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This year, as president of the WSBA, I am dealing with issues that are not those that I have customarily encountered during my career as a lawyer. As such, I am not able to operate on “automatic,” which is easy to do when my daily life is routine. This year has certainly been anything but routine for me.

One of the things that I have always prided myself on is taking the time to reflect on my daily life to try to find the lessons that it presents for me. How often do we hear the adage, “you can’t teach an old dog new tricks”? In my opinion, that is just an excuse not to learn from our experiences and not to have to accept accountability for what is going on around us. I believe we are never too old to learn, to adapt or modify our behavior, and to change our beliefs.

If one accepts the premise that there are lessons to learn from everything, why is it we all don’t learn the same lessons? For me, the answer is diversity. We all come from different backgrounds and cultures and have had varying life experiences, so our perspectives are different. The key is being able to recognize and accept the differences. Difference does not equal bad. Difference is just different. This is one of the wonderful values of diversity. Common incidents can teach us many lessons depending upon our perspective. By sharing our beliefs, backgrounds, knowledge, etc., we are exposed to a richer, fuller experience. By gathering all these different points of view, we are able to collectively be more creative. We are better able to see the bigger picture and, thus, make better decisions and positively influence those around us.

In looking at issues that have been center stage this year for the WSBA Board of Governors — such as racial bias in the criminal justice system, loss of employment opportunities for our members, increased demands for civil legal aid, violence by the police against people of color, and immigration law/ethical rules debates — we have seen tremendous growth in our focus on diversity in our organization, but we still have such a long way to go.

The WSBA Leadership Institute (WLI) plays a big role in our diversity growth. The WLI is a leadership development program created in 2004 by the WSBA Board of Governors. Its founder was then-WSBA President Ronald Ward, whose passion and foresight got this program off the ground and sustained it through its early growing years. The original intent of this program was to give opportunity and training in leadership skills to women, minorities, and other young attorneys from traditionally under-represented groups. The mission statement of the WLI, in part, states that “Our goal is to have a class that reflects the full diversity of our state, which includes race, ethnicity, gender, sexual orientation, disability, and geographic location.”

Although there can only be a maximum of 12 fellows every year, the numbers are adding up. The WLI is only in its seventh year and already many of the graduates of this incredible, nationally acclaimed program are stepping up and utilizing the training, experience, and lessons learned through the WLI and are assuming leadership roles in their com-
communities. As for the legal community, many have become presidents of various minority bar associations, chairs of WSBA committees, and in one case, a governor on the current WSBA Board of Governors. The WSBA continues to support this program because it makes a statement about our level of commitment to, and the extent to which we value, diversity. The impact these graduates can have on an entire community is immense.

By empowering these WLI graduates and encouraging and enabling them to become leaders and serve their communities and our profession, we all benefit from their life experiences, their knowledge of their respective communities and cultures, and their individual unique ways of viewing life and solving problems. Of course, by enabling in this way, those of us in the historical majority must be willing to recognize that there will be times when we are reminded that we are still largely unenlightened. We might make thoughtless and apparently insensitive statements. We may actually be insensitive. Those in the diversity community will hopefully recognize this and work together with us not to blame anyone for this ignorance, oversight, or insensitivity, but rather to use each of these occasions as learning experiences and opportunities to become more aware.

Acknowledging diversity and learning from different perspectives and points of view, empowering everyone in our Association to be a voice in our governance, and respecting each other is how we grow, as individuals, as an organization, and as a community. This is what the WSBA Leadership Institute is all about. So, why should we care about the WLI? We should care because it provides a continuing opportunity for growth for all of us and our future.

WSBA President Steven G. Toole can be reached at steve-wsba@sgtoolelaw.com or 425-455-1570.
n envelope from the Bar Association arrives at your desk. Unlike the envelopes announcing a CLE or a section meeting, this envelope is different. Ominously, it bears a “CONFIDENTIAL” stamp in red ink.

You open the envelope. Your hand starts to shake as you read the enclosed letter. A lawyer from the Office of Disciplinary Counsel (ODC) reports that the Bar has received a complaint about you. A copy of the complaint, perhaps a rambling handwritten narrative from an unhappy former client, is enclosed. The letter from disciplinary counsel requires you to provide a written response. Your response is requested within two weeks.

Your immediate reaction is shock. Then anger. Can’t the Bar lawyers see that your former client (they refer to him as “the grievant”) is a deluded troublemaker — a real crackpot? Don’t they realize you got a damn good result, the best possible under the circumstances?

As the initial shock passes, your first inclination is to call the Office of Disciplinary Counsel and set the record straight. By God, you’ll tell them a thing or two. You reach for the phone. Don’t do it!

Perhaps your reaction is to take a more direct approach. You decide to call your former client — the ungrateful jerk — not to try and resolve the problem, but to give him an uncensored piece of your mind. Don’t do this, either.

If you are like most Washington lawyers, you know a little about the Bar’s lawyer discipline system. Each month, you probably read the disciplinary notices in Bar News. And you try to pay attention in that last half-hour of the CLE programs you attend when they talk about the ethics topics. But be honest with yourself: The last time you actually read the Rules of Professional Conduct was years ago, when you were studying for the bar exam. You may have never read (or even heard of) the Rules for Enforcement of Lawyer Conduct.

Most of us, as we read the disciplinary notices each month, do so with a sense of morbid curiosity. It’s like watching a train wreck. The reported cases are both terrible and fascinating. The dry text of the notices details how the careers and lives of our colleagues, lawyers just like us, have run off the tracks and spun out of control.

But, with all respect, reading the disciplinary notices each month or trying to stay awake during the ethics section at the end of a long day’s CLE presentation does not make you an expert, or even reasonably well-informed, about the actual workings of the lawyer discipline system.

Your shock and anger as you stand there with a letter from disciplinary counsel in your hand is a natural reaction. It is rooted in fear. After all, there are significant potential consequences — personal, professional, and financial — to an alleged ethical breach and to being the subject of a disciplinary investigation. You are, like Alice going down the rabbit hole, about to enter a strange new world. Your fear is understandable. It is fear of the unknown.

I have just concluded my third term as a WSBA hearing officer, presiding over the hearing phase of lawyer discipline cases. Before appointment to the Hearing Officer Panel, I served for several years as a special district counsel, investigating ethical complaints about lawyers. This experience, more than 20 years of working within the lawyer discipline system in Washington, has given me some insights that I now hope to share with you. In this short article, I do not expect to summarize the law of lawyer discipline in Washington. Nor is this article intended as an academic or theoretical discussion. What I hope to share is some practical advice on what you should and should not do when that envelope stamped “CONFIDENTIAL” lands on your desk.

My experience teaches me that the decisions you make and your actions in the first few hours and days after a disciplinary
A grievance arrives may have a significant impact on the outcome of your case. In many of the cases I have presided over as a hearing officer, the respondent lawyer made his or her situation worse by tactical errors or procedural missteps made early in the disciplinary process. Usually these mistakes occur because the respondent does not know what to do or does not take the disciplinary process seriously until it is too late.

**Caveat emptor.** The lawyer discipline system in Washington is the exclusive responsibility of the Washington State Supreme Court. The powers and duties of the various Bar Association participants (the Disciplinary Board and its review committees, the Office of Disciplinary Counsel, the hearing officers) are all delegated from the Court, and the Court retains final disciplinary authority over Washington lawyers as officers of the court.

The views and opinions set out here are my own. I do not speak for the Supreme Court, the Bar Association, the Office of Disciplinary Counsel, or for other members or former members of the Hearing Officer Panel.

Here is my first bit of advice: Particularly if the grievance against you passes the initial review stage and you find yourself the subject of a disciplinary investigation, the first and most important thing you should do is hire competent and experienced defense counsel. Then, be guided by your counsel’s advice. If you take nothing else from this article, please remember that in the lawyer discipline arena, the lawyer who represents himself or herself has a fool for a client.

**The Numbers**

First, it may not be much comfort as you hold disciplinary counsel’s letter in your shaking hand, but you are not alone. There are about 28,500 active members of the WSBA. The Bar receives about 2,000 grievances each year. Thus, each year about seven percent of Washington lawyers receive a grievance. The odds are that at least once during a 30- or 35-year career, every Washington lawyer in active practice will receive a grievance.

Conviction of a crime is an automatic ticket into the discipline system. Following are the sources of grievances (these percentages are from 2010 and the numbers are representative of a typical year):

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Former client</td>
<td>31%</td>
</tr>
<tr>
<td>Opposing client</td>
<td>20%</td>
</tr>
<tr>
<td>Client</td>
<td>17%</td>
</tr>
<tr>
<td>WSBA</td>
<td>10%</td>
</tr>
<tr>
<td>Other lawyer</td>
<td>3%</td>
</tr>
<tr>
<td>Opposing counsel</td>
<td>2%</td>
</tr>
<tr>
<td>Judicial</td>
<td>1%</td>
</tr>
<tr>
<td>Other</td>
<td>16%</td>
</tr>
</tbody>
</table>

Some lawyers, including ethical lawyers who practice well within the Rules of Professional Conduct, receive more than the average number of grievances simply because of the nature of their practices.

Following are the sources of grievances by practice area (these percentages are from 2010 and the numbers are representative of a typical year):

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bankruptcy</td>
<td>5%</td>
</tr>
<tr>
<td>Commercial</td>
<td>8%</td>
</tr>
<tr>
<td>Criminal law</td>
<td>15%</td>
</tr>
<tr>
<td>Estate/probate</td>
<td>5%</td>
</tr>
<tr>
<td>Family law</td>
<td>18%</td>
</tr>
<tr>
<td>Immigration</td>
<td>10%</td>
</tr>
<tr>
<td>Labor law</td>
<td>5%</td>
</tr>
<tr>
<td>Real property</td>
<td>5%</td>
</tr>
<tr>
<td>Torts</td>
<td>13%</td>
</tr>
<tr>
<td>Torts</td>
<td>16%</td>
</tr>
<tr>
<td>Torts</td>
<td>13%</td>
</tr>
</tbody>
</table>

**What Happens to a Grievance?**

The Office of Disciplinary Counsel dismisses about 30 percent of the grievances received each year on an initial review. If a grievance against you is dismissed during the initial intake review, you may not even know about the grievance until you receive notice from ODC that it has been dismissed. But don’t celebrate yet. When ODC dismisses a grievance, the person who filed it has 45 days to request a review of the dismissal under ELC 5.6(b). Review requests are quite common. Under ELC 5.6, upon review, ODC may re-open the file for investigation or refer the case to a review committee of the Disciplinary Board to consider whether the dismissal should be upheld.

Even when your first notice of a disciplinary action is a letter from ODC advising that a grievance was filed but has been dismissed, until the 45-day review period passes, you are not out of the woods. Most dismissals are upheld by a review committee. Beware, however, that if the grievant requests review, he or she may be submitting additional statements or other evidence to ODC. If there is a request for review, you should consider engaging defense counsel to decide whether to submit a response and how such a submission will most effectively support ODC’s initial decision to dismiss. If the notice letter you receive from ODC is not an initial dismissal, you will be required to file a preliminary written response to the grievance. Obviously, you want the grievance dismissed. If the grievance against you is without merit, your best chance to have it dismissed is in your initial response to disciplinary counsel’s notice letter. This response can be supported by documentary evidence, and ideally will be formatted to respond directly to each RPC provision that the grievance implicates.

Depending upon the evidence and the RPC violations implicated by the grievance, your chances for dismissal are reasonably good. ODC dismisses another 30 percent of the grievances received after respondent lawyers file their written responses during the intake review.

Most respondent lawyers believe that they can write their own responses. They think that if they simply tell their side of the story it will make the problem go away. Although many grievances are dismissed after a lawyer files a pro se response, this do-it-yourself approach can be a mistake. Depending on the grievance, you might need the assistance of experienced defense counsel to advance the most effective response, particularly when you know there is some merit to the grievance.

Why? you ask. After all, you are a lawyer, and you know the facts of the underlying grievance as well as anyone. Why go to the expense and embarrassment of bringing in defense counsel now? You may know the facts, but that is not enough. I hope you would never counsel a client facing a serious regulatory or enforcement action to go it alone without the advice of an experienced lawyer. Now you are in the position of that hypothetical client. You could be facing a serious regulatory and enforcement action.

Although you will receive a copy of the grievance and other information submitted to ODC by the grievant, ODC’s initial letter does not usually specify which of the Rules of Professional Conduct may be implicated by the allegations in the grievance. Although your response may be requested because ODC believes that the allegations, if factually supported, would establish a violation of the RPC, there can be other reasons for requesting the lawyer’s response. In some situations, particularly those where the grievant is unsophisticated in legal matters and incapable of using specific terms of art in setting forth the allegations, ODC may be seeking information in order to understand the context of the grievance and to support a decision to dismiss it. Of course, you do not know how ODC has preliminarily assessed
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the grievant’s allegations. Depending on the grievance, you might need the assistance of experienced defense counsel to evaluate the seriousness of the situation and help identify the specific Rules of Professional Conduct that ODC may identify when reviewing the grievant’s allegations against you.

So, let us assume you have filed your written response to the grievance and the Office of Disciplinary Counsel has decided not to dismiss the matter. The remaining 40 percent of grievances, those not dismissed in the initial stages by the ODC intake lawyers, are assigned to individual disciplinary counsel for an investigation. At this stage, disciplinary counsel will investigate the grievance in more detail. Of the 800 or so cases formally investigated each year, the substantial majority are eventually dismissed by ODC after investigation. Then, of the remaining cases, some are resolved through the WSBA’s diversion program, and some are deferred until the resolution of pending civil or criminal litigation relating to the grievance. Only about five percent of the grievances filed each year (about 100 cases) are submitted to one of the Disciplinary Board review committees and ordered to a hearing or resolved through another form of public disciplinary action.

After all is said and done, approximately 95 percent of all grievances are resolved before being assigned to a hearing officer. If you have not hired defense counsel by now, it should be clear that if your case is ordered to a hearing you have a serious problem.

The Discipline System

I trust that by now it is clear that, like most areas of law, lawyer discipline has its own particular methods and procedures, its own terminology, and a refined set of rules. So, as you stand there with that letter from ODC in your hand, before you call anyone, before you do anything, pull yourself together and start thinking like a lawyer.

The rules. Close your office door and turn off your phone. Get out your copy of the Washington Court Rules and turn to the Rules of Professional Conduct. Read the entire text of the RPC, including the Fundamental Principles and the Preamble. Read it all. You need to get a feel for the structure of the RPC and understand where the facts asserted in the grievance fit into the whole fabric of the rules and how those facts may lead to alleged RPC violations. Unless you have extensive experience in this area of law, you probably did not realize how the various sections of the RPC dovetail. If the grievance progresses to investigation and then to hearing, the hearing officer assigned to your case will make findings and recommend sanctions for each rule that ODC proves you have violated. The final recommended sanction may be cumulative, and multiple violations are an aggravating factor when determining a final sanction recommendation under the ABA Standards for Imposing Lawyer Sanctions.

Now, while you still have the Court Rules on your desk, turn to the Rules for Enforcement of Lawyer Conduct (ELC). These rules control the procedures used in discipline cases. If you are eventually charged in a formal complaint with violation of one or more sections of the RPC, the process of proving your alleged misconduct, assessing a recommended penalty, and filing any appeal will be controlled by the ELC. As you read the ELC pay particular attention to ELC 1.5, ELC 5.3(e) and (f), and ELC 5.5. These rules establish your duty to cooperate in the disciplinary investigation and specify the extensive investigatory powers granted to ODC, even before a formal complaint is filed.

Burden of proof. Okay, so now you have read the rules. You have had time to think about the grievance. If your case progresses to investigation and then to hearing, the Office of Disciplinary Counsel will be trying to prove, by a clear preponderance of the evidence, that your conduct violated one or
more of the Rules of Professional Conduct.

After reading the grievance and the rules, you may feel a bit more confident, and you may still be thinking about picking up your phone to put an end to this foolishness. Do not touch that phone. Unless you practice full-time as defense counsel in lawyer discipline cases (and there are few in Washington who do) I can guarantee you that any of the lawyers in the Office of Disciplinary Counsel know a great deal more about the intricacies of the RPC and the ELC than you.

As you read the grievance and the RPC, if you realize you have a problem under the facts alleged by the grievance, your best option may be to simplify and narrow the charges early in the process. To do this, you need the kind of dispassionate assessment and advice that only an experienced defense counsel can provide. Your best shot may still be an early acknowledgement of error and a negotiated settlement that resolves the issues but avoids the more serious disciplinary sanctions: extended suspension or disbarment and loss of your license.

Get this clearly in mind: The lawyers at ODC know this discipline stuff cold. They do this every day. They are good. They are persistent. If the grievance against you was not dismissed during the “intake” process, then ODC is “investigating” the allegations against you. Somebody at ODC thinks the grievance states at least a possible RPC violation. Although the investigation may in the end result in a dismissal of the grievance, you should never assume dismissal will occur.

Throw out any thoughts that you can just blow it past “those bureaucrats” at the Bar Association. If you want to risk making a bad situation worse, go ahead and smart-off to disciplinary counsel or to the ODC staff or treat the ODC lawyers as if you think they are a bunch of incompetent fools. I know of no situation where this has improved a respondent lawyer’s position. In any contact you have with ODC, be completely professional. Be reserved — the ODC lawyers are not your friends — but do not under any circumstance lie or try to mislead them or shade the truth.

Disciplinary counsel are thorough. Since they investigate their cases before they take them to a review committee, when ODC does submit a case to a committee and requests a hearing, admonition, or advisory letter, it is usually pretty solid. The ODC attorneys have the experience and resources to investigate the grievance filed against you, which is their job. The review committee has several options. It can order the case to hearing, order an admonition, dismiss with a non-public advisory letter, dismiss the matter in its entirety, or order more investigation.

I would characterize most of the ODC attorneys I have observed as dedicated, tough, thorough, underpaid by private firm standards, and fair. Like most of us, they can be reasonable and even sympathetic in the proper circumstances and when approached in the proper way. The Supreme Court has delegated substantial authority to disciplinary counsel to investigate and prosecute RPC violations, but they also have the power to transfer cases from an investigatory or pre-hearing status to “diversion” or to settle cases within certain guidelines.

Conclusion

What does all this tell us? Here is my final bit of advice: Understand that the lawyer discipline system in Washington is “front-end loaded.” By this I mean that most cases are resolved in the first 60 days or so. When that envelope marked “CONFIDENTIAL” arrives at their desks, some attorneys go into “ostrich mode,” sticking their heads in the sand in hopes it will all just go away. In my experience as a hearing officer, this is usually a critical mistake.

A disciplinary grievance will not go away. Moreover, the longer you wait to deal with the substance of the complaint,
the tougher it will be to end the case with a favorable result. Think of the disciplinary system as a sieve with several increasingly smaller screens. Your goal is to get out of the sieve as soon as possible. You do not want to be one of the five percent of respondents ordered to a hearing, because by the time a case has worked its way that far into the system, ODC has usually built a strong case and a respondent has little chance of emerging unscathed. Your license to practice law — your livelihood — and even your identity as a lawyer is on the line. When a grievance is headed to hearing, without appropriate legal counsel it is nearly impossible to defend yourself effectively. You do not know the inner workings of the discipline system, and even if you can read the discipline cases at warp speed, you do not know the law.

If I have convinced you that you need defense counsel, at least by the investigation phase of a grievance, then good. But please don’t go down the hall to your partner who does a little civil litigation from time to time and ask her to defend you. You need a defense lawyer who knows the RPC and ELC from the inside out, and who knows how the disciplinary system really works.

**Getting the right defense counsel.** Lawyer discipline cases seem to be a growth area, if the number of ads in the *Bar News* for lawyers seeking work as defense counsel is any indication. I hope this article has convinced you that the discipline system is unlike other areas of law. By the time a hearing officer issues a recommendation for a sanction, the process has advanced to the point where your only recourse is appellate review. You do have the option to appeal to the Disciplinary Board. And you have a right of appeal to the Supreme Court if you receive a suspension or disbarment recommendation from the Disciplinary Board. However, the Disciplinary Board and Supreme Court are reluctant to change factual or credibility findings. Although legal conclusions are reviewed *de novo*, as with all appeals the odds are usually against the party seeking to change the decision of a trier of fact.

In my opinion, the most effective defense counsel in lawyer discipline cases are those few lawyers who have real multiple-case experience in the investigation, pre-trial, and disciplinary-hearing phases of the discipline process. Legal malpractice lawyers, and civil litigation and administrative lawyers with experience in medical or other professional discipline cases, may or may not have experience that translates into this narrow arena. An appellate lawyer may be necessary if your case goes to the Supreme Court on appeal, but in the initial stages of a discipline case you should be trying to avoid an outcome that requires an appeal.

Effective defense counsel must be someone with whom you can be completely frank. You must tell defense counsel everything, even the bad stuff. You need counsel who can explain the hard facts of life to you and to anyone else who may need to hear them, including your partner(s) and your spouse. But the primary qualification for a lawyer that I would want defending me would be someone who is known and respected as a defense counsel by the lawyers at the Office of Disciplinary Counsel.

If you are still not convinced that competent defense counsel is critical to the outcome of your discipline case, thumb through the past five or six issues of the Disciplinary Notices in *Bar News*. Read the last paragraph of the notices where the respondent was disbarred. In case after case you will read, “Respondent represented himself/herself.” Your career is on the line. A good defense is your best option.

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Washington State Bar News | July 2011

sel for oceans and fisheries for the U.S. Senate Committee on Commerce, Science, and Transportation, and as division counsel to Honeywell's Marine Systems Division. His private practice involves marine insurance, international maritime matters, and complex commercial litigation. He has been involved in WSBA disciplinary investigations and as a hearing officer in discipline cases since the late 1980s. He lives in Mill Creek and his office is on board his 42-foot Grand Banks trawler. He welcomes your comments at gadahl@comcast.net or www.dahllawpro.com.

NOTES
1. The position known as special district counsel under the former Rules for Lawyer Discipline is now titled adjunct investigative counsel under the Rules for Enforcement of Lawyer Conduct adopted in 2002.
2. Of course, some attorneys receive multiple grievances. On average between five and eight percent of the WSBA's active members receive a grievance each year. This is about on par with national averages.
3. It is a violation of RPC 8.4(h) to fail to cooperate "fully and promptly" with a disciplinary investigation. See ELC 1.5, ELC 5.3(e) and 5.3(f).
5. In appropriate circumstances, disciplinary counsel may obtain your medical, psychiatric, or psychological records (ELC 2.13(d)); your business records, files, and accounts (ELC 5.3); and your correspondence, email, or any other information relevant to an investigation. Disciplinary counsel may take your deposition or the deposition of any potential witness. You may not assert attorney-client privilege or other prohibitions on revealing client confidences or secrets as a basis for refusing to provide information, ELC 5.4(b). Your privilege against self-incrimination is preserved (ELC 5.4(a)), but most ODC requests for information may be enforced by subpoena (ELC 4.7). There is no statute of limitations for disciplinary matters. ELC 1.4.
6. See ELC Title 6.
7. The ODC is not required to wait for the resolution of pending litigation, but it usually does. The chief disciplinary counsel and the WSBA are well aware that sometimes a grievance is filed in a misguided attempt to enhance an otherwise lackluster civil malpractice claim.
8. If you don’t have a set of the Court Rules handy, the Rules of Professional Conduct are printed in the 2010–2011 edition of Resources, the WSBA membership directory, at pp. 513–576. The RPC are also available at the Washington Courts website (www.courts.wa.gov/court_rules) under the tab "Rules of General Application/RPC."
10. The WSBA's lawyer discipline system is funded solely by lawyers' license fees. The total cost of the discipline system in 2009 was $4,433,320, or 38 percent of member licensing fees. These cost figures are typical, year to year.
11. It is a credit to the integrity of our disciplinary system and the rules adopted by our Supreme Court that in Washington political influence or WSBA connections will not derail a disciplinary investigation or hearing. The ODC has successfully prosecuted former bar presidents and partners in large, well-connected law firms. Our system in Washington has its flaws, but "political influence" is not one of them.
12. The Disciplinary Board reviews recommendations of suspension or disbarment, or those where either the respondent or the ODC files a notice of appeal. ELC 11.2(b). Only Board decisions recommending suspension or disbarment may be appealed as a matter of right to the Supreme Court. ELC 12.3(a).
13. WSBA presidents, members of the Board of Governors, or members of the Disciplinary Board are prohibited, for three years after leaving office, from representing a respondent lawyer in a disciplinary proceeding. ELC 2.13(b).
Attorneys’ Criticism of Judges

Professional Misconduct or Protected Speech?

By George A. Critchlow

Taken together, do the Washington Rules of Professional Conduct (RPC) and the local federal court rules make it unprofessional conduct for a lawyer to criticize a federal judge? The first section of this article provides a framework for thinking about this issue in terms of applicable professionalism standards, constitutional considerations, and court precedent. The second section departs from a purely legal approach and argues that the current “anything goes” cultural, political, and commercial environment in which lawyers operate makes it all the more important for lawyers to support the judicial
branch of our government by engaging in self-restraint with regard to speech or conduct that gratuitously undermines public confidence in the courts.

The federal trial courts in the Eastern and Western Districts of Washington have local rules regulating attorney conduct and speech. The Eastern District rules call for lawyers to “act with dignity, integrity, and courtesy in oral and written communications,” to “be courteous to the court and staff,” to “avoid condemning [an] adversary or opposing party,” and to “refrain from condemnation of the court” (LR 83.1). The Western District requires lawyers to “maintain the respect due to courts and judicial officers” (GR2(c)(3); GR2(f)(3)(E)). Both courts authorize the imposition of discipline (including disbarment, suspension, and reprimand) on attorneys practicing before the court who violate local rules or applicable Washington Rules of Professional Conduct (LR 83.1; GR 2(f)). (These enforceable federal rules should be distinguished from local, hortatory professional courtesy codes endorsed by county bar associations, e.g., the King County Guidelines of Professional Courtesy.)

Meanwhile, Washington RPC 8.2(a) provides:

A lawyer shall not make a statement that the lawyer knows to be false, or with reckless disregard as to its truth or falsity, concerning the qualifications, integrity, or record of a judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

So, do the local rules and RPC define criticism of a federal judge as unprofessional conduct?

Professional Conduct Standards and First Amendment Considerations

RPC 8.2(a) incorporates the New York Times v. Sullivan (376 U.S. 254, 273 (1964)) formulation of the “actual malice” rule for defamation: A lawyer’s statement about a judge’s qualifications, integrity, or record is a violation of the RPC if the lawyer knows the statement is false, or recklessly disregards its truth or falsity. As applied to lawyer conduct in the Ninth Circuit, the standard is objective, i.e., knowledge of truth or falsity is judged from the standpoint of a “reasonable attorney.” United States Dist. Ct. v. Sandlin (12 F.3d 861 (9th Cir. 1993)).

The comments to RPC 8.2(a) reflect the rule’s goal of promoting confidence in the administration of justice:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinion on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice (emphasis added).

Of course, our constitutional jurisprudence recognizes that the expression of opinion is a constitutional right — especially in the political context (Gertz v. Welch, 418 U.S. 323, 337 (1974)).

The challenge is to distinguish between “statements of fact” (which, if false, can lead to discipline) and “opinions” (which are not only permitted, but encouraged). There is plenty of litigation around this question, e.g., Owen v. Carr (113 Ill.2d 273, 497 N.E.2d 1145 (1986)) — lawyer’s letters to judicial inquiry board accusing judge of misconduct must be considered in context and were constitutionally protected as expressions of opinion, not factual charges; State Bar v. Semaan (508 S.W.2d 429 (Tex.Civ.App. 1974)) — lawyer’s criticism of judge as a “midget among giants” in letter to editor held to be protected expression of opinion; and Idaho State Bar v. Topp (129 Idaho 414, 925 P.2d 1113 (1996)) — lawyer’s comment to the press that judge’s decision on controversial case was “political” held to be a false statement.

Courts tend to agree that a “statement of fact” includes implied facts and is something that is capable of being proved as true or false. Statements of opinion, on the other hand, are statements where it is clear (contextually or otherwise) that the speaker is not implying undisclosed, private, first-hand factual knowledge to support the opinion (Standing Committee on Discipline v. Yagman, 55 F.3d 1430, 1437-1440 (9th Cir. 1995); Idaho State Bar v. Topp, id.).

Another category of lawyer speech is subject to discipline regardless of whether the speech is characterized as true, false, or opinion. This is speech that might be prejudicial to a pending trial in which the lawyer is a participant. In Gentile v. State Bar of Nevada (111 S. Ct. 2720 (1991)), the United States Supreme Court held that the government can properly limit lawyer speech that is substantially likely to have a materially prejudicial effect so long as the limits are neutral as to points of view and apply equally to all attorneys participating in a pending case. Language in the case indicated that the restrictions on lawyer speech “merely postpones the attorney’s comments until after the trial” (emphasis added) (id. at 1076).

While it may not always be easy to distinguish opinion from statement of fact, or a true statement from a false (or reckless) statement, or a prejudicial statement from a non-prejudicial statement, the relevant legal rules and doctrine are anchored in constitutional policies that arguably make sense and provide guidance for professional conduct. Nonetheless, there are lingering and difficult questions. Among them: does a false statement about a judge have to be “public” in the sense of generating media or other widespread attention? There are few reported cases involving an alleged ethics violation for “private” or non-public defamation. Perhaps this is because such cases are not the subject of bar complaints, or because disciplinary authorities care little about alleged violations that have no chance of undermining “public” confidence in the administration of justice.

In an interesting disciplinary case arising in the Eastern District of Washington, the Ninth Circuit held that a violation of RPC 8.2(a) was established in the absence of a public statement (United States Dist. Ct. v. Sandlin, 12 F.3d 861 (9th Cir.1993)). In that case, the lawyer made false statements charging a federal judge with altering court records. The statements in question were communicated to FBI agents. The lawyer argued that the only reason the matter reached the public’s attention was because of the disciplinary petition filed by the federal judge, not by the lawyer’s actions. Without precisely finding whether this was a “public” statement, the Court of Appeals held that RPC 8.2(a) is not restricted to public statements. In an older case from Montana, the court exonerated a lawyer from disciplinary charges where his written letter to a third person characterized a judge as “an arrogant jackass” and there
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was no evidence that the lawyer intended the letter to be circulated (In re Huppe, 92 Mont. 211, 11 P.2d. 793 (1932)).

In any event, once we get beyond the constitutional considerations relating to "false statements," "opinion," and speech that is "prejudicial" to a pending case, what are we to make of the judicially created civility rules applicable in many federal and state courts? These rules often require lawyers to refrain from condemning the courts and to promote the image of the profession in the eyes of the public. The standards are not hortatory; they govern professional conduct and have been used as the basis for disbarment proceedings (see, e.g., Standing Committee on Discipline v. Yagman, supra). Do the rules mean that a lawyer cannot express disapproval of a judge even when the expression is non-defamatory under RPC 8.2(a)? Is criticism the same as condemnation? Does the criticism have to be sufficiently public so as to undermine the public's confidence in the courts? Finally, is it possible that condemnation does not equate so much with the content of critical comment — rather, it has to do with communicating facts or opinion in an uncivil or discourteous manner?

A fairly recent case from Michigan is illuminating. Michigan's Rules of Professional Conduct require lawyers to treat with courtesy and respect all persons involved in the legal process and prohibit lawyers from engaging in undignified or discourteous conduct toward the tribunal. On two separate occasions, a lawyer broadcast vulgarities about the three appellate judges who overturned a $15,000,000 verdict the lawyer had obtained for a client in a medical malpractice action. The lawyer attacked the three judges on a radio program. He stated, "I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." In another radio program, the lawyer continued his diatribe against the judges, calling them Adolf Hitler, Goebbels, and Eva Braun, and suggested that the judges be sodomized.

The lawyer was sanctioned by the Michigan Bar and appealed the sanction to the Michigan Supreme Court (Michigan Grievance Adm'r v. Fieger, 476 Mich. 231, 719 N.W. 2d. 123 (2006)). The court held that Michigan could constitutionally forbid attorneys from expressing non-defamatory personal criticism of judges where: 1) the criticism is expressed in a vulgar or uncivil manner; 2) the criticism occurs during a pending case (including an appeal); and 3) there are substantial governmental interests in promoting respect for the judiciary, maintaining the integrity of the judicial process, and vindicating the good moral character of licensed lawyers. The court concluded that the rules "did not preclude Mr. Fieger from expressing disagreement with the judges in his case, and they did not preclude criticism, even strong criticism, from being directed toward these judges; rather, they only precluded him from casting such disagreement and criticism in terms that could only bring disrepute on the legal system" (Michigan Grievance Adm'r, 476 Mich. at 261).

Mr. Fieger’s petition for certiorari was denied. Nonetheless, the Michigan case should be compared to the Ninth Circuit decision in Standing Committee on Discipline v. Yagman (55 F.3d 1430, (9th Cir. 1995)). In that case, Mr. Yagman was disciplined for violating a local rule enjoining attorneys from engaging in any conduct that “degrades or impugns the integrity of the Court [or] interferes with the administration of justice.” A district court panel had disciplined Mr. Yagman for violating both aspects of the rule based on his public comments accusing a federal judge of anti-Semitism, dishonesty, and being “drunk on the bench.” The Ninth Circuit reversed the district court, holding that in order to avoid constitutional overbreadth problems, the rule had to be interpreted to prohibit only statements that a lawyer knew or should know to be false. In essence, the court interpreted the local rule to have the same meaning as RPC 8.2(a). Having done so, the court held that Mr. Yagman was guilty of no more than rhetorical hyperbole in the form of opinions without making or implying any false factual assertions (such as accusing the judge of taking bribes) (id. at 1438). The court concluded that Gentile’s lower constitutional standard did not apply because Yagman was not involved in a pending case, and that Yagman did not interfere with the administration of justice even if his intention was to have the targeted judge recuse himself in future cases.

By contrast, the Seventh Circuit rejected Yagman as “inconsistent with Gentile” and held that an attorney may be disciplined for stating, “I think that Judge X is dishonest.” In Matter of Palmisano (70 F.3d 483, 487 (7th Cir. 1995), cert. den., 517 U.S. 1223 (1995)), the court said:

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To the extent Standing Committee v. Yagman, 55 F.3d 1430 (9th Cir. 1995), may hold that attorneys are entitled to excoriate judges in the same way, and with the same lack of investigation, as persons may attack political officeholders, it is inconsistent with Gentile and our own precedents.

The Mississippi Supreme Court held that the First Amendment did not protect a lawyer’s published statement that a judge had the “judicial temperament of a barbarian” (Mississippi Bar v. Lumumba, 912 So.2d 871, 883-884 (2005)). And in Matter of Westfal, (808 S.W.2d 829, 833-838 (1991)), the Missouri Supreme Court held that the First Amendment did not protect a prosecutor’s televised statement criticizing an appellate judge’s ruling as “a little bit less than honest.”

Other courts have recognized First Amendment defenses to charges of violating professional codes. (See In re Green, 11 P.3d 1078, 1083–1087 (Colo. 2000) — First Amendment protected attorney’s statements that judge who was considering pending motion was racist; Oklahoma Bar Ass’n v. Porter (766 P.2d 958, 964-970 (Okla. 1988)) — First Amendment protected attorney’s statements to news media, made immediately after sentencing of client, characterizing judge as racist; and Ramsey v. Board of Professional Responsibility (771 S.W.2d 116, 120–122 (Tenn. 1989)) — First Amendment protected prosecutor’s “disrespectful” statements to news media, including statement criticizing judge).

It appears that various jurisdictions, including the federal circuit courts, are of different minds on constitutional questions relating to criticism of judges. We can, however, glean some general rules: 1) virtually all courts allow for professional discipline when a lawyer knowingly or recklessly makes a false factual assertion about a judge; 2) there is less constitutional protection for statements (true or false) that may be prejudicial to a pending proceeding (although there is disagreement on what constitutes a “pending proceeding”); 3) “opinions” not prejudicial to a pending action are protected by the First Amendment, but there is disagreement about what constitutes an opinion versus a false statement of fact; and 4) in the Ninth Circuit, based on the Yagman and Sandlin cases, it appears that federal district court civility codes will be interpreted to be coextensive with the First Amendment protections.

The argument is made time and again that lawyers have special obligations to conduct themselves in a manner that advances the administration of justice and promotes confidence in the courts. While this has been the historic justification for rules that purport to restrict lawyer speech, it is arguable that there has never been a time when the need for lawyer self-restraint is greater.

Ours is a multi-media culture of “anything goes” in terms of information that pervades our lives on the Internet, in text messages, on television and radio news and talk shows, in email communication, in tweets, etc. Information and viewpoints are now communicated instantly and are capable of being forwarded or rebroadcast to unlimited numbers of ears and eyes. Unfortunately, much questionable information masquerades as truth to audiences that are not especially skilled at evaluating the source, authenticity, or reliability of what they hear or see. False statements, half-truths, insults, abusive comments, and degrading and insensitive exchanges now have an opportunity to accumulate and reach audiences that were unimaginined in previous generations. This creates unprecedented opportunities for individuals or organizations to affect public perceptions.

Of course, individuals who are aggrieved by a particular statement or point of view have the opportunity to use the same technology to respond and defend with an opposite or alternative view. While I generally agree with the civil liberties adage “the antidote to bad speech is more speech,” it is a proposition that does not apply to judges. The judiciary, in my view, is properly restrained by ethical rules and tradition from publicly engaging in a war of words with lawyers and other elements of society. When judges are attacked — fairly or unfairly — they do not (and should not) blog, write editorials, appear on talk shows, or send mass emails defending themselves or trading insults.

Lawyers are correctly perceived to
have special knowledge, insight, and skills in regard to the courts. A lawyer’s denunciation or condemnation of a judge — especially a condemnation that is public, vitriolic, hyperbolic, and insulting — has the chance of impacting the public and undermining confidence in the courts in a fashion that may go much further than even the lawyer intended. An attack may be unfair or uncivil, but there is not much a judge can do to counter it, especially if its effects are magnified by mass repetition in the media. If the legal culture and court system are to stay above the debased communication and uncivil behavior that characterizes so much of today’s culture, lawyers will lead the way by maintaining a heightened consciousness about what we value and how we affect public perceptions.

I am not advancing a constitutional argument in favor of tough or tougher restrictions on lawyer speech. I am emphatically not advocating that we lawyers abandon our obligation to contribute candid and honest opinions that advance the administration of justice. (The recent public report to the Washington State Supreme Court by the Task Force on Race and the Criminal Justice System, prompted by remarks of two sitting justices, is a salutary case in point; see the report on the Seattle University website at http://bit.ly/3bo7Pj.) I am simply arguing that we lawyers are uniquely positioned to protect the courts from obloquy. We can refrain from transforming ourselves into a Hobbesian legal culture where every disagreement turns into a war, where every disappointment triggers an insult. We can choose rational and logical discourse instead of name-calling and incivility. We can choose to be respectful and courteous when we engage in public discourse about the justice system.

Even if the Constitution gives us the right to be uncivil, to hurl insults, to engage in coarse behavior, we can choose not to indulge that right. We can embrace the civility rules exemplified by the federal courts in this state, not because we are constrained to do so by court decision, but because it is in the interests of our clients, our profession, and our society.

George A. Critchlow served as interim dean until July 1, 2011, and is an associate professor at Gonzaga University School of Law. He can be reached at gcritchlow@lawschool.gonzaga.edu.
Legislative Update from Olympia

Who and What Are Involved When the Bar Participates in the Legislative Process?

by Kathryn Leathers

Typically, the annual Legislative Update reports on specific policy changes of interest to the Bar’s membership that were passed by the Legislature and signed by the Governor, including bills that were introduced at the request of the Bar and major policy changes introduced by others. I’d like to take a different approach in this report. I’d like to talk about what it means — and what it takes — for the Bar to participate in the legislative process. As part of that discussion, I hope to bring to your attention some of the unsung heroes from your lobbyist’s perspective — heroes both within and outside the Bar.

At the outset, it is important to note that although the Bar’s opinion is highly valued in the Legislature, we are only one voice among many. To accomplish any of our proposed policy changes, we must have the support of key legislators through every step of the process. While there are simply too many legislators to thank for their willingness to work with the Bar to list them all here, we owe a special debt of gratitude to the House and Senate Judiciary Committee leadership. Representatives Jamie Pedersen, chair; Roger Goodman, vice chair; Jay Rodne, ranking member; Matt Shea, assistant ranking member; and Senators Adam Kline, chair; Nick Harper, vice chair; and Cheryl Pflug, ranking member.

If you haven’t worked inside the Legislature, the legislative process can seem confusing and mysterious. There’s good reason for that — like any complex system, there’s a lot of insider-baseball knowledge, plenty of rules and, of course, ways to work around those rules. In addition, while legislators represent larger constituencies, they also bring their personal experiences, beliefs, and personalities to the process. This will not surprise you, but not everyone loves attorneys, which is typically due to a negative personal experience outside of the legislative arena — my point is that some folks view proposals by the seat of your pants, because no matter how brilliant and perfect your proposal is, someone almost always has a different perspective and solution to the problem you are trying to solve . . . and those different ideas are rarely shared with you in advance.

The real challenge is developing relationships with legislators that can withstand the inevitable situation of being on different sides of a proposed solution. Not that there isn’t work still for us to do on this front, but I must give credit to our section representatives for their part in establishing strong relationships with legislators built on trust and respect. Establishing these relationships is a product of countless hours of volunteer work — not just on WSBA-proposed legislation, but on many of the bills introduced by others — while under the stresses inherent in any legislative session.

Part of the stress and challenge of any legislative session is the length of session — even a long session (105 days) is too brief to thoroughly consider the many complex fiscal and policy changes that are introduced. Keep in mind that once a legislative session begins, legislators and staff work through every holiday, they frequently work weekends (meaning those from out of town don’t get to see their families very often), and they are known to work well into the night until after most folks have gone to bed. When we — the Bar — participate in this process, we must keep up with this pace and remain fully engaged throughout the process. The commitment required from our section representatives usually amounts to a grueling professional and personal sacrifice. That sounds a little dramatic, but it’s probably an understatement — perhaps it would be
helpful to explain what that commitment actually means.

For WSBA-Request Bills: Long before a legislator agrees to sponsor a Bar-request bill, representatives of a Bar section work closely with their colleagues, other interested external stakeholders, and the Office of the Code Reviser to craft a proposal to make particular changes and improvements to the law. This leg of the journey typically takes many months, and often many years. Once a proposal has been sufficiently vetted and developed, it must be presented to the Bar’s Legislative Committee for initial approval and, if approved, then submitted to the Board of Governors for final approval. That’s the easy part. The rest of the journey typically involves several months of being available on short notice to provide background information to legislative staff and legislators, testify at hearings on the bill, and work with various legislators and stakeholders when amendments are sought to that proposal.

In the 2010–2011 regular legislation session, the Bar introduced 10 bills proposed by various sections. Of those 10 bills, eight were enacted — most in full and without amendment. The two we lost had full bipartisan support in both chambers — the Senate simply ran out of time. Our achievements include enactment of a 48-page omnibus trust and estates bill — the result of over eight years of work by the Real Property, Probate and Trust Section — as well as bills addressing a broad range of issues, including guardianships, personal property exemptions, receivership laws, the Principal and Income Act, the Uniform Parentage Act, and the Corporation Act. The following WSBA-requested bills were enacted, in part or in full: HB 1051, HB 1052, HB 1053, HB 1267, HB 1864 (formerly SB 5085), SB 5057, SB 5058, and SB 5849.

I’d like to acknowledge the remarkable efforts of Rob Nettleton and Karen Treiger, representatives of the Elder Law Section, who, along with the bill’s prime sponsor, Representative Jim Moeller, worked tirelessly to improve upon the laws designed to protect vulnerable adults in our state. There are many people who care passionately about protecting vulnerable adults — the Bar’s bill was just a first step, and we look forward to working with all interested parties to continue making improvements in this area.

For Other Bills: More than 2,000 bills were introduced in the 2010–2011 regular session. The window for introducing bills is pretty narrow — as a result, the vast majority
of bills are brought to the public’s (and our) attention in a manner that feels something like a dam busting open (the firehose analogy also works well here). The Bar’s Legislative Division staff reviews each bill for possible interest to any or several of the Bar’s 27 sections. Identified bills of interest are referred to the relevant sections for review. A section’s review can end with a determination that the section should not take a position on the bill or that the section either supports or opposes the bill. An official position of a section requires that at least 75 percent of the section’s executive committee is in agreement. Legislation that is opposed generates a tremendous amount of work — typically, when a section opposes a bill, an official letter of opposition, consisting of detailed reasons for the stated concerns, is submitted to relevant legislators; if that bill is nonetheless given a hearing, section representatives will typically testify in opposition at the hearing and, if possible, work with legislators and staff to address their concerns. While not every bill gets a hearing, it is important to note that the time period between the date a bill is introduced and the date the bill is given a hearing can range from 24 hours (rare, but it happens) to as much as three weeks — but the majority of bills are heard within 3–10 days of introduction. That means that the turnaround time for reviewing and commenting on most bills prior to a hearing is extremely challenging, and sometimes impossible.

During this last regular session, of the roughly 2,000 bills introduced, nearly 800 bills were referred to our sections for review. More than 60 of those bills were referred to the Real Property Council, a subdivision of the Real Property, Probate and Trust Section. There are no words to describe the gratitude and respect I have for the extraordinary efforts of the Real Property Council — they repeatedly provided invaluable input on multiple complex and lengthy proposals, by way of both written comments and live testimony, and spent many nights burning the midnight oil, all for the good of the legal profession and community. Every one of them deserves an award, but all I have is this forum, so the least I can do is let you know who these unsung heroes are: Michael Barrett, Kathryn McKinley, Brian Danzig, Brian McGinn, Mike Larson, Joseph McCarthy, and Karen Gibbon. Next time you run into one of these folks, you might just want to say thanks — they did us all very proud.

To all the section members who so generously donated their time both before and during session, on both WSBA-request and non-WSBA legislation, it couldn’t be said any better than Senator Kline in a letter dated April 27, 2011, addressed to the many WSBA section members who participated this session:

Your willingness, and that of your colleagues, to spend countless uncompensated hours on a public service that goes largely unregarded and unthanked is, I know, the result of this sense that the law spells out the details of our social contract, and that our profession is at the service of the larger community. At a time when political life and discourse have become marred by a cynical disregard of the community’s greater interests, I am truly humbled by the quiet public service and integrity shown by members of the Bar.

The Legislative Division is beginning to gear up for the next regular session — if you have suggestions for how we might improve upon the services we provide, please contact me at kathrynl@wsba.org, or WSBA Legislative Assistant Diane Froslie at dianef@wsba.org.

Kathryn Leathers is the WSBA legislative liaison.
Legal professionals from across the United States gathered in late October last year at U.C. Berkeley’s law school for “The Mindful Lawyer Conference: Practices and Prospects for Law School, Bench and Bar.” At this first conference of its kind, presenters offered 200 participants a compelling introduction to the ways in which we can integrate “mindfulness” into every aspect of our profession. From the office to the courtroom to the classroom, mindfulness practices are improving the skills, professionalism, and health of lawyers, judges, law students, and professors.

Mindfulness, as described by Jon Kabat-Zinn (founding director of the Stress Reduction Clinic and the Center for Mindfulness in Medicine, Health Care, and Society at the University of Massachusetts Medical School), means “paying attention in a particular way: on purpose, non-judgmentally, in the present moment.” Meditation, central to mindfulness, is a cross-cultural mind-training technique with roots going back thousands of years. Yet, as conference participants discovered, meditation is not the only way to practice mindfulness.

As we research and write, meet with clients, negotiate, and appear in court, countless opportunities arise to “pay attention in a particular way.” This was evident at the conference itself, where — in contrast to most law-related events — there were many moments of intentional silence during and between presentations. During these silences, participants were encouraged to focus their attention on the present moment, and to let go of distractions. While seemingly simple, this turns out to be difficult for most of us. As lawyers (and human beings), our minds are constantly bouncing from past to future, from concern to concern. Focusing on the present moment, without following our mind’s tendency to distract itself, is not easy, but the benefits are significant. Our awareness develops. Our ability to listen improves. Our self-discipline deepens. We learn to move more calmly through challenges and stressful times. Whether sitting at home or standing in front of a jury, mindfulness skills are practical and powerful tools.

Notably, a strong sense of community developed among participants during
Studies repeatedly find that compared to those in other professions, lawyers have some of the highest rates of substance abuse and depression. Mindfulness practices offer an accessible set of skills for those in our profession to address their mental, physical, and emotional health.

this conference. Perhaps this sense of community emerged from the opportunity to connect authentically with colleagues. Perhaps it emerged from the silences, a phenomenon rarely experienced when more than one lawyer is in the room. Perhaps it emerged from mindfully responding to each other rather than reacting in habitual ways. Whatever the reason, these practices offer new ways for legal professionals to relate to and communicate with each other.

It would be difficult to describe in this brief article all three conference days in detail. However, most of the sessions revolved around three areas: legal skills, professionalism, and well-being. In each of these areas, conference leaders and participants offered guidance on how the integration of mindfulness practices can slowly but profoundly transform lawyers’ professional and personal lives. In fact, these practices have already helped many lawyers become more effective and healthy.

With regard to legal skills, Professor Leonard Riskin, among others, addressed the potential for mindfulness to enhance negotiation and conflict resolution through, for example, more attentive and active listening. Professor David Zlotnick explained how mindfulness enhances trial advocacy skills by helping lawyers remain calm, aware, responsive, and focused in court proceedings. Several panelists addressed “metacognition,” which generally means reflecting on your thought processes, in part to see how you filter and shape your understanding of the external world. They pointed out ways in which metacognition can help lawyers see clients’ problems for what they are and find more creative avenues to resolve them.

On the subject of professionalism, judges, court staff, and attorneys described how mindfulness encourages ethical and client-centered lawyering. Former Chief Justice of the Utah Supreme Court Michael Zimmerman described ways in which mindfulness practices can help lawyers get their egos out of the way. Panelists also explained how these practices build skills in uncovering our biases and finding unconscious motives and intentions. These unconscious patterns may interfere with our ability to be honest, treat others with respect, and conduct ourselves with thoughtful dignity toward all people.

As to health and well-being, presenters Dr. Shauna Shapiro and Dr. Phillipe Goldin described extensive scientific research evidencing the positive effects of mindfulness on the brain, the nervous system, and the body as a whole — demonstrating persuasively that mind and body are not separate. Other presenters cited the many ways in which mindfulness practices alleviate anxiety, depression, substance abuse, and stress in general. As discussed in recent Bar News articles, addressing these issues has become increasingly important.

A Trusted Voice for Victims of Negligence

“Julie went through a nerve-wracking experience with endocarditis, an infection that destroyed her aortic heart valve, which was replaced with a titanium heart valve. An echocardiogram would have detected the infection. Paul Chemnick had the stature and confidence to get us through this experience to a successful resolution. He was reassuring, steady, encouraging, and believed in us. He always brought us back to the core truth, and that gave us peace. We so appreciate what he did for us.”

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in the current economic climate. Studies repeatedly find that compared to those in other professions, lawyers have some of the highest rates of substance abuse and depression. Mindfulness practices offer an accessible set of skills for those in our profession to address their mental, physical, and emotional health.

Given these myriad benefits, you might wonder if these practices are difficult to learn. Fortunately, the basic concepts can be described in a matter of minutes. Incorporating them into daily life, however, is not always easy, so support from fellow practitioners can be useful. In light of this, a new group, Washington Contemplative Lawyers (WCL), has formed for anyone interested in mindfulness and the law. Washington Contemplative Lawyers is a secular group, and none of the practices described above are religiously oriented. No previous experience with meditation or mindfulness practice is necessary. In fact, mindfulness practice is most effective when experienced with a beginner’s mind. If you would like to learn more about mindfulness in general or mindfulness and the law specifically, you may be interested in the websites www.lawyersangha.blogspot.com and www.mindfullawyerconference.org. Also, feel free to contact the authors of this article.

About Washington Contemplative Lawyers (WCL)

An organization for Washington state lawyers and judges interested in mindfulness and the law, WCL explores how mindfulness can enhance legal skills, increase professionalism, and improve lawyer and judge well-being. The group aims to provide support to lawyers and judges incorporating mindfulness into their professional lives; education on the relevancy and application of mindfulness to the legal profession; and opportunities to practice mindfulness together in retreat and other settings. The group meets on the last Wednesday of every month at the Washington State Bar Association offices in Seattle from 8:15 to 9:00 a.m., and the meeting is followed by an informal discussion hour until 10:00 a.m. The meeting includes a short shared mindfulness practice. No prior mindfulness experience is necessary, as our discussion and exercises are accessible to both beginners and those with existing practices, formal or otherwise. This is a non-religious group and persons of all backgrounds and beliefs are welcomed. For further information, contact Sevilla Rhoads at 206-816-1302 or srhoads@gsblaw.com.

Sevilla Rhoads has been a WSBA member for over 15 years. She is an attorney with Garvey Schubert Barer’s Labor and Employment practice group, providing employers with legal advice, litigation, and conflict resolution services. She is also an associate mental health counselor with a private practice at Present Health and Wellness (PHW) in downtown Seattle. At PHW, she coaches professionals, individually and in groups (including workshops and retreats), in areas of stress management and mindful living skills. She also offers counseling for those suffering from depression, anxiety, substance abuse, and eating issues. Sherry Williams has been a WSBA member since 1992, and works for the Pierce County Department of Assigned Counsel in Tacoma. She is a registered yoga teacher with Yoga Alliance, and has completed additional professional training through the Center for Mindfulness in Medicine, Health Care, and Society at the University of Massachusetts Medical Center, and at Spirit Rock Meditation Center. She teaches yoga, introduction to meditation, and Mindfulness Based Stress Reduction (MBSR) at various locations in the South Puget Sound area.
U

hi. It’s been a while since you last heard from me, for which I apologize. I’ve had to begin referring to this column as “occasional” rather than “quarterly.”

My last couple of columns were devoted to some of the unintended humor engendered by the English language’s inconsistent and unpredictable rules of pronunciation (resulting in mis-hearings, known as Mondegreens) as well as its ability to treat the same word as a noun, adjective, or verb (resulting in alternate readings of newspaper headlines, known as Crash Blossoms). My email inbox blossomed after the Crash Blossoms column, and to open this installment I thought I’d share a few reader-submitted gems with you.

From the mailbox

One reader reports the Mondegreen “nip it in the butt” — apparently what happens when you try to stop an unsafe trend by sicking an attack dog on it. Another reader alerted me to a newspaper report that someone had gone after something “right from the gecko.”

I stand corrected on “portmanteau words”. I had flippantly referred to the “extra baggage” carried by a word like “affluential” or “intrical,” which results from a speaker or writer’s mispronunciation or confusion over which of two words to choose. One correspondent rightly pointed out that Lewis Carroll coined the expression “portmanteau words” for these terms because they are two words in one, recalling the portmanteau, a once-popular traveling bag that consists of two compartments. These slips of the brain or tongue are sometimes sparks of genius, creating a single coined word that can suggest properties for which two different words are normally required — “affluential” rather than “affluent and influential.” Whether you believe that Sarah Palin’s “refudiate” is a useful contribution to the language depends a lot on how you feel about Ms. Palin.

Another reader wrote me about the tendency, in speaking, to sever the “a” from the “nother” in “another” — as in, “that’s a whole nother issue” instead of “that’s another whole issue,” which admittedly lacks the rhetorical impact of “a whole nother.” The word “another” is, of course, formed from the words “an” and “other,” not “a” and “nother”; so, logically, if it is to be broken, it should be broken after the “n.” But “that’s an whole other issue” would also lack rhetorical impact, in addition to sounding a little stupid. Of course, you could say “that’s a whole other issue,” but that wouldn’t sound nearly so emphatic. You could also say “that’s another issue altogether” — but then you’d run the risk that all those folks who heard you say it would respond in unison, “that’s another issue!” — at least to those who are fans of the movie Airplane! “A whole nother” ends up sounding best, even if ungrammatical. It’s a colloquialism, but a colorful and delightful one in many contexts. You probably don’t want to use it when arguing to a judge, though.

That little word “a” is a matter of no small importance. The Delaware Chancery Court late last year confronted the question whether the word “a” is equivalent to the word “one,” thus restricting a party’s ability to issue more than one notice under a stock purchase agreement that referred to “a 65-day notice.” The court held that there could be any number of such notices, and that the agreement drafters’ use of the term “a notice” did not limit the party’s activities to just a single notice. In fact, of course, the drafters may well have intended the party to have the right to issue only one 65-day notice (otherwise there’d have been no lawsuit over the point) — but the agreement didn’t say so, and the court therefore recognized the validity of sub-
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The blossom crashes again
A delightful crash blossom came my way shortly after my last column: PROSECUTOR TO TRY SHOOTING SUSPECT — a headline for a story about either a routine bit of criminal procedure or a fairly radical approach to the judicial process. The person who sent this to me went on to ruminate about how a hyphen might have helped; and that brought to mind that hyphens, pretty much banned from the language of journalism these days, could be a near-universal solution to the crash blossom "problem." I put “problem” in quotes because I’m not sure it really is a problem, and if it were to be solved, we would be deprived of a wondrous source of amusement. PROSECUTOR TO TRY SHOOTING-SUSPECT isn’t funny, nor is SQUAD HELPS DOG-BITE VICTIM. A hyphen won’t fix all crash blossoms (it’s no solution to RED TAPE HOLDS UP NEW BRIDGE, for example); but the serious lesson to this whimsical sortie is that, often, a little bit of punctuation can keep your seriously intended sentence from becoming a howler.

And that’s my sneaky segue into a punctuation issue I’ve been wanting to address for quite a while now: the problem of the backward apostrophe. The problem I mean, which is becoming ubiquitous these days, is seen when a word or expression that begins with one or more elided characters — such as the word ’twas, an archaic short form of “it was,” which begins such famous iterations as “’Twas the night before Christmas” and “’Twas brillig and the slithy toves did gyre and gimble in the wabe” — shows up with a single open-quote mark in front of it instead of an apostrophe. So ’twas ends up looking like this: ‘twas.

This is caused by word-processing applications' use of "curled" rather than "straight" punctuation systems. "Straight" quotes and apostrophes all look the same, and create no problem; but "curled" quotes and apostrophes curl in or out. Most word-processing software now defaults to curled punctuation, which is more attractive and readable. But the programmers have not yet solved the problem that, when you hit your apostrophe key at the be-
Beginning of a word, the software has no way of knowing if you are making a word that begins with one or more elided letters and therefore calls for an apostrophe (‘), or if you are opening a quotation within a quotation, and therefore need a single open-quote-mark (‘). Oddly, word-processing applications are coded to render, at the beginning of a word, the fairly rare single open-quote rather than the extremely common apostrophe. The correct way of writing the contraction for “it was” is “’twas,” not “’twas” — but try getting your word processing application to do that for you in under three keystrokes. The same is true for any word or expression beginning with an elided character — for example: “the ’90s,” not “the ‘90s” — and definitely not “the 90’s”!

More troublesome twins
Changing gears completely: I wrote in one of my early columns about what I call “troublesome twins” — words that confuse us to the point that we’re not quite sure which one to use. Popular examples are “principle v. principal” and “affect v. effect.” Choosing the wrong one can alter the meaning of a sentence to make it humorous, nonsensical, or — worst of all in our profession — unclear, perhaps imparting a meaning completely different from the one intended.

New pairs of troublesome twins are appearing all the time, and some of these arise from the very sorts of things we’ve been discussing in the last couple of columns: writing a word that one has encountered only orally and thus isn’t sure how to spell. Case in point: imminently v. eminently. “Imminently” means impending, about to happen right now; “eminently” means “extremely” or “profoundly.” The sentence “The speaker was imminently entertaining” means something rather different from “The speaker was eminently entertaining.”

You also see “yay or nay” a lot these days, I’m not sure why. “Yay” is a cheer, like its cousin “hooray.” When talking about parliamentary procedural voting, the expression is “yea or nay” — “yea” being an archaic form of “yes.” And in a similar vein, one increasingly sees in print (usually in email strings and blog comments) the words “Here, here” — a misguided effort to replicate the usually oral phrase “Hear! Hear!” (meaning roughly “ditto!” and shouted when one enthusiastically agrees with what...
a speaker has just said). The spoken phrase “here, here” has a quite different sense, meaning something like “cut that out, you two!”

By the way, the past tense of “mislead” is “misled.” The fact that “lead” is also the spelling of a metal whose name is pronounced “led” does not entitle you to write “mislead” when you mean “misled.” Similarly, the past tense of “plead” is “pleaded” or “pled,” but, please, don’t spell it “plead.”

These last two are not troublesome twins, but I long since abandoned all hope of sticking to a single topic in this column. So for good measure, here’s something completely different: There is growing misunderstanding — and consequently misuse — of the term “spendthrift.” A spendthrift is someone who spends money recklessly or wastefully. The word “thrift” is in there because the word developed as a nomenclature for someone who wastes money that was acquired by the thrift of others — a profligate heir to a fortune, for example. But many people know that “thrift” is a good quality, and assume therefore that a “spendthrift” must be someone who is thrifty, a careful and prudent spender of money — the exact opposite of what a spendthrift really is. If this misunderstanding becomes any more widespread, “spendthrift” will join “biweekly” and several other words that we can’t use at all anymore because so many people think they mean something different from what they actually mean.

One of the great joys of English is that it includes so many words that can express, in a single word, a concept that would normally require several words to define. It’s great that we have the word “spendthrift” (and of course in a pinch we also have “wastrel”), and it’d be a shame to lose it. Please take care of our language by using its riches in the most effective and precise ways, lest all of our words become a muddle of vagueness.

Robert C. Cumbow, a shareholder at the Seattle firm of Graham & Dunn PC, contributes occasional columns on language and writing to Bar News. He teaches at Seattle University School of Law and in its Film Studies Program, and writes on law, language, and movies. He thanks Eileen Brousseau, Aaron Caplan, Flip Morse, and Patrick J. Murray for comments that inspired parts of this installment.

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Civility in Practice
The Comprehensive Law Movement as a Natural Response

BY JOSEPH SHAUB

Starting around 1960, and continuing through the 1980s, the practice of law was marked by the ascendancy of litigation as both the engine of economic growth in the profession and the prevailing ethic. Competent, smart, hard-working, and, above all, tough — these were the values which permeated our professional world. Aggressive was good; results (measured in monetary terms) were paramount. Adversarial litigation exploded as a practice form, and with it came the concomitant rise in interpersonally destructive behavior. The oft-referenced rise in incivility among lawyers was both striking in its metastatic growth and often shocking in its brazen-ness. Isolated voices would express concern about the law’s shift from a “profession” to a “business” and its effect on the well-being of both the lawyers and the clients they served, but, during this time, they remained just that — isolated. But in the late 1980s and early 1990s, these voices coalesced into what law professor Susan Daicoff has called the “Comprehensive Law Movement.”

If there is one driving force behind this movement within our midst, it is the recognition that law should not be an instrument for inflicting avoidable personal (and interpersonal) damage in the service of reaching specific “legal” objectives. Indeed, one theme these approaches share is that when we lower the heat generated by adversarial conflict, we can arrive at more satisfying solutions for our clients. It is about the ascendency of civility in how we conduct our affairs — not just to be “nice” but to achieve effective results. The various “vectors” of this Comprehensive Law Movement include:

• **Collaborative Law:** 20 years ago, Stu Webb, a Minnesota family lawyer, conceived of Collaborative Law. The primary principle is that the last place to resolve disputes between wounded, divorcing individuals is an adversarial litigation process. In Collaborative Law, all professionals and the clients sign a contract abandoning litigated adjudication. Instead, they agree to use neutral professionals to support the individuals in managing their emotional challenges, making parenting decisions, and untangling their financial community.

• **Therapeutic Jurisprudence (TJ):** In 1990, law professors David Wexler and Bruce Winnick wrote about the various psychologically destructive consequences of legal action. They explicitly joined the social sciences of law and psychology in an effort to enhance the therapeutic possibilities inherent in both legal process and result. Starting in the mental health courts, TJ (the subject of more than 600 articles and 18 books) has significantly impacted such diverse practice areas as workers’ compensation, sexual orientation law, and business negotiation.

• **Transformative Mediation (TM):** In 1994, law professor R. Baruch Bush and communications professor Joseph Folger introduced this concept in *The Promise of Mediation*. Transformative Mediation seeks to fashion resolutions that reach beyond a settlement of the legal issues between parties. TM, at its highest expression, explores the power of empathy and forgiveness, making mediation a vehicle for growth and reconciliation.

• **Restorative Justice (RJ):** More than 25 years old, RJ was founded in the criminal justice system. It is an avenue for healing between the criminal offender, the victim, and their community. It focuses not on adjudication of guilt and sentencing, but rather upon dialogue, future problem-solving, and, critically, the offender’s acceptance of accountability for his/her conduct and the damage which has resulted. RJ seeks to “promote peaceful advocacy . . . encourage compassion, reconciliation, forgiveness and healing.” RJ emphasizes the spiritual elements of dispute resolution.

• **Humanizing Legal Education:** Among numerous law professors calling for change, Professor Lawrence Krieger authored an influential research report on the destructive impact of the law school environment on the well-being of law students in the early 2000s. He helped found the Section on Balance in Legal Education in the Association of American Law Schools, which seeks to encourage and support avenues for law students to strengthen their resources for dealing with stress and deepen their interpersonal skills.

Back in 1974, we used to talk about law school as training to become “high-speed legal tools.” This led to troubling blindness to a fundamental truth — we lawyers are people. Our clients are people, too, with dreams and troubles and a fundamental need for connection. During the last 20 years, our colleagues, by the thousands, have striven to sculpt a new and different profession which is wiser and more civil — not because it is nice, but because it is a return to our roots as lawyers as counselors and supporters of our clients’ lives and endeavors.

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Fostering care and respect

Joseph Shaub is a collaborative family lawyer, mediator, and licensed marriage and family therapist with offices in Seattle and Bellevue. He is a frequent speaker at the WSBA Family Law Midyear and has been an adjunct instructor at the University of Washington School of Law. Readers are invited to visit his website and blog for further discussions on lawyers’ well-being at www.josephshaub.com.
Fara thought she had secured a stable place to live for another year when she renewed the lease on her south King County apartment in July 2009. But just a few weeks later, Fara’s landlord sold the building, and the new owners, eager to make renovations, refused to honor the lease extension. By November, the dispute was headed to landlord-tenant court, where Fara’s tenancy would turn on the enforceability of the lease extension she had signed in good faith with the prior property owner. But just before the dispositive “show cause hearing,” the new owners made an offer: in exchange for her agreement to move out by December 1, the new owners would pay Fara three months’ worth of rent in cash. Fara accepted the offer.

Fara did not expect to have trouble finding a new place to rent. She and her husband had steady jobs, they had always been good tenants in the past, and they had cash to pay for background checks, deposits, and moving expenses. Within a few days, Fara had already identified several attractive properties and made appointments to see them. But Fara was stunned when her rental applications were rejected at both properties to which she eventually applied. “You have an eviction record,” the manager at the last property had told her. “It is our company policy not to rent to anyone with an eviction record.” Fara tried to explain that she had never been evicted, but to no avail. “The court records show an eviction,” the manager replied. “That’s what we go by.”

As Fara had learned the hard way, there is no civil court record more damaging to those seeking rental housing in Washington than an unlawful detainer suit (or “UD,” popularly known as “eviction”). Rental housing providers almost universally downgrade applicants who have been sued for eviction, and many reject all such applicants categorically—even if the tenant prevailed, or settled (as in Fara’s case), or if the case is many years old. Many tenant-screening firms also evaluate applicants and assign scores, ratings, or recommendations using algorithms that fail to distinguish between UDs that resulted in judgments or writs of restitution and those that did not. Consequently, the mere filing of an unlawful detainer action becomes a proxy for adverse rental history, which housing providers commonly presume indicates a likelihood of poor performance in a future tenancy, and typically dooms the application.

Indeed, few landlords even bother to obtain the information that would be necessary to take case outcomes or other circumstances into consideration. Tenant-screening companies regularly

Rental Housing’s Elephant in the Room

The Probable Disparate Impact of Unlawful Detainer Records

by Eric Dunn and Merf Ehman
gather and report unlawful detainer records to residential landlords, usually by running name searches in the Superior Court Management Information System (SCOMIS). Other housing providers discover UDUs on their own, typically by accessing and searching SCOMIS through the Washington Courts website. SCOMIS contains few details about filed cases — usually just the party names, filing date, and “case type.” SCOMIS does not contain information about the specific allegations, defenses, findings, or case dispositions, and thus such information seldom appears in professional tenant-screening reports either.

Of course, as Fara’s case indicates, not all UD records result from the tenant’s wrongdoing, and even those that do are not always reasonably predictive of future performance. The uniform treatment of applicants with UD records therefore causes some prospective tenants to be denied housing for arbitrary or unjust reasons — that is, on grounds unrelated to their fitness as residential tenants. And in all likelihood, those unfairly turned down because of UD records are disproportionately women, people of color, families with children, and people with disabilities.4

Nationally, just 47 percent of African-American and 50 percent of Latino families own their homes, compared with 60 percent of Asian-American and 75 percent of white families.5 This means people of color are more likely to be renters potentially subject to eviction proceedings. Also, 32 percent of African-American households and 26 percent of Latino households have zero or negative net worth, compared with just 13 percent of white households.6 This disparity makes minority households much more vulnerable to eviction for non-payment of rent — far and away the most common basis upon which residential UD actions are filed — upon the loss of a job or other sudden income disruption. Gender plays a similar role. Women are more likely to be single parents, and thus require larger dwelling units with higher rent and utility burdens.7 Some research suggests that women are more likely to complain to government agencies about substandard housing conditions, potentially drawing the ire of their landlords.8 Domestic-violence victims, the vast majority of whom are women, have historically faced evictions from landlords fearing disturbances or police visits9 (though Washington has recently prohibited such evictions10). People with disabilities must often litigate — commonly in the unlawful-detainer setting — to secure reasonable accommodations they require for equal access and enjoyment of rental housing. These considerations suggest that the use of unlawful detainer records in rental housing admissions probably causes a “disparate impact” on the basis of race, ethnicity, gender, and other protected-class status.

“Disparate impact” is a theory of anti-discrimination law that prohibits “facially neutral” practices having discriminatory effects. The U.S. Supreme Court first recognized disparate impact in the 1971 case of Griggs v. Duke Power Co., which held that an employment practice that has disproportionately harsh effects on minority applicants violates Title VII unless justified by “business necessity.”11 A party claiming disparate impact discrimination need not demonstrate that the discrimination was intentional (although one of the most common ways to demonstrate the absence of a business necessity is by showing that less-discriminatory alternatives were ignored), only that it causes a discriminatory effect. Statistical evidence is often essential to prove that a challenged practice has a discriminatory effect.12

Intuition and anecdotal evidence suggest it is likely that unlawful detainer actions are filed against racial and ethnic minorities, women, people with disabilities, and members of other protected classes at rates disproportionate to their numbers. Yet mounting effective fair-housing challenges to this practice requires reliable statistics to detect and prove such correlations. Unless and until such data are gathered, this (probably) discriminatory practice will continue unabated. For this reason, we call on Washington courts to begin tracking the race, ethnicity, gender, disability status, and other protected-class status of residential unlawful-detainer defendants. The sooner this data is assembled, the sooner it can be confirmed whether blanket exclusions of UD defendants from rental housing actually causes a disparate impact — and if so, on whom.

We offer two reasons why Washington courts should begin collecting demographic data regarding unlawful detainer defendants. First, eradicating unfair discrimination is an important public policy of this state.13 Second, fair housing law offers the most promising approach for limiting the reflexive and indiscriminate denial of rental housing on the basis of UD records, a practice that threatens the integrity of our landlord-tenant courts altogether.

It is long established in the employment context that the use of judicial records, especially criminal records, can cause a disparate impact on cer-
tain racial and ethnic groups. Just four years after Duke Power, the U. S. Court of Appeals for the Eighth Circuit ruled in Green v. Missouri Pacific Railroad that an employer could not, consistent with Title VII, categorically deny employment to applicants with prior criminal convictions because of the disparate impact such a policy would have on African Americans (who, at that time, were between 2.2 and 6.7 times more likely to be convicted of a criminal offense than whites). An applicant’s criminal history could be considered, but, Green held, “[t]o deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.”

Drawing on Green and similar cases, in 1982 the U.S. Equal Employment Opportunity Commission (EEOC) issued an official “Policy Statement on the Issue of Conviction Records under Title VII,” which established nationwide guidelines for the use of criminal records in hiring. The EEOC policy statement cautioned employers throughout the United States not to reject job applicants based on criminal records unrelated, or only tenuously connected, to the work involved. To justifiably reject a job applicant based on a criminal record, the EEOC policy statement warned, an employer must demonstrate the relationship between job requirements and the criminal record by empirical evidence rather than just a “common sense-based” assertion.

Fair housing statutes are interpreted in substantially the same manner as employment discrimination laws. But the federal agency responsible for enforcing the Fair Housing Act (U.S. Department of Housing & Urban Development) has issued no policy statement advising private housing providers on the use of criminal, eviction, or other judicial records, as the EEOC has done for employment screening. Possibly for this lack of administrative guidance, rental admissions policies categorically or arbitrarily excluding applicants with UD or criminal records appear with some frequency in Washington, even though such blanket exclusions are, at minimum, highly suspect under Green and its progeny.

Criminal background checks, like UD records, are a regular fixture in tenant-screening reports, and often cause ex-
offenders unjust difficulty in obtaining rental housing despite settled fair housing protections. But the ready availability of salient and up-to-date statistical evidence makes claims for discriminatory rental rejections based on criminal records comparatively feasible. The same is not true of UD records, however, because demographic information on unlawful detainer suits is not similarly tracked.

Should the categorical rejection of rental applicants with UD records be proven to cause discriminatory effects on one or more protected classes, a residential landlord would be hard-pressed to defend such a policy as a business necessity. Unlike conviction records — which criminal defendants acquire only upon pleading guilty or being adjudged guilty by a court — a record of being sued for unlawful detainer does not even establish that the applicant performed poorly in the prior tenancy. Most eviction suits are settled without any judicial determination of liability ever being made. Of the cases that do reach judicial adjudication, some are decided in favor of landlords and some in favor of tenants. While housing providers may derive some measure of efficiency in not attempting to distinguish between defendants who were actually "evicted" and those who were not, there is no business necessity for excluding applicants belonging to the latter group.

Housing providers who categorically reject applicants with UD records commonly respond that the mere filing of a UD is reliable evidence of poor rental history irrespective of the outcome, since few landlords would incur legal costs and the associated burdens of litigation except to remove a truly intolerable tenant. Others argue that tenants often prevail in UD suits only because of procedural "technicalities," i.e., avoiding eviction despite actual guilt. These arguments are not completely without merit, though plenty of housing providers will proceed to court with little or no effort at pre-litigation resolution, and one person's "technicality" is another's substantive defense. But at most, these contentions merely establish that the denial of a rental application based on a dismissed UD may sometimes be justified, not that the blanket rejection of all such applicants is always justified.

Indeed, unlawful detainer cases are sometimes filed against tenants who have fulfilled the terms of their rental agreements and done nothing to warrant eviction. Common examples include tenants who face eviction in retaliation for requesting repairs, complaining to code inspectors, or calling the police; tenants who are sued for unlawful detainer after the rental property is foreclosed; or tenants who are sued for non-payment of rent based on sums they do not owe, whether because of accounting errors, unlawful charges, etc. Cases of this nature are frequently brought by pro se landlords unaware of or indifferent to the tenant's legal protections, and such cases are often dismissed on technical grounds because of the landlord's non-compliance with nuances of civil procedure. Other times, inappropriate cases are voluntarily dismissed or settled by agreement when the landlord obtains counsel or when new facts are brought to the landlord's attention.

Once filed, an unlawful detainer case record is permanent. There is no way, even by stipulation, to eliminate a UD record. In some instances, a UD record can be sealed or the tenant's name redacted from SCOMIS, but only temporarily. Even while a UD record is sealed, no statute — unlike with convic-

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tion records — authorizes the tenant to deny the suit’s existence on a rental application.25 A related concern is that unlawful detainer actions are usually filed against entire households, meaning one person’s UD record may actually relate to alleged acts or omissions of others (i.e., people in the household, who may not necessarily be joining the prospective new household).

Even where a UD record reflects a case in which the applicant was truly culpable, the importance of changed circumstances is significant. Most eviction suits are based on non-payment of rent resulting from financial hardship rather than malicious or anti-social behavior. If the economic reasons (such as a lost job, medical problem, divorce, or other income disruption) that led to the prior eviction no longer exist, then the predictive value of the past UD may be substantially diminished. And even a tenant evicted for genuinely wrongful or irresponsible behavior may have reformed, just as a person with a criminal record may have done.

Since a business-necessity defense would not be plausible, it follows that rental admissions policies categorically excluding applicants with UD records violate the Fair Housing Act (and analogous laws, such as Washington’s Law Against Discrimination26) if unlawful detainer suits are filed more often against people of color, women, people with disabilities, or other minorities. The probability of such correlations appears so great that our courts cannot responsibly fail to investigate it.

The reflexive denial of rental applicants with UD records also presents an access to justice problem. Residential tenants are becoming increasingly aware of the fact that a UD record often effectively blacklists the tenant from future housing opportunities. Such tenants often find that preserving their future rental prospects is more important than defending one particular tenancy — a calculation that leads many tenants to vacate rental properties rather than litigate meritorious cases against their landlords. This chilling effect tends to undermine the very legitimacy of the tribunal itself.

Ensuring that tenants and landlords have equal access to the judicial system is as much, if not more, of a concern to Washington’s courts as eliminating unfair discrimination. Demographic data about UD defendants is likely to reveal which tenants are still appearing to contest unlawful detainer suits and which are not, as well as identify any patterns or trends concerning those respective groups. Obtaining this data is an important first step in understanding and ultimately addressing this substantial access to justice problem.

It is not immediately clear how this information should be collected, and we appreciate the reluctance of policymakers to launch new programs of any kind in today’s trying budgetary environment. Yet we believe this data must be gathered, and we believe it can be gathered in an efficient and low-cost manner. Some possible methods include: requiring an unlawful detainer plaintiff to submit a demographic information sheet to the court at the time of filing a complaint (similar to a form already used by some county sheriff’s departments in eviction proceedings), asking UD defendants to fill out a brief questionnaire when they check in with the court, conducting polls or studies using a representative subset of case filings, and requiring sheriff’s deputies or process servers to ascertain certain
information about UD defendants when serving legal process or executing the court’s orders. Any costs, though probably negligible, could be funded through a small increase in UD filing fees or similar means.

However the data is collected, if reliable empirical statistics bear out what has been demonstrated in other states about the connection between eviction and race, ethnicity, and gender, then swift action should ensue. Such action could entail the issuance, by the Washington State Human Rights Commission, of guidance concerning the use of unlawful detainer records for tenant-screening, much like the EEOC guidance for criminal records for employment screening. Such guidance should direct residential landlords not to reject applicants on the basis of UD records except on a case-by-case basis where the eviction is related to the obligations of tenancy, and with the specific facts and evidence of changed circumstances taken into consideration. Though a landlord’s failure to comply with such guidance should constitute *prima facie* evidence of unlawful discrimination under Washington’s own fair housing law, RCW 49.60.222, we expect that most housing providers would accept such guidance and adjust their policies accordingly.

Eric Dunn is a staff attorney with the Seattle office of the Northwest Justice Project where he practices housing law, primarily in the areas of civil rights and access to affordable housing. He can be reached at ericd@nwjustice.org. Merf Ehman is the managing attorney in the Seattle office of Columbia Legal Services, where she represents clients and works on systemic advocacy in the areas of housing, consumer, and civil rights law. She can be reached at merf.ehman@columbialegal.org.

NOTES
1. “Fara” is a pseudonym for an actual client of the Northwest Justice Project.
2. See RCW 59.18.380.
9. U.S. Conference of Mayors, Hunger and Homelessness Survey 64 (2005) (Finding 50 percent of cities surveyed indicated that domestic violence was a primary cause of homelessness).
10. See RCW 59.18.580(1).
13. See RCW 49.60.010 (“The legislature hereby finds and declares that practices of discrimination against any of its inhabitants ... are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.”).
information regarding actual misconduct by the tenant, acts in a manner inconsistent with this standard. Case law established well before the issuance of the EEOC Policy Guidance on Arrests also took this approach to the use of arrest records. See also Gregory v Litton Systems, Inc. (1970, DC Cal) 316 F Supp 401, mod on other grounds, 472 F2d 631 (9th Cir. 1972) (No business necessity to exclude worker based on arrest record where employer had neither examined the particular circumstances surrounding the arrests nor considered the relationship of the charges to the position of sheet metal worker).
22. See GR 15(h)(1) (“The court shall not order the destruction of any court record unless expressly permitted by statute”). No statute authorizes the destruction of unlawful detainer case records.
25. See RCW 9.94A.640 ( felonies); RCW 9.96.060 (misdemeanors).
26. See RCW 49.60.222.
27. The guidance could be based on the rules already in place for some employers related to convictions and arrests. WAC 162-12-140 (limiting arrest inquiries to whether the charges are pending, have been dismissed, or lead to a conviction involving behavior that would adversely affect job performance).
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 WSBA Board of Governors, who are the Fund Trustees. At its meeting on May 8, 2011, the Board conducted the following business:

Komron Allahyari — WSBA No. 19804 (Seattle) — Resigned in lieu of disbarment, 1/10/2011

The applicant and his wife retained Allahyari to represent them in a personal injury action against the owners of a restaurant where the applicants suffered a serious assault. Eventually, settlements were reached with both the general insurance carrier and the liquor liability carrier. Under the terms of the settlement agreements, Allahyari was to pay various claims and to retain a total of $100,406.04 ($26,000 from the first settlement and $74,406.04 from the second settlement) in trust to pay off the Crime Victims Compensation Program’s (CVCP) lien. Allahyari was eventually able to negotiate a substantial reduction in the CVCP’s lien to $35,088.33; however, by that time, Allahyari had misappropriated the trust funds and there were no funds remaining in trust. Allahyari paid the CVCP lien from his personal funds.

One of the items to be paid off from the settlement proceeds was a loan the applicant’s brother had made to the applicant in the principal amount of $80,000. The brother agreed to settle the loan for a total payment of $125,000; however, when disbursing the settlement funds, Allahyari paid only the original $80,000 principal, not the $125,000 agreed-upon amount. The Board approved payment to the applicant of $2,011.41.

Theodore A. Mahr — WSBA No. 19555 (Moses Lake) — Stipulation to three-year suspension 11/10/09; disbarred 12/27/10

The Fund has previously paid $24,703 to 15 former clients of Mahr.

Mahr was a sole-practitioner mainly practicing immigration law. He stipulated to neglecting client cases, making misrepresentations to clients, filing immigration pleadings without notice to and approval of clients, charging or attempting to charge additional fees after being paid agreed-upon flat fees, and failing to return unearned fees and client files.

Applicant A paid Mahr $1,250 to file an I-130 (petition for alien relative). Mahr told him that he had forwarded the paperwork to the United States Custom and Immigration Service (USCIS), but the applicant did not receive the customary receipt that his I-130 application had been received by USCIS. Months later, Mahr told the applicant that the application had been approved, but again the client did not receive any paperwork from USCIS. The applicant again asked Mahr about the status of his application; Mahr asked for an additional $355 to “expedite” the application, which the applicant paid. In January 2009, USCIS notified the applicant that his application had been rejected for failure to pay a $355 filing fee. When the applicant confronted Mahr about this, Mahr requested more money. In February 2009, the applicant paid another $355 to Mahr. In June 2009, the applicant received notice that USCIS had received his I-130, and in November 2009, he was notified that his application had been approved. The hearing officer recommended restitution to Applicant A of $355, which the Fund paid.

Mahr’s client’s family (Applicants B) paid him $1,000 for “getting the immigration hold taken off him and getting him out of jail.” Mahr failed to communicate with the client or the client’s family. Mahr proposed to provide necessary immigration forms and a copy of the fee agreement but never did so. He then requested $6,000 to pay a “fine” after the client was moved from jail to a Yakima detention facility. Mahr failed to appear for a November 2009 court hearing; the client represented himself at the hearing, which was continued to 12/2/09. The client was deported. The Board approved payment to Applicants B of $1,000.

Applicants C paid Mahr $1,000 to represent the husband at an immigration hearing. Before hiring Mahr, the applicants had completed immigration paperwork with the assistance of the Northwest Immigrant Rights Project, but they wanted an attorney to represent the husband in court. Mahr responded only once to their repeated phone calls about the upcoming hearing, telling them it was “just a formality.” Mahr was suspended 11/10/09 and failed to appear for the 12/01/09 hearing. He did not inform the clients of his suspension. The hearing officer recommended restitution to Applicants C of $1,000, which the Fund paid.

Applicant D hired Mahr in May 2010 (while he was suspended) to help with her husband’s immigration case. She paid Mahr $1,500, but Mahr never sent in the forms and was always giving her excuses for not doing so. In October 2010, she sent Mahr another $500 for a work permit; however, the forms were rejected twice because Mahr didn’t enclose the required fees. The Board approved payment of $2,000 to Applicant D.

Applicants E hired Mahr to represent the husband on 8/8/07 on his legal permanent resident (“green card”) application. They paid him a “flat fee” of $1,950. Mahr said he could get the husband’s visa within six months. After six months, they tried to contact Mahr; Mahr “couldn’t remember” they had a case, and then said he had lost their file. Mahr advised them to “wait until we had a new president”; the applicants said they were “speechless” but that he was a lawyer so they trusted him. After more time passed, they consulted with another lawyer and learned about Mahr’s licensing status. They went to his office but it was empty, and his phone was disconnected. In response to communication from the clients, Mahr sent them an undated letter, saying that he drove to Spokane to speak to USCIS, and then told the clients that the husband would not be able to obtain a green card because he had arrived in the United States illegally. In his response to the applicants, Mahr stated the case then stalled because the husband didn’t want to return to Mexico to obtain his papers, that in addition to driving to Spokane, he also drove to Seattle, and that the $1,950 flat fee was “used up.” The Board approved payment of $1,950 to Applicants E.

In July 2009, Applicant F paid Mahr $1,950 to get him released from detention and to get him a “green card.” Mahr did not obtain the applicant’s release. At a 1/11/10 immigration hearing, the immigration judge informed the applicant that Mahr had been suspended on 11/10/09.
After consulting with new counsel, the applicant learned that he would not have been eligible for release because he had a conviction for an aggravated felony; Mahr knew that, but took the applicant’s money and promised an unattainable result. The hearing officer recommended restitution to the applicant and the Board approved payment of $1,950 to Applicant F.

In September 2009, Applicant G contacted Mahr because her husband had been picked up by immigration officials “for being an illegal immigrant with a felony after being deported in 2000.” Other lawyers told the applicant that her husband could not be released on bond under these circumstances; Mahr said he had had people released on bond under these circumstances; Mahr appeared late for the bond hearing. The court denied bond, chastised Mahr as unprepared, and explained that it did not have jurisdiction to grant release. Mahr never provided a bill. By July 2009, the clients were requesting a refund, which was refused. The applicants sued Mahr in small claims court and on 10/7/09 obtained a $331.98 judgment against Mahr. The Board approved payment of that amount to Applicants H.

Applicant I hired Mahr to “get [the applicant’s] wife out of prison by Thanksgiving of 2008.” He paid Mahr $5,000, which was characterized as a “flat fee.” Mahr didn’t do anything, and only when the applicant contacted the wife’s former attorney did he learn that Mahr hadn’t filed anything with the court or with the public defender’s office to take over the file. Mahr signed a promissory note promising to repay the $5,000, but he never did. The Board approved payment of $5,000 to Applicant I.

On 5/26/06, Applicants J hired Mahr to obtain green cards and permanent residency. They paid Mahr $1,000 that day, and another $1,000 four days later. Mahr promised he could speed up the process and obtain their cards for them in “half the time.” The applicants seldom spoke with Mahr; they would meet him at a gas station and Mahr would call someone on the phone to serve as interpreter. They were always told “everything is fine, these things take time.” In late November 2008, the husband’s brother was dying; the husband wanted to go to Mexico to see his brother one last time. Mahr told him he could obtain his residency in one to two weeks given the special situation. The applicants paid Mahr another $2,000. Subsequently, they were unable to get hold of Mahr. The hearing officer found that Mahr performed no work for the applicants and recommended restitution to Applicants J of $4,000, which the Fund paid.

On 6/11/10 (seven months after Mahr’s 11/10/09 suspension and five months after his January 2010 suspension by the immigration court), Applicant K paid Mahr $1,500 to get her boyfriend’s work visa
renewed. Mahr gave her options and she chose one; however, she says it “didn’t seem like he was telling us the truth so the workplace wouldn’t do it.” Then Mahr told them that President Obama was making a new law and it was a “waiting game.” The Board approved payment of $1,500 to Applicant K.

Applicants L paid Mahr $2,060 (a $1,950 fee and a $110 “motion fee”) to represent the husband “for U.S. Immigration Court proceedings.” The husband was arrested by immigration officials. Their son was scheduled to have surgery on 5/9/08. Mahr agreed to try to get the husband released on bond; however, Mahr failed to appear for the bond hearing, and later explained that he was “too busy” to appear. Mahr told the applicants that he had filed a motion to reopen and an emergency stay of removal on 5/3/08, but that was not true. Mahr failed to return numerous calls from the applicants. The husband was never released on bond and was ultimately deported. The hearing officer recommended restitution of $2,060 and the Board approved payment in that amount to Applicant L.

Applicant M hired Mahr to represent her on her immigration matter. She paid him an initial payment of $500. On 11/13/09, the applicant made a “last payment” to Mahr of $1,450. Mahr was suspended on 11/10/09. Mahr sent the applicant a one-page undated document to file with the immigration court, indicating she was representing herself in the matter. The hearing officer recommended restitution of $1,950 and the Board approved payment in that amount to Applicant M.

Applicant N paid Mahr $1,950 on 9/16/09 to represent his son. The applicant’s son told him that Mahr only showed up for one court date, and that Mahr never returned his calls. The applicant was finally able to get hold of Mahr at Mahr’s home, but Mahr was rude and said, “Stop bothering me or I will charge you more because I used gasoline to get to the courts and I did not charge you for that.” The son says that Mahr was supposed to get him a bond and get his “charges corrected” and that Mahr came to court one time and asked for an extension and did nothing else. The Board approved payment to Applicant N of $1,950.

Glenn A. Prior — WSBA No. 22487 (Fife) — Deceased 7/19/09

The Fund has previously paid $44,399 to 15 clients of Prior.

The applicant paid Prior $2,100 on 4/7/09 for “research of criminal case for reissuance of green card/citizenship.” Prior died on 7/19/09 while on vacation in Ecuador. The applicant received nothing from Prior other than the retainer agreement. The Board approved payment to the applicant of $2,100.

Antonio Salazar — WSBA No. 6273 (Seattle) — Disbarred 5/12/2010

The Board previously approved eight applications totaling $7,300. The Board reviewed a total of 81 applications regarding Salazar. Most were denied for lack of evidence of dishonest conduct, as fee disputes, or as claims for malpractice.

The applicant hired Salazar on 1/23/08 to represent him on a case he had already filed in King County District Court. He gave

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Salazar a power of attorney to handle and resolve the matter while he was out of the country, and paid him $1,500 for this case and “recovery of a parking fee deposit.” When he returned to the country in February 2009, he said the parking deposit case couldn’t be scheduled with the court. On 9/19/09, he fired Salazar, requested a refund, and terminated the power of attorney. The Board approved payment to the applicant of $1,200.

Note on Payments: Because of the increasing number and amounts of funds applied for, the Fund Board recommended to the WSBA Board of Governors that any gifts approved be paid only up to $5,000 and that the remaining balance on any gift over $5,000 be held pending review and possible proration at the end of the fiscal year (September 30). The Board of Governors approved that recommendation.

Other Business: In addition to the approved applications, the Fund Board reviewed 90 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. In addition, the Fund Board approved amendments to APR 15 and to the Fund Procedural Rules that will be referred to the WSBA Board of Governors for submission to the Washington State Supreme Court.

Restitution: Before payment is made, the applicant(s) 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 February 8, 2010, five lawyers were making regular restitution payments to the Fund totaling $22,380.

The 2010–2011 Fund Board chair is Seattle attorney Susan Shulenberger. WSBA General Counsel Robert Welden is staff liaison to the Fund Board assisted by Assistant General Counsel Elizabeth Turner.
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**Why Should I Participate?**

Help yourself while helping others!

- Provide public service and help close the access to justice gap.
- Obtain free referrals to help build your client base.
- Learn new skills and expand your practice areas through free or low-cost online trainings.
- Gain increased access to mentoring and peer support opportunities.

**How Do I Sign Up?**

To participate, you must be an active member of WSBA and carry malpractice insurance. All participating attorneys are subject to a WSBA discipline screen. Sign up now at www.mywsba.org. Click on the Moderate Means Program logo to complete a registration form. Contact WSBA Public Service Program Manager Catherine Brown for more information about the insurance requirement and discipline screening.

**What’s Next?**

When a service opportunity arises, you will be contacted by a student at one of the three Washington law schools.

For more information, please visit the Frequently Asked Questions page. You can also contact WSBA Public Service Manager Catherine Brown at 206-733-5905 or catherineb@wsba.org.

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**Enhancing Our Culture of Service**

Public service is a hallmark of the legal profession. Through projects like the Moderate Means Program, the WSBA is enhancing our culture of service, providing ways for lawyers to give back to the communities of which they are such an integral part.

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*A partnership between the WSBA and Washington’s three law schools: Gonzaga University School of Law, Seattle University School of Law, and the University of Washington School of Law.*
Opportunities for Service

Northwest Justice Project
Board of Directors
Application Deadline: September 1, 2011

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, commencing January 2012). Incumbents are eligible for 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 assure 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, email Board Development Chair Lisa Dickinson at lisa@dickinsonlawfirm.com, or Executive Director César Torres at cesar@nwjustice.org. To apply, submit a letter of interest and a résumé to WSBA Communications Dept., 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; or email barleaders@wsba.org.

WSBA Board of Governors 2011 Election Results

The WSBA Board of Governors elected the 2011–2012 president-elect and at-large (B) governor at its June 3, 2011, meeting in Kennewick.

2011-2012 President-elect
Michele G. Radosevich

At-Large (B) Governor
James W. Armstrong

Board of Governors Elections
Districts 3, 6, 7-East, and 8

The governor for District 8 was determined in the April election. A run-off election was held for districts 3, 6, and 7-East, since no candidate received a majority vote in the April election. Run-off elections were held between Jane L. Habegger and Brian J. Kelly in the 3rd District; Jean A. Cotton and Vernon G. Harkins in the 6th District; and Daniel G. Ford and Chris R. Youtz in the 7th-East District. The run-off elections ended May 23.

3rd District: The certified election results from the May 24 ballot counting name Brian J. Kelly as the 3rd District governor-elect.
Eligible voters: 2,522 / Ballots cast: 505
Return rate: 20%
No selection: 0
Jane L. Habegger: 215 votes, 42%
Brian J. Kelly: 290 votes, 57%

6th District: The certified election results from the May 24 ballot counting name Vernon G. Harkins as the 6th District governor-elect.
Eligible voters: 1,952 / Ballots cast: 393
Return rate: 20%
No selection: 0
Jean A. Cotton: 146 votes, 37%
Vernon G. Harkins: 247 votes, 62%

7th-East District: The certified election results from the May 24 ballot counting name Daniel G. Ford as the 7th-East District governor-elect.
Eligible voters: 2,947 / Ballots cast: 334
Return rate: 11%
No selection: 0
Daniel G. Ford: 204 votes, 60%
Chris R. Youtz: 130 votes, 39%

8th District: The certified election results from the April 18 ballot counting name Wilton S. "Bill" Viall III as the 8th District governor-elect.
Eligible voters: 3,654 / Ballots cast: 376
Return rate: 11%
No selection: 25
Wilton S. "Bill" Viall III: 194 votes, 48%
John C. Peick: 182 votes, 45%

Congratulations to 2011–2012 President-elect Michele Radosevich and the five governors-elect. Ms. Radosevich will serve as WSBA president-elect beginning at the close of the WSBA annual meeting on September 22, 2011, and will assume the WSBA presidency in September 2012. The governors-elect will take office at the close of the WSBA annual meeting in September, and will hold office for a term of three years, until September 2014.

WSBA Court Rules and Procedures Committee 2011-2012 Agenda

During its October 1, 2011, to September 30, 2012, term, the WSBA Court Rules and Procedures Committee is scheduled to review the Civil Rules (CR), the Mandatory Arbitration Rules (MAR), and the Civil Rules for Courts of Limited Jurisdiction (CRLJ). Suggestions regarding these rules or questions about the committee should be directed to Elizabeth Turner at 206-239-2109, 800-945-9722, ext. 2109, or wsbacourtrules@wsba.org. Interested individuals are encouraged to participate in the work of the committee. For more information and a schedule of committee meetings, see http://bit.ly/iP2pNg.

Mandatory Continuing Legal Education (MCLE Board)
Application Deadline: July 15, 2011

The WSBA Board of Governors is seeking applications from active WSBA members for appointment to the MCLE Board. One position is available, and members from any district may apply. This is a three-year term commencing October 1, 2011. The MCLE Board approves courses and educational programs that satisfy the educational requirements of the mandatory CLE rule and considers MCLE policy issues, as well as reporting and exception situations. Interested individuals should submit a letter of interest and résumé and complete the Committee Application form at http://bit.ly/iJ4G601 and send to WSBA Communications Dept., 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539; or email barleaders@wsba.org.

Seeking Questionnaires from Candidates for Judicial Appointments
Deadline: July 11, 2011, for August 18, 2011, interview

The WSBA Judicial Recommendation Committee (JRC) is accepting questionnaires from attorneys and judges seeking consideration for appointment to fill potential Washington State Supreme Court and Court of Appeals vacancies. Interested individuals will be interviewed by the Committee on the date listed above. The JRC’s recommendations are reviewed by the WSBA Board of Governors and referred to Governor Gregoire for consideration when making judicial appointments. Materials must be received at the WSBA office by the deadline listed above. To obtain a questionnaire, visit the WSBA.
Every effort is made to return calls sent an official position of the WSBA. Such advice given is intended for the educational and informational purposes 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.

Get More Out of Your Software
The WSBA offers hands-on computer clinics for members wanting to learn more about what Microsoft Office programs — Outlook and Word, as well as Adobe Acrobat — can do for a lawyer. We also cover online legal research such as Casemaker and other resources. Are you a total beginner? No problem. The clinic teaches helpful tips you can use immediately. Bring your laptop or computers are provided, and seating is limited to 15 members. The July 11 clinic will meet from 10 a.m.–noon at the WSBA offices and will focus on Adobe Acrobat Professional, Version 9 (not the Reader). There is no charge and no CLE credit. To reserve your seat, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

Monthly and Weekly Job Seekers Groups
On July 13 from noon–1:30 p.m. at the WSBA office, Lawyers Assistance Program career coach and attorney Karen Summerville will return to the WSBA to describe the job search through the rubric of the “Treasure Hunt.” This will involve networking strategies, approaches to the interview, and useful self-assessment questions to identify what job will be a good fit. No RSVP required. There is also a Weekly Job Seeking group that provides strategy and support to unemployed attorneys. The group runs for eight weeks and is limited to eight attorneys. For more information about monthly and weekly job group programming, contact Dan Crystal at danc@wsba.org, 206-727-8267, or 800-945-9722, ext. 8267.

Work/Life Balance Group
The Lawyers Assistance Program is offering “From Surviving to Thriving: Achieving a Meaningful Work/Life Balance.” This eight-week group offers both specific skills and a supportive environment for this critical topic. If you are interested in participating in the next group, contact LAP therapist Heidi Seligman at heidis@wsba.org, 206-727-8269, or 800-945-9722, ext. 8269.

Interested in Mindful Lawyering?
A growing number of legal professionals across the nation are applying mindfulness-based skills and training to lawyering. The Washington Contemplative Lawyers group meets on the last Wednesday of each month (July 27) at the Lawyers Assistance Program office from 8:15–9:00 a.m. The group explores ways in which mindfulness practices may lead to more effective delivery of quality legal services, increased professionalism, and lawyer well-being and health. For more information, contact Sevilla Rhoads at srhoads@gsblaw.com. Learn more about mindful lawyering on page 27 or at http://wacountemplativelaw.blogspot.com.
Search WSBA Ethics Opinions Online
Formal and informal WSBA ethics opinions are available online at http://mcle.mywsba.org/io. You can search opinions by number, year issued, ethical rule, subject matter, or keyword. Ethics opinions are issued by the WSBA to assist members in interpreting their ethical obligations in specific circumstances. The opinions are the result of study and analysis in response to requests from WSBA members. For assistance, call the Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

LOMAP and Ethics on the Road: The 2011 Traveling Seminar
The WSBA Law Office Management Assistance Program (LOMAP) comes to you! Join us in Seattle on Wednesday, July 27, 2011. Four ethics credits are available and the cost is $99. To register, call or email Julie Salmon at 206-733-5914 or juliesa@wsba.org. For additional information, see www.lomap.org.

Casemaker Online Research
Casemaker is a powerful online research library provided free to WSBA members that can be accessed from the WSBA website at www.wsba.org/resources-and-services/casemaker-and-legal-research. 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).

Worried?
A little anxiety is a good thing — it motivates us to get things done. But too much anxiety can result in procrastination or paralysis, and you get way behind in your work before you know it. If anxiety has become a problem, call the Lawyers Assistance Program at 206-727-8269.

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 the lawyer services coordinator at 206-727-8268, or 800-945-9722, ext. 8268.

Help for Judges
The 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.

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.

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. 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 22-23, Ocean Shores • September 22-23, Seattle • October 28-29, Tacoma
With the exception of the executive session, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Contact Margaret Shane at 206-727-8244, 800-945-9722, ext. 8244, or margarets@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/about-wsba/governance/board-of-governors.

Usury Rate
The average coupon equivalent yield from the first auction of 26-week treasury bills in June 2011 was .107 percent. Therefore, the maximum allowable usury rate for July is 12 percent.
WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Employment Law**

**Labor and Employment Law Boot Camp**
July 7 — Seattle and webcast. 6.25 CLE credits including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Hiring, Firing, and Employee Handbooks**
August 23 — Seattle and webcast. 6 CLE credits, including 1 ethics credit pending. By the WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**General**

**DUI Practice and Procedure for the Non-DUI/Occasional DUI Attorney: Handling the Department of Licensing (DOL) Case Facing DUI Defendants**
July 6 — Seattle and webcast. 1.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**6th Annual WSBA Solo and Small Firm Conference**
July 14–16 — Ocean Shores. 16 CLE credits, including up to 2.75 ethics. By the WSBA Solo and Small Practice Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**New Issues in Today’s Licensing Transactions**

**Maximize Your Online Presence: How to Attract Clients, Leverage Your Website, and Save up to Thousands per Year on Marketing Costs**
August 31 — Seattle and webcast. None. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Health Law**

**Avoiding Elder Law Malpractice and Ethical Violations**
July 20 — Seattle and webcast. 3.5 CLE credits, including .75 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Intellectual Property**

**Center for Advanced Study and Research on Intellectual Property (CASRIP) High Technology Protection Summit**
July 20 — Seattle and webcast. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Washington State Association for Justice Annual Convention**

**Civil Rights Law Seminar**
July 29 — Seattle and webcast. 3.75 CLE credits including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Trust Account Reconciliation**
August 16 — Seattle and webcast. 1.5 CLE credits pending. By the WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**LOMAP and Ethics on the Road: The 2011 Traveling Seminar**

**Immigration Issues and Family Law Litigation**
July 13 — Seattle. 1 CLE credit. By McKinley Irvin Family Law Speaker Series; 206-625-6900; www.mckinleyirvin.com/resources/cle.

**Avoiding Elder Law Malpractice/ Ethical Violations**
July 20 — Seattle and webcast. 3.5 CLE credits, including .75 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Six Insider Secrets Every Family Law Professional Must Know**
August 9 — Seattle and webcast. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**The “Nuts and Bolts” of Protection and Restraining Orders**
August 10 — Seattle. 1 CLE credit. By McKinley Irvin Family Law Speaker Series; 206-625-6900; www.mckinleyirvin.com/resources/cle.

**LOMAP and Ethics on the Road: The 2011 Traveling Seminar**

**DEFENDANTS**
July 6 — Seattle and webcast. 1.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**The Argument for Medical and Dental Condominiums**
July 15 — Seattle. 5.75 CLE credits. By The Seminar Group; 800-574-4852 or 206-463-4400; www.theseminargroup.net/seminar.lasso?seminar=11.medconwa.

**Wineries, Breweries, and Distilleries: Practical Issues in the Alcohol Industry**
July 22 — Portland. 5.5 CLE credits. By The Seminar Group; 800-574-4852 or 206-463-4400; www.theseminargroup.net/seminar.lasso?seminar=11.wineor.

**Maximize Your Online Presence: How to Attract Clients, Leverage Your Website, and Save up to Thousands per Year on Marketing Costs**
August 31 — Seattle and webcast. None. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Health Law**

**Avoiding Elder Law Malpractice and Ethical Violations**
July 20 — Seattle and webcast. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Intellectual Property**

**Center for Advanced Study and Research on Intellectual Property (CASRIP) High Technology Protection Summit**
July 20 — Seattle and webcast. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.
July 22–23 — Seattle. 10.5 CLE credits, including 2 ethics. By University of Washington School of Law; 206-543-0059 or 800-253-8648; www.law.washington.edu/cle.

**Landlord-Tenant Law**

**Tenant Eviction: Practice and Procedure**
August 2 — Seattle and webcast. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Litigation**

**Litigation Section Annual Seminar**
August 26 — Seattle and webcast. 5.75 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Real Property, Probate, and Trust**

**The 2011 Washington Trust Act: Innovation and Clarification for Washington Trusts**
July 25 — Seattle and webcast. 4 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Estate Planning Fundamentals and Forms**
August 4 — Seattle and webcast. 6.25 CLE credits, including 1.5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Six Insider Secrets Every Family Law Professional Must Know**
August 9 — Seattle and webcast. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Sixth Annual WSBA Solo and Small Firm Conference**
July 14–16 — Ocean Shores. 16 CLE credits, including up to 2.75 ethics. By the WSBA Solo and Small Practice Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Webcast Seminars**

**DUI Practice and Procedure for the Non-DUI/Occasional DUI Attorney: Handling the Department of Licensing (DOL) Case Facing DUI Defendants**
July 6 — Seattle and webcast. 1.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Labor and Employment Law Boot Camp**
July 7 — Seattle and webcast. 6.25 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

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**Civil Rights Law Seminar**
July 29 — Seattle and webcast. 3.75 CLE credits including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Trust Account Reconciliation**
August 16 — Seattle and webcast. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Estate Planning Fundamentals and Forms**
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**Six Insider Secrets Every Family Law Professional Must Know**
August 9 — Seattle and webcast. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Hiring, Firing, and Employee Handbooks**
August 23 — Seattle and webcast. 6 CLE credits, including 1 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Cloud Computing Essentials**
August 25 — Seattle and webcast. 1.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Litigation Section Annual Seminar**
August 26 — Seattle and webcast. 5.75 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.

**Maximize Your Online Presence: How to Attract Clients, Leverage Your Website, and Save up to Thousands per Year on Marketing Costs**
August 31 — Seattle and webcast. Non-CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA; www.wsbacle.org.
Announcements

Lukas, Nace, Gutierrez & Sachs, LLP

We are pleased to announce that as of March 1, 2011,

Brooks E. Harlow
(former senior partner of Miller Nash)

has become a principal of the firm.

Lukas, Nace, Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
McLean, VA 22102
703-584-8678

With much thanks to my clients, colleagues, and friends, I am grateful to be celebrating

20 Years of Tribal Court Practice

- Wills/Probate
- BIA/IIM Accounts
- Child Custody/ICWA
- Creditor/Debtor
- Civil/Appeals
- Housing/Employment

20 Years Tribal Court Attorney
10 Years Tribal Court Judge

Law Offices of John Gibson
TribalLawyer@hotmail.com
206-935-1422

Disciplinary Notices

These notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 3.5(d) of the Washington State Supreme Court Rules for Enforcement of Lawyer Conduct, and pursuant to the February 18, 1995, policy statement of the WSBA Board of Governors. For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board at 206-733-5926, leaving the case name, and your name and address.

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

Resigned in Lieu of Disbarment

Myrna B. Weissman (WSBA No. 8203, admitted 1978), of Bellingham, resigned in lieu of disbarment, effective April 7, 2011. While not admitting to the misconduct, Ms. Weissman admits that the Association could prove by a clear preponderance of the evidence the violations set forth in the Statement of Alleged Misconduct and that proof of such violations would suffice to result in her disbarment. This misconduct involves dishonesty, theft, and disregard for the rule of law. According to the Statement of Alleged Misconduct:

Ms. Weissman owned and operated ESL, an escrow company, in connection with her law practice. She maintained a trust account for the purpose of receiving and disbursing funds from real estate closings done by ESL. When funds were received by ESL, Ms. Weissman deposited those funds into the trust account. Funds were disbursed from the trust account to pay off the encumbrances and other amounts owing to third parties as part of closing the transaction. In some cases, the amounts required to pay off encumbrances and other amounts owing to third parties were less than had been anticipated. In those instances, instead of disbursing the excess funds to the party entitled to receive them, Ms. Weissman paid these amounts to herself and/or ELS. These funds that Ms. Weissmann paid to herself and/or ELS exceeded $5,000.

Ms. Weissman’s conduct violated RPC 8.4(b), prohibiting a lawyer from committing a criminal act (here, theft) that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects; RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and RPC 8.4(i), prohibiting a lawyer from committing any act involving moral turpitude, or corruption, or other act which reflects disregard for the rule of law.

Debra J. Slater represented the Bar Association. Thomas M. Fitzpatrick represented Ms. Weissman.

Disbarred

Laine E. Hedwall (WSBA No. 26179, admitted 1996), of Monrovia, California, was disbarred, effective April 14, 2011, by order of the Washington State Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of the State of California. This discipline is based on Mr. Hedwall’s stipulation to misconduct in eight client matters, including failing to competently perform legal services; failing to respond to clients’ reasonable status inquiries; failing to maintain client funds in trust; failing to return client funds; failing to return client papers and property; failing to return unearned fees; failing to provide accountings of client funds; misappropriating client funds; misrepresenting facts to clients; failing to cooperate with six State Bar investigations; and engaging in acts of moral turpitude, dishonesty, or corruption. For more information, see the California Bar Journal (April 2011), available at www.calbarjournal.com/april2011/attorneydiscipline/disbarments.aspx.

Mr. Hedwall’s conduct violated California’s RPC 3-110(A), prohibiting a member from intentionally, recklessly, or repeatedly failing to perform legal services with competence; California’s RPC 3-700(D)(1), requiring a member...
whose employment has terminated to, subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client’s papers and property; California’s RPC 3-700(D)(2), requiring a lawyer whose employment has terminated to promptly refund any part of a fee paid in advance that has not been earned; California’s RPC 4-100(A), requiring all funds received or held for the benefit of clients by a member or law firm be deposited in one or more identifiable bank accounts labeled “Trust Account,” or words of similar import, and maintained in the State of California; California’s RPC 4-100(B)(3), requiring a lawyer to maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; California’s Business and Professions Code Section 6103, in which a willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitutes causes for disbarment or suspension; California’s Business and Professions Code Sections 6106, in which the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension; California’s Business and Professions Code Sections 6068(i), in which it is the duty of an attorney to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself; California’s Business and Professions Code Sections 6068(m), in which it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

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

**Disbarred**

Noel Lerner (WSBA No. 29978, admitted 2000), of Buckley, was disbarred, effective December 27, 2010, by order of the Washington State Supreme Court following a default hearing. This discipline was based on conduct in 11 separate matters involving lack of diligence, failure to communicate, charging unreasonable fees, trust account irregularities, failure to protect clients’ interests, failure to expedite litigation, making false statements, failure to disclose factual misstatements on documents submitted to the court, failure to supervise subordinates, direct solicitation of a client, dishonest conduct, conduct prejudicial to the administration of justice, and failure to cooperate in disciplinary investigations.

**Dissolution matters:** In late 2003 and 2004, five clients hired Ms. Lerner to represent them in their individual dissolutions. In one of the dissolutions, Ms. Lerner engaged in a pattern of intrusiveness during the proceedings sufficient to warrant monetary sanctions that her client ultimately had to pay. This included repeatedly failing to show up or showing up late for scheduled hearings and refusing to engage in meaningful settlement negotiations. Ms. Lerner moved for reconsideration of the sanctions after the deadline for doing so had elapsed and failed to note the motion for hearing. As a result, the judge never saw the motion nor ruled upon it.

In another dissolution matter, Ms. Lerner failed to attend a scheduled status conference or comply with court rules which required her to serve notice on opposing counsel regarding the date for a motion hearing. In four dissolution matters, Ms. Lerner failed to communicate with her clients, including failing to return clients’ phone calls, failing to keep clients fully apprised of their matters or to provide them with copies of papers filed on their behalf, and failing to inform a client of why the court imposed sanctions on him. In two dissolution matters, Ms. Lerner failed to timely file documents, which included a notice of appearance, a notice of withdrawal, an answer to a dissolution petition, and final dissolution papers. In two dissolution matters, Ms. Lerner allowed employees who worked under her to submit documents to the court containing factual misstatements. Ms. Lerner failed to review these documents or to correct them after learning of their inaccuracies. Two dissolution clients paid Ms. Lerner to represent them, but never received an accounting of the time spent on their cases, information about the rate at which they would be billed, or a refund of unearned fees. In one dissolution matter, Ms. Lerner withdrew from the case, but was unable to find or provide the client with all of the original documents he had given her.

In 2007, while Ms. Lerner was awaiting final action on a hearing officer’s unchallenged recommendation that she be suspended, a client hired her to represent him in his dissolution. Ms. Lerner did not inform the client of the likelihood of her impending discipline. She told him her office was in disarray due to remodeling. The client paid Ms. Lerner $3,500 to represent him through the pre-trial stage of the dissolution proceedings and requested that Ms. Lerner obtain a restraining order against his spouse. Ms. Lerner filed the petition for dissolution, but failed to timely seek a restraining order, return the client’s calls inquiring about his case, or prepare for her only court appearance made on his behalf. In April 2008, after the Disciplinary Board approved the suspension recommendation, Ms. Lerner told her client that she must withdraw from his case because of a conflict of interest. Without obtaining the client’s consent, Ms. Lerner transmitted his file, including confidential financial documents, to another lawyer. She did not return the client’s documents, refund any unearned portion of his fee or provide him with an accounting, and failed to sign or file a Notice of Withdrawal and Substitution or respond to communications from successor counsel. The client filed a grievance with the Bar Association against Ms. Lerner, to which Ms. Lerner failed to respond.

**Non-cooperation:** In October 2007, the Bar Association received a grievance against Ms. Lerner alleging that she acted incompetently in her representation of a client and tried to convince the client, who was the defendant in a criminal matter, to accept a plea agreement against his wishes. Disciplinary counsel sent Ms. Lerner a copy of the grievance and two letters requesting that she respond. She did not respond. Ms. Lerner agreed to a deposition after disciplinary counsel issued a subpoena duces tecum. She appeared for the deposition, but never addressed the grievance.

In December 2007, the Bar Association received a notice that Ms. Lerner’s trust account was overdrawn. The Association’s audit manager and disciplinary counsel both sent requests that Ms. Lerner provide an explanation of the overdraft with supporting documentation. Ms. Lerner did not respond. After disciplinary counsel issued a subpoena duces tecum for Ms. Lerner to appear for deposition in February 2008, she requested a postponement of the deposition. Disciplinary counsel postponed the deposition to March 2008; however, Ms. Lerner never provided an explanation of the overdraft or produced the requested documents. Disciplinary counsel obtained information directly from the bank, which showed that Ms. Lerner had made $800 worth of cash withdrawals from her trust account.

**Criminal matters:** In 2007, a client hired Ms. Lerner to defend him against charges of attempted murder. Ms. Lerner failed to complete discovery or comply with the omnibus order filed by the judge. The day of the trial, Ms. Lerner appeared at the trial unprepared to go forward. Ms. Lerner did not appear at the sentencing hearing, instead sending another attorney who was unfamiliar with the case. The court sentenced the client to 18 months’ incarceration.

In 2007, while Ms. Lerner was awaiting final action on a hearing officer’s unchallenged recommendation that she be suspended, she directly solicited employment from a potential client who was in jail on a charge of vehicular homicide. The client’s aunt paid Ms. Lerner $5,000 as a down payment for her legal fee. There was no written fee agreement and Ms. Lerner did not inform the client of her imminent suspension. During the five weeks she represented the client, Ms. Lerner gave her client discovery documents without obtaining the prosecutor’s approval or redacting the documents as required by court rule. Although Ms. Lerner assured her client that she was preparing for trial and would hire experts in her defense, she informed the prosecutor that the case would end in a plea. Ms. Lerner misled her client about the sentencing range that applied to the charges against her, significantly overstating the maximum sentence. When the client became dissatisfied at Ms. Lerner’s
apparent failure to investigate or take any action in her case, she hired another lawyer to represent her on the charges. Ms. Lerner failed to acknowledge the substitution of counsel or forward to the successor counsel any files or documentation of work she had performed on the case. Ms. Lerner failed to refund any portion of the $5,000 fee or provide the client documentation to substantiate that she earned any portion of the fee.

In 2008, while awaiting final action on a hearing officer’s unchallenged recommendation that she be suspended, a client hired Ms. Lerner to represent him on a DUI charge. Members of the client’s family paid Ms. Lerner $5,400. There was no written fee agreement, and Ms. Lerner did not communicate with the family members or her client that she would be unable to carry out the representation because of her likely suspension until after they had fully paid her fee. Ms. Lerner failed to file any pretrial motions, conducted little or no investigation of her client’s case, and failed to appear for hearings, instead requesting continuances. On the day of the trial, Ms. Lerner appeared only to request another continuance and to state that she would not be going forward because she was “disqualified.” This was misleading. In fact, she had been informed that her disciplinary suspension would begin the next day.

The clients or members of the clients’ families in the four criminal cases filed grievances against Ms. Lerner with the Bar Association. Ms. Lerner failed to respond to any of the grievances.

Ms. Lerner’s conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; former RPC 1.4, requiring a lawyer to keep a client reasonably informed about the status of a matter, promptly comply with reasonable requests for information, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; RPC 1.5(a), prohibiting a lawyer from making an agreement for, charging, or collecting an unreasonable fee or an unreasonable amount for expenses; RPC 1.5(b), requiring that the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation; RPC 1.15A(h) (5), requiring that all withdrawals from a trust account be made only to a named payee and not to cash; RPC 1.16(d), requiring that, upon termination of representation, a lawyer take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred; RPC 3.2, requiring a lawyer to make reasonable efforts to expedite litigation consistent with the interests of the client; former RPC 3.3(a)(1), prohibiting a lawyer from making a false statement of material fact or law to a tribunal; former RPC 3.3(c), requiring a lawyer who has offered material evidence and comes to know of its falsity to promptly disclose this fact to the tribunal; RPC 3.4(c), prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal; RPC 5.1(a), requiring a partner in a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct; former RPC 5.3(a), requiring a partner in a law firm to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct; former RPC 5.3(a), requiring a partner in a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of a non-lawyer employee is compatible with the professional obligations of the lawyer; RPC 5.3(c), requiring a lawyer to be responsible for conduct of a non-lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved, or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; RPC 7.3(a), prohibiting a lawyer from directly soliciting professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain; RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; and RPC 8.4(f), prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter.

Natalea Skvir represented the Bar Association. Ms. Lerner did not appear either in person or through counsel. Barbara A. Peterson was the hearing officer.

Suspended

James Charles Lawrie (WSBA No. 466, admitted 1975), of Bellevue, was suspended for two years, effective February 9, 2011, by order of the Washington State Supreme Court following a default hearing. This discipline is based on conduct involving failure to cooperate with a Bar Association investigation.

In May 2008, Client A filed a grievance with the Association, alleging that Mr. Lawrie had agreed to represent her in an action to obtain child support, but had failed to perform any work on her case or earn the $800 in fees she paid him. The matter was assigned to a conflicts review officer. In September 2008, the matter was assigned to a special disciplinary counsel (SDC), who twice wrote to Mr. Lawrie requesting documentation. Mr. Lawrie did not respond or provide the requested information. On June 1, 2009, Mr. Lawrie was suspended from the practice of law for nonpayment of fees. Client A’s grievance was subsequently assigned to disciplinary counsel who, in November 2009, requested from Mr. Lawrie the same information that was requested by the SDC nearly a year before. On December 8, 2009, Mr. Lawrie was personally served with a subpoena for a deposition scheduled on December 29, 2009.

On December 9, 2009, Mr. Lawrie left a voicemail message for disciplinary counsel requesting communications occur via email. On that same date, disciplinary counsel sent Mr. Lawrie an email requesting that he attend the deposition. The day before the deposition, Mr. Lawrie sent disciplinary counsel an email in which he stated, “I have given much thought to this situation and will not be attending any depositions (or otherwise cooperating with any investigation) on this issue. If I am further suspended or even disbarred, I am prepared to accept that.”

Mr. Lawrie’s conduct violated RPC 8.4(l), prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter.

Erica W. Temple represented the Bar Association. Mr. Lawrie did not appear either in person or through counsel. Octavia Y. Hathaway was the hearing officer.

Non-disciplinary Notices

Suspended Pending the Outcome of Disciplinary Proceedings

Ryan Mark Edgley (WSBA No. 16171, admitted 1986), of Yakima, was suspended pending the outcome of disciplinary proceedings pursuant to ELC 7.2(a)(3), effective May 13, 2011, by order of the Washington State Supreme Court. This is not a disciplinary sanction.

Suspended Pending the Outcome of Disciplinary Proceedings

Kimberly L. Grijalva (WSBA No. 29771, admitted 1999), of Yakima, was suspended pending the outcome of disciplinary proceedings pursuant to ELC 7.1, effective May 6, 2011, by order of the Washington State Supreme Court. This is not a disciplinary sanction.

Transferred to Disability Inactive Status

Lea Reed (WSBA No. 27083, admitted 1997), of Kent, was, by stipulation, transferred to disability inactive status, effective May 6, 2011. This is not a disciplinary action.
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Will search for Neva Dale Strange, of Woodinville/Kirkland/Seattle, age 68. Please contact Cole & Gilday, PO Box 249, Stanwood, WA 98292; 360-629-3311.
Briefly About Me

Cassandra Lopez de Arriaga

I became a lawyer because I saw the movie *Inherit the Wind* and loved how it showed lawyers who, in the courtroom, passionately argued their respective sides, but, out of the courtroom, were friends who respected each other.

The future of the practice of law is changing due to technology like Facebook, YouTube, cellphones, and other multimedia outlets.

One of the greatest challenges in law today is finding the balance between civil liberties (privacy) and national security.

If I were not practicing law, I would be a cheerleading coach.

If I could change one thing about the law, it would be making it more accessible to minorities.

This is the best advice I have been given: “Be free,” by actor Eddie Murphy.

I would share this with new lawyers: Don’t let someone else define you. Firms, organizations, and jobs will try to define what skills and traits they believe are important. If you stay true to yourself, wherever you practice, your heart will be in it.

Traits I admire in other attorneys: I know an attorney named Anthony Howard, who most would describe as understated, but I admire that he is a gentleman and practices law in a noble manner.

I would give this advice to a first-year law student: Don’t be vapid, just hoping to get a law job someday. Have a purpose, want to PRACTICE law.

Someone whose opinion matters to me: My children. They have impeccable judgment and their sense of justice has no limits so, oftentimes, their opinions inspire me to be a better person.

People living or from the past I would like to invite to a dinner party: Will Ferrell — because I’d want him to do the grace; Gloria Allred — because I’d have my daughter beat up on her for portraying woman as weak; and my mother — Ferrell — because I’d want him to do the grace; Gloria Allred — because I’d have him do the grace.

I am most proud of this: My high school counselor told me when I asked her about the SATs that, despite my 4.0 GPA, I should pursue a career in cosmetology because Mexicans do not go to college. I went on to UW and then Loyola Law School and my daughter now goes to the United States Naval Academy. A lot that counselor knew.

I am most happy when I’m snuggling with my family watching movies.

My favorite hobby/interest: Being a soccer mom.

My favorite vacation place: I’m a criminal defense lawyer; I don’t take vacations.

Best stress reliever: Good sex.

A book I recommend reading: *Through My Eyes*, by Ruby Bridges. It is a children’s book told by one of the first kids desegregated in the south. Her story is simply amazing.

Technology is overrated.

Currently playing on my iPod/CD player/record player: The Glee soundtrack.

If I could live anywhere, I would live in Bothell (which I do). On a clear day, you have snow-covered mountains in all directions.

The hardest part of my job: Knowing I cannot change a client. It took me several years as a public defender to realize that.

The best part of my job: Walking into court and saying, “Cassandra Lopez de Arriaga for [client’s name].”

S
ome years ago, it amazed me how my one-year-old was able to sleep through all the racket, but as helicopters hovered above our neighborhood, and lights flashed in and out of the window — she lay there peacefully sleeping. Outside the window, the world seemed to be ending. We lived in the Wilshire District in Los Angeles and we were smack in the middle of the Rodney King riots. The grocery store we bought our food from was gone the next day; the wreckage seemed like a movie set. My husband and I decided we were taking our daughter out of this environment and heading to Seattle, a place we had only seen in a movie.

We were there within two weeks with no money, no jobs, or family and friends. It wasn’t long before we established residency and I applied to the University of Washington. On my first day of school, I dropped off our daughter and our six-week-old son at daycare and ventured off to get an education. Fast-forward through law school, 9/11, my husband serving in the Iraq War as a Marine, kids growing big and strong, and traveling 90 miles one-way to my first law job as a Whatcom County public defender. Those 10 years flew by.

Jon Ostlund, director of the PD’s office in Whatcom, interviewed me, and although I had no criminal defense experience, he made me feel like he had found a diamond in the rough. He took a chance on me. I then moved closer to home to serve as a PD in Snohomish County where I was indoctrinated by inspiring trial attorneys, like Marybeth Dingley, Natalie Tarantino, and Susan Gaer. Due to budget cuts, I went to a private firm and, just recently, with the help and support of tons of colleagues, opened my own firm.

My husband attends UW grad school, my son is a junior at O’Dea High School, and my daughter is Plebe at the Naval Academy in Annapolis, Maryland.

My name is Cassandra Lopez de Arriaga, and I am a criminal defense attorney.
DOS Encounter

I'll never forget an argument I once had on the sidewalk in front of the King County Courthouse. If you’re forming a mental image, here are details you might not have anticipated: 1) it happened years before I became a lawyer, and 2) the person I was arguing with was Bill Gates. Yes, that Bill Gates, the software genius now turned philanthropist. It’s a story that illustrates my late father’s maxim, “You never know what’s going to happen next.”

Before attending law school, I was a journalist for seven years. In the winter of 1986, I was a reporter for the business section of the Journal-American, the now-defunct Seattle-Eastside-area daily paper. It was a sweet gig because everything was going on there. High tech was spooling up, work on the original cell phone systems was buzzing, and the first Bellevue skyscrapers were sprouting. But no story was bigger than Microsoft. The first retail version of Windows had been on the market for a year. Had there been a Mt. Rushmore for software, sculptors already would have been chiseling away at a gigantic likeness of 31-year-old Gates.

But Microsoft had a thorn in its side called Seattle Computer Products (SCP). Although a much smaller firm, SCP had one claim to fame. It had developed a simple but handy operating system for the newest Intel-chip computers Microsoft was targeting for its software. In a two-part deal, Microsoft had acquired full rights to the OS from SCP for $75,000 in 1980–1981. In the hands of Microsoft’s programmers, the OS evolved into MS-DOS, and eventually Windows. Ultimately, the companies ended up in litigation over the scope of the license Microsoft had acquired. The details exceed this column’s capacities, but it’s a fascinating story if you’re into that type of thing. Google “Seattle Computer Products” to read about it. (Spoiler: While the jury was out, Microsoft agreed to pay a settlement to SCP of just under $1 million.)

The case was tried in downtown Seattle before King County Superior Court Judge Gerard Shellan. Another reporter had covered the earlier portions of the case and beginning of the trial. But he was unavailable for the latter segments of the trial, so the editor sent me. As it turned out, the juiciest parts — Gates’s testimony and the closing arguments — happened on my watch.

The only thing I remember about Gates’s testimony is that his glasses were really dirty. It’s like how people say Einstein walked around with his shoes untied. At the end of his last day of testimony, I was standing on the Third Avenue sidewalk trying to remember where I had parked my foxy Toyota MR2. As I pondered which parking garage I had chosen that morning, I looked back toward the main courthouse doors just in time to see none other than Gates, escorted by Bill Neukom, then-head Microsoft in-house counsel. They had just left the building and were striding in my direction.

I knew a once-in-a-lifetime opportunity was headed my way. As Gates reached me, I gently stepped in front of him and identified myself. I had no brilliant question to ask, so I resorted to some inane sideline sports reporter question like, “Mr. Gates, how do you feel about the way the trial is going?” But rather than answering the question I had asked, he launched into a complaint about my reporting of the previous day’s testimony. I didn’t recall what the issue was, but he felt that something I had written — or my omission of something — had resulted in the inaccurate portrayal of some aspect of the trial, to Microsoft’s detriment.

OK, I admit my first thought was: Hey, Bill Gates reads my stuff! But a nanosecond later, that sentiment morphed into a burning need to disprove his accusation. I could do so by simply referring to the article in question, which I happened to be carrying in the magnificent faux leather attaché case my mom had bought me when I graduated from college. So, as we engaged in one of those inevitably futile “yes-you-did/no-I-didn’t” spats, I dropped to one knee, popped open my case, and began rummaging for the irrefutable evidence that would force Gates to concede and apologize for questioning my reportage. Of course, the chance of that happening was about equal to that of a PC user getting to talk with a live human at Microsoft support. As I secularly genuflected to search my briefcase, an impromptu crowd gathered, no doubt wondering why the God-of-All-Software was arguing on the sidewalk with some punk in a JCPenney suit. Within a minute or so, Neukom issued the customary, “That will be all the questions for now,” and ushered Gates away.

Surprisingly, Bill hasn’t kept in touch. But I have to say that the impression I got of him from our momentary encounter was positive, even though we were nearly yelling at each other. I never sensed condescension from him. He simply seemed like someone who does everything with an extraordinary degree of passion and focus.

Although there are plenty of reasons to instinctively distrust billionaires, I’ve always felt that Gates is a good human being. I think he has amply demonstrated that by his post-Microsoft career. He could have used his fame and fortune to build monuments to himself or run for president. Instead, he is leading herculean efforts to improve the lives of those on the opposite end of the socioeconomic spectrum from him. Meanwhile, if I can ever find that attaché case, I’m going to send him that clip proving, well, whatever it was I was trying to prove. Yeah, that’ll show him. 😊

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