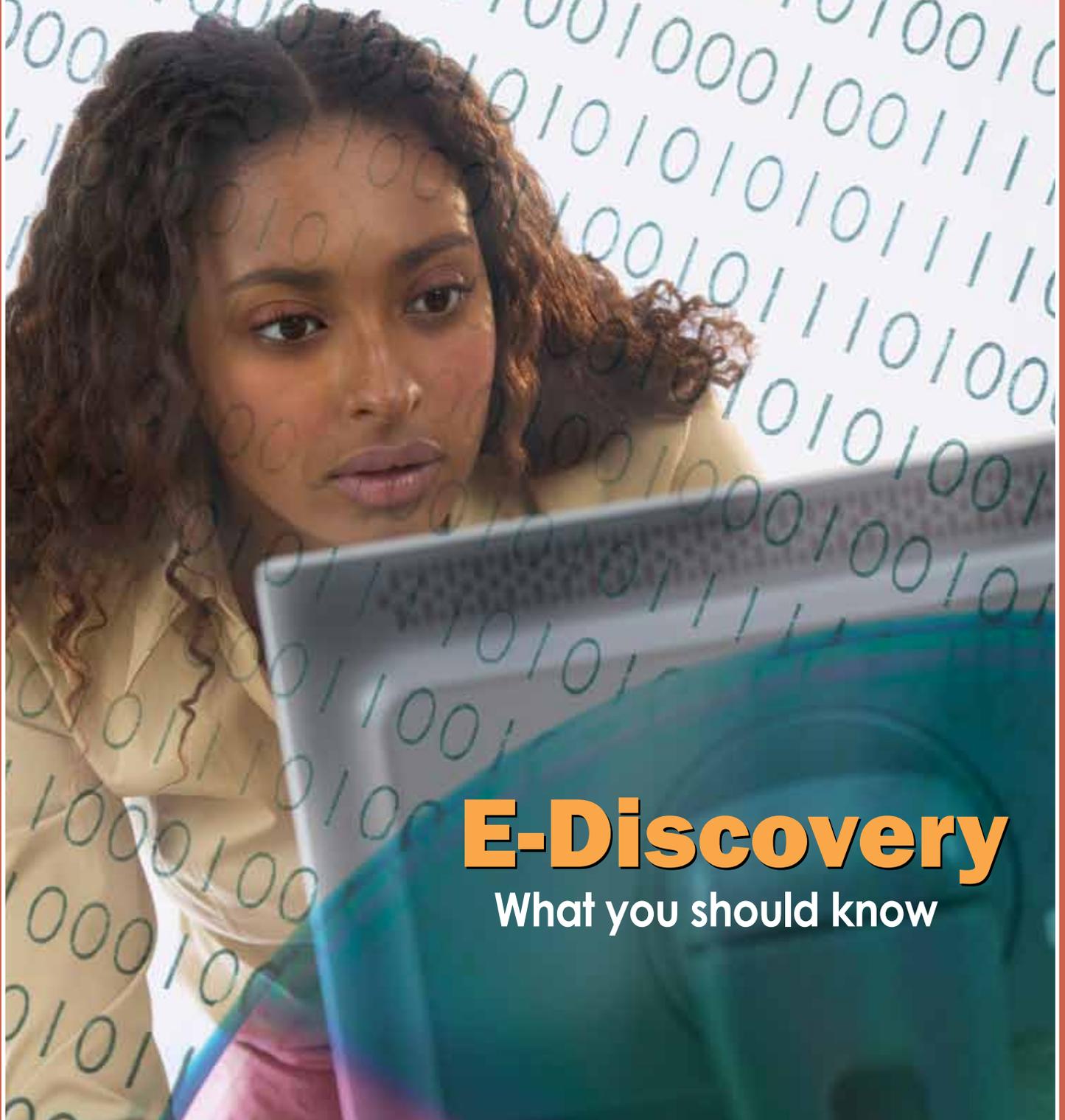


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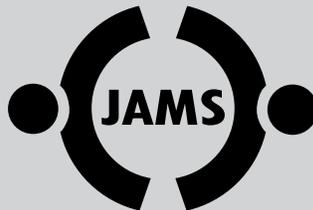
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## FEATURES

**16 E-Discovery and the Proposed Amendments to the Federal Rules of Civil Procedure: A Primer**

*by Robert A. Medved*

**30 Bringing Civics Back to the Classroom: You Can Help**

*by Hon. Marlin Appelwick and Judith Billings*

**32 A New Tool for Safety: Introducing Washington's Sexual Assault Protection Order**

*by Kelly O'Connell*

**35 Your Role in Providing for High-Quality Appellate Judges**

*by Anthony R. Miles and John J. Tollefsen*

**36 The WSBF Loan Repayment Assistance Program Selects Its First Five Recipients**

*by Paula Littlewood*



16



30

13



## COLUMNS

**13 President's Corner**  
South Dakota Heads for "J.A.I.L."

*by S. Brooke Taylor*

**15 Executive's Report**  
Attending the Western States Bar Conference — Innovators Sharing Ideas

*by M. Janice Michels*

## DEPARTMENTS

**7 Letters to the Editor**

**37 Ethics and the Law**  
Do the Crime, Do the Time. But Lose Your License?  
*by Sachia Stonefeld Powell*

**39 Lawyers' Fund for Client Protection**  
*by Robert Welden*

**41 In Memoriam**

**44 FYI**

**51 Disciplinary Notices**

**64 Random Acts of Professionalism Program**

## LISTINGS

**49 Professionals**

**54 Announcements**

**58 Calendar**

**59 Classifieds**



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Bar News welcomes letters from readers. We do not run letters that have been printed in, or are pending before, other legal publications whose readership overlaps ours. Letters should be no more than 250 words in length, and e-mailed to [letterstotheeditor@wsba.org](mailto:letterstotheeditor@wsba.org) or mailed to WSBA, Attn: Letters to the Editor, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330. We reserve the right to edit letters. Bar News does not print anonymous letters, or more than one submission per month from the same contributor.

### Bar News shouldn't be a political soapbox

Once again I object to Brooke Taylor's editorials with regard to medical malpractice litigation. His editorial in the April 2006 *Bar News* ("And Talk We Did") makes it sound as if a bill passed on that topic was a wonderful product of new found cooperation among formerly opposing parties. Only two people were neglected in this collaborative venture: the patient and the ratepayer. The editorial says the act is a solid start toward achieving the goals of patient safety, reduced insurance cost, efficiencies in the system, and avoidance of frivolous lawsuits. Nothing about the quality of patient care. The article says the WSBA stood "shoulder to shoulder" with the governor, the insurance commissioner, the WSMA, WSTLA, physicians insurance and the hospital association. Everyone except the ratepayer and the taxpayer, who pay for all those large verdicts and small verdicts, and for all those lawyers who make their living from "general damages." The failure to mention the patient and the taxpayer is a good indication that this bill was not designed to benefit the people of this country. I also object to the use of the *Bar News* to promote the political views of the president. The article appears to be a subtle put down of cap on damages, since it says "extreme" measures such as the initiative on caps were rejected. The president and the Bar Association have no business using a government publication to promote their opinion on caps or on one initiative or another. For that matter, the president and the Bar have no business using the pages of

a government publication to promote a particular bill, whether it passes or not. And finally, I note that Mr. Taylor is lavish in his praise of Democrats, such as the governor and Pat Lanz, as well as WSTLA, but says nothing good about Republicans or people who might believe that PI lawyers take too much money out of the economy. The WSBA should stop its political lobbying, both in the Legislature and in the pages of the *Bar News*.

Roger Ley, Seattle

### Death penalty on the ropes?

Recently the Washington Supreme Court placed Washington's death penalty system on a precarious foundation. In a slim 5-4 decision, the majority concluded that Washington's death penalty statute was not administered in an arbitrary manner. The majority did acknowledge that serious questions exist about the fairness of its application, but suggested those questions best be left to the people of Washington State and the legislature.

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The dissent, citing the administration of Washington's death penalty statute, concluded "our proportionality review reveals the staggering flaw in the system of administration of the death penalty in Washington." To draw its disapproval, the dissenting justices reflected back to the 1972 United States Supreme Court decision, *Furman v. Georgia*, which held unconstitutional death penalty systems that are applied arbitrarily and capriciously. The four justices acknowledged that Washington's proportionality review was enacted as a mechanism to determine whether the death penalty has been imposed fairly and not "wanton or freakishly." Consequently, after reviewing the 25 years of the administration of Washington's death penalty, and approximately 270 death-eligible cases, the justices analogized who received a death sentence or not to lightning; randomly striking some and not others. A practice they were no longer going to tolerate.

We should applaud these justices for their historic position. At no time in its 25-year existence has Washington's death penalty system been questioned, criticized, and rejected to such an extent and by as many justices. Instead, courts have routinely adopted at face value that Washington's death penalty system was administered fairly. These justices, fortunately, decided the review process requires more. These justices did not rule that capital punishment will always be unjust or arbitrary; they merely exposed the arbitrariness of our current system and concluded that the only thing that has changed since *Furman* is now we have two and a half decades of experience to demonstrate these flaws.

A system so fraught with flaws needs, at a minimum, to be exposed and subjected to debate. Principles such as fairness, justice, and rationality, which are at the core of our criminal justice system, require as much. When a significant number of the members on the state's highest court concludes that a process that is to mete out the most severe punishment is significantly flawed, then at a minimum a moratorium on death sentences until these concerns are addressed is more than warranted.

Mark Larrañaga, Seattle

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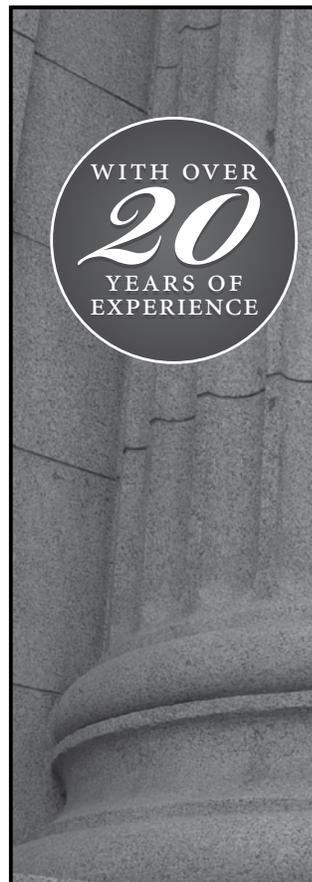
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## South Dakota Heads for "J.A.I.L."

S. Brooke Taylor, WSBA President

South Dakota is headed for "J.A.I.L." this fall, as in the "Judicial Accountability Initiative Law" that will appear on the general election ballot. The title is a bit of a stretch, but does yield a rather catchy acronym. This is an initiative by the people to amend South Dakota's constitution. The full ballot title is "South Dakota Proposed Constitutional Amendment E."

A sense of what lies ahead appears in the preamble: "We, the People of South Dakota, find that the doctrine of judicial immunity has the potential of being greatly abused; that when judges do abuse their power, the People are obliged — it is their duty — to correct that injury, for the benefit of themselves and their posterity. In order to insure judicial accountability and domestic tranquility, we hereby amend our Constitution by adding these provisions as §28 to Article VI, which shall be known as "The J.A.I.L. Amendment."

The proposed constitutional amendment would eliminate judicial immunity as a defense in suits against judges (and arguably other decision-makers) by disgruntled litigants, including convicted felons, if certain transgressions are found by a "Special Grand Jury." Those areas of transgression are defined in Section 2 as follows:

2. Immunity. No immunity shall extend to any judge of this State for any deliberate violation of law, fraud or conspiracy, intentional violation of due process of law, *deliberate disregard of material facts*, judicial

acts without jurisdiction, *blocking of a lawful conclusion of a case*, or any deliberate violation of the Constitutions of South Dakota or the United States, notwithstanding Common Law, or any other contrary statute.

Emphasis is added above for two categories that would seem to grant almost limitless avoidance of judicial immunity. Any "disregard of material facts" is presumably "deliberate," and can be alleged



in almost every case by the losing party. The term "blocking of a lawful conclusion of a case" is generally interpreted to be synonymous with the granting of a motion for summary judgment, or any order that terminates a claim or eliminates a defense without a trial.

The determination of whether a complaint against a judge is entitled to a defense of judicial immunity will be made by a 13-member Special Grand Jury, "... with statewide jurisdiction having power to judge both law and fact." The responsibility of the Special Grand Jury is defined in Section 3 of the initiative as follows: "Their responsibility shall be limited to determining, on an objective standard, whether any civil lawsuit

against a judge would be frivolous or harassing, or fall within the exclusions of immunity as set forth in paragraph 2, and whether there is probable cause of criminal conduct by the judge complained against."

The proposed amendment has 23 separate sections, many of which deal with funding, structure, and process. Here is a summary of some of the more provocative provisions:

- Members of the Special Grand Jury will be paid a salary commensurate to that of South Dakota's Circuit Court judges, which has been computed to be \$387 per day of service. See Section 9.
- Funding for the process will be extracted from the judges themselves by a deduction of 1.9 percent "from the gross judicial salary of all judges." See Section 6.

To qualify for service on the Special Grand Jury one must be 35 years of age, have been a citizen of the United States for nine years and an inhabitant of South Dakota for two years. One cannot be an elected or appointed official, a lawyer or judge, a judicial, prosecutorial, or law enforcement employee, or a person convicted of a felony or determined to be mentally incapacitated. See Section 12.

- Jurors will be drawn out of the hat from the list of registered voters and any citizen who submits his or her name for such drawing, apparently whether they are a voter or not. See Section 13.
- Burdens of proof heavily favor the complaining litigant, including the following rule: "All allegations in the

complaint shall be liberally construed in favor of the complainant. The jurors shall keep in mind, in making their decisions, that they are entrusted by the People of this State with the duty of restoring judicial accountability and a perception of justice, and are not to be swayed by artful presentation by the judge.”

- This curious provision found in Section 15 is augmented by a later provision in Section 19 which provides that judges complained against must provide their own defense, and pay any judgment rendered against them out of their own pockets.
- The Special Grand Jury also has the power to indict a judge if it finds “probable cause of criminal conduct,” and the indictment is then handled by a “non-governmental special prosecutor and a judge with no more than four years on the bench from a county other than that of the defendant judge,” and if convicted, sentencing is done by the “special trial jury” that hears the case, not by the judge. See Section 16.
- The proposed amendment defines a

“strike” as “an adverse immunity decision or a criminal conviction against a judge,” and after three such strikes, the judge loses his job forever, together with half of his pension. See Sections 1 and 18.

The question that immediately comes to mind is: Why is this happening, and why in South Dakota? Curiously, there is nothing of note going on in South Dakota judicially or politically that would encourage this effort. There

tion unanimously imploring its citizens to oppose the ballot measure. This is the same body that recently passed a law banning abortion in South Dakota, and presumably unanimity on any subject is rare.

The most obvious and immediate result of the passage of this initiative would be a challenge to its validity on constitutional grounds, which, if successful, simply replaces the initiative with a direct confrontation between its proponents and the courts, which the

## **What judge in his or her right mind would stay on to the bench in a system where unhappy litigants have such a remedy at their disposal?**

have been no incidents of conspicuous judicial misconduct, nor any decisions that have sparked public outcry. The author and sponsor of the initiative is North Hollywood, California, resident Ron Branson, a disgruntled litigant who has a beef with the judicial branch in general, and was unable to get this matter on the California ballot. The plain fact of the matter is that South Dakota is a relatively easy place to get such an initiative on the ballot, requiring only 32,000 signatures. Paid signature gatherers told South Dakota citizens that the initiative would make judges more accountable, and they signed up in droves. The effort cost Mr. Branson and his supporters an estimated \$100,000 as opposed to the cost of a similar effort in California, which would exceed \$1,000,000.

The measure is so extreme, and so conspicuously vindictive, that it would be humorous if it were not so serious. Unfortunately, the proponents are dead serious, and initial polling in South Dakota showed voters favoring the ballot measure at a rate of 3 to 1! This measure is clearly a stalking horse for a larger effort, and Mr. Branson claims to have organizations in all 50 states ready to march ahead. The potential destruction of the doctrine of judicial immunity has caused so much concern in legal and political circles in South Dakota, that the South Dakota Legislature took the extraordinary step of passing a resolu-

proponents would no doubt relish, contending that it simply proves their point. If a court were to uphold the initiative, or enough of it for it to function, then the second most obvious impact would be to give new meaning to the term “clearing the bench.” What judge in his or her right mind would stay on to the bench in a system where unhappy litigants have such a remedy at their disposal? The only effective remedy is for the measure to be turned back at the polls, “by the people,” in order to take the steam out of this movement. Many South Dakotans are joining with the legal community to oppose this measure, and an expensive and bitter campaign is anticipated.

At the Washington State Bar Association, volunteer lawyers and judges from around the state and all levels of court are working hard on the President’s Initiative Advisory Committee to develop and launch the “Foundations of Freedom Project.” One of the long-range goals of this “initiative” is to ensure that Washington is never fertile ground for anything like South Dakota’s J.A.I.L. 

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## Attending the Western States Bar Conference — Innovators Sharing Ideas

M. Janice Michels, WSBA Executive Director

Independent of the American Bar Association exist various regional bar conferences. The “Jackrabbit” States Conference covers roughly the area between the Rockies and the Mississippi River, the New England Bar Association Conference is for the New England states, and the Southern States Conference covers the states in the Southeast. Some of these demarcations follow federal appellate districts, since the states share the development of district precedent. The Western States Conference is one of the largest, in that it encompasses all the states west of the Rockies, plus Guam and the Northern Mariana Islands. The conference meets annually, primarily to share information and update fellow states on state developments. Because the conference is not closed to other states, and since the western states are often innovators, states such as Texas, the Dakotas, Colorado, and Florida often join us at the meeting.

Nationally, the WSBA is considered a large mandatory bar. Following the “jumbo” mandatory state bars of California, New York, Texas, Florida, and Washington, D.C., in size come Washington, Ohio, Illinois, Michigan, and Virginia — all

of which have 30,000 to 35,000 members. To learn from our neighboring states and to develop leadership goals for the coming year, the WSBA funds the second-year governors, officers, and key staff to attend the conference each year. This is



**A Washington delegation attended the Western States Bar Conference on March 22-25 in San Diego, California. Pictured are (from left to right) Dale Carlisle, 2006 president of the Western States Bar Conference and past-president of the WSBA; S. Brooke Taylor, WSBA president; Marcine Anderson, WSBA governor (at-large); Eron Berg, WSBA governor (2nd District); Karen Mathis, ABA president-elect; Paula Littlewood, WSBA deputy director; Jan Michels, WSBA executive director; Stan Bastian, WSBA governor (4th District).**

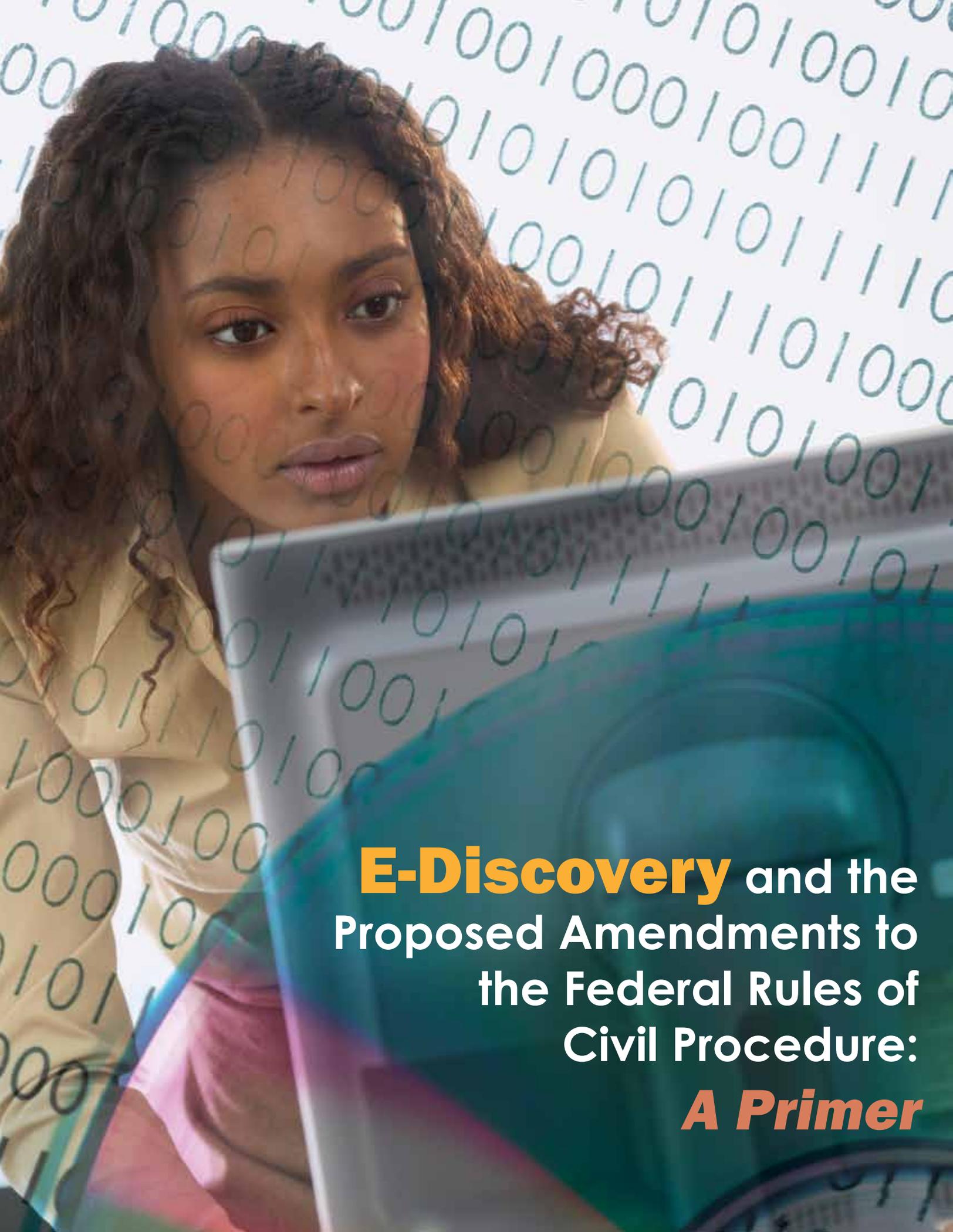
a group that is well grounded in WSBA issues and forms the senior leadership for the coming year. The 2006 conference was presided over by Washington’s own Dale Carlisle, who, in 2004, was elected president of the conference for 2006. The Washington delegation, pictured here with incoming ABA President Karen Mathis, included Dale Carlisle, Brooke Taylor, Marcine Anderson, Stan Bastian, Eron Berg, Paula Littlewood, and me. Also

attending the conference as presenters were WSBA General Counsel Bob Welden, chair of the ABA Standing Committee on Client Protection, and Ron Ward and James Williams, who presented the WSBA Leadership Institute program.

An emerging theme at the conference this year was the need for strong lawyer-assistance programs (LAPs). Many states pointed out that these LAPs need to reach beyond addiction services to mental health, stress, and later-in-life transition issues. The Washington delegation is proud to have been an innovator of these full-service LAPs. Two other themes were the politicalization of judicial elections and the need for public education about the fundamentals of freedom — which are President Taylor’s themes.

Washington stood out as a leader and innovator in these areas and led the conference to recommend a resolution calling on the ABA to develop a national public-education program on the separation of powers, independence of the judiciary, rule of law, and the doctrine of checks and balances. <sup>BN</sup>

*WSBA Executive Director Jan Michels can be reached at [janm@wsba.org](mailto:janm@wsba.org).*



**E-Discovery** and the  
Proposed Amendments to  
the Federal Rules of  
Civil Procedure:  
*A Primer*

# What is the difference between electronic and hardcopy information? How do the E-Discovery Rule Amendments apply? What does the future hold for e-discovery?

BY ROBERT A. MEDVED

## The Digital Difference

There are at least three major differences between information that is stored electronically and information that is stored on paper: (1) electronically stored information is characterized by exponentially larger volumes than paper documents; (2) electronically stored information is dynamic and can unknowingly be changed or deleted; and (3) electronically stored information may become unintelligible when separated from the system that created it.<sup>1</sup> These differences, along with a desire for national uniformity, provided much of the impetus for proposed amendments to Federal Rules of Civil Procedure (FRCP) 16, 26, 33, 34, 37 and 45 and revisions to Form 35 (E-Discovery Rule Amendments).<sup>2</sup>

## Required Reading

The E-Discovery Rule Amendments were not created and should not be read or applied in a vacuum. The *Zubulake v. UBS Warburg LLC* decisions<sup>3</sup> are essential reading about the discovery of electronically stored information. It has been said that “[m]ore than any other case, *Zubulake v. UBS Warburg LLC* has defined the electronic discovery battlefield, addressing key issues such as preservation, spoliation and cost-shifting.”<sup>4</sup> In *Zubulake*, Judge Shira Ann Scheindlin “set ground-breaking parameters for the production of electronic discovery, cost-shifting in such matters, and issues of appropriate sanctions for spoliation.”<sup>5</sup> Judge Scheindlin was a member of the Advisory Committee on Civil Rules that toiled more than five years crafting the E-Discovery Rule Amendments, and she acknowledged the E-Discovery Rule Amendments in *Zubulake V*.<sup>6</sup>

Thus, it seems wise to consider at least three of the *Zubulake* decisions

as required reading for in-house and outside counsel.

*Zubulake I* provides guidelines on the threshold issue of whether a court will even consider shifting or allocating the costs of producing electronically stored information between the producing party and the requesting party, and creates a new seven-factor test that should be considered in conducting the cost-shifting analysis.<sup>7</sup>

*Zubulake IV* provides guidelines on the duty to preserve electronically stored information; when that duty arises; the individuals whose evidence must be preserved; the evidence that must be preserved; and the range of sanctions for spoliation, including an adverse inference instruction that may have an “*in terroem* effect” and “often ends litigation.”<sup>8</sup>

*Zubulake V* grants plaintiff’s request for an adverse inference instruction, partially faults “both in-house and outside” counsel,<sup>9</sup> and provides the following guidelines to counsel regarding counsels’ ongoing duties to preserve electronically stored information:

What must a lawyer do to make certain that relevant information — especially electronic information — is being retained?

\*\*\*

First, counsel must issue a “litigation hold” at the outset of litigation or whenever litigation is reasonably anticipated.<sup>[10]</sup> The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

Second, counsel should communicate directly with the “key players” in the litigation, i.e., the people identified in a party’s initial disclosure and

any subsequent supplementation thereto. Because these “key players” are the “employees likely to have relevant information,” it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.

Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.<sup>11</sup>

## The E-Discovery Rule Amendments: An Overview

### The Starting Point: Terminology

Originally, the Federal Rules of Civil Procedure only needed to address the discovery of “documents” and “things.” The Federal Rules of Civil Procedure were amended in 1970 so the term “documents” would include “data compilations,” and the amendments were interpreted to include information stored on a computer.

As technology advanced, electronically stored information became more dynamic and more difficult to shoehorn into the concept of a “document.” The E-Discovery Rule Amendments address these advances by including the term “electronically stored information” throughout the pretrial and discovery provisions and Form 35 of the proposed Federal Rules of Civil Procedure.<sup>12</sup> However, just as Justice Stewart declined to define the term “pornography” any more precisely than stating “I know it when I see it,”<sup>13</sup> the E-Discovery Rule Amendments have declined to provide a precise

definition of the term “electronically stored information” but intend the term to be “flexible enough to encompass future changes and developments.”<sup>14</sup>

### **The First Procedures: Early Attention Directives**

The E-Discovery Rule Amendments direct the parties to address electronically stored information discovery issues at the very outset of litigation.

As soon as practicable after a lawsuit is filed, the parties must meet to discuss any issues relating to the preservation of electronically stored information and to develop a discovery plan concerning any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced and any issues relating to claims of privilege or protection of trial-preparation materials.

*I* first determines that “cost-shifting should be considered *only* when electronic discovery imposes an ‘undue burden or expense’ on the responding party.” *Zubulake I* then determines that “whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible or inaccessible* format” and determines further that “[w]hether electronic data is accessible or inaccessible turns largely on the media on which it is stored.” *Zubulake I* concludes by ordering that a “court should consider cost-shifting *only* when electronic data is relatively inaccessible” and then provides seven factors that should be considered in conducting the cost-shifting analysis.<sup>17</sup>

To some degree, proposed FRCP 26(b)(2)(B) codifies *Zubulake I*,<sup>18</sup> with one major exception. In *Zubulake I*, if the requesting party is otherwise entitled to

information that has been identified as being “not reasonably accessible,” the court must determine the “not reasonably accessible” issue. Discovery to aid the court in its determination of the “not reasonably accessible” issue may likely be necessary.<sup>23</sup> Then, assuming the producing party makes the “not reasonably accessible” showing, the court may still allow the discovery if the requesting party makes a showing of “good cause, considering the limitations of Rule 26(b)(2)(C).” Proposed FRCP 26(b)(2)(C) is, in essence, a cost-shifting analysis.<sup>24</sup> Discovery to aid the court in its determination of the “good cause” and cost-shifting issues may likely be necessary.<sup>25</sup>

In addition to creating satellite litigation, proposed FRCP 26(b)(2)(B) creates at least two opportunities for gamesmanship. First, proposed FRCP 26(b)(2)(B) provides an incentive to move otherwise discoverable electronically stored information from an economically efficient storage system to an economically inefficient

## **The E-Discovery Rule Amendments direct the parties to address electronically stored information discovery issues at the very outset of litigation.**

A report outlining how the discovery of electronically stored information should be handled must be submitted to the court within 14 days of the meeting. The parties must then provide to the other parties a copy or description of all electronically stored information that the disclosing party may use.<sup>15</sup>

The E-Discovery Rule Amendments also invite the court to include provisions for disclosure or discovery of electronically stored information and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation materials after production in its Scheduling Order.<sup>16</sup>

### **Proposed FRCP 26(b)(2)(B): Cost Shifting or Satellite Litigation?**

The production of electronically stored information can in some instances be costly. It is not uncommon for the producing party to seek a court order to shift some or all of the cost of production to the requesting party. When determining whether to shift those costs, courts usually undertake a “cost-shifting” analysis.

*Zubulake I* is a seminal cost-shifting case and reasons as follows. *Zubulake*

electronically stored information that is “relatively inaccessible” because of undue burden or cost, the producing party was still under an obligation to produce that information, and the only question for the court would be which party would be required to pay for the costs of production.<sup>19</sup> Under proposed FRCP 26(b)(2)(B), however, if the requesting party is otherwise entitled to electronically stored information that is “not reasonably accessible because of undue burden or cost,” the producing party “need not provide discovery” of that information.<sup>20</sup>

Proposed FRCP 26(b)(2)(B) has been characterized as a “legal Chernobyl,”<sup>21</sup> and U.S. Magistrate Ronald J. Hedges advised that it would create “satellite litigation.”<sup>22</sup>

Proposed FRCP 26(b)(2)(B) tees up that satellite litigation early by providing that a producing party “need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” Then, absent agreement of the parties, if the requesting party wants the

storage system and thus re-characterize that information from being “accessible” to being “not accessible.”<sup>26</sup> Magistrate Hedges observed as follows: “What will stop a corporate entity, after commencement of litigation, from making relevant data inaccessible? Why reward such a unilateral decision?”<sup>27</sup> Second, proposed FRCP 26(b)(2)(B) provides an incentive for a producing party to abuse the ambiguities of the undefined term “good cause.”<sup>28</sup>

Technological changes may one day render all electronically stored information readily accessible and proposed FRCP 26(b)(2)(B) unnecessary. Until that day arrives, however, it appears that proposed FRCP 26(b)(2)(B) will create satellite discovery and litigation of electronically stored information discovery issues<sup>29</sup> and will create opportunities for gamesmanship.

### **Proposed FRCP 26(b)(2)(B)(5): Privilege and Trial-Preparation Claims**

Reviewing electronically stored information for privilege and trial-preparation materials can be expensive and increases

the risk of waiver by the inadvertent production of privileged or trial preparation materials.<sup>30</sup> The E-Discovery Rule Amendments address these issues in two ways. First, the E-Discovery Rule Amendments direct the parties to address potential privilege and trial-preparation issues at the very outset of the litigation.<sup>31</sup> Second, proposed FRCP 26(b)(5)(B) provides procedures to assert a privilege or trial-preparation claim after privileged or trial-preparation materials are inadvertently produced.<sup>32</sup>

**Proposed FRCP 33 and FRCP 34: The Discovery Workhorses**

The E-Discovery Rule Amendments clarify the application of the “discovery workhorses,”<sup>33</sup> FRCP 33 and FRCP 34, to electronically stored information.

Regarding interrogatories, proposed FRCP 33(d) leaves no doubt that in those instances when a party responds to an interrogatory by affording the other party an opportunity to inspect the business records of the responding party, the term “business records” includes “electronically stored information.”

Regarding the production of documents, proposed FRCP 34(a) explicitly provides for the production of “electronically stored information,” and proposed FRCP 34(b) provides clear rules regarding the form and manner in which electronically stored information is to be produced.

**Proposed FRCP 37(f): A Safe Harbor or an Uncharted Minefield?**

Proposed FRCP 37(f) addresses “the routine alteration and deletion of” electronically stored information that can occur automatically without an operator’s direction or knowledge. These automatic alteration and deletion features arguably may result in an innocent party losing potentially discoverable information.

Proposed FRCP 37(f) seeks to protect such an innocent party by providing protection against sanctions “for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”<sup>34</sup> Although proposed FRCP 37(f) has been characterized as providing only “limited protection against sanctions,”<sup>35</sup> it has also been

  
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characterized as providing a “safe harbor”<sup>36</sup> against sanctions.

Regardless of how it is characterized, proposed FRCP 37(f) appears to have polarized the “reflexive”<sup>37</sup> views of plaintiffs and defendants and appears to provide fertile grounds for discovery disputes. For example, in attempting to provide some guidance on what constitutes “good-faith,” the Committee Note to proposed FRCP 37(f) elevates the “duty to preserve information” to the lofty status of being the linchpin of “good-faith,” but then relegates a breach of the duty to preserve information to the lowly status of being one of “the factors that bear on a party’s good faith in the routine operation of an information system” even in those instances where the source of the duty to preserve information is a court order.<sup>38</sup> If the courts follow the Committee Note’s guidance literally, this will be a dramatic depar-

percent of the sample cases, “the court cited no authority whatsoever” upon which it based its authority to impose sanctions.<sup>42</sup> Moreover, proposed FRCP 45 does not provide a “safe harbor” to a nonparty whose electronically stored information is subpoenaed in pending litigation.<sup>43</sup>

Magistrate Hedges described proposed FRCP 37(f) as an “uncharted minefield,”<sup>44</sup> and one counsel expects that proposed FRCP 37(f) “is going to encourage the destruction of data.”<sup>45</sup> At the very least, it appears that the contours of proposed FRCP 37(f) will need to be determined judicially.

#### **Missteps Can Be Costly**

So how did all the pretrial electronic discovery issues mesh with the actual merits and trial of the *Zubulake* case? As noted above, the jury was given an adverse inference instruction as a result

for the second trial in 2005, it became apparent that defendants had not fully responded to plaintiff’s 2000 discovery requests for “all documents . . . relating to . . . incidents of alleged seatback failure of Hyundai products . . .,” and plaintiff moved for an order to compel discovery. The trial court granted plaintiff’s motion to compel and ordered the defendants to produce materials “with respect to all consumer complaints . . . involving allegations of seatback failure on all Hyundai vehicles . . .” Shortly thereafter, and approximately six weeks prior to the second trial, Hyundai moved for partial relief from the court order requiring production of consumer complaints regarding seatback failures and requested “that it not be required to restore . . . 96 back-up tapes dating from August 1995.” The bases of Hyundai’s motion for relief were essentially: (1) that all of Hyundai’s pre-January

2002 consumer complaints were archived on 96 back-up tapes; (2) that “[w]hile the data from the back-up tapes is viewable, [Hyundai could not] say with absolute certainty that it can be restored”; and (3) that “[assuming Hyundai

was] able to restore and access the data stored on the tapes, the data must be converted which will require [Hyundai] to write new software program(s) to perform the conversion.” Although Hyundai knew about the back-up tape issues before the 2002 first trial, Hyundai’s 2005 motion for relief was the first time Hyundai disclosed those back-up tape issues to the trial court. It also appears that despite plaintiff’s 2000 discovery requests, Hyundai did not search its computers until November 2005. In partial response to Hyundai’s motion for relief, plaintiff filed two motions seeking various discovery sanctions, including the entry of an order of default against Hyundai on liability.<sup>52</sup> Between November 21, 2005, and January 6, 2006, 10 days prior to the second trial, Hyundai produced information that disclosed approximately 35 alleged incidents of seatback failure, 28 of which occurred before the first trial in 2000.<sup>53</sup> In ruling on the various discovery motions, the

## **Monetary sanctions can also be harsh in an appropriate case. In *United States v. Philip Morris*, a defendant continued to delete e-mails despite its own document-retention program. The court imposed a monetary sanction of \$2.75 million . . . .**

ture from the current standard that an inadvertent or negligent breach of the duty to preserve triggers sanctions.<sup>39</sup> There is also little guidance on what constitutes “exceptional circumstances” under proposed FRCP 37(f), other than that it “provides guidance in a troublesome area distinctive to electronic discovery,” and that it “recognizes that in some circumstances a court should . . . protect . . . against serious prejudice.”<sup>40</sup>

In addition to discovery disputes, there is the consideration that the FRCP 37(f) “safe harbor” is perhaps not so safe. By its own terms, proposed FRCP 37(f) applies only to sanctions under the Federal Rules of Civil Procedure. It does not prevent a court from exercising its inherent power to sanction a party.<sup>41</sup> One fairly recent sample of “all the written opinions in the sanctions arena since January 1, 2000,” revealed that courts based their authority to impose sanctions on their inherent power in 28 percent of the sample cases, and, in 37

of the defendant’s destruction of e-mails. At trial, the jury awarded the plaintiff approximately \$9.1 million in compensatory damages and approximately \$20.2 million in punitive damages.<sup>46</sup>

The *Zubulake* verdict is not all that aberrant. In *Coleman v. Morgan Stanley*,<sup>47</sup> Morgan Stanley did not produce various documents, including some e-mails. As a result of Morgan Stanley’s non-production, the court entered a partial default judgment on liability<sup>48</sup> against Morgan Stanley. At trial, the jury awarded the plaintiff approximately \$604.3 million in compensatory damages and approximately \$850 million in punitive damages.<sup>49</sup>

Geographically closer to home is *Magana v. Hyundai*,<sup>50</sup> a products-liability case where at the first trial in 2002, the jury awarded plaintiff approximately \$8 million in damages. Hyundai appealed liability but not damages, and the case was remanded for a second trial on liability only.<sup>51</sup> While preparing

trial court, among other things, faulted Hyundai's in-house and outside counsel, held that "[i]t was the duty of Hyundai to establish an adequate system to respond to discovery requests," found multiple discovery violations, found the discovery violations were willful, and granted plaintiff's motion for default.<sup>54</sup> The following excerpt from the trial court's oral ruling is instructive:

Hyundai knew that the seat back claim was a critical issues [sic] in the case. Hyundai had the obligation not only to diligently and in good faith respond to discovery efforts, but to maintain a system that would enable them to respond to these claims.

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Hyundai knew that there had been customer complaints, that it had received a number of such complaints.... It was the duty of Hyundai to establish an adequate system to respond to discovery requests. Hyundai failed to establish such a system and failed to respond accurately to discovery requests. Hyundai failed to supplement those answers when it became known that they were incorrect.

I find that the violations were willful as defined in the law. In fact, compared to some of the violations that are seen in the cases before the Court, in terms of a direct misrepresentation — not a misleading representation, but a directly false representation that these violations were egregious.<sup>55</sup>

Monetary sanctions can also be harsh in an appropriate case. In *United States v. Philip Morris*,<sup>56</sup> a defendant continued to delete e-mails despite its own document-retention program. The court imposed a monetary sanction of \$2.75 million and precluded all individuals who failed to comply with the defendant's document-retention program from being called at trial as fact or expert witnesses.

The lesson of *Zubulake*, *Morgan Stanley*, *Hyundai*, and *Philip Morris* appears to be that the incompetence or intentional mishandling of electronically

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stored information during discovery can be costly.

### All Counsel Should Become Familiar With the Legal Landscape

If you are assuming that you need not be concerned with the discovery of electronically stored information or the E-Discovery Rule Amendments since you do not litigate in federal court, or do not represent large clients, or do not represent high-tech clients, or do not litigate big cases, or do not practice intellectual property law, you may want to rethink that assumption in light of the following:

- E-mail evidence surfaces in most areas of state law including attorney discipline, collections, contracts, defamation, discrimination, employment, environmental, industrial insurance, labor, land use, marital dissolutions, municipal, parentage, and wages.<sup>57</sup>
- The Judicial Conference Committee recognized that the “burdens of such [electronic] discovery also affect small organizations and even individual litigants.”<sup>58</sup>
- *Zubulake I* stated the inescapable fact that litigation “involving the discovery of electronic data . . . in today’s world — includes virtually all cases.”<sup>59</sup>
- *Zubulake* itself was not a “big” case. Judge Scheindlin described *Zubulake* as “a relatively routine employment discrimination dispute.”<sup>60</sup>
- The days when counsel might have “sometimes agreed not to poke around” each other’s electronically stored information are gone.<sup>61</sup> If those days ever did exist, *Arthur Andersen* and *Enron* should have put the last nail in their coffin.<sup>62</sup>
- Courts are becoming more critical of counsel’s performance regarding the discovery of electronically stored information.<sup>63</sup>
- Courts are becoming less accepting of human incompetence or technical problems as explanations for non-compliance with discovery requests or orders regarding electronically stored information.<sup>64</sup>

### Conclusion

The E-Discovery Rule Amendments provide guidance for dealing with the issues

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raised by the discovery of electronically stored information. To the extent the E-Discovery Rule Amendments may not be perfect, the courts should not tolerate any attempt to exploit those imperfections. While most counsel will not have the luxury of becoming electronically stored information experts or specialists, all counsel should gain enough familiarity with the issues presented by electronically stored information to enable them to recognize those issues when they arise. <sup>6N</sup>

*Robert A. Medved graduated from the Seattle University School of Law, cum laude, and was editor-in-chief of the Law Review. After law school, he clerked for Judge Jesse W. Curtis, U.S. District Court, Central District of California. Mr. Medved is co-chair of the Intellectual Property Committee for the Federal Bar Association, Western District of Washington. His private law practice includes nearly 30 years of experience in commercial and real estate transactions and in federal and state court litigation. In 2000 and 2001, he served as the interim general counsel for @Link Networks, Inc., a competitive local exchange carrier then based in Boulder, Colorado. Mr. Medved can be reached at 206-232-5800 or bob@ramedved.com.*

NOTES

1. See Report of the Judicial Conference

- Committee on Rules of Practice and Procedure (Judicial Conference Committee) to the Chief Justice of the United States and Members of the Judicial Conference of the United States, at Rules-Page 22 and 23 (September 2005) (Judicial Conference Committee Report), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.
2. The E-Discovery Rule Amendments become effective on December 1, 2006, unless the U.S. Congress intervenes.
3. See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*) (addressed “cost-shifting”); *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*) (addressed release of confidential deposition transcripts); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*) (allocated backup tape restoration costs); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*) (addressed the preservation of evidence, spoliation, and sanctions); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*) (granted sanctions and imposed an adverse inference instruction against UBS); and *Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, 547 (S.D.N.Y. 2005) (*Zubulake VI*) (ruled on the parties’ motions *in limine*).
4. *Zubulake Rules: New Realities in E-Discovery — Lessons Learned and Practical Applications* (February 25, 2005), [www.fiosinc.com/events/webcast\\_archive\\_2005.html](http://www.fiosinc.com/events/webcast_archive_2005.html).

5. “UBS Must Pay \$29.3 Million In Damages,” [www.pglewis.com/presscenter\\_Article.asp?id=86&type=2](http://www.pglewis.com/presscenter_Article.asp?id=86&type=2).
6. See *Zubulake V*, 229 F.R.D. at 440.
7. See *Zubulake I*, 217 F.R.D. at 317-320.
8. See *Zubulake IV*, 220 F.R.D. at 216-222 (italics in the original).
9. See *Zubulake V*, 229 F.R.D. at 424, 433-437, 439-440. See also *infra* note 63.
10. Courts usually require the suspension of routine document retention/destruction policies, which is sometimes referred to as a “litigation hold.” See, e.g., cases cited *infra* note 39.
11. *Zubulake V*, 229 F.R.D. at 433-434 (italics in the original; footnote added).
12. The term “electronically stored information” appears in proposed FRCP 16(b)(5), FRCP 26(a)(1)(B), FRCP 26(b)(2)(B), FRCP 26(f)(3), FRCP 33(d), FRCP 34(a), FRCP 34(b), Form 35, FRCP 37(f), FRCP 45(a)(1)(C), FRCP 45(c)(2)(A), FRCP 45(c)(2)(B), FRCP 45(d)(1)(B), FRCP 45(d)(1)(C), and FRCP 45(d)(1)(D).
13. See *Jacobellis v. Ohio*, 379 U.S. 184, 197 (1964) (Stewart, J., concurring).
14. See Judicial Conference Committee Report, *supra* at Rules App. C-74.
15. Proposed FRCP 26(a)(1)(B), FRCP 26(f), FRCP 26(f)(3), FRCP 26(f)(4), FRCP 26(f)(7), and Form 35.
16. Proposed FRCP 16(b)(5) and FRCP 16(b)(6).
17. See *Zubulake I*, 217 F.R.D. at 318, 324 (italics in the original). The *Zubulake I* seven-factor test was augmented by *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-573 (N.D. Ill. 2004) (“...we modify the *Zubulake* rules by adding a factor that considers the importance of the requested discovery in resolving the issues of the litigation.”).
18. Compare the “not reasonably accessible because of undue burden or cost” language found in proposed FRCP 26(b)(2)(B) with the “accessed” and “accessible” and “accessible/inaccessible test” and “accessible or inaccessible” and “inaccessible” and “most accessible to least accessible” and “range of accessibility” and “relatively inaccessible” and “typically accessible” and “undue burden or expense” language found in *Zubulake I*, 217 F.R.D. at 317-320, 324. Compare the “electronically stored information from sources” language found in the proposed FRCP 26(b)(2)(B) with the “media on which it is stored” language found in



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*Zubulake I*, 217 F.R.D. at 318.

19. See *Zubulake I*, 217 F.R.D. at 324.

20. Proposed FRCP(b)(2)(B) provides: "(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery."

21. See Ephraim Schwartz, "Document Management Systems Go to Court New Federal Rules for 2006 Could Come Down Hard on IT," *InfoWorld* (December 27, 2005), available at [www.infoworld.com/article/05/12/27/01OPreality\\_1.html](http://www.infoworld.com/article/05/12/27/01OPreality_1.html) ("Two proposed amendments to the federal Rules of Civil Procedure, if passed by Congress, will have a major impact on corporations and their IT departments. One expert I spoke with called the situation a legal Chernobyl. \*\*\* If you think calling the changes to Rules 26 and 37(f) 'Chernobyl' is a bit of hyperbole, well then, you can always sit back, do nothing, and wait for the fallout.").

22. Ronald J. Hedges, *View from Another Bench: Zubulake Distinguished — The Impact of the FRCP Amendments on the Holdings in Zubulake*, Fios Inc. (March 22, 2006), [www.fiosinc.com/events/webcast\\_archive.html#](http://www.fiosinc.com/events/webcast_archive.html#).

23. See Judicial Conference Committee Report, *supra* at Rules App. C-48.

24. See, e.g., *Hagemeyer North American, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 602-603 (E.D. Wis. 2004) ("In short, *Zubulake* brought the cost-shifting analysis closer to the Rule 26(b)(2) proportionality test.... For these reasons, the Court is persuaded by the reasoning in *Zubulake* and will adopt the seven-factor *Zubulake* test."). See also Judicial Conference Committee Report, *supra* at Rules App. C-49-C-50.

25. See Judicial Conference Committee Report, *supra* at Rules App. C-49.

26. See Daniel B. Garrie, Matthew J. Armstrong, and William Burdett, *Hiding The Inaccessible Truth: Amending The Federal*

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*Rules to Accommodate Electronic Discovery*, 25 Rev. Litig. 115, 118-119, 123, 125 (2006).

27. See Ronald J. Hedges, *A View From the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 129 (2005); *Id.*, 227 F.R.D. at 139 (... the interplay of proposed Rules 26(b)(2) and 37(f) will enable corporate entities, in the normal course of business, to shift e-information from being reasonably accessible to inaccessible...”).
28. See *id.*, 227 F.R.D. at 128 (“I Note that discovery might still be allowed under

the amendment, but only on a showing of good cause — but hasn’t a good cause determination presumably been made under Rule 26(b)(1) if “broader” discovery has been allowed? Are courts simply to engage in a Rule 26(b)(2) analysis, as the Advisory Committee Note suggests? What additional showing of good cause is contemplated?”).

29. See Wiginton, 229 F.R.D. at 572 (“Theoretically, as technology improves, retrieving and searching data will become more standard and less costly.... In the meantime, until the technology advances and e-discovery becomes less expensive, cost

will continue to be an issue as parties battle over who will foot the bill.”) (citation omitted).

30. *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 28 (D. Md. 2005) provides a compressive discussion of these issues.
31. See proposed FRCP 16(b)(5), FRCP 16(b)(6), FRCP 26(f)(3), FRCP 26(f)(4), and Form 35.
32. Proposed FRCP 26(b)(5)(B) provides: “(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.”
33. See Judicial Conference Committee Report, *supra* at Rules-Page 27.
34. Proposed FRCP 37(f) provides: “(f) Electronically stored information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”
35. See Judicial Conference Committee Report, *supra* at Rules App. C-83.
36. See, e.g., Shira A. Scheindlin and Kanachana Wangkeo, “Electronic Discovery Sanctions in the Twenty-First Century,” *11 Mich. Telecomm. Tech. L. Rev.* 71, 71-72 (2004).
37. See Judicial Conference Committee Report, *supra* at Rules App. C-21.
38. *Id.* at Rules App. C-87.
39. See, e.g., *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (“A failure to preserve documents and records, once the duty to do so has been triggered, raises the issue of spoliation of evidence.”); *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 339 (D. N.J. 2004) (“The duty to preserve

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potentially relevant evidence is an affirmative obligation that a party may not shirk. When the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a 'litigation hold' or 'off switch' on its document retention policy to stop the destruction of that evidence.”); *Rambus, Inc. v. Infineon Technologies AG.*, 220 F.R.D. 264, 281 (E.D. Vir. 2004) (“Therefore, once a party reasonably anticipates litigation, it has a duty to suspend any routine document purging system that might be in effect and to put in place a litigation hold to ensure the preservation of relevant documents — failure to do so constitutes spoliation.”); *Zubulake IV*, 220 F.R.D. at 218 (“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”); *id.*, 220 F.R.D. at 220 (“UBS argues that the tapes were ‘inadvertently recycled....’ But to accept UBS’s argument would ignore the fact that ... UBS had a duty to preserve those tapes. Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”).

40. See Judicial Conference Committee Report, *supra* at Rules-Page 34 and Rules App. C-88.
41. See, e.g., *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“A federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence. Such power includes the power where appropriate to order the exclusion of certain evidence.”); *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 224 F.R.D. 595, note 3 at 598 (D. N.J. 2004) (“This Court’s inherent power to sanction is merely supplemented by the rules and is in no way restricted by sanctions provisions therein.”); See also Judicial Conference Committee Report, *supra* at Rules App. C-87.
42. *Scheidlin and Wangkeo*, *supra* 11 Mich. Telecomm. Tech. L. Rev. at 78.
43. Although the E-Discovery Rule Amendments: (i) conform proposed FRCP 45(d)(1)(D) to proposed FRCP 26(b)(2)(B); (ii) conform proposed FRCP 45(d)(2)(B) to proposed FRCP 26(b)(5); (iii) conform proposed 45(a)(1)(C) to proposed FRCP 34(a); (iv) conform proposed FRCP



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45(d)(1)(B); and FRCP 45(d)(1)(C) to proposed FRCP 34(b), there is no such conforming amendment regarding proposed FRCP 37(f).

44. Hedges, *View from Another Bench: Zubulake Distinguished — The Impact of the FRCP Amendments on the Holdings in Zubulake*, *supra* note 22.

45. See Richard Acello, "E-Mail to Lawyers: E-Discovery Rules on the Way," *ABA Journal E-Report* (October 7, 2005) ("The safe harbor is going to encourage the destruction of data. Insurance companies will insist, in my expectation, on more prompt destruction of data on a more routine basis so that there won't be an issue of good faith.") (quoting Gregory Joseph, former chair of the ABA Litigation Section.).

46. See David Glovin, *UBS Must Pay Ex Saleswoman \$29.3 Min in Sex Bias Case (Update 6)*, Bloomberg (April 6, 2005).

47. *Coleman (Parent) Holdings v. Morgan Stanley*, Case No: 2003 CA 005045 AJ (Fla. Cir.Ct. 2003).

48. See *Coleman*, 2005 WL 674885 (Fla.Cir.Ct. March 23 2005) (granting in part renewed motion for default judgment).

49. See Bo Susan Rosser, "Jury Awards Perelman Additional \$850 Million in Damages from Morgan Stanley," *Court TV* (May 18, 2005), [www.courtTV.com/trials/perelman/051805\\_cty.html](http://www.courtTV.com/trials/perelman/051805_cty.html).

50. *Magana v. Hyundai Motor America, et al.*, Clark County Superior Court, Case No. 00-2-00553-2.

51. *Magana v. Hyundai Motor America*, 123 Wash. App. 306, 319, 94 P.3d 987 (2004).

52. The text beginning after note 51 and continuing to this note 52 is based upon various *Magana* Superior Court pleadings and upon the Draft Transcript of January 20, 2006, Oral Ruling, at 22. (When asked what Hyundai did to find information responsive to plaintiff's discovery requests, Hyundai's in-house counsel testified to the effect that Hyundai "looked at what we had in the legal office, otherwise we would have had to make an extensive computer search.")

53. See *Magana*, Superior Court, Memorandum in Support of Motion for Sanctions Pursuant to CR 37 (December 23, 2005); Michael E. Withey, "Ethical Considerations of Discovery Violations," Power-Point Presentation (undated).

54. *Magana*, Superior Court, Draft Transcript, *supra* note 52. Hyundai has filed a notice of appeal.

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55. Magana, Superior Court, Draft Transcript, *supra* note 52 at 17, 22-23.
56. United States v. Philip Morris, 327 F. Supp. 2d 21 (D.D.C. 2004).
57. See In re Disciplinary Proceeding Against Dann, 136 Wash. 2d 67, 960 P.2d 416 (1998) (attorney discipline); Britannia Holdings Limited v. Greer, 127 Wash. App. 926, 113 P.3d 1041(2005) (collections); Go2Net v. C I Host, 115 Wash. App. 73, 60 P.3d 1245 (2003) (contracts); Maison De France v. Mais Oui!, 126 Wash. App. 34, 108 P.3d 787 (2005) (defamation); Davis v. Microsoft, 149 Wash. 2d 521, 70 P.3d 126 (2002) (discrimination); Boring v. Alaska Airlines, 123 Wash. App. 187, 97 P.3d 51 (2004) (employment); Port of Seattle v. Pollution Control Hearings Bd., 151 Wash. 2d 568, 90 P.3d 659 (2004) (environmental); Vallandigham v. Clover Park School Dist. No. 400, 154 Wash. 2d 16, 109 P.3d 805 (2005) (industrial insurance); DOT v. Inland Boatmen's Union, 103 Wash. App. 573, 13 P.3d 663 (2000) (labor); Callfas v. Seattle City of Construction and Land Use, 129 Wash. App. 579, 120 P.3d 110 (2005) (land use); In re Marriage of Griswold, 112 Wash. App. 333, 48 P.3d 1018 (2002) (marital dissolutions); Eugster v. City of Spokane, 110 Wash. App. 212, 39 P.3d 380 (2002) (municipal); In re Parentage of L.B., 121 Wash. App. 460, 89 P.3d 271 (2004) (parentage); Chelius v. Questar Microsystems, 107 Wash. App. 678, 27 P.2d 681 (2001) (wages).
58. See Judicial Conference Committee Report, *supra* at Rules-Page 23 (italics added).
59. See Zubulake I, 217 F.R.D. at 317 (italics added).
60. See Zubulake V, 229 F.R.D. at 424.
61. See Brian Bergstein, *Lawsuits Fuel E-Data Storage Industry*, Associated Press (March 11, 2006).
62. See Arthur Andersen v. United States, 544 U. S. 696 (2005); Kurt Eichenwald, *Conspiracy of Fools* (Broadway Books 2005); Bethany McLean and Peter Elkind, *The Smartest Guys in the Room* (Penguin Books 2004).
63. See, e.g., Zubulake V, 229 F.R.D. at 424 ("Counsel, in turn, failed to request retained information from one key employee and to give the litigation hold instructions to another. They also failed to adequately communicate with another employee about how she maintained her computer files. Counsel also failed to safeguard backup tapes that might have contained some of the deleted e-mails, and which would have mitigated the damage done by UBS's destruction of those e-mails.").
64. See, e.g., Zubulake IV, 220 F.R.D. at 220 ("UBS argues that the tapes were 'inadvertently recycled....' But to accept UBS's argument would ignore the fact that ... UBS had a duty to preserve those tapes. Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."); Susanne Craig, "How Morgan Stanley Botched a Big Case by Fumbling Emails," *Pittsburgh Post-Gazette* (May 16, 2005) (In *Coleman*, 2005 WL 674885, the court severely sanctioned Morgan Stanley for not producing electronically stored information. "In a written statement responding to questions from The Wall Street Journal, Morgan Stanley says all of its recent 'discovery problems' stemmed from honest mistakes, such as computer glitches and misplaced backup tapes, and were not attempts to stonewall adversaries.").

17<sup>TH</sup> ANNUAL

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# Bringing Civics Back

BY HON. MARLIN APPELWICK AND JUDITH BILLINGS

**A** recent public poll commissioned by the WSBA revealed that barely one half of those surveyed understand what “separation of powers” means and why it is essential to American government. And almost one third don’t understand

the concept of an “independent judiciary.” Some WSBA members would not be surprised to learn that the average Washingtonian has little grasp of basic civics. But this survey focused just on registered voters — those who elect our legislators and judges. If voters don’t understand the fundamentals of our democracy, does anyone?

The Washington survey echoes a similar national study commissioned last year by the ABA. The lack of basic civics knowledge that both studies uncovered can be traced to the steady decline since the 1960s of civics education in K-12 schools. This “civics crisis” is especially acute in Washington, where students often learn little or no civics until high school, and then only as part of a survey course on American history. However, recent changes in state law, which the WSBA enthusiastically lobbied for, should help turn the situation around. And there are ways that WSBA members can be of assistance, too.

## How Civics Is Taught — Or Not Taught

Washington’s public schools are grounded in the concept of local control, meaning there is no statewide curriculum. What is taught in each classroom at each grade level, including which textbooks are used, is determined district by district. There are state standards for student learning,

however, in each of the academic subjects. Known as EALRs (Essential Academic Learning Requirements), these standards are supposed to guide local school districts as they choose curricula and textbooks. The civics EALRs stipulate that students should be able to explain “the core values and democratic principles of the United States as set forth in foundational documents,” analyze “the purposes and organization of government and law,” and understand “the rights and responsibilities of citizenship and principles of democratic civic involvement.”

If all students in the state were actually learning the civics EALRs, we would have no “civics crisis.” However, we know through reports from students, teachers, and administrators that the civics EALRs are not being uniformly taught. And in some districts, they are not taught at all. One reason is that many teachers, especially at the lower grade levels, do not feel adequately prepared to teach “technical” concepts such as the rule of law. We believe the most compelling factor forcing civics out of the classroom, however, is increased attention paid by both teachers and administrators to the subjects tested by the WASL (Washington Assessment

of Student Learning), which does not include civics.

## How Assessment Drives Instruction

Since the advent of the WASL, teachers and administrators have been presented with an overwhelming mandate: Make sure students master reading, writing, and math, but also learn the EALRs in all other subjects. Classroom time is scarce, however, and instructional materials and professional development are expensive. School districts must constantly prioritize how best to use these resources, and it is no surprise that they place WASL preparation at the top of the list. Social studies, the arts, and other non-WASL subjects are pushed to the back burner.

The Council on Public Legal Education has been trying for years to increase civics learning in our schools. We use many strategies, including offering civics workshops to teachers, recruiting volunteer lawyers and judges to work with youth, and helping create extracurricular programs such as youth courts. We know that these efforts will never be enough, though. What is also needed is fundamental statewide reform of the way civics is taught in all public schools, from elementary to high school.

To this end, we helped develop the civics EALRs described above. But we have been frustrated to learn that they are not being uniformly taught. We have debated whether to advocate for a WASL in civics that would elevate it in administrators’ eyes to the level of reading, writing, and math. While there are arguments to be made for a civics WASL, we ultimately decided in favor of holding school districts accountable to the EALRs through an alternative, more naturalistic form of assessment known as the CBA (classroom-based assessment).

CBAs are assessments of student learning that are administered by a teacher as an integral part of the curriculum. They are qualitative in nature (rather than a multiple-choice test like the WASL) and may take the form of an essay, presenta-



# to the Classroom: You Can Help

tion, or other assignment that allows students to demonstrate their analytic and critical thinking skills as well as mastery of basic facts and concepts. For these reasons, CBAs are seen by many as more appropriate for social-studies assessment than a WASL-type exam.

Under a state law enacted in 2004, school districts must “have in place ... assessments or other strategies” to assure student learning in social studies by the end of the 2008-09 school year. Under a new law just signed by the Governor in March, school districts will be required to implement three CBAs in civics each year as part of this effort — one each in elementary, middle, and high school. This is a huge victory for civics education in Washington, as it highlights its importance within social studies, where it competes for attention with history, geography, and economics. The new law also mandates an appropriate assessment tool, the CBA, rather than whatever “strategy” a school district might come up with on its own.

Model CBAs in civics have been developed by the state’s Office of the Superintendent of Public Instruction, which is currently training teachers in how to use them. In addition to training, teachers will also need materials showing them how to implement the CBAs within the civics program or curriculum they use. The new law comes with \$47,000 in funding for a pilot project and teacher training, but this will be insufficient. We anticipate that the same groups that lobbied hard in the Legislature last year for the new civics education assessment law will be back soon asking for funding to help prepare teachers to implement it.

## How You Can Help

While it will take time and money to implement the new civics education assessment system in the schools, WSBA members don’t need to wait in order to see progress soon. There are many excellent civics programs that teachers, schools, and even entire districts have adopted — not because they are required to, but because they understand the importance

of civics education to the maintenance of democracy. And most of these programs welcome participation from lawyers and judges, who are in a unique position to help students see how the rule of law operates in today’s society. We hope you will consider volunteering for one of the programs listed below, or simply contact your local school administrator and ask how you can help.

## Civics Education Volunteer Opportunities for Lawyers and Judges in Washington State

WSBA members are encouraged to track and report their volunteer activities under RPC 6.1

- The law school-based Street Law program pairs law-student teachers with high-school classrooms. Volunteer judges and attorneys are needed in Seattle and Tacoma to assist with mock trials. For more information, see the Street Law website ([www.streetlaw.org](http://www.streetlaw.org)) and contact Margaret Fisher (for Seattle University’s program) at 206-329-2690 or Julia Gold (for the University of Washington program) at 206-543-3434. Ms. Fisher also needs volunteers to help update the state supplement to the Street Law textbook.
- Volunteer judges are needed outside of Seattle and Tacoma to help high-school teachers implement Street Law in classrooms through a grant from the Washington Judges Foundation. Contact Margaret Fisher at 206-329-2690.
- The YMCA Youth and Government Mock Trial and Youth Legislature programs for high-school students provide both one-time and ongoing volunteer opportunities for attorneys and judges. Contact Janelle D. Nesbit, executive director, at [youthandgovexec@qwest.net](mailto:youthandgovexec@qwest.net), or Sarah Clinton at [youthandgovpdir@qwest.net](mailto:youthandgovpdir@qwest.net). See [www.youthandgovernment.org](http://www.youthandgovernment.org) for more details.
- Many legal organizations maintain speakers bureaus to fill requests from classrooms and community groups. To join the WSBA speakers bureau, contact Dené Canter at 206-727-8213

or [denec@wsba.org](mailto:denec@wsba.org). To join the Washington State Trial Lawyers Association speakers bureau, contact Rebecca Parker at 206-464-1011 or [rebecca@wstla.org](mailto:rebecca@wstla.org). The American Civil Liberties Union is also recruiting speakers; contact Doug Honig at 206-624-2184 or [publiceducation@aclu-wa.org](mailto:publiceducation@aclu-wa.org).

- The Lawyers and Students Engaged in Resolution (LASER) program pairs lawyers with schools to teach peer mediation techniques to students. For more information, see their website, [www.laserpeer.org](http://www.laserpeer.org), or contact Barbara Peterson at 206-730-4699 or [administrator@laserpeer.org](mailto:administrator@laserpeer.org).
- We the People, a classroom-based program that helps students develop critical-thinking skills while learning about their rights and responsibilities under the Constitution, seeks volunteers to work with teachers and assist with its state competition. Visit [www.civiced.org/wethepeople.html](http://www.civiced.org/wethepeople.html), or contact Kathy Hand at 206-248-3463 or [kathyhand@comcast.net](mailto:kathyhand@comcast.net).
- The Judges in the Classroom program gives judges the opportunity to teach students about the legal system. For more information, visit the Administrative Office of the Courts’ website at [www.courts.wa.gov/education](http://www.courts.wa.gov/education) or call 360-753-3365.

Please send information on other volunteer opportunities to Pam Inglesby, WSBA public legal education manager, at [pami@wsba.org](mailto:pami@wsba.org). 

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*Hon. Marlin Appelwick serves on the state Court of Appeals. Judith Billings is a former state superintendent of public instruction. They serve as co-chairs on the Council on Public Legal Education. E-mail to the Council may be sent to [cple@wsba.org](mailto:cple@wsba.org). The mission of the Council on Public Legal Education, which is a committee of the Access to Justice Board, is to promote public understanding of the law and civic rights and responsibilities. The CPLE pursues this mission by conducting, coordinating, encouraging, and publicizing public legal education efforts in Washington state.*

# A New Tool for **Safety**: Introducing Washington's **Sexual Assault Protection Order**

BY KELLY O'CONNELL

It is difficult to imagine any act that would shatter your sense of physical safety more than being raped. Nearly 40 percent of women in Washington report they have been the victims of rape, forced sexual contact, or child sexual abuse at some time in their lives.<sup>1</sup> Sexual-assault victims may not feel safe for months or even years after the assault, particularly if the victim has continued contact with the assailant. A rapist may pose an ongoing threat or may use the fear instilled by the first assault to intimidate the victim and prevent her from seeking civil or criminal justice remedies.

Because a victim may fear for her safety, planning to protect the victim against another assault or act of abuse is a critical element of any legal representation. Protection orders are one component of individual safety plans<sup>2</sup> that place the legal burden on the assailant to have no further contact with the victim.

Until now, many victims of sexual assault have had no meaningful way of obtaining protection from the person who assaulted them. For example, a victim who is raped by a customer who regularly frequents her store, but with whom she has never been involved with romantically, does not qualify for a domestic-violence protection order. Parents whose child is molested by a neighbor down the street have little ability to get a civil protective order to ensure that their child is not further contacted by the assailant while playing in the neighbor-

hood. An employee who is raped after a company party by a coworker similarly has no legal remedy for protection.

Thankfully, a new law creating a Sexual Assault Protection Order was just enacted in Washington, and many victims will now have a legal tool to address their devastated sense of physical safety following a sexual assault.<sup>3</sup> Any victim of nonconsensual sexual conduct or penetration, including a single incident, may petition for a Sexual Assault Protection Order under the new statute.

## **The Need for a Sexual Assault Protection Order**

Many people have asked why we need a Sexual Assault Protection Order. The very question fails to recognize one of the most fundamental facts about sexual-assault: Rape is the most underreported crime in America. In Washington, only 15 percent of sexual-assault victims reported to law-enforcement authorities.<sup>4</sup> Only five percent of college victims report nationally.<sup>5</sup> Since approximately 85 percent of sexual-assault victims in Washington do not report the crime to police, the vast majority of these victims will never see any criminal sanctions against the assailant. In a recent study looking at offender relationships to sexual-assault victims, the largest group of offenders was acquaintances or persons known *but not related* to the victim.<sup>6</sup> Almost half of offenders against children and more than two-thirds of offenders against adults were known but not related to the victim.<sup>7</sup>

Existing civil protection orders fail to address the safety concerns of many

sexual-assault survivors. Civil protection orders are available under RCW 26.50 *et seq.* when a person is a victim of domestic violence, including sexual assault in an intimate relationship. A domestic violence protection order requires that the petitioner have a domestic, familial, or dating relationship with the respondent. As a result, the only remedy available to many sexual-assault victims who are not assaulted by family or household members has been a civil anti-harassment order under RCW 10.14 *et seq.* Civil anti-harassment orders require a "course of conduct" — rape victims often have difficulty showing that one act of sexual violence constitutes a pattern or series of acts over time. Civil anti-harassment orders are wholly inadequate for addressing sexual violence and are not designed to address the seriousness of sexual assault and rape. Thus, a victim who has been raped *only* one time, and who has no domestic, familial, or dating relationship with the assailant, may not be able to obtain any type of civil protection order — until now.

In the criminal context, for those victims of sexual violence who do report to law enforcement and see their cases prosecuted, there has been no provision in the criminal code<sup>8</sup> to allow a judge to issue a criminal no-contact order in sex-offense cases to help protect the victim. The new Sexual Assault Protection Order addresses this gap as well. Thus there are two aspects to the new law, both a civil and criminal provision: one that allows a victim to petition civilly on their own behalf, and one that allows the prosecutor, as part of a criminal proceeding, to

obtain a no-contact order or as part of a condition of sentence.

### **Washington's New Sexual Assault Protection Order**

Beginning June 7, 2006, sexual-assault victims in Washington may seek and obtain a Sexual Assault Protection Order. Washington is the 13th state to enact specific legislation to address the safety concerns of victims of sexual assault.<sup>9</sup> The Sexual Assault Protection Order will afford rape victims similar protections that domestic-violence victims have been able to obtain: protection from the assailant and a way to prevent any further contact between the victim and the assailant.

The new statute will establish procedures for obtaining Sexual Assault Protection Orders. Following is a general overview of the process.

#### **Filing a Petition**

Any person who is a victim of nonconsensual sexual conduct or penetration, including a single incident, may petition for the order in the county or municipality where she resides. A person over age 16 may petition on her own behalf. A third party may file on behalf of a victim who is a minor child; a vulnerable adult; or any other adult who cannot file due to age, disability, health, or inaccessibility. A petition must allege the existence of nonconsensual sexual conduct or penetration that gives rise to reasonable fear of future dangerous acts. There is no filing fee.

#### **Hearings**

Sexual-assault advocates are allowed to accompany victims and assist with the preparation of petitions. The court may appoint counsel to represent the petitioner if the respondent is represented by counsel. Evidence concerning prior

sexual activity or reputation is generally inadmissible.

#### **Ex Parte Temporary Orders**

Upon receipt of the petition, the court may issue an *ex parte* order for 14 days prior to a hearing on the matter if the court finds by preponderance of the evidence that the petitioner was a victim of nonconsensual sexual conduct or penetration that gives rise to reasonable fear of future dangerous acts and harm would likely occur if the respondent were given prior notice.



#### **Service of Process**

The court must order a hearing no later than 14 days from the date of the *ex parte* order. Personal service must be made on the respondent at least five days before the hearing.

#### **Final Orders**

After the respondent has been personally served and after a finding by a preponderance of the evidence that the petitioner was a victim of nonconsensual sexual contact or penetration with reasonable fear of future dangerous acts, the court may issue an order prohibiting the respondent from having contact with the petitioner and staying away from certain places specified in the order for a fixed period of time, not

to exceed two years. The order may be extended one or more times.

#### **Remedy**

A Sexual Assault Protection Order shall order that the respondent "stay away" (meaning to refrain from both physical and nonphysical contact with the petitioner directly, indirectly, or through third parties) and shall order any other necessary or injunctive relief for a period of two years or that which is otherwise indicated by the court. Monetary damages are not recoverable.

#### **Notice**

The order shall be immediately entered into the statewide computer database that law enforcement uses to verify protection orders.

#### **Violations**

When law enforcement has probable cause to believe the respondent violated the order, they shall arrest the respondent regardless of whether the violation occurred in their presence.

Violation of a Sexual Assault Protection Order has the same penalties as violations of domestic-violence protection orders under RCW 26.50, *et seq.*

#### **Helping Sexual-Assault Victims in an Emerging Area of Law**

One unique provision in the law provides that judges may appoint counsel to represent the petitioner when the respondent is represented by an attorney at the hearing. The respondent's attorney may raise legal challenges that will be difficult for a victim to address at the hearing without the assistance of a lawyer. Given the complex evidentiary issues that often exist in sexual-assault cases, when a respondent has an attorney representing her interests at a

protection-order hearing, the victim should have the opportunity for legal representation as well.

This provision creates a new and exciting opportunity for attorneys to provide *pro bono* legal service by representing sexual-assault victims in protection-order hearings. In the late summer and fall of 2006, the legal department of the Washington Coalition of Sexual Assault Programs (WCSAP) will be providing statewide training on the new Sexual Assault Protection Order. The training will be at no cost and is expected to provide CLE credits. The hope is that attorneys who receive this training will sign up to take referrals from rape crisis centers or courts that are looking for representation of sexual-assault victims at protection order hearings and for other civil legal needs. WCSAP's legal department provides technical assistance, such as information, referral, and consultation; creates resource materials; and provides support to and training for advocates and attorneys working with survivors of sexual assault in the criminal and civil legal systems. For more informa-

tion about the training series or how to become an attorney referral for rape victims through WCSAP, please contact [kelly@wcsap.org](mailto:kelly@wcsap.org). 

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*Kelly O'Connell is a staff attorney for WCSAP, a membership coalition of more than 40 rape crisis centers throughout Washington. WCSAP's legal program is funded by Legal Assistance for Victims Grant, U.S. Department of Justice, Office on Violence Against Women (Grant 2005-WL-AX-0071). Points of view in this article are those of this author and do not necessarily represent the official position or policies of the U.S. Department of Justice. Portions of this article are excerpted and adapted with permission from previous works by Catherine Carroll, legal director/staff attorney at WCSAP.*

NOTES

1. Lucy Berliner, Sexual-Assault Experiences and Perceptions of Community Response to Sexual-Assault: A Survey of Washington State Women. Research supported by: Office of Crime Victims Advocacy, Washington State Office of Community

Development (October 2001).

2. Every victim has specific and unique circumstances that will determine her individual safety plan — an experienced sexual-assault or domestic-violence advocate is an excellent resource for developing a safety plan.
3. HB 2576. To read the complete text of the bill, see [www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Session%20Law%2002006/2576-S.SL.pdf](http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Session%20Law%2002006/2576-S.SL.pdf).
4. Berliner, p. 7.
5. U.S. Department of Justice, National Institute of Justice, Sexual Victimization of College Women (2000).
6. Berliner, p.6.
7. Ibid.
8. With the exception of Superior and District Court Criminal Rules 3.2(d)(1) and RCW §10.99 *et seq.* which is only for domestic-violence victims.
9. Currently 12 states (California, Colorado, Florida, Illinois, Maine, Maryland, Minnesota, Montana, Oklahoma, South Dakota, Texas, and Wisconsin) have specific sexual assault protective order statutes — by definition these orders protect a sexual-violence survivor regardless of the relationship with the perpetrator.

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# Your Role in Providing for High-Quality Appellate Judges

BY ANTHONY R. MILES AND JOHN J. TOLLEFSEN

**T**he Washington State Bar Association's list of well-qualified candidates for the Court of Appeals has many vacancies in several judicial districts. You can play a vital role in helping the governor select the right person to fill vacancies on the Washington Court of Appeals and Supreme Court. Often these openings occur unexpectedly and must be filled quickly. To assist the governor, the Washington State Bar Association maintains a standing list of well-qualified candidates who have been vetted by the Judicial Recommendation Committee (JRC). The JRC's rating is good for four years, and successful candidates are notified that they may remain on the list by reapplying to the committee within a year of the end of their rating. This article provides the information you need to fulfill your role in this important process.

The JRC is composed of 22 members of the WSBA who are appointed by the Board of Governors for three-year terms. Committee members are from geographically diverse backgrounds, consistent with the statutory mandate that appellate court judiciary live throughout the state. The Board has appointed JRC members who represent the highest ethical standards of the Bar as well as the diversity of Washington's population. Each member calls references and conducts background checks of the candidates. Strict confidentiality is maintained. The candidate is interviewed by at least 12 members of

the committee. After discussion, a ballot is taken to determine if the candidate is well-qualified in the opinion of a two-thirds majority of the committee members (a minimum of nine votes needed).

Washington's Court of Appeals is divided into three divisions, and each division is divided into three districts (RCW 2.06.020). Division I: District 1 (King County); District 2 (Snohomish County); and District 3 (Island, San Juan, Skagit, and Whatcom counties). Division II: District 1 (Pierce County); District 2 (Clallam, Grays Harbor, Jefferson, Kitsap, Mason, and Thurston counties); and District 3 (Clark, Cowlitz, Lewis, Pacific, Skamania, and Wahkiakum counties). Division III: District 1 (Ferry, Lincoln, Okanogan, Pend

***In the past three years, the committee has received very few applications from individuals in many of the state's counties. We encourage interested individuals in all geographic areas to apply, and we are especially seeking applications from well-qualified candidates from Division I, districts 2 and 3; Division II, District 3; and all three districts of Division III.***

Oreille, Spokane, and Stevens counties); District 2 (Adams, Asotin, Benton, Columbia, Franklin, Garfield, Grant, Walla Walla, and Whitman counties); and District 3 (Chelan, Douglas, Kittitas, Klickitat, and Yakima counties).

In the past three years, the committee has received very few applications from individuals in many of the state's counties. We encourage interested individuals in all geographic areas to apply, and we are especially seeking applications from well-qualified candidates from Division I, districts 2 and 3; Division II, District 3; and all three districts of Division III. To start the process, see the WSBA website: [www.wsba.org/lawyers/groups/judicialrecommendation](http://www.wsba.org/lawyers/groups/judicialrecommendation). A candidate may apply to fill a vacancy online at the governor's office ([www.governor.wa.gov/actions/appointments/judicial](http://www.governor.wa.gov/actions/appointments/judicial)). We rec-

ommend that interested candidates apply before a judicial vacancy exists, because of the time needed for the investigation and review. The JRC schedules meetings quarterly but meets only if there are sufficient candidates. Since the governor attempts to fill an unexpected opening as soon as possible, serious candidates should apply early. The list is kept confidential.

Candidates should have achieved well above the average for members of the Bar who have been involved in community and bar work. Not only is scholastic excellence desired, the Board of Governors wants candidates who have a proven track record of civic involvement. Judicial background is helpful but not required. Candidates should take the detailed application form seriously and provide the type of work they would expect to see in appellate briefs. Submitted writing samples should show legal insight and sophistication. At the JRC interview, the candidate should be prepared to answer questions regarding judicial philosophy and qualifications. Proper preparation will help the candidate stand out in the eyes of the panel of 22 lawyers who will focus on every detail of the application and interview. Once an opening occurs, all serious candidates are interviewed by the governor's legal counsel, Richard E. Mitchell.

For more information, contact Anthony R. "Tony" Miles at [tonym@prestongates.com](mailto:tonym@prestongates.com) or Vice-Chair Norma Linda Ureña at [norma@urena-law.com](mailto:norma@urena-law.com). 

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*Anthony R. Miles, an attorney with Preston Gates & Ellis LLP in Seattle, is 2005-2006 chair of the WSBA Judicial Recommendation Committee. Contact him at [tonym@prestongates.com](mailto:tonym@prestongates.com). John J. Tollefsen is a Judicial Recommendation Committee member, and a certified fraud examiner and civil litigator who concentrates on financial fraud and complex business litigation. He can be reached at [john@tollefsenlaw.com](mailto:john@tollefsenlaw.com).*

# The WSBF Loan Repayment Assistance Program Selects Its First Five Recipients

BY PAULA LITTLEWOOD

**A**fter several years of pulling together the details of the Program and securing the necessary funds for the first year, the Washington State Bar Foundation (WSBF) began accepting applications last September for its Loan Repayment Assistance Program (LRAP) — and the response was fantastic! More than 60 applications were received in this first cycle, making the selection of five recipients extremely difficult for the LRAP Advisory Committee, as all merited consideration.

The five recipients selected this year will each receive \$5,000 as a forgivable loan to help repay educational debt and will be eligible to receive \$5,000 each for four additional years so long as they remain in qualifying employment and there is funding to continue the Program. Under the terms of the Program, forgiveness of the loans will begin after three years in qualifying employment. Loans are not forgiven in full until completion of five years of qualifying employment.

The debt loads (i.e., amount owed on educational loans) for the recipients this year ranges from \$55,000 to \$123,000, and their salaries range from \$38,000 to \$50,000 per year.

Here is a little about each recipient:

## Sara Beigh

Sara graduated *magna cum laude* with a B.A. in elementary education from Saint Martin's University, then earned her J.D. from Gonzaga University School of Law in May 2004. Since November 2004, she has served as deputy prosecutor for the Skamania County Prosecutor's Office in Stevenson. Sara has also served on the fundraising committee for United Way and tutored developmentally disabled women in reading and math for the Literacy Network.

## Karey Gallagher

Karey graduated with honors with a B.A. in sociology and political science from Gonzaga University, then earned her J.D. from Gonzaga University School of Law in May 2004. Karey represents victims of domestic violence for the YWCA Domestic Violence Civil Legal Assistance Office in Spokane. Karey has also served as an intern at the Spokane County Superior Court and at Columbia Legal Services.

## Mary Neil

Mary graduated with a B.A. in law and diversity from Western Washington University and earned her J.D. from Gonzaga University School of Law in May 2003. Since August 2003, Mary has been the cultural and natural resources staff attorney with the Lummi Indian Business Council in Bellingham. Mary worked as an intern for the Lummi Nation in their Public Defender's Office while in college and also did an internship with their Office of the Reservation Attorney in the summer of 2001.

## Amy Dempsey

Amy graduated with a B.A. from Gettysburg College in 1996, spent a semester studying public law at American University in Washington, D.C., and earned her J.D. from the University of Vermont School of Law in May 2001. Since 2004, Amy has served as a trial attorney for the Associated Counsel for the Accused in Seattle, providing legal representation to indigent clients. Amy has worked as an attorney for the Pacific Legal Foundation on appellate environmental cases. Before moving to Washington, she served as a staff attorney at the Fulton County Public Defender's Office in Atlanta, Georgia. While in law school, she externed for the

Supreme Court of Georgia. Amy is admitted to practice law in both Georgia and Washington.

## Soren Rottman

Soren graduated with honors with a B.A. in international and Latin American studies from Yale University and earned his J.D. from the University of Washington School of Law in June 2001. Soren works

for the Eastern Washington Office of the Northwest Immigrant Rights Project, providing legal representation to low-income immigrants in Granger. He joined NWIRP as a staff attorney in June 2002 and became the directing attorney there in August 2005. Soren has worked as an extern for the U.S. Court of Appeals and for the Ninth Circuit, and as a paralegal for the Border Association for Refugees from Central America. He holds a second job as an ESL instructor for Yakima Valley Community College.

Congratulations to the LRAP's first five recipients, and thanks especially to the three WSBA sections (Administrative Law, Family Law, and Labor and Employment Law) who made donations to help ensure this Program became a reality! In addition to the sections' contributions, an affiliation relationship with Sallie Mae (which will offer loan-consolidation services to WSBA members) provided the funding to get the Program off the ground this year.

Dependent on funding, the WSBF hopes to add five additional participants next year and will begin accepting applications for the 2006 cycle August 1, 2006. For more information, please check the WSBA website at [www.wsba.org/lawyers/lrap.htm](http://www.wsba.org/lawyers/lrap.htm) or contact Paula Littlewood, WSBA deputy director, at [paulal@wsba.org](mailto:paulal@wsba.org) or 206-239-2120. 





# Do the Crime, Do the Time. But Lose Your License?

BY SACHIA STONEFELD POWELL

What kind of criminal conduct by a lawyer results in discipline? Can a lawyer be disciplined for crimes committed in his/her private life? And what happens if there is no criminal conviction? The Office of Disciplinary Counsel routinely addresses criminal conduct by lawyers, ranging from driving under the influence (DUI) to money laundering. Lawyers can be confused as to how criminal conduct may intersect with discipline. This article will give a brief overview of some of the factors that may determine the effect of criminal conduct on a license to practice law.

### Criminal Conduct May Violate the Rules of Professional Conduct

Rule 8.4(b) of the Rules of Professional Conduct (RPC) prohibits criminal acts that reflect adversely on the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." Lawyers violate this rule most commonly by committing crimes of veracity (e.g., theft or forgery) and crimes prejudicing the justice system (e.g., perjury or witness tampering). However, lawyers have violated RPC 8.4(b) by pushing a cli-

ent or by engaging in disorderly conduct, among other things.<sup>1</sup>

Other types of criminal conduct may be prohibited by RPC 8.4(i).<sup>2</sup> This rule prohibits the commission of any act involving moral turpitude, or corruption, or any unjustified act of assault or other act that reflects disregard for the rule of law. The Washington State Supreme Court has made it clear that whether an act involves "moral turpitude" must be determined by the individual facts of each case. (*In re Disciplinary Proceeding Against McGrath*, 98 Wn.2d 337, 655 P.2d 232 (1982).) However, the Court has provided guidance, indicating that it will look at the inherent nature of the act committed by the lawyer to answer the following question: "[D]o the acts found against the [lawyer], and for which he was convicted . . . , violate the commonly accepted standard of good morals, honesty, and justice?" (*In re Disciplinary Proceeding Against Heard*, 136 Wn.2d 405, 418, 963 P.2d 818 (1998) (quoting *In re Disciplinary Proceeding Against Hopkins*, 54 Wn. 569, 572, 103 P. 805 (1909).)

The Court has also provided guidance to interpret RPC 8.4(i)'s prohibition on conduct "which reflects disregard for the rule of law." (*In re Disciplinary Proceeding Against Curran*, 115 Wn.2d 747, 801 P.2d 962 (1990).) In *Curran*, the Court held that whether criminal conduct violates this provision turns on the consideration of two factors: 1) the frequency of the viola-

tion, and 2) the seriousness of the injury caused. Curran was convicted of vehicular homicide. Although he had no history of driving offenses, his actions resulted in the deaths of two of his three clients/passengers. Consequently, Curran's conviction warranted a six-month suspension<sup>3</sup> because his willingness to risk causing death or serious injury by driving a vehicle after consuming at least three drinks reflected disregard for the rule of law. (115 Wn.2d at 763.)

For purposes of discipline, it is not necessary that the crime be a felony, or even that there be a conviction.<sup>4</sup> Additionally, assisting another in criminal activity may result in discipline, as may an attempt to commit a crime. (RPC 8.4(a) & (f).)

### Even "Private" Conduct May Impact Your Law License

A crime committed outside the course of one's conduct as a lawyer may result in discipline. (See, RPC 8.4(i).) Lawyers have been disciplined for criminal conduct unrelated to the practice of law. This conduct has included driving offenses such as attempting to elude a pursuing police officer or driving under the influence, drug offenses such as growing marijuana plants or presenting a false prescription, misrepresentations including false statements in a personal bankruptcy or tax evasion, bigamy, possession of child pornography, sexual assaults, using a

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deadly weapon to threaten someone, and shoplifting. Consequently, lawyers should not assume that the commission of crimes in their "private" lives, even if completely unrelated to their law practice, will be exempt from discipline.

### **The Severity of the Sanction Depends on the Nature of the Crime**

Conviction of a felony does not automatically result in disbarment. Instead, disbarment is the presumptive sanction<sup>5</sup> for conduct involving: "[I]ntentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or [...] any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."<sup>6</sup> Consequently, lawyers have been disbarred for conduct such as forging the name of a deceased person and then notarizing the signature, giving false testimony, theft of client funds, and various acts of fraud.

### **Interim Suspension for Commission of a Crime**

Conviction of a felony may not necessarily result in disbarment, but a felony

conviction will result in immediate interim suspension from the practice of law during the pendency of the disciplinary proceeding. (Rule 7.1 of the Rules for Enforcement of Lawyer Conduct (ELC).) Conviction of any other "serious crime"<sup>7</sup> may also result in an interim suspension. (ELC 7.1(e).)

Like most allegations of ethical misconduct, the analysis of allegations of criminal conduct is very fact-specific. This makes it difficult to predict what the impact of any given conduct will be on a law license. Of course, the easiest way to avoid discipline based on criminal conduct is to avoid the criminal conduct in the first place. ☞

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*Sachia Stonefeld Powell has been a disciplinary counsel at the WSBA since 1997. She obtained her J.D. in 1991 from Washington University in St. Louis, and worked as a deputy prosecuting attorney prior to joining the WSBA. Opinions expressed herein are the author's and are not official or unofficial WSBA positions.*

#### NOTES

1. The examples of criminal conduct contained in this article are based on public discipline. Information regarding the specific criminal conduct and resulting discipline can be found by searching the Disciplinary Notices on the WSBA web-

site at <http://pro.wsba.org> and selecting "Discipline Notices," or by contacting the Office of Disciplinary Counsel.

2. Depending on the specific conduct, several other of the RPCs may also be implicated. See, e.g., RPC 8.1 (prohibiting a false statement of material fact, or failure to disclose necessary information, on bar application), RPC 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), RPC 8.4(d) (prohibiting conduct prejudicial to the administration of justice), and RPC 8.4(n) (prohibiting conduct demonstrating unfitness to practice law).
3. The Court found that the presumptive sanction was a two-year suspension, but mitigated the length of suspension to six months in light of the 18 months Curran had already spent on interim suspension.
4. RPC 8.4(i). If there is a conviction, Rule 10.14(c) of the Rules for Enforcement of Lawyer Conduct (ELC) provides that "the court record of the conviction is conclusive evidence at the disciplinary hearing of the respondent's guilt of the crime and violation of the statute on which the conviction was based." If there is no conviction, the Association must prove the conduct by a clear preponderance of the evidence, and not by evidence beyond a reasonable doubt. *In re Disciplinary Proceeding Against Huddleston*, 137 Wn.2d 560, 570, n.6, 974 P.2d 325 (1999).
5. The presumptive sanction may be altered by aggravating or mitigating factors. *In re Disciplinary Proceeding Against Dann*, 136 Wn.2d 67, 77, 960 P.2d 416 (1998).
6. American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) 5.11. The Court has approved the application of the ABA Standards to determine the appropriate sanction. *In re Disciplinary Proceeding Against Rentel*, 107 Wash.2d 276, 729 P.2d 615 (1986).
7. ELC 7.1(a)(2). A "serious crime" is any felony, or any other crime a necessary element of which is interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or any attempt, or a conspiracy, or solicitation of another, to commit a serious crime.

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# Lawyers' Fund for Client Protection

BY ROBERT WELDEN

The Lawyers' Fund for Client Protection Committee meets quarterly to review applications for gifts from the Fund. The Committee is authorized to make gifts of up to \$25,000 to eligible applicants. On applications for more than \$25,000, the Committee makes recommendations to the Board of Governors, who are the Fund's trustees. At their meeting on February 24, 2006, the Committee took the following actions:

**Armando Cobos** (WSBA No. 27006 — disbarred): The applicant paid Cobos \$1,500 to file a petition for alien relative (I-130) and for adjustment to status (I-485); and \$1,500 to file for cancellation of removal. Cobos never filed the petition for cancellation of removal and did not refund the fee. The Committee approved payment of \$1,500 to the applicant.

**J. Rodney DeGeorge** (WSBA No. 22931 — disbarred): DeGeorge stipulated to disbarment based on a number of matters, including his conduct related to these applications. He stipulated to restitution and to repay the Lawyers' Fund for Client Protection.

**Applicant A:** The applicant paid DeGeorge \$1,000 to represent her fiancé who had been convicted on criminal charges. DeGeorge agreed to try to get the charge and sentence reduced; or get the client out on work release; or seek credit for time served prior to sentencing. DeGeorge gave the applicant a copy of a Notice of Appearance, but he never filed it and he did not prepare or file any motion or other documents. During a deposition conducted by the Office of Disciplinary Counsel, he produced a document purporting to be a letter to the client regarding his legal options. DeGeorge stipulated that he prepared that document for the purpose of the deposition. He stipulated to pay \$1,000 restitution to the applicant, and the Committee approved payment in that amount.

**Applicant B:** The applicant paid DeGeorge \$22,000 to represent her son on criminal charges. For over a year, DeGeorge misrepresented to the applicant that he had hired an investigator to work on her son's case. DeGeorge stipulated

that he never hired an investigator in this case. When he received discovery documents, he gave copies to the applicant in violation of criminal rules. The prosecutor learned of this and brought a motion seeking sanctions against DeGeorge. At a hearing on the motion, DeGeorge falsely represented to the court that he had hired the applicant to do paralegal work, and falsely represented that he had a written employment contract with her. DeGeorge stipulated to pay \$22,000 restitution, and the Committee approved payment in that amount.

**Applicant C:** The applicant paid DeGeorge \$1,000 to represent her son on criminal charges. DeGeorge agreed to file a motion for a new trial. He gave the applicant a copy of a Notice of Appearance and a Motion for New Trial, and told her he had filed them. In fact, he had not. He took no further action on the case, and did not refund the fee. He stipulated to pay restitution of \$1,000 to the applicant, and the Committee approved payment in that amount.

**Terry O. Forbes** (WSBA No. 5626 — disbarred): For background information regarding Forbes, see January 2006 *Bar News*, p. 34.) The applicant hired Forbes to probate the estate of her grandmother. There were 25 beneficiaries named in the will. Forbes prepared an accounting showing the amounts due to each. He failed to pay 13 beneficiaries. From the proceeds of the estate, \$19,862.60 remains unaccounted for. The Committee approved payment of that amount.

**Bruce E. Hawkins** (WSBA No. 25414 — disbarred): Hawkins stipulated to disbarment based, in part, on his conduct in representing the applicants. Hawkins associated with several nonlawyers who maintained websites that promoted a program to reduce or eliminate consumer credit-card debt through private arbitrations based on the premise that national banks could not lawfully issue credit cards. Debtors throughout the United States made "applications" to the "program" through the websites. They paid fees and were referred to a private arbitration service organized to facilitate the "program." Hawkins stipulated that he knew that since

1996 the Department of the Treasury, Office of the Comptroller of the Currency had decided it is well established that national banks can issue credit cards. He stipulated that of the approximately 100 clients he represented, he knew of none who achieved the promised zero credit-card balance. He stipulated that debtors following his program achieved the goal of having accounts closed with a "paid as agreed" notation in about five percent of his cases, and that he would consider such cases "a mistake on the part of the bank." He also stipulated that many attorneys called him to "make huge accusations of fraud and illegality."

The applicants found one of the websites and paid \$200 to "apply." They were referred to Hawkins. They paid him a fee of \$5,722. Hawkins sent the applicants documents for the arbitrations, and he referred them to an arbitration service without disclosing that he had a financial interest in it. The applicants paid the arbitration service \$139 for each arbitration and received five "arbitration awards." Hawkins then advised them to hire another lawyer to "confirm the awards." They did so, but when they filed the "awards," two of the banks filed oppositions and won. In the other two, after the banks communicated with them, the applicants stipulated to dismissal. The Committee approved payment of \$6,417 to the applicants representing the \$5,722 in fees paid to Hawkins plus the five payments of \$139 paid to his arbitration service.

**William R. Joice** (WSBA No. 19944 — resigned in lieu of disbarment): Joice stipulated to a one-year suspension in connection with these applications. He was subsequently convicted by a jury of first-degree attempted murder in the shooting of another attorney. Following his conviction, he voluntarily resigned in lieu of disbarment.

**Applicant A:** The applicant paid Joice \$600 for representation on a domestic-violence charge. Prior to his arrest, the only service Joice performed was to get a continuance of a hearing date. In his Stipulation to Discipline, Joice agreed to pay \$600 restitution to the applicant and the Committee approved payment of that amount.

**Applicant B:** The applicant paid Joice \$2,500 for representation on a DUI and

related license-suspension proceeding. Prior to his arrest, the only service Joice performed was to get a continuance of a hearing date. In his Stipulation to Discipline, Joice agreed to pay \$2,500 restitution to the applicant, and the Committee approved payment of that amount.

**Donna J. Light** (WSBA No. 22465 — disbarred: For background information regarding Light, see January 2006 *Bar News*, p. 36).

**Applicant A:** The applicant paid Light \$1,000 for representation in a criminal case. Light told him she worked out of her home, but gave him no mailing address. When the applicant left messages on her phone, Light did not return his calls, and later her phone was disconnected. The applicant obtained a post-office-box address for her and he mailed her a letter discharging her and asking for a refund. It was returned because the post-office box was closed. He never heard from Light and received no refund. The hearing officer found that Light never intended to perform legal services for the applicant, and intended to obtain funds from him

by fraud or deception. The hearing officer ordered restitution of \$1,000, and the Committee approved payment of that amount.

**Applicant B:** The applicant prepared a *pro se* petition for dissolution and petition for temporary restraining order with the assistance of the courthouse facilitator. Light was in the room when they discussed looking for an attorney, and she offered to take the applicant's case. The applicant filed the petitions and then called Light. She paid fees totaling \$2,050 to Light. Light never filed a notice of appearance. The applicant prepared declarations from her family and friends, which she gave to Light, who filed them. A hearing was set. When the applicant and Light went to court, the court commissioner said that Light could no longer represent her because she was suspended and that the applicant would need to find another attorney. The Committee approved payment of \$2,050 to the applicant.

**Carlos Valero** (WSBA No. 29192 — disbarred): Valero represented the applicant

in a dissolution-of-marriage proceeding. Subsequently, he paid Valero \$2,400 for representation in child-support issues and to prepare a restraining order and a contempt motion against his wife. Valero took no action on these matters. The Committee approved payment of \$2,400 to the applicant.

**Fund Procedural Rule Amendments:**

The Committee voted to recommend to the Board of Governors that the Fund Procedural Rules be amended to state the current policy that, before an application will be considered, the applicant must also have filed a disciplinary grievance, unless the lawyer is disbarred or deceased, and also that if the lawyer's address of record is no longer current, notice of the application be sent to any other address on file with the WSBA.

**22nd ABA National Forum on Client Protection:**

The Committee agreed to send one lawyer and one nonlawyer member to the ABA National Forum on Client Protection to be held in Vancouver, British Columbia, June 2-3, 2006.

**Other Business:**

The Committee reviewed 10 additional applications that were denied for lack of evidence of dishonest conduct, or as fee disputes or claims for malpractice. Five applications were continued to seek further documentation.

**Restitution:**

Before payment is made to an applicant, the applicant must sign a subrogation agreement with the Fund, and the Fund seeks restitution from the lawyers. Because in most cases those lawyers have no assets, the chief avenue of restitution is through court-ordered restitution in criminal cases. Prosecuting attorneys cooperate with the fund in getting the Fund listed in restitution orders. As of February 2006, eight lawyers were making regular restitution payments to the Fund. ☺

*The committee chair is Tacoma attorney Sarah Richardson. WSBA General Counsel Robert Welden is staff liaison to the committee.*

*Roberson v. Perez*, \_\_\_ Wn.2d. \_\_\_, 123 P.3d 844 (2005); *Rufer v. Abbott Laboratories*, 151 Wn.2d 884, 93 P.3d 121 (2004); *Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 121 (2004); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 89 P.3d 265 (2004); *Kuntz v. Law Corp.*, 175 P.3d 1177 (9th Cir. 2004); *Casper v. Estab. Enterprises, Inc.*, 119 Wn. App. 759, 82 P.3d 1233 (2004); *Kirkpatrick v. Cheff*, 118 Wn. App. 772, 76 P.3d 1211 (2003); *Disciplinary Proceedings Against Michels*, 150 Wn.2d 159, 75 P.3d 950 (2003); *Chumbley v. Beckmann*, 147 Wn.2d 919, 74 P.3d 129 (2003), *modifying* 110 Wn. App. 871, 43 P.3d 53 (2002); *Dewberry v. George*, 115 Wn. App. 351, 62 P.3d 525 (2003); *Edwards, Sieh, Smith & Goodfriend, P.S.*, 114 Wn. App. 823, 61 P.3d 1196 (2003); *Yuille v. State Dept. of Social & Health Services*, 111 Wn. App. 777, rev. denied, 60 P.3d 1111 (2003); *Our appellate team:* *Yalowitz v. Yalowitz*, 145 Wn.2d 79, 31 P.3d 665 (2001); *Nielsen v. Poole*, 111 Wn. App. 662, 41 P.3d 1111 (2001); *Waas v. Family Farms*, 106 Wn. App. 111, 111 P.3d 1111 (2000); *Yann, 103 Wn. App. 771, 75 P.3d 1111 (2000); Broad v. Mannesmann, Aurlengau, AG*, 141 Wn.2d 670, 70 P.3d 371 (2000); *Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), *aff'd Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Backlund v. University of Washington*, 157 Wn.2d 631, 973 P.2d 950 (1999); *DGHI v. Enterprises v. Pacific, Inc.*, 157 Wn.2d 933, 977 P.2d 1231 (1999); *Neel v. Luther Child Center*, 98 Wn. App. 390, 989 P.2d

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## In Memoriam

**Armonica Gilford**, 54, died October 4, 2005. After taking degrees at Pepperdine and the University of Denver School of Law, she passed the bar exams of four states, including Washington. She worked for the Oregon Attorney General's Office for a decade before standing up at a Portland jam session and singing a few tunes she knew. At 44 she took up her childhood dream to be a blues singer and devoted the rest of her life to performance. Gilford also took up skiing with the same focus, declaring she would be a ski instructor. She achieved that, too. Survivors include her husband, Allen Litwiller, of Portland, Oregon.

**Randall R. Walker**, 56, died January 8, 2006. A longtime resident of the Yelm-Lacey-Tacoma area, he was Yelm city prosecutor for some time and also served as *pro tem* judge in Roy. A proud Scot, he took an interest in Scottish heritage and took up the bagpipes. Survivors include his wife, three children, mother, and sister.

**Roger Wesley Jones Jr.**, 61, died December 27, 2005, in Seattle. A Seattle native and great-grandson of Senator Wesley L. Jones, who served in Congress between 1899 and 1933. Jones graduated from Princeton and UW Law School. His law practice focused on real estate and estate planning. Survivors include his wife, three children, and father.

**Richard Hemstad**, 72, died December 12, 2005, in Olympia. He graduated from St. Olaf College and the University of Chicago Law School, and moved to Washington in 1957. After a decade in private practice, he moved to Olympia as counsel to the Republican legislative caucus. Hemstad also served as counsel to Governor Daniel Evans, and was the first director of the state Office of Community Development in 1973. He was elected to the state Senate in 1980 and served one term. He later taught at UPS Law School. Governor Mike Lowry appointed Hemstad to the state Utilities and Transportation Commission in 1993; Governor Gary Locke reappointed him in 1998. He retired in February

2005. Survivors include his wife, four children, and two grandchildren.

**Richard Levidow**, 74, died December 9, 2005, in Seattle. Having made a successful career in corporate law in Manhattan, Levidow found himself burning out and retired to a farm in Pennsylvania at 59. After his first wife died, he took up an invitation to join his son, who was about to drive to Seattle to pursue a UW graduate degree. Levidow found he liked Seattle, joined the public defender's office, and spent over a decade in a happy second career in criminal defense. A second marriage followed, his interest in religion led him to convert to Catholicism, and he thrived on tennis and rose gardening. Family members said he never, ever got used to the Seattle habit of wishing people "have a nice day." "Rather sickening," his wife told an interviewer. "He didn't care for it at all." Survivors include his wife and one son.

**John Gray Carroll**, 81, died December 27, 2005, in Richland. A World War II Marine aviator, he entered UW Law School after the war and graduated in 1951. The day he was sworn in, he received notice his reserve unit had been activated, and he flew in Korea for two more years. Carroll practiced in Seattle with the late John Ehrlichman

and moved his practice to the Tri-Cities when Ehrlichman joined President Nixon's staff in 1971. In 1976 he became a juvenile court commissioner for Benton and Franklin counties, retiring in 2004. He was active in the creation of the counties' adult and juvenile drug courts. Survivors include his wife, four children, nine grandchildren, and several great-grandchildren.

**Eugene G. Schuster**, 76, died January 13, 2006. A Pasco native, he spent his life in the Tri-Cities and was devoted to the Benton-Franklin Legal Aid Society's work. Schuster served in the Army between 1965 and 1967, reaching the rank of captain. His wife, six children and stepchildren, seven grandchildren, mother, and sister survive him.

**Stanley Krause**, 95, former Grays Harbor County prosecutor, died January 3, 2006, in Montesano. A Spokane native, he grew up in Seattle and earned his law degree from the UW in 1934. Two years later he moved to Montesano, then to Aberdeen. He served as prosecuting attorney between 1938 and 1942, resigning to serve in Army counterintelligence during World War II. He was re-elected in 1946. He retired from private practice in 1996. Survivors include three children, seven grandchildren, and four great-grandchildren.

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**Thomas D. Kelley**, one of the three Kelley boys who became Washington lawyers, died January 19, 2006, in Seattle. He was 97. Born in New York City, he moved to Spokane with his family in 1911, when his father's childless uncle asked them to help him run a Palouse spread he homesteaded in 1872. Kelley attended Cornell and UW Law School before graduating from Gonzaga Law School in 1938. He practiced in Los Angeles and Seattle for an insurance

company before starting a private practice in the 1940s. Kelley retired in 1992, and a year later set up shop on Bainbridge Island. He was proud of the family tradition of lawyering, and contributed reminiscences to *Bar News* on his late brothers, William V. and John F. Kelley, of Spokane. Survivors include four children, six grandchildren, and seven great-grandchildren.

**Kathleen M. Taft**, 98, died December

23, 2005, in Spokane. One of the state's longest-lived lawyers, she joined the Bar in 1936 after graduating from the UW Law School. In 1950, she became Spokane County's first family court commissioner, a post she held for 27 years. Taft was mentor to countless judges and lawyers, and her distinguished work in family law was widely and frequently honored. Taft's husband, one-time Spokane mayor and state legislator Willard Taft, died in 1971. Survivors include a number of nieces, nephews, grandnieces and grandnephews, and eight great-grandnieces and nephews. Always looking ahead, Taft worked until a week before suffering a stroke, and only a fortnight before a planned trip to Antarctica — the only continent she hadn't yet visited.

**Walter Thomas "Walt" Greenaway**, 73, attended Pennsylvania State University prior to joining the United States Army in 1953, where he was stationed in West Germany for several years during The Cold War. Upon returning to civilian life, Greenaway graduated from Colorado State University in 1959 and in 1965 obtained his law degree from the UW School of Law. He was a King County deputy prosecuting attorney and later spent three years as an administrator for the federally funded Alcohol Safety Action Project in King County. In 1975, he helped create the Clallam-Jefferson Public Defender office in Port Angeles and served as both its administrator as well as its chief criminal defense lawyer. Beginning in 1979, Greenaway served as a Clallam County Superior Court and District Court judge *pro tem* and court commissioner, including presiding for more than two years as the county's juvenile court judge. He was respected for the wisdom of his decisions and the fairness evident in how he conducted his courtroom. In 1985, Greenaway became a founding partner in the present-day Greenaway, Gay & Tulloch law firm. He was involved as a coach for Little League baseball and soccer teams, served as president and board member of the Clallam County Community Alcohol Center, was the

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legal advisor for Koinenia Ministries, and served as a member of a Clallam County Planning Department advisory group. In the spring of 1992, Greenaway officially retired for the last time and was honored with a gala retirement party attended by well over 200 friends, colleagues, and family members who came from far and wide to join in "Walt Greenaway Night — A Celebration of the Gentleman Lawyer." Greenaway is survived by his wife, Winnie; children Rob, Jeff, Ken, and Denise; and six grandchildren. Born in Johnstown, Pennsylvania, on February 2, 1932, Greenaway died June 25, 2005.

**Wayne R. Parker Jr.**

*As remembered by his son Brian Parker*  
Wayne Parker graduated from the UW School of Law in 1952. In 1954, Wayne and Myron L. "Mike" Borawick, another young attorney, opened a law practice in a one-story, ramshackle building on Pacific Highway South near the Spanish Castle, a well-known ballroom of that time. In those days attorneys were prohibited from advertising, so the enterprising young lawyers had Wayne run for the U.S. Congress and later for insurance commissioner, which allowed them to get their office's name before the public through political campaigning. The plan was a success, and the young lawyers were soon engaged in a busy practice.

In the early 1960s, Parker & Borawick moved across the street into the Puget Sound National Bank Building, where Wayne stayed until 1989. During this time, in addition to his private practice, Wayne also served as attorney for the city of Tukwila from 1972 to 1975, and was a charter member of the South King County Bar Association. While at the bank there were also several bank robberies, one in which the armed robber exited through Wayne's office.

Mike Borawick died in 1973 and Wayne continued on alone until I joined him in 1982. In 1989, Wayne and I moved the office a mile south on Pacific Highway where Wayne continued to work until December 30, 2005, the day before he suffered a stroke.

Born January 16, 1925, in Tacoma, Wayne grew up in Puyallup, graduating from Puyallup High School in 1943. During World War II, Wayne served with the 503rd Parachute Regimental Combat Team in the Philippines. While growing up, Wayne took up boxing and boxed in the Army and as a prize fighter in the Portland and Seattle/Tacoma area both before the war and for several years after. He had many friends from his days in the ring he had stayed in touch with,

including former middle-weight champion Al Hostak, who would frequently drop by the office and reminisce about his fights with Freddie Steele, Harry Matthews, and Tony Zale.

Wayne truly loved practicing law. He always maintained that he had wanted to be a lawyer ever since a young boy and rarely spoke of retirement. Wayne R. Parker Jr. died February 12, 2006, from complications following a stroke. He was 81.

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## WSBA Leadership Institute Seeks Fellows for 2007

The Washington State Bar Association seeks applicants for the 2007 WSBA Leadership Institute. The Leadership Institute recognizes that many lawyers, especially those from diverse backgrounds and other under-represented groups, have not been traditionally recruited for leadership positions or made aware of opportunities for leadership training, skill development, and professional growth available through the WSBA. Ten to 12 attorneys, in practice for three to 10 years, will be carefully selected for the third year of the program. The 2007 program will take place January to August 2007.

The program is a collaborative, experiential, and individualized curriculum that includes eight professional-development seminars. WSBA Leadership Institute fellows will benefit from the latest trends in professional leadership development; exposure to the legislative and judicial systems; interaction with high-level state and local officials and judges; and opportunities to meet high-profile attorneys from the private and public



sectors. The program requires a two-year commitment. Following the completion of the first year, fellows are expected to serve on a WSBA section, committee, or bar-related activity. Fellows will earn 30 CLE credits, and the program is free of charge.

To be considered for the program, applicants must: (1) complete an application with cover letter, résumé, and three references; (2) be an active WSBA member; (3) have practiced law in a U.S. jurisdiction for three to 10 years; (4) be nominated by his/her employer, or if self-employed, by another individual; and (5) provide evidence of interest in community and WSBA activities. Applications for the 2007 WSBA Leadership Institute will be available by mid-summer 2006 for submission in early fall. Application forms and instructions will be available on the WSBA website at [www.wsba.org/lawyers/leadership\\_institute.htm](http://www.wsba.org/lawyers/leadership_institute.htm).

### Tip From the WSBA Professionalism Committee — The “Evidloers”

“Evidloers” is a word floating around the media lately. The word refers to terrorists, and as we all know, we don’t negotiate with them. As lawyers, however, we are expected to negotiate with the opposing

side. Simply put, to approach opposing counsel or the opposing party as the “evildoer” fails to get the job done.

To determine whether you are guilty of this mindset, ask yourself a few simple questions: Do you find yourself stepping into your client’s shoes and taking on his or her feelings of animosity for the opposing party? Have you examined the manner in which you speak or write about the opposing party? Do you use derogatory adjectives to describe the opposing party or attorney? Do you speak pejoratively about the opposing party or attorney during court hearings or depositions? Do you fail to treat the opposing party with the same respect you believe you and your client deserve? Consider the result this behavior produces. Are cases involving this behavior the most stressful? Do you have a poor relationship with the opposing attorney, which not only costs the client more time and money, but also hinders your ability to offer sound legal advice? Or, is it merely about “getting” the other side?

To avoid this behavior in the future, take a mental step back and remember that this is your client’s case, not yours. Your job is to help the client solve the problem, and to do that you need to think clearly and without emotion.

### Food Frenzy! July 14-31

Want to compete with fellow lawyers to make a difference for hungry children? This summer is your chance. Food Lifeline seeks serious (but fun-loving) competitors for the 17th annual Food Frenzy to be held July 14-31. Each year, nearly 60 legal and accounting organizations plan creative office-wide fundraisers for a very important cause: getting food to hungry children during the summer when school meals aren’t available. To sign up your firm, call George Cowan at Vandenberg Johnson & Gandara at 206-386-5903.

### UW Law School Announces First Recipients of Gates Scholarship

The University of Washington School of Law named its first five recipients of the William H. Gates Public Service Law (PSL) Scholarship for 2006-2007: Emily Alvarado, Vanessa Torres



## Mediation ■ Arbitration

Andrew Biggs is pleased to formally announce his availability for mediation and arbitration in King, Pierce and Snohomish Counties.

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Hernandez, Illana Mantell, Colleen Melody, and Michael Peters. The Gates PSL Scholarship covers the cost of tuition, books, room and board, and incidental expenses during law school, giving the scholars the opportunity to attend the UW School of Law and then pursue public-interest law without the crushing burden of educational debt. In exchange, students make a commitment to work for five years in public service. The financial assistance provided by the scholarship allows these students to move directly into jobs doing what they love — providing public service to those in need.

**New Media Guide to Washington State Courts**

The Board for Judicial Administration's Public Trust and Confidence Committee, chaired by Justice Mary Fairhurst, recently published a 76-page comprehensive *Media Guide to Washington State Courts*, an excellent new resource to help reporters and the public better understand Washington courts and the justice system. The guide has been sent to news organizations around the state, and is available on the Washington Courts website at [www.courts.wa.gov/newsinfo](http://www.courts.wa.gov/newsinfo) and the WSBA website at [www.wsba.org/media](http://www.wsba.org/media).

**Got Warrants? DCS Amnesty Week in King County Is June 5-9**

Studies have shown that divorced or separated parents who financially support their children develop a deeper relationship with them. Once a year, the Family Support Division of the King County Prosecutor's Office, the King County Sheriff's Office, and the Washington Division of Child Support (DCS) work together to contact parents who have had bench warrants issued for failing to pay child support. These agencies help parents become compliant with their support obligations and quash warrants for their arrest.

King County's amnesty period this year will run from June 5 through June 9, 2006. During the afternoon of June 9, King County Family Court in Seattle will offer a one-stop warrant quash calendar.

Parents who have active King County warrants for failure to pay child support may appear on a walk-in basis and have a once-a-year opportunity to pay a reduced amount to cancel their warrant. Public defenders will be available at the calendar to assist individuals with their cases. The King County Amnesty phone line is 206-296-8955. DCS offers a comprehensive website related to child-support services with information provided in a variety of languages at [www1.dshs.wa.gov/dcs/index.shtml](http://www1.dshs.wa.gov/dcs/index.shtml).

**WSBA-CLE Member Appreciation Online Only Sale — July 17-28**

Shop the WSBA-CLE online store for half-price recorded seminars and course-books (selected titles only). Stock up on A/V credits for your MCLE reporting. Choose from dozens of titles in a variety of practice areas. The sale begins at 8 a.m. on July 17 and runs through 5 p.m. on July 28. Visit the online store at [www.wsba.org](http://www.wsba.org).

**Supreme Court Amends In-House CLE Rule**

The Washington Supreme Court has amended Admission to Practice Rule (APR) 11, Regulation 104(e) regarding in-house CLEs, and the changes may impact your office and the lawyers in it.

*Background*

In 2003, 25 large law firms joined together to request that private firms be permitted to sponsor accredited in-house CLEs exclusively for their own lawyers. The firms also requested clarification of the advertising requirements for in-house CLEs. The amendments to Regulation 104(e) are the result of those requests and the work of the MCLE Board, the WSBA Board of Governors, and the Supreme Court, with input from affected firms and offices.

*Who is affected*

The amendments to Regulation 104(e) apply to private law firms, corporate legal departments, and government agencies (herein jointly referred to as private legal sponsors) and the lawyers who attend CLEs sponsored by them, as well as outside CLE providers who contract with private legal sponsors. The amendments will affect determination of MCLE accreditation beginning June 1, 2006, and will affect determination of lawyers' earned MCLE credits beginning with those members due to report for the 2005-2007 reporting period.

*Highlights*

- In-house CLEs sponsored by private legal sponsors are eligible for accreditation whether open or closed

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to non-members of the sponsoring office, provided that notice of the CLE is posted on the WSBA MCLE website at <http://pro.wsba.org>. If a government agency is the sponsor of a closed CLE, it must provide a copy of the written materials to anyone who requests it.

- Private legal sponsor CLEs cannot focus directly or indirectly on a case, action, or matter pending before the private legal sponsor.
- The private legal sponsor is the sponsor of the CLE, even if it has contracted with an outside CLE provider to present the CLE.
- Private legal sponsors must file Form 1 applications with detailed agendas for all CLEs. These must be postmarked or submitted online to the MCLE website at least 30 days prior to the starting date of the CLE.

These Form 1 applications will be posted on the MCLE website prior to each CLE, which will be sufficient advertising for programs open to outside attorneys. Lawyers will not receive credit for private legal sponsor CLEs unless the private legal sponsor files the Form 1. Form 1 filings by individual lawyers will not be awarded credits if the private legal sponsor has not filed a Form 1 for the program.

- Members are limited to a total of 15 credits of private law firm CLEs and 15 credits of corporate legal department CLEs in each reporting period, regardless of who the private legal sponsor was. There are no limits on the number of credits a member may earn at CLEs sponsored by government agencies. These limitations will be applied to individual credit calculations beginning with the 2005-2007 reporting period.
- Private legal sponsors must report attendance and submit an evaluation or critique form to the WSBA within 30 days of the CLE ending date.
- Applicable late fees for late filing of Form 1 applications or attendance records will be charged to private legal sponsors as well as other sponsors.

A revised paper Form 1 application incorporating the above changes will be available on the WSBA website on or before June 1, 2006, for sponsors who prefer to submit paper Form 1 applications. However, there is a shorter turn-around time for applications submitted online through the MCLE website, and reporting attendance is only \$1 per name for online submissions. (Reporting attendance is \$3 per name if submitting a paper Form 1 application.)

You can find the amended regulations

on the WSBA website at [www.wsba.org](http://www.wsba.org) by clicking on the "APRs" link in the Site Index, then clicking on "Regulations of the Washington State Board of Continuing Legal Education" link, or visit the Washington Courts website at [www.courts.wa.gov/court\\_rules/Word/gaapprregs.doc](http://www.courts.wa.gov/court_rules/Word/gaapprregs.doc). If you have questions, contact the WSBA Service Center at 800-945-WSBA (9722) or 206-443-WSBA, or e-mail [questions@wsba.org](mailto:questions@wsba.org).

## Mandatory New-Lawyer Orientation

On October 12, 2005, the Washington State Supreme Court adopted amendments to Admission to Practice Rule 5 and 18, mandating that, prior to admission, Bar applicants must complete a minimum of four hours of approved preadmission education. The new rule becomes effective June 1, 2006, and requires that the preadmission course be free to the applicant.

J. Richard "Dick" Manning, who served as WSBA president from 2002-2003, made new-lawyer training a primary initiative of his term of office, and it is through his efforts that these amendments were approved. In an interview with *Bar News*, Mr. Manning noted: "Professional development involves a lot of things. We're the only country in the western world that doesn't give new lawyers or law students some sort of apprenticeship. As many hiring partners will tell you, lawyers come out of law school equipped with smarts, but they're ill prepared in most instances to do what lawyers are expected to do once they're admitted to practice. What they lack, I believe, are the skills of knowing how to communicate with clients, how to organize a practice, how to manage an office . . . and orient to the aspects of law practice that create a lot of stress for people. I think a lot of that stress also leads to what some judges complain about, and that is a lack of civility. All of this points to the need to address professionalism in many different ways."

In preparation for the June 1 implementation date, WSBA-CLE is developing the four-hour mandatory orientation program, working with local bar associations, the Washington Young Lawyers Di-



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### Alan D. Minsk

has joined the firm as Special Counsel  
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vision, and other interested groups. The goal is for WSBA-CLE to provide support and assistance to ensure that applicants in locations where the local bar already provides an orientation program receive standardized information and materials. Where there is not already a program in place, WSBA-CLE will work to support local bar associations and superior courts in staging an orientation program prior to the swearing-in ceremony. In collaborating with local jurisdictions, WSBA-CLE will work to ensure there is no negative fiscal burden to providing the new program.

For more information on the WSBA-CLE orientation program, contact Yvonne K. Chapman, CLE orientation program developer, at 206-727-8271 or yvonnec@wsba.org, or Mark Sideman, director of the WSBA-CLE Department, at 206-727-8220 or marks@wsba.org.

### Computer Clinic



The WSBA offers a hands-on computer clinic for members wanting to

learn more about what Microsoft Office programs — such as Outlook, PowerPoint, Excel, and Word, as well as Adobe Acrobat — can do for a lawyer. Are you a total beginner? No problem. The clinic teaches helpful tips you can use immediately. Computers are provided, and seating is limited to 15 members. There is no charge, and no CLE credits are offered. Clinics are held the second Monday of the month. The next clinic is June 5 from 10 a.m. to noon at the WSBA office. For more information, contact Pete Roberts at 206-727-8237 or peter@wsba.org.

### ABA President to Speak at Access to Justice and Bar Leaders Conferences

American Bar Association President Michael Greco will present the keynote speech at the June 10 luncheon of the 2006 Access to Justice and WSBA Bar Leaders joint conference in Yakima. The theme of Greco's presidency is "The

Renaissance of Idealism in the Legal Profession," which encourages lawyers to commit time to *pro bono* and community service. The conferences' joint plenary session, "Crafting a Vision for the Civil Right to Counsel in Washington State," which will take place immediately before the luncheon, relates to another of Greco's initiatives, the ABA Task Force on Access to Civil Justice. These events are only a portion of the two-day joint conference held annually in Washington state for members and supporters of the Alliance for Equal Justice, and the leaders of bar associations and WSBA sections and committees. Registration information for the Access to Justice Conference can be found at [www.wsba.org/atj](http://www.wsba.org/atj), and for the Bar Leaders Conference at [www.wsba.org/barleadershomepage.htm](http://www.wsba.org/barleadershomepage.htm). CLE credit is pending for both conferences.

### Contract Lawyers Meeting

LOMAP hosts a meeting of contract lawyers the first Tuesday of every month at the WSBA office. The next meeting is June 6 from noon to 1:30 p.m. Bring your lunch, coffee is provided, and network with other contract lawyers.

### WSBA Arbitration Program

The WSBA offers arbitration of lawyer-client fee disputes and mediation ser-

vices to help resolve disputes between lawyers, a lawyer and client, or a lawyer and other professionals. The programs are voluntary and confidential. For more information, visit the WSBA website at [www.wsba.org/lawyers/services/adr.htm](http://www.wsba.org/lawyers/services/adr.htm) or call 206-733-5923.

### New WSBA Online Store

WSBA-CLE is pleased to announce the debut of the new and improved WSBA online store, featuring an expanded product search and faster checkout guaranteed to make your online shopping experience smoother and more convenient. You can now search the tables of contents of all WSBA-CLE deskbooks and the last five years of WSBA-CLE seminar course materials to find the best publication to meet your needs. Visit the new online store at [www.wsba.org/store](http://www.wsba.org/store).



### LAP Solution of the Month: Worried?

A little worry can be a good thing — it motivates us to get things done. But too much anxiety can result in procrastination and

paralysis, and your work may suffer. If anxiety has become a problem, call the Lawyers' Assistance Program at 206-727-8269.

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## Assistance for Law Students

The WSBA Lawyers' Assistance Program (LAP) offers long- and short-term psychotherapy to third-year law students attending the University of Washington and Seattle University. Treatment is offered for depression, addiction, family and relationship issues, health issues, and other mental and emotional problems. The fee is based on a sliding scale ranging from no-cost to \$30 and is determined by a student's ability to pay. For more information about the LAP, call 206-727-8268 or visit [www.wsba.org/lawyers/services/lap.htm](http://www.wsba.org/lawyers/services/lap.htm).



## Speakers Available

The WSBA Lawyers' Assistance Program offers speakers for engagements at county, minority, or specialty bar associations, or other law-related organizations. Topics include stress management, life/work balance, and recognizing and handling problem-personality clients. For more information, contact Jennifer Favell, Ph.D., at 206-727-8267.

## Notice of Intent to Form Juvenile Law Section

Petitions are now being circulated to form a new WSBA Juvenile Law Section pursuant to Section IX of the WSBA Bylaws. There is no current section or other WSBA entity whose primary focus is juvenile law, which falls within the purposes of the WSBA as outlined in General Rule 12. Both the Washington Juvenile Justice Assessment Project Report and the WSBA Blue Ribbon Panel on Criminal Defense have recommended that a juvenile-oriented WSBA entity be established. A study group chaired by Justice Bobbe Bridge — and including Kim Ambrose, Liza Burke, Lisa Kelly, Anne Lee, Mary Li, Casey Trupin, Page Ulrey, and George Yeannakis — recommends the new section. After the required six-month waiting period, the Board of Governors will consider whether to form a Juvenile Law Section at their June 2006 meeting.

**Contemplated Jurisdiction.** The creation of a Juvenile Law Section is proposed to address concerns with juvenile law and policy, including dependency, offender, status offenses (Child in Need of Services, Youth at Risk and Truancy), and the civil legal needs of children and youth.

**Section Purpose.** The Juvenile Law Section will provide a forum for juvenile-law issues and improve the law and practice related to civil and criminal matters involving children and youth in Washington. The section will welcome

advocates from all disciplines and fields of law, including juvenile justice, child welfare, and those who represent youth in civil legal practice. For more information, contact Kim Ambrose at [kambrose@u.washington.edu](mailto:kambrose@u.washington.edu).

## LOMAP & Ethics Traveling Seminars

Plan to attend in Walla Walla on June 13, Richland on June 14, or Yakima on June 15. Registration is \$84, and each seminar has been approved for four CLE credits, including two ethics credits. For more information, contact Julie Salmon at 206-733-5914 or [juliesa@wsba.org](mailto:juliesa@wsba.org).

## Job Seekers Discussion Group

Looking for a job or making a transition? Join us at the Job Seekers Discussion Group the second Wednesday of each month from noon to 1:30 p.m. The group discusses where to look for jobs, how to use your network of contacts, strategies for résumés and cover letters, and how to keep yourself organized and motivated. Exchange information and ideas with other lawyers looking to make a change. Come as you are — no need to RSVP. For more information contact Rebecca Nerison, Ph.D. at 206-727-8269 or [rebeccan@wsba.org](mailto:rebeccan@wsba.org).

## Facing an Ethical Dilemma?

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

## Search WSBA Ethics Opinions Online

Lawyers can search both formal and informal WSBA ethics opinions at <http://pro.wsba.org/io/search.asp>. Opinions can be searched 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

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analysis in response to requests from WSBA members. For assistance, call the Ethics Line at 800-945-9722, ext. 8284, or 206-727-8284.

### Learn More About Case-Management Software

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

### Washington Attorneys Assisting Community Organizations (WAACO) Spokane Training Seminar

WAACO is a statewide organization that connects volunteer attorneys with nonprofit organizations in need of business-related *pro bono* legal services. Volunteer lawyers are needed. Those interested in volunteering are encouraged to attend a training seminar on Thursday, June 8, in Spokane jointly conducted by WAACO and the Spokane County Bar Volunteer Lawyers Program. For more information, e-mail [contact@waaco.org](mailto:contact@waaco.org) or call 866-288-9695.

### Upcoming Board of Governors Meetings

**June 9, Yakima • July 21-22, Port Angeles • September 14-15, Seattle**

With the exception of a one-hour executive session the morning of the first day, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Please contact Donna Sato at 206-727-8244 or [donnas@wsba.org](mailto:donnas@wsba.org). The complete Board of Governors meeting schedule is available on the WSBA website at [www.wsba.org/info/bog/schedule.htm](http://www.wsba.org/info/bog/schedule.htm).

### Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in May 2006 was 4.966 percent. Therefore, the maximum allowable usury rate for June is 12 percent. Information from January 1987 to date is on the WSBA website at [www.wsba.org/media/publications/barnews/usury.htm](http://www.wsba.org/media/publications/barnews/usury.htm).

### APPEALS

**Philip A. Talmadge,**  
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Washington State Supreme Court;  
fellow, American Academy of  
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**Emmelyn Hart-Biberfeld,**  
former law clerk,

Washington State Supreme Court;  
invited member, the Order of  
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**Anne E. Melley,**  
former law clerk,

Washington State Court of Appeals

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## INSURANCE BAD FAITH

*For when they insure it is sweet to them to take the money; but when disaster comes it is otherwise and each man draws his rump back and strives not to pay.*

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Florentine businessman, letter to his wife,  
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*These notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 3.5(d) of the Washington State Supreme Court Rules for Enforcement of Lawyer Conduct, and pursuant to the February 18, 1995, policy statement of the WSBA Board of Governors.*

*For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board at 206-733-5926, leaving the case name, and your name and address.*

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

### Disbarred

**J. Rodney DeGeorge** (WSBA No. 22931, admitted 1993), of Tacoma, was disbarred, effective January 30, 2006, by order of the Washington State Supreme Court following a stipulation approved by the Disciplinary Board. This discipline was based on his conduct in 11 matters.

Between 2001 and 2005, Mr. DeGeorge engaged in the following conduct that established grounds for discipline:

- Failing to file notices of appearance, motions for post-trial relief, a motion for a new trial, and a motion to withdraw a guilty plea (in some instances after having misrepresented to clients and others that such documents were already filed).
- Misrepresenting the outcome of a case to a client, and misrepresenting to several clients that he had taken certain action in their cases when those steps had not occurred.
- Collecting fees from clients and failing to perform any work on the cases or taking only minimal action.
- Retaining fees paid for work that was

- never performed.
- Failing to appear for trials and scheduled court hearings.
- Failing to communicate with clients and failing to respond to client requests for information.
- Failing to inform a judge that trial was set for the next day when obtaining an *ex parte* order sending his client for a competency evaluation.
- Making misrepresentations to a court about a client's eligibility for a Special Sex Offender Sentencing Alternative.
- Failing to respond to requests for information during the course of a disciplinary investigation, and failing to appear at depositions as required by subpoenas issued by disciplinary counsel.
- Making false statements and producing a backdated document in an effort to mislead Bar Association investigators.
- Failing to appear before the WSBA Board of Governors for the administration of a reprimand as required by ELC 13.4(a).

Mr. DeGeorge's conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; RPC 1.4, requiring a lawyer to keep a client reasonably informed about the status of a matter, to promptly comply with reasonable requests for information, and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; RPC 1.5(a), requiring a lawyer's fee to be reasonable; RPC 3.2, requiring a lawyer to make reasonable efforts to expedite litigation consistent with the interests of the client; RPC 3.3(a)(1), prohibiting a lawyer from making a false statement of material fact or law to a tribunal; RPC 3.3(f), requiring a lawyer in an *ex parte* proceeding to inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision; RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;

RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; and RPC 8.4(l), prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter.

Christine Gray represented the Bar Association. Mr. DeGeorge represented himself. Lawrence R. Mills was the hearing officer.

### Disbarred

**James L. White** (WSBA No. 14132, admitted 1984), of Seattle, was disbarred, effective February 3, 2006, by order of the Washington State Supreme Court following a stipulation approved by the Disciplinary Board. This discipline was based on his conduct in 2005 leading to his conviction of the crime of money laundering. *James L. White is to be distinguished from James A.D. White of Seattle and James J. White of Vashon.*

Mr. White was visited in his law office by a client who delivered to him a backpack containing approximately \$100,000 in cash, packaged in bundles and held together by rubber bands. The currency was to be used in connection with the representation of the client. Mr. White was aware that the currency constituted proceeds derived from a conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. Depositing the money into a bank account would have triggered the provisions of 31 U.S.C. § 5313, a federal currency reporting requirement that requires a bank to file a report for cash deposits in excess of \$10,000. In order to avoid the filing requirement, and to disguise the nature and source of the funds, Mr. White took the backpack containing the cash to his residence, where he kept it hidden. Thereafter, he expended the money in a variety of ways intended to further conceal and disguise the criminally derived nature and source of the funds, including delivering \$20,000 in cash to another lawyer as a fee for that lawyer's representation of a co-conspirator in the client's case. Mr. White did not maintain records of

receipt or expenditures of the funds.

In July 2005, Mr. White pleaded guilty in federal district court to one count of money laundering, a violation of 18 U.S.C. § 1956(a)(1)(b)(i) and (ii).

Mr. White's conduct violated RPC 8.4(b), prohibiting a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; 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 any unjustified act of assault or other act that reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes a felony or misdemeanor or not.

Christine Gray represented the Bar Association. David Allen represented Mr. White.

### Suspended

**Andrew Mankowski** (WSBA No. 22999, admitted 1993) of Phoenix, Arizona, was suspended for six months and a day, effective September 29, 2005, by order of the Washington State Supreme Court imposing reciprocal discipline in accordance with an order of the Supreme Court of Arizona. This discipline was based on his conduct between 2002 and 2004 in 10 client matters and his failure to cooperate with the State Bar of Arizona's disciplinary investigations.

Between January 2002 and March 2004, Mr. Mankowski engaged in the following conduct that established grounds for discipline:

- Failing to respond to clients' calls, failing to keep scheduled appointments with clients, and failing to keep clients informed about the status of their cases.
- Failing to provide a client with new contact information after leaving the law firm where he was employed.
- Failing to reasonably expedite liti-

gation and misplacing documents from a client file.

- Failing to reschedule a hearing upon request of a client, failing to inform the client of rescheduled hearing dates, and failing to attend scheduled hearings.
- Failing to submit a response to a court order requesting a written explanation as to why he did not appear at a scheduled hearing, and failing to respond to a court order and the State Bar of Arizona's request requiring a written response to a client's petition seeking to compel his withdrawal from the client's case.
- Failing to attend scheduled depositions and independent medical examinations.
- Failing to respond to written discovery requests, telephone calls from defense counsel, and multiple motions to compel discovery, and failure to comply with resulting discovery orders.
- Falsely informing clients that papers had been filed and served when they had not, failing to file paperwork, and failing to serve a protective order.
- Failing to file a divorce decree as ordered by the court and, once the decree was filed, failing to respond to the client's request to correct multiple errors in the decree.
- Failing to perform any work in a case.
- Refusing to withdraw from cases after clients had fired him.
- Failing to return client files and property upon request of the clients after termination of the representation.
- Failing to refund unused portions of fees or render accountings upon client request after termination of the representation.
- Failing to respond to letters and requests from the State Bar of Arizona during the screening of client grievances and during ensuing disciplinary investigations.

Mr. Mankowski's conduct violated ER 1.2 of the Arizona Rules of Professional Conduct, requiring a lawyer to abide by a client's decisions concerning the objectives of representation

and to consult with the client as to the means by which they are to be pursued; ER 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; ER 1.4, requiring a lawyer to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; ER 1.5, requiring that a lawyer's fee be reasonable; ER 1.16, requiring that a lawyer withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law, if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, or if the lawyer is discharged, and requiring a lawyer to protect a client's interest on termination of representation; ER 3.2, requiring a lawyer to make reasonable efforts to expedite litigation consistent with the interests of the client; ER 3.3(a)(1), prohibiting a lawyer from making a false statement of material fact or law to a tribunal; ER 3.4(c), prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; ER 4.1, prohibiting a lawyer from making a false statement of material fact or law to a third person; ER 4.4, prohibiting a lawyer in the representation of a client from using means that have no substantial purpose other than to embarrass, delay, or burden a third party; ER 8.4(b), prohibiting a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer; ER 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, deceit, fraud, or misrepresentation; 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; Rule 53(c) of the Rules of the Supreme Court of Arizona (Ariz. R. S. Ct.), prohibiting a lawyer from willful violation of any rule or any court order; Ariz. R. S. Ct. 53(d), prohibiting a lawyer from evading service or refusing to cooperate with officials and staff of the state bar acting in the course of such a person's duties; and Ariz. R. S. Ct.

53(f), prohibiting a lawyer from failing to furnish information to or respond promptly to any inquiry or request from bar counsel for information relevant to complaints.

Felice P. Congalton represented the Bar Association. Mr. Mankowski was not represented by counsel.

## Suspended

**Hamersley S. Wright** (WSBA No. 4989, admitted 1973), of Clinton, was suspended for three months, effective February 3, 2006, by order of the Washington State Supreme Court following a stipulation approved by the Disciplinary Board. This discipline was based on his conduct between 1996 and 2001 involving failure to diligently conclude a probate matter, failure to communicate with a client, and failure to cooperate with a disciplinary investigation.

In April 1996, Mr. Wright was hired to probate the estate of a Washington resident who had died intestate in 1994. The sole beneficiary of the estate was the decedent's mother. In September 1996, Mr. Wright filed a petition for administration and was appointed personal representative. Over the next nine months, Mr. Wright filed the appropriate pleadings, resolved two creditors' claims, and filed an inventory. In October 1996, the IRS sent the estate a deficiency notice for the tax year 1992, assessing the decedent \$7,939.41 in estimated taxes plus accrued interest and penalties. Although the estate had sufficient assets to pay the IRS assessment, Mr. Wright did not pay or resolve the tax deficiency. In August 1998, Mr. Wright asked an accountant to prepare the decedent's 1992 tax return. In October 1998, the IRS's automated collection system notified Mr. Wright that the amount due and owing for the decedent's 1992 income taxes was \$8,244.76, plus \$2,112.91 in interest and penalties. At that point, the estate had sufficient assets to pay the IRS deficiency, with interest and penalties. Mr. Wright filed the 1992 tax return and enclosed a trust account check for \$3,808, the accountant's estimate of taxes owed for 1992. In March 1999,

the IRS sent to Mr. Wright a notice that it had adjusted the estate's gross income, taxable income, and penalty charge, and that the estate owed an additional \$4,886.21 in taxes, interest, and penalties. The IRS requested payment by April 1, 1999. Mr. Wright did not pay the tax deficiency.

In August 2000, the estate beneficiary filed a grievance, in which she alleged that probate was still open, that certified mail she sent to Mr. Wright had been returned unclaimed, and that Mr. Wright would not return her phone calls. Mr. Wright did not respond to the Bar Association's request for a response to the grievance. After the Bar Association served Mr. Wright with a subpoena for a noncooperation deposition, he admitted to disciplinary counsel that the estate beneficiary had some legitimate complaints and that he had been lax in completing probate. Shortly after the deposition, Mr. Wright sent a letter to the court requesting that the probate proceedings be kept open for an additional 60 days. Mr. Wright also wrote to the beneficiary advising her about the IRS dispute and recommending that she authorize him to pay \$4,000 to the IRS so that he could close the estate. Mr. Wright did not subsequently pay the \$4,000 or close the estate. In March 2001, he advised the estate beneficiary that he was retiring from the practice of law. Mr. Wright hired another lawyer to conclude the probate while Mr. Wright remained the personal representative. Mr. Wright transferred the \$2,085 of estate funds remaining in his trust account to the new lawyer, intending that it be used to pay the tax deficiency. The balance of the estate's assets remains held in a brokerage account. Over the following several years, the new lawyer charged the estate at least \$2,085 in legal fees but did not resolve the tax issue or conclude probating the estate.

Mr. Wright's conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; RPC 1.4(a), requiring a lawyer to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; RPC 1.4(b), requiring a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; and ELC 5.3(e), requiring a lawyer to promptly respond to any inquiry or request made under the Rules for Enforcement of Lawyer Conduct for information relevant to grievances or matters under investigation.

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

### **Non-Disciplinary Notice**

#### **Suspended Pending Outcome of Disciplinary Proceedings**

**Jonny Ludington-Green, aka Jonny Lee Morales** (WSBA No. 18552, admitted 1989), of San Diego, California, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.1, effective April 5, 2006, by an order of the Washington State Supreme Court. This is not a disciplinary action.

## **LYBECK ❖ MURPHY LLP**

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### **Robert Earl Smith**

has joined the firm as of counsel.

Mr. Smith will continue to counsel behavioral healthcare providers on interpretation and implementation of privacy and security matters (including HIPAA). He will also continue to consult with attorneys and healthcare providers on disclosure of private healthcare information, as well as defense of governmental investigations of patient complaints. His practice also includes estate administration and planning.

Mr. Smith is a member of the Washington State Society of Healthcare Attorneys. He frequently presents at CLE seminars and CEU seminars for healthcare providers.

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## **GORDON & POLSCER, L.L.C.**

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### **William C. "Chris" Gibson**

is now a partner in its Seattle office.

Chris joined Gordon & Polscer's Seattle office in 2003. Chris received his B.A., *cum laude*, from Southeastern Louisiana University in 1987 and his J.D. from the Mississippi College School of Law in 1990. He is admitted to practice in California (currently inactive) and Washington state and federal courts. He will continue handling cases in the areas of construction defect and general insurance coverage, bad faith and insurance defense litigation. Chris is also a member of Northwest Insurance Claims Association.

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### **Renee M. Howard**

has joined the firm as an associate.

Ms. Howard comes to us from Washington, D.C., where she worked as an associate with Jones Day before moving to Seattle. Her practice emphasizes civil and criminal investigations and litigation of hospitals and other health care providers.

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**Glenn S. Draper**

and

**Brian F. Ladenburg**

*formerly with the law office of James Burns*

have joined our firm as Associates.

Brian and Glenn will focus their practice  
on representing asbestos victims in  
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June 9 — web seminar. By the Washington and Oregon Continuing Legal Education Forum, www.freecle.com or 509-627-3418.

### Business

#### Business Law Section Midyear

June 2 — Seattle. 6.5 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

### Construction Law

#### Construction Law Section Midyear

June 16 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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#### Discipline, Documentation and Discharge of Problem Employees

June 13 — Seattle. 5.75 CLE credits. By The Seminar Group, 206-463-4400 or www.theseminargroup.net.

### DUI Law

#### Selected Topics in DUI Law

June 22 — webcast. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

### Elder Law

#### Handling Alzheimer's and Other Elder Care Matters

July 20 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

#### Nursing Home Litigation Part I — Law and Strategies

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#### Practical Tips on Claims Against the Government

June 9 — web seminar. By the Washington and Oregon Continuing Legal Education Forum, www.freecle.com or 509-627-3418.

### Indian Law

#### Bookmaking and Indian Law

June 2 — Seattle. 3 CLE credits. By UW School of Law; 800-CLE-UNIV or 206-543-0059.

### Litigation

**Ultimate Guide to Trying a Case in Skagit County**

June 8 — Mount Vernon. 6 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

#### **Litigation Section Midyear**

June 16 — Seattle. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

#### **Lawyer's Toolbox: Civil Litigation**

July 26 — Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

### Miscellaneous

#### **WDTL Annual Convention**

July 13 — Whistler, B.C. WDTL; 206-749-0319 or info@wdtl.org.

#### **WSTLA & ATLA Convention: Annual Meeting, Golf, Tennis**

July 15-19 — Seattle. By WSTLA; 206-464-1011.

### Real Property

#### **2006 Real Property, Probate and Trust Section Midyear Meeting and Seminar**

June 9-11 — Skamania. 11.5 CLE credits, including 3 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

#### **Lawyer's Toolbox: Residential Real Estate**

June 20 — Seattle. 3.25 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

#### **The Law of Adjoining Properties**

July 26 — Tacoma; July 27 — Seattle. 6 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

### Technology

#### **2006 CASRIP High Technology Protection Summit**

July 21-22 — Seattle. CLE credits pending. By UW School of Law; 800-CLE-UNIV or 206-543-0059.



## Classifieds

Reply to **WSBA Bar News**  
Box Numbers at:

**WSBA Bar News Job Code** \_\_\_\_\_  
**Bar News Classifieds**  
2101 Fourth Ave., Ste. 400  
Seattle, WA 98121-2330

Positions available are also  
posted online at [www.wsba.org/jobs](http://www.wsba.org/jobs).

### Space Available

**Downtown Seattle executive office-sharing:** Full- and part-time offices available on the 32nd floor of the 1001 Fourth Avenue Plaza Building (Fourth and Madison). Beautiful views! Close to courts and library. Short- and long-term leases. Conference rooms, reception, kitchen, telephone answering, mail handling, electronic law library, legal messenger, copier, fax, and much more. \$175 and up. Please call 206-624-9188 for more information.

**Kent office space:** Large, fully furnished office with private entrance in elegant, newly constructed small law building. Referrals. All amenities included. Gated entrance with own parking lot. Highly visible location close to RJC. 206-227-8831.

**Premier high-rise new law office suites** in Columbia Center (Seattle) available on a turnkey basis, summer 2006. Facilities and services included. Move in and commence practice. Premises are divisible for one or more firms. See suite floorplan at [www.badgley-mullins.com](http://www.badgley-mullins.com).

**Professional space available:** Northgate

(Seattle), Edmonds, and Ikea (Renton) area. Call Bob Nakao with The Foundation Group for information at 206-324-9417 or e-mail [bohn@thefoundationgroup.com](mailto:bohn@thefoundationgroup.com).

#### **South Bellevue-Bellefield Office Park.**

One office plus secretary space and amenities. Share 1/3 rent plus other common expenses, e.g., messenger, with two seasoned attorneys. Two blocks from I-405. Lots of free parking. Available December 1 or before. 425-455-0705.

**Executive office suites** — Bellevue and Kirkland. Private suites with skilled receptionist, conference room. Internet, phone, transcription, and other specialized services available. Corner Office Inc. 425-213-6010; [www.cornerofficeinc.com](http://www.cornerofficeinc.com).

#### **Congenial downtown Seattle law firm**

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

#### **Renton office space**

in building in downtown Renton. Includes legal messenger, fax, copier, Internet access, receptionist, parking, possible referrals. 425-228-8899.

#### **Downtown Bellevue office space available:**

\$1,275/month gets you all this: Class A, 6th floor, Cascade-view full-size office, newly carpeted and painted; full reception service; two-line phone service; DSL service; dedicated fax line and service; photocopier use. Conference room. Share space with congenial six-attorney group. Secretarial space also available for minimal additional charge. To view space, contact Sue at Law Offices of Larry Lehmbecker 425-455-3186.

#### **Burlington law office for sale.**

Contact Bill Rimmer, 360-708-3117. Preview Properties-Skagit LLC.

#### **Office space.**

Lakewood law office space with conference room available to share. One attorney must have at least one support staff. Very reasonable rent. Call Harold Carr at 253-572-9335.

### Positions Available

**Attorneys:** Quality attorney recruitment for

contract and direct-hire placement, including lateral-hire partnership and of-counsel positions. We specialize in engagements with Puget Sound's premier law firms of large to small/solo membership, corporate legal departments, boutique practices, and governmental agencies. Please contact Law Dawgs, Inc., in confidence, at 206-224-8269; e-mail [seattle@lawdawgs.com](mailto:seattle@lawdawgs.com); [www.lawdawgs.com](http://www.lawdawgs.com).

**Quality attorneys** sought to fill high-end permanent and contract positions in law firms and companies throughout Washington. Contact Legal Ease, LLC by phone, 425-822-1157; fax, 425-889-2775; e-mail [legalease@legalease.com](mailto:legalease@legalease.com); or visit us on the web at [www.legalease.com](http://www.legalease.com).

**Minzel and Associates, Inc.** is a temporary- and permanent-placement agency for lawyers and paralegals. We are looking for quality lawyers and paralegals who are willing to work on a contract and/or permanent basis for law firms, corporations, solo practitioners, and government agencies. If you are interested, please e-mail your résumé as a Word attachment to [resumes@minzel.com](mailto:resumes@minzel.com). Please visit our website at [www.minzel.com](http://www.minzel.com).

**Contract lawyer position:** Well respected, five-attorney litigation firm seeks a lawyer with a minimum of three years' experience to support active civil trial practice. High-quality work and commensurate opportunity. Initial contract lawyer position with potential for associate position depending upon performance. Superb research and writing skills desired. Excellent academic and professional credentials required. Please send cover letter, résumé, and writing sample to: Office Manager, Smith & Hennessey PLLC, 316 Occidental Ave. S., Ste. 500, Seattle, WA 98104. E-mail to: [rmuraki@smithhennessey.com](mailto:rmuraki@smithhennessey.com). Please, no telephone inquiries.

**Executive director — Northwest Justice Project.** The Northwest Justice Project (NJP) is seeking an executive director. NJP is a well-respected, innovative not-for-profit corporation established to provide civil legal services for low-income people throughout Washington state. NJP is part of a strong and extensive statewide alliance of legal aid providers, funders, and supporters. NJP has an annual budget of \$15 million, 10 offices, and a staff of 140.

It is celebrating its 10th anniversary. NJP seeks a respected, experienced, and energetic attorney leader who is passionate about making equal justice a reality for Washington's diverse, low-income residents. Further information about the position and how to submit an application may be found at <http://www.nwjustice.org>.

**Associate attorney position** — Established Spokane mid-sized law firm seeks criminal law attorney with extensive felony experience. Inquiries confidential. Please respond with résumé and cover letter to Law Office of John Cooney & Associates, P.S., Attn: Business Manager, 910 W. Garland Ave., Spokane, WA 99205-2819.

**Litigation lawyer:** Montgomery Purdue Blankinship & Austin, a 24-lawyer, downtown Seattle law firm, seeks an associate attorney with a minimum of three years' significant experience in commercial and/or real estate litigation. Highly qualified candidates will be able to demonstrate ability to independently manage cases. Must also possess a service-oriented work style and a positive demeanor. Competitive salary and benefits. Fax résumé and cover letter to 206-625-9534 or e-mail [troe@mpba.com](mailto:troe@mpba.com).

**Quality practice opportunity:** Small AV-rated Tacoma firm with diverse practice focusing on plaintiffs' personal injury seeks litigation associate. We are looking for an attorney who is seeking a long-term relationship in a stable, friendly work environment dedicated to the ethical and passionate practice of law on behalf of each of our clients. Minimum of four years of experience preferred. Please submit a résumé and cover letter to Managing Partner, 6915 Lakewood Dr. W., Ste. A-1, Tacoma, WA 98467.

**Associate counsel.** ShareBuilder Corporation, operator of [www.sharebuilder.com](http://www.sharebuilder.com), one of the fastest growing online brokerages in the United States, seeks an associate counsel to work in its Bellevue headquarters. This individual will report to the general counsel. Responsibilities include reviewing and drafting contracts; working on copyright, trademark, advertising, e-commerce, regulatory, corporate governance, and employment matters; and managing litigation. Qualifications include JD degree; strong academic background; at

least three years' experience in a law firm and/or in-house; excellent verbal and written communication skills; strong research skills; good interpersonal skills; litigation experience; and experience in areas of law relevant to ShareBuilder's business. Admission to practice in Washington state would be a plus. Excellent compensation and benefits package. ShareBuilder is an Equal Opportunity Employer and a non-smoking company. If interested, please e-mail or fax your cover letter, résumé, and three professional references (.doc or .txt attachments only) to [hr@sharebuilder.com](mailto:hr@sharebuilder.com); fax 425-451-4449.

**Major, Lindsey & Africa**, attorney search consultants, was founded in 1982 and now has offices in 15 U.S. cities, Hong Kong, and London. In the only legal recruiters' national surveys ever conducted, MLA was described as being "in a league apart from other legal headhunting firms" and was voted "Best Legal Search Firm in the U.S." If you are interested in in-house, partner, or associate opportunities, please contact our Seattle office at 206-218-1010, or e-mail your résumé to [seattle@mlaglobal.com](mailto:seattle@mlaglobal.com).

**Tired of overpriced housing**, wasting hours in your car, and rain? Central Washington has affordable housing, no traffic jams, and four seasons. We're close to the mountains, have a beautiful performing arts theatre, and a high quality of life. Abeyta Nelson, one of the best personal injury firms in the state, needs a good lawyer who is looking for a great career opportunity and to earn an exceptional income. Send a letter telling us what you've got to offer, résumé, two writing samples, and law-school transcript to 1102 W. Yakima Ave., Yakima, WA 98902 or e-mail to [dbeaulaurier@abeytanelson.com](mailto:dbeaulaurier@abeytanelson.com).

**Would you like to practice business law** in a community where there is significant growth and opportunity? Do you want to be part of an established law firm with a reputation for providing high-quality service and expertise? We are seeking the "Best of the Best" to participate in the firm's growth, direction, and leadership. Landerholm, Memovich, Lansverk, & Whitesides, P.S. is a 17-attorney firm that is looking for several highly capable attorneys to join our thriving business practice. Located in Vancouver, Washington, we are

the largest law firm in Southwest Washington, which is an area that offers a superior quality of life, excellent schools, affordable housing, and numerous opportunities for community involvement. Vancouver is the fastest-growing city in the state and is part of the fastest-growing county in the Northwest. With that growth, there are excellent opportunities for intellectual, financial, and organizational advancement. Résumés should be sent to rhonda.kates@landerholm.com, or to Director of Operations, Landerholm, Memovich, et al, 805 Broadway St., Ste. 1000, Vancouver, WA 98660.

**Employee benefits associate, Seattle.**

Stoel Rives LLP is seeking an attorney to join the employee benefits practice group in its Seattle office. The ideal candidate has at least two years of sophisticated employee benefits experience. An exceptional academic record and writing skills are required. Experience at a top-tier law firm is preferred. Send cover letter, résumé, law-school transcript, and a writing sample to Sandra Gronfein, Stoel Rives LLP, 600 University St., Ste. 3600, Seattle, WA, 98101, sgronfein@stoel.com.

**Associate, corporate group, Seattle.**

Stoel Rives LLP is seeking an attorney to join its Seattle corporate group with an emphasis on serving technology companies and companies in other sectors with technology-related issues. Desired: at least two years' transactional experience, including general commercial agreements, software licenses, Internet-related contracts, and other technology development and commercialization matters; exceptional academic record and writing skills; experience at a top-tier law firm preferred; or excellent in-house attorneys. Send cover letter, résumé, law-school transcript, and a writing sample to Sandra Gronfein, Stoel Rives LLP, 600 University St., Ste. 3600, Seattle, WA, 98101, sgronfein@stoel.com.

**Paralegal/legal assistant.** Federal Way firm seeking an energetic person to join our busy litigation team. Two years of paralegal or law-firm experience preferred. This full-time position requires an extremely organized self-starter. Must be proficient in MS Office Suite, have excellent written and oral communication skills, and be accurate and detail conscious. We offer

competitive salary and benefits package as well as a friendly work environment. To apply, please send résumé and cover letter to The Law Office of Robert M. Arim, PLLC, P.O. Box 23730, Federal Way, WA 98093 or e-mail to cwarim@earthlink.net.

**Expeditors International of Washington, Inc.**

seeks an attorney to join its in-house legal department as an entry-level assistant corporate counsel at its downtown Seattle headquarters. Expeditors is willing to train the right person. Applicants must be analytical, intelligent, detail-oriented, motivated individuals with common sense and exceptional client-service skills. Applicants with experience in commercial litigation, drafting contracts, and employment matters are encouraged to apply. Must be licensed to practice law in Washington. Salary range DOE. Benefits include health insurance, 401(k), and stock purchase plan. Please send cover letter and résumé to Attn: Assistant Corporate Counsel, Expeditors International of Washington, Inc., 1015 Third Ave., 12th Fl., Seattle, WA 98104-1190, or fax to 206-674-3459. For more information about Expeditors, visit www.expeditors.com.

**Paralegal/admin.**

— Cendant Timeshare Resort Group seeks a paralegal experienced in commercial real estate to join its small legal office in Redmond (Trendwest). Candidate will be responsible for providing substantive legal work to support senior counsel involved in complex commercial real estate acquisitions. Candidate must have a strong work ethic, be organized, be motivated, have a working knowledge of and ability to assist in all aspects of commercial real estate transactions and lease preparation, be familiar with closing statements, and be able to conduct substantive legal research together with title review and drafting. (Note: this function is not responsible for escrow functions nor closing document preparation and procedures.) This person must be Internet savvy, possess superior written and verbal communication skills and exceptional interpersonal skills, be able to anticipate needs, adapt to rapidly changing priorities, multi-task, take initiative, work independently, and be comfortable working in a corporate setting. In addition, the person will be responsible for all administrative functions, including

mail distribution, correspondence, invoice processing, filing, calendaring, expense reports, booking travel, ordering office supplies, and maintaining office equipment. Must have five-plus years' experience as a paralegal in a law firm, legal department, or comparable legal experience with a real estate focus. Please send cover letter and résumé to sheri.saastad@cendant-trg.com.

**Legal Assistant**

— Swinomish Tribe seeks support for its legal department. Excellent written and oral communication skills. Detail-oriented, highly organized, ability to work independently and under pressure. Experience in complex litigation. Compensation DOE. Send résumé, references, and writing sample to Wendy Otto at Swinomish Tribal Community, PO Box 817, La Conner, WA 98257; e-mail wotto@swinomish.nsn.us.

**Senior counsel**

— Cendant Timeshare Resort Group seeks an experienced (min. seven years) real estate attorney to join its small legal office in Redmond (Trendwest) as in-house counsel. Candidate must have land use and condominium experience and be able to handle complex commercial real estate acquisitions, including assisting with due diligence and entitlements. Knowledge of the timeshare industry and construction transactions is a plus. Must have excellent drafting, negotiating, and interpersonal skills. Competitive compensation and benefits package, including 401(k), annual bonus, and stock plan. Please send cover letter and résumé to sheri.saastad@cendant-trg.com.

**Established AV-rated Bellingham firm**

**seeks associate** with a minimum of two years of civil litigation experience. The successful candidate must possess exceptional research and writing skills, a strong work ethic, and a desire to contribute to the community. Please direct your cover letter and résumé to Adelstein, Sharpe & Serka LLP, Attn: Jeff Fairchild, Esq., PO Box 5158, Bellingham, WA 98227-5158. Full consideration will be given to applications received prior to June 30, 2006.

**Graham & Dunn** has an opening for a commercial real estate attorney with four-plus years of experience in commercial transactions. The qualified candidate will have significant experience in purchase

and sale, leasing, and financing transactions. We are seeking a team player who is passionate, detail-oriented, hard-working, and dedicated to producing top-quality work, with a strong academic background and analytical skills. A partial book of business is preferred, but not required. In business since 1890, the firm represents a wide variety of corporate clients and offers a full range of representation in diverse areas. Our firm is located on one of the waterfront piers in Seattle with spectacular views of Puget Sound, the Olympic Mountain Range, and Mount Rainier. We offer a unique work setting, friendly environment, and competitive compensation.

**Experienced civil litigator wanted** by AV-rated Seattle law firm focusing on construction-defect claims. Strong academic record and good people skills required. Reply with your CV and salary requirements to Richard Levin via e-mail at [RLevin@condodefects.com](mailto:RLevin@condodefects.com).

**Real estate associate attorney.** Immediate opening for real estate associate attorney for an expanding Seattle law firm. The ideal candidate will have five-plus years of transactional experience in real estate, leasing, and/or land use, and be licensed by the WSBA. Candidates with a

partial book of business are preferred, but all qualified candidates will be considered for the position. Candidates should enjoy a team environment and working with people and clients. A successful candidate will have a proven track record in meeting billable hour requirements in the range of 1,800-1,900 hours per year. The firm offers an enjoyable work environment, competitive salary, and benefits. Must be eligible to work in the United States. Robert Half Legal is an Equal Opportunity Employer. To express interest in this position, please contact [allison.williams@roberthalflegal.com](mailto:allison.williams@roberthalflegal.com).

**Downtown Seattle law firm seeks associate attorneys** with minimum three years' experience in creditor rights and bankruptcy. Send résumé to [mlivingston@bwmlegal.com](mailto:mlivingston@bwmlegal.com).

**Trademark attorney.** Exciting opening for a trademark attorney for premiere Seattle law firm. The ideal candidate will have five-plus years of experience with a law firm or in-house legal department and will have experience with domestic and international trademark prosecution. A successful candidate will have experience counseling domestic and international clients, as well as overseeing the filing and tracking of trademark applications, trademark

portfolio maintenance, and meeting filing deadlines. In addition, the ideal candidate will be interested in a professional and team-oriented environment and will have a proven track record in meeting billable hour requirements in the range of 1,700-1,900 hours per year. Very competitive pay and benefits. Must be eligible to work in the United States. Robert Half Legal is an Equal Opportunity Employer. To express interest in this position, please contact [allison.williams@roberthalflegal.com](mailto:allison.williams@roberthalflegal.com).

**The Seattle office of a large Pacific Northwest law firm seeks** an attorney to join the aviation practice group. Applicants should have a minimum of two years' experience in aircraft transactions and aircraft financing. Strong writing skills and academic performance required. Experience in purchase and sale, leasing and financing arrangements, negotiations, and state and federal tax planning a plus. Please submit a cover letter, résumé, and copy of law-school transcript to Len Roden, Administration for Attorney Recruiting, Lane Powell PC, 1420 Fifth Ave., Ste. 4100, Seattle, WA 98101-2338. Lane Powell PC is an equal opportunity employer.

**DIS has immediate openings** in the office of legal services for a chief legal services officer, contracts manager, and contracts specialist. Join one of the recognized leaders in digital government, become a member of a dynamic team of legal professionals at the Washington State Department of Information Services (DIS) in Olympia, Washington. DIS provides quality and reliable computing, telecommunications, video and Internet services to state and local agencies, tribal governments, educational institutions, and not-for-profit organizations. For detailed position information and application instructions please follow link, <http://dis.wa.gov/jobs/currentopenings.aspx>.

**Chief criminal deputy prosecuting attorney** — Island County, Washington. The chief deputy carries a felony caseload, supervises five attorneys, and coordinates prosecution activities. Applicants must have extensive felony trial experience. This is not an entry-level position; only applicants with substantial criminal prosecution experience will be considered. Monthly salary \$6,198.34. Competitive

## To Place a Classified Ad

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

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

WSBA Bar News Classifieds  
2101 Fourth Ave., Ste. 400  
Seattle, WA 98121-2330

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

medical and dental, generous vacation, and the opportunity to live and work in beautiful Island County, Washington. Application, résumé, and legal writing sample required. Applications and information may be obtained at [www.islandcounty.net/hr](http://www.islandcounty.net/hr) or call 360-679-7372. Position will remain open until filled. EOE. Mail packet to Human Resources, PO Box 5000, Coupeville, WA 98239.

**Where will you be in five years?** Create a Plan B! Join two lawyers in an excellent PT business opportunity. Create time for your passions. Jenifer Schramm and Brandy Meyer Andersson. E-mail [brandyandersson@myarbonne.com](mailto:brandyandersson@myarbonne.com).

**Growth opportunity in Bainbridge Island** general civil practice for experienced community-oriented attorney; minimum three years' experience and licensed in Washington state. Submit résumé to PO Box 10629, Bainbridge Island, WA 98110.

### Will Search

**Will search:** seeking will of Richard B. Nichols of Everett/Lake Stevens, Washington. Contact Michael Howard. 206-236-1301.

**Searching for will of Richard Everett Allen**, DOB: 5/2/38, DOD: 4/6/06. Please contact Terry Greenen, attorney, 1104 Main St., Ste. 400, Vancouver, WA 98661, 360-694-1571 with any information.

### Services

**Minzel and Associates, Inc.** is a temporary- and permanent-placement agency for lawyers and paralegals. We provide highly qualified attorneys and paralegals on a contract and/or permanent basis to law firms, corporations, solo practitioners, and government agencies. For more information, please call us at 206-328-5100 or e-mail [mail@minzel.com](mailto:mail@minzel.com).

**Corporate headshots on-location** by Northwest photographer Doug Scott; [www.dougscott.com/advertising/1.php](http://www.dougscott.com/advertising/1.php). "Thanks again. Great work and a very short turn-around time. I'm really impressed." — Lori A. Huard, administrator, Zender Thurston, P.S.

**Great domain names for sale:** [www.tradelawyer.com](http://www.tradelawyer.com), [www.seattlecriminalattorneys.com](http://www.seattlecriminalattorneys.com), [www.seattledivorcelawyers.com](http://www.seattledivorcelawyers.com),

[www.seattlebankruptcyattorneys.com](http://www.seattlebankruptcyattorneys.com), [www.seattlebankruptcylawyers.com](http://www.seattlebankruptcylawyers.com), [www.seattlecivilattorneys.com](http://www.seattlecivilattorneys.com), [www.seattleimmigrationlawyers.com](http://www.seattleimmigrationlawyers.com), [www.seattleprivateinvestigators.com](http://www.seattleprivateinvestigators.com), [www.washingtoncriminalattorneys.com](http://www.washingtoncriminalattorneys.com), [www.washingtoncivilattorneys.com](http://www.washingtoncivilattorneys.com), [www.washingtoncivillawyers.com](http://www.washingtoncivillawyers.com), [www.seattlemessengers.com](http://www.seattlemessengers.com), or [www.seattlecouriers.com](http://www.seattlecouriers.com). To bid on any of these domain names, go to the domain name of your choice above.

**Hard-working contract attorney** helps you meet deadlines. WSBA member with 25 years of experience conducts legal research and writing for attorneys, using UW Law Library and LEXIS online resources. I draft trial and appellate briefs, motions, and memos. Elizabeth Dash Bottman, 206-526-5777, [bjelizabeth@qwest.net](mailto:bjelizabeth@qwest.net).

**Bad faith expert witness.** Former insurance claims adjuster and defense attorney, over 20 years' combined experience. JD, CPCU & ARM. Dave Huss, 425-776-7386.

**Land use lawyer consulting services** on land use and growth management issues (zoning, critical areas, subdivisions, development standards); focus on creative approaches to code interpretations. Twenty-three years' experience with King County, also familiar with Kitsap and Pierce County regulations. Representative clients include private schools, churches, environmental advocates, private developers. Can team with architects, engineers to fashion workable solutions. Michele McFadden 253-853-6730, [mlmcfadden@centurytel.net](mailto:mlmcfadden@centurytel.net).

**Security consultant** — 30 years' security and police experience focusing on risk and vulnerability assessments, security management, operations analysis, and training. Robert Schultheiss, 509-586-3392, or [info@risk-decisions.com](mailto:info@risk-decisions.com).

**Oregon accident?** Unable to settle the case? Associate an experienced Oregon trial attorney to litigate the case and share the fee (proportionate to services). OTLA member, references available, see Martindale, AV-rated. Zach Zabinsky, 503-223-8517.

**Medical malpractice expert witnesses.** We have thousands of board-certified doctor experts in active practice. Fast, easy, flat-rate referrals. Your satisfaction guaranteed! Also, case reviews by veteran MD specialists for

a low flat fee. Med-mal EXPERTS. [www.medmalexperts.com](http://www.medmalexperts.com), 888-521-3601.

**Contract attorney:** All aspects of litigation and appeals, including research. Former name partner in boutique litigation firm. Fourteen-plus years' experience. Have conducted numerous civil jury trials, including complex litigation. Reasonable rates; variable per type of work. Pete Fabish, 206-545-4818.

**IBA**, the Pacific Northwest's oldest business brokerage firm, sells privately held companies and family-owned businesses. We are professional negotiators/facilitators with more than 4,000 completed transactions. Please contact us if we can be of assistance to you or any of your clients at 800-218-4422 or [www.ibainc.com](http://www.ibainc.com).

**Mediation and arbitration services:** Oregon and Washington. O.M. (Met) Wilson Jr. Wilson Dispute Resolution, 1211 SW 5th Ave., Ste. 2950, Portland, OR 97204. 503-972-5090. E-mail [met@wilsonadr.com](mailto:met@wilsonadr.com). Web: [www.wilsonadr.com](http://www.wilsonadr.com).

**Hawaii All Islands Real Estate:** W. Anton Berhalter (WSBA No. 11310, HRS-65566) offers his services for all Hawaii real estate needs. Real estate purchase, sale, management, rentals, and evaluations. Contact Walt Berhalter, J.D., CLU, MBA, RS, Sales Manager, Century 21 All Islands, PO Box 487, 3254 Waikomo Rd., Koloa, HI 96756. E-mail: [walt.berhalter@hawaiimoves.com](mailto:walt.berhalter@hawaiimoves.com). Web: [www.hawaiimoves.com](http://www.hawaiimoves.com). Direct: 808-240-2496; fax: 808-742-9293; cell: 808-651-9732.

**Tax attorneys** (both with LL.M.) available for contract and referrals. Estate planning, business planning, employee benefits, and more. Free consultations. Please call 206-529-5143.

**Experienced brief and motion writer** available as contract attorney. Fifteen years' litigation experience, including trial preparation. Short deadlines OK. Reasonable rates. Lynne Wilson, 206-328-0224, [lynnewilson@aol.com](mailto:lynnewilson@aol.com).

**Forensic document examiner:** Retired from the Eugene Police Department. Trained by the U.S. Secret Service and U.S. Postal Inspection Service. Court-qualified in state and federal courts. Contact Jim Green at 888-485-0832.

## Random Acts of Professionalism Program

The WSBA Professionalism Committee is pleased with the response to its Random Acts of Professionalism Program. This program is a way for lawyers and judges to honor others in the profession who have conducted themselves in a highly professional manner consistent with the spirit of the Creed of Professionalism.

Congratulations to the following judges and lawyers who have been recognized by their colleagues for their professionalism:

Chief Justice Gerry L. Alexander, Olympia  
Mark L. Alexander, Bellevue  
Susan M. Alexander, Bellevue  
Heather L. Alhadeff, Vancouver  
Joan B. Allison, Seattle  
Theodore Angelis, Seattle  
Abraham A. Ardit, Seattle  
Michael G. Atkins, Seattle  
J. Patrick Aylward, Wenatchee  
Laura A. Banks, Shoreline  
Jennifer K.E. Beard, Seattle  
Richard H. Benedetti, Tacoma  
Andrew L. Benjamin, Seattle  
Deborah A. Bianco, Seattle  
Carol R. Bryant, Seattle  
Michael W. Bugni, Seattle  
Peg R. Callaway, Omak  
Leticia Camacho, Seattle  
John Compatore, Seattle  
Lewis W. Card, Wenatchee  
Marc T. Christianson, Tacoma  
Kenneth D. Colvin, Yakima  
Judge Christopher Culp, Okanogan  
Christina L. Corwin, Seattle  
Delaina M. Dancey, Seattle  
James E. Deno, Everett  
Kuljinder K. Dhillon, Seattle  
Norman C. Dick, Longview  
James B. Dolan, Mount Vernon  
James A. Douglas, Seattle  
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