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WA Confidential

Washington’s new “confidentiality” rules for professional conduct are bound to cause trouble. Suppose a divorce client laughs and says, “I’d rather burn the house than let him get half of it.” She is a new client and you have no idea whether arson is “reasonably certain to result” but her “Burning For Peace” t-shirt makes you suspicious.

A mandatory duty of disclosure places counsel in an intractable situation. Counsel becomes judge and jury and makes a finding that his client is guilty of saying something, a “pre-crime” threat perhaps, which must be reported even though nothing has happened, or a finding that it was merely an expression of unhappiness over a property settlement. Disclosing these comments to the opponent would quickly bring a client’s lawsuit for breaching counsel’s duty of confidentiality, among other counts. Not disclosing could result in a disastrous lawsuit against counsel if the threat is not reported and carried out. Counsel has no immunity from liability in either event. So when your client begins to tell her tale, do you immediately notify your malpractice insurer that you may have an “incident” to report?

When does the mandatory duty to disclose begin or end? Does this duty end if the lawyer withdraws from representation? Does it ever end, even after representation is completed? Does this duty attach to substitute counsel who briefly covers for counsel? If a prisoner calls a lawyer and asks a simple question but implies an ambiguous threat against another, is there a duty to disclose if the lawyer-client relationship is in doubt but the threat is reasonably certain to be carried out? What if corporate fraud is “reasonably certain to result” if only one witness is believed but other witnesses disagree? Is this probable cause to breach the client’s trust in counsel?

I would suggest that there were compelling reasons why the old rule of absolute confidentiality existed from the beginning of the profession, even against the demands of the King of England to know the client’s secrets.

The calling of “lawyer” carries with it certain timeless obligations to the client, and one of those is keeping the client’s secrets at all perils to the lawyer. The “all perils” often meant imprisonment by the Crown, loss of lands and money, and other punishments. This historical duty cannot be swept away by bar rules when confidentiality is at the core of the lawyer’s obligation. Some duties are inherent part of the profession by custom. The 6th Amendment right to counsel was enacted at a time when the tradition of the bar was one of absolute confidentiality, and the Amendment, I think, affirms by implication this right to strict confidentiality.

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Ellen Conedera Dial, WSBA President

In our brand-new Rules of Professional Conduct, you will find an entirely new rule entitled (in part) “Multijurisdictional Practice of Law.” Rule 5.5, based on the ABA Model Rule, creates a framework for regulating lawyers’ conduct when their work takes them into other states. I like this rule, because it acknowledges the reality of law practice today as an enterprise that is not limited by the political boundaries of individual states, but rather is driven by the business and personal needs of our clients. The more states that adopt Rule 5.5 as a part of their ethics rules, the greater the flexibility we will have to meet those needs efficiently and effectively. I think that is good for our profession and for our clients.

We also have a new Admission to Practice Rule, APR 8(f), that allows lawyers licensed in other countries to practice law in Washington so long as their only clients are their corporate employers. This international in-house lawyer rule recognizes that businesses today compete in a global economy, where geopolitical boundaries are crossed both physically and electronically countless times every day.

RPC 5.5 and APR 8(f) are “local” by their very nature. Rule 5.5 regulates lawyers admitted in other states who have a temporary presence in Washington. The rule will apply to Washington lawyers who appear temporarily in another state — if that state has adopted the rule! APR 8(f) addresses the law practice of persons holding a license issued by another country who live and work in the State of Washington. Another kind of regulation of our profession is emerging, however — national and international regulation of the practice of law stemming from federal law.

The General Agreement on Trade in Services (GATS) calls for the negotiation of liberalized access to service markets that are covered by GATS, including legal services. The Office of the United States Trade Representative (USTR) is engaged in negotiations to establish standards for access to legal services markets here and in other countries. As stated in an August 2006 report of the ABA Standing Committee on Professional Discipline:

The Office of the USTR … has negotiated and will continue to negotiate principles and commitments that have possible serious ramifications as to how the practice of law in this country will be conducted and regulated in the future. These negotiation positions are intended, in part, to enhance the ability of U.S. lawyers and firms to secure access to existing and emerging foreign legal services markets. They will also, however, apply to access to the U.S. legal service market by inbound lawyers from other countries, and, as a consequence, to interstate multijurisdictional practice by U.S. lawyers.

While it may be many months, and perhaps years, before international standards for access to legal services markets are submitted to Congress for approval, the legal profession in the United States is, by virtue of WTO, subject to a new overlay of federal regulation. The scope of that regulation, while presently unknown, is potentially very broad. Under GATS, the international agreements will encompass access to markets of legal services, but may also prescribe “disciplines” regarding domestic regulation of the profession. Those “disciplines” could include, for example, legal education requirements, bar admission and licensing requirements and procedures, and rules of professional conduct, among other measures that have historically been the prerogative of the states. At issue for our state is the continued authority of the Supreme Court, the head of our judicial branch, to determine what standards will govern the practice of law in this state. Under GATS, the federal government has the power to bargain away that prerogative, and vest that authority in an international body established to resolve disputes over access to the practice of law in the United States, and in every individual state. Moreover, the federal government has the power to sue individual states to force compliance.

The ABA has been consulted by the USTR, as have individual states. Nonetheless, it is not clear exactly what issues are
in active discussion, or what direction the negotiations may take. We do not know when the issues of access to and regulation of legal services markets will be agreed, or, indeed, what the negotiation process will look like. Nor do we know how constitutional issues concerning the reserved powers of the states might be raised.

Federal law is influencing the regulation of the practice of law in yet another way, through rules and policies that are aimed at the most basic aspect of the attorney-client relationship — the attorney-client privilege. For example, regulations issued under the Sarbanes-Oxley Act purport to allow a lawyer to disclose privileged information under certain circumstances. More broadly, the United States Department of Justice has adopted a policy of encouraging (opponents have said “coercing”) companies to waive the privilege as a condition of cooperation during investigations. The Federal Sentencing Guidelines also authorize and encourage the U.S. government to seek waivers as a condition of cooperation.

Apart from the obvious question of whether federal regulations and guidelines should be brought to bear in a way that forces a client to waive the attorney-client privilege in order to avoid indictment, a more subtle question is presented — that is, whether the core of the relationship between attorney and client will be regulated not by the individual states, but rather by the federal government. GATS raises the ante further, presenting the possibility that the nature of the privilege, at least to the extent that it is expressed in our Rules of Professional Conduct, will be subject to the requirements of an international trade agreement and the jurisdiction of an international dispute resolution body established under WTO.

The platform for discussion of our Rules of Professional Conduct, and of the protection of confidential information, is no longer local. It is a national, and even an international, venue. The American Bar Association is actively engaged with the Department of Justice and with USTR on all of these issues. But the individual states must also speak out on the importance of maintaining local control over the standards that will apply to the practice of law in their courts and discipline systems. Transparency in the requirements for access to legal services markets is an important element of international trade. Local control of standards of legal practice, however, is equally important to assuring the quality of those services. Our system of justice, however flawed, is often called “the envy of the world.” I believe that it is, and for good reason. The standards of practice that are to be applied within that system should not be subject to barter for economic gain.

Ellen Conedera Dial can be reached at 206-359-8025 or eccdial@gmail.com. If you would like to write a letter to the editor on this topic, please e-mail it to letters@wsba.org or mail it to WSBA Bar News, Attn: Letters to the Editor, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330.

Oral histories are an essential part of the fabric of our cultures, but sometimes they perpetuate inaccuracies! Thank you to Paul Cressman Sr., for letting me know that I am not, in fact, only the second lawyer to serve as WSBA president who also had not been a governor. Payne Karr, who served as president in 1968-1969, also bore that distinction. I apologize for the error and hope that if there are others, I will hear about them as well! I hope to convince all WSBA members that there are many ways to serve the profession, and many paths may lead to service in this position. — ECD

NOTES
1. This discussion of GATS is based primarily on the August 2006 report of Barbara K. Howe, chair of the ABA Standing Committee on Professional Discipline, a report that is available from the ABA.
2. While the WTO member countries have agreed to try to finish GATS negotiations in 2006, the current round of negotiations, known as the Doha Round, is apparently stalled.
3. Sarbanes-Oxley Act of 2002, Public Law 107-204. Pertinent regulations are found at 17 CFR Part 205. See also WSBA Interim Formal Ethics Opinion 197 concerning the interaction between SEC Regulations issued under the Sarbanes-Oxley Act and Rules 1.2 and 1.6 of the Rules of Professional Conduct. Rule 1.6 has been modified since the issuance of Formal Opinion 197, and the opinion should be reviewed with those modifications in mind.
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Changing Landscapes: 2007 Issues Review

After nine years, M. Janice Michels announces her May 2007 retirement

M. Janice Michels, WSBA Executive Director

When bar leaders canvass other comparable bar associations, read ABA literature, or listen to members, it becomes very clear that there are tons of good ideas out there! All bar leaders want to improve the image of the profession, assist new lawyers in starting their practice, increase professionalism, and provide member benefits. Many bar associations have active programs in these areas, and most find they also need bar leadership's time and energy on sunset reviews (which are bound to raise resistance and controversy); grappling with painful fiscal, court, or legislative controversy; and/or long-range planning, license-fee setting, executive-director hiring, or governance re-evaluations. All these demands require the Board of Governors to prioritize and be deliberate about the issues they tackle in any one year. Bar year 2007 will likely be impacted by the following issues:

The Move
Though this focus should culminate with the WSBA's mid-December move to Puget Sound Plaza (the WSBA will occupy floors 6, 7, 8, and part of 11), it represents a significant effort by the Board and staff. These new quarters in the heart of Seattle's financial district are less expensive than the current lease, and should afford members easier in-out routes and vastly increased parking. We plan an open house for members in the spring.

Judicial Selection/Election
In 1995, the Walsh Commission recommended moving to a merit selection/retention system for filling judicial seats in Washington. Washington citizens at that time were strident about retaining the right to elect their judges. Since then, other groups have reviewed our state's judicial-selection system with concern. For the last two years, the King County Bar Association and other groups have been studying the process of judicial elections. Their findings, discussed at a summit in December 2005 — that 50 percent of our judges start by appointment, and that the majority run unopposed in elections — raise concerns about our elective system. The expense and melodrama of the fall primary for Supreme Court seats has even some legislators interested in possible reform, whether in campaign financing or the actual election process. The WSBA Board of Governors will watch these developments and potential changes or reforms for possible action.

Public Criminal Defense
In the culmination of a sequence of studies and exposés over the past three years, the WSBA's Committee on Public Defense will present its final recommendation for system and funding improvements to the Board in early 2007. As the prosecutors and defenders on the committee work together to repair and fund an inadequate, locally funded public-defense system, some of these recommendations became controversial and are likely to reflect both minority and majority reports. The committee's work reached to juvenile dependency and Becca (status offenses) issues as well as to civil commitments (mental health, sexual predatory) — previously little-studied "systems" within the purview of public defenders.

Joint Supreme Court-WSBA Task Force on the Regulation of Lawyer Conduct
To sustain a viable, trusted system of the regulation of lawyer conduct (discipline), the Washington State Supreme Court, at the WSBA's request, invited the American Bar Association Standing Committee on Professional Discipline to review the system against objective standards of lawyer conduct. (The last ABA review had been conducted in 1993, and many of the recommendations from that report have been implemented.) Their 2006 report was complimentary of the many improvements the WSBA has made and, nevertheless, suggested further system improvements which the joint task force will be charged with evaluating.

Executive Director Search
The announced May 2007 retirement of the WSBA executive director puts the need for recruiting, screening, and hiring a new director in the Board's hands. Immediate Past-President Brooke Taylor has been asked to chair the Executive Director Task Force, which includes current and past governors, WYLD representation, and other WSBA members. The goal is to name the new executive director by March 2007.

“Foundations of Freedom”
Initiated by Immediate Past-President Brooke Taylor and embraced by the new Board and officers is the need to promote civics education to citizens. This program is centered on ways to enhance public understanding of the separation of powers, the rule of law, independence of the judiciary, and checks and balances. With a newly developed brochure (see page 44) and a ready network on the alert for "teachable moments," the WSBA's goal is to promote public interest and education about the essentials of our democracy.

“Justice in Jeopardy”
This initiative is now in its third year. The partners in the coalition working for adequate funding of trial-court operations,
public criminal defense, and civil legal services have welcomed the court-appointed special advocate interest to the coalition, and has framed the 2007 "ask" accompanied by compelling examples and stories. The coalition has achieved, with legislative support and funding action, considerable improvement toward adequate funding of the courts. In 2007, this coalition will continue the momentum for general-fund support for a system that assures that the rule of law is real to everyone.

**Increasing Embrace of Non-Majorities**

Within the next generations, the definition of who are ethnically “majority” and “minority” will shift. To oppress or marginalize individuals based on sexual orientation, physical abilities, ethnicity/race/color, age, or gender will cost lawyers and firms their client base. Studies demonstrate that deep in almost everyone’s early learning and subconscious memories reside unintended or unexamined biases. The WSBA will continue its leadership in demonstrating diversity, equality, and cultural competence—not only because it is politically correct, but because it is vital to the profession and to justice. In 2007, President Ellen Conedera Dial will launch a grant program intended to enlarge the pipeline of currently minority persons of all types into the professions.

**Accommodating Other Changing Landscapes**

**Amendments to the RPCs.** The WSBA will continue its efforts to educate and support members as they work to understand and implement the amended Rules of Professional Conduct. These rules are meant to better conform to the ABA Model Rules and other states’ rules of professional conduct, and the changes may seem huge and perilous. The WSBA will continue its full-scale education and training programs to give members what they need to know, along with practical advice on living within the amended RPCs.

**Civil Legal Services.** The landscape for the delivery of civil legal services is also changing. The multiple funding sources include federal contributions through the federal Legal Services Corporation, IOLTA funds administered by the Legal Foundation of Washington, private donations to LAW Fund, state contributions administered by the Office of Civil Legal Aid, a myriad of local bar donations of time and support to pro bono programs, and special programs supported by donations. The WSBA’s commitment to access to justice is unwavering and steadfast. With a goal of “no one should face their legal problems alone,” the Access to Justice Board has a new statewide plan; the Legal Foundation of Washington/LAW Fund have committed to supporting this plan, which will leverage paid legal services in support of pro bono programs and the Office of Civil Legal Aid, a judicial-branch agency created in 2005 to distribute state funding for legal services, is also working to meet this goal in cooperation with special programs and local pro bono programs.

2007 will be a challenging and eventful year for the WSBA, its Board of Governors, and officers. Through careful application of our assets—fiscal resources, member goodwill, work by volunteers and staff, and reputation—we look forward to many successes in 2007.

WSBA Executive Director Jan Michels can be reached at janm@wsba.org.
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Substantive Due Process and the Problem of Horse Sex

by Natalie Daniels

At the end of 2005, the Seattle Times wrote an article ranking its top-20 news stories, based on articles most often accessed online. Five of the top-20 stories were written about the same news item — horse sex. In July 2005, a man in Enumclaw died from a perforated colon as a direct result of having sex with a stallion. The horse was physically undamaged by the encounter, which put law-enforcement officials in something of a bind. Something terrible and wrong had occurred, but it appeared that no laws had been broken. Washington was one of 14 states with no laws against bestiality. And, if the animal was unharmed, there could be no charge of animal cruelty, which was a crime in Washington. Officers finally settled for charging a man who had videotaped the event with the misdemeanor of trespassing, as the two men had entered a neighbor’s barn without permission in order to facilitate the amorous encounter.

The Washington Legislature reacted with resounding resolve. On March 24, 2006, Governor Christine Gregoire signed into law Senate Bill 6417, a measure that passed unanimously in both the House and Senate. The bill makes bestiality a Class-C felony, punishable by up to five years in prison. Obviously, this was the politically savvy move to make. No legislator wants to be known as the leader of the pro-horse-sex movement. However, while this bill is unquestionably politically sound, it may not be legally sound. The sponsor of this bill stated that her purpose in drafting the legislation was to protect animals, and yet everyone admitted that, in this case at least, no animals were harmed. Does the bestiality bill have a true legitimate state purpose, or is it motivated by a bare desire to persecute a politically unpopular group — the animal lover? Is this bill mere morals legislation, and, if so, is that okay?

This article will analyze morals legislation as a substantive due-process question, and explore when, if ever, traditional American values should be codified. Part II defines morals legislation, and describes the mechanics of substantive due process. Part III questions the judiciary’s role in deciding when or if morals legislation is appropriate. Finally, Part IV applies substantive due-process reasoning to the issue of bestiality in order to illustrate the costs associated both with finding that morals legislation is a legitimate state interest, and that it is not.
Morals Legislation and Substantive Due Process Defined

Morals legislation is any law that is justified solely by “asserting a legitimate government interest in prohibiting or encouraging certain human behavior without any empirical connection to goods other than the alleged good of eliminating or increasing . . . the behavior at issue.” For example, murder is a moral issue, prohibited by the Ten Commandments in Judeo-Christian tradition. It is also a public-safety issue, advancing the vital state interest of keeping people alive so that they may be taxed and otherwise governed. Therefore, while murder is wrong, laws regarding murder are not morals legislation. In contrast, laws against coveting your neighbor’s horse (so to speak) are morals legislation. While most American citizens, and all of Washington’s legislators, are firmly against bestiality, be it for religious, ethical, or even aesthetic reasons, it is more difficult to point to a clear state interest in creating and enforcing laws prohibiting inter-species sex.

To be valid under the U.S. Constitution, morals legislation must pass muster under substantive due-process doctrine. The 14th Amendment’s Due Process Clause states in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The substantive component of the Due Process Clause is generally derived from the word “liberty,” meaning that human conduct may not be regulated by state or federal law to the extent that such regulation would amount to an unconstitutional denial of liberty.

In determining whether a law violates substantive due process, it is absolutely vital to determine whether or not the law impinges on a fundamental or non-fundamental right, as this determines the standard of review that will be applied. If the right exists, but is non-fundamental, meaning not core to human existence, then the standard is one of rational basis. Under rational-basis review, a challenged law will be upheld so long as a court can find that the law was intended to further a legitimate government objective, and there is some chance that the law as stated will actually further the objective. In practice, courts will go to extraordinary lengths to find a legitimate objective, creating justifications for the law if no clear answers are to be found in the legislative history. Substantively, the law will stand.

Laws regulating fundamental rights are far more likely to be invalidated under substantive due-process doctrine. Instead of rational-basis review, courts apply a strict scrutiny standard, meaning that the law in question must be found unconstitutional unless the governmental objective in question is compelling, and the regulation applied is absolutely necessary to achieving that goal. However, because the finding of a fundamental right means that a legislative body is barred from ever impinging on a citizen’s ability to engage in the activity in question, relatively few rights are fundamental. Generally, such rights are found only when a law tends to impinge on privacy or autonomy interests. Questions include what limitations, if any, may be placed on privacy, abortion, family and marriage, and the right to die. The vast majority of these questions address sexuality and sexual expression. All of these issues are highly controversial, because all of them hinge on whether morality is relative, and thereby personal to the individual, or whether it is absolute, meaning uniformly applicable to all.

The judiciary has a checkered past when it comes to substantive due-process doctrine, and does not lightly interfere with the legislative process. In Lochner v. New York, a statute was challenged that limited the working hours of bakery employees to 60 hours per week. The Supreme Court invalidated the law for interfering with the right of employees and employers to freely enter into contract. While the Court did not label the right to contract freely as fundamental, it nevertheless held that employers should be able to hire employees to work as many hours as men were willing to work, and that employees should have the right to work as many hours as they were willing to. Lochner was an exceedingly unpopular decision, and was overturned in 1937. States have been free for some time to regulate the freedom of contract in all sorts of ways deemed vital to the health and safety of their citizens. Nevertheless, the process used by the Court to arrive at its decision was not so very different from that employed today. Because of this, Lochner remains a vital lesson in the possible consequences of relying on the judiciary to determine the appropriate course of legislative action.

Modern jurisprudence regarding substantive due process and the recognition of fundamental rights centers on Griswold v. Connecticut. In Griswold, doctors were found guilty of giving contraceptive advice to married couples in violation of a Connecticut statute that prohibited any person from using “any drug, medicinal article or instrument for the purpose of preventing contraception.” The Supreme Court, in evaluating this statute, expressed an unwillingness to follow the reasoning used in Lochner, noting that “[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” Nevertheless, the Court invalidated the law, finding that many of the rights specifically guaranteed by the Constitution could not be
Overall, the Supreme Court has been willing to employ substantive due-process doctrine to protect individual citizens from overly intrusive laws. The question remains, however, whether the Court’s self-imposed role as a protector of privacy and autonomy is a legitimate one ...

judiciary is out of lock-step with what people genuinely want and need from their government. Yet the Court was equally unwilling to abdicate its role as a limiting force on legislative activity. Therefore, the Court chose to deny any association with Lochner, while simultaneously using a Lochner-like process to invalidate the statute.

Overall, the Supreme Court has been willing to employ substantive due-process doctrine to protect individual citizens from overly intrusive laws. The question remains, however, whether the Court’s self-imposed role as a protector of privacy and autonomy is a legitimate one, and if so, whether the Court has overstepped the bounds of that role in determining what interests a state may genuinely have in promoting morality among its citizens.

Institutional Incompetence — Who Should Decide What Rights Exist? Views differ on when, if ever, it is proper for the judiciary to act as a check on the legislative branch, limiting what laws may be enforced. Review of morals legislation is the height of judicial activism, because every time the judiciary creates a new fundamental right, it removes the underlying moral debate from the hands of the citizenry, who can no longer speak through their elected representatives to demand that certain behaviors be prohibited. As Lochner demonstrates, endorsement of such judicial paternalism may come down to nothing more than whether the outcome of the decision seems favorable. Issues of privacy and morality in particular present an interesting and unique challenge. What should a court do when it is convinced that, proper role of the judiciary aside, the proper role of the legislature is no role whatsoever; that the people must be left alone?

In his dissenting opinion in Lawrence v. Texas, Justice Scalia sounded the death knell of state morals legislation:

The Texas [homosexual sodomy] statute undeniably seeks to further the belief of [the State’s] citizens that certain forms of sexual behavior are “immoral and unacceptable,” — the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity .... The Texas statute, it says, “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” ... This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review .... It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress;” and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

Scalia is essentially saying that the political process itself will ensure the appropriate outcome for the given cultural climate. A genuine disagreement as to issues of right and wrong is nothing more than a culture war, best settled in the trenches of political debate. Further, the judicial branch is institutionally incompetent to decide issues of morality, having no greater insight into such issues than the average person.

Justice Scalia is not alone in his assertion that there is a legitimate governmental interest in prohibiting or encouraging certain human behavior simply as a public evil or a public good. Morals legislation has similarly been promoted by natural-law theorist John Finnis. Finnis strove to prove, relying largely on ancient Greek philosophy, that homosexual conduct is undeniably and immutably immoral. Finnis then argued that the proper role of government is to make laws that encourage those things which are moral, like heterosexual married sex, and discourage those things which are not, like all other forms of sex. By implication, the role of the judiciary under this view is to avoid interfering with legislation regulating immoral behavior, because if it really is possible to make objective and universal determinations of which activities are moral and which are immoral, then it is entirely appropriate for legislators to engage in morals legislation.

A contrasting view is presented by theorist Gayle Rubin, who endorses a system of sexual pluralism. Rubin posits that American culture has a fundamentally unhealthy view of sexuality, one that demands conformity and repression to an extent that would never be tolerated in other areas of human existence. According to Rubin, society is unwilling to acknowledge the possibility that sexual preferences could simply be a matter of taste; that sodomy, for example, could be a lot like lima beans — some like ‘em, some don’t, and some could take ‘em or leave ‘em. She believes the answer is sexual pluralism, a society where sex is judged and limited only by “the way partners treat one another, the level of mutual consideration, the presence or absence of coercion, and the quantity and quality of the pleasures they provide.”

If morality is entirely personal to the individual, and if society is willing to agree to disagree about issues of morality, then sexual pluralism is desirable. There is a certain intellectual and emotional purity in simply doing away with sexual limitations. Never again would we have to ask ourselves “how closely
related is too closely related,” or “what is the maximum acceptable number of husbands,” or “where exactly is the line between porn star and prostitute.” However, at least some of the things that people do to themselves are bad for them. Once consent becomes the rubric, society loses the power to protect people from themselves. Currently, there are activities outside the sexual arena where adult citizens are prevented from doing things they may very well wish to do, even if these activities harm no one but themselves. Drug abuse, self-mutilation, and suicide are examples that come readily to mind. Morals legislation is one method by which legislators may curb self-destructive behavior.

However, to concede the field of battle to Scalia and Finnis at this point is to ignore the costs involved in a judicial hands-off policy, where the Court declines to take on the role of defining the limits of legislative power. The American legal system was never designed with pure majoritarian rule in mind — America is not a democracy; it is a republic. It is entirely appropriate for judges to act with a tendency towards paternalism and a hint of activism. For example, Brown v. Board of Education\(^3\) sparked more violence and discontent than Roe v. Wade; yet that decision is now hailed as having been necessary to push society in the direction of racial equality. The alternative is to always bow to the will of the majority, which has acted in manifestly unjust ways in the past, and arguably continues to do so.

Scalia, in labeling the issue as a culture war, unwittingly demonstrates exactly why the judiciary need not bow to the will of the legislature in these issues. A culture war is, almost by definition, temporary and subject to change as the taste and whim of the public is subject to change. If, as Scalia admits, cultural views of morality can change over time, then morality is not an absolute truth which can be known by all and applied to everyone. And, if morality is personal to the individual, then it is simply not the stuff of vital state interests. Take sodomy, for example. Any individual forced to engage in the activity against his will is already protected by rape statutes, and any individual voluntarily engaged in such activity is presumably not looking...
for legal protection. All others are simply not vital to the debate.

One concern remains, however — that of Scalia’s parade of horribles — that incest, masturbation, polygamy, adultery, and bestiality may no longer be regulated, and will presumably now run rampant through society. If all of these issues truly are merely moral in nature, then none of them may be regulated. The judiciary would then be substituting its moral compass for the legislature’s, finding an issue to be “merely moral” when it invalidates a statute, but holding that a statute advances a vital state interest when the judiciary refuses to condone a particular behavior. Perhaps the real problem with bestiality is that it is morally distasteful, and all possible vital state interests are but a ruse.

Bestiality Revisited

Assuming that the judiciary should be allowed to invalidate at least some morals legislation, can there be a privacy or autonomy interest in bestiality? Thirty-seven states outlaw animal sex — must they all be repealed? Under a substantive due-process analysis, a court would be unlikely to decide that bestiality is a fundamental right. While sex is generally a private and autonomous act, sex has never, in and of itself, been held to be a fundamental right. However, though most laws regarding non-fundamental rights will generally be found valid with little more than a cursory review, the Lawrence case demonstrates that rational basis of review might be a more stringent test in the context of a law that interferes with sexual expression.

Several state interests may be advanced by bestiality laws. These include: protection of animals from physical abuse; protection of animals on the basis that they can’t consent; safety concerns in protecting humans from causing their colons to become perforated; and health concerns in preventing the spread of animal-to-human diseases. Each of these purposes will be briefly examined.

Anti-bestiality law cannot be justified on the grounds of protecting animals from physical abuse, because animal-abuse statutes cover that. As noted in the introduction, no horses were harmed in the making of Senate Bill 6417. As for protecting animals because they cannot consent, the truth is that animals, particularly domesticated ones, don’t consent, the truth is that animals, particularly domesticated ones, don’t consent to most of the things that happen to them. Who’s to say that a sheep doesn’t feel a greater sense of personal violation when being sheared than it experiences during a cold winter’s night in the company of Farmer Brown?

If the vital interest is human safety, then anti-bestiality laws do infringe on autonomy interests. Presumably, an adult should be able to weigh the risks of colon perforation against the joys of horse sex and act accordingly. This leaves the possible interest of disease control, perhaps
the most valid reason for regulating bestiality. However, the law can’t prohibit all human contact with animals — that would eliminate the ranching industry and the possibility of pet ownership. So the diseases to be controlled would have to be sexually transmitted ones. Assuming that there is a risk of such diseases being transmitted between species, there are still two problems. The first is how to justify regulating the animal lover who practices safe sex. The second is how to justify banning sex with animals, but still allowing humans who have an STD to have consensual sex, when the risk of spreading disease is so much greater.

Even if every one of these justifications is a legitimate and vital state interest, none of this analysis uncovers the true root of the issue, which is that the vast majority of people think that bestiality is disgusting, distasteful, and just plain wrong. Whatever state interest is given for bestiality legislation will largely be a sham, because none of those rational reasons account for the moral outrage and revulsion that bestiality engenders.

**Conclusion**

In the realm of constitutional interpretation, morals legislation is a minefield. There is no safe ground, and no easy or obvious answers. In addition, there are costs associated with both sides of the morals-legislation debate. Those who would dismiss “mere” morals legislation as an unworthy form of state interest must be able to defend that assertion in all situations, not just those where the issue is not morally offensive to them personally. It is intellectually dishonest, for example, to defend anti-bestiality laws, but to ridicule those who would oppose gay marriage for championing “mere morals” legislation.

On the other hand, those who would defend morality as its own vital state interest, worthy of consideration apart from any public health or safety concern, must be able to defend that in situations where they are confined in unwanted ways by the morality of others. It is equally dishonest to support anti-abortion legislation or the banning of gay marriage, but to argue that these laws are qualitatively different from legislation regulating the head coverings of women, or the eating of sacred cows. In the end, however, the costs of allowing the judiciary to weigh in on the culture war, to place limits on allowable morals legislation, are relatively minor in comparison to the unacceptable cost of allowing majoritarian politics to proceed unchecked, and to impinge on the liberty interests of the immoral minority. 😊

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NOTES

5. Peter M. Cicchino, “Reason and the Rule of Law: Should Bare Assertions of ‘Public Morality’

6. U.S. Const. amend 14, § 1. This portion of the Constitution is also the basis for all equal-protection claims. Substantive due-process and equal-protection claims are almost always intertwined, but the analysis is somewhat different. As the scope of this article is limited to substantive due-process, equal-protection concerns will largely be ignored.

9. Id.
10. Id.
11. See Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) (law prohibiting optician from selling eyeglass lenses without prescription was constitutional even if it exacted “a needless, wasteful requirement in many cases”).
15. See Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating a statute limiting occupancy of any dwelling unit to members of the same family); Loving v. Virginia, 388 U.S. 1 (1967) (recognizing a fundamental right to marry by invalidating an anti-miscegenation law); Troxel v. Granville, 530 U.S. 57 (2000) (recognizing a “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

16. This is not to say that sexuality and morality are interchangeable terms. Issues of assisted suicide and euthanasia, for example, are moral, because they concern whether or not there can ever be a great enough good in ending suffering to justify the evil of taking life.

17. 198 U.S. 45 (1905).
18. Id. at 64.
19. Id.
20. 381 U.S. 479 (1965).
21. Id. at 480.
22. Id. at 482.
23. Id. at 484.
24. 539 U.S. 558 (2003). This case is an exception to the rule that laws regarding non-fundamental rights will always be upheld. The Supreme Court invalidated a Texas statute under a rational-basis review standard for criminalizing sodomy between two people of the same sex, without finding a fundamental right to sex.
25. Id. at 599, 603-04 (Scalia, J. dissenting).
26. Social conservatives are not the only ones who share this view. For example, Ruth Bader Ginsberg, though supportive of reproductive freedom, nevertheless criticized Roe v. Wade, believing the Supreme Court improperly fanned the flames of controversy at a time when various state legislatures were naturally trending towards more liberal abortion statutes. Suddenly, rather than gradually liberalizing their laws, state legislatures began working to minimize the impact of Roe. See Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L.Rev. 375 (1985).
28. Id. at 1055.
29. In fact, Finnis’s article may have been born out of an affidavit he submitted in the matter of Romer v. Evans, asking the court to uphold a Colorado constitutional amendment that prohibited legal protection for homosexuals. See Cicchino, supra note 5, at 158.
30. Id. at 245. In practical terms, this would mean regulating morals issues on the basis of consent. The problem is that many of these activities, particularly those sexual in nature, are assumed to be consensual, and proving that consent was lacking turns out to be very traumatic for the victim, if not downright impossible.
31. 347 U.S. 483 (1954) (holding school segregation based on race to be unconstitutional).
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when I was a grad student in English Lit, many lifetimes ago, one of the most important books in literary criticism was William Empson’s *Seven Types of Ambiguity*. This was back in the now-lost days when “literary criticism” meant looking at good writing and saying something intelligent and useful about what made it good. Today’s English majors, to their loss, know nothing of this.

I could not now tell you what the seven types of ambiguity were, or even why there were precisely seven rather than eight, or six, or thirteen. But I mention Professor Empson’s estimable title here as a way of noting that, in literary writing, ambiguity is often a good thing. That’s because one of the techniques and purposes of literature is to expand meaning rather than limit it.

This is emphatically not the case in our profession. In law, language needs to be as precise as possible. Ambiguity invites interpretation; and while interpretation creates hours of amusement and enlightenment for English majors, it can create months of dispute, years of litigation, and hundreds of thousands of dollars in legal costs for ordinary business folk. What we want in law — at least in statutes, rules, contracts, and judicial opinions — is clarity, and preferably absolute clarity.

Anyone who’s been to law school knows that a court won’t waste its time construing a statute or interpreting a contractual provision if its meaning is plain on its face. It is only the ambiguous clause that requires judicial construction — and ends up costing lots of money for a result that will disappoint at least half of the people involved. How does ambiguity arise in legal and legislative writing, what do we do when it arises, and how do we learn to avoid it?

The deliberate ambiguity sought by the artful literary writer arises from careful selection of words and phrases that are most likely to suggest broader, deeper meanings and possibilities. The flip side of that coin is the unintended ambiguity of the legal writer or legislative draftsman who — with good intentions, but out of laziness, sloppiness, or inattention — selects a word, phrase, or structure that is capable of more meanings than the one intended. I had occasion to refer to one such kind of ambiguity a couple of months ago, when I briefly discussed the serial comma and the problems created by its absence. I wrote that “Arthur left his estate in equal parts to Gavin, Tristram and Percival” could be read to mean that Arthur’s estate is divided into three parts, one going to each of the three named individuals; or that the estate is divided into two parts, one going to Gavin, the other to Tristram and Percival together. I concluded that, for purposes of the precise clarity needed in legal writing, it’s longer but better to say: “Arthur left his estate in two equal parts, one part to Gavin, the other to Tristram and Percival.”

Back in 1999, the judges of the U.S. Court of Appeals for the First Circuit faced a similar problem when they had to interpret a compact that read, in part: “the Commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area.” Appellants in the case had argued that the lack of a serial comma after “partially regulated plants” and before “and all other handlers” meant that the final phrase “receiving milk from producers located in a regulated area” modified both “partially regulated plants” and “all other handlers” — in other words, the Commission could establish minimum prices for milk handled by a partially regulated plant only if that plant received milk from producers located in a regulated area.

Similarly, the Massachusetts Appeals Court for Essex County rejected an argument that serial commas in a statute rendered its meaning ambiguous because they could be read as meaning “and” or “or.” The court held that a series of terms separated
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by serial commas and culminating in a final term preceded by the word “or” was to be read in the disjunctive, not the conjunctive; that is, an expression such as “a, b, c, or d” means any one of those four elements, not all of the first three or just the last one. (The disjunctive is opposed to the conjunctive. The term “or” is disjunctive: it separates the elements in a series, such that any one of them applies. The word “and” is conjunctive: it conjoins the elements in a series, such that any one of them applies.) “The obvious sense,” the court held, “dictates reading each of the commas as standing in place of an ‘or’ ... the ‘or’ is to be given its ordinary disjunctive meaning.”2 The court reasoned that “The use of the disjunctive ‘or’ between each segment of the statute indicates again that a showing of any one of the activities will constitute the violation at issue in the case. (Unfortunately, the court’s colorful display of literacy and linguistic analysis paled when it chose the phrase “between each segment.” A comma can’t appear “between” a single segment, but only between any two segments. The court would have done better to stick to its established practice of referring to the commas as “separating” the segments, rather than somehow appearing “between” each segment, in violation of the laws of both grammar and physics.)

In the above cases, it was fairly easy for the court to find the correct, intended meaning, despite the ambiguous omission of the serial comma, by simply considering the intent of the statute and comparing it with the result that would follow from the Appellants’ proposed interpretation. But the placement of serial commas can create knottier ambiguities. The New Mexico Supreme Court in 1969 faced the challenge of interpreting the state’s kidnapping and false-imprisonment statutes, which epitomize both ambiguous and misleading legislative drafting:

Kidnaping [sic] is the unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim be held for ransom, as a hostage, confined against his will, or to be held to service against the victim’s will.

False imprisonment consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so.

Interpreting these statutes is a daunting task, which the New Mexico Supremes undertook with aplomb.3 I commend it to those interested enough to look it up, but won’t repeat their analysis here — except to note the court’s especially useful distinction between parenthetical commas, which enclose certain phrases, and serial commas, which separate the several terms that make up a sequence. But metal more attractive is found in rewriting the offending statutes.

We know we’re in trouble when we see the definition of kidnapping uses the term “unlawful.” There are two problems with this. First, since the definition comes from the New Mexico criminal code, it is supposed to tell us what is unlawful, so using the term “unlawful” in defining an unlawful act is spectacularly unhelpful. Second, including the term “unlawful” here suggests that there may be actions of the type defined in this statute that are lawful. If anyone can think of an example of the lawful taking, restraining or confining of a person, by force or deception,
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with intent that the victim be held for ransom, as a hostage, confined against his will, or be held to service against the victim’s will, please let me know. On second thought, don’t — I think the legislature probably inserted the word “unlawful” when someone noticed that, without it, a police officer arresting someone could be guilty of kidnapping. Still, there must have been a better way of making that point than to settle on language that essentially means “the following behavior is against the law — but only if it’s unlawful.”

But moving on to the substance of the statute: Kidnapping may consist of taking, restraining, or confining a person. The statute uses the disjunctive, so any one of those activities will suffice. It’s equally evident that, whichever one of these is done, it must be done by force or deception — again, either of the two will suffice. And it is also clear that there must be a specific intent. But in the intent provision the statute breaks down. As written, the statute could refer to any of three possible intents: (1) that the victim be held for ransom, as a hostage, (2) that the victim be confined against his will, or (3) that the victim be held to service against his will. However, the statute could also be read as referring to four possible intents: (1) that the victim be held for ransom, (2) that the victim be held as a hostage, (3) that the victim be confined against his will, or (4) that the victim be held to service against his will. The latter appears more likely, given the fact that not all hostages are held for ransom.

The false imprisonment definition is not as complex, but it does contain an ambiguous pronoun. Here the intent is to confine or restrain (“intentionally confining or restraining another”), but in addition to the absence of consent there is also a knowledge requirement: “with knowledge that he has no lawful authority to do so.” Who is the “he” referred to in this knowledge provision? We know that a pronoun must refer back to its antecedent, and agree with it in gender and number. But the only word in this definition that could possibly be the antecedent of the pronoun “he” is “another person” — in other words, the victim! So the law is telling us that false imprisonment consists in intentionally confining or restraining another person, without his consent, and
with the knowledge that he, the victim, has “no lawful authority to do so.” To do what? To give his consent? To withhold it? No, we are really lost in the Twilight Zone now. The “do so” must refer to the confining or restraining, and the “he” in the knowledge clause must mean the perpetrator, not the victim, even though the sentence, as constructed, contains no reference to a perpetrator.

So, humbly submitted for your approval, as Rod Serling used to say, here is a proposed rewrite of the statutes at issue in the New Mexico case:

Kidnapping is the taking, restraining, or confining of a person, by force or deception, without lawful authority, with intent that the victim be (1) held for ransom, (2) held as a hostage, (3) confined against his will, or (4) held to service against the victim’s will.

False imprisonment consists of intentionally confining or restraining another person, without his consent and with knowledge that the perpetrator has no lawful authority to do so.
I resorted to a list of numbered items in the definition of kidnapping, and I make no apology for it. Numbering is not very endearing in literary or social writing, but it can be absolute salvation for the lawyer or legislator who quests after the Holy Grail of Absolute Clarity.

More recently, the Supreme Court of Wisconsin had to interpret that state’s recreational immunity statute to determine whether a property owner was liable for the injuries of an invitee on his property, or was immune because the invitee was engaged in recreational activity, of whose consequences the invitee assumed the risk. The statute defined an “owner” as a person who “owns, leases or occupies property,” and defined “property” as “real property and buildings, structures and improvements thereon, and the waters of the state.” Because the invitee was injured in a fall from a structure, the applicability of the recreational immunity statute’s definition of “property” became critical. This is an even more difficult type of ambiguity than the one explored by the New Mexico Supreme Court, because it went to the heart of the issue in the case.

One party maintained that the statute defined three types of property: (1) real property, (2) buildings, structures and improvements thereon, and (3) waters of the state. The other argued that only two types of property were defined: (1) real property together with any buildings, structures and improvements thereon, and (2) waters of the state. The crucial point raised by this dispute was whether a property owner is immune from liability for recreational injuries incurred on any buildings, structures and improvements situated on land owned by the owner. In other words, the question was whether the immunity provision applied if the owner owned the land but not the structure, or the structure but not the land it stood on, or if he had to own both in order to be immune.

The court reasoned that if the legislature had meant to limit immunity to injuries incurred on structures owned by the owner of the real property on which they stood, they would have said so explicitly. “We cannot rewrite [the statute] in the exercise of interpreting it,” the court wrote. But a dissenting judge, in a rich and enjoyable opinion discussing the statute comma by comma, pointed out that at least four differing definitions of “property” could equally reasonably be interpolated from the statute as written, and that resort to legislative intent was unjustified. Probably the judges all went to bed wishing that the injury had occurred upon the waters of the state.

One of the most common types of ambiguity arises from the use of a disjunctive or conjunctive series with a modifying clause, where it is unclear whether the modifying clause applies to all of the terms in the series or just the one nearest it. A simple example is the phrase “frozen meats, fruits, and vegetables.” Are only the meats frozen, or are all three of the things on the list frozen? There is no “rule” of English grammar or statutory construction that helps us with this. The only effective way to deal with an ambiguity of this kind is to nip it in the bud. The writer should spot it and rewrite in order to make sure she has clearly said what was intended. If the modifier applies to only one of the terms in the series, a good rewriting technique is to put that term last: “fruits, vegetables, and frozen...
meats” leaves no ambiguity. If, on the other hand, the modifier applies to the entire series, the only way to make that clear is to use more words. Brevity may be the soul of wit, but it is not always the clearest way to write. “Frozen meats, frozen fruits, and frozen vegetables” is soporifically repetitious, but at least it leaves no doubt. A better approach might be something like “frozen products, namely meats, fruits, and vegetables” or “meats, fruits, and vegetables, all frozen.”

Our own Appellate Division Three faced a case in 1990\textsuperscript{5} that required it to interpret the language of a real estate contract that read, in part, “Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller the equipment stated in Schedule 1 attached hereto and incorporated herein; the 1982 fruit crop and the following legally described real property …” The drafters’ use of a semicolon after “herein” and no punctuation at all between “fruit crop” and the description of the real property gave rise to a dispute as to what was actually being sold, and whether the language gave rise to a general warranty against encumbrance. The court wrote: “Had the series … been separated by a semicolon after crop — or a comma used after equipment and again after crop — there would be no ambiguity.” Deciding that the parties clearly intended the sale of three things — the equipment, the crop, and the real property — the majority re-punctuated the contract and decided the case accordingly. But a dissenting judge maintained that the majority had rewritten the contract, in essence reforming the agreement without sufficient justification in the record. Is it the judges’ job to interpret and enforce a contract or statute according to what its language says, or to rewrite it according to what the court believes it was meant to say, even though it ended up saying something different?

That is a perennial question, and different courts have answered it in different ways. It’s not unreasonable, though, to expect judges to be language police. By reaching opinions based on what laws and contracts actually say, rather than what their drafters may or may not have meant, judges send a crucial message to lawyers and legislators everywhere: Word choices have consequences, and those who are charged with putting the law into

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NOTES
4. Peterson v. Midwest Security Insurance Company, Inc., 636 N.W.2d 727 (Wis. 2001). Though it has limited applicability to Washington law, this case is a great read for property lawyers, personal injury lawyers, and grammarians alike.
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Joy McLean began her WSBA career in 1995 as disciplinary counsel in the Office of Disciplinary Counsel (ODC), and in 1998 was promoted to senior disciplinary counsel. She was appointed associate director for the ODC in 1999, and in 2002 was named director.

Among her many accomplishments at the Bar, Ms. McLean advocated the use of alternative dispute resolution and was the WSBA’s main proponent of “diversion,” in which a lawyer can be diverted from discipline for less-serious misconduct. She gave a highly regarded presentation on diversion at the National Organization of Bar Counsel Conference in February 2006, which made her a nationally recognized authority on the issue. She was a much sought-after speaker, known for her breadth of knowledge and engaging speaking style.

“Joy epitomized the work the Bar is doing to elevate the practice of law,” said Jan Michels, WSBA executive director. “She was an individual of great integrity, dedicated to the legal profession, and firmly committed to protecting the public and serving the citizens of Washington.”

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Angelo Petruss Award

The Angelo Petruss Award is given to a lawyer in government service who has made a significant contribution to the legal profession, the justice system, and the public.

A 1989 cum laude graduate of the University of Puget Sound School of Law, Penny Allen has been an assistant attorney general (and now senior counsel) for the State of Washington for 16 years. During this time, Ms. Allen has also consistently represented low-income clients in Thurston County. Although the Office of the Attorney General encourages its employees to engage in pro bono law practice, it cannot provide resources or support. Ms. Allen has a set of forms and standard documents for her pro bono practice, but there are no automated systems or dedicated support staff available for her use. She also must meet her clients outside of her regular work hours and outside of her office. Although Ms. Allen must work with her pro bono clients on her personal time and with her personal resources, this does not deter her. Once a case is resolved, she contacts Thurston County Volunteer Legal Services and accepts another case.

“Over the years, one case at a time and one client at a time, she has made a significant difference in the lives of the individuals she has represented . . . and in the way she has inspired others to undertake pro bono representation,” wrote the Attorney General’s Office Pro Bono Committee in her nomination.

Nancy C. Ivarinen
Courageous Award

This award is presented to a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession.

Nancy Ivarinen received the Courageous Award for her contributions to the legal profession and activism for access to justice, while overcoming a severe hearing impairment. She was born with conductive hearing loss, and throughout her life, her hearing has continued to deteriorate.

In 2002, her hearing impairment was substantially corrected when she received a Baha bone-anchored system for both ears, the first such surgery in the Pacific Northwest. Her hearing impairment has not deterred her from excelling in the legal profession or helping others. She has devoted countless pro bono hours to low-income clients, primarily those with landlord-tenant and elder-abuse issues.

Ms. Ivarinen is a volunteer attorney with Whatcom County’s LAW Advocates; has developed a Street Law clinical program that allows paralegal students to work with volunteer lawyers to provide free legal services to students at Whatcom County Community College; serves on the Pro Bono Steering Committee of Skagit County Bar Association; provides continuing legal education instruction to attorneys; and serves as gratis landlord-tenant instructor for landlords participating in the Bellingham Police
Department’s Crime Prevention Program. She is appointed by the Washington State Supreme Court to serve on the Practice of Law Board.

**Excellence in Diversity Award • Professor David Boerner**

Professor Paula Lustbader Seattle University School of Law

Alternate Admissions Program/Academic Resource Center

This award is made to a lawyer, law firm, or law-related group that has made a significant contribution to diversity in the legal profession’s employment of ethnic minorities, women, and persons with disabilities.

Professors David Boerner and Paula Lustbader co-founded the Alternative Admissions Program and the Academic Resource Center at Seattle University School of Law. Through their tireless work, Professors Boerner and Lustbader have not only made a significant contribution to diversity in the legal profession, they have helped change the way law schools view diversity and the need for it.

**Professor David Boerner**

Professor Boerner currently serves as chair of the Washington Sentencing Guidelines Commission. He has served on Washington State Supreme Court’s Board for Court Education, its Time-for-Trial Task Force, and its Jury Instruction Committee, and is a past chair of the WSBA Rules of Professional Conduct Committee. Professor Boerner is a highly sought-after lecturer, a frequent contributor to law reviews, and the author of Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981. This is Professor Boerner’s second WSBA award — in 2004, he received the Award of Merit, the WSBA’s highest award.

**Professor Paula Lustbader**

Professor Lustbader has been the director of the Seattle University School of Law’s Academic Resource Center since its inception in 1987. She is a nationally recognized scholar and speaker on law school academic-support programs, learning theory, teaching methods, and diversity, and has given presentations on these subjects at national and international conferences. In addition to being the past chair of both the Teaching Methods and Academic Support sections of the Association of American Law Schools, she has been a frequent program organizer and presenter at conferences sponsored by the Law School Admission Council Institutes for Academic Support, the Institute for Law School Teaching, the Society of American Law Teachers, and the Legal Writing Institute.

**Alternative Admissions Program and Academic Resource Center**

The Seattle University School of Law’s Alternative Admissions Program and Academic Resource Center work to diversify the student body — and, by extension, the population of practicing attorneys — by providing students from diverse backgrounds with access to legal education and other non-academic support, so that they may fully participate in the law school and enrich the learning experience of all its students.

**Outstanding Judge Award • The Honorable D. Gary Steiner**

The Outstanding Judge Award is presented to an elected official in recognition of outstanding service to the citizens of Washington state and special contributions to the legal profession.

Washington State Governor Christine Gregoire was honored for her extraordinary leadership in mediating a compromise between the medical and legal communities on SHB 2292, a hotly contested medical-malpractice-reform bill. The Legislature ultimately passed the compromise bill (also called “Plan B” during the 2005 legislative session) as amended through this historic court while maintaining a warm sense of humor. In 1994, Judge Steiner was instrumental in forming the first drug court in Pierce County, which has been credited with helping to break the cycle of drug abuse and violence. A study of 65 drug-court graduates revealed that 63 percent remained crime-free five years later, almost three times as many as non-graduates, making the drug court a nationally recognized success.

“[The Pierce County drug court] was started ... when the whole idea of problem-solving courts, like drug courts, was a new and largely unproven concept,” wrote Washington State Supreme Court Chief Justice Gerry Alexander. “Judge Steiner believed that such a court could help redeem the lives of persons caught up in the drug world, and his optimism and hard work has paid dividends to the individuals who come before this court as well as for the citizenry of Pierce County.”

**Outstanding Elected Official • The Honorable Christine O. Gregoire**

This award is made to a lawyer, law firm, or law-related group that has made a significant contribution to diversity in the legal profession’s employment of ethnic minorities, women, and persons with disabilities.

Professors David Boerner and Paula Lustbader have helped change the way law schools view diversity and the need for it. They have received the Award of Merit, the WSBA’s second WSBA award for outstanding service to the bench and for special contribution to the legal profession at any level of the court.

Appointed to the Pierce County Superior Court bench in 1981, Judge D. Gary Steiner has presided over some of the most complex and high-profile criminal trials in Pierce County history, and is known for conducting a firm and orderly
process, which has helped improve healthcare by increasing patient safety, reducing medical errors, reforming medical-malpractice insurance, and resolving medical-malpractice claims. WSBA President Brooke Taylor wrote: “Credit must go to Governor Gregoire for her extraordinary leadership in arranging and mediating this process. She chaired all five sessions, and there was never a hint of partisanship in her conduct of the meetings. What did come through loud and clear was her knowledge of the complex issues on the table, and her passion for affordable, accessible healthcare.”

Community Service Award • The Honorable Joel M. Penoyar

Lawyers are known for giving generously of their time and talents in service to their communities. This award, which is new this year, recognizes exceptional non-law-related volunteer work and community service.

A 1974 graduate of the University of Oregon School of Law, Judge Joel Penoyar serves on the Court of Appeals, Division Two in Tacoma.

Judge Penoyar’s community-service activities are numerous: he has been a soccer coach and president of the Willapa Harbor Youth Soccer League for 20 years; a scoutmaster for 18 years; a volunteer firefighter, training officer, and first responder for 15 years; an assistant track and basketball coach at South Bend High School for 10 years; and a member of the Willapa Harbor Lions and South Bend Kiwanis. He has also spoken at countless school assemblies, forums, and award ceremonies; he attends and speaks at District Reasonable Efforts Symposia; and he aids and encourages students with their college dreams.

It is in recognition of Judge Penoyar’s tireless commitment to serving his community that the WSBA was proud to honor him with its first-ever Community Service Award.

Award of Merit • Marc A. Boman

The Award of Merit is the Washington State Bar Association’s highest honor and is most often given for long-term service to the Bar and/or the public. Both lawyers and nonlawyers are eligible for this prestigious award.

Marc Boman received the Award of Merit in recognition for his dedicated service to improving public defense in the state of Washington and his career-long commitment to professionalism. Serving as co-chair of the WSBA Blue Ribbon Panel on Criminal Defense (2003-2004), he worked tirelessly to achieve systemic, lasting improvements in public defense services statewide. The Panel’s report was instrumental in the 2005 Washington State Legislature passing HB 1542, the first requirement for state funding for trial-level public defense in the history of Washington state, and, in 2006, the Legislature funded that mandate. Mr. Boman participated in drafting HB 1542 and was active in informing the state Legislature of the need for public-defense funding.

“He has already inspired a great bench guide on appointment of counsel and is launching other projects as well. His commitment is genuine, productive, and inspiring,” wrote Washington State Supreme Court Justice Susan Owens.

Lifetime Service Award • Patrick H. McIntyre

This special award, given for a lifetime of service to the WSBA and the public, is given only when there is someone especially deserving of this recognition.

Patrick “Mac” McIntyre, a former deputy director and general counsel for Evergreen Legal Services, is retiring after more than a decade as the executive director of the Northwest Justice Project (NJP), a not-for-profit statewide organization that provides free civil legal services to low-income people throughout Washington state. Under his leadership, the NJP has grown from a fledgling legal-services provider to a multi-million dollar statewide organization with a national reputation that has helped countless Washington residents access equal justice.

Mr. McIntyre’s leadership was essential in the creation of the Legal Aid for Washington (LAW) Fund, which provides private support for civil legal-aid programs in Washington state, and the Access to Justice Board, established by the Washington State Supreme Court to address the need for equal access to justice for those facing economic and other barriers. For much of his professional career, Mr. McIntyre has led numerous bipartisan WSBA delegations to Washington, D.C., to help educate our congressional leaders about the need for adequate equal-justice funding that helps our poorest and most vulnerable people.
pointed by the Board of Governors in spring 2003 as a first step in addressing concerns about the quality of indigent defense services in Washington).

Mr. Hyslop’s list of community memberships, activities, and honors is as varied as it is impressive. He has served as president of the Washington State University Alumni Association; on the Spokesman-Review Newspaper Advisory Council; on the board of Morning Star Boys Ranch and as founding board member of its foundation; as director of the Rotary Club of Spokane; as assistant scoutmaster for the Boy Scouts of America; and on the Citizens for Spokane Schools Leadership Team.

Pro Bono Award • Leonard J. Feldman

Leonard Feldman (right) receives the Pro Bono Award from WSBA President Brooke Taylor.

The Pro Bono Award is presented annually to a lawyer, nonlawyer, law firm, or local bar association for outstanding efforts in providing free or low-cost services to the poor, and is based on cumulative efforts rather than the number of pro bono hours or amount of financial contribution. President S. Brooke Taylor presented the award to Mr. Feldman on June 10 at the Access to Justice Conference in Yakima.

In 1995, Mr. Feldman became a district coordinator for the Ninth Circuit Pro Bono Program, a position he still holds. The program provides pro bono counsel to pro se parties with meritorious or complex appeals, provides a valuable learning experience to young attorneys and law students, and assists the court in processing pro se civil appeals more equitably and efficiently. As district coordinator, Mr. Feldman is responsible for enlisting attorneys to participate in the program, circulating memoranda to the pool of attorneys who have signed up for such service, and recruiting attorneys to take the referred appeals. Feldman has participated as pro bono counsel on 16 appeals himself, and currently has one pending before the Ninth Circuit.

In 1995, Mr. Feldman proposed that the University of Washington School of Law establish an externship program for law students to participate in federal appeals. The externship program was established, and operates under Mr. Feldman’s and UW professor Eric Schnapper’s supervision. “Leonard’s work and example have impressed upon the students the importance of a lawyer’s obligation to provide pro bono representation, and the considerable satisfaction that is to be found in meeting that obligation,” Professor Schnapper wrote in support of Leonard Feldman’s nomination.

“The WSBA Pro Bono Award is based on outstanding cumulative efforts, not just pro bono hours. Nevertheless, given the demands of his practice and duties as a shareholder, it is noteworthy that over the last 10 years, Leonard has averaged more than 210 hours of pro bono service each year,” Anderson wrote.
The Board’s Work

BY LINDSAY THOMPSON

Summer Roundup — Yakima, June 9; Port Angeles, July 21

Yakima

The Board’s summer meetings tend to be a combination of planning for the Bar year to start in September, and clearing the deck of the waning one. Newly elected governors start coming to meetings. Presidents-elect start telling presidents, “Get your own coffee.”

The Yakima meeting was a busy one, yoked as it was with the Access to Justice and Bar Leaders’ conferences. The Big Institutional Item was the election of next year’s WSBA president, and it turned out to be an easy choice. 2007 is eastern Washington’s turn in the presidential rotation, and Governor Stan Bastian was the only person who said he wanted to take a swing at it. So he won unanimously. Winning unopposed is always more fun, I’ve found.

It was time to elect the Young Lawyers Division member of the Board, to succeed Katie O’Sullivan next. The BOG interviewed two candidates, and elected Jason Vail to the three-year term. Speaking of the YLD, its leaders gave the Board their annual report, full of awards and public-service work. John Brangwin, another eastern Washington member, takes over as its president in September.

The Court Rules and Procedures Committee, which is in charge of revising and amending all the court rules (duh), presented the Board with some ideas on changing the rule about unpublished appellate opinions not being citable or having precedential value in Washington. The trouble is, some of the online services report them. So they are there to be widely seen, but not used. Opinion was divided and the discussion was long. The Board asked the committee to come back in July with something more precise. Committee chair David Swartling also asked the Board to consider a task force to look at the kudzu-like proliferation of local court rules in Washington. The Board so created.

More reports: CLE Director Mark Sideman got a big round of applause for another in a string of annual reports on what appears to be a highly enterprising and successful management of WSBA’s CLE program. Treasurer Mark Johnson and President-elect Ellen Conedera Dial talked about some financial effects of WSBA’s end-of-the-year move to new digs. Several luminaries brought the Board some American Bar Association resolutions, seeking WSBA support for them at the next ABA House of Delegates meeting. They were intended to start some commitment toward creating a “civil Gideon” right to counsel for basic needs: shelter, sustenance, safety and health, and child custody.

Former WSBA President Ron Ward, Northwest Justice Project’s Deborah Perrellus, Equal Justice Coalition’s Scott Smith, and ABA President Michael Greco made a persuasive case, and the Board voted to support the resolutions.

Then the Board made some appointments and accepted a committee recommendation to file an amicus brief in Ehsani, et al. v. McCullough. There was a discussion about what to do about President-elect-elect Bastian’s last year on the BOG. Some suggested he just serve it out and be president-elect (which he will become when President-elect Dial becomes president and President Taylor becomes immediate past-president, is that all clear?). Others thought the two jobs would be too much work. As more and more governors have run for president before their BOG terms were over, there has been some unhappiness with the number of governors who have to be elected by the BOG to serve out short bits of full terms. So they decided to just move Bastian’s seat from one election class to another and run it for a three-year term this August.

Port Angeles

The Board went to Port Angeles, President Taylor’s longtime home, in July. They added a day to the meeting for a planning session. I wasn’t there, but heard it was a forward-looking sort of affair.

In a new agenda item, Governors’ Open Forum, there was a sort of Quaker meeting where the govs talked about nonagenda stuff that had been on their minds. A little thinking out of the box is a good thing. One agenda item got moved into the time slot, resulting in the Board voting to cosponsor a good government website designed to educate the public on what goes into electing Washington judges. A variety of law and groups like the League of Women Voters are behind it, so as to keep it neutral and nonpartisan.

WSBA ABA delegate J.D. Smith, who is always a smart dresser, brought the Board another ABA resolution, this one intended to endorse diversity efforts in law schools to keep up with demographic realities in America. He made a good case and the BOG voted to support it.

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Reports: Former WSBA governor Bill Hyslop updated the Board on the work of the Committee on Public Defense, which has a big plate of tasks trying to improve that system. General Counsel Bob Welden came in with the annual Keller licensing fee deduction report. Under a U.S. Supreme Court decision, mandatory bars have to tot up how much they spend on political activities like lobbying, prorate it, and give members an opt-out for that sum. Depending on how long you’ve been in practice, the deduction will be between 60 cents and $3.80. The Board also adopted some tighter policies on member data protection to give us all more choices on how much mail, and e-mail, we get.

Court Rules and Procedures Committee Chair David Swartling and staff liaison Doug Ende brought up some rules to change. First up was the question of what, if anything, to do about unpublished appellate opinions. The federal courts will be moving to allow citation of them in 2007. The idea presented was to allow them to be cited if they’d be citable in the states they come from, but to leave Washington’s unpublished cases officially unpublished. At first there seemed to be some division of opinion about the matter, but Judge Christine Quinn-Brintnall, chief judge of the Court of Appeals, Division II, pretty much drove a stake through the heart of the matter with a series of cogent reasons why the idea sucked. Among them — lawyers having to keep up with thousands of extra opinions a year; old unpublished ones being brought up and used in ways the panel wouldn’t have intended if they had known it would be cited; and the fact that different panels could reach opposite conclusions on the same facts, something incomplete databases of old unpublished cases might not reveal. So the Board went with the limited recommendation, which will go to the Supreme Court.

CR 45 underwent some significant changes to track federal law and deal with subpoena notices. CrR 4.8 made some changes to subpoenaing things in criminal cases to even up the playing field. A bunch of other rules had typos and errors corrected. The Supreme Court will decide which ones to publish for comment, and you can see the full text then.

Next year, Swartling said, the commit-

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tee will look at the evidence and infraction rules, time issues, e-discovery, and where to put the juvenile rules in the revision cycles. Swartling won an ovation and a gift for three challenging years chairing the committee, and another from staff for completing 15 years as editor of the WSBA Civil Procedure Deskbook.

After a presentation by Treasurer Mark Johnson, the BOG approved next year’s budget, with expenses, penciling out about $18 million. Amicus Brief Committee Chair Bertha Fitzer gave the Board the committee’s recommendation that WSBA file an amicus brief in a marvelously convoluted case about a lawyer who invested in a property with his client, then died. The committee felt the process should be two-staged — that the BOG first vote to do an amicus brief on grounds that the solution, which is not apparent, should come from the Supreme Court; if that passed, the committee would go away and come back with a solution to put in the brief. Former WSBA Governor Steve Tubbs, of Vancouver, urged the Board not to. There was a good bit of skepticism on the Board about voting to file a brief before knowing what it would be trying to do, and in the end they voted not to.

Another issue came up — what to do, if anything, about a local prosecutorial practice of cutting people charging or sentencing breaks in return for contributions to favored charities. Should the WSBA ask the Rules of Professional Conduct Committee for an opinion? Others said the prosecutors were thinking about drafting some legislation, so maybe we should wait. Well, WAPA Liaison Ed Holm said, it’s turning out to be harder than anyone thought because it impinges on all aspects of criminal law and sentencing. So the Board voted to go ahead and ask the RPC Committee to ponder the matter.

Meeting line-up: La Conner, December 8-9; Tumwater, January 11-12; Bellevue, March 2-3; Longview, April 20-21; Wenatchee, June 1; Quincy, July 27-28; and Seattle, September 13-14.

Meetings are open to members. Come watch.

Lindsay Thompson is Bar News editor and can be reached at barnewseditor@wsba.org.
A Tri-State Look at the Tri-Partite Relationship: Key Insurance Defense Issues in Washington, Oregon, and Idaho

As lawyers around the Northwest have taken advantage of tri-state licensing reciprocity, they are confronting familiar issues on sometimes unfamiliar legal terrain. Insurance defense is a good example. Although practice-management basics generally run closely parallel in Washington, Oregon, and Idaho, there are some key differences. In this column we’ll look at four related questions: (1) whose law governs the attorney-client relationship? (2) who is the client in insurance-defense practice? (3) how are insurance case-management guidelines handled ethically? and (4) how are confidential communications between insurance-defense counsel and the insurer protected?

Whose Law Applies?
To begin with a common example, assume an Oregon-based lawyer who is reciprocally admitted in Washington is asked to handle an insurance-defense case in Washington. Whose law governs the attorney-client relationship? Oregon and Idaho adopted virtually identical choice-of-law provisions in their recently revised Rules of Professional Conduct and Washington adopted a similar rule with its newly amended RPCs. Under all three versions of RPC 8.5(b), if a lawyer is litigating a case in another jurisdiction, the law of that jurisdiction generally applies. This approach is also consistent with general

choice-of-law principles, which look to the jurisdiction with the “most significant relationship” to the parties and the matter involved in determining whose law applies. In our example, therefore, the Oregon-based lawyer handling a Washington court case would look to the law of Washington in addressing the questions posed in this column.

Who Is the Client?
States vary in their treatment of whether insurance-defense counsel are considered two-part test for determining whether an attorney-client relationship exists: (1) the client must subjectively believe that such a relationship exists; and (2) that subjective belief must be objectively reasonable under the circumstances. Although there is no case law directly on point in Oregon in the insurance-defense context, it should follow from Weidner that a law firm and an insurer could agree that the insurer will not be considered the law firm’s client. The ABA took this approach in a formal ethics opinion, 96-403, concluding that the law firm and the insurer could expressly agree to limit the “client” to the insured only.

Case-Management Guidelines
Regardless of whether the insurer is considered a co-client or not, it is typically the one paying all, or at least most, of a lawyer’s bill. The ethical issues surrounding insurance-case-management guidelines, therefore, apply with equal measure to “one-client” and “two-client” scenarios. Washington, Oregon, and Idaho opinions take a twofold approach to case-management guidelines.

The respective Washington, Oregon, and Idaho opinions take a twofold approach to case-management guidelines. First, insurance-defense counsel can acknowledge them without necessarily agreeing to follow them if they conflict with the lawyer’s overriding fiduciary duty to defend the insured competently. Second, insurance-defense counsel need to carefully and continually evaluate the guidelines as the case progresses. All three emphasize that under RPC 1.8(f) which is similar in all three states a lawyer may (with the client’s consent) be paid by another as long as the lawyer’s professional judgment on behalf of the client remains unaffected. All three also emphasize that, in most cases, insurance counsel will be able to comply with both management guidelines and professional standards. But, they all conclude on the cautionary note that if the lawyer’s representation will
be materially limited by the guidelines, then (assuming the insurer won’t modify them) the lawyer must withdraw.

**The Attorney-Client Privilege**

All three states protect confidential communications between defense counsel and the insurer on litigation strategy. The path to that result, however, is different in each.

Under Washington’s “one-client” approach, confidential communications between defense counsel and the insurer regarding litigation strategy fall under work-product protection afforded by Washington Civil Rule 26(b)(4) and Heidebrink v. Moriwaki, 104 Wash.2d 392, 400-401, 706 P.2d 212 (1985). Therefore, even though the insurer is not the defense counsel’s client in Washington, confidential communications between defense counsel and insurers concerning litigation strategy should be protected.

Under Oregon’s “two-client” approach, OSB Formal Ethics Opinion 2005-157 puts such communications squarely within the privilege, because the insured and the insurer are joint clients. Even in a “one-client” scenario in Oregon, however, the privilege applies through the “common-interest doctrine,” which was recognized in Oregon by Interstate Production Cr. v. Fireman’s Fund Ins., 128 F.R.D. 273, 280 (D. Or. 1989). Under the “common-interest doctrine,” which is a variant of the “joint-defense privilege,” sharing confidential information with a third party whose interest is aligned with the client does not constitute a waiver of the attorney-client privilege.²

Idaho has incorporated the common-interest doctrine into Evidence Rule 502(b). It also generally accords work-product protection to confidential communications with insurers regarding the defense of a case under Dabestani v. Bellus, 131 Idaho 542, 545, 961 P.2d 633 (1998). Therefore, whether Idaho law eventually takes the position that it is a “one-client” or “two-client” state, confidential communications between defense counsel and insurers concerning litigation strategy should be protected.

**Summing Up**

Tri-state reciprocity in the Northwest has made practicing across state lines significantly easier. In most instances, the knowledge and skills honed in one jurisdiction apply seamlessly in all three states. There remain, however, important variations in each. Insurance-defense practice is a good illustration of how those nuances play out in an area that shares many common threads.

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

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**NOTES**

1. For a look at these issues farther north and south, see Alaska Ethics Opinions 99-1 and 99-3 and the comments to California Rule of Professional Conduct 3-310. They are available on the Alaska and California bar websites at, respectively, www.alaskabar.org and www.calbar.ca.gov.


6. For more on the common-interest doctrine from a national perspective as it relates to confidential reports between defense counsel and insurers, see Restatement (Third) of the Law Governing Lawyers § 134, cmt. f at 408 (2000).
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The New RPCs and Your Accounts

Now that the new Rules of Professional Conduct have been adopted by our State Supreme Court, attorneys and their staff have many questions about the new trust account rules. In this column, I'll highlight some items in the new rules. Be sure to read the rules and familiarize yourself with the changes.

RPC 1.15A (formerly RPC 1.14) and 1.15B are the new rules which govern the safeguarding of client property and recordkeeping requirements. While there are some significant changes, RPC 1.15A primarily offers clarification of the old rule. The comments to the new rules are especially helpful in this regard.

Some of the highlights of RPC 1.15A are:

- RPC 1.15A applies not only to client property, but third-person property as well.
- Only attorneys admitted to practice law may be authorized signatories on trust accounts. If you have a nonlawyer as a signer on your trust account, you need to change that immediately.
- A written accounting must be provided to your client after every distribution of property. If you hold property but have made no distribution, you must provide at least an annual accounting to your client.
- If there is a dispute about the ownership of client (or third-person) money, that disputed money must stay in the trust account until the issue is resolved.
- Attorneys may withdraw fees from the trust account only when the client has been given reasonable notice through a bill or something similar. If you bill your client for hourly work, be sure you send an invoice and allow the client time to receive and review the invoice before you pay yourself. It's not acceptable to send an invoice and pay yourself on the same day without your client's review.
- Deposits must be made intact. This means no split deposits where one deposit is split into two or more bank accounts at the same time. Many attorneys and law firms used split deposits as a way to handle overpayments. Under the new rules, any check including an overpayment must be deposited in whole to the trust account and the overpayment withdrawn after the check clears.
- Checks cannot be made payable to "cash." All checks must be written to a named payee.
- Withdrawals can be made only by check or bank transfer. This means no ATM cash withdrawals.
- Funds cannot be disbursed from the trust account until the corresponding deposit has actually cleared the banking system. The only exception to this rule is if an attorney has an agreement in writing with the bank personally guaranteeing all disbursements (formerly called an Opinion 177 agreement).
- You cannot disburse more on behalf of a client than that client has in the trust account. You cannot use client funds on behalf of someone else.
- If accepting credit-card payments for advance fee deposits, the payment must be deposited directly to the trust account. The payment cannot first be made to your general account and then transferred to the trust account.
- You must maintain complete records as defined by RPC 1.15B.
- A check register (or equivalent) with a running balance. The check register must reflect all activity in your trust account. Each transaction must list the payee or payor, the client matter, the date, the amount, and the check number where appropriate.
- Client ledgers with running balances. These ledgers must reflect all activity in your trust account for each individual client. Similar to the check register, all transactions must list the payee or payor, the date, the amount, and the check number where appropriate.
- Copies of each deposit slip and deposit item, bank statements, and cancelled checks (or their equivalent). You must have enough information in the copies you keep to recreate your trust-account records if necessary.
- Copies of any invoices, fee agreements, settlement statements, or similar documents that explain the transactions in the trust account. For example, when you pay an invoice from the trust account, keep a copy of the invoice you're paying.

One of the most common questions asked concerns record retention. RPC 1.15B requires trust-account records to be kept for at least seven years after the events they record.

While I've highlighted a lot of items in this list, it does not contain everything covered by RPC 1.15A and B. You'll want to review the new rules thoroughly to ensure compliance.

If you have any questions about the new trust account rules, please feel free to call WSBA Audit Manager Trina Doty at 206-727-8242, Auditor Cheryl Heuett at 206-733-5937, or Auditor Jim Roberg at 206-733-5921.

Trina Doty is the WSBA audit manager, a CPA, and a certified fraud examiner. She oversees the random-examination program, conducts for-cause audits, and educates attorneys about trust-account rules and regulations.
Seeking Applications from Judicial Candidates

Application deadline: December 29, 2006

The WSBA Judicial Recommendation Committee is currently accepting applications from attorneys and judges seeking consideration for appointment to fill potential vacancies on the Washington State Supreme Court and Court of Appeals. The Committee's recommendations are reviewed by the WSBA Board of Governors and then referred to the state governor, who then reviews the recommendations when making judicial appointments. The Committee will interview candidates in February 2007. Applications must be received at the WSBA office by 5 p.m., December 29, 2006. To obtain an application, please visit the WSBA website at www.wsba.org/lawyers/groups/judicialrecommendation/default1.htm or contact the WSBA Service Center at 800-945-9722 or 206-443-9722, or by e-mail at barleaders@wsba.org. Please specify whether you need the application designed for a judge or an attorney.

Changing Your Status to Emeritus

As the 2007 WSBA licensing period approaches, you may be thinking of changing your membership status to accommodate your current career or lifestyle. If you no longer need your active WSBA license, here are reasons to consider Emeritus status.

APR 8(e) creates a limited license status of Emeritus for attorneys otherwise retired from the practice of law, to practice pro bono legal services through a qualified legal services provider. A qualified legal services provider is a “not-for-profit legal services organization whose primary purpose is to provide legal services to low-income clients.” There are no MCLE requirements (although you may attend optional CLE seminars at no cost so that you are aware of changes in the law). The 2007 license fee for Emeritus is $120. This is a significant savings in time and money if you are paying for an active license that you no longer need. Under most circumstances, Emeritus attorneys can remain in Emeritus status indefinitely without having to retake the bar exam if/when returning to active status. Most qualified legal services providers provide malpractice insurance for Emeritus volunteers. There is no age requirement for Emeritus attorneys. Volunteering for a “qualified legal services organization” allows you to control your own schedule. Most importantly, the Emeritus Program provides an opportunity for attorneys to give something back to their communities by helping those who are less fortunate.

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

Emeritus attorney Rebecca Clark had practiced law for 20 years when she decided to change her status from active to Emeritus. “I left my job as manager of the Skagit County Volunteer Lawyer Program [VLP] in January 2006 and took an administrative
The deadline for updating your address to be included in the license-fee renewal packet mailing was October 15. Please call the WSBA to request a duplicate packet if you have not received yours by December 31, 2006. You can check your listing by going to the online lawyer directory at http://pro.wsba.org. If any of your contact information (name, address, phone number, or e-mail address) has changed, please update the information by e-mailing questions@wsba.org, faxing the change to 206-727-8319, or calling the WSBA Service Center at 800-945-9722 or 206-443-9722. APR 13(b) requires all attorneys to update their office address and telephone number within 10 days of the change.

**WYLD Seeks De Novo Associate Editor**

The Washington Young Lawyers Division (WYLD) Editorial Advisory Board (EAB) is seeking a practicing member of the WYLD to serve as De Novo associate editor. Responsibilities include assisting the editor with procuring and editing feature articles, working with authors, and managing De Novo correspondence. The associate editor will work closely with the editor, the EAB, and the WYLD liaison in the areas of organizing content, proofreading, and coordinating articles and schedules to meet specific deadlines. The associate editor will ultimately assume the position of editor. Editorial/publication experience is desirable. Submit résumé and writing samples to: De Novo Associate Editor Search, Attn: Amy O’Donnell, WSBA, 2101 4th Ave., Ste. 400, Seattle, WA 98121-2330. Applications must be received by 5 p.m. on December 1.

It is anticipated that the associate editor will begin his or her duties in January 2007. The term is for 18 months as associate editor, followed by 18 months as editor.

**“Foundations of Freedom” Educational Pamphlet Now Available**

The WSBA has created a new consumer-information pamphlet called “Foundations of Freedom” that covers the basics of American government and democracy. The pamphlet describes the rule of law, the separation of powers, checks and balances, and judicial independence. It also includes a short quiz and a list of useful websites. Lawyers and judges are encouraged to bring the pamphlet with them when they speak to students or the public in schools, courthouses, and community centers. Teachers may also request the pamphlet for classroom use. The WSBA can provide reasonable numbers of copies at no charge, or the pamphlet may be downloaded from the WSBA website at http://www.wsba.org/public/consumer. Requests for copies should be directed to pam@wsba.org.

**Ensure Delivery of WSBA-CLE Products by Year-end**

The Washington State Bar Association office will be moving during December; consequently, WSBA-CLE will not have its traditional on-site “bookstore” selling recorded seminar products in December. However, all of these products, which provide A/V-CLE credits, can be ordered online at www.wsbcle.org. Order by December 15 to ensure receipt via standard delivery by December 29.

**MCLE Certification for Active Members — Due Date for MCLE Reporting**

WSBA members are divided into three MCLE reporting groups based on year of admission. (Newly admitted members are exempt. See “Newly Admitted Members” below.)


**Credit Requirements** The following credit requirements must be met by December 31 of the last year of an active member’s reporting period:

- At least 45 total credits of MCLE Board-approved CLE activities must be taken, which need to include a minimum of 30 live credits and six ethics credits.
- Pre-recorded self-study (A/V) courses cannot be more than five years old, except MCLE Board-approved “skills-based” courses. Pre-recorded self-study courses include the traditional audio-visual (A/V) media of video tapes and cassette tapes. They also include archived webcasts, DVDs, compact discs, and other media with a soundtrack of the MCLE Board-approved course presentation. Written materials should be included with these courses and reviewed prior to claiming credit. In addition, written materials must be purchased by each member, where required by the sponsor, prior to claiming credit.
- Six pro bono credits can be earned per year. Two of these credits are for approved annual training, which must be taken prior to being able to earn credit for the pro bono work. Four pro bono credits may be earned each year if at least four hours of pro bono work was provided through a qualified legal services provider.

**Carry-over CLE Credits.** Carry-over credits from the previous reporting period may be used to meet the requirements of the current reporting period. If your current reporting period credits total exceeds 45, you may carry over a maximum combined total of 15 credits to your next reporting period. Only two ethics credits and five A/V credits may be carried over.

**C2/C3 Reporting Requirement.** All active members due to report are required to file a Continuing Legal Education Certification (C2/C3) form listing all CLE courses taken for credit compliance. The deadline for filing your C2/C3 form is February 1 of the year following the end of your reporting period. Note:

- Your online roster is not a substitute for filing the C2/C3 form.
- The C2/C3 form is a declaration and must be signed and dated, and the city and state where signed must be identified.
- C2/C3 forms are included in the license packets sent in early December to all members due to report (which will be Group 3 members this year).
- All CLE courses listed on member rosters as of October 2006 will be printed on the back of the C2 form. If you took more CLE courses after October 1, and if they appear on your online roster and you do not want to hand-write them on the back of the C2 form, you may print a copy of your roster and attach it to your C2/C3 form. State on your C2/C3 form that the attached online roster printout is a true and correct statement of the CLE courses taken for credit compliance.

- Members must verify that the credit hours listed on the C2/C3 and on the member’s online profile correctly reflect the hours actually attended for each CLE. Online credits may be edited by clicking on the “edit” link next to each course.
- CLE credits taken before October 2006 can be claimed when the C2/C3 form is filed. The C2/C3 form should be filed by February 1, even if all the credits needed for compliance have not been completed.

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

**Newly Admitted Members.** If you are a newly admitted member, you are exempt from reporting CLE credits for the year of your admission and the following calendar year. If you were admitted in 2005, you will not report for this reporting period (2004-2006) even though you are in Group 3. You will first report at the end of the 2007-2009 reporting period. When you report at the end of your first reporting period, you may claim all CLE credits earned on or after your date of admission to the WSBA.

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

**MCLE System — Course Listing and Member Profiles.** Members may use the online MCLE system to: review courses taken and credits earned; apply for course approval; apply for writing credit; pro bono

### Table: Reporting Group

<table>
<thead>
<tr>
<th>Reporting Group</th>
<th>Next Reporting Period</th>
<th>Complete Credits by</th>
<th>File C2 Form by</th>
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<td>2006-2008</td>
<td>December 31, 2008</td>
<td>February 1, 2009</td>
</tr>
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credit, or prep-time credit; and search for approved courses being offered. To use the MCLE system, go to the WSBA website at www.wsba.org and click on "MCLE Website" in the upper left corner. On the next screen, click on the "Member" tab, then select "Member Login." The online instructions will lead you through the process of creating a confidential password and using the system. Online help is available. If you have any questions about using the MCLE system or about the MCLE compliance requirements, see the online FAQs at www.wsba.org/lawyers/licensing/faq-mcle.htm, call the WSBA Service Center at 800-945-9722 or 206-443-9722, or e-mail questions@wsba.org.

**New APR 11 Regulation 104(e) Requirements for In-House CLEs.** Starting with the 2005-2007 reporting period, 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 are the result of amendments to APR 11 Regulation 104(e) adopted by the Supreme Court that went into effect on November 8, 2005.

**MCLE Certification for Group 3 (2004-2006)**

If you are an active WSBA member in MCLE Reporting Group 3 (2004-2006), you will receive your Continuing Legal Education Certification (C2/C3) forms in the license packet that will be mailed in early December. The deadline for returning the C2/C3 form to the WSBA is February 1. Any C2/C3 forms delivered to the WSBA or postmarked after March 1 will be assessed a late fee. Members in Group 3 include active members who were admitted to the WSBA in 1984-1990 or in 1993, 1996, 1999, or 2002. Members admitted in 2005 are also in Group 3 but are not due to report until the end of 2009. Their first reporting period will be 2007-2009; however, any credits earned on or after the day of admittance to the WSBA may be counted for compliance.

The Continuing Legal Education Certification (C2/C3) form that you will receive in your license packet is a declaration that lists all the WSBA-approved courses in your MCLE online profile for the 2004-2006 reporting period as of mid-October. If you take other courses after mid-October, you can add these to the back of the C2 form (the C3 form) when you receive it. The C2/C3 form, not your online profile, is the official record of MCLE compliance. The original copy of the C2/C3 form must be returned to the WSBA to meet compliance requirements.

All WSBA-approved courses that you list on your C2/C3 form must have an Activity ID number. This number is listed on your online MCLE profile and is assigned at the time that the Form 1 for each course is reviewed. If you have taken courses that have not yet been approved by the WSBA, please submit Form 1s for these courses immediately to ensure that they are approved before your C2/C3 is due. Because of high volumes from October through February, Form 1s submitted electronically (at http://pro.wsba.org) could take up to four weeks or more to process. Paper Form 1s may take up to six weeks or more to process. If you submit a paper Form 1, you will be notified by mail of its Activity ID number.

If you are not able to meet the credit requirement by December 31, 2006, and need more time to complete your credits, an automatic extension will be granted until
May 1, 2007. There is no need to apply for it. However, a late fee will be imposed if you take any courses after December 31 that are needed for compliance or if your C2/C3 form is submitted late. If this is the first reporting period in which you will not meet MCLE compliance requirements, the late fee will be $150. The late fee increases by $300 for each consecutive reporting period you are late in meeting MCLE requirements. If you have questions about the Form 1 process or MCLE compliance, please contact the WSBA Service Center at 800-945-9722 or 206-443-9722, or e-mail questions@wsba.org.

MCLE Compliance Report (C4/C5) in 2007 License Packets

All active members who are not due to report MCLE compliance at the end of this year, including new admittees, will receive a report (the C4/C5 form) in their 2007 licensing packets. Each member’s report lists all credits reported to the WSBA for the member’s current reporting period as of mid-October. APR 11.6(a)(3) requires that the WSBA provide an annual report to each active member regarding the credits and courses posted to their MCLE online rosters. This report will help non-reporting active members to better track their credits, as well as ensure correct reporting and compliance at the end of their reporting period.

If you receive the C4/C5 form in your 2007 license packet, it is for your information only. No action needs to be taken unless you want corrections to be made. If you want to make corrections to your WSBA MCLE roster, go to http://pro.wsba.org. Click on the “Member” tab, and then on “Member Login.” The online instructions will lead you through the process of creating a confidential password and beginning to use the system. Online help is available. You may also contact the WSBA Service Center to have corrections made and/or to request an MCLE system instruction booklet at 800-945-9722, 206-443-9722, or questions@wsba.org.

Casemaker Access

Casemaker is a powerful online research library provided free to WSBA members. To access Casemaker, go to the WSBA website at www.wsba.org and click on the Casemaker logo on the right sidebar to access the Casemaker homepage. Click on the Casemaker button to begin. For help using Casemaker, you can contact the WSBA Service Center at 800-945-9722 or 206-443-9722, or e-mail questions@wsba.org.

Attorney General Notice — State Employee Garnishments

The Washington State Office of the Attorney General advises that incorrect or incomplete state employee garnishment paperwork served on the Attorney General can result in costly delays and additional processing fees. The Attorney General is the appropriate place to serve the writ of garnishment whenever the defendant is a state employee. However, the garnishee defendant must also be correctly identified on the writ of garnishment. The garnishee defendant can be listed as either the state agency which employs the defendant, or the State of Washington. When the Attorney General is incorrectly listed as the garnishee defendant, and the defendant is actually an employee of a different state agency, the writ of garnishment must be returned to the sender for correct employer information. If the State of Washington is listed as the garnishee defendant, a processing clerk will check available databases to determine if the individual is employed by a state government agency and forward the writ to that agency. However,

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To assist with your valuation needs or answer any questions, please feel free to contact Brian Kennett at (206) 382-7777 or by email at bkennett@pscpa.com.

MEDIATING ESTATE DISPUTES

Mediating disputes involving Beneficiaries of Estates requires a balance of Mediation experience, knowledge of Estate Law, and sensitivity for the dynamics of family relationships.

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available databases may not include the named defendant. In order to avoid delays and additional processing fees, it is very important to list the appropriate state agency as the garnishee defendant to ensure timely processing of the writ of garnishment. The Washington State Attorney General should not be served and does not process garnishments for employees of private employers.

Maleng to Receive ABA’s “Minister of Justice” Award
The Minister of Justice Award recognizes prosecutors who have evidenced the prosecutor’s obligation to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public, and to have an unwavering commitment to the highest legal and ethical standards. King County Prosecuting Attorney Norm Maleng will receive the award at the ABA’s annual meeting in New Orleans in November. “This is a very special award and I am deeply honored to receive it,” he said. “It reaffirms the mission of our office, which is to serve justice, not just to win cases, and justice cannot be served unless the prosecutor is also mindful of the obligations of fairness and due process owed to people accused of crimes.

McKenna Named Aspen-Rodel Fellow
The Aspen Institute has selected Attorney General Rob McKenna for a new fellowship program honoring public leaders the international organization has identified as “the true rising stars” of American politics. McKenna is one of 24 young elected officials selected after an eight-month search. They will form the second two-year class of the Aspen-Rodel Fellowships in Public Leadership, designed to bring together the very best of the nation’s emerging leaders to discuss broad issues of effective public service.

Goff Appointed Washington’s New Supreme Court Commissioner
Washington Supreme Court Deputy Commissioner Steven Goff has been appointed to the position of court commissioner by the Washington State Supreme Court’s nine justices. Goff replaces Commissioner Geoffrey Crooks, who retired in 1989, has also worked as staff attorney, senior staff attorney, and chief staff attorney in the commissioner’s office. Goff will serve as only the third Supreme Court Commissioner in Washington history.

Tang Named President of American Bar Foundation
David Tang, a partner at Preston Gates Ellis in Seattle, has been named president of the American Bar Foundation. Established in 1952, the American Bar Foundation is an independent, nonprofit national research institute dedicated to the study of law, legal institutions, and legal processes. Tang has been active in a variety of ABA activities, including serving on the ABA House of Delegates since 2002.

Resolving Lawyer Disputes
The WSBA offers two programs to help lawyers resolve disputes. The Fee Arbitration Program focuses on fee disputes between a lawyer and his or her client. To participate, both parties must agree to be bound by the arbitrator’s decision. The Mediation Program provides a venue for parties to work together to resolve any dispute involving a lawyer, including those between a lawyer and a client, a lawyer and another lawyer, or a lawyer and another professional. Either party to a dispute may initiate fee arbitration or mediation. Both programs are non-disciplinary, voluntary, and confidential. Visit www.wsba.org/lawyers/services/adr.htm or call 206-735-5923 or 800-945-9722, ext 5923.

LAP Solution of the Month: Boundaries
Do you have trouble saying “no” when you should? Are you struggling with cases your gut told you to avoid? If so, you may have trouble setting and maintaining good boundaries. Figure out what your limits are, then practice saying “no.” The Lawyers’ Assistance Program can help. Call 206-727-8268 to schedule a free, confidential consultation. Enjoy feeling in control again.

Computer Clinic
The WSBA offers a hands-on computer clinic for members wanting to learn more about what programs — such as Outlook, PowerPoint, Excel, Word, and Adobe Acrobat — can do for a lawyer. Are you a total beginner? No problem. Computers are provided, and seating is limited to 15 members. There is no charge, and no CLE credits are offered. The next clinic will be held November 13 from 10 a.m. to noon at the WSBA office. For more information, contact Pete Roberts at 206-727-8237, or 800-945-9722, ext. 8237, or peter@wsba.org.

Contract Lawyer Meeting
LOMAP hosts a meeting of contract lawyers the first Tuesday of every month at the WSBA’s conference-room facility. The next meeting is November 7 from noon to 1:30. The following meeting will be held December 5. Please bring your lunch — coffee is provided — and network with other contract lawyers.

Job Seekers Discussion Group
Looking for a job or making a transition? Join the Job Seeker Discussion Group the second Wednesday of each month from noon to 1:30.

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Peter H. Nickerson, Ph.D.
p.m. The next meeting is November 8 at the WSBA office. The topic will be “Boundaries — When You Get Your Job or Open Your Practice.” Lawyers’ Assistance Program peer counselors will share their experiences, and there will be opportunities to network. 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. Come as you are — no need to RSVP. For more information, contact Jennifer Favell, Ph.D., at 206-727-8267, or 800-945-9722, ext. 8267, or jenniferf@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. The Ethics Line at 206-727-8284 or 800-945-9722, ext. 8284.

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

Speakers Available
The WSBA Lawyers’ Assistance Program offers speakers for engagements at county, minority, or specialty bar associations, or other law-related organizations. Topics include stress management, life/work balance, and recognizing and handling problem-personality clients. Contact Jennifer Favell, Ph.D., at 206-727-8267 or 800-945-9722, ext. 8267.

Assistance for Law Students
The Lawyers’ Assistance Program offers counseling to third-year law students attending Washington schools. Sessions are held in person or by phone. Treatment is confidential and available for depression, addiction, family and relationship issues, health problems, and emotional distress. A sliding-fee scale is offered ranging from $0-$80 depending on ability to pay. Call 206-727-8268, or 800-945-9722, ext. 8268, or visit www.wsba.org/lawyers/services/lap.html.

LOMAP & ETHICS Traveling Seminars
Plan to attend in Oak Harbor on November 14, Bellingham on November 15, or Burlington on November 16. Registration is $84, and each seminar has been approved for four CLE credits, including two ethics. For more information, contact Julie Salmon at 206-733-5914 or juliesa@wsba.org, or visit www.wsba.org/lawyers/services/lomap.html.

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

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 make recommendations. To make an appointment, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

Upcoming Board of Governors Meetings
December 8-9, LaConner
January 11-12, Tumwater
March 2-3, Bellevue
With the exception of a one-hour executive session, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Contact Donna Sato at 206-727-8244 or donnas@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/info/bog/schedule.htm.

Usury Rate
The average coupon equivalent yield from the first auction of 26-week treasury bills in October 2006 was 5.014 percent. Therefore, the maximum allowable usury rate for October is 12 percent. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.

Correction
In the “Diversity and the Law” article in October’s Bar News, the website address given for the Korean American Bar Association was incorrect. The correct website address is www.kaba-washington.org. In addition, the website address for the Vietnamese American Bar Association has been updated. The new site is www.vabaw.com.
Shannon L. McDougald P.S.
Attorneys at Law

is pleased to announce that

C. N. Coby Cohen

has joined the firm as an associate.

Mr. Cohen was formerly a deputy prosecutor with the King County Prosecutor's Office and an attorney in the litigation section of Perkins Coie. An experienced trial attorney, he is licensed to practice in Washington and California. Mr. Cohen received his J.D. from New York University School of Law and his B.A. from the University of California-Berkeley with honors.

The firm practice emphasizes civil litigation, including defense of securities litigation and arbitrations, employment, and intellectual property law.

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Oseran, Hahn, Spring & Watts, P.S.
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is pleased to announce that

Rani Kay Sampson

whose practice emphasizes commercial and residential real estate, business transactions, intellectual property, and estate planning

has become an associate attorney in the firm.

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Disciplinary Notices

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

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

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

Disbarred

Andrew R. Gala (WSBA No. 17151, admitted 1987), of Seattle, was disbarred, effective April 20, 2006, by order of the Washington State Supreme Court following a hearing. This discipline was based on his conduct between 2000 and 2003 involving misappropriation of law-firm funds, entering into loan transactions with a client without adequate disclosure or written consent, and other conduct involving dishonesty, fraud, deceit, or misrepresentation.

Mr. Gala worked at the Seattle branch of a law firm based in Portland, Oregon. By 2002, Mr. Gala managed the firm's Seattle office and was able to approve certain expenditures without further authorization. The firm's Shareholder Compensation Plan in effect during Mr. Gala's association with it specified that "each Shareholder shall devote his or her entire time and attention to the practice of law for the benefit and account of the Corporation. No Shareholder shall engage in the practice of law other than for the benefit and account of the Corporation." Mr. Gala was the primary billing attorney assigned to all matters involving Client A. Mr. Gala also represented multiple clients in a matter known as the consolidated claims litigation, which had generated large fees over several years.

Matter 1: At intervals in 2002 and 2003, Mr. Gala asked his secretary to obtain three checks (totaling $12,300) for payments to a purported expert witness. Mr. Gala denominated the checks as cost items related to the consolidated claims litigation. The checks, signed by Mr. Gala, were actually made out to Mr. Gala's personal creditor and used to pay a debt owed following Mr. Gala's purchase of a residence on Mercer Island. To explain to the creditor why the check had been drawn on a firm account, Mr. Gala claimed that his firm had set up an escrow account for him. When the firm's accounting department asked for the expert's tax identification number (TIN), Mr. Gala concealed the fact that he was using firm funds to discharge a personal debt by providing the accounting department with an unwitting third party's Social Security number. At the end of 2002, the firm completed an IRS 1099 form listing the $12,300 as income to the "expert witness" paid by the firm. Sometime in 2003, the firm received notice from the IRS that the TIN it had provided for the "expert witness" did not match IRS records. Consequently, the firm sent a notice to Mr. Gala's creditor requesting that he complete a form with his correct TIN. Upon receipt of the notice, an assistant in the creditor's office contacted the firm and explained that their only connection with Mr. Gala was through a purely personal debt for the purchase of his home. The firm's account-
ing department gathered information about the three checks and learned that Social Security number for the TIN did not in fact belong to an “expert witness.” The accounting department determined that firm clients had contributed $10,455 towards Mr. Gala’s house payment, while Mr. Gala had caused the firm to absorb the remaining $1,845 as part of a write-off. The firm’s president immediately communicated with the affected clients and sent checks to reimburse those clients for the “expert fees.”

**Matter 2:** In April 2003, Mr. Gala applied to rent an apartment for himself. He listed the firm name as well as his own as the “applicant.” He directed his paralegal to request a check for $3,825, payable to the entity renting the property, to be drawn on the firm’s client advance account and chargeable to Client A for a “property purchase” matter. Mr. Gala identified the reason for the “client advance” as a “co-brokerage fee.” The firm’s accounting department prepared the check drawn on the firm’s Seattle client advance account. Mr. Gala signed the check and used it to prepay rent on the apartment. Mr. Gala listed the check as a cost item on a Client A matter. He asked the firm’s accounting department to transfer fees and costs in that matter to a new probate file, which would not be subject to the firm’s 60-day billing requirement.

**Matter 3:** In June 2000, Mr. Gala signed a $100,000 promissory note to Client A for money that Client A had loaned to Mr. Gala. In approximately February 2002, Client A loaned Mr. Gala an additional $25,000. Mr. Gala did not provide written disclosure to, and did not obtain written waivers or consents from, Client A regarding potential conflicts of interest. After signing the promissory note, Mr. Gala provided over 200 hours of legal services to Client A for which he did not bill Client A in order to retire all or part of his debt. Under the terms of the firm’s shareholder agreement, the firm, not Mr. Gala, was entitled to receive the value of the legal services provided by Mr. Gala to Client A. Mr. Gala also charged expenses for trips to California and Arizona on Client A matters to the firm, but did not bill Client A for those expenses. After discovering the situation and investigating further, the firm took prompt action to terminate its relationship with Mr. Gala.

Mr. Gala’s conduct violated RPC 1.7(b), prohibiting a lawyer from representing a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person or by the lawyer’s own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after a full disclosure of material facts; RPC 1.8(a), prohibiting a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction and its terms are fair and reasonable and fully disclosed and transmitted in writing to the client, the client is given opportunity to seek the advice of independent counsel, and the client consents; RPC 8.4(b), prohibiting a lawyer from committing a criminal act (here, theft) that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects; RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; RPC 8.4(i), prohibiting a lawyer from committing any act involving moral turpitude, corruption, or any unjustified act of assault or other act which reflects discredit for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise; and former RLD 1.1(a), prohibiting acts involving moral turpitude and acts reflecting discredit for the rule of law.

Linda B. Eide and Scott G. Busby represented the Bar Association. Mr. Gala represented himself. Susan H. Amini was the hearing officer.

**Disbarred**

Virginia S. Lauver (WSBA No. 33377, admitted 2003), of Spokane, was disbarred, effective May 9, 2006, by order of the Washington State Supreme Court following a stipulation approved by the Disciplinary Board. This discipline was based on her conduct between 2002 and 2004 involving multiple acts of forgery and submission of false information on a loan application.

In December 2002, Ms. Lauver filed petition for dissolution of marriage from her husband. Ms. Lauver did not serve her husband with a summons. Ms. Lauver subsequently filed an acceptance of service, which had been signed by her husband at her request in March 2003. The dissolution was ultimately granted by default, finalized, and filed with the court in June 2003. Ms. Lauver did not inform her husband of the finality of the dissolution proceedings, even when it was clear to her that he was unaware of it. In the divorce decree, dated May 30, 2003, Ms. Lauver’s husband was awarded a 160-acre piece of property in Ada County, Idaho.

In June 2003, Ms. Lauver opened her own law practice in Spokane. In 2004, another lawyer joined Ms. Lauver’s firm as a partner. In May 2004, Ms. Lauver filed a quitclaim deed at the Ada County Recorder’s Office. According to the face of the deed, Ms. Lauver’s former husband had awarded to Ms. Lauver title to the 160-acre property as a result of the divorce. Ms. Lauver forged her former husband’s signature on the deed. Ms. Lauver also forged the name of her law partner as notary on the deed.

Subsequently, Ms. Lauver obtained a bank loan secured by the Ada County property. In support of the application for the loan, Ms. Lauver falsely stated that her former husband had died. She supplied the bank with a modified copy of the divorce decree inaccurately showing that she had been awarded the property in the dissolution. At the same bank, Ms. Lauver and her law partner opened a business checking account, a line of credit account for $50,000, and a capital loan account for $10,000. In May 2004, Ms. Lauver forged her law partner’s signature or endorsement on three checks (totaling $43,800), payable to herself, on the business checking account. She used the money from the checks to pay for numerous items, which included personal debts and business debts.

In 2005, Ms. Lauver was charged with one count of forgery in Ada County and four counts of forgery in Spokane County. She pled guilty to one count of forgery in each county, with the single count of forgery in Spokane County encompassing the quitclaim deed as well as the three checks written on the business checking account. Ms. Lauver’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(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Sachia Stonefeld Powell represented the Bar Association. J. Donald Curran represented Ms. Lauver.

**Disbarred**

Carlos Valero (WSBA No. 29192, admitted 1999), of Spokane, was disbarred, effective
April 6, 2006, by order of the Washington State Supreme Court following a default hearing. This discipline was based on Mr. Valero’s conduct in 2003 and 2004 in a number of matters involving multiple acts of misconduct.

It is pertinent to several of the matters that Mr. Valero was previously suspended from the practice of law by order of the Supreme Court dated October 22, 2003, effective December 1, 2003.

**Matter 1:** Between May and September 2003, Mr. Valero, who was not licensed to practice law in Idaho, met with a client on seven different occasions regarding a family law action filed in Idaho, accepted a $100 fee from the client, and appeared on the client’s behalf in Idaho court. Mr. Valero told the Idaho court that he would be filing a notice of appearance, a pro hac vice application, and the necessary pretrial documents by mid-November 2003, all of which he failed to do. Mediation was set for December 1, 2003, and trial was set for December 8, 2003. Mr. Valero failed to meet any of the pretrial deadlines. He subsequently advised the mediator that he would file a pro hac vice motion, associate with Idaho counsel, and represent his client through the mediation. Mr. Valero did not advise the court, the mediator, or opposing counsel about his imminent suspension. After December 1, 2003, Mr. Valero did not cease practicing law. On December 2, Mr. Valero faxed a number of trial documents to opposing counsel. By letter on his law office letterhead, Mr. Valero subsequently advised opposing counsel that he would no longer be representing his client.

**Matter 2:** In a family law action pending in late 2004, Mr. Valero did not notify the opposing lawyer, his client, or the court of his imminent suspension. Mr. Valero did not file a notice of withdrawal with the court after he was suspended. Following the commencement of his suspension, Mr. Valero had several telephone conversations with his client, during which they substantively discussed the case. Mr. Valero told the client that he was very busy and that another lawyer had agreed to assist him on the case. Until she received a fee agreement from the new lawyer and telephoned the new lawyer’s office in early 2004, the client had no knowledge that Mr. Valero was suspended.

**Matter 3:** In January 2003, Mr. Valero was hired by clients to pursue a breach-of-contract claim against a Spokane business. The clients signed a fee agreement and paid Mr. Valero $10,000, characterized in the fee agreement as a “non-refundable advance flat fee retainer.” The clients believed the payment to be an advance fee that would be refunded if Mr. Valero did not do the work for them. Mr. Valero deposited the money into his own account. During the representation, Mr. Valero failed to return several phone calls from the clients and did not appear for scheduled meetings. At one point, he told the clients that he hired a detective, that the detective had discovered that the defendants owned 13 pieces of real property, that he was working on placing liens on these properties, and that he had served the defendants with a notice to appear in court. Mr. Valero had done none of these things. After receiving a letter from the clients in which they requested an itemized bill, copies of the lien, and the return of some original documents, Mr. Valero denied having ever told the clients that a detective had discovered property owned by the defendants. In August 2003, the clients went to Mr. Valero’s office to demand the return of their original documents and property, some of which he failed to return. Subsequently, the clients again demanded an itemized billing statement. As Mr. Valero did not keep track of the time he had spent on their legal matter, he recreated a billing statement showing that he had spent $9,292.50 of attorney time on their case, and he sent the bill to the clients. He also sent them a copy of a proposed complaint, which he asked the clients to sign and return to him. The clients refused to sign the complaint, did not authorize the complaint to be filed, and did not communicate further with Mr. Valero.

In November 2003, Mr. Valero filed the complaint in superior court. The complaint named a number of individuals as defendants, along with a business and several insurance and bonding companies. None of the individual defendants were served, and owing to lack of specificity in naming the business-entity defendant, the incorrect bonding company was served. On or after December 1, 2003, a claims representative contacted Mr. Valero and advised him that they had had no business dealings with the named plaintiffs and were therefore wrongfully served. Mr. Valero responded that he would investigate the matter, but took no further steps to ensure that the incorrectly named party was dismissed from the action. He later told the representative that another lawyer was representing his clients, which was untrue. Mr. Valero did not inform the representative, his clients, any opposing party or counsel, or the court that he was suspended from the practice of law. In December 2003, a lawyer wrote a letter to Mr. Valero asking him to dismiss the lawsuit against the incorrectly named party. Mr. Valero did not respond or take any action after receiving the letter, nor did he inform the lawyer that he was suspended. In January 2004, Mr. Valero told the lawyer that he would agree to dismiss the lawsuit after consulting with his clients, but he took no further action. The lawyer then informed Mr. Valero that if the suit was not voluntarily dismissed, he would commence summary judgment proceedings and seek attorney fees. In a subsequent telephone conversation, Mr. Valero told the lawyer that he would dismiss the lawsuit, but that he was withdrawing from the case and another lawyer would be taking over. He did not provide a reason for withdrawal or identify the new lawyer.

A summary judgment motion was filed against Mr. Valero’s clients and served on Mr. Valero, as he was still the clients’ attorney of record. Mr. Valero did not tell the clients about the motion. Neither Mr. Valero, nor anyone else on behalf of Mr. Valero’s clients, responded to the motion or appeared at the hearing. After determining that Mr. Valero was suspended, the judge rescheduled the hearing. Mr. Valero was sent a notice indicating that the motion had been rescheduled. Mr. Valero did not tell the clients that the motion had been rescheduled. Neither Mr. Valero, nor anyone else on behalf of Mr. Valero’s clients, responded or appeared at the rescheduled hearing, and the judge dismissed the complaint with prejudice, awarding the moving party attorney’s fees and costs. In June 2004, opposing counsel began garnishment proceedings against the clients’ bank account for a total of $955.00. The clients subsequently paid the judgment against them.

**Matter 4:** In August 2004, Mr. Valero agreed to represent a client in a criminal matter for a $2,000 flat fee. Mr. Valero did not tell the client that he was suspended from the practice of law. After meeting with the client several times and offering legal advice about the case, Mr. Valero accepted a $200 payment towards the flat fee. When the client requested that Mr. Valero appear with him at an upcoming court hearing, Mr. Valero explained that another lawyer would be more successful before the assigned judge and would appear at the hearing. While waiting in the courtroom for his lawyer to appear, the client heard the court commissioner tell another defendant that Mr. Valero...
was suspended from the practice of law. Neither Mr. Valero, nor the other lawyer Mr. Valero had named, arrived in the courtroom by the time the client’s case was called. The client’s subsequent attempts to contact Mr. Valero were unsuccessful.

**Matter 5:** In July 2004, while Mr. Valero was suspended from the practice of law, a client hired him to handle both a criminal and a child custody matter. The client paid to Mr. Valero at least $800 towards an agreed-upon $1,500 flat fee. In late July or early August 2004, Mr. Valero prepared and signed a variety of pleadings in the case, which had previously been commenced in superior court. Mr. Valero drove the client and his mother to the courthouse to attend the client’s dependency hearing. During the drive, Mr. Valero and the client substantively discussed both of the client’s cases. While at the courthouse, Mr. Valero identified himself as the client’s lawyer to a Child Protective Services representative, the appointed GAL, his client’s court-appointed lawyer, and the assigned assistant attorney general. Mr. Valero engaged each of these persons in conversation about his client’s case and proposed changes to the parenting plan. He did not tell any of these persons, or his client, that he was suspended from the practice of law. At the courthouse, Mr. Valero accompanied his client and client’s mother to the clerk’s office to file the pleadings he had prepared. Prior to filing the pleadings, Mr. Valero used white-out to cover his signature and directed his client to sign the documents in the area over which he had used white-out.

The client’s pretrial hearing on the criminal charges was set for September 2004. Mr. Valero told his client that he would appear with him at the hearing and advised him to plead not guilty to the charges. On the day of the hearing, Mr. Valero did not meet with his client at the courthouse at the appointed time. When Mr. Valero’s client told the court the name of his lawyer, the presiding judge informed the client that Mr. Valero was suspended from the practice of law and could not represent him. In October or November 2004, Mr. Valero contacted his client and asked him to come to his house, where he asked him to sign a declaration. The declaration stated that the client had been confused when he told the court that he had hired Mr. Valero to represent him on his criminal case. The client refused to sign the declaration because it was false.

**Matter 6:** Between January and August 2004, the Bar Association directed Mr. Valero to respond to the grievances filed against him in Matters 1, 2, and 3. Because Mr. Valero failed to respond, disciplinary counsel was obliged to issue subpoena duces tecum in order to obtain the responses.

Mr. Valero’s conduct violated RPC 1.1, requiring a lawyer to provide competent representation to a client; RPC 1.2, requiring a lawyer to abide by a client’s decisions concerning the objectives of representation; 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 1.14(a), requiring that all funds of clients paid to a lawyer be deposited into an interest-bearing trust account; RPC 1.14(b)(4), requiring a lawyer to promptly pay or deliver to the client as requested by the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive; RPC 1.15(a)(1), requiring a lawyer to withdraw from representing a client if the representation will result in a violation of the Rules of Professional Conduct or other law; RPC 1.15(d), requiring a lawyer upon termination of representation to take steps to the extent reasonably practicable to protect a client’s interests; RPC 5.5(a), prohibiting a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; RPC 5.5(e), prohibiting a lawyer from engaging in the practice of law while on inactive status, or while suspended from the practice of law for any cause; RPC 8.4(b), prohibiting a lawyer from committing a criminal act (here, theft in the second degree, witness tampering, and attempting to suborn perjury) 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; RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; 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 which reflects disregard for the rule of law; RPC 8.4(j), prohibiting a lawyer from willfully disobeying or violating a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear; RPC 8.4(k), prohibiting a lawyer from violating his or her oath as an attorney, 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 (here, ELC 1.5, 5.3(e), 14.1, and 14.2).

Leslie C. Allen represented the Bar Association. Mr. Valero represented himself. Dennis W. Morgan was the hearing officer.

**Suspended**

Randy L. Durham (WSBA No. 17382, admitted 1987), of Tacoma, was suspended for two years, effective April 14, 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 three matters between 2000 and 2004 involving lack of diligence, failure to abide by a client’s decision concerning the objective of representation, filing a non-meritorious claim, and misrepresentations to clients.

**Matter 1:** Between 1997 and 2004, Mr. Durham represented a sheet-metal business. In January 1999, Mr. Durham commenced an action on behalf of the client to recover damages resulting from a breach of contract and to foreclose on a bond and retainage fund. The named defendants in the action included a general contractor, a governmental entity, and a bonding company. In October 2000, the presiding judge partially granted the client’s motion for summary judgment, awarding the client $5,500 against the retainage fund. No order was signed at the time of the hearing. In November 2000, Mr. Durham sent the general contractor’s lawyer a proposed order for signature. The order was never signed and returned, but Mr. Durham did not pursue the matter further. In December 2001, the general contractor made an offer to settle all claims for $11,997.62. Mr. Durham did not respond to the offer. For a period of approximately two years, during which there was little activity on the case, Mr. Durham repeatedly misled the client about the status of the matter. In October 2002, the general contractor offered to settle for $13,727.48. Mr. Durham communicated the offer to the client, who told him to counter-offer $15,000. Mr. Durham instead counter-offered $17,003.48.
In September and October 2003, all contractual basis for arbitration. In fact, no request for arbitration had ever been filed, the relief sought in the complaint was excessive the jurisdictional requirement for arbitration. In March 2000, Mr. Durham advised the client that the bonding company would seek attorney’s fees and costs against the client. The client did not recover any damages above the amount paid pursuant to the agreement.

The client subsequently expressed dissatisfaction about the outcome of the lawsuit. Mr. Durham negotiated a settlement that included a “Joint Pursuit of Claims” agreement, under which Mr. Durham’s client obtained $40,446.49, assigned $25,000 of its claims against the university to the contractor and the bonding company, waived and released its claims against the bonding company and the university, and agreed to dismiss the contractor and the bonding company from the lawsuit. Mr. Durham advised the client to sign the agreement, erroneously assuring him that it would not jeopardize the client’s right to collect additional damages. In July 2001, in accordance with the settlement, Mr. Durham filed the stipulation and order voluntarily dismissing the contractor and the bonding company from the case. The client did not recover any damages above the amount paid pursuant to the agreement.

Matter 2: Mr. Durham’s client was hired by a general contractor to install metal siding at a construction project for a university. The client did not receive full payment for its services. In May 2000, Mr. Durham commenced an action on the client’s behalf, naming the contractor, the bond, and the university as defendants. The bonding company tendered defense of the claim to the general contractor. In June 2001, Mr. Durham negotiated a settlement that included a “Joint Pursuit of Claims” agreement, under which Mr. Durham’s client obtained $40,446.49, assigned $25,000 of its claims against the university to the contractor and the bonding company, waived and released its claims against the bonding company and the university, and agreed to dismiss the contractor and the bonding company from the lawsuit. Mr. Durham represented himself to the court on our request for Arbitration. ”

Mr. Durham told the client that it was still possible to execute on the default judgment obtained in the first lawsuit. In fact, this course of action was not viable, because the client had waived such a remedy when it settled and voluntarily dismissed the general contractor from the first lawsuit in July 2001. In February and March 2004, Mr. Durham repeatedly misled the client about the status of the matter.

In March 2004, the bonding company garnished the client’s bank account to recover the attorney’s fees and costs previously assessed. In April 2004, Mr. Durham attempted to pay the fees and costs with his credit card, but the bonding company’s law firm was not set up to process credit cards and requested a check. Three weeks later, the bonding company again garnished the client’s bank account. Shortly thereafter, Mr. Durham mailed a check that fully satisfied the judgment.

Matter 3: In March 2000, in an unrelated matter, the CEO of the sheet-metal business asked Mr. Durham to investigate and pursue claims against the CEO’s business partner for breach of an agreement. Mr. Durham came to the conclusion that the CEO had no viable claims against the business partner because, among other reasons, the statute of limitations for such an action had already passed. He failed, however, to advise the CEO about this conclusion. The CEO believed Mr. Durham was actively pursuing the claims. In August 2002, Mr. Durham made a number of misrepresentations to the CEO about his efforts to pursue the claims and serve a lawsuit on the CEO’s business partner.

Mr. Durham’s conduct violated RPC 1.2(a), 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 3.1, prohibiting a lawyer from bringing or defending a proceeding, or asserting or controverting an issue therein, unless there is a basis for doing so that is not frivolous; and RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

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

Reprimanded

Jeffrey T. Haley (WSBA No. 9526, admitted 1979), of Bellevue, was ordered to receive a reprimand on January 26, 2006, by order of the Washington State Supreme Court following a hearing. This discipline was based on his conduct in 1988 and 1991 involving conflicts of interest. In addition, the Supreme Court held prospectively that RPC 4.2 prohibits a lawyer who is acting pro se from contacting a party the lawyer knows to be represented by counsel. For additional information, see In re Discipline of Haley, 156 Wn.2d 324, 126 P.3d 1262 (2005).

In 1988, Mr. Haley and four other individuals formed a corporation engaged in the software-development business. In addition to being a shareholder, board member, and secretary of the corporation, Mr. Haley also served as the principal lawyer for the company. To raise capital, the corporation obtained a $75,000 line of credit from a bank. The line of credit was personally guaranteed by the shareholders/directors. This credit was properly secured with a security agreement and a UCC-1 financing statement. As a result, the bank maintained a first-priority security interest in the corporation’s assets. Additional capital was obtained in 1988 in the form of $40,000 loaned to the corporation by Mr. Haley, the funds for which Mr. Haley obtained via personal loan. Mr. Haley obtained a promissory note from the corporation and a signed UCC-1 financing statement as part of the loan transaction. However, there was no separate security agreement securing the note, and the UCC-1 financing statement was not filed until October 1990. Mr. Haley’s security interest had

The parties failed to reach a settlement. In November 2002, Mr. Durham filed a second motion for summary judgment seeking the identical relief sought in the October 2000 motion. As a result, the judge signed the order that Mr. Durham had prepared and circulated in November 2000.

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second priority behind the bank's interest.

In late 1990, the corporation's board of directors came to realize that the company's financial viability was hopeless. The board concluded that the best option was to form another corporation that would purchase the original corporation's assets for an amount at least covering the $75,000 from the bank, thereby discharging all personal liability that they had individually incurred by guaranteeing the line of credit. With the agreement or acquiescence of the board, Mr. Haley formed a new corporation for the purpose of purchasing the original corporation's assets while leaving as many liabilities as possible behind. He conducted a foreclosure sale on the original corporation's assets, which he appeared to be in a position to do as a second-priority security interest holder. Mr. Haley was one of the owners of the new corporation and acted as the new corporation's attorney. As the only bidder at the sale, the new corporation purchased the original corporation's assets for an amount that covered both the bank's $75,000 and the $26,000 remaining due on Mr. Haley's $40,000 loan.

Mr. Haley's duty to the original corporation and its shareholders conflicted with his interests in recovering on his personal loan and in moving the original corporation's assets to the new corporation at the lowest possible price. Mr. Haley made certain that the new corporation took on only those assets and liabilities beneficial to the new corporation, including foreclosing on assets not covered by his UCC-1 financing statement. When the original corporation's board members agreed to the formation of the new corporation and the foreclosure sale, Mr. Haley did not obtain a written consent from the original corporation before the sale.

Mr. Haley's conduct violated RPC 1.7, prohibiting a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after a full disclosure of material facts.

Julian C. Dewell represented the Bar Association at the hearing. Randy V. Beitel represented the Bar Association on appeal. Kenneth S. Kagan represented Mr. Haley at the hearing. Mr. Haley represented himself on appeal. Stew Cogan was the hearing officer.

Reprimanded

Barbara E. Varon (WSBA No. 17041, admitted 1987), of Bellevue, was ordered to receive a reprimand, effective August 4, 2005, following a hearing. This discipline was based on her conduct involving failure to advise a tribunal of all relevant facts in an ex parte proceeding and conduct prejudicial to the administration of justice.

In May 2000, Ms. Varon was hired to represent a client in a child-custody and visitation-rights matter involving the client's son, who resided in Snohomish County with the client's ex-wife pursuant to a parenting plan filed six years earlier in a King County dissolution action. The client advised Ms. Varon that the son was undergoing psychiatric treatment at a hospital in King County. Shortly after Ms. Varon was hired, the client's ex-wife, acting pro se, obtained a temporary order for protection from the Snohomish County Superior Court (Snohomish County TRO). The Snohomish County TRO provided, inter alia, that the King County parenting plan was temporarily suspended, and that the client was restrained from having contact with his ex-wife and his two children except as authorized by the son's psychiatrist.

The client's ex-wife then hired a lawyer, who notified Ms. Varon that he would be representing the ex-wife. The lawyer's letter to Ms. Varon stated that "[t]he purpose of this letter is hopefully to ensure that there is no disruption to the treatment plan devised for [the son] by the doctors and social workers ...." After receiving the letter, Ms. Varon told her client that she would not contact opposing counsel until after she had obtained a restraining order against the client's ex-wife. Ms. Varon then filed a petition seeking modification of the parenting plan in King County Superior Court. Among other things, the petition sought to name Ms. Varon's client as the primary residential parent for his son. Two days later, without notifying opposing counsel or the ex-wife of the hearing, Ms. Varon sought an ex parte temporary order to restrain the ex-wife from contacting her son. Ms. Varon believed that irreparable injury could result if the ex-wife was given notice of the proceeding. Ms. Varon also believed that the ex-wife was evading service.

In support of the request, Ms. Varon submitted 84 pages of documents to the court, which included a copy of the Snohomish County TRO and opposing counsel's letter announcing his representation. However, due to the exigencies of the ex parte calendar, the commissioner only skimmed through the exhibits, relying (pursuant to his established practice) on counsel to advise him orally of all relevant facts to permit him to render an informed decision. Ms. Varon did not orally inform the commissioner of the existence of the prior Snohomish County TRO, nor did she inform the commissioner that the opposing party was represented by counsel. Had she done so, the commissioner would have followed his usual practice and contacted the issuing court and the opposing counsel for a response prior to making his ruling. The commissioner issued the order (King County TRO) as requested by Ms. Varon, giving her client custody of his son and prohibiting the ex-wife from interfering with that custody or entering the client's home or workplace, or his son's daycare or school.

Soon thereafter, to resolve the two conflicting orders, Ms. Varon and the ex-wife's lawyer appeared before a King County commissioner at an emergency hearing, after which the King County TRO order was vacated. The lawyers also appeared before a Snohomish County commissioner at hearings in May and June. As a result, the Snohomish County TRO was vacated and the cause of action dismissed. The client's King County petition for modification of the parenting plan was ultimately granted in the client's favor.

Ms. Varon's conduct violated 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, whether or not the facts are adverse; and RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Natalea Skvir represented the Bar Association. Steven R. Loitz represented Ms. Varon. Craig C. Beles was the hearing officer.

Non-Disciplinary Notice

Suspended Pending Conclusion of Supplemental Proceedings

Richard E. Dullanty (WSBA No. 1936, admitted 1957), of Rockford, was suspended from the practice of law pending the conclusion of supplemental proceedings, pursuant to ELC 7.3, effective August 29, 2006, by an order of the Washington State Supreme Court. This is not a disciplinary action.
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— Francesco di Marco Datini — Florentine businessman, letter to his wife, 14th century.

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

Antitrust Law

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November 17 — Seattle. 6.25 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

3rd Annual Corporate Responsibility Conference
December 14 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Business Law

Foreclosing, Protecting and Defending Liens
December 6 — Seattle. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Foreclosing, Protecting and Defending Liens
December 12 — Spokane. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Creditor/Debtor Law

National Fishery Law Symposium
November 16-17 — Seattle; CLE credits TBD. By UW School of Law; 800-CLE-UNIV or 206-543-0059.

Estate Planning

51st Annual Estate Planning Seminar
November 6 and 7 — Seattle. 14.5 CLE credits, including 1 ethics credit. By WSBA-CLE and Estate Planning Council of Seattle; 800-945-WSBA or 206-443-WSBA.

Gifting to Minors and Durable Powers of Attorney
December 5 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics

Ethics for Corporate Counsel: The New Rules and Recent Trends in Professional Liability
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Ethical Dilemmas for the Practicing Lawyer
November 13 — Seattle. 4 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics with Ease: Ethics for General Practitioners
November 14 — TELE-CLE Series. 1.5 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Law Office Management Assistance Program & Ethics Traveling Seminars
November 14 — Oak Harbor; November 15 — Bellingham; November 16 — Burlington. 4 CLE credits, including 2 ethics. By WSBA LOMAP; 800-945-WSBA or 206-443-WSBA.

Ethics with Ease: Modern Technology and Ethical Dilemmas
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Ethics: Bridging the Cultural Gap
November 16 — Bellevue. 5.75 ethics credits. By WSTLA; 206-464-1011 or seminars@wstla.org.

Ethical Dilemmas for the Practicing Lawyer
November 16 — Yakima. 4 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics with Ease: Ethics for Real Estate Attorneys
November 28 — TELE-CLE Series. 1.5 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics with Ease: Negotiation Ethics — Winning Without Selling Your Soul (with Martin E. Latz)
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Ethics with Ease: Ethics for Business Attorneys
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Legal Ethics and Literature
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Family Law

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November 15 — Seattle. 6.25 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

When Death and Divorce Collide: Crossover Issues in Estate Planning and Family Law
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Immigration Law

Immigration Options for Immigrant Survivors of Domestic Violence: I-360 Self-petitions Under the Violence Against Women Act (VAWA)
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