THE MINING OF METADATA

Final Thoughts from Stan Bastian

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It's fund-amental

The President’s alarm [August 2008 Bar News, “President’s Corner”] does not tell the whole story regarding the Client Security Fund [Lawyers’ Fund for Client Protection]. The Rules do not require revision. Fund payments are gifts, not entitlements. The Board of Governors, as [the fund’s] Trustees, have unfettered discretion to deny or limit any request. Moreover, the Rules intend special scrutiny where “payments of more than $25,000 be made to applicants regarding any one lawyer.” That provision may be interpreted to provide that the limit refers to any one applicant, rather than to “any one lawyer.” However, I expect that the Board of Governors, as Trustees for the Fund, will act in a manner consistent with the integrity of the Fund and with their duties as representatives of the lawyers funding the gifts, and limit the recovery of any claimant where the collective claims against a single lawyer would materially limit the ability of the Fund to respond to other claims.

There are mechanisms to deal with this situation. Other alternatives require consideration, such as insuring against a “catastrophic” loss incurred by a single lawyer. It is irresponsible for the President of the Trustees to propose a “special assessment” to deal with the claims that the Committee faces. Such a course is patently unfair and unpalatable.

In response to the question posed: “No, one bad apple should not spoil the whole bunch” — the defalcations by one lawyer resulting in claims that exceed the Fund balance should not spoil the integrity of the Fund and the benefits that it affords to the public.

Steven B. Tubbs, Vancouver, Washington

Not funny

I was surprised and disappointed by last month’s back page entry, “Will Litigate for Food.” [July 2008 Bar News, “The Bar Beat”]

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there is inadequate access to justice in family law — and in many other areas of “consumer” law — due to cost and complexity. But, well meaning members of the guild sensitive to consumer protection have “solved” the problem by crafting a program with so much consumer protection — read “barriers to entry” — that it will do little to solve the access to justice problem.

Simple economic principles this. The program assumes an educated and honest marketplace, on both the supply and demand sides. But, will the presence of legal technicians in the marketplace cause all — or even a few — of the petition preparers, paralegals, notaries, Craigslist frauds, Internet-based lawyers, and other gray market legal practitioners to take down their shingles? Enforcement of UPL laws is already haphazard and cumbersome — and the likelihood of change is nil. Will the large market of consumers who cannot afford admitted lawyers understand the difference between licensed legal technicians and the gray market, especially a gray market that will have lower operating costs and lower ethical standards? It would be simpler to just allow the large pool of law graduates who fail the bar exam but reach some lower standard and satisfy the moral standards to obtain a limited practice license, and create areas of consumer practice for them — uncontested no asset divorces, traffic court, etc.

Frederic E. Cann, Portland, Oregon

Licensing legal technicians is a laudable goal — providing lower cost options that attorneys for persons seeking assistance with legal matters.

However, the proposed rule has several flaws: 1) Overly stringent qualifications. In addition to obtaining a paralegal, legal assistant, or bachelor’s degree, the legal technician must intern for two to three years under a lawyer’s supervision. Considering that a legal technician can only practice in Title 26 (family law) matters and can not actually represent clients in court, these qualifications are onerous. Who would spend four or five years to complete the degree and the internship in exchange for such uncertain income? 2) Overly restrictive practice. The Title 26 family law area is the only practice area open to legal technicians under the proposed pilot project. It is unrealistic to think that anyone could afford to become a legal technician on income generated exclusively by family law matters. The rule should be expanded to include all of the areas of practice originally considered by the bar — family law, immigration law, landlord-tenant law, and elder law. 3) Mandated “financial responsibility.” How can a legal technician who earns significantly less money than an attorney be expected to afford liability insurance? 4) Continuing education requirements. CLEs are expensive. Unless the bar is willing to offer CLEs to legal technicians at a reduced rate or free of charge, this requirement should be revised.

The WSBA should offer a broad legal technician program from the start. This should include several areas of practice and reasonable expenditures. Legal technicians are the wave of the future — they will have much to offer the public if given a fair chance.

Patricia Michl, Lake Tapps
Some Final Thoughts

Stan Bastian wraps up his year in office by discussing two issues of great concern

In my final column as WSBA president, I want to discuss two issues that continue to challenge the legal profession and which will require considerable attention and effort by the Bar Association — 1) the escalating cost of civil litigation and 2) inadequate funding for our trial courts.

Litigation Costs

Anyone in practice for more than a few years will probably agree that civil litigation is increasingly time-consuming and expensive. It always was, but unfortunately it is getting more so with each passing year.

Recently, in my own practice, I have seen at least two unfortunate and troubling developments: 1) potential plaintiffs with meritorious claims are choosing not to file lawsuits because of the enormous expense involved, and 2) defendants are choosing to settle lawsuits primarily because of their desire to avoid the expense of defending the lawsuit. Unfortunately, decisions to initiate, conduct, or settle litigation are being made less and less on the merits of the case, and more and more on the desire to avoid expensive litigation costs.

We are spending too much time asking and answering interrogatories, managing and conducting electronic discovery, filing and answering discovery motions, taking and defending endless and sometimes unnecessary depositions, and filing and responding to motions to compel. This has got to stop.

Litigation should not be a game played by lawyers for their own amusement and financial gain. It must be a tool available to help clients resolve real legal problems both efficiently and cost-effectively. Clients won’t use the litigation process, and perhaps they won’t use our services, if they can’t afford it.

We must find a way to make civil litigation more affordable and more financially accessible. We need to change the rules so that there are limits to the amount of written discovery, such as interrogatories and requests for production of documents. We need limits on the number and length of depositions. Depositions that take a full day or even multiple days should be a rarity, but unfortunately, they are becoming increasingly the rule, not the exception. We need more clarity on how to preserve and conduct discovery regarding electronic records. We need some limits to the costs associated with expert witnesses. Finally, we need to shorten the time it takes to get a case to trial. It is simply not acceptable for a case to take two, three, or even four years to get to trial.

In my opinion, the federal rules of civil procedure provide a good model for change. Pursuant to the federal rules, trial dates are scheduled early in the process and rarely changed. Discovery has manageable and meaningful limits, and deadlines are set early in the process and then enforced by the courts. Interrogatories are strictly limited, and the number and timing of depositions are restricted. There is more certainty and limits to the discovery process, and this helps reduce both abuse and costs.

I believe that we should give serious thought to changing the civil rules to more
closely resemble the federal rules. Not all of you will agree with this proposal, but I make it in part to stimulate some debate and discussion about these issues. We need to control the escalating costs of litigation; otherwise, it will become an increasingly irrelevant tool for our clients. Changing the civil rules is certainly not the only answer to this problem, but it may be a start.

Court Funding
Most of you know that the Bar Association and the state judiciary have been working together for almost five years to change the way that the state Legislature funds the trial court system. This effort is known as the Justice in Jeopardy Initiative, and it was started because the chronic under-funding of our trial courts had led to an impending crisis in court operations, civil legal aid, parent representation in dependency cases, and indigent public defense.

In fact, several years ago a task force concluded that Washington ranked last in the nation in providing state funding for the costs of trial courts, prosecution, and public defense.

I am happy to report that the effort has led to many successes. In fact, in the last five years the state Legislature has increased state funding by $47.6 million, including: $16 million for parent representation in dependencies, $12.3 million for public defense, $8.3 million for civil legal aid, $6 million for statewide CASA, $2.4 million for district and municipal court judges’ salaries, $2 million for interpreters, and, finally, $600,000 for a juror-pay pilot project. Members of the Bar Association and the judiciary are very thankful for these efforts by members of the Legislature.

Unfortunately, for every step forward made with state funding, we seem to take two steps back with local funding by our counties and cities. The court system is easily overlooked when it comes to budget time during economic downturns, such as what we are now experiencing.

We need more judges, courtrooms, clerks, prosecutors, public defenders, and publicly funded lawyers for people with low incomes. But all of this requires more money. Unfortunately, this issue is not close to a solution and this bar association must continue to make every effort to ensure that our courts are adequately funded. We cannot become complacent about this critical issue.

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The Mining of Metadata

Navigating the hidden ethical dangers of discovering hidden information in electronic documents
Imagine the following situation happens to you as part of your normal practice routine. You send a draft sales agreement to opposing counsel as an e-mail attachment. You have redrafted the same agreement many times using your client’s standard form that is re-saved each time as a new Word document on your computer desktop. Your client’s comments regarding target and bottom-line pricing and negotiation strategies and your associate’s comments and revisions were included in a redline version. You click “accept all changes” on your redline document and comments, and then re-save as the final agreement without redline changes. Without thinking about breaching any ethical obligations related to the disclosure of hidden “metadata” in the electronic copy of your draft agreement, you hit “send.” You are amazed at how technology has helped make you so efficient in the delivery of legal service.

Another situation arises. Your partner has just requested and received an electronic version of discovery requests to your client. She is aware that there might be some metadata that might provide your client an advantage going forward in the lawsuit. Without thinking that she may be breaching an ethical obligation, she reviews the metadata and learns that opposing counsel considered requesting certain information from your client, but decided to pursue a different strategy. Finally, you also note the ease and cost saving associated with filing documents electronically in various federal and state courts and administrative agencies. Good practice? If the PDF format documents you sent in for filing have not been scrubbed to remove metadata, probably not.

Why Is Metadata a Problem?
What is metadata? It is the DNA of the electronic record. It may reveal who worked on a document, the name of the organization that created or worked on it, information about prior versions of the document, recent revisions, and comments inserted in the document during drafting or editing. Thus, hidden text may reflect editorial comments, strategy considerations, legal issues raised by the client or the lawyer, or legal advice provided by the lawyer. For example, the New England Journal of Medicine used simple Microsoft Word functions to discover that an article submitted for publication by a major drug manufacturer had deleted from an earlier draft the revelation of a study linking its arthritis drug to an increased risk of heart attacks.2

Thus, the devil is truly lurking in the unseen metadata — it very well might be confidential information which the disciplinary rules mandate you safeguard from disclosure. Failing to address metadata in this electronic age could result in a malpractice claim and a not-so-friendly visit from the bar disciplinary counsel.3 Scrubbing metadata should be as basic to the lawyer’s practice as washing fruit or vegetables purchased from the grocery store (which may be exposed to unknown contaminants as part of its journey from growers). Metadata — the obligation to scrub it and/or the propriety of its use — has been addressed by a number of bar associations, and recently in a formal opinion form the American Bar Association. The conclusions of the ABA and various states are not consistent and, thus, provide conflicting guidance to counsel on this evolving area.

The ABA Opinion on Metadata Imposes Burden on Sending Party
In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-422.4 ABA 06-442 sidesteps answering the question whether a lawyer who allows privileged or non-public information to slip through to the other side in the form of metadata has violated the standard of care in either a liability or ethical standpoint. However, it does recommend sending electronic records that might otherwise contain metadata in an “imaged” or “hard copy” format (such as fax, imaged PDF, or simply paper), “scrubbing” such information (using software designed for this function) from the document before sharing it with the other side, or executing a “claw back” agreement with the other side (allowing each party to “claw back” privileged documents that were inadvertently produced). Beyond confidential information, 06-442 notes that virtually all electronic documents that are in their original word processing format (such as Word or WordPerfect) contain a variety of metadata that is not confidential and, therefore, may be shared with the other side.

The bottom line from the ethics opinion is that the sender of electronic records must undertake responsibility to make sure its unseen metadata has been removed before it is sent. Does this then open the door to opportunism by the receiving party, since he must know that no one would intentionally disclose confidential or propriety information to the other side? This issue is not answered by the ABA opinion, and may have been intentionally left to be addressed by state and local bars under their ethical rules and statements of professionalism.

State Bar Associations Have Weighed in on Metadata Mining with Varying Conclusions
An increasing number of bar associations have weighed in on this issue. Not surprisingly, since professional responsibility rules vary by jurisdiction, the rules being developed are not consistent, although electronic documents pass readily through various state boundaries.

In one of the earliest decisions, New York State Bar Opinion 782 examined whether opposing counsel’s use of metadata was acceptable or merely exploiting a lawyer’s inadvertent disclosure of privileged material.5

The New York Committee concluded that lawyers may not mine documents for metadata in part based on the “dishonesty, fraud and deceit or misrepresentation” and “conduct prejudicial to the administration of justice” standards found in Model Rule 8.4. (Interesting, since I do not think New York is a model-rule state.) In discussing New York State Bar Opinion 782, Anthony E. Davis, in “The Intersection of Professional Responsibility and Technology,” New York Law Journal, March 7, 2005, states:

While the committee may have been concerned about seeming to exceed its jurisdiction by suggesting a hard-and-fast rule requiring lawyers either to “scrub” the offending “metadata” or use a transmission format that otherwise eliminates it from prying eyes, such a rule may make practical sense.

Similarly, it is not enough to say that it is also unethical for lawyers themselves to search for and read other parties’ “metadata”; after all, as the committee also notes, clients do not operate under any such restriction or inhibition. From a risk-management point of view, it is much easier to express and then enforce a clear and absolute rule.

The Alabama State Bar recently came to a similar result. While concluding that attorneys have an affirmative duty to prevent the disclosure of metadata containing client con-
fidences and secrets, it agreed with the New York Bar that "[a]bsent express authorization from a court, it is ethically impermissible for an attorney to mine metadata from an electronic document he or she inadvertently or improperly receives from another party." (Ala. St. B. Disciplinary Commission, Op. OR-2007-02 (2007)). The Alabama ethics opinion is consistent with Formal Opinions 749 and 782 of the New York State Bar, and the District of Columbia Bar. DC Bar Opinion 341 (September 2007).6

The State Bar of Arizona, in Opinion 07-03 entitled “Confidentiality; Electronic Communications; Inadvertent Disclosure,” decided to follow the same rule and criticized the ABA rule as leaving the sending lawyer at the mercy of the recipient:

Lawyers, in light of this fundamental principle, and in keeping with their status as members of a learned profession, should refrain from conduct that amounts to an unjustified intrusion into the client-lawyer relationship that exists between the opposing party and his or her counsel. ER 8.4(a)-(d). See also Ala. Op. RO-2007-02.

The American Bar Association (ABA), in Formal Op. 06-442 (August 5, 2006), concluded that the Model Rules of Professional Conduct do not prohibit such conduct. We respectfully decline to follow the ABA position. Despite the most reasonable and thorough precautions, and even with the best of intentions, it may not be possible for the sending lawyer to be absolutely certain that all of the potentially harmful metadata has been “scrubbed” from the document before it is transmitted electronically. Under the ABA position, the sending lawyer would be at the mercy of the recipient lawyer. Under such circumstances, the sending lawyer might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely. We do not think that is realistic or necessary.

It should be noted that the Arizona Rules of Professional Conduct do not mirror the model rules adopted by the ABA. This is also true for New York. On the other hand, Washington and Oregon do follow the ABA model rules.

Pennsylvania has a more liberal rule regarding the use of metadata. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility concluded that, under the Pennsylvania Rules of Professional Conduct, each attorney must determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer’s judgment and the particular factual situation.7 Although the waiver of the attorney-client privilege with respect to privileged and confidential materials is a matter for judicial determination, the Committee noted that — similar to New York, Alabama, and Arizona — the inadvertent transmissions of such materials should not be viewed as a waiver of the privilege, except in the case of extreme carelessness or indifference. In short, Pennsylvania lawyers must apply their own judgment on whether to make use of metadata received from an opposing attorney.

The Maryland State Bar Association’s Committee on Ethics has taken perhaps the most liberal view of the issue, stating that an attorney has no ethical duty or obligation upon receiving inadvertently disclosed metadata, except in the arena of federal litigation. (Md. St. B. Ass’n Ethics Comm., Op. 2007-09 (2007)). This split of authority between the ABA and the various state bar opinions leaves attorneys in the uncertain position of how to address the review of metadata, depending on in what state they have their office or from what state the e-mail may have been originated. The lack of a bright-line rule may leave you uncertain on your ethical limitations if you elect to engage in the mining for metadata from an opposing party, especially in states where the state bar has yet to speak on the issue.

What Should We Do in Washington?
The ABA opinion concludes that the ethical rules do not prohibit the review of metadata, and Washington has adopted the ABA Model Rules on Professional Responsibility, and will likely be guided by the same principles.8 As a result, last year the WSBA Professionalism Committee considered whether a separate standard of professionalism should apply to the mining of metadata received from an opposing attorney. The Committee considered the following proposal offered by the chair:

In the effort to be forthright and honest in my dealings with the court, opposing counsel and others, if a lawyer requests or is provided a document in electronic form, the lawyer should not seek to expose “metadata” that contains information that the lawyer knows or reasonably should know was not intended to be disclosed. If the lawyer intends to review the metadata, he shall first notify the sender and allow a reasonable time for the sender to make their intentions known.

The WSBA Professionalism Committee focused on whether the Creed of Professionalism even needed a specific rule addressing metadata, and whether it was properly the realm of the Rules of Professional Conduct Committee to formally addresses the matter similar to other states. The feedback was mixed. Some believed the need to address the misuse of electronic information is important, and should be included. Others expressed the concern that the use of metadata is a very natural and important part of an attorney’s duties, and should not be labeled in any way as unprofessional. The Committee also heard concerns that any prohibition on the use of metadata would unfairly limit the legitimate investigative use of metadata by law enforcement and attorneys during discovery.

This resulted in deadlock over whether to adopt a specific limit on the unfettered use of metadata, even if its disclosure was clearly unintended. The Professionalism Committee ultimately did not pass along a specific recommendation to the Board of Governors, and the issue remains open for resolution.

Although the Committee did not adopt a specific resolution, it nonetheless focused on the importance of professionalism as applied to changes in technology and the practice of law. There is a constant debate about what professionalism is, and how it should impact the everyday practice of law. For this author, professionalism is the Golden Rule for attorneys, emphasizing that the profession benefits when the standards of conduct are kept high, and when the use of cheap ploys aimed at gaining some perceived or actual advantage in the contest is discouraged. Promoting the pursuit of justice for every person, and advancing the goals of our legal system for the benefit of society as a whole, must be the standard for our profession.

The American legal system is based on the foundation that no one is above the law. As such, our profession is charged with maintaining the integrity of laws and the legal system. Each attorney owes a duty much higher than the call of a particular case, or even a particular battle in a protracted contest. Even in an adversarial system such as ours, the duty is to play fair, maintain respect and courtesy to the opposing party, and prevail by following notions of what is right and good, not just what is expedient for the cause of his/her client.

In the final analysis, professionalism is needed more than ever as we confront the challenges of technology and the produc-
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James T. Yand, a member of Stafford Frey Cooper P.C., has published numerous articles and is a frequent speaker on the topic of electronic discovery. He has taught courses at the University of Washington on complex litigation and e-discovery. He is past chair of the WSBA Professionalism Committee.

NOTES
2. The Oregon Rule of Professional Responsibility, Rule 4.4(b), requires that a lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. Comment [3] to Model Rule 4.4 indicates that, unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment.
3. For more on scrubbing metadata, see "Electronic Discovery: Hype, Sleeping Monster, or Roaring Tiger?" James Yand and Craig Kobayashi (September 2006); www.wsba.org/lawyers/groups/professionalism/electronicdiscoveryproof.pdf.
4. ABA Opinion provides:
   The Committee first notes that the Rules do not contain any specific prohibition against a lawyer’s reviewing and using embedded information in electronic documents. The most closely applicable rule, Rule 4.4(b), relates to a lawyer’s receipt of inadvertently sent information. Even if transmission of “metadata” were to be regarded as inadvertent, Rule 4.4(b) is silent as to the ethical propriety of a lawyer’s review or use of such information. The Rule provides only that “[a] lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” Comment [3] to Model Rule 4.4 indicates that, unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment.
5. Lawyer-recipients also have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets. In N.Y. State 749, we concluded that the use of computer technology to access client confidences and secrets revealed in metadata constitutes “an impermissible intrusion on the attorney-client relationship in violation of the Code.” N.Y. State 749 (2003). See also N.Y. State 700 (1997) (improper for a lawyer to exploit an unauthorized communication of confidential information because doing so would constitute conduct “involving dishonesty, fraud, deceit or misrepresentation” and “prejudicial to the administration of justice” in violation of DR 1-102(A)(4) and DR 1-102(A)(5), respectively). New York State Bar Association Committee on Professional Ethics, Opinion Number 782 (December 8, 2004). The committee also noted that non-lawyer recipients of documents containing hidden text have no obligation imposed by the Code to avoid uncovering and exploiting information contained in an e-mailed document’s metadata.
In September 2006, Washington's Rules of Professional Conduct (RPCs) were revised to include the phrase “informed consent.” Although the phrase “informed consent” appears in pre-2006 case law, this amendment to Washington's Rules of Professional Conduct leaves little doubt that the emphasis is on the process of obtaining a client’s informed decision among alternative courses of action. The use of this phrase establishes that it is not enough to simply recite a litany of material facts and obtain a signature. The inclusion of the phrase “informed consent” in our ethics rules indicates the extent of the work that lawyers must do when their clients’ informed consent is required.

The addition of “informed consent” may not represent a substantive change in the rules; the prior rules called for consent after full disclosure. Yet general principles of construction suggest that when a committee of lawyers changes or adds a phrase, that phrase has a different meaning. At the very least, “informed consent” should remind attorneys that the client must be put in a position to meaningfully consent. Attorneys must conduct a meaningful consent process with clients and prospective clients. The changes to the rule should at least inspire us to better document the process and remind us to take our time to explain the alternative options available to our clients.

**Lessons Learned from Other Contexts**

Other sources of law, including medical malpractice and waivers of constitutional rights, remind us that the process of obtaining informed consent should result in a client who makes an informed, knowing, and voluntary choice.

Medical professionals have been tasked with obtaining “informed consent” for decades. There is a statutory scheme in Washington and significant case law defining their obligation. Although none of that is formally adopted or referenced in the new RPCs, it is reasonable to assume such “informed consent” case law will be looked to on how this term applies to lawyers.

In cases involving medical informed consent, the written signed documentation creates a statutory presumption that informed consent was obtained. There is no similar statute for legal informed consent, but it is reasonable to expect that a signed document reflecting the informed-consent process would be strong evidence that the process actually occurred.

Courts have noted that the informed consent required to waive a constitutional right must be knowing and intelligent. Similarly, the process of obtaining informed consent in other contexts should result in an intelligent decision from the client, albeit in a different context.

The importance of getting a signed informed consent, even when certain of the rules may not require it, should not overshadow the reality: Informed consent is a process, not a piece of paper. The documentation of the process is valid only if the process occurs. Disputes about informed consent often arise after memory fades. It is also useful to have regular practice and procedure for what is discussed and how you go through it. Only then is the documentation of informed consent fully useful for defending a lawyer.

Not all client-informed consent must be in writing. For example, attorneys need not document the necessary consent before revealing information relating to representation, using such information to a client’s disadvantage, accepting compensation from a source other than the client, or taking representation adverse to the lawyer’s
I nformed consent is critical in matters of legal ethics. The process of obtaining informed consent should increase client satisfaction, because it increases attorney-client communication and empowers the client’s choices. Informed consent also is helpful to defend in legal malpractice cases, because it should evidence disclosures made to the client and document the client’s choice.

When in doubt, confirm in writing. This is easier than it sounds. The new RPCs and the comments broaden what constitutes a writing, to include electronic communication and voicemail. Writings may be signed by any “electronic sound symbol or process” logically associated with a writing and expressing an intent to sign the writing.

Elements of Informed Consent
The RPCs define the phrase “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Thus, informed consent always involves a discussion of reasonably available alternate courses of action.

The prior language was less clear. For example, when dealing with potential conflicts of interest, former RPC 1.7(b)(2) required that the client consent “in writing after consultation and a full disclosure of the material facts.... When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.” Today, there can be no question: Informed consent requires that the lawyer communicate and explain the proposed course of conduct, material facts, material risks, and reasonably available alternative courses of conduct so that the client may make an informed choice.

Washington’s comments to the rules provide that, when informed consent must be in writing, such writing must be “articulated in a manner that can be easily understood by the client.” In order to obtain informed consent, there generally must be an affirmative response by the client or someone acting on the client’s behalf. In general, consent cannot be inferred from silence. But in some circumstances, consent can be inferred from conduct.

A lawyer need not personally provide all of the information upon which a client might rely to provide informed consent. But, when a lawyer does not personally inform the client, that lawyer “assumes the risk” that the client is inadequately informed and that the consent is invalid. Comment 6 to RPC 1.0 specifically cautions the lawyer of the risk associated with not personally informing a client of material information. The Importance of Informed Consent
Informed consent is critical in matters of legal ethics. The process of obtaining informed consent should increase client satisfaction, because it increases attorney-client communication and empowers the client’s choices. Informed consent also is helpful to defend in legal malpractice cases, because it should evidence disclosures made to the client and document the client’s choice.

If courts borrow the standards from medical malpractice, informed consent may be judged retrospectively by an “objective subjective” standard. This may also be phrased as a reasonable subjective standard, meaning that a contention that informed consent was not obtained must establish that the information that was not disclosed must be material and that it would have made a difference to the objectively reasonable client in a similar circumstance.

In a legal malpractice action, causation must be shown, and it usually must be supported by expert testimony. But in cases where the plaintiff alleges a lack of informed consent, documentation of the process is strong evidence for the defense, increasing the possibility of dismissal by summary judgment. Lack of evidence of informed consent will greatly increase the likelihood that the case will proceed to trial.

In disciplinary matters, evidence of informed consent will be important to the defense where a client claims not to have been properly informed. Proof of causation may not be necessary for a successful bar complaint based on lack of informed consent. Given the definition of informed consent, the assumption of risk language found in the comments, and the ease by which informed consent can be documented, cautious practitioners should revisit their informed consent processes and documentation.

What to Do
The process for obtaining informed consent often begins over the telephone. The attorney should describe the proposed course of conduct and all reasonably available alternatives. The attorney should also communicate and explain the pertinent facts, information, risks, and advantages of each course of conduct. Sometimes it is necessary to explain why the client may wish to discuss the issue with other counsel. During this conversation, it can be helpful for the attorney to make contemporaneous notes of the discussion, followed by dictating a memorandum to the file or drafting the client letter right after the conversation. The closer in time that this occurs to the initial client discussion, the better.

Any discussion, whether a telephone call or in person, should not be a lecture; it should be a dialogue, the goal of which is to inform the client and explain the possible courses of action. Attorneys should not demand a decision by the client if the client needs time to consider the options. The attorney should make sure that the client has the opportunity to ask questions, and the attorney should answer those questions.

After the conversation, the attorney should draft a confirming client letter, which should reiterate the facts, information, risks, and advantages discussed, as well as stating the proposed and alternative courses of action. Two copies of the letter should be sent promptly to the client. The attorney should request that the client sign and return one copy to the attorney. The attorney should then follow up with the
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Conclusion
The process of obtaining informed consent is required under Washington’s Rules of Professional Conduct. A detailed process and written confirmation can provide strong evidence in defense of a legal malpractice claim or bar complaint. Although the 2006 revisions to the RPCs may not reflect a sea change in the rules, they provide clarification and an important reminder to Washington lawyers that informed consent involves dialogue and process.

Going through the process of obtaining informed consent not only satisfies an attorney’s ethical requirements, it also should strengthen the attorney-client relationship and document choices made during representation. When done well, the process reminds clients of why they chose you as their attorney and counselor at law.

Christopher Howard and Colin Folawn are trial lawyers at Northwest law firm Schwabe, Williamson & Wyatt. They co-host Schwabe’s monthly ethics hour CLEs and can be contacted at 206-622-1711 or choward@schwabe.com and cfolawn@schwabe.com.

Notes
1. See, e.g., RPC 1.7(b)(4).
2. The standards in former RPC 1.7(a)(1) was “consents in writing after consultation and a full disclosure of the material facts.”
3. See RCW 7.70.050.
4. See, e.g., United States v. Gamba, 483 F.3d 942, 949 (9th Cir. 2007) (stating that “[t]he Supreme Court is habitually clear when a defendant’s personal and informed consent is required to waive a constitutional right” and citing Boykin v. Alabama, 395 U.S. 238, 241–43 (1969) for the proposition that a guilty plea and the waiver of right to counsel must be made “knowingly” and “intelligently” by the defendant).
5. RPC 1.6(a).
6. RPC 1.8(b).
7. RPC 1.8(f).
8. RPC 1.9.
9. RPC 1.7(b)(4).
10. RPC 1.8(g).
11. RPC 1.9(a).
12. RPC 1.8(a)(2) and (3).
13. RPC 1.8(h)(1).
14. RPC 1(h)(2).
15. See RPC 1.0(n).
16. RPC 1.0(e).
17. RPC 1.0, cmt. 11.
18. RPC 1.0, cmt. 7.
19. Id.
20. Id.
21. RPC 1.0, cmt. 6 (noting that the client is to be afforded “a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns”).
23. See RPC 1.7, cmt. 20.
24. See RPC 1.0(n) (providing that a “writing” includes handwriting, typewriting, printing, photostating, photography, audio or video-recording, and e-mail). A signed writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. Id.
In Praise of Share Transfer Restrictions

by Robert S. Klein

had my first disappointing encounter with negotiable instruments when I was six years old. I had discovered a stack of blank business checks and a massive one-armed check-embossing machine in my father’s home office, and I decided to make my buddies rich. I made out business checks to Jimmy Strong for $10,000,000 and Harry McDermott for $15,000,000. There were whoops of joy on the playground when I handed out the checks. My father was not overjoyed when he found out.

Unrestricted corporate shares are easy to transfer, much easier than it was for me to pass my dad’s business checks. Unfortunately, the consequences of having freely tradable shares can be more troublesome for private corporations. Washington’s minimal organizational requirements ignore a hazard to the founders of close corporations — namely, the risk that unrestricted shares will be issued and will fall into the hands of antagonists. The lack of share transfer controls invites shareholder strife and other mischief. Why doesn’t the Washington Business Corporations Act (Act) offer founders an easy option for adopting share transfer controls?

The threat to the founder’s control will not come from strangers swooping in to gobble up the corporation’s shares. In truth, hostile takeovers are rare for close corporations. Outside investors have little appetite for unmarketable stock. No, the danger will come from or through business associates. The danger is that shares, once granted as a reward to employees or as payment to friends and family for their seed money, will someday be used against the founder and the corporation by a recently fired and vindictive ex-employee, or by an angry ex-spouse (who got the shares in a divorce), or by a deceased shareholder’s greedy children, or, after foreclosure, by an impatient local banker or an aggressive IRS agent. The close corporation needs an orderly way to buy out these adverse interests, but the buy-out price, attorneys’ fees, and potential litigation costs may be steep when share transfer controls are not already in place.

At this time, a Washington close corporation’s only choice is to draft customized share transfer controls — typically in a shareholders’ agreement — to guard against unwelcome shareholders. Some close corporations fail to make this choice when they are organized. Either the founder is a do-it-yourself champion who uses simple Internet forms, or the founder wishes to save his working capital and won’t spend the money on an attorney to draft a shareholders’ agreement, or the founder does not anticipate having any business partners, or the founder does not appreciate the dispute prevention power of a well-crafted agreement. In any event, too many new close corporations are created without transfer controls.

Founding shareholders will insist on controlling their enterprises, whether they aspire to become the next Hewlett and Packard (who famously started their business in a garage) or hope that their child will someday take over the family store. This is more than a matter of personal inclination, it is a matter of financial necessity. Founders often depend on their close corporations for their livelihoods. A founder will instantly understand that he can keep control of his close corporation by controlling who owns its shares — though, in Washington, he will have no idea how to formalize transfer restrictions without the help of an attorney. As we will see, even though the great majority of Washington corporations are privately held, Washington has chosen to omit a special close corporations statute that would establish share transfer restrictions. In some states, statutory transfer controls are automatically
In some states, statutory transfer controls are automatically established if the incorporator (the founder or his attorney) elects close corporation status in the articles of incorporation. In Washington, the Act authorizes transfer controls, which the founder may create if he hires a lawyer to draft a restrictive article of incorporation, bylaw, or shareholders’ agreement.

The Act’s omission makes it more likely that close corporation founders will face unwanted and potentially unhappy co-owners, or, worse, that the founders will be squeezed out of their corporations if ownership of a controlling block of shares falls into the hands of a serious adversary. This omission — the lack of elective statutory transfer controls — is too obscure a point to cause shareholders to lobby for legislative reform.

The precise scope of the problem is unknown, but the vast majority of Washington corporations are privately held and, therefore, may be at risk. We have statistics for three kinds of Washington corporations: public corporations that do not need transfer controls, professional service corporations that have transfer controls whose shares are subject to statutory transfer controls, and venture capital-backed private corporations whose shares are subject to contractual transfer controls. The Washington Secretary of State’s Office reports that, as of September 30, 2007, there were 151,731 active for-profit corporations organized and existing under Washington law, including 7,992 professional service corporations (5.27 percent). Only 186 Washington corporations
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articles of incorporation will not bind shares that were issued before the amendment unless the holder of those shares votes to pass the amendment. The existence of the restrictions must appear on the face or back of the stock certificates. The Act imposes few limitations on transfer restrictions. Certain types of purchasers may be disqualified if the disqualification is not "manifestly unreasonable." Restrictions may be imposed to preserve the corporation's status, its tax elections, or for "any other reasonable purpose." Washington courts have upheld restrictions that are reasonable at the time they are imposed.

What should a practitioner include in a restrictive article for a Washington corporation? Practitioners will have sharply different views about this. Here are the features I suggest:

1. Transfers in violation of the restrictions should be void and should not be recognized on the corporation's books.
2. The restrictions should permit normal stock transfers such as estate planning gifts, employee stock grants, stock restriction agreements, stock option plans, and redemption agreements, including insurance-funded redemptions.
3. Stock pledges should be allowed with the corporation's consent. Eligible buyers at foreclosure sales should be restricted.
4. The shareholders should be able to waive the transfer restrictions for specific transactions.
5. Shareholders should be allowed to voluntarily transfer shares after giving fellow shareholders and the corporation a right of first offer.
6. Certain occurrences should give rise to involuntary buy-out rights: the death of a shareholder, the award of shares to an ex-spouse in a divorce, a shareholder/employee's separation from employment, a creditor's judicial or non-judicial seizure of the shares, or an indirect transfer of shares by an entity.
7. Shares in the hands of an involuntary transferee should temporarily become non-voting shares until the expiration of the right of first offer period.
8. There should be a binding non-judicial procedure for pricing the shares at market value through an appraisal or a formula (e.g., book value or a multiple of EBITDA).
9. The payment of the purchase price for shares should be extended over a sufficient term to avoid a liquidity crisis for the corporation and the remaining shareholders.
10. The transfer restrictions should be integrated with statutory dissenters' rights.
11. The transfer restrictions should explicitly declare a reasonable purpose.
12. Independent transfer restrictions should be included in the Articles to guard against a violation of state and federal securities laws and to avoid blowing any subchapter S election made by the corporation.
13. The transfer restrictions should provide a foundation for (and can be integrated with) a shareholders’ agreement that would offer more sophisticated transfer restrictions, including clauses for buy-sell, drag-along, tag-along, structured employment separation buy-outs, etc.

Restrictive articles will be helpful, perhaps even popular with clients. They will be easy to adopt and inexpensive. Restrictive articles will never be as protective or as sophisticated as a comprehensive shareholders’ agreement, but they are much better than nothing, because nothing is all the Act presently offers.
NOTES
1. A corporation is obligated to transfer ownership of shares on its books if the transfer application is in proper form and no transfer restrictions apply to the shares. See RCW 62A.8-204, 8-401; and RCW 23B.06.270.
3. An improvident transfer could disqualify a close corporation's S-corporation tax election or could violate state or federal securities laws.
4. RCW Title 23B. The Act is a modified version of the Model Business Corporations Act.
5. A minority shareholder-employee will have a claim for being squeezed out of his corporation. Robblee v. Robblee, 68 Wn. App. 69, 841 P.2d 1289 (1992); Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 709, 714, 64 P.3d 1 (2003); and see, e.g., O'Neal and Thompson, Close Corporations and LLC's Law and Practice (Revised 3d ed.), §9:3; O'Neal and Thompson, Oppression of Minority Shareholders and LLC Members (Revised 2d ed.).
6. Minority shareholders may be squeezed out through a reverse stock split (RCW 23B.13.020(1)(d)) or other squeeze out techniques. O'Neal and Thompson, supra, §9:3. The corporation may dilute minority shareholder by issuing or granting new shares to others for fair value, especially if there are no preemptive rights. Each of these solutions is expensive and may provoke an action for corporate dissolution (RCW 23B.14.300(2)(b)) or other litigation.
7. Andrew Carnegie was once asked the secret of his success. He replied: “Concentrate your energies, your thoughts and your capital. The wise man puts all his eggs in one basket and watches the basket.”
8. O’Neal and Thompson, supra, § 7.2, page 7-4 through 7-6.
9. More than 20 states have enacted special supplements for close corporations. This may have the advantage of providing standard transfer restrictions that remove the need and expense of having the founders draft a customized share transfer restriction. See, e.g., Wis. Stat. §§180.1801 through 1837 (2007); and see O’Neal and Thompson, Close Corporations, supra, § 1:15, page 1-99, and §1:19.
11. See O’Neal and Thompson, Close Corporations,
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supra, §§ 1:9, 1:15.
12. RCW 18.100.110, RCW 18.100.116.
13. Venture-capital-funded private corporations are subject to significant controls over the transfer of shares. See the model legal documents published by the National Venture Capital Association at www.nvca.org.
15. VentureSource lists 285 venture-backed companies headquartered in Washington, without regard to the state of formation. 118 are Delaware corporations. The VentureSource list was checked against the Secretary of State’s corporate database to determine the number of Washington corporations. VentureSource offers a comprehensive database of venture-backed companies and their investors. www.venturesource.com.
16. O’Neal and Thompson estimate that considerably more than one-half of all close corporations have adopted transfer controls. Id. at § 7:2, fn. 1.
18. RCW 23B.06.270(1); RCW 23B.02.020(6)(a).
19. RCW 23B.06.270(1).
20. RCW 23B.06.270(2).
23. See Landefeld and DeJong, supra, §11.07(c), pp. 11–23.
24. I thank my law firm’s librarian, Patricia Pi, for her research help. I thank my law firm’s associate John Crosetto and my law partner John Sullivan for their advice and editing.
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Standing: Philip Buri, Marie Gallagher, Kenni Merritt, Laura Justice Debra Stephens and Justice Susan Owens. Seated (l. to r.): Bellingham attorneys welcome Justice Stephens and justices also fielded many questions about the Court’s formal decision-making process. The justices provided insight into the workings of the Court, including judicial conference procedures and the Supreme Court’s formal decision-making process. The justices also fielded many questions about oral argument and provided helpful tips for effective oral advocacy. The Whatcom County Chapter appreciates the justices making time during a busy week at the end of the Court’s Spring 2008 Docket to travel to Bellingham to provide such a meaningful experience for Whatcom County lawyers.

WACDL Presents Awards
The Washington Association of Criminal Defense Lawyers (WACDL) honored three attorneys for outstanding service to the criminal defense bar on June 13 at the association’s annual conference in Chelan. Ted Vosk, of Seattle, received the 2008 President’s Award. Ted Vosk has been the driving force behind the demand for reform at the Washington State Toxicology Lab. WACDL presented the Champion of Justice Award to Teresa Mathis. This award recognizes individuals who, through legislative, judicial, journalistic, or humanitarian pursuits, staunchly preserve or defend the constitutional rights of Washington residents and endeavor to ensure justice and due process for those accused of crime. As an activist, a community volunteer, and the executive director of WACDL for 20 years, Teresa Mathis has served the criminal defense community as a passionate advocate for peace and justice.


State Toxicology Lab.

Veteran Johnson & Associates* squad has captured the 2008 Seattle Lawyers Basketball League crown. On May 28, 2008, number-two-seeded Johnson & Associates prevailed over the number-one-seeded Washington Generals in a bruising battle, avenging one of the team’s only two losses of the 2008 regular season. The undefeated Washington Generals erased an early seven-point deficit (thanks to the hot hand of Mike Lee) to tie Johnson & Associates at 37 all at the half. The game remained close and with eight minutes remaining, the score was knotted at 55. Johnson & Associates then took the lead to take the 2008 crown.

*Johnson & Associates is the name of the basketball team composed of 10 lawyers, many of whom are practicing law in small firms. It is not a real law firm.

WSBA Celebrates 75th Anniversary
In June, a special cake was prepared to celebrate WSBA’s 75th birthday (and the birthdays of staff members born in June). The WSBA Board of Governors also enjoyed an anniversary cake at their June meeting in Vancouver. Although the roots of the WSBA go back 120 years, 2008 marks the 75th Anniversary of the State Bar Act, which established the Washington State Bar Association as an integrated, or unified, bar association.

WSBA go back 120 years, 2008 marks the 75th Anniversary of the State Bar Act, which established the Washington State Bar Association as an integrated, or unified, bar association.
Save the Date — Race Judicata

Join WYLD members, students, judges, and members of the legal community for the third-annual Race Judicata 5K on October 19, 2008. The event seeks to raise funds to support student work in public interest law geared toward public health issues. Walkers and runners are welcome. Join us at beautiful Seward Park in Seattle for this exciting event. Online registration can be found at active.com (search for Race Judicata 5K) or visit www.active.com/event_detail.cfm?event_id=1602854. The event is sponsored by the WSBA Young Lawyers Division.

New State Court Administrator

Washington State Supreme Court Chief Justice Gerry Alexander announced that the Court has named Jeff Hall as Washington’s new state court administrator. The state court administrator heads the Washington State Administrative Office of the Courts (AOC), a judicial branch agency that reports to the Supreme Court. Mr. Hall joined the AOC as a court services specialist in 1991.

“Jeff has the full support of all members of the Court, and we are delighted that he has accepted this appointment,” said Chief Justice Alexander. “The AOC serves a vital role in providing services to courts and the public in Washington, and he will serve the state well in this new capacity.”

13th Annual Access to Justice/Bar Leaders Conference Roundup

The 13th annual Access to Justice Conference was held in Vancouver, Washington, June 6–8, and was, by far, the most well-attended conference yet. All meeting rooms were overflowing with members and supporters of the Alliance for Equal Justice — learning, networking, and sharing information about ways to increase access to the justice system for Washington’s poorest and most vulnerable people. The conference theme, “Justice Without Borders,” was woven throughout the event, with workshops focusing on removing barriers to equal justice for farm workers, Native Americans, pro se individuals, homeless people, children in dependency hearings, and immigrants. Two sessions took an in-depth look at the immigration legal framework in the United States, including American immigration policy and its impact on the justice system. Keynote speaker Shelley Davis, deputy director of Farmworker Justice, drew a standing-room-only crowd and much applause for her tireless efforts to improve health and safety for indigenous farmworkers.

Mark Baum, Mandatory Continuing Legal Education Board member, audited the conference for CLE purposes, and had this to say: “My overall impression was that it was appropriate for those who desire to work in the under-represented, underpaid public access wing of the law industry. I benefited from the program more than I anticipated going in. The speakers were of high quality.
and were evidently dedicated to their life callings and teaching efforts. The program was uplifting, energizing, and offered great food for thought. It makes one wonder why more attorneys are not motivated to engage with, offer assistance to, or at least encouraged to learn about, those who are most in need of legal assistance.” If you are wondering how you can become involved, contact Sharlene Steele at 206-727-8262, or 800-945-9722, ext. 8262, or sharlene@wsba.org.

The Bar Leaders Conference, held jointly with the Access to Justice Conference, was also a great success. WSBA Young Lawyers Division trustees and fellows from the WSBA Leadership Institute were active participants in the various workshops. The proceedings can all be viewed online at www.tvw.org (type “Access to Justice” in the “find” box).

The conference started with a traditional “round table” with six of the Washington State Supreme Court Justices and most members of the WSBA Board of Governors. The packed room of attorneys participated in an interesting discussion on the status of the Lawyers’ Fund for Client Protection. Each active member of the Bar pays $15 annually to help fund this program, which is now threatened by potential claims against a lawyer who engaged in a Ponzi scheme far exceeding the $1.2 million available in the fund.

The second workshop was a timely conversation on the “Changing Face of the Legal Profession.” This lively exchange included separate sessions where the “Millennial” and “Baby Boomer” attorneys brainstormed ideas on their generation’s professional and personal goals, expectations as lawyers, and perspectives on what constitutes a productive and satisfying work environment. The sessions were facilitated by Seattle University School of Law Dean Kellye Testy and Gonzaga School of Law Dean Earl Martin. The two generations reconvened to exchange their findings with WSBA President-elect Mark Johnson and WSBA Young Lawyers Division President-elect Jaime Hawk presiding.

The third Bar Leaders workshop, “Immigration Raids, Retaliation, and Lawyers’ Ethics,” provided practice tips and ethical insights on a variety of areas related to immigration enforcement trends and impacts on civil rights, education, and employment. Also covered was the controversial practice of counsel threatening to report the opposing party to immigration officials, and a proposal submitted to the WSBA Rules Committee to adopt a formal opinion to ban such a practice. The informative panel was led by attorney Henry Cruz, and included panelists Lorena González, Shankar Narayan, Manuel Rios, Siovhan Sheridan-Ayala, and Professor John Strait.

The 2009 joint Access to Justice Conference/WSBA Bar Leaders Conference is May 29 to June 1 at the Yakima Convention Center. We hope you can join us.

McKeown Appointed to Chair National Codes of Conduct Committee
Judge M. Margaret McKeown, of the United States Court of Appeals for the Ninth Circuit, has been selected to chair the Committee on Codes of Conduct of the Judicial Conference of the United States, the national policy-making body for federal courts. Judge McKeown was appointed committee chair by Chief Justice John G. Roberts Jr., of the Supreme Court of the United States. She will serve a three-year term. The Codes of Conduct Committee offers ethics advice, training, and other information on the application of the Codes of Conduct for federal judges and other judicial branch employees.

“I am privileged to accept this appoint-
ment from the Chief Justice. All of us who serve on the committee recognize the importance of ethics in assuring public confidence in the judiciary,” Judge McKeown said.

Spokane County Report
The Spokane County Bar Association (SCBA) was thrilled to have Justice Debra Stephens come “home” and give the keynote address at its annual meeting. Gratitude for service goes to Ed Carroll, outgoing president, and trustees Scott Gambill and Shelley Szambelan, whose terms expired. The SCBA welcomes its new trustees: Ryan Beaudoin, Lynn Mouncey, and Christine Weaver. The SCBA’s Volunteer Lawyer Program (VLP) also recognized past members of the VLP Advisory Committee: Karen Vaché (co-chair) and Judge Paul Bastine (co-chair), Judge Ellen Clark, Judge Linda Tompkins, Judge Gregory Tripp, Pat Connelly, Paul DiNenna Jr., Susan Gasch, Ed Johnson, Holland McBurns, Lin O’Dell, Dale Rau- gost, Joe Shogan Jr., Tim Szambelan, Tom Tremaine, and Bryan Whitaker. The VLP also introduced the new Advisory Committee: Ed Carroll (chair), Judge Maryann Moreno, Scott Gambill, Laura Garrison, Ed Johnson, Nina Roecks, Connie Shields, Joe Shogan Jr., and Arie Tobe.

Recipients of the 2008 VLP awards for pro bono service include: Ewing Anderson, P.S. — Law Firm of the Year; Linda O’Dell — Attorney of the Year; Tim Mangrum — Emeritus Attorney of the Year; James E. Reed and Sean O’Quinn — Bankruptcy/Consumer Law Attorney of the Year; Jim Woodward — Child in Need of Services Attorney of the Year; Michael Cressey — Housing Justice Project Attorney of the Year; Norma Tillotson — Family Law Advice Clinic Attorney of the Year; Mike Gainer — Divorce Advice Clinic Attorney of the Year; and Andrea Poplawski — Status Conference Advice Clinic Attorney of the Year. Kudos to those who give true meaning to “It’s not justice if it’s not equal.”

A recent phone-bank effort resulted in Spokane attorneys smashing previous participation and donation records for donating to the Campaign for Equal Justice. Spokane had more donors than King County, whose legal community is 10 times larger. So how did they do? They had 22 callers volunteer over the three days — Matt Andersen, Ryan Beaudoin, Pat Connelly, Pam DeRusha, Doug Dissoway, Bill Etter, Max Etter, Dave Groesbeck, Art Hayashi, Carol Hunter, Steven Jones, Paul Mack, Kammi Mencke, Kelly Padgham, Mike Pontarolo, John T. Rodgers, Louis Rukavina, Shelly Szambelan, Ron Van Wert, Mark Vovos, Bryan Whitaker, and Penny Youde — and a total of 135 specified and unspecified pledges were made, totaling more than $15,000. Well done, Spokane!

UW School of Law Meets Challenge
With the support of students, faculty, staff, alumni, and friends, the UW School of Law is proud to announce that they have met the challenge by the Washington State Legislature to raise $250,000 by June 30, 2008, for a loan repayment assistance program (LRAP) endowment fund. When added to the $500,000 appropriation from the state, the $250,000 raised by the UW School of Law this year and additional funds raised in previous years bring the total endowment balance to more than $820,000. The Law School was generously supported in its efforts to reach its goal through special gifts by Judy and Mark Malen from the Norm Malen Memorial Fund. Support also came from The Buck Law Group, PLLC which matched law school faculty and staff contributions dollar-for-dollar. More than 25 percent of the portion raised by the Law School was student-generated contributions, including gifts from the law student classes of 2006, 2007, and 2008, as well as contributions from the Public Interest Law Association, a UW student organization.

“The LRAP increases access to justice for low-income persons by supporting lawyers otherwise deterred from public service by lower salaries and high educational debt,” said Washington State Representative Jeannie Darnelle. “I congratulate the Law School on meeting this important fundraising challenge.”

Conference Reports
by WSBA Executive Director Paula Littlewood
Western States Bar Conference: Several WSBA Board members and I recently attended the Western States Bar Conference in Tucson, Arizona. The Western States Bar Conference brings together the officers, certain board members (second-year governors for WSBA), and executive directors from the 17 bar associations that are located roughly from the Mississippi west. The four days provide an opportunity for the various bars to share the highlights of issues they’re working on and to discuss matters of mutual interest and concern.

A few themes emerged as we listened to the issues and concerns facing other bar associations (in no particular order):
1. National bar exam. As the borders between states disappear more and more for practicing lawyers, there seems to be growing support for the concept of a national bar exam.
2. Aging lawyer population. There continues to be much discussion about the effect the large number of lawyers transitioning out of the practice will have as the baby boomers increasingly reach retirement age in the next decade or so. Issues include succession planning, second season of service (encouraging pro bono and
mentoring opportunities), and declining memberships overall for bar associations as more lawyers will be transitioning out than are entering the profession.

3. Mandatory insurance disclosure. Several states are still working to adopt regulations similar to those that WSBA implemented this year; these states are experiencing pushback from members who oppose the idea.

4. Legislative initiatives. Many states continue to face significant efforts by groups generally from outside their states that seek to erode the independence of the judiciary.

Lawyers Assistance Program (LAP)/Lawyer Services Statewide Conference: I had the pleasure of attending the 11th Annual LAP/Lawyer Services Statewide Conference in Chelan. The theme of the two-day conference was building relationships by building communication skills. Among the workshops, participants learned skills for communicating more effectively and empathetically with clients, staff, and colleagues. Many of the attendees at this conference serve as peer counselors for other WSBA members, and the sense of community within the group is very strong. These dedicated volunteers are really the heart and soul of the WSBA Lawyer Services Department, and it was an honor to share some time with all of them.

ABA President Neukom Heads International Conference

William H. Neukom, partner in the Seattle office of K&L Gates and president of the American Bar Association, led a conference highlighting the importance of rule of law to healthy communities on July 2–5 in Vienna, Austria. The World Justice Forum, hosted by the World Justice Project, of which the ABA is a founding member, brought together Supreme Court justices, former European presidents, Nobel laureates, and other world leaders for the conference. The forum included participants from the fields of law, faith, education, engineering, health, and other disciplines from more than 90 countries on five continents. The project is rooted in fundamentals that government officials be accountable under the law; that laws are stable and fair and protect basic rights; that the process by which laws are enforced is fair and efficient; and that access to justice is provided by competent and independent law enforcement officials, lawyers, and judges. “By bringing together members of many professional disciplines,” said Neukom, “we will be able to comprehensively address problems that we face today — poverty, corruption, and bribery in business transactions, among many others. Everyone has a stake, so we want everyone to come together at the same table to create solutions to strengthen the rule of law.”

Family Law Section Awards

On June 21, as part of its Midyear Conference and Annual Meeting held in Vancouver, Washington, the WSBA Family Law Section presented its annual awards for Attorney of the Year to outgoing Chair Jean A. Cotton of Elma, Jurist of the Year to Clark County Superior Court Judge Edwin Poyfair, and Professional of the Year to AOC Senior Court Program Analyst Janet Skreen.

Legal Aid Office Opens in Moses Lake

Columbia Legal Services, Northwest Immigrant Rights Project, and Grant Adams Volunteer Legal Services came together to establish a legal aid office in Moses Lake.

NJP Office Established in Colville

The Northwest Justice Project (NJP) celebrated the opening of a new office in Colville on June 27. NJP welcomed the entire community to learn about NJP’s work and the positive impact the office will have in the Tri-County area. “A staffed legal aid presence in Colville has been a long time coming,” said outgoing state Access to Justice Board Chair and Spokane District Judge Gregory Tripp. “NJP will have a tremendous positive impact in this community by making it easier for Tri-County residents to secure representation in important civil matters including health, housing, and family safety.”

The Colville office will also strengthen NJP’s ongoing effort to provide increased access and representation to tribal communities throughout rural Washington.

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to providing direct representation to eligible clients, NJP’s Colville office will engage in ongoing community education and will work to identify the most pressing civil legal needs of the Tri-Counties community.

Snippets

Ater Wynne LLP has been named a recipient of the 2008 Champion of Civil Rights Award by the National Association for the Advancement of Colored People (NAACP). The award recognizes the pro bono work for the NAACP and the Seattle Branch of the NAACP by Seattle litigators Steve Kennedy and Brenda Molner. “This recognition is well deserved because your efforts extend over many years and have made a substantial contribution to our important work,” states Angela Ciccolo, interim general counsel of the NAACP, in a letter of congratulations.

The international law firm of Dorsey & Whitney LLP announces the election of partner Nelson Dong, co-chair of the Asian Law Practice, as a member and director of the National Committee on United State-China Relations (NCUSCR).

For over 40 years, the NCUSCR has been the leading private national organization with in-depth knowledge and expertise in United States-China relations. Current Committee members include former U.S. Secretaries of State Madeline Albright and Henry Kissinger, and former U.S. Secretary of Defense Robert McNamara. The Committee is most recognized for its role in establishing “ping-pong diplomacy” in 1972. Mr. Dong is a recognized expert on technology and trade issues with China, including manufacturing, piracy, business agreements, and regulations, plus government policy on sensitive exports.

Francois X. Forgette, of Rettig, Osborne, Forgette, LLP, in the Tri-Cities, was elected by the Washington State University Board of Regents to become the chairman of the Board effective for the next academic year.

David C. Snell, of Small, Snell, Weiss and Comfort, P.S., was elected vice president and president-elect of the Tacoma/Pierce County Bar Association for 2008–2010. This was announced at the Tacoma Pierce County Bar Association’s 100th Annual Lincoln Day Banquet in February.

Melvyn Jay Simburg, a partner with law firm Simburg, Ketter, Sheppard & Purdy, LLP, has been reappointed to serve as editor of the International Intellectual Property Year-in-Review, a section of the Year-in-Review Edition of the International Lawyer, the quarterly publication of the American Bar Association Section of International Law. Along with his appointment as editor, Simburg received a simultaneous appointment as vice president of the Intellectual Property Committee of the Section of International Law of the ABA. The section has more than 20,000 members in 90 countries and is a worldwide leader in the development of policy in the international arena and the education of international law practitioners.

Schwabe, Williamson & Wyatt announced that Matthew Bisturis, an associate in the firm’s Vancouver office, was appointed to the board of directors of the Parks Foundation of Clark County. The Parks Foundation of Clark County was established in 1999 to raise funds through public and private partnerships with communities to ensure the health of uncommonly vibrant parks, trails, and recreational programs across Clark County.
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This In Memoriam section contains brief obituaries of WSBA members. The list is not complete and contains only those notices that the WSBA has learned of through newspapers, magazine articles, trade publications, and correspondence. Additional notices will appear in subsequent issues of Bar News. Please e-mail notices or personal remembrances to inmemoriam@wsba.org.

Bodell, James D.
James Bodell was born April 15, 1984, in Salt Lake City, Utah. He attended Washington State University in Vancouver and earned his law degree at Washington and Lee University in Lexington, Virginia, in 2007. He was highly involved in his community and worked for the Washington State Republican Party as a field director. He showed immeasurable courage during his lifelong battle with pulmonary hypertension. He died on July 14, 2008, at the age of 24.

Brachtenbach, Robert F. — “Common Sense Is Not a Bad Precedent”¹

A remembrance of Justice Robert F. Brachtenbach by Catherine C. Clark
I write to remember Robert F. Brachtenbach, a fellow Eastern Washingtonian who served on the Washington Supreme Court for 22 years. I had the honor of clerking for him in 1991–92. I could certainly write a remembrance of Justice Brachtenbach based on his numerous opinions, give you the basic details of his career, and expound on how he was a respected jurist in our state and across the nation, but I prefer to remember Justice Brachtenbach as a person, so that those of you who did not know him can see him for who he was: an incredibly bright man with obvious academic prowess, had a profound sense of curiosity. When he offered me the clerkship, he noted on my University of Washington transcript that I had taken “History of European Witchcraft.”² He commented: “Catherine, anyone who gets a grade like that in a class like that, we need in our chambers.” He was full of questions about a wide variety of subjects like politics, football, and his research project of the time, an article on the rule of statutory construction.

Of course, we also discussed his cases. I remember once, having reviewed a draft opinion involving a defendant who had been convicted of murder, going into his office upset. The draft opinion contained gory details of the crime which seemed to me did not relate to the issues presented to the court. I thought the Court should consider the feelings of family members of crime victims in publishing its opinions. Justice Brachtenbach prevailed upon the rest of the Court to remove the prurient prose. That was one of the kindest things I ever saw him do.

I passed the bar exam in the fall of 1991, and I happily reported this accomplishment to Justice Brachtenbach. He then informed me (for the first time) that none of his clerks had ever failed the exam. I remain grateful to this day that I didn’t carry that bit of information into the examination room.

I was deeply honored when Justice Brachtenbach presented me to the Bar for admission in his courtroom. He expressed kind words for my mother (who had recently passed away) and my father. Few fledgling lawyers are ushered into the practice in such circumstances.

Justice Brachtenbach doodled during oral argument.
He loved agates.
He was a private man — he was never interested in life in the big city like Seattle.
He was a tough customer. He did not tolerate fools or what he considered to be poor workmanship.
He smoked a pipe.
Justice Brachtenbach is famous for also writing in State v. Hornaday: “I dissent for the reasons stated by the majority.”³ A man of

¹ The original text contains a typographical error, where “Common Sense Is Not a Bad Precedent” should be spelled as “Common Sense Is Not A Bad Precedent.”

² This reference is to a course on European Witchcraft, which was likely intended to be a metaphorical use of the term.

³ This is a well-known legal phrase used by Justice William R. Hadley of the Washington Supreme Court.
taught ballroom dancing as therapy and frequently performed. Gretchen Galstad died on July 19, 2008, at the age of 45.

Hatch, Willard
Willard Hatch received his undergraduate degree from Williams College in Massachusetts, and his law degree from Columbia Law School. He served with the Navy in World War II, and established his private law practice, Hatch & Leslie, in the late 1940s, which was later acquired by Foster Pepper & Shefelman. After retiring in 2001, Hatch continued to volunteer with the Small Business Administration SCORE (Service Corps of Retired Executives), offering free advice to entrepreneurs hoping to succeed in business, and at the Seattle office of the Youth Suicide Prevention Program. He died on June 7, 2008, at the age of 88.

Klobucher, John M.
Judge John Klobucher was born in Spokane and served as a corporal in the Army in Korea. He received his law degree from Gonzaga University School of Law. After serving as a law clerk, a deputy prosecuting attorney, and in private practice, Judge

Robert Brachtenbach grew up in Yakima and worked in the fields during harvest and as a grocery store clerk in his teens. He graduated from UW School of Law. He practiced law in Selah and drafted documents that helped create the Tree Top, Inc., growers cooperative. He served in the state House of Representatives and became a Republican floor leader. In 1972, he was appointed to the State Supreme Court and served 22 years, one of the longest-serving Supreme Court justices. He served two years as chief justice. Justice Robert Brachtenbach died May 2, 2008, aged 77.

NOTES
2. The class was not a “how to” course, but rather, how society and the courts dealt with those accused of witchcraft and the punishments inflicted upon them. It was essentially a law class in which we studied the *Malleus Maleficarum* (“The Hammer of Witches”), a treatise on hunting and convicting witches.
3. 105 Wn.2d at 132.

Diggs, Bradley C.
Bradley Diggs was born in Missoula, Montana. He attended Amherst College and earned his law degree from Harvard Law School. He moved to Seattle in 1973 with his wife, Peggy, and joined the firm of Davis Wright Tremaine where he chaired the firm’s commercial transactions practice and was managing partner. His colleagues recall his skillful leadership in growing the firm during a period of mergers and shakeups in the legal industry. Diggs always put family first and was able to achieve a desired balance between his career and home life. He enjoyed vacations to the family cabin in Montana. Diggs also spent time lending his skills to nonprofits such as the YMCA of Greater Seattle and Washington Appleseed. Bradley Diggs died on July 25, 2008, at the age of 59.

Galstad, Gretchen G.
Gretchen Galstad was born in Billings, Montana. She studied ballet with the Pacific Northwest Ballet. She attended at George Washington University in Washington, D.C., and went on to achieve a master’s degree in family counseling and a law degree from Regent University in Virginia Beach, Virginia. Her law practice focused on mediation. After being diagnosed with breast cancer, Galstad
Millikan was born on March 3, 1947, at a U.S. Army hospital in Germany. He graduated from the University of Washington in 1972, then spent two years in the U.S. Army and served a year in Vietnam. He earned his law degree at the University of Puget Sound. He was a past president of the Marysville Sunrise Rotary and past chairman of the Greater Marysville Tulalip Chamber of Commerce. Ian Gordon Millikan died June 21, 2008, at his Marysville home following a two-year struggle with brain cancer.

Morel, Delos
Judge Delos Morel was born in Alameda, California. He studied philosophy before earning his law degree from Hastings College of Law in San Francisco. He worked in the district attorney’s office in San Francisco for eight years before moving to Seattle, where he worked as the chief administrative law judge for the Board of Industrial Insurance Appeals. He died on July 5, 2008, at the age of 93.

Peck, Cornelius J.
Born in Michigan, Cornelius Peck received his law degree on scholarship from Harvard University. After serving in the Navy and with the U.S. Department of Justice, he was a professor at the University of Washington School of Law for 39 years, retiring in 1994. He published widely, was a leading figure in the fields of labor and administrative law, and helped modernize the law school by pushing for classes in skills such as negotiating. Peck enjoyed art, music, and winemaking, and turned his hobby into a business by forming Associated Vintners in the 1960s with some of his colleagues, which was bought out and later became Columbia Winery. He enjoyed vacationing with his family at their rustic Anderson Island cabin. Cornelius Peck died June 10, 2008, aged 85.

Preston, Castromo L.
(See also May 2008 Bar News “In Memoriam.”)

From WDTL President Rick Roberts’s column in the WDTLA Defense News: “It is with great sadness that I report the loss of one of our members, Cass Preston. Cass was defense counsel in several offices, most recently as in-house counsel with Safeco’s Seattle office. Cass was in a motor vehicle accident in mid-December and passed away on January 20, 2008. His untimely loss has been extremely difficult for his family and everyone who knew him. I have struggled with how to comment on his passing when so many of you knew him much better than I. I have also been pleased by the support from our colleagues in WSTLA. In particular, Steve Lingenbrink and Brian Boddy took the lead in establishing the Cass Preston Support Fund at Keybank, and collected a significant sum for Cass’s wife, Susan, and his family. For them, Cass was not an adversary, but a friend, which speaks volumes for Cass’s character.

“This tragedy is a timely reminder that we should cherish the important things in our lives — our family and loved ones — and reflect that in our profession. Do we take the time to tell our loved ones how much they mean to us? While we work hard to fight the good fight, do we remain reasonable, compassionate, and tolerant of minor transgressions?

“Our work is adversarial, but we must keep in mind that the opposing party and their counsel are human beings. We make our profession and WDTL that much better by taking the time to be respectful of our opponent. If you don’t presently make it a practice, take the time to shake your opponent’s hand at the end of every arbitration or trial. Following a deposition or during a telephone call, get to know something about your opposing counsel, like their family or interests. It’s a small thing, but it may be the way that Cass Preston would want to be remembered.”

Cass Preston was 38.
Satterberg, Richard A.
Richard Satterberg grew up in Wenatchee and graduated from the University of Washington School of Law. He served in the Air Force in Korea and then as a reserve officer in the Air Force JAG Corps, attaining the rank of colonel. In 1959, he joined and eventually took over a small practice in White Center, which is today Satterberg, Healy & Eeckhoudt. An avid boater, Satterberg traveled frequently with his wife, cruising the waters of British Columbia and Alaska in their power boat, or wandering through Spain, France, and Italy. He died on May 11, 2008, aged 76.

Sellers, Walter C.
Walter “Buck” Sellers was a graduate of Edmonds High School, Whitman College, and Hastings College of Law. From the age of 16, he was an avid mountaineer, and was one of the first climbers (along with his friend Ed Cooper) to accomplish a traverse between Torment and Forbidden peaks in the Cascade Pass area. He served in the Navy as an officer of supply. He served as an assistant Everett City attorney, the attorney for the Port of Edmonds, and a judge pro tem in Snohomish County District Court, as well as in private practice. Sellers was active in the Washington Trails Association, and a member of the Sierra Club. He had an REI membership card that numbered about 2,000, which was sometimes a source of astonishment to REI employees at store locations outside of the Seattle area that he occasionally patronized. He served his community as a past president of Edmonds in Bloom, the Edmonds Arts Festival, and the Edmonds Historical Society. Walter Sellers died July 5, 2008, aged 70.

Schafer, Janice Elaine Oakes
Janice Schafer was born in Portland, Oregon, in 1957. She received her bachelor’s degree in European studies from Seattle Pacific University, a master’s degree from the Monterey Institute of International Studies, her law degree from Tulane Law School, and an LL.M. in Taxation from New York University Law School. Janice Schafer died on July 8, 2008, at the age of 51.

Somers, Susan
Susan Somers was born in Panama City, Florida, in 1955. She was a lawyer for many years and was a member of the Bar Association when she moved to Lampasas, Texas, from Washington. She died January 5, 2008, aged 52.

Stilz, Judge Clifford L. “Kip”
Judge Clifford “Kip” Stilz was elected to the Thurston County District Court in 1984. Judge Stilz helped create and served as presiding judge for Thurston County Mental Health Court, a program that helps offenders with mental-health problems get access to social services. Judge Stilz will be remembered as a staunch advocate of the First Amendment and a firm believer in the public’s right to have access to the courts. He worked on the Judicial Information System Committee responsible for implementing statewide databases for court records, and served on the Washington Bench-Bar-Press Committee’s Fire Brigade Subcommittee, working behind the scenes to troubleshoot, talk to judges, and ensure the press’s access to the courts. He died June 23, 2008, at the age of 63.

Bar News has also learned of the deaths of Dolores Jane Cooper on May 20, 2008; David H. Middleton on May 8, 2008; and James P. Reid on April 29, 2008. ☠

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September 2008 | Washington State Bar News 39
What is the Future of the Law Institute? What is its mission?
The Future of the Law Institute (FLI) is a year-long program in the greater Seattle area for minority and economically disadvantaged high-school students interested in learning more about a career in the law. The FLI provides students with substantive legal workshops, career counseling, a mock trial, a courthouse tour, and opportunities to meet with legal professionals. Students are matched with an attorney, judge, or law-student mentor for the school year. Additionally, the FLI offers competitive paid and unpaid summer internship opportunities in law firms and courts.

The mission of the FLI is to promote ethnic diversity in the legal profession by encouraging minority and economically disadvantaged high-school students in King County and surrounding areas to pursue higher education in the law. The FLI program has three main goals:

1. Introduce minority and economically disadvantaged high-school students to the law, both substantively and as a potential career option.
2. Inspire interest in pursuing legal education and careers through programs and the opportunity to meet law students, lawyers, judges, law professors, and others in the law.
3. Provide information and resources regarding how to get from high school to law school.

Since its inaugural program in 2002, the FLI has served more than 300 students from 25 area high schools, utilizing the service of 175 volunteers from the bar, bench, law schools, and corporate community.

How was the FLI created and how is it funded?
The FLI was created in 2001 through a coalition of Washington’s courts, state and local bar associations, minority bar associations, and law schools. The coalition recognized that using resources to increase diversity exclusively at law schools and law firms...
The coalition wanted a program to look further down the education “pipeline” to high-school students with historically limited access to role models and positive experiences in the field of law. Thinking “outside the box,” the coalition created the Future of the Law Institute. Our funding is rooted in the support and lasting commitment of Seattle University School of Law, the University of Washington School of Law, the King County Superior Court judicial system, and the FLI mentors, as well as an active and dedicated Board of Directors.

The FLI is registered as an affiliate of the King County Bar Foundation (KCBF). We receive funding from KCBF and also through donations, sponsorships, and grants from law firms, corporations, bar associations, and foundations. In 2007, the FLI was honored with a $10,000 “Diversity Dollars” grant from the Minority Corporate Counsel Association (MCCA). Only 10 organizations nationwide received the competitive award, offered in celebration of MCCA’s 10th anniversary. Representatives from FLI’s Board of Directors received the award at Microsoft headquarters from Mary Snapp, an MCCA director and Microsoft vice president. The recipients of the 2007 grants “have programs that keenly reflect the mission of the Minority Corporate Counsel Association,” said MCCA Executive Director Veta T. Richardson. She praised the effort by noting: “While some of the winning projects are focused on professional development and others are focused on outreach or ‘pipeline,’ all of the programs further the goal to increase opportunities for diverse people in the legal profession. MCCA is pleased to be able to support the important work that they are doing.”

**What does the FLI conduct for the students?**

The FLI initiates the program year by hosting a two-day institute held at the Seattle University and University of Washington law schools and King County Courthouse. Activities include lunch with Superior Court judges, a mock trial, a parent workshop, and a courthouse tour. Following the two-day institute, there are monthly field trips in which mentors and FLI students visit local law schools, tour the King County Courthouse and Regional Justice Center, and visit the Attorney General’s Office in Seattle for a “Meet the Attorney General” event. To promote the FLI activities, we publish a quarterly newsletter highlighting opportunities for scholarships, local law-related events, internship opportunities, and success stories from FLI alumni. We also provide summer internship opportunities in law firms and courthouses for FLI students, so that students can gain further insight into the legal profession from a hands-on perspective.

Integral to the entire program is continuing mentorship. We pair students with attorneys and judges who then act as mentors. Teams of mentors are paired with five to 10 students from one or more high schools. During the academic year, mentors commit to just two weeks and two weekends of meetings with their students.

The final event is a graduation and barbecue in May, with students, parents, mentors, sponsors, and others invited to attend. Summer internships and job shadows at law firms are announced, scholarships are distributed, and students receive certificates of completion. Mentors and school volunteers are also recognized at this event.

**Has the FLI been recognized nationally?**

Yes. In 2004, the American Bar Association recognized the FLI with theABA’s Partnership Award for “exemplary efforts to increase diversity in the legal profession.” FLI has also been recognized locally by the Asian Bar Association of Washington, receiving its Program of the Year Award in 2003.

**What impresses you most about the FLI?**

The most impressive aspect of working for the FLI is interacting with the students, mentors, and board of directors. The students are bright and their energy and
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Curiosity is inspiring. It is also inspiring to collaborate with so many mentors who are busy legal professionals or law students who still make the time to volunteer for this program. Microsoft attorney Sandy Brown is the current president of the FLI Board of Directors, and leads an additional 13 board members in directing the program. As KCBA diversity programs manager, I've really enjoyed working with the board, mentors, and, of course, all of the students. I took over management from Josh Isgur, who worked very hard to start the program. He found grant money and was out in the field working tirelessly. I started in March 2008, and hope to manage the program as well as Josh — I have big footsteps to follow.

What thoughts about the FLI do you want to leave us with?

There are many successes in the FLI. To date, the FLI has awarded over $4,000 in student scholarships, and many of our students are enrolled in colleges and universities, including one FLI graduate currently attending Stanford University. A 2004 FLI graduate and scholarship recipient, “L.S.” who attends Cheyney University of Pennsylvania, describes how important the FLI was to her: “The Future of the Law Institute impacted my decision to pursue a legal career because it was an exciting hands-on experience for me. FLI involved a lot of opportunities and experiences that caught so much of my attention. Ever since I was a little girl, I remember always wanting to be a lawyer and FLI just expanded that horizon for me... Knowing that society needs different cultures and minorities in the field made me feel good also.”

I also want people to know that they can become involved in the FLI in a variety of ways. Judges, attorneys, and law students can become mentors. Firms can offer internships or job shadow-days. Anyone can support the program with funding. We are excited about our upcoming two-day institute on November 21 and 22, 2008, followed by our year-long program, and we welcome all volunteers. To obtain additional information about the FLI and its programs or to become a mentor, please contact me: Shametrice Davis, diversity programs manager, at shametriced@kcba.org or 206-267-7052. ☎️

Shametrice Davis succeeded Joshua Isgur as KCBA diversity programs manager in March. Her responsibilities include running day-to-day operations and implementing the vision of the Future of the Law Institute Board of Directors. She has a B.S. in health science from the University of Maryland and a Master’s in higher education administration from Oregon State University. She worked at Fred Hutchinson Cancer Research Center researching smoking among college students and at Seattle University before joining the KCBA. Joshua Isgur was hired by KCBA in July 2006 as the King County Bar Association’s first diversity programs manager. At the University of Washington, he received a B.A. in international studies from the Henry M. Jackson School and a M.P.A. from the Daniel J. Evans School of Public Affairs. He possesses a professional background encompassing extensive experience managing nonprofit programs. His passion advocating for greater diversity and tolerance in our society is rooted in his work with survivors of the Holocaust, and extensive research and writing on issues of human rights and equal justice in developing countries and in Washington state. Attorney Wilberforce Agyekum and Assistant Attorney General Maureen Mannix edit this column.
When the Supreme Court receives a certified copy of a disciplinary order, it orders the respondent lawyer to show cause why it should not impose the identical discipline. With some exceptions, a final adjudication in another jurisdiction that a lawyer was guilty of misconduct conclusively establishes the misconduct for the purposes of a disciplinary proceeding. The Supreme Court will impose identical discipli-
Reciprocal Discipline: Reporting Responsibilities for Attorneys Who Practice in the Western District

Similar to ELC 9.2, GR 2(f) provides that a lawyer disciplined elsewhere can be disciplined in the Western District. The reciprocal discipline section of GR 2(f) incorporates discipline by any other jurisdiction, which includes "any federal or state court, bar association or other governing authority of any state, territory, possession, or the District of Columbia, or any other governing authority or administrative body which regulates the practice of attorneys." An attorney subject to the disciplinary jurisdiction of the court in the Western District has an affirmative obligation to provide the clerk of the court with a copy of the other jurisdiction's disciplinary letter, notice, or order. For purposes of the reciprocal discipline section, discipline refers to disbarment, suspension, or disciplinary action that temporarily or permanently deprives an attorney of the right to practice law. In addition, if an attorney resigns from the Bar of any other jurisdiction while disciplinary proceedings are pending in that jurisdiction, the attorney must notify the clerk of the court.

Conduct in Federal Court That Could Lead to Discipline and Reciprocal Discipline

Among other things, GR 2(f) contains Standards of Professional Conduct that must be followed. There are a number of unique aspects to federal practice which, if not understood, could lead to violations of those standards, discipline in federal district court, and subsequent reciprocal discipline by the Washington State Supreme Court. Two of these aspects (involving local counsel assignments and declarant signatures) related to practice in the Western District of Washington are highlighted below.

Local counsel practice has become an ever-growing need as matters in the Western District of Washington increase in complexity, size, and geography. Before accepting a local counsel assignment, lawyers should be aware of the obligations imposed by the Western District's Local Rules. GR 2 imposes specific obligations on a lawyer who agrees to act as local counsel for a foreign non-admitted lawyer in a specific case. GR 2(d) requires the local counsel (and not the pro hac vice admitted counsel) to "sign all pleadings" that are filed with the court and to comply with Civil Rule (CR) 10(e).4 Because local counsel is required to sign all filed pleadings, it becomes local counsel's responsibility to ensure compliance with rules like Federal Rule of Civil Procedure (Fed. R. Civ. P.) 11 and Local Civil Rule 37.

An example of the importance of this obligation on local counsel involves discovery of electronically stored information (ESI). Typically, the lawyer with the primary client relationship manages the discovery process. However, in a local counsel setting, the ESI discovery process might not be managed by the local counsel but by the pro hac vice counsel who presumably has the primary attorney-client relationship. Nonetheless, it is the local counsel's responsibility under GR 2(d) to ensure that the pro hac vice counsel complies with the federal rules regarding ESI, and local practice on discovery. In a recent case, a federal district court imposed sanctions under Fed. R. Civ. P. 26(g) and 37 against a lawyer and his client for failure to produce ESI in a timely manner. See R & R Sails, Inc. v. Ins. Co. of Pa., 2008 WI 2232640 (S.D. Cal. April 18, 2008). The district court ordered the defendant either to produce certain documents or to submit a sworn declaration that the records did not exist. The defendant submitted a sworn declaration from a senior employee stating that the specific documents did not exist, but the statement was inaccurate. If facts similar to R & R Sails are presented in a matter in the Western District with local counsel representation, local counsel could be accountable under GR 2(d).

In another aspect of local federal practice, pleadings are filed easily through the Western District's Electronic Case Filing (ECF) system. It has now become commonplace to secure "electronic signatures" from declarants, which are viewed as originals when filed with the court. However, under the court's ECF guidelines, the filing party must keep the paper document with "original" signatures for the duration of the case and any appeals. A responding party can object to the authenticity of the declaration, or the authenticity of the signature, within 10 days of filing.5 Securing the original signed declaration at the time of filing ensures that the lawyer submitting the declaration has been candid with the court and opposing counsel in terms of having an original signed declaration. By contrast, failure to secure the original signature could lead to claims that a declaration was submitted without the authority of the declarant and could lead to action against the lawyer, including disciplinary action by the court.

Conclusion

The local federal rules concerning lawyer discipline have changed considerably in recent years. Lawyers should be aware that misconduct in federal district court may be treated for disciplinary purposes like misconduct committed by the lawyer in another state. In addition to discipline in federal district court, the misconduct can lead to reciprocal discipline by the Washington State Supreme Court.

Felice Congalton is senior disciplinary counsel with the Washington State Bar Association and a member of the Ethics and Practice Committee of the Federal Bar Association for the Western District of Washington. Joanna Plichta is pro bono legal counsel at Foster Pepper PLLC, a member of the Ethics and Practice Committee, and co-chair of the Website and Communications Committee. Alex Baehr is a partner at Dorsey & Whitney LLP and co-chair of the Ethics and Practice Committee.

NOTES


2. The rule has increased from one-and-a-half pages to more than five pages and contains many more detailed explanations.

3. This includes those matters listed in ELC 7.1(a) (2)(B)–(C).

4. CR 10(e) imposes formatting obligations for all pleadings submitted in the Western District, which are familiar to those lawyers who practice regularly in the Western District but possibly new to lawyers admitted pro hac vice. It remains the local counsel's obligation to ensure compliance with this rule, regardless of whether pro hac vice counsel files the at-issue pleading.

You are cordially invited to attend

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

Please join us for an evening of inspiration as we celebrate the accomplishments of the 2008 WSBA award recipients. All members of the legal community are invited to attend.

Name ___________________________________________  WSBA No. ______________________
Address _____________________________________________________________________________
Phone __________________________ E-mail ________________________________
Affiliation/organization _________________________________________________________________

Registration is $95 per person (table of 10 = $950). To make your reservation, please return this form (or a photocopy) with your credit-card information or check payable to WSBA. Space is limited, so please make your reservations early. Reservations and payment must be received no later than September 11, 2008 (refunds cannot be made after September 11). Seating will be assigned.

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

____________________________________  ☐ beef  ☐ chicken  ☐ vegetarian
____________________________________  ☐ beef  ☐ chicken  ☐ vegetarian
____________________________________  ☐ beef  ☐ chicken  ☐ vegetarian
____________________________________  ☐ beef  ☐ chicken  ☐ vegetarian
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____________________________________  ☐ beef  ☐ chicken  ☐ vegetarian

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

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

☐ If you need special accommodations, please check here and explain below.
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You are cordially invited to attend

The Washington State Bar Association’s 50-Year Member Tribute Luncheon

Please join us as we celebrate the accomplishments of the 2008 WSBA 50-year members. All members of the legal community are invited.

Name ___________________________________________ WSBA No. __________________
Address ___________________________________________________________________
Phone __________________________ E-mail __________________________
Affiliation/organization _______________________________________________________

Registration is $45 per person (table of 10 = $450). To make your reservation, please return this form (or a photocopy) with your credit-card information or check payable to WSBA. Space is limited, so please make your reservations early. Reservations and payment must be received by October 9, 2008 (refunds cannot be made after October 9).

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Name as it appears on card ____________________________________________________
Signature ___________________________________________________________________
_______ (no. of persons)  X  $ _______ (price per person)  =  $ ____________ TOTAL

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

_________________________ ☐ chicken ☐ salmon ☐ vegetarian
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The Defender Association

Application deadline: October 3, 2008
The WSBA Board of Governors will be appointing one member to serve the remainder of a three-year term on The Defender Association Board of Directors. The term will commence upon appointment and is effective through December 31, 2009.

The Defender Association is a nonprofit law firm providing public defender services to King County and the City of Seattle in felony, misdemeanor, juvenile, family advocacy, and civil commitment cases, and appeals at all levels of the state courts. The Board generally meets monthly.

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

WSBA Leadership Institute Seeks Fellows for 2009
The WSBA seeks applicants for the 2009 WSBA Leadership Institute. The Leadership Institute recognizes that many lawyers, especially those from diverse backgrounds and underrepresented groups, have not been traditionally recruited for leadership positions or made aware of opportunities for leadership training, skill development, and professional growth available through the WSBA. Approximately 12 attorneys in practice for three to 10 years will be carefully selected for the program’s fifth year. The monthly sessions run from January to July, 2009.

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

The program requires a two-year commitment. Following the completion of the first year, fellows are expected to serve on a WSBA section or committee or participate in a bar-related activity. Fellows will earn a minimum of 30 CLE credits, and the program is provided at no charge to participants.

Applicants must: (1) complete an application with cover letter, résumé, and three references; (2) be an active WSBA member; (3) have practiced law in a U.S. jurisdiction for three to 10 years, i.e., any attorney who has been admitted in a U.S. jurisdiction between January 1, 1999, to December 31, 2006, meets this criterion; (4) be nominated by his/her employer, or if self-employed, by a senior lawyer or judge; and (5) provide evidence of interest in community and WSBA activities. The deadline for applications for the 2009 Leadership Institute is 5:00 p.m., September 30, 2008. Application and nomination forms and instructions are available on the WSBA Leadership Institute website at www.wsba.org/lawyers/2009wli_application.htm.

Opportunities for Service

Washington State Bar Foundation
Board of Trustees
Application deadline: October 3, 2008
The WSBA Board of Governors is seeking to fill one position to serve a three-year term on The Washington State Bar Foundation Board of Trustees. Applicants must be a WSBA member. The Washington State Bar Foundation is a nonprofit organization whose focus is to improve the delivery of legal services to all segments of the public; foster improvement of relations among the Bar, the judiciary, and the public; advance programs related to new lawyer development; support diversity efforts; and promote the administration of justice. If you are interested, please submit a letter of interest and résumé to: WSBA Bar Leaders Division, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 or e-mail barleaders@wsba.org.

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Seeking Questionnaires from Candidates for Judicial Appointments


The WSBA Judicial Recommendation Committee (JRC) is accepting questionnaires from attorneys and judges seeking consideration for appointment to fill potential Washington State Supreme Court and Court of Appeals vacancies. Interested individuals will be interviewed by the Committee on the dates listed above. The JRC’s recommendations are reviewed by the WSBA Board of Governors and referred to the Governor for consideration when making judicial appointments. Materials must be received at the WSBA office by the deadline listed above. To obtain a questionnaire, visit the WSBA website at www.wsba.org/lawyers/groups/judicialrecommendation or contact the WSBA at 206-727-8212, 800-945-9722, ext. 8212, or barleaders@wsba.org.

2008 Licensing and Suspension Information

Provide WSBA with Current Contact Information. You are required to keep your contact information current; see Admission to Practice Rule 13. You can check your listing by going to the online lawyer directory at http://
WSBA Bylaw on Armed Forces Fee Exemption. The WSBA will begin processing Armed Forces Exemptions in December for the 2009 licensing year. WSBA Bylaw Section ILE.1.b., provides for a license fee exemption for eligible members of the U.S. Armed Forces. This section of the WSBA Bylaws provides: “An active member of the Association who is activated from reserve duty status to full-time active duty in the Armed Forces of the United States for more than sixty days in any calendar year, or who is deployed or stationed outside the United States for any period of time for full-time active military duty in the Armed Forces of the United States shall be exempt from the payment of membership fees and assessments for the Lawyers’ Fund for Client Protection upon submitting to the Executive Director satisfactory proof that he or she is so activated, deployed or stationed. All requests for exemption must be postmarked or delivered to the Association offices on or before March 1st of the year for which the exemption is requested. Eligible members must apply every year they wish to claim the exemption. Each exemption applies for only the calendar year in which it is granted, and exemptions may be granted for a maximum total of five years for any member.”

WSBA members whose membership status is active and who are otherwise eligible for the Armed Forces exemption as described above can apply for a waiver of WSBA license fees beginning in December. (WSBA members whose WSBA membership status is inactive or emeritus must still pay the annual WSBA license fees for that status.) If you are an active member and you believe you are eligible for the fee exemption, contact the WSBA Service Center at 800-945-WSBA (9722) or 206-443-WSBA (9722), or questions@wsba.org; or contact Amy Christensen at amyc@wsba.org, 206-727-8243, or by e-mail at questions@wsba.org.

Nominations Sought for Public Education Award

The Council on Public Legal Education is accepting nominations for its Flame of Democracy Award, given to an individual, organization, or program in Washington state that has made a significant contribution to increasing the public’s understanding of law, the justice system, or government. The mission of the CPLE, a committee of the WSBA, is to promote public understanding of the law and civic rights and responsibilities.

First presented in 2002 to the late journalist Richard Larsen, the award was established to highlight the important educational work being done by teachers, lawyers, judges, the media, and a variety of advocacy and community organizations and individuals. Other recipients have been the Yakima County Prosecuting Attorney’s Office for its school outreach program; the Northwest Justice Project for its self-help website; and the League of Women Voters of Washington Education Fund, for its numerous efforts to strengthen citizen knowledge of and partici-
Nominations, which are due December 1, 2008, should be made in the form of a letter (maximum 500 words) describing the nominee's work and how it addresses the mission of the CPLE. The letter also should include the name of a reference who can provide additional information about the nominee. Supporting materials may be submitted; please limit print materials to 10 pages and audio-visual materials to 30 minutes. Self-nominations are encouraged. All nominations will be kept confidential. Nominations should be addressed to: Pam Inglesby, WSBA, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539. E-mail submissions are acceptable, and may be sent to pami@wsba.org. Further information about the CPLE may be found at www.wsba.org/ple.

Legal Foundation of Washington Notice of Public Meeting

The trustees of the Legal Foundation of Washington will meet on September 18, 2008, at the Legal Foundation of Washington offices at 1325 Fourth Ave., Ste. 1335, Seattle, Washington. The public may appear in order to comment on the Foundation’s activities between 9:00 and 9:30 a.m. Call 206-624-2536 to comment on the Foundation’s activities for more information.

New PERS Opportunity for Former Judges and Justices

Members of the Washington State Public Employees’ Retirement System (PERS) with service credit earned while serving as an elected or appointed judge or justice may be able to increase their PERS retirement benefit by purchasing a higher benefit multiplier for the service credit earned during their judicial career. Only PERS members who are not currently serving as a judge and have not started receiving their PERS monthly benefit are eligible for this program. For more information, see www.drs.wa.gov/member/publications/pers/persjudicialincrease.htm or contact the PERS Judicial Benefit Team at 360-664-7966, 800-547-6657, ext. 47966, or recep@drs.wa.gov.

LOMAP and Ethics Traveling Seminar

Join us for the LOMAP and Ethics Traveling Seminar September 23 in Colville, or September 24 in Pullman. The seminar includes these topics: safeguarding client property; required trust account records; minding your matters; and winding down: the golf course beckons. To register, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

Computer Clinic

The WSBA offers a hands-on computer clinic for members. Learn what programs such as Outlook, PowerPoint, Excel, Word, and Adobe Acrobat can do for a lawyer. Are you a total beginner? No problem. The clinic teaches helpful tips you can use immediately. Computers are provided, and seating is limited to 15 members. There is no charge, and no CLE credits are offered. The September 8 clinic will be held from 10:00 a.m. to noon at the WSBA office and will focus on using Windows menus, the mouse, and making adjustments to the screen. The September 11 session will be held from 2:00 to 4:00 p.m. and will focus on using Outlook and practice-management software. For more information or to RSVP, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

Casemaker Online Research

Casemaker is a powerful online research library provided free to WSBA members. To access Casemaker, go to the WSBA website at www.wsba.org and click on the Casemaker logo on the right sidebar. Click on the Casemaker button to begin. For help using Casemaker, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org, or call the WSBA Service Center at 800-945-WSBA (9722) or 206-443-WSBA (9722).

Contract Lawyer Meeting

Discuss the issues with other contract lawyers on September 9 from noon to 1:30 p.m. at the WSBA office. Bring your lunch — coffee and tea are provided — and network with other contract lawyers. For more information, contact Julie Salmon at 206-733-5914, 800-945-9722, ext. 5914, or juliesa@wsba.org.

LAP Solution of the Month: Career on Track?

Has your career turned out the way you planned? Do you have a clear vision for the next five, 10, 20 years? If not, what’s getting in your way? For help developing your career plan, call the Lawyers Assistance Program at 206-727-8268 or 800-945-9722, ext. 8268.

Job Seekers Discussion Group

Looking for a job or making a transition? Join the Job Seekers Discussion Group the second Wednesday of each month from noon to 1:30 p.m. The next meeting is September 10 at the WSBA office. The group discusses where to look for jobs, growing your network of contacts, résumés and cover letters, and keeping yourself organized and motivated. Exchange information and network with other lawyers looking to make a change. Come as you are — no need to RSVP. For more information, call 206-727-8269 or 800-945-9722, ext. 8269, or e-mail rebeccan@wsba.org.

Facing an Ethical Dilemma?

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

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

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

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

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

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

Upcoming Board of Governors Meetings
September 18–19, Seattle • October 24–25, Spokane • December 5–6, Bellingham
With the exception of the executive session, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Contact Margaret Shane at 206-727-8244, 800-945-9722, ext. 8244, or margarets@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/info/bog/schedule.htm.

Usury Rate
The average coupon equivalent yield from the first auction of 26-week treasury bills in August 2008 was 1.966 percent. Therefore, the maximum allowable usury rate for September is 12 percent. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.
Jessica Eaves Mathews is proud to announce the launch of her new firm

EAVES MATHEWS PLLC

Eaves Mathews PLLC will focus on art law matters and will provide legal services and advice to private art collectors, museums, and art galleries on art related issues, including:

- The purchase, consignment, sale, donation, and auction of works of art
- Domestic and international loans of art and cultural property
- International trade issues such as treaty questions and export/import and customs matters
- Museum best practices

The firm will also handle a variety of art related litigation matters, including breach of contract, title issues, and breach of warranty.

In addition to art law matters, the firm will also focus on business and real estate transactions and litigation matters.

Ms. Mathews is also an Adjunct Professor of Art and Cultural Property Law at Seattle University School of Law.

EAVES MATHEWS PLLC
Tel: 206-465-5334 • Fax: 206-299-9403
info@eavesmatthewslaw.com • www.eavesmatthewslaw.com

Davies Pearson, P.C.
Attorneys at Law

is pleased to announce that

Rebecca M. Larson

has become an associate of the firm practicing in personal injury, products liability, employment law, commercial litigation, insurance coverage and defense law.

253-238-5156
rlarson@dpearson.com

920 Fawcett — PO Box 1657
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Tel: 253-620-1500
Toll-free: 800-439-1112
Fax: 253-572-3052

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Dethlefs Sparwasser, PLLC

is pleased to announce that

Jody K. Reich

has joined the firm as a member.

Ms. Reich will continue to focus her practice in the areas of commercial litigation, real estate, and employment law.

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1325 Fourth Ave., Ste. 600, Seattle, WA 98101
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

Courtenay D. Babcock (WSBA No. 22674, admitted 1993), of Blaine, was disbarred, effective April 7, 2008, by order of the Washington State Supreme Court following a default hearing. This discipline was based on conduct in five client matters involving failure to provide competent representation, lack of diligence, failure to communicate, charging unreasonable fees, failure to protect clients’ interests, engaging in dishonest conduct, engaging in conduct that is prejudicial to the administration of justice, and violating a duty imposed by or under the Rules for Enforcement of Lawyer Conduct. Between April 2000 and August 2006, Mr. Babcock engaged in the following conduct:

- Abandoning his practice and failing to diligently represent and communicate with clients in four separate matters;
- Failing to complete and process an application to change a client’s status in an immigration matter;
- Failing to provide to one client a written fee agreement or an explanation of fees or an accounting of time Mr. Babcock spent on the client’s case, and failing to render an accounting to another client of the funds held in Mr. Babcock’s trust account;
- Failing to perform any legal services on behalf of a client in one matter and then failing to refund her deposit, and failing to perform any legal services on behalf of a second client in another matter while obtaining payment of approximately 20 percent (or $11,100) of her settlement proceeds without confirming the agreement in writing;
- Retaining an entire $2,500 advance fee deposit while having performed only a small minor legal service on behalf of the client, and then failing to refund the unearned portion of the advance fee deposit, thereby charging an unreasonable fee for the minor legal service performed;
- Withdrawing a client’s advance fee deposit from his trust account without the client’s knowledge, consent, or authorization, and using it for his own purposes;
- Failing to respond to a client’s requests and to communicate with a client about the refund of his $3,000 advance fee deposit, and failing to promptly refund that advance fee deposit;
- Misrepresenting to the Association the status of his practice and his relationship with a client; and
- Failing to cooperate with the Bar Association’s investigation in three matters and misrepresenting to the Bar Association in another matter that a client was not his client and that he was not receiving a share of that client’s settlement proceeds.

Mr. Babcock’s conduct violated RPC 1.1, requiring a lawyer to provide competent representation to a client; RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; RPC 1.4, requiring a lawyer to keep a client reasonably informed about the status of a matter, promptly comply with reasonable requests for information, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; RPC 1.5(a), requiring a lawyer’s fee to be reasonable; RPC 1.5(b), requiring that when a lawyer has not regularly represented a client, or if the fee agreement is substantially different than that previously used by the parties, the lawyer communicates to the client within a reasonable time the basis or rate of the fee or the factors involved in determining the charges, preferably in writing; former RPC 1.15(d), requiring a lawyer to take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client; RPC 1.5(e), allowing a division of fee between lawyers who are not in the same firm to be made only if the division is between the lawyer and a duly authorized lawyer referral service, or the division is in proportion to the services provided by each lawyer, or by written agreement with the client, each lawyer assumes joint responsibility for the representation, the client is advised of and does not object to the participation of all the lawyers involved, and the total fee is reasonable; RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; and RPC 8.4(i), prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter.

Kathleen A.T. Dassel represented the Bar Association. Mr. Babcock did not appear either in person or through counsel. Joseph D. Bowen was the hearing officer.

Disbarred

Allen C. Hamley (WSBA No. 1028, admitted 1969), of Bellevue, was disbarred, effective July 9, 2008, by order of the Washington State Supreme Court following approval of a stipulation. This discipline was based on conduct involving conversion of estate funds and submitting false declarations to the court.

Mr. Hamley drafted wills for a married couple, Mr. and Mrs. W, naming himself to serve as executor or personal representative (PR) of both estates. Mr. and Mrs. W jointly owned a note and deed of trust for monies they had loaned. Mrs. W died in September 2000; Mr. Hamley filed a probate petition in King County Superior Court in December 2000 and a declaration of completion to close Mrs. W’s estate in June 2005. Mr. W died in August 2004; Mr. Hamley filed a probate petition in King County Superior Court in October 2004. Mr. W’s will named his stepson and Mr. Hamley as co-PRs. Mr. Hamley also served as attorney for the co-PRs.

In May 2005, Mr. Hamley received payoff proceeds totaling $37,124.05 for the note and deed of trust (the estate funds). Mr. Hamley did not deposit the estate funds to an estate bank account. Instead, he deposited the estate funds to his trust account. In or about August 2005, Mr. Hamley withdrew over $21,000 by cashier’s check from the estate funds in his trust account. He did not tell his co-PR about the withdrawal, and he took the funds without authorization. Mr. Hamley used the money to insulate himself from potential legal liability to another client. Later, he testified that he used the funds to protect himself, because “I didn’t have other funds available.”

On May 8, 2006, Mr. W’s stepdaughter (Ms. A), who was a beneficiary of his estate, filed a petition for removal of the co-PRs. Ms. A sought appointment of a successor PR and an accounting. On May 26, 2006, in response to the petition for removal, Mr. Hamley signed and filed a declaration with the court in which he falsely swore that “all funds” of the estate had been deposited to an estate account. In fact, Mr. Hamley had deposited over $37,000 in estate funds to his trust account. On June 1, 2006, the court ordered Mr. Hamley to resign as co-PR, blocked certain bank accounts, and awarded attorney’s fees against Mr. Hamley and Mr. W’s stepson personally for fees incurred by the heirs in bringing the removal proceedings. On June 19, 2006, by a stipulated order, the court removed Mr. W’s stepson as co-PR and appointed Ms. A as the new PR. Mr. Hamley repaid the $37,000 in estate funds described above and associated attorney fees.

Mr. Hamley’s conduct violated RPC 3.3(a), prohibiting a lawyer from making a false statement of fact or law to a tribunal; RPC 4.1, prohibiting a lawyer, in the course of representing a client, from knowingly making a false statement of material fact or law to a third person; RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and RPC 8.4(i), prohibiting a lawyer from committing any act involving moral turpitude, corruption, or other act which reflects disregard for the rule of law, regardless of conviction or
acquittal of a felony or a misdemeanor.

Linda B. Eide represented the Bar Association. Joseph J. Ganz represented Mr. Hamley.

Disbarred

Paul Hernandez (WSBA No. 21015, admitted 1991), of Seattle, was disbarred, effective May 21, 2008, by order of the Washington State Supreme Court following a default hearing. This discipline was based on conduct involving incompetent representation, lack of diligence, settling a case without a client’s authorization, forging a client’s name, misappropriating and converting funds, misrepresentation, lack of communication, and trust account irregularities.

Matter No. 1: In 2003, a client hired Mr. Hernandez to represent him in a personal-injury suit arising from a 2001 automobile accident. There was no written fee agreement. The client verbally agreed to pay Mr. Hernandez a contingency fee of one-third of any settlement amount. Mr. Hernandez verbally agreed that he would pay the client’s medical bills for accident-related health care from the proceeds of settlement.

In 2004, Mr. Hernandez filed a personal injury suit on behalf of the client and subsequently settled the case without the client’s knowledge, consent, or authorization. Mr. Hernandez provided to the insurance company settling the claim a settlement release on which he falsely signed the name of the client. Mr. Hernandez obtained the settlement proceeds in the form of a check. He falsely signed the client’s name to the back of the check and deposited the funds into his account without telling the client that the case had settled or that he had received the proceeds of the settlement. From mid-2004 to 2005, Mr. Hernandez failed to pay the client’s medical bills and failed to return the client’s numerous phone calls requesting information about the status of his case. Mr. Hernandez used the settlement funds to cover shortages in his client trust account.

In May 2005, Mr. Hernandez misrepresented to the client that the suit had just recently been settled and sent the client a check for $12,782.66 purporting to represent the client’s share of the settlement proceeds. At that time, Mr. Hernandez also promised the client that he would pay the client’s healthcare providers and would send the client an accounting of the settlement. Over the next several months, both the client and his medical providers left numerous telephone messages for Mr. Hernandez, to which he failed to respond. In August 2005, the client filed a grievance against Mr. Hernandez with the Bar Association. Mr. Hernandez failed to respond to the Bar Association’s request to answer the client’s grievance. Between August and November 2005, Mr. Hernandez paid the medical providers’ outstanding bills and wrote a letter of apology to the client, which he sent with a final disbursement statement. In November 2005, Mr. Hernandez was personally served with a subpoena duces tecum requiring his appearance at the Bar Association’s offices for a deposition, along with a request for production of his trust account records. Mr. Hernandez did not appear for his deposition. In December 2005, Mr. Hernandez met with disciplinary counsel and admitted that he knew his trust account was short at least $4,000 in August 2005, that he did not keep a running balance in his check register, and that he was not maintaining client ledgers. Mr. Hernandez refused to allow disciplinary counsel to copy his check register. He agreed to produce, no later than December 16, 2005, copies of all his client files, general and trust account deposit receipts, bank statements, cancelled checks, and check registers, as well as computer printouts of client settlement statements from January 2004 to the present for review. Mr. Hernandez subsequently failed to produce any of the agreed-upon information, and he failed to respond to further calls and letters from the Bar Association. The Bar Association served Mr. Hernandez with another subpoena duces tecum for his deposition, but Mr. Hernandez failed to appear. In May 2006, the Supreme Court suspended him from the practice of law based on his non-cooperation with the Bar Association’s investigation.

Matter No. 2: A client hired Mr. Hernandez to represent her in a personal-injury claim. In preparation for mediation of the claim in 2002, the client provided Mr. Hernandez with copies of her medical expenses and notices from one of her healthcare providers (Provider X) threatening court action for nonpayment of her medical bills. The client also referred phone calls from Provider X to Mr. Hernandez for resolution. The mediation resulted in a $3,000 settlement for the client. Mr. Hernandez and the client agreed that Mr. Hernandez would hold approximately $2,000 of the settlement monies in trust for payment of the outstanding medical bills, including one for Provider X. Mr. Hernandez and the client were to meet to pay the outstanding bills, but the meeting never occurred. Mr. Hernandez later advised the client that he had paid all her medical bills when, in fact, he had not done so. In 2003, Provider X filed suit and served the client with a summons and complaint. Mr. Hernandez received the summons and complaint from the client, told her that he “would take care of it,” and reassured her that it would be dismissed. Mr. Hernandez failed to respond to the summons and complaint, and Provider X secured a default judgment against the client. In October 2004, while refinancing her home, the client learned that a collection agency had placed a lien in the amount of approximately $2,500 against her real property on behalf of Provider X. When confronted by the client in October 2004, Mr. Hernandez agreed to work without payment to remove the lien, but took no steps to satisfy the judgment or remove the lien. The client also requested that Mr. Hernandez pay her the full amount of her settlement proceeds, which Mr. Hernandez still held and had failed to distribute to the client’s healthcare providers. Mr. Hernandez agreed to return his fee of $1,000 and to disburse all of her remaining settlement funds. Mr. Hernandez never took steps to satisfy the judgment or to remove the lien, and failed to respond to phone calls or letters from the client about her matter. The client discovered an additional lien filed against her by another healthcare provider whose medical bill Mr. Hernandez failed to pay. Her credit was severely damaged by the ongoing presence of the unsatisfied judgment and liens. Although Mr. Hernandez left the client a message in May 2006 requesting that they arrange a time to meet to discuss how he could repair the damage to the client’s credit, he did not follow through with his request. Mr. Hernandez failed to answer the Bar Association’s requests for a response to the client’s subsequent grievance.

Matter No. 3: In September 2006, the Bar Association’s auditor completed an audit of Mr. Hernandez’s trust account records for the time period between September 29, 2004, and July 31, 2006. The auditor found that Mr. Hernandez made numerous withdrawals from his trust account in the form of checks, cashier’s checks, and ATM withdrawals, but failed to record a client name or identify a client file on the checks, and that Mr. Hernandez removed funds from his trust account and converted the funds to his own use. The audit revealed that Mr. Hernandez’s trust account was short of funds on at least 114 out of 671 days.

Mr. Hernandez’s conduct violated RPC 1.1, requiring a lawyer to provide competent representation to a client; RPC 1.2(a), requiring a lawyer to abide by a client’s decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued; RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; former RPC 1.4, requiring a lawyer to keep a client reasonably informed about the status of a matter, promptly comply with reasonable requests for information, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; former RPC 1.5(b), requiring a lawyer who has not regularly represented a client to communicate the basis or rate of the fee or factors involved in determining the charges for legal services and the lawyer’s billing practices to the client; former RPC 1.5(c), requiring contingent-fee agreements to be in writing and to state the method by which the fee is to be determined; former RPC 1.14(a), requiring all funds of clients paid to a lawyer or law firm to be deposited in one or more identifiable interest-bearing trust accounts maintained and set forth pursuant to the rules; former RPC 1.14(b)(1), requiring a lawyer to promptly notify a client of receipt of his or her funds, securities, or other properties; former RPC 1.14(b)(3), requiring a lawyer to maintain complete records of all funds, securities, or other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them; 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; former 8.4(b), prohibiting a lawyer from committing a criminal act [here, theft in violation of RCW 9A.56.030] that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; former RPC 8.4(c), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; and RPC 8.4(f), prohibiting a lawyer from violating a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter (here, ELC 5.3).

Kathleen A.T. Dassel represented the Bar Association. Mr. Hernandez did not appear either in person or through counsel. Lawrence R. Mills was the hearing officer.

Disbarred

John P. Mele (WSBA No. 16381, admitted 1986), of Bellevue, was disbarred, effective May 21, 2008, by order of the Washington State Supreme Court following a hearing. This discipline resulted from conduct in a class-action lawsuit involving improper communication with represented class members and misrepresentations of material facts to the court and to opposing counsel.

Mr. Mele represented a construction company and its owners in a class-action lawsuit. The lawsuit alleged that Mr. Mele’s clients failed to provide their employees with meal periods or pay them for missed meal periods. The class was officially certified under CR 23(b)(2) in December 2002, contained all the employees of the construction company from April 1999 to those currently employed, and was represented by two attorneys certified as class counsel.

In late January 2003, Mr. Mele prepared and e-mailed to one of his clients (employer) a generic declaration template. The declaration dealt exclusively with the legal defense of “waiver” of meal periods—that is, whether or not the employee chose to work without a meal period. The declaration recited facts about the claims made by the class, attested to the class member’s knowledge of Washington law, and concluded with an affirmative statement of “waiver” of meal periods by the class member. The employer needed only to insert the name and employment date of each class member. By agreement, the employer was to insert the name and employment date of each class member. The employer needed only to insert the name and employment date of each class member. Mr. Mele had not provided the list by the January 2003 date that the interrogatories were due. At the March 2003 motion to compel/sanctions hearing, Mr. Mele knowingly misrepresented the material facts of the date, time duration, and sequence of his telephone conversation with Mr. S, and misrepresented his knowledge and the character of his involvement in his clients’ use of the generic declaration.

In December 2002, class counsel had served interrogatories seeking a telephone list of class members. Mr. Mele had not provided the list by the January 2003 date that the interrogatories were due. At the March 2003 motion to compel/sanctions hearing, Mr. Mele knowingly misrepresented to the court why the list had not been turned over to class counsel. Mr. Mele informed the court that his client had concerns regarding turning over a telephone list of all their employees, but then asserted that he had instructed his client to do so. Mr. Mele did instruct his client in January 2003 to turn over a telephone list of all class members. However, after discovering in February 2003 that his client had not done so, and after assuring opposing counsel that same day he would get the phone list to him, Mr. Mele failed after assuring opposing counsel that same day he would get the phone list to him, Mr. Mele failed to produce the list in February.

Mr. Mele’s conduct violated former RPC 3.3(a)(1), prohibiting a lawyer from knowingly making a false statement of material fact or law to a tribunal; former RPC 3.3(a)(4), prohibiting a lawyer from offering evidence that the lawyer knows to be false; former RPC 4.2, prohibiting a lawyer from communicating about the subject matter of the representation with a party the lawyer knows to be represented by another lawyer, without consent of the other lawyer; former RPC 8.4(a), prohibiting a lawyer from violating or attempting to violate the Rules of Professional Conduct; former 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and former RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Kathleen A.T. Dassel represented the Bar Association. Kurt M. Bulmer represented Mr. Mele.

Suspended

Jeb E. Burgess (WSBA No. 36891, admitted 2005), of Bellevue, was suspended for three years, effective July 9, 2008, by order of the Washington State Supreme Court. This discipline is based on conduct that involved criminal acts.

In March 2006, Mr. Burgess blocked the path of a 13-year-old girl (A.S.) with his car and attempted to engage her in conversation by asking her questions, including her name, her dog’s name, and the location of the middle school. Mr. Burgess did not expose himself on this occasion. In April 2006, Mr. Burgess approached another 13-year-old girl in his van and asked directions to the middle school. When she walked up to the passenger window to answer his question, she observed him in the driver’s seat exposing his penis and masturbat-

ing. In May 2006, Burgess approached another 13-year-old girl in his car and asked directions to the middle school. As she was looking at him, he was holding something that looked like a tissue in his left hand and then uncovered his penis. In August 2006, Mr. Burgess approached an 11-year-old girl and a nine-year-old girl on a school playground and said he was looking for a cell phone. He also said he found some money and asked if it was theirs. As he was leaving he turned and said words to the effect, “I have something cool to show you,” and unzipped his pants and exposed himself to them. In September 2006, Mr. Burgess again blocked A.S.’s path with his car and asked her if she had seen the middle school yet. He drove away when she began to use her cell phone. Mr. Burgess did not expose himself on this occasion. Mr. Burgess was arrested that day and signed an admittedly false statement under oath.

In January 2007, the King County Prosecutor filed an Amended Information charging Mr. Burgess with five gross misdemeanors, which included two counts of indecent exposure (RCW 9A.88.010(1)), one count of stalking (RCW
9A.46.110), and two counts of communication with a minor for immoral purposes (RCW 9.68A.090). Mr. Burgess pleaded guilty to the five-count Amended Information, was sentenced to consecutive 12-month terms with all but 60 days suspended and five years probation, and was required to register as a sex offender. Mr. Burgess admitted that from approximately April 2005 until September 25, 2006, he had engaged in a pattern of “cruising” behavior in which he would drive around, generally after school let out or when he had time, looking for girls with whom to converse and expose his penis and masturbate. He admitted that, during this period of time, he attempted to expose himself 30 times and was successful on eight occasions. He also admitted that he had researched some criminal statutes before engaging in the behavior and knew it was wrong.

Mr. Burgess’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; and RPC 8.4(i), prohibiting a lawyer from committing any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of the law.

Joanne S. Abelson represented the Bar Association. David Allen represented Mr. Burgess. Lish Whitson was the hearing officer.

Reprimanded

Clinton M. Coons (WSBA No. 27246, admitted 1997), of Kent, was ordered to receive a reprimand on May 12, 2008, following approval of a stipulation by a hearing officer. This discipline resulted from engaging in conduct that led to conviction of a misdemeanor under the Internal Revenue Code of 1986, as amended.

Mr. Coons co-owned and operated Business Office Suite Services (BOSS), which provided business services such as bookkeeping functions, paralegal support, and office space to clients. Mr. Coons mostly handled estate-planning matters, document preparation, powers of attorney, tax preparation, and setting up Limited Liability Corporations (LLCs). During the fiscal year ending March 31, 2004, BOSS failed to file an income-tax return. Mr. Coons knew that he had to timely file BOSS’s tax return and timely pay the income taxes due, and intentionally failed to do so. The amount of tax due was $54,667. BOSS initially did not file the tax return based on erroneous advice from accountants as to whether any taxes were owed. In 2005, the IRS began investigating BOSS in connection with its tax filing and reporting requirements. As a result of the IRS inquiry, BOSS hired a forensic accountant to reconstruct the company’s financial records to determine if it had any tax liabilities during fiscal year 2004. The IRS was aware of this process, which took two years and extended past the IRS-imposed deadline. BOSS did not file the tax returns before the deadline because the directors were unsure of the amount due.

In November 2006, Mr. Coons was charged with violating 26 U.S.C. § 7203, a misdemeanor. Mr. Coons pleaded guilty in May 2007. He was placed on probation for three years and was required to report his conviction to the Bar Association. The delinquent tax return has been filed and all back taxes and penalties have been paid.

Mr. Coons’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.

Joanne S. Abelson represented the Bar Association. Paige Davis represented Mr. Coons.

Reprimanded

Andrew T. Mathis (WSBA No. 27090, admitted 1997), of Kent, was ordered to receive a reprimand on May 12, 2008, following approval of a stipulation by a hearing officer. This discipline resulted from engaging in conduct that led to conviction of a misdemeanor under the Internal Revenue Code of 1986, as amended.

Mr. Mathis co-owned and operated Business Office Suite Services (BOSS), which provided business services such as bookkeeping functions, paralegal support, and office space to clients. Mr. Mathis mostly handled estate-planning matters, document preparation, powers of attorney, tax preparation, and setting up Limited Liability Corporations (LLCs). During the fiscal year ending March 31, 2004, BOSS failed to file an income-tax return. Mr. Mathis knew that he had to timely file BOSS’s tax return and timely pay the income taxes due, and intentionally failed to do so. The amount of tax due was $54,667. BOSS initially did not file the tax return based on erroneous advice from accountants as to whether any taxes were owed. In 2005, the IRS began investigating BOSS in connection with its tax filing and reporting requirements. As a result of the IRS inquiry, BOSS hired a forensic accountant to reconstruct the company’s financial records to determine if it had any tax liabilities during fiscal year 2004. The IRS was aware of this process, which took two years and extended past the IRS-imposed deadline. BOSS did not file the tax returns before the deadline because the directors were unsure of the amount due.

In November 2006, Mr. Mathis was charged with violating 26 U.S.C. § 7203, a misdemeanor. Mr. Mathis pleaded guilty in May 2007. He was placed on probation for three years and was required to report his conviction to the Bar Association. The delinquent tax return has been filed, and all back taxes and penalties have been paid.

Mr. Mathis’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.

Joanne S. Abelson represented the Bar Association. Paige Davis represented Mr. Mathis.

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— Francesco di Marco Datini — Florentine businessman, letter to his wife, 14th century.

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**Business Acquisitions: Strategic and Practical Considerations**
September 23 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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October 10 — Seattle. 3 ethics credits pending. By the WSBA Corporate Counsel Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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October 21 — Vancouver. 6.25 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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**Construction Law Year End**
October 20 — Spokane. CLE credits pending. By the WSBA Construction Law Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

**Criminal Law**

**15th Annual Criminal Justice Institute**
September 18–19 — Seattle. 14.75 CLE credits, including 2 ethics. By the WSBA Criminal Law Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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**Alternate Dispute Resolution — ADR 2.0: Science, Technology, and New Developments**
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**Elder Law**

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**Senior Lawyers CLE**
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October 21 — Tele-CLE. 1.5 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

**Estate Planning**

**Essentials of Retirement Benefits and Estate Planning**
September 25 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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**Ethical Dilemmas**
September 16 — Yakima; October 3 — Spokane; October 7 — Olympia. October 16 — Vancouver, Washington; October 16 — Mount Vernon. 4 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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Family Law

Advising Clients on Domestic Partner Registration and Related Issues: Applicability, Portability, Filling the Gaps
October 17 — Seattle. CLE credits pending. By the WSBA Family Law Section, Sexual Orientation and Gender Identification Legal Issues Section, Elder Law Section, and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Intellectual Property Law

Intellectual Property for the Non-IP Attorney
September 11 — Seattle. 6.5 CLE credits, including 1 ethics. By the WSBA Intellectual Property Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

WSBA Eastern Washington Intellectual Property Institute
October 3 — Spokane. CLE credits pending. By the WSBA Intellectual Property Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Licensing Essentials
October 28 — Seattle. CLE credits pending. By the WSBA Intellectual Property Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Labor and Employment Law

Making It Work at Work: Strategies to Foster a Positive/Productive/Litigation-Free Workplace
September 10 — Seattle. 6.75 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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Making It Work at Work: Strategies to Foster a Positive/Productive/Litigation-Free Workplace
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Microsoft Word 2007 for the Law Office
October 3 — Seattle. 6 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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September 5 — Seattle. 6 CLE credits pending. By WSBA-CLE and the WSBA Taxation Law Section; 800-945-WSBA or 206-443-WSBA.

Gain the Edge!® Negotiation Strategies for Lawyers, Featuring Marty Latz
September 23 — Seattle. 6 CLE credits, including 1.5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Making Your Case with a Better Memory
September 24 — Seattle. 6 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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September 26 — Seattle. 5.5 CLE credits, including 2 ethics pending. By the WSBA Dispute Resolution Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

How to Conduct Powerful Cross Examinations, Featuring David Gross
September 29 — Seattle. 5.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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Dirt, Deeds, and Documents: Essentials of Real Estate Conveyancing
September 5 — Seattle. 6 CLE credits, including 1 ethics. By the WSBA Taxation Law Section and WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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

- **Deposition Digest** provides excellent service in all phases of paralegal, litigation, and business support. 24/7/365 availability. Lowest rates. Quick turnaround time. www.depositiondigest.com.

- **QDROs** — Washington and Oregon PERS; pensions; 401(k)s; more. Flat fees for stipulated orders: reasonable hourly rates for contested orders. Contact: Christopher J. Eggert, 360-329-7022, e-mail: chris@qdrowest.com.

**Space Available**

- **Convenient Kirkland** location has an office available with reception area, kitchen, and conference room with parking available. Please call Jim at 425-827-6490.

**Kent office space:** Large, fully furnished office in elegant newly constructed small law building. Possible referrals and space for services. All amenities included. Gate entrance with own parking lot. Highly visible location close to RJC. 206-227-8831.

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

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

**Practice for sale.** South Whidbey Island lawyer wishes to sell well-established, full-time law practice and retire within next year. Caseload includes real estate, wills and estate probate, personal injury, workers comp, Social Security disability, and civil litigation. Repeat clients. Willing to aid in smooth transition with existing cases and client introductions. Fast-growing area, good opportunity for new lawyer or one wishing to make lifestyle change. Contact Floyd Fulle, 360-341-2429 or fff@whidbey.com.

**Will Search**

**Seeking will of Brigitte S. Bates:** Born February 2, 1949; DOD: September 28, 2007. Resided in SeaTac and Arlington, Washington. Spouse filed community-property agreement dated 1996. Brigitte referenced a will and her plans to amend it on several occasions during the last three years of her life. Please contact schoen1959@yahoo.com.

**Will search for Ruth L. Riley (DOB 3/31/26; DOD 11/30/07), longtime resident of Ballard in Seattle, Washington. Please contact Seth Fulcher at 206-292-9333 or sfkelly@mindspring.com.**
Those of you who faithfully read your Bar News know that because of an odd confluence of factors — including the weak U.S. dollar, global warming, and A-Rod’s divorce — WSBA is facing a budget deficit. Surprisingly, the Board of Governors has not yet asked me for advice in this regard. Accordingly, I am sharing here my suggestions for boosting revenue and cutting costs.

To increase revenue:

1. **Upgraded memberships.** In addition to the standard WSBA membership, offer optional premium memberships with higher fees. For example: Silver members ($750) would receive a silver membership card, a WSBA “Trust Me, I’m a Lawyer” T-shirt, and 50 rewards points, redeemable at the ELP and online store (see below); Gold members ($1,000) would get a gold card, a polo shirt, and 100 rewards points; VIP members ($1,500) would get a platinum card, a blazer, 250 rewards points, priority seating at all WSBA events, and access to the VIP Lounge, featuring reclining chairs, a plasma TV, and a martini bar for winding down after that stressful section meeting.

2. **WSBA merchandise.** Make available at WSBA headquarters and the website a line of branded merchandise, e.g., WSBA-logo baseball caps, watches, and baby booties; a WSBA-themed version of Monopoly; a “Courtroom Bloopers” DVD; collector copies of the Bar News autographed by the editor; bobbleheads of WSBA officers and BOG members, etc.

3. **The Experience Legal Project (ELP).** Establish an interactive museum, open to the public for a fee, celebrating the legal profession in Washington. It would be designed by Frank Gehry to vaguely resemble a giant West reporter volume. In the “You Be the Judge” immersive attraction, visitors would sit on the bench in a mock courtroom and decide motions argued by lifelike robotic lawyers (actual robots, not monotonous human lawyers). Or, the whole family could explore the fascinating Hall of Justices, where wax figures of past Washington Supreme Court justices wear the actual robes of their eras (if the old robes still exist, and if they look any different from the current robes, buy the team and work out an arrangement to improve the arena. WSBA would save on operating costs by having members run the concession stands, sell tickets, etc., pro bono. Marketing would focus on the myriad possible puns combining basketball and legal jargon: “We’ll show you order ON the court!” “Our bench rules!” “WSBASonics — Class action!”

4. **WSBASonics.** The NBA team has departed, but Seattle retained the name and is desperate for a replacement tenant at Key Arena. Rumors are that one or two other NBA teams may be for sale. Although it would require a significant initial investment, the long-term payoff could be huge. WSBA would

5. **Supreme Court Recipe Book.** “Chief Justice Alexander’s Constitutional Casserole,” “Justice Fairhurst’s Reasonably Prudent Bratwurst,” “Justice Chambers’s Common Law Chicken Kabobs.” This would be a run-away best-seller, available exclusively through WSBA. This also could be converted to a calendar, although that would require three additional recipes, possibly supplied by pro tems from the Court of Appeals.

To reduce expenses:

- Eliminate enforcement of CLE requirements and scrap the Disciplinary Program. Come on, you’ve fantasized about this, haven’t you?

Bar News Editor Michael Heatherly practices in Bellingham and welcomes your comments (and recipes). He can be reached at 360-312-5156 or barnewseditor@wsba.org.
For effective DUI defense, you want a law firm with some mileage behind it.

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At Fox Bowman Duarte, we emphasize one area of the law: DUI defense. Our eight lawyers have more than 100 years of DUI litigation experience. We’ve successfully defended thousands of cases. And we’re the only DUI defense firm with two offices: Bellevue and Bellingham. For intelligent, innovative and tenacious defense, put your clients in experienced hands. Ours. Find out more at foxbowmanduarte.com.

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The nation’s toughest DUI laws demand the toughest DUI lawyers.

Many believe that blood draw cases are too difficult to defend, and that blood evidence of intoxication is superior. This is not necessarily true. There are a myriad of ways to attack the accuracy and reliability of blood test results.

As early as possible in a legal blood draw case, a comprehensive public disclosure request to the state toxicology lab should be made. Chromatograms, chromatograph maintenance and records, logs, sample volume, quantity of preservatives and anticoagulants in the sample, chain of custody from arrival through testing and storage, standard operating procedures manual (SOP), analyst permits (including those of the analyst who prepared the calibration standards and external controls), along with the results of their proficiency examinations, are among the many items to request. A similar request should be served on the prosecution and filed with the court. You will find samples of these at www.dui-defender.net.

In addition, a thorough investigation includes scrutiny of the police reports to ensure the blood draw was appropriate in lieu of breath, and that the proper warnings were administered pursuant to RCW.46.20.308. An interview of the investigating officer will determine, among other things, whether he or she followed proper procedures and training. Interview all persons who had custody of the sample. It is important to determine how the samples (there must be two vials) were stored at every link in the chain. Samples not properly refrigerated may produce falsely high results because bacteria in the blood creates endogenous alcohol. Under certain conditions, the amount of preservative in the sample may not be adequate to prevent this degradation of the sample and the false positives that result.

Interviewing the phlebotomist is crucial to determine whether he or she used scientifically acceptable procedures of phlebotomy to obtain the samples. There are strict requirements related to identifying the patient, ensuring the vials are not expired, sanitization of the phlebotomist’s hands and the puncture site, the antiseptic used (which should contain no alcohol), and filling the tubes to the appropriate quantity to ensure the amount of blood in the vial is in appropriate proportion to the additives in the vial. The latter is important because under-filled tubes can cause inaccurate results. Finally, the phlebotomist must gently invert the samples 3 to 8 times to adequately mix the blood and additives. Vigorous mixing can cause hemolysis, which coagulates the sample, making it unsuitable for testing.

Another important requirement applicable at every stage of the blood draw and testing is the maintenance of the vial’s vacuum. The vacuum ensures the sample is not exposed to air and contaminants that may cause an inaccurate result. Other requirements for accurate testing exist; an excellent treatise to consult is the highly regarded textbook by Ruth McCall and Cathee Tankersley, Phlebotomy Essentials, Lippincott, Williams & Wilkins, (2008) (4th ed.). The textbook also provides a very comprehensive list of sources of error in phlebotomy and blood testing.

The toxicology lab documents, once received, must be scrutinized for clues of improper handling, storage, and testing of the sample. Familiarity with the lab’s training manuals, SOP manual, and the protocol, Analysis of Alcohols in Aqueous and Biological Samples by Headspace Gas Chromatography, is essential.

Headspace gas chromatography is based on Henry’s Law, which posits that, at a constant temperature, the concentration of a given amount of gas dissolved in a liquid is directly proportional to its concentration in the air directly above the liquid. The vapor above the blood is tested, not the liquid below.

The analyst removes a very small portion of the sample, an “aliquot,” for testing in an autosampler vial, which is then diluted with a type of alcohol, n-propanol, the “internal standard.” If the chromatogram correctly quantifies the internal standard, the assumption is that the quantity of ethanol in the sample is also correct. Thus, it is critical that the internal standard is prepared and stored according to the protocol’s required methods.

The analyst places a maximum of ten autosampler vials in the chromatograph in an order such that certain standards and controls run first. The first vial to run contains a blank (water), followed by the calibrating external standards of 0.079, 0.158, and 0.316, then another blank to verify the absence of carryover. Following this, volatile standards are run to quantify the presence of acetone, isopropanol and/or methanol, along with a 0.02 ethanol standard, and a 0.04 and a 0.079 volatile mix of ethanol with acetone, isopropanol and methanol. Following the volatile standards, a commercially prepared control is run, followed by a blank.

The blood samples (or breath simulator solutions, which may be in the run), follow the blank in lots of 10. Alternating controls (0.10, 0.20) are repeated throughout the run, followed by a blank; each positive sample separated from a commercial control and a blank by no more than ten other samples.

After testing, chromatograms are printed and reviewed in the Quality/Data Review process. The analyst must critically review the data to ensure that blank samples are devoid of carry-over ethanol, and that the controls were properly identified and quantified within +/- 0.01 gm/100 mL of their target values. The presence of the internal standard in each analysis is verified and its “area” denoted on the chromatogram must be at least 900 to ensure sensitivity. An area count below 900 could indicate a plugged injector needle and the need for re-analysis. If any quality controls are out of range, this must be documented and samples re-aliquoted and reanalyzed.

If the data meets all specifications, the run is repeated on a different chromatograph according to the same procedures. For each blood sample, the analyst must ensure that duplicate results agree to within ± 0.01 (% BAC) gm/100 mL from the mean and report the average of the two values, rounding to two decimal places.

Recent findings show the data review process has been carelessly executed, and internal WSP audits found the lab so deficient due to carelessness and poor lab practices that prosecutions are compromised, and the lab’s CALEA accreditation was in jeopardy. The audits found, inter alia, pre-tested samples kept in an insecure location accessible to lab visitors, and samples, ostensibly secured by documented key card entry only, stored in a location with a door propped open by a plastic lid.

Uncovering such errors may result in suppression of the evidence or cause jurors to reject it. Neither is likely if counsel is not thorough in investigation, preparation or lacks understanding of the procedures and science. In the Washington DUI Practice Manual, a forthcoming Thomson-West publication, Ms. Callahan thoroughly explores legal blood testing, and she is available for consultation.

Linda M. Callahan© August, 2008