Washington State Bar News

Vol. 50 No. 8, August 1996

$5

The official publication of the Washington State Bar

Assisted Suicide

SAN FRANCISCO — The U.S. Circuit Court of Appeals refused today to reconsider controverting Washington state's ban on doctor-assisted suicide.

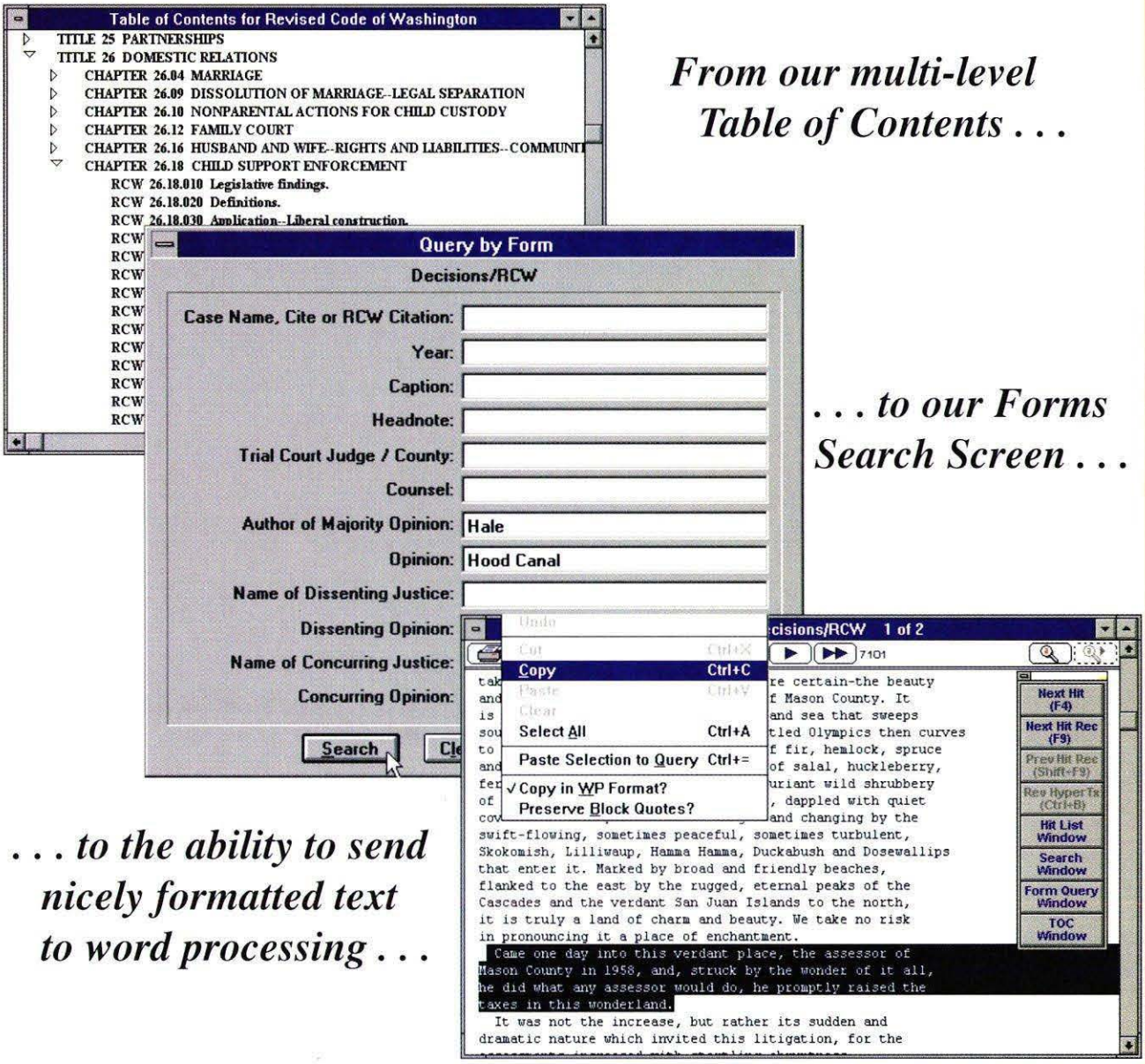
Three terminally ill patients, no longer alive, doctors and Compassion in Dying, an organization, challenged the law.

Washington may appeal to the U.S. Supreme Court, although New York lost its battle with a similar law. Washington's law was part of legisla-

Court upholds assisted suicide

State law ruled unconstitutio

SEATTLE, May 4 — Three



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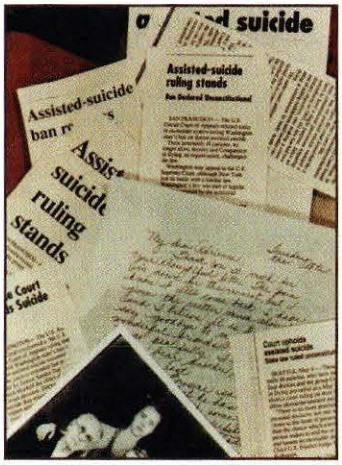

"Assisted Suicide" by Jack Young and Jennifer Klamm, Bar News *Staff*

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The *Bar News* encourages correspondence and article submissions. The submission deadline is the 15th day of the month for the second issue following: e.g., February 15 for the April issue. We request a 3 1/2" disk (in any conventional format) and hard copy at the time of submission. Please include a SASE if you would like your material returned. Article submissions should run approximately 1,200 to 3,000 words. Graphics and illustrations are welcome. Address all correspondence and submissions to: Hal White, *Bar News* Editor, 500 Westin Bldg., 2001 6th Avenue, Seattle, WA 98121-2599.

Washington State Bar News

Vol. 50 No. 8 August 1996

The official publication of the Washington State Bar

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DENNIS P. HARWICK
Executive Director

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Readers are invited to submit letters of reasonable length to the editor. They should be typed on letterhead and signed. The editor reserves the right to select excerpts for publication or edit them as may be appropriate.

What's in a Name?

Editor:

In 1937, the Washington Legislature passed Chapter 100, Laws of 1937, which allowed county prosecuting attorneys to call themselves district attorneys. However, G. W. Hamilton, attorney general of the state, took umbrage when Smith Troy, the Thurston County prosecuting attorney, began to avail himself of this legislation and to refer to himself as the district attorney.

The attorney general's displeasure was caused by the conflict between Chapter 100 and Art. XI, § 5 of the Washington Constitution, which established the constitutional office of "prosecuting attorney."

The Attorney General sued for a writ of prohibition, restraining and prohibiting the prosecuting attorney from referring to himself as a district attorney. The attorney general won.

Our Supreme Court, in a well-reasoned decision, first asked and then answered the question: "What's in a name?" At 190 Wash. 487, Judge John S. Robinson wrote:

> While we are reluctant to thwart the wishes of the prosecuting attorneys who earnestly desire the proposed change, it is plainly our duty to hold that the legislature, acting alone, had no power to make it, and that the first three sections, at least, of chapter 100, Laws of 1937, p. 406, are inoperative and of no effect. It is unnecessary to quote from legal opinions to support this holding, nor is it anywhere more clearly and forcibly pointed out than in the words of the great soldier and statesman who was chairman of the Constitutional Convention of 1787 and the first President of the United States. These words may be found in the farewell address published by Washington to his "Friends and Fellow-Citizens" on the 17th day of September, 1796:
>
> The basis of our political systems, is the right of the people to make and to alter their constitutions of government: *but the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.* (Italics ours.)

This brief historical review has a point. It has recently become common practice (e.g., your own comment, *Bar News* Vol. 50, No. 1, p. 9) to refer to members of our highest court as "Justices." However, the Washington Constitution only provides

CORRECTION: The Legal Ease ad on page 45 of the June 1996 *Bar News* contained errors. We apologize. The corrected ad appears below.

for "judges" to sit upon our court. Art. IV is explicit that the court shall consist of "judges," Art. IV, § 2. Only "judges" may be elected to this court, Art. V, § 3. Only "judges" can retire from this court, Art. IV, § 3 (a). Indeed, the only "justices" authorized by the Washington Constitution are Justices of the Peace, Art. IV, § 1.

Perhaps you might mention this problem in your worthy publication and remind all of our sisters and brothers at the bar of the oath they have taken to uphold the constitution of Washington, and of their "sacred obligation" to preserve the constitutional milieu.

JAMES E.F.X. WARME
Kelso

Asset Forfeiture

Editor:

You seem to fit Elbert Hubbard's venerable definition of an editor as "a person whose business it is to separate the wheat from the chaff, then see that the chaff is printed." Your June 1996 cover advertises, "Dean Koontz on Asset Forfeiture Laws," then presents a fictional account by someone who may write compelling fiction but falls far short of the standards of a professional journal.

We began to suspect you had printed the chaff when we read Koontz's letter claiming that "asset forfeiture laws are in violation of all the basic principals [sic] on which this country and its legal system were founded." That is simply wrong. Asset forfeiture was part of British common law when this nation was founded, and forfeiture laws were among the earliest enactments after the Constitution was adopted. Forfeiture of ships and cargo was prescribed for customs violations (e.g., Act of Aug. 4, 1790, ch. 35 § 60, 1 Stat. 174), for transporting slaves (Act of May 10, 1800, ch. 51 §§ 1-10, 2 Stat. 426-30), and for federal tax fraud and other revenue violations.

After that we were not surprised to read Koontz's fictional version of the forfeiture laws. Just to correct a few minor points, real property cannot be seized under Washington or federal law without prior notice and a hearing. Both federal and Washington laws prohibit forfeiture of the property of an innocent owner. No property can be seized without probable cause, just as no person can be arrested and put in jail without probable cause.

Asset forfeiture laws were designed to take the profits out of crimes motivated by greed, crimes like drug-dealing, money-laundering, promoting prostitution and fraud. These laws have been used effectively and fairly in Washington. For example, the forfeiture laws permitted King County to recover more than $100,000 of the ill-gotten gains of a group of itinerant driveway pavers who preyed on elderly victims in rural areas all over Washington. Thanks to Washington's forfeiture laws, most of the victims got most of their money back. Our laws have also been used to forfeit the profits of major drug dealers, money launderers and promoters of prostitution. As a society we do not think it wrong for the victim of a crime to sue to recover damages or proceeds of the crime. Why should we think any differently in the area of forfeiture?

As a professional journal, the *Bar News* should be contributing to our understanding of controversial legal issues, not muddying them up with emotional, obviously biased fiction that pretends to be based on real laws. There are many Washington attorneys in the defense bar and in government who work with asset forfeiture laws and know them well. While we argue about issues (that is, after all, the nature of our profession), the level of debate has been high, and is tempered by mutual respect. It would have been appropriate for the *Bar News* to add to the quality of the debate, rather than merely increasing the noise level.

BARBARA A. MACK
PATRICK SAINSBURY
Seattle

Letter Dialogue

Editor:

I like the dialogue that occurs when you print responses to letters to the editor. This approach is more interesting and informative than the standard soap box approach. *Atlantic Monthly* and other respected publications use this format. It is especially useful when outspoken commentators are discussing a narrow topic that many of us do not encounter in our

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7 CLE credits $150

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8/9 - Seattle - Sheraton Hotel and Towers
6 CLE credits $150

❑ **Recent Changes in Land Use and Environmental Law**
(Featuring the new Real Property Deskbook, 3rd ed.)
8/16 - Seattle - WA State Convention & Trade Center
6.5 CLE credits $185 (with Deskbook excerpts)
$125 (without Deskbook excerpts)

❑ **Elder Law: Beyond the Basics**
8/23 - Seattle - Sheraton Hotel and Towers
6.75 CLE credits $150

SEPTEMBER

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9/10 - Aberdeen - Office of Phillips, Krause & Brown
6.75 CLE credits $130
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practice, e.g., alleged recovered memory in child sexual abuse cases.

MICHAEL J. KILLEEN
Seattle

Perceptions of Lawyers

Editor:

Jim Bond ("Is the Good Lawyer an Oxymoron?") believes our very tarnished images will brighten the more people know that justice is what we work and get paid for (although the getting paid notion was not mentioned once in his article, and it is well known that acceptance of that notion by the public is random at best).

My experience four years ago belies his optimism. Then, I ran for public office wearing my WSTLA and Bar Association endorsements as badges of honor. I knocked on about 15,000 doors during that campaign, most of which opened. I never had a door slammed in my face because of my party affiliation, but three times doors were slammed in my face by constituents who learned I was a lawyer, either from my campaign literature — which openly (shamelessly?) displayed the fact that I was a lawyer — or from my truthful responses to the question, What do you do?" A fourth time, two Dobermans ran out of the house, the owner charging behind to apologize. Learning that I was a lawyer, he showed greater remorse by hollering "attack." By the time I got to the house with the words "no politicos, bible thumpers, revenuers, or lawyers" painted on the steps, I had become savvy enough to finesse my line of work.

This experience taught me two things, one of which I always knew, the other affirmed by Mr. Bond: (1) most people are polite when they meet you regardless of what or whether they've heard about you, and (2) some people really dislike lawyers, no matter what they know or what you try to tell them.

JOHN P. MCDONALD
Vancouver, Washington

Editor:

It is a feel-good thing to have your peers speak in rebuttal of our public perception of lawyers as a pervasive societal problem. We know, among ourselves, the quality we add to our society as a whole, as well as the quality service most of us give our clients by and large.

I question whether the misimpression can ever be fixed as long as our society is "shame-based," by which I mean perfection is expected of individuals and other legal entities without exception. In such a society, lawyers are a constant reminder that people fail to make the correct decisions and do the right thing all of the time and, often, even most of the time. Thus, insofar as we are reminders of imperfection, we will continue to be the butt of societal derision.

MICHAEL HOFF
Seattle

✣ ✣ ✣

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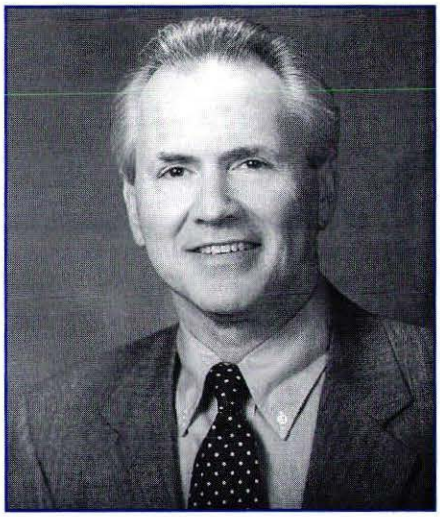
Do the Right Thing

by **Edward F. Shea,** *WSBA President*



Edward F. Shea

Take a moment, and pull out your copy of the Court Rules, and look at GR 12. Adopted by the Supreme Court, GR 12 sets out the purposes of the Washington State Bar Association and lists activities the Association is — and isn't — authorized to carry out. In essence, GR 12 tells the Bar to serve its members and the public interest.

The WSBA budget, and the work it funds, maps how we carry out GR 12's mandates. Last year, the Board of Governors found a critical need for a top-to-bottom review of the WSBA's present and future financial ability to meet its duties under GR 12. The task fell to the Board of Governors' Budget and Audit Committee as part of its ongoing budget monitoring. The Committee's members are WSBA Treasurer and 3rd District Governor Mary Fairhurst; 4th District Governor Steve Crossland; 5th District Governor Patricia Williams, WSBA Executive Director Dennis Harwick and Director of Finance and Administration Pat Dieken, WSBA President-elect Tom Chambers and me. To gain some additional perspective, we asked three WSBA members to join us: Auburn lawyer Tim Jenkins, Environmental Protection Agency attorney Dean Ingemansen and Marcella Fleming, president of the Loren Miller Bar Association and a lawyer for Boeing.

After months of study, here's what we found: (1) for years, WSBA auditors have recommended that we maintain a reserve fund equal to 10% of annual revenues; they're right. (2) Last year, the Board dramatically increased Disciplinary Department staffing to deal with a seemingly endless backlog of disciplinary complaints hanging, unresolved, over our members' heads. As a result, (3) the Bar Association office in Seattle is now too small, our lease is up, and office vacancy rates are very low. That means new space at a higher price than we got 10 years ago for our current space. (4) As part of our move, we need to upgrade a lot of seriously outdated equipment that is increasingly inefficient to use and costly to maintain. (5) Though less than in the early 1980s, inflation marches on, pushing WSBA operating costs up year in and year out.

From these facts comes one inescapable conclusion: the Bar Association needs more money. We looked at increasing fees for various services from the bar exam to providing certificates of good standing. All have been steadily increased in recent years and can't realistically be raised again. Even if we did, they wouldn't bring in enough additional revenue.

That left only one place to go, and that's where we went. This summer, we recommended, and the Board of Governors adopted, a plan to increase WSBA licensing fees over the years 1997-2000. As part of this plan, we have stretched out the time between a member's admission to practice and paying full licensing fees from four to six years.

Here's the picture:

	Active Years 6 and over	Active Years 4 and 5	Active Years 2 and 3	Active Year of Admission*	Inactive
Current License Fee	**195**	**195**	**115**	**60** 30	**37**
1997 Increase	45	16	11	0	6
1997 License Fee	**240**	**211**	**126**	**60** **30**	**43**
1998 Increase	32	16	11	0	5
1998 License Fee	**272**	**227**	**137**	**60** **30**	**48**
1999 Increase	9	6	5	5	2
1999 License Fee	**281**	**233**	**142**	**65** **35**	**50**
2000 Increase	9	5	3	3	1
2000 License Fee	**290**	**238**	**145**	**68** **38**	**51**

*$90 if admitted pursuant to winter bar exam; $30 if admitted pursuant to summer bar exam

Raising licensing fees wasn't an attractive option. Each of us on the Committee and Board will have to pay them, too. But consider these tables; perhaps they will put the decision in perspective:

Apples to Apples

State	Mandatory Fees
Washington	$205
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Apples to Other Kinds of Apples

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Dentists	$553
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It is possible that longtime critics of the Bar Association might file a referendum despite the demonstrated need for a license fee increase and at a cost to the Association of more than $15,000. If one is filed, we will carry our case to you in every corner of Washington. We are already forming a committee and marshaling the facts. Here is a preview: We have gone 10 years without an increase by eliminating the annual bar convention, turning the CLE department into a revenue-generating center, wiping out all sorts of programs and wringing services out of every corner of operation.

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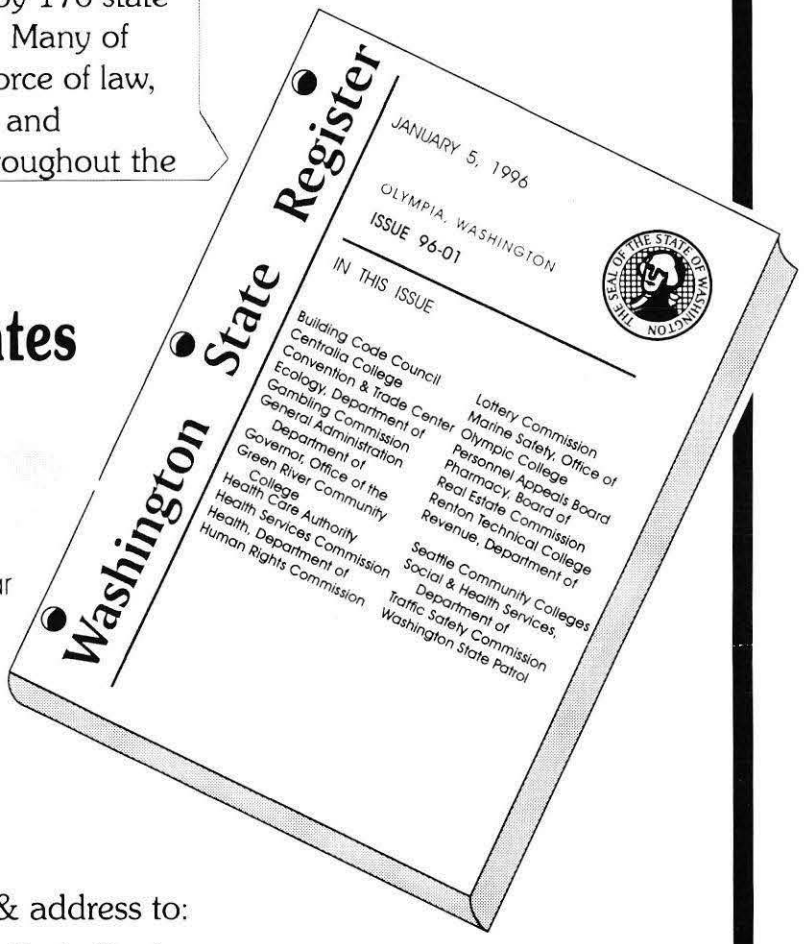

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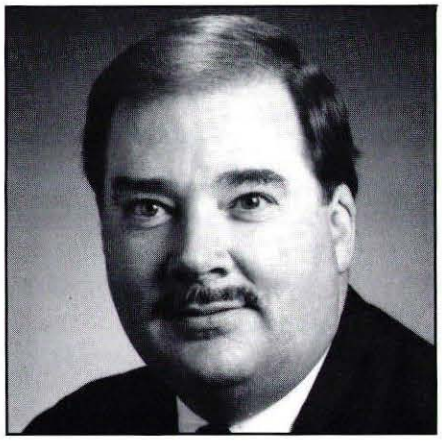
But, in the real world, inflation drives up costs. WSBA members now number 20,000, and you and the general public call the bar office 20,000 times a week. That's over 1 million requests for information and services a year before we even open the mail. Increased service demands mean investments in equipment, office space, staffing and supplies. Legal-service lawyers know what it's like to go a decade without a funding increase. Government lawyers watch as inflation and the public's antipathy to taxes chisel away at their program resources and keep their salaries low. Private-practice lawyers know the relentless lockstep march of overhead and that you can squeeze and cut and rightsize only so far before you have to raise your rates.

As you can see, we're in this together. The Bar has a responsibility to you, and to the public, that is fundamental to our professional mission. While you are busy serving the needs of your clients, public and private, the Bar delivers quality continuing legal education programs across the state, saving you time and helping hold down license fees. The Bar monitors, sponsors and responds to legislation in Olympia that affects your practices. The Bar works with the Supreme Court to make court rules practical and workable. The Bar supports active sections and committees whose work reaches into every practice area. The Bar maintains the disciplinary system with which we protect the public from bad lawyers, and good lawyers from unjust accusation. But all of this has a price, and without a phased-in, gradual, four-year licensing fee increase, we cannot meet our responsibilities. If we do not act, other institutions will surely act for us and without our participation or approval.

The licensing fee increase will cost the equivalent of four movies (with snacks) in 1997; that plus several Big Mac lunches in 1998, and those items plus the cost of a cassette tape in the two years that lead us to the century's end. Any way you analyze it, this is the responsible course to take if we are to maintain the independence of our profession and the way we practice law.



Dennis P. Harwick

"TANSTAAFL"

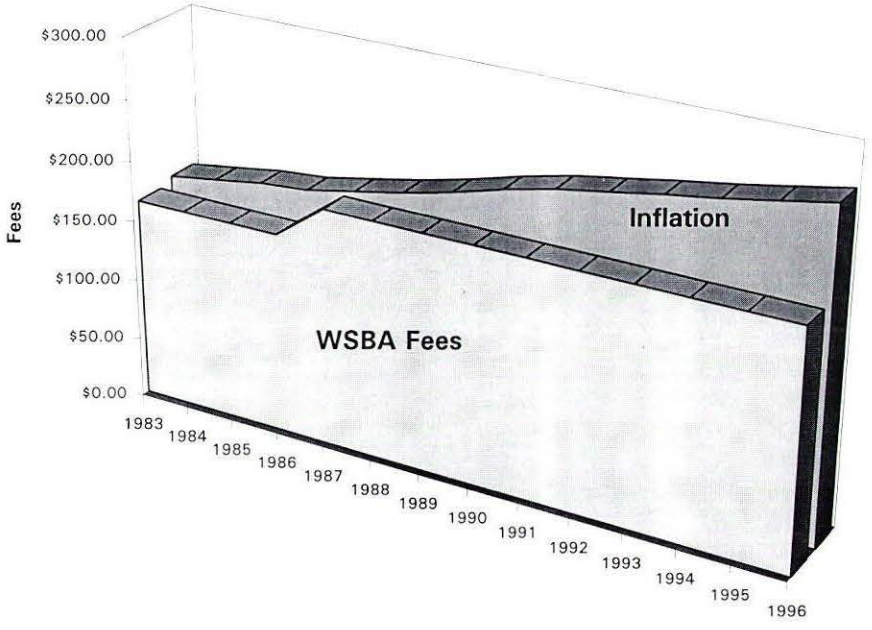
by **Dennis P. Harwick**
WSBA Executive Director

"There ain't no such thing as a free lunch." TANSTAAFL. Simple enough. True enough. But you'd be amazed how often members of the public and WSBA members want to ignore the inevitability of TANSTAAFL.

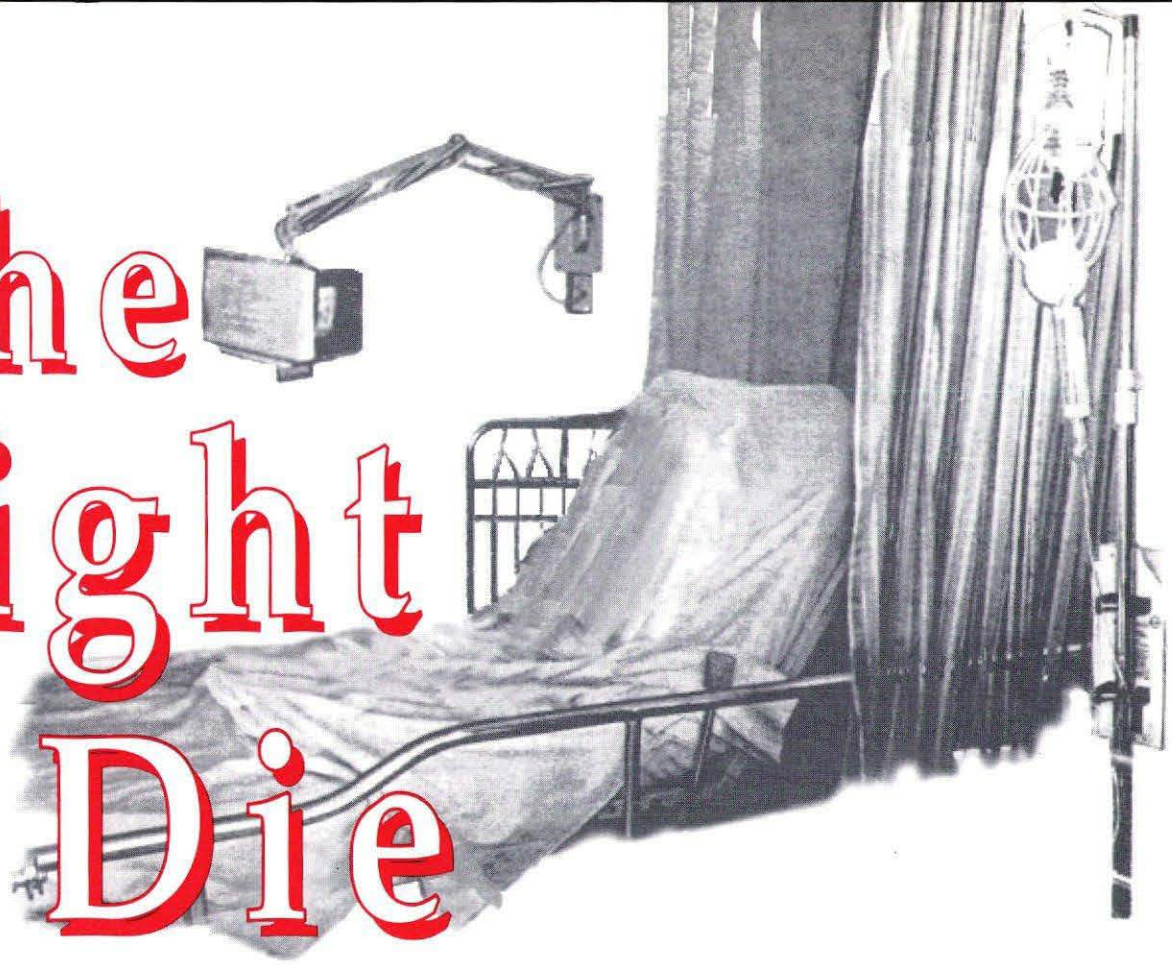
Even though there may not be any free lunches, there are good deals — and the WSBA is one of them. WSBA licensing fees haven't gone up in 10 years. And even with the increases proposed by the Board of Governors (see chart on page 13), WSBA fees will be among the lowest in our peer group. But that won't stop the perennial critics of the WSBA. The political posturing has already started, i.e., "If you'll just give free CLE to people like me, I won't file a referendum." Trouble is — **there ain't no such thing as a free lunch**. Giving something to one person or group inevitably means subsidizing it with fees or revenues from someone else.

Over the past five years or so, the WSBA has worked diligently to eliminate subsidies that everyone has to pay for. Consequently, most of the annual license fee revenue goes to regulatory programs like attorney discipline. A much smaller portion goes to central programs like *Bar News*, the legislative program, and the Young Lawyers Division. Reasonable people can disagree on how to set those priorities, but remember — there ain't no such thing as a free lunch!

WSBA Fees vs. Inflation



The Right to Die



by **Kathryn L. Tucker & Kari Anne Smith**

Introduction

A majority of states, including Washington and New York, have statutes that prohibit assisting suicide. These statutes are understood to prohibit physicians from assisting their mentally competent, terminally ill patients to hasten death. The assisted suicide statutes in Washington and New York have recently been challenged in federal court under the Fourteenth Amendment to the United States Constitution.[1]

The plaintiffs in these cases maintained that the United States Constitution protects the right of a mentally competent, terminally ill person to hasten his or her death in a manner that is sure to result in death, is nonviolent, and preserves dignity by self-administering drugs prescribed by a doctor for that purpose. The plaintiffs argued that the Fourteenth Amendment protects the individual's decision to hasten death with physician-prescribed medication, and that statutes prohibiting physician-assisted suicide deny equal protection to competent, terminally ill adults who are not on life support.

Summary of the Constitutional Challenge

The Fourteenth Amendment Protects Individual Liberty

The United States Supreme Court has consistently recognized that the Fourteenth Amendment's protection of liberty extends to important personal decisions that individuals make about their lives and how they will live them.[2] The challenged statutes, which make aiding suicide a criminal act, prevent mentally competent, dying citizens from choosing to shorten the period of suffering before death by self-administering drugs prescribed for the purpose of hastening death. The state thus intrudes into and controls a profoundly and uniquely personal decision, one that is properly reserved to the individual, to be made in consultation with his or her doctor. These statutes thereby abridge the liberty guaranteed by the Fourteenth Amendment.

The Fourteenth Amendment Guarantees Equal Protection

A somewhat unusual aspect of the challenged laws is that they do not seek to punish suicide, or attempted suicide, itself; in addition, citizens have the right to refuse, or direct the withdrawal of, life-sustaining treatment with the intent to hasten death.[3] Physicians who comply with such requests are immune from prosecution under the challenged statutes.[4] Thus, some terminally ill patients are able to choose to hasten their inevitable deaths with medical assistance. This distinction, between a terminally ill patient whose condition involves life-sustaining treatment and a dying patient whose condition does not involve life-sustaining treatment, violates the Equal Protection Clause of the Fourteenth Amendment.

The Challenge to Washington's Assisted-suicide Statute

Compassion in Dying v. Washington was filed in the United States District Court for the Western District of Washington on January 24, 1994. The challenged Washington law (RCW 9A.36.060) is virtually identical to similar laws in New York and other states:

1. A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.
2. Promoting a suicide is a class C felony.

The *Compassion* plaintiffs include four physicians who treat terminally ill pa-

tients, three terminally ill patients, and Compassion in Dying, a nonprofit patients' rights, services and advocacy organization in Seattle.[5] The physicians are all licensed to practice in Washington and treat mentally competent, terminally ill adults, some of whom wish to hasten their deaths with help from their physicians. The patient-plaintiffs suffered from cancer, AIDS and emphysema, and desired to obtain prescription drugs to hasten death. All of the patient plaintiffs died in the months after the case was filed.

On May 3, 1994, District Court Judge Barbara J. Rothstein declared the Washington law unconstitutional, concluding that a competent, terminally ill adult has a constitutionally guaranteed right to hasten death with physician assistance. *Compassion*, 850 F. Supp. at 1462. Although the District Court found that the interests of a state may justify regulating this activity, the Court held that a total prohibition of this activity places an undue burden on the exercise of a constitutionally protected liberty interest. *Id.* at 1465. The District Court held that the Washington law also violates the Equal Protection Clause because it impermissibly treats similarly situated groups of terminally ill patients differently. *Id.* at 1467. In overturning the Washington statute, Judge Rothstein declared:

> The liberty interest protected by the Fourteenth Amendment is the freedom to make choices according to one's individual conscience about those matters which are essential to personal autonomy and basic human dignity. There is no more profoundly personal decision, nor one which is closer to the heart of personal liberty, than the choice which a terminally ill person makes to end his or her suffering and hasten an inevitable death. From a constitutional perspective, the court does not believe that a distinction can be drawn between refusing life-sustaining medical treatment and physician-assisted suicide by an uncoerced, mentally competent, terminally ill adult. *Id.* at 1461.

"Those who believe strongly that death must come without physician assistance are free to follow that creed . . . . They are not free, however, to force their views . . . on all the other members of a democratic society."

On appeal, a three-judge panel of the United States Court of Appeals for the Ninth Circuit voted 2-1 to reverse the District Court decision. *Compassion In Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995).

The plaintiffs petitioned for a rehearing en banc, and because of the "extraordinary importance" of the case, the Ninth Circuit granted the petition. *Compassion*, 79 F.3d at 798. On October 26, 1995, eleven judges sitting en banc heard oral arguments. This was the largest number of judges to hear any case involving constitutional aspects of end-of-life decisions. Participating in the panel were Judges Stephen Reinhardt, Harry Pregerson, Andrew J. Kleinfeld, Proctor Hug Jr., Betty B. Fletcher, Ferdinand Francis Fernandez, James R. Browning, Robert R. Beezer, Mary M. Schroeder, David R. Thompson, and Charles Wiggins.

On March 6, 1996, in a landmark 8-3 decision, the Ninth Circuit affirmed the District Court decision, holding that "there is a constitutionally-protected liberty interest in determining the time and manner of one's own death," and that Washington's statute prohibiting physician assistance in the form of drugs prescribed to mentally competent, terminally ill adults who wish to hasten death violates the Fourteenth Amendment. *Id.* at 793-94.

In an exhaustive opinion, written by Judge Stephen Reinhardt, the Ninth Circuit stated:

> A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a child-like state of helplessness, diapered, sedated, incontinent. How a person dies not only determines the nature of the final period of his existence, but in many cases, the enduring memories held by those who love him.
>
> In this case, by permitting the *individual* to exercise the right to *choose* we are following the constitutional mandate to take such decisions out of the hands of the government, both state and federal, and to put them where they rightly belong, in the hands of the people. We are allowing individuals to make the decisions that so profoundly affect their very existence—and precluding the state from intruding excessively into that critical realm. The Constitution and the courts stand as a bulwark between individual freedom and arbitrary and intrusive governmental power. Under our constitutional system, neither the state nor the majority of the people in a state can impose its will upon the individual in a matter so highly "central to personal dignity and autonomy." Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths. *Id.* at 813-14, 839 (emphasis in opinion) (citation omitted).[6]

In its ruling, the Ninth Circuit recognized that state laws or regulations "are both necessary and desirable to ensure against errors and abuse, and to protect legitimate state interests." *Id.* at 832-33.[7] Regulation of physician-assisted suicide, however, may not impose an undue burden on the protected liberty interest. *Id.* at

835, citing *Casey*, 112 S. Ct. at 2828.

The Washington State Attorney General has announced her intent to petition for review of the en banc panel's decision by the Supreme Court. *[Subsequent to the preparation of this article, the Ninth Circuit denied a request for rehearing before the entire 23-judge court. After this decision, the Supreme Court blocked enforcement of the 8-3 ruling pending its decision on whether to review Washington's appeal. - Ed.]*

The Challenge to New York's Assisted-suicide Statute

On July 20, 1994, *Quill v. Vacco* was filed in the United States District Court for the Southern District of New York. *Quill* challenged the constitutionality of a New York statute prohibiting physician-assisted suicide, which is virtually identical to that in Washington.

The *Quill* plaintiffs included three physicians who treat terminally ill patients and three terminally ill patients suffering from cancer and AIDS. The physicians are all licensed to practice in New York. All of the patient-plaintiffs died in the months after the case was filed.

On December 15, 1994, the constitutionality of the New York assisted suicide law was upheld by District Court Judge Thomas Griesa. The plaintiffs appealed to the United States Court of Appeals for the Second Circuit.

On April 2, 1996, in a 3-0 vote, the Second Circuit ruled that the New York law prohibiting physician-assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment because it "does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths," and distinctions made with respect to such persons "do not further any legitimate state purpose." *Quill v. Vacco*, 1996 U.S. App. LEXIS 6215, 32.[8] The *Quill* court found:

> Indeed, there is nothing "natural" about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and the withdrawal of ventilation brings about respiratory failure. By ordering the discontinuance of these artificial life-sustaining processes or refusing to accept them in the first place, a patient hastens his death by means that are not natural in any sense. It certainly cannot be said that the death that immediately ensues is the natural result of the progression of the disease or condition from which the patient suffers.
>
> Moreover, the writing of a prescription to hasten death, after consultation with a patient, involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation and/or dehydration. Withdrawal of life support requires physicians or those acting at their direction physically to remove equipment and, often, to administer palliative drugs which may themselves contribute to death. The ending of life by these means is nothing more nor less than assisted suicide. It simply cannot be said that those mentally competent, terminally ill persons who seek to hasten death but whose treatment does not include life support are treated equally. *Id.* at 41.

In answer to the state's argument that the state has an interest in preserving the life of all of its citizens at all times and under all circumstances, the court wrote:

> But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes. And what business is it of the state to require the continuation of agony when the result is imminent and inevitable? What concern prompts the state to interfere with a mentally competent patient's "right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life," when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? The greatly reduced interest of the state in preserving life compels the answer to these questions: "None." *Id.* at 42 (citations omitted).[9]

The New York Attorney General has announced that he will seek review of the Second Circuit's decision.

Conclusion

There is little doubt that the question of whether dying patients have a constitutionally protected right to choose to hasten inevitable death with physician assistance will ultimately reach the United States Supreme Court. Should that court determine that such a right exists under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amend-

ment, the effect will be similar to that of *Roe v. Wade*, as refined by *Casey*, in the reproductive rights context: States will be permitted to regulate — but not prohibit — physician assistance in hastening the inevitable death of mentally competent, terminally ill patients.

Endnotes

[1] *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), *affirmed, en banc*, 79 F.3d 790 (9th Cir. 1996); *Quill v. Vacco*, 870 F. Supp. 78 (S.D.N.Y. 1994), *rev'd.*, 1996 U.S. App. LEXIS 6215 (2d Cir. Apr. 2, 1996).

[2] *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing and education); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Cruzan v. Director, Mo. Dep't. of Health*, 497 U.S. 261 (1990) (refusing unwanted medical treatment). *See also*, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.")

[3] *See, e.g.*, RCW 9A.36.060 (punishing a person for aiding *another* in the attempt of suicide).

[4] *See, e.g.*, RCW 70.122.100.

[5] Compassion In Dying provides information, counseling and assistance to mentally competent, terminally ill adult patients considering hastening their deaths.

[6] Importantly, the Ninth Circuit recognized that the loved ones of the dying patient may be present at the hastened death so that the patient need not be alone. *Id.* at 838, n. 140.

[7] For examples of proposed procedural safeguards, *see, e.g.*, Oregon's Death with Dignity Act, ORS 127.800 et seq.; Charles Baron, et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide,* 33 Harv. J. on Legis. 1 (Winter 1996); Timothy E. Quill, *Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide*, 327 N. Eng. J. Med. 1380 (1992).

[8] The *Quill* court declined to find that there is a constitutionally protected liberty interest at stake in light of what it defined as an "admonition" given by the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), disfavoring any expansion of protected liberty interests. *Id.* at 24-25.

[9] Circuit Court Judge Guido Calabresi filed a concurring opinion expressing his view that both liberty and equal protection grounds support striking the challenged law, but advocating a "constitutional remand" to allow the legislature an opportunity to reconsider the issue and recraft legislation. *Id.* at 71-87.

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The Riddle of *Fisons*: When is Discovery not Discovery?

(Hint: When it's part of the adversary process.)

by **Randolph I. Gordon**

In September 1993, the Washington State Supreme Court ordered the imposition of sanctions upon the Seattle law firm of Bogle & Gates and its client, Fisons Corporation, for discovery abuse.[1] The law firm and its client ultimately agreed to pay a fine of $325,000. In May 1995, Bogle & Gates, representing defendant Subaru of America, was again sharply criticized for discovery abuse by U.S. District Court Judge Robert J. Bryan.[2] In response to plaintiff's motion for sanctions, defense counsel cited Fisons *for the principle that: "Fair and reasonable resistance to discovery is not sanctionable."*

Indeed.

Learning *Fisons* the Hard Way: A Law Firm's Trip Down Advocacy's Slippery Slope

The problem of determining what constitutes "fair and reasonable resistance to discovery" (*Fisons*, at 346) is, of course, precisely where the proverbial horse lies moldering. In "scorched earth" litigation such a determination is as tortuous as the investigation of "war crimes" in modern warfare — and for similar reasons. In both contexts:

(1) the judgment of what constitutes fair and reasonable conduct must be made, in the first instance, by the alleged offender;

(2) the facts necessary to justify sanctions are difficult to uncover because, among other reasons, they are often in the exclusive possession of the party who benefits from their concealment;

(3) the misconduct of one party tends to degrade standards for both, blurring distinctions and undercutting the moral standing of the injured party; and

(4) the rewards of misconduct are enormous.

Fisons, regrettably, does little to ease the conflict "between the attorney's duty to represent the client's interest and the attorney's duty as an officer of the court to use, but not abuse the judicial process." *Id.* at 354. This is left to self-regulation, in the first instance, on the theory that:

> [V]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that *they cannot justify as legitimate*. The lawyer's duty to place his client's interests ahead of all others *presupposes* that the lawyer will live with the rules that govern the system. Unlike the polemicist haranguing the public from the soapbox in the park, the lawyer enjoys the privileges of a professional license that entitles him to enter into the justice system to represent his client, and in doing so, to pursue his profession and earn his living. He is *subject to the correlative obligation to comply with the rules* and *to conduct himself* in a manner consistent with the proper functioning of that system. [Emphasis added].

In other words, the "honor system." One cannot help but marvel at the notion of lawyers being free to pursue any litigation tactic that they can *justify as legitimate*. Lawyers are, after all, in the "justification" business. As H. L. Mencken unflatteringly remarked, and the legal community has yet to disprove: "As for a lawyer, he is simply, under our cash-register civilization, one who teaches scoundrels how to commit their swindles without too much risk."[4] To *presuppose* that lawyers will comply with rules which they regard as being duty-bound to stretch to the breaking point in the name of vigorous advocacy is unsound in theory. Theoretically, one could anticipate that the

balance between full and fair discovery and vigorous representation of a client's interest would be reached at that point providing *as little discovery as can be justified*. Practically, however, the transaction costs associated with compelling discovery, obtaining adequate sanctions, and collecting such awards, virtually assures that such efforts will be even less fruitful.

When is a Brain not a Brain and other Mysteries of Advocacy

We have all seen it. We have, in fact, ourselves heard the siren call of philosophy. For, in the response to standard interrogatories we soon learn that every lawyer is, at heart, a Philosopher-King. Even the novice attorney who has never revealed in early life an inclination towards philosophy finds flowering within him its fully-formed expression. Consider the typical exchange: "Please identify the experts you intend to call at trial?" Response: "Not yet determined."

No one questions the propriety of the inquiry. It is expressly authorized by CR 26. Yet the response is worthless. Is it possible that the counsel for respondent has yet to form an *intention* respecting its trial witnesses? Philosophy beckons. Perhaps the Universe *is* governed by strict determinism and we are free of both will and intention. Intention is a slippery notion and the selection of experts for trial is, after all, a small thing to busy attorneys and may easily escape their notice. (More to the point, how can anyone prove otherwise?) Indeed, we soon learn that the formulation of the requisite intention regarding expert witnesses to be called at trial coincides precisely with the cutoff for disclosing experts mandated in the pretrial schedule. After all, disclosure of experts one second earlier than required may work to the advantage of opposing counsel. It follows that lawyers, demonstrating rare mental discipline, apparently *will* themselves to form no intention until it is congruent with their litigation stratagem. Once more, the "floor" established by the rules, becomes the "ceiling" for performance. Once more, advocacy works to minimize discovery.

But, let us examine *Fisons* more closely to see where the line between advocacy and misconduct lies. A doctor and his insurance company seek damages from a drug company after the parties have settled with a patient injured by a drug (Theophylline) prescribed by the physician and manufactured by the drug company. The doctor and his insurer allege fraud, product liability, and Consumer Protection Act claims. During the course of discovery, the doctor's "simple request" (so characterized by the court, at 346 n. 86) reads as follows:

> INTERROGATORY NO. 2: Can Theophylline cause brain damage in humans?
>
> ANSWER: *See* general objections [set forth in two pages] attached hereto as Exhibit A and incorporated herein by this reference. This interrogatory calls for an expert opinion beyond the scope of Civil Rule 26(b)(4), and is, in any event, premature. Furthermore, this interrogatory appears to call for an opinion based on medical knowledge after January 18, 1986, whereas the relevant time frame is on or before January 18, 1986. In addition, this interrogatory is not reasonably calculated to lead to discovery of admissible evidence under CR 26(b)(1). This interrogatory is also vague, ambiguous and overbroad. **For example, the term "cause" is vague and ambiguous in that it does not specify whether it includes indirect, as opposed to direct, causes**. The term "brain damage" is similarly vague and ambiguous and is overbroad as to time and scope. **For example, it is unclear whether the term "brain" includes the entire central nervous system**; it is further unclear whether the term "brain damage" includes temporary as well as permanent changes. [Bolding added for emphasis.] *Id.* at 346 n. 86.

"To presuppose that lawyers will comply with rules which they regard as being duty-bound to stretch to the breaking point . . . is unsound in theory."

The Washington Supreme Court quoted the above as an example of the drug company demonstrating its "resistance to comply with discovery" and stated: "Although we do not condone this kind of answer, this answer, *alone*, would not warrant sanctions as it does raise some legitimate objections." [Italics in original.] *Id.*

Consider: What does it mean for the Washington Supreme Court to state that the foregoing response is not condoned, but that it does not warrant sanctions? It apparently means that you are "bad" for doing it, but that you will not be punished. Under the "honor system," this works. As a grant of authority to the trial courts to enforce discovery, it fails. (And in the adversary system where being "bad" is simply pushing the "edge of the envelope" of vigorous advocacy, it becomes a badge of honor; a virtue.) Is asserting the ambiguity of "cause" or "brain" in the context of the interrogatory propounded here legitimate advocacy or pettifoggery and obstructionism? If the latter, it must be sanctionable if we are ever to have meaningful discovery.

Suppose the prescient propounder were to have anticipated the objection and met it in advance by saying: "Does the drug cause (and I mean directly *or* indirectly) brain damage — and by brain damage I mean the *entire* central nervous system?" Could not the response be: "Objection. The term 'indirect' is vague and overbroad encompassing without limitation the Universe of indirect effects far beyond any possible legal causation. Further object that 'central nervous system' is vague and ambiguous as it fails to state where the peripheral nervous system begins?" If advocacy can mean that a 'brain' is ambiguous, then virtually every word in the English language soon dissolves into a pool of pedantic circumlocution.

We can scarcely be surprised then at the course of discovery in *Staggs v. Subaru of America* . Asked if their client (Subaru of America) had received information from the National Highway Traffic Safety Administration respecting driver's seats in

the Subaru Justy collapsing backwards from rear-impact forces of 30 miles per hour, Bogle & Gates is reported to have responded: "[the request is] vague, confusing and unintelligible .... Specifically, 30 miles per hour is a velocity, not a force, and due to this confusion of technical terms, no meaningful response can be given."[5]

The lesson of *Fisons* is not reassuring. It appears that in order to be sanctioned you have to be caught red-handed. That is, of course, precisely what happened.

Plaintiffs' counsel requested the production of letters relating to Theophylline toxicity in children. The Court found: "Had the request, as written, been complied with, the first smoking gun letter (exhibit 3) would have been disclosed early in the litigation." *Id.* at 349. It was not. The same attorneys who were unclear over the meaning of the word "brain" responded as follows:

> Such letter, *if any*, regarding Somophyllin Oral Liquid will be produced at a reasonable time and place convenient to Fisons and its counsel of record. *Id.* at 348.

The so-called "smoking gun" letters were not produced. In fact, the Court concluded:

> It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company. The objections did not specify that certain documents were not being produced. Instead the general objections were followed by a promise to produce requested documents. These responses did not comply with either the spirit or letter of the discovery rules and thus were signed in violation of the certification requirement [under CR 26(g)]. *Id.* at 352.

What is especially shocking is that:

> Although interrogatories and requests for production should have led to the discovery of the "smoking gun" documents, their existence was not revealed to the doctor until one of them was anonymously delivered to his attorneys. *Id.* at 337.

Following a motion for sanctions heard before the special discovery master, the drug company was ordered to turn over any immediately available documents. "The next day, the second "smoking gun," a 1985 internal memorandum describing theophylline toxicity in children, was delivered along with about 10,000 other documents." *Id.*

What follows establishes, if nothing else, that the defendant and its counsel were not easily embarrassed. Did counsel renounce what the *Fisons* court found to be evasive and misleading non-responses? Did the drug company claim that its inquiry into the records did not uncover the smoking gun documents? No, to both. *Id.* at 347, 352. Rather, the drug company through its counsel took the position that: (1) "[t]he plaintiffs themselves limited the scope of discovery;" (2) the smoking gun documents were "not intended to relate" to the product in question; (3) the drug company "produced all of the documents it agreed to produce or was ordered to produce"; (4) the failure to produce the smoking gun documents resulted from "the plaintiffs' failure to specifically ask for those documents or from their failure to move to compel [their] production"; and (5) that "[d]iscovery is an adversarial process and good lawyering required the responses made in this case." *Id.* at 352-53.

The Court concluded: "If the discovery rules are to be effective, then the drug company's arguments must be rejected." *Id.* at 353.

Why the Adversary Process Fails Us Respecting Discovery

Among those venerable principles underlying the Federal Rules of Civil Procedure, upon which our own Civil Rules were modeled, is this one: "a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." *Fisons*, at 242. As then-Court of Appeals Judge Barbara Durham wrote:[6]

> The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, [356 U.S. 677, 682 (1958).] The availability of liberal discovery means that civil trials "no longer need be carried on in the dark. The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, [329 U.S. 495, 501 (1947).]

This system obviously cannot suc-

ceed without the full cooperation of the parties.

Historically, the courts have been content to leave the determination of what is reasonable and fair respecting discovery largely in the hands of the attorneys involved: what one side will produce, and what the other side will accept. Judicial intervention has been rare partly because it has been perceived as a matter best left to counsel to work out, and partly because of the difficulty of ascertaining fault, but also because "the issue of imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge." *Id.* at 355. As a consequence, the traditional handling of this disagreeable task is akin to a parent separating a fight between siblings with the admonition: "Break it up, you two, or you'll both be punished."

This approach has proven equally ineffective in both courthouses and homes.

All too frequently, the prolonged efforts to gain discovery preliminary to the ultimate motion for sanctions, taken alone, give rise to legal fees and costs to the aggrieved party well in excess of the amount of any sanction (if any is awarded). Such awards, even when adequate, often go unpaid because parties forego collection as incompatible with the compromises required for settlement. Surely, the parties reason, the collection of a discovery sanction should not stand in the way of a settlement. Thus, the interests of the judicial system in deterring discovery abuse go unserved.

Although reluctant to exercise their authority, trial courts have been afforded wide discretion to determine proper sanctions, both in deference to them as judicial actors best positioned to decide the issue, and to eliminate the chilling effect that a review de novo could have on their willingness to impose sanctions. *Fisons*, at 339, citing *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742-43 (1989). However, in one rare case of appellate reversal of a trial court's sanction for inadequacy, the Court of Appeals disapproved a sanction award of $2,500 for being "cheap at twice the price in the context of a $4.5 million wrongful death case." *Gammon, supra*, at 282. "The sanction," we are told, "should insure that the wrongdoer does not profit from the wrong." *Fisons*, at 356.

The rewards of successful concealment of key evidence — and the incentives for abuse — are vast; the risk of sanction remote. Recall, if you will, that it is the party seeking discovery (and inappropriately denied it) who must establish the existence of the document sought. Anonymous donors of smoking gun documents are mournfully few.

"What does it mean for the Washington Supreme Court to state that the . . . response is not condoned, but that it does not warrant sanctions?"

Cooperation, the highest authorities have made it clear, is essential for the system to function. Yet, the adversary system is founded on the notion that the truth will emerge from a contest of opposing forces. Consider its basic premise: two antagonists confront a body of evidence from which they each extract that which is most favorable to themselves and most unfavorable to their opponents. The very word "antagonist" derives from the Greek words *anti* ("against"), *agonistes* ("competitor"), and, ultimately, from *agonizethai* ("to contend") and *agonia* ("struggle"). The athletes of ancient Greece (from *athlos*, a contest) were closely examined by the officials, and took an oath to observe all the rules. Irregularities were rare, we are told, because "the penalty and dishonor attached to such offenses was discouragingly great."[7]

By contrast, the penalties associated with discovery abuse are mild compared with the potential benefits, are rarely imposed, and are frequently twisted into an accolade by those who perceive it as evidence of vigorous advocacy.

Discovery, as long as it is regarded as adversarial, all too often remains an opportunity for the prolongation of litigation, the imposition of punitive expense on the opponent, and the concealment of evidence to avoid an adjudication on the merits. Counsel often conclude that their duty to represent their client takes precedence over their obligations to cooperate in discovery when called upon to produce documents damaging to their client's case. Applying the principles of advocacy, many attorneys will provide as little discovery as can be justified (and less), thus foisting the burden of compelling discovery upon opposing counsel — and the court. Never-

theless, the Court in *Fisons* expressly rejected the notion that a party fulfills its discovery obligations by merely producing all documents agreed upon or compelled by court order. There is an affirmative duty to disclose responsive materials.

Where one party is in the exclusive possession of evidence harmful to it, the instincts of contention will promote concealment, not disclosure. While each party may be motivated to extract information from the other through vigorous efforts, we have already observed that the cost of extraction is very high indeed, greatly favoring the party resisting discovery. Moreover, the diminished expectations which arise from widespread discovery abuse, infrequent sanctions, and the high costs of seeking judicial intervention encourage further abuse: "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense."[8]

While the adversary process excels in the courtroom in drawing out competing inferences from a shared body of evidence, it works against the full disclosure and assembly of the relevant evidence essential to litigation. As the United States Supreme Court held: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[9] Proper litigation is difficult if discovery is hobbled by the adversarial instinct, and it becomes impossible in the face of discovery abuse. Put another way, discovery abuse has all the moral integrity of one athlete hiding the car keys of another, so that his competitor cannot get to the stadium in time. *Cooperation* should reign supreme outside of the stadium; competition within.

When Philosopher-Kings Meet Special Masters

We have considered the powerful adversarial reflex which hinders the cooperation essential to full and fair discovery. Even when the adversary process is not contentious, abuse of discovery often is tolerated by tacit agreement, as an alternative to incurring the costs of ineffective judicial review, or in retaliation for perceived misconduct by opposing counsel. A generation of discovery abuse (and the associated lowering of expectations) has gravely impaired the utility of interrogatories, requests for admission and requests for production.

In addition to limited judicial resources, the effectiveness of judicial intervention has been hampered by judicial perceptions: The aversion to the disagreeable task of awarding sanctions, the belief that discovery matters are properly handled between counsel, and the difficulty of ascertaining fault. These factors often prompt a court to place blame on both parties for failing to work things out, further discouraging appeals to the court and prejudicing the court's sympathy for the injured party seeking discovery.

An entire generation of lawyers is badly in need of education regarding appropriate expectations concerning discovery. "The purposes of sanctions orders," we are told, "are to deter, to punish, to compensate and to educate." *Fisons*, at 356. All of these functions are served by a steady, accessible judicial presence, such as a "Special Master for Discovery" (SMD), who can offer immediate and repeated guidance. Some of the United States district court judges, concerned with obstructionist objections during depositions, have found that making themselves avail-

able by telephone on short notice to resolve disputes has a salutary effect. Having an SMD on call, to further the discovery process, to lower the threshold for judicial intervention, and to inject practicality into the process, will provide a re-education badly needed by attorneys who have run wild, fearless of sanctions, forgetful of their duties to the system.

Consider this approach. After a case is filed, at the request of either party, the case shall be designated for service by an SMD. Each party will be required to remit a minimal fee to the SMD fund to help underwrite the service. Telephone hearings will be encouraged — with orders to issue immediately by fax — for a nominal fee per party. If a discovery request, objection, or response is found to be lacking or inappropriate in any way, an order for sanctions (with a fixed minimum assessment), plus the cost of the hearing shall be assessed against the offending party, to be paid within 14 days. The presumption shall be that sanctions shall always be ordered against any party whose response to discovery (or request for discovery) is inappropriate: Either the response (or inquiry) is appropriate, or it is not; either more documents ought to be produced, or not; either an objection is well-founded, or it is not. A de novo review by the Superior Court would, as with the Mandatory Arbitration Rules, award reasonable attorneys' fees and costs allocable to the review to the opposing party if the party seeking review did not improve its position under the SMD's order. Courts should give the SMD, within its modest realm, deference.

The sanctions can be designated, in whole or part, as compensatory or punitive in nature. Compensatory sanctions would be paid to the opposing party for fees and costs incurred, while punitive sanctions would be paid to the SMD fund or other court-related fund. As the Washington Supreme Court stated: "To avoid the appeal of sanctions motions as a profession or profitable specialty of law, we encourage trial courts to consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds." *Id.*

Such an SMD would undoubtedly become a profit-center for the courts. If objections are raised that the SMD has a predisposition to assess sanctions to secure funding for his or her position, so be it. We can only hope that the fear of sanctions (just or unjust) will provide just the fillip needed to encourage cooperation. The SMD's ready availability and practical willingness to state when "brain" means "brain," and when an objection is pure hokum, will provide the perfect environment for classical conditioning: frequent, consistent, and moderate correction. Critiquing responses to interrogatories at the cost of the offending party may provide just the appropriate check on the heretofore untrammeled concealment of non-responses beneath objections. An SMD will make short shrift of the pettifoggery of the self-anointed Philosopher-Kings.

Endnotes

[1] *Physicians Insurance Exchange v. Fisons Corporation*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

[2] *Staggs v. Subaru of America, Inc.*, U.S. District Court for the Western District of Washington (at Tacoma), Cause No. C93-5678B.

[3] Schwarzer, *Sanctions Under the New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181, 184 (1985) as quoted in *Fisons, supra*, at 354-55.

[4] Mencken, *Minority Report: H. L. Mencken's Notebooks*, (New York: Alfred A. Knopf, 1956), p. 132.

[5] Fryer, "Dismaying Discovery," *Puget Sound Business Journal* (King Co.), 11/17/95, p. 34 (Quoting Judge Bryan).

[6] *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280; 686 P.2d 1102 (1984); *aff'd*, 104 Wn.2d 613; 707 P.2d 685 (1985).

[7] Durant, *The Story of Civilization, II. The Life of Greece*, (New York: Simon & Schuster, 1966), p. 213

[8] Schwarzer, *supra*, 104 F.R.D. at 205 as cited in *Fisons*, at 355.

[9] *Hickman v. Taylor*, 329 U.S. 495 (1947).

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Bellevue attorney ***Randolph I. Gordon*** *is the former president of the East King County Bar Association and currently serves as a trustee of the King County Bar Association.*

Thoughts on Prosecutors and Amateur Witnesses

by **Jeff Tolman**

I could hardly wait for my assault jury trial. For a change it would be a fair fight, amateur witnesses for the State and amateur witnesses for me, the defense. So many times I had heard young prosecutors discuss their "winning streaks"; visualizing themselves as having Gerry Spence's skills and not realizing the huge advantage they have in their witnesses. I was excited that, for a change, the playing field would be level.

Usually the State has wonderful, professional witnesses who are experienced in the judicial system and well versed in how to advocate their position from the witness stand.

Prosecutor: "Would you please state your name and occupation?"

Witness: "Darrell Larson, trooper, Washington State Patrol."

Prosecutor: "Trooper, have you received any special awards or accolades?"

Witness (at least as it usually sounds to me as defense attorney): "I graduated magna cum laude from Washington State University in 1974, and was captain of all of the University's inter-collegiate teams. After graduation I attended and was valedictorian of my class at the State Patrol Academy. While at the Academy I won the Nobel Peace Prize and found a cure for cancer. Do you want me to go on?"

Prosecutor: "No, that is fine. Do you recall the night of May 1, 1993?

Witness: "Yes, it was a clear night, approximately thirty-two degrees Fahrenheit, zero degrees Celsius. The moon was full. I received a call at eleven-ten

. . . I'm sorry but I don't recall the seconds . . ."

As the judge orders the jury to quit applauding, you know things look bad. They look worse when your nervous client (whose testimony is supposed to counter the trooper's version of what happened) takes the stand.

Attorney: "Sir, would you please state your name for the record?"

Witness: "Ah . . . I know it, really. I am just a little nervous. I think it starts with a J or K."

Attorney: "Is it Mike Kirk?"

Witness: "Yeah! That's it, Mike Kirk!"

Attorney: "And do you have any children?"

Witness: "Ah . . . that little red-haired girl . . . and that obnoxious teen-aged boy. I can't remember their names right now. I'm a little nervous."

And off we go, trying to determine what happened from the testimony of a paid, professional witness and a nervous, criminally-charged citizen. Not surprisingly, the prosecutor usually wins.

Today, for a change, the witnesses would be equal.

After our usual voir dire and opening statements, the prosecutor called her first witnesses — a carpenter who had seen the alleged assault. Confidently she asked, as she had so many times before, "Please state your name and occupation."

"Ah . . . Bill . . . ah . . . Jones. I am a . . . ah . . . carpenter, I think. I'm kind of nervous."

I immediately noticed a tinge of redness in my opponent's cheeks. She would have to gently lead this witness through her examination and deal with the anguish that only defense attorneys usually feel as their witnesses are being cross-examined. Having spent most of my time in court watching professional witnesses cut my client's heart out, I knew what to do.

"Mr. Jones, you saw the defendant strike Mr. Smith, didn't you?"

"Object! Leading!" I responded with glee.

"Sustained," said the judge.

"The defendant struck the victim, didn't he?"

"Object! Leading!" I echoed.

"Sustained!"

"What happened on May 3rd between the defendant and Mr. Smith ?" the Prosecutor asked, in what football fans know as a "Hail Mary" pass.

"Well . . . let's see. May third . . . this year? Yeah. Well . . . I saw the defendant . . . I don't know if I had seen him ever before. Maybe at the mall. I don't recall, but he looks a bit familiar . . ."

And off the witness went (as so many of mine had before), telling as truthfully as possible everything he believed could conceivably relate to the trial. As his story rolled on despite the prosecutor's best attempts to give it an interesting part and end, I relaxed a little. I had been on the other side of the table so many times, begging my client to keep to the point; the prosecutor sitting smugly, giggling inside at my frustration, knowing the jury would be confused and disenchanted by the testimony.

Now the tables had been turned.

The trial took too long and was far more confusing than usual. With no one to neatly tie the State's case together (a job usually done so well by the professional witness), the jury entered their deliberations not trusting the lawyers and not understanding the witnesses. After an hour (thanks to the convoluted testimony and State's burden of proof) a "not guilty" verdict was rendered. As the jurors and parties left the courtroom, just the prosecutor and I remained. She was visibly shaken by the loss.

"I know how you feel," I said, referring to the emptiness after losing a trial.

"My witness was terrible. Damn!"

"I know how you feel," I said again. "And no doubt will again soon — the next time you have a trooper against me."

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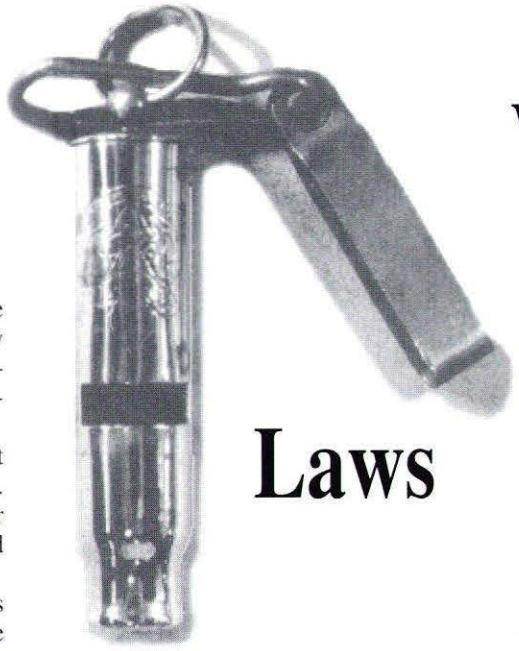
Former WSBA governor ***Jeff Tolman*** *practices in Poulsbo.*

Washington's Whistleblower Laws



by **Brian Sonntag**

Too often people perceive the job of an auditor as strictly accounting. They believe auditors spend all of their time combing ledgers and calculating numbers.

While accounting *is* an important part of an auditor's job, it is not the only role. As one attorney — a former Latin teacher — told me, the Latin root of the word "auditor" means "one who listens."

The definition of a listener illustrates perfectly the responsibility of the state auditor in serving as a check between government operations and public expectations. A vital part of our responsibility is receiving and examining concerns raised by state employees and other citizens regarding improper governmental activities.

Under the Washington Constitution, we are the auditor of all public accounts. This means that every tax dollar spent by state and local governments falls within our purview. That amounts to roughly $40 billion annually, including federal grants that flow to state and local governments.

During our audits of 2,400 units of local government and 300 state agencies, we strike a balance between two major focuses. First, we examine financial statements. Second, we review financially related laws to make sure that government entities comply with applicable regulations.

Between the two duties, issues of legal compliance are usually of greater interest to the public. Indeed, the lion's share of complaints from whistleblowers involve legal compliance issues.

The State Employee Whistleblower Program, administered by this office, was established by legislation in 1982 to encourage state employees to disclose instances of government improprieties. This law shields whistleblowers' identities and protects them against retaliation.

The State Government Whistleblower Act (RCW 42.40) provides greater authority to investigate assertions of improper government activities than we typically possess in regular financial and legal compliance auditing. We are empowered to conduct probes of any employee action that allegedly violates a law or regulation, poses a substantial danger to public health and safety, abuses authority, or grossly wastes public funds.

However there is one exception. State law prevents the auditor from pursuing personnel actions, including employee grievances, disciplinary action, dismissals, demotions and violations of state civil service law. Other avenues — including agency and union grievance procedures, the Human Rights Commission, the Personnel Appeals Board and the courts — exist to resolve those issues.

Besides the State Employee Whistleblower Program, state law also provides an avenue for employees of cities, counties and other local governments to come forward as whistleblowers. In 1992, the Legislature enacted the Local Government Whistleblower Act (RCW 42.41), which requires local governments to create their own whistleblower programs.

At the state level, we investigate a wide variety of cases, ranging from fraud and misuse of public resources to employee abuse of work hours. Examples of substantiated whistleblower allegations include:

- An employee who used office space and equipment, a state vehicle, and other public resources for a private consulting business during normal business hours. The employee resigned and left the state.
- A state agency which failed to use vendors selected under a state contract as required for certain purchases. As a result, the agency was overcharged $16,700 for the purchases over a two-year period.
- A university department which made false claims and processed unallowable charges — totaling nearly $100,000 — against federal research grants. This was done in order to keep unspent federal funds once the research grants expired.
- Two state agency employees who accessed confidential information for their personal use.

Since its inception, the State Employee Whistleblower Program has grown. For example, the number of allegations reported by state employees increased 29 percent between 1994 and 1995. More than 400 allegations were brought to this office by whistleblowers; most involved human services and higher education. Of the cases we receive, we substantiate approximately 25 percent.

Recently, we have also had a broad array of complaints which allege criminal activity. These cases include falsification of public assistance, using public resources for sexual exploitation of children and violating the right to privacy. In connection with these responsibilities, the Auditor's office has developed partnerships with the State Patrol, the FBI and county prosecutors. We also join with ethics boards, the federal inspectors general, the state Human Rights Commission and the state Public Disclosure Commission whenever appropriate.

We believe our increase in cases is due to a heightened emphasis on the whistleblower program. I am proud to say that over the past three years we have strengthened the whistleblower program at both the state and local levels. We have added emphasis to the state program by assigning responsibility at the deputy state auditor level. Over the past several years, successful amendments have also been enacted by the Legislature. One change granted permanent protection against retaliation if a whistleblower's identify becomes known. The original law provided protection for only a two-year period.

This year, we will evaluate the program to make sure it is operating as efficiently as possible and achieving the desired results. Once completed, this evaluation is expected to produce proposed changes

Reminder

The WSBA Annual Business Meeting and more:
Friday, September 6
Seattle Hilton (6th & University in downtown Seattle)

8 a.m. - noon CLE:
"Discovery - A Tool, Not a Club" - The abuse of discovery; enhancing the image of lawyers; improving professionalism and assisting attorneys to avoid malpractice.)
$25 - Registration by mail on the form in the brochure mailed to all WSBA members, or by phone to Jerrie Bennett at (206) 727-8211.
3.75 CLE credits pending.

12:15 - WSBA Awards Luncheon
- President's Award
- Board of Governor's Award for Professionalism
- Angelo Petruss Award for Lawyers in Public Service
- Outstanding Judge Award
- WSBA Pro Bono Award
- WSBA Courageous Award
- WSBA Affirmative Action Award

$20 - Reservations by mail [watch your mailbox for the brochure mentioned above] or by phone to Sharlene Steele at (206) 727-8262.

2 p.m. - 1996 Annual Business Meeting
Because no resolutions were filed this year, the meeting will focus on the passing of the gavel from President Edward Shea of Pasco to President-elect Tom Chambers of Seattle.

that will hopefully be addressed by the Legislature in 1997.

The Local Government Whistleblower Act also continues to improve. In 1995 we secured legislative approval of our request to beef up the Local Government Whistleblower Act. It allowed local government employees to report improper activity to the county prosecutor when an entity had no policies and procedures for a whistleblower program. In instances where the prosecutor was involved in improper activity, the employee could take a complaint to the state auditor.

Besides government employees, other citizens are also an important source for identifying government waste and abuse. They must have avenues to report such activity. Thus, in 1996, we co-sponsored executive request legislation that, for the first time, would grant private citizens the same protection as public employees in identifying fraud and abuse by private companies which contract with government. While the measure did not pass during the 1996 legislative session, it remains a necessary step in making government more accountable to the citizens it serves. Its time will come.

The auditor's office also has an active constituent referral program in which citizens bring potential audit issues to our attention. Issues that fall within the scope of our responsibility are examined during our audits.

Attorneys can also benefit from the services of the state auditor. Working papers of prior whistleblower investigations are available, and the office can also provide technical assistance on statutory requirements and analytical data about whistleblower assertions. Moreover, the office can offer expert testimony and assist in Human Rights Commission investigations of retaliatory actions taken against whistleblowers.

Accountability is the fundamental issue for the state auditor. The purpose of our audit work is to help governments improve their operations and ensure that they use public resources properly. Citizens and public employees have much to contribute to government accountability.

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Brian Sonntag *is the Washington State Auditor.*

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in July 1996 is 5.43%. The maximum allowable interest rate permissible for August 1996 is therefore 12%. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates of the past 10 years appeared on page 41 of the July *Bar News*.

Gov't Accountability Project

The Seattle branch of the Washington, D.C.-based Government Accountability Project celebrates four years of operation in Washington state. This nonprofit law firm represents whistleblowers who report waste or wrongdoing in areas such as water quality, toxic waste and worker safety. Attorneys wishing to volunteer for GAP projects may contact the Seattle office at (206) 292-2850.

Reprimanded

Puyallup lawyer Gregory S. Webley (WSBA No. 12875, admitted 1982) will receive two reprimands. This discipline was recommended by the Hearing Officer following a hearing and became final on May 17, 1996, when neither party appealed.

The Hearing Officer found that Webley made an untrue statement in his response to a grievance filed against him by a former client. The grievance raised an issue regarding Webley's treatment of funds paid by the client. In response to the grievance, Webley stated that he had placed the funds in his general account rather than his trust account because at the time of the deposit, over half the funds were earned and he anticipated earning the other half within a few days. The Hearing Officer found that this statement was not true and therefore violated RPC 8.4(c) (conduct involving misrepresentation) and Rule 2.8(a) of the Rules for Lawyer Discipline (requiring "full and complete" response to Bar Association inquiries). For this conduct, the Hearing Officer recommended that Webley receive a reprimand.

The second reprimand resulted from Webley's representation of a second client in a child support modification petition. At a hearing on October 21, 1992, a Pierce County Superior Court Commissioner granted Webley's client an increase in child support and ordered that Webley present an order. Webley appeared before a different Commissioner on November 2, 1992, to present the order, but the Commissioner told Webley to present it to the Commissioner who presided at the October 21st hearing. Webley did not tell the client that he had unsuccessfully tried to present the order. The client called Webley's office repeatedly in December 1992 but her calls were never returned. In February 1993, the client consulted with another lawyer, who called Webley on her behalf. In March, at the Bar Association's suggestion, the client wrote to Webley to ask him to advise her on the current status of her case. The client filed a grievance against Webley, which was sent to him on May 10, 1993. On May 12, 1993, the client wrote to a Pierce County Superior Court Judge, asking for his assistance in having her child support modification order entered. The Judge's assistant contacted Webley, who said the client had fired him and that he would contact her. The client never fired Webley. Webley finally contacted the client by letter dated June 8, 1993, and thereafter completed the client's case. The Hearing Officer found that Webley violated RPC 1.4 by failing to keep the client reasonably informed about the status of her case and failing to promptly comply with her reasonable requests for information. The Hearing Officer recommended that Webley receive a second reprimand for this conduct.

The hearing officer was Frederick D. Gentry of Olympia. Webley represented himself. The Association was represented by Disciplinary Counsel Anne I. Seidel.

Censured

Auburn lawyer William Messer (WSBA No. 8504, admitted 1978) has been ordered censured pursuant to a stipulation to discipline, approved May 21, 1996. The discipline resulted from Messer's failure to obey a court order in his own bankruptcy case.

Messer filed a Chapter 11 bankruptcy petition on October 5, 1990. In July 1991, based on a motion by the U.S. Trustee, Messer's case was ordered converted to a Chapter 7. By that time, Messer had decided that he no longer wished to pursue the bankruptcy due to changes in his personal circumstances.

On August 27, 1991, the Bankruptcy Judge entered an order requiring Messer to appear for an examination by the U.S. Trustee pursuant to Bankruptcy Rule 2004 ("2004 examination"). Messer did not appear. The U.S. District Court Judge

entered a show cause order in March, 1992. That hearing was continued to April 10, 1992. by an order that warned Messer that a failure to appear for a rescheduled 2004 examination might result in a criminal conviction of contempt. Messer did not appear for the rescheduled exam. At the April 10, 1992, show cause hearing, the U.S. District Court judge issued a warrant for Messer's arrest.

Messer turned himself in on April 13, 1992, and later pled guilty to criminal contempt for his failure to appear. On April 20, 1992, Messer appeared for a 2004 examination. On April 27, 1992, the U.S. District Court judge entered an order dismissing the criminal contempt case against Messer.

Messer stipulated that by failing to obey the court's order requiring him to appear for the 2004 examination, he violated RPC 8.4(d) (conduct prejudicial to the administration of justice) and was subject to discipline under Rule 1.1(b) of the Rules for Lawyer Discipline (willful disobedience of a court order).

The hearing officer was Edward Lane of Tacoma. Messer was represented by Kurt M. Bulmer. The Bar Association was represented by disciplinary counsel Anne I. Seidel.

Suspended

Kent lawyer Robert Kuvara (WSBA No. 3603, admitted 1963) has been ordered suspended for thirty days by Supreme Court order. The suspension will start August 17, 1996. The discipline is based upon Kuvara's mishandling of his trust account.

Following a hearing in this matter, the hearing officer concluded that Kuvara failed to keep complete records of all client funds, failed to deposit and maintain all client funds in a trust account, deposited his own funds into his pooled trust account, failed to withdraw attorney fees from the trust account when earned and, by withdrawing funds to which he was not entitled, used client funds to pay personal expenses. The hearing officer found that this conduct violated RPC 1.14. The hearing officer found that Kuvara knew, or should have known, that he was not handling client funds properly.

The hearing officer was Claude M. Pearson of Tacoma. Kuvara was represented by Leland G. Ripley. The Bar Association was represented by disciplinary counsel Anne I. Seidel and William G. McGillin.

Censured

North Bend lawyer Richard E. Percival (WSBA No. 7003, admitted 1976) has been ordered censured by the Disciplinary Board following review of a Stipulation to Discipline.

In 1990, Percival agreed to represent an estate in a probate action in which there were two co-executors to a will ("A" and "B"), both of whom were also beneficiaries. They disagreed on the interpretation of key provisions in the will. Percival also agreed to represent "A" in her capacity as beneficiary. "B" did not agree to Percival representing both the estate and the individual interests of "A." "B" perceived Percival to be a neutral party and felt confident in discussing with Percival his concerns about ambiguities in the will.

Prior to the completion of the probate, Percival filed a Notice of Withdrawal and Consent to Substitution, in which he withdrew as attorney of record for the estate and consented to the substitution of "A," pro se. Approximately four months later, Percival filed a Notice of Appearance on behalf of "A."

Prior to Percival's withdrawal as attorney for the estate, "B" advised Percival that he wanted to see a copy of a memorandum Percival was preparing concerning the interpretation of the will before the memorandum was filed with the court. Percival filed this memorandum with the court without first providing a copy to "B."

Percival and the WSBA stipulated that: 1) Percival's conduct in simultaneously representing both the estate and "A" individually violated Rule of Professional Conduct 1.7(a) and (b) (conflict of interest between two clients); 2) Percival's conduct in representing the interests of "A" individually after withdrawing from the representation of the estate violated Rule of Professional Conduct 1.9(a) (conflict of interest between client and former client); and 3) Percival's conduct in disregarding the instruction of "B" to provide him with a copy of a memorandum prior to filing the memorandum violated Rule of Professional Conduct 1.2(a) (consulting with client).

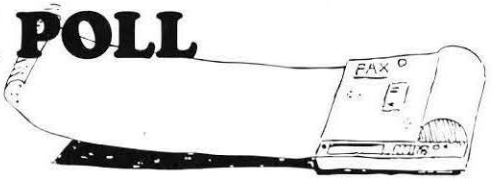
Percival and the WSBA stipulated that he should receive a Letter of Censure for this misconduct.

The hearing officer was Charles E. Peery. Disciplinary Counsel Maureen Devlin represented the WSBA. Jerry W. Bird represented Percival.

For a complete copy of any disciplinary decision, call the WSBA Disciplinary Board at (206) 727-8280, and leave the case name and your address.

THE WASHINGTON STATE BAR NEWS

FAX POLL



What is your opinion regarding the physician-assisted suicide of mentally competent, terminally ill patients? Many believe that the ability to control one's own body is a fundamental right. Others fear that once a precedent has been set for such practices, it will be difficult to draw a line at where the procedure should stop.

Please check the statement that most reflects your opinion, along with any comments or qualifications you may have, and fax (or mail) this entire page to the number/address below. No cover sheet is necessary.

1. ____ I strongly support a patient's right to physician-assisted suicide.

2. ____ I somewhat support a patient's right to physician-assisted suicide.

3. ____ I am undecided, but I believe the issue should be studied.

4. ____ I somewhat oppose a patient's right to physician-assisted suicide.

5. ____ I strongly oppose a patient's right to physician-assisted suicide.

Comments/Other: _____

_____

_____

_____

_____

Name and city of faxing attorney (required): _____

(This will not be printed unless your comments are chosen for publication along with poll results in the September *Bar News*.)

Fax your response by August 14 to:
(206) 727-8320

Or, mail your response by August 11 to:
Washington State Bar Association
Attn: *Bar News* Editor
2001 Sixth Ave., Suite 500
Seattle, WA 98121

Please send suggestions for future fax polls to the above address.

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Current through 1994

Washington Administrative Code

Current through noon, July 19, 1995

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RESULTS

of

THE WASHINGTON STATE BAR NEWS

FAX POLL

In last month's *Bar News*, we asked your opinion regarding mandatory pro bono. The results:

1. 10% strongly supported the concept of mandatory pro bono.
2. 3% somewhat supported the concept of mandatory pro bono.
3. 1% were undecided, but believed the concept should be studied.
4. 84% strongly opposed the concept of mandatory pro bono.
5. 2% somewhat opposed the concept of mandatory pro bono.

Overall, 103 valid responses were received — one shy of our "Fax Poll" record. Judging from the number of times the "strongly opposed" phrase was circled, underlined or followed by exclamation points, those who oppose mandatory pro bono feel strongly about this issue. The Board of Governors was scheduled to discuss this topic at its July 19-20 meeting in Port Ludlow. A summary of its discussion will appear in the September "Board's Work."

Your Comments:

"You will be required to throw me in jail first. . . . I just finished a pro bono guardianship where my fees would have been $2,500. I am starting another as the judge asked me personally to do so. If you order me to complete pro bono work, I shall never again do so."

S. Gay Cordell, Wenatchee

"No matter how it is implemented, pro bono inevitably will become politicized and a captive of the 'politically correct' forces. Volunteering for labor unions will be allowed but not business groups, for tenants but not for landlords, for women's groups but not for men's groups, for the National Lawyer's Guild but not the Federalist Society, etc. We all support the public good as we see it, and that should be sufficient without creating a new bureaucratic program."

Christopher Hodgkin, Friday Harbor

"I always believed that Amendment 13 to the Constitution abolished involuntary servitude in this country."

Martin Muench, Spokane

"I am an at-home mother. I work 120 hours per year as a self-employed contract attorney. I work about 80 hours per year pro bono. I have decided that I must cut back on unpaid work in order to meet my family obligations. I strongly support mandatory pro bono, but only if it is [computed] in terms of total hours of practice."

Deborah Niedermeyer, Fairbanks, Alaska

"As corporate counsel in Denver, how am I to provide legal services in Washington? ... It's been nearly 20 years since I've done anything but in-house corporate/commercial banking law. To do anything else is arguably malpractice. Will the bar insure me in such circumstances? My employer sure won't."

Steven Poquette, Denver, Colorado

August

1 **Bankruptcy 101: What You Should Know About Bankruptcy Law**
Seattle
By WSBA CLE/Creditor-Debtor Section (206) 727-8202
6 CLE credits

2 **Sexual Harrassment**
Seattle
By WSBA CLE (206) 727-8202
7 CLE credits

2 **Internet Client Service & Development**
Seattle
By Themis (206) 783-4014
6.75 CLE credits (incl. 1 ethics)

5 **Health Care Ethics**
Seattle
By UW School of Medicine (206) 781-2303
36.25 Nexus credits for health care attorneys

9 **Business Succession: Strategies for Planning**
Seattle
By WSBA CLE (206) 727-8202
6 CLE credits

12 **Preparing Attorneys to Thrive**
Seattle
By Millennium Associates (303) 368-5111
30.25 CLE credits (incl. 2.5 ethics)

14 **Civil Prac. & Litiga. Technology**
Seattle
By ALI/ABA (206) 621-1503
20.50 CLE credits

14 **Subrogation: Moderated Video CLE** (replay of 3/29/96 seminar)
Seattle
By WSTLA (206) 464-1011
5.25 CLE credits

14 **Winning Strategies for Jury Selection**
Seattle
By NBI (715) 835-8525
6.5 CLE credits (incl. 1 ethics)

14 **Jencks Act**
Seattle
By WACDL (206) 623-1302
1 CLE credit

15 **Trial as Theater** (moderated video replay)
Seattle
By WSTLA (206) 464-1011
6 CLE credits

15 **Brownfields Redevelopment in WA**
Seattle
By LSI (206) 621-1938
11 CLE credits

16 **Auto Cases/De Novo Challenges** (moderated video replay)
Seattle
By WSTLA (206) 464-1011
6.25 CLE credits (incl. .5 ethics)

16 **Recent Changes in Land Use and Environmental Law**
Seattle
By WSBA CLE /Envir. & Land Use Law Section (206) 727-8202
6.5 CLE credits

16 **2nd Ann'l Winthrop Family Law**
Winthrop
By Catalyst Pub (206) 827-8757
6.25 CLE credits

16 **Exhibits: One Picture A Thousand Words**
Tacoma
By TPCBA (206) 627-3883
2.5 CLE credits pending

21 **Current WA State Tax Issues**
Bellevue
By Lorman (715) 833-3940
6 CLE credits

23 **Elder Law: Beyond the Basics**
Seattle
By WSBA CLE/Elder Law Section (206) 727-8202
6.75 CLE credits

23 **Third-Party Custody**
Seattle
By KCBA (206) 624-9365
1.25 CLE credits

26 **Credit & Financial Analysis**
Seattle
By Dun & Bradstreet (206) 464-4242

27 **Complying with Fair Debt Collection**
Seattle
By NBI (715) 835-8525
6.5 CLE credits

28 **Deposition Skills**
Seattle
By NITA (800) 225-6482
19.75 CLE credits

29 **Legal Ethics**
Seattle
By West Pub. (206) 628-6435
2.5 CLE ethics credits

September

6 **National Labor Relations Act Law & Procedures**
Seattle
By ABA/KCBA/National Labor Relations Board (206) 220-6311
7 CLE credits

8 **Juvenile Training Program**
Leavenworth
By WA State Criminal Justice Training (509) 459-6319
15.5 CLE credits (incl. 2 ethics)

9 **Federal Income Taxation of Individuals, of Corporations & Shareholders, of Partners & Partnerships, Federal Income Taxation Decision-making, Tax Characterization**
Seattle
By Golden Gate U. (206) 622-9996
41.25 CLE credits

9 **Internet Symposium '96**
Seattle
By Seattle U. (206) 591-2274
10.5 CLE credits (incl. 1.5 ethics)

10 **Residential/Comm. Eviction**
Seattle
By NBI (715) 835-8525
6.5 CLE credits (incl. 1.5 ethics)

10 **Ultimate Jury Guide**
Aberdeen
By WSBA CLE (206) 727-8202
6.75 CLE credits

11 **Judge Coughenour's "Elements of Trial"**
Seattle - 1st of 15 sessions
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

11 **Restitution & Fines**
Seattle
By WACDL (206) 623-1302
1 CLE credit

11&12 **Advanced Estate Planning Techniques in WA**
Seattle - 11th
Spokane - 12th
By NBI (715) 835-8525
7.25 CLE credits (incl. 1 ethics)

11-14 **Intellectual Property Certificate Program**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

12 **Promoting Diversity and Eliminating Bias in the Legal Profession**
Seattle
By WSBA CLE/Opportunities for Minorities in the Legal Profession Committee
(206) 727-8202
6.5 ethics credits

12&19 **The Development and Construction Process: A Guide for the Real Estate Professional**
Seattle - 12th
Spokane - 19th
By WSBA CLE/RPPT Section
(206) 727-8202
6.5 CLE credits

12-13 **Western Regional Indian Law**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credit pending

13, 18, 19 & 20 **Chambers & Taylors Super Seminar — A Comprehensive Update for Every Lawyer**
Seattle - 13th
Olympia - 13th
Bellingham - 13th
Port Angeles - 18th
Vancouver - 19th
Spokane - 19th
Yakima - 20th
By WSTLA (206) 464-1011
6.5 CLE credits (incl. .5 ethics)

13 **Impact Fees in WA**
Seattle
By LSI (206) 567-4490
7.75 CLE credits

18, 20 & 25 **Valuing Closely Held Businesses**
Spokane - 18th
Bellevue - 20th
Seattle - 25th

By BAS (206) 223-5400
7.5 CLE credits

19 **Surfing the Net**
Seattle
By Puget Sound Assn. of Legal Administrators (206) 789-2111
1 CLE credit

19 **School Law in WA**
Bellevue
By NBI (715) 835-8525
6.5 CLE credits

19 **Construction Law**
Seattle
By LSI (206) 621-1938/ (800) 854-0009
12.75 CLE credits

20 **Northwest Employee Benefits Conference**
Seattle
By WSBA CLE/Taxation Section (206) 727-8202
6 CLE credits (est.)

20 **Wired for Law: How to Use the Internet to Remain Competitive**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

20 **Employment, Labor & Human Resources Law & Practice Certificate, Session 1**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
44 CLE credits

20&21 **Third Annual Criminal Justice Institute**
SeaTac
By WSBA CLE/Criminal Law Section (206) 727-8202
10.5 CLE credits, incl. .75 ethics

24-26 **The Internet & the Practice of Intellectual Property (24th), Environmental Law (25th), Employment Law (26th)**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

26 **Evaluating & Settling Cases: Demo of a Mediation**
Seattle
By WSTLA (206) 464-1011
CLE credits pending

26 **Collection Law in WA**
Spokane
By Lorman (715) 833-3940
4 CLE credits

26 **Using Psychology Experts in Child Custody & Visitation Issues in WA**
Seattle
By NBI (715) 835-8525
6.5 CLE credits

27 **Communication in the Courts**
Seattle
By Carl Grant (206) 364-5289
2 CLE credits

27 **3rd Annual TPCBA Convention**
Silverdale
By TPCBA (206) 627-3883
7 CLE credits (incl. 2 ethics)

27-28 **Trying Cases to Win: Featuring the Honorable Herbert J. Stern**
Seattle & Spokane
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

30 **13th Annual Pacific Northwest Inst. on Special Ed. & the Law**
Yakima
By UW School of Law
(206) 543-7258/(800) CLE UNIV
8.5 CLE credits

October

1 & 11 **Labor & Employee Law in WA**
Seattle - 1st
Spokane - 11th
By NBI (715) 835-8525

6.5 CLE credits (incl. 1 ethics)

3 **Securities Lit. Loss Prevention**
Seattle
By PRMS (216) 766-6426
3 CLE credits

4 **Employment, Labor & Human Resources Law & Practice Certificate, II**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credit pending

4 **Advanced ADR**
Seattle
By WA Arbitration & Mediation Service (800) 933-6348
CLE credits pending

4-6 & 19-20 **Basic Mediation Skills Certif.**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

9 **ADR Event**
Seattle
By UW CLE/WSBA ADR Sec.
(206) 543-0059/(800) CLE UNIV
CLE credits pending

10 **Employee & Labor Law**
Bellingham
By Lorman (715) 833-3940
3.5 CLE credits

11-13 **Family Mediation AAML Certificate Program**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

16 **Helping Clients Control Wealth Using the Charitable Remainder Trust**
Redmond
By AM Express Financial Adv.
(206) 919-3639
1.5 CLE credits

18 **Employment, Labor & Human Resources Law & Practice Certificate III**
Seattle
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

18 **Children in the War Zone**
Seattle
By PSI (800) 621-5336
6.5 CLE credits

18 **Reaching Children in the Court System Impacted by Substance Abuse in the Home**
Yakima
By WA St. CASA (206) 667-9716
10 CLE credits (incl. 1.5 ethics)

21 **Interest-based Mediation**
Spokane
By Fulcrum Inst. (509) 838-2799
Nexus credit

25 **Bankruptcy**
Seattle
By KCBA (206) 624-9365
1.25 CLE credits

25 **Sixth Annual Marine Insurance Conference**
Location TBA
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

26 **3rd Annual American Academy of Matrimonial Lawyers' Greatest Hits**
Location TBA
By UW CLE
(206) 543-0059(800) CLE UNIV
CLE credits pending

26 **LLC & Other Business Entities**
Location TBA
By UW CLE
(206) 543-0059/(800) CLE UNIV
CLE credits pending

Favorite Legal-research Web Sites

The following list is a sample of legal research sites prepared by Bradley J. Hillis, Legal Analyst, Office of the Administrator for the Courts for the State of Washington. For a more complete list, send e-mail to : Brad.Hillis@courts.wa.gov, or visit his Web site at: *http://www.wolfenet.com/~dhillis/index.htm.*

Washington

Searchable database of Washington court opinions, opinions from 40 other states, the U.S. Supreme Court and Ninth Circuit (you must register, but the service is free): *http://www.llr.com/opinion/PLS.HTM*

Legislature, pending bills, RCW, Constitution (WACs and State Register not yet on-line): *http://www.leg.wa.gov/*

Washington courts and State Law Library, published and unpublished Supreme Court and courts of appeal opinions since March 1996, addresses, calendar, press releases: *http://www.wa.gov/courts/*

Opinions of the Supreme Court and courts of appeal, since November 1995 (CD-Law): *http://www.cdlaw.com/*

State Law, Constitutions and Court Opinions

State Court Locator at Villanova Law School (opinions of Idaho, Alaska, California, etc.): *http://ming.law.vill.edu/State-Ct/index.html*

Searchable court opinions of 20 states from Washburn Law School — you can search the court opinions of those states that do not have a search engine located at their site: *http://lawlib.wuacc.edu/washlaw/washlaw.html*

Constitutions from all states: *http://www.harbornet.com/rights/states.html*

Address directory for all courts, nationwide: *http://www.courts.com/*

Addresses and biographies for attorneys via West or Martindale-Hubble: *http://www.wld.com/* or *http://www.martindale.com/*

FindLaw (a big legal list plus searchable law reviews online): *http://www.findlaw.com/*

Federal Materials

U.S. House Internet Law Library (U.S. Code, Code of Federal Regulations, Fed. Register): *http://www.house.gov/*

Library of Congress: *http://lcweb.loc.gov/homepage/lchp.html*

THOMAS - U.S. bills, Congressional Record: *http://thomas.loc.gov/home/thomas.html*

Cornell Legal Information Institute (U.S. Supreme Court opinions, U.S. Code, court rules. (Sign up to receive same day e-mail messages of Supreme Court decisions): *http://www.law.cornell.edu/lii.table.html*

Supreme Court cases, searchable, from 1967 - present: *http://www.usscplus.com/*

Emory Law School has links to opinions from all federal circuits: *http://www.law.emory.edu/*

Searchable recent opinions from all circuits from *National Law Journal* Extra: *http://www.ljextra.com/*

Law Libraries

University of Southern California Law Library Home Page (best West-coast library): *http://www.usc.edu/dept/law-lib/usclaw.html*

D'Angelo Law Library at University of Chicago (Lyonette Louis-Jacques "list of listserve groups" and her article, "Legal Research Using the Internet," are both great): *http://law.lib.uchicago.edu/lib/*

Yale Law Library (good source for international documents and a fun atmosphere): *http://elsinore.cis.yale.edu/lawweb/lawlib.htm*

Columbia University Libraries (especially strong for international topics): *http://www.columbia.edu/cu/libraries/*

In lieu of the regular column by WSBA disciplinary staff, we are publishing two formal opinions approved by the Board of Governors at its May meeting.

Formal Opinions 192 (Sale of a Law Practice) and 193 (Disbursal Accounts)

192
Sale of a Law Practice

I. Introduction

This opinion addresses the question whether, under the Washington Rules of Professional Conduct, a lawyer (the "Selling Lawyer") may sell his or her legal practice to another lawyer (the "Buying Lawyer"). This opinion holds that such a transaction is consistent with both public policy and the existing RPCs ("Rules"). Nonetheless, the Rules impose several limitations on such transactions. Those limitations are discussed as well.

II. The Legality of the Sale of a Law Practice

Nothing in the Rules expressly or impliedly prohibits the sale of law practices. The absence of an express or implied prohibition itself compels the conclusion that the sale of law practices is permitted. In addition, however, such sales—within the limitations discussed below—benefit both lawyers and the public. Among other things, the planning for and implementation of such sales can be an effective means by which a lawyer who wishes to leave the practice can help ensure that his or her clients continue to be served by competent counsel.

III. Ethical Limitations on the Sale of a Law Practice :

The balance of this opinion addresses actual or arguable ethical limitations on the sale of law practices. The reader is cautioned, however, that additional limitations may apply in particular cases.

A. ***Avoidance of Dishonest Conduct.*** As in any other aspect of their dealings with others, lawyers engaging in the purchase or sale of law practices must avoid "conduct involving dishonesty, fraud, deceit or misrepresentation." RPC 8.4(c); *cf. In re Saulnier*, 97 Wn.2d 676, 648 P.2d 433 (1982); *In re Krogh*, 85 Wn.2d 462, 536 P.2d 578 (1975); *In re Smith*, 315 Or. 260, 843 P.2d 449 (1992).

B. ***Limitations Pertaining to the Duties of Confidentiality and Secrecy.*** RPC 1.6 provides:

> (a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).
>
> (b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent the client from committing a crime; or
>
> (2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.
>
> (c) A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.

The Terminology section of the Rules provides in pertinent part:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate where the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Because the Selling Lawyer and the Purchasing Lawyer are not part of the same firm, the Selling Lawyer may not reveal a particular client's confidences or secrets to the Purchasing Lawyer without the client's express consent, after notification of the pending change. See, *Koehler v. Wales*, 16 Wn. App. 304, 311, 556 P.2d

233 (fn.6)(1976).

This does not mean, however, that there is no way for the Purchasing Lawyer to learn about the Selling Lawyer's practice. For example, the identities of a lawyer's clients and the parties adverse thereto, and a description of the nature of the matter, will typically constitute neither confidences nor secrets. *See, e.g., State v. Sheppard*, 52 Wn. App. 707, 703-14, 763 P.2d 1232 (1988); *cf. Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). Similarly, there would be no limitation upon the Selling Lawyer revealing the information about particular matters as long as the Selling Lawyer does not provide the names of particular clients or information from which the names could readily be determined. And, in any particular case, the client may consent, after consultation, to revelation of his or her confidence and secrets to the Purchasing Lawyer.

C. *Multiple Client Conflict Checks.* RPC 1.7 provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). 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.

RPC 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or
>
> (b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

The same multiple client conflict of interest rules that would apply if the Purchasing Lawyer were to acquire a new client from some other source apply to the acquisition of a client as the result of a purchase of a law practice. On the other hand, former clients of the Selling Lawyer and current clients of the Selling Lawyer who do not become clients of the Purchasing Lawyer need not be analyzed under either the current client or the former client conflicts rules as long as the Purchasing Attorney does not learn any confidences or secrets of that client.[1]

D. *Noncompete Provisions.* RPC 5.6(a) prevents a lawyer from offering or accepting

> [a] partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . . .

By its terms, this rule does not prohibit the Selling Lawyer and the Purchasing Lawyer from entering into an agreement by which the Selling Lawyer agrees not to compete for clients against the Purchasing Lawyer in the future. *Accord* Oregon State Bar Legal Ethics Op No 1991-106.

E. *Changes to Client Fee Agreements.* Another question that can arise is whether the Purchasing Lawyer has the right to insist upon an increase in fees above and beyond what the Selling Lawyer agreed to with a client.

The Purchasing Lawyer is not a party to any fee agreement between the Selling Lawyer and that lawyer's clients and thus is not bound by those agreements. The Purchasing Lawyer's fee agreement is, of course, bound by the terms of RPC 1.5, and both the Purchasing Lawyer and the Selling Lawyer must make sure that a client understands the basis on which the Purchasing Lawyer's fee will be determined. In addition, the Selling Lawyer's duty of competent representation under RPC 1.1 requires the Selling Lawyer to advise clients fairly and fully about their

options in regard to fees. *See also* RPC 1.15 regarding an attorney's duties upon withdrawal from representation.[2]

F. *Recommendation of the Purchasing Lawyer by the Selling Lawyer.*

Another question that can arise concerns whether the Selling Lawyer can affirmatively recommend the Purchasing Lawyer to his or her clients. Under RPC 7.2(c),[3] the answer is "no." *See also, Walsh v. Brousseau*, 62 Wash. App. 739, 744-45, 815 P.2d 838 (1991) (holding that a sale of law practice agreement in which the selling lawyer had a continuing duty to refer clients to the purchasing lawyer violated RPC 7.3); *Hizey v. Carpenter*, 119 Wn.2d 251, 264, 830 P.2d 646 (1992).

This does not mean, however, that the Purchasing Lawyer may not communicate in writing with the Selling Lawyer's clients and make truthful and not misleading statements about his or her own abilities. *Cf.* RPC 7.3;[4] RPC 7.1;[5] *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 100 L. Ed. 2d 475, 108 S. Ct. 1916 (1988). This also does not mean that the Selling Lawyer has no responsibility whatsoever with regard to evaluating the Purchasing Lawyer's ability to handle the work. RPC 1.1 provides in part that "[a] lawyer shall provide competent representation to a client." The Selling Lawyer must take reasonable steps under the circumstances to ensure that the Purchasing Lawyer is at least minimally competent. *Cf.* ABA Formal Op. No. 92-369 (1992); ABA Formal Op. No. 88-356 (1988).

G. *Releases of Liability.*

RPC 1.8(h) provides that a lawyer who is representing a client in a matter:

> Shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

The Selling Lawyer cannot, as a matter of course, seek releases from any clients unless those clients are first informed that independent representation is appropriate in connection with this release. The procurement of such a release would also be dependent upon the other more general duties that a lawyer owes a client, including but not limited to the duty to avoid "conduct involving dishonesty, fraud, deceit or misrepresentation" pursuant to RPC 8.4(c).

H. *Dealing with Clients Who Refuse To Allow the Transfer.*

With regard to withdrawal from representation, RPC 1.15 provides:

> (a) Except as stated in section (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:
>
> (1) The representation will result in violation of the Rules of Professional Conduct or other law;
>
> (2) The lawyer's physical or mental condition materially impairs his ability to represent the client; or
>
> (3) The lawyer is discharged.
>
> (b) Except as stated in section (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> (1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (2) The client has used the lawyer's services to perpetrate a crime or fraud;
>
> (3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
>
> (4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (6) Other good cause for withdrawal exists.
>
> (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) A lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Unless one of the specific bases for withdrawal stated in this section can be shown to exist, the Selling Lawyer would be obligated to complete work previously accepted that the client does not wish to have transferred to the Purchasing Lawyer or, presumably, some other lawyer of the client's choice.

Notes:

[1] *Cf.* RPC 1.10(c):

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) Any lawyer remaining in the firm has acquired confidences or secrets protected by rules 1.6 and 1.9(b) that are material to the matter.

[2] The question whether the Selling Lawyer may have contractual liability to a client if the Selling Lawyer refuses to complete a matter that the client wishes the Selling Lawyer to complete is a matter of contract law on which we express no opinion.

[3] RPC 7.2(c) provides:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

See also, ABA Formal Opinion No. 1994-388.

[4] RPC 7.3 provides:

(a) A lawyer shall not directly or through a third person solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship in person or by telephone, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not send a written communication to a prospective client for the purpose of obtaining professional employment if the person has made known to the lawyer a desire not to receive communications from the lawyer.

[5] RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

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Disbursal Accounts

Facts: As required by RPC1.14(a),[1] Lawyer generally maintains client funds in an IOLTA account. When funds held in trust are payable to a client or nonclient, Lawyer simply writes a check on that account to the payee.

Recently, Lawyer has been told that Lawyer can secure free or reduced price services or obtain other benefits if Lawyer will use a non-IOLTA disbursing account in addition to an IOLTA account. Instead of writing a trust account check directly payable to the payee, Lawyer would write a check payable to the disbursing account and would then, in turn, cause a check to be written on that account to the payee. The potential for benefit arises because of the "float" on the disbursing account.

Question: May Lawyer use such a disbursing account?

Conclusion: No.

Discussion: RPC 1.14(a), which is set forth above, requires that "[a]ll funds. . . shall be deposited in" an IOLTA account.[2] RPC 1.14 makes no exception for disbursing accounts, and we see no basis for reading one into the rule as a matter of interpretation. Moreover, the obvious purpose behind the trust account rules — to maximize the degree of protection accorded client funds — is not served by allowing those funds to pass through a disbursing account.[3]

Notes:

[1] RPC 1.14(a) provides:

(a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in RPC 1.14(c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

[2] *See also,* RPC 1.14(c), which provides in part:

(c) Each trust account referred to in RPC 1.14(a) shall be an interest-bearing trust account in any bank, credit union or savings and loan association, selected by a lawyer in the exercise of ordinary prudence, authorized by federal or state law to do business in Washington and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Washington Credit Union Share Guaranty Association, or the Federal Savings and Loan Insurance Corporation, or which is a "qualified public depository" as defined in RCW 39.58.010(2), which bank, credit union, savings and loan association or qualified public depository has filed an agreement with the Disciplinary Board pursuant to rule 13.4 of the Rules for Lawyer Discipline. Interest-bearing trust funds shall be placed in accounts in which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to reserve by law or regulation.

(1) A lawyer who receives client funds shall maintain a pooled interest-bearing

trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to The Legal Foundation of Washington, as established by the Supreme Court of Washington. All other fees and transaction costs shall be paid by the lawyer. A lawyer may, but shall not be required to, notify the client of the intended use of such funds.

(2) All client funds shall be deposited in the account specified in subsection (1) unless they are deposited in:

(i) a separate interest-bearing trust account for the particular client or client's matter on which the interest will be paid to the client; or

(ii) a pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client.

(3) In determining whether to use the account specified in subsection (1) or an account specified in subsection (2), a lawyer shall consider only whether the funds to be invested could be utilized to provide a positive net return to the client, as determined by taking into consideration the following factors:

(i) the amount of interest that the funds would earn during the period they are expected to be deposited;

(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's benefit; and

(iii) the capability of financial institutions to calculate and pay interest to individual clients.

(4) As to accounts created under subsection (c)(11), lawyers or law firms shall direct the depository institution:

(i) to remit interest or dividends, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to The Legal Foundation of Washington. Other fees and transaction costs will be directed to the lawyer;

(ii) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and the amount of service charges deducted, if any, and the account balance(s) of the period in which the report is made, with a copy of such statement to be transmitted to the depositing lawyer or law firm.

[3] In light of our answer under RPC 1.14, we need not consider whether the use of a disbursing account for Lawyer's benefit would create conflict of interest problems under RPC 1.7(b) and 1.8(a).

The Oxford Dictionary of American Legal Quotations

Fred R. Shapiro, 582 pp., hardcover, $49.95 Oxford University Press (198 Madison Avenue, New York NY 10016-4314), 1993; to order, call (800) 451-7556.

reviewed by **Robert C. Cumbow**

Fred Shapiro's *Oxford Dictionary of American Legal Quotations* is a handy book for anyone who writes about law and a convenient and varied resource of quotations of all kinds for your next brief, CLE, law review article, or speaking presentation. Its biggest advantage is that, unlike most editions of *Bartlett's Familiar Quotations* (which it resembles in many other respects), the book is arranged by topic, not by author. This is consistent with the way in which this book, and most quotation books, are most likely to be used.

Nevertheless, like a truly valuable reference work, it is also indexed by key word and by author's name; so there's no way you can fail to find what you're looking for. For example, suppose you want to find the source of the famous remark, "It is a *constitution* we are expounding . . ." If you can remember that it was written by Justice John Marshall, you'll find it indexed under his name, and you'll be directed to the topic section "Constitution," where you will find the full quote and its cite. If you look for it under the key word "constitution," however, you will also find another reference directing you to Justice William Brennan's 1964 reiteration of the same statement in *Jacobellis v. Ohio*.

Or suppose you want to find "I know it when I see it," but you don't recall who said it *or* whether he was talking about pornography or obscenity. You can look under either key word "know" or "see," where you will be directed to the topic section on Obscenity. There you will find that it was Justice Potter Stewart, and you will acquire the ability to amaze your friends with the information that what he found so difficult to define was not obscenity in general but specifically hardcore pornography.

Oxford and Shapiro have set a definable frame for their book, admitting only American authors or quotes about the American legal system; so you'll find no tired old "Let's kill all the lawyers" here. Of course setting this frame has made it tempting for Shapiro to try to make his collection embody a theory of American law as well as a potpourri of zippy and resonant comments that bear repeating.

As a result, some of the quotes are overlong, amounting really to recitations of famous passages from drama, literature, or trial transcripts. And while deservedly famous and worth reciting, most seem to qualify more as excerpts than as quotations. This is especially true of the longer ones, such as Clarence Darrow's summation in *Leopold v. Loeb*, or Herman Melville's explication of the Fast-Fish-Loose-Fish law in *Moby Dick*, both of which are broken up into several shorter sections.

Shapiro also includes, in his prefatory materials, a list of the most frequently-cited sources in the book. Not surprisingly, the top slot belongs to Oliver Wendell Holmes, Jr. The number two position, with scarcely half as many citations, is Justice Robert H. Jackson. Rounding out the top ten are Benjamin Cardozo, Thomas Jefferson, Learned Hand, John Marshall, William O. Douglas, Felix Frankfurter, Louis Brandeis and William J. Brennan, Jr. A substantial number of non-lawyers figure high on the list as well—mostly writers of a satirical bent: Mark Twain, Ambrose Bierce, H.L. Mencken, Will Rogers, Finley Peter Dunne. This list, though interesting, is largely useless information: The frequency with which the various authors are quoted may be an index less of the importance of what those authors had to say than of how stylishly they said it; or maybe it is simply a function of how much we have available—who was around long enough to say the most stuff. Nevertheless, it gives something of an indication of the character and tone of the book.

The *Dictionary* is not only a ready reference for looking up quotes, known or unknown, it's also a browser's treasury. There is much to be gained—useful and otherwise—from thumbing these pages. For one thing, it gives the reader an opportunity to compare, at a glance, the thoughts of different writers on a single subject. And not only their thoughts, but also their personal styles. One discovers, for example, that the celebrated Learned Hand, for all his wisdom, really wasn't much of a writer—witness his grammatically bewildering effort to distinguish between *res judicata* and collateral estoppel:

> A judgment may be a merger or bar, or it may be an estoppel. For the first, the cause of action must be the same; for the second, they may be as different as possible.

This passage is immediately followed in the *Dictionary* by Benjamin Cardozo's explanation, penned three years later, of the same distinction, electric in its clarity.

Most of the quotes are from lawyers, judges, or legal or political writers; but some are from literature and even pop music (check the author index under Dylan, Bob). The book's sweep is broad enough to include the scathing observations of Lenny Bruce about the fundamentals of law and justice, the erudition of Burke and De Tocqueville, the rousing rhetoric of Paine and Thoreau, little gems from a couple of Judge Alex Kozinski's brilliant Ninth Circuit dissents, and outfielder Curt Flood on the constitutionality of baseball contracts.

Movies, television and popular fiction —arguably most Americans' main source of information (or misinformation) about lawyers and law — are amply represented through such diverse lawyer-related works as *Mr. Deeds Goes to Town*, *The Life of Emile Zola*, *Miracle on 34th Street*, *Adam's Rib*, the Perry Mason novels of Erle Stanley Gardner, *Judgment at Nuremberg*, *Love Story*, *The Verdict*, and *JFK*. Occasionally Shapiro makes an apparently arbitrary decision regarding whether to classify a quote under literature or motion pictures. *To Kill a Mockingbird* and *Anatomy of a Murder* are both novels and movies; *Inherit the Wind* and *Twelve Angry Men* were plays before they were films; and *The Caine Mutiny* was a novel, a play *and* a motion picture. Arguably all are best known as movies, but Shapiro seems reluctant to quote a screenplay if he can quote its original literary source instead.

Color and humor abound. All the best lawyer jokes will be found here, as well as whimsical moments from courtroom encounters, excerpts from interesting wills of famous people, oddly written judicial

decisions ("Opinions, Curious"), and the jaded views of Groucho Marx on copyright law. Delicious legal lampoons from Marx Brothers movies also appear, though indexed under their writers rather than under "Marx": the great contract scene from George S. Kaufman and Morrie Ryskind's *A Night at the Opera* ("there ain't no sanity clause") and the criminal sentencing from Harry Ruby's hilarious screenplay to *Duck Soup* ("I sentence you to ten years in Leavenworth, or eleven years in Twelveworth." "I'll take five and ten in Woolworth.").

For many lawyers — and certainly for law students — the law school quotes will be the most familiar. Professor Kingsfield's "Here's a dime, go call your mother and tell her you will never be a lawyer" is eye-openingly cross-referenced to the real-life incident on which it was based—involving Professor Edward Henry "Bull" Warren, also the originator of "Look well to the right, look well to the left," familiar to all first-year law students. Strangely missing is Kingsfield's widely-quoted "skulls full of mush" metaphor—a suitable candidate for inclusion in a future edition. The editor graciously asks for suggestions for improving and adding to the book, and includes his own address to send them to, evidencing a clear intent to regard the *Dictionary* as a living, growing work and a continuing contribution to American legal lore.

Lawyers are fond of lacing their work with quotes. With this book available, there's no longer any excuse for getting it wrong.

Seattle attorney ***Robert Cumbow*** *chairs the Editorial Advisory Board and frequently reviews books for the* Bar News

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Inslee, Best, Doezie & Ryder, PS, a well-established, mid-sized downtown Bellevue firm seeks attorneys with strong entrepreneurial/client development skills and five or more years' experience in land use, litigation, employment or business law. Successful candidates will have a solid work record and client base, and a team-oriented attitude. Firm's compensation arrangement encourages lateral transfers. Submit a cover letter, résumé and details of your transferrable practice to: Firm Administrator, PO Box C-90016, Bellevue WA 98009.

Small dynamic Seattle law firm seeks one attorney and two paralegals, both highly experienced in environmental coverage defense litigation, to quickly assume major responsibilities in pending cases. Extensive experience in discovery and motion practice phases of environmental coverage litigation in Washington a prerequisite. Qualified individuals, please send résumé and list of environmental cases previously worked on, and a writing sample (attorneys only) to *Bar News* Box 501. All inquiries will be treated as confidential.

Litigation attorney: small downtown Seattle law firm seeks attorney with commercial/business/construction litigation experience. Prefer admittance in both WA and OR. Fax résumés to Sanford Levy (206) 382-5527 or mail to Levy & Associates, 1601 5th Ave., Ste. 2370, Seattle WA 98101.

ZymoGenetics, a local biotechnology company located in Seattle's historic

Lake Union Steam Plant, is looking for a Patent Attorney. The successful candidate will have at least three years' experience preparing and prosecuting biotechnology patent applications. State and Patent Bar membership; excellent written and oral communication skills; and exceptional attention to detail are a must. The qualified applicant should perform independently and creatively within a team environment. Technology licensing and client counseling experience preferred. As a subsidiary of NOVO NORDISK, the world's largest manufacturer of insulin, ZymoGenetics offers an exciting environment characteristic of a small research and development company, along with the scope and stability of a large pharmaceutical corporation. We also offer intellectual challenge, state-of-the-art facilities and a generous benefits package. Please apply by sending your résumé/CV, noting reference number #71N196 to: ZymoGenetics, Inc., Human Resources, 1201 Eastlake Ave. E., Seattle WA 98102. ZymoGenetics is committed to equal opportunity and diversity.

Associate position: we are a small, established firm with a practice concentrating on real estate, bankruptcy, litigation and creditor rights, seeking an associate with at least two years of similar experience. Congenial and motivated office with good benefits. Work load is substantial and varied, with significant client contact expected. Please submit résumé and writing sample to William L. Bishop, Jr., Bishop & Lynch, PS, 720 Olive Way, Ste. 1600, Seattle WA 98101.

Tired of business as usual? We're different! Sebris Busto, PS, is a small employment law firm (management) with blue-chip clients. We are looking for a seasoned litigation attorney with a minimum of ten years' experience in handling employment law matters. Candidates must have strong interpersonal skills, quality litigation leadership experience, as well as the ability to assume responsibility for client matters. Send résumé to Mari Stosich-Wall, Sebris Busto, PS, 10900 NE 8th St. Ste. 1500, Bellevue WA 98004. All replies are confidential.

Will Search

Gerald Uhrland: anyone having knowledge of a Will executed by Gerald Uhrland, born 11/5/33 at Cincinnati, OH, died 5/17/96 at Friday Harbor, WA, please contact Charles Jackson at (360) 378-2191.

James Peter Kraft, resided in King County. Anyone having knowledge of a will executed by Mr. Kraft, please contact attorney Bill Hickman at (206) 744-5658.

Donna Lee West: anyone having knowledge of a Trust Agreement, dated May 21, 1975, executed by Donna Lee West of Spokane County, please contact attorney Debra J. Merkley at (206) 285-6181

Services

Forensic document examiner. Trained by Secret Service/U.S. Postal Crime Lab examiners. Court-qualified. Currently the examiner for the Eugene Police Department. Only civil cases accepted. Jim Green at (503) 485-0832.

Legal research is my forte! Contract attorney performs legal research at UW Law Library for lawyers anywhere in Washington State. Will draft trial briefs, motions, memoranda. Clerked in King County Superior Court, U.S. Bankruptcy Court. Elizabeth Dash Bottman, (206) 526-5777.

Complex litigation in Oregon? We are an AV law firm and will co-counsel or pay a contingent referral fee for personal injury, commercial litigation, employment law and civil rights, constitutional law, or other complex matters. We have successfully litigated in the U.S. Supreme Court and in federal and state trial and appellate courts in several western states. Call Don S. Willner & Associates (800) 333-0328 or (503) 228-4000.

Urology forensic consultant: experienced, boards, professor, M.D., J.D., plaintiff or defense; (314) 361-7780.

Oregon accident? Unable to settle the case? Associate an experienced Oregon trial attorney to litigate the case and share the fee. OTLA member; references available. Zach Zabinsky, (503) 223-8517.

Contract attorney: experienced, accomplished trial and appellate attorney available, twelve plus years' experience. Litigation and writing emphasized. References; reasonable rates. M. Scott Dutton (206) 324-2306, fax (206) 324-0435.

Registered professional land surveyor with J.D. and extensive experience as a consultant expert witness in boundary disputes. Author of articles and regular columns in recognized journals and instructor for land surveyors' seminars; active in professional societies. Jerry R. Broadus, Geometrix Surveying Inc. (206) 840-5680.

Contract attorney: will do research, memorandums, and motions on all areas of law, in every jurisdiction. Have clerked at the AG's, PD's, and at law firm. Very reasonable rates and prompt service throughout the Puget Sound area. (206) 257-1005.

Miscellaneous

Boyfriend wanted: DWF searching for intelligent, playful, handsome, successful, spiritual six-foot-plus man. Must love children, dogs, Bainbridge Island, good food, wine, intimacy. Possible long-term relationship. I am 42, attractive, well-educated, sophisticated and enjoy life's many pleasures. Please, no small-talk! No George Costanzas! (206) 781-3822.

Beach retreat — enjoy the luxury touch in our elegant beachfront penthouse in Gearhart, Oregon. Panoramic ocean view. Two bedrooms, two baths, plus loft; sleeps eight. Deck, fireplace, laundry facilities. Indoor heated pool, Jacuzzi, golf, tennis. Fully equipped kitchen; (503) 221-4291.

Orcas Island farmhouse — 30 acres with marine/island views, meadows, stream and waterfalls. Fully furnished, woodstove, sleeps six. Available by week-end, week or month year round. From $700/week. No smokers. (206) 781-2715.

Wanted: all in-house counsel. The Corporate Law Department (Section) of WSBA is preparing its 1997 Directory of members and subscribers. The Directory will be free to 1997 Section members. Questionnaires will accompany the current Section Newsletter, to obtain accurate information for publication. PLEASE RESPOND PROMPTLY. For information, call Sheri Borgford of WSBA, at (206) 727-8239.

Pacific County Courthouse

Pacific County, the third county created north of the Columbia River, was established by the Oregon Territorial Legislature on February 3, 1851. In 1889, promoters arrived in South Bend and began advertising it as "The Baltimore of the Pacific." On February 5, 1993, the citizens chose to move the county seat to South Bend from Oysterville.

Construction on a grand courthouse began in 1910 and was completed the following year at a cost of $132,000, Tiffany glass dome included! Once dubbed "The Gilded Palace of Extravagance" by local newspapers, it has remained essentially unchanged since the day it was built — with two notable exceptions. In the 1940s, the county commissioners assigned a county jail inmate, who was also an artist, the project of painting scenes of Pacific County's early history on panels in the foyer. He also painted the cement columns on the second floor of the rotunda to resemble marble; they are mistaken for the real thing to this day. In the spring of 1980, the art glass dome was cleaned and restored to its original brilliance. Ironically, the price tag was $144,700, nearly $13,000 more than the cost of constructing the entire building in 1910!

The Pacific County Courthouse overlooks the Willipa River, with the majestic Olympic Mountains and the Pacific Ocean close by. It is an architectural treasure in the midst of a locale rich in recreational opportunities.

*Photographer **Stan Morse** and writer **Csilla Muhl**, both Washington attorneys, have combined their talents to offer this continuing department to our readers.*

WSBA Run-off Election Results

Terrance (Terry) Lee of Vancouver won the run-off in the WSBA Board of Governors election for the Third District. Votes were counted July 8. Lee and Marla Ludolph-Heikkala, also of Vancouver, had a run-off when none of the three candidates won the majority of votes in the first round. Melissa Denton of Olympia was eliminated in the first round.

The other three winners (running unopposed) were: Mary Alice Theiler, King County at Large; Donald Powell, Sixth District; Marijean E. Moschetto; Eighth District.

The new governors will take their place on the Board at the Bar's Annual Business Meeting on September 6 at the Seattle Hilton. Biographies and photos of the new governors and President-elect Tom Chambers will run in the October issue of the *Bar News*. ◆

New State Office of Public Defense

Effective July 1, 1996, the Washington State Office of Public Defense was established to administer the appellate indigent defense fund, including payments to attorneys who represent indigent defendants on appeal.

Office of Public Defense, 925 Plum St., Building 4, Third Floor, PO Box 40957, Olympia, WA 98504-0957, phone — (360) 956-2105, fax — (360) 956-2112. Bobbi Olson, Interim Director — (360) 956-2107; Kelly Reid, Administrative Assistant — (360) 956-2106; Ann Childers, Attorney Payments/Recoupment — (360) 956-2108; Sharon McAferty, Court Reporter/Co. Clerk Payments — (360) 956-2109. ◆

José Gaitán named 18th president of Hispanic National Bar Association

José E. Gaitán, a principal in Gaitán Lenker Davis & Myers in Seattle, was recently named president of the Hispanic National Bar Association, which represents more than 27,000 attorneys across the nation. He also co-founded and served as chairman of the board of the Washington State Hispanic Bar Association.

Gaitán's practice focuses on complex insurance cases. He has served as a deputy prosecuting attorney for King County and an assistant U.S. attorney for the Department of Justice. He is a former faculty member of 12 years at the University of Washington School of Law, regularly teaches at the National Institute of Trial Advocacy, and co-authored a chapter in the current *Washington Civil Procedure Deskbook*. In 1995 he served as moderator at the White House Council on Small Businesses. He currently serves as vice president of the Seattle World Affairs Council. ◆

WSBA Annual Business Meeting, Lunch and Reduced-fee CLE on September 6

Don't forget the WSBA Annual Business Meeting and cheap CLE on September 6 at the Seattle Hilton. The $25 CLE, 3.75 credits pending, is produced by the Public Relations Committee. **Discovery — A Tool, Not a Club**, is about the abuse of discovery and is designed to enhance the image of lawyers, improve professionalism and assist attorneys in avoiding malpractice. It runs from 8 a.m. to noon. Watch your mailbox for the brochure and registration form or call program coordinator Jerrie Bennett at (206) 727-8202 for registration information.

The CLE is followed by the 1996 WSBA Awards Luncheon at 12:15 at the Top of the Hilton. Cost for lunch is $20. Board of Governors' Awards to be presented include: The President's Award; Board of Governors' Award for Professionalism; Angelo Petruss Award for Lawyers in Public Service; Outstanding Judge Award; WSBA Pro Bono Award; WSBA Courageous Award; and the Affirmative Action Award. For lunch reservations, watch your mailbox for the brochure mentioned above or call Sharlene Steele at (206) 727-8262.

The official business meeting will follow the lunch. Since no resolutions were filed, business will concentrate on the passing of the gavel from President Ed Shea to President-elect Tom Chambers. ◆

"Since You Asked" is a forum for members to ask questions of the Board of Governors. The first "Since You Asked" appeared in the June 1996 issue. The feature will appear periodically. Send your questions to: WSBA, Board of Governors, 500 Westin Bldg., Seattle, WA 98121-2599.

Professionalism Improves with Awareness and Understanding

Promoting Diversity and Eliminating Bias in the Legal Profession will be presented on September 12 by the Washington State Bar Association CLE Committee and Opportunities for Minorities in the Legal Profession Committee. Professionalism begets trust. Trust is earned through understanding, appreciation, and acceptance of values. How you are respected — and whether you respect differences found in others — will profoundly impact your ability to communicate with others and practice law.

This fascinating program has been approved for 6.50 ethics credit by the Washington State Board of CLE. Here's your chance to fulfill the new mandatory CLE ethics requirement (see article below), explore the ethical implications of bias within the legal system, and determine how to decrease conflicts and improve your effectiveness within the legal system.

Program chairs Felicia L. Gittleman (Bogle & Gates P.L.L.C. and chair of WSBA Opportunities for Minorities in the Legal Profession Committee) and Brian S. Tsuchida of The Public Defender Association have selected a distinguished faculty for this special seminar.

Keynote Speaker Mary Alice Theiler's remarks will address *"Multi-Cultural Awareness and Diversity — Keys to Enriching the Legal Profession and the Communities We Serve."* Ms. Theiler — with the Seattle firm of Theiler Douglas Drachler & McKee — is a governor-elect of the WSBA's Board of Governors, a past president of the Seattle-King County Bar Association, and recipient of the 1996 Helen M. Geisness Award.

The featured presenter in the afternoon is Donna M. Stringer, Ph.D. , president of Executive Diversity Services, Inc. in Seattle. She will explore *"Diversity and Cross-Cultural Interactions — How to Decrease Conflicts and Improve Your Effectiveness within the Legal System."* She is a social psychologist with nearly 20 years experience as a manager and teacher and trainer of multi-cultural issues who has been a featured speaker at many local, state and national conferences, and has conducted training programs for more than 30,000 people.

Other faculty members include: Professor David Boerner at Seattle University School of Law, Robert S. Mahler from the Seattle firm of MacDonald Hoague & Bayless; George P. Trejo, Jr. from the Trejo Law Offices in Yakima; the Hon. Richard A. Jones from King County Superior Court; Sharon A. Sakamoto from the Seattle firm of Kawakami & Sakamoto; and the Hon. Albert M. Raines from the Office of Administrative Hearings.

For more information or to request a brochure, please contact Michele Kramer at the WSBA at (206) 727-8202. ◆

MCLE Ethics Rule Reminder

By now every lawyer licensed in Washington is aware that the Supreme Court amended the mandatory CLE requirements effective January 1, 1996. The change requires that six credits within the three-year, 45-credit hour CLE requirements must be "devoted exclusively to the areas of legal ethics, professional responsibility and professionalism," the latter including issues of diversity and anti-bias training. The change will first affect those practitioners reporting their 1994-96 credits next January. That group must have two credits by the end of this year. Those who will report for the years 1995-97 will have to include four credits, and the group reporting for 1996-98 will need the full six credits.

Several WSBA programs are scheduled in these fields this fall, so if you have this new requirement coming due next year, you should add them to you calendars. Some local providers will have a small portion of a seminar on other topics approved for some ethics credits. See the "Calendar" section of the *Bar News* for seminar credit information.

Two upcoming WSBA seminars qualify for the full six credits. The first, Promoting Diversity and Eliminating Bias in the Legal Profession, will be presented on September 12 in Seattle (see article above). The second, Ethical Dilemmas for the Legal Profession, will focus

Continued on page 60

Mandatory Parent Education in Clallam County

by William G. Knebes, Court Commissioner

I watched as they silently filed into the room. Men and women with anxious faces, saying nothing to each other, yet sharing much in common. The facilitator began the program by asking each person to introduce themselves and describe their children. Then she quoted statistics which caught everyone's attention: 50% of all first marriages fail; 75% of all second marriages fail; between 70% and 80% of our children today will live a portion of their childhood in a single parent home.

Finally, she quoted from a longitudinal study of children of divorced parents. Five years after the divorce, only one-third of the children had properly adjusted, another third were experiencing minor problems traceable to their parents' separation and another third were experiencing intense difficulties. "The goal of this class," she said, "is to keep your children in the top third."

The class is called Children in the Middle and is a requirement for parents in dissolution and paternity cases in Clallam County. Healthy Families, a non-profit community counseling and treatment agency, conducts the class. Parents are referred by the Superior Court Clerk and a sliding fee scale is utilized. Persons attending are provided a guide to supplement the information presented.

Part of the program consists of watching a video which highlights four of the common problem areas in which parents, many times unknowingly, cause great anxiety in their children: 1) children as messengers; 2) disparaging the other parent in the presence of the children; 3) concerns about money; and 4) children as spies.

Mandatory parent education programs are beginning to proliferate. A brief survey shows Snohomish, Thurston, Lewis, Yakima, Spokane, Okanogan and Clallam counties mandate attendance, usually by local court rule. King County requires the education for parents in litigated cases who are referred to Family Court Services.

Several years ago it was Snohomish County and Judge James H. Allendoerfer that led the movement resulting in the passage of RCW 26.12.172. This statute clarifies the court's authority to order the parent classes. Oregon passed a similar law in 1995 and several counties in Oregon are now requiring parents to attend education classes.

So far, the feedback has been encouraging. In Clallam County, virtually all of the comments from attendees has been positive and attendance is now being used in Show Cause hearings as a badge of good parenting. Attorneys are also reporting encouraging words from their clients. One Yakima firm, Kendrick and Malane, has gone so far as to credit $50 against their clients' bills if they provide a certificate of completion, even though the cost of the seminar is $35.

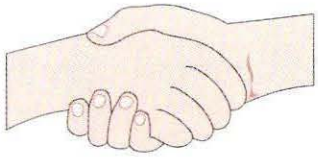
By the end of the program, the mood in the room had changed considerably. Gone were the anxious faces and the quiet room. In their place, was the sound of people sharing and caring. Caring about their children by learning how to mitigate the damage inevitably caused by a parental separation.

For additional resources, the January 1996 issue of the **Family and Conciliation Courts Review** has several articles concerning parent education programs. Contact: AFCC, 329 W. Wilson Street, Madison, WI 53703, (608) 251-4001. Three of the more popular programs are:

Children Cope with Divorce
Families First
1105 Peachtree Street N.E.
P.O. Box 7948, Station C
Atlanta, GA 30357-0948

Children First
Children First Foundation
207 East Washington Street
Belleville, IL 62220

Children in the Middle
Center for Divorce Education
P.O. Box 5900
Athens, OH 45701



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Seattle, WA 98121-2599

*Payment **must** accompany order*

Biking for CLE Credits

The Second Annual Black Hills Motor Classic CLE on August 5-7 is not your run-of-the-mill CLE. Not when the participants show up on motorcycles and sporting black leather instead of pinstripes. "People who show up in a car won't be turned away either," says Kevin Snell, president and "road captain" of the Street Legal Motorcycle Club of Minneapolis, which is made up of lawyers and non-lawyers. Their logo shows a bald eagle riding a motorcycle with the scales of justice hanging from the handlebars.

The CLE is held in conjunction with the national Black Hills Motor Classic in Sturgis, S.D., where a quarter of a million bikers converge for a week-long rally (the February issue of the ABA Journal featured an article on three Seattle lawyers who attended). The free CLE is at Horsethief Lodge in Hill City, S.D. Topics include: Securities Law; Muzzling Free Speech with Anti-Discrimination Laws; Americans with Disabilities Act; Family Medical Leave Act; Double Jeopardy; ADR; Civility, Ethics & the Language of the Law; and Actions Against Motorists that AIM at Motorcyclists. Sessions will be held in the mornings and evenings, with riding during the day. To register, call Kevin Snell at (612) 347-0374. ◆

National Poll Shows Preston Leads in Female Attorneys

According to the National Law Journal's most recent survey on how women are doing in the legal profession at the 250 biggest U.S. law firms, Preston Gates & Ellis ranked number one in the Pacific Northwest and 39th nationally.

Female attorneys represent 30.7 percent of Preston's professional staff. The national average for all law firms is only 9.1 percent female, while the average for the top 250 firms is 26.4 percent. The percentage of female attorneys is based on the total number of partners, associates and special status attorneys, and does not include support personnel.

Preston Gates & Ellis has 230 attorneys in seven West Coast offices and in offices in Washington, D.C. and Hong Kong. It was founded in 1883. ◆

MCLE Ethics — *Continued from page 54*

on commonly occurring problem areas for litigation and business attorneys. It will first be presented in Tacoma and Spokane in October, and thereafter in Vancouver, Seattle and Kennewick through November 21. Also, Kirke-Van Orsdel, the administrators of the bar-sponsored attorney liability insurance program, will present two-hour seminars in the last two weeks of October in Richland, Olympia, Seattle, Mount Vernon and Spokane. These sessions will emphasize proper law office management procedures that better serve every lawyer's ethical duty to their clients. It is designed for sole practitioners and firms of any size and will focus on proven methods to end confusion in discussing billing procedures with clients, clarifying information on the billing itself, and setting up better accounting and conflict of interest check systems. Support staff that have responsibilities in this area of office management are encouraged to attend.

Mailings on all these programs will be in your offices shortly. For questions about the ethics and reporting requirements, call the Bar's Licensing Department at (206) 727-8271. For questions on these and other WSBA seminars, call (206) 727-8202. ◆

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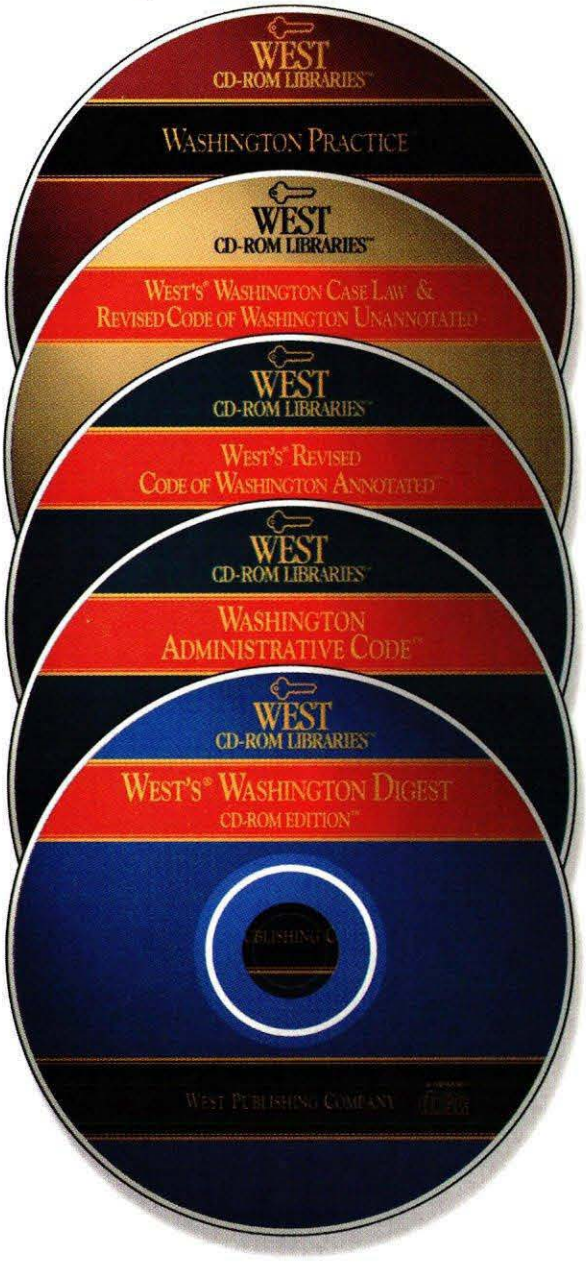

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