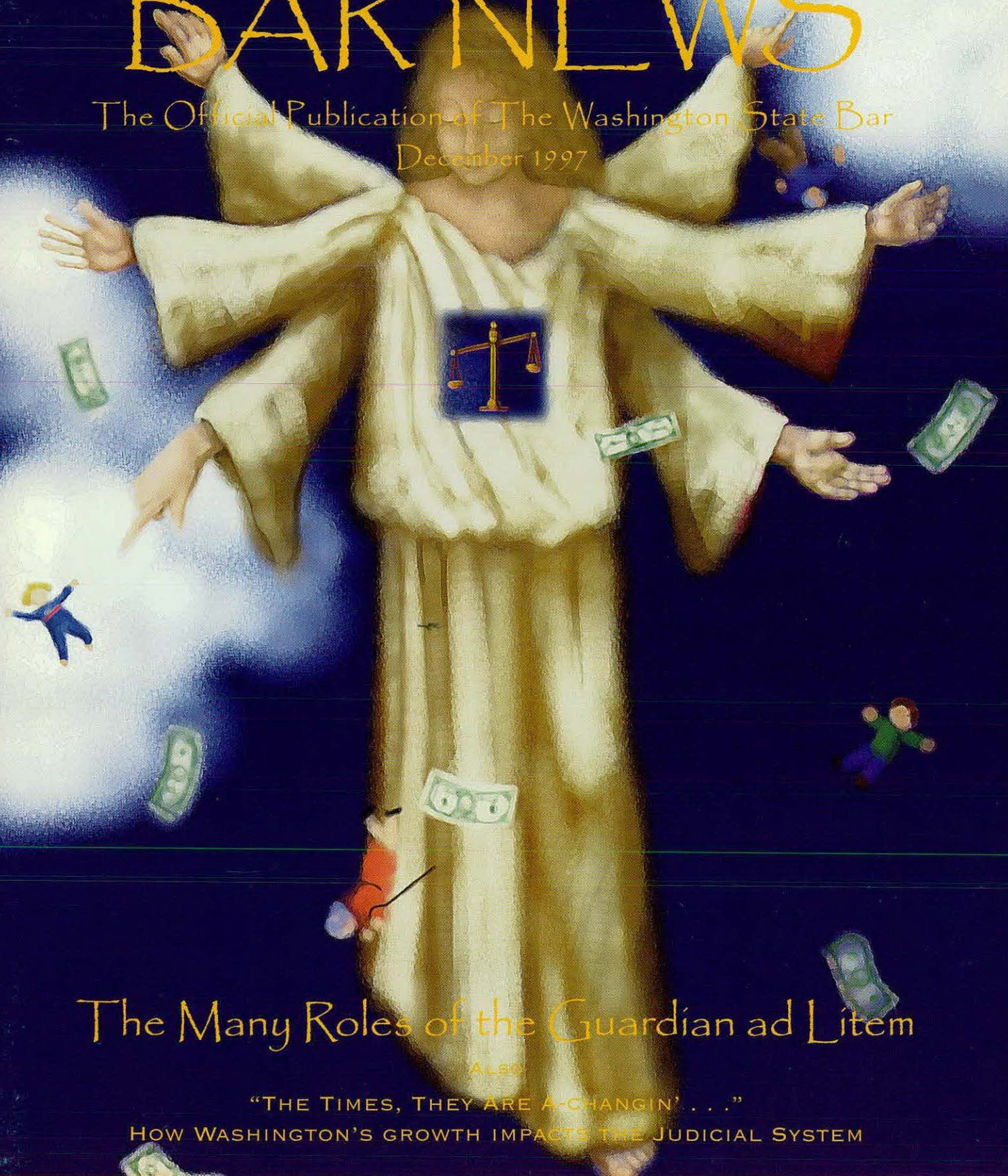


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The Official Publication of The Washington State Bar
December 1997



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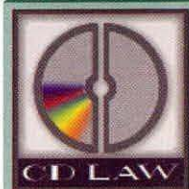
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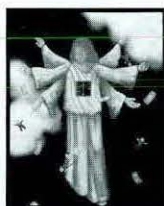
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TOBACCO SETTLEMENT NO CHANGE IN CORPORATE CULTURE

■ Editor:

I read with interest Attorney General Gregoire's article on the tobacco settlement. She is to be commended for suing the industry and for pursuing the settlement of the state suits. Unfortunately, her article tells us precious little about the actual terms of the settlement. By com-

mission and omission, she has painted a misleading picture of several important features. Since the proposal is now in the hands of our national political leaders, and knowing the financial and political power of the tobacco industry (let's not forget the \$50 billion dollar industry tax credit that was sneaked into the budget deal) only an informed public can ensure that the settlement is in its interest and is designed to carry out its professed goals.

A critical facet of the settlement and to

any solution to the cigarette problem is FDA control over cigarettes since nicotine, a critical component, is a highly addictive drug. Gregoire states that the settlement provides "clear FDA authority to regulate nicotine as a drug," but provides no details. Unfortunately, her statement is quite misleading. As proposed, the FDA, for 12 years, may require the gradual reduction, but not the elimination, of nicotine, *but only if* it meets the burden of proof of demonstrating by substantive evidence that the modification (a) will result in a significant reduction of the health risk associated with smoking, (b) is technologically feasible, and (here is the hook) (c) will not result in the creation of a significant demand for contraband. This shifting of the burden of proof to the FDA is unique among industries subject to its jurisdiction. Just why this industry should be accorded this exalted status is not explained. In addition, any modification must be delayed "to provide time and a process for Congress to intervene should it so choose." After 12 years, the FDA may require the elimination of nicotine but any such action must be phased in with an initial two-year delay "to permit time for a meaningful Congressional review." These invitations for Congressional intervention are again unique to the tobacco industry.

The industry's interest in not giving up control over nicotine is apparent when we consider that a United States District Court in North Carolina, the heart of tobacco land, ruled on April 25, 1997, that the FDA had jurisdiction to regulate tobacco as a "drug" and as a "device" under the Food, Drug and Cosmetic Act. *Covne Beam, Inc. v. FDA*, 958 F.S. 1060 (M.D.N.C. 1997).

Clearly, the settlement would weaken this portion of the decision. This same court also ruled that while the FDA has authority to impose access restrictions and labeling requirements on tobacco products, it lacks authority to restrict their advertising and promotion. However, the basis for the ruling was not the First Amendment consideration suggested by Gregoire, but rather § 360j(e) of the Food, Drug and Cosmetic Act. It is obvious that the negotiated trade-off was to weaken FDA control over nicotine in exchange for the advertising restrictions in the settlement. Considering the industry's long history of evasion and deceit, it will no

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doubt find ways to circumvent the agreed advertising restrictions. According to advertising executives interviewed by *USA Today*, the proposed restrictions on advertising could be circumvented by exploiting creative alternatives including direct mail, public smoking by celebrities popular among teens, new ad spaces on private property (e.g., gas pumps), conventional advertising at overseas venues popular among the young, skillful use of "sassy phrases" in word-only advertising, tobacco company sponsorship of cultural and high profile research and charitable events, and "wild" postings that pop up on urban construction sites. Bruce Horowitz, *USA Today*, June 23, 1997.

Gregoire does not tell us that the settlement would abolish all class actions, as well as all "joinders, aggregations, consolidations, extrapolation or other devices that resolve cases other than on the basis of individual trials." In other words, the industry does not want a level playing field. It wants only individuals it knows it can take on with vastly superior resources.

Individual suits have an additional hurdle. The industry is subject to an annual cap for damage suits — \$2 billion in the first year and rising to \$5 billion in the next six years. However, any judgment in excess of \$1 million will not be paid in the year entered unless every other judgment/settlement can be satisfied within the cap, and if it cannot, it will be rolled over, *without interest*, until it can be paid under the cap.

The settlement has provisions requiring the reduction of teenage smoking — 30% in five years, 50% in seven years, and 60% in 10 years. If the goals are not met, the industry will have to pay a fine of \$80 million a year for each percentage point it falls short of the goal with an annual cap of \$2 billion. But in the fine print, we find that these penalties are tax deductible as business expenses. This means that the American taxpayer, including those who do not smoke, will pay for a large portion of this penalty. In addition, any penalty paid is subject to a 75% refund *plus interest*, by a showing of good-faith compliance.

Gregoire rightly claims credit for the effort to reduce teenage smoking, but what about the millions of adults who were teens once and became addicted as

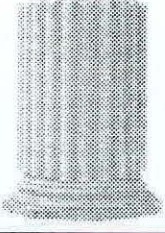
teens and who are dying at the rate of 400,000 per year? What about them? They are left to their individual devices but subject to the above limitations.

Gregoire states the settlement provides for "full disclosure of industry research." This would be nice if it were true. The actual language is for disclosure subject to "claims of privileges or protections including attorney-client privileges and work product" protections. This sounds reasonable on its face, but not when you

know that for years the industry has routed all research documents through its attorneys just for this reason.

Gregoire claims the settlement is about "a change in corporate culture." Yet, I see no change. I see no admission by tobacco of the suffering and death it has caused and continues to cause to untold millions of innocent people; no admission that nicotine is an addictive drug; no admission that cigarettes kill; no promise to get out of the killing business; no statement

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of intention to cease exploitation of the third world countries — with their more vulnerable populations. In other words, the industry will continue to spread misery and death but on a larger scale than before. The financial market's reaction to the settlement gives mute confirmation of this.

The settlement has many good, positive features and Gregoire and the others should be given credit for what they have accomplished, but until there really is a change in tobacco's corporate culture, it remains to be seen how much will be

accomplished. In the meantime, hundreds of thousands of Americans will continue to die horrible deaths from cigarettes and tobacco stock will continue to be a good investment.

ROY J. MOCERI
Friday Harbor

MANY LITIGANTS CAN'T
AFFORD DUAL WITNESSES

■ Editor:

Thank you for your article on "Therapy

vs. Forensics." This exposes this dangerous assumption of some or perhaps many in the psychological and psychiatric community that they can control who may properly be called as expert forensic witnesses in their fields under the guise of professional ethics. I was exposed to that in the last two years, but providently managed to finally convince the treating psychiatrist to act as the forensic expert for the plaintiff. If I had not been able to do that, we would, for lack of funds, have been unable to present forensic evidence of the causation of the plaintiff's very serious psychological injuries before the jury.

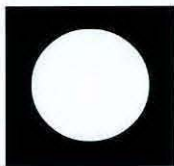
I, for one, am unperturbed that those trained in clinical psychology and psychiatry are not typically trained to know the rules of procedure, rules of evidence and standards of proof used in the courtroom. Furthermore, I believe that anyone who expects any expert to be unbiased is either extremely naive or drowning in a pit of self-delusion. I expect my experts to be as partisan for my cause as they can within the disciplines of their profession and that is the most bias I hope to run up against when my opponents hire experts. It is not the expert's job to try the case, it is my job. And it is my job to show the bias and weakness of the opposing expert's testimony. That is why I have books on psychology, psychiatry, and medicine on my bookshelves. That is why in case preparation and even at depositions and trial I may have books and peer-reviewed articles on psychological testing and DSM IV at my fingertips. That is because I hope to be an advocate in the modern methods of trial. That may be forgotten in our rush for mediation that can easily lose sight of the fact, often proven in trial, that some people's motives are not very nice.

Now, I am sure the defense bar would be delighted to limit the plaintiff's bar to the use of "forensic therapists" who merely evaluate the client. Then their own "expert" would not be so vulnerable to the observation that he or she had no intimate knowledge of the patient or relied on limited interview time and/or on tests of questionable application or problematic evaluation. But frankly, if independence and neutrality were the only real concerns of the ethical dilemma of whether treating health care providers should give their opinions on forensic matters, then we would not have to worry over differences of opinion as undoubtedly both forensic

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experts would be of the same opinion. Otherwise, one might merely accuse the plaintiff and defense bars of hiring their experts only to agree with their own position or accuse the jury and courts of making choices between competing schools of medicine.

In justification of their position, the authors set up the straw man patient as one with separate, dual roles to play in life, the patient and the litigant. My legal client does not have two roles. He or she is one person. It would seem to me that any psychologist or psychiatrist who fails to realize this is doing the patient a serious disservice. As a lawyer, I represent the whole person, not just an actor part of the person playing a role as a client-litigant. Furthermore, I would really like my doctors to understand my clients are whole people, not just some casting studies for different roles in life. I know that is not popular these days in a society where one must identify oneself according to his or her current role, but I find it a lot more realistic.

The authors continually stress the neutrality of the forensic observer as the goal. In 30-plus years of practice, I have yet to meet a neutral witness. In my experience, the more time and money invested in the witness, the more education, training and experience accumulated by that witness, the more that witness will have invested in his or her opinion. That very investment spells a bias. It may be the right bias, but that is for the trier of fact, the jury, to decide, not the expert's certifying board, whether it is the American Academy of Psychiatry or the American Society of Civil Engineers.

I am deeply disturbed that opinions such as those expressed by the authors in this article may influence the bench or bar as meritorious reasons to exclude evidence, whether in industrial injuries or through tort litigation or otherwise. Many litigants just cannot afford a treating physician and an expert forensic witness. While a dual expert witness requirement of plaintiffs may delight the defense bar, I do not believe our system of justice or society is seriously threatened by letting the treating physician, psychologist or psychiatrist testify on matters of forensics.

EDWARD D. CAMPBELL
Seattle

WRITTEN VOIR DIRE SUCCESSFUL

■ Editor:

Please allow me to weigh in from the hinterland regarding the *voir dire* controversy. I am a trial lawyer licensed in both Washington and Massachusetts, and practice in Massachusetts. Here there is no attorney-conducted *voir dire*. The trial judge asks several basic questions regarding prior knowledge of the case, the parties or the witnesses. There are also

questions regarding bias and possible inability to serve. Those potential jurors who sit quietly are then qualified for this jury.

In 1993, in a medical malpractice case, I persuaded a superior court judge to permit the use of a written jury questionnaire, to be drafted by both counsel and approved by the court. We had to agree that it was "informational" only, and would not be used as the basis for challenges for cause. Both sides had 10 questions that we believed would disqualify a

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Why Some Lawyers Make A Fortune... While Others Struggle To Earn A Living

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TRABUCO, CA - Why do some lawyers get rich while others struggle just to get by? The answer, according to California lawyer David Ward is not talent, education, hard work, or even luck. "The lawyers who make the big money are not necessarily better lawyers," Ward says. "They have simply learned how to market their services."

Ward, a successful sole practitioner who once struggled to attract clients, credits his turnaround to a little-known marketing method he stumbled across six years ago. He tried it and almost immediately attracted a large number of referrals. "I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight."

Ward points out that although most lawyers get the bulk of their business through referrals, not one in 100 has a referral system, which, he maintains, can increase referrals by as much as 1000%. "Without a system, referrals are unpredictable. You may get new business this month, you may not," he says.

A referral system, by contrast, can bring in a steady stream of new clients, month after month, year after year. "It feels great to come to the office every day knowing the phone is going to ring and new business will be on the line," Ward says.

Ward, who has taught his referral system to lawyers throughout the U.S., says that most lawyers' marketing is, "somewhere between atrocious and non-existent." As a result, he says, the lawyer who uses even a few simple marketing techniques can stand out from the competition. "When that happens, getting clients is easy."

Ward has written a report entitled, "How To Get More Clients In A Month Than You Now Get All Year!" which reveals how any lawyer can use this marketing system to get more clients and increase their income. For a **FREE** copy, call 1-800-562-4627 for a 24 hour **FREE** recorded message.

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person from serving, and another 20 that were expressive of relevant attitudes. The questions were not phrased to be subtle. Sample questions included:

1. "Do you believe that doctors should not be sued for damages?"

2. "Do you believe that doctors should not be responsible for personal injury unless they try to harm the patient?"

3. "Do you believe that medical malpractice lawsuits are, generally speaking, frivolous?"

More than 80% of the qualified jurors answered "yes" to three or more of the ten questions that have disqualified them from service. Questions from the defense perspective included:

1. "Do you believe that doctors should be liable for any bad result, even if they did nothing wrong?"

2. "Do you believe that doctors would generally lie on the witness stand to protect another doctor?"

Fewer than 10% of the jurors answered "yes" to one or more of the defense "automatic disqualification" questions.

The fact that attitudes are widely held does not mean that persons holding those attitudes are fit to serve on a specific jury. During the history of this country, now and the past, attitudes denigrating women and minorities were common. The fact that the attitudes are common does not mean people with those attitudes should not be discharged for cause on some juries. The only way to probe that is individual *voir dire* conducted by the lawyers.

In addition to protecting the right to an impartial jury, *voir dire* serves another

important function. It makes sure the jurors are involved in the litigation, and not just observers of it. My experience tells me that answering questions put by the trial lawyers makes jurors more involved, and piques both curiosity and interest in the case.

I urge Washington attorneys who favor curtailing *voir dire*, especially writers like Patricia Michl, to try a few cases in a jurisdiction where biased, disinterested or bored jurors are the norm. The anti-*voir dire* movement would die quickly. Do not make the mistake that Massachusetts has made, and assume that faster trials are as good as fairer trials.

R. KEITH PARTLOW
Boston, MA



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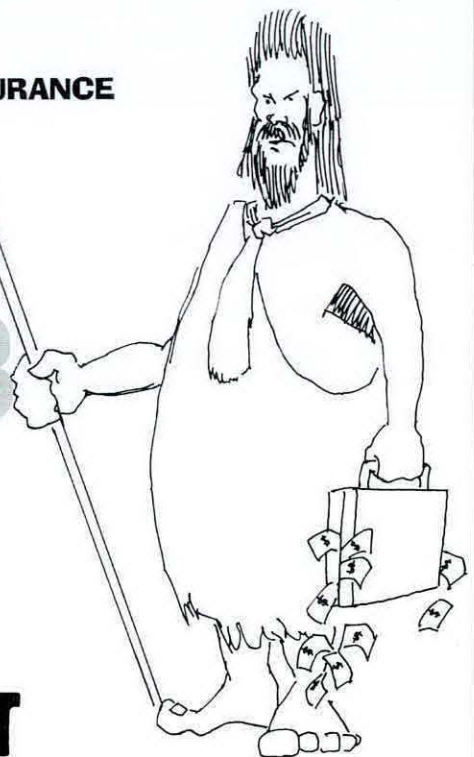
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Jeff Tolman

THE CHRISTMAS WISH

BY JEFF TOLMAN, GUEST EDITOR

Christmas was just around the corner. Another year was nearly done. Unfortunately, my work for the day was not. Phone calls had to be returned, and a client just walked in for "a second of my time." I was late for dinner and a call from my kids showed they weren't getting along — with each other or anybody else. My shopping days were dwindling. There was little money coming into the office, as people bought Christmas gifts rather than paid their lawyer.

I was frazzled as my client sat down and said, "I know I should have followed your advice, but ..."

"Why me?" I wondered.

"For Christmas all I really want is for things to go smoothly for a change."

The rest of the day got worse. My client took an hour rehashing (in a way so unorganized it had to have been on purpose) why he hadn't followed my advice and mentioned that, since our discussion took place after hours, he shouldn't be charged for it. My dinner was cold when I finally got home. My kids were each in solitary confinement in their rooms. My wife, Laurie, was obviously exhausted, still steaming from dealing with the kids, and disappointed that we had not been able to have dinner together. After some dialogue and a bit of TV, we all went to bed, grumpy and miles away from having the Christmas spirit.

★ ★ ★ ★ ★ ★ ★

I awoke the next morning to the smell of fresh coffee and my wife's beautiful face.

"I thought you might like to have some room service," she said.

"Thanks," I said, and gladly accepted the coffee.

When I arrived at the office, to my surprise, everyone else's cars were there. The staff and associates were busy working. Phones were ringing. Work was being processed. Clients were coming in smiling and thanking everyone for their kind service. My motion in district court went well. The judge even said, "Mr. Tolman, that was the finest argument

I have ever heard!" Two people I never thought would pay me brought in checks. One even left a tip as thanks for my patience. My clients came to their appointments on time and stated their problems in a

quick, smooth and orderly fashion. I gave them my best advice, and they promised to follow it. It was a great day at work.

When I got home, my kids had their homework done, their rooms cleaned and were just completing a couple of extra chores. "Hi, Dad!" they said, and each gave me a hug. Laurie had made one of the best meals I'd ever eaten. After an evening of great family camaraderie, as the kids went off to bed, she gave me that nice marital wink.

"Wow! What a day," I thought.

★ ★ ★ ★ ★ ★ ★

The upcoming days followed the same pattern. Everyone was nice, polite, articulate, friendly, and nearly perfect.

On the first day it was great. The next day, less

EDITOR'S PAGE

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great. Within a week, I was miserable. It struck me that life without imperfection has no color. It is the problems we face and solve that give us growth. There was little challenge — except to keep my head smaller than the state of Rhode Island from everybody complimenting me on my abilities as a lawyer and human.

Having a perfect life was totally imperfect. I realized that it is my clients' idiosyncrasies and human frailties that make them unique individuals. It is teaching my kids how to resolve a conflict so that everyone keeps their dignity that will make them good adults. It is not being paid by some clients that makes me wonder: "Why aren't they paying? Did I do

something wrong as a lawyer? How can I be better, so that I don't face the same problem again?" It is the imperfection that gives this life wonder. It is the struggle that makes me, and everyone else, think and dream and grow.

As Christmas approached, I looked to the sky and said, "I'd just like things back to normal again — less-than-perfect people in less-than-perfect situations, with all of their frailties, idiosyncrasies and individuality. That's what I'd like this Christmas."

★ ★ ★ ★ ★ ★ ★

I was awakened by the phone. "Hello, Jeff, this is Darrell Larson. I've been thinking about our last conversation — by the way, since we're not talking in the office, I won't be charged for this, will I?"

Just then my kids came in, Andy chasing after Chris, trying to hit him with a pillow, or his fist, whichever was most available. "Dad," Andy said, "Chris just woke me up. All I wanted to do was sleep for another half hour before I have to get up."

The kids looked over to see me smiling. The world was in disorder again. Just as it should be.

Happy Holidays!

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Mary Fairhurst

IT IS IN GIVING
THAT WE RECEIVE

My theme for this year is "Stewards of Justice" and how we can make a difference in the justice system. When I speak to attorneys and judges, I challenge each to be a steward of justice. Lynnwood attorney R. James Pidduck approached me after one of my speeches and said, "I think it's great that you are encouraging attorneys to get or stay involved in improving the justice system. But I think attorneys have an important role in being involved in and improving their communities." I agree.

There are a variety of ways to be involved. During the holiday season, there are many requests for our time, talents and treasures. We need to think about what we really care about and devote some of what we have and are to them. Many groups and organizations will welcome your new or continued involvement and input. And there are needs for which no groups or organizations yet exist that you might take the lead in addressing. When we get involved with efforts for which we have passion, they no longer seem like work — they become a pleasure.

When I began volunteering, I thought I was the one contributing. I have discovered that I am also receiving: I have made new friends; I have encountered new experiences and learned from them; I have learned more about myself and others; I have had the satisfaction of working with others toward a common goal; I have discovered that I can make a difference and that others are grateful for whatever I can contribute. I continue to volunteer because I want to contribute. But no matter how much I give, I find I receive more in return.

Remember, being an attorney is part of who we are.

Sometimes, we divide our roles into distinct boxes and think of ourselves as attorneys only in the office or the courtroom; we don't tell others proudly that we are attorneys when we work with them in nonlegal settings. When others know that you — the scout leader, the soccer coach, the reading tutor — are also an attorney, you reflect well on all of us in this noble profession. When you give, we all receive.

"Each of us has something to give . . ."

When you give, you also receive. You add to and expand your personal and professional experiences. You

learn about new areas and people. You network and make connections and friends. You apply your problem-solving skills in new areas and learn new approaches to addressing issues. You have the satisfaction of a job well done and of being part of the solution. You can be proud that you made a difference.

We have been given many gifts. As Island and San Juan Counties Superior Court Judge Alan Hancock said when he received the WSBA Outstanding Judge Award in 1996, "From those to whom much is given, much is expected."

Each of us has something to give, and it is in giving that we receive.



The Board of Governors, the President-elect and I wish you and yours the happiest and healthiest of holiday seasons.

Thirteen Causes of On-the-job Stress

If the prospect of the upcoming holidays leaves you feeling anything but cheerful, and the list below seems all too familiar, you may want to examine what Susan Jeffers discusses in her book, *Feel the Fear and Do It Anyway*. She suggests, "You may not be the cause of all that you experience, but you are the cause of your reactions to everything that happens to you."



1. Inadequate time to complete a job to one's satisfaction.
2. Lack of clear job description, or chain of command.
3. Absence of recognition or reward for good job performance.

4. Inability or lack of opportunity to voice complaints.
5. Many responsibilities, but little authority to make decisions.
6. Inability to work with those around you because of basic differences in personality, values or goals.
7. Lack of control or pride over the finished product.
8. Job insecurity due to pressures from within the organization, or the possibility of a take-over or merger.
9. Prejudice and bigotry due to age, gender, race or religion.
10. Unpleasant environmental conditions: cigarette smoke and other air pollution, crowding, noise, exposure to chemicals, commuting difficulties or inadequate equipment.
11. Not being able to use personal talents or abilities effectively or to their full potential.
12. Problems at home: family worries, financial problems, alcohol/drug problems, etc.
13. The "FUD" factor: fear, uncertainty and doubt.

— Compiled from DHHS statistics as distributed by Pierce County Medical Bureau in "Hope."

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Dennis P. Harwick
Executive Director

As most of you know, I'm leaving the WSBA at the end of this month. I've been writing a monthly executive director's column for over 12 years now, so it is a mixture of relief and consternation to know that this is probably my last bar association column. Should it be maudlin? Should it be profound? Should it be solemn? I simply don't know.

I would, however, like to use it as an opportunity to look back at the WSBA over the past seven years. Many things have changed. Some haven't.

When I arrived in late 1990, the place certainly looked different. We were in adequate, but inefficient, office space in the Westin Building. Most of the staff was still sitting at typewriters. There were no direct dial phone numbers or voice mail. The WSBA office didn't open until 9 a.m. and shut down promptly at 5 p.m. There were no computer networks or e-mail. The fax machine number was a secret, and it was turned off at 5 p.m. so that no one could send in a stealth fax. There was, quite simply, a siege mentality.

And why not? There was something of a siege. Member disenchantment was palpable — and quantifiable! There was a widespread member perception that the WSBA leadership lived high on the hog and that the finances of the WSBA were shaky. A lot of it was true. There were excesses. And the finances were not just shaky, they were downright frightening! At several points in the late '80s, the WSBA actually had a negative fund balance (net worth)!

But things are different now. Finances are stable and our fund balance complies with our outside auditor's recommendations. Staff is housed in efficient, comfortable work spaces and have the tools to provide services to WSBA members. The State Bar Conference Center is an efficient and flexible meeting facility. The "good old days" of the Board of Governors meeting at the fanciest resorts are now a dim memory. And, most

A LOOK BACK . . .

importantly, the quantity and quality of services provided to WSBA members and the public are vastly improved.

Along the way, I've met many remarkable people. I've worked with eight WSBA presidents: Lowell Halverson, Joe Delay, Steve DeForest, Paul Stritmatter, Ron Gould, Ed Shea, Tom Chambers and Mary Fairhurst. I've worked with 35 members of the Board of Governors — including the legendary Alva Long. I've worked with three *Bar News* editors — including the remarkable Lindsay Thompson. And I've worked with literally hundreds of volunteer leaders. An attempt to name any of them is destined to result in the embarrassment of overlooking someone worthy of

*"... the quantity and quality of services ...
are vastly improved."*

mention, but there are some who should be named: Ada Shen Jaffe, Ellen Dial, John McKay, Paula

Boggs, Carolyn Cairns, Jim Kaufman, John Powers, Sharon Sakamoto, West Campbell, Jan Eric Peterson, Frank Slak, Scott Smith, Marlin Appelwick, Wayne Blair, Greg Dallaire, Rosemary Daszkiewicz, Steve Tubbs, Don Curran, Judy Eiler, Monte Hester, Jim Handmacher, Vickie Norris, Marcella Fleming, Lisa Lowe, Robb Bakemeier, Pat McInytre, Jim Bamberger, John Purbaugh, Don Powell, Elaine Houghton, Llew Pritchard, Tom Fitzpatrick, Jeff Tolman, Dave Andrews, and Bart Waldman. These are my heroes.

I've also been blessed with some terrific colleagues: Bob Welden, Pat Dieken, Barbara Harper, John Fattorini, Bonnie Kam, Tom Russell, Diane DeRyss, Lee Ripley, Dodie Prescott, Jo Morehouse, Bryn Hancock, Alice Paine, Lauren Moore, Judy Foster and Barbara Clark.

It's not easy saying goodbye or letting go. I will always wonder how much more we could have accomplished.

I wish you all well.

EXECUTIVE'S REPORT

Adjusting in the Aftermath:

Last year, the Washington State Legislature enacted sweeping changes to the laws under which Washington courts appoint guardians ad litem in family law,¹ juvenile and guardianship cases.² The intent of the 1996 "Act Relating to Guardian and Guardian Ad Litem Systems To Protect Minors and Alleged Incapacitated Persons"³ was to "make improvements to the guardian and guardian ad litem systems currently in place for the protection of minors and incapacitated persons."⁴ This article is limited to discussion of guardians ad litem (hereinafter "GALs"), who are persons appointed by the court for a temporary and specific set of purposes, primarily to investigate and report to the court. GALs are distinguished from guardians, who are generally appointed for longer terms and have decision-making authority on behalf of the ward for whom they are appointed.

The legislature's focus on GAL issues was first directed by complaints from those in the guardianship arena, who testified about the wrongs inflicted by GALs upon them, their loved ones or their clients in guardianship cases.⁵ Soon thereafter, however, similar anecdotes were given of GAL abuses in family law cases,⁶ which centered on the futility of challenging a GAL once appointed and of the difficulties in challenging the GAL's recommendations in court. The Legislature jumped in to correct problems perceived to have been caused in large part by lack of judicial control over GALs.

Complaints about GAL fees and billing practices were supported by testimony of

hourly billing rates, excessive final bills, absence of monthly statements or statements which did not provide enough detail about GAL activity on the case, and GALs churning the case to incur larger fees. In some cases, large GAL fees were billed, but a written report was never prepared.

Many of the concerns voiced have a legitimate factual foundation. Certainly, every practice area has its own brand of horror stories. The lack of accountability is attributable to the lack of a "system" to oversee GAL activity.

In keeping with legislative intent to make improvements to protect vulnerable populations, the new legislation set requirements for guardians ad litem relating to mandatory education, study of the feasibility and desirability of GAL certification, investigation of the problems and concerns about the role of GALs in RCW Titles 11, 13 and 26 and study of the feasibility of statewide use of CASA (Court Appointed Special Advocate)⁷ programs, including private funding sources. Fulfilling legislative mandate, the Office of the Administrator for the Courts (OAC) issued a 65-page report on these topics dated August 1997. The report provides definitions, reviews issues for guardianship and family law GALs, outlines curriculum for GAL education and makes further recommendations. The recently released report supports the importance of the judiciary's role in maintaining public confidence and details the court's oversight, ensuring fairness and impartiality and prohibiting *ex parte* communication.

NEW GUARDIANSHIP RULES

Under RCW 11.88.090(2)(b), GALs are now required to file and serve, within five days of appointment, each party with a statement which includes (1) the GAL's education related to GAL duties; (2) previous 10 years' criminal history, per RCW 9.94A.030; (3) hourly rate, if compensated; (4) whether the GAL has had contact with a party before appointment; and (5) whether there is an apparent conflict of interest. Within three days, any party may file and serve a motion for order to show cause why the GAL should not be removed for one of the following reasons: (1) lack of necessary expertise; (2) hourly rate higher than reasonable; or (3) conflict of interest. If the GAL is removed in the noticed hearing on the motion, the court must state the reasons for removal in the order. If the GAL is not removed, the moving party may be assessed fees/sanctions.⁸

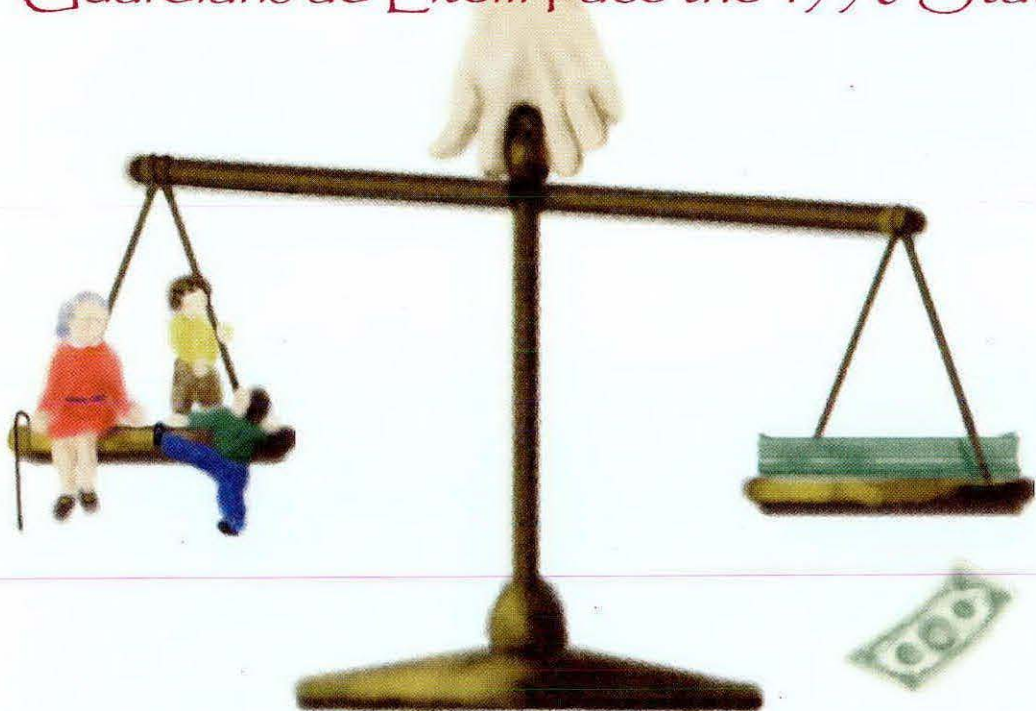
A new section, RCW 11.88.045(5), allows any person to request court protection for an alleged incapacitated person subject to various kinds of abuse/exploitation or for emergency needs. An "alternative arrangement" (such as a power of attorney), executed before the petition for guardianship was filed, "shall remain effective unless the court" determines otherwise. A GAL may also move the court for this action.⁹

Parties to a guardianship proceeding now

... may file responses to the

BY MEREDITH LYNN HARDY AND NANCY BRADBURN-JOHNSON

Guardians ad Litem Face the 1996 Statute Changes



GAL report with the court . . . at any time . . . the court may remove the GAL for failure to perform (the GAL's) duties as specified in this chapter, provided that the GAL shall have five days' notice of any motion to remove before the court enters such an order. In addition, the court in its discretion may reduce a guardian ad litem's fee for failure to carry out (the GAL's) duties.¹⁰

Guardianship GALs are now required to investigate and report on other

. . . arrangements previously made by the alleged incapacitated person, such as trusts or powers of attorney, including identifying any guardianship nominations contained in a power of attorney, and why a guardianship is nevertheless necessary.¹¹

Under RCW 11.88.090(4)(e), the GAL's duties include

. . . to investigate alternate ar-

rangements made, or which might be created, by or on behalf of the alleged incapacitated person, such as revocable or irrevocable trusts, or durable powers of attorney; whether good cause exists for any such arrangements to be discontinued; and why such arrangements should not be continued or created in lieu of a guardianship.

Under RCW 11.88.090(4)(f)(iv), the GAL's report must include

. . . a description of any alternative arrangements previously made by the alleged incapacitated person or which could be made, and whether and to what extent such alternatives should be used in lieu of guardianship, and if the guardian ad litem is recommending discontinuation of such arrangements, specific findings as to why such arrangements are contrary to the best interest of the alleged incapacitated person.

Under Title 11 as amended, the GAL

may request continuation of the hearing date on the petition. If the hearing does not occur within sixty (60) days of the petition filing date, however, the GAL

shall file interim reports summarizing [the GAL's] activities on the proceeding during the time period as well as fees and costs incurred.¹²

Lastly, the GAL must now attend all hearings in person unless there is a written waiver by all parties,¹³ and the

court may consider whether any person who makes decisions regarding the alleged incapacitated person or estate has breached a statutory or fiduciary duty.¹⁴

The superior courts, in addition to requiring mandatory education as described elsewhere in this article, are required to maintain a registry of persons willing and qualified to serve as GALs in Title 11 matters. The court selection for appointment shall be "in a system of rotation" unless there is a need for "particular expertise." The court was further mandated to

develop procedures for periodic review of the persons on the registry and for probation, suspension or removal of persons on the registry for failure to perform properly their duties as guardian ad litem. In the event the Court does not select a person next on the list, it shall include in the order of appointment a written decision explaining its decision.¹⁵

Eligibility for the GAL registry includes the following added specifics: (1) written statement of background, including (a) level of formal education, (b) training related to GAL's duties, (c) number of years' experience as GAL, (d) number of appointments as GAL and the county or counties of appointment, (e) criminal his-

tory, as defined in RCW 9.94A.030 and (f) evidence of knowledge in areas previously listed in the statute (such as developmental disabilities). The written statement is also to include how many times a GAL has been removed for failure to perform GAL duties. Further, the background and qualification statement is to be updated annually; and (2) completion of the model training program.¹⁶

An attorney now may not serve as a superior court judge *pro tempore* or a superior court commissioner *pro tempore* in a judicial district while appointed to serve on a case in that judicial district as a paid GAL under Title 11, 13 or 26 RCW if that judicial district is contained within Division I or II of the Court of Appeals and has a population of more than one hundred thousand.¹⁷

TITLE 13 GALs

Under RCW 13.34.100(3)(e), the guardian ad litem statement of qualifications does not need to include identifying information that may be used to harm a GAL.

"The court may require the GAL to provide periodic reports to the parties regarding the status of the work."

When a CASA or volunteer GAL is requested, the program will give the court the name of the person it recommends and appointment is effective immediately. If a party reasonably believes the CASA is inappropriate or unqualified, the party may request review of the appointment by the program. The program must complete the review within five judicial days and remove any appointee for good cause. If the party is not satisfied, the party may file a motion with the court for removal of

the CASA on the grounds the advocate or volunteer is inappropriate or unqualified.¹⁸

FAMILY LAW GALs

RCW 26.12.11175(1)(b) states that the "court may require the GAL to provide periodic reports to the parties regarding the status of [the GAL's] work. The GAL shall file . . . report at least sixty days prior to trial." Furthermore, GALs who are not volunteers must provide the parties with an itemized accounting of their time and billing for services each month.¹⁹

RCW 26.12.175(3)(e) and RCW 26.12.175(4) require background information from Title 26 GALs similar to that required for other types of GALs.

The statutes now require:

[E]ach GAL program for compensated GALs shall establish a rotational registry system for the appointment of GALs. If a judicial district does not have a program the court shall establish the rotational registry system. GALs shall be selected from the registry except in exceptional circumstances as determined and documented by the court. The parties may make a joint recommendation for the appointment of a guardian ad litem from the registry. RCW 13.34 . . . (2)(a) and RCW 26.12 . . . (2)(a).

Further,

[I]n judicial districts with a population over one hundred thousand, a list of three names shall be selected from the registry and given to the parties along with the background information . . . including hourly rates for services. If more than one name remains on the list, the court shall make the appointment from the names on the list. In the event all three names are stricken the person whose name next appears on the registry shall be appointed. RCW 13.34 . . . (2)(b) and RCW 26.12 . . . (2)(b).


Then,

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if a party reasonably believes that the appointed GAL lacks the necessary expertise for the proceeding, charges an hourly rate higher than what is reasonable for the particular proceeding, or has a conflict of interest, the party may, within three judicial days from the appointment, move for substitution of the appointed GAL by filing a motion with the court. RCW 13.34(2)(c) and RCW 26.12(3).

Finally, the "rotational registry system shall not apply to CASA programs." RCW 13.34(3) and RCW 26.12(3).

MANDATORY GAL EDUCATION

The OAC recommendations for training and education of GALs to assure a minimum standard of competency include 30 hours of instruction for Juvenile Court GALs, 28 hours of instruction for family law GALs and a requirement new to those in law, a six-month practicum for all new GALs. The practicum is designed to pair a new GAL with a "mentor" GAL, who will review reports, help answer questions and provide direction to the new GAL as the GAL gains skills. It is as yet unclear who will pay the costs associated with the mentor's time. The committee, however, has recommended public financing of GALs in indigence cases, which may stretch to fit this additional short-term expense.

The OAC recommends against "grandfathering" GALs by exempting them from training and ongoing education requirements set in place in the 1996 legislative session. The committee reasoned that the benefit of training is to assure minimum standards of practice in this very important area. By exempting those who have been doing this work, continuation of uneven work product is likely. OAC recommends that "all persons applying to become a GAL or CASA after January 1, 1998" should be required to complete training in the curriculum or an OAC approved program before accepting their first GAL case.

The OAC recommendations for training distinguish between acquiring knowledge, building skills and developing the abilities necessary to make complex decisions, such as adhering to ethical standards and performing self-evaluations.

"The OAC recommends against 'grandfathering' GALs by exempting them from training and ongoing education requirements set in place in the 1996 legislative session."

The report also acknowledges the differences between juvenile dependency and family laws. Recommendations for training identify those legal areas and recommend training in those areas be taught separately by experts in the area of practice. In other areas of training that share a common body of knowledge, such as child development and substance abuse treatment, GALs applying for juvenile dependency and family law cases may be taught together, although by no means is that a requirement.

The OAC recommends that CASA programs not be mandated by the state in

Chapter 13 and 26 actions, but rather recommends the state to encourage the use of CASA programs in Chapter 13 cases by funding new programs and maintaining and expanding existing programs. In Chapter 26 actions, the judges of the state are encouraged to review their GAL policies and to consider use of CASAs. The OAC also acknowledges the cost of supporting a CASA program and the difficulty of obtaining private funding, and therefore recommends continued public funding of CASA programs.

OAC also recommends creation of a central registry through OAC for all GALs who are removed from any state court listing as a result of a grievance process. A registry will allow courts to track GALs more carefully, while preserving GALs' due-process rights.

The committee also recommends changes be made to the GAL order of appointment, urges adoption of court rules by our Supreme Court to standardize GAL practice, and it recommends the judiciary take steps to regain the public's confidence in the use of GALs. The OAC report recommends discontinuation of a



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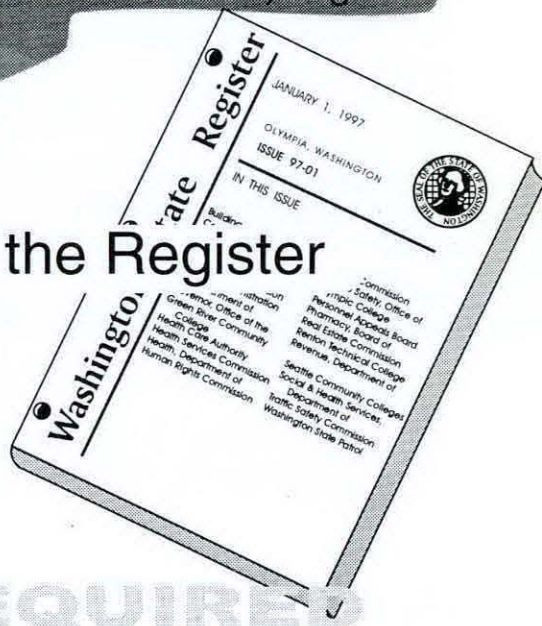
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rotational policy because of the constitutional problems contained therein and the inconsistency of application by state courts.

RECOMMENDATIONS

Concerns notwithstanding, court appointment of GALs in this state is a benefit and in most cases results in a better-informed court. The GAL acts as the "eyes and ears of the court," a role unique in our adversarial legal system. Ideally, the GAL acts as a neutral information gatherer and reporter. The role is necessarily flexible due to the fact-driven nature of most legal proceedings. Given our state courts' continued use of GALs as well as the intention of the 1996 legislation to address the public's concerns, we propose that the strengths of this practice be enhanced and weaknesses addressed beginning with the following suggestions.

Adoption of OAC recommendations is a solid beginning. It would create a "system" in family law and dependencies where none has existed. Stronger court involvement in each case, however, would complement the OAC recommendations and address the concerns by the public of GAL overreaching. We recommend the courts continue to develop and clarify policy regarding the role of GALs in family law cases within the state as well as enhanced supervision of GAL practice, including selection. For example, court review of final GAL reports with final pleadings in all cases, even agreed cases, could be conducted so that the court approves the GAL report (and thereby the investigation). The GAL work product is thus formalized and a record is preserved.

Court review of qualifications for GALs in their county and clear procedures for complaints against GAL practice should also be implemented and updated regularly. Required training curricula have now been developed by legislatively mandated committees for both guardianship and family law GALs; courts should assure that all GALs who are appointed have completed the required training.

Private attorneys can improve GAL practice, too, by litigating issues and not personalities, maintaining perspective, educating themselves about factual issues which occur (e.g., mental health and drug/alcohol abuse and treatment), encouraging more CLEs to deal with diffi-

cult cases and becoming involved with the family law section of the bar association.

The population seen by the court and served by GALs is the most difficult in terms of facts, procedures and personalities. Some courts, the OAC and the legislature began dealing with the problems and issues of GAL practice several years ago with good result. In 1995, concerned by the lack of oversight for compensated GALs, the King County Judges and Court Commissioners formed a joint bench-bar work group, which developed guidelines, administrative policies and a code of ethics. In March 1996, the King County Superior Court judges adopted these policies. The policies include selection, qualifications, training, a complaint process and a code of ethics and were a useful tool for the OAC.

Efforts continue to help GALs solve commonly encountered problems. The Washington State Bar Association sponsored the first GAL inter-county forum this year in Seattle to provide a means for GALs around the state to meet, confer about commonly encountered problems and encourage self-evaluation and peer consultation, with a second annual forum scheduled for March 20, 1998.

In the vast majority of cases, children and alleged incapacitated persons have been well served by the appointment of GALs. With the collaboration of the judiciary, OAC, GALs and attorneys, service to these vulnerable and tender populations will continue to be improved.

ENDNOTES

- ¹Chapter 26.09 RCW, Chapter 26.26 RCW, and Chapter 26.10 RCW.
- ²Title 11 RCW.
- ³ESSB 6257 (1996).
- ⁴RCW 2.56.030.
- ⁵Chapter 11.88 RCW
- ⁶Title 26 RCW cases, including dissolution of marriage, paternity, and third-party cases.
- ⁷CASA programs originated here in Washington state, and in 1984 the national CASA Association was founded, with its headquarters in Seattle. Although primarily interested with volunteers in juvenile dependency cases, the National CASA Association also supports the work of volunteers in family law cases.
- ⁸RCW 11.88.090(2)(b).
- ⁹RCW 11.88.090(8).
- ¹⁰RCW 11.88.090(6).
- ¹¹RCW 11.88.030(h)(i).
- ¹²RCW 11.88.090(v)(ix).
- ¹³RCW 11.8.090(11).
- ¹⁴RCW 11.88.090(2).

- ¹⁵RCW 11.88.090(3)(a).
- ¹⁶RCW 11.88.090(3)(b).
- ¹⁷RCW 2.08; currently the only county which comes within this exception is King County.
- ¹⁸RCW 13.34.100(8)
- ¹⁹RCW 26.12.75(1)(c).



Meredith Lynn Hardy, MSW, J.D., is a 1972 graduate of the University of Southern California School of Social Work and a 1983 graduate of Loyola University Law School. A former guardian ad litem, she is co-founder and 1996-97 chair of the Guardian Ad Litem Section of the King County Bar Association and served as member and chair of the WSBA Continuing Legal Education Committee. A pro tem family law commissioner with King County Superior Court, she was a member of the DSHS Advisory Group for the establishment of model training and handbook for Guardianship GALs.

Nancy Bradburn-Johnson, J.D., is a 1983 graduate of Seattle University School of Law. Since 1991, she has served as program attorney for the CASA Family Law Program in King County Superior Court. She received the 1996 King County Washington Women Lawyers Award for Special Contribution to the Judiciary.

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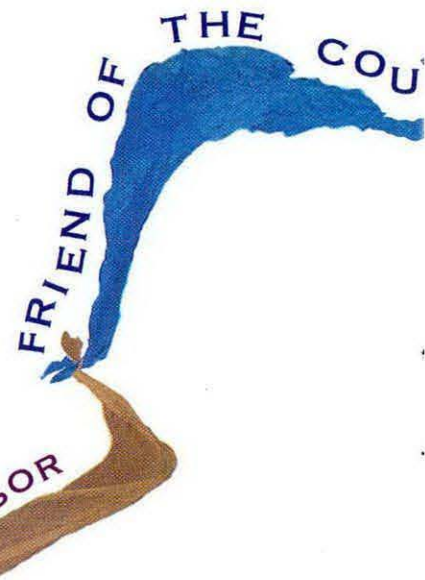
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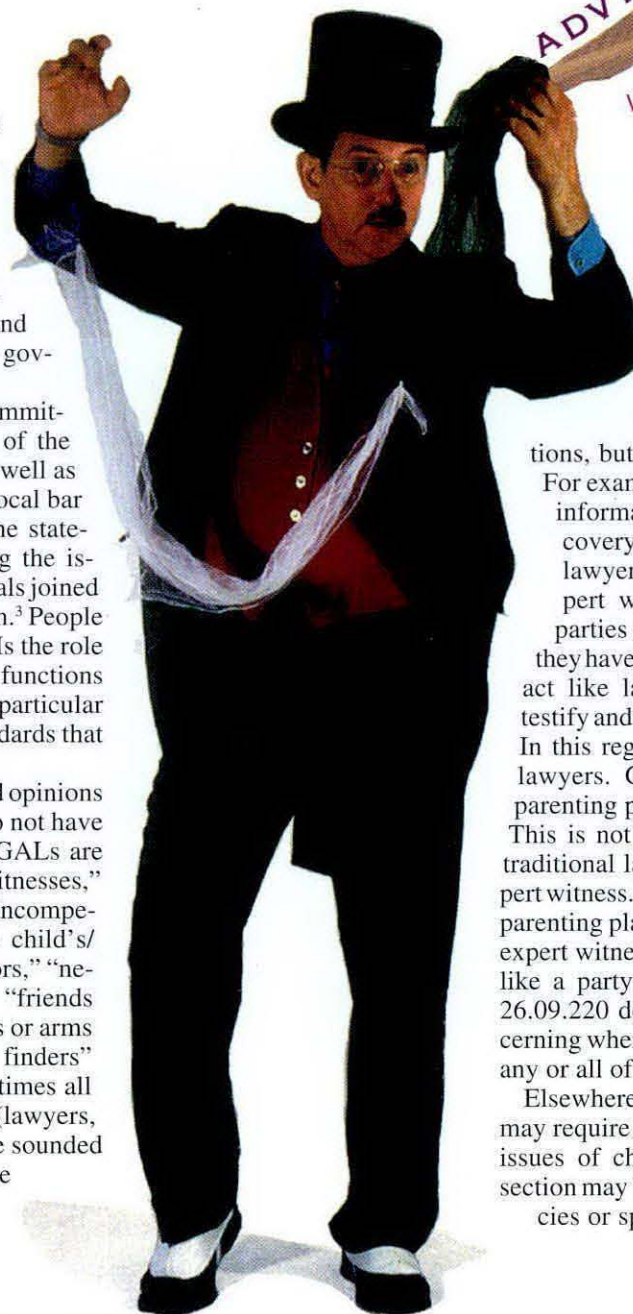
Rethinking the Roles of Guardians Ad Litem in Dissolutions:



Right now in Washington state, a broad cross-section of people involved with our legal system are engaged in a conversation about *guardians ad litem* ("GALs"). In 1996, the legislature responded to citizen complaints about perceived abuses involving GALs in both custody matters and guardianships by drafting legislation to govern GALs under Titles 11, 13, and 26.¹

For the last year and a half, many committees under the auspices of the Office of the Administrator for the Courts (OAC) as well as county court administrators, state and local bar association family law sections and one state-wide conference² have been examining the issues. Division One of the Court of Appeals joined in the conversation with a recent opinion.³ People are asking: What is the role of a GAL? Is the role different in different settings? Are some functions incompatible with other functions or a particular role? Are there practice and ethical standards that can be expected and/or imposed?

While many people have strongly held opinions about GALs, most people admit they do not have a clear understanding of what one is. GALs are referred to as "investigators," "expert witnesses," "lawyers," "lay advocates for the child/incompetent," "lawyers/lay advocates for the child's/incompetent's 'best interest,'" "mediators," "negotiators," "supervisors," "monitors," "friends or advisors to the court," "eyes and ears or arms of the court," "recommenders," "fact finders" and "*de facto* decision makers."⁴ Sometimes all are rolled into one figure. Many of us (lawyers, GALs, commissioners and judges) have sounded as if we were talking in circles when we tried to explain what the GAL is.



WASHINGTON STATUTES UNCLEAR

The statutes and cases discussing GALs in custody/dissolution contexts in this state are neither comprehensive nor clear. RCW 26.09.220 lumps GALs and investigators together without any guidance to distinguish them.⁵ The statute gives a list of duties or functions, but it is not explicit about the role. For example, the GALs have access to all information without going through discovery, so they are not quite like parties, lawyers, typical witnesses, nor even expert witnesses. GALs must show all parties their notes and report. As such they have no confidentiality and, thus, don't act like lawyers. They can be called to testify and are subject to cross-examination. In this regard they are like witnesses, not lawyers. GALs' reports to the court on parenting plans are admitted automatically. This is not something within the role of a traditional lawyer, party, investigator or expert witness. And they may recommend which parenting plan the court should adopt (like an expert witness, special master, or judge), unlike a party, lawyer, or lay witness. RCW 26.09.220 does not establish standards concerning when the court may or should appoint any or all of these figures.

Elsewhere in RCW 26 there is language that may require the appointment of a GAL when issues of child abuse are alleged, but that section may be read to refer only to dependencies or special proceedings under 26.44.⁶



Have We Been Seeking Magicians?

In 1991, the Legislature amended RCW 26.12, adding subsection 175, which says the court may appoint a GAL whenever necessary to protect the child's best interest. The person is to investigate, report to the court on parenting arrangements and represent the child's best interest.⁷ The statute gives no further guidance on roles or functions.

The cases have not been much more helpful. Two early Court of Appeals opinions state that appointment of someone to act as attorney for the child or to do an investigation is not constitutionally required but may be necessary if the parties don't develop all the evidence.⁸ By 1985, that person was called a GAL or a lawyer for the child.⁹ None of these sources gives much guidance as to the role of the GAL.

In a very recent case, *Fernando v. Nieswandt*, the Court of Appeals addresses the role of a GAL in parenting plan disputes. The focus in this case is the status of expert witness, since one party challenged the GAL's testimony regarding her recommendations as inadmissible opinion under ER 702. The court notes that the statute allows the GAL to report to the court her impressions of interviews with doctors and experts and to make recommendations about appropriate parenting plans, even though the GAL "need not have any specific training."¹⁰

It is assumed without discussion that the Legislature can vary the rules of evidence to authorize family courts "to hear the opinions of a witness who would not be a traditional expert under ER 702." Then, within three sentences, the

Fernando court states that the GAL is not appointed as an expert, but is an expert:

A guardian ad litem is not appointed as an 'expert.' Rather, she is appointed to investigate the child and family situation for the court and make recommendations. In effect, she acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a common sense impression to the court.¹¹

These three sentences illustrate some of the contradictory impulses which drive the confusion about GALs. Here the GAL is viewed from the perspective of the court and is seen as an adviser for the court, but not as a representative of the child.¹² The GAL need not be a real expert on family dynamics, nor on anything else. But in the end, the GAL gives the court not an expert opinion, but a common sense impression. Typically, the court does not need nor does it permit a witness to give common sense impressions, especially on the ultimate issue.¹³

OAC REPORT

The OAC, GAL Project Final Report was released in mid-August, 1997. The Report makes a valiant effort at trying to set up statewide standards for the training of GALs and for resolving grievances against them. This is particularly chal-

lenging when the role of the GAL has not been clarified. The Report defines GALs as

paid professionals . . . who contract with the court or bill clients for providing services . . . loosely directed by statute, eligibility criteria for appointments . . . are established by the court in each jurisdiction.

CASAs are volunteer GALs. The Report specifically recommends that the Supreme Court adopt rules establishing the GAL/CASA roles, responsibilities, duties, rights and powers. The Report then offers a draft of several such rules.

Before reaching the rules, the Report seems to propose some additional definitions for GALs: "represent the best interest of the child" (p. 5); "advocate on behalf of the child" (p. 5); "friends of the court" (p. 23); and "(t)o the extent that the person served by the GAL/CASA is a party, the GAL/CASA can assume the role of party in the case, including a *pro se* party's ability to perform duties traditionally performed by an attorney." (p. 40)

"Represent" and "advocate" are often terms of art in the context of courts which refer to functions performed by a lawyer. But many GALs and CASAs are not lawyers. And the Report itself states that

BY RAVEN LIDMAN &
BETSY HOLLINGSWORTH

"...[W]e can see a real disparity in who these figures are perceived to be and what they do or should be able to do."

the GAL gets lawyer status from being a *pro se* party, not by direct appointment as lawyer.

Further, it is not clear whether the GAL is a *pro se* lawyer or an advocate for a

person (the child), or for a concept (the best interest of the child) as perceived by the GAL. It is very rare in our jurisprudence to have individuals appointed to represent concepts, especially if the con-

cept is the very standard by which the court is to make its decision.

OAC-proposed Rule 2 covers general roles and responsibilities of the GAL. Rule 2 contains a list of 19 'responsibilities.' Most are aspirational exhortations to be professional (c), avoid conflicts of interest (e), be respectful (f), informed (g), etc. Some of the 19 do speak to role. The first requires that the GAL represent the best interests of the person for whom he or she is appointed, even if conflicting with the wishes of that person. And then the rule goes on to say that the GAL "shall not advocate or advise any party in any way which would create in the mind of a reasonable person an appearance of representing that party." Rule 2 (a). This section seems to contradict the earlier assertion that the GAL can substitute for a child-party and, in fact, represent that party. Notably absent from the Report is any requirement that the GAL inform the court about the child's wishes.

Proposed Rule 4 is entitled "Rights and Powers of GAL." It reiterates that the GAL must get notice of all pleadings in a case and can appear in all proceedings through submission of oral and written reports, subject to cross-examination and impeachment. This envisions that the GAL will function as a witness, even at a motion hearing. However, in a section entitled additional rights and powers, when the person represented by the GAL is a party, the GAL is given the rights to file pleadings, conduct discovery, note motions, subpoena and examine witnesses, appeal decisions, and make oral arguments. And despite the fact that these look like the kinds of activities a lawyer engages in, the rule asserts that these shall not constitute the unauthorized practice of law.

AUTHORS' CONCLUSIONS AND RECOMMENDATIONS

As a state, we have only just begun in earnest this conversation about GALs. By referring to the report, the recent case, the statutes and older cases, we can see a real disparity in who these figures are



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perceived to be and what they do or should be able to do. It is difficult to imagine how they are to be regulated if the roles and responsibilities are so in conflict.

From our reading of cases and statutes from other states, law reviews, practice articles, and training materials, we have discovered that most states are in the same circumstances as Washington. They utilize GALs without a clear understanding of what they are.¹⁴

Our conclusions and recommendations are straightforward:

(1) One appointee cannot be all things to all people and cannot do everything.

(2) Latin further obscures the issue. The term GAL is just too vague and malleable.

(3) Since these figures are appointed as part of our legal system, the courts should use existing roles from within that system. This last recommendation coincides with Rule 6 of the OAC Report, which states that the court can appoint someone not as a GAL but to a limited role, such as mediator, investigator, evaluator, etc. We would not, however, suggest using terms, such as "evaluator," which do not clarify the role and are not traditional figures within the legal system. If this rule is followed there would not be a need for a GAL.

There are recognized roles: investigator/fact witness; expert witness; lawyer, mediator and party. We should decide what kind of a role is appropriate to the situation and then appoint someone with the satisfactory qualifications to that role. The recognized roles will constrain the appointee's functions.

A lawyer for the child would advise the child, advocate for the position adopted by the client, would not testify, and would file briefs — not reports with recommendations. The lawyer would be admitted to the bar and would not be a lay advocate or lay representative.

The "investigator" would collect information. The report of that information would be provided to the parties, not to the court. The parties would present the information to the court in the form of competent witnesses. The investigator might be such a witness if s/he has first-hand knowledge of some information, but the investigator would be constrained, like any other witness, by the rules of evidence. A well-trained investigator, as is frequently used by prosecutors, plaintiffs and defendants, would not become an automatic expert witness and would

not make recommendations or render opinions on the outcome.

An "expert witness" would be appointed to address issues that are within the expert's specific qualifications where needed to assist the court. S/he might testify to certain conclusions and even relay hearsay, but only on those issues and to the extent that the expert's qualifications permit. The expert would not submit a report to the court but would address the court under oath, subject to cross-examination. The expert would not represent anyone, including the court.

In dissolutions, children are not parties. Thus a GAL should not be given party status when the child does not have that status. In other types of cases where the child or alleged incompetent is a party, the court should be very clear if it is giving the GAL party status. And if so, it seems to us that by permitting the GAL to serve as recommender and as *pro se* lawyer, the court is creating a super party with special rights which distort the limits of due process.

The court may wish to have someone monitor visits or serve as a mediator. These are roles that are quite limited in scope and, in the case of mediator, conflict with almost any of the other roles and functions.

In conclusion, the rights and interests of the various participants (parents, children and alleged incompetents) are very important, too important to be relegated to a process that is less than full due process of law. If, collectively, we cannot agree on the basic outlines of what a GAL is, perhaps we must move to a different paradigm for meeting the needs of the child. This is not an academic question but one of deepest importance to our system of justice.

ENDNOTES:

¹ESSB 6257, 1996.

²First Annual Inter-county GAL Forum, 2/28/97, sponsored by the King County Bar Association, GAL Committee.

³*Fernando v. Nieswandt*, 87 Wn App 103, 107, (Div I, 1997).

⁴No statute or case in Washington expressly says the GAL is the decision maker. However, Prof. Lidman is reminded by a Thurston County colleague that while serving as commissioner *pro tem* in 1986, she asked one of the lawyers what the GAL had "decided." Many people use the term "fact-finder" to refer to GALs. They often mean "investigator." Fact-finding is a function which is constitutionally reserved to the judge or jury.

⁵The current OAC-approved form order

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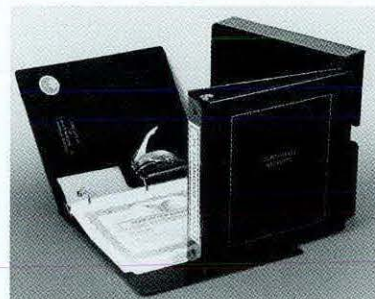
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appointing a GAL or investigator also adds lawyer, but, likewise, makes no distinctions between them, and presumably a judge could check off all duties under each label. When the Washington Marriage and Divorce Act was adopted, it was modeled on the Uniform Act, which did not use the term GAL.

⁶RCW 26.44.053.

⁷RCW 26.12.175(b)

⁸*In re the Marriage of Waggener*, 13 Wn. App. 911,917 538 P.2d 845 (Div. II, 1975) *Wildermuth v. Wildermuth*, 14 Wn. App. 442, 446, 542 P.2d 463 (Div. I, 1975).

⁹*Marriage of Nordby*, 41 Wn. App. 531,534, 706 P2d 277 (Div I, 1985).

¹⁰*Fernando v. Nieswandt*, 87 Wn App 103, 107, (Div I, 1997). Even for those who do have extensive training, such as psychologists, there is a complete split within the profession as to whether they are qualified to recommend in favor of one parent having custody. American Psychological Association: *Guidelines for Child Custody Evaluations in Divorce Proceedings*, III, #14 (1994). Gary B. Melton et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals & Lawyers* (1987); Lois Weithorn (ed.) *Psychology and Child Custody Determinations*, University of Nebraska Press (1987), (“[F]inal determinations as to

which placements are in the children’s ‘best interests’ necessarily become value laden and nonscientific Thus, in offering opinions on which of two or more adequate options is ‘best for a child,’ psychologists are performing not as ‘experts’ but as ‘individuals with personal biases and lifestyle preferences.’” at 159-60.)

¹¹*Fernando v. Nieswandt*, *supra* at 107.

¹²It is unusual, except in the context of probation, for our courts to engage investigatory personnel on the court’s behalf. This is the jurisprudence of the European civil law system, which uses investigating judges.

¹³In all other types of cases in our legal system, an expert must be qualified based on special experience or training and are not needed if the subject matter is within common knowledge. FRE 701.

¹⁴Minnesota has conducted the most intensive study of guardians ad litem in custody-type cases: Guardians ad Litem, Program Evaluation Division, Office of the Legislative Auditor, Minn., 1997). One of the study’s major conclusions was that

“ . . . [t]here is not a universally understood or consistently applied definition of the appropriate roles and responsibilities for guardians in Minnesota, leading to a frequent confusion and different expectations.”²¹



Raven Lidman and Betsy Hollingsworth are clinical professors of law at Seattle University School of Law, where they have supervised students representing children in dissolutions. Their article, “The Guardian ad Litem in Custody Proceedings: The Judicial System Stretched Beyond Recognition,” is scheduled for publication in December 1997 in the Vol. 6 issue of the George Mason Law Review.

“Laughter cuts across all boundaries, uplifting everyone with its universal appeal.”

The *Bar News* thanks Tacoma magician and entertainment jack of all trades, **Mario Lorenz**, for the scarf trick shown on pages 22-23. Lorenz has performed and emceed in the theater, on television and in live comedy for 20 years across the United States. He has just returned from a three-year sojourn in Atlanta, where he organized shows in conjunction with the Summer Olympics.

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Changing Venues

Awards and Honors

Felicia A. Malsby of Tacoma's Davies Pearson firm has been named Outstanding Young Lawyer for 1997 by the Young Lawyers Division of the Washington State Bar Association. The award recognized her work in creating a law and government scholarship program for high school students sponsored by the Tacoma-Pierce County Bar Association's Young Lawyers Division.

Okanogan County District Court Judge **Dave Edwards** recently was tapped to serve a four-year stint on the Washington Commission on Judicial Conduct.

Judge **William A. Harrison** was presented with a certificate for outstanding service by the Executive Committee of the National Conference of Administrative Law Judges at the ABA Annual Meeting this year. He presides over cases brought before the Pollution Control Hearings Board, Shorelines Hearings Board, the Forest Practices Appeals Board and the Hydraulic Appeals Board.

Seattle attorney **Stanbery Foster, Jr.** has been elected chair of the Washington State Chapter of the American College of Trust and Estate Counsel (ACTEC).



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The Justice Run in Spokane netted bigger donations than ever to the Volunteer Lawyers Program. A thumbs-up to organizer **Mike Connelly** and committee members **Tim Durkin, Yvonne Leveque, Kellee Spangenberg, Maureen Carl, Pat Dalton, Laurie Connelly, Paul Kirkpatrick, Greg Lockwood, Lisette Carter, Lori Lewis, Kurt Kramer and Francesca D'Angelo.** Corporate Cup winners were the Spokane City Public Defender's office team of **Pat Johnson, Monte Rich and Mary Logan Frey.** Other winners included **Robert Dellwo, Sally Pritchard, Tom Tremaine and Nancy Voermans.**

"ROW, ROW, ROW YOUR BOAT . . ."

Seattle attorney **Chris Young** recently won the lightweight doubles skulling competition in her age group at the U.S. National Rowing Championships in Long Beach, California.

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Herma Hill Kay, Dean of Boalt Hall, UC Berkeley, will speak at the 12th Annual Goldmark Awards Luncheon. Kay, who teaches and publishes in the fields of family law, California marital property, sex-based discrimination and conflict of laws, will speak on diversity and the negative impact of Proposition 209 on law school diversity.

Use the coupon at right to buy a ticket or table for your firm. Buying a table enables the Legal Foundation to offer complimentary invitations to six other guests from the legal-service community.

GOLDMARK AWARDS LUNCHEON

1:30 P.M. JANUARY 23, 1998

Yes, I would like to honor the work of legal services by attending the luncheon. I will bring _____ guests (\$30)/person enclosed).

My firm would like to purchase a table (\$300). Four members of our firm will attend and six seats will be donated (a charitable contribution of \$180).

No, I cannot attend the luncheon, but I would like to show my support with a donation of \$ _____.

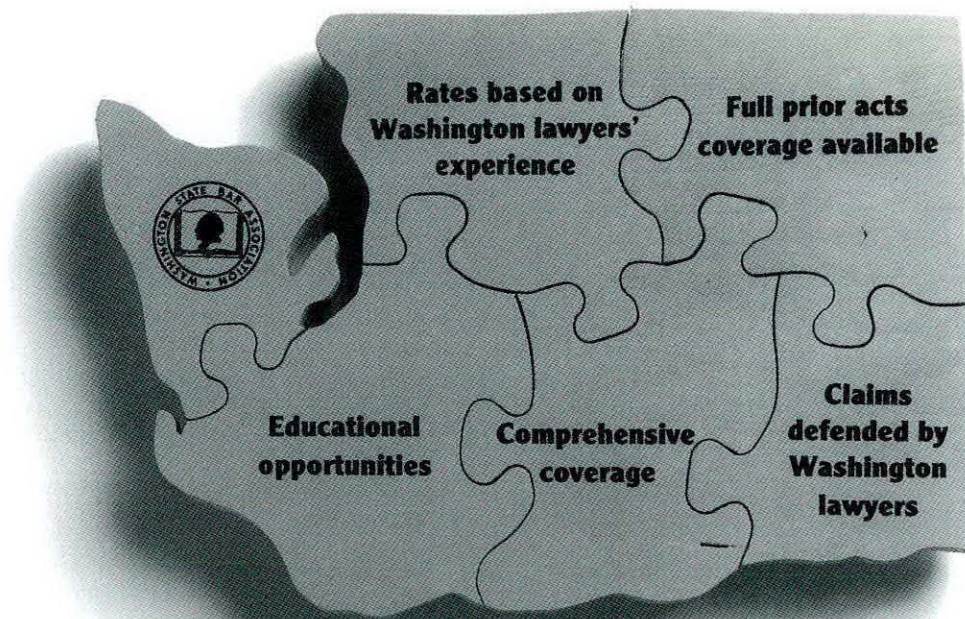
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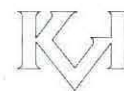


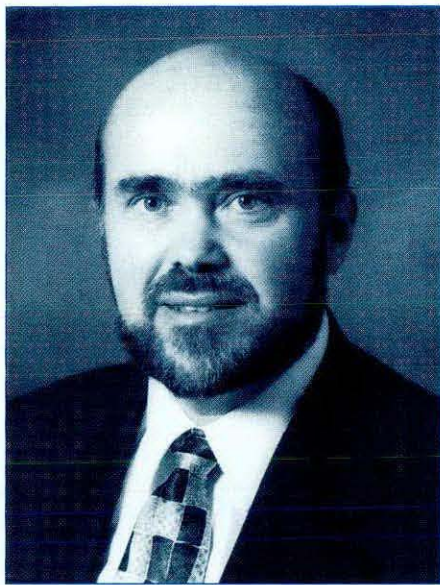
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Gerhard Letzing, executive director of the Washington State Trial Lawyers Association, has assumed the presidency of the National Association of Trial Lawyer Executives. Letzing was a co-founder and executive director of Washington Fair Share/Citizen Action.

MOVING AND SHAKING

Michael S. Bissell has joined the Spokane firm of McCormick, Dunn & Black, where he will concentrate on construction law and litigation.

Seattle attorney **Kathryn L. Tucker** recently began serving as director of Legal Affairs at Compassion in Dying, a Seattle-based nonprofit, public-interest organization dedicated to protecting and expanding rights and options of the terminally ill.

Two downtown Bellevue business and intellectual property law firms have recently merged, with the new firm to be known as Vance, Romero & Montague, P.S. William Shakespeare would be pleased.



Former U.S. Ambassador **Edward E. Wolfe**, currently the chair of the Board of Directors for Big Brothers of King County, recently opened the Wolfe Law Office in Seattle.

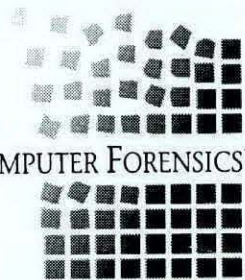


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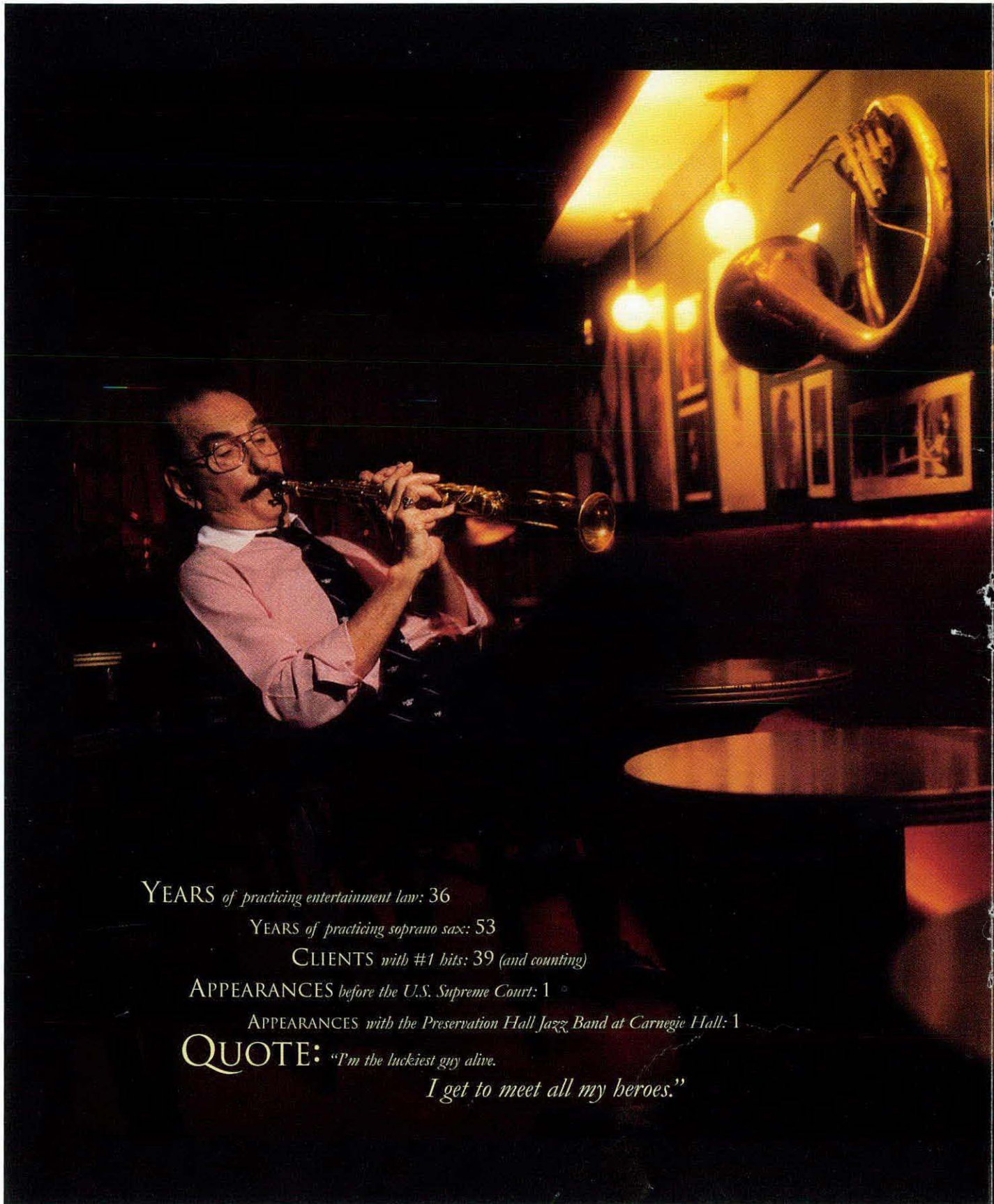
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YEARS of practicing entertainment law: 36

YEARS of practicing soprano sax: 53

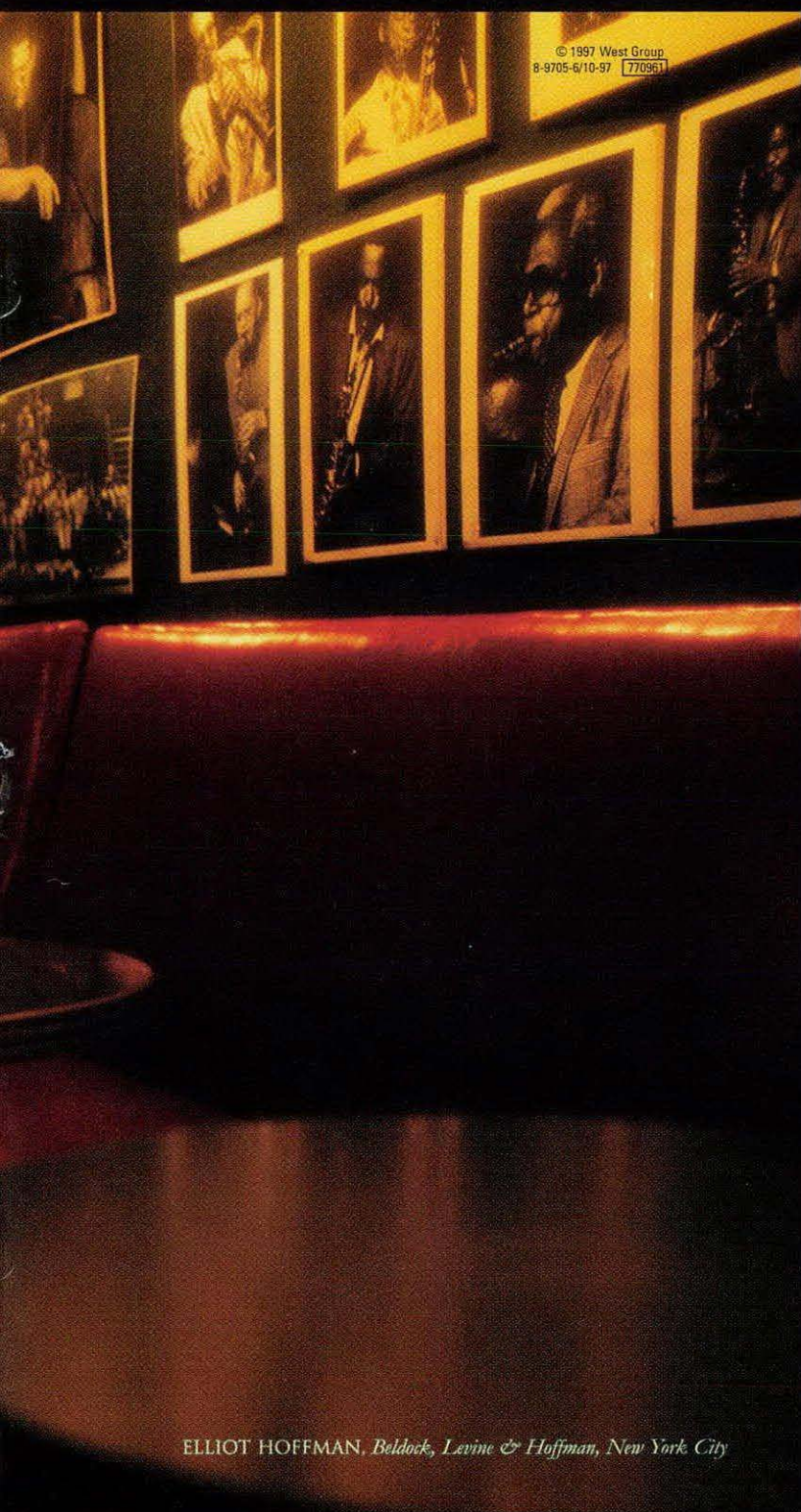
CLIENTS with #1 hits: 39 (and counting)

APPEARANCES before the U.S. Supreme Court: 1

APPEARANCES with the Preservation Hall Jazz Band at Carnegie Hall: 1

QUOTE: "I'm the luckiest guy alive.

I get to meet all my heroes."



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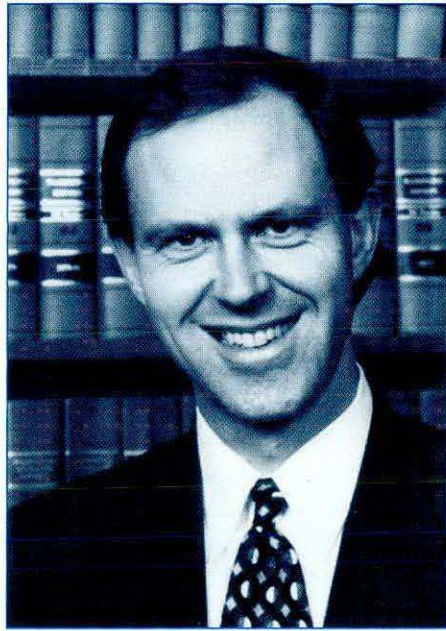


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IN MEMORIAM



Seattle attorney **Bob Dawson** was recently elected president of the Washington State Trial Lawyers Association. **Frank Ladenburg, Jr.** of Tacoma is the organization's new president-elect.

"ORDER IN THE CLASSROOM, HERE COMES THE JUDGE"

The 40th annual Washington Judicial Conference sent 27 judges from all levels of the state's judicial system into six Yakima schools recently. The volunteer judges included Washington Supreme Court Chief Justice **Barbara Durham**, Yakima County District Judge **Randall Marquis** and Judge **Steve Warming** from Kelso.

Vickie M. Bunnell, a 1979 graduate of University of Puget Sound Law School and former Pierce County Public Defender, died in Colebrook, New Hampshire, this past August at the hands of a crazed gunman. Contributions in her memory may be sent to: New Hampshire Bar Foundation, Vickie Bunnell Memorial Fund, 112 Pleasant Street, Concord, NH 03301.

Wesley K. Duce of Everett, age 77, passed away peacefully in his sleep in October. He served as a captain in the U.S. Air Force during World War II and had practiced law in Everett since 1948. He was the first president of the city's Exchange Club.

Manson, Washington, native **Fred G. Enslow**, who practiced law in Tacoma for 34 years, died in October in Yelm at age 70. He was active in amateur boxing in boys' clubs and a longtime member of the Elks Club.

DUI Defense

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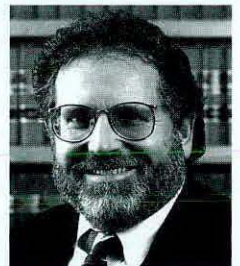
Douglas L. Cowan

Dean, National College of DUI Defense; Founder, Washington Association of Criminal Defense Lawyers; Founder/President, Washington Foundation for Criminal Justice



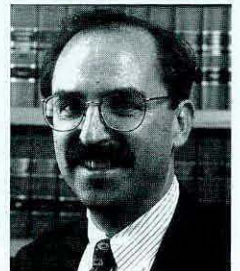
Stephen W. Hayne

Past President, Washington Association of Criminal Defense Lawyers; Past Chair, Washington State Bar Association and Washington State Trial Lawyers Association, Criminal Law Sections; "Top 10" Trial Lawyer (Washington Law Journal)



Jon Scott Fox

Past Chair, Washington State Bar Association, Criminal Law Section; Founder, Washington Association of Criminal Defense Lawyers; Instructor, National College of DUI Defense



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Stephen L. Wanderer, Esq. of Longview
at a 9/25/97 CLE discussion group.

Steve, thank you for your honest evaluation. Now we want to thank the over 900 volunteers who prepare and present our courses. Without their dedication and contribution, WSBA-CLE would not be Washington's most popular provider and the lowest cost state-wide sponsor of CLE seminars.

* See next month's *Bar News* for a list of our 96-97 deskbook authors & editors.

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Christopher B. Wells
David R. Wilson

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Brad Britzmann
Doug Brown
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Connie R. Collingsworth
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Candy Marshall
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Jeffrey B. Van Duzer
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Ralph Brindley
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Best of CLE 1996
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Durham and the "Dylan Rule"

Bob Dylan was right: "The times, they are a-changin . . ." and so are our courts. Today, our population stands at five and a half million, nearly double that of 1960. Last year, our 162 superior court judges processed almost 233,000 filings. Case load pressures that almost overwhelmed the state Court of Appeals during the '70s and '80s helped push the Court's original 12-judge roster to 20 names. Last year, those judges issued 1,800 opinions. The courts of limited jurisdiction, the workhorse of the system, last year resolved more than 1.8 million cases.

Over the years, we have moved positively in solving the problems that have challenged us. We invented new ways to solve case load problems. Studies in King County show civil cases move through the system at a faster rate than they did a decade ago. Several years ago, we mounted an intensive effort to wipe out a 600-case backlog in the Court of Appeals, putting the court in position to better control future case load increases.

Mismatched court and law enforcement schedules have also added to case flow problems, leading to multiple continuances, even dismissal of some criminal cases. Using an automated program we developed called "LECS," or Law Enforcement Coordination System, police schedules can now be blended with court dockets, saving everyone (police,

the court system, and litigants) time, anxiety and frustration.

In response to system stresses induced by the rapid rise in self-represented litigants in family law cases, courthouse facilitators have been specially trained to meet these individuals at the courthouse door, take them in hand, and help them move their cases through the system in an expeditious manner.

Recently, we began a "one judge, one family" approach to domestic cases. This management method seems to be having a positive effect on an old problem: different judges who unknowingly make overlapping decisions in the same case.

Though these problem-specific solutions were adequate for the problems previously at hand, there is now a need for a more comprehensive approach. Experts project that by the year 2020, nearly eight million people will live within our borders. That is more than one person per *each acre* of mountain, forest and prairie land in this state. What will that mean for our courts? Trends observed since the early '80s suggest our state judicial system may have to deal with as many as 3.6 million trial and appellate cases when 2020 arrives, *half again* the 2.3 million cases it processed last year.

But burgeoning population growth is not the only problem we face. Other fac-

tors — the constant enactment of new laws that create new tasks for a stressed criminal justice system, the courts' continuing struggle to maintain full and equal partnerships with other criminal justice agencies, increasing competition for decreasing local revenues and an inherent imbalance in the way state and local funds are allocated to courts — figure into the mix of problems our courts must absorb, digest and ultimately solve.

In my state-of-the-judiciary address to the 1995 legislature, I announced we were about to undertake a comprehensive assessment of the services and operations of district and municipal courts. After two years and 136 on-site court visits to collect information, that assessment is now complete. We conducted this study to determine how to make these courts more functional. We wanted to know if services, such as probation and domestic violence protection, were meeting the needs of citizens. The final report contains numerous recommendations for improving district and municipal court services, but of particular interest is the report's final conclusions:

Sufficient funding of the courts of limited jurisdiction is at the very core of the effective delivery of judicial services. Without sufficient funding, limited jurisdiction courts are neither independent nor effective. Almost every major concern expressed during the study about the delivery of judicial services, from

BY BARBARA DURHAM, CHIEF JUSTICE,
WASHINGTON SUPREME COURT

public access to the destruction of records, can be traced to funding inadequacies.

There are similar problems in our superior courts. Last spring, officials in Bellingham discovered tougher juvenile crime laws were pushing more juveniles into adult court. The result: more adult jury trials and longer stays in juvenile detention facilities. Other costs were noted. According to one official, juvenile and

adult criminal trials were "bumping civil litigation into the next century." Similarly, attorneys in Spokane cautioned county officials that soaring criminal trial rates were shunting civil cases to the sidelines. True to the well-known baseball maxim "If you build it, they will come," officials in King County observed last July that their shiny new regional justice center was attracting more felony filings than had been projected when the facility was first envisioned. If the trend

continues, they said, more staff will be needed.

To help us gain more knowledge about problems such as these and their effect on the judicial system, the judges and lawyers who make up the state Board for Judicial Administration, the policy-setting body for the state judiciary, are organizing a statewide task force. It will be headed by Doug Beighle, a Seattle attorney who retired last spring as senior vice president and chief administrative officer of The Boeing Company. A bottom-up look at our state judicial system will be the first task for Mr. Beighle and his group. What are the core values that ensure justice is dispensed fairly and evenly? Where has the system become "stale"? In what ways does it no longer meet the needs of our citizens as a place to resolve disputes? Are we looking for effective and common-sense ways to use our limited resources?

The next step will be to develop a schedule of detailed improvements needed to carry us successfully into the future. Already-proposed solutions, like those listed in the court assessment study quoted earlier, will provide a crucial starting point, and the identification of a preferred funding model will be a key part of this stage of the endeavor. All of these factors will be built into a plan of action — a business plan, actually — for Washington's judicial system.

A major part of the effort will focus on finding the right state-local funding formula. One might think the state already contributes its fair share of court funding. True, state funds cover all appellate system costs, plus half of all superior court judges' salaries. But when all expenses are totaled, it is *local* governments that carry the largest share — 83 percent — of the court funding load. That is not the way courts are funded elsewhere, however. In more than two-thirds of the states, most local court funding comes from the state level.

Are there other ways to cut the funding pie? Perhaps the state should assume support of all judicial salaries. Maybe there are other costs — such as witness and interpreter expenses, jury fees and indigent defense costs, for example — that should be absorbed by the state. Such a move would raise, of course, a fundamental political question: Will increased state



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support mean decreased local control? This and other sensitive questions will demand careful consideration by Mr. Beighle and his group.

We know that unbalanced funding creates problems for our courts, but we also know that simply increasing revenue is not the only answer to those problems. Collective ingenuity and inventiveness must be directed towards discovering new ways of using the resources we have at hand. We need to rethink long-cherished conventions, form new concepts and polish old ones.

Most of all, we must develop better ways of administering the *business* of justice. Common sense tells us that better business practices will lead to better justice. The object of our efforts is a court system that handles cases more efficiently and predictably, at less expense, and with equity and fairness for all.

Lawyers can help by giving us participation, not just representation. We intend to conduct a series of meetings, hearings and focus group sessions. Attorneys will be asked to participate in these events, complete surveys and otherwise become involved in the process. It is important to

understand that we need *critical* participation — the involvement of those skeptical about change, as well as those eager to embrace it.

Finally, when we begin to form recommendations, we will need the thoughts and ideas of lawyers, as justice system professionals, about how our court system works and how it might be improved.

Washington's court system has come a long way. One hundred and fifty years ago, it consisted of one non-attorney judge who presided in a log cabin in Lewis County. Today, 400 judges preside in court facilities all over the state.

We must move our courts forward and approach the new millennium with an eye toward making them leaner, more functional, cost-efficient tools of justice. With the help and cooperation of members of the bar, I am confident we will do just that.



This article was adapted from the text of keynote remarks made by Chief Justice Durham at the WSBA Criminal Justice Institute in September.

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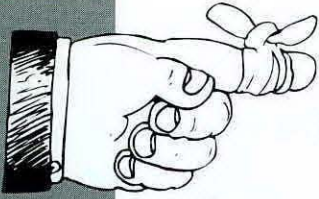
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State Bar Highlights



LICENSING AND CLE FORMS — COMING TO YOU IN DECEMBER

All bar members will receive their **1998 licensing packet** this month containing forms and detailed information. If you are an active status member, your trust account declaration will be included. Active status members in CLE Reporting Group 3 also will receive their CLE certification form in this packet. (Group 3 includes all members admitted from 1984 through 1990, and in 1993, 1996 and 1999.) For questions, call the WSBA Licensing Department at (206) 727-8210.

Frequently Asked Questions

When will I receive my 1998 license form?

- by December 20, 1997.

When are the forms and fees due?

- by February 2, 1998.
- late penalties are assessed after March 1, 1998.

How much are the 1998 License Fees?

Active — Admitted Prior to 1994

Licensing fee \$272, LFCP Assessment \$10

Active — Admitted 1994 or 1995

Licensing fee \$227, LFCP Assessment \$10

Active — Admitted 1996 or 1997

Licensing fee \$137, LFCP Assessment \$10

Inactive — Any Admission Date

Licensing fee \$48, LFCP n/a

(Note: LFCP = Lawyers Fund for Client Protection)

What if I want to change my status?

See page A1 of your Licensing Form Packet for information and a form to change your status from active to inactive. There is also a form for voluntary resignations. If you want to change from inactive to active, call (206) 727-8210 for detailed instructions.

What About Newly Admitted Members and CLE Reporting?

- You are exempt from reporting CLE credits during your

year of admission in any jurisdiction and the following calendar year.

- credits may be earned during this period, starting from your admission date, and will be applied toward your first reporting period.

I'm in Reporting Group 3. How many credits am I required to report? (Note: Only those reporting CLE credits this year will receive a CLE reporting form.)

- 45 credits, including 4 ethics, earned by **December 31, 1997.**

- carry-over credits from your last reporting period will be printed on your CLE reporting form.

How many audio/video credits can I claim?

- 15 maximum of the 45 total credits. All 4 ethics credits can be acquired via A/V.

Can I claim credits for programs attended before admission to the bar, such as a bar review course?

No, but credit may be claimed for all approved courses attended since date of admission. Credit is allowed for WSBA members who take an approved out-of-state bar review course when seeking admission elsewhere.

Can I get credit for attending courses for an advanced law degree (e.g., LL.M.)?

Yes. 1 credit for each clock hour of instructed class time,

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WSBA Communications staff at (206) 727-8203

up to a maximum of 15 hours of credit for each course attended.

What if I have more than 45 credits to report?

- 15 excess credits from the current 1995-1997 period may be carried over and applied to the next reporting period.
- if you have 15 excess credits this reporting period, a maximum of 5 may be audio/video credits, and 2 may be ethics credits. Additional ethics carry-over credits will be converted to general credits.
- carry-over credits from 1994 (last reporting period) must be claimed in 1995-1997.

Does the WSBA keep a record of my seminar attendance?

- No. It is the responsibility of the individual attorney to keep that record and report the credits on the CLE Certification form you'll find in the licensing packet at the end of your three-year reporting period.

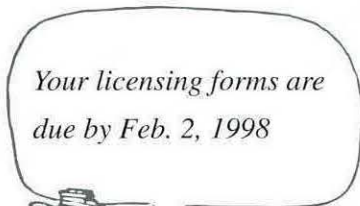
How do I know if a certain course was approved for credit?

- Submit a Form 1 application. It's located in the 1997-98 *Resources*, page 475. If you don't have one, call us at (206) 727-8210 and we'll mail it to you. Fill it out, we'll look the seminar up in our computer base — which has more than 28,000 accredited seminars or courses listed — and we'll send you the information.

I was a speaker at a CLE seminar. How many CLE credits do I get?

Speakers at approved CLE seminars may claim actual preparation time up to 10 additional CLE credits for each hour of presentation, in addition to the credits earned for attending the program. A panel moderator or speaker may

claim a maximum of five credits.



Your licensing forms are due by Feb. 2, 1998

What's MCLE Comity for Out-of-State Active Members ?

An active member of the Washington State Bar Association whose principal office is in Oregon, Idaho, or Utah

may meet mandatory CLE requirements by either (a) complying with Washington's CLE requirements, or (b) providing proof of current compliance with the CLE requirements of Oregon, Idaho, or Utah. Proof of compliance may be obtained from the State Bar in those states.

What is a trust account and why do I have to file a Trust Account Declaration with my licensing fees?

- A trust account is maintained at a bank, savings and loan or credit union for the purpose of holding client funds. Only lawyers who handle client funds need a trust account. Only active status members will receive a trust account form in their licensing packet.
- An IOLTA account (Interest on Lawyer Trust Accounts) is a pooled, interest-bearing trust account for deposit of client funds that are so small or that will be held for so short a time that they would not earn a net interest payable to the client. Interest on IOLTA accounts is payable to the Legal Foundation of Washington, a non-profit organization independent from the WSBA. The Foundation administers grants to finance law-related projects, particularly the delivery of legal services to the indigent. If you have questions about the Foundation, call them at (206) 624-2536.
- For more information on trust account guidelines, the WSBA publishes *Rules, Regulations and Common Sense — Managing Client Trust Accounts*. Call (206) 727-8242 to request a copy.

NOTICE OF HEARING ON PETITION FOR REINSTATEMENT

A petition for reinstatement after disbarment has been filed on behalf of Thornton P. Percival, who was disbarred on May 31, 1989. Percival practiced in Woodinville, Washington.

A hearing on Percival's petition will be conducted before the Character and Fitness Committee on Saturday, December 6, 1997. On or before the date of the hearing, anyone wishing to do so may file with the Character and Fitness Committee a written statement for or against reinstatement, setting forth factual matters showing that the petitioner does or does not meet the requirements of RLD 9.6(a). Except by its leave, no person other than the

Continued on next page

Continued from previous page

petitioner or petitioner's counsel shall be heard orally by the Character and Fitness Committee.

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USURY RATE

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The WSBA Judicial Recommendation Committee is currently accepting applications from attorneys and judges seeking consideration for appointment to fill potential appellate-court vacancies. Interested candidates will be interviewed by the Committee at its spring meeting (date TBA). The deadlines for receipt of questionnaires by the WSBA offices is 5 p.m., Jan. 16, 1998.

The Committee's recommendations are reviewed by the WSBA Board of Governors and then referred to the

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If you are interested in scheduling an interview, please contact the WSBA at 2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330, telephone (206) 727-8227, to obtain a questionnaire. Please specify whether you need the questionnaire designed for a judge or an attorney.



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FYI information



Ethics and the

BY BARRIE ALTHOFF, WSBA CHIEF DISCIPLINARY COUNSEL

Family law lawyers have chosen one of the most rewarding, difficult and frustrating areas of practice. They daily serve clients struggling with raw and volatile emotions, helping them resolve crucial legal problems such as marriage dissolutions, spousal and domestic violence, child custody, visitation rights and support payments (or, more often, the lack thereof). They are front line providers to the public of access to justice, assuring that through law "the dignity of the individual attain[s] respect and protection." They are, unfortunately, more likely than other lawyers, however, to have disciplinary grievances filed against them, receiving about one in every four or five grievances filed. This article suggests some ways to serve family law clients and lessen the likelihood of grievances being filed. While this article is directed to family-law lawyers, it may also apply to others, particularly those with volume law practices.

INTRODUCTION

The high percentage of grievances filed against family-law lawyers does not mean they are more unethical than other lawyers. Rather, it reflects the fact that many problems of the average legal consumer involve family law issues. It reflects that family law practice involves constant dealing with often legally-unsophisticated persons coping with highly emotional issues who often cannot afford, or can barely afford, legal services. It also reflects the often "volume" nature of the practice, serving clients who can afford only the briefest consultation with lawyers, and who thus must often deal with nonlawyer support staff, and yet who often demand "full service" legal representation.

COMMUNICATION PROBLEMS

Family law clients often complain that their lawyers do not communicate with them, by not responding to telephone

calls or letters, by ignoring information provided by them, by not explaining legal proceedings or documents, by not keeping them informed about the status of their cases, or by not providing them the information they need to make informed decisions. Failing to communicate violates Rule 1.4 of the Rules of Professional Conduct ("RPCs").

The solution to noncommunication is simple: communicate. The implementation of the solution, however, is much more difficult, since lack of communication involves both the procedure and the substance of communication. Procedurally, a low-income or underage family-law client may move frequently, may be wary of leaving forwarding addresses or telephone numbers, or may not have ready access to a telephone or to voice mail, so that even if you do try to communicate, you may be unsuccessful. If your support staff cannot communicate with the client on your behalf, and the size of the matter does not justify an individually crafted letter, you may want to mail a simple form to your client telling them you tried to communicate (state the dates and times you tried), and asking them to call you at a specified date and time. If the matter is urgent, state that on the form. Then put a copy of the form in your client file and put the date and time on your calendar and be available to take the call. If the client does not call you at that time, try calling the client and again document your attempt. This way the client must take some responsibility for communication and, if a grievance is filed against you, you have proof that you made reasonable efforts to communicate.

Substantive communication for family law lawyers can be more difficult because it may involve complex legal concepts and often arises in emotionally charged contexts. Your client frequently may not understand references to legal terminology such as depositions, inter-

rogatories, restraining orders, interim relief and the like. Thus you need to communicate simply and translate your thoughts into everyday language. Often this takes considerable time. You must be prepared to spend that time yourself, or through your staff. If you do not, you are inviting a grievance. In the family law context, your duty to communicate may be further complicated by your client's inability to make adequately considered decisions due to an impairment, such as being a minor or suffering from a mental disability, or perhaps merely because of the highly emotional context of many family law problems. RPC 1.13 requires you in these cases to try to maintain as normal a client-lawyer relationship as is possible. If you believe your client cannot adequately act in his or her own interests, however, you may seek appointment of a guardian.

Communication is also required to allow the client to decide, under RPC 1.2, the scope of your representation. Many family law clients cannot afford traditional full-service legal representation from you and need to be informed of alternatives, such as unbundled legal services. While these clients often want or need considerable hand-holding, you may not be able to provide this at a low cost. Thus, you and your client need to discuss this when you undertake and agree on the scope of your representation. Doing so will enable you to defend and even avoid grievances later alleging you were expected to do something which you never thought you had agreed to do.

Clients often have a very short time, usually a matter of days, to decide whether to move to revise or reconsider an order. If you do not prepare them in advance for this, they will likely complain that you did not communicate with them and that they could not make the informed decision to which they are entitled. To avoid this, explain procedures to them in ad-

Family Law Lawyer

vance, have them present at the hearing, and immediately on receipt provide them copies of the order and advise them of their options. Then document your actions.

RPC 2.1 requires you to render candid advice and exercise independent professional judgment on behalf of your client. Equally important for family law lawyers, RPC 2.1 specifically authorizes you in rendering advice to "refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." Often in the family law context, what is legal may not necessarily be what is best for your client or your client's children. For example, aggressive litigation tactics may seriously harm your client's ability to relate to his or her children and to work with his or her ex-spouse in the best interests of their children. RPC 2.1 allows you to freely explore these issues with your client.

DILIGENCE

RPC 1.3 requires you to act with "reasonable diligence and promptness" in representing your client. Clients and lawyers define "diligence" very differently, and inevitably the client's definition of when a matter should be accomplished is far shorter than the lawyer's. It is your responsibility to educate your client about the practical realities of litigation and moving cases forward, and about the many tasks you may be undertaking on their behalf of which they may be unaware. If you do not, your client will assume you are doing nothing and will likely file a grievance. Similarly, when the court renders an oral decision on a matter, such as child support, you should promptly (preferably immediately) follow up with the written order so that your client will immediately benefit from the order, such as payment of increased support, or enforcement by contempt, or simply knowing the matter is final.

SUPERVISING STAFF

Family law lawyers frequently rely heavily on support staff since many clients would otherwise be unable to afford legal assistance unless fees are kept lower by using nonlawyer assistants. RPC 5.3 requires you to supervise your nonlawyer staff to assure that their conduct is compatible with your obligations as a lawyer. RPC 5.4 prohibits you from assisting nonlawyers to engage in the unauthorized practice of law.

Your staff must fully understand your ethical obligations to the client, especially if they will deal frequently with your clients. They must be trained not to reveal confidences and secrets of your clients, and not to give legal advice. When you first meet with your client, you should explain, preferably with your staff present, that your staff are bound to honor such confidences and secrets and that they may not give legal advice, even in emergency situations. As a corollary, your staff must know how to contact you in emergencies so that you can respond to your clients' needs. You should also train your staff to document conversations with your clients so that when you examine a file you can immediately tell its status.

FEES

Since fees are at the root of many grievances against family law lawyers, it is crucial to use written fee agreements and to take the time to personally discuss it with the client. RPC 1.5(d)(1) prohibits contingent fees in pre-dissolution domestic relations matters, but permits them in post-dissolution matters. See *WSBA Formal Opinion 75* (1960) (although the contingent fee rate therein would likely raise problems today.) The agreement should discuss the relationship of fees due under it and any court-ordered fees, explaining that court-ordered fees may be less than those set out in the fee agreement, but that the client generally is still obligated to

pay the fees under the agreement. It should also clearly state to whom court-ordered fees belong when received. *Unless* stated to the contrary in the fee agreement, they will generally belong to the client. See *WSBA Informal Opinion 88-1*. Depending on the terms of your fee agreement, you may generally bill your client for time spent on their matters by your paralegal staff. Your bill for such services should clearly reflect the time they spent at their lower billing rate, not at your billing rate. "Initial switching" is unethical.

It is important to bill clients on a regular and frequent basis. By doing so you can identify fee problems early and, if appropriate, withdraw from representation before you are trapped in a money-losing representation. If you have not been paid your fees and are considering suing to collect them, remember that at least half of such suits result in malpractice claims and many also result in bar grievances. Generally, you would do better to lick your financial wounds and get on with your life. If you haven't been paid and decide to withdraw, generally you cannot hold on to the client file if the client needs it; see RPC 1.15(d) and *WSBA Formal Opinion 181*. Don't rely on technical arguments that you may have a lien — life is too short to engage in fights over files. If you plan on withdrawing for nonpayment of fees, comply with RPC 1.15(d) and do it early enough not to endanger your client's interests. Don't be afraid to lose unpaid fees by withdrawing early, since it is better than being locked into the representation by waiting too long and then losing a lot more of your time and money.

CANDOR

Candor towards the court and others is important in family law practice because of the volume of work and the nature of the practice. The court and others have to be able to trust you as an officer of the court. RPCs 3.3, 3.4, 4.1, and 8.4(c & d)

set out some of your ethical requirements of candor.

In family law it is not unusual to deal with unrepresented parties. You and your staff should be very careful in doing so, taking particular care not to mislead them. See RPC 4.3. Affidavits and declarations, extensively used in family-law practice, should be what they purport to be and signatures thereon should be authentic. A declaration is false, for example, if it bears a signature which purports to be your client's signature but is not, even if

your client agrees with the substance of the document. Orders signed by others and provided to you for submission *ex parte* should not be modified by you without the express consent of the others.

CONFLICTS OF INTEREST

You need a careful conflicts-of-interest checking system to assure that you are not undertaking a representation that may conflict with existing clients. Every family law lawyer has probably been asked at some time to represent both parties to a

"friendly" or uncontested divorce. Do not do it. The conflicts are real and irreconcilable. While you may be able to act as an intermediary between the two parties under RPC 2.2, the situation is fraught with dangers with the possibility of grievances against you by both parties. If you do undertake it, make it clear to both parties that you are acting solely as an intermediary, comply strictly with RPC 2.2, and, if the intermediation is not successful, do not represent either party in any subsequent proceedings.

Since family law clients typically have few available resources, lawyers are at risk whether they will ever be paid unless they are paid in advance. RPC 1.8(j) generally prohibits you from securing or obtaining payment of your fees by acquiring a proprietary interest in the cause of action; since in a dissolution substantially all marital property is subject to court division, you generally may not secure payment of your fee by acquiring an interest in the marital house or other property.

DON'T EMBRACE OPPORTUNITIES (YOUR CLIENT)

There is no provision in the RPCs explicitly prohibiting having sex with clients. Nor is there an RPC provision explicitly prohibiting tickling them, ridiculing them, tarring and feathering them, or murdering them. The WSBA Office of Disciplinary Counsel takes the position, however, as do many courts and bar associations, that maintaining a sexual relationship with a client, particularly a family law client, even where the relationship is allegedly "consensual" is generally prohibited. The issue is at present being litigated.

Sex-with-client situations nearly always involve a male lawyer and a female client. There appear to be inherent conflicts prohibited by RPCs 1.7 and 1.8 in that the lawyer knows the client's often precarious and vulnerable emotional and financial status and uses that knowledge to the disadvantage of the client. This is true even where the client may be the one initiating the relationship. It is highly questionable whether a lawyer engaged in and pursuing a sexual relationship with a client can give that client truly independent and candid legal advice as required

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under RPC 2.1. It is also questionable whether a lawyer having sex with his clients satisfies RPC 1.3, which requires a lawyer, as far as reasonably possible, to maintain a "normal" client-lawyer relationship with any client whose ability to make adequately considered decisions in connection with the representation is impaired. Having sex with clients is not yet part of maintaining a "normal" client-lawyer relationship. Substantially all other professions ban sexual relationships between lawyers and clients.

CONCLUSION

As a family law lawyer you have a very difficult task. To lessen the chance of grievances, you should communicate well and simply, act diligently and explain timing to your client, carefully train and supervise your staff, bill fairly and frequently, be candid with others, and avoid conflicts of interest (including sex with your clients). You also need to take care of yourself since your work can be highly emotionally charged and draining. Emotional burnout is a possibility, grievances a statistical probability, unpaid fees a certainty. Your role as a lawyer is not to make a good living for yourself, but to make living good for your clients, to see that through law "the dignity of the individual attain[s] respect and protection." By doing so you make a crucial difference in the lives of your clients, providing them access to justice and demonstrating that the profession of law is in fact a noble one.



DISBARRED

Lawyer Delwyne H. Clark of Tacoma and Olympia (WSBA No. 4682, admitted 1972) has been ordered disbarred by order of the Supreme Court effective September 5, 1997. The order was entered after a default disciplinary hearing and automatic review by the Disciplinary Board and Supreme Court. The discipline is based upon Clark's abandonment of his practice, which resulted in his failure in more than 20 cases to diligently represent and keep clients informed about the status of their legal matters, his failure to properly withdraw from representing those clients, his improper acceptance

and retention of legal fees for services he did not provide, and his conviction of two counts of misdemeanor theft from clients. It is also based on his lack of competence, lack of diligence, and failure to communicate in three other client matters, his unauthorized agreement to dismiss one client's lawsuit, and his unfitness to practice law.

Abandonment of Practice and Criminal Conviction — In January 1994, Clark closed his Olympia law office without notifying more than 20 clients with active

matters or returning those clients' files and unearned fees. In connection with the abandonment of his practice, Clark was initially charged with eight counts of felony theft for accepting and retaining fees without performing the work for which he was retained, and on February 16, 1996, he pleaded guilty to two counts of third degree theft. These actions violated RPCs 1.3, 1.4, 1.5, 1.15, and 8.4(b) and (c), and subject Clark to discipline pursuant to RLD 1.1(i).

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separate matters, a collection case, a dissolution case, and a personal injury case, Clark failed to diligently pursue his clients' interests and did not keep his clients adequately informed about the status of their matters. This resulted in disruption of one client's negotiated payment schedule on a debt, entry of a default decree of dissolution in another client's case, and the unauthorized dismissal of the third

client's personal injury suit. These actions violated RPCs 1.1, 1.2, 1.3, 1.4, and 1.5, and subject Clark to discipline pursuant to RLD 1.1(i).

Unfitness to Practice — Based on the above acts of misconduct, and on Clark's history of discipline (both a Censure and a Reprimand for neglect of client matters and a Suspension for failure to cooperate with a disciplinary investigation), Clark

was also found to have demonstrated unfitness to practice law. This subjects Clark to discipline pursuant to RLD 1.1(p). Additionally, Clark's failure to file an answer to the formal disciplinary charges against him subjected him to discipline pursuant to RLD 1.1(j).

The hearing officer was Judith Mandel of Port Orchard. Respondent did not participate in the proceedings. The Bar Association was represented by Disciplinary Counsel Jean Kelley McElroy.

REPRIMANDED

Seattle lawyer Donald A. McLeod (WSBA No. 1308, admitted 1968) has been ordered reprimanded, pursuant to a stipulation for discipline approved by the Disciplinary Board on September 26, 1997. The discipline is based upon his signing and sealing a notary certificate when the contents of the certificate were false, in violation of RPC 8.4(b), 8.4(c); purporting to comply with a court order regarding discovery with interrogatory answers containing the false notary certificate, in violation of RPC 3.4(c); and transmitting those answers with the false notary certificate to opposing counsel, in violation of RPC 4.1(a).

McLeod represented plaintiffs, the crew of a fishing vessel, in a lawsuit against the owners of the fishing vessel for nonpayment of wages. The trial court ordered plaintiffs to respond to interrogatories on or before January 31, 1995. On that date, McLeod transmitted to opposing counsel several sets of signed interrogatory responses, including interrogatory responses of a plaintiff who resided in Rhode Island. Attached to that plaintiff's response was a notary certificate signed and sealed by McLeod as a Notary Public, which appeared to reflect that the Rhode Island plaintiff signed the document in King County, Washington, on January 16, 1995.

At the arbitration hearing, the Rhode Island plaintiff testified that the signature on the interrogatory responses purporting to be his was not his. He indicated that the answers were answers he had approved over the telephone, and that he would have signed these interrogatory responses, but he had not signed them and had not authorized anyone to sign his name to them. He further testified that he neither had been in King County, Washington,

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nor had met with his counsel anywhere, during January 1995.

Respondent represented himself. Disciplinary Counsel Joanne S. Abelson represented the Association.

SUSPENDED

Tacoma lawyer Michael McKean (WSBA No. 4438, admitted October 19, 1971) was suspended for 60 days, effective October 17, 1997, pursuant to stipulation for discipline by order of the Washington Supreme Court. The discipline is based upon McKean's misconduct in gaining access to his then wife's savings account, transferring funds to her checking account, securing a check for the account, completing the check for \$6,000, forging her signature, and depositing the check into his own account, all without any authority.

McKean was represented by Bryan Hershmann of Tacoma. The Bar Association was represented by Disciplinary Counsel Christopher Sutton.

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

INTERIM SUSPENSION

Vancouver lawyer Paul L. Henderson (WSBA No. 8729, admitted 1978) was ordered suspended from the practice of law pending the outcome of disciplinary

proceedings by Supreme Court order entered October 13, 1997.

Linda B. Eide represented the Bar Association.

Suspension is pursuant to RLD Title 3 and is not a disciplinary sanction.

APPEALS

John Mele has the experience, enthusiasm and flexibility you need in an appellate lawyer. Mr. Mele worked on over 80 decisions during his clerkship with the Washington Court of Appeals. In private practice, he has addressed nearly every civil issue on appeal, from contract interpretation to equal protection, offers of judgment to jury instructions, slip-and-fall liability to lost profits. In the last five years alone, he has worked on over 60 appeals before Washington and Oregon appellate courts, and the 9th and 10th Circuits. Mr. Mele is available for consultation, briefing and argument, and will consider a variety of fee arrangements.

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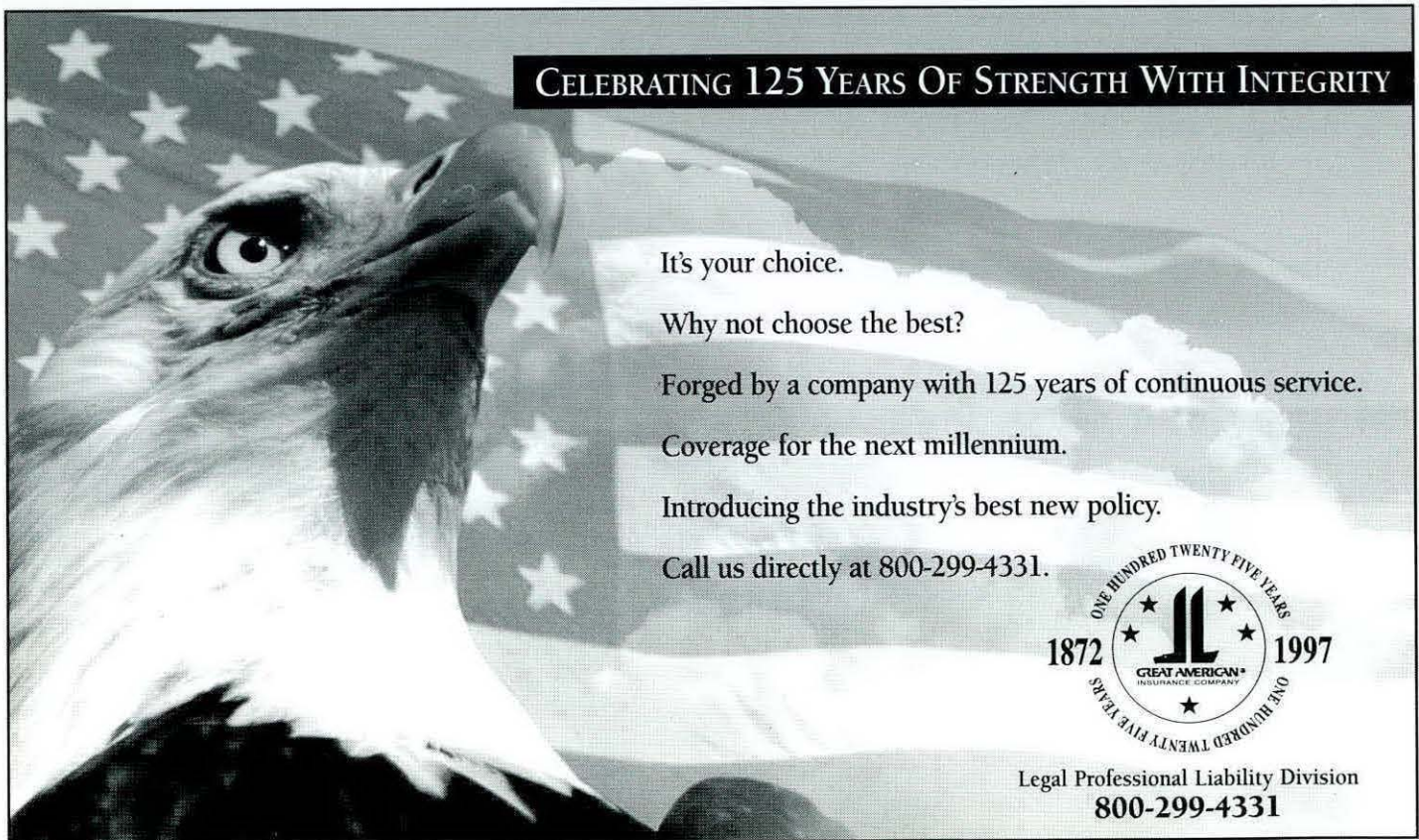
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pending
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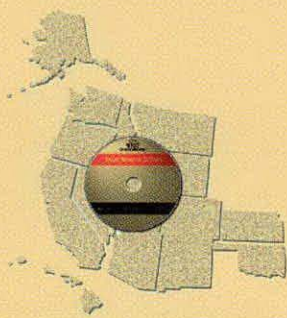
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