Washington State Bar News

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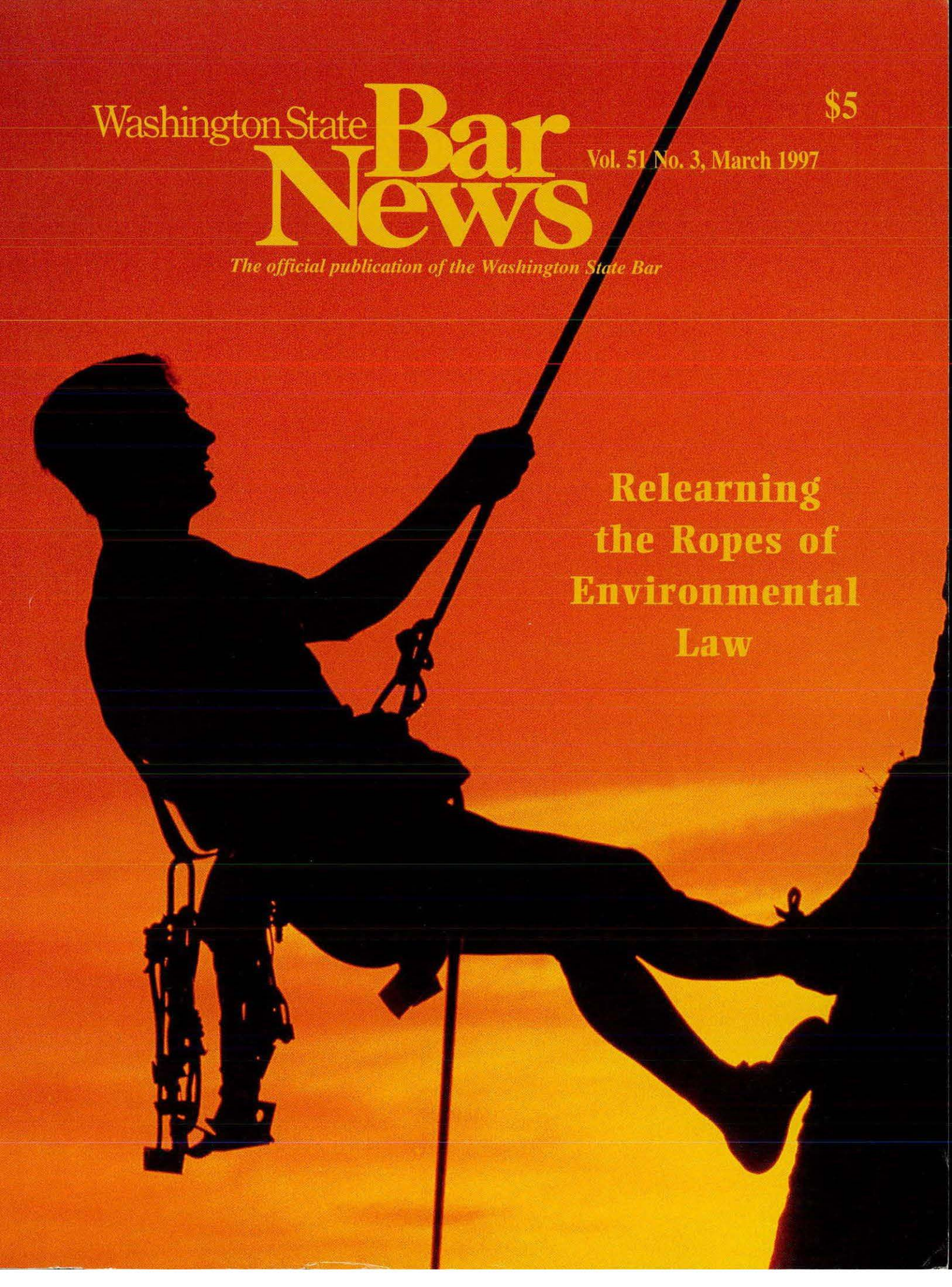
*The official publication of the Washington State Bar*



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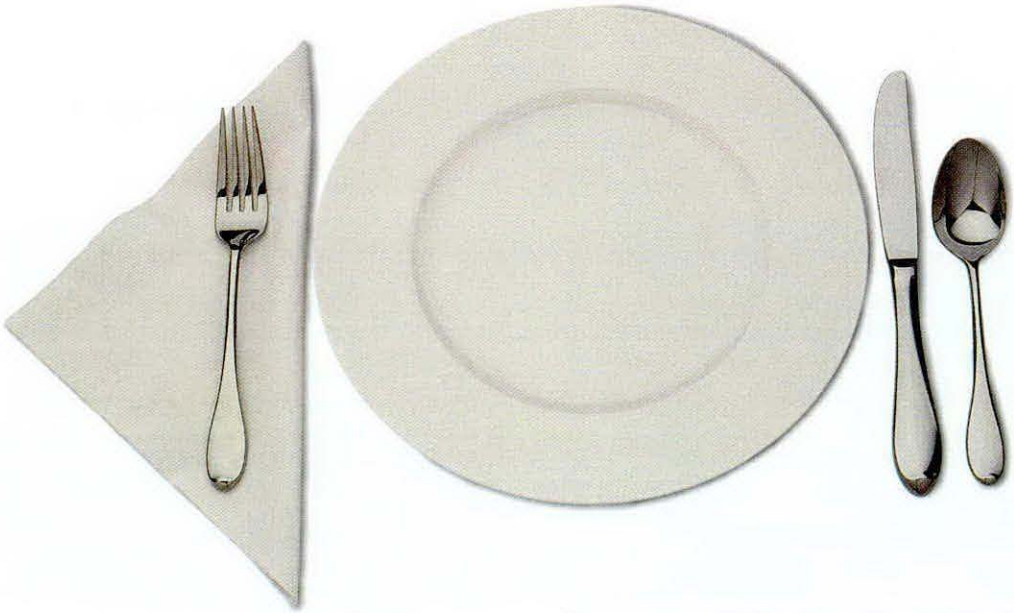

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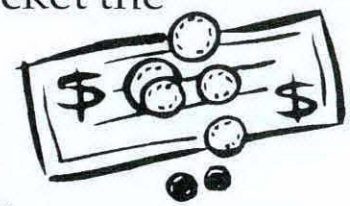

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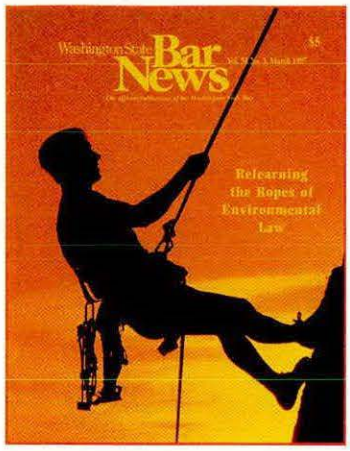


*Relearning the Ropes: The Changing Landscape of Environmental Law*

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## Responses to Hill Article

*Readers are invited to submit letters of reasonable length to the editor. They should be typed on letterhead and signed. The editor reserves the right to select excerpts for publication or edit them as may be appropriate. Signatures in excess of three names will be printed only in exceptional circumstances, at the sole discretion of the editor.*

Editor:

Jack Hill misrepresents my position on videotaping investigative interviews in his article "Beyond Advocacy: Professionalism in Child Sex Abuse Interviews" (January 1997). For the record, I neither support nor oppose videotaping per se. If, as Mr. Hill argues, the basis for establishing a policy of videotaping investigative interviews is the cognitive memory literature, then videotaping should either apply to young children or to all witnesses. There is only scientific evidence that young children, as a group, have heightened vulnerability to suggestive interviewing, as compared to older children and adults. To direct the policy at all children, but not adults, reinforces an inaccurate and prejudicial view that children of all ages are more suggestible than adults.

The other issue I have raised about imposing videotaping concerns the implications outside the investigative arena. The experts that Mr. Hill cites illustrate the point. Drs. Ceci and Bruck state that the term interviews applies to "any conversations between adults and children about the target event." The Amicus brief in the Kelly Michaels case that they authored, claims that the failure to audio or videotape initial interviews with children "makes it impossible to determine the accuracy of their subsequent statements," and goes on to say that summaries of other interviews cannot substitute for a taped interview. Since children will invariably have talked to someone — parents, teachers, doctors — before an official interview, this position implies that we can never conclude that children's reports are true.

A law based on the premise that talking to children is dangerous to their memories could create a harmful social climate for victimized children. It is evident that Mr. Hill and others are not just concerned about investigative interviews. They worry that the societal response has gone too far in believing children and acting on their reports. I agree that there were excesses, but in recent years the child protection community has worked hard to improve practice. The question is how do we respond when children say they have been raped or molested? Are parents to be accused of confirmatory bias because they believe their children? Discouraged from comforting and supporting them? Dissuaded from getting treatment? Should children be told not to talk abut their experiences? As a parent and citizen, never mind a professional who works with traumatized children every day, I say no. What do the videotaping proponents say? The report I prepared for the Washington State Institute for Public Policy did not take a position on videotaping. It summarized the arguments for and against, and it arrived at four conclusions: 1) scientific

# How to Open or Improve Your Own Law Practice.

Edward Poll is a nationally recognized advisor to attorneys in the business of law. He consults with attorneys and law firms, leads workshops and speaks for lawyers' groups on a variety of law practice management subjects. Mr. Poll has the unique blend of 25 years of law practice and extensive experience as a CEO, managing partner of a large firm and founder of his own firm. In a recent UW CLE interview, Mr. Poll said:

**Q. What separates a successful attorney from an unsuccessful one?**

A. A successful law practice requires business skills. That can be boiled down into three concepts: getting clients, doing the work and getting paid. That's true whether you're a shoe shiner or a store owner or a lawyer. When focus groups are asked what they think of lawyers, they identify business skills as the missing link. They perceive that lawyers can handle the technical aspects of the job.

**Q. So often we hear lawyers reminding each other, 'Law is not a business, it's a profession.' You seem to be saying the opposite. Why?**

A. Today the client accepts that we are professionals. They see lawyers as technically competent. That's a given. What the client does not like is the rudeness, the arrogance, the brusque treatment. That's when they get angry, and it's usually what prompts them to file a complaint with the State Bar.

Maybe I'm a little bit of a devil's advocate. I take that point of view only because so many people are focusing on the professional side without recognizing the business side - except perhaps with grudging acceptance.

**Q. Is there a difference between managing a small firm and managing a large firm?**

A. Absolutely. The reason I say that is because big-firm lawyers don't manage. They have skilled professionals managing, such as a managing partner, a CEO, a human resources person, or a Chief Operating Officer. A small firm doesn't perceive it can afford all these skills. Then the small-firm lawyer is the manager who generally isn't willing to give up control. The failure to delegate tasks to staff keeps the small-firm attorney trapped in minutiae that prevent marketing for new client business - and the attorney always has the feeling of being burdened or overworked.

**Q. What is the next big change coming down the road?**

A. Lawyers are going to act in a businesslike way, while retaining the best aspects of the concept of professionalism. The smaller firms and sole practitioners must once again become the counselors of the 1700's and 1800's. They should be the first people the client turns to for advice because of the high esteem in which the lawyer is held. The larger firms are starting to recognize this and move toward that philosophy also.

For a free, no-obligation transcript of the complete UW CLE interview with Edward Poll, call us at 800-CLE-UNIV. Edward Poll, live and in-person, will Chair the UW *Small Law Practice Institute* in Seattle, March 25-28, 1997. Mention this ad to register at the discounted priority price. **Don't miss this unique opportunity!**

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justifications for videotaping apply either to young children or all witnesses: 2) the costs and logistical implications of implementing videotaping have not been calculated and might be substantial; 3) a study would be necessary to determine the impact of videotaping on the prosecution process because there is currently no evidence to support or refute the extant arguments; and 4) a social climate that discouraged children from talking about experiences and parents from supporting children would be harmful.

Everyone agrees that professionalism and good documentation are essential in all criminal justice interviews. But the question about videotaping interviews with children who report abuse is more complicated than Mr. Hill makes it out to be.

LUCY BERLINER
Seattle

Editor:

Jack Hill is an articulate advocate for criminal defendants. In his article/editorial in the January *Bar News* about child abuse interviews, however, he uses misstatements and misrepresentations to make his arguments.

No prosecutor wants to charge or convict an innocent person. The majority of child sexual abuse cases referred to law enforcement are never prosecuted. That is not because they are necessarily untrue, it is because of the high standard of proof required before prosecutors file charges.

The issue of documenting interviews with children is worthy of debate. We have entered a new age of technology and how best to adapt those advances must be evaluated. However, in his position paper Mr. Hill does not offer a discussion of this issue. Instead he perpetuates myths and misconceptions about children and their suggestibility. Further, he digs out infamous cases to stir emotions when he knows that those cases are not in any way representative of the typical child abuse case.

Most troubling is that Mr. Hill chose to ignore a large body of social science research to make his point.

Studies have consistently demonstrated that children over about six to eight years of age are no more likely to be prompted to false disclosures by questioners than are adults. Even Dr. Ceci's research, relied upon by Mr. Hill, does not support Mr. Hill's argument. Every one of the subjects in Dr. Ceci's research in this area were pre-schoolers. Dr. Ceci has acknowledged that his own research has no application to children over 6 years of age. Less than 15 percent of the child abuse cases filed in Snohomish County in 1996 against adult offenders involved children six or under.

On the same Nightline show referred to by Mr. Hill, Dr. Ceci estimated that even in cases involving children under six years of age, the number of cases where adults have influenced children's memories is, "Maybe one percent, five percent, 10 percent. I suspect it's nowhere near the majority" He continued: "My hunch is the majority of interviews with kids by frontline workers, child protective services, law enforcement, therapists, pediatricians are well-done."

Dr. Ceci added that although young children could be misled by interviewers, his research showed it would take a repeated and purposeful effort to do so: "I'm not talking about a single interview, where you sit down and use a single leading question, and all of a sudden the

child's giving you some highly elaborate narrative about something that never happened. That isn't how you grow a narrative. We do it over long periods of time, with repeated false suggestions by an interviewer." Mr. Hill, I hope, is not suggesting that law enforcement throughout this state are intentionally and repeatedly attempting to manipulate children into making false disclosures of sexual abuse.

We do not videotape interviews with adults. We do not videotape interviews with any other type of crime victim. For children over six to eight years of age, there is no support in the research to suggest that children are more apt to be led into false suggestions by a single interview than are adults. So why does Mr. Hill advocate videotaping interviews with children?

The answer, I suspect, is that the videotape becomes a tool for the defense. It becomes available for defense "experts" to attack. Mr. Hill should be candid in his writing: The push for mandated videotaping of child interviews is a strategic issue for the criminal defense bar. It allows defense lawyers to have something to divert the jury's focus away from the in-court testimony of children.

One reason that the professional community is so divided about videotaping interviews with children is that the focus of a criminal trial is apt to degenerate into distracting and expensive arguments critiquing a particular interviewing style.

The requirement of mandated videotaping would also serve to place one more impediment in front of investigators. It will make it more difficult and more expensive for police, especially in smaller communities, to do their job.

While Mr. Hill would seek to spend limited police resources of recording equipment, VCRs, one-way mirrors, videotape storage areas, etc., I would prefer to spend those resources on enhanced training of interviewers.

Mr. Hill outrageously cites the Rules of Professional Responsibility to suggest that prosecutors are unethical by allowing police to investigate cases involving children the same as cases involving adults. His remedy is to have the legislature mandate how law enforcement does its job. I believe that police should continue to investigate cases as they have for decades; using their skills, training and judgment. It is unwise, I suggest, for a legislature to begin mandating specific investigative techniques for specific crimes. Will special rules next be imposed for investigating domestic violence cases, eyewitness identification cases, burglary cases?

There is no professional agreement on whether to videotape interviews of children who report abuse. The country's largest multidisciplinary professional organization on child abuse has recently studied the issue and concluded there is no consensus in the professional field about whether statements from children should be recorded; only that they should be well documented. I agree that these interviews should be well documented.

I also believe that interviews with adults and any other crime victim should be well documented. To require interviewers to electronically record statements by children is to suggest that there is a reason to treat them differently than adults.

Empirically there is no support for that conclusion. To mandate interviewers to electronically record is to perpetuate false beliefs about children. If video recording becomes a requirement of every investigative interview with a child, then Mr. Hill indeed will have advocated well for his criminal defendant clients.

PAUL STERN
Everett

## Government Lawyer Tribute Appreciated

Editor:

President Tom Chambers' Tribute to Government Lawyers (*Bar News,* January 1997) is timely and well-deserved. The unique challenges facing these public servants and their often unappreciated dedication and accompaniments, are worthy of recognition. Further reason(s) for pride in our profession, the unselfish efforts of attorneys in public service. I salute them for their commitment.

J. D. CURRAN
Spokane

## Lawyers With Student Loans Punished Enough Already

Editor:

I offer you some thoughts on disbarring or sanctioning lawyers who are not paying their student loans.

He or she started law school filled with enthusiasm with the idea of becoming lawyer, working for a few years servicing the poor and then going to a big firm and earning lots of money. After the first year, the tuition doubled, and by the third year it had redoubled. The indebtedness now approximates over $50,000.

He/she failed the bar the first time but passed on the second time and now on to default on the loan. Going out into the real world, he/she discovers that there are very few legal jobs out there and those that are there pay very poorly. There is a starving lawyer on every corner trying to start a practice.

Who is at fault, and what sanctions should be applied? The student for continuing on not realizing how big the indebtedness will be, the law school for escalating the tuition, the greedy banker who gave out the money knowing it was guaranteed by the government and that the student could not file bankruptcy, or the United States for creating a loan methodology without supervision of either the students or the bankers or the school? Should we sanction the school and refuse to honor its diploma? What do we do to the banker and — especially — what do we do to the United States of America, which created this wonderful opportunity to incur excessive student loans?

What of the student? He or she is now a lawyer and now in default. It will probably take 20 to 25 years to repay the loan and he or she cannot file bankruptcy.

I think the new lawyer has been punished enough, and it is something the Bar Association should have no part of.

PAUL M. WILLIAMS
Edmonds

P.S. I have no student loan.

## Saab Story

Editor:

The recent increase in WSBA annual dues has been sold to members on the theory that it is needed to pay for improved regulatory programs. However, some of the money is going elsewhere.

For example, on November 30, 1996, Executive Director Dennis Harwick executed a lease agreement with Carter Motors Inc. of Seattle. Pursuant to this agreement, the WSBA took possession of a new 1997 Saab 9000CSE automobile. The stated value of the vehicle plus applicable federal luxury tax is $40,121.50.

WSBA documents also indicate that Executive Director Harwick is paid a salary of $106,000 per year.

EDWARD V. HISKES
Richland

## In re: Cumulative Subject Index and Advance Sheets

Editor:

Please add my voice to the chorus asking that the responsibility for publication of the advance sheets of the appellate courts of this state be returned to the Office of the Reporter of Decisions.

Since the private publisher took over publication about a year ago, they have made more errors than in all the previous 30 years I have been using the sheets. Their charges are no bargain either, and based on experience with other private publishers, I would expect the future price increases to far exceed those incurred in the past through the Reporter's office.

Also, the private publisher has not published a cumulative subject index since taking over. The one the Reporter's Office did, most recently in 1995, was excellent.

The Reporter's office was one of the few state agencies that I believe worked quite well and I ask other attorneys who feel as I do to write the Office of the Reporter in support of efforts to undo the error of privatizing these publications.

THOMAS M. BLAKE
Renton

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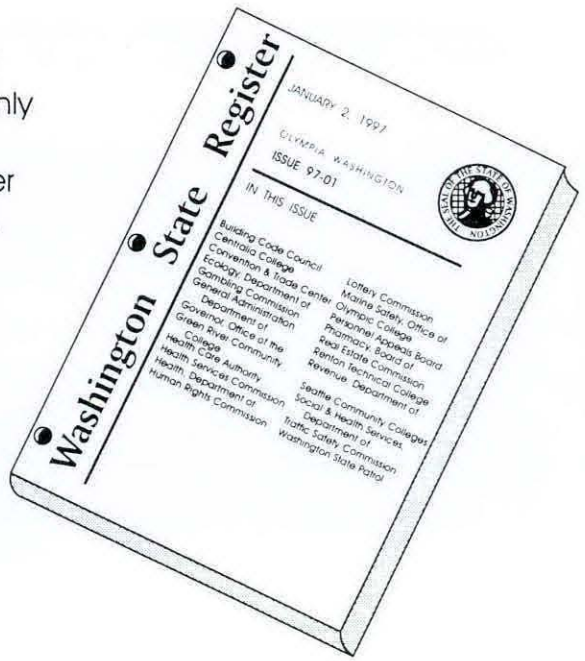


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# The Jury System: A Fourth Branch of Government?

design by Alan Troy Hunter

*by* **Tom Chambers**
*WSBA President*

A single client and a single lawyer can make the world a better place. As America was forming its government at the federal level, as well as state by state, a French observer named Alexis de Tocqueville was on hand to observe the process. You see, at that time the French were also interested in revolution. De Tocqueville wrote a book called, "Democracy in America." It is a classic.

De Tocqueville included a chapter on the jury system in the United States. It is only nine pages long — just enough to develop one good concept. He contended that the jury system in America is the way citizens represent themselves directly, rather than by elected representation. Let me repeat that. The jury system in America is the way citizens represent themselves directly, rather than by elected representation.

It is almost as if the jury system is the fourth branch of government.

The right to a trial by jury is not contained in our federal constitution, yet every state in the union guarantees such a right. Here in Washington, our state constitution provides that ". . . the right to trial by jury shall remain inviolate."

Juries reflect society's values and mores. Consider some of the major changes that they have brought about.

Who put the Ku Klux Klan into bankruptcy? It was not the executive branch of government, nor was it the legislative branch of government. It was not even a government agency. A single lawyer, Morris Dees, and a single client, the mother of a lynched young man, who went into a court of law and presented their case to a jury. The panel delivered a multimillion-dollar verdict against the Klan. As a result, the Klan's building was foreclosed and the organization was forced into bankruptcy.

Who stopped Ford from manufacturing Pintos with exploding gas tanks? It was not the executive branch of government, nor was it the legislative branch of government. It was not even a government agency. It was a single lawyer, acting as the advocate for a single client, the victim of a horrifying burn, that got the attention of the Ford Motor Company. While the jury verdict that exceeded $100 million was reduced by the judge to $6 million, the people had nonetheless spoken directly to Ford. Ford listened.

When the oil tanker Valdez spewed black death and pollution into Prince William Sound, do you think that Exxon worried about the executive branch of government, the legislative branch or even government agencies? No. But Exxon was terrified of lawyers, their individual clients and the judicial branch of government. The oil company knew that by going before a jury, the lawyers and clients afforded the citizenry the opportunity to speak directly to Exxon about the spill.

Let us not forget all the other lawyers — whether corporate litigators, prosecutors, criminal defense lawyers or other members of the Bar — who, with a single client and a jury, have sent a message for all to hear.

In our democracy, citizens are afforded many opportunities to speak out and to participate. As jurors, citizens form what I believe to be the fourth branch of our government, with an opportunity to represent themselves directly.

## Two Quick Self-tests — If you or a fellow lawyer experiences:

- ☐ Sadness and/or irritability
- ☐ loss of interest or pleasure in activities once enjoyed
- ☐ changes in weight or appetite
- ☐ changes in sleeping pattern
- ☐ guilt, hopelessness or worthlessness
- ☐ inability to concentrate, remember, think or make decisions
- ☐ fatigue or loss of energy
- ☐ restlessness or decreased activity noticed by others
- ☐ thoughts of suicide or death,

. . .you may be depressed.

If you:

- ☐ lose time from work due to drinking
- ☐ find that drinking is making your home life unhappy
- ☐ drink because you are shy
- ☐ find that drinking is affecting your reputation
- ☐ have gotten into financial difficulty as a result of drinking
- ☐ turn to lower companions and an inferior environment when you're drinking
- ☐ become careless of your family's welfare because of drinking
- ☐ feel a decrease in ambition since drinking
- ☐ crave a drink at a definite time daily
- ☐ want a drink the next morning
- ☐ have difficulty sleeping because of drinking
- ☐ are jeopardizing your job or business due to drinking
- ☐ drink to escape worries or trouble
- ☐ drink alone
- ☐ ever have a complete loss of memory from drinking
- ☐ drink to build up your self-confidence

. . . you may have a problem with alcohol.

If you'd like to talk to somebody about it, call us at (206) 727-8268. Remember: every call is absolutely confidential (RLD 12.7).

### NOTICE TO ATTORNEYS

The State of Washington, Department of Corrections, intends to issue a Request for Proposal (RFP) in early April, 1997 for the purpose of obtaining legal services for felony offenders housed at (1) McNeil Island Corrections Center, Steilacoom; (2) the Washington Corrections Center for Women, Purdy; (3) Washington Corrections Center, Shelton; and (4) Twin Rivers Corrections Center, Special Offender Center, and Washington State Reformatory, Monroe.

Successful bidders will provide legal services to eligible offenders and training/assistance to law clerks and offenders in the use of the law library and legal research techniques. Representation will be for civil matters only.

For further information and to obtain a copy of the RFP when issued, contact:

Department of Corrections
Office of Contracts and Regulations
410 West 5th
P.O. Box 41114
Olympia, Washington 98504-1114
(360) 586-2160
(360) 664-2009 (FAX)

# "Don't Shoot the Messenger" The Story of the Student Loan Default/License Suspension Rule

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

In January, the Board of Governors grappled with the issue of developing a rule that would provide for a procedure to suspend a lawyer's license to practice law for defaulting on a state or federally guaranteed educational loan. The Board was bombarded with strongly worded protests telling the Board, in no uncertain terms, that such a rule was stupid, counterproductive, and ill-advised. Almost uniformly, these protests told the Board to shelve the development of such a rule. And equally uniformly, people were outraged at the Board of Governors for even considering such a rule.

***There's only one problem — people are shooting the messenger!*** There is little, if any, support in the Board of Governors for the underlying public policy of suspending professional licenses (including the license to practice law) as a collection enforcement device. Rather, the public policy was set last year when the Washington State Legislature passed Substitute House Bill 2371 and the Governor signed the bill into law. At the time the bill was sailing through the legislature, the best the WSBA could do was point out that only the Supreme Court, not the legislature, had the authority to suspend a lawyer's license to practice. Consequently, a provision was included in the SHB 2371 recognizing the separation of powers issue. However, the legislature then wrote the Supreme Court and asked the Court to draft and adopt a rule to effectuate the license suspension policy. The Washington Supreme Court then, appropriately enough, asked the WSBA to develop such a rule. The message since then has been clear: ***The WSBA can be part of the process of developing a rule — or it can have a rule drafted by someone else and imposed upon it! That was the choice, not whether the WSBA agreed with the public policy.*** The Legislature has already set the public policy, like it or not!

Consequently, the WSBA has developed a rule with as many safeguards and procedural protections as possible, and has delivered that proposal to the Supreme Court. The proposed rule was accompanied by the following letter from WSBA President Tom Chambers. The letter speaks for itself. **Just don't shoot the messenger!**

January 14, 1997

Justice Charles W. Johnson, Chair
Supreme Court Rules Committee
Temple of Justice
Olympia, WA 98504-0929

Dear Justice Johnson:

Enclosed herewith is proposed Admission to Practice Rule 16 providing for the suspension of the license to practice law for the default of federally guaranteed student loans. The Board [of Governors] worked hard to make the proposed rule consistent with existing statutory intent and to be consistent with the administration of the practice of law by the State Bar Association and the Supreme Court of this state. While consistent with the legislation, the proposed rule provides some due process.

The Bar Association Board of Governors wanted me to convey to you that the Board received input from lawyers around the state, including the Spokane County Bar Association, the King County Bar Association, and the Washington Young Lawyers Division. All of these groups of lawyers opposed the policy of suspending the licenses of all licensees for the default of student loans. Among the reasons cited are:

(1) Those enforcing student loans already enjoy substantial remedies under bankruptcy and garnishment law;

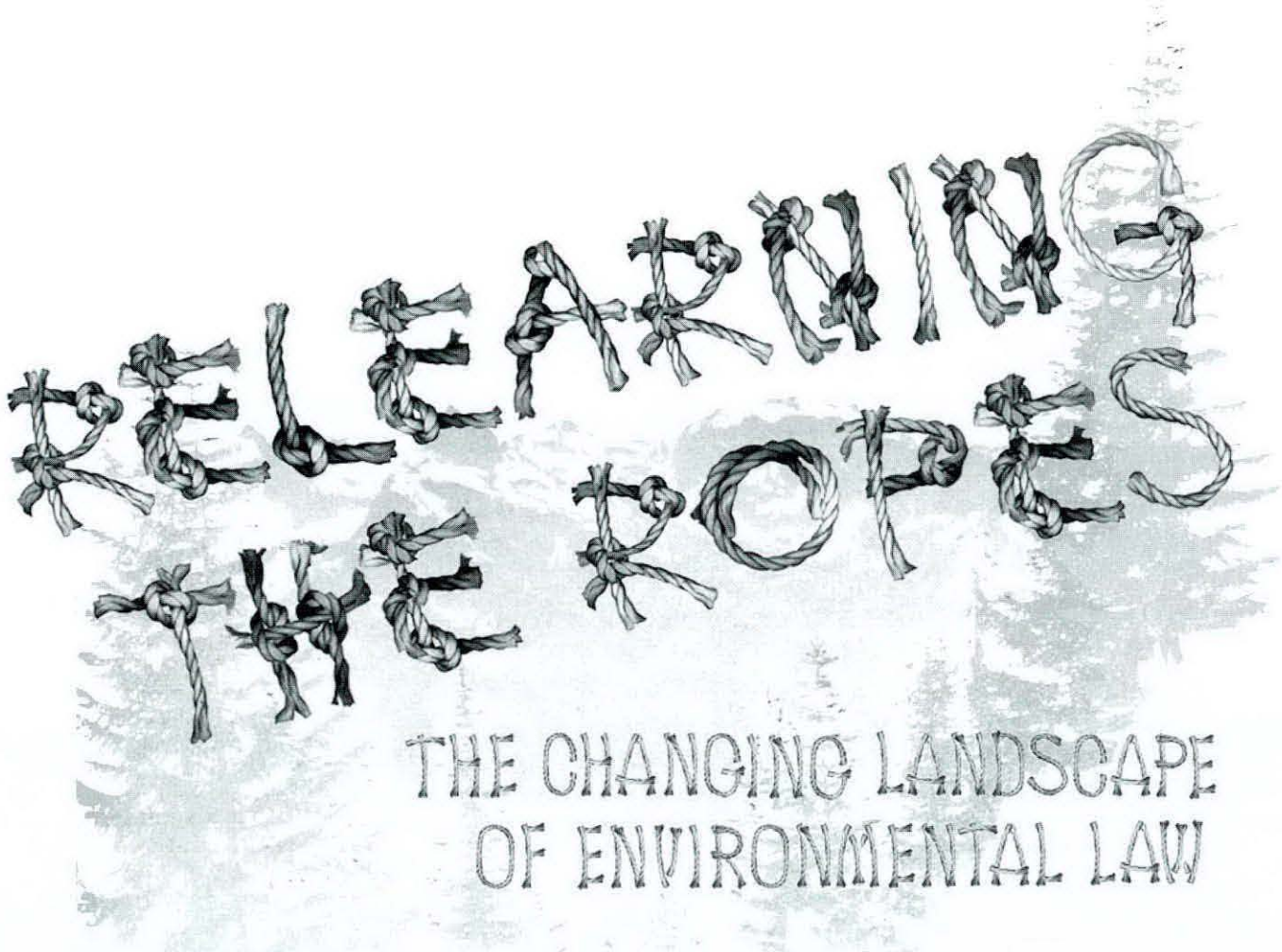
(2) The suspension of licenses for the default of student loans is illogical considering the profits and insurance premiums enjoyed by those making and insuring the loans; and

(3) Suspension of the licenses of lawyers fails to recognize the circumstances of young lawyers who either choose to work for legal services or have difficulty finding jobs in today's environment.

A majority of the Board of Governors of the Bar Association is in agreement with those who oppose the policy of suspending professional licenses for those who default on student loans.

Very truly yours,

s/Tom Chambers, President
Washington State Bar Association




*by* **Kenneth S. Weiner**

No, 1724 is not the date that the *ancien regime* in Europe began to collapse, opening the way for the French Revolution. It is, however, a legislative bill number with revolutionary implications for the way land use permitting and environmental review have been conducted in Washington for the past quarter century.

ESHB 1724 is the Engrossed Substitute House Bill number of an extraordinary law jointly lobbied by business and environmental groups, as well as by state and local governments. The Act passed unanimously in the 1995 Legislature and went into effect across the state in April 1996. [1]

ESHB 1724 represents the first comprehensive land use permitting and environmental reform measure to be enacted since the parade of legislation began after the first Earth Day 25 years ago. The 106-page omnibus measure resulted from a two-year effort by the Governor's Regulatory Reform Task Force. The Act amends many of the state's basic land use and environmental statutes, such as the State Environmental Policy Act (SEPA), Growth Management Act (GMA), Shorelines Management Act (SMA), subdivision and hearing examiner statutes. The Act also created a state land use commission to assess and continue the reform effort.

This is a major accomplishment and national model in the current polarized political climate, where environmental reform legislation faces gridlock in Congress. Many of the same issues facing federal and state agencies with natural resource and land use planning responsibilities are addressed by the reforms in 1724 relating to comprehensive planning and environmental impact review.

The changes mandated by 1724 are now beginning to be felt in the permit process. While some cities and counties had improved their performance in recent years, the need to bring local codes into compliance with 1724 has already triggered a house-cleaning of land use and environmental codes.

"We have been making improvements for several years," noted Seattle City Council member Sue Donaldson, "1724 provided further impetus for streamlining our process."

L. Tom Fitzsimmons, director of the Washington State Department of Ecology and the former chief administrative officer for Thurston County, which has been a leader in implementation, agreed:

> We thought we had done a lot to simplify the permit system, but 1724 spurred us to re-examine our permit process. We have combined or eliminated unnecessary procedures, we have gotten our land use and environmental staff to work better as a team, and we are doing a better job of communicating with applicants and the public.
>
> We strengthened the opportunities for both businesspeople and neighborhoods to identify and try to resolve issues earlier in the project review process.

## A Year of Change

Without rehashing the debate over problems in our current environmental and land use laws, or the way these laws are administered, 1724 seeks to:

(1) simplify the number of permits, hearings and appeals to conserve everyone's resources,

(2) create more predictability by increasing reliance on planning decisions already made; and

(3) improve timely review of proposed projects by eliminating duplication and integrating the various requirements that apply to a project.

Since the enactment of 1724, most cities and counties have changed their basic land use permitting process. A few examples of the changes that have already been adopted by localities around the state:

***Hearings.*** Over the years, agencies have layered on several different hearings on the same decision. For example, some used to hold three or four successive appeal hearings on whether a permit should be issued or whether an environmental impact statement (EIS) should be prepared. All cities and counties, whether or not they plan under GMA, are changing their local ordinances to hold a maximum of one "open record" hearing and one "closed record" appeal on a local land use permit.

Many cities and counties have also eliminated a second layer of administrative appeals to their city or county councils, and various routine permits no longer have administrative hearings or appeals (see chart on page 23).

***Depoliticizing Appeals.*** Many cities and counties throughout the state have changed their codes and de-politicized the permit process so that appeals on technical issues, such as the adequacy of critical area or other environmental studies, will be decided by hearing examiners rather than by elected officials.

***Early Notices.*** Many communities did not learn about proposed projects until well into the permit processing, when it became difficult for an applicant or agency to make changes. Beginning April 1, 1996, cities and counties planning under GMA started to issue an early public notice within 14 days of receiving a complete application.

In a radical departure from the past, the better local notices are beginning to inform people about land use planning decisions and environmental studies that have already occurred, so public comment does not start from a blank slate. It is akin to using an early "scoping" process to define the scope of issues, studies, and permit requirements to assist applicants and the public for those projects that involve more than simple construction permits.

***Relying on Plan Decisions.*** In the past, when a project has been proposed, opponents often argued that all of the basic land use planning issues could be reopened in the course of reviewing a project's environmental impacts and making permit decisions. This undercut the incentive for businesses and neighborhoods to work together with public officials to develop good comprehensive plans and development standards, since they did not feel bound by "plan level" decisions.

ESHB 1724 mandates that permitting agencies, hearing examiners and courts rely on basic planning decisions that have already been made, while using "project review" to ensure "consistency" with plans and codes and deal with those environmental impacts, if any, that were not previously "addressed." Some recent high-profile project siting decisions already indicate that this direction is being taken seriously.

Yet there's also cause for concern, as early anecdotes reveal misunderstanding and abuse. Some developers have broadly asserted that consistency with zoning (and perhaps other development regulations) is all that's needed and SEPA review is unnecessary, while some citizens respond that any issue is still fair game during permit review. Many local planners are still running SEPA and permit processes and paperwork separately from each other.

An intensive retraining of agency staff, hearing examiners, developers, consultants, and community groups — not to mention lawyers — is desperately needed to help people understand what prior decisions are and are not capable of being relied upon, and what issues get "docketed" for future consideration.[2]

***Permit Timelines.*** One of the key provisions of the Act is a far-reaching experiment. In exchange for suspending certain claims of municipal liability, local ordinances are now being adopted that require final permit decisions within 120 days of receiving a complete application (not counting time for studies or appeals). The success of this reform may be one of the most difficult to measure.

A new vocabulary has also been emerging over the past year, which reflects SEPA's original intent to integrate land use and environmental analysis, rather than to have separate processes (see accompanying box, page 26).

Since localities are just learning the ropes and starting to do business differently, it will be a few years until we know how effective the reforms are in producing better and faster decisions. To assess preliminary progress and prospects, it's essential to understand the basics of ESHB 1724.

## The Basic Social Compact in 1724: Plan Reliance & Project Review

The Act legislates twin truths on which there is broad consensus:

1. If agencies, informed by thoughtful environmental and fiscal analysis, can adopt better plans and development regulations than they have in the past, better and faster permit applications and decisions are likely to be made; and

2. No matter how good plans and regulations may be, it isn't possible for them to cover everything — because of the desire for a free-market economy, the reality that some projects will continue to be controversial, and the humility of knowing our limits to plan or predict the future. Review of individual projects remains essential.

***In short, the basic compact embodied in the Act is that greater reliance will be placed on plan level decisions, while individual environmental and land use review of proposed projects will continue.***

In this legislative concord, development interests gained greater certainty and predictability — and shorter permit-processing if applications are complete and agency-permitting staff are well-

trained. Environmental and citizen interests retained the safety net provided by SEPA. That safety net includes adequate impact analysis, authority to avoid or otherwise mitigate impacts not addressed, and public and interagency review. Both businesses and citizens have greater accountability from government to follow the rules and explain decisions.

Local officials gained greater deference to the land use and environmental choices they made in adopting their plans and regulations, bolstering their position when buffeted by criticism from applicants or citizens. All in all, not a bad balance to strike.

ESHB 1724 gives us a chart to navigate the shoals, but an inexperienced pilot can still run the ship aground. The law makes sense, but I think about what aggressive advocates for developers or citizen groups will argue before inexperienced permit staff, hearing examiners or judges who may not be familiar with the whole fabric of the Act,

cautions Dick Ford, former chair of the Growth Strategies Commission. "We have a way to go before people understand the artful balance written into the law."

## Integration not Substitution

A persistent slogan in the regulatory reform debate has been: "Now that we have GMA, we don't need SEPA anymore." As noted above, both the Regulatory Reform Task Force, and — more importantly — the Legislature, did not adopt that solution.

The Act reflects a basic rejection of doctrines that substitute one law for another, such as the doctrine of "functional equivalency."[3] The Act also rejected legislative proposals to "categorically exempt" large groups of projects from environmental review, such as projects located in urban growth areas.[4] Although the Legislature has occasionally adopted a specific provision to address a particular issue in this fashion,[5] these approaches reflect the "road not taken," to borrow a phrase from the poet Robert Frost.

Instead, 1724 requires "integration" of the state's basic planning, permitting, and environmental review laws. The basic premise is that SEPA and GMA have related, but not identical, purposes and roles. Rather than effectively repeal one law or the other, 1724 would simply have the same studies, documents, notices, agency and public comment periods, serve both laws simultaneously.[6]

In articulating this compact, the Act clarifies the basic roles of substantive planning statutes, such as GMA,[7] and environmental review under SEPA, which in Washington state has both a procedural and a substantive function.[8]

SEPA's role is not to substitute for planning statutes. Rather, given the body of environmental and land use regulation that has developed since 1970, SEPA's role is to focus on the "gaps and overlaps" in applicable laws.[9] Gaps refer to environmental impacts, factors or values that are not in existing regulations or plans. Overlaps refer to where the whole may be greater or different from the parts, such as in the cases of cumulative or synergistic impacts, or in multiple laws inconsistently regulating the same environmental concern.[10]

### The Role of SEPA in Project Review

Given the 25-year history of generally segregating SEPA from planning and permit review, making integration work largely depends on understanding the role of SEPA in the new project review process.[11] In the year following the passage of 1724, it has been common in meetings and hearings on local 1724 ordinances around the state to hear: "SEPA doesn't apply if a project is consistent with the local plan" or "We don't need SEPA at the project level."

People have been confusing use of the SEPA process to consider the environmental impacts of a project, with use of SEPA substantive authority to condition a project. The former is part of integrated project review, which includes the use of SEPA procedures to pull together and use environmental information on a project, such as traffic studies or wetland analyses prepared under critical-area ordinances. The latter refers to whether or not an agency needs turn to SEPA for additional legal authority beyond its land use and environmental codes in order to control the environmental impacts of a project.[12]

> ***"If agencies, informed by thoughtful environmental and fiscal analysis, can adopt better plans and development regulations, than they have in the past, better and easier permit applications and decisions are likely to be made."***

Bob Tobin, Seattle assistant city attorney and former deputy Thurston County prosecutor who has been involved in many of the leading state land use and SEPA cases, comments:

> This is likely to be the greatest source of confusion and misinterpretation of 1724 and of the local ordinances that are being adopted across the state, especially if certain provisions of 1724 are quoted out-of-context.
>
> ESHB 1724 plainly states that case-by-case project review, which includes environmental review under SEPA, continues to be essential, even if the need to use SEPA substantive authority to condition projects becomes less frequent,

Faith Lumsden, a planner for the City of Bellevue active in regulatory reform, explains:

> Even where localities don't need to use SEPA to place conditions on a project, we need to check if there are important environmental impacts we didn't address in our codes or prior studies. If we identify impacts, we usually have authority under our land use or subdivision code to address the issue. A SEPA process that is tied into our permit process is not an extra step, but an analytical tool that helps us to make a decision on a project.
>
> It's pretty simple for routine projects. We typically document the results in our staff report or decision on the permit.

Local officials from such diverse jurisdictions as East Wenatchee, Mill Creek, Spokane, Clark and Pierce Counties, Olympia, Tacoma, Everett and Seattle have said they see the process under 1724 the same way.

## Planned Actions

Perhaps the greatest controversy to date swirls around a provision for "planned actions" in the SEPA amendments contained in 1724. The planned-action provision basically packages an option currently available under existing law to rely on a programmatic EIS to anticipate and address the impacts of a type of project, thus streamlining environmental review when specific projects are proposed. The provision does not exempt a project from project level environmental review or mitigation, but makes clear that a threshold determination (Determination of Significance or Nonsignificance) is not required for such projects (since an EIS has already been prepared).[13]

As the provision is written, it would seem logical for a project application to include at least an abbreviated environmental checklist and for a city or county to confirm that the impacts of the subsequent project are within the range of the programmatic EIS (the usual standard for relying on prior environmental documents). Yet some advocates of planned actions have maintained that neither of these steps is allowed, despite the legislative history and guidance from Ecology. Although the debate is not over, there is concern (not limited to lawyers) that the resolution will impair the current ability to use existing environmental documents for projects other than planned actions.[14]

## Old Habits Die Hard

So far, achieving integration hasn't been as easy as it might seem. Old habits die hard. Plus, although relatively few projects get appealed, and a tinier fraction go to court, the fear of appeals plays a part.

Practitioners are afraid to integrate land use and environmental review because they have developed an industry of preparing fairly boilerplate SEPA documents over the past 25 years. Certainty is a big part of the process, and they believe they have a good handle both on the preparation cost and on what will pass muster as "adequate" because it looks familiar. Many people would rather stick to the safe path or grouse about regulation than make the process work as intended or explain to a hearing examiner or superior court judge why a document that looks different is adequate.

Paul Roberts, Everett's Planning Director, who is managing one of the model efforts currently underway with companies such as Boeing and Fluke for the Southwest Everett industrial area, notes:

> We need better guidance and successful examples. We have a real learning curve before agencies understand that each stage in the planning and permitting process starts from where the last stage ended, rather than starting a detailed analysis from scratch every time a new project comes along.

Recognizing this problem, 1724 mandated — and the Washington State Department of Ecology (Ecology) and Department of Trade and Community Development (CTED) are working with diverse interests to develop — rules and models for integrating documents and processes. Many people hope that the rules will include incentives and protections for those who implement the reforms in 1724, breaking many of the bad habits of the past.

The most practical and significant reform may well be a new "project checklist" form to be used by GMA jurisdictions instead of the current environmental checklist. The "integrated" form would combine analysis of a project's consistency with development regulations, including critical area ordinances and review of its environmental impacts, thus eliminating duplicative studies.

Lucy Steers, a long-time representative of the League of Women Voters, cofounder of 1000 Friends of Washington, and a member of a number of state commissions and advisory committees involved with growth management and 1724, observes:

> One of the basic agreements in 1724 was to retain SEPA review at the project level. But this review has to be combined with reviewing consistency with the codes and environmental studies that already exist. We need a new form to help applicants, agencies, and citizens to analyze consistency, as well as to identify and discuss any important impacts that haven't been addressed or included for planned actions. Along with earlier and clearer public notice on permit applications, this direction will help to streamline everyone's review.

## Backlash from a Slow Start

The Act anticipated start-up problems and provided a nine-month lead time for cities and counties to work with businesses and citizens to develop new permit procedures. The debate over Initiative 48 — a hard-line "takings" law — largely consumed or paralyzed localities until its repeal in November 1995. Communities lost valuable time to chart a new course and to strengthen the consensus reflected in 1724. Many local 1724 implementing ordinances were hastily conceived to meet the April 1, 1996, deadline, and they continue to have glitches.

Several localities did not think through how to achieve the efficiencies allowed by 1724 and lengthened the permit process. For larger localities, difficulties in meeting the 120-day permit decision deadline led to resistance to implementing other provisions of 1724, including a failure to provide better notice and integrated SEPA review. Nearly all have various appeal provisions that are inconsistent with 1724.

At the same time, many cities and counties had not yet completed their GMA comprehensive plans or development regulations, or they were under appeal. In some jurisdictions, it has been difficult to know which plans and codes could be relied upon to make project level decisions, while applicants understandably sought to be "grandfathered" under old codes.

It is a difficult climate in which to build a lasting peace among business, community, environmental, and local government interests. These problems have prompted a backlash, where some interests wish to renegotiate the basic compact contained in 1724, either through the Land Use Study Commission or directly through the legislative process. It is too soon to say whether or not the Commission will achieve a workable consensus proposal that remains true to the policy direction specified in its charter and the precepts of 1724.[15]

## Accomplishing Reform

Like most private-sector efforts to "retool" corporate cultures, regulatory reform starts with the need for retraining and for a new, common language. In one forum after another, people have a difficult time talking about how to increase reliance on existing plans, codes and environmental studies, while understanding the role that the Legislature recognized the SEPA process will continue to play when project applications are submitted.

"The integration approach initiated by 1724 is basically sound, but change in all sectors has been slower than we expected," comments John Hempelmann, who advised the regulatory-reform efforts and represented development interests in the legislative process.

In the end, however, "integration" cannot be legislated any more than the good writing of environmental documents, balanced comprehensive plans, or wise decisions by agencies or courts. It will take a serious re-education effort, coupled with incentives and rewards in the personnel system and in environmental-consultant contracts, to overcome the habits of 25 years. Ideological slogans and "easy-fix" amendments in the legislative arena won't get us there.

Businesses and labor unions, agencies and citizen activists, the presidents of major Northwest corporations such as Microsoft and Boeing (not to mention the President and Vice President of the United States) are bent on "reinventing" their organizations to teach "teamwork" and "retool" people's skills to thrive in a global economy. Perhaps this should give us a hint that — more than new regulations or glib legislative proposals sure to be introduced and to command inordinate time by all stakeholders — a widespread training effort is needed for the basic redirection agreed upon in 1724 to succeed. The alternative involves reverting to options that are likely to be both divisive and politically unachievable.

The Act has provided many of the basic tools to "reinvent" the regulatory landscape. Whether these tools will be used to build a lasting peace, or rejected in order to prepare for another round of legislative wars remains to be seen.

*Endnotes*

[1] Although it might be appropriate to refer to ESHB 1724 as the "environmental and land use permitting reform act of 1995," the bill did not contain a provision for a "short title" that officially allows the entire act to be referred to by a single name. Since the Act amended so many different statutes, its provisions have been dispersed and codified throughout the RCWs. This increases the potential for its provisions to be misused be-

cause they might not be interpreted within the intent, principles and interrelated context of ESHB 1724.

Partly for this reason, some of the key operative provisions of the Act are accompanied by important legislative intent statements (see, for example, sections 1, 101, 201, 401, 403, 501, 601). These statements may prove crucial to the success of these regulatory reforms, just as the legislative intent of the 1983 SEPA reforms contained in *Ten Years' Experience with SEPA* (Wa. St. Legislature Commission on Environmental Policy, 1983), have been valuable to practitioners and courts in interpreting SEPA.

Unlike the 1983 SEPA reforms, however, the final report of the Regulatory Reform Task Force was drafted prior to some of the key provisions in 1724. Although the report does not provide a definitive legislative history, the interim and final reports provide helpful background on several of the reforms. The "SEPA/GMA Work Group," a committee of diverse interests that advised the Task Force and drafted some of the key amendments ultimately adopted in 1724, produced several consensus policy papers, recommendations and memoranda to the Task Force (which are in Ecology and Task Force files) that are helpful in understanding several key sections of the Act.

[2] A key reform in 1724 requires localities to provide a procedure for "docketing" suggested revisions to comprehensive plans and development regulations. Sections 101-102; RCW 36.70A.470 and accompanying Code Reviser's note. The intent is to make sure that projects are judged on the environmental and land use standards in effect at the time of the application, yet to make sure that suggestions for improving plans and regulations that arise in the course of reviewing a permit application are not lost. This "issue allocation" process depends on an adequate local record when plans and regulations were adopted, so that the reviewing body can determine whether the locality made a conscious decision about whether its plan or regulation is meant to "address" an impact, or whether there is a gap (or lack of specificity) in the regulation that the permitting agency could mitigate in the normal project review process.

***"Whether [1724's] tools will be used to build a lasting peace, or rejected in order to prepare for another round of legislative wars, remains to be seen."***

[3] The functional-equivalent doctrine holds that one law provides the substantive and procedural protections equivalent to another law and can therefore fully substitute for compliance with the other law. Unlike SEPA, GMA and local land use codes do not provide for supplemental authority, alternatives analysis or public review, which is one of the reasons that some interests have sought to limits or terminate SEPA's applicability to GMA jurisdictions. In similar situations under other environmental laws, such as air quality and hazardous-waste cleanup, the Supreme Court and the Washington Legislature have also declined to adopt the functional-equivalent doctrine. *Asarco Inc. v Air Quality Coalition*, 601 P2d 501, 92 W2d 685 (1979) The legislative history of RCW 4321C.0381, the SEPA exemption for air operating permits, makes clear that the categorical exemption is limited to a type of permit that merely compiled, but did not establish, environmental standards.

A similar conclusion was reached under the state's hazardous-waste cleanup program which, unlike the Federal Superfund under CERCLA, decided to integrate SEPA and MTCA processes. *See*, e.g., RCW 70.105D.090, RCW 43.21C.036, and WAC 197-11-250 *et seq*. The functional-equivalent doctrine is different from the ability to consult and defer to other agencies with jurisdiction on specific environmental or land use impacts or mitigation measures, which was incorporated as a reform in 1724. Section 202(5); RCW 43.21C.240(5). The adoption of "integration" does not, of course, satisfy interests that advocate repeal of GMA, SEPA or other laws.

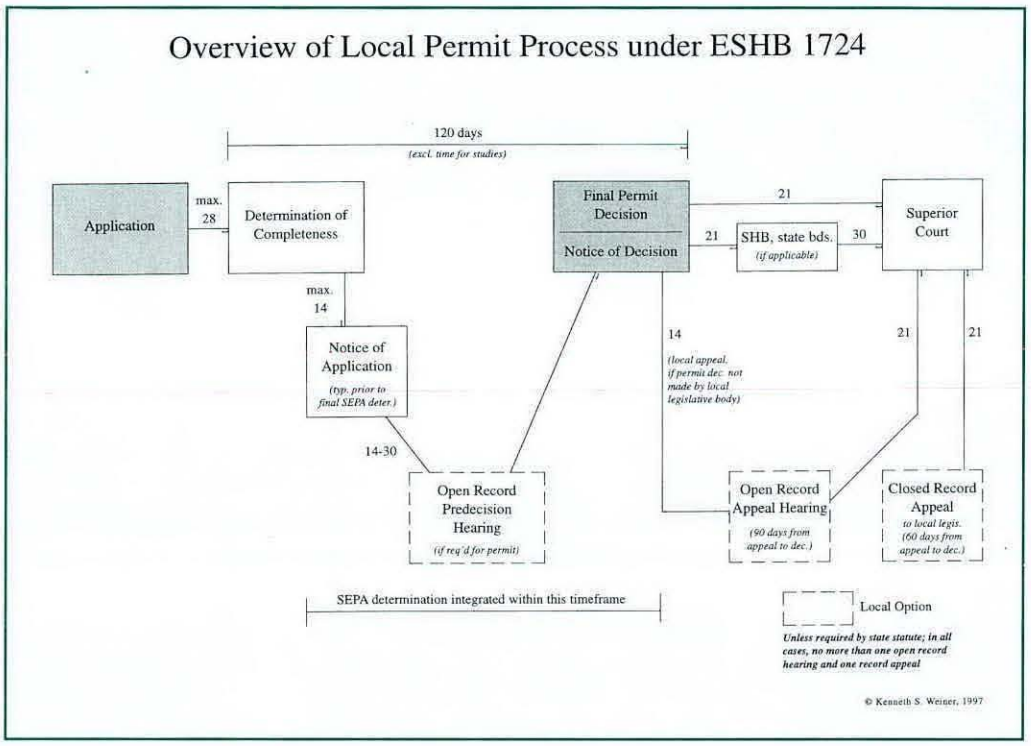
[4] A SEPA categorical exemption defines actions that are not capable of having a potentially significant adverse environmental impact warranting detailed environmental review. RCW 43.21C.031 and 110(1)(a). Under these provisions, SEPA authority cannot be used to mitigate the environmental impacts of categorically exempt actions, which is just one of the problems of using an exemption approach.

[5] Fewer than a dozen narrow legislative SEPA exemptions have been enacted in 25 years.

[6] For example, a wetland study prepared under a local critical-area ordinance would also serve as the wetland analysis needed under SEPA. The environmental checklist submitted with a permit application can simply incorporate other studies by reference or identify that they will be prepared and available for public and agency review prior to a permit decision. Removing SEPA's applicability in GMA jurisdictions has an added dimension, since SEPA applies to many actions other than project permits (including public and non-project actions).

[7] Note that shoreline management master programs approved under the Shoreline Management Act are now part of GMA comprehensive plans. RCW 36.70A.480.

[8] SEPA's procedural provisions refer to giving "consideration" to environmental factors (study or analysis), which includes the preparation and adequacy of environmental documents. SEPA's substantive provisions refer to the "action" taking as a result of the consideration of environmental factors, namely, the implementation of SEPA's goals




and policies by modifying, conditioning or denying proposed actions.

[9] Section 201 of 1724. SEPA's role in focusing on the "gaps and overlaps" is not a new concept, but it is fundamental to SEPA as well as to NEPA, the federal statute on which state "mini-NEPAs" such as SEPA are modeled. The intent was plainly stated by NEPA's prime sponsor, Senator Henry M. Jackson of Washington state, when he declared on the floor of the Congress in 1969 that "henceforth no agency would be able to say it lacked the authority to protect the environment." A central element of the Jackson-Muskie compromise that enabled NEPA's passage was the agreement that the "supplemental authority" and discretion afforded agencies under NEPA could not be used to undermine specific adopted environmental standards in other laws, such as the clean-air and water laws. Thus, SEPA reflects a logical progression that requires: (1) that all state and local laws be administered in accordance with its policies to the fullest extent possible (RCW 43.21C.030); (2) all state and local agencies to have reviewed and reported to the legislature on any impediments and remedial measures needed to do so (RCW 43.21C.040); (3) that all state and local agencies continue to comply with statutory environmental quality standards, since there was concern that the discretion and balancing under SEPA might undermine compliance with adopted air and water quality standards (RCW 43.21C.050); and (4) that all state and local agencies have "supplementary" authority to their existing powers to carry out the policies and goals of the act, including conditioning or denying projects subject to certain safeguards (RCW 43.21C.060). The statutory architecture of SEPA and NEPA are similar in this regard.

[10] The reference to "gaps and overlaps" should not be misconstrued to mean that environmental review under SEPA (SEPA's procedural aspect) occurs only if there is a gap or overlap. On the contrary, it is precisely through the process of SEPA project level environmental review (conducted in conjunction with other project review activities) that gaps and overlaps are identified. See preceding and succeeding notes and related text discussion.

[11] The Act concisely explains the role of

SEPA in project review as follows: "Proposed projects should continue to receive environmental review, which should be conducted in a manner that is integrated with and does not duplicate other requirements. Project level environmental review should be used to: (i) review and document consistency with comprehensive plans and development regulations; (ii) provide prompt and coordinated review by government agencies and the public on compliance with applicable environmental laws and plans, including mitigation for specific project impacts that have not been considered or addressed at the plan or development regulation level; and (iii) ensure accountability by local government to applicants and the public for requiring and implementing mitigation measures." Section 201 and Code Reviser's note accompanying RCW 43.21C.240.

[12] Thus, on the procedural side, if a project has environmental impacts, and these impacts are not evaluated under another law or regulation, SEPA provides the authority for requiring the impact to be analyzed. On the substantive side, if applicable regulations do not address a project impact, SEPA provides the authority for avoiding or otherwise mitigating the impact. See Section 201(1)(e), the Code Reviser's Note accompanying RCW 43.21C.240 and the preceding two footnotes.

> ***". . . [T]he analysis of environmental and land use impacts should be done together . . ."***

Environmental impacts include impacts on land use, which is an "element of the environment" under RCW 43.21C.110 and WAC 197-11-444. These sections reinforce the requirement that the analysis of environmental and land use impacts should be done together in one "project review" process. It is in this integrated SEPA/GMA project review process of analyzing the project's impacts and consistency with land use regulations that any "gaps and overlaps" are identified. As noted above, the study or analysis of impacts (the procedural aspect of SEPA) — which are usually easy to do in conjunction with any study requirements of other laws or regulations — should be carefully distinguished from decisions on a project or any mitigation conditions. At the decision stage, use of SEPA authority to condition or deny projects (the substantive aspect of SEPA) is often not needed. The applicable development regulations may be sufficient to control the project's impacts, or the permitting agency can place additional conditions on a project through other laws, such as subdivision or zoning codes. It may be accurate shorthand, though misleading, to say that "SEPA does not apply at the project level," as long as the statement is understood to mean there is "no need to use SEPA substantive authority to address the impacts of this particular project."

[13] Section 203; RCW 43.21C.031. This was one of the most controversial provisions of 1724 as originally proposed; it was substantially modified in the legislative process. As currently worded, it predefines a procedure that would be consistent with and allowed under the provisions for phasing (or tiering) and use of existing environmental documents. WAC 197-11-060(5) and 600. One of the reasons it was thought to be valuable to specify these procedures in the statute was that localities were not using these provisions, even though they could have done so prior to the enactment of 1724.

[14] The SEPA Rules currently allow reliance on existing environmental documents and make clear that a new threshold determination is not needed unless there is new information indicating a significant environmental impact or a substantial change in a proposal causing a significant impact. WAC 197-11-600. This applies to all state and local agencies for all actions, and is *not* limited to "planned actions" or to jurisdictions planning under GMA. One of the concerns about the planned-action provision in RCW 34.21C.031 and the debate surrounding its use is that hearing examiners or courts will misconstrue SEPA and will limit the use of existing documents for subsequent or implementing projects to planned actions, rather than recognize that planned actions represent only one option for use of existing documents.

[15] Section 804; RCW 90.61.040. The Commission's initial recommendations have focused on clarifying urban and rural uses.

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# A New Land Use Lexicon

**"Address" an impact** refers to impacts that have been considered during environmental review and for which decisions have been made by permitting agencies on whether to accept, avoid or otherwise mitigate the impacts.

For purposes of relying on "plan level" documents under 1724, "address an impact" means that when a city/county adopts a plan or regulation under GMA – along with its plan level environmental-review process under SEPA – the city/county has adequately identified the specific adverse impacts of proposed projects and the impacts have either: (1) been avoided or otherwise mitigated (for example, through the specific provisions in plans or development regulations); or (2) the local legislative body has considered the impacts and has made a deliberate decision (through adoption of levels of service or other explicit plan-level decisions) to accept these impacts. ESHB 1724 §§201-202 and 403-405; RCW 36.70B.030 and 040, RCW 43.21C.240.

**Character of development:** one of the four basic categories used to measure whether a proposed project is "consistent" with applicable development regulations. This phrase refers to the characteristics of the development – other than the type of land use, density, and infrastructure needed for the project. Depending on the quality of local development regulations, this review may be largely a code-checking exercise to make sure that the impacts or emissions from a project — such as traffic, runoff, noise, habitat alteration, and similar land use and environmental consequences of the project — are addressed by existing regulations. Although the review may include project siting or design, the term should not be misunderstood as being directed mainly toward aesthetics. ESHB 1724 §403; RCW 36.70B.040.

**Closed-record appeal** means an appeal following an "open-record hearing or appeal," where the parties base their arguments "on the record" of the earlier hearing (no or limited new evidence or information is allowed). Cities and counties have the option of whether or not to provide closed-record appeals. A closed record appeal is typically to a local legislative body or special board, but is an administrative (quasi-judicial), not legislative, proceeding. ESHB 1724 §402; RCW 36.70B.020.

**Consistency:** at the project level, "consistency" refers to whether a proposed project is consistent with seven adopted and applicable development regulations, or in their absence, comprehensive plans (which include subarea plans). If the impacts are not "addressed" by existing regulations, the city/county may use other authority, such as SEPA, to address the impacts — assuming that "docketing" does not apply and that the requirements for the use of other authority are met (such as the criteria for use of SEPA substantive authority in WAC 197-11-660). ESHB 1724 §§403-405; RCW 36.70B.030 and 040.

**Consolidated-permit process**: a process defined in local development regulations where an applicant has the right to a single application and project review process (including appeals) for all project permits needed from that city/county. ESHB §410; RCW 36.70B.120.

**Development agreement:** an agreement approved by local ordinance or resolution, between a local government and a person owning or controlling real property, that can set forth development standards, mitigation, financial agreements, or other provisions relating to the use or development of a property. ESHB 1724 §§502-506; RCW 36.70B.170 et seq.

**Docketing:** a procedure in local development regulations for any interested person – applicants, citizens, agencies, hearing examiners – to suggest changes to local plans or regulations. Cities/counties are required to consider these changes through a public process. Docketing is intended to allow plans and regulations to be revised to reflect lessons learned from processing an application – without penalizing or changing the rules on pending project applications that meet existing requirements. Docketing does not preclude a city/county from mitigating a proposed project's impacts where there are gaps or overlaps in existing regulations (e.g., development regulations do not "address" a project's impacts). RCW 36.70A.470; ESHB 1724 §§101 and 102.

**Determination of completeness:** an oral or written determination by a city/county that the submittal requirements for a project permit application have been met, and the application is sufficiently complete for continued processing. A determination of completeness does not mean that all information necessary for a decision has been submitted. Depending on the submittal and project impacts, additional studies may be required as part of the project review process. The determination of completeness triggers the applicable timelines in the project review process. ESHB 1724 §408; RCW 36.70B.070.

**Integrated Process** refers to combining or closely coordinating the requirements under various applicable laws, so that documents prepared under different regulations or requirements serve multiple purposes and are reviewed by agencies and the public at the same time (see Project Review). ESHB 1724 §§201 and 403; RCW 36.70B.060, WAC 197-11-030(2)(e), 210 through 235, 640.

- continued from page 25 -

**LUPA**: the acronym for the Land Use Petition Act, which provides standard procedures for judicial review of local land use decisions and replaces the former statutory writ of review and other confusing appeal procedures. RCW 36.70C.

**Notice of application:** an early notice to the public and other agencies issued within 14 days of a complete application (determination of completeness). This notice is intended to be considerably more informative and substantive than typical public notices, so that reviewers can start from plan level decisions already made and studies and requirements that already exist. Localities that use mailed bulletins or newspaper publication do not have to reprint the full notice, but it must be readily available for review during the comment period. Smaller routine projects, often labeled as "type 1" permits in local development regulations, typically do not require this notice. ESHB 1724 §415, 418; RCW 36.70B.110, 140.

**Notice of decision**: a document stating the decision on a project permit, mitigation measures if any, final SEPA determination, and appeal procedures. The notice may be the permit itself. ESHB 1724 §413; RCW 36.70B.130.

**Open-record hearing:** a hearing, including evidence and testimony, that is used to define the city/county record for the project decision (if a hearing is required). If a city/county chooses to use an open-record hearing for making a project decision, the hearing may be held either: (1) before the project decision is made ("open-record predecision hearing"); or (2) after the decision is made by an agency official, as an appeal to a hearing examiner or hearing body ("open-record appeal hearing"). To promote integration and simplify permit processing, a city/county can also elect to hold a SEPA procedural appeal hearing (adequacy of a DNS or EIS) at an "open-record predecision hearing" based on a final staff recommendation and final SEPA document on the proposed project. Not all public hearings are "open-record hearings." Public hearings can still be held to obtain public comments (such as on scoping, draft environmental impact statements or design documents), in contrast to an adjudicatory hearing, which defines the entire record for the decision (although some confusion may occur because RCW 36.70B labels the former as "public meetings," so the definition must be read in its entirety). Applicants have the right to joint hearings where more than one agency requires a hearing. ESHB 1724 §402, 415(7) and (8); RCW 36.70B.020, 110(7) and (8).

**Optional DNS process**: an option for a city/county to include a statement in its notice of application that a project is likely to receive a SEPA Determination of Nonsignificance (DNS). The project's environmental impacts will still be reviewed and mitigated as appropriate in the project review process through applicable regulations and, if necessary, use of SEPA substantive authority or other law. Use of the optional DNS process typically means that a second 14-day comment period on a DNS is not needed. Draft SEPA Rule revisions to conform to ESHB 1724.

**Planned action**: a type of project in an urban growth area, designated in a local ordinance or resolution, for which neither a SEPA threshold determination nor EIS is necessary (because a prior threshold determination and EIS have already been prepared which adequately addressed the project's probable significant adverse impacts). Although proposed projects which qualify as planned actions are expected to have a simpler project review process, the projects are subject to environmental review and mitigation under SEPA. Planned actions should not be confused with proposals that are categorically exempt under SEPA. ESHB 1724 §203; RCW 36.70B.031.

**Plan level** refers to decisions on plans, policies or programs, in contrast to specific projects. For purposes of 1724 implementation, plan level generally refers to local land use planning choices made by local governments when they adopt comprehensive plans and development regulations after environmental, public, and intergovernmental review and coordination through GMA/SEPA processes. Plan level actions may be geographically-specific (e.g., countywide or neighborhood), address a functional element (e.g., capital facilities or shoreline management plan), or combined with project actions (e.g., major industrial developments, master planned projects). ESHB 1724 §§201-202, 403-405; RCW 36.70B.040; RCW 43.21C.240; WAC 197-11-210 et seq, 704.

**Project level** refers to decisions on proposals for specific uses, construction or management activities located in a defined geographic area, in contrast to policy decisions of more general applicability (see Plan-Level). Project level generally refers to activities that require permits or similar approvals. ESHB 1724 §§101-102, 201-202, 403-405; RCW 36.70A.470(1); RCW 36.70B.040; RCW 43.21C.240; WAC 197-11-704.

**Project review**: the process for reaching a project decision, including land use (GMA and related laws), environmental (SEPA and related laws), public, and governmental review of project permit applications. Project review commences when an applicant begins consulting with a permitting agency (pre-application) and concludes after any appeals. State or local processing timelines typically apply to the main permitting process: the time between the receipt of an application and the decision on the application and any administrative appeals. "Integrated project review," mandated by 1724, requires that the studies and reviews under various laws be conducted together rather than separately to avoid unnecessary duplication, delay, and paperwork. ESHB 1724 §§101-102, 201-202, 403-405; RCW 36.70A.470; RCW 36.70B.030 et seq.; RCW 43.21C.240.

# Ethics, Tax and Malpractice Issues in Contract Lawyer Relationships

*by* **Deborah Guyol**

A contract lawyer is one who is hired by another lawyer or a law firm (the "hiring lawyer") on a temporary or irregular basis to do work for the hiring lawyer's clients. Contract relationships are becoming more prevalent as both hiring lawyers and contract lawyers seek ways to improve efficiency and flexibility in a changing legal marketplace.

Most lawyers who enter into contract relationships focus first on questions of money, deadlines, and work product expectations. Once they agree on these terms, they shake hands and begin work. Although it's essential to address these issues, it's equally important to consider the serious but less obvious issues of ethics, tax status and malpractice liability and coverage.

The nature of the particular contract lawyer relationship affects all three areas. And as illustrated in the accompanying chart, these areas are interrelated; answering a question in one area often provides guidance in how to answer the others. Lawyers who do not decide at the outset how to approach the ethics, tax and malpractice issues arising from their relationship may come to regret their shortsightedness.

## Who are the contract lawyer's clients for conflict purposes?

Clyde is a contract lawyer, a recent law school graduate who works steadily for one hiring lawyer — Hazel. Clyde spends three or four hours every day working in Hazel's office on projects she assigns, and is paid by the billable hour. Hazel devotes a lot of time to explaining assignments to Clyde and critiquing his work. Theirs is an example of the "close supervision and relationship" type of arrangement (shown in the first column of the chart).

Are all of Hazel's clients also Clyde's for conflicts purposes? Can Clyde accept an assignment from a second hiring lawyer in a matter opposing one of Hazel's clients?

To begin the analysis, we ask whether Clyde is "associated with" Hazel. The term "associated with" comes from ABA Formal Opinion No. 88-356 — the most definitive statement to date about the ethics concerns arising from contract lawyer relationships. According to ABA Op. 88-356, if a contract lawyer is "associated with" a hiring lawyer or firm, *all* the hiring lawyer or firm's clients are also the contract lawyer's clients.

There's no bright line test to determine when a contract lawyer is "associated with" a hiring lawyer; rather the determination is made on a case by case basis. The comment to ABA Model Rule 1.10 suggests looking at:

- How the lawyers present themselves to the public — whether they look like a firm;
- The terms of any formal agreement between the lawyers; and
- The contract lawyer's access to confidential client information.

Clyde's regular hours and the fact that he works in Hazel's office, where he probably has access to all the files of all her clients, make him appear to be associated with Hazel. Therefore, he should not accept work directly adverse to *any* of Hazel's clients.

Consider another typical contract lawyer — one who fits the "independent" relationship (shown in the second column of the chart). Cleo has several years of experience and works for a variety of hiring lawyers, including Henry. Because Cleo has her own office, she comes to Henry's only occasionally — to discuss assignments, to pick up files or to deliver finished projects. Henry doesn't provide much oversight of Cleo's work because he trusts her judgment and ability. He usually simply reads through the briefs she writes for him, signs his name and files them.

Cleo is probably not "associated with" Henry for conflicts purposes. So if she gets a call asking her to work on a project opposing a client of Henry's for whom Cleo has not worked, conflicts rules should not prevent her from accepting the project.

This scenario suggests an issue not covered by conflicts rules: what should Cleo do if a hiring lawyer asks her to work on a case in which Henry is opposing counsel? Some contract lawyers would never accept such an assignment. Others feel it depends on the hiring lawyer. For the sake of customer relations, Cleo should first ask Henry whether he minds her accepting the assignment; he may in fact be planning to ask for her help on this very case!

Although Cleo represents the independent end of the spectrum of possible relationships, the "associated with" test is decided case by case. Thus Cleo and Henry would be wise to have a written agreement stating that they are not a firm and that Cleo does not have access to any of Henry's client files other than those he specifically assigns. Similarly, the prudent course for Hazel would be to have a written agreement with Clyde stating that he is associated with her — that all her clients are also his clients.

## When does a contract lawyer's client become a former client?

Different conflicts rules apply to former clients. In general, representation adverse to a former client is prohibited only for the same or substantially related matters, while representation adverse to a present client may be prohibited even for unrelated matters. Note that some courts define "present" client broadly. Cautious contract lawyers will apply present client conflicts rules (disclosure and consent) if

| | Close Relationship With and Supervision of Contract Lawyer | Independent Relationship: Little or No Supervision of Contract Lawyer |
|---|---|---|
| **Ethics Issues — Conflicts** | Contract lawyer may be "associated with" lawyer or firm for conflict purposes | Contract lawyer probably is not "associated with" lawyer or firm for conflict purposes |
| **Ethics Issues — Disclosure** | Hiring lawyer need not disclose use of contract lawyer to client per ABA Op. 88-356 | Hiring lawyer must disclose use of contract lawyer to client per ABA Op. 88-356 |
| **Independent Contractor or Employee** | Contract lawyer may be seen as employee by taxing authority | Contract lawyer is more likely to be seen as an independent contractor by taxing authority |
| **Malpractice — Liability** | Hiring lawyer is more likely to be liable for contract lawyer's malpractice | Hiring lawyer is less likely to be liable for contract lawyer's malpractice |
| **Malpractice — Coverage** | Hiring lawyer's policy may cover contract lawyer | Hiring lawyer's policy may not cover contract lawyer |

they are unsure whether a client is truly "former."

If Clyde is "associated with" Hazel, her clients are his present clients; when he stops being associated with Hazel her clients become his former clients. It's harder to tell when the client of an "independent" contract lawyer becomes "former," and there is little guidance either in ABA Op. 88-356 or elsewhere.

It is probably safest for the independent contract lawyer to consider the client a present client until the close of the matter the contract lawyer worked on. Thus, if Cleo helps Henry by opposing a motion for summary judgment in January and the trial is set for June, she should not consider the client a former client until the case is resolved, whether by settlement, at trial or on appeal. This approach makes practical sense because as long as the case is pending, Henry may call on Cleo for more work — on the trial brief or settlement agreement, for example.

### Can screening the contract lawyer avoid problems of imputed disqualification?

The problem of imputed disqualification will arise more often in the "close" relationship, like that between Clyde and Hazel. Perhaps Clyde needs more work than Hazel can give him, and he doesn't want to run every potential assignment from other hiring lawyers through Hazel's conflicts-checking system.

Several states, including Washington, allow screening of lawyers to avoid imputed disqualification. And ABA Op. 88-356 uses access to information as a criterion for "associated with." Thus Hazel might be able to screen Clyde from client files he does not work on. She should make sure Clyde works in his own designated space (rather than in a common area such as conference room or library), lock the file cabinets, have a written office policy about access to files, make sure her staff understands the policy, and have provisions in her agreement with Clyde addressing these matters. With these safeguards in place, Clyde's client roster should include only those of Hazel's clients he had actually worked for. The arrangement is not risk-free, however, and it is more likely to succeed in less close and regular relationships.

### When must a hiring lawyer disclose to the client that she is working with a contract lawyer?

Many hiring lawyers worry about what, if anything, to tell their clients about the contract lawyers they use. Ethics rules typically require only that the lawyer keep the client "reasonably informed" about the status of a matter. Does this mean she must disclose her use of a contract lawyer?

According to ABA Op. 88-356, the hiring lawyer *must* tell the client only if she is *not* closely supervising the contract lawyer. That is, Hazel need not tell her clients about Clyde, but Henry must tell his about Cleo.

We recommend *always* disclosing use of contract lawyers to clients, both to avoid ethical problems and as a matter of good client relations. For example, Hazel's clients are likely to see Clyde in her office and speak with him by telephone. Hazel will want to bill her clients for Clyde's time. All this will work more smoothly if Hazel has explained to her clients that Clyde works with her and that she reviews his work carefully.

Rules on division of fees with a lawyer not in the same firm also make disclosure advisable, because exactly what constitutes a "division of fees" is not clear. ABA Op. 88-356 suggests that a division of fees occurs only when there is a contingent fee that is actually divided between hiring and contract lawyers. But some ethics experts believe *any* payment to a contract lawyer for work for which the hiring lawyer bills the client is a division of fees requiring disclosure. (If the contract lawyer is "associated with" the hiring lawyer, no disclosure is necessary because the lawyers are seen as part of the same firm.)

Both Henry and Hazel should use a client retainer agreement that discloses their use of contract lawyers, and the rates at which they will bill their clients for those lawyers' services.

### When is a contract lawyer an independent contractor? An employee?

The tax consequences of the distinction between independent contractor and employee can be onerous, and most fall on the hiring lawyer. Therefore it is crucial for hiring lawyers to be aware of the issue, and to ensure the relationship conforms to the law. Note that the law is murky — and it comes from both federal and state sources.

In the federal arena, the question is a matter of common law; it is derived from cases, most of which do not deal with professional relationships of any kind, let alone lawyers. One source of guidance is the IRS's 20 factors, which may or may not accurately reflect the common law. (While the IRS is the decision maker at the audit level, a federal court will decide any challenge to the IRS's conclusion, and federal court decisions make up the "common law.") Section 220 of the *Restatement (Second) of Agency* (defining servant — or employee) provides another perspective on the common law.

Many states, including Washington, have statutory definitions of "independent contractor," but while there is some overlap, these do not control for federal law purposes. Thus, it is theoretically possible for a person to be an independent contractor under state law but not under federal law.

As a general rule, however, under both federal and state law the key concepts are "direction and control" (indicating employee status) and "independent trade or business" (indicating independent contractor status). Clyde, who works under Hazel's close direction and control, and in her office rather than his own, looks like an employee. Cleo, who has her own business serving several hiring lawyers, looks like an independent contractor. These examples represent the extremes

of a continuum, however. The question will be tougher for cases that fall between the poles.

Hazel should avoid the temptation to save money by treating Clyde as an independent contractor and not paying withholding and Social Security taxes for him. The IRS takes an aggressive position on who is an employee (contending that true independent contractors are almost as rare as flying pigs). In addition, under state law, Hazel could find herself liable for workers' compensation, unemployment insurance and other such charges.

As with ethics issues, it makes sense to address this issue in the written agreement — especially if the contract lawyer is an independent contractor. Thus Cleo's contract with Henry should state that she operates her own business and pays her own taxes.

### In what circumstances will the hiring lawyer be liable for the contract lawyer's acts?

Malpractice claims or cases involving contract lawyers are rare. We heard of only one claim nationwide, and we were unable to verify it. Although insurers do not classify claims in a way that provides a definitive answer, contract work does not appear to be a high-risk area — at least in terms of liability.

Anyone can be sued, however. If a contract lawyer without individual coverage is sued, he will have to pay his own costs of defense — which are likely to be significant whether or not the lawyer is exonerated. All contract lawyers should assess the risk with this hard truth in mind.

Most hiring lawyers assume they are liable for any work done by the contract lawyer, and they may be right. But the answer may also depend on the level of the hiring lawyer's oversight of the work, the closeness of the association between the lawyers, and the nature of the contract lawyer's client contact.

Hazel supervises Clyde's work closely, and their relationship looks like (or is) one of employer and employee. If Clyde makes a mistake and Hazel does not catch it, she could be liable.

Cleo works independently, and Henry reviews her work only minimally. Is Henry liable for Cleo's malpractice? Many hiring lawyers believe that if they sign their name to the contract lawyer's product and a malpractice claim results, they — rather than the contract lawyer — will be liable. But the possibility that Henry is ultimately on the hook will be cold comfort for Cleo if (because she spoke often to the client) she is named in the lawsuit. In that event she needs her own coverage, both for liability and for costs of defense.

### When will the hiring lawyer's professional-liability policy cover the contract lawyer?

The more a contract lawyer, like Clyde, looks like part of the hiring lawyer's firm, the more likely he is to be covered by the hiring lawyer's policy. But the language of the policy itself is also important. If it clearly covers only Hazel, and if Clyde gets sued, he will be unhappy. Cleo is unlikely to be covered by Henry's policy unless specific policy language covers her situation or she is added as a named insured.

Unfortunately, many insurance carriers are reluctant to sell insurance to lawyers who describe themselves as contract lawyers. Contract lawyers who want their own insurance coverage, therefore, should research the situation thoroughly before applying.

Several ABA publications treat malpractice issues in detail. All come from the Standing Committee on Lawyers' Professional Liability. The *Lawyer's Desk Guide to Legal Malpractice* is a good resource on preventing malpractice and claims. The *Lawyer's Professional Liability Update* contains a directory of insurance carriers. *Characteristics of Legal Malpractice* compiles statistics on claims experience that can help all lawyers evaluate the risks of their practices.

### Conclusion

The nature of the hiring lawyer's relationship to the contract lawyer is key in determining ethical, tax status, and malpractice liability and coverage issues. If Hazel decides to treat Clyde as an employee because she's concerned about tax liability, she needs to discuss the ethical implications of her decision with him. If Cleo describes herself to hiring lawyers as someone so reliable that her work need not be reviewed, she should advise them about the need for client disclosure and consent. She should be aware of federal and state definitions of independent contractor.

And Hazel and Henry, Cleo and Clyde, would all be smart to craft agreements that address all these issues at the beginning of their relationship.

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*by* **Sherrie Bennett**
Bar News *Editor*

**February 14-15, 1997**

**1996 Annual Discipline Report:**

Barrie Althoff, Director of Lawyer Discipline and Chief Disciplinary Counsel, presented an annual report on the state of WSBA disciplinary affairs to the Board of Governors. After extensive restructuring and addition of personnel, disciplinary staff now consists of Althoff, 16 disciplinary counsel, two professional investigators, two consumer affairs staff, a voluntary-fee-arbitration coordinator/lead secretary, six additional secretaries, a file clerk and a receptionist.

Announcing that the backlog of disciplinary cases has started to recede, with 2,566 cases resolved this past year, Althoff noted that disciplinary counsel are still receiving approximately 10 grievances per day, about the same as last year. Althoff reported that 94% of the currently pending 1,004 cases were filed in 1994 or after, with the remaining 6% generally involving attorneys who have disappeared and cannot be located or deferrals pending civil or criminal investigations. Of the grievances filed last year, 22% were in family law cases, 19% were in criminal matters, and 12% were in torts cases.

Althoff described the disciplinary department's new focus on streamlining intake procedures. A consumer affairs staff now takes more time with grievants to educate them on what to expect from the Bar Association and filter out inappropriate complaints. Some cases (such as when an attorney does not want to release a client file after another attorney has been retained by the client) are immediately diverted and can usually be resolved within days. Similarly, clients complaining that their attorneys simply aren't communicating with them are sent letters (copied to the negligent attorneys) to contact the Bar Association again if the attorneys have not responded within two weeks.

In his presentation to the board, Althoff touched on some of the duties other than lawyer discipline which the disciplinary staff carries out, including filing custodianships when lawyers abandon their practices, issuing certificates of good standing, making discipline status checks, voluntary fee arbitrations, trust account audits, overdraft check investigations, and writing and presenting CLE materials on lawyer discipline and legal ethics issues.

**Telephone Hotline Proposed:**

Susan Daniel, co-chair of the Telephone Access Committee of the Access to Justice Board, presented a proposal to the Board of Governors for establishing a WSBA Legal Advice and Referral Hotline. Under this proposal, WSBA would not incur direct costs, as the start- up costs would be underwritten by Tele-lawyer, a telephone legal advice service operating in California which would actually operate the service. Tele-lawyer intake workers would answer the phone and screen and route calls. In return, Tele-lawyer would collect and retain all fees generated by the calls. Tele-lawyer would contract with state-licensed attorneys who reside in Washington to provide the telephone services. These attorneys would have a minimum of 10 years' experience in the subject area of the calls they take. The attorneys would be precluded from taking on any direct representation of cases discussed through the service. The Access to Justice Board would work with Tele-lawyer to coordinate the recruitment of qualified state-licensed attorneys to provide the legal advice. Additionally, the Washington Young Lawyers Division (WYLD) would implement the Greater Access & Assistance Project (GAAP) by establishing local or regional panels of WYLD members throughout the state. Panel members would agree to represent eligible clients on reduced-fee basis in civil and criminal areas of law. The panels would also be open to non-WYLD members who met eligibility criteria. The WYLD would be responsible for providing adequate training for participating attorneys. The WSBA would lend its name to advertising and promotional materials, and promote the project through WSBA publications and other channels of communication.

The proposal sparked many questions from the Governors. President Chambers asked about the amount of money which would be generated from the project, which would go to the Tele-lawyer coffers. Governor Williams pointed out that it is not morally reprehensible to make a profit, but felt that a monitoring system was important. She also commented that there was not enough information yet on how the process would work.

Governor Whitson felt that the proposal, as presently conceived, would not "pass ABA muster" because of the closed nature of the attorney panel. He also voiced concerns over the difficulties of collecting fees once advice had been given. Governor Whitson articulated a "hope and prayer" for the proposed hotline: he "hoped" that the hotline could enhance the delivery statewide of legal services, and "prayed" that there would be quality services provided. Rodney Umberger, Jr. responded in defense of the project that the GAAP project doesn't limit itself to young lawyers, but is open to all interested attorneys. He added that existing lawyer referral services are overwhelmed with the volume of calls currently being received.

Governor Theiler commented that there is a big need for these services in communities statewide and that phone access is less intimidating for many people. She described the proposal as a "win-win" situation for everyone.

The proposal drew comment from Gene Godderis, who briefly described the Tacoma Legal Referral Project just getting underway. The participants of this project do not want competition from the proposed hotline, but would want the services to be complementary. Bob Welden, WSBA General Counsel, voiced concerns regarding fee-sharing, conflicts of interest, screening competency and liability issues.

After lengthy discussion, the Board agreed that the Telephone Access Committee should continue in its existing efforts, and invite counties with lawyer referral programs to participate in the discussion. The Committee will report back to the Board in June with details regarding any contractual obligations to Tele-lawyer and how the program would be discontinued if not successful. The committee will seek input from various WSBA sections (such as the Family Law and General Practice sections) which might be affected.

**Coming Legislation:**

Ellen Conedera Dial, Legislative Committee Chair, and John Fattorini, WSBA Legislative Representative, gave a report on the initial expected progress of upcoming legislative bills either supported by the Board or affecting Washington lawyers. While it is still quite early in the legislative season, it appears several of the bills advocated by the Board will shortly be making their way out of committees and into the light of broader scrutiny.

Jeff Needle, a Seattle attorney, described a bill which he drafted, aptly titled the "Civil Rights Act of 1997," which would allow those whose state constitutional rights were violated to collect damages. The BOG referred the bill to the Legislative Committee for comment and action.

**Judicial Administrative Focus:**

Wayne Blair and Kim Dunn gave a report on their participation on the Board of Judicial Administration, an informal policy-

making body of the courts which meets monthly. There is considerable ongoing discussion and negotiation regarding salary adjustments by the Washington Citizens' Commission on Salaries. The Board agreed to support additional court judgeships in Spokane, Pierce and Snohomish counties. Blair and Dunn reported that judges appear divided regarding the Walsh Commission Report on judicial selection, and the Board of Judicial Administration will not be taking a position. Blair mentioned a newspaper insert voter's pamphlet on judicial candidates which appeared shortly before the recent elections, an idea put forth by the Walsh Commission.

**Now You See It . . . Now You Don't?**

Bob Welden described a WSBA bylaws revision proposal intended to eliminate reference to statutes in effect in 1991, while also foregoing any possibility that the WSBA would be cast as a "state agency." Ostensibly not designed to make substantive policy changes, the proposed revised bylaws would nonetheless require for the first time that expenses of copying and WSBA staff time be paid by the requester of any WSBA records.

Ed Hiskes and Howard Todd, Bar members long concerned about the openness of Bar meetings and records, spoke against the proposed revision. Todd stated the WSBA had a history of interpreting disclosure rules in such a way as to exclude financial records. Both Hiskes and Todd insisted that requests they themselves made for disclosure of Bar records had been minimal, and not an imposition on WSBA staff. Hiskes also brought up the issue of whether or not a person (such as the executive director) who is the subject of inquiry should be the same person who decided whether or not specific information can be released.

Both President Chambers and Governor Theiler expressed concern that the Board might be moving backward by adopting this proposal, and that a "delicate balance" between fundamentally different views might become unbalanced. Governor Powell, whose initial assessment of the cross-referenced bylaws as "cumbersome" sparked the revision, stated that he would like to see the Board make a clear statement of openness without having the Board subject to statutory provisions which apply to state agencies. The matter was referred to a committee composed of Governors Powell and McMullen, Bob Welden, Ed Hiskes and Dan Hannula. They will report back to the Board in May.

**Executive Session:**

In closed executive session, the Board addressed the issue of the appeal of a CLE fine for late filing, administered a reprimand, reviewed 23 pages of disciplinary materials, and heard reports from the Litigation and Personnel committees.

**Appointment to Disciplinary Committee:**

The Board unanimously appointed Tanya Guenther, Spokane real estate developer, to the lay position on the Disciplinary Committee.

**Is the Bar Going "Softie"?**

Microsoft has given the WSBA a proposal which would put a state-of-the-art Microsoft desktop on every desk at the Bar Association offices and provide free website hosting for 18 months. In exchange, the WSBA would provide Microsoft marketing promotional opportunities such as a quarterly ad in the *Bar News* and a "sponsor frame" advertisement at the bottom of each website page. The Microsoft proposal would also include deep discount opportunities for all WSBA members to purchase high-end PC hardware.

Governor Crossland, who chairs the Electronic Communications Committee, spoke

enthusiastically about the potential for upgrading the WSBA's website to include such amenities as "hot links" to other websites. Bonnie Kam, Director of Communications, stated that a similar program she participated in several years ago with West Publishing was very beneficial. The Board formed a committee composed of Governors Crossland, Williams and Lee, and Dennis Harwick and Sherry Johnson of the WSBA, and authorized the Committee to consider the Microsoft proposal when it is finalized and enter into an agreement if it seems to be a satisfactory arrangement.

**Independent Audit of Bar Financial Statements:**

Dennis Harwick presented the independent auditor's report on the WSBA's 1996 fiscal year financial statements. He reported that he was encouraged by the lack of a management letter suggesting changes in procedures.

**Legal Foundation Litigation:**

Dwight Williams from the Legal Foundation of Washington briefed the Board on a lawsuit just filed by the Washington Legal Foundation against the Legal Foundation of Washington in federal district court. The lawsuit challenges on first and fifth amendment grounds the contributions of LPOs to the IOLTA program.

**President's Report:**

President Chambers reported on a meeting for bar presidents which he attended in San Antonio. He has requested videotapes on bar professionalism from a bar association in Georgia. President Chambers also reiterated the Board's commitment to maintaining and improving the WSBA's relationship with the state Supreme Court, citing the recent meeting between the Board of Governors and members of the Supreme Court as a positive step in that direction. He envisions at least two such meetings each year with that court.

**President-elect's Report:**

President-elect Fairhurst reported on her attendance at Supreme Court and Court of Appeals swearing-in ceremonies, Access to Justice planning meetings, weekly legislative meetings, and the LASER annual meeting.

She also discussed the Time Standards Committee which the Superior Court Judges Association has created to deal with the issues of appropriate time standards from filing to resolution of cases. The WSBA will send at least two representatives to meetings of the Time Standards Committee.

**Executive Director's Report:**

Executive Harwick presented a batch of resolutions authorizing banking relationships for approval by the Board. These resolutions are necessitated by the recent frequent bank mergers in Washington State.

The Board approved a regulation proposed by the MCLE Board which would permit active members of the Bar with offices in Oregon, Utah or Idaho to comply with Admission to Practice Rule (APR) 11 by evidencing compliance with CLE requirements in the state in which their principal office is located. This proposed regulation will now be sent to the Supreme Court for consideration.

# Mandatory Mediation With Nonattorneys? Eight Reasons to Say "No"

*by* **Douglas P. Becker**

*[Editor's Note: Family law mediation continues to provoke comment. Following up on Andrew Kidde's recent* Bar News *article is this contrasting view from the chair of the WSBA Family Law Section.]*

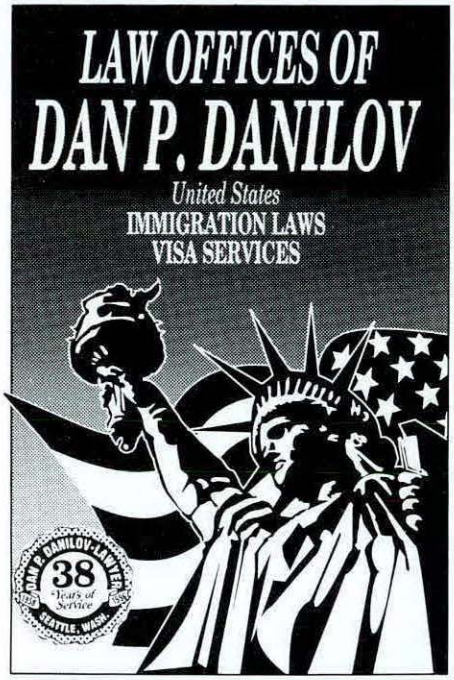
Family law seems to get reinvented every 10 years. That's probably because it's not like other areas of law: it's highly emotional and presents a complex web of issues for resolution rather than one big issue. In other words, it's a messy *equitable* proceeding not easily subject to clear decisions or statutes that would turn it into a manageable *legal* proceeding. That creates a lot of frustration on the part of people who aren't accustomed to it. While I understand the motivations behind the efforts to reinvent family law, attempting to do so without a deep understanding of the field will never lead to workable results. The experience during the past 10 years with parenting plans, child support rules and mandatory forms should clearly demonstrate the unintended consequences of even the best efforts.

We are again in the throes of reinventing family law. The Domestic Relations Commission of the Supreme Court, capably led by Justice Guy, has taken on the mission. In addition, there are many other committees addressing smaller parts of the problem. I serve on several such committees and I wish them all well — there are many improvements that can be made. But I have become concerned about a particular proposal that has been touted as the primary solution for family law. That proposal is mandatory ADR (alternative dispute resolution).

The first problem is the mandatory nature of the proposal. Many family law attorneys believe the current voluntary ADR system is working well and it's not appropriate to divert all cases into a setting where the parties bargain their fates in a face-to-face manner. The ADR proponents have responded that "waivers will be granted when needed." But what does "when needed" mean? Everyone agrees a waiver should be granted in domestic-violence cases, but not everyone agrees on what constitutes domestic violence. What about verbally aggressive, controlling behavior that never escalates into physical contact? What about cases where there is a substantial imbalance in emotional strength, education or access to information? Will there be a concerted effort to seek out and exclude cases where mediation is inappropriate or will the waiver be subtly discouraged? How would a waiver option be exercised and who would have the burden to accomplish it? Finally, should we expect domestic abuse victims to have the savvy and willpower to avail themselves of this option? It's contrary to the pattern of abusive relationships to expect victims to suddenly and effectively begin asserting their rights.

The second problem is with the definition of ADR. It includes arbitration, settlement conferences and mediation, but who qualifies to lead it? Certainly arbitration and settlement conferences would be done by judges and experienced attorneys. But if ADR includes nonattorney mediation, that is where the bulk of it will likely occur. Why? Because any party who wants nonattorney mediation can simply reject any other form of ADR and ADR will be mandatory. A party will demand it because they perceive it to be cheap or they





want to resolve the matter without reference to legal standards or both. But when one party demands nonattorney mediation, the other party's only options are to bring a motion in court, reject it and risk sanctions or accept nonattorney mediation. It is not difficult to see which of those choices will be most commonly picked, especially by unrepresented parties. The potential for one party to easily steer the proceedings into a private bargaining session isolated from any legal input is unacceptable.

The third problem is that so many family law parties are unrepresented. No one knows for sure how many, but upwards of 50% of all family law cases have at least one unrepresented party. While most cases are resolved without intervention, many cases still require intervention. Unrepresented parties generally lack sufficient legal knowledge about the issues, the law, the effects of different drafting alternatives and, most importantly, what they can expect at trial. In other words, they are blind to their rights and obligations.

Mediators who are not experienced in family law litigation are blind, too. They cannot give legal advice (although the unavoidability of doing so during mediation has yet to be addressed by the ADR community). In short, nonattorney mediation for unrepresented parties is essentially the "blind leading the blind."

The fourth problem is that mediators who don't practice family law can't adequately mediate money issues like child support, maintenance, property, debts, pensions and taxes, especially with unrepresented parties. Money issues are complex and sensitive topics. The current law is the product of an enormous amount of effort by a highly diverse body of decision makers all intent on fashioning the fairest public policy. It takes a family law attorney who does nothing but negotiate and litigate these issues at least 8 to 10 years to become reasonably knowledgeable. And mediators for unrepresented parties need to be more than reasonably knowledgeable if they will be the parties' only source of legal information.

The fifth problem is that training nonattorney mediators to avoid the pitfalls is illogical. There are only two ways such training could be implemented and both are unacceptable. First, the training could be used by mediators to address the issues raised in mediation. But that would constitute giving legal advice, which nonattorneys aren't qualified or allowed to do. Second, the training could be used by mediators to "flag the legal issues" which would trigger a request to the parties to either obtain legal advice or waive it. What a trap! The parties are unrepresented specifically because they don't have, don't want or can't afford legal advice, and then they are told to either get it or make a knowing waiver of it, which nicely absolves the mediator of all responsibility. Given that the parties are already unrepresented and obtaining legal advice would cause additional delay and expense, the chances of the parties actually doing so are nil.

The sixth problem is that while trials always result in a decision, mediation doesn't. This lack of a guaranteed resolution shifts the balance of power in favor of the inflexible party. If settlement isn't achieved, the parties go to trial — but everyone wants to avoid that. So somebody has to compromise to achieve settlement. Many parties figure out that crossing their arms on their chest is a very effective strategy. When that happens, mediators often end up as the unwitting agents of the intractable party simply because there is no way to achieve agreement other than to have the more flexible party keep on flexing. That's not how resolution should be achieved.

The answer I've gotten from professional mediators is they are trained to spot imbalances of power and to either compensate for it or stop the proceedings. But I've asked them what percentage of the time they actually terminate mediations on those grounds. They can't answer the question. In my view, if they don't do so *at least* 20% of the time, they aren't picking up on power imbalances at all. In fact, my experience is that probably 50% of all family law cases are inappropriate for mediation if the parties don't have attorneys with them in the mediation sessions. Mediators simply don't believe it. I doubt even 1% of mediations are halted by mediators on grounds of imbalance of power.

The seventh problem is that in mediation the parties invent their own solution. That works well when the parties are governments or corporations or otherwise have good legal representation, as in personal injury cases. But the logic breaks down when unrepresented individuals are asked to perform a legal task that is complex, competitive and highly important to their future. That's why some people characterize mediation for unrepresented parties as "access to injustice." Diverting people into mediation is easy; getting justice out of it is hard. It requires a lot of legal support for the participants. Having a neutral party with substantial knowledge of family law is the absolute minimum support.

The eighth problem is that mediation is based on an approach in which the process is more important than the outcome. This leads to an inherent conflict with "access to justice" and "gender and justice" where the focus is on the outcome. Is it a legitimate goal of the court system to elevate the avoidance of conflict over the justice of the results achieved? Mediation may be an easy way to get an outcome, but justice is not its goal. It's an entirely different method of resolving disputes than the courts are charged with providing, yet the courts are being asked to impose it.

The rationalization that "whatever the parties agree to is justice" lacks substance when the process is mandatory and the parties are ignorant of their rights. It resembles nothing so much as shooing the parties out of the courtroom with the admonition to settle it in the hall. When a

court orders the parties to participate in an alternative process to resolve their dispute, a process that everyone expects to end the matter, there must be an assurance of the legitimacy and quality of the process. The parties deserve to get an answer that comports with the law, not be told to fend for themselves.

Are there any alternatives? Sure. Settlement conferences have long served as the "last best chance" to avoid trial in family law cases. In a settlement conference a judge reviews the materials submitted by the parties, gives his or her opinion as to the likely outcome at trial and encourages the parties to settle. While that sounds a lot like mediation, the crucial distinction is that a legal opinion is always part of the process and settlement conferences have historically been conducted by judges. Due to the judicial case load, however, they are increasingly being handled by experienced family law attorneys.

Proponents of nonattorney mediation may claim these objections simply reflect self-interest on the part of family law attorneys. That's not true. Unlike nonattorney mediators who depend on mediation for their livelihood, attorneys who perform mediation rarely devote more than a small fraction of their practice to it. And family law attorneys aren't really worried about the impact on their clients, either. If mediation were required, attorneys could easily protect their clients by choosing an appropriate mediator or advising against an agreement. At the very least, attorneys would be advising clients of their rights. Family law attorneys are opposing mandatory ADR, particularly with nonattorney mediators, primarily because of the impact it would have on unrepresented parties, who by definition aren't clients. Family law attorneys see the reality of divorces "up close and personal" and we know that without an attorney to represent them, many parties simply don't have what it takes to negotiate a fair settlement. And the parties with the most to lose are usually women. They usually have the kids and they can't "earn their way out" of it later. This is a gender-and-justice issue and an access-to-justice issue.

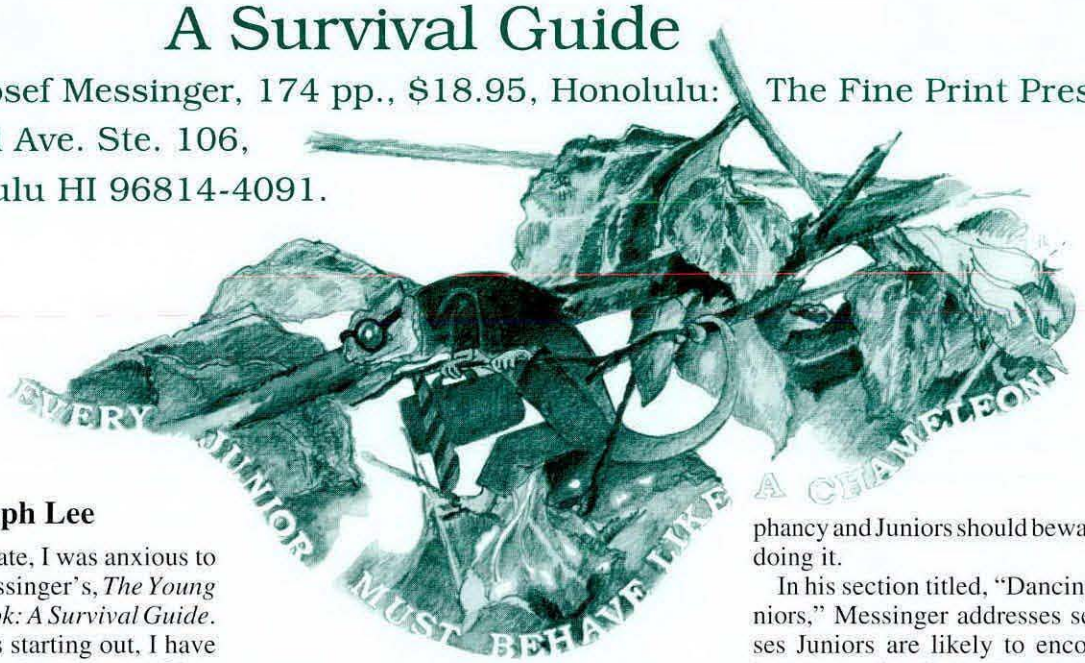
In the final analysis, nonattorney mediation lacks too many of the factors that justice requires to become a mandatory process of the courts. It makes no provision for independent assessment of the needs of children (which is why agreement of the parties is not a valid basis for deviation of child support and why court-ordered mediation of child support is prohibited by RCW 26.12.190(1)). It ignores the public's legitimate interest in having broken families receive what they are entitled to so that the family members don't become a burden on society. It disregards the accumulated wisdom, compromises and fairness embodied in the statutory and appellate law of the State of Washington. It has no means (other than the mediator terminating the process, which virtually never happens) to compensate for imbalances of power, emotion, information and sophistication between the parties. And it fails to meet the expectation of the parties that somewhere in the justice system they will receive an answer from someone who knows what they are doing; in short, justice.



*Douglas P. Becker is the 1996-97 Chair of the WSBA Family Law Section.*

# The Young Lawyer's Jungle Book: A Survival Guide

by Thane Josef Messinger, 174 pp., $18.95, Honolulu: The Fine Print Press, 350 Ward Ave. Ste. 106, Honolulu HI 96814-4091.




*reviewed by* **Joseph Lee**

As a young associate, I was anxious to read Thane Josef Messinger's, *The Young Lawyer's Jungle Book: A Survival Guide*. Like most associates starting out, I have quickly realized that three years of law school education did not adequately prepare me for legal practice. While volumes have been written about law school survival and how to get ahead in law school, books on associate survival are relatively few in number. (Probably due to the lack of time young associates have for outside reading). Thus, it was refreshing to discover that Messinger's book is primarily addressed to this forgotten class of legal society.

Messinger draws mostly from his own experience as a junior associate practicing commercial law in Hawaii upon graduating from the University of Texas Law School. He insists the main reason for his book derives from his own "miserable" first year as a "junior" at a large firm. Messinger describes his first year as one filled with uncertainty and a complete lack of guidance. Thus, he offers his own tidbits and advice on everything from "your place in the firm" to dealing with other attorneys, clients, secretaries, and staff in order to avoid the traps and pitfalls that await every young "junior" in a firm.

The author delivers his words of wisdom in a light-hearted and humorous manner, which makes the subject matter a little easier to digest. The book is peppered with anecdotes and humorous stories from the author's own early years as an associate. In summarizing a Junior's place in the firm, Messinger succinctly states that, "You = money."

Messinger describes in humorous detail the type of personalities a Junior is likely to encounter at a firm: the Academic ("endlessly strive for an A+"), the Bureaucrat ("perfectly happy if all of humanity were boiled down into neat little columns and rows"), the Fly-boy ("seat-of-the pants barnstormers"), the Perfectionist ("will part the seven seas in search of the uncrossed *t* or undotted *i*"), the Power-lustee ("crave the feeling of self-importance that comes with recognition"), and the Schmoozer ("dive into the sea of humanity with an abandon that would make the Ty-D-Bol Man queasy"). Although dealing with various personalities may be difficult, Messinger contends it is actually part of the learning process and will make it easier to deal with difficult clients down the road.

In the author's view every Junior must behave like a "chameleon." Not only must a Junior be a different person with fellow Juniors than they are with Seniors, but a Junior must also adapt and be a different person with each Senior under his or her own terms. Messinger advises Juniors to learn what Seniors are looking for and give it to them. On the other hand, the author warns many Seniors loathe sycophancy and Juniors should beware of overdoing it.

In his section titled, "Dancing with Seniors," Messinger addresses several crises Juniors are likely to encounter and how to resolve them. For example, what happens when there is a conflict between or among Seniors? The author urges Juniors in these situations to avoid taking sides and to "stay the hell anchored." While Seniors can usually weather the office storm, Juniors are often left exposed and vulnerable in these situations. Moreover, Messinger advocates carefully laying down the rule when a Junior is absolutely swamped from work for Senior #1 and is approached by Senior #2 to take on additional work. In these troublesome situations, the author encourages the Junior to inform Senior #2 that he or she is busy with work from Senior #1, but if Senior #2 wants to discuss the work load issue with Senior #1, then Junior would be more than happy to help out. This approach will make the Junior look like a "team player" without disrespecting the needs of Senior #2. The author also advises against turning down undesirable work. Unless the Junior is absolutely overwhelmed from too much work, it is best to accept any and all work that comes Junior's way.

Messinger also advises on how to deal with mistakes, which are inevitable for every young associate. First, don't cover up mistakes. Think about what really happened and confirm that there really is a problem. If, in fact, there is a serious mistake, the Junior should go to the assigning

signing Senior to report the problem and ask how it may be resolved. In most cases, the partner will be surprised by the Junior's candor and ability to spot problems. Most importantly, the Junior should do everything possible to address the problem by meeting the Senior's expectations so the mistake does not reoccur.

> ***"You = money."***

The author spends a chapter on "Details, Details," most of which is covered in every firm's new-associate orientation. He emphasizes the importance of proper grammar and clear writing and the avoidance of legalese. In addition, although keeping track of time is always the last item on the "To Do" list, Messinger stresses the importance of accurately keeping track of time on a daily basis. In order to meet billable hour requirements, he does not encourage shooting for "billable superstardom." Instead, the author recommends maintaining a steady pace while regularly evaluating whether billable hour requirements are being met. In general, the author believes 10-to-12-hour days are the norm in order to meet "average" billable requirements. Messinger encourages every Junior to plan their own schedule depending on his or her firm's own billable requirements.

In "Fitting In" at the firm, Messinger gives advice on everything from getting along to dressing the part. Again, most of the author's advice is common sense and no big surprise. For example, it is obviously important to get along with everyone or, as Messinger states, "Be thou a good puppy." Also, not surprisingly, modesty is encouraged. Most Juniors would have second thoughts about proclaiming themselves, "God's gift to the law." Messinger also reminds Juniors that it is important to be perceived as a team player, and not to criticize or whine about a situation. As far as dressing the part, the author encourages conservative clothes, targeted at or slightly above the image of the firm's partners.

Messinger recommends an assertive approach in dealing with opposing counsel and representing the needs of a client. If opposing counsel plays hardball, then Junior has an obligation to the client to reciprocate. The client relies on the advice of the attorney. As the author artfully states, "If you suck, he loses." However, zealous representation does not mean a Junior must be discourteous or rude. It is far more important to determine when an attorney has to play hardball and act accordingly. The author aptly notes that the legal community is a small one and, in the end, it is better to make friends rather than enemies.

In dealing with clients, Messinger recommends modeling your style to fit the needs of the client. More often than not, attorneys believe they know what is best for the client without considering what the client really wants. Thus, Messinger recommends listening carefully to the needs of the client and to begin thinking like a client. Juniors should offer legal advice while permitting the client to call the shots. Another important task in working with clients is keeping them informed by sending them copies of all substantive documents and pleadings. The documents not only inform the client about the matter, but also justify the legal fees that are being paid by the client. The attorney should act professionally and try to conceal any nervousness he or she may have regarding client contact.

Young Juniors quickly realize that many of the answers to their daily dilemmas can be answered by secretaries, paralegals, and other staff. Thus, Messinger strongly emphasizes the importance of taking care of staff who in turn will take care of the Junior. Therefore, it helps to be polite and courteous to the staff. In most cases, a Junior's task has already been done before, and the staff are generally the ones who can help find previous examples.

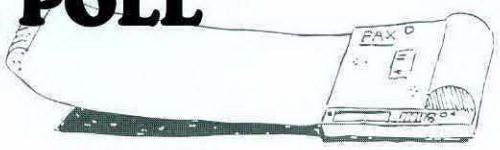
If you're a "Junior" and you're tired of picking up another treatise on the law or dread having to read that new case before tomorrow's meeting, you may want to give Messinger's *Survival Guide* a try. The book is loaded with common-sense advice for new associates, presented in a humorous, readable manner. While it may or may not provide much insight on your own firm environment, it is guaranteed to provide a good laugh. Which every young associate can use more of!



***Joseph Lee*** *is a first-year associate at the Foster, Pepper & Shefelman law firm in Seattle, and is planning to develop hobbies and interests other than law as soon as he can find the time.*

**THE WASHINGTON STATE BAR NEWS**

# FAX POLL




What is your opinion regarding the Walsh Commission's recommendation to create volunteer citizen nominating commissions to review and compile a list of recommended candidates from which the appointing authority would fill all judicial openings? Proponents contend that this approach, which is now used by 30 other states, involves voters in comprehensive recruiting and assessing of qualified judicial candidates. Opponents voice concerns about political patronage and the influence of partisan considerations in the process.

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

1. ____ I strongly support the creation of judicial nominating commissions.
2. ____ I somewhat support the creation of judicial nominating commissions.
3. ____ I am undecided, but I believe the issue should be studied further.
4. ____ I somewhat oppose the creation of judicial nominating commissions.
5. ____ I strongly oppose the creation of judicial nominating commissions.

Comments/Other:_____

_____

_____

_____

Name and city of attorney (required): _____
(This will not be printed unless your comments are chosen for publication along with poll results in the April *Bar News*.)

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

Or, mail your response by March 11 to:
**ATTN BAR NEWS EDITOR**
**WASHINGTON STATE BAR ASSOCIATION**
**2101 4TH AVE 4TH FL**
**SEATTLE WA 98121-2330**

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

# RESULTS

**of**

**THE WASHINGTON STATE BAR NEWS**

# FAX POLL


In last month's *Bar News*, we asked your opinion regarding the required videotaping of child abuse victim interviews. The results:

1. 400 (68%) strongly supported the required videotaping of child abuse victim interviews.
2. 35 (6%) somewhat supported the required videotaping of child abuse victim interviews.
3. 23 (4%) were undecided, but believed the concept should be studied.
4. 4 (<1%) somewhat opposed the required videotaping of child abuse victim interviews.
5. 126 (22%) strongly opposed the required videotaping of child abuse victim interviews.

Overall, 588 valid responses, an all-time record, were received.

## *Your Comments:*

"It frequently is very difficult for child abuse victims to feel sufficiently secure to disclose their victimization. To insist on videotaping disclosure would be to silence many victims. Further, to covertly videotape would be illegal. We do not require other crime victims to be videotaped for their police statements."

*Barbara Corey-Boulet, Tacoma*

"I feel that videotaping can be done in an unobtrusive manner. It would not impede the flow of information to the prosecutor, and it would help avoid injustices like the Wenatchee sex prosecutions . . . . ."

*Allen Bentley, Seattle*

"Children look to adults for cues on what to do and say. One needs the best possible record of a child interview — videotape — to distinguish answers drawn from a child's memory from answers unintentionally suggested by others. Failures to make this distinction ruin lives."

*David Marshall, Seattle*

"The best method of determining what happened is a complete, thorough and professional investigation. These are the rule. Intentional misconduct is not occurring across the state."

*Randall Yates, Everett*

*Although these statistics accurately reflect the viewpoints of the individuals who responded, they do not necessarily reflect the overall opinion of the WSBA membership.*

## Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in February 1997 is 5.0%. The maximum allowable interest rate permissible for March 1997 is therefore 12%. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates of the past 10 years appeared on page 41 of the July 1996 *Bar News*.

## Financial Fraud Brochure Available

A free brochure, "Don't Get Burned by the Financial Planner 'Name Game,'" is available from the Consumer Federation of American/National Association of Personal Financial Advisors. In a recent study, 58% of financial planners offered "mystery shoppers" fee-only financial planning services but actually earned commissions or other financial rewards for implementing the recommendations they made to clients. The quality of disclosure about compensation arrangements varied greatly among the firms, and the relevant information was often buried in the fine print of the federally required Form ADV disclosure documents. To order the brochure, call toll-free at (888) 333-6659.

## Attorney General Opinions

**Crimes - Courts - Sentences - Prosecuting attorney** - Effect of completion of terms and conditions of deferred imposition of sentence or of suspension of execution of sentence upon defendants' criminal-history record.

1. By virtue of RCW 3.66.067, a criminal defendant whose imposition of sentence has been deferred may, after meeting such terms as the court may have established, apply to withdraw his or her plea and seek dismissal of the charges, and the court may for good cause grant such application; however, where sentence is imposed but its execution is suspended pursuant to RCW 3.66.068, the law does not authorize withdrawal of guilty plea or dismissal of charges.

2. Whether a criminal sentence is deferred pursuant to RCW 3.66.067, or imposed and suspended pursuant to RCW 3.66.068, courts lack authority to delete or expunge the record of conviction based on a defendant's fulfillment of conditions attached to the deferred or suspended sentence; RCW 10.97 defines these records as "conviction record" and requires that the record of conviction in either type of case be maintained and available to law enforcement agencies and others as defined therein.

AGO 1997 No. 1



## Suspended

Tacoma lawyer Lauri J. Phillips (WSBA No. 24243, admitted 1994) has been suspended for two years pursuant to a stipulation for discipline, approved November 20, 1996. The discipline is based upon abandonment of her practice without notifying her clients, in violation of RPCs 1.3 and 1.4.

Phillips was a sole practitioner in Tacoma for approximately 11 months. On or about October 14, 1995, lawyer Phillips left Tacoma and her law practice without any notice to her clients. Phillips did not arrange for other lawyers to take her clients' cases nor assist clients with imminent court dates. On October 16, 1995, Phillips' paralegal informed the Bar Association that she arrived at work to find the office empty and abandoned. On October 17, 1995, the Disciplinary Board appointed a custodian of Phillips' client files, pursuant to RLD 8.6. Between October 1995 and March 1996, seven clients filed grievances against Phillips for failure to complete the work she agreed to perform. Many of the grievances also requested that Phillips return the unused portion of the nonrefundable advance fee deposit. In March 1996, the Bar Association located Phillips. After disciplinary counsel called Phillips, she agreed to respond to the grievances and refund the unearned advanced-fee deposits. In April and May 1996, she refunded the unearned advance fee deposits. One client continues to dispute the amount she received.

Respondent represented herself and disciplinary counsel Julie Shankland represented the Bar Association.

## Censured

Spokane lawyer Bruce R. Boyden (WSBA No. 9463, admitted 1979) was ordered censured pursuant to stipulation for discipline, approved November 27, 1996. The discipline is based upon Boyden's appropriation of client funds from his client trust account, after he was unable to determine the whereabouts of his client, and his subsequent failure to promptly remit client funds when the client later contacted him and demanded the

funds.

Respondent was represented by Dennis P. Hession of Spokane. The Bar Association was represented by disciplinary counsel William G. McGillin.

## Disbarred

Seattle lawyer John S. Sandmeyer (WSBA No. 12469, admitted 1982) has been ordered disbarred effective November 22, 1996. The disbarment, which was pursuant to a stipulation, was based on Sandmeyer's conviction of one count of conspiracy to commit mail fraud.

On May 17, 1994, Sandmeyer pled guilty to one count of conspiracy to commit mail fraud. Sandmeyer and the United States executed a Factual Basis for Guilty Plea, which stated that Sandmeyer agreed to act as a figurehead at a law office controlled by nonlawyers who set up the office to generate false and fraudulent claims and thereby obtain insurance benefits. The Factual Basis for Guilty Plea also stated that Sandmeyer deliberately avoided knowing the full scope of the nonlawyers' scheme.

The parties stipulated that Sandmeyer's conduct violated Rules 1.1(a) (act involving moral turpitude, dishonesty or corruption), 1.1(c) (violation of oath), 1.1(o) (assisting another in committing act prohibited by rules) and 1.1(p) (conduct demonstrating unfitness to practice) of the Rules for Lawyer Discipline.

The Hearing Officer was Randy M. Boyer. Sandmeyer was represented by Gary Clower. The Bar Association was represented by disciplinary counsel Mark Lough.

✦

Seattle lawyer Margaret Ennis-Keener (WSBA No. 17518, admitted 1987), has been ordered disbarred effective November 22, 1996. The disbarment, which was pursuant to a stipulation, was based on Ennis-Keener's misappropriation of client funds.

Ennis-Keener was a shareholder in a law firm that represented plaintiffs in personal injury claims. In August of 1993, she settled a client's claim. The firm withheld $4,189 due to a pending subrogation interest by an insurance company for personal injury protection benefits. After the insurance company did not respond to repeated inquiries, it was determined to release the funds to the client. In the spring of 1994, Ennis-Keener informed the firm that she was terminating her association with the firm.

On her last day at the firm, Ennis-Keener requested and received a check payable to the client for $4,189 drawn on the firm's trust account. The check was not signed. Ennis-Keener inadvertently held the check until she found it in mid-July 1994. She then signed it in the name of the law firm administrator, without authorization to do so, and forged the client's endorsement, making the check payable to herself. She then deposited the check in her personal bank account.

The law firm's comptroller contacted Ennis-Keener after the client told the firm she had not received the funds withheld for the subrogation interest. Ennis-Keener told the comptroller that the client had paid the funds to her for legal work done separate from the firm's representation. Ennis-Keener then called the client and told her that there appeared to be fraudulent behavior by a former bookkeeper of the firm, that Ennis-Keener was handling the situation, and that a meeting was to be held among the bookkeeper, the bookkeeper's attorney, the firm and Ennis-Keener. The client contacted the firm, and the firm's managing partner called Ennis-Keener. Ennis-Keener admitted that she had fraudulently converted the check and stated that she would repay the client that day. Later that day, she brought the client a cashier's check for $5,000, representing the misappropriated funds, plus interest and additional compensation for inconveniences.

Ennis-Keener stipulated that the facts summarized above established by a clear preponderance of the evidence that she violated Rule 1.1(a) (acts involving moral turpitude and dishonesty) and 1.1(p) (conduct demonstrating unfitness to practice law) of the Rules for Lawyer Discipline, and Rules 8.4(c) (act involving dishonesty, fraud, deceit or misrepresentation), 1.14(a) (client funds must be maintained in trust account), 1.14(b)(3) (lawyer must render appropriate accounts regarding client funds), and 1.14(b)(4) (requiring prompt payment to client of funds client is entitled to receive) of the Rules of Professional Conduct.

Ennis-Keener was represented by Leland G. Ripley. The Association was represented by Disciplinary Counsel Mark Lough.

✦

Bellingham lawyer George Livesey Jr. (WSBA No. 02492, admitted 1949) has been ordered disbarred effective January 13, 1997, by order of the Supreme Court. The discipline imposed was pursuant to an October 1996 Stipulation for Disbarment. Livesey's disbarment was based upon several misappropriations of client money, ranging from $21,000 to $80,000, which he had received as executor of an estate and as attorney for the beneficiary

of another probate estate; his preparation of a testamentary instrument for a non-relative, which bequeathed to him $10,000; and his $50,000 unsecured loan from a long-time client without complying with the terms of the conflict-of-interest rules. The misappropriations of estate and client funds occurred between March 1994 and October 1995.

*I. Procedural History*

Disciplinary charges were filed against Livesey on March 18, 1996. On April 11, 1996, the Supreme Court suspended Livesey pending the outcome of the disciplinary proceedings. On October 10, 1996, Livesey signed a Stipulation to Disbarment. The Stipulation provided for restitution of:

1) Three payments to a probate estate:
   a) $4,885 principal plus $216.23 in costs;
   b) $23,725.68 principal plus $2,500 in attorney's fees, with interest;
   c) $60,000 principal and $20,000 in attorney's fees plus interest;
2) A payment of $80,122.27 principal, prejudgment interest of $4,807.32, attorney's fees of $3,500, and costs of $210, plus interest, to the beneficiary of second probate estate.

The restitution amounts were based on a November 1995 judgment and three stipulated judgments entered in Whatcom County Superior Court in March 1996 and May 1996 in a case filed by the estate for which Livesey had acted as Executor and a case filed by one of his clients, a beneficiary to another estate. Pursuant to the terms of the stipulation to disbarment, Livesey also agreed to pay to the Bar Association costs and expenses of $3,475.60. The Disciplinary Board approved the stipulation on December 4, 1996. By Supreme Court order entered January 13, 1997, Livesey was disbarred and ordered to pay restitution and costs as outlined above.

*II. Facts*

*A. Theft of First Client's Funds*

In March 1994, Livesey assumed his duties as executor of an estate, and received a $21,650.81 check on behalf of the Estate. He deposited the check in his IOLTA account instead of the estate's account, and misappropriated the money. As of the date of the stipulation, there were insufficient funds in the IOLTA account to disburse the $21,650.81 to the estate. In February 1995, Livesey cashed the estate's $67,298.95 certificates of deposit in return for a cashier's check made payable to the estate. Livesey deposited the cashier's check into his IOLTA account instead of the estate's account, and misappropriated the money. The beneficiaries of the estate learned of the misappropriations in the summer of 1995, after Livesey had resigned as executor. Livesey resigned after the beneficiaries began to question: 1) his delay in creating the trust provided for in their mother's will; 2) his preparation of the will which provided him with a $10,000 bequest; 3) his payment to himself of the $10,000 bequest; and 4) his payment to himself of $14,000 in attorney's fees without court approval or notice to the beneficiaries.

Livesey stipulated that the Association had sufficient evidence for a hearing officer to find that as executor of the estate, he violated RLD 1.1(a) (commission of an act involving dishonesty), RPC 1.8(c) (prohibiting the preparation of a testamentary instrument which gives the lawyer a substantial bequest), and RPC 1.14 and 8.4(c) (relating to dishonesty and mishandling of client funds).

*B. Improper Loan from Second Client*

On September 26, 1995, Livesey asked a long-time client to loan him $50,000 for

four days. Prior to obtaining the loan, Livesey did not fully disclose to the client the terms of the loan, nor did he give her reasonable opportunity to seek the advice of independent counsel. The client loaned him the $50,000. Livesey used the $50,000 loan to repay the Estate referenced in Section II.A., above. The next day, Livesey gave the client a promissory note evidencing a promise to repay the loan on or before October 2, 1995, with $1,000 interest. Livesey did not repay the loan by October 2, 1995. On October 3, 1995, Livesey showed the client a check for approximately $80,000, payable to one of Livesey's other clients, and told her that he would deposit that check in his account and use it to repay the $50,000 loan. The client also asked Livesey for the $10,000 which Livesey had received on her behalf in connection with the sale of real estate in August 1995. On October 11, 1995, the client filed suit for money owing. On October 12, 1995, Livesey paid the client $62,000, using a $52,000 cashier's check purchased with funds drawn on this general business account and a $10,000 general business account check.

Livesey stipulated that the Association had sufficient evidence for a hearing officer to find that he violated RLD 1.1(a) (commission of an act involving dishonesty), and RPC 1.8(a)(1) and 1.8(a)(2) (improper business transaction with a client) when he obtained the loan from his client.

*C. Forgery of Third Client's Check and Misuse of Funds*

Livesey was hired by the third client to represent her interests during the probate of her father's estate. On October 2, 1995, Livesey received an $80,122.27 check payable to the third client, drawn on her late father's estate account. He asked his client to endorse the check over to him so that he could deposit it in his IOLTA account. He said he would give her an IOLTA check for the full amount as soon as the check cleared the account.

On October 12, 1995, Livesey went to the bank on which the check was drawn and endorsed it payable to the order of himself, scratching out the "for deposit only" endorsement on the back of the check. Instead of cashing the check, the bank issued an $80,122.27 cashier's check payable to the client. On October 12, 1995, Livesey endorsed the cashier's check over to himself, signing his client's name. He deposited the check into his general business account. Livesey did not have his client's permission to endorse the cashier's check on her behalf, nor did he have the client's permission to deposit the check into his general business account. Livesey used the funds from the $80,122.27 cashier's check to pay the second client $62,000.

Livesey stipulated that the Association had sufficient evidence for a hearing officer to find that his unauthorized endorsement of the $80,122.27 cashier's check, unauthorized deposit of the cashier's check into his general business account, and use of his client's monies to repay the second client $62,000 violated RLD 1.1(a) (commission of an act involving dishonesty), and RPC 1.14 and 8.4(c) (relating to dishonesty and mishandling of client funds).

The hearing officer was Nancy Preg of Seattle. Livesey represented himself. The Bar Association was represented by disciplinary counsel Leslie Ching Allen.

*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.*

## Judicial Recommendation Committee

The WSBA Judicial Recommendation Committee is currently accepting applications from attorneys and judges seeking consideration for appointment to potential appellate-court vacancies. The Committee will interview candidates in May 1997. The questionnaire deadline is 5 p.m., March 14, 1997, at the WSBA offices.

Recommendations are reviewed by the WSBA Board of Governors and then referred to the Governor for review when appointments are made to vacancies on the Washington Court of Appeals and Supreme Court.

Contact the WSBA at 2101 4th Avenue, 4th 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.

### In Memoriam

**Maurice D. Powell**: Eastside's longest-practicing attorney and civic leader of Kirkland died December 26 at the age of 85. The Edmonton, Alberta, native earned his way through law school playing clarinet and saxophone on luxury boats and the RKO circuit; he later founded and presided over Kirkland's Citizen's Bank.

# CALENDAR

## March

1 **WSBA presidential nomination petitions** due at 5 p.m.
WSBA offices
*(see related story, page 34, Feb. issue.)*

3 **Premises Liability**
Bellevue
By WSTLA (206) 464-1011
6 CLE credits pending

6 **Handling Business Litigation**
Seattle
By WSBA CLE (206) 727-8202
CLE credits pending

7 **Selected Issues in Complex Family Law Cases**
Seattle
By WSBA CLE (206) 727-8202
6.5 CLE credits

7 **Estate Planning for the Small to Medium-sized Estate**
Seattle
Also in Spokane 3/13
By WSBA CLE (206) 727-8202
6.75 CLE credits

10 **Powerful Communication Techniques**
Spokane
Also Seattle 3/12 & Tacoma 3/13 & Bellevue 3/21
Nat'l Seminars Group (206) 447-1911
CLE credits pending

12 **Title Insurance & Claim in WA**
Seattle
By NBI (715) 835-8525
6.5 CLE credits (incl. 1 ethics)

13 **Employment Law Institute**
Seattle
By WSBA CLE (206) 727-8202
*Also offered as VIA-CLE*
6.5 CLE credits

13 **Solutions to Sabotage, Stony Silence and Resistance: Meeting Effectively with Clients & Colleagues**
Seattle
By WSBA Law Practice Management Section (206) 789-8320
1 CLE credit pending

19 **Family Limited Partnership & Limited-liability Companies**
Spokane
Also Seattle 3/20
By NBI (715) 835-8525
7.25 CLE credits (incl. 1 ethics)

20 **Workers' Compensation**
SeaTac
By WSTLA (206) 464-1011
CLE credits pending

21 **How to Handle Boundary & Title Disputes**
Seattle
Also in Portland 3/26
By WSBA CLE (206) 727-8202
6.0 CLE credits (incl. 1 ethics) pending

21 **Competitive Explosion: Telecommunications Revolution Continues**
Seattle
By LSI (NEXUS) (206) 567-4490
12.75 CLE credits

22 **1st-year Deputy Prosecuting Attorney**
Seattle
By King Co. Pros. Atty. (206) 296-9000
26.25 CLE credits (incl. 2 ethics)

24 **Construction Industry Arbitrator Training Workshop**
Seattle
By Amer. Arb. Assn. (206) 622-6435
CLE credits pending

25 **Preparing A Parenting/Custody Case in Washington**
Seattle
By NBI (715) 835-8525
6.5 CLE credits

26 **Telling Your Story: Creating and Using Cost-effective Exhibits**
Seattle
By WSBA CLE (206) 727-8202
6.25 CLE credits

27 **Rights & Remedies of Consumer Debts In and Out of Bankruptcy**
Seattle
By KCBA (206) 340-2578
6.5 CLE credits pending

27 **Managing Partners' Panel**
Seattle
By ALA & WSBA Law Practice Management Section (206) 789-2111
1 CLE credit pending

28-29 **WSBA Board of Governors meeting**
La Connor
(206) 727-8200

31-4/5 **Skills Training**
Bothell/Seattle
By WSBA CLE (206) 727-8202
45.5 CLE credits

## April

4 **EP For Qualified Retirement Plans & IRA Benefits**
Seattle
By WSBA CLE (206) 727-8202
6.75 CLE credits pending

8 **Communication in the Courts in WA**
Seattle
Also in Wenatchee 4/23
By Carl Grant (206) 364-5298
6.5 CLE credits

10 **Recognizing and Protecting Intellectual Property Rights**
Seattle
By WSBA CLE & Intellectual & Industrial Property Section (206) 727-8202
6.75 CLE credits, (incl. .75 ethics)

pending

10 **Basic Wage & Hour Law in WA**
Seattle
Also in Spokane 4/11
By NBI (715) 835-8525
6.5 CLE credits (incl. 1 ethics )

11-12 **6th Annual Northwest Alternative Dispute Resolution Conference**
Seattle - Shoreline Conf. Center
By KCBA, WSBA, WA Law School Fndn., Mediation Consortium of WA
11.5 CLE credits pending

16 **Workers' Compensation In WA**
Seattle
By Lorman (715) 833-3940
6.5 CLE credits

17 **Auto Cases**
SeaTac
By WSTLA (206) 464-1011
CLE credits pending

17 **Indian Law**
Seattle
By WSBA CLE & Indian Law Section (206) 727-8202
6.0 CLE credits (pending)

18 **Trial Mentor: Your Guide for Going to Trial (3rd Annual Litigation Institute)**
Seattle
By WSBA CLE (206) 727-8202
7 CLE credits (incl. 1.25 ethics) pending

18-19 **NW Bankruptcy Institute**
Seattle
Sponsored by OR State Bar & WSBA Creditor/Debtor Section (503) 684-7404
10 CLE credits pending

23 **Commercial Leases**
Seattle
By WSBA CLE (206) 727-8202
6.75 CLE credits

24 **Retirement Plans in Estate Planning Process**
Walla Walla
By Walla Walla Estate Planning Cncil (509) 382-2541
1.5 CLE credits

24 **Limited-liability Companies in WA**
Spokane
Also Seattle 4/25
By NBI (715) 835-8525
8.25 CLE credits (incl. .5 ethics)

25 **Win at Every Level**
Spokane
Also in Seattle 4/29
By Emissary Enterprise, LLC (303) 417-0253
7.25 CLE credits (incl. .75 ethics)

## May

2 **Negotiation Skills**
Seattle
By WSBA CLE (206)727-8202
CLE credits pending

2-3 **Family Law Skills**
Seattle
By WSBA CLE (206)727-8202
10 CLE credits pending

2 - 3 **"Paralegals on the Cutting Edge" Washington State Paralegal Association Annual Convention**
Fife - Connie (206) 383-3791

8 **Impact of the ADA on Work**
Seattle
Lorman (715) 833-3940
6.5 CLE credits

8 - 10 **Environmental & Land Use Law Midyear**
Eastsound
By WSBA CLE and ELUL Section (206) 727-8202
CLE credits pending

9 **Public Procurement & Private Construction Section Midyear**
Seattle
By WSBA CLE and PPPC Section (206) 727-8202
6 CLE Credits (pending)

12 **Estate & Gift Taxation**
Seattle
Golden Gate U (206) 622-9996
41.25 CLE credits

12 **Intellectual Property**
Richland
U. Ctr. For Prof. Ed. (509) 201-7202
7 CLE credits (incl. 1 ethics)

12 **Tax Timing**
Seattle
Golden Gate U (206) 622-9996
41.25 CLE credits

16 **Employment Law**
Seattle
By WSTLA CLE (206) 464-1011
CLE credits pending

22 **Tax-saving Ideas Using LLCs**
Walla Walla
Walla Walla Estate Planning Cncl. (509) 382-2541
1.5 CLE credits

30-31 **Business Law Midyear**
Seattle
By WSBA CLE and Bus. Law Section (206) 727-8202
12 CLE credits pending

## June

4/5/11 **Risk Management for Attorneys**
Seattle
By CNA Insurance Companies
3.25 CLE ethics credits

31 **WSTLA 1997 Annual Meeting & Convention**
Vancouver BC, Canada (206) 464-1011
CLE credits pending

# Is this *Your* Year (For a Grievance to be Filed Against You)?

*by* **Barrie Althoff**, *WSBA Director of Lawyer Discipline & Chief Disciplinary Counsel*

*Prefatory note: This article describes some of the more common ethical violations in the scenario of a practicing lawyer, as well as some possible consequences of the violations. Is this lawyer you? How many ethical violations can you identify in this scenario? How many can you spot in your own practice?*

It's only midmorning, but already, after a difficult settlement conference late last night, you've met with two clients, phoned another, made a brief court appearance, set a deposition, and now you're going through your morning mail. You're feeling good because your family law/personal injury practice is starting to turn profitable.

The last eight years since you started your practice have been tough, and last year was especially bad. You were drinking too much, your marriage fell apart, and you got hit with your first malpractice suit, which you knew you were lucky to settle for a modest amount. This year, however, you're starting to see signs of success in your practice. You open one envelope delighted to find a $4,000 check from Sam Felix, whose divorce you handled two years ago. You thought he'd never pay, so you padded your billed hours by an extra $1,000 to reflect the two years of interest you forgot to claim in your fee agreement with him and to cover the risk of nonpayment. You resolve to put some of the money in your trust account to repay part of the temporary $5,000 loan you made to yourself late last year when your cash flow was a bit weak. But, on second thought, you decide not to since it is unlikely you will be audited anytime soon and no one will know; besides, you need the money. You open a second envelope and find another angry letter from Beth Rue, again asking when you're going to file suit on her slip-and-fall case against the city. You've been meaning to tell her for the last nine months you were wrong when you assured her she had a good chance of collecting $75,000; now, having made a few inquiries, you haven't figured out how to tell her you think the case is a loser. And you mistakenly agreed to handle the case on a one-third contingency. But one third of nothing is nothing. She was so demanding and insistent that you've just put off talking to her. Besides, how do you explain to her that you forgot to file a notice of claim with the city, and that the witness — the only witness to the accident — whom she long insisted you talk to, has — you just discovered last week — recently moved out of town without any forwarding address? You can't just admit to her you made a mistake, since she might well sue you for malpractice. You make a note to yourself to think of some technical-sounding excuse why she doesn't have a good case and then give her a call next week, or the next. But you know you'll probably delay again. Who needs a client like her, anyway? Better to just ignore her. You pick up the next envelope and see that it's from the State Bar Association. You know it's bad news even without opening it: either it's another notice of overdue bar dues, or it's a grievance. You open it. A grievance has been filed against you, and the Bar wants your response.

You remember hearing recently at the county bar luncheon that 2,400 lawyers — one in every eight or so lawyers in the state — had a grievance filed against him or her last year, but you thought they were talking about the other lawyers in the room, not you. When you heard that most grievances are filed by disgruntled clients or ex-clients against family law, criminal law, or personal injury lawyers in sole practice, or in small partnerships, you were a bit uncomfortable for awhile, since that pretty well described your practice. You dismissed your concern, however, on the basis that those areas were very high-emotion areas where clients often are not used to dealing with lawyers and have a lot to lose. Besides, you figure, the clients don't know much about the law and are unlikely to know how to file a grievance against you. You started feeling more uncomfortable, however, when you heard that the single biggest complaint against lawyers was their failure to communicate with their clients and act diligently on their cases. Although you knew you had a bit of a problem with that last year, you figured you hadn't done anything serious enough to warrant a grievance. You made a practice of not responding to letters from clients since it took so much time. But even though you felt uncomfortable billing the client for the time, you nearly always returned phone calls, or at least you usually did after the seventh or eighth message from a client, especially if the client was threatening to dismiss you. You heard that lots of clients are unhappy with their lawyers' fees, but you dismissed that, also, as just people being too cheap to pay for services. Somebody told you that lots of clients were starting to complain about conflicts of interest, but you knew that didn't apply to you — except maybe when you represented Tammy and Bill Swanson in their "friendly" marriage dissolution and child support agreement. And, oh yes, there was that time, early last year, when you

represented Sharon Smith in her dispute with her former partners in a dissolving accounting firm which you, previously, also had represented.

Surely, the grievance against you must be a mistake. You reread the letter. No, it's you. You know the Bar dismisses over half of the grievances simply because they don't state any claim of ethical violation, and you wonder why the Bar didn't dismiss this one.

The Bar letter tells you Susan Libre, your former client, complained to the Bar that early last year you didn't answer her letters or respond to her calls for nearly nine months. You vaguely remember her as a disagreeable client who talked to you about filing suit for her injuries in an auto accident that had happened nearly three years before. You remember telling her you'd look into the case, but you also remember you doubted the case was worth pursuing and doubted you could file suit before the statute of limitations ran. But you never got around to telling her those doubts or checking the statute. You remember at the time you were in the middle of a hard-fought, but losing, child custody trial representing Daphne Mundae, the wife of your former client. Nearly every day you were in trial Susan had left you messages which you never got around to answering. Susan got through to you on the phone late one night, however, just after a very bad day in court. She was very angry you hadn't called her. She told you she came to you for help and was mad that you were ignoring her. You yelled at her, and then, to cover up your feeling like a fool, you tried to blame her for calling you so late at night and interrupting your trial preparation. She hung up on you, and you, thankfully, never heard from her again. Until now. You never even billed her.

You start guessing the odds of what will happen with Susan's grievance if it doesn't get dismissed. You figure you won't be disbarred for not communicating with her. (Or did you also miss the statute of limitations?) Besides, last year the Supreme Court disbarred only a handful of lawyers, and it suspended from practice only a few more than that, and those were all for really serious violations. You doubt even that you would join the unlucky seven or so lawyers who were reprimanded, or the few more than that who were censured. You figure the most you will get is maybe an admonition or an advisory letter like another 30 or so of your fellow lawyers got last year. Then you figure, that fewer than three in a thousand lawyers get any type of discipline in a year, so why should it be you? You figure the Bar must be picking on you because you're a sole practitioner, and bet it wouldn't be doing so if you were one of those overpaid "elevator lawyers" in a big Seattle law firm.

You figure the Bar will never learn about your padding Sam's bill (and, besides, he paid it in full and was lucky to get the result you got for him), or about the trust account loan, since you can correct that little problem later. Will the Bar find out about Beth? You hope she hasn't complained, and you resolve to call her. But not just now — you'd better start putting together a response for the Bar on Susan's grievance. But you decide you don't really have time to do it now. Maybe if you don't respond right away, the Bar will just go away, like some of your irksome clients. Maybe you should just wait until the Bar sends another request and shows it is serious. Meanwhile, maybe you will call Beth next week. Or the week after . . . .Oh, God, why is practicing law so hard?

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**Mary Anne Vance**, co-author of the chapters on Estate Planning and Probate in Butterworth's *Washington Civil Practice Deskbook,* is available for association, consultation or referral of probate and guardianship cases, both contested and noncontested

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**Roger K. Anderson**, former legal malpractice insurance defense attorney with Lee, Smart, Cook, Martin and Patterson, P.S., announces his availability for association, consultation or referral of substantial plaintiff's claims of legal malpractice

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announces his availability for consultation, association or representation regarding lawyer ethics issues, defense of disciplinary grievances, as well as consultation, association, or expert testimony regarding claims for lawyer malpractice.

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**William B. Knowles** is available for consultation, referral and association in cases involving employment discrimination, wrongful termination, wage claims, unemployment compensation and federal employee EEOC or Merit System Protection Board appeals.

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**Douglass A. North** announces his availability for referral, consultation or association on appellate arguments and briefs.

**Douglass A. North**

**Maltman, Reed, North, Ahrens & Malnati, P.S.**
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**201 South Biscayne Boulevard**
**Miami, Florida 33131**
**Telephone (305) 379-9103**
**Fax (305) 381-9982**

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**Spokane, WA 99201**
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**Fax: (509) 455-8327**

References upon Request

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former adjunct professor of law at UPS and former in-house counsel for North Pacific Insurance Co., is available for consultation, association or referral in matters involving all types of insurance coverage, as well as arbitration and mediation in civil, tort and contract litigation.

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***Reply to WSBA* Bar News *Box Numbers at: WSBA* Bar News *Box___*, Bar News *Classifieds, 2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330.***

**Attorney jobs: Indispensable** monthly job-hunting bulletin listing 500-600 current jobs (federal/state government, courts, Capitol Hill, public interest, corporations, associations, law firms, universities, international organizations, RFPs) for attorneys at all levels of experience in Washington, D.C., nationwide and overseas. Order: *National and Federal Legal Employment Report,* 1010 Vermont Ave. NW, #408-WB, Washington, D.C. 20005. $39-three months; $69-six months. (800) 296-9611. Visa/MC.

**Minzel & Associates** is a temporary placement agency for lawyers and paralegals. We provide highly qualified attorneys and paralegals on a contract basis to law firms, corporations, solo practitioners, and government agencies. Jeff Minzel, who worked at Davis Wright Tremaine for a number of years, carefully screens all attorneys and paralegals. Highlights of the screening process include a personal interview, a detailed review of the applicant's legal/non-legal work experience and educational background, an evaluation of the applicant's legal skills, reference checks, a review for bar complaints and malpractice suits, and verification of good standing status. These lawyers and paralegals can help you enhance profits, control costs, manage growth, increase flexibility, improve client service, and increase career satisfaction.

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**Litigation associate.** Applications are invited from experienced commercial litigation attorneys who desire to become contributing participants in the continued growth of a dynamic mid-sized AV law firm. Applicants should have a minimum of two years' experience in all phases of civil litigation. Admission to OSB required. WSB a plus. Competitive compensation and benefits package. Submit letter of application and résumé to: Administrator; Sussman Shank Wapnick Caplan & Stiles LLP; 1000 S.W. Broadway, Suite 1400; Portland, OR 97205.

**Employment law attorney**. Landerholm, Memovich, Lansverk & Whitesides, P.S., a 23-attorney law firm in Vancouver, Washington, seeks employment law attorney with at least three years' experience in counseling employers on a broad range of employment matters including discrimination, wage and hour, ADA compliance, drug testing, and personnel handbooks. Litigation experience a plus. Applicants must demonstrate an ability to manage rapid growth and possess a superior academic background and have excellent writing skills. Please submit résumé, law school transcript, and a short writing sample to Director of Administration, PO Box 1086, Vancouver, WA 98666.

**Associate position available** with small East King County law firm engaged in general civil practice. Three-plus years' experience; litigation a must, transactional experience (estates, probate, real estate, commercial) a plus. Excellent writing and analytical skills; interpersonal skills are essential. Send a cover letter (highlighting strengths, professional goals, outlining salary/benefit requirements) and résumé to WSBA *Bar News* Box 514.

**Successful solo practitioner** in a rural eastern-Washington town is looking for an attorney to share law practice. Computer and bilingual (Spanish) expertise preferred. Please send résumé and writing sample to: Stansfield Law Firm, P.S.; 212 G Street SE; Quincy, WA 98848.

**In-house attorney** for Volume Collection Company in Longview. Salary based on experience. Send résumé to PO Box 95, Longview, WA 98632.

**Bogle & Gates P.L.L.C.** is pleased to announce an opportunity in its Seattle office for a litigation associate. The successful candidate will have a minimum of two years' litigation practice experience handling product liability/personal injury and general commercial litigation matters. Experience in a law firm setting and current Washington State Bar membership is strongly preferred. We require outstanding academic credentials, excellent oral and written communication skills and a dedication to providing the highest-quality client service. We offer a competitive compensation and benefits package, and a professional work environment. Qualified individuals should submit a cover letter describing their qualifications, résumé, law school transcript, and a writing sample to: Ms. Alisa Tazioli; Attorney Recruiting and Training Manager; Bogle & Gates P.L.L.C.; Two Union Square; 601 Union Street, Ste. 5100; Seattle, WA 98101-2346. We are an EEO employer and encourage those from diverse backgrounds to apply. (No phone calls please.)

**Small Seattle maritime** firm seeks experienced associate for growing defense-oriented practice. Commitment to excellence required. Mail résumé to: Gibbons & Associates, P.S.; 1201 3rd Avenue, Suite 2800, Seattle, WA 98101-3000.

**In-house attorney**. Northwest Farm Credit Services, an agricultural lender, has an immediate opening for an experienced attorney to support its corporate, commercial and consumer lending activities and to provide day-to-day legal support to multiple- branch operations located throughout the four Pacific Northwest states.

Responsibilities include providing legal support to management, document preparation and loan-closing on a variety of loan products ranging from consumer to complex multi-entity loans and loan participations. Incumbent will have primary responsibility for regulatory compliance in truth in lending, equal credit, RESPA, and other applicable regulations.

Branch support includes phone counseling and document review in all areas of branch operations and lending emphasizing real property, secured transactions, title, bankruptcy, environmental, litigation and general legal issues.

Position requires a Juris Doctor Degree currently admitted to practice in at least one of the four NW states and minimum of three years of substantial banking, commercial lending/leasing and related areas with an emphasis in banking, real property and secured transactions. Some travel is required. Significant personal computer skills are desirable and ultimately required to effectively prepare loan and closing documents and perform other responsibilities.

Competitive compensation and benefits/ DOE. Send cover letter and résumé to Farm Credit Services; Attn: In-house Counsel Position; P.O. Box TAF-C5, Spokane, Washington 99220-4005. EOE. Only those selected for an interview will be contacted.

**Island County Prosecuting Attorney** is accepting applications for Chief Criminal Deputy. The Chief Deputy carries a felony case load, supervises five attorneys, and coordinates prosecution activities. Applicants must have extensive felony trial experience; trial of homicide and sexual assault cases is preferred. This is not an entry level position; only applicants with substantial criminal prosecution experience will be considered.

Position will close upon selection of qualified applicant. Application and résumé are required. Call (360) 679-7372 for information and an application. EOE.

**Securities attorney — Seattle** law firm with strong international business practice seeks experienced corporate finance/securities lawyer to work with members of the firm. Reply to WSBA *Bar News* Box 515.

**Associate position available** with small downtown Seattle law firm engaged in general civil trial/maritime/insurance defense practice in Washington and Alaska. Must have at least three years of solid trial practice and civil litigation experience; maritime industry and/ or maritime law experience a plus. Must have excellent writing and analytic skills. Please send résumé and writing sample to: Smith+Co; 600 University St., Ste. 2020; Seattle, WA 98101.

**Associate position** for a transactional attorney with a minimum of two years' experience in the areas of commercial real estate and general business law is available in a 10-member law firm in Boise, Idaho. Send résumé and transcript to Hiring Attorney, Meuleman, Miller & Cummings, PO Box 955, Boise, Idaho.

**Opportunity for business lawyers**. The Seattle office of Bullivant Houser Bailey Pendergrass & Hoffman, a Northwest regional law firm with four offices on the West Coast, seeks one or more lawyers for our expanding business practice. This is an exceptional opportunity for an experienced business lawyer with an established practice in one or more of the following areas: corporate and securities law, real estate, taxation, finance, and estate planning and administration. Bullivant Houser Bailey offers an exciting opportunity to join an established, full-service firm with a commitment to developing and expanding our mutual client base. Please direct your confidential reply to: Ms. Kelli Derrig, Bullivant Houser Bailey Pendergrass & Hoffman, 2400 Westlake Office Tower, 1601 5th Avenue, Seattle, WA 98101-1618. EOE.

**Litigation attorney wanted** — Seattle office of Bullivant Houser Bailey Pendergrass & Hoffman, PS, seeks a litigation attorney

with a minimum of three years of experience in civil litigation, (preferably casualty defense), including preparation of pleadings, all aspects of discovery, motion practice, mandatory arbitrations, and some trial experience. Excellent research and writing abilities required. Salary to be determined based on qualifications and experience. Written inquiries only. All inquiries are confidential. Send résumé, writing samples, transcript, and cover letter detailing pertinent experience to Kelli E. Derrig, Hiring Coordinator, 2400 Westlake Office Tower, 1601 Fifth Ave., Seattle, WA 98101-1618. EOE.

**Prominent medium-sized Seattle** law firm seeks an associate for its real estate department. Candidates must have high academic credentials and a minimum of one year's experience with real estate transactions. Send résumé and writing sample to Attorney Recruiting Coordinator, WSBA *Bar News* Box 516. We strongly encourage those from diverse backgrounds to apply.

**Electric utility senior counsel**. Large progressive and prestigious electric public utility district located in the Puget Sound area seeks an experienced attorney for its corporate legal department. To qualify the candidate must have outstanding academic credentials, excellent references, admission in the Washington State Bar and a minimum of five years' experience in one or more of the following areas; utilities and energy law, contracts, labor/employment, administrative law, real estate, public utility districts and environmental law. Some litigation experience is required. Salary commensurate with education and experience. For consideration, please send résumé, writing sample, and law school transcript to Office of General Counsel, PO Box 1107, Everett, WA 98206-1107. Applications will be accepted through March 30, 1997. EOE.

**Seattle-based maritime** insurance defense firm seeks associate with a minimum of two year's general litigation experience for its Anchorage, Alaska, office. Exceptional opportunity for qualified attorney possessing academic distinction, analytical ability and writing skills. Current Alaska bar membership desirable but not essential. Respond to Hiring Committee, WSBA *Bar News* Box 517.

**Cairncross & Hempelmann, P.S.**, a mid-sized, full-service commercial law firm, is seeking two associates to join our business transactional practice. Superior academic credentials and demonstrated excellence in oral and **written communication** required. Real estate and/or IP experience a plus. Please submit cover letter and résumé to: Cindy Bredy, Hiring Coordinator, Cairncross & Hempelmann, P.S., 70th Floor, Columbia Center, 701 5th Avenue, Seattle, WA 98104-7016. Cairncross & Hempelmann is an equal opportunity employer.

**Les Schwab Tire Centers** in Prineville, Oregon, invites applications for the position of corporate counsel. The successful candidate will have three-plus years of law firm or corporate legal department experience in real estate, contracts and general business. This position offers a sophisticated corporate legal practice in one of the Northwest's most livable regions. Send résumé and salary history to: Ms. Mary Jo Grimes, Legal Department, Les Schwab Tire Centers, PO Box 667, Prineville, Oregon 97754.

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**Rigos Bar Review** — Washington law written by Washington lawyers exclusively for the Washington Bar Exam. Classes in Seattle, Tacoma, and Portland. Contacts: (206) 624-0716, 102735.3047@compuserve.com, and www.rigosrev.com.

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## MISCELLANEOUS

**Newport, Oregon.** One-bedroom cottage overlooking Yaquina Bay. Five minutes from Oregon Coast Aquarium, bayfront, and beaches. $49/night; $294/week. (541) 265-8553.

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**Italy — Tuscany** — 18th C. Farmhouse, end of private road on wine and olive estate. Views of San Gimignano's medieval towers, 30 miles from Florence, completely furnished, sleeps six, weekly $700 - $900.

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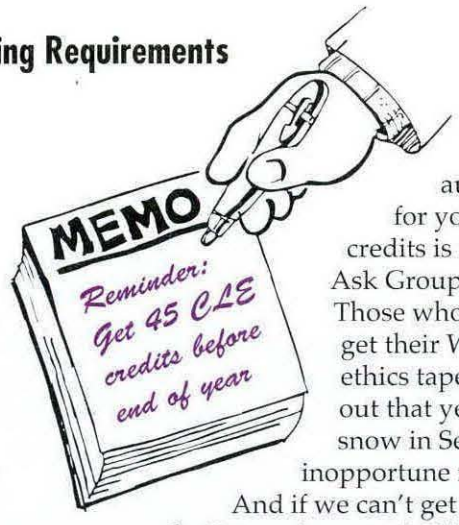
**Mexico time share**: 1 bedroom unit at 5-star Sheraton Buganvilias in Puerto Vallarta. Weeks 16 and 17 (in 1997, April 19-26, April 26-May 3). Red time for Resorts Condominium International exchanges. Significant saving over current sale price in Mexico. Doug Smith, (206) 471-1000.

## Licensing Lessons Simplify Reporting Requirements




A little advance planning goes a long way when it comes to fulfilling CLE and licensing requirements. "Group 2" (which just reported its CLE credits from 1994-96) appears to have survived, but not without a few snafus.

Hopefully "Group 3" can come through the next licensing/CLE reporting season unscathed. Group 3 includes all lawyers admitted from 1984 through 1990 and in 1993 and 1996. Group 3 will report on the next licensing form their CLE credits earned from 1995 through the end of 1997. Save this page to refer to when you have questions.

1. License forms are mailed out in the middle of December. If you haven't received a license form by the first week in January, please call the Bar immediately.

2. Of course, we do have your current address — DON'T WE???? We've been told at least a hundred times in the last month that we sent someone's license form to the wrong address. (Admission to Practice Rule 13(b) requires that Bar members notify us of address changes within 10 days.)

**IF YOU MOVE, PLEASE TELL US!** There is no money in our budget for a mind reader. And the Ouija board is broken.

3. When you do receive your license form, please hold on to it. We were amazed at the number of attorneys who called to say they'd lost their forms. Our favorite call was from a legal secretary who pleaded with us on February 3, the day the license fee was due, to replace her boss' form because it was "lost somewhere on his desk." When asked how this was possible, she responded that he's a litigation attorney. We're not certain this is an adequate explanation but no one wants to go investigate. His office sounds too scary.

4. You need 45 credits, including 4 ethics credits and they must have been taken between January 1, 1995, and December 31, 1997. Waiting until the end of December to order audio tapes for your ethics credits is very risky. Ask Group 2 people. Those who tried to get their WSBA CLE ethics tapes found out that yes, it does snow in Seattle at inopportune moments. And if we can't get to work, the Bar can't open. And if the Bar is closed the last working days of the year, you can't get your tapes.

5. Fifteen credits can be audio/video (a/v). We thought the distinction between live and audio/video was pretty clear until an attorney called with the following question: He watched a tape of a program which had been given live two weeks before. Should he list this as live or audio/video? If you didn't see it live, you can't claim it as live.

6. Make certain that your CLE seminars are approved by the MCLE Board before you take them — otherwise you may be spending money for courses you can't report. If your seminar has not yet been approved, you need to send us a Form 1 with a copy of the seminar brochure. We need a complete agenda, showing a breakdown of the time, including lunch and breaks.

7. If you've already taken a seminar that hasn't been approved yet, send in your Form 1 as soon as possible. If you wait until December 1997, you will probably be one of several hundred waiting for a response. It may or may not come before you need to report. We work as fast as we can but there are only three staff members reviewing CLE applications for the reporting group as well as the license forms for all 20,000 members of the Bar.

*See Licensing on page 58*

## UW Assistant Dean Madrid receives ABA Spirit of Excellence Award

Sandra Madrid, assistant dean at the University of Washington School of Law and former winner of the WSBA Affirmative Action Award, received the 1997 Spirit of Excellence Award from the American Bar Association's Commission for Minorities in the Profession. The award was presented at the ABA meeting in San Antonio on Feb. 1. Madrid was awarded the WSBA's Affirmative Action Award in 1993.

The award is given to someone who has made significant contributions to the advancement of racial or ethnic diversity in the profession, influenced other ethnic or racial minorities to pursue legal careers, opened doors for racial or ethnic minority lawyers in a variety of job settings that were historically closed to them, or advanced opportunities for racial or ethnic minorities within a practice area or segment of the profession.

According to a press release from the UW, Madrid, who is not a lawyer, has served as assistant dean for four years and currently chairs the Minority Affairs Committee of the Law School Admissions Council, a group charged with encouraging recruitment, retention and successful bar passage of students of color. The committee is currently developing a program for 1998 in which law schools will be offered a stipend to develop programs that reach out to undergraduates or high school students of color during a designated Minority Law Student Recruitment Month.

"The work with the committee has been some of the most exciting I've done because we are funded through a percentage of the fees for the Law School Aptitude Test (LSAT) and have been able to use the money in creative ways, which has enhanced the likelihood of students of color entering the legal profession," Madrid said in the release.

She has actively recruited minorities to the UW School of Law, where currently 36 percent of the student body is of color. The UW is one of the top national law schools in commitment to diversity and trails only the University of New Mexico in the number of Native American students.

Madrid earned her master's and doctoral degrees at the UW's College of Education. She received the King County Bar Association's Outstanding Non-lawyer Award in 1995, the president of the WSBA and King County Bar Foundation gave her a special award for enhancing access to legal education for students of color in 1994. ◆

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**Licensing** — *Continued from previous page*

8. If something appears to be wrong with your license form or CLE reporting form, **DO NOT PANIC**. Despite all our proofreading and test runs, the computer tape made a serious error on Group 2's carryover credits. If an attorney had carryover credits involving percentages (e.g., 12.50), everything in front of the decimal point was deleted, making it appear that the attorney had only .50 carryover credits.

There is no truth to the rumor that the Licensing Department was stealing carryover credits and stashing them in their storage room! The only thing you're likely to see stashed in Licensing is chocolate. If you say you have 12.50 carryover credits instead of .50, our computer system should have the same data. While we sincerely hope that this never recurs, please write your correct carryover credits on the reporting form if you know them.

9. If you have a problem, we ask for your patience when you call. On December 18, a mere five days after the 1997 license forms were mailed out, **4,283** telephone calls were received at the Bar between 8 a.m. and 2 p.m. Between 10 a.m. and 11 a.m. on that day, a total of **954** calls were received. Not all of these calls went to the Licensing Department, but it certainly felt that way.

With one Licensing Supervisor, two trusty assistants and a temporary employee, answering all these calls was quite a challenge. Fortunately, they were assisted by staff members from other departments who pitched in and helped out with as much good humor as they could muster in the face of statements such as "I've called four times in the last hour and no one's called me back yet."

Finally, if all of this is just too stressful, help is just a phone call away. The Lawyers' Assistance Program can be reached at 206-727-8268. All calls are confidential and a little short-term therapy couldn't hurt. ◆

## Bikers do it for CLE Credits

The Third Annual Black Hills Motor Classic CLE Seminar is set for Aug. 2-9 at Horsethief Lodge and Campground, behind Mt. Rushmore in South Dakota.

The week-long CLE seminar is for motorcycling enthusiasts who prefer the feel of black leather to polyester pinstripes. It is held in conjunction with the national Black Hills Motor Classic in Sturgis, S.D., where a quarter of a million bikers converge for a week-long rally. The free CLE is sponsored by the Street Legal Motorcycle Club of Minneapolis, whose membership rolls include both lawyers and non-lawyers. Their logo is a bald eagle riding a motorcycle with the scales of justice hanging from the handlebars. CLE sessions are held in the morning and evenings, with riding during the day.

For more information on seminar topics and to register, call Kevin Snell, President and Road Captain of Street Legal Motorcycle Club, at (612) 347-0374. ◆

## Stepping Out with Tacoma Bar Foundation to Benefit Volunteer Legal Services

The Tacoma Pierce County Bar Foundation presents its Third Annual Night at the Theatre, to benefit the volunteer legal services program. This years' presentation is "Chaps," a "cowboy cabaret with an English accent."

A reception will begin at 6 p.m. followed by a 7 p.m. curtain call on Sunday, April 6, at the Tacoma Actors Guild at 915 Broadway. Tickets are $12.50. Call Elsie at the Volunteer Legal Services office at (206) 572-5134. All proceeds go toward the VLS Program. ◆

## Use *Resources* to Your Advantage

Would you like your name and/or firm listed under your area of practice in the Yellow Pages of the new WSBA *Resources* annual directory? List your firm under Appeals, Workers Compensation, Contract Attorneys, Environmental Law, or any heading you choose.

The *Resources* directory is used by thousands of your fellow attorneys, and the Yellow Pages is a one-stop shopping resource for all your legal service needs. Find consultants, paralegals, contract attorneys, business appraisers and more.

The cost for a 4-line listing is just $25. Listings may include the firm name, person's name, address, phone and fax number.

To reserve your Yellow Pages listing in the May 1997 directory, complete this form and return **by March 12** with your check for $25 payable to "WSBA" to: Washington State Bar Association, *Resources* Yellow Pages, 2101 4th Ave. — 4th Floor, Seattle, WA 98121-2330. For questions, call the *Resources* Editor at (206) 727-8214.

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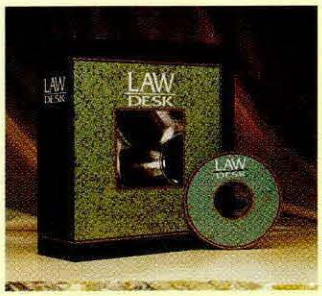


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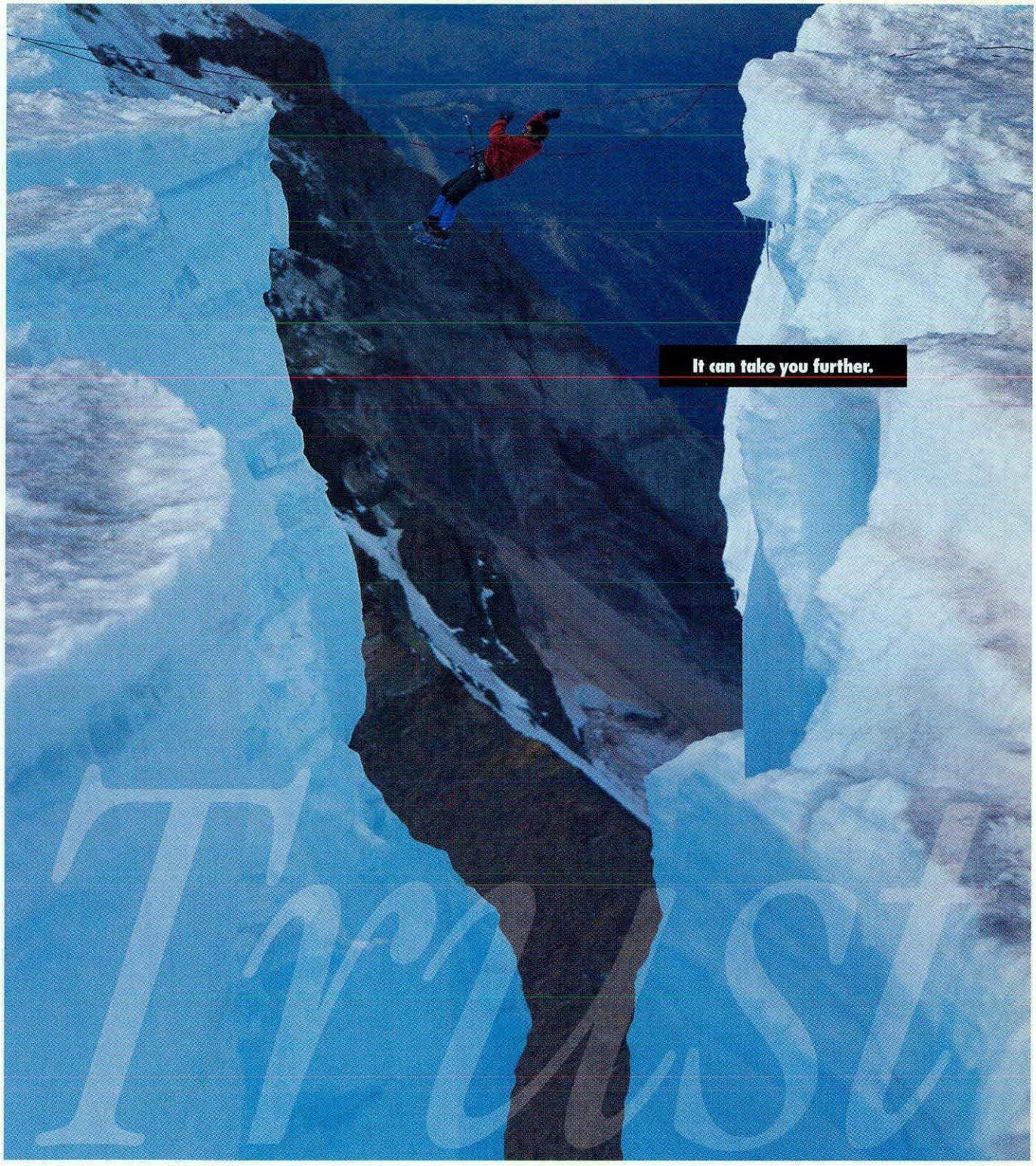


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