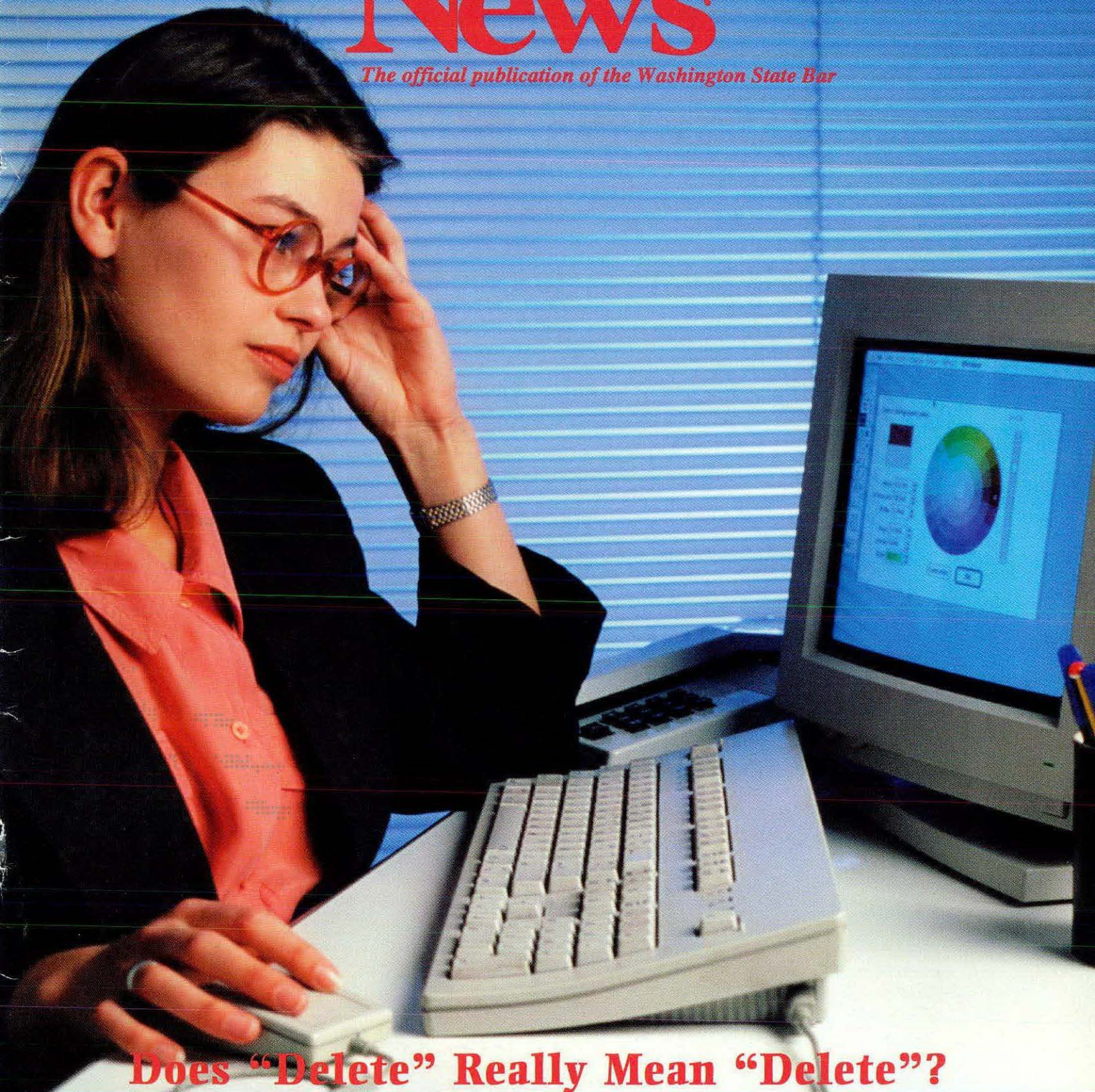


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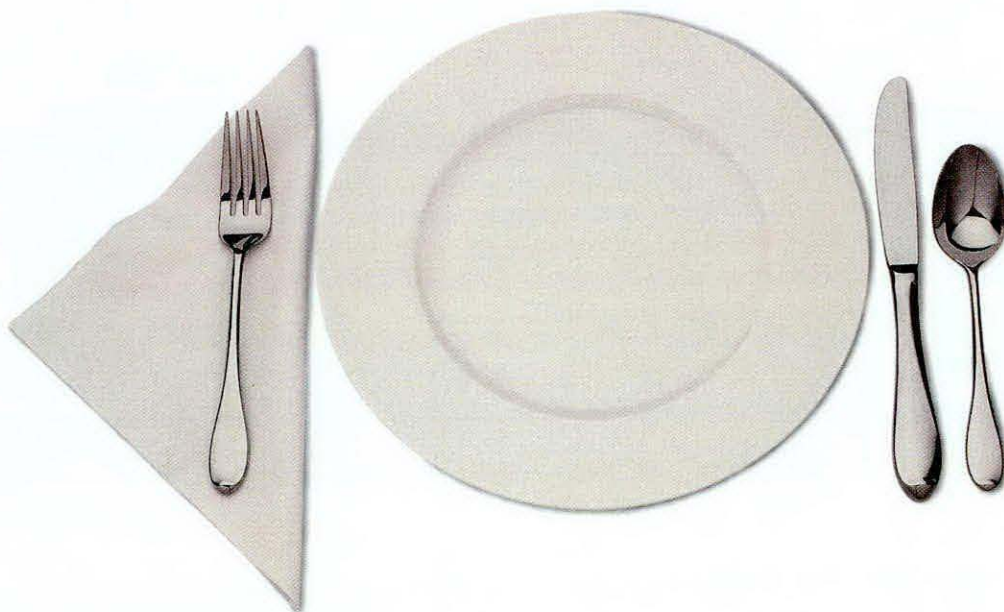
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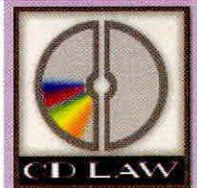
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Eric Oliver is a nationally recognized specialist in implicit and nonverbal communications. He is a trainer, author and consultant who helps lawyers and their firms advance their skills in presentation, persuasion and communication. A regular contributor to Wiley's *Trial Diplomacy Journal* as well as author of *The Human Factor at Work* and *The Complete Litigator*, Oliver is currently working with Seattle trial lawyer Paul Luvera on a book about the jury for Michie Law Books. The following is an excerpt from the UW CLE's recent interview with Mr. Oliver:

Q. What is the one glaring and obvious communication mistake that lawyers make?

A. It's one that most human beings find incredible that lawyers don't understand: lawyers have learned to substitute theory for practice. Lawyers have learned to accept highly stylized language as normal. They use words like "pursuantly" in everyday language. Once they have been through law school and practiced a few years, they assume that kind of communication is normal. They forget how awkward it all felt when they first encountered it. One of my favorite examples of this is the notion of conditional relevance. Often a judge turns to a jury and lets them know that certain testimony has been let in and they should listen to it. Then the judge tells them that later on this same testimony - which they were just told to listen to with their hearts and minds - may be disallowed. In that case, the jury is instructed they may have to forget all about it later. Now how can anyone reasonably do that?

Q. What's the first step for lawyers in learning to communicate better?

A. In order to communicate, you need to build a bridge to others. It's all a matter of human relations. It's not what they say, but how they say it. Everyone might ask, "What does this sound like from the receiver's point of view?" If the receiver perceives a conflict between what you say and how you say it, he or she will go with how you say it - utterly forgetting any words you say to the contrary. Lawyers, meanwhile, are trained to focus on words. It's as if words are scrolling by on their mental screen. For example, during

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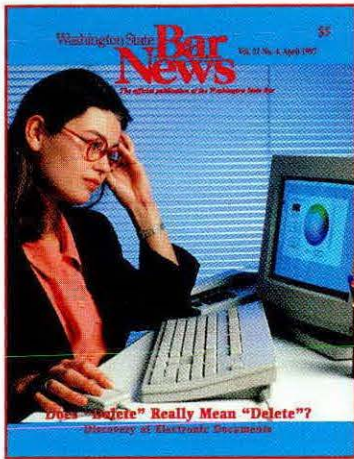
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Washington State Bar News

Vol. 51 No. 4, April 1997

The official publication of the Washington State Bar

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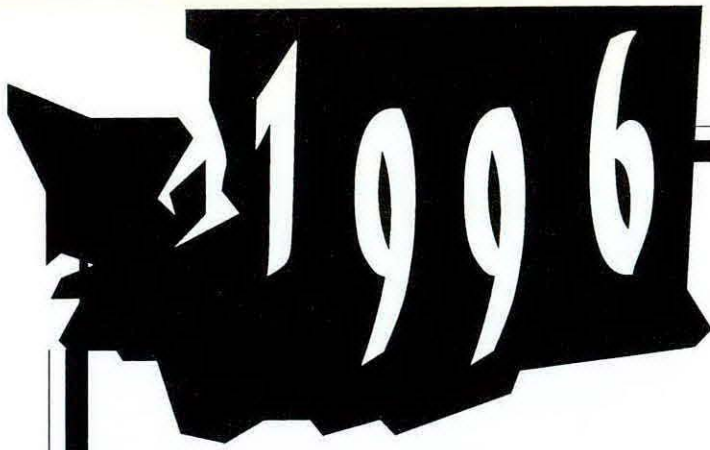
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Editor:

I laughed as I read Jeff Tolman's "Allegedly Humorous" memorandum in the February *Bar News*. Mr. Tolman proposed the government pay lawyers not to practice law in the interests of clearing up court congestion.

The morning after reading this seemingly far-fetched proposal, imagine my surprise to pick up my *New York Times* and find the government is already headed in this direction for another group of professionals: doctors. The front page of the February 21, 1997, edition states the federal government will begin paying New York hospitals NOT to train doctors. Evidently, there are too many doctors in New York ordering unnecessary tests and expensive procedures.

However, if there are fewer new doctors, it is easy to surmise that the remaining doctors will continue their wasteful ways and charge more for their time, saying because of the new policy, doctors are in short supply. Soon the government will have to expand this program to existing doctors, paying them not to order expensive tests and procedures. Once doctors have obtained such a program, lawyers will certainly demand equal treatment!

Take heart, Mr. Tolman. It could happen sooner than you think.

STELLA J. EDENS
Walla Walla

Responses to Hill Article

Editor:

I am a Bellevue attorney practicing family law and also serve on the board of an organization providing therapy and counseling for abused children.

I would like to congratulate John H. Hill on a very fine article on child sex abuse interviews in the January 1997 edition of the *Washington State Bar News*. Such an article was long overdue. However, his article does not go far enough discussing the magnitude of this problem of false allegations of child sex abuse, particularly in the area of custody and visitation litigation.

First and foremost, everyone involved in this field in any way must recognize that false allegations of child sexual abuse are themselves harmful to the child because the accused parent, nearly always

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the father, is taken out of the child's life. Even if this does not happen, the child custody litigation itself is always harmful to the child. From the standpoint of the accused, there is no such thing as a fair trial. Judges bend over backwards to protect a child whenever an allegation of sexual abuse is made, and rightly so. Even if the allegations have no merit, a man's name is never cleared. Sanctions for false allegations of sexual abuse in a custody proceeding are seldom, if ever, awarded because the courts do not want to discourage people from making these allegations.

False allegations of child sexual abuse are frequently used as weapons in custody and visitation litigation. Many mothers think that a child can be successfully raised without a father or have deluded themselves into thinking that the negative influence of the father of their child outweighs the positive. Mothers making these accusations may be acting maliciously or in good faith.

Clearly, many trained professionals in the child advocate protection field are using improper and overly suggestive

interviewing techniques. Even more improper and overly suggestive interviewing, however, takes place when the untrained mother or other family member interviews the child before any contact with the trained professional is ever made. The custodial parent can continue this interviewing over the often lengthy periods of time between visitations with the noncustodial parent. The mother in those situations may often already have a great deal of animosity towards the father over divorce issues, which hardly makes for an objective evaluation. Frequently, other untrained family members of the mother and daycare providers, who are friendly to the mother, get into the interviewing process. Professionals and daycare providers err on the side of reporting the possibility of sexual abuse because they face liability if they do not. Having concluded that something occurred, the mother then takes her sexual abuse findings and the child to Child Protective Services and a professional sexual assault evaluator for further interviews, frequently without any knowledge or participation at all on the part of the father. It



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goes without saying that CPS workers and sexual abuse evaluators are hardly concerned with protecting the rights of men accused of sexually abusing their children. In a recent case, I had a CPS

worker tell me that there was no question that my client was guilty of abusing his child, even though he had not even talked to my client! Later in that same case, we had a guardian ad litem appointed to

represent the best interests of the child. Incredibly, the guardian ad litem declined to interview the child because the child had already been interviewed at length by the police, CPS and the sexual abuse evaluator. Of course, there were no videotapes of these interviews.

Against this background, we have the federal and state governments spending millions and millions of tax dollars on programs to search and prosecute child sexual abuse. Unless you count the money spent on public defenders in criminal cases, none of this money goes to assisting men who are falsely accused. In the recent, high-profile McMartin preschool case, the defendants were lucky because they had highly motivated public defenders and they were facing wild, outrageous accusations from many different children that could not have possibly taken place. Unfortunately, a man facing child sexual abuse allegations in custody or visitation litigation does not get a lawyer at government expense and the charges are infinitely more subtle and more difficult to disprove and the accuser has a lesser burden of proof. The cost of custody/visitation litigation is enormous. Many, if not most, of these cases are resolved not on the merits, but because the father cannot afford to spend his life savings to protect his visitation rights. The father is forced out of the child's life and the child is the loser. Seldom, if ever, is there a definitive answer to the question of whether sexual abuse has occurred. Professional sexual abuse evaluators simply do not write reports guaranteeing that the father is innocent. Often times the child has no memory of the alleged incident after the initial round of interviews, which are often controlled completely by the custodial parent. The professional sex abuse interviewer is then allowed to testify about what the child said, even though there may be no record whatsoever of the interview and the child does not remember what happened, making cross-examination impossible.

For these reasons, videotaping of child abuse victim interviews should be mandatory, and I fail to see how anyone could possibly oppose such a law.

PAUL E. SIMMERLY
Bellevue

Editor:

There are several problems inherent in

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enacting legislation requiring victims of child abuse to be interviewed on videotape, just as there are many flaws in the thinking of those who favor such legislation.

Problems include: 1) children, like many victims of traumatic crime, have a hard enough time discussing the details of the offense with a stranger and the presence of recording devices, whether video or audio, only increases the likelihood of nondisclosure or a terse disclosure (imagine discussing with a stranger the details of your last voluntary sexual encounter, now imagine videotaping the discussion, now imagine that you were threatened or shamed into the sexual encounter by a superior — get the picture?); 2) requiring child victims to submit to audio taping, something one cannot legally compel even a convicted criminal to do, sends a message to child victims and their caretakers that, despite all the encouragement to reveal abuse, they are less creditable than adults and will be put through an investigatory “wringer” if they dare speak out; 3) enacting a law requiring law enforcement to gather certain types of evidence in certain types of cases in only certain ways for reasons having nothing to do with the Fourth Amendment is a peculiar way to protect the community; 4) the parents of child victims often have the notion that a videotaped interview can substitute for courtroom testimony which is, of course, simply not the case — try explaining to them that the law now requires their child to testify in court and on videotape and at any other interview or hearing that might be required; 5) many of the agencies that do use or have used videotaped interviews have gotten terrible results — inaudible audio and/or poor-quality video or nothing — without the backup of the tools that other jurisdictions rely on, such as notes carefully taken by an attentive and trained interviewer. Some of the flawed thinking behind the push for videotaped interviews include: 1) photos and videotapes are more “real” than other forms of evidence — this notion has some weight when comparing witness testimony with an actual videotape of the criminal activity, but it falls apart when the video simply shows the witness reiterating their testimony; 2) child interviews are done by untrained people who manipulate the children into making false

accusations — this is flatly untrue in Pierce County (where Jack Hill works) — where people are untrained, they should be trained and a great deal of training is available within Washington — anyone who has raised a child knows how difficult it can be to get a child to do anything and even the most fervent defense attorney has to admit it’s a stretch to say that a child can be coached (particularly by a stranger during the course of one interview) to implicate daddy as the perpetrator of ongoing and detailed abuse; 3) videotaped interviews will eliminate the need for subsequent interviews — experience with videotaped interviews shows that the opposite is usually true, with bad sound or picture actually creating the need for a subsequent usable interview — the “need” for subsequent interviews, interviews beyond that done by law enforcement, is otherwise illusory — a thorough interview done by a trained person who has some knowledge of the allegations is all anyone “needs” from the victim — defense interviews are not done out of a need to get the real truth, rather, they are done out of fear of malpractice or a desire to harass the victim or otherwise throw a wrench into the works — my experience in defense interviews has consistently been that the defense attorney doesn’t get the results he or she desires because the victim is credible, uncoached or consistent.

As a prosecutor, I want to nail bad guys and to protect the innocent. To do these things, I have no less desire or need for true and accurate interviews than a defense attorney. Legislation mandating videotaped interviews of child victims of abuse will further neither goal. In my experience as a prosecutor and in my training as a film/video-based anthropologist, mandatory videotaping of child victims will not make for better prosecution, will not reveal false accusations, and will not guarantee anyone any sort of “ultimate evidence.” Rather, it will simply provide another issue for litigation besides the truth.

It is worth noting that no one suggests videotaping burglary victims or robbery witnesses, witnesses that in my experience are usually not even interviewed by Jack’s lawyers.

SUE L. SHOLIN
Tacoma

Editor:

I am stunned by the timing of the fax poll on child abuse victim interviews. It is a lot like being asked to vote in an election after only one side has been permitted to present information to the voters. Nevertheless, here are my hurried comments:

The bar poll on videotaping child abuse interviews is ill-timed. It is inconceivable that the Bar would seek to poll its members after presenting only one side of the

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issue. The interviewing of child abuse victims is far too important to be measured by polls taken after the publication of such a partisan article.

As a deputy prosecuting attorney who for more than nine years supervised the sexual assault unit in the Pierce County Prosecuting Attorney's Office, I strongly oppose required videotaping of child abuse victim interviews.

In Pierce County (as in most counties), child abuse interviews are accomplished pursuant to an elaborate protocol which has been endorsed by police, social workers and health care professionals. These various agencies carefully have implemented a procedure to protect children, to elicit disclosure and to preserve necessary statements. Washington state is fortunate to have many nationally recognized medical and psychological professionals who work with child abuse victims. None of these professionals supports mandatory videotaping of child abuse victim interviews.

It frequently is very difficult for child abuse victims to feel sufficiently secure to disclose their victimization. To insist on videotaped 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.

Our own state supreme court has recognized the phenomenon of delayed disclosure (*State v. Petrich*, 101 Wn. 2d 566 (1984)), in which victims disclose in a piecemeal manner. To require videotaping of child abuse interviews would wrongly focus on what likely is but a small piece of disclosure.

Further, to the extent that proponents consider a victim's disclosure to police and prosecutors to be the first disclosure, they are mistaken. Authorities do not randomly grab children off the streets and question them about abuse. Children are scheduled for child abuse interviews because they already have disclosed their victimization to someone else. Child abuse interviewers are not paid a bounty based on the number of chargeable cases they interview. In Pierce County, fewer than 20% of child abuse interviews result in criminal charges. Isn't it telling that the only persons complaining about the interview process are the perpetrators (or their legal representatives) of the very

acts which give rise to the interviews? Shall we ask the fox how to design the hen house?

An equally troubling issue regarding mandatory videotaping of child abuse interviews concerns discovery. Who would have custody of the interview tape? What protections would prevent the defendant from possessing and duplicating the videotaped victim statement?

As regards Jack Hill's recent column, I suggest that he wholly lacks both credentials and practice experience to support such self-serving conclusions requiring such interviews. Mr. Hill's representation that the case of *State v. Sortland* was dismissed because of faulty interviewing by police and prosecutors is flatly wrong. In that case, a judge found the victims competent (after a competency hearing that lasted many weeks) and then changed his mind. Likewise, despite all the criticism of the Wenatchee cases by Mr. Hill's former employee Kathy Lyon, the fact remains that more than 15 individuals were convicted — many by guilty pleas.

Finally, there is nothing sinister about the practice of destruction of short-hand interview notes after the interview report

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is written — most police agencies do just that. Mr. Hill's agenda furthers the desire of defense attorneys to shift the focus of criminal trials from the wrongful acts of their clients to the actions of everyone else in the case. Such trial tactics are not new.

BARBARA COREY-BOULET
Tacoma

Editor:

I am the adult felony deputy prosecuting attorney for Klickitat County, the county seat of which is Goldendale, Washington, and have prosecuted many cases of child sexual abuse. As indicated on the attached form, I strongly oppose mandatory videotaping interviews of alleged victims of child abuse, whether it be sexual or physical abuse. To mandate such a procedure would ignore real-life considerations not even addressed in John Hill's article, "Beyond Advocacy: Professionalism in Child Sex Abuse Interviews" [January *Bar News*, page 17].

In the course of preparing this response, I spoke with Dr. Kirk Johnson, a state-certified sexual offender therapist, and Lucy Berliner, who was mentioned in

Hill's article. While neither can be considered an advocate for the pro or con side of this issue, both gave me greater insight on the complexities involved in this area, insights that were inexcusably absent in Hill's article, especially in light of its use as the source of opinion for your readers in the February fax poll.

Although Dr. Johnson's area of expertise is the evaluation and treatment of sexually deviant offenders, he has testified in one of my cases as an expert witness for the defense; specifically, as to the adequacy and possible suggestibility of officers' interviews in a multiple-victim sexual abuse case. I mention this to highlight the fact that he is no prosecution puppet. Dr. Johnson raised a valid point: who is to set or specify the standards of an objectively "appropriate" interview? Currently, there are no standards recognized by the relevant associations, such as the American Professional Society for Abused Children, and the APA, just guidelines and recommended procedures. In the absence of such standards, reliance upon a videotape to assess the credibility and reliability of a child victim by assessing whether one particu-

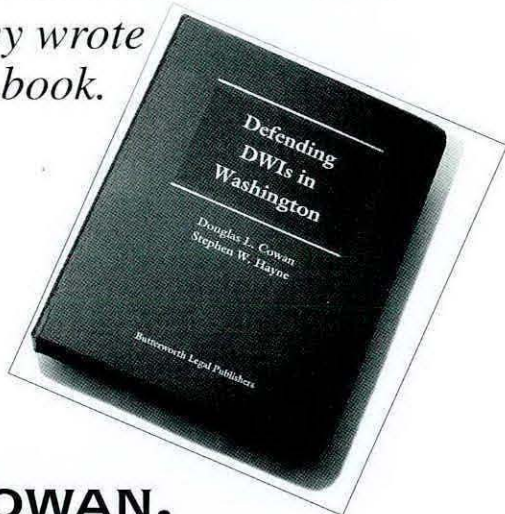
lar interview is adequate and appropriate could turn each trial into a "battle of the experts" with the focus on the interviewer, rather than the child. Thus, the offender, through the attorney, can attack the credibility of the child without the necessity of "going after" the child at trial. This is a clever way of attacking the child's credibility without running the risk of offending the jury.

Dr. Johnson also raised two concerns as regards mandatory videotaping: first, the practical matter of providing each county in this state with the necessary equipment, trained personnel, and an adequate physical facility for such a procedure. Second, the very pertinent and troubling question as to why we are singling out children in sexual abuse cases, when mandatory videotaping is not at issue for any other witness in any other type of case. Why indeed?

I have my own questions: if, as John Hill suggests, videotaping will eliminate the need for multiple interviews and thus reduce the possibility of distortion through suggestibility, does this mean that all defense counsel will be content with one interview that is videotaped, and forego

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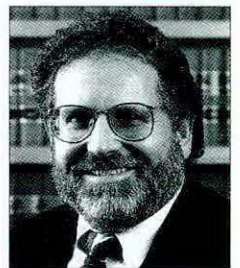
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their own interview of the victim? What is the procedure if there is more than a momentary breakdown of equipment during the taping? What if, prior to such a breakdown or failure, the taped segment showed a reluctant or recanting victim, but after taping resumed, the victim perks up or reaffirms the abuse? How does mandatory videotaping implicate chapter 9.73 RCW? What is the psychological impact on the child if the abuse included videotaping? How are we going to guarantee the pristine nature of a disclosure by videotaping the first formal interview, when "suggestive" comments or questions may have already been made by the person(s) to whom the initial disclosure was made? Indeed, Hill defines "interview" as "includ[ing] any conversations between adults and children about the target event." Note that his definition does not include conversations between child victims and their friends, although in cases where the victim is a girl in her teens, it has been my experience that a friend is often the first person to whom a disclosure is made.

I wonder how many readers of Hill's article took the trouble to contact Lucy Berliner, as I did, before responding to this poll? First, I learned that Ms. Berliner did *not* distribute a position paper opposing Hill's proposed pilot program or videotaping of child interviews, as is asserted by John Hill. Did the editorial staff make any effort to verify the asserted facts in this article before publication? What Ms. Berliner did do was to co-author a booklet entitled "Protocols and Training Standards: Investigating Allegations of Child Sexual Abuse" under the auspices of the Washington State Institute for Public Policy. This booklet was received by this office perhaps a week prior to my conversation with Ms. Berliner. I have now read it in its entirety, and it seems to address the relevant issues in a responsible, even-handed way. The subject matter contained in this booklet is too extensive to encapsulate here, but should be afforded a forum for an in-depth and extended discussion in your pages, since you have taken on this issue. Unfortunately, because the WSBA did not choose to present anything other than Hill's rather transparent advocacy, your readers, particularly those with no experience in this area, were deprived of needed information for a meaningful response to the fax

poll. All you have provided is a one-sentence summary of the reasons given by those opposed to videotaping, without any elucidation of the real-life considerations giving rise to those reasons.

I also learned from Ms. Berliner that she has submitted a letter to the WSBA in response to Hill's article; unfortunately, that letter was not available to your readership until the March 1997 issue. Again, those responding to the poll must do so before any knowledgeable clarification or rebuttal can be brought to their attention. What meaning can then be attributed to the results of your fax poll under these circumstances? This is an important question if, as has been suggested, the results will be conveyed to the state legislature to support a bill mandating videotaped interviews. Is this the type of irresponsible and thoughtless opinion-gathering that we, as lawyers, wish to associate ourselves with? Have you, as editor, given any thought to the credibility of the Washington State Bar Association under this scenario?

Lastly, Hill's article was permeated with suggestions and innuendo that prosecutors or assistant attorneys general cannot be trusted to conduct themselves in a professional or ethical manner in cases of this nature. By publishing this article with innuendos intact, the WSBA has, in my view, endorsed that view. Unfortunately, I cannot protest this with my feet or wallet; I have to be a WSBA member to practice law in this state, and my dues, as set by the WSBA, have to be paid in order to be a member in good standing. We on the prosecutorial side have long endured membership without peer representation, but that benign neglect is preferable to this: compulsory membership in an association that allows the competence and ethics of its own members to be maligned, simply because they practice in one specific area. Would you publish an article which seeks to cast a cloud upon the ethical standards of those who defend insurance companies, particularly if the author were an attorney whose primary practice was representing plaintiffs in personal injury lawsuits? Would you publish an article from a prosecutor which insinuated that all criminal-defense attorneys are willing to engage in unethical conduct to get their clients off? If you recoil in disgust at these suggestions, as you should, then you must ask yourself

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why your publication would allow a class of members of the WSBA to be treated so unfairly and discourteously. The author is not responsible for the dissemination of this viewpoint; you, as editor, are.

GWENDOLYN L. GRUNDEI
Goldendale

Responses to February Editorial

Discussing your editorial policy in the

February *Bar News*, you posed an interesting challenge to Washington Bar members: think about what you say before you say it. You promised you'd do the same and that you "will always defend" our right to our opinions, no matter how they might differ from your own . . . so long as they are stated responsibly. I am an advocate of responsibility in journalism as in law, but not as you appear to define it, not within the context of chilling the expres-

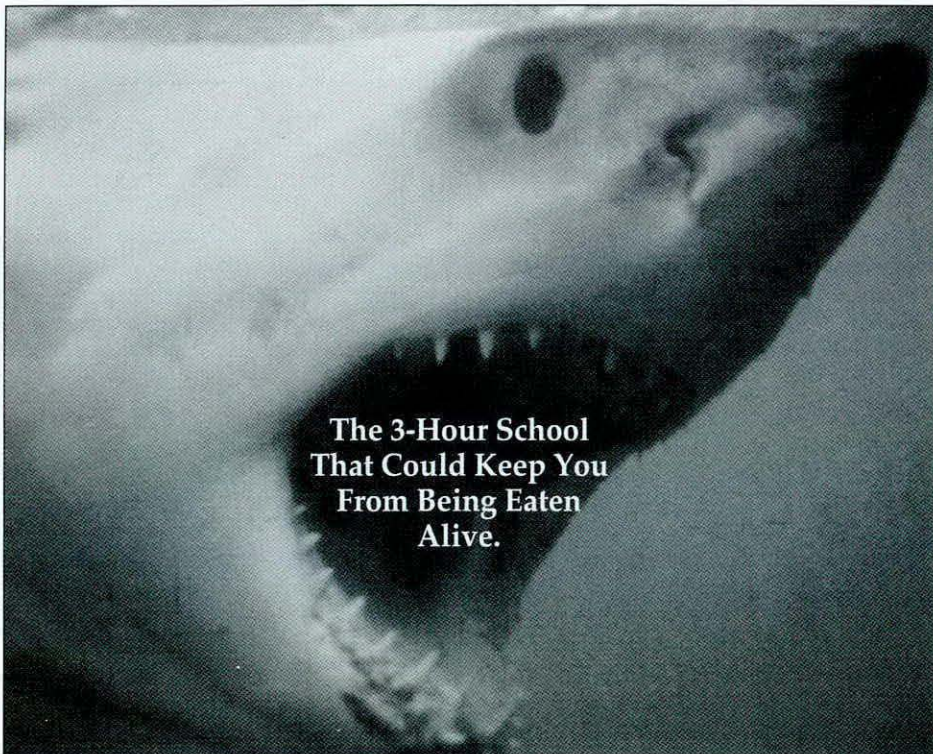
sion of information and ideas. When you say we should discuss our colleagues in a "respectful, thoughtful manner," without affront to their "integrity and character" whatever that might be, you are implying another promise altogether — that the *Bar News* will no longer tolerate opinions critical of actions within our venerated profession.

It is unfortunate for your readership if, indeed, you find the critical analysis of our legal system to be offensive. Regrettably, we must swallow the bitter truth: there are problems within our profession. Sometimes these problems are of such magnitude that we must draw them to the attention of our fellows in the interests of maintaining the integrity of our profession. Yet your article implies that you will dismiss serious evidence of failed legal accountability with the kind of glib phraseology of your editorial: "slanderous or simply derogatory remarks . . . about another attorney's personal respectability and moral strength."

This kind of delicacy engenders prior restraint on publication — perhaps the most insidious form of censorship. Failures of courage on the part of publishers is nothing new, but when they are practiced by a legal publication, they are dangerous. If debate isn't welcomed within the legal profession, where will it find a home?

I experienced the consequence of your policy after I submitted a piece to your publication regarding judicial and prosecutorial misconduct as they affected the Wenatchee sex ring prosecutions, at the request of former *Bar News* editor, Hal White. Actually, not only did my piece involve thought, but it called on my extensive research into the cases, research that included interviews of children, suspects, witnesses, government agents; review of government documents; observation of trials and hearings. Many of my findings were included in a 200-page investigative report which was provided to the U.S. Justice Department along with a letter from Governor Lowry and House Speaker Clyde Ballard requesting a federal investigation of the matters. My non-fiction book about the Wenatchee prosecutions is scheduled for publication in 1997 (Avon Books, New York.)

White read and approved the piece, told me he was "proud" to publish it, and slated it for publication in January 1997.



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Two weeks before its publication, the article was pulled without any attempt at editorial modification, the first time such a thing has happened in White's experience. White told me that you and editorial board members had prevailed upon him because you feared the controversy the piece might generate. White cited legal concerns, but acknowledged these were vacuous, since my research had been impeccable and was supported by official documents. The problem was political, he said: the piece was sure to anger Wenatchee officials and certain members of the Bar. No doubt mine was the kind of article that you refer to when you say that White unhesitatingly published articles previously "unheard of in the pages of the *Bar News*." But not this time. He was, as he put it to me, a "lame duck."

The actions of the *Bar News* reminded me of a chapter by noted First Amendment writer, Nat Hentoff, in his book, *Free Speech for Me — But Not for Thee* (Harper Collins, New York, 1993) about a misguided decision by New York University Law School that the father's side

in a custody battle with a gay mother was too "offensive" to be argued in a moot court competition. Although the moot court chairman said that the legal issues, which were based on a real case, were "an opportunity for a valid academic inquiry," the board at last removed the controversial child custody case from the competition, the first time such a thing had been done.

Wrote a NYU professor of the "offensive" issue: "[T]he only acceptable or enduring way to demonstrate that it is a wrong idea is by putting it to the test of debate, not by putting it out of the pale of debate . . . That," said the professor, "is what advocacy is all about."

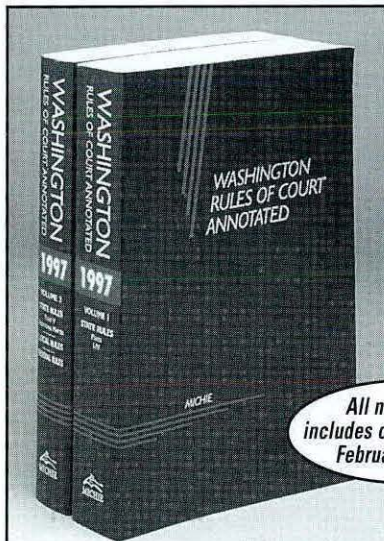
"The Bill of Rights was enacted just so that politically incorrect points of view could be expressed," wrote a California appeals court justice of the NYU decision. "If lawyers forget this, we will ultimately have a society where ideas are crimes."

If there was an upside to NYU's action, it was this: welcome to the real world. "The priority given to students' sensitivi-

ties at New York University Law School," wrote Hentoff, "is an effective training ground for those lawyers who may, in the future, have to obey rules by state bar associations that also stress the need to maintain the correct attitudes and language of members of the profession in good standing."

Maybe your readers have missed something: Hentoff, perhaps the nation's most renowned writer on constitutional issues, read my article and told me it was the first time, to his knowledge, that a lawyer had thoroughly analyzed the role of failed legal accountability in a notorious child abuse prosecution. Certainly, readers will miss something in future issues of the *Bar News* in the absence of an editor like Mr. White, who once had the courage to publish controversial articles by lawyers you might characterize as "non-thinkers." I urge you to publish this letter, knowing that you will think about it and, if your courage again fails, refuse the challenge.

KATHRYN LYON
Olympia



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Editor:

I appreciated your reference (Editor's Page, February 1997) to Voltaire's frequently cited but even more frequently disregarded statement "I disagree, sir, with what you say but will defend to the death your right to say it."

It was particularly interesting to find this in the same issue as Mr. Horn's letter concerning the proposed RPC 8.4(g) and (h). The basic tenet of these proposed rule changes is "I don't like what you say and will do my best to punish you for saying it."

The punishment of politically incorrect speech is not new. More than a hundred and sixty years ago, de Tocqueville wrote "In America the majority raises formidable barriers around the liberty of opinion; within these barriers an author may write what he pleases, but woe to him if he goes beyond them." But it is depressing to see attorneys — the putative defenders of the Constitution — so eager to suppress speech they find personally objectionable.

Certainly some speech is obnoxious. (Nobody seems to complain about innocuous speech. One generally doesn't need constitutional protection to preserve the right to say nice things about others; constitutions are needed only to protect the unpopular.) I would, for example, certainly resent your addressing or referring to me in court — or, indeed, else-

where — as "fatso." (I do not stipulate that I am fat, you understand; I will only acknowledge being Falstaffian, while in the parlance of disability I am fleshly challenged, and in the field of genetics we are beginning to realize that I suffered a misfortune in the genetic lottery. But there is no denying that our society discriminates against persons of physical amplitude. I would challenge anyone to name a condition — sex, race, national origin, sexual preference, or any other — which has as many terms of offense and approbation as physical substance does, or that is associated in the common mind with a negative connotation as often as the terms "fat" and "lazy" are associated in speech or thought. If you choose to call me so, I will be offended, will think less of you, and will hope the court will recoil in disapproval and therefore lean in my client's favor. But I will not ask that you be sanctioned, disciplined or disbarred for doing so. If you choose to be hurtful, if you choose to be obnoxious, I will be offended, but I will understand that my respect for Voltaire's principle requires me to defend even obnoxious speech directed at me. As you said, when you encounter derogatory remarks, you tend to think less of the speaker. That level of societal disapproval is appropriate, and sufficient. It does not need to be supplemented with official punishment; to do so changes the speech from obnoxious to

unlawful, which is a bridge it is extremely dangerous to cross.

Certainly it would be nice if everybody were nice to everybody. But if they won't be, I would rather trust to social disapproval than to laws, regulations and potential disbarment to help us try to go back and remember what we all learned in kindergarten. My enemies I can handle; God save me from my well-intentioned friends.

Of course, even the first amendment has limits. One cannot cry "fire" in a crowded theater or speak fighting words without the risk of civil liability. One cannot continue to speak in court after the court has told one to sit down and shut up without risk of contempt, or interrupt the deliberations of Congress by shouting in the galleries without the risk of ejection and arrest. But these are limits which are necessary to assure safe and functioning society. We take enormous risks when we start to broaden those limits to include speech which is (merely?) personally offensive or obnoxious. And we must be especially on guard against the insidious temptation of those who would argue that the functioning of government (or in this case the law) requires enforced and mandated politeness to some, though not to all (if the RPC & amendments pass as proposed you can continue to call me "fatso" or "lard butt" with impunity, but I cannot reply with a well-phrased "Oh yeah, chickie?") It is too easy to nibble away at the Constitution, as I might nibble at a chocolate chip cookie, deluding oneself that each nibble doesn't really do any damage, until we suddenly find that the cumulative nibbles have left us with nothing but a pile of crumbs. But then it is too late.

The most dangerous enemies of the First Amendment are not those who would challenge it head-on, but those who attack it widdershins by professing their belief in free speech while carving out one by one exceptions which fit their social or political agendas. Nat Hentoff wrote a superb book, *Free Speech for Me but Not for Thee*, in which he laid out prophetically the danger to society of first one ideology and then another being allowed to define the limits of allowed speech. I recommend it unequivocally to those who believe that they are protecting themselves when they seek to outlaw speech they disapprove of. Those of my genera-

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tion (generationally challenged? victims of ageism?) also will recall Dietrich Bonhoeffer's warning about letting the rights of others slip away without objection in the hope that "they" will never get to oneself.

I hope you, and the *Bar News*, will take seriously your commitment to defend others' rights to say what they will subject only to social and intellectual reproach, and that you will eschew the temptation to replace disapproval with censorship. Would that the bar were equally foresighted.

CHRISTOPHER HODGKIN
Friday Harbor

Rejection of "PC" RPC

Editor:

I have not followed the ongoing debate about the proposed "PC Rule" closely, as I, like 99% of the lawyers in this state, have more significant concerns, and, frankly, would like to see the Bar focus its energies on more important issues like the dysfunctional lawyer discipline system. Personally, I think we should all practice Queen Victoria's rule on homosexuality. "I don't mind really what people do, so long as they don't do it in the street and frighten the horses."

It strikes me, though, that Douglas Titus has inadvertently demonstrated why the proposed "PC Rule" is a bad idea in his letter in the February issue. He suggests that a prior writer has the right to express his opinion as long as he does it in a manner that is "rational, dignified and courteous," but should not be allowed by the new rule to express himself in a way that falls below that standard. I don't recall what the prior writer said, and I'm not digging into the parakeet's cage to find out. I would note, though, that Jonathan Swift could not have survived as a member of the Washington Bar under that standard, and neither could Thomas Paine. Actually, quite a few of the lawyers I deal with won't survive long if they are going to be disciplined for expressing themselves in a way that isn't "rational, dignified, and courteous." Once you accept the proposition that speech on some subjects has to meet a higher standard of courtesy than speech on others, the whole concept of free speech disappears; that's why Larry Flynt got away with accusing Jerry Falwell of incest with his mother in an outhouse.

Let's face it: while employment discrimination is a real problem, it isn't an offense against the profession analogous to, say, stealing from a client or tampering with a witness. The RPCs are meant to regulate our conduct as members of a learned profession, not as business people. The real reason this proposition is before the Bar as an amendment to the RPCs is that the groups pushing it aren't getting anywhere with the Legislature, which has the responsibility for writing the laws relating to discrimination, and the RPCs are a set of rules binding on us all that can be altered by small, vocal pressure groups if we lose sight of the underlying principles. To circumvent the Legislature by amending the RPCs is as improper as the Legislature's occasional efforts to bypass the Supreme Court and regulate the profession or operation of the Bar directly, and should meet the same fate. The proposed rule is dangerous to free speech and outside the purposes of the RPCs, and should be rejected.

MICHAEL NAGLE
Olympia

Editor:

I say to proponents of the amendment to RPC 8.4(g), "Get your dirty and politically correct hands off my law practice!"

JEFF JARED
Kirkland

Editor:

Since my letter analyzing the ramifications of adopting the proposed amendment to RPC 8.4 was published in the December issue of the *Bar News*, the Supreme Court has published the rule for comment. The amendment would elevate "sexual orientation," a class established by conduct, to the status of legally protected classes based upon traits, such as sex, race or age. The amendment would also prohibit acts and speech which manifest bias toward all protected classes. Comments will only be accepted until April 30, 1997, by the Clerk of the Supreme Court at PO Box 40929, Olympia, WA 98504-0929.

The letters published in reply to mine apparently misunderstood my analysis, for they did not respond to it. All that is necessary to address the perceived problem is to require attorneys to treat the participants in the legal system, including each other, with respect. It is not necessary for the WSBA to invade the business of law nor to engage in social engineering to achieve this goal.

The rationale for the amendment is that the current rule is "woefully inadequate to stop the behavior we wanted to stop because it prohibits only acts of discrimination that are 'prohibited by law.'" David M. Horn, 51 *WSBN* 2, p. 9. The examples given of discrimination to be avoided were an attorney referring in court to

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another attorney as "boy," a judge who observed that a defendant appeared to be homosexual and the hypothetical of an associate who was dismissed when his firm discovered that he was homosexual.

The proposed amendment creates attorney misconduct for "conduct" which "manifests" bias on the basis of "sexual orientation." The term "sexual orientation" is so vague as to unfairly expose even the most open minded attorney to an unreasonable risk of sanction. What precisely does the term mean? It is not listed in my dictionary. Literally taken, the term is defined by the individual who perceives that he or she has been wronged. The term has no precise meaning, but encompasses whatever orientation the self perceived victim may have for sex. Take prostitution for instance, some are apparently oriented toward prostitution, male and female, vendor and vendee. Would not the adoption of the proposed amendment create a professional violation for manifesting disapproval (bias) of prostitution?

A rule which measures bias based upon the orientation of the perceived victim is unworkable. There must be an objective standard against which to measure an alleged violation. The proponents of the amendment argue, disingenuously, that

the meaning of the communication is subject to the reasonable person test. So far so good. The issue, though, is not what meaning is communicated, but what communication is prohibited. The determination of what is prohibited is not subject to the reasonable person test nor is it defined in the amendment. Certainly it is acceptable to hold in disdain, to be prejudiced against, those who engage in sexual conduct which we all as a community hold to be inappropriate. Examples would be prostitution, bigamy and polygamy. The rule is apparently meant to protect homosexuals, so why not just say that. A rule which specifically protects homosexuals by name cannot later be expanded by clever plaintiffs to protect groups with a different orientation.

The WSBA should as a policy decision avoid regulation of the entrepreneurial aspect of the practice of law, which is already regulated by federal, state and local jurisdictions. Expanding the mandate of the WSBA will further distract it from its core purpose: regulating the practice of law (to be contrasted with the entrepreneurial aspect or business of law). Indeed, based upon the WSBA's dismal performance in the regulation of attorney discipline, its most important function, in 1993 the ABA recommended that the

WSBA be relieved of that responsibility. 927 P.2d Proposed Rules LXVII. The WSBA should focus upon and master its existing responsibilities before it seeks to expand its horizons to include social engineering.

The amendment proponents will argue that existing law, outside of Seattle, is inadequate to coerce their idea of appropriate behavior. 51 *WSBN* 2, p. 9. The Congress of the United States and the Washington State legislature have seen fit not to provide special treatment based upon sexual orientation, while Seattle has. This fact does not predicate a policy argument for expanding such protection for ethical reasons. In fact, since the local laws do not apply to businesses with less than seven employees, they may be viewed as economic in nature, not ethical. This is because there is no logical basis for exempting any business, no matter how small, from a law which is ethical in nature rather than economic.

Should the WSBA undertake to regulate the business of law it will find itself on a slippery slope. If it can regulate the bases for hiring and firing employees it can surely regulate their pay scale and so on. The days when the bar association set the rates attorneys charge for their services are behind us, and should stay there. The bar should focus upon the practice of law, not the business of law.

Freedom of speech has always seen a basic tenant of American jurisprudence. Our criminal laws govern conduct, not speech or thought. Our civil rights laws and RPC govern conduct not speech and certainly not thought. The drafters carefully chose the term "conduct." They could have used the term "act," but that would not address the grievances complained of, verbal disrespect. "Conduct" is more broad and more far reaching in its meaning than "act." One could argue that "conduct" should not include speech; but, read the rule. In the legal arena, an attorney conducts him or herself by articulating a legal position. This is only done effectively with words. Two of the examples provided by the proponents are oral statements made during a court proceeding. The amendments will, if adopted by the Supreme Court, ultimately be interpreted to include speech. The unfortunate disbarred attorney who makes such case law will be forced to pursue the freedom of speech matter in the federal courts, while unable to earn a living, having lost his or her license to practice law.

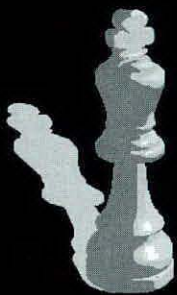
The stated purpose of the proposed

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amendment is to protect people from the degradation of bias in the legal system; in a word, disrespect. This could readily be codified into an amendment which would create a RPC violation for being disrespectful while engaged in the practice of, but not the business of law. My proposal, however, would not achieve the unstated goal of the rule's proponents, which is to coerce normalization of conduct which many consider to be inappropriate, or even immoral. I know the members of our profession have a higher standard than that, the question is, do we have the courage to act? For it was Yeats who said "The best lack all conviction, while the worst are full of passionate intensity."

JAMES RIGBY
Seattle

GBLA Services Enumerated

Editor:

The Government Lawyers Bar Association (GLBA) appreciates the recognition given to public-sector attorneys by President Tom Chambers in the January issue of the *WSBA Bar News*. Government lawyers serve and protect the citizens of the State of Washington in many capacities and we are encouraged that the WSBA acknowledges us as vital members of the Bar.

GLBA would especially like to thank

President Chambers' kind words about our organization. However, I would like to clarify the services we provide to publicly employed lawyers. First, we do provide high-quality, inexpensive CLEs relevant to government practice to our membership. We also contribute financial and personal support to the Thurston County Legal Clinic, which serves low-income clients. Additionally, GLBA administers a trust fund financed by the executive team of the Attorney General's office that helps defray the costs of pro bono work for assistant attorneys general.

We are one of many specialty bar associations which send a liaison to each Board of Governors' meeting to hear and be heard about issues before the Board. We do not, as stated in President Chambers' article, represent government lawyers' positions to the Legislature. We are not a lobbying organization.

I'm looking forward to hearing from other government attorneys who would be interested in knowing more about our fine organization.

MARY JO DIAZ
President, GLBA, Olympia

Both O.J. Simpson Juries Right

Editor:

In finding O.J. Simpson liable for willfully causing the deaths of Nicole Brown

Simpson and Ronald Goldman, the civil jury did what the highly criticized criminal jury could not. The contrasting unanimous verdicts highlight the irony of the American system of justice. Now that it is all over, except the appeal, we should join together to celebrate this maligned jury system of ours and do something to address the underlying problem.

The civil jury found that, more likely than not, O.J. Simpson killed his ex-wife and Mr. Goldman. They did it promptly, thoughtfully and with a unanimity not required by law. The defendant's suave testimony and the police racism and ineptitude did not stop them from concluding the obvious — O.J. Simpson had the motive, opportunity and ability to kill these two human beings, and no other scenario is more likely than that he did it; wearing size 12 Bruno Magli shoes, with a knife in front of his ex-wife's condominium just minutes before leaving for Chicago with one more piece of luggage than he returned with.

The criminal jury found that there was a reasonable doubt whether or not O.J. Simpson was guilty of murder. In a seemingly cavalier deliberation of only four hours, every juror agreed that reasonable doubt existed in the racially perjured testimony of the fence-jumping discovery of the bloody glove at the Simpson estate.

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Doubt that was compounded by the poor forensic work of the coroner and by detectives too untested or ill-trained to recognize that it is a blatant and stupid violation of forensic protocol to obtain samples of the defendant's blood at the crime scene during evidence collections.

In these two verdicts we have reaffirmed that we would rather set a guilty man free than convict an innocent one. We have also confirmed our faith in a civil jury to award sums of money in compensatory damages. While money damages imposed against the wealthy and the poor alike may seem absurd or incongruous, they are the only basis of equalization in a modern capitalistic society. With that, he willfully caused these deaths, O.J. Simpson will have no insurance policy money or bankruptcy court to protect him from the judgment. Whether he is wealthy or broke, his income and wages may be garnished down to the minimum wage for the next 20 years or more. If there is a better system for our society, it has not made itself known yet.

Pundits and television personalities will no doubt compare the lawyers, judges, evidence and jurors in the two cases. There is, perhaps, one lesson that we may want to take to heart from the fact that a majority of African-Americans think he is not guilty, while a majority of white Americans think he is. The core of this disagreement is in the historic experience of these two groups with the police and the judicial system. When police attitudes, conduct and honesty were called

into question, African-Americans who have experienced or been witness to police racism are likely receptive to believing that racism is a real and present danger. Most white Americans generally want to, and do, believe that racial prejudice is almost exclusively a provincial or by-gone phenomenon. It is easier to ignore prejudice in our society now that African-Americans have been given visible places in many of its institutions. It may be harder to accept that our own views and beliefs may still contain racist thinking. Yet, like sin, no person is without any prejudice. It is no defense to argue that minorities, based on their experience, may go on distrusting the institutions of society, even if we can get to a point where we have essentially eliminated discrimination for them.

The lesson here is that the Los Angeles Police Department knowingly allowed an expressed racist to remain on the force, and our society paid a small payment of the price of its indifference to that racism in the O.J. Simpson acquittal. The makeup of the jury, the lawyers, the judges and the particulars of the evidence may have expedited the verdict, but the result was correct.

This reminder of the worst of times in America is the legacy of indifference to racism in our communities, where white Americans want to believe that Mark Fuhrman and the police force that retained him are anachronistic, black Americans see a direct lineage to the days of water cannons, attack dogs and the lynch-

ing tree. We have a lack of consensus that leaves various perspectives bewildered by each other. Logically, the truth lies somewhere in between. The in-between is not comfortable. Hopefully, the discomfort will cause each of us to refuse to ignore the racism that still permeates our county and our lives. Hopefully, it will cause each of us to ask our police chief and our school superintendent and most importantly, ourselves, "What are you doing to stop prejudice today?" We cannot settle for platitudes or excuses. If this question had been pursued of Daryl Gates while he was the chief of the city of Los Angeles Police Department, we might not be lamenting how well our jury system has worked in the O.J. Simpson or, for that matter, the Rodney King cases. But, perhaps, that's another story for another time?

HOWARD S. STEIN
Bellevue

April Fools?

Editor:

Have you heard the news? The Washington State Bar Association has taken the bull by the horns and totally overhauled the legal profession. What they've done is truly amazing!

1. Two-year moratorium on Washington State Bar Examinations.

No bar exams will be given biannually in 1998 and 1999. The next test scheduled for February 2000 will begin a new practice of yearly exams administered in Washington. With no exams offered for two years, Washington will stem the tide of new attorneys in the job market and cause other far-reaching changes in this state's practice of law.

2. Commitment to clear up the backlog of complaints against lawyers by the year 2000.

Current bar staffing and funding will be reallocated from administering bar examinations to handling the thousands of complaints about unethical lawyers. The Bar has recognized public concern with the quality of attorneys and is making this unprecedented move to bring the staggering backlog up to date. With no exams for two years and the backlog addressed, complaints will be handled on a prompt, current basis beginning in the year 2000.

3. Promise to provide legal services for Washington state's working poor by matching with new, unemployed attorneys.

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the Bar, designed to serve the needs of our state's residents for legal help, will also address unemployment woes for many new attorneys in our state. Currently, the majority of practicing attorneys serve the minority of Washington residents. Working poor people earning \$10 an hour or less can't afford the typical \$150-\$300 hourly rates of many attorneys in matters such as divorce, child custody battles, support enforcement problems, domestic-violence cases, probates, bankruptcies and criminal law violations. The Bar will begin the match-up with a toll-free telephone number available throughout Washington.

Participating attorneys will be offered a complete waiver of required Continuing Legal Education units (CLEs), free training by retired attorneys recruited specially for this program, low-cost office space to be available at locations around the state and low-interest business loans, both obtained through the Bar's massive buying power. The Bar has also called on the federal government to forgive or defer student loans for attorneys working in this program.

In return, working-poor, low-income clients determined on a sliding scale will pay \$25-\$50 an hour for legal services. The three-year program starts with a contract to serve 100% of working-poor clients the first year, 75% the second and 25% the third. After completion of the first year, attorneys will then be able to take on their own clients at higher hourly rates, with an agreed-upon cap of \$75 an hour.

4. New requirement for law school graduates to complete one-year apprenticeship.

After 1997, no law school graduates will be qualified to take the Washington bar without completion of a one-year apprenticeship program as part of the law school curriculum. Other professions such as teaching and medicine have long required a practice period by student teachers and interns. The apprenticeship requirement will also address some of the unmet legal needs of the state as the bar is requesting legal-service groups to take on the new students in coordination with local law schools. Attorneys from these legal groups, as well as local firms who become involved in teaching, will have their CLEs waived as an additional incentive to participate.

5. Practicing attorneys will be offered incentives to hire and train new attorneys. Beginning in the year 2,000, new attor-

neys will have a year's experience as they go into the job market. Currently, established firms bypass newer attorneys, opting for those with a minimum of three years of experience obtained courtesy of other in-state or out-of-state law firms. The Bar will offer incentives to firms which choose to participate in the apprenticeship program and commit to hiring these new attorneys.

Firms will be offered relaxed CLE requirements, group discounting of Bar fees frozen at the current rate and the opportunity to participate in a new Bar program to certify lawyers in various specialties. Certified specialization has been a long-time dream of many senior members of the state's bar who have seen its success in other states. To date, Washington has declined to follow the trend.

6. Reciprocity with other bars will begin in the year 2005.

Out-of-state attorneys wishing to practice in Washington are required to take the state's bar exam. In 2005, Washington will change its policy on reciprocity, waiving the exam for other states which offer the same consideration for this state's attorneys. This new policy will address the concerns of out-of-state attorneys who will effectively be shut out of Washington completely until the Bar exam resumes in February 2000.

If you haven't heard about these incredible changes, it's because the date is April 1. A lawyer can dream, can't she?

JUDITH A. MATHISON
Seattle

Cumulative Index Missed

Editor:

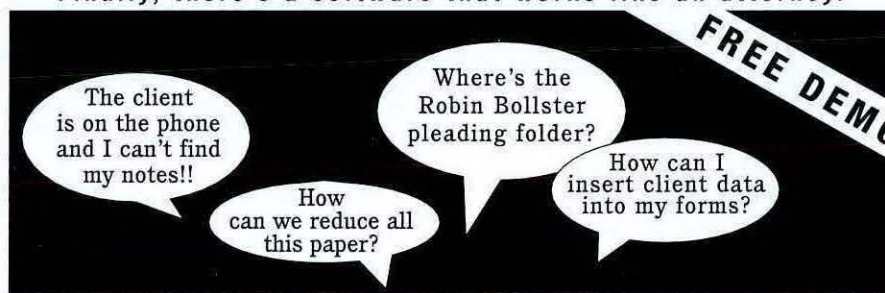
With the transfer of the Washington Reporter series to Lawyers Cooperative Publishing, many Washington practitioners may be unaware that the annual Cumulative Index to the Washington Reporter series is no longer being published. The Cumulative Index, last published for the year 1995, provides access to the Washington Reporter headnote system and is an extremely efficient way to research Washington case law. Without the Cumulative Index, the only remaining indexes are keyed to the West Publishing headnotes which, in my experience, do not reflect the holdings of the Washington courts as accurately as does the Cumulative Index.

Lawyers Cooperative Publishing is currently determining whether to recommence publication of an updated Cumulative Index. If members of the Bar are interested in seeing this publication continued, they should write to Mr. Bob Kehn, Director of Product Development, Western Market Center, Lawyers Cooperative Publishing, 50 California Street, 19th Floor, San Francisco, CA 94111-4524.

I urge all fellow Bar members to take action in order to avoid the loss of this unique resource.

DAVID J.W. HACKETT
Seattle

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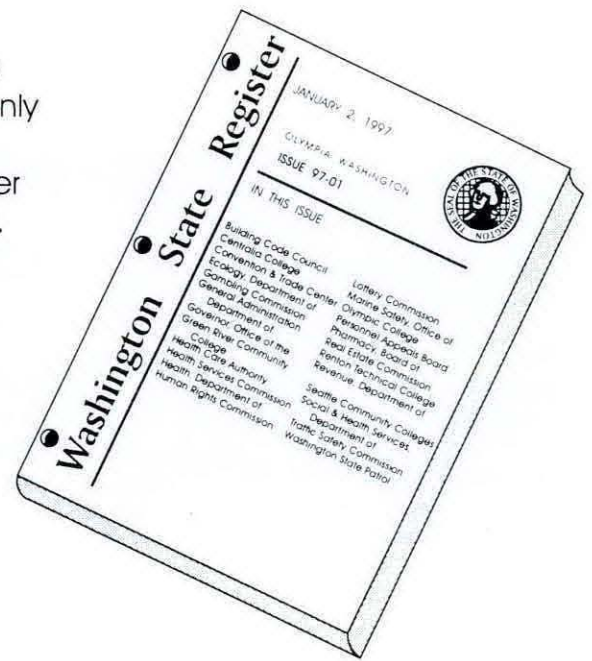
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Jump-starting Some Positive Karma

by Sherrie Bennett, Bar News Editor

The King County Bar Association's recent gifting of "Justice is More than Hot Air" balloons and coffee gift certificates to more than 400 attorneys who represented clients through KCBA pro bono programs last year started me thinking about some of the rewards of the pro bono (intentional and otherwise) work I've done over the years.

There are the tangible rewards, unforeseen at the time I was doing the work. I think of the personal injury case which brought me the down payment on my home: the client was referred by someone for whom I had done legal work thinking that the chances of being paid were slim.

In a similar category are the imaginative gifts clients with no money have bestowed upon me. Not possessing cash, they apparently looked around amongst what they *did* possess for items which might be of some value to me. I have been gifted with everything from firewood to carpentry work to live crab deposited in my office bathroom sink. My paralegal never quite got over the shock of her close encounter with squirming shellfish in the lavatory, but they made for a great feast!

There are also what I refer to as the "atta-girl" rewards, reflections of good deeds done for which you receive a kind word or card from the client expressing their thanks. I keep a folder of just such mementos for browsing through on days when opposing counsel or (God forbid) my client has compared me to the likes of Attila the Hun. It seems that over the years, a much larger proportion of these mementos have come from pro bono clients. So on the days when I've heard one lawyer joke too many, or been exposed to opposing counsel who I have reason to believe might actually *be* Attila the Hun reincarnate, my file of mementos from past happy (and often pro bono) clients helps me focus on one of the basic rewards of lawyering: helping other people with real problems.

Ultimately, there is the karma-building to consider: Every action generates a force of energy which returns to us in kind. We reap what we sow. What goes around comes around. With each choice we make,

we are determining what our future will hold. I like to hope that the pro bono work I have done might serve as karmic buffer to balance out some of my less-than-stellar actions.

If you've read this far, and you've thought about doing pro bono work but just didn't know where to begin, here's your opportunity to jump-start some positive karma. Listed below are names and numbers for just a few of the pro bono and volunteer programs other lawyers are participating in and finding rewarding. Pick up the phone, and start looking forward to some live crab in your bathroom sink!

Benton-Franklin Legal Aid Society
(509) 582-5378

Blue Mountain Volunteer Attorney Referral Program (Columbia, Walla Walla counties)
(509) 529-4980

Chelan/Douglas County Legal Aid
(509) 662-6156

Clallam County Pro Bono Lawyers
(360) 417-0818

Clark County Volunteer Lawyers Program
(360) 695-5313 or (360) 695-5975

Eastside Legal Assistance Program (East King County)
(206) 861-7033

North Columbia Community Action Council Inc. (Grant County)
(509) 765-9206 or (509) 754-4052

Grays Harbor Volunteer Legal Aid Service
(360) 533-3652

Volunteer Lawyer Program of Jefferson County
(360) 379-0278

King County Bar Association
(206) 624-9365

Kitsap County Volunteer Attorney Services
(360) 377-0053

Kittitas County Volunteer Attorney Legal Services
(509) 925-6434



Sherrie Bennett

Lewis County Bar Legal Aid
(360) 748-0430

Thurston/Mason County Volunteer Legal Clinic
(360) 705-8194

Northeast Washington Legal Aid (Ferry, Stevens Counties)
(509) 684-8421

Okanogan County Legal Services Program
(509) 422-4041

Skagit County Volunteer Lawyer Program
(360) 336-6627

Snohomish County Legal Services
(206) 258-9283

Spokane Bar Association Volunteer Lawyers Program
(509) 459-6836 or (509) 623-2665

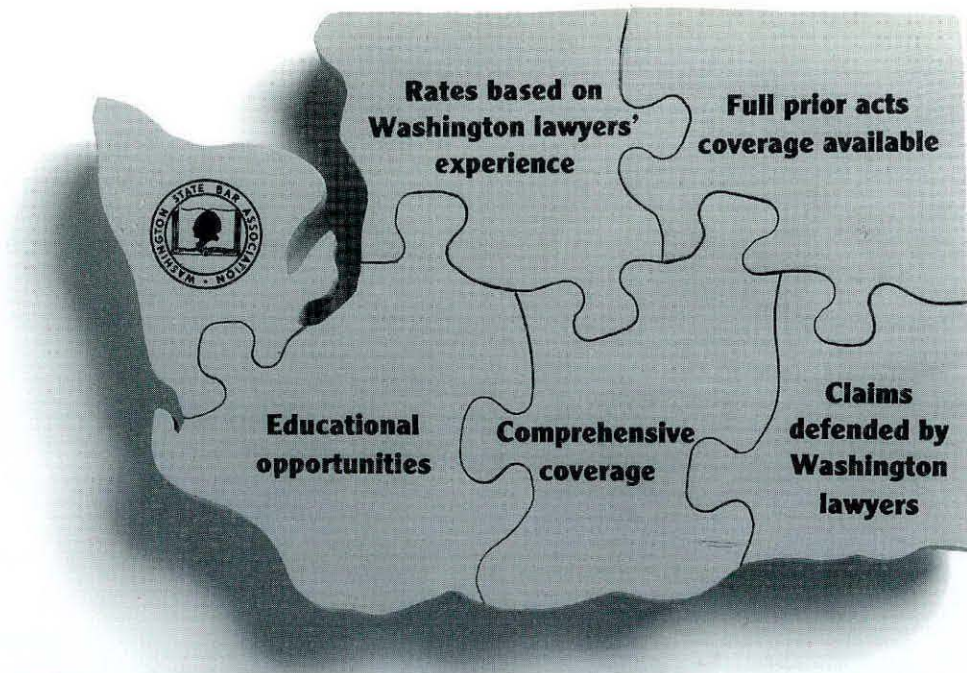
Tacoma-Pierce County Bar Association Volunteer Legal Services Program
(206) 572-5134

Law Advocates (Whatcom County)
(360) 671-6079

Whitman County Indigent Legal Services Program
(509) 334-9147

Yakima Bar Association/YWCA Volunteer Attorney Services
(509) 248-7820

For more information on specific volunteer programs in your county, call Joan Fairbanks with the Access to Justice Board of the Washington State Bar Association at (206) 727-8200.



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Driving the Snakes out of Washington



design by Alan Troy Hunter

by **Tom Chambers**
WSBA President

St. Patrick, so the legend goes, drove the snakes out of Ireland. Here in Washington we have our own snakes to worry about, including those who prey upon our citizens by practicing law without a license. We've all seen these con artists in action, hawking cheap divorces, wills and living trusts. Their victims — usually among the most vulnerable members of our society — are left with unintended results and, all too often, huge financial losses.

In Benton County, prosecutors have accused one man of 31 counts of illegally practicing law. His alleged victims are all Spanish-speaking.

I am more of a leprechaun than a saint, but I certainly would love to drive these snakes out of our state. And I know that plenty of you would like to do so, too. There is no quick fix to this problem. The Bar Association is hamstrung by antitrust regulations. Add to that the public per-

ception that lawyers are trying to stamp out competition, and the problem gets even stickier. Under a series of older cases, individual lawyers have standing to bring civil actions against those who engage in the unauthorized practice of law. Whether we combat these charlatans as individuals or collectively as an organization, the public will perceive that we lawyers are simply trying to protect our already feathered nests.

We are not letting that bind prevent us from seeking a solution. Addressing the unauthorized practice of law ranks high on the Board's list of priorities. Among the tireless advocates for the need to protect our citizens are Steve Tubbs of Vancouver, Steve Crossland of Cashmere and Doug Walsh of Seattle.

Here's our plan:

Victims: Last month I pointed out that a single lawyer and a single client could make a difference. We need to hear the real stories of these illegal practitioners' victims.

The Law: Statutes and case law are not the problem. Already, both support action against an unauthorized practitioner, who would be held to the same standards used for legal malpractice. The real problem is that so often the victims cannot afford an attorney, or the damages do not justify a contingency fee. Legislation proposed by our Consumer Protection Committee and supported by our Attorney General would make the unauthorized practice of law a per se violation of the Consumer Protection Act. That change would put some much-needed teeth into the law.

Training: We need a seminar complete with forms and case law to train lawyers who are representing victims.

If you know of any victims, please contact any of the lawyers mentioned in this column. We will work hard to find representation for these people.

It won't take a miracle to begin to drive these snakes out of Washington, just hard work, dedication and the will to improve legal representation for all our citizens.



The Annual Financial Report

Each year I write a column trying to summarize how the WSBA is doing financially. If a picture is worth a thousand words, you will find three thousand words below. In summary, we're doing fine—right on budget.

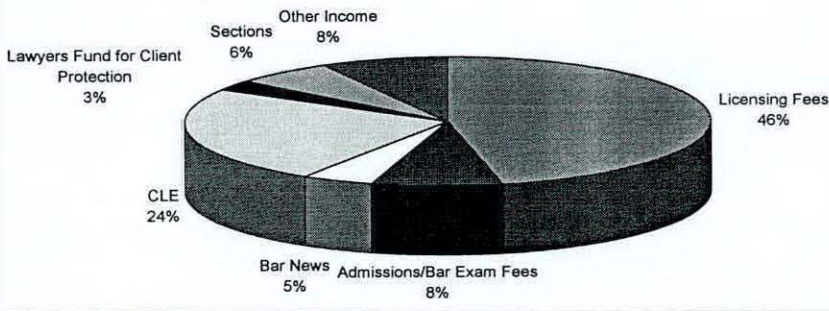
For the fiscal year that ended on September 30, 1996, we started eating into our General Fund reserve a little—which was just what we budgeted. (See bar chart below.) Hence the need for an

annual membership fee increase in 1997! For those of you who like numbers, there are comparative income/expense reports on the next page. Again this year we got a clean report from our outside auditor and no management letter, i.e., the auditors didn't have any suggestions for significant changes in our financial practices. If you want a copy of the audited financial report, please call my office at (206) 727-8244 and I'll send you one.

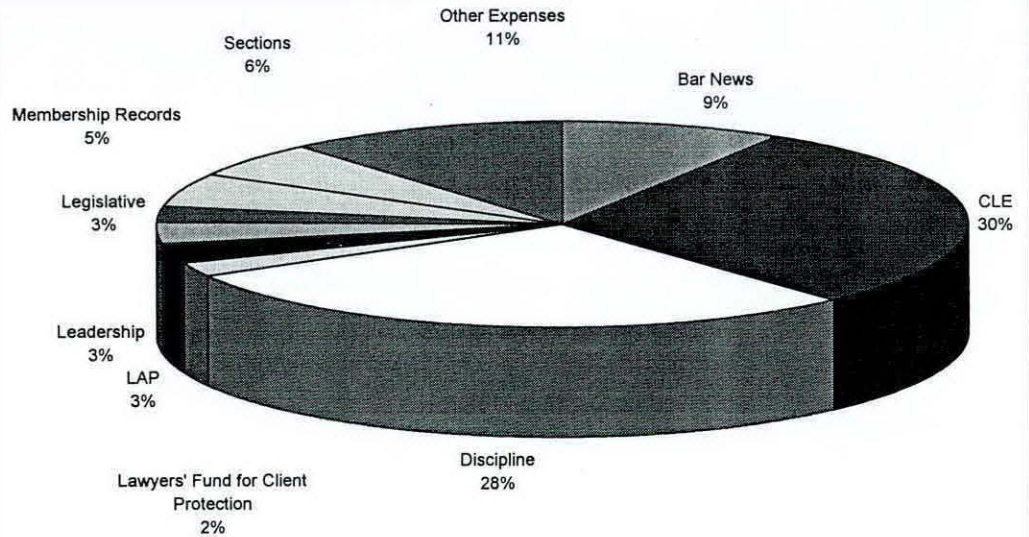


Dennis P. Harwick

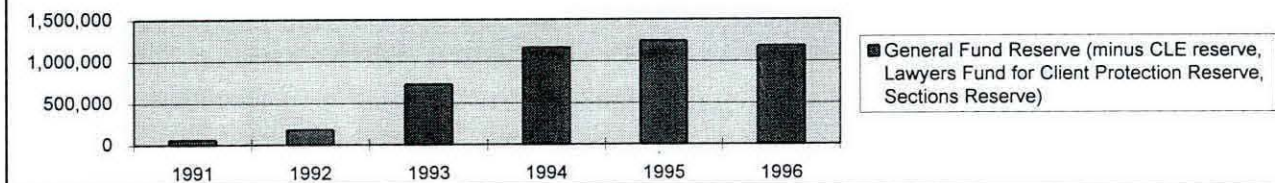
Where WSBA Money Comes From



Where WSBA Money Goes



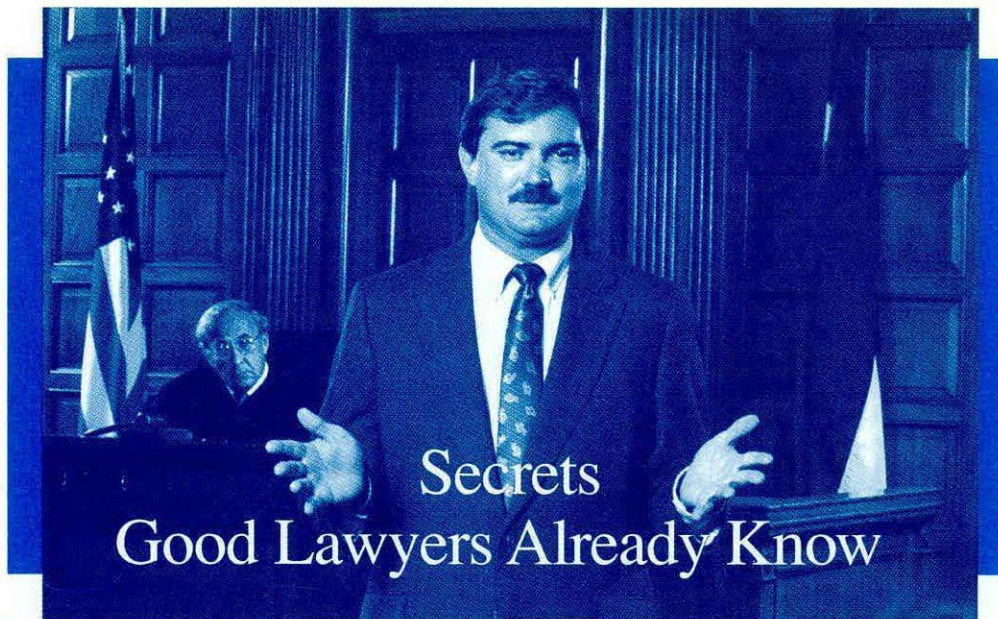
WSBA General Fund Reserve



WSBA Revenues/Expenses/Fund Balances

	1996	1995	1994	1993	1992	1991	1990
Revenues							
Licensing Fees	3,840,232	3,730,881	3,610,103	3,459,595	3,311,696	3,161,134	2,999,637
Access to Justice	0	7,348	9,800				
Administration (interest earned)	186,599	171,515	103,306	68,656	65,218	106,357	137,796
Admissions/Bar Exam Fees	680,382	667,617	707,444	731,041	640,519	579,973	621,989
Audits (random and for cause)	0	682	2,128				
Bar News	372,199	361,890	337,951	309,418	255,525	267,737	246,590
CLE - Publications	381,491	426,797	352,353				
CLE - Seminars (combined pre-FY94)	1,617,907	1,573,993	1,534,681	1,753,037	1,244,676	1,367,231	1,491,765
Communications	20,101	25,947	39,869	28,026	33,347	30,361	
Convention	0	0	0	1,094	159,678	107,617	172,822
LAW-BBS (electronic bulletin board)	19,222	33,832	28,566				
Lawyers Referral Service	0	0	0	0	31,086	38,415	49,415
Lawyers Fund for Client Protection	210,499	259					
Law-Related Education/MENTOR	0	0	6,412	28,843	31,663	31,434	
Mandatory CLE Fees	124,462	103,382	110,089	110,967	120,851	111,575	
Membership Records	53,500	52,821	63,014	56,497	55,266	30,455	
Resources Directory	133,356	121,134	88,599	6,752	28,901	45,156	42,487
Sections	495,669	507,573	412,458	349,350	280,165	264,908	245,896
Young Lawyers Division	47,392	45,760	48,242	42,338	31,105	24,453	18,587
Other Income	68,567	59,683	132,477	123,900	116,606	62,221	152,811
Total Revenues	8,251,578	7,891,114	7,587,492	7,069,514	6,406,302	6,229,027	6,179,795
Expenses							
Access to Justice	126,862	130,464	92,674	15,359	14,993	29,812	
Administration	780,656	776,387	695,828				
Admissions/Bar Exam	568,441	571,689	585,366	362,104	357,887	418,053	286,621
Audits	120,505	93,263	114,864				
Bar News	606,098	554,184	482,050	281,200	291,890	292,872	257,575
CLE - Publications	400,698	434,463	284,398				
CLE - Seminars (combined pre-FY94)	1,581,104	1,479,313	1,437,100	1,206,832	917,750	963,722	924,801
Communications	99,793	150,367	154,952	36,742	63,584	73,369	191,038
Convention	0	0	0	20,771	132,771	159,484	192,590
Court Rules	18,149	16,015	15,786				
Discipline	1,896,601	1,529,945	1,005,660	45,972	52,925	100,218	58,021
Fee Arbitration	20,122	23,463	19,997				
LAW-BBS (electronic bulletin board)	18,383	31,364	22,884				
Law-Related Education/MENTOR	0	0	6,605	18,293	44,210	72,615	
Lawyers' Fund for Client Protection	145,252	44,511	109,826	100,000	8,751	34,609	35,920
Lawyers' Assistance Program	221,772	220,564	229,355	13,728	21,436	24,508	21,902
Lawyer Referral Service	0	0	0	0	23,597	21,502	19,991
Leadership	221,580	241,465	266,513	129,867	107,626	153,299	146,367
Legislative Activities	170,650	167,933	164,996	40,114	33,252	37,066	32,619
Local Bar Support	18,539	13,554	34,871	588	12,476	12,103	
Mandatory CLE	127,438	169,518	106,056				
Membership Records	348,597	331,473	261,994	40,631	32,470	35,586	
Resources Directory	72,178	48,876	43,428	43	64,993	66,556	60,384
Sections	370,968	438,978	339,886	245,096	227,309	250,817	237,765
Young Lawyers Division	138,132	138,409	121,966	98,233	92,025	84,507	83,045
Other Expenses	12,816	41,285	30,319	104,553	126,478	150,778	209,991
Salaries	*	*	*	2,134,869	2,149,647	2,129,965	1,829,217
Employee Benefits	*	*	*	611,111	596,136	538,577	460,164
Rent, Taxes, & Utilities	*	*	*	387,845	394,625	394,390	355,374
Postage and Supplies	*	*	*	198,098	176,980	132,067	207,065
Equipment Rent & Maintenance	*	*	*	190,977	158,942	190,677	127,050
Depreciations & Amortization	*	*	*	156,252	102,537	85,950	67,100
Interest	*	*	*	36,539	29,283	19,845	27,161
Insurance	*	*	*	29,030	29,046	28,530	30,371
Professional Fees	*	*	*	15,847	18,375	21,088	49,386
Loss of Asset Dispositions	*	*	*	7,306	2,279	17,664	0
Write-down of Fixed Assets	*	*	*			48,175	
Provision for deferred compensation			203,000				
Total Expenses	8,085,354	7,605,604	6,830,374	6,528,000	6,284,273	6,588,404	5,911,498
Revenues Over (Under) Expenses							
Fund Balance - beginning of year	166,224	285,510	757,118	541,514	122,029	-359,377	268,297
Fund Balance - end of year	1,767,439	1,481,929	724,811	183,297	61,268	420,645	152,348
	1,933,663	1,767,439	1,481,929	724,811	183,297	61,268	420,645
General Fund Reserve (minus CLE, LCFP, Sections)	1,181,466	1,241,801	1,163,594				

* Allocated to various programs based on staff time sheets



by Stephen W. Comiskey

The art of lawyering is not a science. It's not limited to licensed attorneys, nor is it subject to universal agreement. I began lawyering as a boot Marine Corps Second Lieutenant just graduated from The Basic School and the U.S. Naval Academy. It wasn't until a few years later that I actually graduated from The American University Washington College of Law, passed the bar and was licensed to practice law in Virginia and Maryland and waived into the bar of the District of Columbia.

Many of my Annapolis Navy and Marine contemporaries eventually left the Service and became airline pilots. Whether in or out of the Service, over the years they have trained for thousands of hours so that they will react appropriately and calmly in the few seconds of crisis that may occur in their aviation careers. At the other extreme, lawyers have no training in crisis management, yet that's part of our legal practice almost every day.

Who are we lawyers? Our families, friends, neighbors and, most amazingly, total strangers, turn to us with their most personal and consequential matters and we all (both they and us) are confident we can assist them. And we do assist them. We manage crises. We work the problems. We do the deals. We try the cases. We serve our clients.

One navigation instructor's first words to my class years ago were: "You can pass this course by scoring 80 percent, but how many of you only want to make it home four out of five times?" In client representation, as in navigation, perfection is the *only*

acceptable goal. The good lawyers' secrets are guideposts that provide some of the lawyering navigational aids to help us *always* find the harbor lights of home.

Shakespeare wrote: "All the world's a stage, And all the men and women merely players." When we're away from our homes, who lives in our lawyers' world with us? Who are these players we share our stage with? Secretaries and staff, clients, opposing counsel, opposing counsel's clients, judges, clerks, court reporters, media reporters and journalists, the list is seemingly endless. Many of these players are not interested in assisting us and some are downright opposed to us accomplishing our goals for our clients. Yet, we need to accomplish our mission and make it home safely. Our opponents are trying to do the same. In the transactional arenas we perform in it is easier for both of us to be successful. In the adversarial forums it's considerably harder.

What are each of these player's expectations of us and how can we meet them as well as meeting our own expectations and aspirations? How can we treat each of them as we want to be treated? How can we balance their competing demands on us and remain true to ourselves and to our clients? In the heat of the lawyering battles we need unwavering principles to guide us steadfastly. In the throes of the storms we need lighthouses and buoys to ensure we steer clear of dangers and distractions as we complete our mission and return home. These good lawyers' secrets are the guideposts that serve those purposes. They serve us all. They serve us well.

1. Lawyers are the custodians of the ideals of our society.

2. Honor, courage and commitment are the heart and the soul and the body of a lawyer.

3. Lawyering is an art, not a science. It takes study, observation and experience to master the art of lawyering.

4. Lawyering is difficult. It requires

continuous thinking. One of the things we all find hardest to do.

5. Lawyering requires working hard, but it's not hard work. Thinking is hard, but it's not hard work either. I can't define hard work for you, but I know it when I see it. Long hours alone don't define hard work. People who do hard work for a living understand this. You should, too.

6. Trust your instincts, especially when interviewing prospective clients.

7. Try not to waste too much time thinking about why the other side did or didn't do something.

8. Be thankful for those who declare their opposition to you, they are much easier to deal with than those who masquerade as an ally.

9. In the practice of law, You have no friends, only opponents and potential

opponents. Forewarned is forearmed.

10. Listen to those who disagree with you. It takes courage to confront you, so they may really have a point worth listening to.

11. Few counsel have successfully used the media. More often the media uses counsel.

12. Find out as soon as possible whether the person you are dealing with has the authority to do, or to agree to, what you're proposing. Don't let others take your message or your offer to their decision maker. Demand to present it yourself.

13. Trial lawyers have a hard time delegating.

14. Be known as the lawyer who makes deals, not breaks them.

15. Create and propose legitimate, sound alternatives to get your client to the desired end result. Think of ways to accomplish things, not reasons why they won't work or can't be done. Be a closer.

16. Be known for your good business, as well as good legal judgment. They often are irretrievably intertwined.

17. If you listen to what your opponent says, read what your opponent writes, and think about what you've heard and read, then most of the time you'll know what to anticipate and you can plan accordingly.

18. Always ask yourself: Is this something I can, and should, do for my client, or would my client be better served if someone else did it? Ask yourself this question not only with respect to others on your staff, whose legal fees would be less expensive than yours, but also as to lawyers outside of your law firm, who may specialize in that legal area.

19. If your goal as the lawyer is to persuade someone to do something that you want them to do, then don't be overly concerned with why they do it, if they do what you want them to do.

20. Know the preeminent practicing lawyer specialists in the various legal specialty areas in your local bar well

enough so that you can call them, not only to refer cases to them, or to bring them in as specialists in matters you are handling, but also to see if they agree that you can handle it, when you are considering taking on a new case in their specialty area of practice. If they know you, then they will usually give you their candid opinions. If you do decide to take on the case, they will oftentimes offer to be available for you to call when unusual things happen along the way.

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21. Don't ask judges for advice, in or out of the courtroom.

22. You are the messenger, not the message.

23. It is important that everyone that you deal with have universal faith in the accuracy of what you say and give to them.

24. Thank fellow lawyers who refer cases to you by taking them to breakfast or lunch. Do not volunteer that you will keep them posted on how the case is going. You have enough things to worry about. Don't unnecessarily create any more.

25. The lawyer has to be the detail person. Check and recheck everything.

26. Don't create your own troubles.

Leave that to your opponents.

27. Be proud of what you do and what you have done for each of your clients. It is your life's work and your personal and professional legacy, not only to your family, but to those who follow you, to strive to master the art of lawyering.

28. Know who your client is.

29. Remember who your client is.

30. Only represent your client.

31. Don't surprise your client.

32. After each prospective client has told you their story, but before you tell them what you think, ask them what they want and why. Their responses may surprise you. After you've found out what they really want, then tell them honestly

and realistically whether or not you can help them get it.

33. When a new client leaves your office they should stop worrying about their problem. You should tell them that they need to move on with their lives, to take care of their family and their business, or work, and it is now your job to worry about this case. This may be the most therapeutic thing you can do for your clients and the one thing each will appreciate the most, forever.

34. Question your client only at a time and in a place where the answers will remain attorney-client privileged information.

35. If you batted .333 for a baseball career you'd be enshrined in the Baseball Hall of Fame. Clients know home runs, extra base hits, even singles are hard to get. But if they believe that they had their day in Court, and that you gave them three honorable and legitimate swings, with all your best efforts, they'll be satisfied that you served them well, and you will have, regardless of the ultimate outcome.

36. Don't expect thank yous or kudos from your clients. But savor them when they come.

37. If you give your clients your home phone number, then expect they'll call you at home.

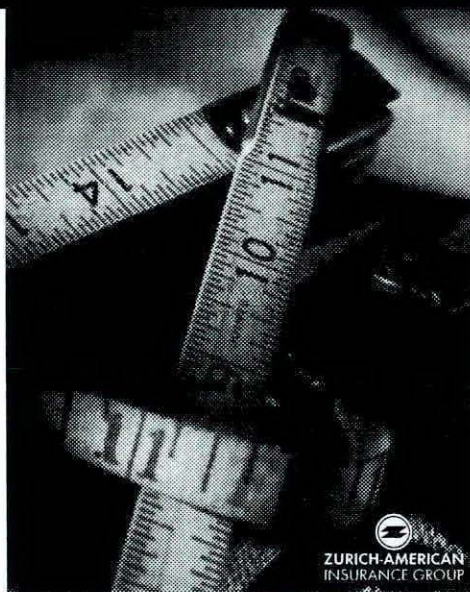
38. No one but you should be providing any information at any time to anybody. Train your staff from the outset that their job is to take in information and write down questions to pass on to you, but that only you provide any information or answer any questions. There are no gray areas here. This is true, regardless of whether the caller is a client or opposing counsel. Even a frustrated client, once you have explained it to them, should appreciate your diligence and absolute adherence to the attorney-client privilege.

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39. Don't represent both the husband and the wife in a divorce proceeding, no matter how much they argue for it, nor how simple and straightforward the process may seem. Choose one or the other, and ensure that all documents reflect that spouse as your only client, especially if the other spouse chooses not to retain counsel.

40. Be very wary of the prospective client who is currently represented by counsel, but shopping around for replacement counsel, unbeknownst to their present counsel.

41. Always be alert for potential conflicts of interest. Make a preliminary conflict check as soon as you know the name of the prospective client and the general subject matter of the representation. Resolve all potential conflicts issues before undertaking any representation.

42. It's the recognition of the potential conflict of interest that's the hard part. Once identified as a potential conflict of interest, it's usually a straightforward exercise to determine whether or not there is a conflict.

43. Be familiar with the names and telephone numbers of the people who run the federal, state and local government services, agencies and programs, as well as the private and not-for-profit organizations, so that you can recommend them to prospective clients who may have no legal remedy but who have definite needs for assistance. Make the initial call for them.

44. Lawyering does not require or condone any distraction from your own high moral and ethical standards. Be true to yourself and to those standards. Always.

45. As a trial lawyer at trial you are a hired gun. If you try to be something more than that, you will be something less.

***"Be known
as the lawyer
who makes deals,
not breaks them."***

46. The trial lawyer at trial is a one-armed paperhanger, a multi-instrumented street musician and singer, and a one-person movie industry: producer, director, writer, set designer, stagehand, and star performer. Break a leg.

47. The Court Clerk, Court Reporter and Courtroom Marshal are your best indicators of how you are doing at trial. Ask them. Listen to what they say.

48. Don't tell the jury what you say is not evidence for them to consider. Persuade them by everything you do and say

that what *you* say is the most important thing they will hear.

49. Treat the judge as the first among equals.

50. Never assume the judge knows anything.

51. If you can't do it sincerely, don't do it. Little children and juries, recognize, appreciate and reward sincerity. Juries punish insincerity.

52. Watch other trial lawyers perform. Study their successes and failures. Take as your own whatever you can wear comfortably and naturally. But remember everything takes practice and few things feel comfortable or natural the first time you try them on.

53. A trial lawyer is not a good follower.

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* * *

54. The assistance provided to trial lawyers by those in court clerks' offices is immeasurable and generously given. But it is not legal advice and provides you no safe harbor should it prove to be erroneous.

* * *

55. Choose and use your local counsel wisely. They should be invaluable. Make sure they are.

* * *

56. Search for and hire the best expert witnesses available and then keep the tightest rein possible on each of them. None of your experts should even think about doing something, writing something, or saying something, and certainly not spending any money, without checking with you first to pre-approve it.

* * *

57. Avoid familiarity with opposing counsel. Friendly is not a term your client should think of when describing your relationship with your opposing counsel. Civil and respectful, yes; friendly, no.

* * *

58. In court, argue to the judge about your opponent's arguments, not about your opponent. Judges abhor bickering between counsel.

* * *

59. Imagine a coin balanced on its edge in the center of a circle, heads facing north and tails facing south. As the trial lawyer you are stationed at one of the poles and your opponent is at the other. During the trial, the jury is walking around the circle hearing, alternatively, you and then your opponent, describe opposite sides of that same coin. Each of you is arguing accurately what you want the jury to see inside that circle. At the conclusion of the trial the jury will tell you which of you were more persuasive, not what's inside the circle.

* * *

60. In those jurisdictions where jury instructions precede closing arguments, the lawyer giving the *final* closing argument has an advantage over their opponent, because the jury stops walking around the circle facing that lawyer's side of the coin, and then retires to deliberate.

* * *

61. As the trial lawyer you should be

the jury's teacher and you should use teaching techniques:

1. Tell them what's going to happen (Opening Statement);

2. Make it happen (Direct and Cross Examination of Witnesses and Admission of Evidence); and,

3. Tell them what happened (Closing Argument).

* * *

62. When your opponent concentrates on the personalities involved (including yours), rather than on the facts, the issues and the law, it usually means that they think you're holding the winning cards and that distracting you is their best strategy. Don't fall for it. Stay on your course and win.

* * *

63. At trial, the more lawyers there are sitting at opposing counsel's table, the better off you are.

* * *

64. You don't learn any more about trying cases sitting in the *second chair*, than you learn about driving cars sitting in the passenger seat.

* * *

65. A trial lawyer must have the same intensity, ability to focus and unwavering absolute self-confidence in themselves, their preparation for this moment and the certainty of their eventual victory as an ace combat pilot in a single-engine jet fighter outnumbered in an aerial dogfight.

* * *

66. Each individual has their own personal dignity, just as they have their own personal shadow, that varies with the amount and the angle of light shining on that person. Our democratic society, and our justice system within our democracy, will only last as long as we continue to recognize that dignity, even of the weakest or the vilest amongst us, requires our equal treatment of every one of us under our laws. This is the lawyers' gospel. Be prepared to fight and to die for it.



This article is excerpted from a book entitled A Good Lawyer:™ Secrets Good Lawyers [And Their Best Clients] Already Know, published on the Internet by Stephen Comisky, a Virginia lawyer. The remainder of the book can be accessed at <http://www.agoodlawyer.com>.

Secrets of Washington Lawyers

"Never undumb [educate] your opponent."

- Carl Maxey, Spokane

"It is most important to periodically advise your client that he did not catch the disease in your office, but that he brought it in with him when he first chose to discuss his case."

- Ted Zylstra, Oak Harbor

"Seek solutions, not wars."

"Your relationship with your clients will determine the success of what you do. Treat all clients as if they were your first, last and only client. Meet them in the reception area and walk them to the door. Keep them informed, anticipate their needs, admit a mistake if you make one and move on. You will be respected for your honesty."

- Charlotte Chalker, Tacoma

"In its basic form, lawyering is looking through the eyes of others. Your client. The jury. The witness. The judge. Always view the case so the fact finders will understand and respect your case. It is they — not your client or the witnesses or counsel — who will determine the result in the case."

- Jeff Tolman, Poulsbo

"Take time to become sufficiently involved with your clients to REALLY know and understand their problems."

- Paul Stritmatter, Hoquiam

"The facts are the facts. You can't change the facts, but it's important to know what the facts are."

- George Kargianis, Seattle

"The client must have a clear understanding of the fee and the plan for handling the file at the initial conference. A written fee agreement is essential in any kind of case and is required in a contingent fee case."

- Paul Luvera, Mount Vernon

When Documents Are Electronic: Discovery of Computer-generated Materials

by John J. Dunbar



Few document requests lack a lengthy definition of what a "document" is. As the use of computers, e-mail and the Internet grow, however, lawyers' discovery tools need to expand to keep pace with our rapidly changing technological environment.

Electronic mail messages, or "e-mail," for example, may never be printed onto paper and often exist on a computer alone. They can yield a treasure trove. When tracing the Iran Contra arms deals, investigators found a wealth of documents in an early e-mail system, called Prof-Notes. Though paper had been shredded and computer records had been deleted, copies of the Prof-Notes had also been stored on a backup tape, which disgorged reams of incriminating memos. In another famous case, the prosecution of the police officers who beat Rodney King, investigators found e-mails by police officers with statements like the following: "Oops, I haven't beaten anyone that bad in a long time." Business litigators are uncovering similar skeletons in computer closets.

Discovery Rules

The discovery rules contain a passing, but broad, reference to electronically generated documents. Federal Rule of Civil Procedure ("FRCP") and Superior Court Civil Rule ("CR") 34 provide that "documents" subject to discovery include not only physical writings but also "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."

There is no question that the rule applies to computer records; an insurer who decided otherwise was eventually sanctioned with what amounted to a default judgment during trial for having failed to provide computerized records on the ground that raw data in a computer was not a "document" under Rule 34. *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382-83, (7th Cir. 1993). The Advisory Committee Notes to the 1970 Amendment which added the "data compilation" language to the federal rule point out that the new language "makes clear that Rule 34 applies to electronic data compilations," such as information on computers.

Other discovery rules will come into play. As in "straight paper" discovery, discovery rules allowing physical inspections, depositions of corporate record keepers, subpoenas duces tecum, interrogatories, and protective orders can be used in discovery of electronic information.

Discovery Tools

Discovery requests are being honed to specifically seek documents that may be available only in electronic form, such as e-mail. E-mail provides a written record of conversations that used to be carried out in person or over the phone. Memories of conversations are fallible, and e-mail can go a long way in proving what really was discussed.

E-mail messages also often reveal a candor not found in more formal letters or memos, and they can be used to demonstrate the writer's knowledge and intent.

A Range of Materials

E-mail will become the darling of discovery, but so will many other types of computerized records. Computer records are becoming more and more important to everyday business, and thus to litigation. As computerized communications and recordkeeping become commonplace in organizations large and small, e-mail and other computerized records will become the grist of discovery. In cases involving maintenance quality, such as aircraft crash cases, maintenance records are often computerized. In medical malpractice cases, some medical records, ranging from CAT scans to more basic records, will have been kept on computers, and nowhere else. In employment cases, plaintiffs have sought access to word-processing systems to show revisions or changes in evaluations and termination memos. In fraud cases, financial records are often found in computers, and e-mail messages have been used to prove the company's understanding of its financial condition. In a Washington case, a discovery search of an employer's computer network reportedly found a memo specifically directing the destruction of "evidence" regarding a discharged employee.

Checking computers may be the only way to obtain some documents. In some offices, standard memos and letters, as well as e-mail messages, are not stored in paper files. In any case, where a file is thin or documents appear missing, these computer sources may contain invaluable information. In many cases today, checking computer hard drives for documents can be the only way to obtain a complete

picture of the correspondence between the parties. Computerized records may also contain further information not included in the printed document itself. Date and time stamps are noted in the document list, as is the identity of the author or reviser.

Computerized documents also remain available after they appear to be deleted. Even after the delete key is pressed, e-mail and other computer-generated comments often live on to tell their tale. In many computer document management systems today, copies of each revision of a document are automatically made each time the document is generated and revised. Thus, even after a document is deleted from a hard drive's active file list, the document and drafts of it may exist in a backup tape or disk, where they were stored for safe-keeping. Finally, a deleted document may still exist in a paper file.

Concerns have also arisen regarding destruction of documents. Some believe that documents kept in a "paperless" office may be easier to destroy or alter than paper documents. Copies of paper documents often end up in many offices, and some copies are stored under lock and key. Computerized documents kept in a centralized computer system can be altered by one person, sometimes from outside of the office, but it's not simple.

Early Discovery Is Crucial

Speed in discovery is important.

Some document management systems make it almost impossible to ever completely delete a document from backup memory. Many other systems allow documents to be deleted or periodically "overwritten" with new material, but the document will remain present on the system for some period of time after deletion. In these systems, the electronic information constituting the document remains "physically present" even though the document is no longer on a file list and appears to have been deleted. In most systems, that information will remain present so long as enough new documents have not come in to push out all of the deleted old documents. This process has been described as putting a document onto a conveyor belt that is heading towards the paper shredder. Sooner or later, the deleted document will be confetti. By seeking quick discov-

"Speed in the discovery of computer-generated materials is important."

ery of these materials, counsel can avoid their destruction.

Thus, it is important to quickly put the opponent on notice of the need to retain computerized information and to learn as much as possible about the opponent's document management system. Are all documents stored? Are some documents deleted? When are documents identified for retention or deletion? How are documents identified for deletion? Why? Who makes the decision to retain or delete? What standards apply? Do deleted documents remain physically present on the hard drive, on a back-up drive, or on disks or tapes? A party searching for computerized records should also learn whether or not the target of discovery has a network, whether or not the network will provide a complete file list, whether or not some documents have limited "password" access so that the document will not be listed on the file list, and whether or not there are "off-line" or "stand-alone" computers that contain documents not listed on the network. Are there local area networks (LANs) which could contain additional materials? Where are back-up tapes or diskettes stored? Given the amount of work being done on laptops and home PCs, in the appropriate case these computers may also yield important documents. In cases where there is a concern regarding document destruction, counsel should learn about who has access to the system, what record is made of that access, and how it can be obtained.

To determine the types of discovery needed, the quickest route may be to take a record keeper deposition under FRCP or CR 30(b)(6). In a company that employs a network administrator or management information systems manager, that person or an assistant may be able to provide the necessary information. In

other organizations, a consultant might be responsible for computer matters. The consultant or employee who is responsible for your own system can provide valuable tips on the right questions to ask. If a serious concern develops regarding deliberate data loss, get an accredited expert — and a court order. Finally, use the record keeper deposition to authenticate the records and lay a business record foundation for the computerized information that has been produced.

Discovery rules also provide for inspections of physical objects, which should apply to computers and computer equipment. Rule 34(a) provides for requests that allow a party to "inspect and copy, test, or sample any tangible thing" within the scope of discovery, or to permit entry on land "[f]or the purpose of inspection . . . testing, or sampling the property or any designated object or operation" within the scope of discovery. FRCP 34(a); CR 34(a). The request must particularize the items to be inspected and must contain reasonable time, place and manner restrictions. FRCP 34(b); CR 34(b). As shown below, requests for computer inspections can easily run afoul of these requirements.

Other discovery vehicles can be used to obtain such discovery. Rule 30(b)(5) allows a deposition notice to a party opponent to be accompanied by a request "for the production of tangible things at the taking of the deposition."

FRCP 45(a)(1)(c) allows for trial and deposition subpoenas that direct the witness to "produce and permit inspection and copying of designated books, papers, documents, or tangible things" in the custody or control of the witness. FRCP 30(b)(5); CR 30(b)(5). Each of these provisions might be used to seek inspection of a computer system.

Using Interrogatories to Obtain Computer Analysis

Interrogatories have also been the subject of discovery disputes involving computerized information. At times, a document request may not yield usable information. A given computerized report may not contain the necessary information, or the report may be too voluminous to use. In such cases, at least in federal court and some state courts, interrogatories can be used to specify information that can be

drawn from an opponent's data bases.

For example, in *Mackey v. IBP, Inc.*, 167 F.R.D. 186 (D. Kan. 1996), plaintiff sued a meat packer for retaliatory discharge due to her report of a repetitive motion injury. Plaintiff served interrogatories seeking a list of all workers that the meat packer terminated during a two year period while on worker's compensation or injury leave. The meat packer objected that it did not track and categorize the requested information, and argued that it would be unreasonable to impose the \$1,500 programming expense necessary to obtain that information from its computer system. The court cut back the geographic scope and thus the cost of the request, but then overruled the objection and ordered the response, apparently at defendant's expense. 167 F.R.D. at 198-99. By contrast, others believe that a party is not required to design a new computer program to extract data. See Gilbreth and Bender, *Computer Software and the Internet*, at 281 (1995).

A party seeking to avoid having to analyze its own data for an opponent might consider the use of FRCP 33(d) and CR 33(c), which permits the production of business records containing the requested information in lieu of a specific interrogatory answer. Such a tactic, however, might require producing a mountain of records in response to an interrogatory that could be answered with a brief interrogatory response, and it could require the production of confidential information in reports that otherwise might not be discoverable. Thus, the use of Rule 33 could require the production of more information than necessary.

This strategy also might not satisfy Rule 33's requirements that "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served," and that the answering specification shall have "sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party being served, the records from which the answer may be ascertained." In any event, interrogatories seeking data analysis are sure to spark many a discovery conference.

Be Specific

Discovery requests typically include a laundry list definition of what a document is, with the thought that the respon-

dent might not think of everything without a list. When it comes to computer data, however, many discovery requests simply adopt the awkward "data compilation" language of the discovery rules. A more specific list of computerized documents will avoid disputes later. See *E.E.O.C. v. General Dynamics Corp.*, 999 F.2d 113, 116 (5th Cir. 1993) (failure to provide data tape in addition to printout should not have resulted in sanctions where trial court order requiring production of all "tangible" material did not specify production of tapes).

Be Practical

The fact that information is computerized can lead to more efficient litigation, but counsel can speed the process by taking greater advantage of computer tools.

Lawyers should consider practical, time-saving approaches to the computerized information we collect. Ask for the information in paper and disk form, as the disk will allow for quick scans and searches of the documents. "Date" stamps cannot easily be added to a computerized document, so a paper printout with stamping establishes what was produced. A disk may provide further information about the history of the document, such as when it was created and revised. Use a new or newly formatted disk to avoid the inadvertent production of active or recently deleted documents already on a disk.

The request for a disk has not always been granted, however, and courts have not always required the production of data tapes or disks, even when the paper printout contained reams of material that would be expensive to input for analysis. See *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257 (E.D. Pa. 1980) (denying request for data tape where paper printout was produced); see also Wright & Miller, 8A *Federal Practice And Procedure* § 2218 (1994). The *Manual for Complex Litigation*, published by The Federal Judicial Center, has taken a more open approach, which has evolved over time. The 1985 edition of the *Manual* noted that "sometimes" a party should be required to provide "machine-readable" data for analysis, "without the time, expense, and potential for errors that would result if data from a printout were reentered manually." *Manual for Complex Litigation* (Second) § 21.446 (1985). The most recent version of the *Manual* notes that "[c]omputerized data have become common in litigation," and treats requests for disks with an even more open approach. The 1995 edition provides that courts should consider "whether production and inspection should be in computer-readable form (such as by translation onto CD ROM disks, or of printouts (hard copies)); what information the producing party must be required to provide (such as manuals and similar materials) to facilitate the requesting party's access to and inspec-

APPEALS

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

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tion of the producing party's data; whether to require the parties to agree on a standard format for production of computerized data; and how to minimize and allocate the costs of production (such as of the computer runs or of special programming to facilitate production) and equalize the burdens on parties. *Manual for Complex Litigation* (Third), § 21.446 (1995).

Given the push-button ease and low cost of copying computerized data onto a disk, many believe that the courts should require production of electronic data unless there is a strong showing that this would be unduly burdensome. See Horning, "Electronically Stored Evidence: Answers To Some Recurring Questions Concerning Pretrial Discovery and Trial Usage," 41 *Wash & Lee L. Rev.* 1335, 1344 (1984). The U.S. Supreme Court noted that even if programming costs are incurred to retrieve computer data in discovery, "there is no reason to believe that the same information could be extracted any less expensively if the records were kept in less modern forms." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 362 (1978) (district court abused discretion in requiring defendant to pay for compiling class member list). The Court expected computerized discovery to be more efficient "for otherwise computers would not have gained such widespread use in the storing and handling of information." *Id.* As the use of computer disks and Internet or "cyberspace" communication becomes more common, lawyers and courts interested in efficiency may come to treat these forms of electronic data as documents subject to production in their "electronic" form, just as a sheet of paper is produced in its most useful form, paper. Just as a paper document is produced along with any copies of that document that contain date stamps or other notations, computerized records can also be produced along with drafts, dates, and time of production and other computerized information pertaining to the document.

Convincing Judges

If a discovery dispute arises, judges may need to be convinced of the need for this discovery. As demands for such discovery increase, courts are struggling to develop more specific rules. As is usually

the case in discovery disputes, few published decisions exist, particularly at the state court level. Most courts are adopting a case-by-case approach. Counsel should, too. Show the judge why this discovery is not extraordinary, why the discovery is needed, and why this request is not unduly burdensome. In many businesses, e-mail is as common as memos once were. E-mail messages are often not printed, yet they contain valuable information. Asking an opponent to check its hard drives for certain files is often easier than doing a physical search. On some office systems, network "search engines" like those used on the Internet can search for file names or terms used in the text of a document, much like a LEXIS and Westlaw search for case names and key phrases used in cases. Given the risk of deletion, the need for quick discovery also should be explained.

The Limits of Discovery

At times, courts have allowed very intrusive discovery. In some cases, particularly those involving trade secrets and other forms of intellectual property, counsel have actually been able to require the opposing party to turn over access to their computer hard drives so that counsel can review them and obtain discovery. No published Washington decision deals with the issue of whether to allow counsel the right to take control of a business's hard drive. Courts in other jurisdictions, however, have allowed plaintiffs in trade secret cases to take custody of the defendants' hard drives, so that plaintiff's experts could search for deleted files or other incriminating evidence.

For example, in a notorious case involving the Church of Scientology, a church related organization even obtained an *ex parte* writ of seizure allowing it to seize control of defendant's hard drive, the guts of its computer system. See *Religious Technology Center v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1522 (D. Colo. 1995). That case involved a Scientology organization's attempt to stop a posting on the Internet of allegedly confidential church documents. The church organization obtained a temporary restraining order regarding the posting, and obtained a seizure order under copyright laws. See 17 U.S.C. § 503(a) (Copyright Act's pre-trial seizure provision). Pursuant to the

writ of seizure, computer equipment, software and extensive materials were seized from defendant's premises. The court later ordered that defendant's counsel or its representative be allowed to be present while the church's counsel searched the impounded evidence and ordered that any items claimed to be privileged be segregated from the impounded materials and turned over to the court. After the preliminary injunction hearing, the court denied the church's motion for a preliminary injunction, and it ordered the church to immediately return and restore the seized materials, at the church's expense, to the precise places from which they had been taken. Such intrusive discovery can impose a heavy cost on the opponent, and the risk of a counterclaim for abuse of process seems high.

Seizing a hard drive is not necessary to achieve discovery goals. Just as premises can be inspected, so, too, can computer equipment. Moreover, just as documents can be copied, so, too, can hard drives and computer disks. Nevertheless, even these less intrusive discovery tools raise concerns about privileged communications, confidentiality, trade secrets, competitive advantage, harassment and pure expense.

As a result, other courts have been more cautious with hard-drive inspections. In *Strasser v. Yalamanchi*, 669 So.2d 1142, 1144-45 (Fla. App. 1996), the court quashed a trial court order allowing access to a computer system. The purpose of the access was to attempt to resurrect files purged in the ordinary course by an "overwrite" program that allowed newer documents to write over older ones in order to save memory space. The trial court placed no limits on the access, including time and scope limitations, which put confidential patient records at risk. In reversing the trial court's order, the appellate court stated that the party seeking discovery might still obtain the discovery if he made a showing that the purged evidence might be revived and if reasonable limitations on the time and scope of discovery were imposed along with access restrictions that would protect against data loss and protect patient confidentiality. 669 So.2d at 1144-45. Another recent case illustrates the difficulties that hard-drive inspections entail. In *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526 (1st Cir. 1996), the district court

denied a discharged employee's motion to permit discovery of the contents of its employer's hard drive and granted the employer's motion for summary judgment against the employee's wrongful-discharge claims. The summary judgment was based, in part, on a memo found on the defendant's word-processing system. During discovery, the employer produced a disk containing a copy of the word processing file for the key memo. As a result of "autodating" software, the disk showed that one version of the memo had a date after termination. Armed with this fact, the employee contended that the memo had been fabricated or modified after termination. When the employee sought access to the employer's hard drive, the district court directed the parties to create a protocol to ensure minimal intrusion. After the parties failed to agree on the protocol, the district court reconsidered its earlier decision and decided against allowing a hard-drive "fishing expedition."

The First Circuit agreed and affirmed, noting (1) plaintiff's failure to demonstrate a "particularized likelihood of discovering appropriate information," including any evidence of fabrication, (2) plaintiff's failure to detail a "plausible basis for believing that specified facts" could be found that were "susceptible of collection within a reasonable time frame," (3) the lack of perceived detail in plaintiff's protocol, and (4) the "substantial risks and costs" of the process, including the confidentiality of information on the hard drive that was proprietary or subject to the attorney-client privilege. The court criticized the plaintiff's mere assertion that "there may be a way" to prove fabrication of the document, but nevertheless noted that there "may be cases where discovery of word processing files on a computer hard drive may be warranted." 83 F.3d at 531-35.

Courts should be willing to grant more-intrusive discovery if evidence is produced that requested files are being deleted. In one such case, *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90, 99-100 (D. Colo. 1996), the district court enforced a "site inspection order" directing that no records be destroyed and allowing expedited discovery for the purpose of copying computerized files. The court sought to preserve materials from alleged destruction, while



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preserving the respondent's right to object to the protection of confidential materials. The court found an answer to the "protocol problems" in *Strasser* and *Fennell*. A special master was appointed. Computer files were copied from a hard drive and placed in an escrow, under the master's control, where they were subject to regular discovery procedures. While the district court eventually expressed concern that the party seeking discovery had "delayed this case with an exaggerated concern with minutiae" and had "little idea what they were looking for," the court awarded fee sanctions against the respondent for the deletion of word-processing files.

Develop an Adequate Protocol

In taking a case-by-case approach, courts are not ruling out hard-drive inspections, but they are requiring detailed discovery procedures that protect the responding party from burdensome or overly intrusive discovery. To obtain such an inspection, counsel may first need to prove a strong need for the discovery. Courts routinely allow discovery of original paper files, which yield tidbits about ink color and other pieces of occasionally helpful information not found in photocopies. In a paper case, however, the discovering party is not afforded the opportunity to inspect offices to locate files and then review them before responding counsel can deal with privileged and confidential information through appropriate redactions and protective orders.

Thus, the protocol needs to deal with the legitimate confidentiality interests at stake. The courts assume sufficient trust between counsel, so that responding counsel should be allowed to review material on a disk before turning it over. If a concern develops regarding data destruction, a neutral escrow can be used to protect confidentiality. In the unusual case, a special master might be appointed, as in *Gates Rubber*. But see *Upjohn Co. v. Hygiela Biological Laboratories*, 151 F.R.D. 355, 360 (E.D. Cal. 1993) (denying appointment of special master to resolve discovery issues in trade secret case; appointment justified only in "very rare cases"). The protocol must also deal with the risk and cost of the discovery, and it must minimize the risk of data loss and business intrusion. By developing such a

protocol, counsel might satisfy the concerns expressed in *Fennell*, *Gates Rubber*, and *Strasser*, but it won't be easy.

Work Product Concerns

Work product concerns arise when data bases are kept for litigation-related purposes. In such cases, courts balance the needs of the truth-finding process with the need for rigorous preparation and advocacy. Compare *U.S. v. AT&T*, 642 F.2d 1285, 1296-1302 (D.C. Cir. 1980) (refusing to provide AT&T with MCI data base shared with government anti-trust lawyers) with *Wright & Miller*, 8A *Federal Practice and Procedure* § 2218 (1994) (advocating open discovery, particularly where the data base will be used as evidence at trial or relied upon by experts).

Use Protective Orders

Protective orders will become increasingly important. The Advisory Committee Note to the Amendment to Federal Rule 34 makes it clear that the court should limit abusive discovery through the use of such orders [r]espondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden of expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

The *Manual for Complex Litigation* echoes the view that the "methodology of a company's computer system may itself be a valuable asset that should not be handed over without a good reason," and that the federal courts may enter protective orders under Rule 26(c) to prevent abuse or misuse. *Manual for Complex Litigation* (Second) § 21.466. Computer software and programs are "clearly protectable as trade secrets" in the proper case, as are "the underlying source code and the architecture of a computer pro-

gram." See generally *Fabkom, Inc. v. R.W. Smith & Associates, Inc.*, 1996 WESTLAW 531873 (S.D.N.Y. 1996) (granting preliminary injunction in trade secret battle over alleged software copying). Raw data possessed by third parties who oppose subpoenas may also be given heightened protection. Compare *Dow Chemical Company v. Allen*, 672 F.2d 1262 (7th Cir. 1982) (affirming order quashing subpoena of third-party's research data) with *Burka v. U.S. Dept. of Health and Human Services*, 87 F.3d 508, 518-21 (D.C. Cir. 1996) (data tapes were not protected by any qualified research privilege or by the Freedom of Information Act).

Destruction Sanctions

Not surprisingly, the destruction of computerized evidence can subject a party to sanctions. In *Computer Associates International, Inc. v. American Fundware*, 133 F.R.D. 166 (D. Colo. 1990), the defendant destroyed prior versions of a source code while a discovery request was pending for those very same versions. Judge Carrigan found that "[d]estroying the best evidence relating to core issue in the case inflicts the ultimate prejudice upon the opposing party." Given that plaintiff had made it plain that it wanted the source codes before they were destroyed, "no alternative sanction short of a default judgment would adequately punish [defendant] and deter future like-minded litigants." Even if a default judgment is not ordered, the destruction of evidence can lead to an adverse inference at summary judgment or trial. *Id.* But see *Baker v. General Motors Corp.*, 86 F.3d 811 (8th Cir. 1996) (reversing what amounted to default sanction as too severe where GM claimed in discovery that computerized customer complaint records that were more than five years old had been deleted, but numerous reports were belatedly found to exist in paper files elsewhere); *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90, 99-100 (D. Colo. 1996) (partial monetary sanction for employee's "clean-up" of word processing files after litigation had begun).

The Future

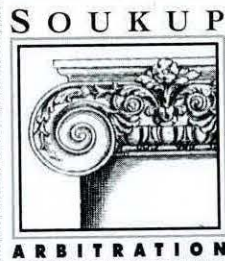
Computerized discovery issues will

only increase. Many of today's students are already computer-fluent. As they enter the work force, the tide of computerized information will rise higher. As always, lawyers need to know the basic facts of any case. As computers become more and more common, those basic facts

will come more and more to include how to discover computerized information.



John Dunbar is an attorney practicing with the Portland firm of Ball Janik, LLP.



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Notice of Deadline for Filing WSBA Resolutions

Pursuant to WSBA Bylaw Article VII, Section F — "Resolutions," any ten (10) active members of the WSBA may present a written resolution to the Board of Governors for consideration at the WSBA's Annual Business Meeting, which will be held this year on Friday, September 12, 1997, beginning at 2 p.m. at the WSBA Office, Fourth Floor, 2101 Fourth Avenue, Seattle, Washington.

Resolutions must be filed with the WSBA Executive Director at least ninety (90) days before the Annual Meeting (by 5 p.m. on Monday, June 16, 1997) and must be accompanied by a written report explaining the resolution. The resolution and explanatory report together shall not exceed a total of one thousand (1,000)

words. The Executive Director's office is at the WSBA, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330.

The Board of Governors will refer any resolutions addressing issues within the purpose of the WSBA to the WSBA Resolutions Committee. Those purposes are set forth in Article I of the WSBA Bylaws and General Rule 12 of the Washington Court Rules.

The Resolutions Committee will hold a public hearing to consider the views of the proponents and opponents of resolutions on Thursday, September 4, 1997, beginning at 1:30 p.m. at the offices of the WSBA (2101 Fourth Avenue, Fourth Floor, Seattle). Proponents and opponents of resolutions are urged to attend the hearing or to present their views in written form for consideration by the Resolutions Committee.

Proposed resolutions will be published in the July 1997 issue of the *Bar News*.

Members of the WSBA Resolutions Committee are: Lee Kraft (chair), John Caldbick, William Fleck, Stephen Pfeifer, Edward Ratcliffe, Robert Redman, John Riley, John Schultz, Stacey Smythe, Phillip Thom and Ted Zylstra.

Reprimanded

Bellevue lawyer Donna Jean Light (WSBA No. 22465, admitted 1993) has been ordered to receive two reprimands

pursuant to a stipulation for discipline, approved January 1997. The discipline is based upon her mishandling of client funds in two matters.

Light met lawyer "X" when she was in law school. At that time he worked at a large Seattle law firm. Unbeknownst to Light, X transferred to inactive status in April 1991, and in May 1992, was suspended from the practice of law in Washington for failure to pay bar dues. X told Light he was "retired."

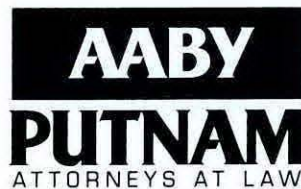
In September 1993, a friend contacted X for advice on settling his deceased father's estate. X told the friend he was "retired" and referred him to Light. He told the friend that because Light was inexperienced, he would supervise her work. The friend, who was named as the personal representative in his father's will, retained Light as attorney for the estate. The major asset in the estate was a house. The will left all the property in the estate to the personal representative and his sister. During the pendency of the probate, X periodically consulted with the personal representative and gave him legal advice. In July 1994, the father's house was sold. Light and the personal representative met at the escrow company and Light was given a check for \$47,167. Light met with X later that day in his office. He made a telephone call that appeared to Light to be to the personal representative. It appeared to Light from what X said during and immediately following this call that X had obtained permission from the personal representative to invest the proceeds from the sale of the house. X told Light that the sister's interests would be protected and that the personal representative had the authority to authorize the investment. Acting on X's direction, Light deposited the check in her IOLTA trust account and paid out all the money either directly to X or to third parties on X's behalf. X did not invest any of the money on the estate's behalf, nor did he repay any of it. Disciplinary proceedings against X have been deferred pending the resolution of criminal charges against him.

Light stipulated that by giving X funds belonging to the estate without consulting directly with the personal representative, she violated RPC 1.4 (communication), 1.14(b)(3) (duty to render appropriate accounts to client) and 1.1 (competence).

The second reprimand stemmed from Light's conduct in a second case involving X. A couple contacted X to obtain

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representation in the purchase of a home. X told the couple that he was working with Light. X reviewed the proposed purchase and sale agreement and at his suggestion, Light was listed as the escrow agent in the agreement. Light then picked up a check for \$5,000, the amount of the earnest money deposit, from the wife. The check was made payable to Light. Light did not know at that time that she was listed as the escrow agent. She told the wife she would be delivering the funds to X. At X's instruction, Light cashed the check and gave X the entire \$5,000 in cash. Light believed X would place the funds in an interest-bearing escrow account, but he instead converted the funds. Light stipulated that by giving X the \$5,000 without determining either his entitlement to the funds or whether she had a fiduciary duty to the purchasers, she violated RPC 1.14(a) (preserving client property), made applicable to real estate escrow funds through RPC 1.14(d).

The two reprimands were based on several mitigating factors, some details of which were not made part of the public record. Light also agreed to make restitution in both cases.

Respondent represented herself. The Bar Association was represented by Disciplinary counsel Anne I. Seidel.

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.

Suspended

Tacoma lawyer David C. Hemmelgarn (WSBA No. 13372, admitted 1983) has been ordered suspended for two years effective January 13, 1997, pursuant to a stipulation to discipline. The suspension is based upon Hemmelgarn's misconduct with respect to several client matters between early 1991 and fall 1995. Among the factors considered in mitigation of the disciplinary sanctions was Hemmelgarn's mental condition during this period which affected his ability to practice law.

Lack of Diligence, Competence and Communication

Case 1 - Hemmelgarn was hired to represent a client against the State of Washington for a personal injury matter. He served a complaint for damages upon

the incorrect statutory state employee, resulting in the suit being dismissed after the statute of limitations had expired. Hemmelgarn was unsuccessful in an appeal. Despite the dismissal, Hemmelgarn continued to assure the client and several health care providers for two years after the case had been dismissed that trial of the matter was pending. By failing to properly accomplish service of process within the period of the statute of limitations, Hemmelgarn violated RPC 1.1 (competence) and RPC 1.3 (diligence); by failing to inform client of the status of the case and of the dismissal of the lawsuit, Hemmelgarn violated RPC 1.4 (reasonably inform client about case); and by misrepresenting that the case had been dismissed to his client and to health care providers, Hemmelgarn violated RPC 8.4(c) (dishonesty). As part of the stipulation, Hemmelgarn has agreed to make restitution to his client of all out of pocket expenses, including medical care costs.

Case 2 - After filing a petition for dissolution of his client's marriage, in May 1992, and conducting negotiations with the spouse's lawyer, Hemmelgarn ceased further action, failed to advise his client of a trial date, failed to appear for trial and, thereby, allowed a decree containing provisions contrary to the client's wishes to be entered. By failing to diligently pursue the client's dissolution, Hemmelgarn violated RPC 1.3 (diligence). By failing to keep the client in-

formed about the case, Hemmelgarn violated RPC 1.4 (reasonably inform client about case). As part of the stipulation, Hemmelgarn has agreed to make restitution to the client for fees paid by the client to another lawyer hired to vacate the dissolution decree.

Case 3 - In early 1991, Hemmelgarn, while an active member of the Oregon Bar, undertook the representation of two clients injured in a motor vehicle accident. Hemmelgarn subsequently failed to pay his bar dues, resulting in his suspension from the Oregon Bar. On the day the statute of limitations was to expire, Hemmelgarn requested the assistance of another Oregon lawyer, who filed a summons and complaint prepared by Hemmelgarn. Hemmelgarn failed to comply with Oregon law which requires service be accomplished within sixty days of filing, or advise his client of the need to accomplish service within the sixty day period. As a result, the lawsuit was dismissed. Hemmelgarn's waiting to the last day to file a complaint and his failure to make arrangements for the proper service of process violated RPC 1.1 (competence) and RPC 1.3 (diligence). His failure to tell his client of his suspension from the practice of law in Oregon and of the client's need to promptly seek new counsel violated RPC 1.4 (reasonably inform client about case).

Case 4 - Hemmelgarn was hired in fall 1991 to defend a client in a suit to enforce

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a contract for the sale of a mobile home. He failed to appear timely at a hearing, and a default summary judgment was entered. Over the next few months, Hemmelgarn exchanged telephone calls and letters with opposing counsel, but did not move to vacate the default summary judgment until one hundred and eleven days after its entry. The motion was denied and Hemmelgarn failed to inform the client, who learned of the judgment when the client's bank account was garnished. Hemmelgarn's failure to respond to a summary judgment motion and to timely file a motion to vacate the judgment violated RPC 1.1 (competence) and RPC 1.3 (diligence). Hemmelgarn's failure to tell his client of the entry of the summary judgment and writ of garnishment violated RPC 1.4 (reasonably inform a client about case).

Case 5 - In October 1990, Hemmelgarn was hired to defend a client, who was being sued for breach of contract to purchase a mobile home, and to recover the

client's down payment. The client, after agreeing to purchase the mobile home and making the down payment, refused to complete the purchase because the dealer failed to timely deliver the mobile home. After initially working on the case, Hemmelgarn failed to bring the matter to conclusion and failed to maintain communication with the client. Hemmelgarn's failure to pursue the client's lawsuit violated RPC 1.3 (diligence) and RPC 3.2 (reasonable efforts to expedite litigation). Hemmelgarn's failure to respond to the client's requests for information violated RPC 1.4 (reasonably inform client about case).

Improper Representation

Case 6 - Hemmelgarn, while an active member of the Oregon Bar, was hired, in January 1992, to defend a Washington client against her former husband's enforcement, in the state of Oregon, of an agreement in which, he claimed, the client had consented to forgive support arrearage in exchange for his consent to the adoption of their child by the client's present husband. Hemmelgarn was also to assert the client's claim for support arrearage. After the representation began, Hemmelgarn learned he was suspended from the Oregon Bar for nonpayment of dues. He told the client that he had been suspended but that he intended to be reinstated prior to the trial. He continued to represent the client and to bill the client for the work. On the day of trial, Hemmelgarn was still suspended. He faxed the client, who had been waiting for him to appear, that he could not represent the client at the trial and made suggestions about how the client could proceed with the trial alone. The client settled the matter on her own for a number of reasons, including Hemmelgarn's inability to appear on the client's behalf and the continued cost of litigation. Hemmelgarn's conduct in failing to timely withdraw from the case and his ongoing work for the client when he could not practice violated RPC 1.15 (duty to withdraw). By giving advice to the client in Oregon, when suspended from active membership in Oregon, Hemmelgarn violated RPC 5.5(a) (prohibiting unauthorized practice of law) and RPC 8.4(d) (prohibiting conduct prejudicial to the administration of justice). By seeking payment for services performed when he was sus-

pended from active membership in the Oregon bar, Hemmelgarn violated RPC 1.5 (charging an unreasonable fee). As part of the stipulation, Hemmelgarn has agreed to make restitution to the clients of fees collected during the time he was suspended from the Oregon bar.

Misconduct in Criminal Matters

Cases 7 and 8 - While representing different clients during 1991 and 1992 in various criminal matters in district and superior court cases, Hemmelgarn was late to court or failed to appear. Hemmelgarn's tardiness or failure to appear at several district court and superior court hearings violated RPC 1.3 (diligence) and RPC 8.4(d) (conduct prejudicial to administration of justice).

Case 9 - While representing a client in a criminal case, Hemmelgarn, in November 1991, signed an indemnitor's agreement to ensure the client's appearance in court. By signing an indemnitor's agreement with a bonding company on behalf of a client, Hemmelgarn gave improper financial assistance to a client and gained a financial interest in the litigation, which violated RPC 1.8(c) (financial assistance to client during litigation) and RPC 1.7(b) (representing client when representation may be limited by lawyer's own interests).

Prior to reinstatement, Hemmelgarn must demonstrate he is physically and mentally fit to practice law, and make restitution as stated above. Upon reinstatement, Hemmelgarn will be on probation for two years.

Hemmelgarn represented himself. Disciplinary counsel Maria Regimbal and Christopher Sutton represented the Bar Association. The hearing officer was F. Ross Boundy of Seattle.

Interim Suspension

Tacoma lawyer Gary W. Ross (# 15938, admitted 1986) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered January 10, 1997.

Interim suspension is pursuant to RLD Title 3 and is not a disciplinary sanction. Joy McLean represented the Bar Association.

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THE WASHINGTON STATE BAR NEWS

FAX POLL

What do you think about the Walsh Commission's recommendation that Canon 7 of the Code of Judicial Conduct be revised to impose limits on campaign contributions by persons or organizations and impose aggregate limits on expenditures by a judicial candidate's campaign committee? Proponents have stated that this would maintain the appearance of judicial impartiality, as many campaign contributions for judicial candidates come from lawyers or corporations having an interest in influencing decisions. Opponents have raised First and Fourteenth Amendment principles protecting political expression.

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 limits on judicial campaign contributions by persons and corporations and aggregate limits on judicial campaign expenditures.
2. I somewhat support limits on judicial campaign contributions by persons and corporations and aggregate limits on judicial campaign expenditures.
3. I am undecided, but I believe the issue should be studied further.
4. I somewhat oppose limits on judicial campaign contributions by persons and corporations and aggregate limits on judicial campaign expenditures.
5. I strongly oppose limits on judicial campaign contributions by persons and corporations and aggregate limits on judicial campaign expenditures.

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 May *Bar News*.)

Fax your response by April 15 to:
 (206) 727-8320

Or, mail your response by April 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 Walsh Commission's recommendations to create volunteer citizen nominating commissions to compile lists of judicial candidates. The results:

1. 19 (38%) strongly supported the creation of citizen judicial nominating commissions.
2. 1 (2%) somewhat supported the creation of citizen judicial nominating commissions.
3. 0 (0%) were undecided, but believed the concept should be studied.
4. 1 (2%) somewhat opposed the creation of citizen judicial nominating commissions.
5. 29 (58%) strongly opposed the creation of citizen judicial nominating commissions.

Overall, 50 valid responses were received.

Your Comments:

"What is needed is a change in the Canons of Judicial Ethics, to permit candidates to speak out on the issues — not a star chamber 'nominating commission.'"

Gregory Moravan, Bellevue

"All such citizen nominating commissions should be comprised exclusively of nonpracticing attorneys. Perhaps retired members of the bar should also be excluded."

Jared Garth, Spokane

"Just what we need: committees of hand-picked elites stacking the bench with their cronies. The judiciary, like any other branch of government, should answer to the people, and the only way to achieve this in any measure is through elections by the people."

Patricia Michl, Sumner

"Partisan politics and patronage surrounds every aspect of government and probably always will. Shouldn't the judiciary remain above this type of political 'piggyback'? Consider the qualifications, knowledge and experience, not his or her political affiliation."

Tyler Morris, Kennewick

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



April

- 3/31 **Skills Training Course**
-4/4 Bothell/Seattle
by WSBA CLE (206) 727-8202
45.5 CLE credits
- 1 **Discovery of Experts in the Wake of the Firestorm Case**
Seattle
By KCBA (206) 340-2572
2 CLE ethics credits pending
- 3 **Basic WA Estate Planning Skills: Series of 7, Session 6: Planning for the Disabled & Elderly**
Seattle
By UW CLE (206) 543-0059/
(800) CLE UNIV
4 CLE credits
- 4 **EP For Qualified Retirement Plans & IRA Benefits**
Seattle
By WSBA CLE (206) 727-8202
6.75 CLE credits
- 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)
- 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
(206) 340-2572
11.5 CLE credits pending
- 16 **Workers' Compensation In WA**
Seattle
By Lorman (715) 833-3940
6.5 CLE credits
- 16 **Effective Civil Litigation: Leveraging the Civil Rules/Introducing the New Supplement to the Civil Procedure Deskbook**
Seattle
By WSBA CLE (206) 727-8202
5.75 CLE credits

- 17 **Auto Cases**
SeaTac
By WSTLA (206) 464-1011
CLE credits pending
- 17 **Indian Law and How It Affects Your Clients**
Seattle
By WSBA CLE & Indian Law Section
(206) 727-8202
6.75 CLE credits
- 17 **Basic Washington Estate Planning Skills: Series of 7, Session 7: Putting It All Together**
Seattle
By UW CLE (206) 543-0059/
(800) CLE -UNIV
4 CLE credits
- 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)
- 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 Cncl
(509) 382-2541
1.5 CLE credits
- 24 **Limited-liability Companies in WA**
Spokane, also in 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

- 1-2 **Nonverbal Negotiation & Persuasion Strategies in Law, Featuring Eric Oliver & Tom Anastasi**
Seattle
By UW CLE (206) 543-0059/
(800) CLE UNIV
7.5 CLE credits pending
- 2 **Defending the Construction Claim**
Seattle
By WA Defense Trial Lawyers
(206) 233-2930
CLE credits pending
- 2 **Negotiation in the Practice of Law**
Seattle
By WSBA CLE (206)727-8202
6.0 CLE credits (estimated)

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- 2 **Economic Damages**
Seattle
By KCBA (206) 340-2572
6.5 CLE credits pending
- 2-3 **WSBA Board of Governors Meeting**
Spokane
(206) 727-8244
- 2-3 **Family Law Skills**
Seattle
By WSBA CLE & Family Law Section (206) 727-8202
11 CLE credits
- 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 Section Midyear**
Eastsound
By WSBA CLE & ELUL Section (206) 727-8202
11.25 CLE credits (incl. .75 ethics) pending
- 9 **Preparing for a Judicial Career: A Practical Approach**
Seattle
By WSBA Opportunities for Minorities in the Legal Profession Committee (206) 874-8081
6.5 CLE credits pending
- 9 **9th Annual Nuts & Bolts of Insurance Coverage Seminar, Part II**
Seattle
By KCBA (206) 340-2572
6.5 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
- 13 **Peoples Law School: Employment Law for Nonprofits**
Seattle
By WSTLA (206) 464-1011
- CLE credits pending
- 15-16 **30th Annual Pacific Coast Labor & Employment Law Conference**
Seattle
By UW CLE (206) 543-0059/
(800) CLE UNIV
15.75 CLE credits (incl. 2 ethics) pending
- 16 **Employment Law**
Seattle
By WSTLA CLE (206) 464-1011
CLE credits pending
- 16 **WPI: The New Civil Instructions . . . Never Seen Before**
Seattle
By WSTLA (206) 464-1011
CLE credits pending
- 16 **Estate Planning for the Mid-sized Estate and Small-business Owner**
Seattle
By KCBA (206) 340-2572
6.5 CLE credits pending
- 20-21 **WSBA Board of Governors Meeting**
Yakima
(206) 727-8244
- 22 **Tax-saving Ideas Using LLCs**
Walla Walla
Walla Walla Estate Planning Cncl. (509) 382-2541
1.5 CLE credits
- 30 **Brain Injuries**
Seattle
By WSTLA (206) 464-1011
CLE credits pending
- 30 **2nd Annual Pacific NW Entertainment Law Seminar**
Seattle
By KCBA (206) 340-2572
6.5 CLE credits pending
- 30-31 **Business Law Section Midyear**
Seattle
By WSBA CLE & Bus. Law Section (206) 727-8202
14 CLE credits (incl. 2 ethics) pending
- June**
- 4,5,11 **Risk Management for Attorneys**
Seattle
By CNA Insurance Companies (312) 822-1548
3.25 CLE ethics credits
- 5 **Starting & Building a P.I. Practice**
Seattle
- by WSTLA (206) 464-1011
CLE credits pending
- 6-8 **Real Property, Probate & Trust Section Midyear**
Yakima
by WSBA CLE & RPPT Section (206) 727-8202
10.5 CLE credits pending
- 12 **Employee Handbooks, Hiring & Firing, Employee Contracts**
Spokane, also in Seattle 6/19
By WSBA CLE (206) 727-8202
6 CLE credits pending
- 13 **Handling Business Litigation**
Seattle
By WSBA CLE (206) 727-8202
CLE credits pending
- 16-21 **2nd Annual NW Trial Mastery Demonstration Program, featuring Paul Luvera, Hon. William Dwyer, Gerry Spence & More!**
By UW CLE (206) 543-0059/
(800) CLE-UNIV
7 CLE credits per day
- 20 **Real Estate Drafting & Practice**
Seattle
By WSBA CLE (206) 727-8202
CLE credits pending
- 20-21 **Litigation Section Midyear**
Chelan
By WSBA CLE & Litigation Section (206) 727-8202
8 CLE credits (incl. 2 ethics) pending
- 20-22 **Access to Justice Conference**
Yakima
(206) 727-8262
- 21 **WSBA Annual Awards Luncheon**
Yakima
(206) 727-8262
- 21-22 **Bar Leaders Conference**
Yakima
(206) 727-8262
- 27-29 **Family Law Section Midyear**
Vancouver, WA
By WSBA CLE & Family Law Section (206) 727-8202
CLE credits pending
- July**
- 31-8/3 **WSTLA 1997 Annual Meeting & Convention**
Vancouver B.C. Canada
(206) 464-1011
CLE credits pending



Communicating With Your Client

by **Barrie Althoff**, *Chief WSBA Disciplinary Counsel*

Communicating with your client enables you to learn your client's objectives, to instill confidence in the client that you can meet those objectives, and to satisfy your professional responsibilities. Failing to communicate with your client will likely lead to a dissatisfied client who will not pay your bill and who may seek disciplinary action against you. Rule 1.4 of the Rules of Professional Conduct ("RPC") requires you to (1) keep your client reasonably informed about the status of a matter, (2) promptly comply with reasonable requests for information, and, (3) explain a matter to your client to the extent reasonably necessary to permit your client to make informed decisions regarding the representation. This article looks at these and some related duties.

RPC 1.4 provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Your first duty under RPC 1.4 is to keep your client reasonably informed about the status of a matter. This is a positive duty — that is, you are obligated to keep your client informed, regardless of whether the client requests it or not. You are not permitted merely to await a client's request for information about the status. To meet this duty, you must periodically let your client know what you have already done on the matter, what you are currently doing, and what you will be doing. The frequency and extent of this will vary with each client depending on, for example, how long you have represented the client, the nature of the matter, and the needs of the client. You need to keep your client informed, not in detail, but more generally, as to where the matter is going. In litigation, for example, you need to explain your general strategy of handling the case, as well as the likelihood of success or failure. In negotiations, where there is usually more time available, you should provide more detailed information to your client about the major terms of the negotiations. Your positive duty to communicate with your client also allows you to find out about changes in your client's status — for

example, in one case a lawyer did not discover his client had died until more than two years after the death.

Often a lawyer does not communicate with his or her client because the lawyer has failed to meet his or her RPC 1.3 obligation to represent the client with reasonable diligence and promptness. The lawyer may have assured the client that he or she is looking after the client's matter, but in fact the lawyer has done nothing for the client. If you find yourself in this situation, and your inactivity is because there is nothing to do at the time (for example, you are awaiting a response from the other side or awaiting a judicial determination), explain that to your client. If there are things you should be doing, however, apologize to your client for your lack of diligence, and then start working on the case. Clients have little confidence in, or respect for, a lawyer who repeatedly, but falsely, assures them he or she is working on their case, when in fact the lawyer is not doing so.

Your duty to keep your client informed about the status of a matter can be satisfied in part by regularly sending your client detailed bills explaining what you have done. All too often, bills are the only form of a lawyer's communication with his or her client. It clearly should not be. At the very start of your representation, explain to your client the likely cost of your services and related costs, and thereafter regularly keep your client informed and be available to answer questions about your bills. Talk to your clients in person about your bills and do not leave this important form of communication to your staff. If you are uncomfortable doing so, your client will likely also be uncomfortable, and, when questions arise as to your bills, your client is unlikely to discuss them with you. A dissatisfied client often does not pay bills, but instead files a grievance with the Bar against you. If your client is not paying your bills promptly, you need to communicate promptly with the client to find out if the client is dissatisfied with your representation, and if so, if you can cure that dissatisfaction. If you cannot, you and your client need to communicate as to whether to continue the representation. If the client does not have money to pay your bills, decide quickly whether you

want to withdraw from the representation or whether you want to represent the client on a pro bono basis. You cannot make this decision, however, unless you communicate with your client.

The duty to keep your client informed about the status of a matter also includes a duty, if you are working in a law firm with other lawyers, to let the client know if you are leaving the law firm, since it is the client's choice as to who will continue to represent him or her. This notice to the client should be given in a manner that neither encourages nor discourages the client from following you.

Your second duty under RPC 1.4 is to respond promptly to reasonable requests for information. All too frequently clients complain that their lawyers do not return telephone calls and ignore information given by the clients in letters. You must respond to telephone calls and letters from your client and you must do so promptly. A good practice is always to return phone calls the same day, or, at the very latest, the next day. If you call your clients and cannot get through them, send a letter to them saying you tried; consider setting a specified date and time in your letter at which you will be in your office and ask the clients to contact you at that time. In every case, document your return calls and attempts to call since it is your defense against a charge of noncommunication. If you cannot promptly provide the information requested, promptly contact the client and explain that you cannot do so, and state when you will be able to do so. Use your voice mail and your client's answering machine, if possible, to communicate, but do not hide behind your voice mail. A message on your voice mail stating that you will return calls, when in fact you do not, only angers your clients.

Your duty to respond promptly to client requests for information is limited to reasonable requests. What is reasonable will depend on the particular situation of you and your client and the nature of the representation. Practically, however, you should respond promptly to all requests that you can. If you do not think a particular request is reasonable, you should talk to your client about the request. If your client requests overly detailed information or on too short a time frame, you



should not hesitate to tell your client that you believe the request is unreasonable and explain what you are willing to do to meet the client's expressed needs. If your client is in jail, you do not have to visit the client in jail every time your client demands to talk to you; rather, you must be available to your client on a reasonable basis.

Your duty to communicate with your client also requires you to keep your staff informed on how to contact you so that communications from your clients can be forwarded to you. Failure to do so can lead to a separate disciplinary charge of failing to supervise your support staff. While you may take a vacation or be away from your office for extended periods of time, your ethical duty to communicate with your clients does not take a vacation. You cannot keep your client informed, comply with reasonable requests for information, and explain matters to your client if you are unavailable for extended time — for travel, health reasons, or other obligations — unless you make advance arrangements with your client and with others. This may involve having your staff, or another lawyer, be the conduit for communication, and be available to review your mail and telephone messages. Your staff should know how to contact you during such an absence and during emergencies.

Your third duty under RPC 1.4 is to explain matters to your client to the extent reasonably necessary to permit your client to make informed decisions regarding the representation. Thus, you need to explain, for example, alternative courses of action and their consequences. To do so you must obviously know and understand those courses and consequences, and, if you do not, educate yourself about them. Similarly, you have a duty to promptly advise your client of civil settlement offers or criminal plea bargain offers and help your client understand the offers and the consequences of accepting or rejecting them. You cannot do this unless you understand your client's objectives and situation. You generally may not withhold relevant information from your client except in extremely rare cases where the information cannot by law be revealed or where it might harm your client; for example, disclosure of an unfavorable psychiatric diagnosis of your client might not be advisable at a particular time.

Your duty to explain to your client the law, alternative courses of action, and their consequences, is related to your duty under RPC 1.2 to abide by your client's decisions concerning the objectives of representation and to "consult" with your client as to the means by which those objectives are to be met. Under the RPCs the term "consult" means "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Thus, communication requires you to use language in a manner that can be understood by your client. You must consider your client's ability to comprehend your spoken and written comments and make special efforts, for example, if your client is a child, emotionally distraught, or does not comprehend English. Communication with a client in jail also requires special efforts on your part.

Communication is more than merely you talking or writing to your client. It also requires you to listen to your client and read and understand what your client writes and says to you. You need to listen to what your client is saying, to allow your client to tell his or her story, as well as for you to gather necessary information. Equally important, you need to listen to what your client is not saying. If, for example, you never hear a "thank you," is your client thankful and are you meeting your client's expectations?

There are serious consequences of not communicating with your client. If you do not communicate, you are likely to do a poor job representing your client and there is a high likelihood that your client will feel ignored. Ignored clients often seek to gain their lawyer's attention either by not paying their legal bills, or by filing a grievance with the Bar. Neither is a desirable result. Both can be avoided by communicating with your client.

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Save While You Learn — And Get a Two-Fer

Thanks to a recently completed arrangement between the WSBA's CLE program and Kirke-Van Orsdel, Inc. — the only lawyer's liability insurance program sponsored by the Bar — you can now get discounts on your liability premiums by attending WSBA CLE programs.

KVI and its underwriter, Reliance National Insurance Company, recognize your participation in the Bar's CLE programs as an important loss prevention practice and will give a credit against your premium. Yearly savings for firms and individual lawyers can be appreciable.

Effective early this summer, each WSBA CLE brochure will notify seminar attendees that they will receive a 5 percent discount on the lawyer liability premium, up to a maximum of 10 percent (from attending two programs) per year. At the end of each WSBA seminar, certificates of completion will be given to attendees to enclose with their next renewal or initial application.

Further details are available from Tom Russell, WSBA CLE Director, at (206) 727-8220, or Pam Blake, KVI account executive, at (206) 224-7411 or 1-800-366-7411. ♦

Laugh While You Learn...coming to a town near you

Suppose you could attend the hottest CLE program in the country, just down the road in a town near you? Your fellow Washington attorneys rated it with superlatives such as "Mesmerizing and jam-packed with stuff so exciting I can hardly wait to use it," "Entertaining-lively; high energy examples applied to a wide variety of cases civil and criminal," and "Working with the knowledge I gained has absolutely and irrevocably changed my behavior in the courtroom."

Suppose you could attend at the lowest price for a regional program — \$135, or \$99 per person for groups of five or more, and get 6.75 MCLE credits including 1 ethics credit? Sup-

Continued on page 59



Danilov Discusses Immigration at Statue of Liberty

Dan P. Danilov, perhaps Seattle's best-known immigration lawyer, recently traveled to the Statue of

Liberty to present

the latest report on the new immigration laws to the staff and tour guides of the world-famous monument. This was a follow-up visit to his first report presented in October. He was joined for the February 24 presentation by his business partner, Allen E. Kaye of New York.

"Oh, it was terrific," Danilov said enthusiastically. "I talked to all the tour guides, gave them a lecture, they made a movie of it, and then they'll show it in the theater in the basement of the Statue of Liberty."

He also provided the guides with literature to pass out to visitors. The Statue had 18 million visitors last year.

"Usually," Danilov said, "people stop by the guard and say 'how do I get a green card, what do I do?' So the guard gives them a copy of the information. Sometimes, these people then come to our office, and when we ask, 'who referred you to our office? They say, 'The Statue of Liberty!'"

Danilov graduated from the University of Washington School of Law in 1958. He is the author of many immigration books, including *Immigrating to the U.S.A.*, and is co-author with Kaye of an immigration column published in many newspapers and magazines in the U.S. and abroad. The two also publish a paper called *United States Immigration News*.

Danilov was born in the Soviet Union and his parents fled from the Bolsheviks in 1928 to China. He graduated from La Salle College in Hong Kong in 1941, and during World War II, he and his brother published a secret newsletter which they distributed to allied prisoner-of-war camps in Shanghai.

He came to America in 1947, and spent two years in Korea as a member of the U.S. Army. He is a former deputy prosecuting attorney for King County and served as municipal judge in Des Moines. ♦

WYLD Seeks Volunteers to Help Students "Celebrate Their Freedom"

WSBA's Young Lawyers Division is seeking volunteers to go into schools during Law Week, May 5-9. This year's National Law Week theme is "Celebrate Your Freedom." Teachers and principals will be offered the following three options:

Option One: Presentation of a dropout prevention video which is tailored for the middle school age group. The 30-minute video is a variation on the "Scared Straight" theme, where young inmates from Oregon and Texas are interviewed about the life choices they've made. The video is accompanied by optional supplemental written materials. Contact Brian Vasey at (206) 361-4634 for materials.

Option Two: A mock trial. The American Bar Association has scripts for several mock trials, such as "The Trial of Gold E. Locks." Contact Kira Kuetgens at (206) 874-2026 for materials.

Option Three: A "Street Law" program. This program can be tailored for one hour, one week or even up to one year. It provides high school students with a basic knowledge of their legal rights in areas such as landlord/tenant disputes, basic contract law, basic constitutional law, family law and civil and criminal court proceedings. Contact Steve Gross at (206) 776-3191 for materials.

To volunteer, or for more information about Law Week, contact David Reed, Law Related Education Committee Chair, at Bogle & Gates in Seattle at (206) 621-1511. ♦

WYLD Midyear Meeting in Chelan

WSBA's Young Lawyers Division is having its Midyear Meeting, CLE and Northwest Regional Affiliate Organizations Project on May 8-10 at Campbell's Resort in Chelan.

Thursday night is set aside for a welcome reception.

Friday's schedule includes: WYLD Trustee, Network and Committee Meetings — open to everyone; Awards Luncheon; Second Annual "Bad Golfers" Scramble Golf Tournament; Dinner Cruise on the Lady of the Lake.

Saturday's schedule includes: Continuing Legal Education: How to Read Financial Statements (David Duryee from Management

Advisory Services will present a hands-on class on how to read and understand financial statements), 3.5 CLE credits are pending; Professionalism Lunch featuring keynote speaker Supreme Court Justice Phillip Talmadge; Affiliate Organizations Project — AOPs are public and member service projects sponsored by young lawyer groups throughout the U.S. This is an opportunity to share ideas with other young lawyers on Washington's Aspiring Youth Program, Young Lawyers Cooperation with FEMA, and Establishing a Law and Government Sponsorship and Mentorship Program. Saturday will end with a dinner and reception.

For more information, contact Sheri Borgford, WYLD Administrator, at the WSBA at (206) 727-8239. ♦

ADR Section Publishes Provider Directory

by L. Elise Dieterich, ADR Section Chair

The 1997 Directory of Washington State Arbitrators, Mediators and Other Dispute Resolution Providers is out!

This directory, published as a joint project of the ADR Section's Education Committee and the Mediation Consortium of Washington State, includes all those providers who returned the directory entry form (sent out to ADR Section members in their newsletter last year) and the required \$25 entry fee.

As promised when entries for the directory were solicited, the entry fees (plus a modest contribution of ADR Section funds) were used by the Education Committee to produce a first run of 240 directories in a 3-ring binder format, which were distributed free to courthouses, law libraries and legal aid programs, where we hope the directory will be accessed by consumers in need of ADR services.

We are now working on a soft cover edition, to be sold at the Sixth Annual ADR Conference on April 11-12, and by mail through the Washington State Bar Association (watch your mailbox for an order form to be sent to all ADR Section members within the month). The cost to purchase the soft cover edition is \$10 for providers listed in the directory, and \$20 for all others.

Plans for the 1998 directory are underway. Contact L. Elise Dieterich, ADR Section Chair, at (206) 583-8393 for more information. ♦

The Laser Project: Growing Strong!

by Marla B. Elliott,
LASER Project
Coordinator

A standing-room-only crowd packed into the WSBA's beautiful new meeting facilities for the LASER Project's recent training of new volunteers on February 28 and March 1. This two-day training, co-sponsored by the Puget Sound Educational Service District, brought volunteer lawyers and school personnel together to learn about conflict resolution and how to implement peer mediation programs in schools. Thirty lawyers and representatives from five schools were trained; most of those schools formed teams of volunteer lawyers on the spot. The WSBA, as one of LASER's sponsoring organizations, graciously donated use of their meeting facilities. The training was free to volunteer lawyers.

LASER, an acronym for Lawyers and Students Engaged in Resolution, uses volun-



teer lawyers to train student mediators. The LASER Project is a joint project of the WSBA, the Attorney General's Office, and the Office of the Superintendent of Public Instruction. Lawyers volunteering through the LASER

Project make a two-year commitment to "adopt" a school by spending a few hours per month training and mentoring student mediators, and by working with school personnel to facilitate and support the school's peer mediation program.

The LASER Project continues to seek additional volunteers. Additional training seminars are planned for later in 1997. To volunteer, call or write the LASER Project at PO Box 40100, Olympia, WA 98504-0100; (360) 664-2476. Send your name and mailing address and you will be notified of future training opportunities. ♦

CLE — Continued from page 57

pose that by attending at most sites, your registration fee was applied in part toward funding your local bar association's programs?

If all this sounds new and different — it is! A brand new alliance of the Washington State Bar Association CLE program with six county bar associations makes the nationally acclaimed "Killer Cross Examination" seminar available across the state via video replay. It features Roger Dodd and Larry Pozner, nationally prominent trial lawyers and authors of America's best selling book on cross examination. They are described by Washington lawyers as "Dynamic and entertaining... polished and effective."

"This seminar is so spirited, it pours over into the tape sessions," according to attendees. The tapes show: how to make preparation and presentation easier, how to get the witness to say "yes" each time, how to direct the jury's attention to your best facts, how to turn the hostile expert around so getting off the stand

looks like the best option, and so forth. Each site will have a live, local, experienced trial lawyer to lead the site group in plenty of opportunities to apply the myriad practice tips to local situations.

The dates, sites and co-sponsoring local bars are: **April 17 — Vancouver** (Clark County Bar Association); **April 24 — Port Hadlock** (Jefferson County Bar Association); **April 25 — Wenatchee** (Chelan/Douglas County Bar Association); **April 25 — Yakima** (Yakima County Bar Association); **April 29 — Spokane** (Spokane County Bar Association); **May 2 — Seattle**; and **May 2 — Kelso** (Cowlitz County Bar Association).

Details and registration forms were sent out in a brochure in late March, but for further information, more brochures, or to register by phone, call (206) 727-8202 between 8:30 a.m. and 5 p.m. Walk-in registrations will be on a space available basis (this program sold out in Seattle in February.) ♦

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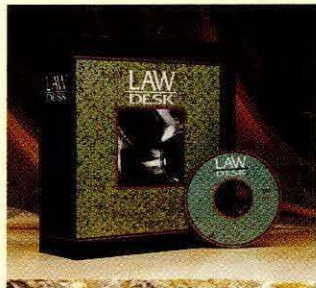
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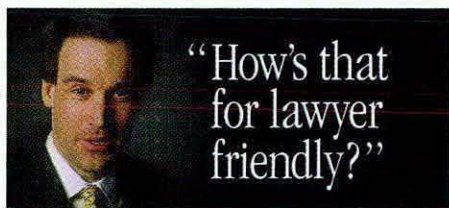
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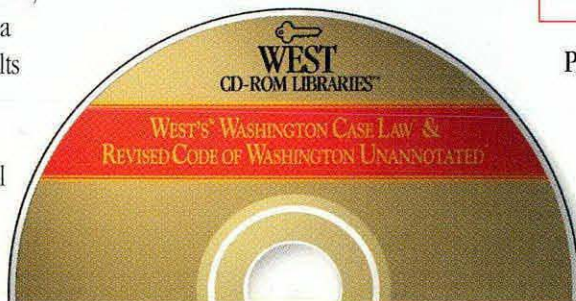
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