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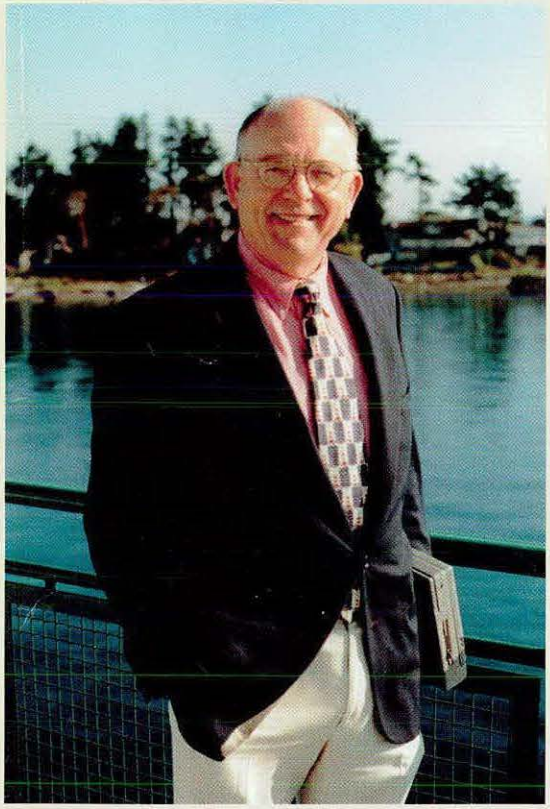
October 1998

M. WAYNE BLAIR 1998-1999 WSBA PRESIDENT



M. Wayne Blair combines business with pleasure on his daily ferry commute.

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SEATTLE - M. Wayne Blair took the helm of the Washington State Bar Association on September 11 at the Annual Awards Luncheon and Business Meeing.

One look at his résumé and you know he's a Bar Association workhorse. Serving as President of the WSBA Board of Governors is just the capper to a volunteer career which has seen Wayne serving on an array of committees, boards, task forces and commissions. With a self-deprecating sense of humor and a consensus-building direct style of leadership, Wayne comes to the presidency with a desire to enhance the bar association's role as a professional organization. Wayne sees access to justice issues and the practice of law by nonlawyers as two important issues now facing bar members. He hopes to play a constructive role in the bar association's complex and shifting relationship with the state Supreme court. As a believer in "due process" rather than "do process," Wayne is a strong proponent of Board decisions being made only after membership information and comment, open debate and thoughtful review.

The Power of Truth

An Attorney's Guide to Winning Jury Trials in a Dishonest World

"There is a vague popular belief that lawyers are necessarily dishonest.... Let no young man choosing the law for a calling for a moment yield to the popular belief - resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer."

Abraham Lincoln

They do not like us. The term "they," of course, includes everybody but us. Even our own relatives do not like lawyers. They also do not trust us. They believe we are willing to deceive, spin, manipulate, cover up, intimidate, distort, and just flat out lie to enrich ourselves and benefit our clients.

The unfortunate reality is that "they" are people who sit on juries. As a result, every time you walk into a courtroom on the first day of trial, you are facing a group of people who question your motives and assume that they cannot believe a word you say.

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Stare Decisis: Everything You Never Realized You Need to Know *Page 31*

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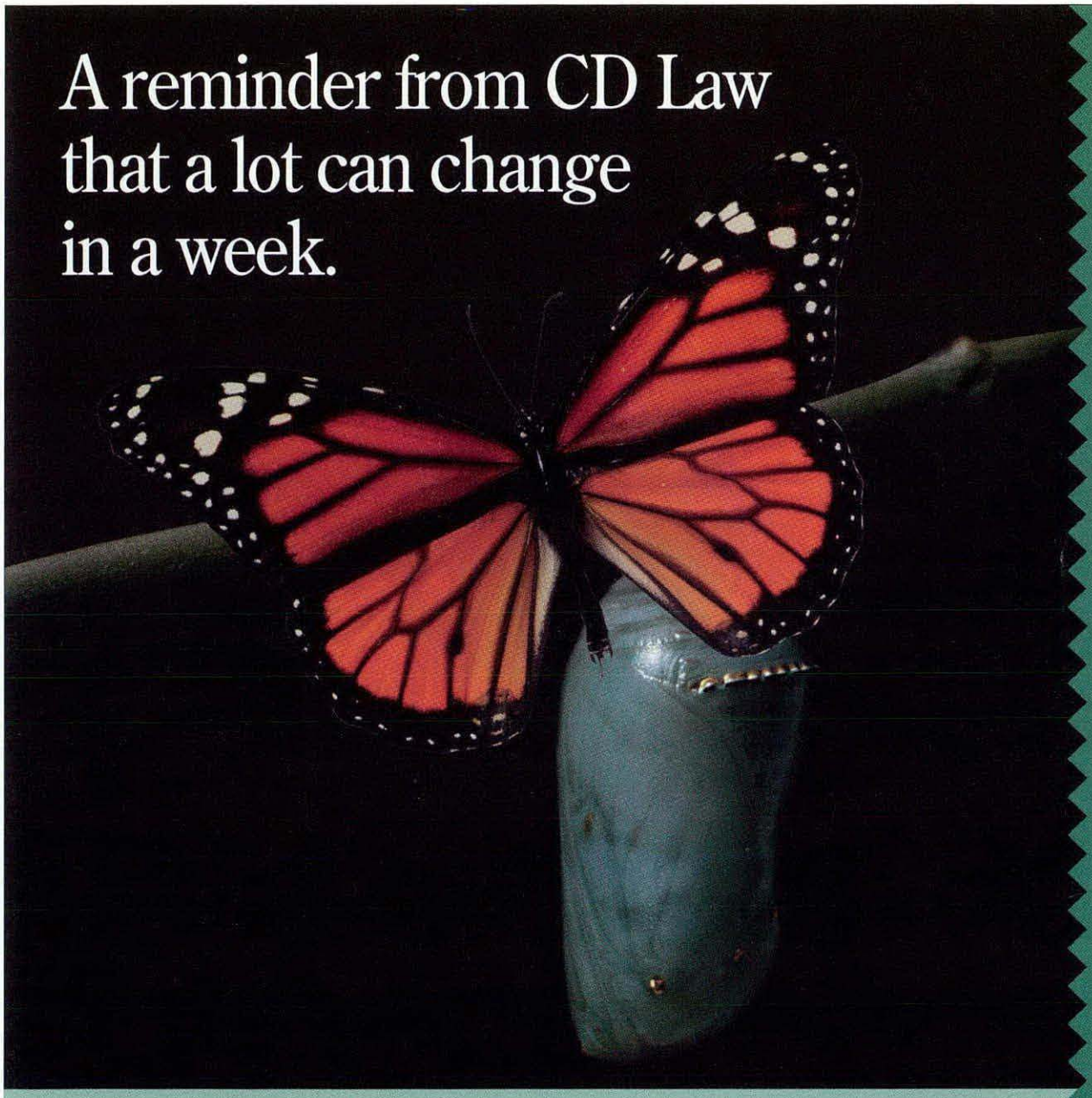

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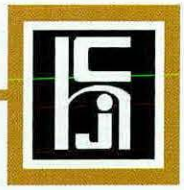

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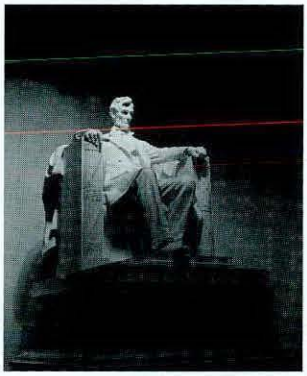
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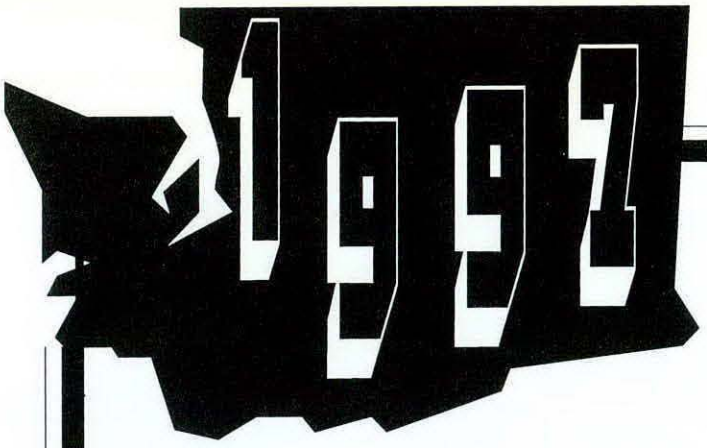

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Letters

Don't Forget the 9th Amendment

■ Editor:

Gary Willis' 10th Amendment piece harkens the new interest in states' rights and federalism. (*Seattle P.I.* 8-2-98). The theory behind states' rights as Gov. Tommy Thompson of Wisconsin says, is because states are closer to people and thus better at meeting their needs. But don't forget the 10th Amendment's next-door neighbor in the Bill of Rights, the even more radical and power-devolving 9th Amendment. If states are better than the feds at solving problems, doesn't it follow that individuals are better than states? As the 10th Amendment guarantees unmentioned rights to states, the 9th Amendment guarantees unmentioned rights to individuals.

The 9th Amendment (1791) guarantees "rights . . . retained by the people." Washington's Constitution of 1889 carries this decentralization further. Article I, Section 1 states that " governments are established . . . to . . . maintain individual rights."

The founders of the US Constitution were well versed in natural law and the ideas of British philosopher John Locke and his 1688 "Two Treatises on Government." Locke argued that rights precede government. This natural rights paradigm was the background legal, ethical and philosophical tradition of both our federal and state constitutional founders.

The 9th Amendment — and its state constitutional counterparts — are general repositories for individual rights. And note that state constitutions can go even farther than the federal constitution in protecting individual rights; federal rights are only a minimum baseline of protection.

The forgotten 9th Amendment was resurrected in the famous U.S. Supreme Court case of Griswold v. Connecticut, 381 U.S. 479 (1965), upholding the privacy right of single women to get birth control pills, even though the word "privacy" is not specifically mentioned in the US Constitution. [Griswold was one of the main cases later used to support the right to abortion upheld in Roe v. Wade, 410 US 113 (1973).]

Just as the 10th Amendment and federalism allow for states to be 50 little experiments with liberty, so should the 9th Amendment allow for individuals to be millions of little experiments with liberty. Thus James Madison's 9th Amendment of 1791 should be broadly construed today to argue for a broad freedom of lifestyle and right to be let alone by government. It should also be grounds for the specific rights to opt out of some taxes, to gay marriage, to work for less than minimum wage, to drive without a license, to take drugs, and to have sex-for-money.

Jeff E. Jared
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Macauley Article Entertaining

■ Editor:

Thank you for running William Macauley's article on "Making a Better Record," an explanation of helpful tips for lawyers from the court reporter's point

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Vernon Smith *Douglas Cowan*

of view. His exceptionally clear writing style and many humorous examples made the article not only helpful reading, but entertaining as well.

I noticed that Mr. Macauley began his reporting career in 1946, which leads me to believe that he likely practiced the mysterious and ancient art of shorthand reporting. When I was a law clerk, the reporter in our court was Vern Sorenson, who also used shorthand. Vern would sit bent over his pad, madly scribbling away as lawyers and witnesses spoke, mumbled, and interrupted each other. There was never any question but that we would get good transcripts, and Vern never once shook his hand to release the cramping that would have afflicted me if I had been in his place. I recognize that today's technology allows for many conveniences, but there was a welcome element of craftsmanship in Vern's pen-and-paper shorthand. I would wager that Mr. Macauley, too, remembers the shorthand days, but whether with nostalgia or relief for the change in technology I would not know.

In any event, I wanted to thank you for running Mr. Macauley's article. And if this was really his "first professional writing effort," as indicated in the squib at the end of the article, it was a beginning that promises (I hope) similarly excellent efforts in the future.

KEVIN D. SWAN
Seattle

WOMEN AND PERSONS OF COLOR ENTITLED TO AFFIRMATIVE ACTION PREFERENCES

Editor:

This fall, Washington voters will decide the fate of Initiative 200, which bans race- and sex-based preferences with respect to public employment, education and contracting. I-200 supporters argue that such preferences violate fundamental rights and are inconsistent with Martin Luther King's ideal of a society in which people are judged on the basis of character and not skin color.

I-200 opponents respond by claiming that banning preferences will exacerbate racial tensions and reduce number of employment and educational opportunities available to persons of color and women.

While I-200 will likely have such consequences, this argument implicitly concedes the crucial point to affirmative action opponents. A right can be outweighed by another right, but never by consequences. If race- and sex-based preferences violate fundamental rights, they are wrong no matter how good the consequences of allowing them might be.

The crucial issue, then, is whether such preferences violate a fundamental right of some kind. Affirmative-action opponents claim they do and base this claim on what they take to be two obvious principles of justice: 1) the most qualified applicant is morally entitled to the educational or employment position; and 2) discrimination is always wrong.

While these principles may seem plausible, both are false. Employers often hire

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Why Some Washington Lawyers Get Rich... While Others Struggle To Earn A Living

TRABUCO, CA - Why do some lawyers make a fortune while others struggle just to get by? The answer, according to California lawyer David Ward, has nothing to do with talent, education, hard work, or even luck. "The lawyers who make the big money are not necessarily better lawyers," Ward says. "They have simply learned how to market their services."

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

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

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

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

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

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less qualified candidates without violating anyone's rights. Suppose, for example, two white males, John and Tom, apply for a position as a cashier. Both take a number of exams, and the only difference between them is that Tom completes each transaction slightly more quickly than John. All things considered, then, Tom is the most qualified person for the job.

If the most qualified person were morally entitled to the job, then it would be wrong for the employer to hire John. But suppose that John and the employer establish a better rapport than Tom and the employer. Even if the employer will have no on-the-job contact with the successful candidate, the employer would do no wrong by hiring John instead of Tom.

This means that the most qualified applicant does not have a *right* to the job. If it is legitimate for an employer to hire a less qualified person because the employer likes that person more, it is equally legitimate to hire a less qualified woman or person of color to increase diversity in the workplace. A job candidate has no grounds to complain if a less qualified candidate is hired — as long as the chosen candidate is qualified for the position.

Indeed, employers often choose among *qualified* candidates on the basis of subjective characteristics that do not bear on job performance, and most people accept the legitimacy of such practices. In a free market economy, a person is entitled to dispose of her property as she sees fit as long as she does not cause unjustifiable harm to other persons. A job candidate cannot unilaterally acquire a right in an employer's property simply by being the best candidate.

The other principle cited by affirmative-action opponents, namely that discrimination is always wrong, fares no better. The word "discriminate" means "to make a clear distinction; distinguish; differentiate." By definition, then, *every* hiring or admission decision based on some distinction between two people involves discrimination.

Not every act of discrimination is morally objectionable. For example, it is legitimate for a law firm to hire only law school graduates with a GPA of at least 3.0, even though such a policy discriminates against graduates with less than a 3.0 GPA. The justification is to ensure that the firm employs only the most accomplished, hardest-working attorneys.

Whether an act of discrimination is wrong, then, depends on the rationale for preferring one characteristic to another. Discrimination on the basis of a belief that one race or sex is inferior to another race or sex is *always* wrong because it violates the fundamental right to equal respect.

But this does not mean that all discrimination on the basis of sex or race is wrong. It is obviously legitimate for a film director to insist that black characters be played by black performers because the rationale is to present a credible story. It is equally legitimate for a state to fund education for women, but not for men, on the harmful effects of alcohol consumption during pregnancy.

Similarly, granting a race- or sex-based preference to an otherwise qualified job

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or school applicant is legitimate. Although discrimination on the basis of sex and race stereotypes has been prohibited for 30 years, its effects are still being experienced by women and people of color to the undeserved advantage of white males.

Research shows, for example, that institutional discrimination causes women and persons of color to exclude academic success as a component of self-esteem. According to Claude M. Steele, a psychologist at Stanford University, negative stereotypes about the intellectual abilities of women and persons of color cause "academic disidentification."[1] Women and persons of color distance themselves from the fear of confirming these damaging stereotypes by rejecting academic achievement as a basis for self-evaluation.

Academic disidentification protects self-esteem from the risk of confirming stereotypes about intellectual ability, but such protection comes at a profound cost. Academic success requires an emotional commitment to academic pursuits; obviously, how much energy a person expends in pursuit of a goal depends on how much she cares about that goal.

The problem is that academic disidentification withdraws emotional investment from academic pursuits. As a result, women and persons of color are far more likely than white males to underperform academically. Indeed, SAT and ACT test scores consistently overpredict the performance of women and persons of color in areas implicated by negative stereotypes.

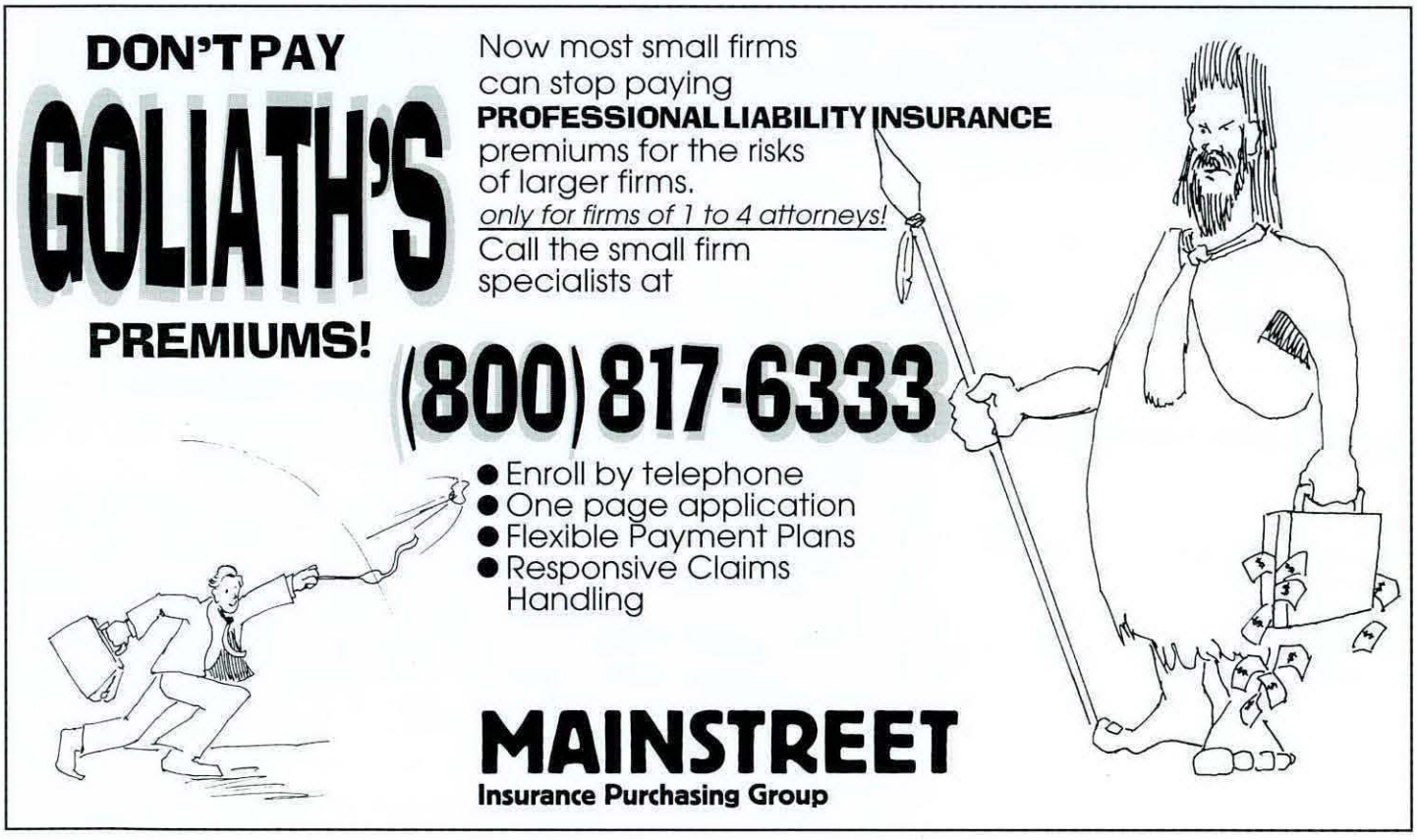
At one prestigious university, for example, black students with a C+ average had a mean ACT score at the 98th percentile, while white students with a C+ average had a mean ACT score at only the 34th percentile.[2] While the gap in mathematical performance between boys and girls is closing at the high-school level, women consistently underperform in advanced mathematics at the college level.

Clearly, it is not some initial skill deficit that explains this underperformance because the students at each test-score level have comparable skills. What explains the lower performance is widespread academic disidentification among women and persons of color that is caused by the racist and sexist stereotypes that support institutional discrimination.

Of course, many women and persons of color successfully resist the pressure to disidentify and go on to achieve at a level that is beyond the reach of most white males. But it is also true that every successful woman and person of color must expend energy to overcome institutional and psychological obstacles that white males do not have to confront.

As a result of institutional discrimination, it is considerably more difficult for a woman or person of color to achieve at every level of academic success than it is for a white male. What this means, then, is that every white male has an undeserved competitive advantage, or head start, over every woman and every person of color.

The purpose of affirmative action is neither punishment nor restitution, both of which would be illegitimate in the absence of *individual fault* on the part of



the affected white male. Rather, the purpose of affirmative action is to negate the advantages that have unfairly accrued to white males as a result of racism and sexism. It is unfair to allow a person to profit from an undeserved advantage — even if that person is not culpable for such an advantage. And when it is society that confers these unfair advantages on white males, society is morally obligated to negate those advantages.

The justification for at least some veteran preferences is based on similar reasoning. Notwithstanding recruitment propaganda, a person who serves in the military must devote considerable energy to learning skills that have little or no value in the civilian workplace. For this reason, someone who has never served in the military has a competitive advantage in the form of a head start over someone who has because the former is better able to devote her energy to acquiring commercially valuable skills.

Of course, many people choose to enlist and thus willingly assume whatever competitive disadvantage attends military service; in such cases, one might argue society has no obligation to level the playing field. But when it is society that requires the person to serve in the military, as it did during the draft era, society has a *moral obligation* to negate the undeserved competitive advantage that accrues to civilians.

Likewise, society has a moral obligation to negate the advantages that have unfairly accrued to white males from institutional discrimination. If, as seems reasonable, affirmative action is obligatory in the case of conscripted veterans, then it is also obligatory in the case of persons of color and women. Affirmative action in such cases is not merely permissible; it is *obligatory*.

I-200 supporters, then, are wrong in thinking race- and sex-based preferences violate a fundamental right. On the contrary, society is morally obligated to negate the competitive advantages that have unfairly accrued to white males as a result of institutional racism and sexism.

KENNETH EINAR HIMMA
Seattle

NOTES

[1] Steele, Claude M., "A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance," *American Psychologist*, vol. 52, no. 6, 1997, 613-629.

[2] See Steele, Claude M., "Race and the Schooling of Black Americans," *The Atlantic Monthly*, April 1992, 74.

Readers are invited to submit letters of reasonable length to the editor. They should be typed on letterhead and signed. Due date is the 15th of the month for the second issue following. The editor reserves the right to select excerpts for publication or edit them as may be appropriate. Signatures in excess of three names will be printed only in exceptional circumstances, at the sole discretion of the editor.

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One look at Wayne Blair's résumé and you know he's a Bar Association workhorse. Serving as President of the WSBA Board of Governors is just the capper to a volunteer career which has seen Wayne serving on an array of committees, boards, task forces and commissions. With a self-deprecating sense of humor and a consensus-building direct style of leadership, Wayne comes to the presidency with a desire to enhance the bar association's role as a professional organization. Wayne sees access to justice issues and the practice of law by nonlawyers as two important issues now facing bar members. He hopes to play a constructive role in the bar association's complex and shifting relationship with the state Supreme Court. As a believer in "due process" rather than "do process," Wayne is a strong proponent of Board decisions being made only after membership information and comment, open debate and thoughtful review.

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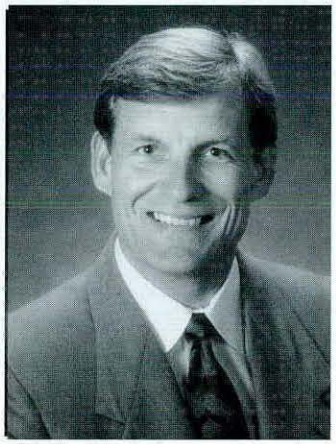
. . . and 4 New Governors

James E. Deno

Second District

Deno, admitted to the Bar in 1965, has a general practice in Everett, where he has practiced since 1969. He has represented both plaintiffs and defendants in personal injury cases, trying numerous cases in Snohomish, Skagit and Whatcom counties. He has served in various positions with the Snohomish County Bar Association and was president in 1988-89. He also is a member of the Washington State Trial Lawyers' Association.



Daryl L. Graves

Ninth District

A 1977 cum laude graduate of the University of Puget Sound School of Law, Graves is a partner in the Tacoma firm of Graves & Treyz, PLLC. His practice emphasizes plaintiffs' personal injury, medical and dental negligence and criminal defense. He has been Secretary-Treasurer and President of the Tacoma-Pierce County Bar Association, and is a former adjunct professor of law at the University of Puget Sound School of Law. He is a frequent CLE speaker and is a member of the Tacoma-Pierce County Bar Association, the Washington Association of Criminal Defense Laywers, and an Eagle Member of the Washington State Trial Lawyers' Association.

Lindsay T. Thompson

Seventh District

Thompson, a graduate of St. Andrews Presbyterian College, Oxford University and Lewis & Clark Law School, is a former editor of the *Bar News*, where he covered the Board of Governors for eight years. He also was a contributing editor to *Trial News* in 1995-96 and is a current writer for *Washington Law & Politics*. He is a member of the ABA, WSTLA, LEGALS and KCBA, is a Fellow of the American Bar Foundation, and is treasurer of Washington State BarPac. He is a shareholder in Junker & Thompson, P.C., in Seattle, where he practices customs and international trade law, civil trials and appeals, and business and commercial law.

Stephen T. Osborne

Fourth District

A native of the Tri-Cities, Osborne graduated from Gonzaga Law School in 1973. In 1977, he was a founding partner of the firm of Raekes, Rettig & Osborne, and became a member of the Judge Advocate General's Corps. A member of the U.S. Army Reserve for 29 years (he holds the rank of lieutenant colonel), he was called to active duty during Operation Desert Storm, where he served as Officer in Charge of the legal office at King Khalid Military City in Saudi Arabia. Steve has also served two terms on the Editorial Advisory Board for the *Bar News* and two terms on the Legal Service to the Military Committee.

Spokane attorney John T. Powers, Jr., was recently appointed to serve as governor of the Fifth District, taking over for President-elect Richard Eymann.

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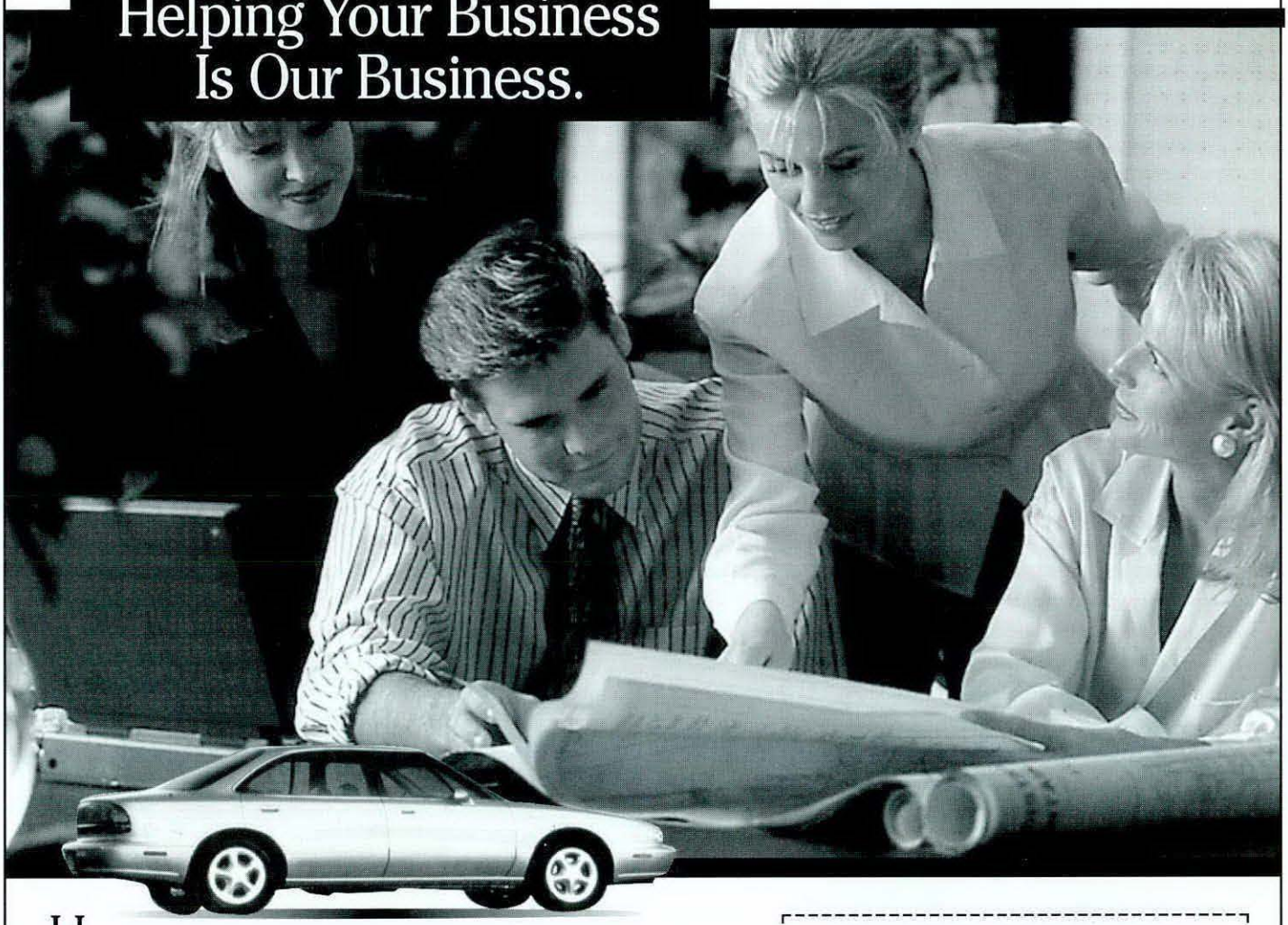

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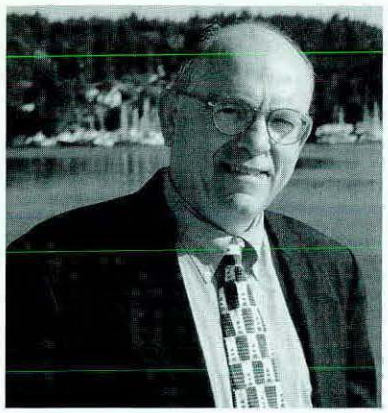

M. Wayne Blair
President

PRESIDENT'S CORNER

LAWYERS SHOULD OPPOSE INITIATIVE 200!

I am honored to serve as the 108th president of the Washington State Bar Association. I look forward to working with the membership, the committees, the sections, Executive Director Jan Michels and the WSBA staff, and the Board of Governors: Terry Lee of Vancouver, Don Powell of Tacoma, Marijean Moschetto of Bellevue, Mary Alice Theiler of Seattle, Walt Krueger of Kirkland, Dick Eymann of Spokane, Dick Manning of Seattle, Jim Deno of Everett, Steve Osborne of Kennewick, Lindsay Thompson of Seattle, Daryl Graves of Tacoma, and John Powers, Jr., of Spokane.

Many thanks to Mary Fairhurst for her strong leadership as the 107th WSBA President, and for her five outstanding years of continuous service on the Board of Governors.

One of my responsibilities as president is to draw attention to important issues facing the legal profession, even when, or perhaps especially when, those topics are controversial. Initiative 200 is an important issue facing all Washington voters this November. Speaking personally, I urge all lawyers to publicly oppose and vote against this initiative.

One of my responsibilities as president is to draw attention to important issues facing the legal profession, even when, or perhaps especially when, those topics are controversial.

The ballot title of Initiative 200 simply provides: "The state shall not discriminate against — or grant preferential treatment to — any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting."

Initiative 200 is similar to Proposition 209, which was passed by California voters in November 1996. As with Proposition 209, the ballot title is misleading, and should read: "All affirmative action programs in public employment, public education or public contracting shall be prohibited." This is the goal of the initiative's sponsors and will be the effect if Initiative 200 passes.

Elway Research of Seattle polled 400 voters from June 19-21 for the *Seattle Times*. The poll showed that 64 percent would vote for the initiative based upon the ballot title. When those voters were informed that the initiative would effectively end affirmative action for women and minorities in state and local government, public education and college admissions, only 49 percent indicated they would vote for it.

If Initiative 200 passes, what will be its effect on the legal profession? Currently the WSBA has approximately 20,800 active lawyers. Of those, approximately 30 percent are women and 7 percent are lawyers of color. Because the WSBA does not maintain any precise statistics, these numbers are approximate. While these percentages are growing, they are far from the number of women (slightly over 50 percent) and people of color (almost 40 percent) in the population at large.

When I was a student at the University of Washington School of Law from 1965-68, there were very few women or students of color. The class was basically white and male. Of this year's graduating class of the University of Washington School of Law, almost half were women and one-third were students of color. The rise in the number of women and minorities in the legal profession is, of course, attributable to the increasing percentages of women and minorities in our law schools.

Our country is now engaged in a great debate as to whether the affirmative action programs which began in the 1960s should be ended. In the last few years, we have seen affirmative action programs abolished by the courts in Texas, and by the voters in California. In May of this year, an effort before Congress to prohibit affirmative action admission procedures in public colleges and universities which receive federal funding failed, but the debate continues.

Following passage of Proposition 209 in California, the 1997 freshman class at each public university in California experienced steep drops in the admissions of black and Hispanic applicants. Public law schools in California have experienced even more significant declines in the admission of minorities.

Our profession in the long term must reflect the diversity of the population. Dean Roland L. Hjorth, in his address to the 1998 University of Washington School of Law graduating class, said:

"Diversity in the legal profession is . . . important to the rule of law itself.

Lawyers shape the law, and they will shape it better

if the legal profession reflects the diversity of our society. The rule of law depends upon respect for the law, and that respect will surely run deeper if the legal profession is open to all groups in our richly diverse society. America has always been a society based on law and forged by lawyers. Law and lawyers have been the principal means by which we have been able to mold one nation out of a people whose principal characteristic has been diversity. If any groups are excluded from our profession, we will endanger our ability to mold unity out of diversity."

At its meeting in January 1998, the Board of Governors took the unusual step of voting on the public record to oppose Initiative 200. The resolution of the Board was based upon the need for more diversity in the legal profession and the adverse impact Initiative 200 would have on the admission and enrollment of minorities in the public law schools.

Julian Bond, a black legislator from Georgia in the 1960s and a nationally known civil rights leader who recently assumed the position of Chair of the NAACP, addressed this summer's convention of the Washington State Trial Lawyers' Association. In his view, Initiative 200 is simply wrong. He believes that affirmative action programs need to continue to overcome the adverse economic and social impact of past discrimination on blacks:

> "In America today, compared with the white child, a black child is one and one-half times more likely to grow up in a family whose head did not finish high school, two times as likely to be born to a teenage mother, two and one-half times more likely to be born at low birth weight, three times more likely to live in a single-parent home, four times more likely to have a mother who had no prenatal care, four and one-half times as likely to live with neither parent, five times as likely to depend solely on a mother's earnings, and nine times as likely to be a victim of homicide as a teenager or young adult. . ."

While affirmative action programs over the last 30 years may have been imperfect, they clearly have been very effective in expanding the opportunities for women and minorities in the population at large, the legal profession and our public law schools. Has there been sufficient progress? Certainly not. The "playing field" is still not level; the opportunities for people of color and women are not the same as for white males. The need for affirmative action continues. Nearly all those questioned in the previously mentioned *Seattle Times* poll agreed that discrimination still exists; 93 percent believed that racial discrimination against minorities still exists, and 80 percent agree that discrimination against women still exists. Sadly, we still have a long way to go to achieve the goals of affirmative action programs.

The Board of Governors will not be taking any action collectively to oppose this measure. It is not appropriate for the Board to spend your licensing fees in opposition to this initiative. While the decision of the Board of Governors was nearly unanimous (9-1), any further action by members of the Board will continue only on an individual basis.

Each of us as lawyers must consider the adverse impact passage of this initiative would have on the legal community. We simply cannot return to the days when this profession was mostly white and male. Please voice loudly and often your opposition to Initiative 200. Despite popular criticism of the legal profession, people still listen to what thoughtful lawyers say.

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Sherrie Bennett
Editor

The Good News/Bad News of Small-town Lawyering

EDITOR'S PAGE

Some recent downtime spent in the small Washington coast town where I used to practice law has me reminiscing about the pleasures of small-town living. Long cruises on a golden bay, with the geese flying overhead signaling the approach of winter. Stomping through the woods in delicious early-morning anticipation of that favorite fishing hole. Wondering which of the just-caught salmon to cook first....

My remembrances of sylvan days and silvery nights also bring back to the top of my brain some of the finer details of the reality of practicing law in a rural environment. So here's the good news and the bad news of what was for me the intriguing experience of small-town lawyering:

1. **Everyone knows your name**. It's impossible to be anonymous in a small town. The upside is that no one cares if you're purple-and-pink polka-dotted, because they have faith that you will do as good a job for them as you did for their neighbor or brother-in-law back last year. The downside (one which became painfully clear to me as a municipal prosecutor) is that you are just as clearly and personally identified as that "so-and-so" who wrongfully accused sweet Aunt Mabel (of the largest clan in town) of having a few too many drinks and plowing her car into the neighborhood gas pumps. Everyone knows Aunt Mabel is perfectly harmless!

2. **You run into your clients everywhere**. On a positive note, the client you run into in the "beer and wine" section of the local grocery has an extra opportunity to tell you all about that fascinating piece of potential evidence she just discovered hidden behind her refrigerator. On a negative note, it's hard to explain to your client why you haven't gotten to his case when he just watched you spend three hours retrieving your crab pots from what you thought was your secret spot on the bay.

3. **News spreads like fresh manure**. Everyone in a small town immediately knows when something bad has happened to someone else. The upside is that when you or one of your clients has a problem, lots of people are there to care and help you get through it. The bad news is that things you'd rather remain confidential, like what your spouse was doing when you weren't around and the personal hygiene products you purchased at the pharmacy last week, are hot topics of conversation at Rotary meetings.

4. **Lawyers change hats regularly**. When there are only 10 lawyers in the entire county and a limited number of clients, bar members usually take their turn at being prosecutor, judge, county commissioner, etc. The good news is that you get a chance to do things you'd never thought of doing before. The bad news is that you can find yourself stuck doing things you really don't enjoy all that much, and are marginally qualified for.

5. **You get very familiar with all your opposing counsel**. You learn about all the other local lawyers' techniques and courtroom style, so the surprises become less frequent with time. And everyone stands by their word, because you know that you'll be seeing opposing counsel on another case next week and what goes around comes around (an unofficial local court rule known as the "goose and gander" rule). But you know what they say about familiarity breeding contempt....

6. **Slow-paced it ain't**. I am always surprised when I hear urban lawyers pining away for the "slow pace" of small-town lawyering, because I found it very hard work. In some ways, the familiarities bring a more intense practice, without the luxury of lots of partners to share overhead expenses with. But the good news is that you spend so much time in the courtroom that you forever lose any fear you might have had of litigation.

So on days like today, when the air is turning cooler and the geese are starting to fly over the bay, I raise my fishing pole in a salute to rural lawyers across the state. May your own particular brand of country pleasures outshine the perils of small-town practice.

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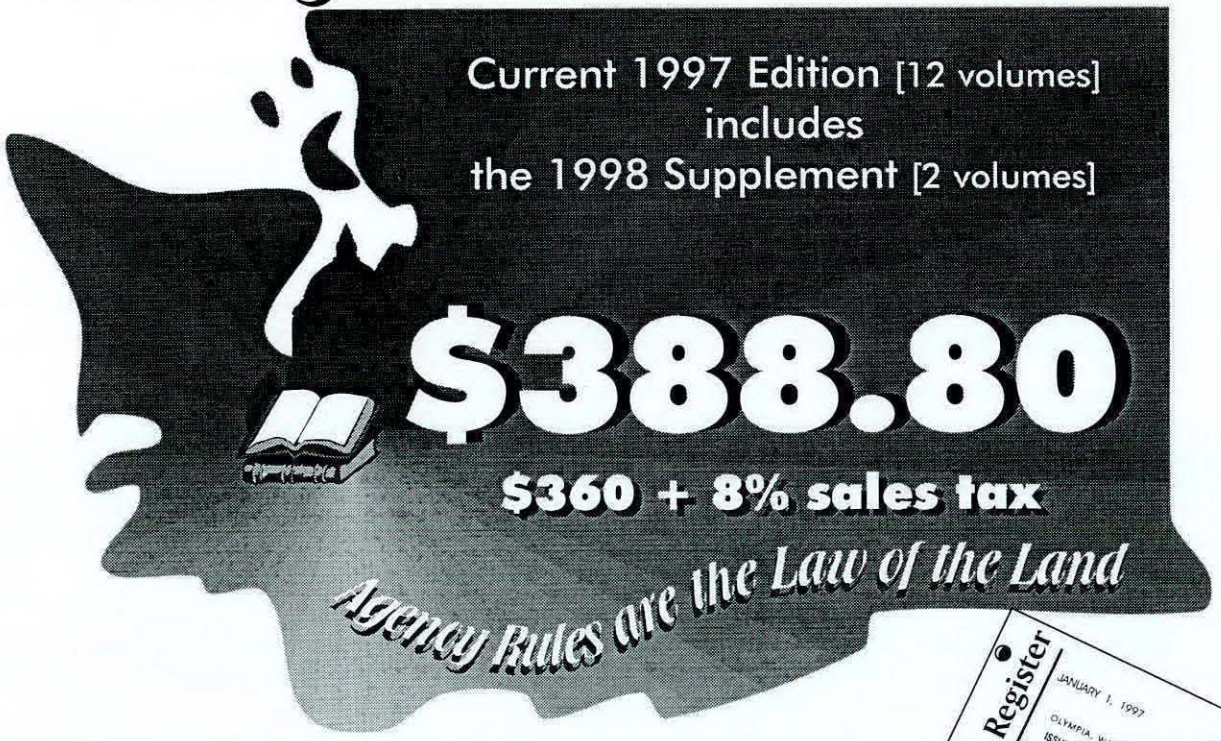

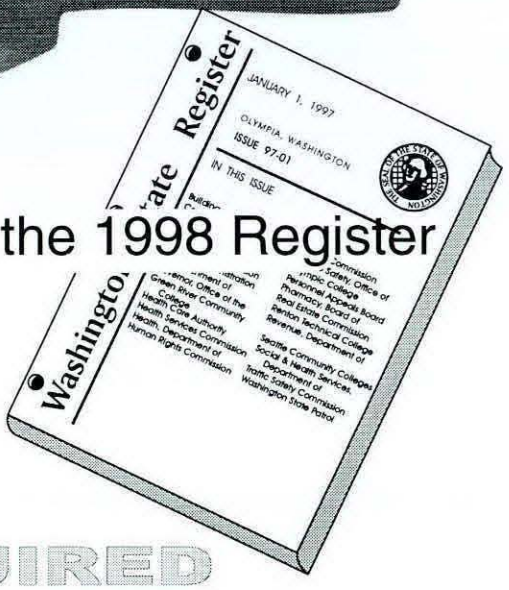

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Jan Michels
Executive Director

Now, Down to Work

EXEC'S REPORT

In the months since I joined WSBA I have been accumulating input from the Board of Governors, members, sections, committees, local and specialty bars, law-related organizations, the judiciary, the press, and the public. I thank you all for your willingness to share your opinions and ideas. In past *Bar News* columns, from "listening" to "C-words" to my scope of the horizon, I have described to you my developing perceptions and observations. Now it's down to the work of making the alterations and adjustments to your administrative office that I feel will serve members and the public better. I am enthused and energized about the potential of these programs; staff is supportive, and I continue to subject these programs to your review. I gladly accept your comments and ideas.

1. WSBA needs more people willing to be leaders, committee members and delegates; these people must reflect our wonderful diversity of practice, geography, race, perspective and philosophy. To address this need WSBA will implement a "Bar Leadership Program" which will increase support and coordination to YLD, committees, sections, and local and specialty bar associations. This program will include a monthly news bulletin of hot information and happenings, a master calendar of events and programs across specialized interests, a web page about volunteer opportunities available to members, rotating reports about what the various groups are doing, and an appreciation program to thank those who have contributed their time and energy to Bar activities. Better use of existing resources will accomplish these initiatives.

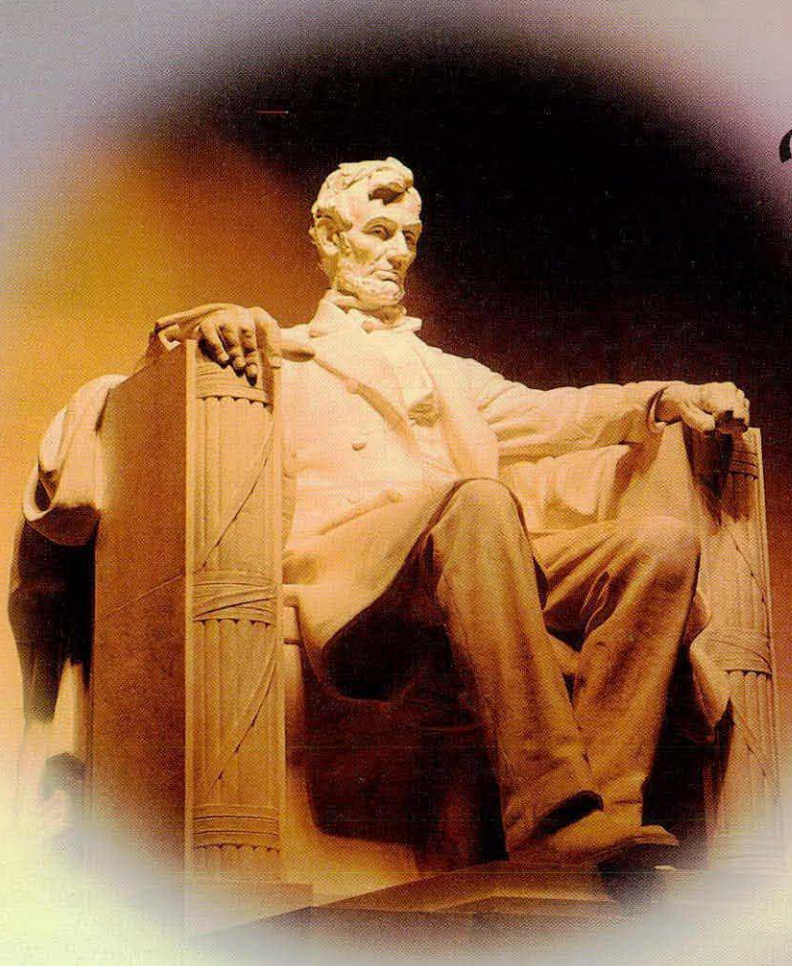
2. WSBA needs strong and effective mandatory services. To meet this need I have begun a management review of discipline, and later in the year will review MCLE reporting and admissions/licensing. The review is directed at assuring members, the public and the court that these programs operate efficiently and effectively. My initial assessment is that these programs need to maximize technology support, better communicate with members, and simplify and remove redundancy in their procedures. This review and recommendations will be presented to the BOG in late 1998.

3. WSBA needs a strong advocacy program for its members and their profession. Here, my work plan is to implement two different programs directed at increasing respect for the law and its advocates. One track will include public education about the law, a response to criticism of judges, and gathering and publishing information about the many services and programs offered by lawyers. The second track will offer practical assistance to lawyers in their day-to-day business of getting and keeping clients, keeping up with technology, managing the business side of their practice, and leading a balanced life.

4. WSBA needs to extol members' commonalities and professionalism — respect for the rule of law and commitment to helping others. To harness the energy of this common commitment, WSBA needs to enfranchise all its members, including government lawyers, out-of-state and military lawyers, and the many attorneys in alternative practice. Work in this area will include more immediate information on sharing, use of technology for interactive feedback, and an active outreach program. Should there be adequate support for a "Celebration 2000," supporting this event will be part of this initiative.

5. WSBA needs to enter the new age of "Internet time" with readily available information, news bytes, and matrix management (a euphemism for "use every human resource in whatever way they can add to the end product"). The world is changing around us, and we need to accommodate an increasingly electronic orientation and the many attributes of a new age. The average age of active members is now 42; without losing the value of our traditions and history we must accommodate the changing world. Under this work item you will see increasing use of the Internet and website; WSBA will become a resource for lawyers to get and use relevant information. Expressions of this work item include WSBA listservs, educational materials, new-style CLEs and a revamped communications program.

These programs represent the new directions I believe you have asked me for. Can you buy in? Have I heard you? If you cringe, tell me why. If you have another point of view, explain it to me. This plan is not "done" — it is a dynamic idea, which has room for new ideas and input, but it is an expression of what I believe WSBA needs and what I will work on in the near future. For the longer range future, WSBA staff and I are participating with the WSBA President, Board of Governors and the Long-range Planning Committee in defining the WSBA in the next millennium.



The Power of Truth

An Attorney's Guide to Winning Jury Trials in a Dishonest World

"There is a vague popular belief that lawyers are necessarily dishonest . . . . Let no young man choosing the law for a calling for a moment yield to the popular belief — resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer."

Abraham Lincoln

BY STEPHEN D. EASTON

They do not like us. The term "they," of course, includes everybody but us. Even our own relatives do not like lawyers. They also do not trust us. They believe we are willing to deceive, spin, manipulate, cover up, intimidate, distort, and just flat out lie to enrich ourselves and benefit our clients.

The unfortunate reality is that "they" are people who sit on juries. As a result, every time you walk into a courtroom on the first day of trial, you are facing a group of people who question your motives and assume that they cannot believe a word you say.

This belief is both common and strong. In a recent study, a jury research firm asked potential jurors if they thought an attorney would lie in court to promote his cause. Sixty-two percent of those potential jurors believed it was likely that an attorney would lie to them.[1]

Much as we hate to admit it, they are often right. Many trial attorneys seem to believe that their duty to zealously represent their clients requires them to be aggressive, fervent, ruthless, and, if necessary, tricky and deceitful. This belief causes them to stretch their otherwise strong points beyond believability, vigorously object to every item of evidence that might hurt them, and fight about every issue, no matter how trivial.

"Any profession that suffers from so foul a reputation must, in some way, provoke it."

Alan Dershowitz

When jurors see an attorney pursuing this "win at any cost" strategy, they correctly assume the attorney will not let the truth stand in the way of victory. If your opponent engages in these all too common tactics, she is giving you a wonderful opportunity to gain a significant advantage over her.

A trial, after all, is a credibility contest. Look at a trial from a juror's perspective: The two lawyers are trying to establish diametrically opposed propositions. "He is guilty" versus "He is not guilty," or "They should pay" versus "It is not our fault." At least one of the lawyers must be lying, right? Maybe both of them. You know how those lawyers are.

If you can establish that you are the one attorney in the room who should be trusted, it follows that your opponent cannot be trusted. If the jurors believe in you, you will win almost every time, even if the emotional appeal of the case favors your opponent.

Of course, there is no magic wand of credibility that you can simply wave at the start of trial to make yourself believable to jurors. Instead, you have to build credibility slowly, one small but important step at a time. Several of the techniques needed to establish your credibility are somewhat unpleasant, especially when your client is sitting in the chair next to yours. Some seem counter-intuitive, because they require "admissions against interest." Furthermore, these techniques require constant attention and sustained effort, because one misstep can irreversibly destroy the credibility you have worked to establish.

Always Tell The Truth

The first rule of establishing credibility is obvious and easy to state: Never tell a lie. Surprisingly, this rule is rarely followed. During most trials, attorneys tell several lies.

Think about all the untrue statements you have heard from lawyers during trial. Many piously proclaim that "voir dire is just a process attorneys use to pick a fair jury." Whom are we kidding? No attorney really wants a "fair" jury. Do we really think jurors are not smart enough to figure out that we are trying to get a jury that is as biased toward our side of the case as possible? Other classic "little white lies" include: "I only have a few questions for this witness, Your Honor"; "I hate to interrupt (but I have to object)"; and "I am not trying to confuse you with this question, Mr. Witness."

Many would argue that these are harmless little mistruths that are no different than those common in ordinary social situations (like "that was a wonderful meal, Mrs. Mother-in-Law"). "Many" are wrong. You are not in an ordinary social situation. You are in a trial before a group of people who are predisposed to believe that you are willing to deceive them simply because you are a lawyer. Why give them any evidence to support this belief?

You cannot afford to lie about anything. Resolve that every statement that comes from your lips during trial will be completely accurate, even when the truth causes you some temporary discomfort.

When faced with a situation that seems to call for a "little white lie" during trial, always consider the option, vastly underused by attorneys, of saying nothing. If this option is not available, tell the truth.

"The most powerful weapon we have — indeed the most powerful weapon that any people can have — is truth. If we ever find ourselves in a position where we cannot tell the truth, or where we feel that the telling will injure us, we will have sacrificed that most powerful weapon."

Dwight Eisenhower

Prepare, Prepare, Prepare

Honesty alone is not credibility. A perfectly honest person who knows little or nothing about a subject has little credibility about that subject. Credibility requires equal parts of both honesty and knowledge.

"Integrity without knowledge is weak and useless, and knowledge without integrity is dangerous and dreadful."

Samuel Johnson

Before every trial, you should vow to know more about the case than anyone else in the courtroom, including the parties, the expert witnesses, the judge and, most important, your opponent. Through your opening statement, examination of witnesses, and closing argument, you need to show the jurors that you are the one authoritative source they can rely upon to lead them to a just verdict.

Mastering the facts, the technical concepts, and the legal issues in a case does not come easily. Before the trial begins, you should prepare, prepare, prepare! There is no shortcut. Every statement you make during trial must be correct, and this can happen only when your preparation has been exhaustive. Nothing says "this lawyer cannot be believed" like a factual mistake.

If you know the case backwards and forwards, you can demonstrate your knowledge to the jurors as the trial progresses without ever being obnoxious. If you do, the jurors will believe you when you tell them, in final argument, that a verdict against your client would be an injustice.

"Ya Gotta Believe"

You cannot be an effective advocate if you do not believe, in your gut, that your

client's position is just, correct and fair. If you do not believe that a verdict against your client would be a manifest injustice, you are in serious trouble.

This does not mean you should believe that your client is perfect or that he made no mistakes. But if you do not believe your client should and must win the trial, you should find someone else to try the case or urge your client to settle. The jurors need to see and feel the strength of your conviction.

"I have heard an experienced counsellor say that he never feared the effect upon a jury of a lawyer who does not believe in his heart that his client ought to have a verdict. If he does not believe it, his unbelief will appear to the jury, despite all his protestations, and will become their unbelief."

Ralph Waldo Emerson

Admit The Weaknesses In Your Case

Despite the strength of your conviction, you have to admit the weaknesses of your case. No case that reaches a jury is perfect. If your opponent did not have something to talk about, you would not be in trial.

The best way to defuse your opponent's strengths is simply to admit them. Once you concede a point, your opponent looks silly if she continues to press it. At the same time, your willingness to admit the warts in your case shows the jurors they can trust your judgment about the real issues in the case.

Fight Battles You Can Win

The most important battle in any trial is the battle over where the war will be fought. Never let your opponent define the terms of the debate. Focus the jurors' attention on an issue you can win, and win decisively.

"Don't take the wrong side of an argument just because your opponent has taken the right side."

Baltasar Gracián

In any lawsuit, there are several potential issues. In a civil or criminal suit, there are usually about five elements of a *prima facie* case. Each of those five elements presents a possible battleground at trial. Pick the best of these issues, and fight hard. Offer no resistance on other issues. By conceding these other issues and focusing on the issue you have chosen, you are increasing your credibility in the eyes of the jurors. You are also sending a direct message identifying the real issue in the trial.

This can be a tough rule to follow. Attorneys are proud of their willingness to fight about any issue. Many a trial attorney has fallen into the trap of taking on the opponent on issues that cannot be won. Unfortunately, once you engage the battle on an issue, it is impossible to withdraw gracefully. When you tell the jurors, in closing argument, that the issue is really not critical, you are inviting your opponent to ask the jurors why you have spent the last week fighting over this issue.

If your opponent makes the mistake of fighting on an issue she should have conceded, take full advantage of this mistake! Present the overwhelming evidence in your favor on this issue. Emphasize it in your final argument.

Be Organized (Or At Least Look Organized)

Think of the many presentations you have heard over the course of your education and career. As a rule, you have tended to believe those who make organized presentations more than those who are disorganized. Organization implies that the presenter has thought through the material, discarded some initially appealing points after further consideration, and come to a well-reasoned conclusion.

Strive to be organized, if possible. For some reason, though, many trial attorneys are simply not organized people. There is something about the personalities of those of us who are attracted to trial work that seems to be inconsistent with neatness and organization. If you are not organized, recognize this shortcoming. Turn the responsibility for keeping the case organized over to your second chair or your legal assistant.

Instruct Every Witness To Tell The Truth

Every time you meet with a witness to prepare for testimony, you should beat one phrase into the witness's head: Tell the truth! You should say this so often that the witness thinks you have a screw loose. About this point, you do! You should show the witness that you mean this, by demanding truthful, not tricky, answers to questions that you cover while preparing him for his testimony.

Your case will be presented largely through witnesses. If the witnesses are not credible, you have no chance of establishing your own credibility. Jurors see right through witnesses who are trying to help the case with cute, incomplete or otherwise tricky answers. Very few people are good at lying or attempting to deceive through incomplete answers. Tell your witnesses that, even if they are among the very few people who can lie with a straight face, your own reaction will probably give them away!

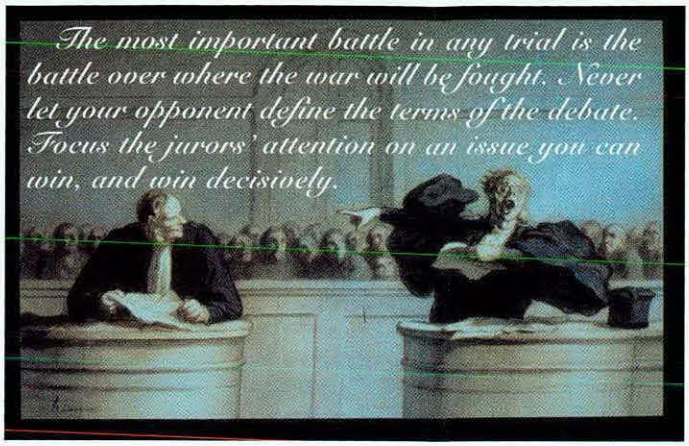
Help your witnesses establish confidence through your insistence on telling the truth. Let them know that telling the truth will not get them into trouble, regardless of the antics of opposing counsel.

Dress Appropriately And Neatly

Like it or not, Americans make many judgments based upon appearance. Dress neatly, in a manner appropriate with the fact that you are trying a case in a court

of law.

Although it is important not to overdress and thereby distance yourself from the jurors, underdressing is also dangerous because it is a type of lie. If you are representing a large corporation or a well-known physician, wearing a tattered sport coat instead of a suit will look phony.



Be Likeable

Jurors, like all other human beings, tend to favor the people they like. Consequently, to be effective in the courtroom, you must be likeable.

In most cases, you will not be liked at the start of trial. You are, after all, a lawyer. Furthermore, you may be representing a person accused of a monstrous crime or a "deep pocketed" corporation sued by a horribly injured, fired or allegedly defamed plaintiff.

Work to win over the jurors. Keep the case interesting. Be aware that the trial is a tremendous imposition upon the time of the jurors, and work to get the case to them as soon as possible. If you repeat questions, beat dead horses, and otherwise bore the jurors, they will stop listening to you. If you keep the evidence and your arguments interesting, the jurors will pay more attention to you. Do your best to keep the juror's attention, by using a variety of types of evidence, varying your speaking style, and emphasizing the important parts of the case.

On occasion, you will be forced to present relatively boring material in order to meet your burden of proof on an element of your case. If this problem cannot be avoided, warn the jurors about this portion of your evidence in your opening statement and let them know you have no choice. If possible, without being blatant, blame your opponent for failing to stipulate to these matters.

Keep your ego hidden. Be courteous to the judge, to the court personnel, to your staff, and to your opponents. Show the jurors your personality. Use self-deprecating humor (while being careful not to overdo it).

Be yourself! If you cannot be yourself and be likeable, practice in an area that does not require a winning personality. You will almost certainly make more money than you would as a trial attorney.

Hire Experts With Integrity

In many cases, the most important witnesses are experts. More than any other witnesses, experts are a reflection of you. After all, you choose them.

Unfortunately, the world of experts is inhabited by many professional witnesses who are willing to hire themselves out to say almost whatever an attorney wants them to say. Never hire these experts. Instead, hire actual experts who have the integrity to tell you if your case does not have merit.

Do Not Bluff

The heat of battle causes lawyers to do more than tell little white lies. When we are pressed into a corner during trial, we are tempted to make statements that we may or may not be able to back up. Examples include: "I am sure I can find plenty of case law supporting my position on this point, Your Honor," and "It is a well known scientific principle that. . . ."

Resist the temptation to make any statement you are not sure you can back up. If you make such a statement, your opponent will certainly check it out and will gladly make you eat your words if you turn out to be wrong. Unfortunately, you will be eating more than just your words. You will also be eating up any credibility you had gained to that point in the trial.

Avoid Sending The Wrong Signals Off The Record

From the time you head toward the courtroom on the first day of trial until the verdict is read, jurors will be watching you. Be careful about the messages you send.

The jurors will watch how you interact with other people during the trial. Treat the judge, the witnesses, and the other members of your trial team with courtesy and respect.

If possible, do not prepare your witnesses in the courthouse, where the jurors might see you. There is nothing wrong with preparing your witnesses. It might be malpractice not to prepare them. Nonetheless, jurors might get the wrong impression if they see you doing it. Remember that they are inherently suspicious of lawyers. It is a short logical leap for a juror to conclude that you are putting words into the mouth of a witness.

Forget About False Flattery

Somewhere the notion got started that trial attorneys are required to tell jurors that their service on the jury is a sacrifice of untold proportions and that the attorneys and their clients will be eternally grateful to them for their attention. Jurors recognize this obviously overstated praise for what it is: A phony attempt to generate bias in favor of the flatterer. Be courteous and respectful, but forget the apple polishing. A brief "thank you for your attention" during final argument is sufficient.

Avoid Asking Your Witnesses Leading Questions

Despite the evidentiary doctrine that theoretically limits the practice, you can generally ask leading questions if you so desire. Except as a timesaving device on preliminary matters such as a witness's background, though, you should avoid using leading questions with your witnesses.

Jurors are impressed by a witness who responds to an open-ended question by reciting relevant details. Detail is often interpreted as accuracy. When the detail is recited in the question by the attorney and simply adopted by the witness with a "yes" answer, though, jurors assume the attorney is putting words in the witness's mouth. Prepare your witness to answer open-ended questions.

Be Passionate

Honest emotion is a very powerful force in the courtroom. (Fake emotion, on the other hand, always backfires.)

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ances or inaction.

After a few additional meetings of these parties, a mutually agreed-upon plan of action was developed. The plan included a plant-funded air study to identify odors and quantify concentrations of chemicals present that could cause adverse health effects. The risk assessment firm was tasked with performing this study under joint direction of the plant managers and the CAB. Through the CAB, citizens participated in developing the experimental design and sampling plan for the air study, thereby ensuring that their interests would be addressed. For instance, the CAB was given "go/no go" authority in determining when to perform air sampling. This element was critical to adequately addressing community concerns because off-site odors were detected only periodically. Granting this authority to the CAB, however, meant that the plant might incur excess fees due to the possibility that mobilization of sampling efforts would be required with relatively short notice.

Although most citizens were initially distrustful of the plant, many attended the meetings and some donated time. Increasingly, the open meetings and commitment by plant managers to respond to community requests resulted in a decreased number of hostile and distrustful citizens. A shared belief that the plant was working to address community complaints and possibly solve an emissions problem became more prevalent among the concerned parties. Communication and mutual understanding were further improved by the availability of plant-operations tours offered to local residents and public access to the plant's environmental performance data. After a several-day wait and a couple of false starts, sampling was authorized and initiated during an odor event. Samples were collected at the facility's process site, as well as at six other locations (three upwind and three downwind of the plant) where odors had been detected. Following the air sampling, analysis by both a certified laboratory and a professional odor panel, and review of the results by the risk assessment experts, a town meeting was organized to report the findings.

The results of the analyses indicated the presence of several chemicals, only one of which was detected above its odor threshold such that it could consistently explain the odor(s) reported by residents. This chemical, carbonyl sulfide, is thought to stimulate a branch of a cranial nerve which has both motor and sensory functions. Direct stimulation of the sensory portion of this nerve by carbonyl sulfide is believed to cause the sensation of irritation, but not pathological damage. The distinction between irritation (a sensation) and pathology (damage to tissue) is a concept that most general audiences would have difficulty understanding. Because residents had generally begun to trust plant management and had been provided both an informal education and authority to execute the air sampling, however, the community understood and was largely satisfied with the investigation results. Subsequent issues concerning the periodic exposure to carbonyl sulfide were not encountered.

> Elevated conflict between the facility and members of the surrounding community is more likely to arise when the facility (or, rather, its corporate management) assumes a reactive or defensive posture, as opposed to a proactive one.

The Retrenched Approach

In contrast to the proactive approach described above, management of the facility described below chose to disregard the residents' complaints in some manner, such as by ignoring them, downplaying their seriousness, refuting their substance, and/or refusing to cooperate with the residents' requests for information.

Following a two-year period of inaction by the thermoplastic plant that resulted in increased conflict with its neighbors, negative press (reaching the level of state officials), and eventual enforcement by the state environmental regulatory agency, the plant reluctantly commissioned a health risk assessment of odors emanating from the facility. While this represented a "positive" effort on the facility's part, the plant's management demonstrated obstructive behavior, meeting the required compliance objectives to only a minimal extent. In particular, citizens were not even questioned about their exposure experiences at any point during the risk assessment development. Consequently, the risk assessment was seriously flawed, as it did not address the neighboring residents' critical time period of concern.

The plant's senior management continues to be seriously distrusted by residents and even some plant employees. Each party has become entrenched in their position, causing the conflict to become escalated. The citizens have formed a community group, gaining federal and local agency financial assistance to investigate facility emissions. As part of this investigation, the group commissioned a study, the results of which are potentially dam-

aging to the facility. The consultant conducting the study was able to estimate off-site exposures to some chemicals emitted by the plant at levels above allowable workplace concentrations using public records retained by regulatory agencies regarding facility production and emissions, state-of-the-art air dispersion modeling, several years of historical meteorological data for the area and scientific literature regarding both chemical toxicity and chemical releases during plastics processing.

Six years after the initial conflict began, the plant had still not adequately addressed the complaints. The citizens' groups continued to gain force, seeking bids on substantial additional work to support the existence of current and/or historical off-site impacts and considering litigation to resolve the issue. As a result of the retrenched approach taken by plant management, the plant already had spent substantial resources to generate additional reports and data required by the regulatory authorities, which were now closely monitoring all aspects of the facility's operations. A long history of complaints of odors and health effects associated with the plant was now on record with local authorities. The plant had been forced to shut down operations on several occasions due to non-compliance with regulatory requirements, and the corporation had spent substantial money to employ attorneys in their defense. The plant's management had engendered distrust and ill will from much of the surrounding community, as well as some of their plant personnel.

Costs And Benefits

A determination of how best to address the complaints of neighbors is typically decided upon by facility management using an informal cost-benefit analysis. Such methods generally involve discussion among senior facility managers and a preliminary evaluation of the projected expense for investigating the association between neighbors' complaints and facility emissions. The emphasis is on those costs and benefits that are more obvious, while the less obvious and possibly more serious ones are likely to be discounted.

Conspicuous Costs and Benefits

We define conspicuous costs and benefits of a proactive approach (e.g., conducting an air quality evaluation) as those typically considered through the informal cost-benefit analysis process as described above. Examples of conspicuous costs include staff time (management and operations), environmental consultants, environmental/emissions sampling and laboratory analyses. Conspicuous benefits include improved public and community relations and reduced risk of legal actions. Conspicuous costs are usually more numerous and more easily quantifiable than are the obvious benefits. Simple estimates of costs can be generated by estimating staff hours and receiving contractual bids for environmental consultants and data collection and analysis. For facilities facing off-site odor complaints by nearby residents, a well-designed sampling plan and analysis program, a report on findings, and communication of risks to the community will typically cost between $20,000 and $60,000. In addition, the need to address other existing or past issues could result in substantially greater costs if the facility has a poor environmental record and/or a negative history interacting with the surrounding community.

The obvious benefits from such an ap-

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proach — improved community relations and reduced risk of a lawsuit — are much more difficult to quantify. Not surprisingly, factors that do not lend themselves to quantification are often ignored during an informal cost-benefit analysis. Management decisions should be governed by *managerial* accounting methods, rather than *financial* accounting methods. These methods afford greater consideration of uncertain events and generally provide better overall managerial information. Short of performing such analyses, uncertain events are ordinarily heavily discounted. In the presence of few quantified benefits for a proactive approach to an odor issue, facility management is often hesitant to choose a course of action with such a large price tag. Hence, a retrenched approach is often chosen over a proactive one.

Hidden Costs and Benefits

We define hidden costs and benefits as those that are typically not considered during an informal cost-benefit analysis. The hidden costs can include the potential to raise additional issues. Hidden benefits can include improved relations with regulators, increased quantities and understanding of process/emissions data, the potential for identifying off-site odor sources, reduced impacts on neighboring community and employees, improved employee morale, improved long-term ability to focus on business, improved positioning for future expansions or for gaining regulatory exemptions, generation of data useful in potential litigation, some basis for negotiating reduced insurance rates, reduced risk of and amount of settlement costs, and reduced risk of plaintiff's judgments and judgment amounts.

The risk of raising other issues in the process of providing information openly to the community may not be initially considered. Yet, this is an unavoidable potential risk for facilities adopting a more proactive position and particularly for those that have not had positive community relations in the past. Such risks, however, can usually be managed successfully given that the facility need not disclose all site information to external parties. Additionally, citizens and citizen groups usually rally around one issue (for example, the elimination of an observed odor), and have sufficient time and energy to bring the facility to task over only that one issue. Other peripheral issues will not generate the support or interest of a sufficient portion of those concerned, particularly when the facility adequately addresses the issue that initially brought the citizens together.

The list of hidden benefits can be extensive. As with the conspicuous benefits, hidden benefits of a proactive approach are not easily quantifiable. In order to estimate the value of such benefits, a facility manager would have to employ cost-benefit analysis techniques that are considerably more sophisticated than those associated with the estimation of staff hours and subconsultant fees. These would involve techniques that would assign an estimated probability and estimated incremental value for each of the listed benefits and may establish dependencies between events. Several of these hidden costs could have substantial estimated values.

Developing A Proactive Approach

In order to develop a proactive approach, a facility's management must overcome the perception and fear that this alternative will result in the facility's loss of control and money. Managers must become convinced that a proactive approach will likely cost less in the end. As described previously, an open approach may entail shared facility/operational information in the form of access to records, the site and meetings. Records access may include routinely furnishing information about facility emissions (emissions and environmental investigations reports) to public entities such as a local library. This does not imply that the facility should divulge any and all requested information, but that it should establish a routine means for providing information that may have a direct bearing on third parties. Facility access, by providing tours to interested citizens, will assist in the education of the community about the facility's processes. Often, once neighbors become knowledgeable about a facility's processes, they become less apprehensive about the facility's operations — fear of the unknown is a powerful force. Facilitating or hosting periodic community meetings at which questions can be posed to the facility's management and responses provided is another means of providing access. It may also entail opening certain facility meetings to selected members of the community who represent and give voice to the interests of the community.

Warning Signs Of Retrenched Approach And Potential Litigation

Based on a review of the managerial response alternatives considered here, the proactive approach taken at the cement kiln is obviously the more desirable response. When faced with reports of off-site impacts at your own client's facility, however, the best choices may not be so apparent. Such choices become particularly unclear when you are faced with dispensing thousands of dollars to assess off-site emissions and to listen to concerns of angry residents. Hence, we offer some warning signs, or approaches that usually prove counterproductive.

The first warning signs of a retrenched approach include a lack of management interest in investigating off-site impacts and denial of their existence. This lack of concern frequently results due to the nature of off-site odors. For instance, depending on meteorological and operating conditions, detection of these odors may

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vary considerably over time. Consequently, facility management can often get the mistaken impression that citizen concerns are unfounded or will be short-lived. Upon visiting an off-site location shortly after an odor is noted, management may note little to no odor and conclude that community members are overreacting.

Subsequent signs of a retrenched facility response to community odor complaints may include any of the following:

- The absence of data generation or scientific evaluations
- Addressing issues only to the extent prescribed by applicable regulatory authority
- The absence of a forum for communication between the facility and its neighbors
- Persistent unwillingness by facility management to address community concerns
- Unwillingness to spend money to evaluate emissions and air quality
- Decreased contact between the facility and disgruntled citizens
- Increased indirect contact between citizens and the facility (through police, health department, agencies, attorneys, etc.)

These warning signs indicate an increasing likelihood of litigation and relatively high likelihood of a judgment for the plaintiffs. In the absence of good scientific data indicating the facility is not responsible for the odor or that it has taken adequate measures to mitigate the odor, courts and juries may weigh anecdotal information provided by the plaintiffs more heavily, if only due to the lack of contradictory evidence provided by the defendant.

Conclusion

Although at first glance resisting external pressures to obtain facility emissions information seems the most prudent and cost-effective approach, it often underestimates costs associated with neighbors protecting their interests and agencies enforcing their regulations. Facility management decisions about resisting or promoting investigation can seriously impact so many areas: facility publicity, the regulatory leeway the facility is afforded, the ability to expand or develop site operational insurance premiums, employee morale, productivity, the generation of valuable process-related data, exposure of the community to chemicals of health concern, frequency and severity of nuisance incidents, and community relations. The list of potential costs and benefits is long. When such costs and benefits are considered rather than being dismissed, and when facility management overcomes hesitation about involving the surrounding community in addressing off-site impacts, the interests of both the facility and the community may be met in a more cost-effective manner.

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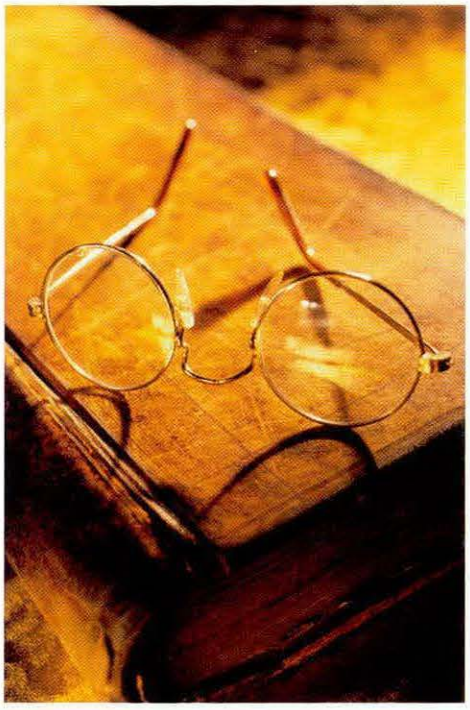
"Assessing Risks and Costs Related to Environmental Issues" is just one of several dozen features on the WSBA web site at

www.wsba.org

Stare Decisis

Everything You Never Realized You Need To Know

by Kelly Kunsch



The title of this article may appear oxymoronic (or to some, perhaps simply moronic). After all, the doctrine of stare decisis is of ancient lineage.[1] Whatever difficulties that could arise in its interpretation surely must have been worked out over hundreds of years of application. Yet, within this state, there are still some issues that should be identified and addressed with respect to the doctrine. The first issue is how stringently the Supreme Court of Washington should apply the doctrine to its own decisions. The second issue is what precedential value decisions by one division of the Court of Appeals have over trial courts located in another division. The third (and related) issue is what authority decisions by one division of the Court of Appeals have over the other divisions of that court. Finally, a potential issue that merits mention is the appropriate application of the doctrine in the Ninth Circuit if that circuit is split into two circuits at least in part for philosophical reasons.

In this state, the rule is that stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned.

This article begins with a brief description of the doctrine.

The Doctrine of Stare Decisis Revisited

Stare decisis is one of the fundamental precepts of the common law. As *Black's Law Dictionary* states, under the doctrine of stare decisis, "a deliberate or solemn decision of [a] court made after argument on [a] question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy."[2] The obvious purpose of the doctrine is to promote stability and permanence in the law[3] and to ensure predictablity for those governed by it.[4]

Because of its constrictiveness on the courts, the doctrine is applied narrowly. It does not apply to language that is unnecessary to the conclusion reached.[5] Similarly, when the literal words of an opinion appear to control an issue but the opinion neither addresses nor considers the issue, the opinion is not dispositive and a subsequent court may reexamine the issue without usurping the role of the higher court.[6] Finally, American courts today follow the practice that, despite the doctrine, certain situations call for the abandonment of precedent.

There are actually two types of stare decisis. The best known requires that once a court makes a holding on an issue, lower courts are obligated to follow that precedent. Scholars writing in the area call this vertical stare decisis.[7] What is less commonly noted is that stare decisis also applies to courts of equal rank, including the deciding court itself. This is called horizonal stare decisis. While vertical stare decisis is virtually absolute,[8] there is currently no such unbending rule obligating courts to adhere to their own prior precedents.[9]

A Brief History of the Doctrine's Application

In England, the doctrine of stare decisis (even horizontal stare decisis) was rigidly adhered to.[10] Once a decision was made, the courts were bound to follow it. Early American courts applied the doctrine almost as rigidly. At the beginning of the 20th century, however, courts of the United States began to relax their attitude.[11]

Oliver Wendell Holmes was a major proponent of the more lenient interpretation. He asserted: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[12]

Over the years, Washington courts have adopted such a less rigid approach to applying the doctrine. Courts have made statements such as: "the doctrine is not an absolute impediment to change,"[13] "stability should not be confused with perpetuity,"[14] and "reconsidering cases enables the law to grow and change to meet the ever-changing needs of an ever-changing society and yet, at once, to preserve the very society which gives it shape."[15] But even with this lenity, there is a certain threshold that must be overcome before a decision may be disregarded. Unlike many other jurisdictions, Washington courts have defined that threshold. In this state, the rule is that stare decisis requires a clear showing that

an established rule is incorrect and harmful before it is abandoned.[16] It is in interpreting and applying this rule that members of the state's Supreme Court seem to diverge.

The major policy reason for requiring all trial courts to follow any Court of Appeals decision is to create uniformity throughout the state. Allowing variation in application of state law between counties is not in accordance with the purpose of both state and county governance.

Recent Supreme Court Decisions Applying the Doctrine

The doctrine of stare decisis is probably more important in Washington than in other states. This is because when judges are elected, there is a tendency toward higher turnover in the judicial ranks than when judges are appointed. The resulting changes in court makeup consequently increase the likelihood that the court's judicial philosophy will change and, with such changes, the desire to abandon precedent intensifies. The doctrine of stare decisis provides a check on such tendencies by emphasizing the rule of law so essential to our legal system.

As emphasized above, the horizonal type of stare decisis applies to the court that made the prior decision. Although the Washington Supreme Court recognizes this part of the doctrine, it has recently been grappling with its application.

A conspicuous example is *State v. Berlin*[17] and its companion case *State v. Warden,*[18] decided in December 1997. The issue in both cases was the appropriateness of particular jury instructions for lesser included offenses. In making its decision, the *Berlin* court overruled a decision it had made the previous year, *State v. Lucky*.[19] In *Lucky*, Justice Alexander wrote the majority opinion, with which six other justices concurred. Justice Johnson wrote a dissenting opinion. One year later, in reversing *Lucky*, Justice Johnson wrote the majority opinion, with which (again) six justices concurred. Justices Alexander and Talmadge wrote dissents. The policy arguments on both sides were essentially the same. One additional argument necessarily made by the majority in the later cases was that the *Lucky* decision was both incorrect and harmful (the test for abandoning a precedent under stare decisis). Ironically, one of the reasons *Lucky* was deemed incorrect and harmful was that it overruled prior cases without the requisite showings of incorrectness and harmfulness.[20] Justice Alexander's dissent emphasized that the underlying arguments were the same in all the cases and that little had changed in the small passage of time. The majority, he said, merely paid lip service to the doctrine of stare decisis.[21] Justice Talmadge also attacked the court's "lurch[ing] from one policy pronouncement to the next, with no firm roots in the constitution, statutes, or decisions of the Court."[22]

In other cases, Justice Sanders has cited the doctrine of stare decisis as obligating him to follow a precedent that he had previously dissented from or would have dissented from.[23] There is evidence from these decisions that some of the justices may be applying the doctrine of stare decisis differently. Apart from concerns over the erosion of the doctrine itself,

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Jon Fox

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

Bill Bowman

Former Deputy Prosecutor and Public Defender; Executive Board, WSBA Criminal Law Section; Member, Washington Association of Criminal Defense Lawyers; Instructor, WFCJ Annual DUI Defense Seminar; Graduate, National College of DUI Defense.

there could also be a systemic problem if some justices apply the doctrine more stringently than others. If some of the justices feel more limited by the doctrine's application than others, those justices' voices are diluted to some degree.

Trial Courts' Obligation to Follow Extradivisional Court of Appeals Decisions

A more concrete issue (one concerning the rule itself rather than its application) concerns the effect of state appellate court decisions over state trial courts. The question occasionally arises whether a decision made by one division of the Washington Court of Appeals is binding on a trial court in another division.[24] Because trial court opinions are not published, one cannot know what precedential value those courts typically accord appellate court decisions from other divisions. In addition, no higher level court has addressed the issue. There are several reasons, however, why any Court of Appeals decision should be binding on all state trial courts.

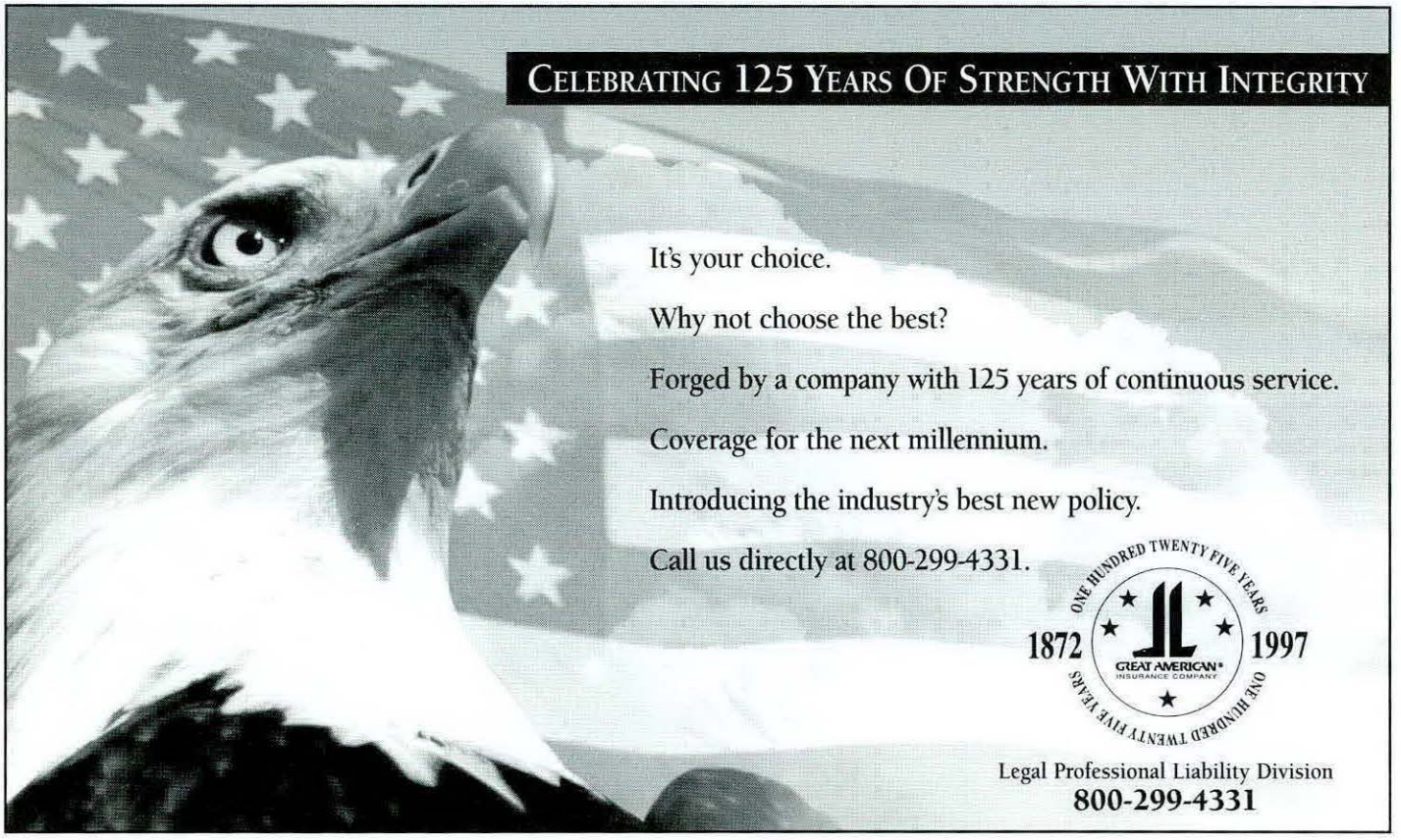
The major policy reason for requiring all trial courts to follow any Court of Appeals decision is to create uniformity throughout the state. Allowing variation in application of state law between counties is not in accordance with the purpose of both state and county governance. While the state is the basic entity of government in our country, the counties (which trial courts operate within) are more entities of administrative convenience.[25] In addition, under a policy that does not bind a trial court to all Court of Appeals decisions, litigants will be encouraged to forum shop for a favorable county court.

Other states with an intermediate court of appeals have adopted a policy in favor of vertical stare decisis over all trial courts in construing the precedential value of their appellate courts.[26] For example, Florida (whose appellate level courts are actually considered distinct courts)[27] has stated that the hierarchy of decisional holdings would demand that in the event the only case on point by the Court of Appeals is from a division other than the one in which the trial court is located, the trial court would be required to follow that decision. Alternatively, if the division of the Court of Appeals in which the trial court is located has decided the issue, the trial court is bound to follow it.[28]

Finding mandatory authority of all Court of Appeals decisions over all trial courts is also supported structurally by the enabling legislation. Unlike federal circuits, the Washington Court of Appeals should be treated as a single court rather than as multiple courts. First, the language creating the court differs from that in the federal scheme. The federal scheme initially creates circuits,[29] then declares: "There shall be in each circuit a court of appeals."[30] The implication is that under the federal statutes, each circuit court of appeals is a separate entity.

The Washington statute, by contrast, states: "There is hereby established *a* court of appeals[31] . . ." and "*The* court shall have three divisions" (emphases added).[32] The plain language indicates that under the state statutes, the Court of Appeals is considered a single entity. As such, the only geographical limitation on precedential value of a Court of Appeals decision would be the boundaries of the state itself.

Finally, if custom and usage can be allowed as proof, research tools and citation forms provide further evidence fa-



voring this interpretation. The *Washington Digest* does not indicate which division decided an opinion while the *Federal Practice Digest* (and its predecessors) do indicate the circuit. And while a citation of a federal court of appeals case requires reference to the circuit, a citation to a Washington Court of Appeals case does not require a divisional notation.

Court of Appeals Obligation to Follow Extradivisional Court of Appeals Decision

If the above analysis is valid and a strict construction of the doctrine of stare decisis is applied, it follows that a decision of any division of the Court of Appeals should be binding on all other divisions (absent a finding of incorrectness and harmfulness). The reality is that this is not the case. The three divisions do give deference to each other's decisions. However, they do not in practice follow another division's holding to the extent that the doctrine of stare decisis would typically require. Although no appellate court has explicitly stated that it is not bound by a decision from another division, certain court decisions demonstrate that to be the belief. For example, in *State v. Danis*,[33] Division One recognized that Division Three had recently decided the same issue but declined (although respectfully so) to follow the precedent.[34] In addition, the Rules of Appellate Procedure recognize the existence of such conflicting decisions (and thereby arguably acknowledge the right of appellate courts to disagree with each other) in stating: "A petition for review will be accepted by the Supreme Court only: . . . (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals . . ."[35]

For the same reasons that uniformity of precedent over trial court decisions is desirable, the current system is less than ideal. Even in a state (Florida) whose intermediate courts of appeals are considered, like Federal Circuits, to be separate courts, at least one commentator has been critical of this approach to horizontal stare decisis.[36] As he says, the state legislature could not enact valid legislation that would bear differently upon state citizens depending upon the intermediate appellate division in which they happened to be sued,[37] so why should the judiciary be able to? Both uniformity and predictability would be promoted by applying the doctrine horizontally at the Court of Appeals level. However, convincing the courts to limit their own discretion would be a difficult task. Furthermore, many attorneys may see the current policy as one that gives them more leeway in which to operate. Thus, any movement toward horizontal stare decisis at the Court of Appeals may be hard fought.

Future Issues? Ninth Circuit Severance

Finally, the doctrine of stare decisis and the stringency of its application might also become a local issue at the federal level. There is a perpetual movement to divide the Ninth Circuit Court of Appeals into two circuits. If the Ninth Circuit ever does divide, prior decisions of the Ninth Circuit will continue to be binding on both resulting courts. Even though much of the rationale for dividing the Ninth Circuit derives from its unwieldy size, one of the arguments in favor of division is the philosophical disagreements of judges from different states.[38] If the Ninth Circuit is divided, the resulting appellate courts (and every district court beneath them) will have to harmonize any new judicial philosophy with their application of the doctrine of stare decisis.

Conclusion

The doctrine of stare decisis is like Frank Gifford: aged yet still active. Portions of this article have merely been observations on the continuing vitality of the ancient doctrine. Even so, there remain some aspects of that doctrine and its application in this state that have not yet been explored. The need for predictability and possible uniformity will be better served if the questions regarding the precedential weight accorded to extradivisional Court of Appeals decisions are resolved. Perhaps this article will stimulate some pronouncement on these matters.

Notes

[1]There is some dispute as to how ancient the lineage is. See Fred W. Catlett, "The Development of the Doctrine of Stare Decisis and the Extent to which it Should be Applied," 21 *Wash.L.Rev.* 158, 158-59 (1946).

[2]*Black's Law Dictionary* 1406 (6th ed. 1990).

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The Board's Work

BY SHERRIE BENNETT
BAR NEWS EDITOR

At the Board of Governors September 10-11 meeting in Seattle, a proposed "reciprocity rule" draft in development for one year was presented by **Mike Larson** and approved by the Board as appropriate to forward on to the state Supreme Court. Proposed Admission to Practice Rule 17, drafted by the WSBA Reciprocity Committee requires an attorney licensed to practice law in another state who wishes to qualify for admission to the practice of law in the State of Washington to present satisfactory proof of both admission to the practice of law, together with current good standing, in another state, and active legal experience as a lawyer or counselor at law at the time of the application; possess the good moral character and fitness requisite for a member of the Bar of the State of Washington; execute under oath and file with the Bar Association two copies of an application, one of which shall be in the applicant's own handwriting, in such form as may be required by the Board of Governors; file with the application a certificate from the authorities in such other states having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice, and the date thereof, and as to the good standing of such lawyer or counselor at law or the equivalent; provide with the application such other evidence of the applicant's educational and professional qualifications, good moral character, and fitness and compliance with the requirements of this rule as the Board of Governors may require; establish to the satisfaction of the Board of Governors the state that licensed the attorney applicant allows the admission of licensed Washington attorneys under terms and conditions no more burdensome than set forth in these rules; and pay, upon the filing of the application, the fee established for such admission, which shall be at least equal to that required pursuant to rule 3(d)(2) to be paid by an attorney applicant to take the bar examination.

LAWYERS' FUND FOR CLIENT PROTECTION

Thomas Delong presented the annual report on the Lawyers' Fund for Client Protection, a fund for victims of clear acts of lawyer dishonesty and malpractice. During the past year, $195,000 was paid to the victims of 10 lawyers statewide. The Board asked the committee to review the program and report back to the Board on whether victims' and attorneys' names should be published, what the coverage criteria should be, and whether a $30,000 limit on each claim is appropriate.

LEGAL FOUNDATION OF WASHINGTON

The annual report of the Legal Foundation of Washington was given to the Board by **Bradley Diggs**, **John Kluge**, **Greg Tripp**, **Elise Dean**, **Lisa Lowe**, **Dwight Williams**, **Barbara Clark** and **Nancy Isserlis**. Foundation income is up $400,000 this year, with about half coming from limited practice officer income. The Foundation will parcel out approximately $5.9 million in grants this year.

Brief writing is ongoing in the Foundation's pending litigation, with the Foundation being represented *pro bono* by the Perkins Coie LLP law firm. Other *pro bono* representation is being provided by Bogle & Gates PLLC (WSBA), Davis Wright Tremaine LLP (American Bar Association) and Heller Ehrman White & McAuliffe (Ninth Circuit Pro Bono Program).

COMMITTEE TO DEFINE THE PRACTICE OF LAW

Governor Crossland presented the Committee to Define the Practice of Law's preliminary draft of the definition of the practice of law, as follows:

"(a) The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s). This includes but is not limited to:

(1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for consideration.

(2) Selection, drafting, and completion of legal documents or agreements which affect the legal rights of any entity or person(s).

(3) Representation of another entity or person(s) in a court or dispute resolution process or in an administrative adjudicative proceeding.

(4) Negotiation of legal rights or responsibilities on behalf of another entity

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or person(s).

(b) The following shall not be deemed the unlicensed or unauthorized practice of law:

(1) Practicing law authorized by a limited license to practice pursuant to the Admission to Practice Rules.

(2) Serving as a court house facilitator pursuant to court rule.

(3) Acting as a law representative authorized by administrative agencies or tribunals pursuant to court rule.

(4) Sale of legal forms in print or electronic formats."

The Board approved the expenditure of up to $20,000 for hearings on this issue to be heard in various parts of the state over the next few months.

SEVENTH DISTRICT REDISTRICTING

After eloquent arguments to the contrary by **Tom Campbell** and Judge **Judith Eiler**, the Board voted 7-4 to eliminate the King County at-Large positions and divide the Seventh Congressional District into three approximately equal voting districts. The new voting districts are divided according to the map on page 35 of the May 1998 *Bar News*.

BYLAW AMENDMENTS ON OPEN RECORDS/OPEN MEETINGS

After considerable debate over several meetings, the Board approved changes to the open records/open meetings bylaw provisions. Not intended to make any substantial change to the present bylaws, the amendment updates and incorporates into the bylaws the provisions of the statutes currently cited in the bylaws, and eliminates references to those specific statutes. The adopted amendments were drafted by **Mike Killeen**.

KVI ASSIGNMENT

The Board tabled until the October meeting the issue of whether to assign the bar-sponsored insurance program brokerage and administrative agreement between the WSBA and Kirke-Van Orsdel, Inc., to Seabury & Smith, Inc., as a consequence of the merger between KVI and Marsh & McLennan Company (Seabury & Smith is a division of Marsh & McLennan). An *ad hoc* committee composed of new governors Steve Osborne and Jim Deno and former governor Dennis La Porte will report back to the Board on this issue in October.

APPOINTMENTS

John Powers, Jr. was appointed to fill the empty 5th Congressional District governor seat left by Governor Eymann upon his becoming President-elect.

William Simmons was appointed to the Law Clerk Committee, and **Rick Kimbrough** was tapped as WSBA interim ABA delegate. The Board also appointed **James Degel** and **Richard Sayre** as WSBA delegates to the Supreme Court Oversight Board for Professional Guardianship Certification. **Patrick J. Oshie** became a new Board member with the Northwest Justice Project.

MODEL EMPLOYMENT POLICIES FOR WASHINGTON LEGAL EMPLOYERS

Suzanne Thomas and **Sevilla Clayden** presented proposed voluntary, advisory policies designed to serve as model policies for firms desiring to develop personnel policies regarding HIV/AIDS employees and sexual harassment. The matter was tabled until the October meeting.

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PREMISES LIABILITY • DISCRIMINATION
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TORT • EMPLOYMENT • PERSONAL INJURY
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WRONGFI MERCIAL
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State Bar Highlights

Cookies for Everyone

At its September 11 Board of Governors meeting, the board received cookies in the shape of the state of Washington from Governor Marijean Moschetto as a year-end thank you. The Board said goodbye to outgoing governors William H. Nielsen, Steve Crossland, Lish Whitson and Dennis J. La Porte. It then welcomed new governors James E. Deno, Stephen T. Osborne, Lindsay T. Thompson and Daryl L. Graves (see page 13). Also, with the election of Governor Dick Eymann to President-elect, John T. Powers, Jr., of Spokane, was appointed to fill out his remaining term.

Annual Awards Winners Honored

Twelve individuals and organizations were honored at the Bar's Annual Award Luncheon and Business Meeting at the Seattle Space Needle on September 11.

The November *Bar News* will feature photos and biographies of the Annual Awards winners:

Lewis H. Orland — Lifetime Achievement Award

Judge **John A. Schultheis** and Judge **J. Dean Morgan** — Outstanding Judge awards

Benton-Franklin Legal Aid Society and **Scott A. Smith** — Pro Bono awards

Julian C. (Pete) Dewell — Award of Merit

Jack G. Rosenow — Award for Professionalism

Joseph E. Shorin III — Angelo Petruss Award for Lawyers in Public Service

King County Prosecutor's Office — Affirmative Action Award

Junko Charity Louise (June) Gerard and **A. Stephen Anderson** — Courageous Awards

J.J. Leary, Jr. — President's Award

Outgoing President Mary Fairhurst shares a treat with new President M. Wayne Blair.

50-year Members Honored

Congratulations to the 23 individuals who were admitted to practice law in Washington in 1948 and are still members of the Washington State Bar Association. They were honored at the Annual Awards Luncheon:

Eugene Arron
William B. Bantz
Stanton Burr Bennett
Delwyn Glenn Biddle
Harry Robert Calbom, Jr.
Seaton Maurice Daly
Jennings Patrick Felix
John Augustus Godfrey
David B. Hallin
Willard Hatch
Clarence Henry Heckendorn
Valen Harold Honeywell, Jr.
Joseph S. Kane
T. Hughlon McDowell
Thomas James Moran
Gordon W. Moss
Hugo E. Oswald, Jr.
Omar S. Parker
Howard P. Pruzan
Richard C. Reed
Stuart W. Todd
Allan H. Toole
J. Vernon Williams

FYI Information

EMERITUS RULE

The Washington State Bar Association Board of Governors is in the process of establishing policies to implement the Emeritus Rule recently adopted by the Supreme Court. This new rule creates a limited license for attorneys admitted in Washington and other states, and otherwise fully retired from the practice of law, to practice pro bono legal services through a qualified not-for-profit legal services organization whose primary purpose is to provide legal services to low-income clients. Washington is the seventh state to adopt such a rule.

The goal of this rule is to encourage pro bono participation by experienced retired attorneys and judges who wish to make a significant contribution in the wake of dramatically reduced funding support for legal services programs coupled with a growing low-income population. Based on other states' experiences, Emeritus member participation will foster the development of new and creative ways to enhance and support the delivery of legal services, e.g., serving as part-time volunteer "staff," supervising law students and volunteers, developing/teaching continuing legal education programs, referring cases to pro bono attorneys, providing advice and brief service, serving on volunteer boards.

To qualify for Emeritus status, an attorney must be in current good standing as a lawyer and meet minimum active practice experience requirements (five of the 10 years preceding application for Washington lawyers, 10 of 15 years for non-Washington lawyers). Washington lawyers will pay the annual inactive membership fee of $50. The Board of Governors will decide at its October meeting the appropriate fee for non-Washington lawyers. Emeritus attorneys are exempt from Continuing Legal Education requirements, but must complete a full-day training program to be held in January 1999. The application form (available from the Washington State Bar Association at 206-727-8227) provides that the Emeritus applicant identify the legal services provider for whom he or she will be providing pro bono services. A list of these qualified legal services providers is available from Joan Fairbanks at the Washington State Bar Association at 206-727-8282.

WSBA CLE-PUBLICATIONS UPDATES ADR DESKBOOK

Obtain up-to-date information on new developments which have taken place in Alternate Dispute Resolution since the publication of the 1995 second edition by purchasing the 1998 Supplement to the Alternate Dispute Resolution Deskbook. The Editor-in-chief of both the supplement and the original deskbook is Issaquah attorney Bruce F. Meyers.

Eighteen Washington experts contributed to the supplement, which includes practice pointers for mediators and counsel, as well as coverage of mediation in the Ninth Circuit Court of Appeals. The update also contains a new 30-plus page point-by-point comparison of all Washington counties' local MARs with the King County LMAR. Plus in-depth coverage of mandatory arbitration, analysis of ADR ethical issues, and full exploration of the use of mediation to settle civil cases.

The new deskbook update will be a valuable addition to practitioners' libraries. Cost of the 222-page supplement alone is $75. The more than 700-page deskbook plus supplement set is $165. To purchase the books or for further information, call 206-733-5918.

TRAVELS WITH STAN

Best of luck to Chelan attorney Stan Morse as he sets off on another round-the-world adventure. Morse, also a professional photographer and writer, took the courthouse pictures for the cover of the last two issues of the WSBA's *Resources* directory. He recently returned from a six-month solo journey around the globe, documenting his travels as a paraplegic in a wheelchair. He posted weekly updates on the *Wenatchee World*'s online edition under the byline "Travels with Stan," and was interviewed on NPR. He currently is editing a book about his adventures, and left on October 1 for another six months of travels. His photo collection "Centennial Courthouse" recently showed at Sunburst Gallery in Wenatchee.

WSBA COMMITTEE APPOINTMENTS

The Board of Governors has made its appointments to the WSBA Standing Committees for the fiscal year beginning October 1, 1998. The appointments are based on the Committee Preference Forms which are mailed to the entire WSBA membership in February of each year and then considered by the governor in the relevant district in making committee appointments. The incoming WSBA President selects the committee chairs. This process has been completed for 1998 and letters have been sent to the new and reappointed members of the committees notifying them of their appointments. The Bar does not individually notify those who expressed interest in being on a committee but were not appointed.

We encourage you to submit your name next year when you receive your Committee Preference Form. Please also note that later this year our WSBA Website will have a selection for "Bar Leadership Opportunities" where openings for service will be posted.

Annual Committee Reports

The following are excerpts from the WSBA's committees' annual reports for the past fiscal year. Annual reports from WSBA sections were highlighted in the September issue of FYI.

Character and Fitness

This committee held hearings for bar exam applicants whose character and fitness to practice law has been questioned as a result of past conduct, and held hearings on petitions of reinstatement by disbarred attorneys. Opinions are issued within 20 days of the hearing. The committee meets on at least five Saturdays during the year for a full day of hearings.

Consumer Protection

(formerly the Unauthorized Practice of Law Committee)

This committee is committed to enacting legislation that would make the unauthorized practice of law a *per se* violation of the Consumer Protection Act. The group is focusing future efforts on a CLE for attorneys interested in accepting referrals of victims of the unauthorized practice of law, and setting up a referral network of attorneys for such cases.

Corrections

The group reviewed a number of legislative proposals relating to corrections, including the education of juveniles in prison and incidents of rape by corrections officers, and toured the Washington State Penitentiary and Washington Corrections Center for Women, talking with prisoners and observing a number of programs. In the future, the group will look at issues concerning the incarceration of youth in adult correctional facilities.

Court Rules and Procedures

This committee reviewed the Criminal Rules for both Superior Court and Courts of Limited Jurisdiction and proposed amendments to the Board of Governors. Among the proposals reviewed were those for a mandatory Alternate Dispute Resolution procedure, proposed rules regarding American with Disabilities Act issues, and changes to the Civil Rules for Courts of Limited Jurisdiction proposed by the District and Municipal Court Judges Association.

Editorial Advisory Board

The group continued its mission of advising *Bar News* staff members on publication policies and the progressive updating of the magazine's look. The EAB also began drafting changes to the appendix of the *Editor's Handbook* and kept the Board of Governors advised on *Bar News* issues.

Judicial Recommendation

This committee modified judicial applicant questionnaires to include inquiry into Access to Justice issues, conducted applicant interviews, and provided a list of well-qualified applicants for the state's appellant system to the Board of Governors.

Law Clerk

The committee administers the state's Law Clerk Program, which has approximately 48 law clerks enrolled. Law clerks work with tutors to circumvent the traditional law school scenario to prepare for the bar exam. Future goals include designing guidelines for advanced standing to certain law clerk applicants, such as those with some degree of law school or who did not attend an ABA accredited law school.

Law Examiners

This committee's main task is to prepare and grade each bar exam, and try to streamline the bar exam training, preparation and grading process. The committee is developing a question bank, which will be available should an exam be compromised or an examiner be unable to prepare a satisfactory question. The goal is to have a full exam in reserve.

Lawyers Assistance Program (LAP) Steering

This group's goal is to strengthen the Lawyers Assistance Program by getting the word out about its programs and services, and developing a strong network of peer counselors, including an annual statewide training program. The Judicial Subcommittee is working on a presentation to the judges association to educate judges about the appropriateness of LAP services for lawyers in distress.

See Committees — *page 42*

Committees — *continued from page 41*

Lawyers' Fund for Client Protection

This committee meets approximately four times a year to review claims made by clients who have been financially victimized by their lawyers. Claims are first made to the Bar and are investigated thoroughly. Bar staff then make recommendations to the committee. The committee discusses numerous cases each year and awards compensation to clients.

Legal Assistant

This group spent the past year working with the Access to Justice Board to pursue the goal of increasing access to courts and administrative agencies for low- and middle-income individuals. It serves as the primary liaison between the Bar and paralegal organizations and educational programs.

Mandatory Continuing Legal Education (MCLE)

The committee has been involved in rewriting the MCLE rules, which have been forwarded to the Board of Governors and the Supreme Court. It also has tried to improve the procedure and reduce the time for course approval. Each year the group forwards to the Supreme Court a list of bar members who are not in compliance with MCLE rules.

Opportunities for Minorities in the Legal Profession

The group's goals include working with law firms about the value of diversity in the workplace, maintaining close ties to specialty and minority bar associations, and building student liaison relationships with the state's three law schools. The committee also is working on an evaluation of the King County Gay and Lesbian Task Force Report to make recommendations to the Board of Governors, and a directory of young minority lawyers.

Pro Bono and Legal Aid

The committee's primary goal is to implement the Volunteer Attorney Legal Services Action Plan, adopted by the Board of Governors in 1994. It developed a report on civil equal justice funding options, and presented a proposal for CLE credit for pro bono representation for low-income clients, which was adopted by the BOG in February.

Professionalism

This committee was formed out of the former Bench-Bar-Press and Public Relations committees. Its main goal is to develop programs that enhance professionalism and increase civility in the legal profession. The committee is developing programs that would help the Bar be more cohesive, and working with law schools on some practical training for soon-to-be lawyers.

Rules of Professional Conduct

The committee received 44 inquiries regarding ethical conduct, and issued 33 informal ethics opinions. It is working on an "opinion bank" so that Bar members can find fact specific rulings easily. This bank could be cross-referenced with ABA and other jurisdiction rulings.

CHANGE OF VENUE?

Bar member Wayne P. Coffelt sent this photo of his vanity license plate to share with readers. Coffelt — a member of the Washington, Illinois and Oklahoma state bars — proudly drives his Illinois car in Oklahoma with a license plate that advertises Washington. He hopes to relocate to Washington soon to stop the confusion.

ETHICAL RESPONSIBILITY OF CANDOR TO JUDGES

BY BARRIE ALTHOFF, WSBA CHIEF DISCIPLINARY COUNSEL*

Under the Rules of Professional Conduct (RPCs) we have duties as advocates to represent our clients. As guardians of the law we also have a duty to maintain the integrity of the legal system and of the legal profession, a duty which both complements and sometimes transcends our ethical duties to our clients. This article looks at our ethical duty as advocates to be candid with judges.

INTRODUCTION

In our practices we tend to think of our duties to our clients as our preeminent ethical duties. We often forget that we also have duties to maintain the integrity of the legal system and of the legal profession. Our duty of candor to judges sometimes conflicts with our duty of maintaining our client's confidences and secrets. The ethical rules and interpretations, particularly in the area of criminal law practice, reflect that conflict and tension between two fundamental, but at times irreconcilable, ethical principles.

Unlike in some legal systems where judges independently investigate facts, our judges rely on us to bring them the facts. At the same time, our duty to maintain the confidences and secrets of our clients is a cornerstone of building trust and communication with our clients. If clients cannot trust us to keep information confidential, they will not disclose confidences and secrets to us. Without those confidences and secrets, however, we cannot competently serve our clients.

Fulfillment of our conflicting duties of candor and confidentiality ultimately determines whether our profession and our system of justice will survive. Failures in the duty of candor causes judges and others in the legal profession to lose respect for the noncandid lawyer and greatly lessens the lawyer's future effectiveness. Failures in the duty of confidentiality causes clients to not communicate essential information. Failures in both result in disrespect for, and loss of public trust in, the legal system and legal profession.[1] But where is the line to be drawn between these conflicting duties?

THE BASIC RULE

RPC 3.3(a) sets out the basic rule of candor when we are acting as advocates, while the rest of RPC 3.3 elaborates on this basic duty. RPC 3.3 requires that we not *knowingly*:

- make a false statement of material fact or law to a tribunal;

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• fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by our client (except where confidentiality rules prohibit disclosure);

• fail to disclose to a tribunal controlling legal authority known by us to be directly adverse to our client's position and not disclosed by opposing counsel;

• offer evidence that we know is false.

The term "tribunal" in RPC 3.3 is not defined. It would appear to include, however, not merely judges in courts, but also administrative law judges and others having similar judicial or quasi-judicial authority in trials and other proceedings analogous to fact-finding trials or administrative law proceedings. Our duties before nonadjudicative legislative or administrative proceedings are governed not by RPC 3.3, but by RPC 3.9.

Our RPC 3.3 duty of candor to the tribunal may clearly conflict with our RPC 1.6 duty to maintain our client's confidences and secrets. In Washington, our duty of confidentiality generally supersedes our duty of candor, and thus both RPC 3.3(a) and RPC 3.3(c) specifically exclude disclosures which would violate RPC 1.6. ABA Model RPC 3.3(a), from which our RPC 3.3(a) is partially derived, does not have the equivalent RPC 1.6 exception; instead the Model Rules make the duty of candor more absolute, specifically providing in Model RPC 3.3(b) that Model RPC 3.3(a) applies even if compliance requires disclosure of information otherwise protected by Model RPC 1.6.

The duty of candor applies to oral, written and documentary statements. It requires that when we speak on behalf of ourselves, such as when we make a statement in open court, or when we make an affidavit, we do so only if we know our assertion is true or we believe it is true after a reasonably diligent inquiry. If we sign a declaration on behalf of a client, we need to make sure we have full authority to do so from the client, not the client's spouse or other person, unless they are the client's authorized agent, and, in that case the declaration's signature should accurately reflect the facts.

In *In re Dianna Lobrie* (aka *Carlson*) (*Washington State Bar News*, June 1993 p. 34), a lawyer was reprimanded for presenting to a tribunal, in violation of RPC 3.3(a), a false written statement in her own protection order and for failing, in violation of RPC 3.3(f), to tell an ex parte commissioner that earlier the same day she had unsuccessfully sought an order from a different commissioner. Similarly, in *In re Gimi Page* (*Washington State Bar News*, November 1996, p. 42), a lawyer was reprimanded for presenting to a tribunal, in violation of RPC 3.3(a), "agreed" orders after she had changed them without opposing counsel's consent, while in *In re Sherrie Bennett* (*Washington State Bar News*, August 1998, p. 44), a lawyer was censured for violating RPC 3.3(a) by presenting to a court an "agreed" child support order after changing the order and placing opposing counsel's initials on the order without that counsel's consent.

If a person other than a client provides us evidence that we know is false, we must refuse to offer it. If our client provides evidence, or advises us he or she intends to provide evidence, which we know is false, however, we are in a much more difficult situation. Although we do not guarantee the accuracy of the information our client presents, we must make reasonable inquiry. While our client is en-

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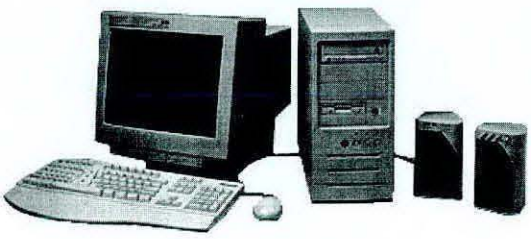

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titled to confidentiality and to testify in a criminal case, our client is not entitled to make us participate in deceiving the court.

Disclosing Controlling Adverse Authority

RPC 3.3(a) requires us to disclose controlling legal authority known to us which is not disclosed by opposing counsel. As a practical matter, "controlling" means that we must cite for Washington courts applicable Washington and U.S. Supreme Court case law, as well as applicable Washington statutes, regulations, ordinances, and so on. If the omitted authority is well-known or a leading case, the court as a practical matter may well assume we should have known the authority. If we are not sure whether we need to disclose an authority, the better course is to disclose and distinguish it since here, at least, there is no conflict with our duty of client confidentiality. If we disclose such authority because opposing counsel has not, we should make sure to very carefully explain to our client the reason we must do so; if we do not explain it, the client is likely to believe we did not represent him or her well and file a grievance against us.

Ex parte Proceedings

The duty of candor to the tribunal is especially important in ex parte proceedings where there is no one to present an opposing view or expose deficiencies in proof. Thus, RPC 3.3(f), modeled on ABA Model RPC 3.3(d), specifically provides an expanded duty of candor for lawyers in those proceedings. It provides that a lawyer "*shall* inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, *whether or not the facts are adverse*" (emphasis added). Our duty to the integrity of the system prevails over our duty to a client.

In 1997 a Washington lawyer was admonished for obtaining an ex parte default judgment while failing to tell the court commissioner about his frequent contacts with the defendant during the relevant time. Another Washington lawyer was admonished in 1997 for failing to disclose to the court when seeking approval of a minor's tort settlement his own receipt of a fee from an insurer. For a discussion of the duty of candor in ex parte proceedings, see Dennis, "The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)," 8 *Georgetown Journal of Legal Ethics* 157 (1994).

Knowing/Reasonably Believing That Evidence is False

RPC 3.3(a) prohibits us from offering evidence if we *know* the evidence is false. The courts usually have a stringent standard for a lawyer's "knowing" before they impose an obligation to reveal client perjury. The lawyer is often required to have "a firm factual basis" for the belief that the client is committing perjury before any duty of disclosure arises. *United States ex rel. Wilcox v. Johnson*, 555 U.S. F.2d 115, 122 (3d Cir. 1977). As a result, it may only be the "unusual case" wherein the "knowing" standard of RPC 3.3 will be met. *ABA Formal Opinion 87-353* (April 20, 1987).

RPC 3.3(e) provides that we "may" refuse to offer evidence that we *reasonably believe* is false. Thus, RPC 3.3(e)

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permits, but does not require, us to offer, or to refuse to offer, such evidence. This provision protects us from, among other things, being charged with incompetence or lack of diligence, or having disciplinary action taken, for offering, or deciding not to offer, such questionable evidence. Ultimately, this rule reflects that it is for the court to determine the probative value of the evidence.

The RPCs define "know" as denoting "actual knowledge of the fact in question" and go on to state that "A person's knowledge may be inferred from circumstances." The RPCs define "reasonably believes" as denoting "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." The RPCs define "reasonable" in this context as denoting "the conduct of a reasonably prudent and competent lawyer." As a practical matter, even though RPC 3.3(e) permits us to offer evidence that we reasonably believe is false, only rarely in a civil case would we ever want to offer such evidence if only because, if proven false, it reflects seriously and adversely on our own credibility as well as our client's case. In a criminal case, however, the issues are more complex.

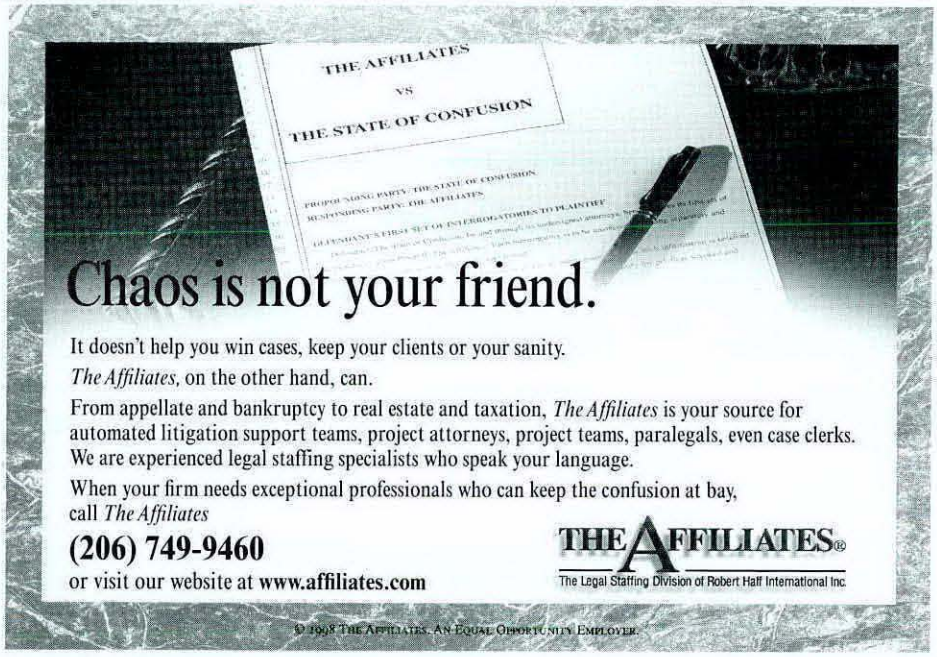
FIXING A FALSITY

RPC 3.3(c) requires that if we have offered material evidence which we come to know is false, we must promptly disclose this fact to the tribunal unless disclosure is prohibited by the RPC 1.6 confidentiality provisions; as noted above, ABA Model RPC 3.3 is absolute and does not contain such a confidentiality exception.

RPC 3.3(b) also clarifies that our basic RPC 3.3(a) duty of candor continues to the conclusion of a legal proceeding so that if we discover before a proceeding is concluded that we offered evidence that was false, we must correct it, but we do not have to do so if we do not discover it until after the proceeding is concluded. This does not, of course, answer the larger ethical issue of whether there may have been a miscarriage of justice based on that false evidence, and whether we can do anything to remedy that miscarriage without violating our other ethical duties, such as confidentiality, to our client.

RPC 3.3(d) attempts to deal with the conflict between our duty of candor to the tribunal and our duty of confidentiality to our client. Since ABA Model RPC 3.3 has a much more absolute duty of candor to judges and does not have the confidentiality exception of our RPC 3.3, the Model Rule has no counterpart to our RPC 3.3(d).

Our RPC 3.3(d) provides that if we have offered material evidence that we come to know is false, and disclosure of the falsity is prohibited by the confidentiality provisions of RPC 1.6, we "shall promptly make reasonable efforts to convince the client to consent to disclosure." Since clients do not have a legally enforceable ethical obligation to the legal system or profession, however, they may have little or no interest in consenting to such disclosure, especially since such nonconsent may well be in their interest and help them prevail in the legal proceeding. Accordingly, RPC 3.3(d) also provides that if the client refuses to permit the disclosure, we may seek to withdraw from the representation in accordance with RPC 1.15. Since a client who insists on maintaining falsity and who does not value truth is not one most of us



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would feel comfortable with, if we have such a client, we would be wise to consider a prompt withdrawal, for where we disagree with our client's disclosure wishes, withdrawal may well be our only option.

Criminal Cases

Very difficult and conflicting constitutional and ethical issues arise in the context of a criminal case, including the client's right to testify and to effective assistance of counsel, and the client's right to confidentiality. Our RPC 3.3(g), which has no parallel in the ABA Model RPCs on which our RPCs are partially modeled, provides that constitutional law defining the right of assistance of counsel in criminal cases may supersede the obligations otherwise imposed under our RPC 3.3.

The definitional distinctions and competing interests in criminal cases leave a fine and uncomfortable line to walk. Difficult situations arise where we do not "know," but perhaps just strongly suspect, that the evidence a client wants presented or has presented is false. Differing considerations arise depending on whether the suspected perjury is by the defendant or by a witness. Washington compounds the dilemma since our RPCs require us to honor the client's right to confidentiality under RPC 1.6, whereas the Model RPC 3.3 does not. We do know that a client does not have a constitutional right to offer perjured testimony. *United States v. Curtis*, 742 D.2d 1070 (7th Cir. 1984), cert. denied 475 U.S. 1064 (1986). A threat to withdraw and disclose to the court if the client insists on perjury does not deprive the client of constitutionally effective assistance of counsel. *Nix v. Whiteside*, 475 U.S. 157 (1986). If the client persists in intending to present false evidence, withdrawal should be considered. In *State v. Berrysmith*, 87 Wn. App. 268 (Div. I, 1997), the court upheld the withdrawal on the first day of trial of a criminal-defense lawyer, who raised with the court in camera his concern that his client intended to commit perjury, rather than requiring the lawyer to remain and allow the client to testify and see if perjury was committed.

If we cannot withdraw and our client refuses to testify truthfully, in a civil context we likely may disclose the falsity subject to RPC 1.6, and in most cases can likely effect a withdrawal. In a criminal context, however, commentators are not so certain of the correct course of conduct, with some suggesting that a client's constitutional rights to testify and to counsel, our duty of confidentiality to the client, and the severe repercussions to the client, may override our duty of candor to the court. *State v. Berrysmith* suggests that these rights and duties do not include, in effect, the right to require counsel to participate, albeit passively, in deceiving the court.

If we cannot withdraw in the criminal case, we are left with the dilemma of continuing to represent a perjuring client while risking disciplinary action and the loss of our reputation. We really have no good choices. The choices basically are to disclose the falsity or to stay silent. Although some courts have suggested that we have our client testify in a narrative fashion without direct examination by us and without us arguing the false testimony in closing argument, the Supreme Court's dictum in *Nix*, and the ABA, have disapproved this approach. Dictum in *Nix* suggests that if our client cannot be dissuaded from intended per-

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jury, and we cannot withdraw, our duty of candor must prevail and we must disclose the intended perjury. But that case was not construing our RPCs and did not involve the explicit Washington provisions requiring the lawyer to maintain client confidences. In either a civil or criminal case, of course, the result of disclosure of the falsity of the evidence may be loss of the case, a possible perjury prosecution for the client, almost certainly a very angry client, and quite possibly a client-initiated malpractice suit and/or disciplinary grievance.

For an extended discussion of these difficult issues, see *Ethical Problems Facing the Criminal Defense Lawyer* (Uphof, editor; ABA, 1996), pp. 131-167, and authorities cited therein. More generally, see ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct, Third Edition* (1996), pages 307-323; Hazard & Hodes, *The Law of Lawyering* (Second Edition) §3.3:208 - §3.3:501, and the authorities cited at §3.3:220; Liskov, "Criminal Defendant Perjury: A Lawyer's Choice between Ethics, the Constitution, and the Truth," 28 *New England Law Review* 881 (1994); and *ABA Formal Opinion 87-353* (April 20, 1987) — but remember in reviewing this opinion that while ABA Model RPC 3.3 specifically overrides the Model RPC confidentiality provisions, our RPC 3.3 explicitly retains the RPC 1.6 confidentiality provisions.

CONCLUSION

Candor to judges and maintaining the confidentiality of client confidences and secrets are both fundamental, but competing, ethical values in our system of law. Both are essential. RPC 3.3 tries to reconcile the two. In many cases, the reconciliation works. In some cases, however, particularly in the criminal law area, the two are irreconcilable. As lawyers we have the difficult, and at times impossible, task of satisfying both.

NOTES

[1] Ethical duties not herein discussed, but related to the duty of candor to judges, include the duty of candor to persons other than judges, such as opposing parties and counsel (RPC 3.4) and to third persons (RPC 4.1). See Althoff, "A Lawyer's Duty of Truth and Candor to Non-Clients," *Washington State Bar News*, January 1998, pp. 26-31. RPC 8.4(c) prohibits us from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. RPC 8.2(a) prohibits us from making false or reckless statements about the qualifications, integrity, or record of a judge, or a judicial candidate. RPC 8.2(b) requires lawyer candidates for judicial office to comply with the Code of Judicial Conduct, while RPC 8.2(c) urges us to support efforts to defend judges and courts from unjust criticism.

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DISCIPLINARY NOTICES

DISBARRED

Charles David Fornero (WSBA No. 20971, admitted 1991), of Seattle, has been disbarred by the Washington Supreme Court effective June 24, 1998. He was also ordered to pay restitution in the amount of $9,801.50, pursuant to RLD 5.3, and costs and expenses in the amount of $1,918.82, pursuant to RLD 5.7. The Order of Disbarment was entered after a default hearing and was based upon the Hearing Officer's Findings and Conclusions that Fornero committed 22 counts of ethical misconduct. The Disciplinary Board approved the Hearing Officer's recommendation of disbarment and restitution. The discipline is based upon findings that Fornero lacked competence (RPC 1.1), failed to abide by clients' decisions regarding the scope of representation (RPC 1.2), continued to neglect eight client matters (RPC 1.3), failed to comply with his clients' reasonable requests for information (RPC 1.4), failed to withdraw or return unearned fees (RPC 1.15), and his misrepresentation to clients about the status of their cases (RPC 8.4(c)).

In August 1995, Fornero moved out of his Federal Way office without informing his clients. He did not keep his clients apprised of the status of their cases, he missed court appointments, and then he made misrepresentations to his clients to hide this neglect. He failed to expedite litigation and he tendered a settlement offer without his client's consent, and after his services had been terminated.

The Hearing Officer was Bradford N. Cattle of Everett. Respondent did not appear for the hearing. Disciplinary Counsel Bernadette Janét represented the Bar Association.

Allison J. Lyon (WSBA No. 8484, admitted 1978), of Edmonds, has been or-

dered disbarred from the practice of law pursuant to a stipulation approved by the Supreme Court on June 24, 1998. The Court also ordered Lyon to pay the costs of disciplinary proceedings in the amount of $1,445.55, the costs of prior disciplinary proceedings in the amount of $3,024.51, and restitution in the amount of $2,500. The discipline is based upon his neglect of two cases, failure to communicate with clients, misrepresentation of the status of one case, and failure to protect his client's interests upon discharge, in violation of RPC 1.3, 1.4, 8.4(c), and 1.15(d). The discipline is also based upon his failure to cooperate with the Bar Association's investigation, in violation of RLD 2.8, and his conduct in practicing law while suspended, in violation of RLD 1.1(l), 8.1, 8.2, and 8.3.

In July 1995, Lyon was retained to review an exceptional sentence given to his client by the Indeterminate Sentencing Review Board ("the Board"). Lyon received a fee of $2,500. He visited his client once in prison to discuss the case. Subsequently, he and his client exchanged letters, and Lyon assured his client that he would review records at the Board. Lyon states that he reviewed the records and researched the legal issues, but never advised his client regarding the merits of the case, nor did he return calls from the client and the client's spouse.

Lyon was also retained to represent a 12-year-old boy who was severely injured by a dog. After conducting some preliminary investigation and research, he wrote to the dog's owners and offered to settle the case. When the owners did not respond, Lyon waited two years before filing a lawsuit, then failed to make reasonable efforts to serve the dog's owners. The client's parents became concerned regarding delays, so they discharged Lyon and requested the file. Lyon failed to turn over the file until the Bar Association served him with a subpoena. Moreover, Lyon failed to notify the court of his discharge. As a result, the client did not receive notice when the court dismissed the lawsuit for want of prosecution.

The above misconduct occurred while Lyon was under the supervision of a probation monitor for a prior discipline case in which he failed to provide competent representation, failed to communicate with clients, and failed to cooperate with the investigation. Furthermore, Lyon did not cooperate with the Bar Association's investigation of these grievances.

Finally, on September 4, 1997, Lyon was ordered suspended from the practice of law by the Supreme Court based upon his failure to comply with the 1994 to 1996 Continuing Legal Education Requirements. He was notified of the suspension by the Supreme Court and Disciplinary Counsel. While suspended, Lyon continued to work as a staff attorney for a legal services office.

Respondent represented himself. Disciplinary Counsel Marsha Matsumoto represented the Bar Association.

ADMONISHED

Lakewood lawyer Joel A. Feldman (WSBA No. 5985, admitted 1975) has been ordered admonished by a February 6, 1998, order of a Disciplinary Board Review Committee. Feldman violated RPC 1.3 by failing to diligently pursue his duties as personal representative of an estate. Feldman failed to file tax returns for two years while the estate was pending, sold the real property for less than the assessed value on unfavorable contract terms, and failed to adequately investigate whether a humane society, which was named as the major beneficiary of the estate on the condition of providing care for the decedent's animals, was willing to care for the animals.

Respondent represented himself. Disciplinary Counsel Julie A. Shankland represented the Bar Association.

Spokane lawyer Julio Morley (WSBA No. 8338, admitted 1978) has been ordered admonished by a May 15, 1998, order of a Disciplinary Board Review Committee. Morley violated RPC 3.4(c) by disbursing trust account funds to his client and others in violation of a court order restricting the disbursal of those funds without court approval.

Morley was represented by Fred Montoya. Disciplinary Counsel Julie A. Shankland represented the Bar Association.

Kathleen Schmidt (WSBA No. 7803, admitted 1977), of Wenatchee, has been ordered admonished by a Review Committee. The discipline is based upon her continued contact with an opposing party after being repeatedly informed that the party was now represented by counsel.

Schmidt's conduct violated RPC 4.2, which prohibits a lawyer from communicating with a party the lawyer knows is represented by another lawyer, unless the lawyer has the consent of the other law-

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yer or is authorized by law to do so.

Respondent represented herself. Disciplinary Counsel Bernadette S. Janét represented the Bar Association.

Spokane lawyer Herbert Landis (WSBA No. 9483, admitted 1979) has been ordered admonished by a February 6, 1998, order of a Disciplinary Board Review Committee. In the course of representing a father in a custody proceeding, Landis sought to obtain old mental health records of the mother, even though both the guardian ad litem and the Family Court Service Coordinator had advised him that they had the current mental health records of the mother and that they did not want the older records. Nevertheless, Landis issued subpoenas to out-of-state health care providers to obtain the older records, misrepresenting to the providers that the guardian ad litem had authorized him to obtain the records, when in fact the guardian ad litem had made no such request and had at that point already been discharged from the case. Landis also failed to give the mother the statutorily required 14-day notice when subpoenaing her medical records.

Landis' conduct in failing to give the required notice and making misleading statements in his letters and subpoenas violated the RPC 4.4 prohibition against using methods of obtaining evidence that violate the legal rights of others, the RPC 8.4(c) prohibition against conduct involving misrepresentation, and the RPC 8.4(d) prohibition against conduct prejudicial to the administration of justice.

Landis represented himself. Disciplinary Counsel Julie A. Shankland represented the Bar Association.

Mark L. Lorbiecki (WSBA No. 16796, admitted 1987), of Seattle, has been ordered admonished by a Review Committee of the Disciplinary Board. The admonition is based upon his disclosure of confidential information regarding his clients' settlement negotiations and settlement, in violation of RPC 1.6, which requires a lawyer to maintain client confidences and secrets.

During the course of settlement negotiations on behalf of two personal injury clients, without permission from his clients, Lorbiecki advised another lawyer, who represented the clients in a separate real estate matter, about the negotiations. After a settlement had been reached, Lorbiecki advised the clients' real estate lawyer that the settlement funds had been deposited into Lorbiecki's trust account. The real estate lawyer, who had a fee dispute with the clients, filed an attorney's lien and "notice of subrogation claim" on the settlement proceeds. Lorbiecki paid $8,992.25 of the clients' settlement funds to the Court Clerk in satisfaction of the purported lien and subrogation claim.

Respondent represented himself. Disciplinary Counsel Christine Gray represented the Bar Association.

Ronald P. Abernethy (WSBA No. 14239, admitted 1984), of Seattle, has been ordered admonished by a Review Committee of the Disciplinary Board. The admonition is based upon Abernethy's neglect of a criminal appeal, in violation of RPC 1.3, and his failure to communicate with his client regarding the status of the appeal, in violation of RPC 1.4.

Abernethy represented a criminal defendant on an assault charge, the subsequent "Three Strikes and You're Out" hearing, and the appeal. The client requested the appeal following his conviction and sentence of life in prison without the possibility of parole. Abernethy timely filed a Notice of Appeal, Designation of Clerk's Papers, and Request for Extension of Time to File Brief. He was aware that the "Three Strikes" law was relatively new, and there were several challenges to it already before the Supreme Court.

Following the Supreme Court's decision in the first major "Three Strikes" case, Abernethy determined that his client no longer had any valid appellate issues. Consequently, he did not file a brief, but did not withdraw either. The client did not agree with the decision to abandon the appeal.

Abernethy was aware that *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), requires a court-appointed criminal defense attorney, who does not believe his client's appeal has merit, to nevertheless file a brief raising all possible appeal issues accompanied by his request to withdraw from the case. Abernethy neglected to do anything. The Court of Appeals dismissed the client's appeal for failure to prosecute.

Respondent Abernethy represented himself. Disciplinary Counsel Sachia I. Stonefeld represented the Bar Association.

SERIOUS PERSONAL INJURY

ILLUSTRATIVE CASE:

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Robert J. Hall (WSBA No. 3387, admitted 1956), of Seattle, has been ordered admonished by a Review Committee of the Disciplinary Board. The admonition is based upon Hall's neglect of a probate matter, in violation of RPC 1.3.

Hall drafted a will that established monthly distributions to two heirs. Following the testator's death, the personal representative (P.R.) made the monthly distributions until his own death in June 1994. Hall served as the lawyer for the P.R. and the estate. In July 1994, Hall informed one of the heirs that the P.R. had died, and agreed to petition the court for the appointment of a successor P.R. Hall was aware that the heirs desired a quick resolution so that the monthly distributions would not be interrupted.

The heirs filed a grievance against Hall in November 1995 because no successor P.R. had been appointed. In April 1996, Hall agreed to expeditiously seek a successor P.R. Hall took no further action on the case. In January 1997, the heirs hired a new lawyer and quickly obtained an order appointing a successor P.R.

Respondent Hall represented himself. Disciplinary Counsel Sachia I. Stonefeld represented the Bar Association.

Nondisciplinary Notices

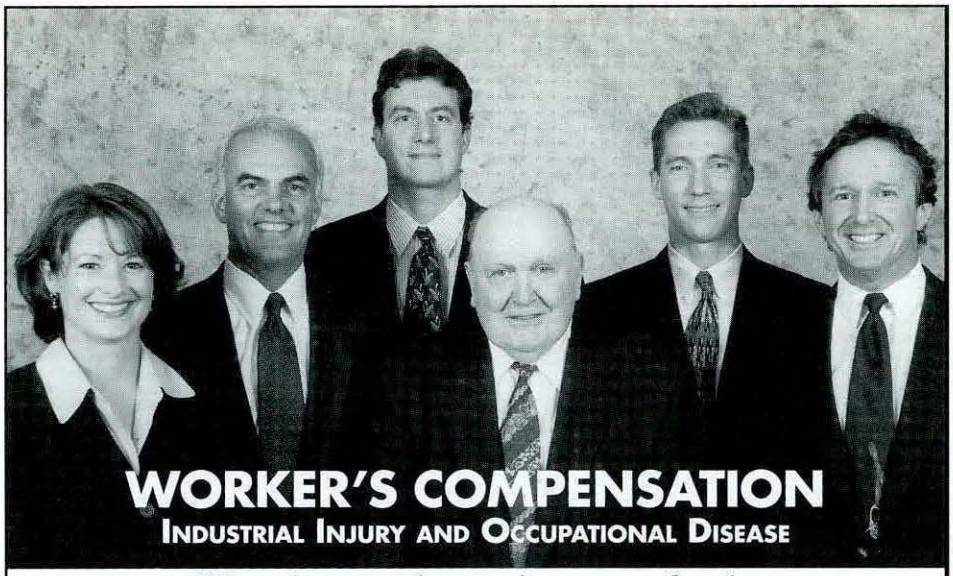
Interim Suspension

James A. Heard (WSBA No. 12272, admitted 1974), of Aberdeen, has been suspended from the practice of law pending supplemental proceedings by order of the Washington Supreme Court, dated July 29, 1998. The suspension is effective immediately. The interim suspension is pursuant to RLD title 3 and is not a disciplinary sanction.

Mr. Heard is representing himself. Disciplinary Counsel Maureen Devlin is representing the Bar Association.

Douglas Leonardo (WSBA No. 07070, admitted 1976), of Kirkland, has been suspended from the practice of law pending supplemental proceedings by order of the Washington Supreme Court, dated August 13, 1998. The suspension is effective immediately. The interim suspension is pursuant to RLD title 3 and is not a disciplinary sanction.

Mr. Leonardo is representing himself. Disciplinary Counsel Maureen Devlin is representing the Bar Association.



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To announce a seminar, please send information to:
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Seattle, WA 98121-2330.
fax: 206-727-8320
e-mail: comm@wsba.org

Information must be received by the 1st of the month for placement in the following month's issue.

Administrative Law

Administrative Hearings with Judges: What Judges Really Want to Hear
Nov. 12 – Seattle; Nov. 17 – Olympia. 6.75 CLE credits estimated. By WSBA CLE 206-727-8202.

Alternate Dispute Resolution

Training to be a Professional Mediator
Oct. 1-2 – Seattle. 15 CLE credits (incl. 1 ethics). By Alan Alhadeff J.D. Mediation 206-281-9950.

Professional Mediation Skills Training
Oct. 9-11, 24-25 – Seattle. 36 CLE credits (incl. 2 ethics). By WA Law School Foundation 206-543-0059.

Interest-based Mediation — The Process: Philosophies, Proficiency and Procedures
Oct. 19-23 – Spokane. 40 CLE credits (incl. 1 ethics). By Fulcrum Institute 509-838-2799.

Computer Camp for Counselors: Basic Hands-on Workshop for Using the Internet in Your Practice
Nov. 13 – Seattle. 3.5 CLE credits estimated. By WSBA CLE 206-727-8202.

Computer Camp for Counselors: Legal Research over the Internet Workshop
Dec. 11 – Seattle. 3.5 CLE credits estimated. By WSBA CLE 206-727-8202.

4th Annual Advanced ADR Seminar
Oct. 30 – Seattle. 4 CLE credits (incl. 1 ethics). By WA Arbritration and Mediation Service 206-467-0793.

Appeals

Introduction to Appeals: How to be an Effective Advocate in the Court of Appeals, Division II
Oct. 21 – Port Orchard; Oct. 22 – Vancouver; Oct. 23 – Tacoma. 6.25 CLE credits (incl. 1 ethics). By Court of Appeals, Div. II 360-956-2110.

Business Law

The Revised Uniform Partnership Act: Handling the Changes
Oct. 1 – Seattle. 4.5 CLE credits. By WSBA CLE and Business Law Section 206-727-8202.

The Uniform Commercial Code Seminar
Oct. 14 – Seattle. 3 CLE credits. By CT Corporation System 212-315-7800.

Valuing Closely Held Businesses: Theory, Practice and Law
Oct. 14 – Spokane; Oct. 16 – Bellevue; Oct. 21 – Seattle; Oct. 23 – Portland, OR. 7.5 CLE credits. By Business Advisory Services 206-223-5400.

Collection Law in WA
Oct. 22 – Spokane. 6.5 CLE credits (incl. .75 ethics). By Lorman 715-833-3940.

How to Avoid Antitrust Actions Against Your Business Clients (The 1998 Antitrust, Consumer Protection and Unfair Business Practices Conference)
Nov. 6 – Seattle. 6.25 CLE credits. By WSBA CLE and Consumer Protection and Antitrust Section 206-727-8202.

Business Conflicts of Interest/Limited Liability Companies
Dec. 16 – Seattle. 6.5 CLE credits estimated (full day); 3.25 CLE credits estimated (half-day). By WSBA CLE 206-727-8202.

Computer Law

The Legal Ramifications of Year 2000 Compliance in WA
Oct. 29 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

Criminal Law

The Masters of the Criminal Practice
Dec. 9 – Seattle. 6.5 CLE credits estimated. By WSBA CLE 206-727-8202.

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Elder Law

How to Handle Elder Law Cases: Cutting-edge Strategies and Remedies
Oct. 15 – Seattle. 7 CLE credits (incl. 1 ethics). By WSBA CLE 206-727-8202.

Employment

The Basics of Employment Law
Oct. 5-6 – Seattle. 12 CLE credits. By Council on Education in Management 925-988-1837.

Human Resources Law
Oct. 14 – Seattle. 6.5 CLE credits. By NBI 715-835-7909.

Management Perspectives on Employment Law in WA
Oct. 14 – Seattle. 6.5 CLE credits. By The Cambridge Institute 703-790-9595; www.mgmtconcepts.com

Estate Planning

Charitable Gift Techniques
Oct. 16 – Walla Walla. 6 CLE credits. By Walla Walla Valley Estate Planning Council 509-529-0630.

Truth About Estate Planning Workshop
Oct. 20-21 – Seattle. CLE credits TBA. By National Network of Estate Planning Attorneys 800-638-8681 x113.

Dynasty Planning and Generation-skipping
Oct. 20-21 – Seattle. CLE credits TBA. By National Network of Estate Planning Attorneys 800-638-8681 x137.

Master Your Marketplace
Oct. 20-21 – Seattle. CLE credits TBA. By National Network of Estate Planning Attorneys 800-638-8681 x137.

Family Limited Partnerships
Oct. 20-21 – Seattle. CLE credits TBA. By National Network of Estate Planning Attorneys 800-638-8681 x137.

22nd Semi-annual Estate Planning Collegium
Oct. 22-24 – Seattle. CLE credits TBA. By National Network of Estate Planning Attorneys 800-638-8681 x137.

43rd Annual Estate Planning Seminar
Nov. 2-3 – Seattle. 15.75 CLE credits. By WSBA CLE and Estate Planning Council of Seattle 206-727-8202.

How to Draft Wills and Other Estate Planning Documents
Dec. 3 – Seattle and Spokane. 6.5 CLE credits (incl. .5 ethics) estimated. By WSBA CLE and Young Lawyers Division 206-727-8202.

How to Probate an Estate and Handle Post-mortem Matters
Dec. 4 – Seattle and Spokane. 6.5 CLE credits estimated. By WSBA CLE and Young Lawyers Division 206-727-8202.

Ethics

Ethical Dilemmas for the Practicing Lawyer
Oct. 2 – Spokane; Oct. 16 – Tacoma; Oct. 30 – Yakima; Nov. 6 – Mt. Vernon; Nov. 13 – Vancouver; Nov. 30 – Seattle. 4 CLE ethics credits. By WSBA CLE 206-727-8202.

Professionalism and Character: How Intertwined?
Oct. 12, 30; Nov. 30; Dec. 21; Jan. 28; Feb. 23 – by telephone. 2 CLE ethics credits pending. By TRT Inc. 800-672-

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Round Table Ethics
Oct. 16 – Portland, OR. CLE credits TBA. By OSBA 503-684-7413.

Rule 11: Its Use, Abuse and Implications for Professionalism
Oct. 28 - Seattle. 3 CLE ethics credits pending. By KCBA 206-340-2578.

Twin Professional Problems: Substance Abuse and Elimination of Bias
Oct. 29; Nov. 24; Dec. 28; Jan. 27; Feb. 16 – by telephone. 2 CLE ethics credits pending. By TRT Inc. 800-672-6253 or www.trt-cle.com

Ethics for Real Estate Lawyers
Nov. 11 – your office. 1.5 CLE ethics credits estimated. By WSBA CLE 206-727-8202.

Ethics for Business Lawyers
Nov. 18 – your office. 1.5 CLE ethics credits estimated. By WSBA CLE 206-727-8202.

Ethics for Criminal Lawyers
Nov. 19 – your office. 1.5 CLE ethics credits estimated. By WSBA CLE 206-727-8202.

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Ethics for Estate Planners
Dec. 2 – your office. 1.5 CLE ethics credits estimated. By WSBA CLE 206-727-8202.

Ethics for Family Lawyers
Dec. 2 – your office. 1.5 CLE ethics credits estimated. By WSBA CLE 206-727-8202.

Ethics Seminar
Dec. 11- Seattle. 3.75 CLE ethics credits pending. By WDTL 206-521-6559 or www.wdtl.org

Ethics for Litigators
Dec. 16 – your office. 1.5 CLE ethics credits estimated. By WSBA CLE 206-727-8202.

FAMILY LAW

Tax Aspects of Divorce
Oct. 21 – Seattle. 7.25 CLE credits (incl. 1 ethics) estimated. By NBI 715-835-7909.

The Psychology of Divorce
Oct. 30 - Seattle. 6 CLE credits (incl. 1 ethics) pending. By KCBA 206-340-2578

GENERAL

Advanced Legal Writing and Editing
Oct. 1 – Seattle. 6.5 CLE credits. By LawProse 214-691-8588.

Introduction to Westlaw
Oct. 6, 21 – Seattle. 1.5 CLE credits. By West Group 206-628-6435.

CD-ROM: Premise
Oct. 6, 27 – Seattle. 1.5 CLE credits. By West Group 206-628-6435.

1998 Fall Conference
Oct. 7-9 – Chelan. 11.25 CLE credits (incl. 1.75 ethics). By WA Assn. of Municipal Attorneys 206-625-1300.

Effective Legal Negotiation and Settlement
Oct. 9 – Portland, OR. CLE credits TBA. By OSBA 503-684-7413.

Internet Legal Research: Using the Internet to Improve Your Law Practice; The Ethics & Liabilities of Going Online
Oct. 9-10 – Bellevue. 12 CLE credits (incl. 2.5 ethics). By KCBA 206-624-9365.

Choice of Limited Liability Entities—LLC, LLP, S-Corps
credits estimated. By WSBA CLE 206-727-8202.

Oct. 2 – Seattle. 3.5 CLE credits. By UW CLE 206-543-0059.

Taxation for the General Practitioner
Oct. 9 – Seattle. 6.75 CLE credits. By WSBA CLE 206-727-8202.

Sanctions Competence and Diligence
Oct. 11, 22; Nov. 23; Dec. 30; Jan. 29; Feb. 15 – by telephone. 2 CLE ethics credits pending. By TRT Inc. 800-672-6253 or www.trt-cle.com

Getting to Know the Courthouses in Seattle
Oct. 12-15 – Seattle. 5 CLE credits. By KCBA 206-624-9365.

Anatomy of a Computer
Oct. 15 – Seattle. 6 CLE credits. By KCBA 206-624-9365.

Proving and Challenging Damages
Oct. 15 – Portland, OR. CLE credits TBA. By OSBA 503-684-7413.

Serving Clients with HIV/AIDS: New and Continuing Challenges
Oct. 16 – Seattle. 6.25 CLE credits. By KCBA 206-624-9365.

Advanced Westlaw
Oct. 23 – Seattle. 1.5 CLE credits. By West Group 206-628-6435.

Psychology and the Legal Profession
Oct. 26; Nov. 25; Dec. 29; Jan. 25; Feb. 22 – by telephone. 2 CLE credits pending. By TRT Inc. 800-672-6253 or www.trt-cle.com

7th Annual Water Law
Dec. 4 – SeaTac. 6 CLE credits estimated. By WSBA CLE 206-727-8202.

Best of CLE 1998
Dec. 10 – Seattle. 6.5 CLE credits estimated. By WSBA CLE and General Practice Section 206-727-8202.

Last Chance Video Round-up
Dec. 21-23 – WSBA offices. CLE credits TBA. By WSBA CLE 206-727-8202.

INSURANCE

5th Annual Insurance Law Basics Seminar
Oct. 9 – Seattle. 5.75 CLE credits pending. By WSTLA 206-464-1011.

Insurance Law Seminar
Nov. 5 – Spokane; Nov. 6 – Seattle. 6 CLE credits (incl. 1 ethics) pending. By WDTL 206-521-6559 or www.wdtl.org

INTELLECTUAL PROPERTY

Copyright Law
Oct. 28 – Seattle. 6.5 CLE credits. By Lorman 715-833-3940.

INTERNATIONAL LAW

Are We Reaching World Law (and Peace) Through Business?
Oct. 2 – Seattle. CLE credits TBA. By WSBA World Peace Through Law Section 206-727-8202.

1998 International Law Institute
Oct. 27 – Seattle. 7 CLE credits pending. By WSBA International Law Section 425-644-4800.

LANDLORD/TENANT

Tenant Improvements
Oct. 15 – Seattle. 11 CLE credits. By LSI 206-567-4490.

LITIGATION

5th Annual Insurance Law Basics Seminar
Oct. 9 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

Defending Misdemeanor Cases
Oct. 9 – Seattle; Oct. 23 – Kennewick.

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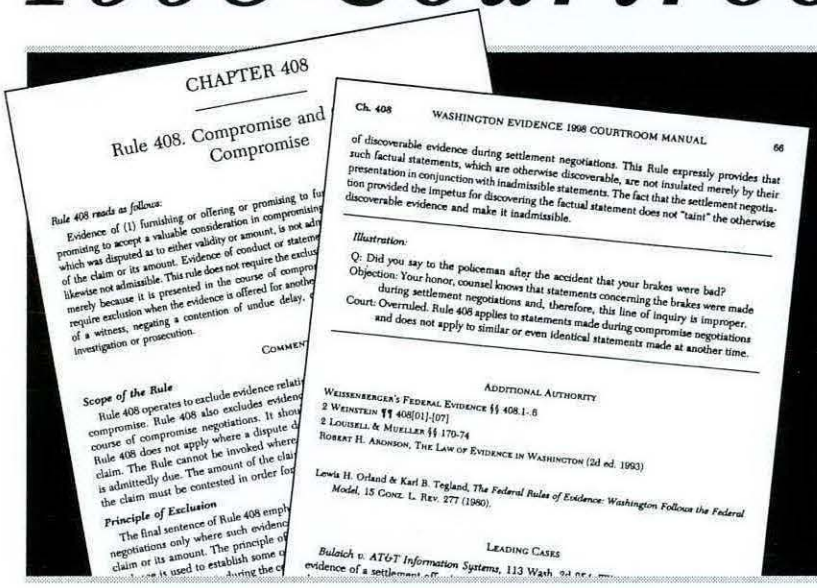
CHAPTER 408

Rule 408. Compromise and Compromise

Rule 408 reads as follows:

Evidence of (1) furnishing or offering or promising to fu
promising to accept a valuable consideration in compromising
which was disputed as to either validity or amount, is not adm
of the claim or its amount. Evidence of conduct or statem
likewise not admissible. This rule does not require the exclus
merely because it is presented in the course of compro
require exclusion when the evidence is offered for another
of a witness, negating a contention of undue delay,
investigation or prosecution.

COMMEN

Scope of the Rule

Rule 408 operates to exclude evidence relati
compromise. Rule 408 also excludes evidenc
course of compromise negotiations. It show
Rule 408 does not apply where a dispute d
claim. The Rule cannot be invoked where
is admittedly due. The amount of the clai
the claim must be contested in order fo

Principle of Exclusion

The final sentence of Rule 408 emph
negotiations only where such evidenc
claim or its amount. The principle of
evidence is used to establish some

Ch. 408 WASHINGTON EVIDENCE 1998 COURTROOM MANUAL 66

of discoverable evidence during settlement negotiations. This Rule expressly provides that such factual statements, which are otherwise discoverable, are not insulated merely by their presentation in conjunction with inadmissible statements. The fact that the settlement negotiation provided the impetus for discovering the factual statement does not "taint" the otherwise discoverable evidence and make it inadmissible.

Illustration:

Q: Did you say to the policeman after the accident that your brakes were bad?
Objection: Your honor, counsel knows that statements concerning the brakes were made during settlement negotiations and, therefore, this line of inquiry is improper.
Court: Overruled. Rule 408 applies to statements made during compromise negotiations and does not apply to similar or even identical statements made at another time.

ADDITIONAL AUTHORITY

WEISSENBERGER'S FEDERAL EVIDENCE §§ 408.1-.6
2 WEINSTEIN ¶¶ 408[01]-[07]
2 LOUISELL & MUELLER §§ 170-74
ROBERT H. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON (2d ed. 1993)

Lewis H. Orland & Karl B. Tegland, *The Federal Rules of Evidence: Washington Follows the Federal Model*, 15 GONZ. L. REV. 277 (1980).

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Bulaich v. AT&T Information Systems, 113 Wash. 2d

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Defense Trial Tactics
Oct. 16 – Seattle. 6 CLE credits (incl. .75 ethics) pending. By WDTL 206-521-6559 or www.wdtl.org

Discovery and Depositions
Oct. 28 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

Sequences: Advanced Cross-examination
Oct. 28 – your office. 1.5 CLE credits estimated. By WSBA CLE 206-727-8202.

Emerging Issues in Civil Rights Litigation
Oct. 28 – Seattle. 6.5 CLE credits (incl. 1.25 ethics). By NBI 715-835-7909.

Women of WSTLA Annual Retreat
Oct. 29-30 – Leavenworth. CLE credits TBA. By WSTLA 206-464-1011.

Power Persuasion: Trial Advocacy Techniques for the Experienced Litigator
Nov. 4 – Seattle. 6.75 CLE credits. By WSBA CLE 206-727-8202.

Tort Law Update
Nov. 11 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

The Tacoma CLE
Dec. 10 – Tacoma. CLE credits TBA. By WSTLA 206-464-1011.

Medical Malpractice

Alternative and Regular Medicine
Nov. 4 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

Nursing Home Malpractice Seminar
Nov. 18 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

Personal Injury

Impairment and Disability Evaluation
Oct. 9 – Spokane, 8.5 CLE credits; Oct. 10-11 – Seattle, 17 CLE credits. By SEAK 508-548-7023.

Permanent Soft Tissue Injuries
Oct. 17 – Seattle. 6.5 CLE nexus credits. By Dr. Daniel P. Dock 218-525-2033.

Adjusting the Automobile Injury Claim in WA
Nov. 17 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

Real Estate

Drafting and Foreclosing Deeds of Trust after the Amendments to the Deed of Trust Act
Oct. 1 – Seattle; Oct. 8 – Spokane. 6.5 CLE credits (incl. 1 ethics). By WSBA CLE and RPPT Section 206-727-8202.

5th Annual Fall Real Estate Conference
Nov. 19 – Seattle. 6.5 CLE credits estimated. By WSBA CLE 206-727-8202.

Commercial Real Estate: Drafting and Negotiation Considerations
Nov. 20 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

Taxation

Exempt Organizations and Charitable Activities in WA
Nov. 19 – Seattle. 7.25 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

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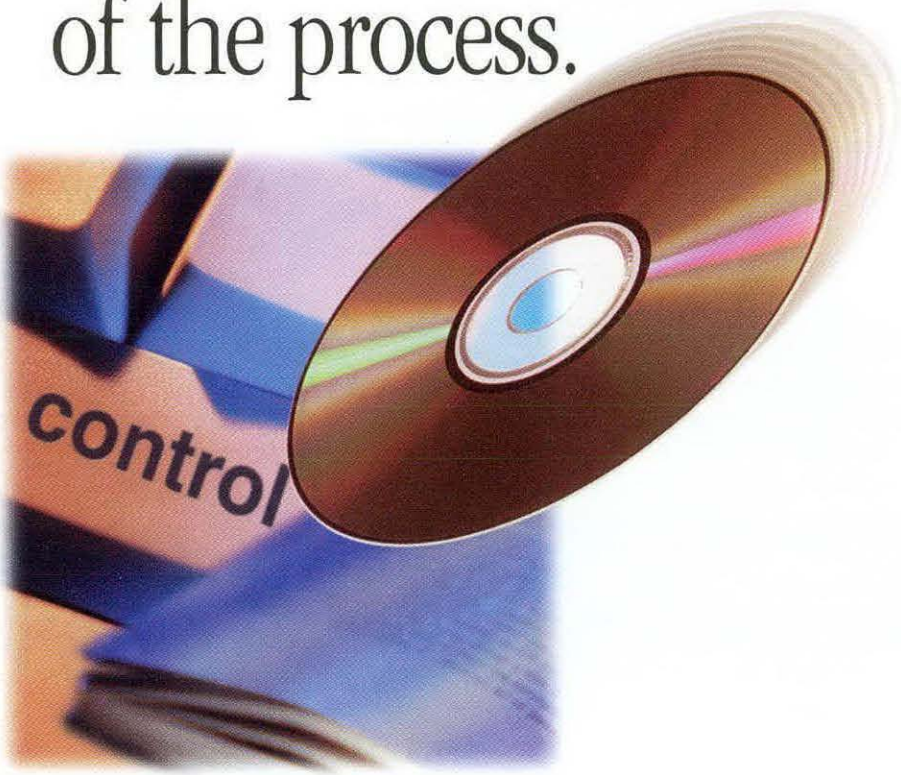

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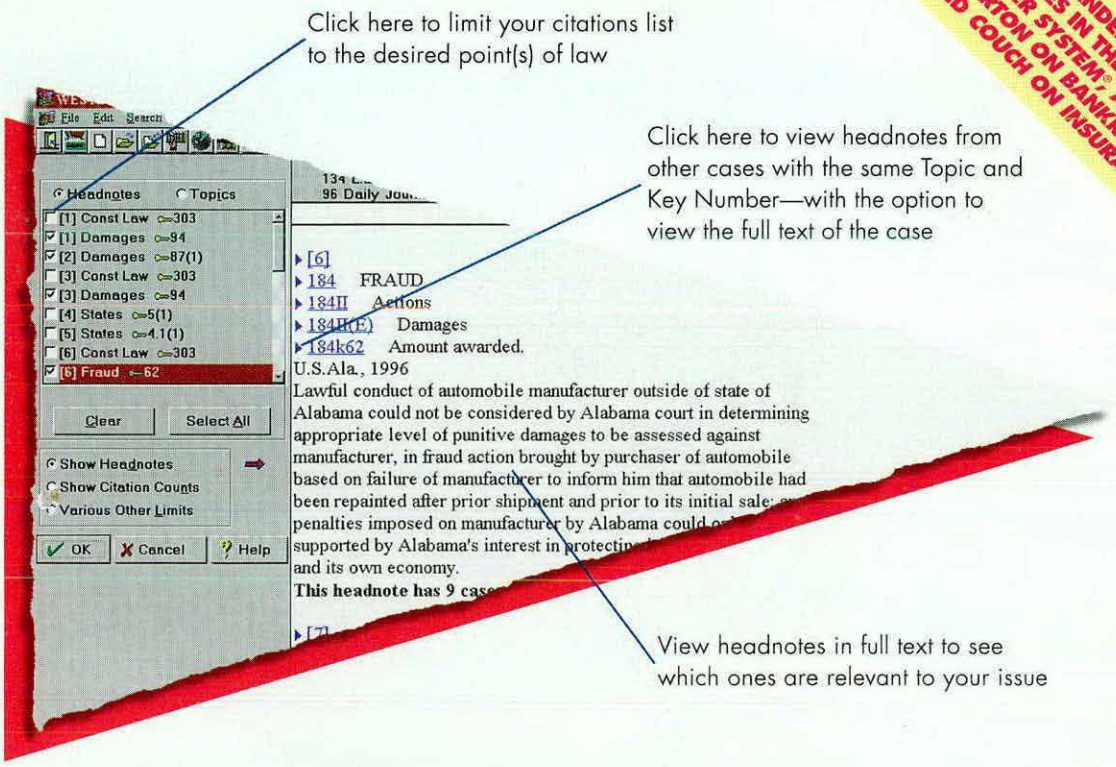

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