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FIVE DOLLARS

Washington State BAR NEWS

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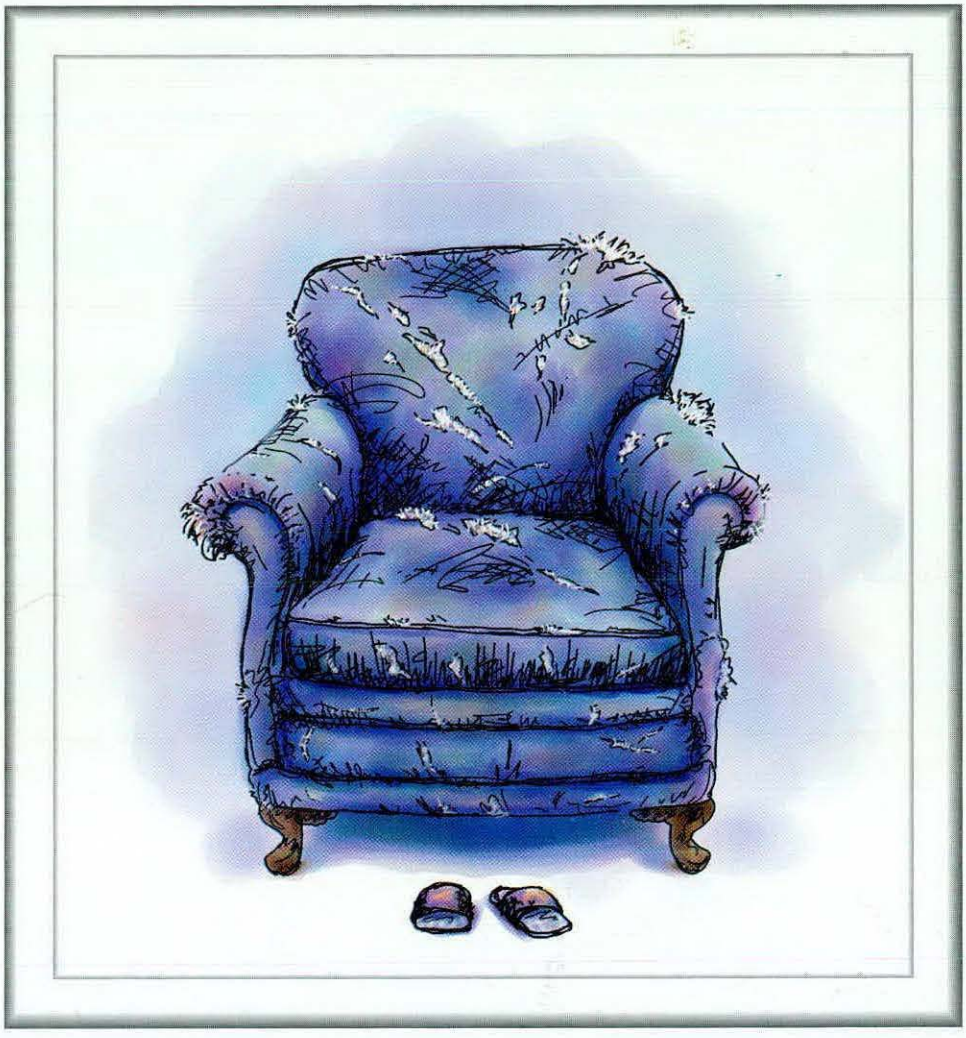
November 1998



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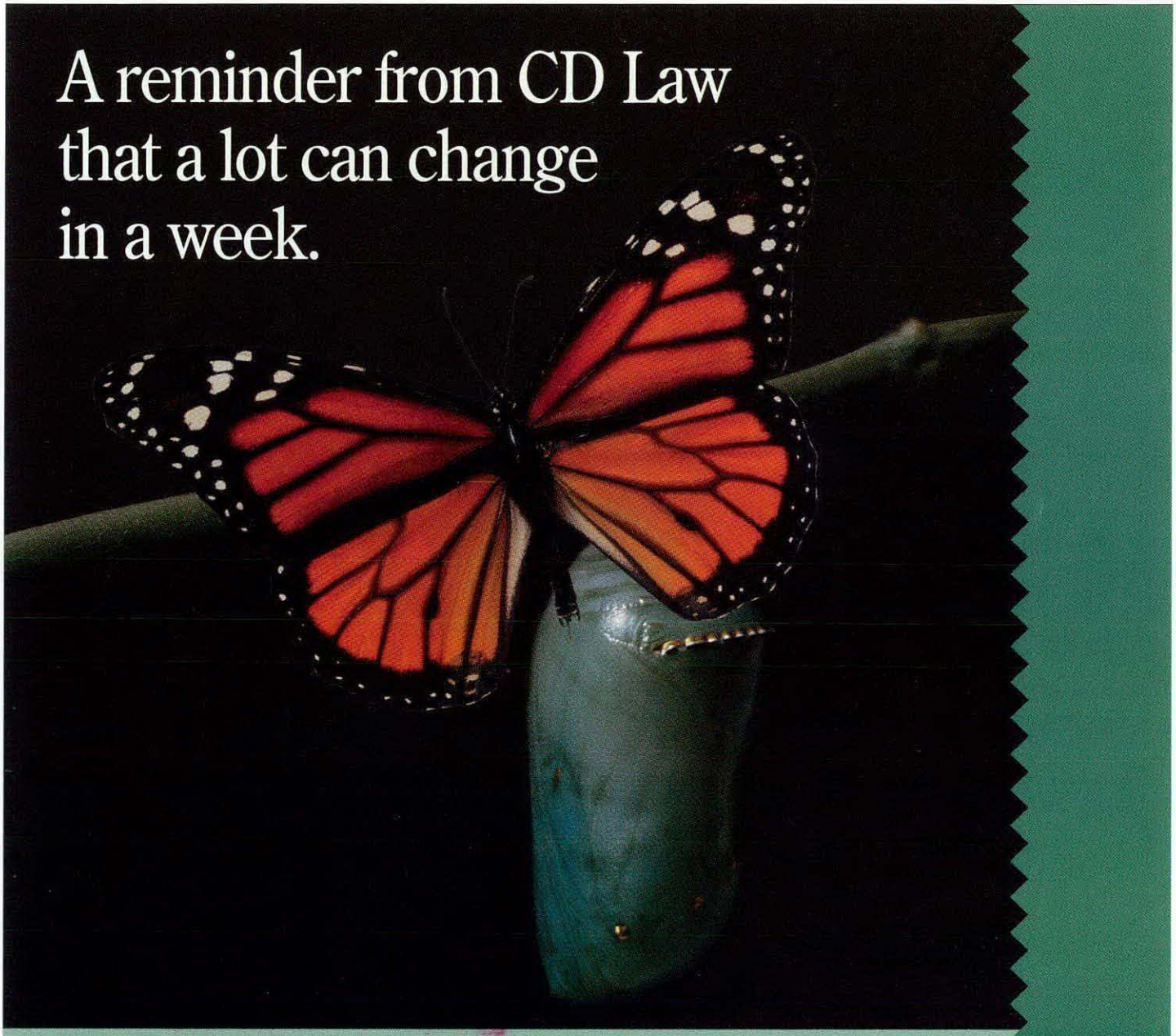

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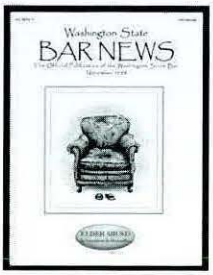

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Letters

Errata

Editor's Note: We apologize for the misprinting of two individuals' names in the October issue. On page 37, Thomas Dreiling's name was incorrectly printed as Thomas Delong, and John Clute's name was incorrectly printed as John Kluge. We regret these errors.

"Sexual Ambition": The Flip Side Of Sexual Harassment?

Editor:

Katie Roiphe's op-ed (*Seattle P.I.*, 9-16) on Monica Lewinsky's bald career ambition in soliciting Mr. Clinton for job favors was right on point. Maybe there should be a legal action akin to sexual harassment, but from its flip side. It would be against the woman who wiles the more powerful male to get ahead. It might be the new tort and rage of the 2000s. It could be called "sexual ambition," or maybe "sexual manipulation," or perhaps "sexual overreaching." Women who let their boss harass them in order to get ahead would be jointly culpable.

Sexual ambition can be justified as legal action in the same way we justify penalties on both parties for things like bribery and prostitution. Both parties are seen as guilty, even though, as in prostitution, the male often is the power holder. But both are seen as wrongdoers.

This would put starlets, ambitious bimbos, assertive interns and other sexually ambitious women on notice: you may be culpable along with your male superior because you won't always be able to cry victim when you're actively using your femininity to get ahead.

Jeff E. Jared
Kirkland

IOLTA Interest Unconstitutional

Editor:

I believe the use of "interest" on IOLTA accounts by the Columbia/Evergreen Legal Services is unconstitutional for several reasons. While IOLTA is presented as money from nowhere, as money which would not exist if IOLTA did not claim it, in fact IOLTA money comes from the bank. The bank has to write a check every month to the Supreme Court of Washington to pay its IOLTA bill. If the bank did not have to pay this money, it would be able to return it to investors, pay better wages, finance things, or something: it could use the money itself. An exaction of money for a government purpose is a tax. IOLTA is a tax.

There are several infirmities in this tax. First, the Supreme Court cannot impose a tax on anyone because the court cannot act as a legislature and then rule on the validity of legislation it created. This is a conflict of interest and a violation of the separation of powers doctrine. Also, seemingly, taxes must be passed by the Legislature and signed by the governor, even though the state constitution may not clearly say so. Second, the tax is wrong because it forces an individual, the person with trust account money, to use his or her money as a lever to generate tax revenue for causes which the individual may oppose. LSC says the individual has no rights because no interest would be paid anyway. But LSC is using the individual's money to gain revenue for itself. By analogy, an individual might own land which cannot be used because of inaccessibility, but this land, frozen in winter perhaps, could be used *as a convenience* by the Army, in winter, without loss to the owner, who opposes the Army for ideological reasons. Like LSC, the Army says the owner cannot use the property, and it can, without harm to the property owner. This is unconstitutional. But why?

The City of Tigard "takings" case provides a partial answer. IOLTA is an exaction imposed on banks, in proportion to lawyer accounts, to support political and social service activities that neither the bank nor its lawyer customers have anything to do with. An exaction directed at an individual, corporate or personal, must be proportional to a burden on the government caused by that individual. See *Burton v. Clark County*, 958 P.2d 343 (Div. 2). Any other tax not of general application is invalid.

The City of Tigard problem is complicated further because IOLTA is not a tax for a general governmental purpose. Taxes must be raised for government purposes. IOLTA is a tax scheme designed to support Evergreen/Columbia Legal Services, even though there are other minor beneficiaries. But Evergreen/Columbia is not a government agency. Evergreen has (or had) lobbyists in Olympia, takes political positions and litigates. It is partisan. Evergreen is governed by its board, not by the public through the legislature. The government cannot impose a tax to support a political group not subject to the control or supervision of the people via the legislature. But because IOLTA does precisely this, it forces individuals — banks, lawyers and holders of trust account money — to pay taxes for a private group whose purposes are sometimes reprehensible to the bank, lawyer or holder of trust account money. IOLTA is a tax on individuals to support contrary individuals. The First Amendment forbids an exaction from one individual so that another individual can speak in a manner opposed by the exactee, and therefore IOLTA is unconstitutional.

Roger B. Ley
Seattle

Balanced Budget Act

Editor:

The September issue (State Bar Highlights) mentions that the WSBA Board of Governors passed a resolution urging repeal of Section 4734 of the Balanced Budget Act of 1997 (dubbed the "Send Granny's Lawyer to Jail Law" by its opponents). This resolution should be considered in context.

Section 4734 makes it a crime to counsel or otherwise assist with certain Medicaid asset transfers for the purpose of qualifying clients for Medicaid's long-term care benefits. While the law raises legitimate constitutional concerns, its passage reflects lawmakers' desperate frustration with Medicaid planning.

Medicaid is a means-tested public assistance program. It is welfare. It is on the brink of bankruptcy and already fails to cover two-thirds of the elderly poor and half of all poor children. It suffers from a notorious reputation for problems with access, quality, reimbursement, discrimination and institutional bias.

As Medicaid spending has skyrocketed, Congress has repeatedly attempted to curtail egregious forms of Medicaid planning in order to preserve Medicaid's scarce resources for the truly needy. In turn, Medicaid planners have fought to preserve this lucrative practice by creating new loopholes where Congress has succeeded in closing others.

Finally, Congress and the President signed into law 42 U.S.C. 1320a-7b(a), (6) which made it a federal crime to transfer assets in order to become eligible for Medicaid if the transfer resulted in a period of ineligibility for benefits. Subsequently, Congress retargeted the law in BBA Section 4734 to criminalize only assistance with Medicaid asset transfers,

acknowledging that purveyors of Medicaid planning services often instigate complex Medicaid planning arrangements.

Although criminalization is plagued with difficulties and should not be viewed as a long-term solution, Congress and the President ran out of apparent options. All previous attempts to close loopholes in Medicaid eligibility rules have been frustrated by the success of Medicaid planners in opening new loopholes. In context, criminalization should be viewed merely as evidence of a renewed and more determined commitment to save Medicaid for its intended recipients.

Congress and the President soon will tire of this cat-and-mouse game. Genuine reform of our long-term care financing system is imminent. The Center for Long-term Care Financing recently introduced *LTC Choice: A Simple, Cost-Free Solution to the Long-term Care Financing Puzzle* to guide the reform effort. The report explains how America's long-term care service delivery and financing system became so dysfunctional. More importantly, the report describes what we can and must do as a nation to finance quality long-term care for all Americans as the baby-boom generation ages.

A WSBA Board of Governors interested in the well-being of our senior population can do more than pass resolutions at the behest of its dues-paying Medicaid planners. The Center for Long-term Care Financing is a ready and willing resource should the WSBA desire to revisit the subject.

David M. Rosenfeld, Seattle

We Need a New Offer of Judgment Law

Editor:

"We have nothing to lose." As a mediator I hear that statement frequently. Not just from the plaintiff's side either. However, it is this type of statement from the plaintiff's side that seems to be driving the push, at least in part, for "tort reform," something that we have no justification for in Washington State. That is, if you look at average damage awards over the past few years and take into account what we do not have—a meaningful Offer of Judgment law (or settlement if you prefer).

I always assume that when lawyers make a statement such as "having nothing to lose" they are speaking in relative terms. Every participant in a lawsuit has something to lose, including lawyers. If that is the perception lawyers have, we have flaws in our system—either poor risk analysis by the lawyers and their clients or not enough risk in losing.

There is not much, specifically, that we can do about the former other than what we have already done by instituting continuing education and having rules of procedure to weed out weak or frivolous lawsuits. However, there is something specific we can do about the latter. Washington needs an Offer of Judgment law that will get the attention of lawyers and their clients, both plaintiffs and defendants. Without such a law, any talk of "tort reform" is premature.

Washington's existing Offer of Judgment law is RCW 4.84.280. This law is limited. It permits the court to tax attorney fees as costs in actions of $10,000 or less. Thus it is of little use in most civil actions.

To be most effective, an Offer of Judgment law must apply to almost all cases. If there can be a prevailing party, there can be an Offer of Judgment. A good Offer of Judgment law should provide that, at some point early in the lawsuit, any party to the lawsuit may make an offer to any other party which, if accepted, can be reduced to judgment. The party to

whom the offer is made should then have a reasonable time in which to accept or reject the offer; say 30 days. As the trial date approaches the response time can be shortened, but the process should not be abandoned. Rather, special notice provisions should apply. Failure to reject an offer would be deemed a rejection. The penalty for rejection would be that in the event the party who rejected the offer did not improve its position by a certain amount, say at least 10 percent, at a subsequent trial or settlement (this provides the parties with an extra bargaining chip), then that party would be liable to the offering party for all of that party's attorney fees and costs (not just taxable costs) incurred from the time of the rejection.

For example, the Offer of Judgment law might read: RCW 4.84.–. Offer of Judgment (Settlement) in determining costs in damage actions. Any party to an action that has a claim for damages as a component thereof may serve upon any other party to the action an Offer of Judgment. The offer may not be make prior to 10 days after the last responsive pleading is due. The party to whom the offer is made shall have 30 days from receipt of the offer to either accept or reject the offer. A counter offer, or no response, shall be deemed a rejection. Offers made within 30 days of trial shall have no set time for response other than a "reasonable time." Reasonableness shall be determined by the court at the time of proffered enforcement. In the event that the party who rejects an offer is not the prevailing party by at least 20 percent at subsequent trial or settlement, then the offering party shall be entitled to recover all attorney fees and costs incurred from the date of rejection. Parties may make multiple offers and joint offers. An offer submitted to the court for enforcement shall be the most recent in time. No offer may be filed nor communicated to the court until after judgment is entered or settlement filed.

As is readily apparent, offers of judgment are very case-specific, unlike "tort reform" proposals, which tend to be very general. It is the difference between a scalpel and a sledgehammer.

Some benefits of such an Offer of Judgment law would be better early investigation and evaluation by lawyers. There are few cases where most of the facts are not known early on. Admissible evidence is not necessary for early thorough evaluation.

Tighter and better pleadings would result. Sometimes for various reasons, such as time constraints or failure to investigate thoroughly (including a careful interview of the client), pleadings are sloppily drafted. This includes overstatement. Poor pleadings lead to hearings. Offers of Judgment increase the downside of this practice.

Pre-suit negotiations are an increased option. Certainly the easiest way to avoid the risks of an offer of judgment is to make an attempt to resolve the dispute prior to suit. It does not hurt to get an idea of where the opposition is coming from. This is especially true in small value cases.

Use of Early Neutral Evaluation, an inexpensive way for lawyers to test their cases, is helpful. The couple of hours or so it will take a neutral to review a case with a fresh set of neutral eyes can be money well spent.

Better control of fees and costs is required. The possibility of having to pay the costs and fees of other parties certainly makes it a good idea to be careful to keep tight control of what the case is

costing. When an offer of judgment is presented to a court for enforcement, the court will use a test of reasonableness. Lawyers who do not keep time sheets (which is standard in contingent fee cases) will have a problem.

Less delay in prosecution can result. Delay is money. Cases that are moved forward with little delay cost less.

Some attempt to control special damages is necessary. This also relates to delay. Since there is a direct relationship between special damages and general damages, large special damages that cannot be supported as "reasonable and necessary" can prevent any resolution short of trial. Offers of judgment make it good practice to make sure that medical providers know palliative care in personal injury cases can be devasting.

In conclusion, a meaningful Offer of Judgment law would likely produce many benefits for both members of the Bar and their clients. At the very least, it's time for this discussion.

Ted Clelland
Washington Arbitration
& Mediation Service, Seattle

In Memoriam

Editor:

A long-time friend and fellow attorney, Jack Hawkins, passed away last November. As you may recall, Jack served as the president of the South King County Bar Association twice during his career.

In addition to being a highly respected and prominent attorney practicing out of Auburn, Jack Hawkins was involved in making his community a better place. From 1978-1988, he served as trustee for Green River Comunity College. He also served on the city of Auburn's Board of Adjustment.

We'd like to honor Jack by establishing the Jack Hawkins Memorial Scholarship Endowment at Green River Community College. This endowment, once it reaches $20,000, will fund scholarships in Jack's memory in perpetuity. What a wonderful way to pay tribute to Jack for all he has done for the bar association, the college and our community.

Please join us with a $100 contribution, or a contribution with which you are comfortable, to the Jack Hawkins Memorial Scholarship Endowment, which can be pledged over the next year. Many of Jack's friends and colleagues have already contributed to making this endowment a reality.

Please call Joyce Van Wyck, Annual Fund Coordinator for Green River Community College, at 253-288-3342 if you have any questions. Thank you.

Robert E. West, Jr.
Stephen L. Freeborn
Federal Way

Filing Fees

Editor:

The suggestion of a filing fee for filing an answer or response in Superior Court will strike a familiar note with lawyers practicing before 1950.

The fee schedule in effect at that time was approximately this:

Filing of Complaint $7
Filing of Appearance–Answer: $3
Default Judgment: $3
Judgment after Contest or Appearance by Defendant: $6

Sam Wilhite, our Skagit County Clerk at that time, successfully promoted a legislative change to a one-fee system—$14 payable by the plaintiff at filing.

This effort won Mr. Wilhite the undying gratitude of County Clerks, legal secretaries and lawyers throughout the state who were spared the nuisance of writing, receiving, and accounting for these multiple checks.

George E. McIntosh
Bow, Washington

Minimum Fee Schedule from Another Era

Editor:

I was reading the article by John Bull in the September 1998 *Bar News* about Alternate Fee Arrangements and thought you might find the excerpt from 1948 Chelan County Bar Association Minimum Fee Schedule interesting. As far as I know this is for real because the schedule of fees is on a poster board and I found it in an old file of Edson Dow, one of the listed attorneys.

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David M. Bohr, Wenatchee

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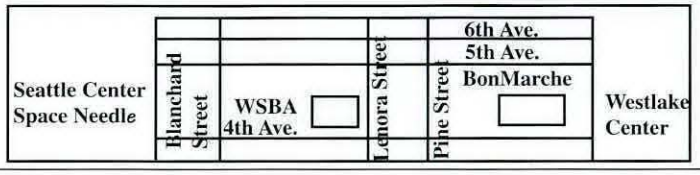

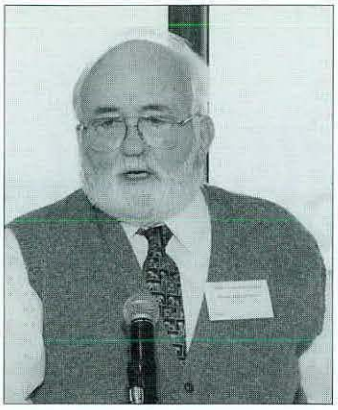

Justice James Dolliver
Guest Columnist

Supreme Court Election Coverage Not Representative

Remarks by Justice James M. Dolliver at the Annual Meeting of the Washington State Bar Association September 11, 1998

Contrary to popular press reports, the members of the Supreme Court get along very well personally. As a multi-judge court, we have always kept our hands on each other's throats intellectually; but we treat this as a professional relationship and remain personally on good terms with each other. It should be remembered that the court is comprised of nine individuals with large egos, from different parts of the state, and of different personal backgrounds. The wonder is not that we on occasion may give the public reason to believe we are not on good terms but that we are able to get along at all. We do, but we have to work at it; and each judge spends a good amount of time attempting to be congenial.

Part of the problem is that more and more the court is called upon to decide issues of public importance rather than disputes by the private individual.

In judging the court we should discount any election statements. These are many times only geared toward winning an election and exciting the public in any way to gain their vote. We should also ignore all press comments. The press is a wonderful institution which exists with the full protection of the First Amendment. Its interests do not, however, always coincide with those of the court. Controversy, not quietly doing your job, is what sells newspapers and gains a television audience.

During my tenure on the court, it seems as if the court is viewed more and more as an adjunct to the Legislature. Unfortunately, the public attitude toward the court has little to do with legal principles and everything to do with who wins and who loses. There is no question in my mind but that some of this public attitude has been brought about by the court. For example, I believe in deciding our cases we have acted more globally than locally. But most of it simply represents another way of looking at the court and its functions. Part of the problem is that more and more the court is called upon to decide issues of public importance rather than disputes by the private individual. This has given the court a high visibility and resulted in a belief that the court is simply an ordinary political institution. I am not sure the court can overcome this infirmity, but it must try.

The single most important change from the time I first came on the court in May 1976 to the present has been the advent of the word processor and the personal computer. For example, when I first came on the court, the legal secretary would have to type at least 15 carbon copies. Woe betide any judge who made a change, particularly in the middle of an opinion! While this might have been tolerated once, after the second or third time you would be hunting for a new legal secretary. Now, of course, with the advent of the computer, word processor, and photocopy machine, the whole problem has disappeared. This doesn't mean we use less paper; far from it. We are in the "midst of interminable corrections," and we have changed from a common law court into more of a civil court.

Not only have computers changed the way we write, but they have also changed the way we do research. When I was a law clerk back in the early 1950s, it seemed as if I spent most of my time researching the *Decennial Digest* and using mostly local cases. Today, the world has opened up, and we now are able to research cases from other jurisdictions easily by computer. Whether we are writing better opinions is an open question.

All in all it seems to me there have been very few really substantive changes, other than the computer, word processor, and photocopier, since the 1970s. We are certainly a much more visible organization than we have been before, and I like to think we are still doing a good job for the people of Washington.

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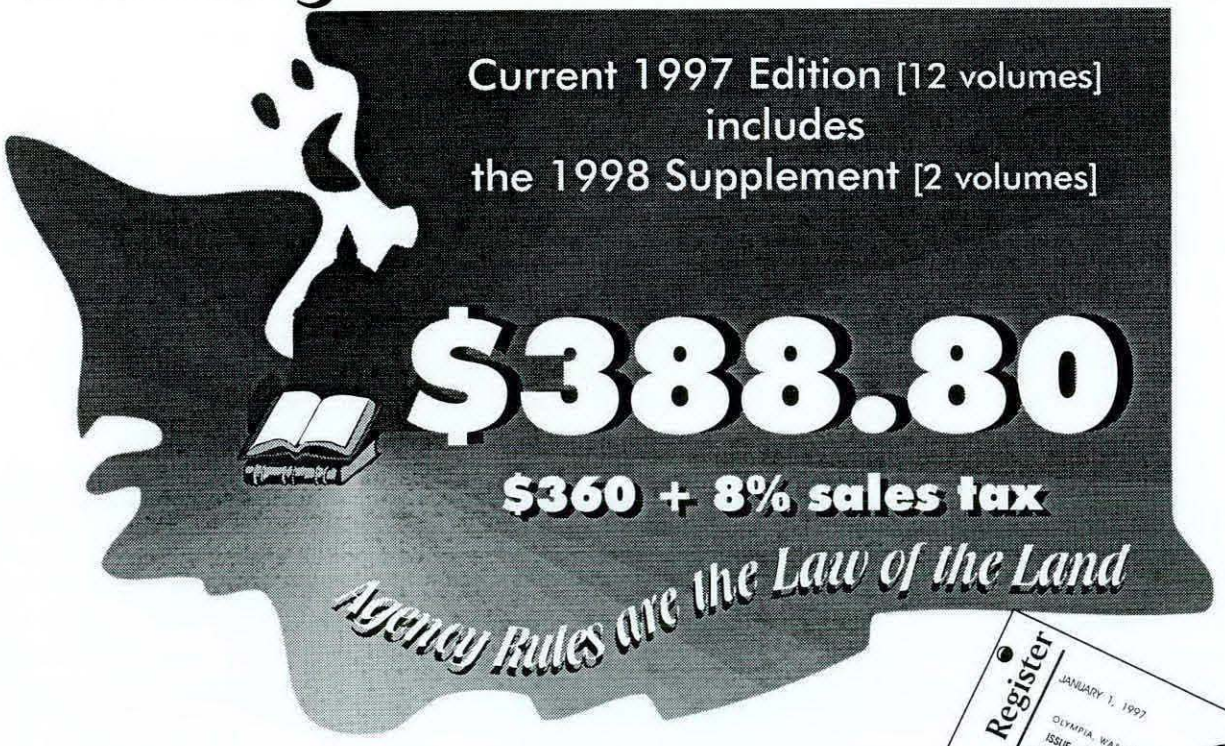

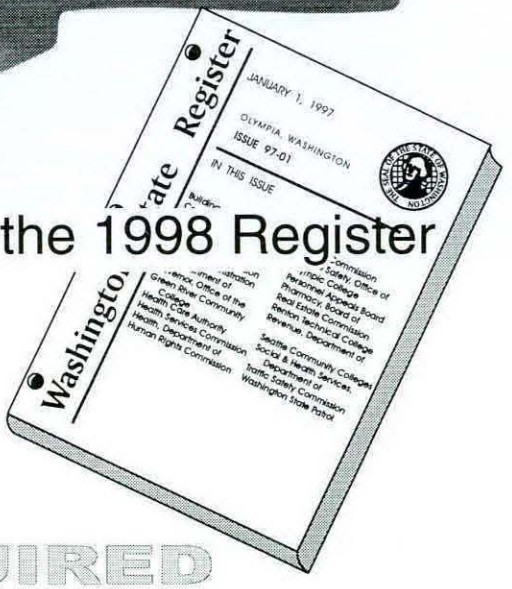

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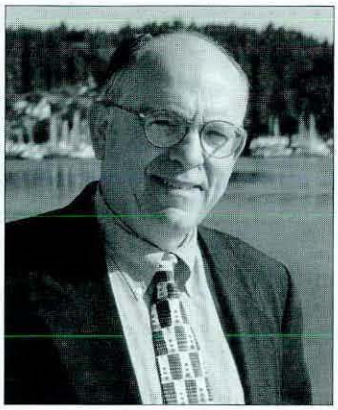

M. Wayne Blair
President

WHAT KIND OF BAR ASSOCIATION DO WE WANT?

A primary focus of the Board of Governors over the past six years has been reform of the lawyer discipline system. Implementation of the recommendations of the Joint Task Force on Lawyer Discipline is nearly complete. During this time, the members have seen significant changes in the administration, rules and regulations relating to, as well as an increased commitment of resources toward, lawyer discipline. This next year will see a continued emphasis by the Board of Governors and the Office of Disciplinary Counsel on reducing the lawyer discipline backlog, and on implementing a law office management program. Significant progress already has been made, and I am hopeful that within the next seven months, the backlog will be under control.

During this next year, my focus, and that of the Board, will continue to be on the Washington State Bar Association as a professional association.

Beginning with the presidency of Mary Fairhurst, whose term immediately preceded mine, the emphasis of the Board of Governors shifted from its work as a regulatory agency under the Washington Supreme Court, to its role as a professional association of lawyers with approximately 24,000 members. During this next year, my focus, and that of the Board, will continue to be on the Washington State Bar Association as a professional association. We will address such questions as: What can the Board of Governors, the staff, the committees, the sections and the Young Lawyers Division do to strengthen the WSBA as a professional association? How can we provide better and more meaningful service to our members? How best do we continue to be inclusive in our activities, to include all members who wish to be involved in the work of the WSBA, and to ensure that the voice and views of all members are being heard and considered by the Board of Governors? Approximately 30 percent of our membership are women and 8 percent are lawyers of color. What can we do to ensure that women and lawyers of color are involved in the activities of and hold leadership positions in the WSBA?

On July 16, 1998, the Board of Governors held its annual retreat. Board members were joined at the meeting by senior staff, as well as by those representatives of other legal organizations, committees and sections who chose to attend. The Board engaged Carl Peters, a professional facilitator, to assist in this one-day retreat. Prior to the retreat, the planning committee polled members of the Board; presidents of local, minority and specialty bars; and committee and section chairs about the issues they thought the Board of Governors should be discussing at the retreat, and what priorities they would place on those issues. Three issues arose as being most important: internal communications, including communications with the 60 other bar associations and legal organizations in this state; external communications, including communications with the courts, the legislature and the public; and governance, including how to make the Board, committees, sections and staff work more effectively together. Out of that retreat, an abundance of ideas emerged to improve communications and governance. By the end of the day, the WSBA had taken a significant step in a strategic planning process.

At its September 11 meeting, the Board formally authorized the WSBA to engage in a strategic planning process. The last time the State Bar engaged in such a process was 1990, under a committee chaired by Bill Gates and Julie Weston. The Board of Governors has agreed that it is time to engage in such a process again, with the idea that the long-range plan emerging from this process will be a dynamic document to be updated from time to time. The Board asked the Long-range Planning Committee of the Board of Governors to serve as the steering committee, and to return to the Board at the October 23 and 24 meeting in Bellingham, with specific recommendations for a strategic planning process, together with an estimated budget and timeline. Currently serving on the

Long-range Planning Committee are: Lish Whitson, Walter Krueger, Dick Eymann, Jim Deno, John Powers, Rafael Gonzales, Mary Fairhurst, Douglas Fair, Kathleen Hopkins, Mary Alice Theiler, Millicent Newhouse, Terry Lee, Marijean Moschetto, Jan Michels, Pat Dieken and myself.

One of the important objectives of this long-range planning process is to strengthen the Washington State Bar Association as a professional association. The current Board of Governors, like other recent boards, is strongly committed to openness, inclusiveness, diversity and service to the membership. As a part of this process, we will reach out to the membership, to the committees, to the sections, to other bar associations and to others, in an effort to answer the question: What kind of bar association do we want, and how do we get there? We are depending upon your thoughtful help as we go forward.

Jan Michels
Executive Director

Countless Hours of Service

Do you realize that over 170 of your peers volunteer as governors, committee chairs, section chairs, YLD officers, local bar officers, specialty bar officers and WSBA delegates? Even at a conservative estimate of five hours a week each, these volunteers commit over 8,000 hours a year to bar work. Most of these bar leaders are backed by 10- to 40-member boards, trustees or advisory committees which meet monthly or quarterly. These board members generally carry a portfolio for their organization of membership, recruitment, special CLE or educational programs, publications, newsletters, service programs, awards or liaison activities. A conservative estimate of three hours a week from each board member or trustee of these groups totals over 30,000 hours a year for the promotion of the law, legal services and their profession. Clearly, Washington lawyers care about their profession.

I hear a lot of appreciation for the bar leaders who volunteer so many hours to their profession, their various associations, communities and citizens.

In addition to these bar-service hours, WSBA members donate countless hours to service programs, speakers bureaus, educational programs, and community service projects and volunteer programs. And those hours are augmented even further by pro bono hours. Some communities, like the award-winning Benton-Franklin Legal Aid Society, boast 100 percent participation by local lawyers in pro bono service. Most local bars have extensive pro bono programs. Many lawyers take referrals from Northwest Justice Project's CLEAR line. By any measure, these hours amount to staggering statewide totals, showing that Washington lawyers are dedicated to justice and service to Washington's children and communities.

I hear a lot of appreciation for the bar leaders who volunteer so many hours to their profession, their various associations, communities and citizens. Members appreciate that the organized bar delivers CLEs, programs and events, and newsletters. They appreciate a place to bring issues with the substance of the law, like-minded colleagues with whom to brainstorm and plan, a voice for legislative or rule issues, and a collegial place to talk and listen to others with parallel challenges.

Appreciation also comes from low-income citizens for pro bono and community services; from the Board of Governors for input, guidance and support; and from the collective consciousness that oversees the law, its application and its integrity. Lawyers care, and they show their commitment by donating one of their most valuable resources—their time. So I am privileged to voice the collective "Thank You" on behalf of members, citizens, communities, and the integrity of the rule of law. Your service truly shows you care.

ELDER ABUSE: Recognition & Remedies

ELDER ABUSE is widespread in the United States. Although attorneys frequently encounter such cases, they often do not recognize that abuse is involved. This article describes the various types of abuse, the reasons that abuse occurs, diagnostic indicators and how an attorney can recognize the signs of abuse, procedures for investigation and intervention, and various legal theories for pursuing such cases in Washington.

by Cheryl C. Mitchell, Ferd H. Mitchell and Donald C. Brockett

Background

ELDER ABUSE HAS BECOME recognized as a widespread problem in the United States. As the ranks of those over the age of 65 continues to grow, elder abuse is receiving increased national attention.[1] As one author has observed, "Elder abuse is one of the last types of family maltreatment to come to the public attention."[2]

Elder abuse is, in many ways, similar to child abuse. But there are also significant differences, and research and recognition of the problem did not begin until the 1970s.[3] Elder abuse is a national problem, existing with a frequency and rate approximately that of child abuse. It is estimated only one out of every six cases of elder abuse is brought to the attention of the authorities.[4]

Cases go unreported for many different reasons. There are situations where parents or other elderly persons are being cared for by family members or others and feel that they cannot complain about physical, mental or economic abuse because it may mean the loss of the companionship of that person and they fear loneliness. Many elderly women and some elderly men feel they are in abusive relationships but need the economic security provided by the other person so they cannot sever the relationship. There are cases in which elderly people do not want to reveal to the police or other authorities that they have been swindled in an unwise investment and lost all or most of their life savings because of embarrassment or a feeling that such a revelation will make them even more vulnerable.

Elder abuse ranges from scams involving only a few hundred dollars to cases involving large sums of money, false imprisonment and even murder. Abuse cases are appearing more often in the popular press, ranging from "estate planning" as a rationale for taking the funds of an elderly person to the murder of an elderly couple for their funds.[5]

Types of Abuse

THE BASIC TYPES OF ABUSE INCLUDE, but are not limited to, physical abuse (which may or may not involve sexual abuse), mental abuse and financial exploitation. Abuse is defined by statute in Washington as "a non-accidental act of physical or mental mistreatment or injury, or sexual mistreatment, which harms a person through action or inaction by another individual."[6]

Physical abuse is frequently subdivided into intentional abuse (which may include "active neglect") and unintentional abuse (which is sometimes called "passive neglect").[7] The statutory definition of abuse does not distinguish between intentional and unintentional abuse. In intentional abuse, the perpetrator takes an affirmative action or fails to take an action that causes the elderly person to be neglected, abused or exploited.[8] In passive abuse or neglect cases, the perpetrator unknowingly fails to act for the benefit of the elder.[9] Attorneys may be involved in abuse if they fail to take protective actions on behalf of clients.[10]

Psychological (mental) abuse can include verbal threats, intimidation or name-calling by a caregiver or family member. Mental abuse can destroy the quality of life of an elderly person and have severe negative physical impact,[11] including failure to thrive. Certain types of psychological abuse are quite subtle, and involve what might be termed "brainwashing."

In this scenario, the abuser gains the confidence of the elderly person and convinces the elder that no one but the abuser can be trusted. Where the senior has some mild form of paranoia, the abuser uses this condition to gain control of the elder by constantly assuring him or her that only the abuser cares about the elder. By cutting off relationships with others, the

abuser makes the elder more dependent, thereby gaining control of the life (and finances) of the victim.[12] This technique sometimes takes place in spousal abuse settings, where the abuser controls the life of the victim.[13] Psychological abuse cases can be quite subtle, with the actions of the abuser being hidden from public view.[14]

Financial abuse has been defined by one author as "all misappropriations of finances, as well as theft of property or possessions of an older individual... including theft, 'conning' and extortion."[15] In Washington, the definition of financial exploitation is also found in statute: "Exploitation" means "the illegal or improper use of a frail elder or vulnerable adult or that person's income or resources, including trust funds, for another person's profit or advantage."[16] All types of abuse may be encountered in a practice setting whenever mistreatment is an issue.[17]

Neglect frequently involves family members (sometimes including the spouse of an elderly ill individual).[18] Neglect may also, however, involve non-family members, such as paid caregivers, or even professionals such as accountants or attorneys.[19] In Washington State, "neglect" means "a pattern of conduct or inaction by a person or entity with a duty of care for a frail elder or vulnerable adult that results in the deprivation of care necessary to maintain the vulnerable person's physical or mental health."[20]

Reasons for Abuse

WHAT CAUSES ELDER ABUSE? Although there is no easy answer to this question, it is clear that the vulnerability of the elderly person plays a significant role in such cases. The elderly person may be vulnerable because of physical deterioration in health, mental decline or both. Elderly individuals may find themselves vulnerable due to advanced age, physical and/or mental disabilities, or lack of independence, including a lack of mobility.

Physical abuse of an elderly person may go unreported for long periods of time. Reports may be made to health professionals that the elderly person "fell out of bed" or "tripped and fell." The elderly person may be so confused that he or she cannot remember what happened to cause the injury or, if he or she can remember, may be afraid to report the abuse, fearing retaliation.

A history of family violence, including spousal abuse, may indicate a predisposition towards abusive relationships.[21] It has been recognized that a family history of abuse or mental illness may greatly increase the likelihood of elder abuse.[22] Some studies have indicated that alcohol and/or drug abuse by a care provider increases the chances of financial

Emotional abuse is frequently coupled with physical abuse, although it is also common for emotional abuse to occur alone.

exploitation or physical abuse.[23] Many studies indicate that when the abuser is financially dependent on the elderly person, the probability of abuse increases.

Some cases involving physical abuse may arise from "caregiver burnout" rather than from an intent to mistreat the elderly individual. A caregiver who has experienced extreme stress due to caring for an elderly person may impulsively strike out or verbally abuse an elderly person.[24]

Emotional abuse is frequently coupled with physical abuse, although it is also common for emotional abuse to occur alone. Emotional abuse can involve coercion on the part of caregivers; for example, a senior may be told, "If you don't give me your home in exchange for caring for you, you'll go to a nursing home."[25]

Unintentional abuse (neglect) results from caregivers who are uneducated or uninformed about how to properly care for seniors. The difference between neglect and abuse is a fine line: sometimes caregivers are not just uneducated but also are uninterested in learning proper caregiving, in which case the situation may shift from unintentional to intentional abuse.

Financial exploitation may be seen in many forms and for different reasons. Excessive payments to caregivers, "friends" or others can be an indication of financial abuse. Seniors are also targets for financial abuse by aggressive salespersons and con artists. As a group, seniors often want to trust advisors and are more dependent, making them more likely victims for exploitation and abuse.[26]

Most elderly persons fear, more than anything else, having to leave their homes to go to nursing homes.[27] Many senior citizens will do almost anything they can to avoid institutionalization, even if it means giving up all of their worldly wealth and possessions in order to remain at home. Seniors, desperate to remain at home, sometimes enter into agreements with caregivers to leave all of their assets to the caregiver in exchange for a promise of lifetime care.[28] Unfortunately, what generally happens is that once the exploiter has received all the elder's property, the elder is abandoned by the so-called caregiver.

A caregiver who is financially dependent upon the elderly person may be angry and hostile due to monetary reliance upon the elderly person. Many cases of exploitation involve greed.[29] As the standard of living in the United States continues to be subject to intense pressures, younger individuals feel more and more need to gain access to financial security by whatever means possible.[30] Frequently, elderly individuals are seen as having outlived their usefulness and having no need for worldly possessions or wealth. Our society has adopted a cynical perspective of the aging process: those who have retired and are no longer "contributing" to our society are often seen as having less value and are therefore less deserving than others.

One author has said, "The American attitudes toward the old are contradictory. We pay lip service to the idealized images of beloved and tranquil grandparents, wise elders, white-haired patriarchs and matriarchs. But the opposite image disparages the elderly, seeing aging as decay, decrepitude, an undignified dependency."[31] It is possible for those who would exploit the elderly to justify taking wealth from the elderly because they no longer "need it," or the younger person "deserves it." Many family members who abuse their elderly relatives justify financial abuse by saying, "After all, I will get his money when he dies." In some cases the ploy of "estate planning" is done to divest wealthy persons of their "excess" assets. Of course, this type of planning ignores the fact that the elderly person may require the use of his or her funds and there is no present tax liability because taxes will only be due after his or her death.[32] Frequently, the causes of physical, mental and financial abuse cannot be separated into neat categories; causes of abuse may overlap significantly.[33]

Similarities Between Child Abuse and Elder Abuse

MANY OF THE PROBLEMS in dealing with elderly abuse cases are similar to those encountered in child abuse cases. One court has noted:

> *Elder abuse is a growing problem in this country because of the growing number of elderly people. Like child abuse, elder abuse is a difficult crime to detect and prosecute. In both types of cases the victim is often an unreliable witness because of limited mental capacity — undeveloped in the case of the child, impaired by old age in the case of the elder.*[34]

The limited mental ability or clarity of recall of the victim is a factor that looms large in the minds of both private attorneys and prosecutors, whether the case involves a child who has allegedly been abused or an elderly person on whose testimony the court must rely. Situations involving young children often raise issues of competency to testify, while in elder abuse cases, credibility may be a problem, especially when it is perceived that the elderly person "is becoming senile" or "has Alzheimer's disease." Reports that might otherwise be taken seri-

ously by the authorities are frequently considered unreliable when reported by children or elderly individuals.

Diagnostic Indicators

STUDIES HAVE REVEALED the following possible indicators of elder abuse:[35]

- Dramatic changes in long-standing estate planning documents;
- Sudden changes in ownership of bank accounts or other investments from sole ownership to joint tenancy with right of survivorship;
- Preparation of estate planning documents and creation of investment accounts where the beneficiaries and co-owners are not the"natural" heirs;
- A sudden interest in the elderly person's financial affairs by relatives who profess a strong interest in "protecting the assets" of the elderly person by arranging for large gifts;
- New "friends" in the life of the elderly person, who suddenly declare undying love and affection for the elderly person;
- Significant changes in the standard of living of an elderly person; the standard of living will often decrease, but may increase with the "help" of the elderly person's funds where there is a corresponding increase in the standard of living of the caregiver;
- A much younger caregiver or "friend" expresses romantic interest in an elderly person who has significant assets and/or income; or proposes that the senior adopt him or her;
- A helper or caregiver who has promised to keep the elder out of a nursing home in exchange for payments that are disproportionate to the services being provided;
- Funds and personal possessions of the elderly person are missing and cannot be located;
- Isolation of the elderly person, with former friends and/or relatives cut off from the elderly person by a "friend" or caregiver;
- The caregiver or friend of the elderly person eavesdrops on all conversations that include the elderly person, and does not allow the elderly person to be alone with friends, family or other individuals;
- The elder is moved to a new location, away from existing family, friends and other support services;
- The elderly person is deprived of independent representation, advice and counsel.

Reports of physical assaults may be dismissed by the police or mental health authorities as hallucinations or paranoia.

Procedures for Investigation and Intervention

A CONCERN OVER POSSIBLE ABUSE and the need for investigation will often begin with an observation by an uninvolved person that something inappropriate seems to be taking place in the life of an elderly person. Such reports may be made to Adult Protective Services; the local police or sheriff's department; the Office of the Attorney General; a financial advisor, physician or other health care professional; an attorney; or other community organization or individual. Attorneys will often be called upon to give advice and to explain how community resources can be most effectively used to investigate the problems that are presented.

When abuse is suspected, physicians, nurses, psychologists and pharmacists must immediately make an oral report and have a duty to make a written report to the Department of Social and Health Services (DSHS) within 10 days.[36] The statutes also provide that financial institutions or attorneys having reasonable cause to believe such abuse exists may report such information to DSHS. The reports are confidential,[37] unless there is a judicial proceeding or the person consents to disclosure. In a judicial proceeding,[38] there is immunity from liability for those "participating in good faith in making a report...or testifying about the abuse." The legislature has designated "failure to report" as a gross misdemeanor if the person "knowingly fails to make the report or fails to cause the report to be made."[39]

The existence of physical abuse may be the easiest to document, where suspected mental or financial abuse often raises complex issues when proof is sought. Reports of physical assaults (including rape, theft and other acts) may be dismissed, however, by the police or mental health authorities as hallucinations or paranoia. Indeed, an exploiter who is in a trust relationship with an elderly person may report to the authorities that the elderly person is "losing it," thereby finding the perfect alibi for the continuation of abuse or exploitation. Individuals in positions of authority may routinely discount complaints by seniors who have cognitive impairment.[40]

For the investigation of possible causes of physical or mental abuse, the involvement of medical and psychological professionals is essential. Only through such expert assessment can possible abuse be identified and appropriate intervention obtained.

When financial abuse is a possible issue, it may be quite difficult to determine the amount of missing funds and property. Due to cognitive impairment, the elder may not be sure what is missing. In such cases, copies of account statements and income tax records can be helpful in

providing information regarding the elderly person's former financial status. Friends, neighbors, accountants, stock brokers, bankers and others who were previously acquainted with the financial holdings of the elderly individual may provide valuable information. In some cases, it will be necessary to appoint a guardian to investigate the assets of the elder and to have the court authorize the guardian to prepare an accounting and, if necessary, bring a civil action against any abusers.

In most cases involving financial exploitation, there is a confidential or fiduciary relationship between the elderly person (the victim) and the perpetrator. As defined in *Black's Law Dictionary*, a "fiduciary relationship" is:[41]

> *A very broad term embracing both technical fiduciary relations and those informal relations which exist whenever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person in the integrity and fidelity of another.... Out of such a relation, the law raises the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other....*

In cases involving gifts, transfers, devises and bequests, the courts have held that the existence of a confidential relationship between the parties shifts the burden of proof to the donee to show, by clear and convincing evidence, that the transaction was made freely and independently by the donor.[42]

Civil Statutory Remedies for Abuse or Exploitation

VARIOUS CIVIL remedies for abuse and exploitation cases exist in Washington statutes. The following actions may be taken:

- Orders of protection for a vulnerable adult and restraining orders under RCW 74.34 and CR 65. RCW 74.34.110 et seq. was enacted in 1986, and provides a cause of action for elder abuse, as well as for payment of attorney's fees.[43] The statute was amended in 1995 to provide that a cause of action for elder abuse transfers to the executor or administrator of the estate, for the benefit of surviving spouse, child or children or other heirs.[44] One apparent deficiency of the amendment is that it does not specify what happens if the executor, administrator or others set forth are the alleged abusers.
- Petition for appointment of a full or limited guardian of the elderly individual, if *and only if* the elderly person is unable to manage his or her own affairs and guardianship proceedings are appropriate (RCW 11.88).[45]
- Referral to and investigation by Adult Protective Services (APS) (or the agency responsible for investigating such allegations). APS will become involved only if no attorney is involved and if the elderly person agrees to the investigation by that agency;[46] APS cannot prosecute cases, only investigate. APS workers will not be able to go to court to obtain restraining orders and initiate legal action without help from an attorney. The attorneys for APS are in the Office of the Attorney General.
- Actions for conversion, fraud and replevin on behalf of the elder.

Legal theories for bringing a civil cause of action against a donee can include fiduciary relationship, undue influence, "de facto" guardian for the donor, constructive trust and rescission.

Practice Tips for Obtaining Relief Under RCW 74.34 and CR 65

A CAUSE OF ACTION for abuse of an elderly person (denominated in the statute as "a vulnerable adult") may be filed under RCW 74.34. If the elderly person or his or her property or assets are in immediate danger, the combination of an abuse action under RCW 74.34 and injunctive relief under CR 65 is in order.

In the event there is potential for immediate irreparable harm, an attorney should file a Motion for a Restraining Order under CR 65. This motion may be filed concurrently with the filing of a Petition for an Order of Protection of a Vulnerable Adult under RCW 74.34. A Petition under RCW 74.34 may be filed without requesting an Order of Protection, but under these circumstances, no hearing will take place for two weeks; it is essential to determine whether an immediate restraining order should be requested.

If it is determined that a temporary restraining order (TRO) will be requested, then an affidavit in support of the TRO should be prepared. This affidavit should set forth the elements of immediate and irreparable injury and must be prepared and presented to the court at the time the hearing takes place. If the elderly person (vulnerable adult) is in a position of peril or will be placed in a position of peril, the court can shorten the time for hearing so that little notice to the other party will be required. Be prepared to prove or make an offer of proof that the client is in danger or that there will be serious injury to your client. It will frequently be helpful to prepare an affidavit by your client stating the salient facts of the case. The emergency nature of such actions sometimes requires immediate proceedings, but the requirements of Rule 11 must not be ignored.[47]

In such circumstances, prior to the time set for the hearing, an Order of Protection and Temporary Restraining Orders should be prepared, with both Findings of Fact and Conclusions of Law. The Findings should include the following:

1. That the court has jurisdiction over the parties;
2. The age of the vulnerable adult;
3. The physical, mental or other related problems that make the client fit within the definition of a vulnerable adult;
4. That there is reason to believe that the vulnerable adult has been abused and/or exploited and/or is threatened with further abuse and/or exploitation.

Conclusions of Law should include:

1. Whether the respondents have received notice of the hearing. If no notice has been provided, then pursuant to CR 65(b), there must be a significant justification regarding why no notice was provided. In the event that no notice is provided, the court may require the posting of a bond, pursuant to CR 65(c);
2. That a TRO is necessary to protect the client.

The Order should contain sufficient restrictions to prevent the alleged abusers from contacting the vulnerable adult, exclude the alleged abusers from transferring, selling, giving or otherwise disposing of the property or assets of the vulnerable adult and require an accounting of all property and assets of the vulnerable adult within a specified time period (generally 14 days). The Order must set a date and time for the next hearing.

In the event that a TRO is issued, it must contain not only the day and month it was signed, it also must contain the time the Order was entered (CR 65(b)).

In the event that a TRO is not re-

quested under CR 65, then a Notice of Hearing on the Order of Protection for a Vulnerable Adult should be prepared. The alleged abuser (and his or her attorney, if there is one) should be personally served with the papers. An affidavit of service should be filed with the court prior to the hearing.

Criminal Remedies

CRIMINAL REMEDIES FOR ABUSE cases raise a variety of issues. Difficulties may be encountered in obtaining police investigation of certain types of cases. The police may not be prepared to deal effectively with economic crime cases (officers are not usually accountants and police do not have any on staff). There is also the potential of difficult witnesses (such as elderly persons who they think will not remember, are hesitant to testify, or still like the person who abused or stole from them). Additionally, cases may not appear to merit the allocation of resources because there is little likelihood the prosecutor will bring charges.

Those persons involved in the criminal justice system often do not consider such cases to be "real" cases. A private attorney can help to convince the police agency responsible for the investigation that, if they invest the resources, the case can probably be presented to the prosecutor and the individual charged. Information provided by an attorney can make the difference in whether or not charges can be brought.

Several complexities may be encountered with respect to the prosecution of elder abuse cases. The prosecutor must become adequately aware of and understand the abuse issues raised by the case, be willing to bring the necessary action and believe that adequate evidence exists and can be presented to have a reasonable likelihood of conviction.

The resources of prosecutors are limited. Prosecutors do not conduct investigations, so they will ask for an investigation by the appropriate police agency. When the police agency is contacted and someone is assigned, the prosecutor may be asked to "promise" that if the investigation occurs they will indeed charge someone. But how can the prosecutor give such a "promise"? A private attorney can provide details that will assist in the investigation and convince the prosecutor and the police agency that the situation will result in a prosecutable case.

In an affidavit of probable cause, the prosecutor justifies the commencement of the case, and must delineate sufficient facts and circumstances to convince the court there is reason to believe the defendant should be charged. Evidence provided by a private attorney, either through the police agency during the investigation, or later as the investigation of the matter proceeds, can be crucial to the prosecutor. The prosecutor will be ready to proceed to trial only when there is sufficient evidence to prove the case beyond a reasonable doubt to the jurors in the case.

The following are selected statutes under which criminal action can take place:

- Criminal mistreatment is a crime that is designed to punish those who provide inappropriately for dependent persons, "including frail elder and vulnerable adults."[48] The statutes provide a comprehensive scheme of definitions, the degrees of criminal mistreatment, and degrees of abandonment of a dependent person.[49]
- Malicious harassment[50] is aimed at punishing certain behavior toward persons because of their ancestry or mental, physical or sensory handicap. Crimes having to do with restraint of an incompetent person are covered in kidnapping,[51] unlawful imprisonment[52] and custodial interference.[53]

- Theft statutes may come into play when there has been a misappropriation of the money or property of the elderly person.[54] The legislature has added specific considerations to the sentencing guidelines that allow a judge to render a sentence higher than the usual guideline for a particular crime by declaring an "exceptional sentence" if specific circumstances can be proven by the prosecution.
- The statutes deal with the abuse of adult dependent and developmentally disabled persons and recognize that there may be "injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a[n]...adult dependent, or developmentally disabled person...that may indicate that the...adult's health, welfare, and safety is harmed...."[55] Specific definitions are provided for the terms *adult dependent persons*; *negligent treatment or maltreatment*; *developmentally disabled person*; *malice* or *maliciously*.[56] The crime of luring[57] may be applicable to persons with developmental disabilities.

As noted previously, reports regarding abuse must be provided by certain professionals to law enforcement agencies or DSHS[58] and the same is required of "any adult who has reasonable cause to believe" that an adult dependent or developmentally disabled person residing with them has suffered severe abuse.[59] When abuse is reported, DSHS must inform the proper law enforcement agency; in turn, the law enforcement agency must report certain cases to the county prosecutor or city attorney.[60] The county prosecutor or city attorney must notify the victim, any persons the victim requests, and DSHS of the decision to charge or not charge within five days of that decision.[61]

Domestic violence laws apply in many situations involving the elderly. Often, the abuse of an elderly person will be by a family or household member and is specifically covered by statutory definitions.[62] An order of protection may be issued, the violation of which constitutes a gross misdemeanor,[63] and with violations of previously issued no-contact orders it may constitute a felony. While knowledge of the order is required for a willful violation, the officer may serve the order on the person, and if the individual does not immediately obey, subsequent actions may be a violation of the order.[64]

The State Patrol is required to keep information on vulnerable adult abuse.[65] Although information regarding the commission of crime is available only to criminal justice agencies and in civil court proceedings on written order of a judge,[66] background checks may be disclosed[67] to businesses and organizations providing services to developmentally disabled persons or vulnerable adults. In addition, the information may be disclosed to law enforcement agencies, the attorney general's office, prosecuting authorities and DSHS. As a result of the dissemination of the information, the state is immune from liability.[68]

Long-term care facility resident rights are provided by statute.[69] Residents have a right to be free from physical or chemical restraints, as those terms are defined.[70] The facility must not use verbal, mental, sexual or physical abuse, including corporal punishment or involuntary seclusion.[71] A prosecutor may decide to charge such abuse as a misdemeanor if it occurs. Unfortunately, in many states, the individuals responsible for prosecution of such crimes are frequently uninformed regarding the elements of elder abuse and may be overworked and unwilling to pursue such prosecutions.

Civil Versus Criminal Suit—Which Should Come First?

A VARIETY OF ISSUES are encountered in determining whether a civil or criminal suit should be pursued first. In terms of

discovery, a civil case may create an expanded ability to conduct discovery and thus may be an attractive option. And the standard for court action is much more readily satisfied. On the other hand, civil cases are costly, and slow to resolve an issue, so a realistic remedy may not be available. A criminal case may encounter discovery limitations, and the standard for conviction is "beyond a reasonable doubt." However, more rapid action may result and the cost is borne by the state.

Attorneys in civil suits have the ability to subpoena documents from banks and other institutions that are available to police departments only if they can show the court "probable cause" to justify their production. The recent trend in criminal cases is that notice must be given to the individual for whom the police have requested records, and the person must be given an opportunity to resist. Then, of course, the material may ultimately be suppressed in the criminal case if the police obtain it, if a court determines that even though another judge issued the search warrant the police did not actually have the necessary "probable cause."

A criminal action should be considered first if there will be a loss of evidence of the crime (and a lack of ability to proceed in any civil case) because of a delay or loss of a witness. Witnesses often do not stay at the same addresses and do not leave forwarding addresses for the convenience of police. Witnesses sometimes disappear or die. Additionally, the longer contact with witnesses is delayed, the less likely memory will be fresh with respect to events and how they transpired. This may be especially true of an elderly person, depending on his or her condition.

Often, on balance, criminal cases should perhaps be pursued first, unless there are issues regarding the statute of limitations or other considerations as mentioned *supra*. As in the O.J. Simpson trial, an unsuccessful criminal case may lay the groundwork for a later, successful civil verdict.[72]

Experts have determined that weak enforcement mechanisms and the difficulty of prosecuting cases of elder abuse contribute to the inadequacy of both civil and criminal remedies.[73] A recent article noted:

> *Although many communities have begun to recognize that elder abuse is a pervasive systemic problem, intervention in elder abuse cases is often frustratingly difficult. In fact, it is the authors' observation that advocates who work only in their traditional professional models are often the least effective interventionists. This is because the abused elderly can rarely find their way to professionals' offices alone or otherwise take advantage of resources that are available to them. Those who work with the abused elderly realize that difficulties in assisting victims of abuse stem from many factors, including isolation in nursing homes, other institutions, and at home, from those who could assist them; dependence upon their abusers, for emotional or physical assistance; and inability, through dementia or other physical limitations, to seek help.*[74]

Non-Judicial Remedies

EXPERTS ON ELDER ABUSE have noted that other, non-judicial remedies may be effective. The addition of another person into the home of the elderly person frequently has the effect of reducing the potential for abuse.[75] The exact reason why this result occurs is not known; some experts term this the "watchdog effect."

In some cases, arranging for a different caregiver can remove the abuser from the home. This may be difficult, however, in cases where the alleged abuser has created a dependency relationship with the elderly individual. The elderly individual may have an overwhelming fear that the removal of the caregiver will cause his or her institutionalization and wish to avoid this at all costs. In addition, the elderly person may fear retaliation by the

caregiver if the true circumstances are discovered.

Where the alleged abuser is a family member, the elderly individual may value the dysfunctional family relationship more highly than having the abuse cease. In such cases, psychological or mental health counseling may assist the elderly individual. In Washington, Adult Protective Services has the authority to arrange for appropriate legal actions to be taken to protect the interests of the elderly.[76]

Conclusion

EVERY ATTORNEY SHOULD be sensitive to recognizing potential cases of elder abuse and understanding the various remedies that are available. Any attorney who is approached by a friend or caregiver who seeks to act on behalf of an elderly person should exercise caution. If the individual advises the attorney that the elderly person wishes to make gifts or prepare a new will, it is essential to assure that the objectives and interests of the elderly person are protected.

If the attorney accepts the friend or caregiver as a client, then action must be taken to assure that the elderly person receives independent representation. If an attorney is asked to prepare documents for an elderly person who is not a client, and with whom the attorney has never met (and will never meet), such a request must be viewed with skepticism.[77] Con artists are not reluctant to involve innocent third parties (including attorneys) in their misdeeds. As the Court stated in a criminal case involving the exploitation of an elderly person:

Any attorney who is approached by a friend or caregiver who seeks to act on behalf of an elderly person should exercise caution.

> *The facts turned up in the investigation that preceded [the defendant's] arrest, when they are taken as a whole, would have indicated to a reasonable police officer that [the defendant] was trying to* despoil *a vulnerable old women.* The protection of the vulnerable is a noble duty of government. *(emphasis added)*[78]

If we, as attorneys, understand elder abuse, we can act to protect the elderly.[79]

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Donald C. Brockett was in the Spokane County Prosecuting Attorney's office for 33 years and was the prosecutor for 25 of those years, 1969-1994. He is currently in private practice handling cases dealing with criminal law, insurance defense, employment and sexual harassment.

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60 RCW 26.44.030(4) and (5).
61 RCW 26.44.030(6).
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63 RCW 26.50.110.
64 RCW 26.50.115.
65 RCW 43.43.070.
66 RCW 43.43.710.
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1998 Washington State Ba

Congratulations to the following 25 individuals who were admitted to practice law in Washington in 1948 and are still members of the Washington State Bar.

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
Hon. Alfred O. Holte
Valen Harold Honeywell, Jr.
Joseph S. Kane
T. Hughlon McDowell
Thomas James Moran
Gordon W. Moss
Hugo E. Oswald, Jr.
Omar S. Parker
Hon. Harold J. Petrie
Howard P. Pruzan
Richard C. Reed
Stuart W. Todd
Allan H. Toole
J. Vernon Williams

50 YEARS

ABOVE: *1997-98 WSBA President Mary E. Fairhurst passes the gavel to 1998-99 President M. Wayne Blair.*

RIGHT: *A group of the WSBA's 50-year members pose at the Annual Awards Luncheon.*

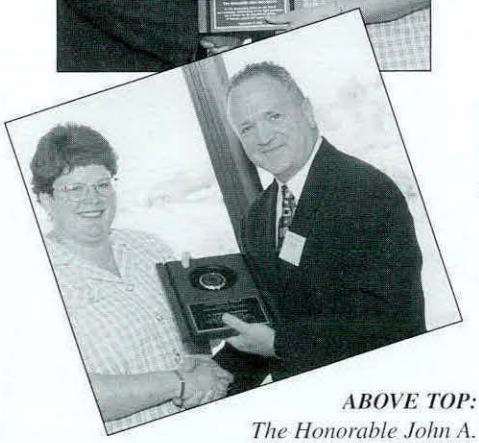
BELOW: *Dean Lewis H. Orland receives the Lifetime Service Award from Mary E. Fairhurst.*

RIGHT ABOVE: *J.J. Leary, jr. receives the President's Award from Mary E. Fairhurst.*

RIGHT MIDDLE: *Junko Charity Louise (June) Gerard receives the Courageous Award from Mary E. Fairhurst.*

RIGHT: *Jack G. Rosenow receives the Professionalism Award from Mary E. Fairhurst.*

ır Association Award Recipients



ABOVE TOP: *The Honorable John A. Schultheis receives the Outstanding Judge Award from Mary E. Fairhurst.*

ABOVE LOWER: *A. Stephen Anderson receives the Courageous Award from Mary E. Fairhurst.*

ABOVE: *Julian C. (Pete) Dewell receives the Award of Merit from Mary E. Fairhurst.*

RIGHT ABOVE: *On behalf of the Benton-Franklin Legal Aid Society, Robert Swisher receives the Pro Bono Award from Mary E. Fairhurst.*

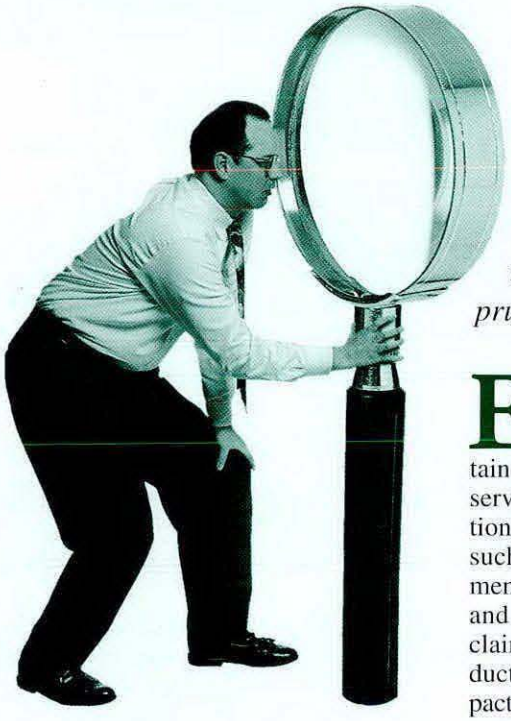
RIGHT: *Joseph E. Shorin III receives the Angelo Petruss Award for Lawyers in Public Service from Mary E. Fairhurst.*

TOP: *The Honorable J. Dean Morgan receives the Outstanding Judge Award from Mary E. Fairhurst.*

MIDDLE: *Scott A. Smith receives the Pro Bono Award from Mary E. Fairhurst.*

LOWER: *On behalf of the King County Prosecutor's Office, Norm Maleng receives the Affirmative Action Award from Mary E. Fairhurst.*

Violence-Theft-Harassment and the Fair Credit Reporting Act



by Judi A. Vail

An investigative consumer report includes the same elements as a consumer report but the information gathered will have been obtained through a process of interviewing friends and associates—including previous employers.

The September 1997 amendments to the Fair Credit Reporting Act (FCRA), 15 USC § 1681, et seq., have created unanticipated problems for employers, consumer reporting agencies and employees. Congress's intent was to better protect consumer privacy rights. Instead, the amendments may end many customary and prudent employment-related investigations.[1]

Employers, in an effort to secure expertise or to provide some layer of protection from liability, often retain an outside attorney or investigative service to conduct workplace investigations. The areas most likely to demand such expertise relate to sexual harassment, violence in the workplace, fraud and theft, and workers' compensation claim abuse. In these areas, poorly conducted investigations can seriously impact the safety and well-being of consumers and employees, and result in prohibitively high punitive damage awards against employers.[2]

Much to the surprise of employers and attorneys, the FCRA imposes cumbersome procedural requirements on all involved when the investigation is conducted by a Consumer Reporting Agency.

Who is a Consumer Reporting Agency?

A Consumer Reporting Agency (CRA) is any person who for fees, dues, or on a cooperative, non-profit basis, regularly engages, in whole or in part, in assembling or evaluating information on consumers (applicants/employees) for the purpose of preparing or furnishing reports on those individuals. The definition of a CRA is extremely broad. At a minimum, it includes investigators, employment services, employer associations and consultants.[3]

In reliance upon pre-amendment judicial decisions, the FTC opinions exclude law enforcement agencies from the definition of a CRA.[4] Many attorneys, however, will qualify as CRAs. For example, those attorneys who regularly assist employers with conducting internal investigations may be CRAs.[5] The general conclusion of FTC staff is that attorneys engaging in workplace investigations in anticipation of actual litigation would not be functioning as a CRA.

What is a Consumer Report?

A consumer report is any written, oral or other communication by a CRA which bears on a consumer's (applicant/employee's) general reputation, personal characteristics, or mode of living that is used or is expected to be used for any employment purpose.[6]

What is an Investigative Consumer Report?

An investigative consumer report includes the same elements as a consumer report but the information gathered is obtained through a process of interviewing friends and associates—including previous employers.[7] Many investigations conducted in the workplace will include elements of both a consumer report and an investigative consumer report.

"Employment purposes" include any decision that adversely impacts an applicant or employee's employment. An "adverse action" could include failure to hire or transfer, reassignment, demotion, suspension, written warning or termination of employment.[8]

Application of the Fair Credit Reporting Act to Employers

FCRA impacts any employer who uses a CRA[9] to conduct criminal background checks; to seek information; or to investigate a person's character, gen-

eral reputation, personal characteristics or general mode of living, where the CRA provides reports on applicants or employees for the purpose of making an employment-related decision.

Typically, prudent employers make background and reference checks as part of the normal hiring practice. Employers frequently outsource these checks. But utilizing an outside third party, whether paid or unpaid, will make the employer and the outside third party subject to FCRA mandated obligations.

Applicants and Employees Must Authorize a Consumer Report

Employers must obtain written authorization from the applicant or employee prior to obtaining a consumer report. Paragraphs incorporated into an employment application form are inadequate for this purpose. Employers must provide a clear and separate disclosure and authorization document to all applicants/employees, informing them that a consumer report may be ordered for employment purposes. The mandated summary of consumer rights must also be issued separately.[10]

The FTC staff maintains that if the separate form is used, it is permissible to secure a general or blanket distribution of authorization and disclosure from the applicant or employee.[11] The authorization and disclosure form should clearly state that a consumer report may be ordered at any time during a person's employment and should describe the report's nature and scope. This all-inclusive approach would adequately address the matter of background checks and the gathering of information generally obtained through public records or verification of facts associated with a consumer report.

Beyond the Scope of Hiring

Employers with a clear understanding of the law and its requirements will prepare in advance to ensure compliance. Compliance for pre-employment screening is fairly simple. Understanding that reference checks may be both consumer reports and investigative consumer reports should not present any insurmountable obstacles either. Unfortunately, many employers do not realize how broadly the FCRA applies, and subsequently may be running about at the last minute trying to secure authorizations in an effort to be able to proceed with critical investigations.[12]

Work-related inquiries present unique challenges for employers. Investigations for theft of necessity often go beyond simple surveillance. In cases of sexual harassment or violence in the workplace it will often be essential to interview co-workers and others familiar with the alleged harasser or offender. Thus, interviewing co-workers and associates can trigger employer obligations attached to an investigative consumer report.

Employers with a clear understanding of the law and its requirements will prepare in advance to ensure compliance.

Many investigations conducted in the workplace will need to include elements of both a consumer report and an investigative consumer report, with comparable but distinguishable requirements. Differences apply to authorization disclosure and distribution of the summary of rights, the right to inspect, and the employee's right to dispute the consumer report. Additionally, the fact that a consumer report may be written or oral presents particular problems, as discussed below.

Confusion with Disclosure Responsibilities

In contrast to the Section 604(b)(2) requirements of the FCRA (that apparently authorize blanket authorization and disclosure), the language of FCRA Section 606 (a)(1)(A) mandates that the employer make a disclosure to the applicant/employee no later than three days after the date on which the report is first requested, informing the person of his/her rights and the scope and nature of the investigation.[13] Section 606(a)(1)(B) ensures the employee's right to obtain additional information and a summary of those rights. Finally, Section 606(b) sets out the information that must be disclosed when the employee requests disclosure.[14] These requirements seem to rather effectively remove any element of surprise. Unfortunately, surprise is an element that can be critical in some workplace investigations.

The problems attached to the FCRA investigative consumer report disclosure requirements are worrisome.[15] Despite the statutory language, FTC staff believes that an investigative report disclosure can be treated the same as a standard consumer report disclosure and therefore can be made at any time before an investigative report is ordered. If the Section 606 language is strictly interpreted, however, it could bring some very critical investigations to a screeching halt.[16]

Violence in the Workplace

For example, consider an incident that involves violence in the workplace. Typically, if an employer has engaged an attorney or investigator to conduct an investigation, it is because there are genuine concerns about employee or consumer safety. Legitimate fears relate to the potential conduct of a specifically volatile employee. The FCRA "not later than three days after" disclosure mandate may work to trigger a violent episode, thereby putting the public or workforce in jeopardy.

Ignoring the Language of the Statute

Many regulators believe that a strict interpretation of FCRA would bring many customary and prudent practices to a halt. Thus, they seek to focus on Congress's intent, rather than the letter of the law. Unfortunately, this is only setting them on the track toward legal derailment, because in litigation courts will first look to the very letter of the FCRA.

Assuming the FTC is correct in its opinion that an investigative consumer report may be authorized in the same manner as a consumer report, many employers and their representatives may be caught unawares. If an employer has not secured a blanket pre-authorization and disclosure from its workforce, it would be necessary to secure the authorization at the time of a suspected incident. Certainly, that action would alert a moderately suspicious employee. Investigations into incidents of suspected theft become futile. Persons accused of harassment are frequently fearful and uncooperative; obtaining after-the-fact authorization could be extremely difficult. Logistically, it may be impossible to secure an authorization in cases involving workers' compensation abuse. An after-the-fact authorization and disclosure notice is enough to thwart an employer's efforts to reasonably investigate.

The Next Problem: The Consumer Report Itself

An employer must furnish a copy of the consumer report to the applicant/employee prior to taking an adverse employ-

ment action. Under the FCRA, the employer may not redact this report. Nor can the consumer report be edited or sanitized in any way to protect the "sources" of information. The employer's report must be a mechanical copy of the report received from the CRA. Since a consumer report can be oral or written, this presents the novel question of how employers can convey verbal information received by a service, investigator or attorney to an applicant/employee.

Most people expect a modicum of privacy, security and safety at work. Consider the problems of releasing a written consumer report relating to an incident of sexual harassment in the workplace. If an employer receives a complaint of sexual harassment it is required to immediately investigate and take prompt remedial action where appropriate.[17] Friends and associates of the parties involved may be totally unwilling to cooperate in a workplace investigation if they know that a disgruntled co-worker is going to be driving around with statements of what they said and where they live on a piece of paper.

Immediate Action Prohibited

Additionally, FCRA requires a pre-adverse action notice/waiting period. Therefore, before an employer can take any adverse employment action because of the report, a copy must first be provided to the applicant/employee. The FTC has issued an informal opinion that five days would be an approximate/appropriate pre-adverse action notice period.[18]

Employer action may be limited to placing an employee discovered to be engaging in criminal activity, sexual harassment or violent and dangerous conduct on paid administrative leave while the notice period is satisfied, but surely that was not the intent of Congress when this law was amended. At the end of the requisite notice period, the employer may take action.

Responsibility of the CRA

The FCRA requires the CRA, upon

written request, to provide a copy of the consumer report to the applicant/employee. There are additional CRA disclosure requirements that will involve the release and opening of certain files.[19] Unlike the employer, however, the CRA can redact its report to protect sources. Initially, this may encourage a sense of relief, but any feeling of relief is premature.

The CRA may provide the employer with a bare-bones written consumer report that is no more than a brief summary that may partially address concerns regarding the protection of sources. But because a consumer report can be written or oral, it is questionable if a summary report is realistic. After all, an employer will be relying on this information to make an informed employment decision before it takes action against an applicant/employee. Few employers will want to terminate an employee based on a vague report.

Furthermore, many employers seek out professionals to secure a level of expertise in handling high-risk situations which the employer does not possess. Employers have nevertheless been held liable for $1 million to $3 million judgments for taking adverse employment actions in reliance upon broad or insufficient investigative summaries. The FCRA will discourage employers from seeking this professional assistance, or from being able to review thoughtfully prepared reports. Attorneys will be hesitant to handle investigations because they will have legitimate concerns relating to ethical duties and privileges.

Implementing Change

Congress must return to the drawing board. This time, amendments should be made with significant input from labor and employment law attorneys and employer services. A few suggested changes include:

1. Allowing an employer to redact an investigative consumer report. Employers should be allowed to protect sources from future harassment and possible danger. This measure would ensure that employers will receive and review a complete report prior to taking an adverse employment action. Section(s) 604, 606, and 615(a).
2. Specifically exempting certain types of investigations from coverage. High-risk investigations and investigations mandated by other federal and state laws should be exempted in Section 603(e) and 603(d).
3. Specifically permitting a blanket disclosure at any time during the employee's tenure of employment. Clarifying the language dealing with investigative consumer reports would allow critical investigations to be conducted without "tipping" an employer's "hand." Section 606(a)(1)(A).
4. Specifically excluding "attorneys" from the definition of a consumer-reporting agency. Section 603(f).

Until Congress acts, however, you must educate your clients thoroughly and then decide to what degree and in what capacity you, as an attorney, should become involved in workplace investigations.

NOTES

[1] The Federal Trade Commission (FTC) is the enforcing agency for the FCRA. The FTC Credit Practices Division is extremely small, and its attorneys should be commended for their efforts during the past year. The FTC has been bombarded with questions from employers, employer groups and employment-law attorneys on the application of the FCRA amendments to a variety of workplace issues.

[2] Compare Duffy v. Leading Edge Prod., 459 F.3d 308 (5th Cir. 1995), employer made hasty or mistaken decision; Kestenbaum v. Pennzoil Co., 108 N.M. 20, 41 IER 67 (1988), cert. denied, 490 U.S. 1109 (1989). $1 million judgment for termination attributable to a sloppy investigation.

[3] 15 U.S.C.§ 1681,et seq.; Section 603(f) defines a consumer reporting agency.

[4] Ollestead v. Kelley, 573 F.2d 1109 (9TH Cir. 1978); Ricci v. Key Bancshares of Maine, Inc., 768 F. 2d 456 (1st Cir. 1985).

[5] Section 603(f)... any person which for fees...

[6] Section 603(d)(1) definition of a consumer report.

[7] Section 603(e) definition of an investigative consumer report.

[8] EEOC Compliance Manual Section 614, Volume 2, General types of adverse action ...are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension and discharge. Other types of adverse action include threats, reprimands, negative evaluations, harassment or other adverse treatment. See also, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.

[9] Section 603(f) attorneys regularly conducting investigations and assembling reports for an employer could be a CRA. Investigative services would definitely be a CRA.

[10] Section 606(a)(1)(B) statement of consumer rights.

[11] Section 604(b)(2), S. Rep. No. 104-185, 104th Cong., 1st Sess.35 (1995); H.R. Rep. No. 103-486, 103d Cong. 2d Sess. 30 (1994); S. Rep. No. 103-209, 103d Cong., 1st Sess.11 (1994).

[12] Section 606(a) notice that a consumer report may be ordered and a summary of the employee's rights as prepared pursuant to Section 609(c). Section 606(b) disclosure notice of the nature and scope of investigation.

[13] Section 606(a)(1)(A) mandates a disclosure shall be made not later than 3 days from the date of request.

[14] Section 606(a)(1)(B).

[15] Section 606 sets out procedures that must be followed for an investigative report in addition to those required by Section 604(b) for consumer reports.

[16] Id.

[17] EEOC Policy Guidance on Current Issues of Sexual Harassment, in 8 Fair Employment Practices, Labor Relations Reporter (BNA), duty to investigate. See,e.g., Beth Ann Faragher v. City of Boca Raton No. 97-282 ____ U.S.___(1998) Burlington Industries, Inc., v. Kimberly Ellerth No. 97-569 ___U.S.___(1998). See also, Section 603(e) unsupported supposition to exclude co-workers from "associates" when determining as individual's general character. Sexual harassment investigations often turn on credibility issues.

[18] Section 604(b) requires an employer furnish to the employee a copy of the report before any adverse employment action is taken.

[19] Section 609 principal requirement that the CRA disclose all the information on file of any public information that it collects. Section 609(a)(2) permits the CRA to delete sources of investigative consumer report information before making the disclosures. Section 604(b)(3)(A) contains no exception for investigative reports. An employer who redacts a copy of a report prior to disclosure violates Section 604(b)(3)(A).

Judi Vail currently practices management defense in the area of labor and employment law in Washington. She was formerly a director of employment policy with a regional employers' association, giving her considerable experience dealing with the problems employers face in the administration of their procedures. *The author wishes to express her sincere appreciation to Thomas E. Lindley of Perkins Coie LLP and Margaret A. Bryant of Jackson, Lewis, Schnitzler & Krupman for their invaluable insight and encouragement in the development of this article.*

Changing Venues

HONORS & AWARDS

Former Washington Chief Justice **Robert Utter** has received the American Judicature Society's highest honor, the Justice Award, for his career-long efforts to improve the courts of his state and nation and abroad.

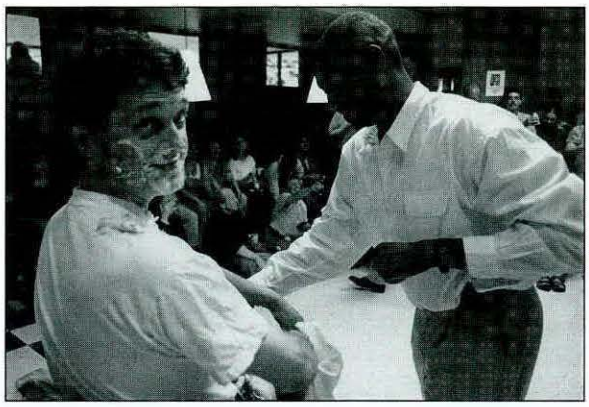
Washington Attorney General **Christine Gregoire** has received the National Association of Attorneys General's Wyman Award, presented each year to the state attorney general who has done the most to advance the goals and objectives of the nation's AGs.

Judge **Donald D. Haley** of the King County Superior Court has been elected chair of the national Conference of State Trial Judges for 1998-1999.

Paul Stritmatter of Strittmatter Kessler Whelan Withey was elected Treasurer of the Trial Lawyers for Public Justice Foundation at the organization's annual meeting in Washington, D.C.

Frank Ladenburg, Jr. was recently elected president of the Washington State Trial Lawyers Association. Other new officers include: **Janet Rice**, president-elect; **Maria Diamond**, vice president west; **Roger Felice**, vice president east; **Deborah Nelson-Willis**, vice president CLE; **Brenda Snyder**, vice president CLE; **Lou Delorie**, vice president development; **Rod Ray**, vice president finance; **Laura Jaeger**, vice president judicial relations; **John Budlong**, vice president legislative; **Steve Toole**, second vice president legislative; **George Thornton**, vice president membership; **Brad Fulton**, second vice president membership; **Lori Haskell,** vice president public affairs; **Judy Massong**, second vice president public affairs; **Cheryl Robbins Berg**, vice president publications; **Peter Harris**, secretary/treasurer; **Renee Paravecchio**, *Trial News* editor-in-chief; **William McGonagle**, first congressional district; **Robert Zielke** and **Breean Beggs**, second congressional district; **Craig Schauermann**, third congressional district; **Tim Mahoney** and **Rod Nelson**, fourth congressional district; **Doug Spruance**, fifth congressional district; **Jack Connelly**, sixth congressional district; **Kevin Coluccio**, seventh congressional district; **Steve Bulzomi**, eighth congressional district; **Georgia Locher**, ninth congressional district; **Beverly Grant**, at large; and **Ted Willhite**, American Trial Lawyers Association delegate.

Frank Ladenburg, Jr.



Bob Stokes with pie on his face and Marvin Glover assisting in the cleanup.

Carmen L. Smith

James S. Rogers of Seattle was recently honored by the Washington State Trial Lawyers as the 1998 Trial Lawyer of the Year.

Barbara C. Sherland of Stoel Rives LLP has been elected a Fellow of The American College of Trust and Estate Counsel. Sherland is also Director of the Probate and Trust Council of the Real Property, Probate and Trust Section of the WSBA.

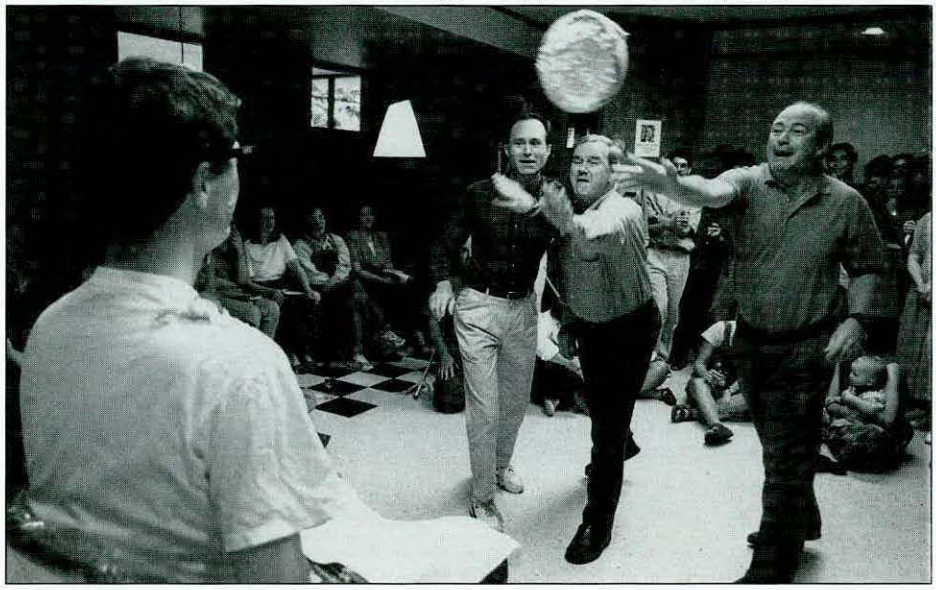
Carmen L. Smith of Graham & Dunn PC was recently appointed by Governor Locke as a new member of the State Securities Advisory Committee.

Family Services of King County has named **Robert Taylor**, an Assistant United States Attorney in the Office of the U.S. Attorney, as a new member of its Board of Directors.

Robert Stokes, Vice President and Chief Litigaton Counsel for AT&T Wireless Services, Inc. got a pie in the face during the first "Here's to Bob" Pie Auction and Toss-A-Thon at Stokes Lawrence, P.S. The event was part of Food Frenzy, an annual competition among Seattle law and CPA firms to raise food and funds for Food Lifeline.

Thomas M. Fitzpatrick of Stafford Frey Cooper has become a member of the Board of Directors of the American Bar Association, representing Alaska, Montana, Oregon and Washington. **Richard J. Wallis** of Bogle & Gates PLLC has become a delegate for the ABA's Antitrust Law Section.

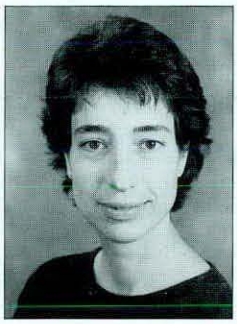
THUMBS UP to Mill Creek attorney **Brian Phillips**, who is taking a year out of his Snohomish County practice to travel with the ABA's volunteer efforts



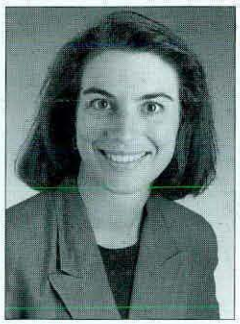
Stokes Lawrence, PS shareholders pictured left to right, Rob Thomas, Mike Havers & Doug Lawrence in a failed attempt to toss their $300 pie at their former colleague, Robert Stokes.

in the former Yugoslavia. He will work with judges and lawyers in Belgrade to help create a more open and democratic legal structure.

Vancouver attorney **Mark Feichtinger** has been selected to become a rear admiral in the U.S. Naval Reserve. This seems a fitting reward for someone whose legal career was preceded by a stint aboard the USS Sturgeon (yes, sturgeon!).



Mary-Alice Pomputius



Kristina C. Udall

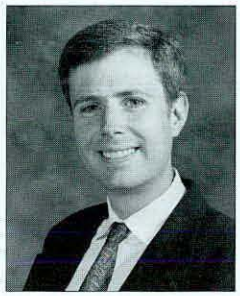
Jodi Freudenberger

Linda Portnoy has been chosen to preside over the new Lake Forest Park Municipal Court. Portnoy is a co-author of "Washington Criminal Practice in Courts of Limited Jurisdiction."

Robin Bale and **Evelyn Fielding Lopez** have been appointed as the state's newest Administrative Law Judges. Bale is a recipient of the Spokane Bar Access to Justice Award, and Lopez is currently president of the Northwest Justice Project Board.

Veronica A. Freitas

Kimberly M. Meyers



Daniel J. Caplinger

Alison L. Yearsley

MOVERS & SHAKERS

Jeffrey M. Thomas and **Franklin D. Cordell** have been elected as partners of the firm at Gordon Murray Tilden in Seattle.

New partners at Stoel Rives LLP include **David P. Hattery**, **Laurie A. Smiley** and **Leslie S. Wallis**. **Timothy J. O'Connell** has joined the firm as Of Counsel. New associates include **David S. Levin** and **Kenneth M. Odza**.

Robert F. Lopez has become a director at Betts, Patterson & Mines, P.S. The firm has also promoted **Kathleen A.T. Dassel** to senior attorney.

Mary-Alice Pomputius has joined Foster Pepper Shefelman PLLC as Of Counsel practicing intellectual property and trademark law.

William Kastner & Gibbs PLLC has announced that **Kristina C. Udall** has joined the firm as Of Counsel. Her practice involves estate planning, elder law, business and tax planning and charitable giving matters. Also joining the firm as associate is **Jodi Freudenberger**, who is also on the Board of Directors for the Seattle/King County Humane Society.

Thomas M. Culbertson has joined the Lukins & Annis, P.S. firm in Spokane, where he will continue to practice in business, tax and estate planning.

Preston Gates & Ellis LLP has added **Mary Helen Hemmen** to the Seattle office, where she will have an environmental law practice.

Susan D. Betcher now calls Seed and Berry LLP home. An engineer, she will concentrate her practice at Seed and Berry in patent prosecution within the mechanical group.

Alison L. Yearsley has joined Lane Powell Spears Lubersky LLP as an associate in the product and premises liability and insurance defense areas. **Kimberly M. Meyers** also joins the firm as a tort and employment litigator. **Veronica A. Freitas** has also become an associate with the firm and will concentrate her practice in the areas of estate planning and taxation. **Daniel J. Caplinger** joins the firm as an associate with a concentration in estate planning and business.

Steven K. Meyer has joined the Beemer & Mumma firm in Spokane.

Thomas D. Lofton has moved his Washington law office to Kirkland, but is keeping his second office in downtown Portland. Sounds like a killer commute, Thomas!

Perkins Coie LLP has announced that **George H.G. Yates** has joined the Business Transactions Group in the firm's Seattle office. The firm has also recently announced that **Roger M. Tolbert**, formerly co-director of the finance and technology practice group, has become a partner in the Bellevue office. Additionally, **Richard R. Albrecht** has rejoined the firm as Of Counsel.

Keating, Bucklin & McCormack, Inc., P.S. has announced that **Richard B. Jolley** has joined the firm as an associate.

Thomas G. Morton has become a member of the Tax and Transactions Practice Group at Bogle & Gates PLLC in Seattle.

Steven Beeghly and **Jessica Newman** have joined Reed McClure as associates.

Joyce J. Dillon has joined Foster Pepper & Shefelman PLLC as an associate practicing intellectual property law, with a concentration in copyright and trademark issues.

IN MEMORIAM

Michael Keyes, prominent Spokane attorney who served as the first commissioner for Division Three of the Washington State Court of Appeals, passed away in July at the age of 55. Michael is survived by his wife Susan and seven children.

John O. Graybeal, senior partner at Graybeal, Jackson and Haley in Bellevue, passed away June 27, 1998, at the age of 75. He was a member of the Rainier Club and The Retired Officers Association. He is survived by his wife, Janice, a son and a daughter.

John Joseph Dodds, former attorney for the Army Corp of Engineers, passed away June 29, 1998, at the age of 80. He is survived by his wife of 57 years, Margaret, two sons and three daughters.

Ethical Responsibility of Lawyers to Uphold the Judiciary

by Barrie Althoff, WSBA Chief Disciplinary Counsel

As guardians of the law, lawyers have a duty to maintain the integrity of the legal system and of the legal profession. This article looks at our ethical duty under Title 8 of the Rules of Professional Conduct (RPCs) to uphold the judiciary, and at certain other RPCs relating to our duties to judges.

Introduction

The responsibility of lawyers to judges arises from the central role of the judiciary in our legal system. Judges interpret and apply the laws in individual adjudications, and, under our Constitution, balance the powers of the executive and legislative branches of government. They can balance those powers, however, only if they remain independent of those powers. Thus, the Canons of Judicial Conduct (CJCs), which set out the ethical responsibilities of judges and are analogous to the RPCs applicable to lawyers, provide in Canon 1 that "An independent and honorable judiciary is indispensable to justice in our society."

In exercising its powers, the judiciary has neither the executive power of the sword nor the legislative power of the purse. It has only the power which arises from public respect for and confidence in the judiciary. Public confidence and respect in the judiciary must ultimately be based on the independence, integrity and competence of the judiciary.

Lawyers, as part of the legal profession and as officers of the Court, have an obligation to maintain public confidence and respect in the judiciary. Furthermore, because of their positions and presumed greater knowledge of judges, lawyers can, by their conduct and words, have a very significant impact on the public's perception of the judiciary.

The RPCs impose on lawyers various obligations intended to maintain public confidence in the judiciary. This article first looks at RPC 8.2, relating principally to our duty to defend, and to refrain from false or reckless criticism of, judges. Our duty of candor to judges under RPC 3.3 was discussed in Althoff, "Ethical Responsibility of Candor to Judges," *Washington State Bar News*, October 1998, page 43, and thus is not further discussed here. The article also touches lightly on several other RPC provisions which relate to our day-to-day interactions with judges in litigation.

In exercising its powers, the judiciary has neither the executive power of the sword nor the legislative power of the purse.

RPC 8.2(a) Duty to Limit Criticism

RPC 8.2, captioned "Judicial and Legal Officials," sets out three duties of lawyers to judges and public legal officials. Paragraph (a) prohibits certain false or reckless criticisms of judges and others; paragraph (b) requires lawyers who are judicial candidates to comply with applicable provisions of the Code of Judicial Conduct; and paragraph (c) exhorts lawyers to defend judges from unjust criticism.

RPC 8.2(a) prohibits false or reckless statements about judges and certain others. It provides that a lawyer "shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications, integrity, or record of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

The rule applies to statements about judges, adjudicatory officers (which includes court commissioners and administrative law judges), public legal officers (usually understood to apply to attorney general, prosecuting attorney and public defender positions, but perhaps also applicable to positions such as court reporters, bailiffs and the like), and candidates for election or appointment to any of these positions. It does not prohibit truthful criticism of them. It does prohibit certain, but not all, false and reckless statements about them. It only prohibits false or reckless statements about a judge's "qualifications, integrity, or record." The ABA Model Rule 8.2(a), on which this is based, covers only a judge's "qualifications or integrity"; a judge's "record" was added by the Washington Supreme Court when it adopted the RPCs in 1985.

The WSBA RPC Committee summarized this provision in its June 7, 1982, memorandum transmitting to the WSBA Board of Governors the Committee's final draft of what was ultimately to become our RPCs. It stated:

> This Rule continues the prohibition in DR 8-102(A) of making false statements of fact concerning the qualifications of a judicial candidate and in DR 8-102(B) against making false accusations against a judge and extends them to a holder of or a candidate for a "public legal office." The rationale for this extension is that the public relies on assessments by lawyers of the performance of holders of or candidates for public legal offices, and that false statements by a lawyer can undermine public confidence in the administration of justice. The Committee agrees. The prohibition is couched in the language of *New York Times v. Sullivan* and thus should withstand constitutional challenge.

The RPC Committee recognized that in regulating speech, the rule raised constitutional issues. A complete ban on lawyers' criticism of judges would violate the constitution's first amendment right of freedom of speech and would be both

Opinions expressed herein are the author's and are not official WSBA positions.

undesirable and far broader than needed. The lesser regulation of speech, namely prohibiting false or recklessly false statements about certain matters, is much less restrictive.

A lawyer's statements about judges generally are constitutionally protected unless made with knowledge of their falsity or in reckless disregard of their truth or falsity. *Garrison v. Louisiana*, 379 U.S. 64 (1964). This more limited regulation of speech is usually justified on the basis that it upholds public confidence in the judiciary, but more importantly, on the basis that as regulated members of the bar, lawyers relinquish certain rights in exchange for the privilege of practicing law. Further, public confidence in the judiciary would likely be equally harmed by attempting to limit all lawyer criticism of judges, since that would likely generate suspicion of the judges, as it would by lawyers' knowingly false and reckless statements about judges. See Note, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N.Ky.L.Rev. 129 (1988). The Michigan Attorney Discipline Board rejected arguments that Michigan's equivalent to Washington's RPC 8.2(a) impermissibly infringed on lawyers' free speech rights. *Grievance Administrator v. Fieger* (Mich. Atty Disc. Bd. No. 94-186GA, 9/2/97).

It has been argued that the public has a right to information about the judiciary (see Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame L.Rev. 489 (1981)), and that lawyers have a civic duty to inform the public of their assessments of judges based on their special knowledge of and experience with the competency of judges. WSBA Formal Opinion No. 46 (1956), interpreting the ethical rules then in effect, for example, asserts that "In a state like Washington, where judges are elected, the bar has an affirmative duty to advise the lay public concerning the qualifications of candidates so that good judges may be elected and unqualified persons defeated. (Canon 2 of the Canons of Professional Ethics.)" See also Chapman, *Criticism - A Lawyer's Duty or Downfall*, 1981 S. Ill.U.L.J. 437. It has also been argued that because of lawyers' special knowledge of judges, lawyers should be held to a higher standard of conduct in statements made about them. See Essay, *Three Discussions of Legal Ethics*, 126 U. Pa. L. Rev. 452 (1977); *In re Hopewell*, 507 N.W.2d 911 (S.D. 1992).

In any case, RPC 8.2(a) does not silence lawyer criticism of judges, but only prohibits knowingly false, or recklessly false, statements, thus adopting the libel standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964). Washington's RPCs define the term "knowingly" as "actual knowledge." In lawyer discipline cases, courts have generally found the state's interest in protecting and defending the judiciary overrides a lawyer's first amendment right of free speech, at least where the lawyer's statements were knowingly false or reckless. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), and generally, the discussion of Model RPC 8.2 at ABA *Annotated Model Rules of Professional Conduct* (Third Edition, 1996), p. 539-549. Further, it appears that RPC 8.2(a) likely prohibits only statements of fact, not opinions. See *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995). To some extent, the requirements and spirit of RPC 8.2(a) can be met by lawyers showing common sense, reserve and

patience in criticizing judges and by judges recognizing they are not infallible and developing thick skins.

In *In re Robert L. Hayes* (*Washington State Bar News*, May 1998, p. 44), a lawyer received two reprimands for, among other things, making unsubstantiated allegations concerning a court commissioner's integrity in violation of RPC 8.2(a). The lawyer had falsely alleged that the commissioner's ruling was biased because he was a friend of opposing counsel. In *U.S. District Court for the E.D. of Wa. v. Sandlin*, 12 F.3d 861 (9th Cir. 1993) (see also *Washington State Bar News*, September 1994, p. 42), a lawyer was suspended for six months from practice before the U.S. District Court for violating RPC 8.2(a) by recklessly accusing a judge and/or court reporter of tampering with evidence.

RPC 8.2(b): Judicial Candidates Subject to Judicial Code

RPC 8.2(b) requires lawyers who are judicial candidates to "comply with the applicable provisions of the Code of Judicial Conduct." The most relevant of those provisions for purposes of this article is Canon 7(B), which governs judicial campaigns.

Section (1)(c) of Canon 7(B) prohibits its judicial candidates from (i) making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," (ii) making statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the courts," and from (iii) "knowingly misrepresenting the identity, qualifications, present position or other fact concerning the candidate or an opponent." The Canons also prohibit the personal solicitation of campaign contributions by judicial candidates (other than through committees). Thus, if a lawyer contributes to a judge's reelection campaign, the contribution should be to the campaign committee and not to the judge personally; and even such a contribution may be inadvisable, for example, if the lawyer has cases pending before the judge.

A lawyer considering running for judicial office should become familiar with the Code of Judicial Conduct. Under Rule 1.1(k) of the Rules for Lawyer Discipline, a lawyer is subject to discipline for violating that code. See the *Sandlin* decision above, for cites to several Washington decisions relating to discipline arising from judicial candidates' statements. The WSBA has concurrent jurisdiction with the Commission on Judicial Conduct over alleged violations of the Code of Judicial Conduct by lawyers who are successful in their candidacy, and exclusive jurisdiction over lawyers who are not successful in their candidacy.

RPC 8.2(c) Exhortation to Defend Judges

RPC 8.2(c) provides that a "lawyer, in order to assist in maintaining the fair and independent administration of justice, *should* support and continue traditional efforts to defend judges and courts from unjust criticism" (emphasis added). By use of "should" rather than "shall," this provision is hortatory, and no discipline will result for failure to comply with this provision.

The provision appears to have been taken from a comment to Rule 8.2 of the ABA's Model RPCs, on which our RPCs generally are based. It was not a part of Washington's Code of Professional Re-

sponsibility, the predecessor to our RPCs. Nor was it in the drafts of the then-proposed RPCs submitted by the WSBA RPC Committee to the WSBA Board of Governors. It appears to have been added by the Board, since it was included in the proposed RPCs sent by the Board to the Washington Supreme Court and published for comment by the Court in the 103 Wn.2d, No. 8, advance sheets.

What are those "traditional efforts" which the rule exhorts us to continue? They include speaking up when the judiciary as an institution is under attack, as well as when individual judges are falsely attacked, correcting public misinformation about the judiciary, and educating the public about the role of the judiciary and its need for independence. Do leaders of the bar, those at bar associations and those such as attorneys general have a more pronounced obligation to defend the judiciary? Do lawyers who serve in the legislature have a special duty to defend judicial independence? Is a mere exhortation to defend the judiciary an adequate protection of an institution of such central importance to our legal system? To some extent, the exhortation of RPC 8.2(c) to defend judges gives meaning to the generality of our promise in our oath of admission as an attorney (Admission to Practice Rule 5(d)) that we "will maintain the respect due to the courts of justice and judicial officers." See also discussion of RPC 3.5(c) below.

When the ABA first adopted its Model RPCs, the ABA Judicial Administration Division published a program to implement its comment to Model RPC 8.2. *Unjust Criticism of Judges: Model Program Outline for State and Local Bar Meet Inaccurate or Unjust Criticism of Judges and Courts* (1986), available as Appendix B to ABA, *An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence* (1997). It recommended that the bar should respond publicly to attacks on a judge only if (1) the attack is a public comment and is an unwarranted or unjust attack on a judge in a pending case, or (2) the attack is unwarranted or unjust and may adversely affect the administration of justice. The model program notes that generally judges are not in a position to defend themselves since the public is likely to view such defense as mere self-defense and lacking in credibility, and since any self-defense may interfere with pending litigation and merely encourage those who seek to control the judiciary through intimidation.

Other Duties to Judges

Even if a lawyer's statement or criticism of a judge or public legal officer is not knowingly false or made recklessly, or does not pertain to the judge's "qualifications, integrity, or record," and thus is not prohibited by RPC 8.2(a), it may still subject the lawyer to discipline under other RPCs.

A lawyer's statements or conduct may, for example, violate RPC 3.5(c), which proscribes "conduct intended to disrupt a tribunal," or RPC 3.6(a), which prohibits a lawyer from making extrajudicial statements which the lawyer "knows or reasonably should know" "will have a substantial likelihood of materially prejudicing an adjudicative proceeding," or RPC 8.4, which prohibits "conduct that is prejudicial to the administration of justice." Besides subjecting the lawyer to discipline under these various RPC provisions, such conduct, whether or not also violative of RPC 8.2(a), may, if made in the course of legal proceedings, also subject the lawyer to the court's contempt power.

In *In re Michael W. Smith* (*Washington State Bar News*, February 1998), a

lawyer was reprimanded for, among other things, discourteous and disrespectful conduct violating RPC 3.5(c), RPC 8.4(d), and the Oath of Attorney, for conduct described by the court in *State v. Garrett*, 124 Wn.2d 504, 522 (1994). The court concluded that the defense counsel was "boorish, contemptuous, discourteous, disrespectful, insolent, obdurate, obnoxious, offensive, rude and uncouth" and was "disrespectful, abusive, antagonistic and insulting in total disregard for the respect due the court."

In *In re Larvadian*, 664 S. 2d 395 (LA 1995), a lawyer was suspended from practice for three months for attacking the integrity of a district court judge by accusing him of being racist and cursing him in the courtroom. In *Prucker v. Statewide Grievance Committee*, No. CV94-054-14-36 (Conn. Superior Ct, June 9, 1995), a lawyer's comment to a judge that "this is bullshit" was found to be profanity disruptive of the legal process.

A lawyer's conduct, as opposed to statements, as it relates to judges is also subject to ethical restraints. These include our RPC 3.1 duty not to bring or defend lawsuits or issues on a frivolous basis; our RPC 3.2 duty to use reasonable efforts to expedite litigation "consistent with the interests of the client" and our RPC 3.5 duty not to seek to influence a judge or fact finder by prohibited means (including ex parte contacts and disruptive conduct). RPC 3.5 prohibits a lawyer from (a) seeking to influence a judge (or a juror or prospective juror) by means not permitted by law, (b) from communicating ex parte with such a person, or (c) from engaging in conduct intended to disrupt a proceeding. In each case, the rule seeks to protect the judiciary from improper influences, communications and conduct which would diminish its ability to act impartially.

A lawyer generally may not communicate ex parte with the judge, but may communicate with the judge on any matter that is unrelated to and remote from any matter pending before the judge. The test is whether the communication has the possibility or appearance of influencing the outcome of the case. It does not matter whether the lawyer or the judge initiates the communication; if it is the judge, the lawyer needs to decline to participate and the lawyer or the judge should notify opposing counsel of the event. For administrative law judges, the practical aspects of such communications may be more difficult. For example, since often they have no support staff, yet they need to schedule conferences and status meetings, they may contact the lawyer directly, but they should seek to simultaneously include lawyers from each side.

Obviously a lawyer may not attempt to influence the judge by offering gifts or loans, and, if a judge solicits gifts or loans, the lawyer may not agree. This does not mean, however, that the lawyer cannot participate in normal social hospitality of social dinners, birthday gifts, and other items of small monetary amount so long as they are not intended to influence the judge. Common sense is obviously needed.

Obviously a lawyer may not attempt to influence the judge by offering gifts or loans, and, if a judge solicits gifts or loans, the lawyer may not agree.

Conclusion

The role of an independent judiciary is central in our legal system. Lawyers have important ethical responsibilities to help maintain that independence. The duties include limiting criticism of judges to truthful criticism, defending the judiciary from unjust attacks, and taking steps to assure the proper functioning of the judicial system. Lawyers have not only an ethical obligation to support the judiciary, but also a very practical reason: without an independent judiciary, there cannot be an independent bar.

Disciplinary Notices

The following notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 11.2(c)(4) of the Supreme Court's Rules for Lawyer Discipline, and pursuant to the February 18, 1995 policy statement of the WSBA Board of Governors.

Disbarred

James A. Graettinger (WSBA No. 14975, admitted 1985), formerly of Wenatchee, has been disbarred pursuant to a stipulation for discipline approved by the Supreme Court effective September 11, 1998. In the stipulation, Mr. Graettinger admitted he had knowingly forged the signature of a U.S. Bankruptcy Court Judge.

In October 1997, the United States Attorney's Office filed a one-count information in the Federal District Court for the Eastern District of Washington

charging Graettinger with the felony crime of forging a Federal Judicial Officer's signature, 18 U.S.C. §505. He pled guilty and was sentenced to three years' probation, 150 hours of community service, and agreed to pay $5,448 in restitution to certain persons.

In the stipulation, Graettinger also admitted that he had deceived clients about the status of their cases; had created fictitious documents containing forged signatures and/or the letterhead of a Bankruptcy Judge, a Superior Court Judge, a Superior Court Commissioner, an opposing party and an opposing counsel; and that he had failed to diligently pursue clients' cases.

Graettinger stipulated that the Bar Association had sufficient evidence to meet its burden of proving by a clear preponderance that his conduct violated RPC 1.3 (lack of reasonable diligence); RPC 1.4 (duty to keep client reasonably informed); RPC 8.4(b), which prohibits a lawyer from engaging in a criminal act that reflects adversely on the lawyer's honesty or trustworthiness; RPC 8.4(c), which prohibits a lawyer from engaging in acts involving dishonesty, fraud, deceit or misrepresentation; RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice); and RLD 1.1(a), which prohibits a lawyer from committing acts which involve moral turpitude or which reflect disregard for the rule of law. He also stipulated that the Bar Association had sufficient evidence to meet its burden of proving that he violated RLD 1.1(p) by engaging in conduct demonstrating unfitness to practice law.

Erik S. Bakke of Wenatchee represented Graettinger. Disciplinary Counsel Leslie Ching Allen represented the Bar Association.

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Claude K. Irwin, Jr. (WSBA No. 5206, admitted 1973), of Veradale, Washington, has been disbarred by order of the Supreme Court effective April 29, 1998, following a default disciplinary hearing. The discipline is based upon his handling of a probate action and mishandling of estate funds, in violation of RPCs 1.4 (a) and (b), 1.7 (b), 1.8 (a), 1.14 (c) (2), 7.1 (a) and (b), and 8.4 (b) and (c).

In 1992, Irwin filed a probate action, opening the Estate of Mary Rock ("the Estate"), on behalf of the Estate's personal representative. While the Estate was in probate, Irwin instructed the personal representative to turn over the funds in the Estate account, stating that he would re-invest the Estate's liquid funds "in real estate" to obtain a higher return than bank interest. At Irwin's direction, his office staff directly liquidated all the non-cash Estate assets, excluding the decedent's residence, and deposited the proceeds into an IOLTA trust account. Irwin then transferred virtually all the liquidated proceeds of the Estate (approximately $347,000) from the IOLTA account to two corporations, Ivy Development Corporation and Powderhorn Ridge Ranch, Inc., via unsecured promissory notes payable to the Estate's personal representative. Irwin was a partial owner, officer and board member of both corporations. The Estate's personal representative never received the promissory notes and was never informed that the Estate's funds had been invested in two corporations in which Irwin had a personal interest. Irwin then misled the Estate's beneficiaries about the investments and about the cause for delays in closing the Estate and distributing the assets. In response to the beneficiaries' complaints about the delays, Irwin transferred a portion of the funds back from Ivy Development Corporation into his IOLTA account and made partial distributions to the beneficiaries. Irwin never made full distribution to the beneficiaries and did not close the Estate.

The Hearing Officer was David A. Thorner, Yakima. Disciplinary Counsel Jean Kelley McElroy represented the Bar Association.

SUSPENDED

Wade R. Dann (WSBA No. 7552, admitted 1973), of Seattle and Bellingham, has been suspended from the practice of law for one year following a Supreme Court opinion issued August 13, 1998. The discipline is based upon Dann's misrepresentation to four different clients concerning which lawyers and firm employees worked on their cases.

In 1990, while a partner at Ulin, Dann and Lambe, Dann switched his initials on billing statements for those of an associate and claimed the associate's work as his own on two different cases. Dann justified his actions by claiming that he had reviewed the associate's work or had done similar work, and was saving the clients money by deleting the associate's time. He had no contemporaneous time records supporting that he had done any work on these cases.

In 1992, while a partner at Dann Greenberg Radder, Dann switched the initials of paraprofessionals who had worked on two different cases so that the clients were misled as to who had performed the work. In one instance, a client asked that a particular paraprofessional work on his case, but the requested person was unavailable and another paraprofessional worked on the case. Dann switched the initials on the billing statements so it appeared that the person the client had requested work on the case in fact did so. In a second instance, a client asked that a particular paraprofessional

not work on his case. Dann believed that that paraprofessional was the most qualified to do the work, and placed that person on the case. He switched the initials on the billing statements so it appeared that the work had been performed by one of the firm's partners.

Dann's conduct violated RPC 8.4(c), which prohibits dishonest conduct.

Kurt Bulmer represented Dann at the hearing, and with David Swartling before the Supreme Court. Disciplinary Counsel David Cluxton and Lisa Crawford represented the Bar Association at the hearing, and Disciplinary Counsel Joanne Abelson represented the Bar Association before the Supreme Court.

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James J. Brown, III (WSBA No. 14945, admitted May 1985) was ordered suspended from the practice of law for one year and placed on probation for five years effective September 9, 1998 by order of the Washington State Supreme Court.

The discipline imposed was reciprocal to Brown's suspension in the State of California. By order of the State Bar Court of the State Bar of California filed on April 15, 1998, Brown was suspended from the practice of law for five years, execution stayed, and placed on probation for five years on conditions that he be actually suspended from the practice of law for one year and until he makes certain restitution. Brown stipulated to the disposition and to findings that he was convicted of one count of felony spousal battery, that he was convicted of four felony counts for the unauthorized practice of law, that he shared legal fees with a person not licensed to practice law, that he failed to competently perform legal services for several clients, and that he failed to provide clients with accountings of attorneys fees and of settlement proceeds.

Brown did not respond to the Washington State Supreme Court's order issued pursuant to Rule 12.6 of the Rules for Lawyer Discipline, which directed him to inform the court of any claim that the imposition of identical discipline in this state would be unwarranted and, if so, the reasons therefore. Disciplinary Counsel Felice P. Congalton represented the Bar Association.

•

Ronald K. Schaffner (WSBA No. 15506, admitted November 1985) was ordered suspended from the practice of law for two years effective September 11, 1998 by order of the Washington State Supreme Court.

The discipline imposed was reciprocal to Schaffner's suspension in the State of Oregon. By order of the Supreme Court of the State of Oregon dated June 26, 1997, Schaffner received a two-year suspension from the practice of law in Oregon. Schaffner was accused of neglect of client matters. He was disciplined previously for similar misconduct.

By an opinion dated December 1, 1997, a Trial Panel of the Disciplinary Board of the Oregon State Bar found that Schaffner had neglected another client matter. The Trial Panel recommended that Schaffner be disbarred. In response to the recommendation, Schaffner submitted a Form B Resignation to the Supreme Court of the State of Oregon. As Schaffner's resignation was accepted, discipline was not imposed.

Schaffner did not respond to the Washington State Supreme Court's order issued pursuant to Rule 12.6 of the Rules for Lawyer Discipline, which directed him to inform the court of any claim that the imposition of identical discipline in this state would be unwarranted and, if so, the reasons therefore. The Bar Association was represented by Disciplinary Counsel Felice P. Congalton.

REPRIMANDED

Bradley R. Marshall (WSBA No. 15830, admitted 1986), of Seattle, has been reprimanded pursuant to the Disciplinary Board's March 27, 1997 order, entered after a disciplinary hearing. The discipline is based upon Marshall's handling of a case in which he instructed a member of his office staff to sign two declarations without the declarants' permission and to emulate the declarants' signatures. Without making any notation that the declarants had not signed these declarations, Marshall filed these declarations with the court. These actions violated RPC 3.3 (a)(1) and (a)(4), RPC 4.1 (a), RPC 5.3, and RPC 8.4 (a), (c), and (d).

Marshall's client's case had been dismissed on a summary judgment motion in part because declarations submitted by the client and another witness were not in the proper form. Marshall had his staff prepare amended declarations for his client and the witness, so the declarations would meet the requirements of Civil Rule 56, but did not change the substance of two declarations previously signed by

the declarants. He later instructed his staff to sign the two declarations and to emulate the signatures of his client and the witness. He knowingly filed the declarations with the false signatures in support of a motion for reconsideration of an order. There were no notations on the declarations to indicate that the declarants had not signed them, and Marshall did not inform opposing counsel or the judge that the declarants had not signed the declarations. Although Marshall directed his staff to improperly sign declarations, he would not accept personal responsibility for the improper signatures or submitting false information to the court.

The Hearing Officer was C. Bradford Cattle of Everett. Kurt Bulmer of Seattle represented the Respondent. Disciplinary Counsel Anne Seidel and Jean Kelley McElroy represented the Bar Association.

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Camille H. Jescavage (WSBA No. 16784, admitted 1987), formerly of Clinton, Island County, has been reprimanded for assisting the unauthorized practice of law, pursuant to a stipulation for discipline approved by order of the Disciplinary Board entered on July 28, 1998.

Jescavage allowed her name to be used on the letterhead of Accident and Medical Investigations ("AMI"), a for-profit corporation. She filed certain complaints or other court papers on behalf of AMI clients. She was employed by a nonlawyer, AMI's president and owner Dick McClellan. McClellan subsequently pled guilty to federal mail fraud and was ordered to pay more than $200,000 in restitution to AMI victims, who did not receive promised settlement funds.

Jescavage stipulated that her conduct violated 5.5(b) (assisting the unauthorized practice of law), RPC and 5.4(d) (practicing in a for-profit corporation with a nonlawyer), and RLD 1.1(e) (permitting her name to be used as a lawyer by another person who is not a lawyer), and subjects her to discipline under RLD 1.1(i).

Don G. Daniel represented Respondent. Disciplinary Counsel Linda B. Eide represented the Bar Association.

•

John W. Schmidtke (WSBA No. 13301, admitted 1983), of Hawaii, has been reprimanded by the Supreme Court effective May 12, 1998. By order entered November 20, 1997, the Disciplinary Board of the Hawaii Supreme Court ordered that Schmidtke receive a public reprimand for misconduct found by a hearing officer after a disciplinary hearing. By order dated May 12, 1998, pursuant to RLD 12.6, the Supreme Court of Washington reciprocated discipline as imposed by the Public Order of the Disciplinary Board of the Hawaii Supreme Court. The reciprocal discipline is based upon Schmidtke's dealings with a witness in a child custody matter.

Schmidtke's discipline resulted from his proffering copies of sexually explicit photographs of a witness to that witness outside of court, while requesting that she stay out of the child custody proceedings. Schmidtke's actions violated the Hawaii Rules of Professional Conduct Rule 3.4 (h) (a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party).

Respondent represented himself. Disciplinary Counsel Jean Kelley McElroy represented the Bar Association.

CENSURED

M. Fred Weedon (WSBA No. 3413, admitted 1970), of Lopez, has been censured pursuant to a stipulation for discipline approved by the Disciplinary Board on July 28, 1998. The discipline is based upon his conduct with respect to a real estate transaction and subsequent litigation.

In September 1989, Weedon acted as the independent closing agent for the purchase and sale of a residential waterfront property on Lopez Island consisting of a house and land adjacent to the seller's commercial property. The residential purchasers did not intend to purchase the seller's commercial property, but did intend to purchase the entire cove, which they believed was part of the property they purchased.

In October 1990, the residential purchasers became concerned that their deed's legal description included the commercial property. They consulted Weedon, who eventually ascertained the title company had made a mistake regarding the legal description of the property. According to Weedon, he considered the error a scrivener's error. Weedon advised the purchasers of the mistaken legal description and asked if they wanted him to correct or reform the deed. They responded that they would hire counsel to protect their interests, and, in fact, did so. Weedon began representing the sellers shortly thereafter.

According to Weedon, he advised the purchasers' lawyer that the way to correct the problem was to re-record the deed. Although Weedon did not receive permission to do so, on January 24, 1991, he filed a "correction deed," which changed the legal description of the property, decreasing its size and waterfront footage. The purchasers and their lawyer maintain that Weedon did not tell them of this action until months later; Weedon maintains he told the lawyer within a few days.

In April 1991, the sellers sold their commercial property to a third party. This property also had been conveyed to the residential purchasers according to the September 1989 deed, and was the subject of the correction deed. Weedon acted as an independent closing agent in this transaction. He notified the residential purchasers' lawyer of the sale after it closed.

In December 1991, the residential purchasers sued Weedon, the sellers, the third party purchasers, the title company and others. In April 1993, the parties mediated a settlement, which was confirmed by court order on July 17, 1995. The order stated, among other things, that Weedon "shall" deposit $7,000 into the court registry, after which time he would be dismissed with prejudice. On August 7, 1995, Weedon obtained an *ex parte* order which provided that he would be entitled to be dismissed upon his payment of $7,000 into the court registry, but did not include the mandatory language of the court's written order. He failed to provide the purchasers' lawyer with notice that he was seeking the *ex parte* order, and never advised him that he obtained it. He did not pay the funds into the court registry until September 1997, after he received a letter from bar counsel opining that his actions constituted an ethical violation.

Weedon's conduct violated RPC 4.4, which prohibits a lawyer from burdening third parties, and RPC 3.5(b), which prohibits a lawyer from improperly using *ex parte* proceedings.

William Bergsten represented Weedon. Disciplinary Counsel Joanne S. Abelson represented the Bar Association.

ADMONISHED

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.

•

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.

•

Richard H. Benedetti (WSBA No. 6330, admitted 1975), of Tacoma, has been ordered admonished by a Review Committee of the Disciplinary Board effective March 16, 1998. The admonition is based upon Benedetti's failure to timely advise his client, the plaintiff in a personal injury claim, of his firm's representation of the defendant's insurance company in other matters. The admonition was also based upon Benedetti's failure to obtain his client's written waiver of the potential conflict of interest and consent to his continued representation. Benedetti's conduct violated RPC 1.7(a) and RPC 1.7(b).

In response to the issues raised by this case, Benedetti's firm took corrective measures and reviewed all existing cases where potential conflicts may have existed, made full disclosures to the appropriate clients, and created or corrected written records. Furthermore, the firm instituted a policy requiring a client's written waiver or consent in writing at the outset of representation should similar situations arise in the future.

Benedetti was represented by Kurt Bulmer. Marsha Matsumoto represented the Bar Association.

State Bar Highlights

Award Winners

Congratulations to two WSBA staff members, Executive Director Jan Michels and Director of Lawyer Services Barbara Harper.

Jan was honored by the Washington Association of County Officials with a Distinguished Service Award. The award was presented at their annual meeting, held in Wenatchee. Prior to joining the WSBA this past April, Jan was Director and Superior Court Clerk of the King County Department of Judicial Administration, and served as President of the Washington Association of County Officials.

At the Legal Profession Assistance Conference held in Montreal, Barbara was presented with the John A. Mcdonald QC & James B. Cushman Memorial Award for Outstanding Contributions to Lawyer Assistance Programs. Barbara was recognized for "her leadership and expertise…matched by her kind and gentle guidance," and the WSBA's Lawyer Assistance Program was acknowledged as one of the finest in North America.

RIGHT: *The WSBA's Margaret Morgan (left) accepts the "Best Program Award of Professional Excellence," presented by the Association of Continuing Legal Education Administrators (ACLEA) at its conference in Toronto.*

Resources

Annual WSBA Membership Directory *(published every May)*

The 1998-99 Resources membership directory is now on sale for half-price:

$8.15 — WSBA members in-state
$7.50 — WSBA members out-of-state
$17.38 — non-WSBA members in-state
$16.00 — non-WSBA members out-of-state

To order, send a letter request with check payment (to WSBA; payment must accompany order):

Washington State Bar Association
attn: Order Processing
2101 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330

Questions? Call **206-727-8213**.

NOTICE: The Washington State Access to Justice Board is in the process of evaluating the implementation to date of its *Plan for the Delivery of Civil Legal Services to Low Income People in Washington State*. We encourage your comments and feedback. Information is available by contacting Sharlene Steele at 206-727-8262 or sharlene@wsba.org, or by visiting www.ejc.org. There also will be two public meetings: November 20 in Spokane and December 4 in Seattle. Thank you for your interest and support.

Congratulations!

New Admittees to the Bar from the Summer 1998 WSBA Exam:

A
Abbott, Gregory B., Seattle, WA
Abrahamson, Michael Everett, Seattle, WA
Adams, Matthew Hyrum, Yakima, WA
Addicott, D. Christian, Seattle, WA
Alaily, Rima Jamil, Appleton, WI
Allen, Alexander Thomas, Seattle, WA
Allred, Chad, Renton, WA
Allred, Lisa R., Moscow, ID
Anderson, Dianna L. Tenino, WA
Anderson, Erik B., Seattle, WA
Anderson, Isaac Abram, Silverdale, WA
Anderson, Kristi S., Ames, IA
Anderson, Stephanie, Mercer Island, WA
Andrews, John Steven, Seattle, WA
Andrews, Katharine Maria, Mountlake Terrace, WA
Ankney, Angela D., Kirkland, WA
Arnold, Andrew Peter, Seattle, WA
Ashbaugh, Denise L., Seattle, WA
Asplund, Jill E., Renton, WA
Austell, Randi J., Bothell, WA
Ayers, Gerrit Jonathan, Tacoma, WA

B
Bailey, Robert A., Alexandria VA
Baker, Gabriel, Seattle, WA
Balasubramani, Venkat, Seattle, WA
Baldwin, Thomas Alan Jr., Puyallup, WA
Ballinger, Kristin E., Seattle, WA
Bamford, Kristen M., Auburn, WA
Barbosa, Norman Mcintosh, Seattle, WA
Barker, William Wesley, Seattle, WA
Barrett, Jeannie Antoinette, Spokane, WA
Barry-Smith, Andrea C., Weston, MA
Bartfeld, Esther C., Seattle, WA
Bartley, Ava Eldress, Tigard, OR
Bartoletta, Dominic M., Spokane, WA
Bayer, Jennifer D., Lacey, WA
Beale, Laurie K., Vashon, WA
Beckerman, Sarah, Bellevue, WA
Beer, Cliften Duncan, Seattle, WA
Beer, Tiffany Townsend, Seattle, WA
Bennett, Robert Carl, Tacoma, WA
Berger, Kristin, Seattle, WA
Bergland, Kerri Ann, Kent, WA
Betcher, Susan Denise, Seattle, WA
Betz, David Farley, Seattle, WA
Bielefield, Beth Anne, Spokane, WA
Black, Neal Dean, Kirkland, WA
Blazy, Kelly Grace, Tacoma, WA
Bledsoe, Jim A., Spokane, WA
Blendinger, Jill, Lake Oswego, OR
Blomgren, John August, Lynnwood, WA
Blotch, Alan T., Kingston, WA
Boksenbaum, Lisa Sue, Redmond, WA
Bonds, Renee T., Federal Way, WA
Bonini, George Edward, Seattle, WA
Bostwick, Jarrett Todd, Seattle, WA
Bowman, David Michael, Seattle, WA
Bracken, Sean Paul, Spokane, WA
Bradley, R. Douglas, Seattle, WA
Brandt, Tracy Sue, Spokane, WA
Branum, Kyle L., Seattle, WA
Broadhead, Roxane, Spokane, WA
Brodsky, Michael P., Mukilteo, WA
Brown, Sandra Lee, Seattle, WA
Buchanan, Jacqueline Jean, Pacific, WA
Buchanan, John Owen, Washington, DC

FYI nformation

Burgess, Heather L., El Paso, TX
Burke, Maureen D., Seattle, WA
Burke, Michael E. IV, Bellevue, WA
Burnett, David Turner, Bellevue, WA
Butler, John Kenneth, Seattle, WA
Butler, Stephen James, Seattle, WA

C

Cai, Rongwei, Seattle, WA
Calandrillo, Steve P., Seattle, WA
Caldwell, Robert N., Seattle, WA
Calligan, Michael D., Arcata, CA
Callison, Kathleen, Tumwater, WA
Canfield, Damon Hooper, Tacoma, WA
Capener, Jeffery Howard, McMinnville, OR
Caplinger, Daniel James, Seattle, WA
Carleton, Eva J., Gig Harbor, WA
Carroll, Kelline A., Issaquah, WA
Carver, Mary Gail, Buckley, WA
Cason, Christopher M., Issaquah, WA
Celotti, Janice L., Orange, CA
Cerda, Victor, Seattle, WA
Chan, Priscilla To-Yin, Lakewood, WA
Chenaur, Angel, Auburn, WA
Christiansen, William Terry II, Issaquah, WA
Chung, Janet Shirley, Seattle, WA
Clare, Mary Christine, Seattle, WA
Clark, Jane Elizabeth, Seattle, WA
Clark, John D., Issaquah, WA
Clark, Sara M., Seattle, WA
Clarke, William W., Auburn, WA
Clemans, Warren Michael, Seattle, WA
Clifford, Kharma S., Toppenish, WA
Cody, Gregory L., Seattle, WA
Coffing, Curtis Brian, Seattle, WA
Coker, Christopher John, Lacey, WA
Collins, Scott Michael, Seattle, WA
Colthurst, Laura Ann, Seattle, WA
Conway, Dianne Kathleen, Tacoma, WA
Cook, Julie Dee, Bellevue, WA
Cook, Patrick C., Edmonds, WA
Cook, Vaughn Graham Takao, Seattle, WA
Cooper, Noelle E., Bainbridge Island, WA
Cords, Danshera, Tacoma, WA
Costeck, Ronald Andrew Malcolm, Seattle, WA
Cotten, Marya N., Ketchikan, AK
Cottnair, David Stephen, Lynnwood, WA
Cozart, Eleanor L., Tacoma, WA
Crick, Derek D., Spokane, WA
Croft, William Jerry, Spokane, WA
Cronin, Patrick Joseph, Spokane, WA
Crooks, James H., Sumner, WA
Crosby, Ian Bradford, Seattle, WA
Crowder, Jennifer Lane, Charlottesville, VA
Crowe, Daniel Zene, Seattle, WA
Crowell, Samuel Harvell, Seattle, WA
Culver, Michael Daniel, Seattle, WA
Curnow, Amber Kathleen, University Place, WA
Curtice, Melanie K., Seattle, WA
Cushman, Jennifer Slifka, Seattle, WA
Cyr, Maureen Marie, Seattle, WA

D

Daggett, David Keith, Spokane, WA
Daily, Molly Margaret, Portland, OR
Danskin, Timothy Alan, Lynnwood, WA
Danzig, Brian J., Seattle, WA
Davis, Jennifer Thurman, Everett, WA
Davis, Paul Matthew, Spokane, WA
Dawson, William Thomas, Tacoma, WA
Deater, Kimberly Ann, Spokane, WA
Deem, Patricia Anne, Washington, DC
Defreyn, Debra Lynn, Seattle, WA

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in October 1998 is 4.335 percent. The maximum allowable interest rate permissible for November is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates of the past 10 years appear on page 52 of the June *Bar News*, and in the online edition of the *Bar News* at http://www.wsba.org/barnews/usuryrate.html. The usury rate for October 1998 was inadvertently omitted from last month's issue. The average coupon equivalent yield was 4.978 percent and the maximum allowable interest rate was 12 percent. The *Bar News* regrets the omission.

Defreyn, Marc D., Seattle, WA
Deliganis, Chryssa V., Seattle, WA
Del-Pan, Andrea, San Francisco, CA
De Maine, Philip Matthew, Tacoma, WA
Dennis, Morgan H., University Place, WA
Dermody, Allen W., Kent, WA
Derry, Amy C., Seattle, WA
De Vrieze, Heather S., Seattle, WA
Dias, Blake Edward, Seattle, WA
Dillon, Joyce, Seattle, WA
Dobrin, Victoria Jane, Seattle, WA
Dods, Sarah C., Seattle, WA
Doumit, Thomas Michael, Rosburg, WA
Driscoll, Tamara J., Helena, MT
Dumm, Christopher Jesse, Vancouver, WA
Dyce, Elaine, Cerritos, CA

E

Eason, Patrick A., Tacoma, WA
Egan, James, Seattle, WA
Ehman, Martha Sue, Seattle, WA
Elder, Joyce Lynn, Kent, WA
Elliott, James Stephen, Yakima, WA
Ells, Clinton Staveland, Mercer Island, WA
Emry, Darcy B., Federal Way, WA
Eng, Kimton N., Seattle, WA
Entress, Geoffrey R., Bainbridge Island, WA
Ericson, Britt Marie, Edmonds, WA
Estes, Amy Christine, Seattle, WA
Euteneier, Jennifer Margareta, Seattle, WA
Evans, Alison Bell, Seattle, WA
Ewing, Thomas L., Seattle, WA

F

Fabi, Edward Singson, Seattle, WA
Fairhall, Thomas A., Port Hadlock, WA
Falkner, Thomas W., Tacoma, WA
Fall, Laurie Kathleen, Seattle, WA
Fannin, Patrick Kie, Spokane, WA
Farr, Denise Rochelle, Seattle, WA
Farrell, Shawn Michael, Seattle, WA
Fasnacht, Robert J. Jr., Hayden, ID
Fazio, Daniel Nicholas, Seattle, WA
Feir, Scott E., Seattle, WA
Feld, Andrew D., M.D., Kirkland, WA
Fenn, Colleen G., Dayton, WA
Fielder, Forrest E. Jr., Bellevue, WA
Fong-Uribe, Debbie L., Spokane, WA
Foster, William Crozier, Austin, TX
Frazier, Jeffrey Michael, Seattle, WA
Freise, Kimberly S., Mercer Island, WA
Friedberg, Daniel Scott, Seattle, WA
Frockt, David S., Seattle, WA
Froembling, James Richard, Des Moines, WA
Fucetola, James Ernest, Spokane, WA
Funston, Karen Leigh, Bellingham, WA

G

Galbraith, Ann Kathleen, Mercer Island, WA
Gall, Sheila Marie, Seattle, WA
Gallagher, Christine, Chicago, IL
Garber, Laurie Chenin, Portland, OR
Garcia-Swain, Susan, Seattle, WA
Gardner, Jeffrey Charles, Portland, OR
Garrity, Michael D., Seattle, WA
Gassman, Alicia May, Seattle, WA
Gausman, Carlton James, Seattle, WA
Gee, David W., Seattle, WA
Gibson, John Bradley, Seattle, WA
Gideon, Cindy Carra, Spokane, WA
Giger, Rhonda, Everett, WA
Gilmour, Andrew Robert, Riverside, CA
Glisson, Stan, Bothell, WA
Godfread, Andrea, Seattle, WA
Goedde, Patricia A., Seattle, WA
Goforth, Aaron D., Spokane, WA
Goller, John Gerard, Spokane, WA
Gorrell, John T., Seattle, WA
Gottesman, Gregory A., Seattle, WA
Gottesman, Shannon, Seattle, WA
Grafe, Darren E., Tacoma, WA
Gray, Michael Patrick, Seattle, WA
Greene, Rebecca Erin, Seattle, WA
Greene, Taylor A., Seatttle, WA
Grewe, Todd Matthew, Portland, OR
Griffin, Chris, San Francisco, CA
Griffith, Darcy L., Kirkland, WA
Griffith, Sarah Joan, Seattle, WA
Guevara, Lori J., Tampa, FL
Guinan, Cathleen M., Seattle, WA
Guinasso, Gina, Seattle, WA
Gullaksen, Dana Kristin, Tacoma, WA
Gulmert, Katherine S., Cayucos, CA
Gupta, Ramon R., Seattle, WA

H

Hall, Ryan J., Seattle, WA
Hairopoulos, Erin Courtney, Seattle, WA
Hall, Shelley Marie, Seattle, WA
Halliburton, Christian Mukunda, Seattle, WA
Han, Grace Jin, Seattle, WA
Hanan, Jennifer Irene, Albany, NY
Hanlon, Jennifer Julia, Olympia, WA
Hansen, Kevin Blair, Santa Fe, NM
Hanson, Amy Nicole Linscheid, Lynnwood, WA
Harden, Jenna Daniella, Vancouver, WA
Harman, Michael Christopher, Bellevue, WA
Harris, Adrienne Elizabeth, Visalia, CA
Harris, Jason Edward, Burnaby, BC
Hart, Serena Suzanne Alsup, Seattle, WA
Hathaway, Octavia Y., Seattle, WA
Hatten-Boyd, Laurie, Spokane, WA
Hawes, Tami Jo Shallbetter, Seattle, WA
Heims, Tracy Michael, Seattle, WA
Hemstreet, Melissa A., Kingston, WA
Henderson, Penny Rose, Sedro-Woolley, WA
Hendrix, Robert F. II, Seattle, WA
Herr, Heidi Erica, Seattle, WA
Herrman, David Adam, Mercer Island, WA
Hershey, Kenneth Eugene, Burien, WA

Calendar

This information is submitted by providers. Please check with providers to verify CLE credits approved.

To announce a seminar, please send information to:
WSBA, Bar News Calendar
2101 4th Avenue
4th Floor
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. By WSBA CLE 206-727-8202.

Computer Camp for Counselors: Basic Hands-on Workshop for Using the Internet in Your Practice
Nov. 13 – Seattle. 3.75 CLE credits estimated. By WSBA CLE 206-727-8202.

Computer Camp for Counselors: Legal Research over the Internet Workshop
Dec. 11 – Seattle. 4.25 CLE credits estimated. By WSBA CLE 206-727-8202.

BANKRUPTCY

Fundamentals of Bankruptcy Law and Procedure in WA
Dec. 8 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

BUSINESS LAW

Public Charities in WA
Nov. 6 – Seattle. 6.5 CLE credits. 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.

How to Raise Private Equity Capital
Nov. 6 – Seattle. 7.25 CLE credits. By WA Law School Foundation 206-543-0059.

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

CONSTRUCTION LAW

Advanced Construction Law in WA
Dec. 11 – Seattle. 6.5 CLE credits (incl. 1.25 ethics). By NBI 715-835-7909.

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.

Contract and Purchasing Law in WA
Dec. 16 – Seattle. 6.5 CLE credits (incl. .5 ethics). By NBI 715-835-7909.

CRIMINAL LAW

The Masters of the Criminal Practice
Dec. 16 – Seattle. 6.5 CLE credits estimated. By WSBA CLE 206-727-8202.

EDUCATION

Special Education Law in WA
Dec. 3 – Seattle. 6.5 CLE credits. By Professional Development Network 414-798-5242

EMPLOYMENT

Personnel Law Update
Nov. 17-18 – Seattle. 12.25 CLE credits. By Council on Education in Mgmt. 925-988-1837.

FMLA Update Workshop
Dec. 1-2 – Seattle. 12 CLE credits. Council on Education in Management 925-988-1837.

How to Conduct an Internal Investigation
Dec. 3 – Seattle. 6 CLE credits. By Council on Education in Management 925-988-1837.

Advanced Workers' Compensation in WA
Dec. 17 – Seattle; Dec. 18 – Spokane. 6.25 CLE credits (incl. 1.25 ethics). NBI 715-835-7909.

ENVIRONMENTAL LAW

15th Annual Pacific NW Environmental Law Conference
Nov. 18 – Seattle; Nov. 19 – Portland, OR. 7.75 CLE credits. By Oregon Law Institute of Northwestern School of Law of Lewis & Clark College 503-243-3326.

ESTATE PLANNING

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
Nov. 6 – Mt. Vernon; Nov. 13 – Vancouver; Nov. 20 – Seattle. 4 CLE ethics credits. By WSBA CLE 206-727-8202.

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

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

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

Twin Professional Problems: Substance Abuse and Elimination of Bias
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

Professionalism and Character: How Intertwined?
Nov. 30; Dec. 21; Jan. 28; Feb. 23 – by telephone. 2 CLE ethics credits pending. By TRT Inc. 800-672-6253 or www.trt-cle.com

Calendar

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

Ethics for Family Lawyers
Dec. 2 – your office. 1.5 CLE ethics credits. 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.

Ethical Issues in the Personal Injury Practice
Dec. 18 – Seattle. 6 Ethics credits pending. WSTLA 206-464-1011

Professional Responsibility Institute
Dec. 19 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

Teleconference: Ethics in the Law
Dec. 29 – Your phone. CLE credits TBA. WSTLA 206-464-1011.

FAMILY LAW

Stalking and Strangulation: Lethality and Reality
Nov. 5-6 – Burien. 5.75 CLE credits. By Greater Puget Sound Domestic Violence Conference 253-833-9911 ext. 2548.

Ethics in Family Law
Nov.18 – Seattle. 2 Ethics CLE credits pending. By KCBA 206-340-2578.

GENERAL

Getting the Judge to Say "Yes"
Nov. 13 – Seattle. 7 CLE credits (incl. 1 ethics). By Kinder Legal 206-622-3810.

New Attorney Solo Practice Seminar
Nov. 14 – Bellevue. 5.5 CLE credits (incl. .5 ethics) pending. By KCBA and SW2 Seminars 206-340-2578.

Teleconference: How to Implement *Mahler*: Getting Your Fees from the PIP Carrier
Nov. 19 – Your phone. 1.5 CLE credits pending. WSTLA 206-464-1011.

Psychology and the Legal Profession
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

What Every Attorney Should Know about Finance and Accounting
Dec. 3 – Seattle. 7.5 CLE credits. By Sequoia Professional Development 202-955-9373.

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

Lawyers and the Internet: What Every Lawyer Should Know about Using the Internet
Dec. 9 – Seattle. 7.5 CLE credits (incl. 2 ethics). Sequoia Professional Dev. 202-955-9373.

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

The Tacoma CLE: South Sound Year End Smorgasbord
Dec. 10, 9 a.m. – 5 p.m. – Landmark Convention Center, Tacoma. 7 CLE credits applied (includes 1 Ethics) pending. WSTLA 206-464-1011.

Evening CLE: Avoiding Legal Malpractice
Dec. 21, 6 – 9 p.m. – Plymouth Congregational Church, Seattle. 3 CLE Ethics pending. WSTLA 206-464-1011

Cross Training 101
Dec. 21 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

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

INSURANCE

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

Settlement of Claims of Minors and Incapacitated Persons
Nov. 13, 1998 – Seattle. 6.5 CLE credits (incl. .5 ethics) pending. By KCBA 206-340-2578.

WA Title Insurance
Dec. 11 – Seattle – 6.25 CLE credits (incl. 1.5 ethics). By Lorman 715-833-3940.

21st Annual Insurance Law Seminar
Jan 21, 1999, 9 a.m. – 5 p.m. – Cavanaugh's Inn at the Park, Spokane. WSTLA 206-464-1011.

21st Annual Insurance Law Seminar
Jan 22, 1999, 9 a.m. – 5 p.m. Doubletree Hotel/Seattle Airport, SeaTac. WSTLA 206-464-1011.

LAND USE

Land Use Training
Dec. 8-11 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

WA Boundary Law and Adjoining Landowner Disputes
Dec. 17 – Lynnwood; Dec. 18 – Seattle. (Also self-study.) 6.5 CLE credits. By Professional Education Systems 715-833-5296.

LITIGATION

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

Stockbroker Litigation: Pursuing and Defending Claims Against Stockbrokers and Brokerage Firms
Nov. 6, 1998 – 6.5 Ethics CLE credits (incl. 1.5 ethics) pending. By KCBA 206-340-2578.

Tort Law Update
Nov. 11 – Seattle. 9 a.m. – 5 p.m. 6.25 CLE credits (incl. 1.5 ethics). WSTLA 206-464-1011.

How to Investigate and Litigate Cases Involving Multiple Sex Allegations, Victims and Suspects
Nov. 13 – Tukwila. 7.25 CLE credits. NW Child Abuse Defense Resource Ctr. 253-520-0496.

Preparing For & Getting Through Trial with Judges & Juries.
Nov. 17, 1998 – Seattle. 6.5 CLE credits pending. By KCBA 206-340-2578.

Nursing Home Malpractice in WA
Nov. 18 – Seattle. 6.5 CLE credits (incl. .75 ethics). By NBI 715-835-7909.

Child Witness Statements and Sex Abuse Cases
Nov. 19 – Seattle. 2 CLE credits. By Seattle Forensic Institute 206-624-6454.

Probate Litigation
Nov. 20, 1998 – Seattle. 6.25 CLE credits (incl. .5 Ethics) pending. By KCBA 206-340-2578.

Trial Masters at Work
Dec. 4 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

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

DUIs and the 1998 Legislation
Dec. 11 – Seattle. 7.5 CLE credits (incl. 1 ethics). NW College of DUI Defense 425-451-1995.

Tegland's 5th Annual Litigation Update
Dec. 12 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

Teleconference: Trying Your Case in District Court
Dec. 16, noon – 1:30 p.m. Your phone. 1.5 CLE credits applied. WSTLA 206-464-1011.

PERSONAL INJURY

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

5th Annual Fall Real Estate Conference
Nov. 19 – Seattle. 6.5 CLE credits. 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.

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

Announcements

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Duncan C. Turner

Diana P. Danzberger Michael G. Atkins

Of Counsel
Lish Whitson

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Seattle, Washington 98101
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Fax: (206) 621-9686

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Of Counsel to the Firm

Effective September 1, 1998

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We also extend best wishes to Ellen Chestnut, as she continues her interest in special education law at the U.S. Department of Education, Office of Civil Rights.

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MICHAEL P. MONACO

Stanford University (B.A., 1989); Hastings College of Law, University o California (J.D., *cum laude* 1994), Associate Managing Editor, Hastings Law Journal

and

TONIE L. BITSEFF

University of Washington (B.A., 1993) Seattle University School of Law (J.D., *magna cum laude*, 1996); University of Washington School of Law (LL.M., Taxation, 1998); First Place, University of Washington School of Law Taxation Paper Competition

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SONG OSWALD & MONDRESS PLLC
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Facsimile (206) 398-1501
Email: wsong@somcrisa.com

The Osborn Law Firm
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Franklin L. Smith
formerly a partner at Krutch, Lindel

has joined the firm as a shareholder and that effective November 1, 1998 the firm shall be known as Osborn◆Smith.

Mr. Smith will continue his practice in civil litigation with emphasis in aviation law and personal injury.

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The Law Office of
Mary Anne Vance, P.S.
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3 WSBA Motor Vehicle deskbooks: Accidents, Accident Litigation and Accident Insurance. Forms, analysis, how-to, etc. Mint condition, current through 1995. $200 or best offer. Contact David Shaw 509-634-8834 or e-mail res_atty @televar.com

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Deadline: Text and payment received (not postmarked) by 1st of each month for issue following, e.g., November 1 for December issue. No cancellations after deadline. Mail to: WSBA *Bar News* Classifieds, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330.

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WILL SEARCH

William F. Langshaw: anyone with any knowledge of a will executed by William F. Langshaw of Seattle please contact attorney William L. Neal 206-667-8211.

Margaret V. Rombauer: seeking will of Margaret V. Rombauer. Please contact Loretta Rombauer at 206-622-6646 (work) or 425-432-1346 (home).

William Vernon Glenn died June 30, 1998, resident of Othello, Washington. Born May 18, 1936, Nyssa, Oregon. If any attorney has possession of this will, please contact Bruce D. Pinkerton, 1426 E. Hunter Place, Ste. A, Moses Lake, WA 98837; 509-765-0688.

Melvin Floyd Brewster: anyone who has prepared a will for Melvin Floyd Brewster, who died in Tacoma 8/4/98, plase contact attorney Gaylerd Masters 253-383-1406.

MISCELLANEOUS

Italy: Tuscany: classic 18th-C. house, just restored, views of San Gimignano's medieval towers, 30 miles SW of Florence, 4 miles to train, 6 bedrooms (sleeps 15), 3 baths, about 2500 square feet, private road, set in vineyards, olives, apricots, weekly $1600-2500. 14th-C. villa, former monastery, 17 miles S of Florence, rent as one to three living units, 3 to 10 bedrooms (sleeps 7-27), 3 to 8 baths, about 5000 square feet, private road, wine, olive estate, pool, gardens, weekly $1300-5000. Rome: central, view, large (1000+ square feet), 1-bedroom, 1-bath apartment, sleeps 4, living room, dining room, kitchen, veranda, weekly $1200. Law office of Ken Lawson (Seattle) 206-632-1085; fax 206-632-1086.

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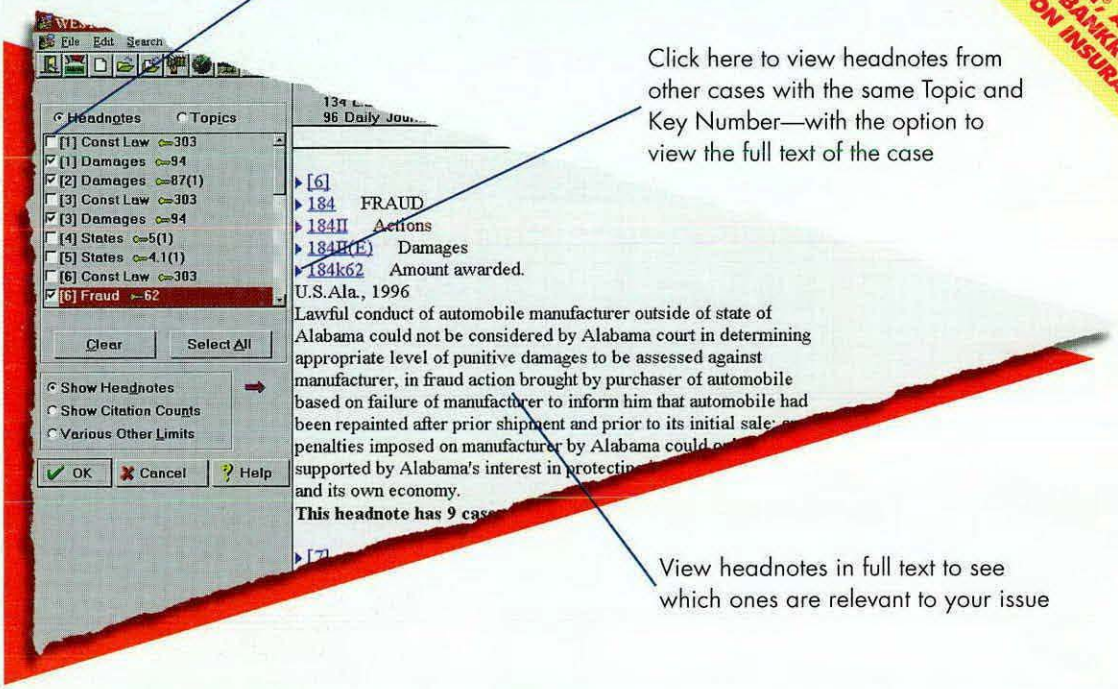

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