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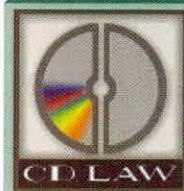
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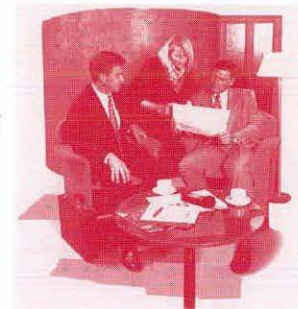
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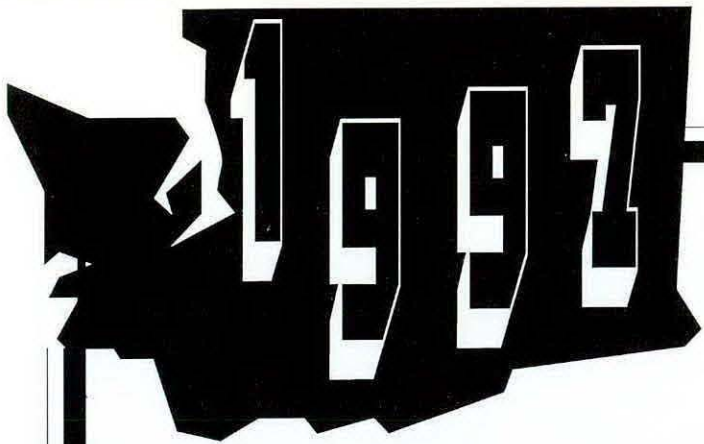


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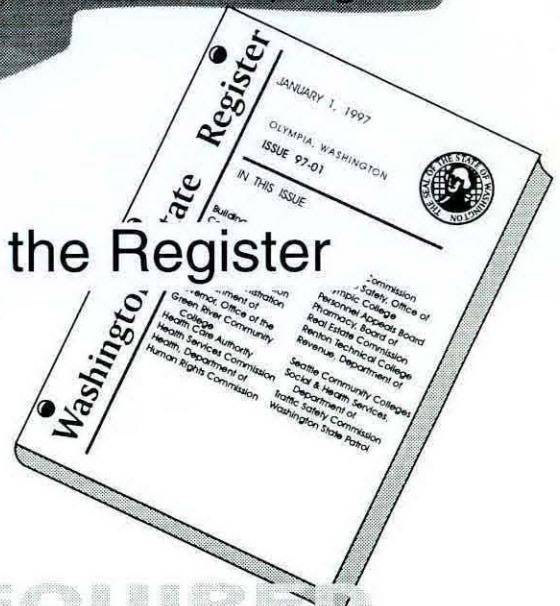
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# Letters

## FAMILY LAW GAL EXTINCT DINOSAUR

■ Editor:

I find it almost impossible to believe that anybody still doesn't get it, to use a common vernacular, about guardians ad litem in family law. What is the problem with the legal community, and Washington attorneys in particular?

Anyone who has any knowledge of how the law changes in response to the societal pressures around it should easily see the family law GAL dinosaur for exactly what it is: an extinct concept that is on life-support only because it generates lucrative fees while allowing the exercise of unbridled power.

If those in the legal system would only be forced to stare into a video camera while reciting their pontifications on this subject, and then freely pass said video around to strangers, there would be no more family law GALs in very short order.

Raven Lidman is the only one who I have heard who even tries to tell the truth about this cesspool. Notwithstanding my respect for her, I still am amazed that she refuses to call it what it is: a clever method for raiding a marital community for fees while wielding power over two emotionally pained individuals in a manner unavailable to even the President of the United States.

The Navajo Nation calls the BIA (Bureau of Indian Affairs) something different. They say it stands for Bossing Indians Around. In Washington courts, GAL stands for Getting All the Loot. Possibly, in the case of attorney GALs, one could say Generating Abusive Litigation.

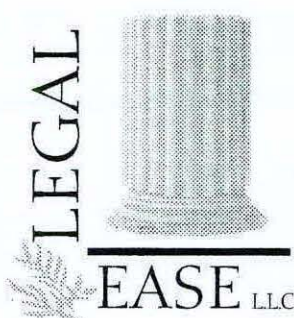
Why is a GAL in family law an extinct dinosaur on life support? Because the law has changed so that children are no longer property. It was only when children were treated legally as property (which had some potential constitutional rights) that it was necessary to appoint a protector to make sure that the attorneys didn't take the "property" concept too far while zealously advocating for their clients. Today children are viewed as "not quite full persons." The exceptions to this make it a Swiss cheese view but generally it is accurate.

Here is a radical idea I would like all the attorneys to consider: Ban GALs (and investigators) in family law, period.

I can hear the screams of anguish already from those who profess to care about children but are only lining their pockets while destroying parent-child relationships. But the truth is that if there is a case where a GAL might be needed to protect a child's best interests (the operative phrase under RCW 26.12.175), the very first thing a judge should do is to

transfer the case to juvenile court as a dependency case and order the State to come in as a party to represent the child and fulfill the GAL role. Why is this not done at present? Simple. It triggers constitutional rights for the parents in defense of their rights. Free attorneys and all that other crap. You say it would be too costly?

Okay, try this one: any allegations of abuse by one parent against the other parent that are not simultaneously ac-



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accompanied by a crime report to the local police result in an immediate transfer of primary residential placement to the accused parent and limitations imposed on the false accuser. If a police report is actually made, then the case goes to juvenile court as a dependency case anyway, since any criminal activity inside a family per se endangers children. The end result is that if a GAL is appointed, it is under the law and in the court which is designed

to handle the issues causing it.

Just because two people are being divorced doesn't mean they are not capable of doing the right things. Teaching people to kowtow and worship a GAL under the premise that if they genuflect properly they will win the case is revolting to my stomach. It should be to everyone else as well.

LAWRENCE HUT  
via e-mail

MORE GAL INFO

■ Editor:

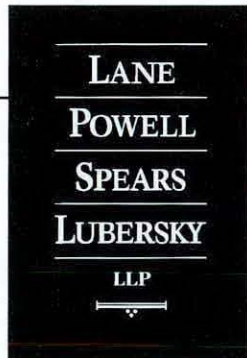
Our article in the December *Bar News* may have assumed a level of experience that many readers do not have concerning GALs. We would like to provide additional information that may be helpful to those readers who may have felt as if a bit more basis would be helpful.

**Term.** In Washington state, the term "Guardian ad litem" includes both paid and volunteer GALs. Paid GALs practice primarily in adoptions, minor settlements, guardianships and family law cases involving children. Volunteer GALs are recruited, screened, trained and mentored through CASA programs to investigate the child's situation in juvenile court dependency actions as well as family law cases, including domestic violence actions. In the vast majority of juvenile dependency actions, there is little money available to pay GALs.

**Eyes and Ears for the Court.** Part of the confusion surrounding many discussions about GALs is because GALs are appointed in so many different types of actions. Regardless of the type of action, generally the Guardian ad litem acts as the "eyes and ears for the court." See, e.g., National Probate Standards. Ideally, the GAL acts as a neutral, impartial, information gatherer and reporter, operating with objectivity and without bias. Recommendations are made to assist the court in making a more knowledgeable, informed decision and should be based on information gathered by the GAL during the investigation and detailed in the report.

**Party Status — Sometimes.** Another area of confusion is whether or not a GAL is a party. In some actions, the law provides party status to the GAL. In paternity cases, for example, the court is required to appoint a GAL for the child, who is a party under the law. Party status is also accorded GALs in dependency cases by statute. (CASAs who are appointed in paternity and dependency cases are treated as parties, too.) Similarly, GALs are considered parties in some actions by virtue of Title 4 RCW. Generally, GALs in family law custody cases are not parties.

**Confusion with CASAs.** By definition, CASAs (we are referring to those who volunteer as GALs with a CASA Program as well as those volunteers who are



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called CASAs) are affiliated with Court Appointed Special Advocate Programs, whose mission is to provide a GAL/CASA in every dependency case. CASA Programs have administrative policies, standards, and training curriculums based on those prepared by the National CASA Association and tailored by individual CASA Programs to meet the unique needs of their county. To further confuse matters, CASAs are also sometimes called "GALs" or "GALs appointed from CASA."

**CASA Volunteers.** Community members who apply to become CASAs must complete a rigorous application process, which includes an application, names and telephone numbers of three references, a criminal-history release authorization for the Washington State Patrol, an interview with staff and orientation training. As part of the training, the volunteer is provided with a manual, which includes a Code of Ethics. Once an applicant is accepted, cases are screened by professional staff at CASA and matched to a volunteer's ability and interest. The CASA staff provides guidance and services during the investigation and court proceedings. Grievances are handled by the program manager, and grievants are encouraged to air their concerns in open court. The 1996 legislators codified this practice when they amended Chapter 26.09 RCW.

**Court's Authority to Appoint.** In dissolution cases, statutory authority for appointing GALs and CASAs is found in RCW 26.09.220 and RCW 26.12.175; if paternity is also an issue, a GAL (or a CASA) must be appointed for the child under both state and federal laws and is a party to the lawsuit. RCW 26.09.220 codifies the court's authority to appoint GALs or CASAs in dissolution cases, while RCW 26.12.175 recognizes the court's authority to appoint individuals, including professionals, GALs, investigators or CASAs, to investigate family law cases. The court is required to appoint a GAL or CASA to protect the best interests of children of pending divorce where "both parents appear to be fit parents, and where the parties fail in their proof to adequately develop the relevant [statutory] factor." *In re Marriage of Waggener*, 13 Wa.App.911, 917 (1975).

*Waggener* also held that "the trial court has discretion to appoint a GAL to protect

the children's rights when they might conflict with the interests and desires of the parents . . . even when the parents object to the appointment of a guardian." *Ibid.* Commenting on the parenting statutes, the court explained the reasoning behind appointing a GAL even when both parents are fit: "The legislative purpose is to avoid custody determinations based solely on the evidence . . . *often partisan* (italics added) produced by the adversar-

ies, and to avoid a result dictated by the skill of the advocates or the strategies employed by counsel." *Ibid.* at 915.

The lower appellate court was following the holding of *In re Palmer*, 81 Wa.2d 604, 608 (1972), in which the Washington Supreme Court held that the trial court had the discretion and authority to "have an independent investigation made in custody proceedings."



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**Court's Role as Decision Maker.** The court is obligated to decide cases in accordance with the law and the evidence presented to it and to make those decisions in an unbiased manner. *See, e.g., In re Luscier*, 84 Wn.2d 135 (1974). The quality of the court's decision depends on many factors: the court's knowledge of the practice area, the skill of the attorneys who represent the parties, the quality of the information presented to the court, and the type of relief sought by the parties. Within the family law context, the court is asked to make a decision which is in the best interests of the child, an impossible task made even more formidable when one realizes that the child is usually not a party and that the people representing the child's best interests are the child's parents, who may have their own motivations, biases and misunderstandings as to what is best for the child, and that the parents may be representing themselves. Under the best of situations, *pro se* parents have a difficult time dealing with the legal, factual and procedural elements of family law actions, which are complex even for practicing attorneys. In most cases, where one or both parents are *pro se*, the evidence will not be sufficiently

developed in relation to the type of decision the court is asked to make.

**Recent Division I Case.** *Fernando v. Nieswandt*, 87 Wn.App. 103 (1997) is the first case in Washington to address the question of the GAL role. The *Nieswandt* court stated that GALs have immunity when acting as an arm of the court, reasoning that GALs are an integral part of the judiciary and thus act as agents of the court. A GAL does not act as an expert (although an individual GAL may be qualified as an expert if he or she has the requisite ER 801 background) nor as an attorney, but as a gatherer of information about a particular family. In custody cases, the court has the authority to appoint both a GAL and an attorney for the child under Title 26 RCW, although, for practical and monetary reasons, usually the court appoints either one or the other; rarely are both appointed at the same time.

**GAL role.** The role of the GAL is necessarily flexible due to the fact-driven nature of most legal proceedings and often unique legal and factual issues to be addressed in any given case. This flexibility can lead to further confusion by GALs and parties alike, especially given

the emotionally charged nature of court proceedings. GALs are appointed or required in the most difficult of cases for the court, those in which independent information must come through someone other than the parties. This complexity increases the possibility that a case will not have a tidy conclusion and that the parties and attorneys in the cases will have strong feelings.

**Investigation.** In most cases, investigation by a paid GAL or a volunteer CASA should include gathering or reviewing records and interviewing in person or by telephone any relevant professionals, such as medical doctors or school personnel. The GAL's focus is on the interests of the alleged incapacitated person or the child. Again, *see e.g.*, National Probate Standards. GAL and CASA recommendations are inductive, derived after factual inquiry and access to those attending the charge. Recommendations are advisory only and do not carry the weight of law unless the parties agree to follow the recommendations or the court so orders.

**Reasons for Appointment.** In custody cases where GALs are appointed, often

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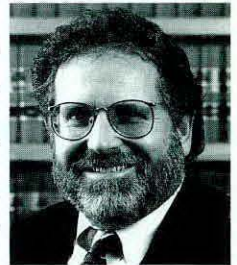
### Douglas L. Cowan

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



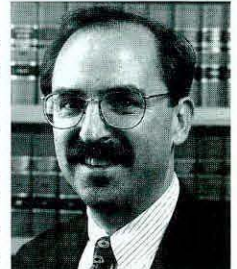
### Stephen W. Hayne

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



### Jon Scott Fox

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



both parents have significant problems, whether they be impairment from substance abuse; untreated or undiagnosed mental illness, such as bipolar disorder, schizophrenia or narcissism; lack of parenting skills arising from the parents' own troubled past; or even traumatic brain injury, which can change personalities and reduce basic competency to care for oneself, let alone one's child. To gain perspective, many of these families carry a legacy through the generations. In other types of cases, GALs are appointed for similar reasons — to safeguard the decision-making process concerning a disadvantaged person.

**Children's Rights Control.** It is well-settled in family law that when the rights or best interests of the children are adverse to the rights of the parents to parent, then the children's interests must control. RCW 26.09.187; *see, also, In re Sumey*, 94 WA.2d 757 (1980). The greater weight placed on the interests of the most-vulnerable family members suggests the need, in dissolution cases as well as in adoptions, minor settlements and dependencies, for someone other than a parent to protect the child's interests when a

conflict with parental interests appears likely.

**Family Law Emotions.** In many custody law cases, complex emotions, sometimes exacerbated by the legal process, can obscure even healthy parents' desire to support their child's relationship with the other parent.

[D]uring legal disputes arising from divorce, the child may be exposed to manipulation, anger, or rejection by one or both parents. Accusations of blame and unfitness are common since parents often use custody proceedings to vent bitter feelings or gain leverage in the financial settlement.

"Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce," 87 *Yale L.J.* 1126 (1978).

In the majority of custody cases, parents are well able to parent and are able to agree on parenting arrangements for their children. These are the cases that most

practitioners handle and in which appointments of GALs are unnecessary. In those custody cases where parents are not so good, however, the child can be placed at great risk both emotionally and physically.

**Reliability of Information Provided by Parents.** Those parents who are not able to adequately consider their child's needs during a divorce are often the same parents who cannot give the court adequate information which is relevant, complete and accurate. The legal system's emphasis on the adversarial method to bring all of the important information before the court breaks down in many of these cases because of the nature of the parents' problems, the lack of attorneys and the procedural complexities in our legal system. Parents who are *pro se* are further disadvantaged because they do not know the legal constraints within which the court must operate.

**Conclusion: Protection Through Independent Investigation.** Thus, the idea is to appoint GALs or CASAs to protect the children in contested custody cases through objective investigation of the

# 13 Great Reasons to use J·A·M·S/ENDISPUTE.



Fred R. Butterworth, Esq.



Hon. Robert J. Doran (Ret.)



Hon. Marshal Forrest (Ret.)



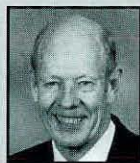
Hon. James I. Maddock (Ret.)



Hon. Daniel A. Moore, Jr. (Ret.)



Shawn Otorowski, Esq.



Hon. Robert H. Peterson (Ret.)



Hon. Norman W. Quinn (Ret.)



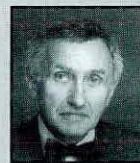
Hon. Kathleen A. Roberts (Ret.)



Hon. Jack P. Scholfield (Ret.)



Hon. Gerard M. Shellan (Ret.)



Hon. Robert W. Winsor (Ret.)



Steve H. Winterbauer, Esq.



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family's situation and support for the children's best interests, which is the court's paramount concern by law. The flexibility of the GAL's role allows the court to fashion an order that addresses the children's unique needs in each case. In particularly compelling cases, e.g., where mental illness or chemical dependency clouds the parents' judgment, the GAL report helps to document the long-term progress of the family. There is ample anecdotal evidence that appoint-

ment of a GAL helps prevent the inequities that occur when parents, mutually anxious to escape scrutiny, collude to reach a parenting agreement that does not have the children's best interests in mind.

**Competing Philosophies of Court's Role.** Whenever GALs are discussed, fundamental philosophical differences emerge about the nature and extent of the court's role in private civil cases. Does the court have the right to intervene (or

interfere) in a divorce by, say, ordering the parents into parenting classes? Case law in Washington supports the court's concern for children. *See, e.g., Chapman v. Pererra*, 41 Wn.App. 444 (1985) and *State v. Santos*, 104 Wn.2d 142 (1985). But should the court be allowed to interfere with family dynamics by ordering drug evaluations, treatment or counseling? What duty does the court owe to the children when the parents are unable to set aside their own differences and call upon the court for help?

**Responsibility.** It is easy to be critical when faced with the desperate circumstances presented by many of these families. Sometimes the blame falls on the individual family members, sometimes on the professionals who try to help, sometimes on the court. If we, collectively and professionally, are to progress, we need to have the facts before us. Certainly, GAL practices have room for improvement, beginning with the order of appointment. Employing our critical-thinking skills to examine weaknesses, assess strengths and move toward making changes will result in better decisions by our court and for our communities.

Thank you for the opportunity to present this information.

MEREDITH L. HARDY  
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Seattle

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

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

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

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

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

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

## NO GLORIFICATION OF COLUMBIA LEGAL SERVICES

■ Editor:

I object to the continuous glorification of Columbia Legal Services, Evergreen Legal Services and the other legal-service agencies. The main purpose of Columbia is to conduct political litigation, such as the recent lawsuit which led to a ruling that Indian tribes have a right to collect shellfish on privately owned beach property. Evergreen is also involved in prison litigation which is designed to change the prison system. This is political, too. Political activities are better conducted in the Legislature, where all the lobbying interests have a chance to be heard.

It is true that legal services also represent individuals. But I wonder how much

of that money goes to individual needs, such as expert witnesses for wives (and husbands) in custody cases. Rather, I think that much of their work goes toward winning entitlements. More welfare does not make this a better world. Also, legal-service lawyers are paid by a different entity from their client. This being so, I believe they represent their clients within the parameters of their political perspective rather than strictly adhering to their clients' desires.

I believe society should encourage people to be responsible. I think that Evergreen/Columbia, broadly speaking, tries to do the opposite; that they try to make more entitlements and benefits available, rather than helping people to be self-sufficient.

I am disturbed that some of the superior court filing fee goes to Columbia. The filing fee is a bar, to some, to access to justice. The fee discourages small parties from using superior court, and it tends to make it available primarily to large institutional litigants.

Legal-service lawyers are paid by the taxpayer, so they can attempt to make their ideological views part of the law.

They are not responsible to the people through an elected official, as are prosecuting attorneys, attorneys general and other lawyers in the executive branch of government. They are responsible only to the extent that their lobbyists, of which Evergreen has several, are able to lobby the Legislature to give them money.

I think the Bar Association should revise its unqualified endorsement of Legal Services.

ROGER B. LEY  
Seattle

#### ABOUT SECTIONS

■ Editor:

This letter is in response to a letter by Mr. Scott M. Missall in the January *Bar News*.

In his review of the WSBA Annual Report in the September *Bar News*, Mr. Missall concluded that the entry of \$143,716 for "Sections Operations" reflected a surplus generated from charges by the WSBA to the sections for indirect expenses. In fact, "Sections Operations" reflects revenues generated by the sec-

tions from their own activities, for example, seminars and section dues. Sections do not contribute to the general operations of the WSBA. Sections do reimburse the WSBA for indirect expenses. Sections use staff time and materials to operate and, to that extent, they reimburse the WSBA for these resources. The reimbursement is based upon the actual resources used by each section.

I hope this information is helpful. We truly appreciate that Mr. Missall and others review the WSBA financial information.

STEPHEN R. CROSSLAND  
WSBA Treasurer

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

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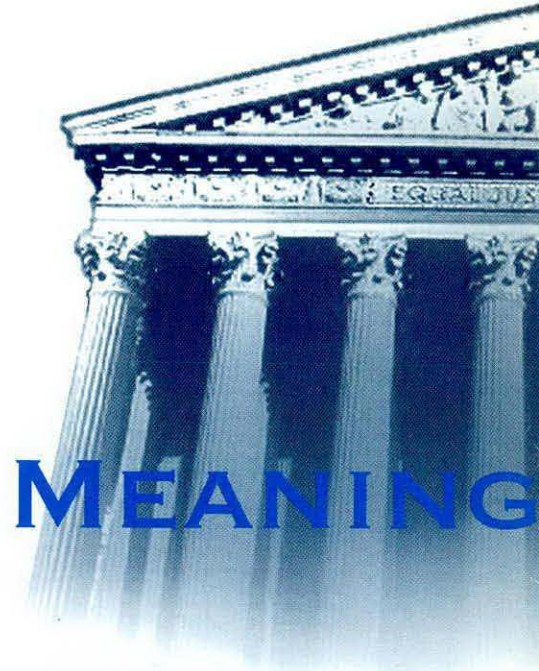
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The words "Equal Justice under Law" are inscribed over the entrance to the United States Supreme Court. Every day, children pledge allegiance to the United States and conclude by saying "with liberty and justice for all." We must ensure that these words have meaning.

Stewards of justice work to ensure the doors of the justice system stay open and accessible to all. People who need legal services but cannot afford them must be provided assistance. The courts must not be a place where costs makes redress meaningless. Access to justice is a cornerstone of our democracy.

Washington state has 1.2 million vulnerable and poor people, many with extensive legal problems that threaten to divide their

families or are related to the basic needs for food, shelter, physical safety or the protection of their fundamental human rights. This staggering number reminds me of a story I read in *Chicken Soup for the Soul*:

A man walking on a beach sees a person in the distance continually taking steps, leaning over and throwing something into the water. The man draws closer, and he sees that the beach is covered with starfish and the person is throwing the starfish back to the sea one at a time. He points out the futility of the effort, as there are so many starfish. The person responds, as he throws the starfish back, one by one, "Made a difference to that one."

## Welcome!

We are proud to welcome  
*Leslie R. Schenck*  
to our Seattle office.

Ms. Schenck focuses her practice on environmental regulatory compliance, environmental law and general litigation. Ms. Schenck formerly practiced at the firm of Lane Powell Spears Lubersky in Seattle and San Francisco, and is admitted to practice in both California and Washington.



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### Northwest Justice Project Public Meetings

The Northwest Justice Project, a 501(c)(3) not-for-profit organization which provides civil legal services to eligible low-income clients, will hold public meetings on:

January 31, 1998  
April 3, 1998  
July 18, 1998  
October 17, 1998

For more information, call  
Lisa Giuffré at (206) 464-1519  
or toll-free at (888) 201-1012.



# FUL WORDS

You can make a difference. And a lot of groundwork has already been laid. Washington has a model public-private partnership, the Access to Justice Network, which provides a comprehensive, coordinated statewide approach to the provision of the delivery of civil legal services. The Access to Justice Network includes: providers of civil legal services for low-income people (Columbia Legal Services, Northwest Justice Project, 23 volunteer attorney programs, and specialized providers of legal services); the WSBA and its Pro Bono and Legal Aid Committee; the Access to Justice Board; county, specialty, and minority bar associations; Washington's three law schools; the Supreme Court; the Washington judiciary; court clerks and court-house facilitators; the Equal Justice Coalition; the Legal Foundation of Washington; LAW Fund; and many others who support the goal of equal access to justice.

At the WSBA's request, the Supreme Court justices in 1994 created an Access to Justice (ATJ) Board, and that Board assured access for low- and moderate-income residents of the State of Washington to the civil-justice system through high-quality legal services. The nine-member ATJ Board, administered by the WSBA, has a number of committees and works as part of the Access to Justice Network.

The ATJ Board has the following 10 committees: ATJ Conference Planning; Accountability Standards; Education; Equal Justice Coalition; Jurisprudence of ATJ; Resource Development; Status Impediments to ATJ; Systems Impediments to ATJ; Technology and Communications; and Telephone Access.

The ATJ Board and WSBA coordinate the Access to

Justice Conferences. The first annual conference in 1996 had as its theme Visualize Justice. In 1997, the conference focused on Partnerships for Justice. This year the conference — to be held April 3-5, 1998, at Campbell's Resort in Lake Chelan — will address Working for Justice. For a long weekend, a broad cross-section of people gather to discuss and strategize how to ensure access to justice. The plenary session this year features partnerships that have developed since the last conference. There will be nuts-and-bolts workshops. The conference provides a wonderful opportunity to gather information and network. A highlight of every conference is the musical production of the Moderately Talented Yet Plucky Repertory Theater of Justice.

*"The courts must not be a place  
where cost makes redress meaningless.  
Access to justice is a cornerstone of our democracy."*

There are many ways you can help ensure access to justice. You can increase your activities as a volunteer lawyer. (More than 4,000 attorneys, approximately 14 percent of the WSBA, provide free civil legal services through the volunteer-attorney programs.) You can contribute to LAW Fund. (More than 5,500 attorneys and judges contribute.) You can volunteer to work on one of the 10 ATJ Board committees. (One hundred eighty-six attorneys and judges volunteer, including 82 members of the EJC steering committee.) You can be an Equal Justice Coalition team captain or member and help convince the legislatures in both Washingtons that the funding of legal services is vital. (There are 25 EJC team captains and hundreds of attorneys who write letters to their legislators.) You can attend this year's Access to Justice Conference. (Two hundred attorneys, judges and service providers attended in 1996; more than 250 people attended in 1997.) For more information on any of these activities, please call Joan Fairbanks at the WSBA office, (206) 727-8282.

Like the person on the beach, we can make a difference. We can ensure access to justice one step at a time.

# PRESIDENT'S CORNER



Pat Dieken  
Interim Executive Director

## WSBA SECTIONS: MORE TO OFFER

In 1973, the Board of Governors approved the formation of 12 sections. There were 1,900 members of sections that first year. Sections were expected to enable a far larger number of lawyers to participate in Bar activities, and it was predicted in the October/November 1973 issue of *Bar News* that sections were expected to become increasingly important in Bar Association affairs. This prediction has certainly come true! Sections have grown: more sections, more members, and more activities. There will soon be 22 sections, with the newest — the Senior Lawyers Section — currently being organized. Of the nearly 21,000 active members of the WSBA, close to 9,000 are members of at least one section. Since many of these members belong to more than one, there are more than 16,000 section members.

And, today, sections provide more services to their members than ever. They provide members of the Bar who have specialized interests a forum in which to pursue their interests consonant with the interests of the WSBA. Sections support the continuing legal education of lawyers; they cooperate in the development of the legislative program of the Bar; and they organize and inform their members of issues and events in their areas of interest.

Sections are fully self-supporting. No member license fees are used to fund section activities, and money collected by sections does not support general Bar operations. Section dues and other revenues fully cover section operating expenses and the sections' share of the Bar's over-

head costs. With the approval of the Board of Governors, each section establishes its own bylaws, dues structure and annual budget. Each section elects officers and determines how it can best serve its members; most publish periodic newsletters and hold meetings on items of interest. Many cosponsor CLE seminars with our CLE department, hold midyear meetings with a variety of programming, publish directories of their members (usually free to that section's members) and publish reference books for sale. In addition, sections continue to add innovative new products and services for their members. The

Law Practice Management and Technology Section, the Elder Law Section, and the Family Law Section now have their own areas on the WSBA Internet web site (visit them at [www.wsba.org](http://www.wsba.org)), with more in the making. The Business Law Section just issued its first edition of BizLawDisk, an electronic compilation of the Washington statutes and regulations regularly used by business lawyers, distributed at no cost to its members. For information about each section's current activities, see page 24 of this issue.

WSBA sections are supported by Sections Liaison Sheri Borgford, (206) 727-8239, and Sections Assistant Carey White, (206) 727-8293. Officers and members of each section are listed in the *Resources* directory. I encourage you to call either of these staff members or contact an officer of a section in which you have an interest. The section year begins each October 1, and dues are collected each fall. However, it is never too late to join a section!

*"Today, sections provide more services  
to their members than ever."*

# The Board's Work

---

BY SHERRIE BENNETT  
BAR NEWS EDITOR

January 9-10, 1998  
Olympia

The Board of Governors, following through on a commitment to improve communications with the Washington Supreme Court, met with members of the court for several hours, in addition to having dinner and lunch with various Justices.

## STUDENT LOAN DEFAULT RULE RETURNED TO SUPREME COURT UNDER PROTEST

The Board reluctantly returned the newest draft of proposed APR 16 to the Washington Supreme Court as follows:

**(a) Suspension from Practice.** The Washington State Bar Association may request that the Supreme Court suspend a member from the practice of law, upon receipt of certification from the state or federal government:

(1) that the member is delinquent on a federally or state guaranteed educational loan for the member's education and for which a lending agency is the obligee,

(2) that the member is financially able to pay, and

(3) that the lending agency has exhausted all administrative and legal remedies. Suspension shall not be recommended unless (1), (2) and (3) are established by a clear preponderance of the evidence.

**(b) Notice and Hearing.** The Washington State Bar Association, upon receipt of the certification in part (a) shall give actual written notice by certified mail, return receipt requested, to the member that the member may be suspended from practice no sooner than 60 days after the date the Washington State Bar Association sends the notice to the member, unless during the 60-day period the member submits to the Washington State Bar

Association satisfactory proof of one or more of the following:

(1) the member is not delinquent,  
(2) the member is unable in good faith to pay,

(3) the member is currently negotiating a repayment or deferral agreement or other modification to the loan,

(4) the loan has been discharged by operation of law or may be subject to discharge in a pending bankruptcy proceeding, or

(5) the lending agency has not exhausted all administrative or legal remedies. If the Washington State Bar Association deems the proof unsatisfactory, a hearing will be held before a committee designated by the Washington State Bar Association Board of Governors to give the member an opportunity to show cause why the member should not be suspended from practice.

**(c) Order of Suspension.** After the 60 day period, the Supreme Court may enter an order suspending the member from practice, unless satisfactory proof provided for in part (b) has been received, or unless the committee designated by the Board of Governors has found good cause not to suspend the member.

**(d) Reinstatement.** The Supreme Court may reinstate the member upon receipt of satisfactory proof that the member meets the criteria of part (b) (1), (2), (3), (4) or (5) and the member continues to meet all other requirements to practice law.

## AND DON'T FORGET TO PAY YOUR CHILD SUPPORT...

In a similar vein, the Board responded to a Supreme Court request for a proposed court rule to effectuate the legislative request set out in RCW 2.48.166 that no person who has been certified as noncompliant with a child support or parenting plan court order may be admitted to practice, and that any WSBA member found noncompliant be suspended from practice. General Counsel Bob Welden, in consultation with Governors

Lee and Moschetto, will draft a proposed rule and circulate it to the Family Law and Administrative Law Sections, the Superior Court Judges Association and others who may have a particular interest. The matter will be addressed again at the Board's February meeting.

## MCLE TASK FORCE RECOMMENDATIONS APPROVED

The Board heard the continuing report of MCLE Task Force members Jeff Belfiglio, Howard Fischer, Linda Gordon, Don Law, Gary Randall and Chairman J. J. Leary, Jr. and approved the following recommendations:

(1) Course providers will be allowed to teach legal ethics, professionalism and professional responsibility in a broader, more meaningful way while still meeting the ethics and professionalism component;

(2) CLE providers will report attendance to the Bar Association, which will be responsible for recording and keeping track of members' attendance and providing each member with reports on an annual basis, plus sending out notices by September 15th of each year to those members who will be reporting at the end of that year;

(3) The Board of Governors will be removed from the appeals process for MCLE delinquencies;

(4) Records and information contained in attorney compliance reports will not be available to any providers, including the CLE department of the WSBA;

(5) CLE courses will be accredited primarily on the basis of content as legal education, rather than on the basis of those attending;

(6) Alternative dispute resolution courses will be specifically listed as areas which may be approved as legal education, so long as the course complies with existing standards of CLE approval;

(7) Accredited sponsoring agencies

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will not need to seek preapproval of their courses;

(8) The MCLE Board will formally adopt its current practice of having a Board member approve applications by the CLE Department of the Bar Association, rather than having Bar-appointed staff review them;

(9) The WSBA Board of Governors retains its present policy of not granting appeals from the MCLE Board for denials of course credit; and

(10) The MCLE Board will re-examine the exemption for state and federal legislators.

The MCLE Task Force members will return for further discussions with the Board regarding the future structure and authority of the MCLE Board.

STATEWIDE TELEPHONE  
REFERRAL HOTLINE  
CRITERIA ESTABLISHED

Spurred by the Access to Justice Board's alternative proposals for establishing a statewide telephone referral line, the Board received feedback from Isabel Safora, Susan Daniel, Pat McIntyre, Jim Bamberger, Stuart Heath, Michael Cane and Joan Fairbanks before deciding that the WSBA will develop a set of standards for legal advice and referral hotlines in Washington state, which may include the following criteria: All advice attorneys are WSBA members; all advice attorneys are covered by malpractice insurance; all advice attorneys have 10 years' experience in the area of practice in which they advise; all lawyer referral services receive a fee-sharing amount of 5 percent on all phone calls referred by them; all participating lawyer referral services will donate a certain percentage of fees to the CLEAR program; no advice attorneys can provide individual representation to the callers; and the charge for the advice call is \$3 per minute or less. Hotlines complying with the developed criteria can receive referrals from lawyer referral services, CLEAR and others. President Fairhurst appointed Governors Powell, Whitson, Lee and a representative of the Washington Young Lawyers Division to a committee to draft the specific criteria.

OPPOSITION TO  
INITIATIVE 200

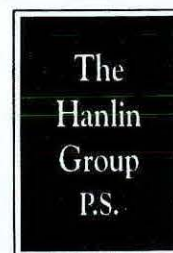
After the second appearance before the Board by Kim Morgan-Glass, the Board voted to endorse the position of the coalition opposing Initiative 200, the anti-affirmative action initiative currently underway.

INTERPROFESSIONAL  
COMMITTEE REPORT

The Board heard a report from Kathleen Kilcullen, chair of the Interprofessional Committee, and voted to increase the committee's budget by \$1,000. The committee will report to the Board with an action plan at the May meeting.

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## THE BOARD'S WORK

### BUDGET AND AUDIT COMMITTEE REPORT

Governor Crossland presented the fiscal year-to-date financial summary to the Board, and reviewed actions taken by the budget and audit committee, including salary surveys and a committee "stamp of approval" for a \$39,000 grant application pursued by the Access to Justice Board.

### SPECIALIZATION ISSUE D.O.A.

After a report by Governor Crossland that one of his constituents had requested that the Board once again review the issue of certification of specialists, the Board discussed previous Board studies and reviews of the issue, and declined to take further action.

### BOARD MEETINGS TO BE TELEVISED

After an extended discussion regarding the degree of frankness sometimes expressed by Board members in discussions regarding legislative issues, the Board voted 7-2 to invite TV Washington, a public-service TV channel, to record and televise Board meetings as appropriate.

### FEE ARBITRATION PANEL APPOINTMENT

Jack Lauderbaugh was appointed by the Board to the Fee Arbitration Panel. It was also agreed that President Fairhurst will consult with the Governors from Bellingham, Tacoma and Seattle in making appointments to the Law Clerk Committee.

### EXECUTIVE DIRECTOR SEARCH COMMENCES

Governor Whitson updated the Board on the current status of the search for executive director, anticipating that acceptance of applications will terminate shortly and review of candidates will begin.

### LEGISLATIVE REPORT

The Board was joined by WSBA Legislative Representative John Fattorini, who discussed matters coming before the Legislature this session. The Board voted unanimously to support the Supreme Court budget request, specifically including a request for additional funding for the Court of Appeals. The Board also

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agreed unanimously to oppose proposed legislation to increase the jurisdictional

limits of Small Claims Courts to \$10,000. Mr. Fattorini also discussed potential bills

relating to tort reform, but reported that no bills had as yet been introduced.

BOARD OF GOVERNORS MEETING SCHEDULE  
FOR THE REMAINDER OF FY 1997-1998

February 13-14, 1998	Tacoma	Lincoln Day Dinner (2/12/98) Legislative Report
April 3-4, 1998	Chelan	Legislative Report Annual Lawyer Discipline Report ATJ and BLC Conferences
April 17, 1998	WSBA Offices, Seattle	Half-day Meeting with Section Leaders
May 1-2, 1998	Spokane	Meet with Spokane County Bar Association Meet with Gonzaga Law Dean Annual ATJ/Legal Services Presentation
June 12-13, 1998	Leavenworth	Review Preliminary Budget Receive Court Rules Committee Report
July 17-18, 1998	Edmonds	Approval of Budget Finalize Court Rules Committee Recommendations
September 10-11, 1998	Seattle	Begin ED Evaluation Process Annual Business Meeting

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# State Bar Highlights

## BOARD OF GOVERNORS TO HOLD ELECTION

Four positions on the WSBA Board of Governors will be up for election this year, i.e., the Governors representing the Second, Fourth, Seventh, and Ninth Congressional Districts. Those positions are currently held by William H. Nielsen (Second District), Steve Crossland (Fourth District), Lish Whitson (Seventh District), and Dennis J. LaPorte (Ninth District).

The WSBA Bylaws provide that any member in good standing, except a member previously elected to the Board of Governors, may be nominated for the office of Governor from the Congressional District in which such member is entitled to vote by filing a petition signed by at least twenty (20) active members of the WSBA then entitled to vote in that district. All out-of-state active WSBA members are now eligible to vote in the district of the address of their agent within the State of Washington for the purpose of receiving service of process as required by APR 5(e), or, if specifically designated to the Executive Director, within the district of their primary Washington practice.

Nominating petitions are available from the Office of the WSBA Executive Director by contacting Brynn Hancock at WSBA, 2101 Fourth Avenue —

Fourth Floor, Seattle, WA 98121-2330; (206) 727-8244. Petitions must be received by the Executive Director of the WSBA by 5 p.m. on March 2, 1998. The Board of Governors determines the official dates of the election. Ballots are usually mailed around the first of June and counted approximately the first of July.

Note: *Bar News* intends to include in its May issue a section carrying biographical statements of 100 words or less from all the nominated candidates. Those statements should accompany the nominating petitions.

## USURY RATE

The average coupon equivalent yield from the first auction of 26-week treasury bills in January 1998 is 5.339%. The maximum allowable interest rate permissible for February is therefore 12%. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates of the past 10 years appear on page 32 of the June 1997 *Bar News*, and in the online edition of the *Bar News* at <http://www.wsba.org/BarNews/usuryrate.html>

## RESOURCES

Annual Membership Directory

**\$16.29 — WSBA members in Washington** (includes WA state sales tax)

**\$15.00 — WSBA members out of state**

**\$34.75 — non-members in Washington** (includes WA state sales tax)

**\$32.00 — non-members out of state**

*Check must accompany order*

Please send me \_\_\_\_\_ copies of the May 1998-99 *Resources* membership directory

Name \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

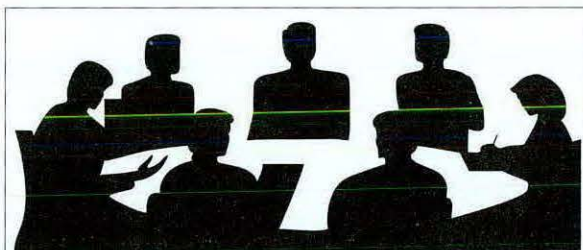
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2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330

FYI information

ONE CONVENIENT LOCATION:

THE 1998 LAW OFFICE MANAGEMENT INSTITUTE AND LEGAL EXPO EXHIBIT HALL

Reserve Friday, March 6 as the day to improve your law firm. Take advantage of an opportunity to review services and products of note to the legal profession *and* learn how to improve and keep your law firm competitive.



can: obtain solid tips for making sure you get paid; take advantage of the easiest and fastest ways to attract clients; begin using the Internet for improving your practice of law; effectively weigh the pros and cons of using contract attorneys; determine the 12 deadliest law practice management mistakes and how to avoid them; find, interview and nurture quality law firm staff; prevent sexual harassment and liability, for your clients and within your own firm; pose questions to a special panel recruited to help you find direction for your specific law office concerns; review and understand the nuts and bolts of professional liability policies; develop and give advice about currently permissible hiring and termination procedures; address telecommuting concerns that impact management, users and technical support within your firm; improve your client service, communicate better and work with clients who are particularly challenging; and make an informed decision whether or not to implement an Internet website for your law firm.

The Law Practice Management and Technology Section, the Association of Legal Administrators, Puget Sound Chapter, and the WSBA CLE Department have teamed up again to present this unique program for your benefit. Register for the Institute by February 20 as an "early bird" and you'll save on the program tuition. And even if you can't attend the entire Institute, free admission to tour the EXPO Exhibit Hall — where more than 40 exhibitors are anticipated — can still be obtained by pre-registering with the WSBA.

What's in store? Find out how to attract and keep satisfied clients. Featured speaker Tom Champoux, author of "People Skills: A Strategy for Achieving Results" and "Quality Customer Service," brings to the 1998 Institute his valuable insight on "Client Service: The Competitive Edge." Don't miss this opportunity to learn from Mr. Champoux how to create an environment in your law firm where people are motivated to achieve the common goal of delivering Quality Client Service. Find out just how critical service is — both internally and to your external clients.

Want solutions? Twelve cutting-edge concurrent seminar sessions help you get to — and keep on — the right track. Register for the Institute so that you

can: obtain solid tips for making sure you get paid; take advantage of the easiest and fastest ways to attract clients; begin using the Internet for improving your practice of law; effectively weigh the pros and cons of using contract attorneys; determine the 12 deadliest law practice management mistakes and how to avoid them; find, interview and nurture quality law firm staff; prevent sexual harassment and liability, for your clients and within your own firm; pose questions to a special panel recruited to help you find direction for your specific law office concerns; review and understand the nuts and bolts of professional liability policies; develop and give advice about currently permissible hiring and termination procedures; address telecommuting concerns that impact management, users and technical support within your firm; improve your client service, communicate better and work with clients who are particularly challenging; and make an informed decision whether or not to implement an Internet website for your law firm.

This event will be held in Seattle at the Washington State Convention and Trade Center. Call (206) 727-8202 for further information and to request a program brochure. Also, additional information is available on the WSBA website at [www.wsba.org](http://www.wsba.org) in the CLE section. At the least, sign up to tour the EXPO Exhibit Hall. For the most, register now to reserve your spot at the Law Office Management Institute and learn how to keep your firm competitive.

Sponsored by

Washington State Bar Association CLE  
Law Practice Management & Technology Section  
and

The Association of Legal Administrators, Puget Sound Chapter

## SPOTLIGHT ON WSBA SECTIONS

The following information is excerpted from the Sections' annual reports and features highlights of recent Section activity.

**Administrative Law** — The section focused most of its energy and attention on publication of its newsletter and the sponsorship of two CLEs. One CLE was an experiment for the section: a specialized presentation on defending local government officials held at a low-cost suburban location at a low price, \$75 per attendee, including lunch. It was well-attended by attorneys and numerous public officials. They also have been working on an extensive update on the Sections Practice Manual on Washington Administrative Law.

**Alternate Dispute Resolution** — About 250 ADR practitioners attended the 6th Northwest ADR Conference, in conjunction with the University of Washington and King County Bar Association. The Arbitration Committee completed a Mandatory Arbitrator Training videotape, designed to aid arbitrators to prepare for hearings under the Mandatory Arbitration Rules. The Education Committee produced the ADR Provider Directory. The Mediation Committee worked with the WSBA's Office of Disciplinary Counsel to develop a mediation program for lawyer complaints. The School Mediation Committee presented a workshop for 118 students and 40 school administrators. The Eastern Washington Committee helped the Spokane County Superior Court set up a settlement week program for civil and divorce cases.

**Business Law** — The section sponsored the annual Securities and Regulation Institute and a CLE in conjunction with its mid-year meeting. Its special project is BizLaw Disk, which is an effort to have all business law sections of the Revised Code of Washington put on disk. This project is being helped along by law school students from the University of Washington. The Conflicts in the Business Practice Committee is updating its desk book. The section worked with the Secretary of State's office on the Digital Signature Program which became effective in January, and the executive board hopes to approve a new Uniform General Partnership Act for the state. The section formed a new committee, The Law of Commerce in Cyberspace.

**Consumer Protection Antitrust & Unfair Business Practices** — The section held its annual CLE in November, and is nearing completion of a compilation of all antitrust consent decrees entered into by the Attorney General's Office. It will be distributed to section members and others who are interested, and will be regularly updated.

**Corporate Law Department** — The section sponsored a CLE titled "Finance and Accounting Issues for In-House Counsel and Other Business Lawyers," which teamed accountants with lawyers

to discuss practical issues pertaining to IPOs, mergers and executive compensation. Quarterly dinners featured speakers on topics such as land use, immigration and the Boeing-McDonnell Douglas merger.

**Creditor-Debtor** — The section published the second edition of the Bankruptcy Digest, which includes summaries of hundreds of bankruptcy cases that originated in Washington state. It co-sponsored the 10th annual NW Bankruptcy Institute with the Oregon State Bar Association, and sponsored seminars on liens and Bankruptcy 101. It continued its traveling seminar to bring nationally prominent speakers to smaller communities that otherwise don't have access to such a program, and has helped edit materials for various community legal services organizations.

**Criminal Law** — This section helped the WSBA Court Rules Committee redraft a version of GR 19 regarding packaging and handling sensitive courtroom exhibits, and spent a great deal of time developing a web page. It produced an annual CLE in Yakima on Ethics for Prosecutors and Defense Counsel, and co-sponsored the WSBA CLE's annual Criminal Justice Institute, bringing together prosecutors, judges, defense counsel, legislators and others involved in the criminal justice system.

**Elder Law** — The section produced a quarterly newsletter, started work on a member directory and developed a web page. It has taken an active role in responding to legislative proposals and commented on proposed rule making regarding vulnerable adults and guardianships, as well as mandatory alternative dispute resolution proposals, digital signatures, and the Access to Justice Tele-lawyer project. The section continues to work with the Attorney General's office on a CLE project, as well as an education effort directed towards general practitioners with elderly clients.

**Environmental & Land Use** — Sponsored two CLEs, "Science and the Law" and "The Prognosis for Urban Growth Boundaries & Related Land Use/Environmental Issues," and co-sponsored a third with WSBA CLE titled "Land Use & Environmental Law: A Checklist Approach to the Fundamentals." The section also sponsored a work party on Earth Day in which members helped restore an erosion-damaged slope and repaired other damage to Carkeek Park in Seattle.

**Family Law** — Published a Family Law Directory, including a directory of expert witnesses segregated by specialty and geographic location. Published three Legislative Hotsheets to inform its members of the status and its position on various bills. Created the position of Legislative Coordinator to assist the executive board in tracking and coordinating its legislative agenda. In its routine work, it

took positions on 15 bills and testified on several.

**General Practice** — The section co-sponsored the annual "Best of CLE" program in both December 1996 and 1997, and participated with the Law Office Management & Technology section in reviewing and recommending models for the new Law Practice Assistance Program at the WSBA.

**Health Law** — Has continued to sponsor a series of short seminars at no charge for its members. Published a newsletter to keep members apprised of developments in the industry. The Licensing Subsection sponsored short CLEs and published updates on recent developments. The section has worked on an update for a Health Law Deskbook.

**Indian Law** — Conducted a CLE introducing non-Indian law practitioners to Indian law concepts. More than 100 participants attended from the fields of real estate, environmental, criminal, family, bankruptcy, employment, personal injury, construction, forestry, governmental and medical law. Many members volunteered as mentors and speakers at trainings for non-Indian law practitioners who wish to help the native community, and participated in a program by Columbia Legal Services which encouraged lawyers to accept pro bono Indian law cases.

**Intellectual & Industrial Property** — The section sponsored a CLE with prominent members of the local bar who practice in the areas of patents, trademarks, copyrights, trade secrets and entertainment law. It also reviewed and sponsored proposed legislation on personality rights that did not pass the Legislature in 1997, but is anticipated to be presented in the current session.

**International Practice** — Published the third edition of "Doing Business in Washington State — A Guide for Foreign Business and Investment"; sponsored cross-border discussions with the British Columbia Law Society to implement mutual amendments to rules regarding foreign law consultants (specifically APR 15); conducted the annual Spring Industry Tour for foreign lawyers and judges at the UW School of Law, including a trip to the capitol in Olympia, and meetings with Supreme Court Justices Smith, Alexander and Sanders; and co-sponsored with KCBA a breakfast reception for attendees of the International Korean Lawyers Convention in Seattle.

**Law Practice Management & Technology** — Hosted several roundtable discussion groups in Seattle, covering topics such as voice recognition software and effective client meetings. Presented a CLE on "Enhancing and Improving Your Law Practice with Technology," which included speakers on legal software, computer networking, Internet and CD-ROM legal research tools. Developed a web page which includes links to a variety of law office management resources as well as vendor sites for the main types of software used by lawyers and law firms. Added "& Technology" to its original name.

**Litigation** — Sponsored two seminars, one on

civil practice and one on trial practice. Also published a much-needed update of the Civil Practice Deskbook. Also worked closely with the WSBA's lobbyist and leadership to address various bills before the Legislature which affected the administration of justice, our court systems, tort laws and lawyers in this state.

**Public Procurement & Private Construction** — Presented a CLE on "Public Bidding Law in Washington," with more than 120 attendees. Its mid-year meeting CLE was "Public Works in the New Millennium: Emerging Trends in Public Construction," addressing procurement methods, labor and financing, and was attended by public owners, developers, design professionals, contractors and other industry representatives. Held informal quarterly forums with public and private figures invited to speak on topics including the Public Facilities District for the new Mariners' stadium and the Regional Transit Authority.

**Real Property, Probate & Trust** — Reviewed and commented on more than 50 bills in the last legislative session. Introduced SB 5110, which was passed into law in July. This bill provides significant improvements in probate and estate laws. In conjunction with WSBA CLE, produced seminars on real estate taxation, commercial properties, real estate development and construction, federal estate tax and fiduciary income tax. Produced a membership directory that includes information about private and governmental service providers that are relevant to the RPPT practitioner.

**Taxation Law** — The section has a relationship with three other tax-related organizations — the Attorney-CPA Tax Clinic, International Tax Roundtable and Pension Round Table — which offer programs to section members. The IRS Liaison Committee meets periodically with IRS representatives to learn about various developments, and the State and Local Tax Committee meets periodically with guests from the Department of Revenue for updates. The Estate and Gift Tax Committee also updated the Model Life Insurance Trust Form Book.

**World Peace Through Law** — Sponsored the CLE "Global Justice: Professional Ethics and International Crimes," which discussed the Yugoslav War Crimes Tribunal, proposals for an International Criminal Court, the general duty to prosecute under international law, the professional responsibility of attorneys to promote the rules of law, and professional ethics in international transactions. The sequel CLE was "World Law and Disorder: Creating a Permanent International Criminal Court," which featured former Nuremberg War Crimes Prosecutor Benjamin Ferencz. Held monthly brown bag lunch meetings on topics including the financial crisis at the United Nations, the anniversary of the World Conference on Women in Beijing, maintaining democratic freedoms within Arab-Israeli relations, and the removal of land mines.

FYI  
Information

## WE THE JURY . . .

BY GODFREY D. LEHMAN (PROMETHEUS BOOKS, 1997)

*"The law is not majestic.  
The law is what public opinion says it is . . .  
When we had the important precincts,  
when we had the magistrate's court,  
when we had the Manhattan DA?  
Wasn't that the law? . . .  
The law is the vigorish I pay.  
The law is my overhead."*

SOURCE: BILLY BATHGATE AT PAGE 312  
E. L. DOCTOROW, HARPER PAPERBACKS (1989)

REVIEWED BY PHILIP DE TURK

The theme of the author Godfrey D. Lehman (who styles himself as an active member of the "Fully Informed Jury Association") is that juries, when allowed to function independently without restraint on their person, consciences, or their understanding of the law, will render verdicts that represent what is best for the people at a given time. Thus, kings, despots, judges, prosecuting attorneys, and even lawyers (heaven forbid) should not be allowed to circumvent the desires of the people by corraling a set of talesmen who will bring back a predesignated verdict.

In explaining this theory, the author discusses some outstanding jury trials of the past. The first of these trials is one commonly known as Bushell's case and involves the 12 men who having

no First Amendment to invoke, wrote it for themselves . . . . They also composed, albeit unconsciously, two sections of what was to become Article I, Section 9 of the Constitution: . . . habeas corpus . . . no bill of attainder shall be passed.

In doing so, Bushell and his compatriots found William Penn not guilty of violations which the King and his Merry-men had tried to enforce against this subsequent developer of American life in Pennsylvania.

The second jury confrontation which the author develops took place around 1688. As a result of the failure of the prosecutor to properly prove its case, the court was about to dismiss the matter

when one Mr. Finch, an attorney for one of the defendants, became involved:

At this point, Finch, violating court protocol and good manners, broke in: "I humbly beg Your Lordship's favor."

The interruption astounded the court. "What say you, Mr. Finch?"

"I ask your pardon for breaking in when you are directing the jury. I know I should not do it, but I hope you will not be angry with me for it."

"If I thought you did any service to your client I should willingly hearken to you."

"That which I humbly offer Your Lordship is only to remember Your Lordship where we were." Finch continued: "I only speak it, My Lord, because if it be evidence, we have other matters to offer in answer to that evidence and in our defense."

Other matters? The crowd gasped; associate defense counsel, unprepared, was stunned. What insipidness was this to suggest "other matters" at the point of victory?

The Chief Justice was astounded: "If you have more to offer, why did you conclude here and let me begin to direct the jury? But since you say you have other to offer, we will hear it. (page 87)

As a result, the case was not dismissed and everyone was very angry with attorney Finch as the matter dragged on and on (but only to a happy conclusion):

By introducing this legal issue, Finch had once again altered the whole character of the trial, but this time to the bishops' advantage. For if the bishops had won acquittals on doubt of publication, the victory on fact alone would have been equivocal and indecisive. The king would not have been stopped from invoking these extreme powers and eventually the battle would have to be refought. (page 91)

Another strong jury was involved. And it is important to know that when the juries were locked up in ancient England, it was without any of the comforts of home; no food, no drink, no restroom facilities, no heat or cooling, or anything that would enable them to render a verdict without being affected by outside influences.

According to the author, juries have been manipulated throughout history, but not always successfully. In the Salem Witch Trials, which are discussed at page 141 of his book, Mr. Lehman states:

The enraged Judges could exact revenge in only one way. They forced every acquitted defendant to pay jail fees before releasing them, thus placing a great burden upon their families.

The Witch Trials were also more successfully defended in the later years rather than earlier, because "the jury base had been expanded to include the entire community, not just members of the Puritan Church." Also, "spectral evidence was no longer admissible;" and finally, "public hysteria was waning." (page 141)

In reading this chapter entitled "Practitioners of the Detestable Arts," one is reminded of several other "witch hunts" which have taken place, not only in Eastern Washington during the past few years, but also other parts of the United States.

In *The Trial of John Peter Zenger* is another example of a self-righteous judge precluding a defendant from getting the full benefit of the jury system that had been supposedly enacted to protect such overreaching. Ultimately, this jury also acquitted the defendant of libel. In doing so . . .

the numerous audience expressed their joy in three loud Huzzas, and scarcely one person except the officers of the court were observed not to join in this noisy exclamation. (page 171)

Later,

The fundamental premise of a democratic government is that ultimate control will be exercised by sound public opinion operating through the ballot and many other channels of expression available in a free society. (Arthur Hayes Sulzberger, 1953, *We The Jury* . . . page 173)

The foregoing paragraph pretty well summarizes the gist of the book. When juries are enabled to act independently of the restrictions illegally forced upon them, justice has usually been done. In developing that theme, it draws some conclusions which are interesting but not necessarily accurate. For instance:

The fierceness with which pro-slavery forces opposed using juries in runaway slave cases, in contrast with the fervor of abolitionists who made appeals to juries central to their cause, suggests that juries exercised a strong influence over public policy, which was not in the slavers' favor. This influence was all the more forceful, con-

sidering the fact that the panels were composed exclusively of white males, probably most of them property owners.

These phenomena also suggest an interesting theory regarding the Civil War, that had the resolution of slavery been left to juries, the nation, insofar as slavery was a contributing factor, might have escaped war entirely. Slavery would have ended by jury verdicts, as it had ended in the previous century in Massachusetts, as this chapter relates. Freedom for slaves achieved without a president to proclaim it or a Thirteenth Amendment to guarantee it! (page 210)

At page 265, referring to the trial of Susan B. Anthony for attempting to vote purportedly illegally, it is stated:

Throughout the entire trial, the twelve jurors had uttered not a word, but as they recovered from their shock they were surrounded. Quizzed by the defense and the press, the jurors expressed anger, frustration, and outrage. Most of them complained it was not their verdict at all, and they had not challenged the clerk because they were uncertain about their power to do so.

Nonetheless, it was clear that the majority sentiment on the panel would have been to exonerate Anthony. It is very likely that Anthony would have been acquitted unanimously had this jury, even though skewed by the method of selection, been able to deliver its own verdict. At any rate, we can be certain she never would have been convicted.

Because of this interpretation of what took place at the Susan B. Anthony trial, Mr. Lehman concludes:

Consider this: had a true jury verdict been given, it is almost certain that the right of women to vote would have been recognized as inherent and constitutionally protected beginning that afternoon of June 17, 1873, by

edict of a relatively homogeneous jury of twelve men, probably all white and relatively stable financially. But because of a judicial imperative and judicial petulance, American women were forced to struggle for forty-six more years to win that recognition in the Nineteenth Amendment. (page 269)

There are a number of interesting quotations in the book with which the average citizen is familiar but probably does not know the context in which such were applied. Thus, we learn again Lord Acton's phraseology "power tends to corrupt, and absolute power corrupts absolutely." (page 176), as well as the language used in the Zola trial in France in 1898,

How is it that one cannot speak of justice in a courtroom?" The Judge replied irrationally. "There is something above that, the honor and safety of the country." (page 332)

The author does not stop at merely picking apart historical verdicts and speculating on how a rational jury could have affected the outcome. He spends time defending this theme especially in his Afterword, which is entitled "They are coming to get you." Postulating that the present use of jury questionnaires, jury panel experts, and other methods to affect the constitution of a particular jury is similar almost to the packing of juries that took place all those many years ago in Merry Old England, he states:

Another attempt to inject integrity into the trial would be to question the honesty of jury selection. When the judge explains that the object is to seek a fair jury, if you are hardy enough you might ask: 'Are you really? Doesn't each side want to win the case, and if so, is each really not looking for jurors biased in its favor and not being fair at all?'



*Philip H. DeTurk, who in the past has reviewed classic novels, herein has reviewed a book concerned primarily with the past, with special thanks to Pat Michl.*

# SEPARATED

BY DANIEL M. WARNER

## WHY A MARRIED PERSON MIGHT WANT TO FILE "SINGLE"

In Washington,<sup>1</sup> a person estranged and separated from his or her spouse, but without a decree of divorce or separate maintenance, is able to file a federal income tax return as a single person, possibly<sup>2</sup> saving a considerable amount of money.

Treasury revenue rulings apparently militate to the contrary, providing that although a separated person does not (or may choose not to) generate community property<sup>3</sup> in community property states,<sup>4</sup> the taxpayer cannot file "single," but must file "married filing jointly" or "married filing separately." This ruling is not supportable, however, under Washington law or Tax Court decision.

There are five filing choices: single, married filing jointly, married filing separately, surviving spouse (qualifying widower or widow), and head of household. Using the 1997 tax rate schedule (Schedule X), a person with taxable income of \$110,000 pays different amounts of tax depending upon her marital status. Filing as "single," the taxpayer would pay \$29,236; married filing separately, the same taxpayer would owe \$31,848.<sup>5</sup> Obviously, the person filing "single" saves \$2,612 in federal tax.<sup>6</sup>

Under federal regulation,<sup>7</sup> the determination of whether a person is married is made at the close of the taxable year, and a person is "married" even though living apart from the spouse unless "legally separated under a decree of divorce or separate maintenance." The current regulation illustrates:

Taxpayer A and his wife B both make their returns on a calendar year basis. In July 1954, they enter into a separation agreement and thereafter live apart, but no decree of divorce or separate maintenance is issued until March 1955. If A item-

izes and claims his actual deductions on his return for the calendar year 1954, B may not elect the standard deduction on her return since B is considered as married to A (although permanently separated by agreement) on the last day of 1954.<sup>8</sup>

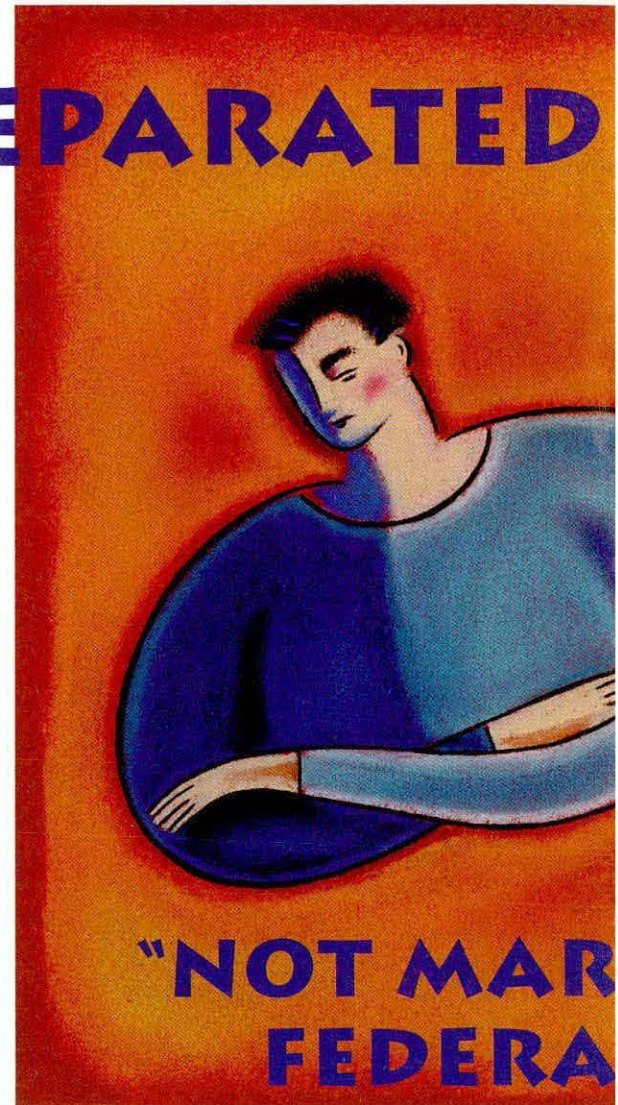
The IRS does not consider a separation agreement (a contract between husband and wife setting out terms of living apart) equivalent to a divorce; a decree of separate maintenance (a court-approved order directing one spouse to pay the other support) is.<sup>9</sup>

A better (albeit different from the IRS's) analysis is this: if the decree in March of 1955 lists the date of separation as July 1954, and the parties have executed a separation agreement, each may file "single" for 1954. If the parties have executed a separation agreement and subsequently divorce, their actions are clear evidence that the marriage is defunct and was so from the date of the agreement. Moreover, because the separation agreement merges into the divorce decree, the marriage is effectively terminated at the execution of the agreement, and the federal tax definition of "married" coincides with the relevant state law.

### IS THE MARRIAGE DEFUNCT?

Washington law recognizes that a marriage might terminate without the formalities of divorce.<sup>10</sup>

In one case, the court recognized that life insurance premiums paid by the husband generally inure to the benefit of the marital community upon his death, but noted that the parties had been separated for over a year at the husband's death, and, therefore, it was a fact question



whether a community relationship existed at the time the last premium payment was made.<sup>11</sup>

In another case,<sup>12</sup> the parties secured an interlocutory (not final) decree of divorce but never procured the final decree. At the husband's death 16 years later, the court found no marriage existed for purposes of allocating community property. In *Estate of Osicka*<sup>13</sup> the parties had been separated nine years and had signed a separation agreement at the time of one's death. The court found the marriage defunct, though no divorce action had been filed. But where the time of separation was short, no separation agreement was signed and the parties continued interacting positively, the court found no negation of the marital

# AT TAX TIME



## "MERGED" FOR FILING USES

community (the wife was thus entitled to the insurance proceeds), and stated "the rule distilled from these cases":

Mere physical separation of the parties does not establish that they are living separate and apart sufficient to negate the existence of a community. The test is whether the parties by their conduct have exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship.<sup>14</sup>

If there is a separation agreement and estrangement, the courts have no problem determining the parties' intent and

finding the marriage defunct. Under *Boober*, a court could find the marriage defunct even without a separation contract; living apart and having no further "will to union" is enough.

### FURTHER ARGUMENT: THE MERGER DOCTRINE

Washington courts have been willing to pronounce a marriage ended when the parties have a separation contract but have not divorced, or if they are simply living apart intending to renounce the relationship. The termination date of the marriage for determining rights and duties would be as of the execution of the contract; from then on, the spouses should be able to file "single." This follows from the *de facto* termination of the marriage, considered above, and also from the effect of a legal separation and application of the merger doctrine to dissolution of marriage.

**Legal Separation.** A "legal separation" is a contract between spouses by which they may terminate the matrimonial status. In Washington it is a distinct action, a "petition for legal separation in lieu of dissolution," and is, except in name, the same process as a dissolution.<sup>15</sup> This qualifies as a "decree of separate maintenance" under IRC section 7703(a)(2). A legal separation may become "merged" into the divorce decree and the effective date of the obligations of the decree are retroactive to the date of the separation.

### Merger. Merger is

... the fusion or absorption of one thing or right into another; generally spoken of a case where

one of the subjects is of less dignity or importance than the other. Here the less important ceases to have an independent existence . . .<sup>16</sup>

The Washington court has stated this rule regarding merger:

When parties adopt a written agreement as the expression of their intentions, that instrument becomes the contract, and all negotiations and understandings previous thereto become merged into the agreement.<sup>17</sup>

In divorce law, merger is a "substitution of rights and duties under judgment or decree for those under property settlement agreement."<sup>18</sup>

If parties execute a separation contract (but have no decree of separation signed by a judge) and subsequently move on to a decree of dissolution, the contract may merge into the decree. Once merged, the contract ceases to exist as a separate agreement; no action can be taken on the contract and "suit may only be had on the decree."<sup>19</sup> As to whether a merger has occurred, the Washington Court of Appeals observed,

There is no definitive Washington case . . . yet a few general observations can be made. If the prior court decree approves, confirms, or incorporates by reference the terms of a separation agreement, Washington courts will nearly always hold that a merger has occurred . . . unless the decree does not adequately identify the agreement that is to be merged . . . But ultimately in order to determine whether a merger has occurred the court will look to the intention of the parties and the court as expressed in the documents themselves.<sup>20</sup>

Rights and duties under a superior document relate back to the effective date of the inferior, subsumed document.

The effective termination date of a marriage would be the separation agreement date if the parties later dissolve the marriage, confirming the separation. If parties separate by contract in July and obtain a decree of dissolution the next March, the contract merges into the decree so that all of the terms of the contract are enforceable as part of the decree. Obtaining the decree of dissolution is really a formality, confirming the previous *de facto* dissolution; the dissolution is legally effective in July, because all of its terms are enforceable as of that date. The

ability of either spouse to file "single" relates back to the date of the separation contract and is not effective only as of the later dissolution decree.

Whether a merger has occurred depends, as noted above, on the intention of the parties. The particular issue of whether a separation contract, subsequently "ratified" by merger into a decree of dissolution, effectively terminates a marriage relationship for tax purposes as of the execution of the contract has not been addressed by any community property

state court, but in analogous situations courts have found the termination relates back to the contract date.

In *MacKenzie v Sellner*,<sup>21</sup> Mrs. Sellner commenced a divorce proceeding; the parties lived apart. They entered into a property settlement that gave the wife the family automobile and that was incorporated into the divorce decree granted on April 30, 1957. Before the entry of the decree (but after the settlement), on March 14, Mrs. Sellner was in an automobile accident; judgment was rendered against the marital community. Mr. Sellner appealed, claiming he had no legal liability for the acts of his estranged wife. The issue was whether at the time of the tort "a community still exist[ed] to which the liability of an individual spouse can be imputed." The court held it did not:

In the instant case, a divorce action had been commenced, the parties were living separate and apart, and a property settlement agreement had been executed and subsequently approved by the court, which determined the status and character of Mr. and Mrs. Sellner's present and future property from the date of the property settlement agreement, as well as determining the status and character of their present and future obligations. Nothing but the shell of the marriage contract remained at the time the tort occurred . . . [The marital] community had, for all practical purposes, been terminated.<sup>22</sup>

In another case,<sup>23</sup> a couple executed a separation agreement by which the wife conveyed to the husband as his sole property a life insurance policy. A subsequent divorce decree incorporated the agreement. When the husband died intestate without changing the beneficiary of the policy, the court denied the ex-wife any interest in the insurance, noting that the contract was merged into the decree. The wife had no interest in the insurance between the time of the contract's execution and the divorce, and no interest in it after the divorce. Her rights were determined as of the date of the agreement.<sup>24</sup> Similarly, where the parties' separation agreement required the husband to name their children as beneficiaries of a life insurance policy, and the agreement was incor-

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porated into a later divorce decree (the requirement to name the children was reiterated), the husband's later change of beneficiary was without effect.<sup>25</sup> The relationship of the parties was determined as of the time of the execution of the agreement, where that agreement was merged into the divorce decree. The merger in this case was explicit (or nearly: the agreement "was incorporated"),<sup>26</sup> but — as noted above — the intent of the parties dictates.

So, if the parties have executed a separation agreement or contract indicating that their marriage is defunct and they consider it so, it will be defunct as of the date that the spouses no longer have a will to union — a desire to continue the marital relationship — even if they are not yet divorced. A carefully worded decree would specify the date upon which the separation became effective.

#### FEDERAL DEFERENCE TO STATE DOMESTIC-RELATION LAWS IN TAX MATTERS

If a state considers two people "unmarried" because they are permanently separated and have lost the "will to union" or because they have a separation agreement (and certainly where that agreement is later ratified by entry of a divorce decree)<sup>27</sup> the parties are considered "not married" for tax purposes.

In its application of the tax laws, there has been a consistent deference by Congress to state laws in such matters. For example, marital allowances are available only if the man and woman taxpayers are legally married under the laws of the state in which they reside.<sup>28</sup>

In *Lord v. Commissioner*, indeed, the Tax Court recognized that under Washington law the Lords' marriage was defunct because the parties no longer wished to be a marital community (even absent a divorce). "No interlocutory divorce decree or written separation agreement is required to dissipate the marital community," said the court. Therefore Robert Lord's income was taxable only to him.<sup>29</sup>

The United States Supreme Court has also recognized that the states have the right to determine who is married and who is not:

[D]omestic relations [is] an area that has long been regarded

as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact . . . [T]he Court [has] said: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . ." [And] "The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."<sup>30</sup>

#### SUMMARY AND CONCLUSION

The analysis here, that a marriage may be legally defunct without a divorce, is not remarkable. The IRS has recognized state court rulings that when for all intents and purposes a marriage has been terminated and the spouses show by affirmative action their intent not to maintain the community status, then the community property laws will not be applied to the spouses.<sup>31</sup>

If community property laws are not applied, then "no portion of the earnings of the husband is includible in the gross income of the wife." And again, the Tax Court itself has recognized that even without the 1972 changes to RCW 26.16.140 (providing that a person's income during permanent estrangement from his or her spouse is characterized as his separate property), such would be the rule from the case law.

#### Endnotes

<sup>1</sup> The same analysis would apply to Californians. It does not appear to apply to other community property states. The discussion here is limited to Washington.

<sup>2</sup> See note 5, *infra*.

<sup>3</sup> Rev. Rul. 68-66, 1968-1 CB 33.

<sup>4</sup> The Internal Revenue Service recognizes nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington; Wisconsin joined their ranks in 1986 by adopting the Wisconsin Marital Property Act. Only Washington law is considered here.

<sup>5</sup> An unmarried head of household (most typically a divorced or never-married person with custody of children) would pay \$27,429; this category is not in issue

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here. The "married filing separately" category is likely not a good choice for most community-property taxpayers. If the community had \$110,000 in taxable income, each spouse would claim \$55,000 as taxable income, and pay \$12,990, for a total liability of \$25,980. Filing jointly the tax liability also would be \$25,980, but there would be only one return to prepare instead of two. Usually, the splitting of income between two tax returns will increase the aggregate amount of tax liability because the filing separately rates are higher than the joint rates. In certain circumstances filing separately might be beneficial.

<sup>6</sup> Whether a taxpayer suffers a "marriage penalty" or enjoys a "marriage bonus" compared to a single person depends upon the distribution of income between the spouses. For an in-depth discussion of the issues, see Lawrence Zelenak, "Marriage and the Income Tax," 67 *S. Cal. L. Rev.* 339 (1994).

<sup>7</sup> Treas. Reg. Section 1.143-1(a)

<sup>8</sup> Treas. Reg. Section 1.143-1(a) Example (1).

<sup>9</sup> A "decree of separate maintenance" is "money paid by one married person to the other for support if they are no longer living as husband and wife. Commonly it is referred to as separate support and follows from a court order." A "decree of legal separation" is "a court order arrang-

ing the terms (custody, support, etc.) under which a married couple will live separately." A "separation agreement" is defined as "written arrangements concerning custody, child support, alimony and property division made by a married couple who are usually about to get a divorce or legal separation." *Black's Law Dictionary*, 6th Edition.

<sup>10</sup> See also William Oltman, "The Implied Termination of Community Property Agreements Upon Permanent Separation," 14 *U. Puget Sound L. Rev.*, 53 (1990), text accompanying notes 11-19, dealing — as the title indicates — with community property agreements.

<sup>11</sup> *Aetna Life Insurance Company v. Bunt*, 738 P.2d 322 (Wash. Ct. App., 1987).

<sup>12</sup> *Togliatti v. Robertson*, 190 P.2d 575 (Wash., 1948).

<sup>13</sup> 461 P.2d 585 (Wash Ct. App., 1969).

<sup>14</sup> *Id.*, at 187.

<sup>15</sup> RCW 26.09.030(4). This section also provides that if one party files for a legal separation and the other wants a dissolution, the court must enter a dissolution. Provisions for "legal separation" are at RCW 26.09.070: parties may, upon separation, as part of the petition for dissolution or for legal separation or independent of any petition, enter into a "separation contract" providing for the maintenance of either of them, the disposition of

any property owned by both or either of them, the custody, support, and visitation of their children and for the release of each other from all obligations except those expressed in the contract.

"If the parties to such a contract elect to live separate and apart without any court decree," the contract may be recorded with the county auditor and the parties may "cause notice thereof to be published in a legal newspaper" in the county. The publication is notice to the world of the separation. If the parties to a separation contract have not petitioned for legal separation or for dissolution, they may do so later and the contract "shall be binding on the court" as to the terms of the separation or dissolution. RCW 26.09.070(3). Issues regarding custody, visitation and support of children are not binding on the court; no "unfair" contract is binding.

<sup>16</sup> *Black's Law Dictionary*, 6th Edition.

<sup>17</sup> *Dix Steel v. Miles Const. Co.*, 443 P.2d 532 (Wash., 1968), at 535.

<sup>18</sup> *Id.*

<sup>19</sup> *Matter of Marriage of Olsen*, 600 P.2d 690 (Wash. App., 1979).

<sup>20</sup> *Id.* at 693-94.

<sup>21</sup> 361 P.2d 165 (Wash, 1961).

<sup>22</sup> *MacKenzie v. Sellner*, 361 P.2d 101, at 166.

<sup>23</sup> *Aetna Life Insurance Co. v. Wadsworth*, 675 P.2d 604 (Wash. Ct. App., 1984).

<sup>24</sup> *Id.* at 606.

<sup>25</sup> *Aetna Life Insurance Co. v. Bunt*, 738 P.2d 322 (Wash. Ct. App., 1987).

<sup>26</sup> *Id.*, at 322.

<sup>27</sup> RCW 26.009.020 provides: "if the parties are separated" the Petition for Dissolution of Marriage, or for Legal Separation, must include the date on which the separation occurred.

<sup>28</sup> *Ensinger v. Commissioner of Internal Revenue*, 610 F.2d 189, at 191 (4th Cir., 1979).

<sup>29</sup> *Lord v. Commissioner of Internal Revenue*, 60 T.C. 199, 206 (1972).

<sup>30</sup> *Sosna v. State of Iowa*, 419 U.S. 393, 404 (1975). See also *Lee v. Commissioner of Internal Revenue*, 550 F.2d 1201 (9th Cir. Ct. App., 1977): "state law governs in determining marital status for federal tax purposes."

<sup>31</sup> Rev. Rul. 68-66, 1968-1, CB 33.

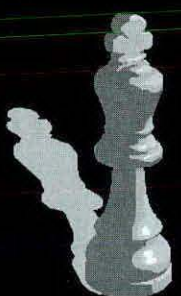


*Daniel Warner is an associate professor of business law at the College of Business at Western Washington University and is the author of a college textbook on The Legal Environment of Business.*

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# The Taxpayer Relief Act and Family Businesses: Few Qualify; Other Methods More Effective

BY GLEN WHITE

Many family business owners may be thinking that the Taxpayer Relief Act of 1997 will save their families the pain of liquidating the business to pay their estate tax. A closer look shows that only a few businesses who meet certain requirements will benefit. Even if a business meets the requirements, other estate tax reduction methods should save them more in the long run.

## MANY BUSINESSES EXCLUDED

The law narrowly defines the businesses that qualify for tax relief. First, the exclusion applies only to estates, not to gifts made during the owner's life. In addition, businesses must be owned substantially, if not completely, by three or fewer families. Family members must also actively participate or manage the business for at least five years before, and 10 years after, the owner's death. Any public ownership within three years of the owner's death, doing most business outside the US, or high proportions of income generated from investment, disqualify the business entirely. Those family businesses remaining must represent at least 50 percent of the "adjusted gross estate." This is a specifically defined term that includes all lifetime gifts to the spouse, business stock gifts within 10 years of the owner's death, and some gifts made within three years of the owner's death.

The value of the business is subject to several downward adjustments before application of the 50 percent test. Those adjustments include:

- All of the owner's debts, other than debt on his personal residence and debt that paid medical or educational expenses.
- Most rental property, and any cash or marketable securities that exceed the "day to day working capital need of the business." This is based on a historical analysis that does not allow for capital acquisitions.
- The value of selected other assets that may produce interest or other income, such as commodities transactions.

- The 50 percent test must be met after adjusting the business's value down, and the estate value up. Thus, in many cases the real test may be 60 percent, 70 percent or more.

## THE BEST WAY TO REDUCE ESTATE TAXES?

For those businesses that meet the stringent requirements, the exemption does not necessarily eliminate the need for traditional estate reduction measures, such as gifting. The new rules appear to put estate tax savings in jeopardy when gifts are made within 10 years of the owner's death. But what about the long-term benefits of gifting alone? To demonstrate the benefits of gifting, we will use the fictional example below.

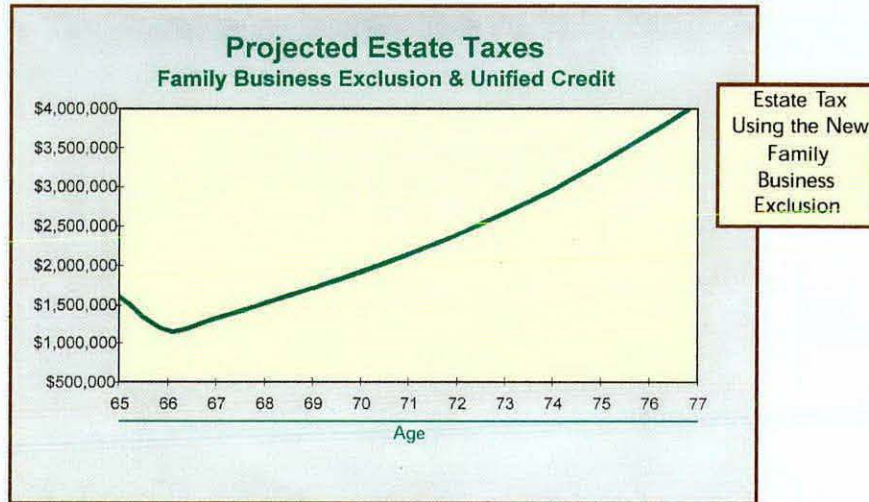
Example: Phil and Mary Jones are ready to retire and give their business to their children. They believe that they can meet their cash flow needs during retirement from Social Security, distributions from retirement plans, and rents from the real estate that is leased to the business. Their net worth consists of the following assets.

	Current Value	Expected Appreciation
Bank Accounts	\$50,000	
Retirement Plans	\$450,000	
Personal Property	\$100,000	
Residence	\$400,000	3%
Family Business	\$2,500,000	10%
Business Real Estate	<u>1,000,000</u>	3%
<b>Net Worth</b>	<b><u>\$4,500,000</u></b>	

Assuming the Jones make no gifts to the children and structure their estates to maximize the tax savings opportunities of Family Business Exemption and Unified Credit, the chart on the following page depicts the estate tax liability.

Alternatively, if the Jones gift as much of the business stock as allowed by the Unified Credit, and thereby become ineligible for the Family Business Exemption, valuing the gifts on a minority interest basis, the estate tax liability compares as shown on the second chart.

The estate tax is higher in the first three years due to a rule that recalculates the value of the gifts made within that time under the estate tax rules rather than the gift rules. Otherwise, the estate tax under traditional gifting methods would always be lower than under the Family Business Exclusion.

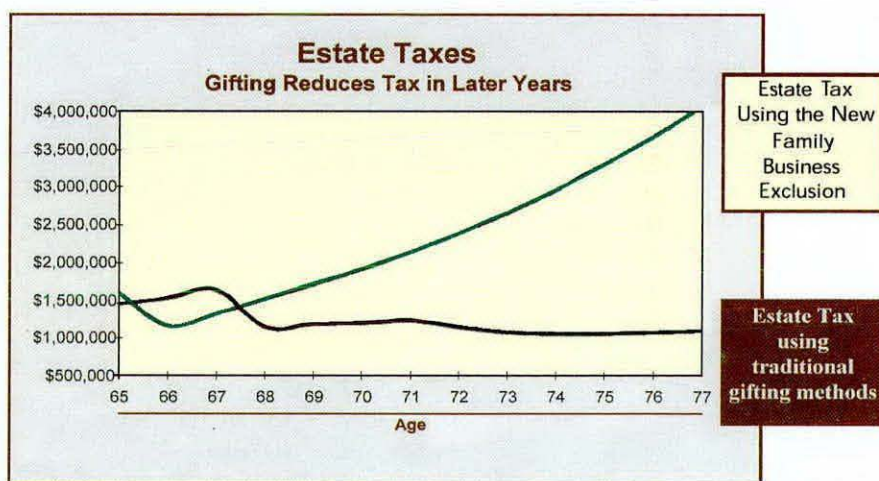


We modeled a variety of different variations of this example to determine what factors influence the point where the new exclusion's advantages fall short of a gifting program. The most influential factors were rates of business appreciation and the magnitude of valuation discounts. In each variation we used, gifting reduced estate tax more in the long term.

Even when business appreciation was run at a modest average of 6 percent per year and no discounts were applied to the gift

values, the Family Business Exclusion was behind the gifting alternative within seven years.

Generic examples like the ones used here can only take the discussion so far. The real key to finding the right estate plan for a business owner is through a thorough examination of their individual situation. This is most often accomplished through fairly sophisticated financial models and projections.



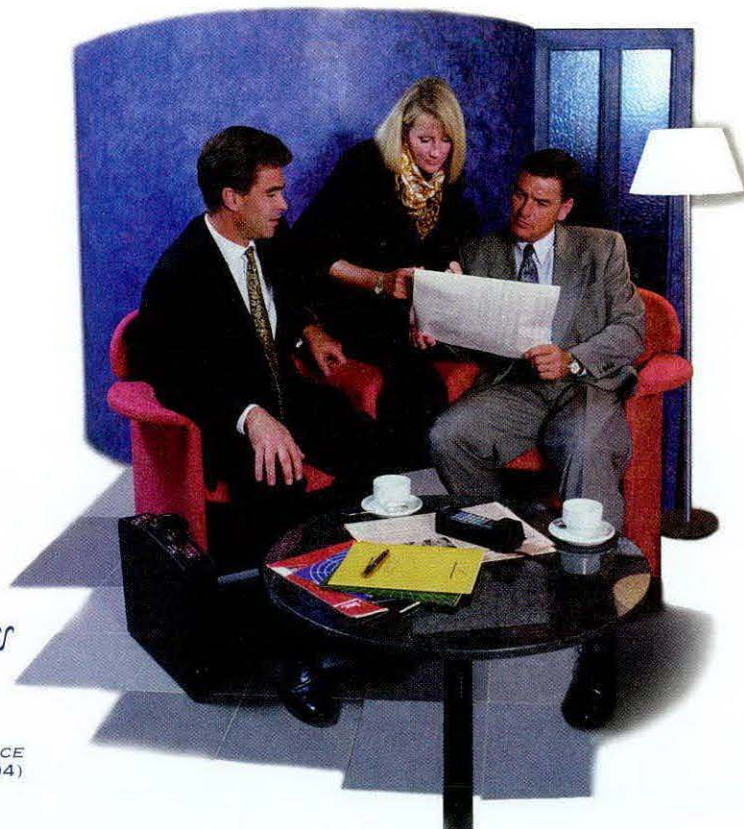
The new Estate Tax Exclusion for Family Businesses appears to benefit those who do not make better plans early. Greater benefit still is available for those who do develop a plan, and in so doing utilize the expertise of specialists to evaluate all of their options.



*Glen White is vice president and director of Technical Services for The Rainier Group Inc.*

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JOB SHIFT: HOW TO PROSPER IN A WORKPLACE WITHOUT JOBS, WILLIAM BRIDGES, P. 27 (1994)



## CONTINGENT WORKERS AND THE INTERNAL REVENUE CODE

WORKERS FOR A NEW MILLENNIUM: — WHOSE EMPLOYEES? WHO CARES?

BY CLEMENS H. BARNES, NORMAN S. MILKS & NANCY L. GALLUP

Relationships between companies and their workers are changing in significant ways. Firms are using more leased employees and consultants. At the same time, many workers are moving into temporary and part-time jobs or becoming independent contractors.

When a business hires a worker as an independent contractor, it is often because the business can avoid the responsibilities that attach to an employment relationship, most notably employment tax and wage-withholding responsibilities. If workers are not employees, employers may also avoid costs related to pension plan, health insurance and other fringe benefits, including workers' compensation. Also, employers can avoid state laws relating to employment taxes and regulations of the workplace.

A worker may choose to be an independent contractor because he wants to work autonomously, because he places a low

value on fringe benefits (e.g., health insurance), because that is the only way the business will hire him, or for other reasons. Also, from a tax perspective, a worker may prefer being classified as an independent contractor because employee business expenses are deductible only as part of a bucket of itemized deductions which are subject to a 2 percent floor of adjusted gross income. In contrast, an independent contractor may deduct expenses as ordinary and necessary business expenses on Schedule C (Form 1040). Furthermore, independent contractors can establish their own benefit plans.

### DEFINING CONTINGENT WORKERS

Federal tax, employment and benefit laws contain various definitions of an employee. However, each of these definitions or concepts generally hinges on a control test — who determines what task is to be done and how it is to be accomplished.

The debate continues over factors that determine contingent-worker status. Some discussions consider all non-traditional workers to be contingent workers. A 1995 Bureau of Labor Statistics (BLS) survey defines contingent workers as all individuals who do not have expectations of a long-term employment relationship.

The terminology for contingent worker definitions is complex. Companies now use terms such as workers, work providers, and work arrangers to replace the familiar labels of employer and employee.

Workers who fall into each of the classifications below are now included in the meaning of contingent workers:

- Persons working for temporary employment agencies
- Free-lancers
- Independent contractors
- Part-time employees

- Workers employed by the day
- Short-term hires
- On-call workers
- Contract employees
- Leased employees
- Workers without explicit or implicit ties to the workplace.

#### WHO ARE EMPLOYEES?

As more and more companies choose to use contingent workers, it becomes important to understand the difference between an employee and an independent contractor.

Under the common-law rules, the relationship of employer and employee exists when the employer has the right to control and direct the worker, not only as to the result to be accomplished, but also as to the details and means by which that result is to be accomplished. That is, the employer controls not only what work has to be done, but also how the work must be done.

To meet this test, the employer does not

need to *actually* direct or control the manner in which the services are performed; it is enough if the employer has the *right* to do so. In contrast, an independent contractor is a worker who is subject to the control and direction of another *only* as to the result of his work, not as to the means.

Certain workers are deemed to be employees for tax purposes regardless of the common law. Others ("statutory independent contractors") are exempted from employee status.

#### CLASSIFICATION FOR EMPLOYMENT TAXES

To help determine whether a worker is an employee or an independent contractor for wage-withholding, FICA and FUTA purposes, the IRS developed a 20-factor control test in *Revenue Ruling 87-41*. Each of the factors considers the amount of control the business has over the worker. The relative importance of each factor varies depending on the occupation and the context in which the services are performed.

States may also provide specific ex-

emptions for certain workers. For instance, domestic help in a private home (RCW 50.04.160) and newspaper carriers ("paperboys") (RCW 50.04.240) are excluded from the definition of "employment" for unemployment compensation purposes in Washington.

#### THE 1997 IRS MANUAL

On March 4, 1997, the IRS issued a revised training manual for employment tax auditors. This manual confirms that the employment test turns on the employer's right to direct and control the worker and states that the 20 factors are guidelines to help gauge the level of control. The factors are not exclusive, though, and are not intended as an objective "scoring mechanism" for making the determination.

Recognizing that the common-law factors, as well as the emphasis given to them, change over the years, the IRS has arranged some of the 20 factors under three major headings, which it calls "categories of evidence." These are behavioral control, financial control and the structure of the relationship.

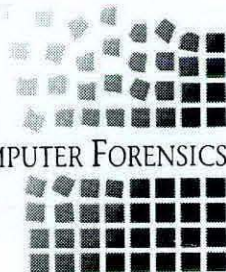


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## BEHAVIORAL CONTROL

Indicators of behavioral control include instruction, compliance with third-party standards, the nature of the occupation, service to the public, the right to control work, evaluation systems and the nature of training programs provided.

Although both independent contractors and employees receive instruction, the critical factor is whether or not the instruction is aimed at *how* the work gets done (employee) or limited to describing the result to be achieved (independent contractor).

Being forced to comply with an independent influence, such as government (or other third-party) regulations, does not evidence employee status. Being forced to comply with client requirements, however, shows sufficient control. For example, wearing uniforms would not be an indicator of behavioral control *if* the uniform is required solely for security or safety reasons.

The nature of the work being done is an important factor. Skilled professionals who are not subject to direction are generally considered independent contractors. However, unskilled workers, even if they are doing work which does not require direction, are generally *not* independent contractors.

An important related factor is whether the worker (or labor-providing company) provides service for more customers than just one company. For example, a bookkeeper or accountant would be an independent contractor if he prepared the books for more than one company, but would be considered an employee if he prepared books for only one company.

Other typical attributes of an independent contractor are that the service provider is free to hire assistants to perform the work and has the right of control over the specific means of getting the work done. This means the contractor does such things as setting the hours he works, deciding whether he, or his hired assistants, will perform the services, and deciding what tools to use. He is subject only to satisfaction and direction as to the work to be done — i.e., the end result.

For example, if a company contracts with a painting contractor to give an office building a face lift, the company will set the goal to be accomplished (the premises are to be entirely painted by the end of the month). However, in accomplishing this job, the painting contractor can decide whether he will personally do the painting or, if not, how many workers to use and what hours they will work.

Evaluation mechanisms aimed at con-

trolling how the work is performed, rather than setting standards for the final result to be achieved, are evidence of employee status.

When training is provided, the type of training given has an impact on whether the individual is considered an employee or an independent contractor. Optional training aimed at providing background information about the employer's business is not evidence of employee status,

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but education aimed at providing the worker necessary skills to complete the requested task is.

#### FINANCIAL CONTROL

The IRS manual also describes different types of financial control which are used to determine whether an individual is an employee or an independent contractor. Indicators of financial control used in the IRS definition are economic independence (multiple clients), independent business, significant investment, tools of the trade, opportunity for profit or loss/significant unreimbursed expenses, and method of payment.

Economic independence does not evidence the ability to control the details of the work. Nevertheless, having multiple clients does show the existence of an independent business and is considered evidence of independent-contractor status.

Whether the worker (or the business providing the workers) is an independently established business or professional can be important. The IRS asks if the

*"... having multiple clients  
does show the existence  
of an independent business ..."*

work being done for the company ended tomorrow, would that independent business continue to exist? Does the entity have a separate taxpayer identification number?

In *Schuffenhauer v. Employment Sec.*, 86 Wn.2d 233 (1975), the court held that to be treated as an independent contractor for unemployment compensation purposes, the worker must be engaged in an independently established occupation. In other words, he must be sufficiently independent from his employer that his business would survive termination of that relationship.

For example, while a business could hire a staff attorney to give advice on labor-and-benefit questions, it could also hire an outside law firm and obtain advice

from one of the firm's lawyers. Without that company's business, that law firm would continue to exist since it undoubtedly serves other clients. This is a classic example of an independent contractor. An in-house lawyer, however, would be out of business if he were fired or if the company to which he provides services went out of business.

In businesses which require a substantial capital investment, making that investment is evidence of independent-contractor status. However, an independent contractor can meet this requirement simply by either buying or leasing the needed equipment.

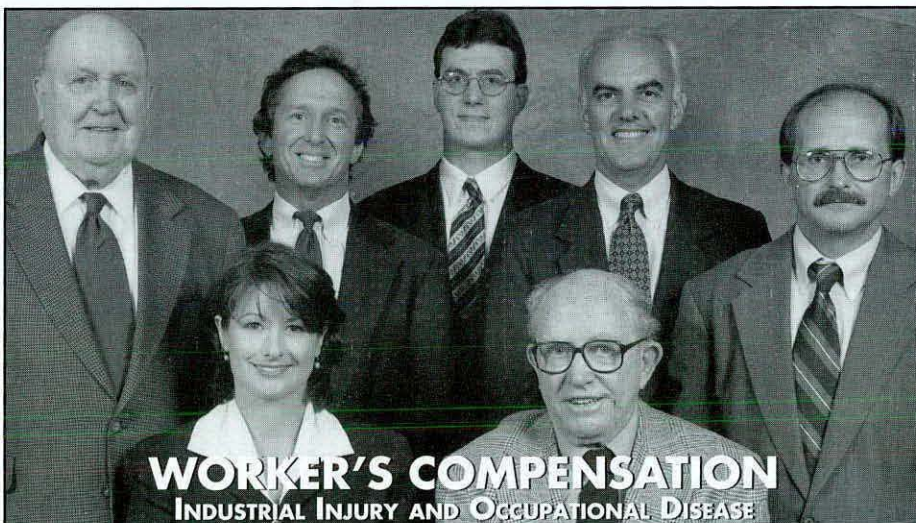
Similarly, the independent contractor often provides his own working tools and has an independent place of work. For example, if a company hires a gardening service company to keep its lawn mowed, the company typically owns its own lawn mowers, travels to the premises in its own truck, and has an office and equipment yard someplace where it maintains its equipment and keeps its own books.

The opportunity for making a profit or a loss is another indicator of independent-contractor status. For example, the following are considered activities of an independent contractor: paying for rent, utilities, tools, training, advertising, the wages of assistants, licensing fees, insurance, repairs, supplies, maintenance, and inventories.

The method of payment is also an indicator. For example, paying a flat fee for performance of a specific job is evidence of an independent-contractor arrangement, whereas hourly fees generally indicate employment. Commission payments are neutral.

#### THE STRUCTURE OF THE RELATIONSHIP

The structure of the relationship is an important factor in determining independent contractor status. Eight factors are used in considering the structure of the relationship: the intended relationship, the agreement with the worker, payment to a corporation, payment of employee benefits, state law, rights of discharge or termination, the intention of permanence, and whether or not the work performed is



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part of the company's regular business activity. This section discusses each of these factors.

The intended relationship between the parties is part of determining whether the individual is an employee or an independent contractor. This intention is often indicated in a written agreement between the parties. Also, issuing a 1099 versus a W2 indicates the company's intent to treat the worker as an independent contractor.

What the worker is called by the employing company does not necessarily make that worker an "employee" or an "independent contractor." On the other hand, whether the worker and the company regard themselves as employee and employer or as a separate company and contractor is always a factor. So the structure of the arrangement, and what the parties regard their relationship to be, can make a difference.

When payment for services is made, if the recipient of the funds is a separate entity with a separate identification number, such as a corporation, this indicates an independent-contractor relationship. In addition, if the employing company pays for certain employee benefits, such as sick pay, vacation pay, pension benefits or unemployment insurance, this indicates status as an employee rather than an independent contractor.

The worker's characterization may be subject to professional regulations or state tax laws.

The ability of the employer to discharge at will indicates employment as does the ability of the worker to quit at will without ongoing liability for failing to finish the contracted project. The ability to terminate the relationship only upon failure to provide the contracted result is evidence of an independent-contractor arrangement.

The intended length of the relationship is also an important factor. The question here is whether the length of the relationship is definite (independent contractor) or indefinite (employee).

If the work being done is part of the normal revenue-producing activity of the business, then the individual performing the work is an employee. If the work is aimed at completing a specific limited

*"What the worker is called by the employing company does not necessarily make that worker an 'employee' or an 'independent contractor.'"*

project that is ancillary to normal activity, then that individual is probably an independent contractor.

#### STATUTORY EMPLOYEES

In addition to the common-law rules, certain statutory provisions make workers employees for specific purposes.

FICA taxes, for example, apply only to compensation paid to persons properly classified as employees. There are four broad categories of employees for FICA tax purposes (under *Code Section 3121(d)*):

- corporate officers;
- common-law employees;
- statutory employees; and
- officers of a state or a political subdi-

vision of a state that entered into a voluntary coverage agreement.

The "statutory employees" are individuals in specific occupations (*Code Section 3121(d)(3)*). They include:

- agent drivers or commission drivers
- full-time life insurance sales agents
- home workers
- traveling or city sales agents

In order for these workers to be statutory employees, there must be a service contract which provides that substantially all of the services are to be performed by the worker directly. However, the worker is *not* a statutory employee if (1) he has a substantial investment in the facilities used in connection with the performance of the services, or (2) the services are not part of a continuing relationship with the business.

There are also certain "statutory independent contractors." These include workers who perform services as "qualified real estate agent" or as "direct sellers" (*Code Section 3508(a)*). They are independent contractors if their pay is related to their sales or other output, *not* to the number of hours they worked. Also, there must be a written contract, between the seller and the business, providing that the seller will *not* be treated as an employee for federal tax purposes.

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## COURTS APPLY THE RULES

Here are some examples of court cases applying the rules described in this section.

In *Butts v. Commissioner*, 66 T.C.M. 1041 (T.C. Memo 1993-478) *aff'd, per curiam* 49F.3d 713 (1995), the courts ruled that an insurance agent was an independent contractor and, therefore, could deduct office expenses as business expenses. Although the insurance company retained the right to review poor perfor-

mance and suggest corrective action and maintained a right of approval of the independent contractor's employees, it could not control the methods and means by which he should operate his business. The company's provision of fringe benefits, the requirement of regular business hours, and mandatory attendance at training programs were insufficient controls for him to be considered an employee.

*Simpson v. Commissioner*, 64 TC 974 (1975) found Simpson to be an independent contractor when he worked as an

insurance agent for Farmers Insurance Group (FIG) during 1970. Although his contract restricted him as to the policies he could sell for other insurance companies, FIG did not exercise a significant degree of control over the details of the work. He was also responsible for, and paid for, the facilities used in selling insurance.

*Dixon v. Burman*, 593 F. Supp. 6 (N.D. Ind., 1983) ruled that an insurance agent was not the employee of the insurance company whose policies she sold. She worked on a commission basis and could be an agent for other companies. The company did not control her work hours; her work was unsupervised; and she paid her own travel and other business expenses.

*Golden v. A.P. Orleans Inc.*, 681 F. Supp. 1100 (E.D. Pa., 1988) found that a developer was the employer of a real estate agent selling his houses, even though there was a formal, independent-contractor agreement between them. The court ruled that the developer actually treated the real estate agent as its employee.

In *Broussard v. L.H. Bossier Inc.*, 789F.2d 1158 (5th Cir., 1986), the owner-driver of a truck was found not to be the employee of a company she worked for because the company in question was not her only customer. In addition, the company hired her as an independent business person at a pay scale different from that of its own drivers.



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## CONCLUSION

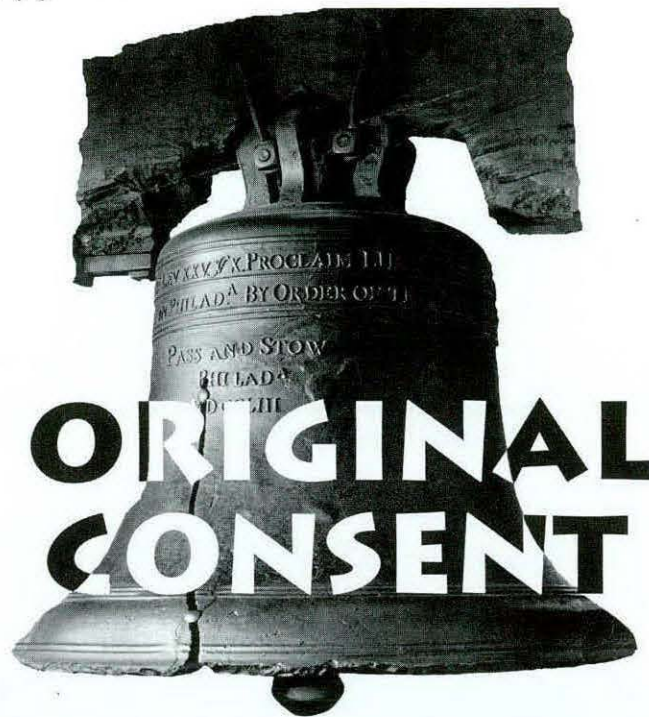
While there can be some very strong advantages to having work performed by "independent contractors" and other contingent workers, it is not as simple as merely calling the worker one thing rather than another. There are great risks in misclassifying workers to achieve some perceived advantage.

In conclusion, the use of "independent contractors" remains a promising benefit to employers provided they are careful to ensure they are dealing with true "independent contractors."



*Clemens H. Barnes, Norman S. Milks & Nancy L. Gallup practice with Bogle & Gates in Seattle.*

If You Ask Me . . .



EXCERPTED FROM THE LINCOLN DAY SPEECH TO THE TACOMA-PIERCE COUNTY BAR ASSOCIATION, FEBRUARY 13, 1997, BY THE HONORABLE RICHARD B. SANDERS, JUSTICE, WASHINGTON SUPREME COURT

We gather to honor Lincoln, but during his life he was a controversial figure not always so honored. He spoke out and spoke up — and he had his critics because of it. In anticipation of his presidency, seven states had already left the Union before his inauguration. Some called his ideas on equality and the consent of the governed radical and revolutionary. Lincoln, however, thought these ideas were embedded in the cornerstone of the Republic, the Declaration of Independence, and he wasn't afraid to say so.

Much has changed since Lincoln's birth and death, but if he were here tonight I think he would say, in that homey wisdom of his, the important things remain the same. Human nature has not changed. Right and wrong have not changed. Ideals of liberty and equality are just as important today as at any time in all of recorded history. And eternal vigilance is still their price.

American ideals of self-sufficiency and liberty were not lost on Lincoln. For a man like him, the idea of one man being a slave to another must have been almost inconceivable. But Lincoln was also a very practical man — as lawyers, at least successful ones, must be. He saw slavery as part of the landscape — but as a part that really didn't fit.

Lincoln recognized that slavery, like it or not, was firmly part of the legal order of the day. One simply could not make a plausible constitutional argument that there was anything unconstitutional about it. Nevertheless, Lincoln thought it was contrary to the first principles of the American nation. He drew those first principles from the Declaration of Independence. The principle which Lincoln found in the Declaration — but not in the Constitution — was equality.

Let us recall that the word "equality" never appears in the Constitution of 1787 and was not added until ratification of the 14th Amendment after Lincoln's death. The Declaration of Independence, however, begins precisely on that note:

We hold these truths to be self evident: that all men are created *equal*; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

Lincoln often quoted these words from the Declaration to support his argument

that the extension of slavery to the new territories was inconsistent with the original American purpose. But he used the term "equality" in a sense quite different from the way it is sometimes used today.

He replied to Senator Stephen Douglas's claim that Kansas and Nebraska should be allowed to choose for themselves whether they would be free or slave states by quoting the Declaration and stating that for governments to derive their just powers from the *consent* of the governed, one must be first free to give or withhold that consent. Such, he said, was inconsistent with slavery because the master governs the slave without the slave's consent, and no slave state can be based on principles of consent. Lincoln argued "equality" meant all are governed by the same set of rules — not one set for the master and another for the slave. "Allow all the governed an equal voice in the government, and that, *and that only* is self government," he said. (Peoria speech of October 16, 1854.)

Lincoln held that the reason equality was important to the slave debate was that equality, by its nature, requires each person to give his consent to be governed by any other man. If he does not consent, he who would be master lacks any legitimate basis to assert a claim of superiority

from a mere position of equality. Rejection of the equality principle, however, removed any necessity for consent. We don't ask cattle to consent — but if men are created equal, the consent of one man is a necessary prerequisite for his governance by another.

In the time of Lincoln, as today, that is a critical distinction. Lincoln said it was the "central idea" of "the equality of men," which was the driving force of America.

And implicit in that equality was the principle that one man could not dominate another through governmental control absent consent because we are all equally members of the human race. Just before he died, Jefferson stated the point:

All eyes are opened, or opening, to the rights of man . . . [and to] the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a fa-

vored few, booted and spurred, ready to ride them . . ."

(Letter to Roger Weightman  
June 24, 1826.)

No man is good enough to govern another man without the consent of the other because consent is the reciprocal of equality. Those who live under the rule of law in a society of equals therefore must consent to its making, and those who make the law are equally subject to its application, without exception. Equality, consent and legitimate government, therefore, go together in the land of the equal.

In a society of equals there is simply no room for those who under color of law, but without the legitimate authority of the law, wrongfully impose themselves as superiors upon those who are really their equals. This is just another form of slavery — it differs in degree, but not in kind. It is domination without consent. It is one man riding on the back of another by the force of his power, not by the consent of his equal. As Lincoln said: "no man is good enough to govern another man, *without the other's consent*." (Peoria speech October 16, 1854.)

Yes, Lincoln freed the slaves, but that was not enough to secure their freedom. The Reconstruction Congress recognized this when it gave the citizens a powerful tool for equality in the 14th Amendment and the anti-Ku Klux Klan act which followed. But the problem has not been solved, nor will it ever be put to rest, as long as human nature persists.

The framers of our state constitution were no strangers to these ideas. History of the time reveals they were in fundamental agreement with Lincoln's understanding of equality and attempted to embody that in the first Article of the Washington Constitution, which sums it all up in one triumphant sentence:

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Once again, we hear the claim that political power originates in the people, not the state. Once again, we hear the principle that governments have no power but what the people give them by consent, and presumably that consent is limited



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and defined by the Constitution itself. Once again, and very overtly this time, we hear the directive that it is the ultimate purpose and essential function of government to protect and maintain individual rights. Conversely, by necessary implication, it must be an act of constitutional outrage for the government to violate the very rights it was created to secure.

What are these "individual rights" about which the framers spoke? Life, liberty and property are summarized just that way in Article I, Section 3 as they were similarly enumerated in the Declaration of Independence, the Fifth Amendment, the Fourteenth Amendment and by John Locke.

*Equality* is mentioned in Article I, Section 12, which forbids a special grant of privilege or immunity to any citizen or class of citizens not *equally* available to all. There is nothing in this language which exempts those who act under color of law from the proscription against special favoritism; much less is there anything which allows government actors to claim an immunity from the application of the same laws as their fellow citizens. And I can find no support for such a claim of special privilege or immunity elsewhere in the text.

The struggle for equality continues today in the minds of men and in the Temple of Justice. Article IV of our constitution entrusts to the courts judicial power without limitation. The courts are the constitutional guardians of equality. If the courts do not insist that those who govern act within the limitations of constitutional consent — that which we call the rule of law — no one else will have the power or will to do it for them. But we cannot be satisfied with the job our courts have done, and I am not satisfied with the job I have done in my short tenure.

All too often, the courts have deliberately turned a deaf ear to the cries of those abused under the color of law by those acting behind a badge of authority yet without legitimate legal justification. Too often, we have turned a blind eye to legislative and executive encroachments, sometimes popular encroachments imposed by the people themselves through the initiative process, which incrementally exceed the limits of legitimate governmental power as defined and delegated by original consent. Thomas Jefferson said, "An elective despotism was not the

government we fought for." (*Notes on Virginia.*)

Ah, we say, mistakes can happen and judges are only human. This is so true — but I am not talking about simple mistakes. Nor am I talking about individuals or personalities. I am speaking of an obvious pattern of precedent, spanning the better part of this century, which has been allowed to accumulate without formal notice, much less serious challenge. Nevertheless, its presence is so unmistakable that it is as if it were by design. This precedent subverts the constitution, as effectively as any alien force, in the form of rules of construction and presumptions. These essentially say the government is presumed to be right when it is really wrong; that it is strong, when by the constitutional text it is clearly weak; that no person's right has been violated when in truth his right has been taken; that an unconstitutional statute is nevertheless enforced unless proven to be so beyond a reasonable doubt; or that some alleged preposterous fact exists by virtue of legislative declaration or judicial whimsy, when any school child can tell you, "The emperor has no clothes."

To paraphrase Justice Robert F. Utter, the presumption of *legitimate* use of state power is precisely the opposite of that which is necessary and proper in a free society where the government is based on the limited consent of equals. In his law review article entitled "Perspectives on State Constitutions," Justice Utter commented:

This doctrine, which is founded on the separation of powers and a presumption of the honorable intent of executive and legislative officials who have also sworn to uphold the constitution, makes it difficult to apply the Declaration at all, let alone in an independent manner. It seriously hampers the courts' accomplishment of what Article I, Section 1, of the Washington Declaration defines as the fundamental purpose of our state's constitution and government: to protect and maintain individual rights.<sup>1</sup>

Referring to the beyond-the-reasonable-doubt standard required to prove constitutional invalidity, Justice Utter stated

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such a standard was originally designed to apply to facts, not law.

It was designed to prevent innocent people from being convicted of serious crimes. When applied to the legal questions of constitutional validity, however, this rigorous standard has no such noble goal. Rather, it serves

to undercut the fundamental rights of Washington citizens, and therefore should be discarded.<sup>2</sup>

To put it another way, rules of construction and presumptions which make it difficult if not impossible for the ordinary citizen to prove his constitutional right has been violated invite the master

to dominate the servant without the servant's consent, while paralyzing the court's ability to protect the principle that all men are created equal under the law and that government not only derives its just powers from the consent of the governed but must live within the strict boundaries of that consent.

I ask you, could we not better serve the purpose of equality and original consent if we were to demand of our government the virtue of Caesar's wife rather than that of O.J. Simpson? Let us recall that Simpson was acquitted of a double aggravated murder based upon the beyond-a-reasonable-doubt standard, although by a simple preponderance, a jury says, he did the deed.

We suffer Mr. Simpson's liberty as the price of our mutual freedom; however, the *price* of allowing the master to exploit the servant without the servant's consent — that price is freedom itself. And that price is too high.

Judges should be impartial, but preference for the government over the citizen is just the opposite of impartiality. Moreover in the words of Justice William O. Douglas, the constitution is not neutral. (*The Court Years*, p. 8.) The law gives the answer and dictates the result. The law of liberty and equality is the law of our constitution, of our land, and must be law in the courtroom as well.

In the words of Lincoln:

Neither let us be slandered from our duty by false accusations against us, nor frightened from it by menaces of destruction to government nor of dungeons to ourselves. LET US HAVE FAITH THAT RIGHT MAKES MIGHT, AND IN THAT FAITH, LET US, TO THE END, DARE TO DO OUR DUTY AS WE UNDERSTAND IT.

ENDNOTES

<sup>1</sup> Justice Robert F. Utter, "Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights," 7 *U. Puget Sound L. Rev.* 507 (1984) (*Perspectives on State Constitutions*).

<sup>2</sup> *Perspectives on State Constitutions*, supra, at 508. See, also, *Griffin v. Eller*, 130 Wn.2d 58, 64-65 (1996); *State v. Aver*, 109 Wn.2d 303, 315-318 (1987).

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## LEGAL MINUTIAE:

### HOW NOT TO GET THE JOB

BY JEFF TOLMAN

One of my great joys, and at the same time great frustrations, is interviewing young lawyers. Emerging from law school, where days are spent dissecting *The Rule Against Perpetuities*, but no even seconds are spent talking about what lawyers actually do, these men and women enter the job market void of understanding what employers are looking for. Having had "their brains turned to mush" and then been taught to think like lawyers (see *The Paper Chase*), they believe employers are looking for an interest in, and understanding of legal minutiae.

Listen folks, my clients want a human being on their team, not some brainiac with no soul. For example, a couple of years ago, I was teaching an interview class at a law school. A young woman agreed to do a mock interview in front of the other 50 lawyers-to-be. Her résumé was impressive: Vice president of the Rule of Shelley's Case Society. Author of law review article entitled "The Socratic Method: No Pain, No Gain." But her résumé said nothing about her out-of-law-school life. For all I could tell, she'd arrived on the planet the first day of college and not left a center of learning since.

So I inquired, "Ms. Smith, tell me a little bit about yourself."

She immediately responded, looking me right in the eye, "Federal law does not require me to answer that."

I stopped that interview and asked the other attendees what they thought of her answer. For several moments, there was silence.

Finally, a young man raised his hand and said, "She obviously knows more about federal law than I do."

The image was vivid. A new client finally comes in to my office after decades of avoiding legal help because, after all, we are lawyers. She sits down and looks across the table at the first lawyer she has ever seen in the flesh; a person with more formal education than her extended family combined; a trained arguer. Wanting to break the ice (hoping the attorney would charge a nice person

less than a pain in the neck), she asks, "How did you get to Poulsbo?"

"Federal law doesn't require me to answer that."

Snapping back to the interview class, I realize it's going to be a long day for me. And a long job search for many of the folks at the class.

In real-life interviews, people miss the boat, too. All the résumés say the candidates are good communicators. Yet a surprising number are monosyllabic in person.

*"If I ask,  
Why did you decide to  
become a lawyer,  
and you don't  
understand the question,  
that's a bad sign."*

All cover letters say, "I am a hard worker." Too often, the first question someone seeking a job has is, "What time would I have to be at work?"

At every interview, I ask, "Why am I better off hiring you than not?" The answer is consistent. "Because I can take clients for you right away. If a client came in right now, I could lift that burden from you."

Good answer.

My next question, though, is "What is the statute of limitations on a tort?"

Silence.

"How many witnesses do you need for a will?"

Silence and a near projectile vomiting.

For those reading this who are seeking jobs, lawyers want to hire people who are:

1. Straightforward. If I ask, "Why did you decide to become a lawyer?" and you don't understand the question, that's a bad sign.

2. Human. My clients know a lot more about how I treat them than if my legal advice gets an "A."

3. Dedicated. You should work longer and harder than I do. You are learning a new, complicated job that I've been doing for 20 years.

4. Street smart. More of what will help you succeed long-term was learned tending bar than in your study group.

5. Enthusiasm. If you are lukewarm about the practice before jumping in, believe me, after dissatisfied clients, huge accounts receivable and bad judicial (and client) decisions against you, you'll hate it.

But there is occasionally a beautiful diamond. Years ago, I was interviewing a nice lady. As I always do, I asked, "What do you know about me or the firm?" She said, "You met your wife on a blind date, immediately fell in love, have two kids . . ."

As she recited the highlights of my life, it became apparent that she knew more about me than my sisters-in-law.

"Why?" I asked.

"Because I've researched and only want to work for your firm or the attorney general."

She works for the attorney general now. Unfortunately, they offered her more money than we could.

It gave me great joy to interview her and see how impressive some people can be. There are too few people like her. Anyway too many people full of legal minutiae.



*Poulsbo attorney Jeff Tolman is a frequent contributor to the Bar News.*

The practice of law is a learned profession requiring knowledge and skills. You cannot know, or be expected to know, everything, nor can you always perform as skillfully as you should. Sometimes you do not know what you should know, you do not handle a matter with the requisite skill, or you simply forget things. Most likely at some time in your practice you have made, or will make, a big mistake.

This article briefly considers your ethical obligations as a lawyer when you make that big mistake. It looks at some of the applicable Rules of Professional Conduct (RPCs) to determine what obligations you must satisfy under those rules to avoid discipline as a result of your having made the big mistake. It also assumes that, while you want to know what the minimum level of required conduct is, you also want to serve your clients at far better than the merely ethical level. This article suggests some ways to better serve your clients and the profession when you make the big mistake. It also asks some questions about what ethical level of practice you want for yourself and for the profession.

RPC 1.1 requires you to provide "competent representation" to your client. "Competent" means that you must have "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." "Competent" does not mean "perfect," nor does it mean "without any mistakes." It does mean, however, representation without material (big) mistakes. This article assumes that your big mistake is a material mistake constituting malpractice and that you recognize that your representation has not met the standard of competence.

If your representation is continuing, and it is not too late to remedy the mistake, you should promptly remedy it at no cost to your client. This is simply part of competent representation. Do you also have an obligation to advise your client of the mistake? If the representation is continuing, but it is too late to remedy the mistake, or the representation is now over and you cannot remedy the mistake, what are you to do? In those cases, do you have an obligation to tell your client? If you do,

what and how do you need to tell the client?

RPC 1.4 requires you to keep your "client reasonably informed about the status of a matter." This is an affirmative, positive duty on your part regardless of whether or not the client inquires. Indeed,

## WHAT TO DO WHEN

you may be the only one who knows of the mistake at the time, so there is no way the client can know unless you affirmatively disclose it.

RPC 1.4 also requires you to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." A big mistake affects the status of a matter; it raises obvious questions about your competence to handle the matter entrusted to you by the client, and your client is entitled to be informed about this so as to make an informed decision regarding whether or not to continue with you as his or her lawyer. When a lawyer is unable to carry a matter forward promptly, the lawyer must inform the client of that fact. *Pasanante v. Yormark*, 350 A.2d, 497 (N.J. 1975), and *In re Putsey*, 675 N.E.2d 703 (Ind. 1997). Where a lawyer fails to act on a client's claim, the lawyer has a duty to promptly notify the client of this failure and of the possible claim the client may thus have against the lawyer. *Tallon v. Committee on Professional Standards*, 447 N.Y.S.2d 50 (1982), and *In re Higginson*, 664 N.E.2d 732 (Ind. 1996).

If you make a big mistake, recognize it as such, and can remedy it, you should do so as part of your ethical duty of competence. As part of your ethical duty of communication to your client, you should inform your client of the big mistake and that you have remedied it, so that the client can determine what, if anything, to do about the representation. If the mistake can be, or has been, remedied at no cost or harm to the client, it is unlikely this disclosure will cause a problem with

your client. To the contrary, if you have established a trusting relationship with the client, the admission of error is likely to improve the attorney-client relationship.

If you make a big mistake, you have an

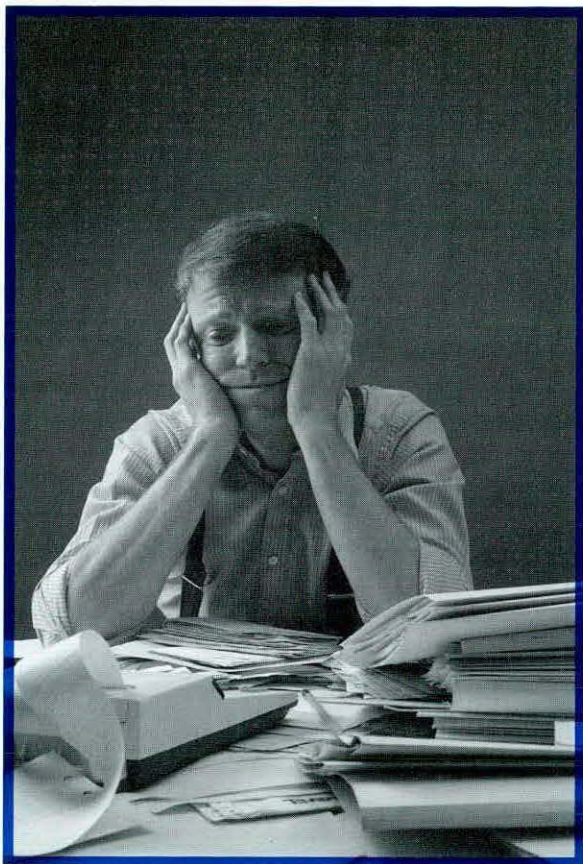
adverse interest to your client. Whether or not you remedy the situation, you may still have liability to the client. You need to inform your client of this adverse interest. RPC 1.7(b) prohibits you from representing a client "if the representation of that client may be materially limited by . . . the lawyer's own interests." Your representation of the client may well be limited by your fear of the discovery of your mistake or of a possible malpractice claim.

RPC 1.7(b) permits you to continue your otherwise adverse representation if you reasonably believe the representation will not be adversely affected and if your client consents to the representation after consultation and full disclosure of the material facts. The RPCs define "after consultation" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." That means you must be honest with your client that the mistake is a big one. It also means that you must tell your client that he or she may have a malpractice claim against you. Even if you have established a good and trusting relationship with the client, this can be very difficult to do. If you do not have such a relationship, it can seem impossible. The RPCs do not permit compromises, however, in ethical principles.

If you want to settle the malpractice claim with the client, RPC 1.7(h) requires you to notify your client, or former client, that it is appropriate for the client to obtain independent legal representation to determine what rights, if any, the client may have against you. Under RPC 1.7(a),

BY BARRIE ALTHOFF, WSBA CHIEF DISCIPLINARY COUNSEL

# YOU MAKE A BIG MISTAKE



would clearly be beneficial. Thus, it would not be a “confidence” as defined, nor would RPC 1.9(b) apply. Your knowing failure to disclose that information, however, is a continuing harm to the client, and it might reasonably be argued that by not informing the client of the mistake and possible claim against you, you are engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, all prohibited by RPC 8.4. In the criminal-law context, such failure to disclose might also be viewed as lack of candor toward the tribunal under RPC 3.3 or conduct detrimental to the administration of justice prohibited by RPC 8.4:(d)(4).

Aside from the ethical considerations, there are other things you should do when you become aware of having made the big mistake. You should obviously make sure that in fact you made a big mistake: very carefully analyze the facts and law, and consult another lawyer, especially one knowledgeable in malpractice in the area in question. When you are doing this, however, do not think merely from a lawyer’s perspective. Remember that you are a lawyer to serve your client, not yourself. So consider your conduct also from the client’s perspective and whether or not the client was well-served by your conduct. Even if your conduct was not malpractice, if your client was dissatisfied with your conduct you should still want to remedy that dissatisfaction to the extent you reasonably can.

any such settlement must be “fair and reasonable” to the client, and it may not be conditioned on the client’s agreeing not to file a disciplinary grievance against you, since such a condition would be prejudicial to the administration of justice and be prohibited by RPC 8.4(d)(4). See *The Law of Lawyering*, 1.8:902, 1997 Supplement.

If you no longer represent the client, you are still in a difficult situation. While RPC 1.9(b) prohibits you from using confidences or secrets relating to the representation of the former client to the disadvantage of the former client, depending on the facts of the case your big mistake, or your knowledge of it or of your client’s possible malpractice claim against you, may or may not be within the definition of “confidences or secrets” and may or may

not be covered by RPC 1.9(b). Confidences are defined as “information gained in the professional relationship . . . the disclosure of which . . . would likely be detrimental to the client” [emphasis added.] If, for example, your big mistake resulted in your client’s getting a benefit to which the client was not legally entitled, disclosure of it might indeed be detrimental to your client, since the benefit might be lost. On the other hand, more commonly your big mistake results in your client’s not getting a benefit to which the client was at least arguably entitled. In this case, disclosure of the malpractice might be beneficial, not detrimental. For example, if you made a big mistake in representing a criminal defendant and the client was convicted as a result, your big mistake was prejudicial ineffective assistance of counsel, and disclosure of that

If you have malpractice insurance, you should promptly notify your insurer. Insurers often can help you resolve the matter with the client. Insurers are usually not pleased, however, with lawyers “confessing” their mistakes to their clients, since such admissions likely establish liability. The usual advice of insurers is, and some insurance policies may even purport to require you, to say nothing to the client that may in any way acknowledge that a mistake was made or that you are responsible for it. It is clear that your ethical obligation supersedes any contrary insurance provision. More importantly — from the view of the legal profession — in clients’ eyes such stonewalling by you when discovered by the client is likely to be seen as an insult, a breach of the very trust they placed in you as a professional to solve their legal prob-

lem. Your failure to admit and apologize for your mistake is the very thing that incites a client to initiate a malpractice suit and bar grievance against you.

When you make the big mistake, complying with your ethical obligations under the RPCs takes great courage and trust on your part. Some lawyers may argue that in the "real world" you cannot afford to admit to your client that you made a big mistake because your client will likely sue you for malpractice, and that admitting your mistake is professional suicide. They may be right. But if you do not admit your mistake to your client, your relationship with your client is built on a lie and deceit, one wherein you are afraid that the truth will someday be known or discovered. By not telling your client, even where not ethically required to do so, you are in effect committing ethical suicide, choosing your own self-interests over those of your client, refusing to accept the responsibility for your mistake and refusing to be held accountable to your client and the legal profession. You can choose to preserve your own self-respect by truthfully and fully acknowledging to your client that you made the big mistake, recognizing that your livelihood is at stake. Or you can choose to live a life of looking after your own interests before those of your clients.

When admitted to the bar, we all took an oath to abide by the RPCs. That oath is not conditioned on compliance not having a personal cost to us. The ethical

mandate to all of us is clear: we look after our clients' interests regardless of the cost to ourselves. A primary function of law is to hold persons accountable for their conduct. Lawyers as guardians of the law should, more than any other professionals, willingly be accountable for their conduct. Until we lawyers are ourselves accountable for our mistakes, we will neither receive nor deserve the respect of the public. By admitting our mistakes to our clients and taking the consequences, we are acting in the best traditions of the law and earn that respect.



## DISCIPLINARY ACTIONS

### REPRIMANDED

Lawyer Michael W. Smith (WSBA No. 6106, admitted 1975) has been ordered reprimanded pursuant to a stipulation approved by the Disciplinary Board of the Washington State Bar Association on September 26, 1997. The discipline is based upon Smith's conduct during criminal trial.

In April 1991, Smith represented client Garrett on a charge of second degree child molestation in Skagit County Superior Court. Throughout the trial, Smith engaged in disrespectful conduct toward the court, referred in front of the jury evidence that had been ruled inadmis-

sible, and refused to voir dire four prospective jurors and to brief legal issues because he disagreed with the court's decisions. Smith's conduct violated the Oath of Attorney and Rules of Professional Conduct 3.5(c) and 8.4(d), and subjected him to discipline pursuant to Rules for Lawyer Discipline 1.1(c) and (i). The hearing officer was John E. Hanson of Bellevue. Respondent was represented by Lowell H. Ashbac Jr. The Bar Association was represented by Disciplinary Counsel Marsha A. Matsumoto.

### SUSPENDED

Lacey lawyer Karen Lundahl (WSBA No. 8746, admitted 1978) has been suspended for two years pursuant to an order of the Supreme Court entered on October 28, 1997. The discipline is based upon failure to communicate with clients, to complete matters she was hired to handle, to formally withdraw from matters she stopped working on, to maintain a client trust account, and to cooperate with the Bar Association investigation of grievances against her.

In the first matter, Lundahl represented a client in modifying child support. At the modification hearing the commissioner granted Lundahl's client an increase in child support at the modification hearing. The Commissioner instructed the father's lawyer to prepare the proposed order and Lundahl to prepare the child support work sheets. The father's lawyer mailed the proposed order to Lundahl. Lundahl never sent her client a copy, nor returned the proposed order to the father's lawyer, nor sent the father's lawyer a copy of the child support worksheets. Lundahl did no further work on the client's case and did not respond to telephone calls or letters from her client or from the father's lawyer after the hearing. The client terminated Lundahl's services by letter. Lundahl never filed a notice of intent to withdraw with the court.

In the second matter, Lundahl was hired to modify a parenting plan and child support order. Lundahl filed the petition for modification, but neglected to file her client's Financial Declaration. Lundahl did not arrange for service of the petition on the father, but told her client that she had done so. The client later arranged for service on her own. When the matter finally was heard, the court refused to enter a child support order because the father had not been served with the finan-

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cial declaration. The client then arranged for service of a hearing notice and her financial declaration and child support work sheet. At the new hearing, the commissioner granted the client a support increase, but gave the father additional time to file an objection to the order. The father filed an objection which the client faxed to Lundahl. Lundahl told the client that she would set a hearing. Lundahl did not set a hearing, did no further work on the client's case, and Lundahl did not communicate with the client despite repeated calls and a letter from the client. One client paid Lundahl \$530 during this period, \$200 of which was designated as a minimum charge in the fee agreement. The remaining \$330 of the funds was an advance fee or advance fee and cost deposit, but was not deposited in a trust account. A second client paid Lundahl \$230 by check. This payment included \$30 for a filing fee. Lundahl did not deposit the check in a trust account. A third client paid Lundahl \$600 as an advance fee and cost deposit. Lundahl did not deposit any of the \$600 in a trust account. A fourth client paid Lundahl \$485 in cash, \$160 of which was forecasts. None of this payment was deposited in a trust account.

The Bar Association asked Lundahl to respond to five separate grievances. Lundahl did not respond to any of the letters from the Bar Association. Lundahl was personally served with a subpoena duces tecum for a deposition, but Lundahl did not appear for the deposition. Lundahl's deposition was rescheduled. Lundahl was finally deposed pursuant to RLD 2.8(b). The subpoena duces tecum required Lundahl to bring the complete file and any documentation relating to her representation of one grievant. Lundahl brought the grievant's case file but informed Disciplinary Counsel that one document was missing from the file and that she would forward that to her. She did not forward it. Lundahl did not respond to subsequent letters requesting that she provide additional documents that the grievant alleged were in Lundahl's possession. Lundahl was subpoenaed for a second deposition, but Lundahl did not appear for this deposition and Lundahl failed to respond to additional requests for information by the Bar Association.

Lundahl violated RPC 1.4(a) (communication) by failing to respond to reasonable requests for information about her clients' cases.

Lundahl violated RPC 1.15 (terminat-

ing representation) by failing to file a Notice of Intent to Withdraw as required by that rule and otherwise failing to protect her clients' interests after being discharged. Lundahl violated RPC 1.3 (diligence) by failing to complete her clients' cases and otherwise failing to act with reasonable diligence and promptness in representing her clients. Lundahl violated RPC 8.4(c) (dishonesty) by giving a client information about her case and the work performed by Lundahl that was not accurate. Lundahl violated RPC 1.14(a) (preserving client funds) by failing to maintain funds belonging to her clients in a client trust account. Lundahl violated RLD 2.8 (a) (duty to furnish prompt response) by failing to respond to the Bar Association's requests for information regarding grievances filed against her and by failing to comply with the subpoenas duces tecum requiring her appearance at two depositions. The hearing officer was James Buckley of Seattle. Respondent did not appear at the hearing either personally or through counsel. The Bar Association was represented by Disciplinary Counsel Anne Seidel.

*For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board at (206) 727-8252 leaving the case name and your address.*

#### NONDISCIPLINARY ACTIONS

##### INTERIM SUSPENSION

Mountlake Terrace lawyer George R. Cole (WSBA No. 5575, admitted 1974) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered June 10, 1997.

☆

Tacoma lawyer Michael Sean McAllister (WSBA No. 22279, admitted 1967) was ordered suspended from the practice of law, pending the outcome of disciplinary proceedings, by Supreme Court order entered 1997.

☆

Yakima lawyer Frederick Earle Porter (WSBA No. 3640, admitted 1967) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings, by Supreme Court order entered September 5, 1997.

*Interim suspension is pursuant to RLD Title 3 and is not a disciplinary sanction.*

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## CLE CALENDAR

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*Bar News Calendar*,  
WSBA, 2101 4th  
Avenue, 4th Floor,  
Seattle, WA 98121-2330  
Fax (206) 727-8320  
e-mail comm@wsba.org

### ALTERNATE DISPUTE RESOLUTION

#### Arbitration Training

Feb. 11 - Olympia. CLE credits TBA.  
By Thurston Co. Bar Assn. (360) 753-2101.

#### Bankruptcy: A Changing Practice Under the New W.D.Wn. Chapter 13 Rules

Feb. 13 Vancouver. 4 CLE credits (incl. 1 ethics).  
By WSBA CLE (206) 727-8202.

### BANKRUPTCY

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Feb 13 - Vancouver. 4 CLE credits (incl. 1 ethics). By WSBA CLE (206) 727-8202.

### BUSINESS LAW

#### Software Licensing Agreements

Feb. 5 - Seattle. 7 CLE credits.  
By Sequoia Professional Development (202) 955-9373.

#### Representing the Growing or Maturing Closely Held Business

Feb. 6 - Seattle. 6.75 CLE credits (incl. .75 ethics).  
By WSBA CLE (206) 727-8202.

#### Strategies for High-growth Companies Raising Capital Strategic Partnerships

Feb. 12 - Seattle. 6.5 CLE credits.

By The Cambridge Institute  
(703) 790-9595 ext. 124.

#### Covenants Not To Compete

Feb. 20 - Seattle. 4 CLE credits.  
By Lorman (715) 833-3940.

#### Third Annual Buying and Selling Electricity in the West Conference

Feb. 19-20 - Seattle. 14.25 CLE credits.  
By LSI (800) 854-8009

#### Corporate Counsel Institute and Legal Expo

Mar. 6 - Seattle. 6.5 CLE credits (incl. 1 ethics) estimated. By WSBA CLE and Corporate Law Department Section (206) 727-8202.

#### Collection Law in WA

Mar. 10 - Seattle. 5.25 CLE credits.  
By Lorman (715) 833-3940.

### CONSTRUCTION

#### Construction Liens in ID and WA

Feb. 19 - Coeur d'Alene, ID. CLE credits TBA.  
By Lorman (715) 833 3940.

### EMPLOYMENT

#### Annual Employment Law Institute

Mar. 27 - Seattle. CLE credits TBA.  
By WSBA CLE (206) 727-8202.

### ESTATE PLANNING

#### Estate Planning for the Small to Medium-sized Estate

Feb 19 - Tacoma; Feb. 27 - Seattle. 6.75 CLE credits. By WSBA CLE (206) 727-8202.

### FAMILY LAW

#### Family Law Litigation

Feb. 10 - Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI (715) 835-8525.

#### Second Annual Inter-county GAL Forum

Mar. 20 - Seattle. 6 CLE credits estimated. By WSBA CLE (206) 727-8202.

### GENERAL

#### The CD Law CLE

Feb. 23 - Vancouver; Feb. 25, Mar. 23 Seattle; Apr. 6 - Spokane. 3 CLE credits. By Unger & Baumann (360) 452-7688.

## UPCOMING SEMINARS

### 1997

OCTOBER 17 **ETHICS/BAR GRIEVANCES**  
*1/2 Day - Seattle*

NOVEMBER 13 **INSURANCE LAW - Spokane**

NOVEMBER 14 **INSURANCE LAW - Seattle**

DECEMBER 12 **PRODUCT LIABILITY**  
*1/2 Day - Seattle*

### 1998

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APRIL 24 **ORTHOPEDIC/SOFT TISSUE DEFENSE**  
*Seattle*

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NOVEMBER **INSURANCE LAW - Spokane**  
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**Cutting-edge Negotiation Strategy for Lawyers**

Feb. 13-14 - Seattle. 12.5 CLE credits. By Negotiation Strategy Institute (805) 642-7748 x6.

**Cultural Diversity In the Workplace**

Apr. 18 - Chelan. 4 CLE credits. By WSBA LAP (206) ;727-8268.

**The Evolution of Deferred Prosecution**

Apr. 18 - Seattle. 2 CLE credits. By WSBA LAP (206) 727-8268.

**Video Wars**

Feb. 12-13 - Seattle. 9.5 CLE credits. By LSI

**IMMIGRATION**

**1998 Northwest Regional Immigration Seminar**

Feb. 26-27 - Seattle. 14.5 CLE credits (incl. .5 ethics) pending. By KCBA (206) 340-2572.

**INTELLECTUAL PROPERTY**

**Intellectual Property Institute**

Mar. 24 - Seattle. 6.5 CLE credits estimated. By WSBA CLE (206) 727-8202.

**LAW OFFICE MANAGEMENT**

**Bad-faith Litigation in WA**

Perpetual Problems in the P.I. Practice: Feb. 18 - Seattle. CLE credits TBA. By WSTLA (206) 464 1011.

**Lost in the MIST of LIST**

Mar. 12 - Seattle. CLE credits TBA. By WSTLA (206) 464-1011.

**Lawyers Are From Mars, Juries Are From Venus**

Mar. 19 - Spokane. CLE credits TBA. By WSTLA (206) 464-1011.

**Annual Workers Compensation Seminar**

Apr. 16 - Seattle. CLE credits TBA. By WSTLA (206) 464-1011.

**Auto Cases**

Apr. 29 - Seattle. CLE credits TBA. By WSTLA (206) 464-1011.

**Subrogation**

May 7 - Seattle. CLE credits TBA. By WSTLA (206) 464-1011.

**Suing and Defending Professionals in WA**

Mar. 12 - Bellevue. 6 CLE credits. By WSBA CLE (206) 727-8202.

**REAL PROPERTY, PROBATE & TRUST**

**The Dollars and Cents of Real Estate Transactions, including Tax and Financing Issues**

Mar. 27 - Bellevue. CLE credits TBA. By WSBA CLE (206) 727-8202.

**The Essentials of Office and Retail Leases in WA**

Mar. 11 - Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI (715) 835-8525.

**34th Annual NAEPC Conference**

Apr. 23 - Walla Walla. 1.5 CLE credits. By Walla Walla Valley Estate Planning Council (509) 529-0630.

**Irrevocable Life Insurance Trusts and Current Taxation Issues in Life Insurance**

May 21 - Walla Walla. 1.5 CLE credits. By Walla Walla Valley Estate Planning Council (509) 529-0630.

**Legal Aspects of Casualty and Disaster**

Feb. 20 - Seattle; Feb. 27 Vancouver. 6.25 CLE credits (incl. .75) ethics pending. By WSBA CLE and RPPT Section (206) 727-8202.

**Use of Limited Liability Companies in Estate Planning**

Mar. 19 - Spokane. 7 CLE credits (incl. .5 ethics). By Lorman (715) 833 3940.

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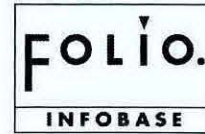
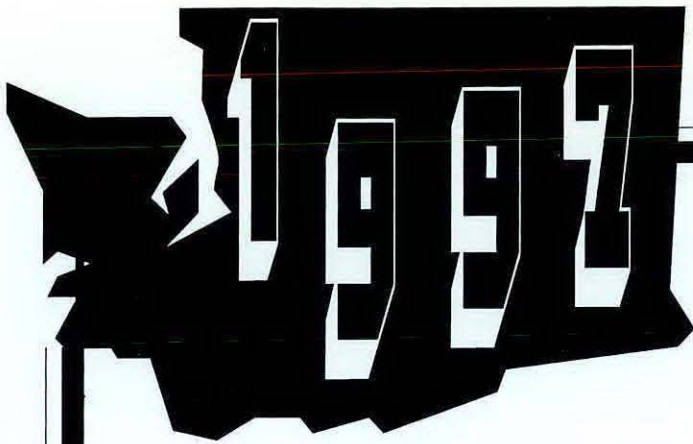
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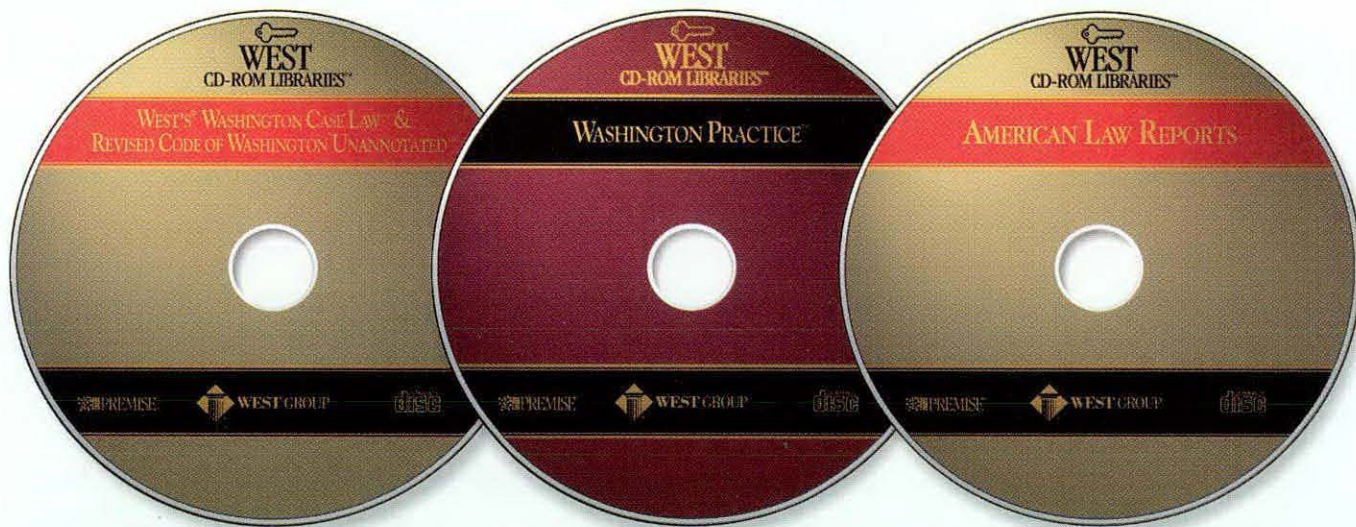
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at Carnegie Hall: 1

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