VOL. 52 NO. 7

FIVE DOLLARS

Washington State BAR NEWS

The Official Publication of the Washington State Bar

July 1998

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, . . . Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens . . .

Article III, Treaty of Medicine Creek
December 26, 1854

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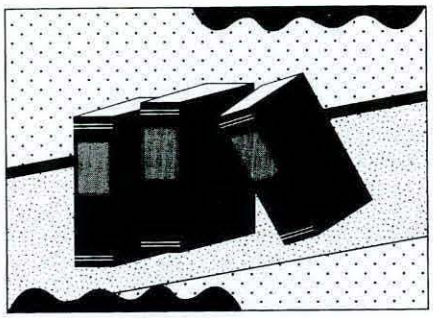

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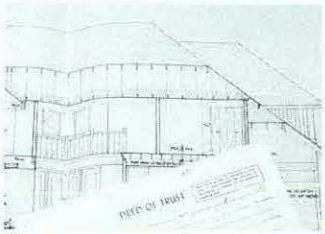

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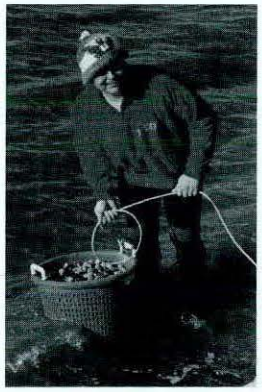

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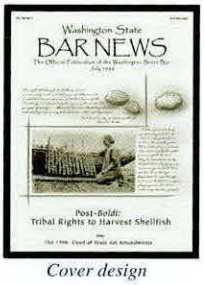

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Letters

ERRATUM

Editor's Note: We apologize for the misprinting of a portion of Daniel M. Caine's letter to the editor in the June issue. It is his professional *patience* rather than his professional *practice* which is lessening over time. Judging from Mr. Caine's kind reaction to our misprint, we believe he has plenty of professional patience remaining.

STEPPARENT CHILD SUPPORT ORDERS NO LONGER ENFORCED

Editor:

On February 26, 1998, the Washington State Supreme Court decided *Harmon v. DSHS*. The court ruled that the Washington State Child Support Schedule (Chapter 26.19 RCW) cannot be used to determine if a stepparent owes money for a stepchild who no longer lives with the stepparent.

Effective March 1, 1998, the Division of Child Support (DCS) will no longer enforce orders which established stepparent liability for child support and were based on the Washington State Child Support Schedule. If a parent has an order for any current, future or back child support for a stepchild, DCS may stop all actions to collect support for that child. This includes payroll deductions, liens, credit bureau reporting, license suspensions and IRS refunds. Consistent with the rule articulated in *In re Marriage of Stoltzfus*, 69 Wn. 2d 558, 849 P.2d 685 (1993), DCS will not refund any support monies paid before March 1, 1998.

For more information about how this court decision affects a parent's child support obligation, attorneys and/or responsible parents may wish to contact the Support Enforcement Officer who handles the case.

CYNTHIA M. CHANEY
Staff Attorney
Policy and Program Development
Division of Child Support, Olympia

NEW TECHNOLOGY SOLVES TECHNOLOGY-INDUCED PROBLEMS

Editor:

I read the article that was submitted by Mark D. Walters (May *Bar News*, p. 16), and I am in complete agreement with his description of the problem and his legal analysis of the problem. However, just as technology has created the problem, technology has also created a solution that removes any concerns about confidentiality and waiver of attorney client privilege.

When the Washington Legislature passed RCW 19.34 *et. seq.*, The Electronic Authorization Act, the solution for the problem became available. ID Certify became the first licensed Certification Authority (CA) and repository in the state of Washington. If an attorney and his client were to obtain a digital-signature certificate from a licensed CA, like ID Certify, the private key for that digital signature and for encryption would be stored on a Smartcard token. That Smartcard token could be used to identify the sender and intended recipient of an e-mail message. That same Smartcard token could be used to encrypt the e-mail message. The encryption used by ID Certify is sophisticated enough that to break the code would cost in excess of 1/2 billion dollars per message and would take many months of computer time.

ID Certify also provides a service called SPIM (Secure Private Internet Mail) that allows an attorney to duplicate all of the services provided by the U.S. Postal Service with the added benefit of having all messages encrypted. For example, an e-mail message can be sent restricted delivery, return receipt requested. To accomplish this is rather simple and would only be a three-button operation for the selection of services on a computer screen. The attorney with his digital signature Smartcard token could sign the e-mail message and any attachments. This permits the recipient to verify the attorney as the e-mail sender, and the e-mail message would be encrypted with the public encryption key of the recipient. This message could then be decrypted only by use of the private key of the recipient from his Smartcard token. The message is sent to the repository for ID Certify, which would then notify the intended recipient that he has a message waiting and asks him to identify himself with his digital signature, and the message will be forwarded. Once the recipient signs the notice of mail waiting, the message is forwarded. In order to open the message the recipient must sign receipt of delivery with his digital signature. That receipt is then forwarded to the sender. If requested, the repository can also provide a time stamp that certifies the time of delivery and also certifies the message sent (in an encrypted format).

Utilizing the current technology provides all the necessary elements to ensure that there is no issue with protecting the

confidentiality of e-mail nor an issue with ensuring that the attorney-client privilege remains intact. The benefits of digital signature, encryption and secure e-mail, however, are much greater than just preserving the attorney-client privilege. The Smartcard token can be used to encrypt all files stored on a computer system if persons other than the attorney have access to the system. The attorney can then decrypt them when needed with his private key. The attorney can have regular e-mail contact with his client with an audit trail of all communications and verification that the client has received all the e-mail messages. The client can review and sign documents transferred as attachments to e-mail with their digital signature, which under the statute can be equivalent to a notarized signature. The amount of time that it takes to respond by secure e-mail is substantially less than if the calls are made by telephone and they have the added benefit of being secure. The most common problem with telephone calls is telephone tag and the social conversation that usually accompanies a call which wastes a lot of time, and which cannot be billed. There is no problem of availability through the use of e-mail, since it can be received via the Internet regardless of location and can be answered at the time most convenient for the attorney.

Sometimes, the best solution to a legal problem is technology, and that is certainly true in this instance.

DONALD D. BUNDY
CEO, ID Certify, Yakima

FEE ARBITRATION FEEDBACK

■ Editor:

Hooray for Terry Lee and his article opposing the proposed Fee Arbitration Program in the May 1998 issue! While the new draft addresses some of the problems associated with last year's mandatory fee arbitration proposal, attorneys should remain strongly opposed to the adoption of the revised APR 17 and its regulations.

I am a sole practitioner in Seattle. A majority of my cases involve domestic-relations matters. More often than not, my clients have limited financial resources and are unable to make significant cash advance deposits to cover the projected amount of attorney fees and costs over the entire life of a case.

The unintended consequence of APR 17 will be an increased reluctance by attorneys to accept cases which are not fully secured by a substantial cash advance deposit. In turn, this will result in fewer members of the public being able to retain legal counsel. Attorneys will be disinclined to trigger an arbitration fee dispute (with the possibility of trial *de novo* no less) by assigning a client to collection for a relatively small amount of receivables. Once the client's substantial cash advance deposit becomes exhausted, attorneys will be wise to withdraw representation or potentially buy themselves into a fee arbitration dispute.

In my experience in private practice, disputes over fees more likely occur when a client is dissatisfied with an adverse legal result than from any quarrel over the

quality of an attorney's representation or alleged excessive billing for services. Instituting a fee arbitration program under the proposed rule will provide a powerful new tool for those clients who seek to unjustly evade their financial obligations. If an attorney seeks to enforce his or her fee agreement, APR 17 will require that attorney to spend additional time, effort and money to defend his or her fees before an arbitrator.

Finally, and perhaps most importantly, I have not heard any reasonable explanation why there is a need for this fee arbitration proposal. Do we really need to promulgate another 24 single-spaced pages of rules and regulations which expand bureaucracy, increase the costs of practicing law, and further limit access of clients to lawyers? The alleged reason given by proponents is that we are a "self-regulating profession." But so what? Must our Bar Association adopt banal regulatory schemes for fear of others regulating our profession? Another alleged reason is that it serves the "best interests of the public." How so? This is a conclusory statement, not a demonstrable fact. Proponents also proclaim that 11 states and the District of Columbia currently have such programs. This fact indicates that 39 or 78 percent) of the states do not. If the proponents of APR 17 cannot rationally articulate the existence of a serious fee dispute problem in Washington state, it should not be looking for a solution. Leave the self-flagellation to medieval monks.

Although the drafters cleverly dropped the work "mandatory" from the fee arbitration proposal's title, this proposed rule is "mandatory" unless an attorney declines to seek full compensation for his or her fees from an intransigent client. The vast majority of attorneys in private practice seek to help our clients and be justly compensated. Instituting this fee arbitration program will further increase the cost of practicing law — a cost which will be passed on to clients and further restrict the public from being able to both obtain and afford legal counsel.

STEVEN A. HEMMAT
Seattle

■ Editor:

I have reviewed the revised proposal on WSBA fee arbitration and am unalterably opposed to two portions of it. The first is the proposal that a client may seek to arbitrate legal fees they have already paid.

Under the proposed regulation, a client in a personal-injury matter could recover a judgment of $150,000 following a trial and pay a $50,000 contingent fee. The lawyer would then pay the taxes on the money and use it to support his family. At some unspecified later date, the client could then petition for arbitration of the fee which he or she had paid.

Paragraph (b) specifically provides that the program would cover "any and all fees and costs *paid*, advanced, charged or claimed for legal services by lawyers" (emphasis added). The lawyer would then face the possibility that an arbitrator, acting after the case is all over and the client has agreed to pay the fee, could "split the baby" as arbitrators often do. The lawyer could then find herself ordered to pay back $20,000, for example, to the client.

If a client takes issue with the amount of a fee charged but not paid, he or she certainly should have a right to seek redress, either from the courts or from the fee arbitration process. Provision could

be built into the arbitration process so that a client who questions the amount of the fee in a personal-injury case must be notified of the right to arbitrate. The arbitration program could further provide that the entire amount of the fee claimed would then be sequestered, pending arbitration. However, I strongly suggest that arbitration apply only to fees which have not yet been paid.

The proposal also allows for the trial *de novo* if a party is in disagreement with the arbitrator's decision. This is equivalent to what tort practitioners in my former home town of Chicago used to call "Defendant's Motion to Stall, Procrastinate and Delay." Imagine you have handled a family law case for someone and they have racked up a pretty good-sized bill, which they won't pay. You withdraw and seek to collect your bill, and they demand arbitration. Ultimately, you receive an arbitration award for the full amount of your fees, which you now plan to turn into a judgment. Instead, the individual finds out that, by seeking a trial *de novo*, he can stop collection without posting a bond or incurring any significant costs. He further finds that a trial *de novo* could be many months off in the future.

For a good example of how optional trials *de novo* are working, I call your attention to the Mandatory Arbitration Rules in superior court. There, insurance carriers have learned to use the arbitration proceeding in lieu of discovery. Unless the award is shockingly low, they routinely file a demand for a trial *de novo*. Thus, the arbitration procedure becomes largely meaningless, except as a method of discovery and delay. To be effective, arbitration should be binding.

STEPHEN T. CARMICK
Chehalis

■ Editor:

First and foremost, the proposal represents an attempt by the Bar Association to control attorney fees. This intent is seen in the language of Rule 17(h) that the arbitrator will seek to assure that the attorney fee is reasonable as provided by the vague Rules of Professional Conduct. "Seek to assure" means that the Bar wants the arbitrator to look specifically to this particular issue, not to the terms of the agreement between attorney and client. RPC 1.5 on "reasonable fees" includes inchoate matters such as "whether the fee agreement demonstrates that the client received reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices" and, of course, "[that particular] lawyer's ability, reputation and experience," and "the novelty and difficulty of the questions involved." Aside from that, the arbitrator is supposed to make a finding with regard to the "relative merit and quality of the professional services." This just might mean that if the arbitrator does not approve of the type of work done by the lawyer, for political reasons, the arbitrator might deny payment of the fee.

In light of the language of section (h)(1), discussed above, the language of (h)(2) — that there is a presumption that a fee is reasonable if it is in writing — is meaningless.

Lawyers play a sensitive role in our society. Lawyers protect their clients from the actions of government. They represent parties in tobacco litigation, conservation litigation, political litigation, lawsuits for and against affirmative action, criminal litigation, abortion litigation, dissolution litigation in which all sorts of cultural values are brought to bear, and so forth. No government agency should have the power to regulate fees. The power to regulate fees is the power to destroy those who protect their clients from the government. Government includes courts, and courts are now asserting the power, indirectly or directly, to control the livelihood of those who oppose their exercise of power.

Many would say this is a foolish concern. The arbitrators are supposed to be independent. Yet this bar association/government agency does not believe in juries (mandatory fee proposal, August 1997); or freedom of speech (censorship of speech on sex, race, creed, religion, sexual orientation, marital status, RPC 8.4g); or the importance of contract (same mandatory fee proposal).

It is not the intention of the current Bar agency which is the only concern. With this precedent for controlling attorney fees, some future bar agency/court may exert more power to control fees and hurt lawyers whose political views it opposes. Class actions, environmental litigation, union/management lawsuits and other matters with complex fee issues are examples in which the Bar Association may easily find a party to complain about fees so the Bar can assert jurisdiction and wield political influence.

Without being a political scientist, I think the intoxicating desire to assert political power, a desire which is seen everywhere in history, is enough to encourage the Bar Association and the courts to influence politics by interfering with attorney fees.

The choice of lawyers should be determined by the market system.

As to the arbitrators, the Bar Association will probably influence their selection. Even if they do not do so today, they may, as I suggested in the paragraph above, do so in the future. The lay arbitrators will have to come from somewhere, and I suspect they will come from a source sympathetic to the politics of the Bar Association.

Second, and aside from the politics, the proposal is unfair to the public because it effectively destroys small claims for malpractice. The rule, perhaps intentionally, does not clearly say that the client can raise a defense of malpractice. Maybe so, but there can be no claim for affirmative relief. A client who arbitrates may be left with a small claim for negligence, and that claim will be lost because it is too unwieldy to file an independent lawsuit. The client would be better off in small claims court, where all claims can be heard, and might be better off in arbitration or district court. But the WSBA does not tell the consumer that "access to justice" applies to claims against lawyers.

Third, the proposal is unfair to lawyers because the arbitrators have tremendous power, but no standards. A contract is no assurance because the arbitrators, lay and lawyer alike, will have to "seek to assure" themselves that no RPC was violated. Once past that question, the arbitrator "shall be the judge of the relevance and materiality of the evidence offered." Is this equity court? If the lawyer is dissatisfied and seeks a decision by a jury and an elected judge, she runs the risk of paying ruinous fees to the other side.

Fourth, the expense of the program, to lawyers and taxpayers, is important, as is the cavalier attitude, however disguised, toward the obligation of a contract.

Finally, this proposal was once offered as a method for cutting down on bar complaints. I don't think there has even been any evidence, study or proof that this was or is an issue. But if it is an issue, then the Bar Association should, as a prosecutorial agency, review every complaint and proceed on behalf of the public if the Association believes there has been an offense. It is not fair to the public to shunt disciplinary matters into fee litigation.

The proposal should be rejected.

ROGER B. LEY
Seattle

JURY VETO OVER GOVERNMENT LAWS

■ Editor:

Was it a Celestine coincidence that Sherrie Bennett's story about her jury duty experience appeared in the same *Bar News* issue (May 1998) as William Kirby's letter about the historic purpose of the jury? Ms. Bennett asked the sobering question which haunts all jurors at the time the verdict is delivered: "Have we considered everything?" Juries today are told to consider only the facts, but as Mr. Kirby has pointed out, many state constitutions of yesteryear explicitly stated that juries were to judge the *law* as well as the facts. And some state constitutions still do. For example, Article 23 of the Maryland constitution states:

> In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except

that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

This is the idea of jury nullification, that the people should have a veto over government laws when they serve on juries. Self-defense and the privilege of necessity are modern-day applications of this legitimate jury function.

While many state constitutions no longer explicitly authorize jury nullification, and some still do, the fact remains that the jury still has the power of the general verdict to decide the entire case. Moreover, a jury's verdict of acquittal is final, and the jury cannot be punished for its verdict. So "everything" cannot possibly be considered until the jury also considers the justness of the law, and even if the law is just in the abstract, whether applying that law in this particular case would lead to a just result.

The only time the citizen will ever vote on the application of a real law in real life is when he or she serves on a jury.

PATRICIA MICHL
Sumner

CULTURE OF DISBELIEF DISCOURSE, CONTINUED . . .

■ Editor:

As much as Steve Burtchaell (May 1998) would like *Bar News* readers to believe otherwise, my review of Stephen Carter's *The Culture of Disbelief* did not argue that religion should be the only source of moral authority for those who would govern. Rather, I sought only to echo Carter's own concern that contemporary jurisprudence errs when it takes religion out of the equation altogether.

Mr. Burtchaell drags out the tired old argument that because religious belief has historically been used as a motive for unspeakable abuses of power, it should not be trusted as a moral authority. By that rationale, neither should we trust philosophy, psychology, literature, music, art, science, economics or history itself. No field of human exploration, learning and conviction is exempt from abuse by the unscrupulous or the misguided.

Mr. Burtchaell asks us to contemplate the horror behind such words as "Crusade. Jihad. Inquisition. Pogrom. Holocaust." (Strange; I always thought of the Pogroms and the Holocaust as outrages *against* religion, not excesses *of* religion.) But for every Torquemada or Bloody Mary Mr. Burtchaell can point to, I can show him a Mohandas Gandhi, a Martin Luther King or a Desmond Tutu, for whom religious authority generated only the most beneficial political and historical consequences.

ROBERT C. CUMBOW
BELLEVUE

■ Editor:

Steve Burtchaell makes what he calls a "short putt" and compares me with the perpetrators of the Holocaust. He vilifies me for reminding him in the March *Bar News* that our government was founded by a society steeped in a religious tradition. My evidence included the reference in the Declaration of Independence to God as the source of our rights to "Life, Liberty and the pursuit of Happiness" and the statement in the Constitution that its purpose is to "secure the blessings of liberty." I did not even mention that our coin of the realm carries the inscription "In God We Trust" or that the pledge of

allegiance ends with the words "one nation under God."

He states that it is evil to endorse religion as the wellspring of morality. The Declaration of Independence, however, states that our rights, including the rights to life, liberty and the pursuit of happiness, are granted to us by God. With this language, the drafters of the Declaration of Independence invoked God as their authority for revolting against the tyranny of King George. Certainly this is not the type of evil Mr. Burtchaell fears.

He cites the usual list of horrors over the last millennium for his proof that everything done in the name of God is not good. While we can all agree with that premise, the list does not prove that all religion is evil nor that all religion inevitably leads to evil.

Mr. Burtchaell does not deal with several other incidents of more recent note. For instance, the Soviet Union, communist China, Hitler and Pol Pot are responsible for more than one hundred million (100,000,000) documented murders during this century. These regimes were all atheistic tyrannies. One thing these tyrannies had in common was that they made a religion of their respective regimes. Perhaps this is the evil Mr. Burtchaell fears.

If we are to continue as a democratic society it is imperative that we continue to debate issues of public policy. It chills that debate to vilify those who participate, if only to remind us of our history. Unlike atheistic tyrannies, in order to remain a democracy, we must be tolerant even of those with diverse ideas.

JAMES RIGBY
Seattle

MORE LETOURNEAU

■ Editor:

I laughed out loud at the end of Tom Stahl's June letter regarding Ms. LeTourneau. Heck, why should they even wait until the boy turns 16 before they marry and raise their family? It can't be because that's the law, since our oppressive regulation of intergenerational love and sex is what Mr. Stahl is complaining about in the first place. Sounds like any time's the right time for true love, doesn't it?

Having prosecuted sex crimes for almost 10 years, I've watched many kids go from getting screwed to being screwed up, all at the hands of some "loving" adult. Male or female, the 12- and 13-year-olds get "courted" by the thirtysomethings, who in turn get "courted" by the killjoy State of Washington. It may be about their genitals, but it's the kids' brains that get scrambled up.

I'm not sure what "traditional American values" Mr. Stahl is referring to, but if he thinks ramming our kids into adulthood and parenthood for our own sexual pleasure is one of them, no thanks.

LeTourneau is an opportunistic crook just like any other. She's where she belongs. Mr. Stahl, there is a difference between living free and being free to have sex with kids. Maybe it's a distinction too subtle for you to make. Luckily, most jurors seem to grasp it.

MARK K. ROE
Everett

PUBLIC PERCEPTION OF LAWYERS JUSTIFIED

■ Editor:

Dr. Christian Harris makes valid criticism of the ethics review procedure for lawyers in this state in the June *Bar News*. As one of his examples, Dr. Harris described how nothing happened to a lawyer who lied in open court. The Bar would do well to heed Dr. Harris' suggestion of "adding a bit more of a draconian sting to [the WSBA's] window-dressing operation regarding professionals' ethics."

It only takes a couple of rotten apples to make the whole barrel stink. As long as dishonest and incompetent lawyers are allowed to remain in our ranks, the public perception of our profession shall remain the same.

Discipline for violating certain Rules of Professional Conduct (RPCs) does not seem to be forthcoming very frequently. Specifically, RPC 3.3 requires candor toward the tribunal. The rule prohibits false statements of fact or law, false evidence, and failure to disclose controlling legal authority adverse to the lawyer's position. Some firms actually reward lawyers for this type of conduct. Dishonesty in statements made to others or in discovery tactics is prohibited by RPC 3.4, 4.1 and 8.4. As Dr. Harris suggests, lawyers do not seem to be disciplined for dishonesty to other lawyers, witnesses or the court.

It has been said that there is usually a grain of truth in jest. We can expect lawyer jokes to get increasingly bitter until we do a better job of policing our own ranks.

JOHN MERRIAM
Seattle

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.

Mary Fairhurst
President

This Sunny Sunday

Think of opportunities that present themselves only once – and seize them.

Sitting in my office on a sunny Sunday, receiving e-mails from attorneys sitting in *their* offices on this sunny Sunday, I am reminded that we have to make time to take care of ourselves and have fun doing the things we love. It is easy to forget and, if we're not careful, another season will have zoomed by. The years seem to go faster every year.

When you read this column, we will be half way through our summer months. The courts will be getting ready to take their August break. The days will still be long and, we hope, sunny. Have you set aside some time this year to take a break? Do you, as part of your regular routine, take care of yourself? What are you doing to keep yourself healthy and happy?

It is easy to forget ourselves because we are so busy taking care of others — our clients, our families, our friends. As lawyers we take on many responsibilities, and we must meet those responsibilities. We have many deadlines and we have to meet those deadlines. There is a lot of pressure on us day in and day out to meet all the demands of work and home. But if we don't take care of ourselves, we won't be able to fulfill our roles as stewards of justice.

Remember, we are human. We have to recharge our batteries. We should strive to have balance in our life. There is a lot to be said for a good laugh and a good cry, in remembering what you love to do and doing it, for not putting off until tomorrow some of the fun you can be having today.

Each of us has different ways of taking a time out for ourselves. For some, it may be playing the piano; for others a tough game of racquetball; some would take a week at the beach doing nothing; others might climb mountains; some would explore museums. It's not what we do that matters, and there is no one answer. What is important, I think, is that we remember to pause and think of what we love and take time to do it.

I am reminded of the poem "When I am an old woman, I will wear purple." Think of what you would do when you are old, and do it now. Think of opportunities that present themselves only once — and seize them.

Right now, I am headed out the door to watch my niece in the finals of her fastpitch softball tournament, on this sunny Sunday.

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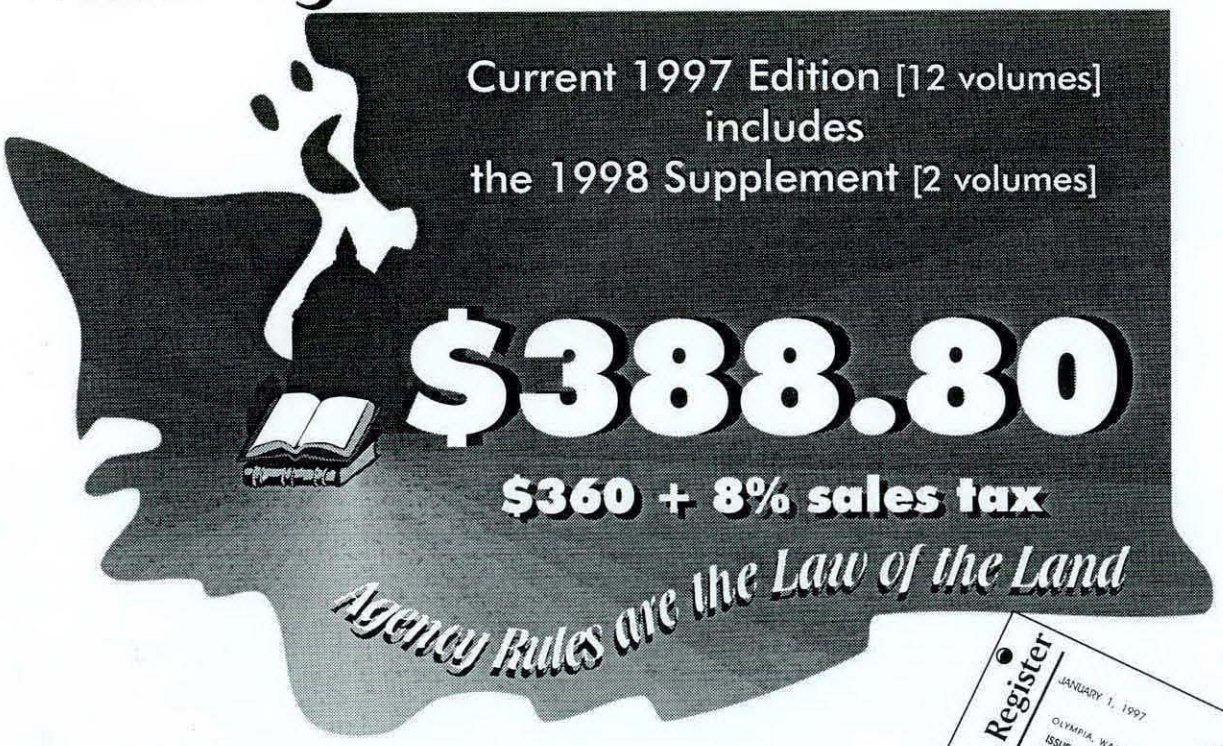

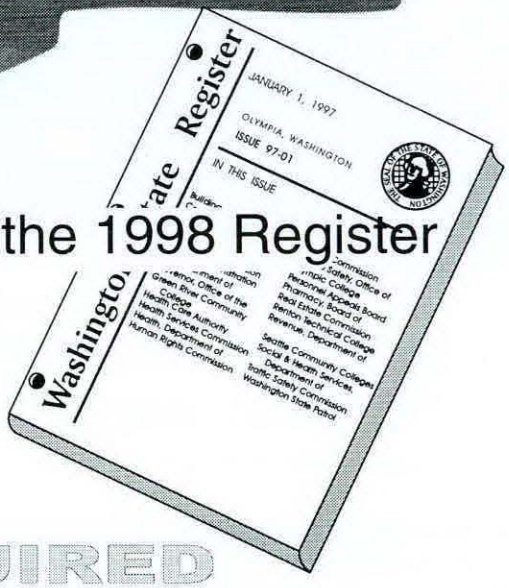

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EXECUTIVE'S REPORT

Jan Michels
Executive Director

BAR LEADERS, BOARDS, COMMITTEES, PANELS, SECTIONS, YLD, MEMBERS...

THE WORLD OF "*C...*" WORDS

This is my month to report on what I see outside the WSBA office: I'm leading up to my ambitious goal of "synthesis" in next month's column. My first observation about the constituencies outside the WSBA office is that it is a complex landscape. No graphic can depict it; no diagram can describe it. I'll navigate this landscape as I see it with *"co...," "com..."* and *"con..."* words, but most dominant is the word *commitment*.

With the blessed or cursed "person from Mars" perspective, I have met and talked with representatives of the various groups supporting the practice of law and the legal profession in Washington. Whether division, board, section, committee, local and specialty bar, or member, most persons with whom I've visited acknowledge the convolutions of the guiding structures but are quick to also express the common *"co..."* words of cooperation, consensus and collegiality about their focus and support of the Washington State Bar. This co-exists with the dynamic tension of *"con..."* words like conflict, control, controversy and contention. While sections work to define and refine substantive law, they may not always agree with one another about what constitutes complementary and competing interests. While Boards were created to broaden participation and scope in major initiatives, tasks or trends, there may be conflict among their priorities and the role of the WSBA to balance all interests. Committees have been created by the WSBA Board of Governors to explore issues, oversee projects or tasks, and/or advise the BOG, but committee advice may not reconcile with that of sections and boards. It takes all these constituencies to coalesce ideas and interests into "best practices" and action plans. But even the best ideas can be confounded without the grass-root support of bar leaders and members. This complex architecture is hard to support. My overwhelming observation is that this environment depends on constant communication and consideration of broadly collected facts to stay modern and responsive.

On the other hand, everywhere I look and listen I hear the powerful *"co..."* words of commitment and consensus about the basic mission of the profession — service to the public and the profession. This common theme is a "hot" message when carried by the 23,000 members licensed to practice law in Washington!

What I've learned in working in this setting is to respect issues-in-process; to allow the *"co..."* and *"con..."* words to seek their balance; and to inform discussions wherever staff, history or research can serve to illuminate. Seen as a process, this configuration is vital and inclusive, if perhaps a little overbuilt. The job of the Executive Director and WSBA staff is to represent, enliven and promote the "commitment" and "service" messages while supporting the decision and action process.

I'll close with my usual messages: "Tell us how we're doing" and "How can we be better?"

Communicate with me at *janm@wsba.org*

POST-*BOLDT:*

Tribal Rights to Harvest Shellfish

BY PHIL KATZEN & RIYAZ KANJI

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purposes of curing, . . . : *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens . . . .
>
> Article III, Treaty of Medicine Creek, 10 Stat. 1132, December 26, 1854.

Based on the above treaty language, on January 28, 1998, the Ninth Circuit Court of Appeals upheld the rights of 20 western Washington Indian tribes to harvest shellfish free from State regulation.[1] In the latest installment of the continuing saga of *United States v. Washington*, colloquially known as "the Boldt decision," the Court held that tribes are entitled to take up to 50 percent of the harvestable amount of all species of shellfish found in the tribes' "usual and accustomed grounds and stations." The decision applies to all types of shellfish found on tidelands, including clams, cockles, oysters and mussels, and it applies on private as well as publicly owned tidelands. The decision also applies to shellfish found in subtidal or deep-water areas, including geoduck, crab, shrimp, sea urchins, sea cucumbers, octopus, scallops and squid.

The Court held that:

- Tribes are not limited to taking only those shellfish that existed here and were used by the tribes at treaty times — the right of taking fish reserves to the tribes the right to engage in the activity of fishing and is not limited as to species.[2]
- The tribes are not limited to taking shellfish only by those means used at treaty times — they may take advantage of modern fishing technology and new markets that did not exist in 1854.[3]
- The tribes are not limited to taking shellfish only from public tidelands or waters — they may go onto tidelands that were sold by the State to private owners long after the treaties were signed.[4]
- On properties owned or leased by commercial shellfish growers, tribes are not prohibited from taking shellfish from natural beds that have been enhanced by the growers; growers may exclude tribes only from those beds they have entirely created by their own labor where no natural bed existed.[5]

The Court held that these conclusions flow from the plain language of the treaties and the understandings of both the tribes and the United States at the treaty negotiations.[6]

HISTORICAL BACKGROUND

For at least 3,000 years, Indian people of western Washington have been fishing people. At treaty time they exploited virtually every aquatic animal in their environment, including more than 100 species of shellfish. There were no limits on their rights to take any shellfish they desired. They used shellfish as a staple of their diet, in trade with Indians and non-Indians, as bait for other important fisheries, as tools and medicines, and for myriad other purposes. As shellfish were always accessible, they could prove the difference between starvation and survival in times of salmon shortages. All members of the society, including persons too young, too old or too infirm to engage in the much more physically demanding salmon fishing, could provide for at least part of their own subsistence by digging clams or taking oysters. By the time of the treaties, Indians also made use of plants and animals introduced by non-Indians and took advantage of new technology as it became available, and they sold shellfish and other fish to new markets occasioned by the arrival of settlers.

During the treaty negotiations, Indians insisted upon one overriding condition to their cession of millions of acres of lands: that they be allowed to continue their way of life as fishing people. Governor Isaac Stevens and the other United States treaty commissioners realized that making that promise was not only necessary to obtain the tribes' consent to the treaties, but also served the United States' interests in keeping down the cost of the treaties and in ensuring that Indians would continue to supply shellfish and other fish to settlers. The United States commissioners wrote assurances into the treaties, promising Indians that they would forever retain the "right of taking fish" at all their "usual

and accustomed grounds and stations." Nothing known to have occurred during the treaty negotiations suggested that the right of taking fish would be limited to particular species, methods or markets then available, although the tribes did agree to share their fisheries "in common with" citizens.

By 1854, there was a well-developed non-Indian shellfish industry along the Atlantic coast of the United States and the beginnings of a similar industry in Shoalwater (now Willapa) Bay in Washington Territory. Two elements of the shellfishing industry on the east coast had long been in conflict, leading to numerous court decisions and legislative enactments. On one side were the citizens who claimed a right to take shellfish (principally oysters at that time) from all natural beds or banks, regardless of the ownership of the tidelands, whose right to do so was repeatedly upheld by courts and legislatures up and down the east coast.[7]

On the other side of the conflict were persons seeking to cultivate oysters as their private property. Cultivators typically harvested oysters from natural beds in one location and moved them to other areas, either for storage until transport to market was available (a "staked" bed), or to grow to marketable size (a "cultivated" bed).[8]

Conflicts arose between the two groups when cultivators attempted to practice their industry by transplanting oysters onto existing natural beds and when members of the public attempted to harvest oysters that had been transplanted by cultivators. The result of this conflict was the establishment of rules that were uniform in their basic provisions, however much they might vary as to detail. Without exception at the time of the treaties, the right of the public to take from natural beds was protected against encroachment by cultivators.

The right of cultivators to the exclusive use of their oysters was not always recognized, however, leading to the failure of the oyster cultivation industry in many areas. Where legal protection was given to cultivators, the industry flourished. Such legal protection was, however, uniformly subject to two limitations: first, that any shellfish beds created by cultivators be placed where no natural bed existed; and second, that the cultivators mark the boundaries of their beds with stakes or other visible signs showing the extent of their exclusive area. If cultivators attempted to cultivate oysters where a natural bed existed, the public was allowed to take not only the natural oysters, but the commingled oysters planted by the cultivator. Thus, only the "artificial" beds created solely by the labor of the cultivator enjoyed legal protection.

These rules and practices were duplicated in Washington Territory, both before and after the treaties, and the United States Commissioners were personally familiar with them.[9] Thus, the United States commissioners understood that without specific legal protection for staked or cultivated beds, the public and Indians would exercise their rights to take whatever oysters they found, thus making a cultivation industry impossible. Accordingly, they wrote into the treaties a single exception to the tribes' right to take fish: "provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens." The language of the proviso was drawn directly from the treaty-time shellfish industry and carried with it the understanding prevalent in that industry. Hence, in using such language, the treaty commissioners knew that they were preserving tribes' rights to natural shellfish beds, thereby keeping their word that, under the treaties, the tribes would not be excluded from their ancient fisheries.[10]

For many decades after the treaties, the tribes continued to dominate the harvests of clams, oysters, crab and other shellfish. Over time, however, the native Olympia Oyster virtually disappeared from the beaches of Puget Sound, falling to less than one percent of its historic production, mostly as a result of pollution from pulp mills and overharvest. Pacific oysters were imported into Puget Sound to replace the native oysters and are now the dominant oyster species, but natural spawning of Pacific oysters in this area is limited. The native littleneck clam has not declined to the same extent as the native oyster, but manila clams, accidentally introduced with the Pacific oysters, have spread naturally throughout much of Puget Sound and have largely displaced the native littleneck clams. Manilas have comprised over 80 percent of the commercial clam production in recent years.[11] Meanwhile, the State sold the best naturally producing shellfish tidelands in Puget Sound and then enforced trespass and theft laws against tribal members attempting to exercise their treaty rights. Thus, before this litigation, tribal shellfisheries had declined to a tiny portion of the harvest in Washington.[12]

Cecelia Pell Bob roasting cockle clams on Squaxin Island, circa 1900

Course of the Litigation

After the historic 1974 decision upholding tribal treaty fishing rights to salmon and steelhead, Judge Boldt retained continuing jurisdiction to hear and determine issues relating to other species of fish.[13] The shellfish litigation was filed by the tribes in 1989 as part of that continuing jurisdiction. Before trial, numerous parties intervened as defendants, including three separate groups of private tideland

property owners and a group of commercial shellfish growers, and the United States joined the tribes as a plaintiff.

After extensive pretrial preparation, including the exchange of written direct testimony of 27 expert witnesses, Judge Edward Rafeedie heard evidence for 13 days in April 1994. In December of that year, he issued his first ruling, holding that tribes were entitled to take all species of shellfish to the same extent as all other fish, excepting only from artificial beds wholly created by non-Indians, and regardless of the ownership of the property on which the shellfish were found. He then ordered a second trial to resolve issues as to how the tribes' rights were to be implemented.

The second trial took place in May 1995, leading to the implementation decision in August of that year, which was later modified after motions for reconsideration.[14] A final judgment was issued in December 1995. The implementation decision set out a complex plan for implementing tribal shellfish rights, including numerous procedural requirements for tribes to follow in order to have access to privately owned tidelands and the properties of commercial growers. It also virtually eliminated all tribal rights to shellfish on existing commercial-grower properties by redefining the meaning of the treaty term "cultivated" for such properties only, so that natural beds on those properties were deemed "cultivated" if a grower engaged in any cultivation activities on them. The district court devised this definition to protect the growers from any hardship that might have resulted from implementation of the tribes' rights on their properties.[15]

Perhaps the most fundamental doctrine applied by the courts to claims of treaty fishing rights is the "reserved rights" doctrine. . . [which] holds that treaty fishing rights are pre-existing rights reserved by tribes, not grants of new rights by the United States.

The State and intervenor defendants all appealed the basic treaty right determinations made in the first decision. The tribes and the United States cross-appealed from numerous aspects of the implementation decision. After 1,200 pages of briefing, and a three-hour oral argument, Judge Trott wrote for a unanimous Ninth Circuit. The decision upheld Judge Rafeedie's first decision, thereby rejecting all of defendants' appeals. The Court also upheld time and manner conditions Judge Rafeedie had placed on tribal harvests from private property as part of the implementation decision, but reversed the redefinition of "cultivated" as well as several other aspects of the implementation decision appealed by the tribes and United States. Several implementation issues were remanded to the district court for a third trial. All parties have petitioned for rehearing as to some aspect of the Panel's decision, with the State and some property owners suggesting rehearing *en banc*.[16] The reasoning of the Court as to some of the principal issues is described below.

New Species of Shellfish, New Technologies and New Markets

Perhaps the most fundamental doctrine applied by the courts to claims of treaty fishing rights is the "reserved rights" doctrine, first articulated in *United States v. Winans*, 198 U.S. 371 (1905). That doctrine holds that treaty fishing rights are pre-existing rights reserved by tribes, not grants of new rights by the United States. The Ninth Circuit reading of the reserved rights doctrine begins with the fact that tribes were not limited to taking any particular species of fish before the treaties. Thus what tribes reserved was the right to take any species of fish. The Court found this interpretation consistent with the plain language of the treaties, which simply used the word "fish," a word that has "perhaps the widest sweep of any word the drafters could have chosen."[17] Thus, tribes are entitled to harvest newly introduced species that have replaced native shellfish as well as species that formerly may not have been considered valuable.

The Ninth Circuit applied the same reasoning to the State's claim, for example, that tribes could not use modern diving gear to harvest geoduck in deep water because they had not harvested geoduck

in such locations before the treaties. The Court noted that the treaties contain "no mention of any . . . technology-based restrictions on the Tribes' rights."[18] The Court further held that the "usual and accustomed grounds and stations" apply uniformly to where tribes may take fish; nothing in the treaty language or the negotiations suggests that separate usual and accustomed areas must be shown for each species of fish.[19]

Privately Owned Tidelands

The State and private property owners argued that the right to fish "in common with citizens" means that tribes could have access only to the same tidelands as the non-Indian public. The Court held that such an interpretation of "in common with" has been rejected many times by the Supreme Court, which has specifically upheld the tribes' rights to cross private property to exercise treaty fishing rights.[20] As early as 1905, the Supreme Court recognized that an interpretation limiting tribes' rights to those held by the non-Indian public would mean the tribes had reserved nothing by the treaties, while giving up their rights to millions of acres of land.[21]

The property owners further argued that those earlier fishing decisions applied only to free-swimming fish, such as salmon, not to clams or oysters embedded in or affixed to the soil of privately owned tidelands, which are the personal property of the tideland owner under State law. This argument was rejected, as well, because state law property concepts cannot override federal treaty rights.[22] As the district court also found, at treaty times shellfish embedded in tidelands were treated the same as free-swimming fish, and tidelands were used for stake netting

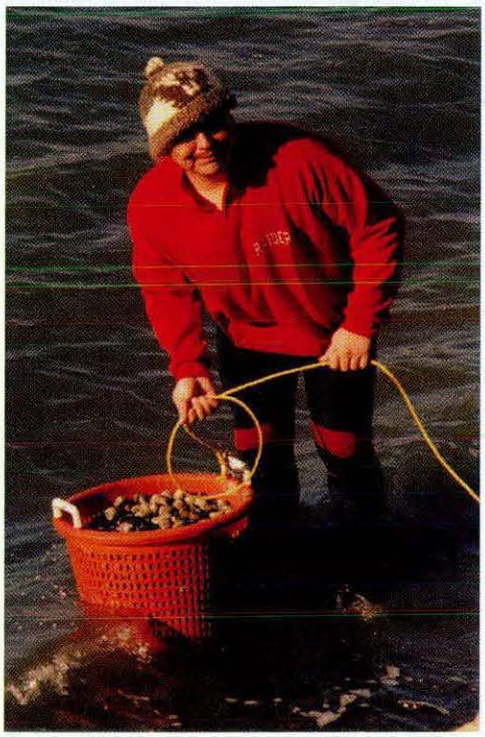
As early as 1905, the Supreme Court recognized that an interpretation limiting tribes' rights to those held by the non-Indian public would mean the tribes had reserved nothing by the treaties, while giving up their rights to millions of acres of land.

and other forms of salmon fishing, so there was no reason to distinguish between free-swimming and embedded shellfish.[23] Additionally, more than a decade after the State began selling its tidelands in Puget Sound, the 1907 Legislature passed a statute that would have given private tideland owners exclusive rights to shellfish beds on their tidelands, provided they complied with certain requirements. House Bill No. 373, Session of 1907. The Legislature's action shows that private tideland ownership was not considered to carry with it an automatic right to exclude the public from natural shellfish beds. Governor Albert Mead vetoed the bill, saying in his veto message, "Clams are fish. Fish are *ferae naturae*; therefore, wild animals." *House Journal* of The Eleventh Legislature at 106. He went on to explain that the bill had to be vetoed because it not only interfered with the historic rights of the public to take shellfish from natural beds, but also failed "to recognize the sacred provisions of treaty rights" unless an exemption were included for Indians who "were dependent upon their harvests from the clam beds for a livelihood." *Id.* at 109.

Finally, the property owners argued that all privately owned tidelands were *per se* "staked or cultivated" beds. The Court rejected this contention because, as described above, such was not the understanding of those terms at treaty times. The Court also noted that this interpretation would leave the tribes with little or no access to clams or oysters, thus frustrating the intent of the parties to the treaties to preserve the tribes' access to shellfish.[24]

Natural Beds on Commercial-Grower Properties

The commercial shellfish growers asserted that any shellfish bed that has been improved in any fashion by the actions of a grower is "cultivated" within the meaning of the treaty terms and, therefore, outside the scope of the tribes' harvest rights. Under that definition, all natural shellfish beds could become cultivated, thus leaving the tribes no natural beds from which to harvest. The Ninth Circuit rejected this interpretation for many of the same reasons it rejected the private property owners' arguments that all privately owned tidelands were "staked or cultivated."[25]



Balancing of Interests

The Ninth Circuit's decision does not mean that the tribes have the right to take shellfish wherever and whenever they want without regard for the interests of others. The Court upheld many of the time and manner restrictions imposed by the district court with respect to tribal harvesting from private property. For example, the tribes must give property owners ample notice of their intent to harvest; they must limit the number of tribal members who may harvest; they may generally harvest from any particular property for only five days out of the year; and their means of access to the tidelands is strictly limited.[26] The tribes must also limit their harvests to no more than 50 percent of the harvestable shellfish on each property owner's tidelands and abide by strict shellfish sanitation guidelines to protect human health.[27]

Conclusion

Tribes have been exercising their treaty shellfishing rights since the district court's final judgment in 1995. Tribes are now taking significant quantities of crab, shrimp, geoduck, sea urchins, clams and oysters. Thus, tribes have moved one step closer to fulfilling the promise of the treaties: they have access to nearly the full diversity of aquatic resources upon which their societies have always depended. As was true for centuries, shellfish are again playing a crucial role in sustaining Indian people.

Notes

[1] *United States v. Washington*, 135 F.3d 618 (9th Cir. 1998).
[2] *Id.*, 135 F.3d at 630-31.
[3] *Id.*, 135 F.3d at 631.
[4] *Id.*, 135 F.3d at 633-35.
[5] *Id.*, 135 F.3d at 635-36, 639-40.
[6] This article cannot cover all the issues and arguments raised in the appeal or before the trial court. It is only an overview of some of the more significant points addressed by the Ninth Circuit.
[7] *United States v. Washington*, 873 F.Supp. 1422, 1432-34 and n.12 (W.D.Wash. 1994).
[8] *United States v. Washington*, 135 F.3d at 627-28.
[9] *United States v. Washington*, 873 F.Supp. at 1433-34.
[10] *Id.*, 873 F.Supp. at 1435-36.
[11] *United States v. Washington*, 135 F.3d at 627.
[12] *Id.*
[13] *United States v. Washington*, 384 F.Supp. 312, 419 (W.D.Wash. 1974).
[14] *United States v. Washington*, 898 F.Supp. 1453 (W.D.Wash. 1995); *United States v. Washington*, 909 F.Supp. 787 (W.D.Wash. 1995).
[15] *United States v. Washington*, 898 F.Supp. at 1461-62.
[16] On May 7, 1998, the Ninth Circuit asked for responses to the rehearing petitions filed by the tribes and commercial shellfish growers. Those petitions raise only very narrow issues that do not affect the matters discussed in this article. No responses to the other petitions were requested.
[17] *United States v. Washington*, 135 F.3d at 631, quoting from the district court decision, 873 F.Supp. at 1430.
[18] *United States v. Washington*, 135 F.3d at 631.
[19] *Id.*, 135 F.3d at 631-32.
[20] *Id.*, 135 F.3d at 633-34.
[21] *United States v. Winans*, 198 U.S. at 380.
[22] *United States v. Washington*, 135 F.3d at 634-35.
[23] *United States v. Washington*, 873 F.Supp.

at 1439, 1444.

[24] *United States v. Washington*, 135 F.3d at 635-36.

[25] *Id.*

[26] *United States v. Washington*, 898 F.Supp. at 1472-73.

[27] *Id.* A detailed and comprehensive procedure for ensuring that tribal shellfisheries comply with national standards for shellfish health and sanitation was agreed to as part of a consent decree adopted by the district court.

Phil Katzen *is a staff attorney with the Native American Project of Columbia Legal Services in Seattle. He has represented Indian tribes in treaty fishing rights litigation since 1978. He argued the shellfish case before the Ninth Circuit for the tribes and he is co-lead counsel for the tribes in the shellfish litigation with Mason Morisset.*

Riyaz Kanji *is an attorney with Williams & Connolly in Washington, D.C. He represented tribes in the shellfish litigation in the Ninth Circuit pro bono. He also participated in the shellfish case in the district court for Columbia Legal Services on a Skadden Arps fellowship.*

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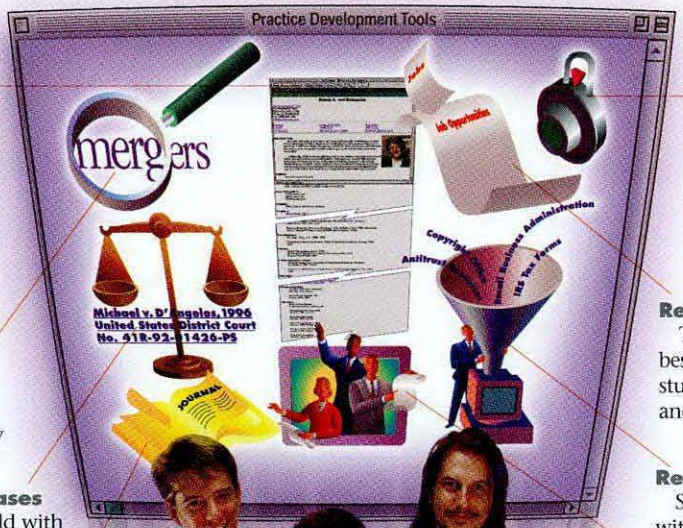

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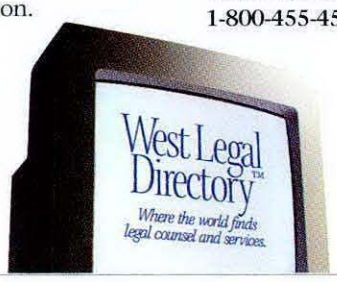

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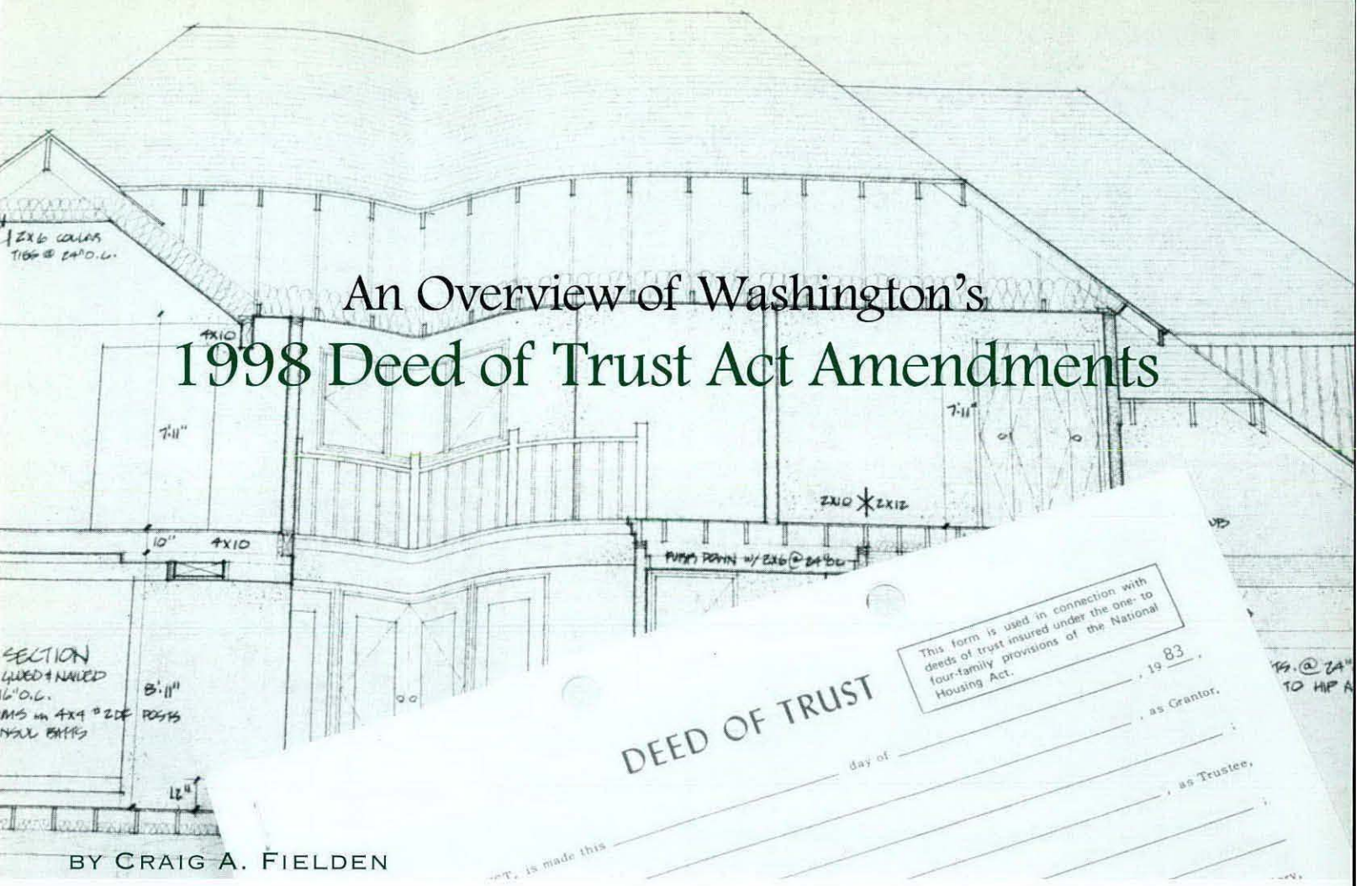


An Overview of Washington's 1998 Deed of Trust Act Amendments

BY CRAIG A. FIELDEN

On June 11, 1998, a set of comprehensive amendments to Washington's Deed of Trust Act, chapter 61.24 RCW (the Act), took effect. Although the Act has undergone minor revisions since its original enactment in 1965, the 1998 amendments are the first wholesale changes to the Act. The 1998 amendments revise 12 of the 14 sections of the prior Act, create four new sections, and modify RCW 7.28.300 (quieting title against a real property security lien) and RCW 7.60.020 (appointment of a receiver).

The new Act makes numerous substantive changes in the law of real property financing and nonjudicial foreclosures. In addition, the new Act contains several provisions which simply codify prior existing practices or clarify ambiguities under the old statute. This article provides only a thumbnail sketch of the most significant substantive changes and clarifications. The practitioner is advised to carefully review the amended Act in its entirety.

Anti-deficiency Provisions

Among the most notable of the 1998 amendments are the new Act's anti-deficiency provisions, i.e., the rules regarding the extent to which borrowers and guarantors are liable for a deficiency after a trustee's sale. A "deficiency" is that portion of the obligation secured by a deed of trust that remains unsatisfied if the proceeds realized at a trustee's sale are insufficient to retire the whole debt. These modifications were accomplished in part through new definitions. For example, the amended Act specifically distinguishes between a "borrower," "grantor" and "guarantor." In short, a guarantor cannot also be a borrower. Since the amended Act treats borrowers and guarantors differently with respect to their potential liability for a deficiency judgment, this distinction prevents a lender from requiring the same person to act in both capacities in an attempt to circumvent the statutory limitations on post-sale liability. The Act does not, however, prevent a guarantor from being a grantor under a deed of trust that is given to secure the borrower's note, provided the grantor is not also a borrower.

The definition of "guarantor" also requires a written guaranty of the debt separate from the deed of trust. This prevents a guaranty from arising inadvertently. For example, a borrower who transfers property that secures a recourse loan and who is not released by the lender may remain personally liable for the debt, even though the debt may be assumed by the transferee. The requirement of a written guaranty precludes this borrower from becoming a guarantor, which would otherwise cause the borrower to lose the anti-deficiency protections provided to borrowers under the new Act. Similarly, persons liable on a debt by reason of apparent or implied authority could also be considered guarantors if a written guaranty of the debt was not required. Also, under this new definition of guarantor, if a non-borrower grantor's deed of trust contains a payment covenant, the grantor is not automatically considered a guarantor for the purpose of determining the potential extent of the grantor's post-sale liability.

The majority of the changes to the anti-deficiency provisions of the Act are contained in the amended RCW 61.24.100. Under the prior version of that section, the borrower had no personal liability for a deficiency following a trustee's sale. Under the new Act, however, if the underlying obligation is a "commercial loan" (defined as a loan that is not made primarily for "personal, family or household purposes"), and the deed of trust does not encumber the borrower's principal residence on the date of the trustee's sale, a lender who purchases the property at such sale now has limited recourse against a borrower. Specifically, if and to the extent the "fair value" (another newly defined term) of the property as of the date of the trustee's sale is less than the amount of the debt, and regardless of the amount of the lender's bid, the lender may obtain a judgment against the borrower (a) for the wrongful retention of any rents, insurance proceeds or condemnation awards that are owed to the lender, and (b) to the extent such difference is caused by waste to the property committed by the borrower after the date the deed of trust is granted. Both of those provisions also apply to the deed of trust grantor (who may or may not be the borrower). In both cases, the liable party must have been given the statutory notices of the foreclosure, and the action must be brought within one year after the date of the trustee's sale, as opposed to the normal six-year statute of limitations. The one-year period is extended to the point that action is tolled by bankruptcy or any other debtor protection statute. In order to provide flexibility for settlements, the amended section states that an agreement by the borrower or grantor to extend the one-year period will be effective if it is in writing and entered into after the notice of foreclosure is given.

> A borrower who transfers property that secures a recourse loan and who is not released by the lender may remain personally liable for the debt....

The amended Act also provides that a trustee's sale under a deed of trust securing a commercial loan not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the "substantial equivalent" of that obligation, is not secured by the deed of trust. RCW 61.24.100(10). Thus, the parties may segregate liabilities into those that may be included in the lender's bid price and, therefore, recovered from the sale if the lender is outbid, and those that will survive a trustee's sale. For example, advances made by the lender prior to foreclosure to remediate a release of hazardous substances can be secured while the borrower's liabilities for contamination that is not discovered until after the lender owns the property are not. Because of the "substantially similar" qualification, however, the lender cannot both secure a specific obligation *and* require the borrower to execute an unsecured indemnification and cause that obligation to survive the sale.

The amended RCW 61.24.100 also clarifies the scope of a guarantor's liability for a post-sale deficiency, an issue which the Washington courts have declined to resolve. E.g., *Glenham v. Palzer*,

58 Wn. App. 294, 298 n.4, 792 P.2d 551 (1990); *Thompson v. Smith*, 58 Wn. App. 361, 367 n.4, 793 P.2d 449 (1990). Under the new Act, the guarantor of a commercial loan is liable for a deficiency judgment, but only if the guarantor was given the same statutory notices as are required to be given to the borrower and the action is brought within the limitations period applicable to the borrower and grantor. In any such action, the guarantor may plead the "fair value" of the property as a defense to some portion of or all of its liability. Under this defense, the guarantor's liability is equal to the debt as of the sale date, less the greater of the successful bid amount or the fair value of the property sold at the sale, plus interest on the amount of the deficiency from the sale date at the rate provided in the applicable loan documents, plus such costs, expenses and fees as are agreed to in the guaranty. If any other collateral for the same debt is sold prior to the entry of the deficiency judgment, the fair value of that property is added to the other fair values for the purpose of determining the extent of the guarantor's liability. This "fair value" defense avoids the inequities of a double recovery that would otherwise result from a successful bid that is significantly less than both the debt and the value of the property.

Finally, as long as the guarantor is not a borrower, the guaranty itself may be secured by a deed of trust. A trustee's sale under such a deed of trust extinguishes the liability of the guarantor under the guaranty to the same extent a borrower's liabilities are terminated by a trustee's sale. If the foreclosed property is the guarantor's principal residence, however, the guarantor has the first right to the sale proceeds in an amount equal to the homestead exemption, which, under RCW 6.13.030, is the lesser of $30,000 or the guarantor's equity in the property.

Other Remedies

Washington prohibits a "concurrent action" on the same debt in the context of a judicial or nonjudicial foreclosure. RCW 61.12.120, 61.24.030(4). A new subsection (2) to RCW 61.24.100 makes clear that by taking a deed of trust, a lender is not precluded from bringing another type of action prior to commencing a trustee's sale. In other words, Washington has no "security first" rule. In addition, if the other action has been concluded and any portion of the debt remains outstanding, the lender may thereafter judicially or nonjudicially foreclose a deed of trust. This should avoid concerns over whether a lender is precluded from obtaining a "pre-foreclosure deficiency" against the borrower because it may not seek a personal judgment after a trustee's sale is held. While these provisions were not previously codified, neither represents a departure from existing law.

Bankruptcy Concerns

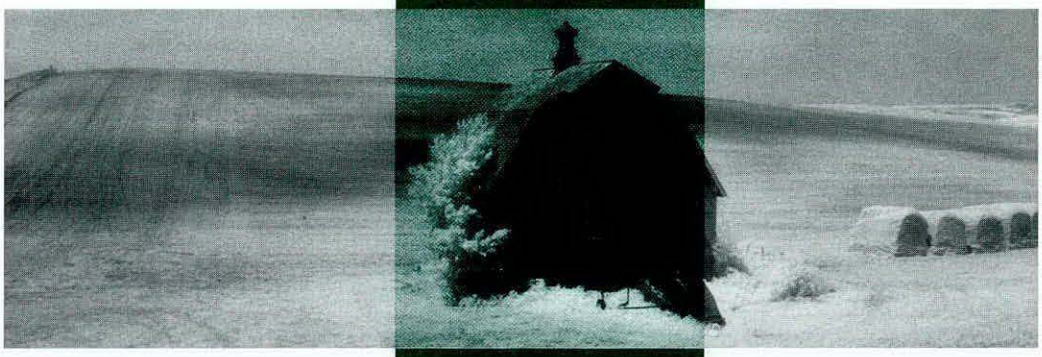
Another significant provision of the new Act attempts to circumvent a common bankruptcy problem by specifically defining the exact time when a trustee's sale is deemed "final." In Washington, the recording of a deed is required to complete the transfer of title to real property. As a result, between the time of a trustee's sale and the time the deed is recorded, legal title to the property re-

mains with the grantor while equitable title passes to the purchaser. Ordinarily, the separate legal and equitable titles to a foreclosed property are reunited upon recording of the trustee's deed, except in cases where a bona fide purchaser intervenes before the beneficial owner can perfect its legal title by recording the trustee's deed. Under *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979), these same race-notice principles apply in bankruptcy cases which involve Washington real property.

Where a bankruptcy is filed *after* the conclusion of a trustee's sale, but *before* the trustee's deed is recorded, four sections of the Bankruptcy Code — Sections 362(a), 541, 544(a)(3), 549(a) — operated to produce a result which is inconsistent with Washington's strict race-notice approach to legal title. These four sections of the Code combined to bring the foreclosed property into the bankruptcy estate, stay the recording of the trustee's deed, and permit the bankruptcy trustee to avoid the transfer of the debtor's equitable interest in the property. *See, e.g., In re Williams*, 124 B.R. 311 (Bankr. C.D. Cal. 1991); *In re Walker*, 861 F.2d 597 (9th Cir. 1988).

The amended RCW 61.24.050 attempts to avoid this result by providing that a trustee's sale is "final" as of the time and date the trustee accepts a bid, *provided* the trustee's deed is recorded within 15 days. This "relation back" approach follows a similar 1993 attempt by the California legislature to circumvent the same bankruptcy concern. California's relation back statute, Section 2924h(c) of the California Civil Code, has been tested and proven effective in at least two cases, *In re Engles*, 193 B.R. 23 (Bankr. S.D. Cal. 1996), and *In re Garner*, 208 B.R. 698 (Bankr. N.D. Cal. 1997). The California approach successfully avoids the automatic bankruptcy stay because Section 362(b)(3) of the Code excepts from the stay certain acts to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under Section 546(b) of the Code. Section 546(b), in turn, gives effect to state law provisions permitting retroactive perfection.

Washington law provides that the foreclosure of agricultural property must be accomplished judicially....



Exclusion of Agricultural Land

In order to provide farmers and other owners of agricultural property facing foreclosure the opportunity to harvest seasonal crops from their land, Washington law provides that the foreclosure of agricultural property must be accomplished judicially, thus allowing the landowner a longer foreclosure process as well as a one-year redemption period. To accomplish this result, the prior version of RCW 61.24.030 required that a deed of trust, as a prerequisite to being nonjudicially foreclosed, contain a statement that the secured property "is not used principally for agricultural or farming purposes." This language, however, left open several questions. Are "farming purposes" different from "agricultural purposes"? May a deed of trust be foreclosed nonjudicially if it contains the required statement but the land is actually used for agricultural purposes? And what happens if the use of the land changes after the execution of the deed of trust?

Under the amended RCW 61.24.030, a deed of trust must still contain a statement that the property is not used for agricultural purposes if it is to be foreclosed nonjudicially. The term "farming" has been eliminated due to its ambiguous meaning. In addition, the term "agricultural purposes" has been specifically defined as "an operation that produces crops, livestock, or aquatic goods." This definition is consistent with an approach used in other security contexts, most notably in

the proposed new Article 9 of the Uniform Commercial Code. *See* Draft Revision of Uniform Commercial Code Article 9 — Secured Transactions; Sales of Accounts and Chattel Paper, §§ 9-102(3), (23), (29); and 9-105(c).

The new statute also requires that, in addition to the *statement* that the encumbered property is not used for agricultural purposes, the property is not *in fact* so employed. To this end, the revised RCW 61.24.030 requires that if the statement is false as of *both* the date the deed of trust was granted *and* the date of the trustee's sale, the property must be foreclosed judicially. Thus, a nonjudicial foreclosure is allowed if the statement is true as of either of those two dates. This prohibits the grantor from changing non-agricultural property to an agricultural use in an attempt to circumvent the beneficiary's contractual right to foreclose nonjudicially. However, if the property was originally used for agricultural purposes but its use changes during the term of the deed of trust, the deed of trust may be amended to include the non-agricultural use statement, thus providing to the beneficiary the remedy of nonjudicial foreclosure.

Trustees and the Foreclosure Process

In 1981, the Act was amended to allow any "domestic corporation" to act as a trustee. Since that amendment, a number of out-of-state entities with no physical presence within the state have been incorporating in Washington for the sole purpose of acting as trustees in nonjudicial foreclosures. Unlike the other parties authorized to act as trustees under the Act (e.g., title companies insuring Washington property, Washington attorneys, certain regulated financial institutions, etc.), these out-of-state entities are essentially unregulated and may offer the grantor no in-state contact. This can be especially burdensome on the unrepresented homeowner who is unsophisticated in real estate matters and is facing a nonjudicial foreclosure. To rectify this problem, the modified RCW 61.24.010 requires that at least one officer of a domestic corporation trustee be a Washington resident. The amended RCW 61.24.030 also requires trustees to maintain a street address in Washington prior to the date of the notice of trustee's sale through the trustee's sale for purposes of personal service of process.

Another change concerns successor trustees. Under the prior RCW 61.24.010, the beneficiary could appoint a successor trustee at its discretion. Under the amendments to that section, any such appointment is deemed an automatic resignation of the predecessor trustee. This eliminates the previous requirement that the predecessor trustee resign, which simply complicated the process and increased the costs, particularly when the original trustee was difficult to locate.

The amended Act also makes several significant changes and numerous smaller changes to various aspects of the foreclosure process, including codifying the existing practice of allowing the beneficiary to "credit bid" the amount of its debt at the trustee's sale (RCW 61.24.070), creating specific procedures for the handling of surplus sales proceeds (RCW 61.24.080), and providing that certain

anti-competitive efforts to interfere with the bidding process at trustees' sales are violations of the Washington Consumer Protection Act (new section).

Personal Property

If a deed of trust with security agreement provisions encumbers both real and personal property, the trustee may foreclose on the personal property as part of the trustee's sale pursuant to the UCC. RCW 62A.9-50(4). The amendments to RCW 61.24.020 codify this existing practice in the Deed of Trust Act, as well, by explicitly authorizing the trustee to sell the grantor's interest in the personal property secured by the deed of trust. For consistency, the revised RCW 61.24.050 recognizes that the trustee's deed transfers all of the grantor's interest in both the real and personal property sold at the trustee's sale.

Other Amendments

The bill signed by Governor Locke also contains minor, technical amendments to two related statutes. First, a modified RCW 7.60.020 ensures that a deed of trust can be removed from record title if the debt that it secures is barred by the statutes of limitations. Second, a change to RCW 7.60.020 clarifies that a receiver may be appointed under an assignment of rents when the lender holds a deed of trust as opposed to a mortgage, and no showing of danger or injury to the property is required.

Practice Tips

The following is a non-comprehensive list of items that the practitioner should keep in mind in light of the new Act:

- Given the difference in potential liability after a trustee's sale, the parties should determine whether a given person or entity should be a borrower or a guarantor in a commercial loan.

- If the borrower and property owner in a commercial loan are different persons, the parties should consider whether or not the grantor should also execute a separate guaranty and whether or not the deed of trust should secure the note or the guaranty.

- Deed of trust language regarding the non-agricultural use of the property should be amended to comply with the new requirements.

- Non-recourse "carveouts" should include waste to the property and the borrower's wrongful retention of any rents, insurance proceeds or condemnation awards that are pledged to the lender.

- Although "waste," as used in this statute, refers to that term as defined at common law, a deed of trust might nevertheless specify without exclusion those acts or omissions that could be so characterized.

- Forms that include the statutory notices given for default, foreclosure and a trustee's sale should be modified to include the new requirements.

- Documents for commercial loans should state that the proceeds may not be used for personal, family or household purposes.

The lender should include in a deed of trust and guaranty the obligation of the

borrower, grantor and guarantor to pay the costs of any property appraisals that may be obtained in connection with a suit for a deficiency judgment.

• The lender should include in the guaranty an obligation to pay interest on the deficiency from the date of the trustee's sale and after any judgment is rendered until paid and the costs, expenses and expert witness and attorneys' fees it incurs in obtaining and collecting the judgment.

• The lender should consider excluding from the obligations secured by the deed of trust certain matters that are not likely to be discovered or expenses that are not likely to be incurred until after the foreclosure in order to preserve its rights to recover them against the borrower after a trustee's sale.

• A deed of trust or other instrument should include an assignment of rents, insurance proceeds and condemnation awards to the lender as part of the security for the loan and address how those funds are to be paid, held and applied.

• A repayment guaranty should include payment obligations that are in addition to principal and interest, such as those arising because of waste or the wrongful retention of rents, insurance proceeds or condemnation awards.

• Some of the typical qualifications to real estate security enforceability opinions should be revised in light of the clarifications provided by the amendment.

• Since the amendment requires the borrower — as well as the grantor — to receive the statutory notices of default, foreclosure and trustee's sale, and conditions a lender's rights to a deficiency judgment against a guarantor upon such person also being given those notices, the lender should ensure that the address of each of those parties is stated in the loan documents.

• The parties should address the extent to which the guarantor is to have a right to reimbursement against the borrower if the guarantor becomes subject to a deficiency judgment.

Craig A. Fielden *is an attorney with Stoel Rives LLP, where he practices primarily in the areas of real estate finance, development and leasing.* *He would like to thank* ***Gordon Tanner****, chair of the committee that drafted the 1998 Deed of Trust Act amendments, and* ***David Rockwell****, chair of the subcommittee that addressed post-foreclosure liability, for their help in the preparation of this article, and* ***David Levant*** *for his assistance with the bankruptcy portions of this article.*

Resolving Disputes Outside the Courthouse

"Then it's settled: decaf americano on Mondays and Wednesdays, double mocha on Tuesdays and Thursdays. On Fridays it's chai for everyone."

As part of National Law Day, May 1, U.S. Attorney General Janet Reno asked the states' attorneys general to join her in promoting dispute resolution programs that offer alternatives to expensive trials and ease the burdens on our court systems. Washington Attorney General Christine Gregoire prepared this article highlighting one of the state's successful dispute resolution programs.

BY CHRISTINE GREGOIRE
ATTORNEY GENERAL

Picture two angry high school students on the verge of a dangerous and explosive showdown. Now, picture the same two boys talking through and resolving their differences with the help of their peers and a trained mediator. This is not a fictional account. It is a true story with a happy ending, thanks to the peer mediation LASER program (Lawyers and Students Engaged in Resolution), in which lawyers, educators and students join forces to prevent youth violence in our middle and high schools. Students ready to come to blows can use peer mediation to avoid violence, and students suspended for violence can return to school, make amends and learn how to avoid violence to resolve future disputes.

As a result of programs like LASER, more young people are developing a growing appreciation of how their actions impact others. But if dispute resolution teaches kids how to solve their problems peacefully, then shouldn't this be a valuable lesson for the rest of this lawsuit-happy society?

National Law Day on May 1 provided us with an opportunity to celebrate and reflect upon the role of law in our society. In keeping with that tradition, I supported U.S. Attorney General Janet Reno's initiative to use Law Day to advance the cause of dispute resolution and the many beneficial ways programs like LASER serve our communities and our system of justice as a whole.

As an alternative to expensive and time-consuming litigation, there is no cookie-cutter approach to dispute resolution. Programs come in all shapes and sizes, but the common goal is to solve problems. In its purest form, isn't that the most basic obligation lawyers have to the people they represent?

It is time for all of us to look back to those days when the town lawyer helped to preserve civility, relationships and the spirit of community by attempting to help people settle their differences before filing suit and going to trial. Times have changed, but we should be working to recapture that informal approach by helping people create solutions that suit their unique needs and circumstances.

More often than not, dispute resolution is far more satisfying because it allows people to control how decisions are made, rather than giving control away to the judge or jury.

With the huge costs associated with litigation in money, time and energy, there are no winners. In one way or another we all lose. But dispute resolution, in whatever form it is used, preserves individual dignity, inspires creative solutions, and minimizes the burdens on our court systems.

As with all innovations, however, we should not take the gem of dispute resolution and exploit it into a highly formalized, expensive process. It should be used as soon as possible in a dispute, thereby avoiding and eliminating the need for excessive and expensive formal discovery. Keeping it simple is the key to success. We should not turn a good idea upside down by overthinking and overcomplicating the process.

Dispute resolution programs in Washington run the gamut from mediation to neutral evaluation to youth-violence conflict resolution in schools to conflict-prevention techniques incorporated into community policing. The list is as long as the creativity of the community.

Please join me in supporting these programs and making a commitment to get involved. For more information about dispute resolution services in your community, contact your courts, local community groups or the Attorney General's Dispute Resolution Coordinator, Mary Barrett, at 360-664-2475.

TRUST ACCOUNT OVERDRAFT NOTIFICATION AGREEMENT

BANK PARTICIPATION LIST

(May 28, 1998)

Pursuant to Rule 13.4 of the Rules for Lawyer Discipline and an amendment to RPC 1.14(a) (both effective March 1, 1991) lawyer trust accounts can be maintained only in financial institutions which are approved because they have filed with the Disciplinary Board an agreement to report to that Board in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored. Following is a list of all approved financial institutions as of May 28, 1998. Direct inquiries regarding the list to the Disciplinary Board, c/o Counsel to the Disciplinary Board, Washington State Bar Association, 2101 4th Avenue, 4th Floor, Seattle, WA 98121-2330, (206) 727-8280.

American First National Bank
American Marine Bank
American National Bank
Asia Europe Americas Bank
Baker Boyer Bank
Bank Northwest
Bank of Bellingham
Bank of California
Bank of Fairfield
Bank of Grays Harbor
Bank of Latah
Bank of Northshore
Bank of Pullman
Bank of Sumner
Bank of the Pacific
Bank of the West
Bank of Vancouver
Bank of Whitman
Bellingham National Bank
Cascade Community Bank
Cashmere Valley Bank
Centennial Bank
Central Washington Bank
Central Valley Bank, N.A.
Charter Bank
Citizens First Bank
Citibank
Coastal Community Bank
Columbia Bank
Columbia National Bank
Columbia Savings Bank, Federal Savings Bank
Columbia Trust Bank
Commerce Bank of Washington, N.A.
Commercial Bank of Everett
Community First Bank
Continental Savings Bank
Coulee Dam Federal Credit Union
Cowlitz Bank
Credit Union Puget Sound
Edmonds National Bank
Enterprise Bank of Bellevue, N.A.
Evergreen Bank
Farmers and Merchants Bank
Farmers State Bank
First Community Bank
First American State Bank
First Bank of Washington
First Savings Bank of Renton
First Federal Savings Bank of Washington
First Heritage Bank of Snohomish
First Independent Bank, Downtown Office
First National Bank of Port Orchard
First National Bank in Spokane
Frontier Bank/Branch Operations
Gesa Credit Union
Global Federal Credit Union
Grant National Bank
Great Northwest Bank, A Savings Bank
Great Western Bank
Harbor Bank
Heritage Bank
Harbor Community Bank
Home Security Bank
Horizon Bank
Horizon Credit Union
Industrial Credit Union
Inland Northwest Bank
Intalco Employees' Credit Union
InterWest Savings Bank
Islanders Bank
Issaquah Bank
Key Bank of Puget Sound
Key Bank of Washington
King County Medical Society Credit Union
Kitsap Bank
Kittitas Valley Bank
Klickitat Valley Bank
Metropolitan Federal Savings and Loan Association of Seattle
Mid State Bank
Mt. Rainier National Bank
National Bank of Bremerton
National Bank of Tukwila
North Cascades National Bank
North Pacific Bank
North Sound Bank
Northwest Community Bank
Northwest National Bank
Northwestern National Bank
O Bee Credit Union
Olympia Credit Union
Olympic Savings Bank

Continued on next page

Pacific First Bank, FSB
Pacific Northwest Bank
Pacific One Bank
Pend Oreille Bank
Peoples State Bank
Pioneer National Bank
Pioneer Savings Bank
Prairie Security Bank
Prime Pacific Bank, N.A.
Public Employees Credit Union
Puget Sound Bank
Puyallup Valley Bank
Redmond National Bank
Riverview Savings Bank
San Juan County Bank
Seattle-First National Bank
Security Pacific Bank Washington, N.A.
Security State Bank
Silverdale State Bank
Skagit State Bank
Snocope Federal Credit Union
Social and Health Services Federal Credit Union
Union Sound Banking Company
Sound Savings and Loan Association
Spokane Catholic Credit Union
Spokane Police Credit Union
Spokane Postal Credit Union
Spokane Teachers Credit Union
State National Bank of Garfield
Sterling Savings Association
Summit Savings Bank
Timberland Savings Bank
Towne Bank of Woodinville
Twin County Credit Union
Twin Harbors Credit Union
U.S. Bank of Washington
United Health Services Credit Union
United Savings and Loan Bank
United Security Bank
Valley Commercial Bank
Valley Community Bank
Viking Community Bank
Washington Federal Savings and Loan Association
Washington First International Bank
Washington Mutual Savings Bank
Washington State Bank
Washington State Bar Association Credit Union
Washington Trust Bank
Wells Fargo Bank
Whatcom State Bank
Wheatland Bank, The
Whidbey Island Bank
Yakima Valley Bank

This list of approved banks also appears in the online edition of the Bar News at:

www.wsba.org

The online edition also includes a table of maximum allowable interest rate (usury rate), monthly 1987-date.

The Board's Work

BY SHERRIE BENNETT
BAR NEWS EDITOR

Leavenworth was the site of the Board of Governors' meeting over June 13th and 14th, 1998. While the setting was serene, the Board accomplished much on issues that have been shadowing the group for some time.

"Stake Driven Through The Heart" Of Mandatory Fee Arbitration

In a stunning and unexpected development, the Board "drove a stake through the heart" (to quote Governor Whitson) of mandatory fee arbitration. After thanking the governors who had worked long and hard to craft an acceptable rule, a majority of the Board voted to permanently cease considering mandatory fee arbitration as a potential reality. President Fairhurst pointed out that the voluntary fee mediation program would still be available for those members wishing to make use of it. The decision to deep-six mandatory fee arbitration appeared to stem from the arrival of anti-arbitration resolutions on the scene. Several governors also commented that negative feedback from members had influenced their votes.

Civil Equal Justice Legislative Package

After a report from the Pro Bono/Legal Aid Committee (presented by Jim Bamberger and Gail Smith), the Board adopted a resolution declaring the availability of civil equal justice services to be a chronic problem which has now reached crisis proportions, and proposed a $10 million increase in appropriation for state civil equal justice activities for the 1999-2001 biennium.

The Board also approved (in concept, with finalization expected to come at the July Board meeting), the following proposals to secure the needed new revenue:

- adding a new statute creating a civil equal justice revolving fund in the department of community, trade and economic development;
- amending RCW 36.18.020 to increase superior court filing fees by $30, from $110 to $140, with the state's share of the increased revenue to go to the civil equal justice revolving fund;
- amending RCW 27.24.070 to increase the base amount of the county law libraries' allocation of the filing fee from $12 to $17, and the maximum amount from $15 to $20 ($22 for libraries with more than one site);
- adding a new section to RCW 36.18.020 to establish a superior court answer fee of $45 per filing (designating $5 of each filing fee for county law libraries), with the state's share of the new revenue to go to the civil equal justice revolving fund;
- including in the legislative package calling for increases in filing fees for superior court sufficient non-supplantation language to ensure that the counties' share of increased funds is exclusively dedicated for local civil equal justice administration activities and not siphoned off for other local governmental purposes;
- adding a new section to RCW 3.62 establishing a civil equal justice surcharge of $14 on district court civil filings (raising the fee from $31 to $45), with $10 of this surcharge to be transferred to the civil equal justice revolving fund;
- new civil rules establishing a uniform system for determining indigency and procedures for the waiver of filing and answer fees in accordance with Pro Bono/Legal Aid Committee's recommendations.

In the process of coming to an in-concept approval of these funding mechanisms, many of the governors cited examples and statistics from their own districts as proof of the perceived crisis dimensions of the access to justice problems. Governor Nielsen stood as the lone governor who felt the presented report did not substantiate the existence of a problem of crisis proportions. Governor Nielsen then quite eloquently stated that, while lawyers were created by the legal system and not the other way around, that we all had a responsibility as human beings (rather than simply as lawyers) to address this problem. He urged the board to be "intellectually honest" in making sure that there was a solid long-range plan in place, rather than simply letting access to justice issues "run away with us" for a short time.

New President-Elect

The Board elected Richard C. Eymann of Spokane as the new President-elect for the 1998-1999 Board year, to become President of the Board for a one-year term beginning September 1999. Eymann is currently the Governor from the Fifth District. When he becomes President-elect, the vacancy in his Board position will be filled by an appointment by the Board of Governors pursuant to the WSBA bylaws.

Court Rules And Procedures Committee Report

After reviewing an extensive report by the Court Rules and Procedures Committee presented by John Monter, the Board approved proposed amendments to CrR 4.2 (guilty plea form),GR 19, CrR3.4 and CrRLJ 3.4 (regarding videoconferencing), and RALJ 4.3 (stay of sentence pending appeal) and approved a proposed new GR 11.3 and GR 21 (regarding the Americans With Disabilities Act and the court system).

Annual Awards Recipients Selected

The Board selected the following recipients for awards to be given at the September annual meeting: **Lewis Orland** (Lifetime Achievement Award); Judge **John Schultheis** and Judge **Dean Morgan** (Outstanding Judge awards); **Franklin/Benton County Volunteer Lawyer Program** and **Scott A. Smith** (Pro Bono awards); **Julian C. (Pete) Dewell** (Award of Merit); **Jack Rosenow** (Award for Professionalism); **Joseph E. Shorin** (Angelo Petruss Award for Lawyers in Public Service); **King County**

Prosecutor's Office (Affirmative Action Award) and **Charity Louise Junko (June) Gerard** and **A. Stephen Anderson** (Courageous Awards).

NEW APPOINTMENTS

The Board has appointed Pat Aylward and Ellen Dial as the new co-chairs of the BAR-PAC committee. They will develop short- and long-range plans to reactivate BAR-PAC. The Board also reappointed Scott Miller to a third term as WSBA delegate to the American Bar Association, and reappointed Catherine Smith to the Office of Public Defense Advisory Committee. The Board also appointed Mary Wechsler to the Board for Trial Court Education and John Murphy to the Washington Pattern Jury Instructions Committee.

THE SAAB IS SOLD

Governor Crossland reported that the Board has now sold the Saab vehicle previously acquired to fulfill the compensation package negotiated for by former executive director Dennis Harwick. Governor Crossland also presented a proposed 1998-1999 budget in draft form.

For other recent news, including the results of the Board of Governors elections, see FYI beginning on page 37.

MARK YOUR CALENDAR:

WSBA Annual Business Meeting

Friday, September 11
at the WSBA Offices
2101 Fourth Avenue, Fourth Floor, Seattle

Changing Venues

'Tis The Season For Honors And Awards

The Spokane County Bar Association's Volunteer Lawyers Program has honored the following law firms and lawyers: "Large firm of the year" **Feltman, Gebhardt, Eymann & Jones**; "Small firm of the year" **Jordan & Ronnestad**; "Attorney of the Year" **Joe Shogan**; "Government Attorney of the Year" **Larry Briney**; "Family Law Attorney of the Year" **Uche Umuolo**; and "Young Lawyer of the Year" **Mary Chavez**. Other award recipients are **Lisette Carter** ("Marathon Hours in a Single Case"); **Gene Hamilton** ("Advice Clinic Attorney of the Year"); **Esposito, Tombari, George, Topliff & Campbell** ("Bankruptcy Firm of the Year"); and **Tobin Carlson** ("Government Attorney Rookie of the Year").

Nancy Pacharzina, from the Seattle firm of Heller Ehrman White & McAuliffe, has been awarded the Washington State Bar Association's Young Lawyers Division Thomas Neville Pro Bono Award for her work advocating for farm workers.

George W. Martin, Jr., a partner with Seattle's Hillis, Clark, Martin & Peterson, P.S., was recently elected to the board of directors of Commercial Law Affiliates, the world's largest affiliation of independent business and commercial law firms.

Hugh Spitzer, an attorney with Foster Pepper & Shefelman PLLC, has received the *Washington Law Review* Outstanding Alumnus Achievement Award on the basis of his distinguished service to both the legal community and the public at large.

The Pierce County Bar Association's Young Lawyers Division has presented Washington Supreme Court Justice **Richard B. Sanders** with its annual "Liberty Bell" award for his work in promoting a better understanding of the law.

The King County Bar Association has elected the following new officers and members of the Board of Trustees: **Linda J. Strout**, President; **Lucy P. Isaki**, First Vice-President; **Frederick L. Noland**, Second Vice-President; and **Catherine D. Shaffer**, Secretary. **Kenneth Hart** continues in the second year of a two-year term as Treasurer. New Central District trustees include **Jeffrey A. Beaver**, **Ronald S. Bemis** and **Raymond C. McFarland**. East District Trustee will be **Allen R. Sakai**.

Charles Bates has been appointed to a six-year term on the Bellevue Civil Service Commission. He is the director of field human resources for Paccar Automotive, Inc.

William H. Song, a partner in the Seattle firm of Davies, Roberts & Reid, was appointed by President Clinton as a White House delegate to the first National Summit on Retirement Savings Policy in Washington D.C., co-hosted by the White House and Congressional leadership.

The Reed McClure law firm recently honored **William (Bill) Hickman** for 30 years of dedicated service. Hickman has edited the award-winning *Washington Insurance Law Letter* since 1975 and has also been a columnist for *Insurance Week* and the *Washington Journal*.

The Washington State Association of Municipal Attorneys has elected the following officers: **Greg A. Rubstello**, President; **Richard N. Little, Jr.**, First Vice President; **Laurie Flinn Connelly**, Second Vice President. Board members include **Daniel B. Heid** (immediate past president), **Paul E. Sullivan**, **Judith Zeider**, **David E. Kahn**, **Michael D. "Mick" Howe**, **Robin Jenkinson**, **Michael J. Finkle** and **Patrick W. Mason**.

$500,000 Gift at Seattle University

Friends of **Ron Peterson**, who first posed the idea of a School of Law at Seattle University, have donated $500,000 to name the Law Practice Clinic in the new School of Law building in his memory. Peterson died in March.

Joinders and Partnering Continue

Miller Nash LLP is pleased to welcome **John R. Christiansen**, **Brian W. Esler** and **Elizabeth R. Holohan** to the firm.

Gary Ikeda, formerly vice president and chief legal counsel for Kaiser/Group Health, has been named Deputy Attorney General for the Attorney General of Washington.

Seattle attorneys **Earl Sutherland** and **Bradley Grisham** have been named to Reed McClure's Executive Committee. **Ross Jacobson**, **Greg Montgomery** and **Gail Stargardter** have become shareholders in the firm.

Spokane attorney **Patrick K. Stiley** has graciously allowed **Derek Madel** and **Frank L. Cikutovich** to join him in the newly formed Stiley, Madel & Cikutovich, PLLC.

New associates at the Seattle offices of Preston Gates & Ellis LLP include **Carrie A. Cook**, **Hilary Buckley Domeika** and **Christopher Cunningham**.

Sandra Gallagher has been named to head Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, PLLC's financial institutions practice. Gallagher will replace her father, **J. James Gallagher**, who is leaving the firm to accept an appointment as Vice Chairman and member of the Board of Columbia Banking System, Inc.

Mark C. Griffin has joined the law firm of Graham & Dunn P.C. as an associate.

Thomas R. Chapman has become associated with the Spokane firm of Evans, Craven & Lackie, P.S.

Larry E. Halvorson and **Michael B. Saunders** have combined their practices to form the new Seattle firm named, oddly enough, Halvorson & Saunders, PLLC.

New non-voting shareholders at Lee, Smart, Cook, Martin & Patterson, P.S. include **Kathleen Cochran** and **Greg Turner**. **Craig L. McIvor** has joined the firm.

Eugene I. Annis has been elected Managing Partner at Lukins & Annis, P.S. in Spokane. **Bryce J. Wilcox** has become a principal with the firm, and **Thomas M. Culbertson** has joined the firm. Additional attorneys joining Lukins and Annis include **Sean L. Anderson**, **Darin C. Davidson**, **Dwayne C. Fowles** and **Suzanne R. Seburn**.

State Bar Highlights

Much Ado About Bar Elections, Awards and Annual Meeting

Four new Governors will take their seats at the WSBA Board of Governors table beginning in September. Three were unopposed, while one district had two candidates.

Lindsay T. Thompson won the Seventh Congressional District race with 778 votes to Anthony L. Butler's 600 votes. Ballots were counted at the Bar offices on June 10. Almost 20 percent of the approximately 6,900 members of the Seventh District returned their ballots.

Thompson is a former editor of the *Bar News* where he covered the Board of Governors for eight years. He also was a contributing editor to *Trial News* in 1995-96 and is a current writer for *Washington Law & Politics*. He is a shareholder in Junker & Thompson, P.C., in Seattle, where he practices customs and international trade law, civil trials and appeals, and business and commercial law.

Running unopposed were **James E. Deno** in the Second District, **Stephen T. Osborne** in the Fourth District and **Daryl L. Graves** in the Ninth District.

Deno has a general practice in Everett, where he has practiced since 1969. He has represented both plaintiffs and defendants in personal injury cases, trying numerous cases in Snohomish, Skagit and Whatcom counties. He has served in various positions with the Snohomish County Bar Association and was president in 1988-89.

Osborne has been a member of the Judge Advocate General's Corps since 1977 and was a founding partner of the firm of Raekes, Rettig & Osborne. A member of the U.S. Army Reserve for 29 years, he was called to active duty during Operation Desert Storm, where he served as Officer in Charge of the legal office at King Khalid Military City in Saudi Arabia.

Graves is a partner in the Tacoma firm of Graves & Treyz, PLLC. His practice emphasizes plaintiffs' personal injury, medical and dental negligence and criminal defense. He has been Secretary-Treasurer and President of the Tacoma-Pierce County Bar Association, and is a former adjunct professor of law at the University of Puget Sound School of Law.

The new Governors will assume their positions at the Bar's Annual Meeting on Friday, September 11, at the Bar offices at 2101 Fourth Avenue, Fourth Floor, in downtown Seattle. President Mary Fairhurst will pass the gavel to incoming President M. Wayne Blair. Also at this meeting, current Governor Richard (Dick) Eymann will take over as President-elect. The meeting begins at 1:30 p.m. in the conference center.

To contribute news and information, call WSBA Communications staff at 206-727-8203

The election of Dick Eymann to President-elect will create a vacancy on the Board of Governors for the Fifth District. According to the bylaws, the Board of Governors shall appoint an eligible resident of the district to serve until the next scheduled election in the spring of 2000. Nominations of interested parties should be directed to the President in care of WSBA and must be received by August 10, 1998.

For the first time in several years, the Annual Awards Presentation will again be held in conjunction with the Annual Business Meeting. Award winners are chosen in categories such as Professionalism, Lifetime Achievement and President's Award (see Board's Work in this issue for the list of nominees). Certificates also will be presented to those lawyers who have been members of the Bar for 50 years.

Judicial Recommendation Committee Seeks Applications for Appellate Court

The WSBA Judicial Recommendation Committee is currently accepting applications from attorneys and judges seeking consideration for appointment to fill potential appellate court vacancies. Interested candidates will be interviewed by the Committee at its September 25 meeting. The deadline for receipt of questionnaires by the WSBA offices is 5 p.m., July 23, 1998.

The Committee's recommendations are reviewed by the WSBA Board of Governors and then referred to the Governor for review when appointments are made to fill vacancies on the Washington Court of Appeals and Supreme Court.

If you are interested in scheduling an interview, please contact the WSBA at 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330, telephone 206-727-8227, to obtain a questionnaire. Please specify whether you need the questionnaire designed for a judge or an attorney.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in June 1998 is 5.077 percent. The maximum allowable interest rate permissible for July is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates of the past 10 years appear on page 52 of the June *Bar News*, and in the online edition of the *Bar News* at www.wsba.org/BarNews/usuryrate.html

FYI information

STATE SUPREME COURT PASSES BAR-SPONSORED EMERITUS RULE AND HOUSE COUNSEL RULE

On June 4, 1998, the Supreme Court of Washington passed two amendments to the Admission to Practice Rules, proposed by the Washington State Bar Association. Both rules will take effect September 1, 1998.

EMERITUS RULE

Proposed amendment to APR 8(e) — Special Admissions — makes an exception for Emeritus membership, admitting the lawyer to the limited practice of law with a qualified legal services provider. It states, in part:

> ...A lawyer admitted to the practice of law in a state or territory of the United States or the District of Columbia, including Washington State, may apply to the Board of Governors for a limited license to practice law as an emeritus member in this state when the lawyer is otherwise fully retired from the practice of law....
>
> The practice of a lawyer admitted under this section shall be limited to providing legal service for no fee through a qualified legal services provider; or serving as an unpaid governing or advisory board member or trustee of or providing legal counsel or service for no fee to a qualified legal services provider....
>
> A qualified legal services provider is a not-for-profit legal services organization whose primary purpose is to provide legal services to low income clients...A lawyer admitted under this section shall pay to the Washington State Bar Association an annual license fee in the amount required of inactive members....

The rule also states that emeritus members are subject to the RPCs, the RLDs, and all other rules governing lawyers admitted to the WSBA; and emeritus members are exempt from Continuing Legal Education requirements. However, they must complete a training course prior to being admitted as an emeritus member.

HOUSE COUNSEL RULES

Proposed amendment to APR 8(f) — Special Admissions — makes an exception for House Counsel. It states, in part:

> ...A lawyer admitted to the practice of law in a state or territory of the United States or the District of Columbia may apply to the Board of Governors for a limited license to practice law as in-house counsel in this state when the lawyer is employed in Washington as a lawyer exclusively for a profit or not-for-profit corporation, including its subsidiaries and affiliates, association, or other business entity, that is not a government entity, and whose lawful business consists of activities other than the practice of law or the provision of legal services....
>
> The lawyer must also pass the Professional Responsibility portion of the Washington bar examination....
>
> The Practice of a lawyer admitted under this section shall be limited to practice exclusively for the employer...and shall not include appearing before a court or tribunal as a person admitted to practice law in this state, except in association with an active member of the Washington State Bar Association who shall be the lawyer of record therein...[or] offering legal services or advice to the public or holding oneself out to be so engaged or authorized....
>
> A lawyer admitted under this section shall pay to the Washington State Bar Association an annual license fee in the amount required of active members admitted to practice for 3 or more years.

The rules also states that house counsel members are subject to the RPCs, the RLDs, and all other laws governing lawyers admitted to the WSBA.

TEXAS IOLTA DECISION POSES MORE QUESTIONS HERE

In a Texas case, *Phillips et al v. Washington Legal Foundation,* the U.S. Supreme Court ruled 5-4 on June 15 that the Interest on Lawyer Trust Accounts is the private property of those clients. The court remanded the case to a federal judge in Austin to decide whether that state had taken private property and should pay just compensation for it.

The U.S. Supreme Court did *not* hold that IOLTA requirements as mandated by state rules are unconstitutional. It remanded to the District Court the issue of whether such rules violate the Takings Clause of the Constitution.

The premise of Washington's IOLTA rule (RPC 1.14) is that the only client funds to be maintained in an IOLTA account are those that are nominal in amount or are expected to be held for a short period of time such that the funds would not be able to earn net interest payable to the client. If the client funds held by a lawyer

Continued on next page

would earn net interest to the client, then the Washington lawyer is currently required to maintain those funds in a separate interest-paying account, and to pay the net interest to the client. Thus, under Washington's IOLTA rule, any interest earned on client funds which could inure to the benefit of the client is being paid to the client.

The issue of whether payment of interest on IOLTA funds to an entity such as the Legal Foundation of Washington constitutes a "taking" is yet to be resolved.

New Members for Access to Justice Board

After serving three-year terms, **Mary Alice Theiler** and **Nancy Isserlis** are proud members of the first graduating class of the Access to Justice Board. On May 15, 1998, they attended their last Access to Justice Board meeting as Board members.

The Washington State Supreme Court recently appointed new ATJ Board members **Michele Jones-Garling** of the University of Washington Clinical Law Program, and **Scott A. Smith** of Short Cressman & Burgess. The Supreme Court also extended **Hon. T.W. (Chip) Small's** term by three years.

Although **Paul Stritmatter** has one year left in his term on the Board, his position as Chair has expired. At its May meeting the ATJ Board elected **Ken Davidson** of Davidson, Czeisler, Kilpatric & Zeno as the new Chair and Hon. T.W. Small as Co-Chair.

Access to Justice Board meetings are open to the public. Call Joan Fairbanks, WSBA Access to Justice Manager, at 206-727-8282 if you are interested in attending.

Applause!!

Thanks to the following attorneys for volunteering to help eighth-grade students at Islander Middle School on Mercer Island with their mock trial program in May: **Zulema Hinojos-Fall**, **Terri Luken** and **Mark Larson**.

Judy Berrett joins WSBA as Communications Director

Judy Berrett is the new Director of Communications for the WSBA. She brings 17 years of experience in corporate communications, marketing and public relations to the position — 15 of which were spent in the software industry.

A California native who has lived in Seattle for 20 years, Judy has a BA in English from the University of California, Santa Barbara. Before beginning her work at the Bar on June 1, she was Marketing Communications Manager at AEI Music Network Inc. in Seattle and, previously, Marketing Manager for Interlinq Software Corporation in Kirkland. She shares these thoughts on Bar communications:

"I'm very excited to be at the WSBA. In the few weeks I've been here, I've found it to be a vibrant, active organization. Broadly stated, my mission, and that of the entire Communications Department, is to enhance communications with all our constituencies — bar members, the media and the general public. More specifically, we will be focusing on three primary areas:

(1) Educating and enlightening the public to promote understanding of the law, increasing citizen awareness of legal rights and responsibilities, and building positive community relations. Revival of our Speakers Bureau has already begun. Your response has been tremendous, and we're putting the infrastructure in place that will enable us to effectively and efficiently manage this important program. There are numerous other Law-Related Education programs under development, as well. Our Access to Justice program is a national model, and there's a high degree of commitment by the WSBA to encourage its members to engage in pro bono work for low-income people. There are many stories waiting to be told; we'll begin by publicizing some of these activities in *Bar News* and will work to get coverage in the general media as well.

(2) Enhancing the level of service we provide to our members and the public. The "member services" initiative, which Jan Michels wrote about in her Executive's Report in the June issue of *Bar News*, will be part of the Communications Department. Later this year, the WSBA Service Center will be established, staffed by knowledgeable and helpful people who will be available statewide through a toll-free number.

(3) Taking advantage of all communications vehicles in the best possible ways, including utilizing technologies such as the Internet and e-mail. The WSBA was one of the first bar associations with a Web site — and there's a lot of good information to be found at www.wsba.org! Keeping our Web site current with "hot" information is a priority. But there's definitely a place for printed information (such as *Bar News*), and we'll work to find the right balance."

Do you want to hone your public speaking skills?
Would you like to educate and inspire others?

Join the SPEAKERS BUREAU

A public education service provided by lawyer-volunteers who:

- promote public understanding of the law and our legal system
- increase citizen awareness of legal rights & responsibilities
- build positive community/client relations

Lawyers volunteer their time and expertise to help citizens understand how the legal system works and how laws affect their lives. Lawyers speak to civic, professional and school groups on more than 100 topics in addition to offering guidance in mock trial programs. If you have ideas or questions, please contact the Law-Related Education Coordinator, Laurie Rosenfeld, at 206-727-8226.

Yes, enroll me in the Washington State Bar Association's Speakers Bureau!

Name_____ WSBA #_____ E-mail_____

Address_____ City/State_____ ZIP_____

Day Phone_____ Evening Phone_____ Fax_____

1) Availability: ____Day ____Evening ____M-F ____Weekends ____No restrictions ____Other _____

2) Geographic Preference (Cities/Counties): _____

3) Preferred Audience: ____No Preference ____Adults ____Senior Citizens ____College Students
_____Youth (K-12) _____Law Students

4) Speaking Preferences:

MOCK TRIAL PROGRAMS (please check the role(s) you would be willing to undertake):
____ Mock Trial Judge _____ Mock Trial Attorney-Rater _____ Pre-trial Presenter

TRADITIONAL SPEAKING TOPICS (Please list your areas of expertise and rank in order of preference 1, 2, etc. In addition to practice areas, other topics might include: ADR, Appeals, Computer Law, Indian/Tribal Law, Judicial System, Juvenile Justice, Legal Careers, Non-profit Organizations, Pro Se, School Law, Small Businesses, Trials):

_____

_____

_____

I volunteer to serve on the WSBA Speakers Bureau and agree to offer my speaking services free of charge. I certify that the information stated herein is correct: I am a WSBA member in good standing, I have no pending discipline actions, I am a lawyer knowledgeable in the areas stated above, and I am a reasonably capable speaker.

Signed: _____ Date: _____

Mail or Fax this Application to: WSBA Speakers Bureau
2101 Fourth Avenue — Fourth Floor, Seattle, WA 98121-2330 or FAX: 206-727-8320

Ethical Responsibilities of Lawyers Regarding Other Lawyers

BY BARRIE ALTHOFF, WSBA CHIEF DISCIPLINARY COUNSEL

Many of us practice law in partnerships with other lawyers, or as a supervising lawyer of other lawyers, or as a lawyer supervised by another lawyer. This article outlines our ethical responsibilities under the Rules of Professional Conduct (RPCs) as to the conduct of other lawyers. It does not address a lawyer's ethical responsibilities as to nonlawyer assistants since those have been previously addressed in "Ethical Responsibilities of Lawyers Regarding Nonlawyer Assistants" (*Bar News*, June 1998, p. 39).

Overview of RPCs 5.1 and 5.2

RPC 5.1 specifies the ethical duty of a partner or supervisory lawyer as to other lawyers. RPC 5.1(a) requires a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." RPC 5.1(b) requires similar efforts by a lawyer who has supervisory authority over other lawyers. Where a partner also supervises another lawyer, the partner is subject to both RPC 5.1(a) and 5.1(b). RPC 5.1(c) outlines the situations in which the partner or supervising lawyer will be responsible for another lawyer's violation of the RPCs.

RPC 5.2 requires a lawyer to comply with the RPCs even where the lawyer may be acting at the direction of another person, and delineates the very limited circumstances under which a subordinate lawyer will be relieved of ethical liability for having otherwise violated the RPCs when acting at the direction of a supervisory lawyer.

Definition of a "Partner"

RPC 5.1(a) applies only to a "partner in a law firm." The "terminology" section of the RPCs defines the term "partner" as "a member of a partnership and a shareholder in a law firm organized as a professional corporation." Unless the lawyer is such a member or shareholder, the lawyer is not a "partner" as defined in the RPCs and is not subject to RPC 5.1(a).

Although the terminology section of the RPCs broadly defines the terms "firm" or "law firm" as "a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization," RPC 5.1(a) does not apply unless that lawyer is a partner or shareholder. Thus, RPC 5.1(a) does not apply, for example, to lawyers in corporate or government legal departments. These lawyers, however, may be subject to RPC 5.1(b), discussed below.

The most important measure in any firm is a very clear policy, regularly stated, repeated and documented, and an understanding by all lawyers and all staff, that the ethical rules are the mandatory foundation of the firm's practice and that all lawyers and staff are expected and required to fully know and comply with them.

Duty of a Partner to Other Lawyers

Under RPC 5.1(a) a partner must "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform" to the RPCs. "All lawyers" includes, of course, the partner's partners as well as employed lawyers. This is a responsibility of each partner and is not dependent on whether the partner has any supervisory authority. Nor is it dependent on the size of the firm or the fact that it has multiple locations.

What are the required "measures"? The RPCs do not list any *specific* measures. The appropriate measures will vary with the firm's structure, size, location(s), staff experience and nature of practice. The most important measure in any firm is a very clear policy, regularly stated, repeated and documented, and an understanding by all lawyers and all staff, that the ethical rules are the mandatory foundation of the firm's practice and that all lawyers and staff are expected and required to fully know and comply with them. Related to this should be a practice of clear, consistent and immediate action taken upon discovery of any ethical violation, and immediate efforts to remedy the effects of such a violation. The policy should be enforced whether the lawyer is the most senior partner or the most junior associate.

Such a policy, understanding and practice, however, are not sufficient of themselves. A partner should also see that his or her firm has ready access for its lawyers to information on legal ethics. This would include Washington's Rules of Professional Conduct and the published opinions of the WSBA Rules of Professional Conduct Committee, both of which are reprinted in *Resources*, published annually by the WSBA. The rules are also available in collected court rules and on the Supreme Court's Internet homepage. In addition, each firm should have available for its lawyers publications that explain those rules. There is no comprehensive general analysis of Washington's Rules of Professional Conduct. The clos-

est to it is perhaps this author's continuing work-in-progress CLE materials, *Legal Ethics, Discipline and Professionalism*. Each firm should also have available to its lawyers (directly or through a library) treatises on the ABA Model Rules of Professional Conduct, on which Washington's Rules of Professional Conduct are largely based. Every lawyer should also have his or own copy of the ABA Center for Professional Responsibility's one-volume paperback, *Annotated Model Rules of Professional Conduct*, Third Edition (1996) (available from the American Bar Association Service/Publications Center, 800-285-2221). More expansive and expensive are the two-volume Geoffrey Hazard & William Hodes, *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct* (Aspen Publishers, Second Edition, supplemented annually), and the multivolume *ABA/BNA Lawyers Manual on Professional Conduct* (available from the Bureau of National Affairs, 800-372-1033). Aging, but still useful, is Charles W. Wolfram's hornbook, *Modern Legal Ethics* (West, 1986). Every firm should also assure that its lawyers are aware that the WSBA Professional Responsibility Counsel (206-727-8284) is available to discuss with them ethical issues of their proposed future conduct.

Regardless of the size of the firm, another measure that partners may wish to consider putting into effect to assure compliance with the RPCs is establishing a firm practice of a senior partner regularly leading a discussion at firm meetings on the disciplinary notices, or the Ethics & the Law column, published each month in the *Washington State Bar News*, with a view to keeping the firm's lawyers abreast of ethical issues and reported ethical violations. Such a discussion might focus, for example, on how the firm's lawyers can assure that they do not engage in the type of misconduct described in the notices, and how the firm can improve its procedures to better serve its clients. Alternatively, the firm could schedule a systematic review of the RPCs at periodic meetings, announcing in advance which one or two specific rules are to be considered, and assigning a senior partner to lead the discussion.

In a small firm the appropriate "measures" which a partner may consider putting into effect might be somewhat more informal and might include, for example, the daily interaction of a partner with his or her subordinate lawyers, where guidance is sought and given and questions are asked and answered. The practice of circulating advance sheets among the firm's lawyers and regular discussion among them of current cases also might be appropriate.

In a very large firm, or one having multiple locations, it is likely that the required "measures" will need to be more formal. They might include, for example, creation of a firm ethics manual setting forth the firm's requirement of ethical conduct, requiring that each lawyer participate in continuing legal education as to ethical issues, directing that ethical issues and possible violations within the office be immediately directed to a designated senior partner or committee, use of checklists on transactions which include an overview to assure compliance with ethical obligations, structured training for lawyers and staff by a committee of partners, and so on. Such training should not be limited to ethical issues. Since a principal ethical duty, for example, is to provide competent representation to a client, the training should also include relevant substantive law to assure such competence, as well as training in such basics of law office management as communications, ethical billing and collection practices, maintaining trust accounts, diligence, and so on.

The partner would also want to assure that the firm has in effect procedures to verify that each lawyer in the firm remains authorized to practice law in jurisdictions where needed and that lawyer job candidates are admitted to the Washington bar and are not suspended or disbarred lawyers from other jurisdictions. The "measures" would also include establishment of docketing and conflicts checks systems to assure that the firm's lawyers are handling matters diligently and not in violation of the conflict-of-interest provisions.

A partner is not a guarantor that all of the firm's lawyers will in fact act ethically. The partner is merely required to make reasonable efforts to ensure that the firm has in effect measures to reasonably assure ethical conduct by its lawyers. The partner should periodically review the firm's existing "measures" and immediately act if they are inadequate. The partner should also document such a review and his or her efforts to remedy any deficiencies, so that the partner can prove his or her ongoing compliance with RPC 5.1(a). If the partner has made reasonable efforts to ensure such compliance, and nevertheless a lawyer in the firm fails to meet the required ethical standards, the partner will generally have met his or her responsibilities under RPC 5.1(a).

. . . a lawyer who is a partner has liability regardless of whether the offending lawyer is under his or her direct authority, but only if the partner knows of the misconduct at a time when it can be remedied and fails to take action to do so.

Definition and Duties of a Supervising Lawyer

RPC 5.1(b) defines the duties of a "lawyer having direct supervisory authority over another lawyer." The RPCs do not define that phrase, nor is there significant judicial interpretation of it. It appears to include, however, partners who oversee other lawyers, as well as direct supervisory lawyers in law firms, corporate and government legal departments, pro bono organizations, regardless of whether the person they supervise is another partner, an associate, an "of counsel" lawyer, a contract lawyer or a volunteer lawyer. A partner who has no direct supervisory authority over any other lawyer would thus not be subject to RPC 5.1(b), but would still be subject to RPC 5.1(a).

RPC 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." The required "reasonable efforts" will likely include many, if not most, of the measures discussed above with reference to partners. It is clear that a practice of allowing subordinate lawyers in a firm to "sink or swim" does not satisfy RPC 5.1(b). See *In re Yacavino*, 494 A. 2d 801 (N.J., 1985). The rule recognizes that work will be delegated by one lawyer to another, but equally clearly holds that delegation does not relieve the delegator of responsibility for the delegated work.

The rule requires that the supervisory authority be a *direct* authority. The requirement that the supervisory authority be direct should likely be interpreted both vertically and horizontally. In a large firm, for example, a new associate may well report to a senior associate, who in turn reports to a junior partner, who may then report to a senior partner. Under RPC 5.1(b), it would appear that each supervisory lawyer is responsible only for the conduct of the lawyer over whom he or she has direct supervisory authority, and not for other lawyers further down the hierarchy. The two partners in this example would, of course, still have duties under RPC 5.1(a) for all the lawyers.

"Direct" should also be interpreted horizontally and perhaps even geographically. For example, in a large firm with multiple practice area departments, a partner or supervisory lawyer in the business transactions department is unlikely to have direct supervisory authority over a lawyer in the litigation department, and thus would normally not have responsibility under RPC 5.1(b) for that litigating lawyer. But if the business lawyer did in fact have direct supervisory authority over the litigating lawyer, the business lawyer would be subject to RPC 5.1(b), and would be required to make reasonable efforts to assure that the litigating lawyer's conduct complied with the RPCs. If the business lawyer did not have direct supervisory authority over the litigating lawyer, but was a partner who had not made reasonable efforts to assure that the firm had in effect measures to assure compliance with the RPCs, the business partner would be liable under RPC 5.1(a) for violations of the RPCs by the litigating lawyer. For example, if the violation of the litigating lawyer was to represent a client in a clear conflict of interest situation, and if the firm had no measures in place to avoid conflict of interest situations, the business partner would have violated RPC 5.1(a) by failing to make reasonable efforts to ensure that such measures were in place. Similarly, if a firm has various geographically separate offices, unless a lawyer in one office has direct supervisory authority over a lawyer in another office, it would appear the lawyer in the first office would not have responsibility under RPC 5.1(b). If either lawyer were a partner, RPC 5.1(a) would still of course apply to the partner regardless of the geographical separation.

RPC 5.1(b) anticipates a direct relationship which, by definition, will likely

involve one-to-one contact and communication. At the least, the supervising lawyer should assure himself or herself that the subordinate lawyer is familiar with the RPCs and understands the necessity to comply with them. The supervising attorney should also anticipate obvious ethical issues that may arise in connection with the particular legal matter at hand and discuss them with the subordinate lawyer. For example, if the subordinate lawyer is handling a case where the other side is represented by counsel, the supervising lawyer should make sure that the subordinate lawyer knows that he or she cannot directly communicate with the opposing client in violation of RPC 4.2, or, if the opposing client is not represented, give that client the impression that the subordinate lawyer is disinterested in the matter in violation of RPC 4.3. Similarly, in a firm with a high-volume practice, the efforts might include initial training and refresher courses, and regular and frequent meetings with the subordinate lawyer before actions are taken, as well as regular reviews of matters handled. It might also include periodic "audits" of past cases, including review of case files, pleadings, and inquiry of the client, opposing counsel and others whom the subordinate lawyer has dealt with in the course of handling the case.

LIABILITY OF PARTNER OR SUPERVISORY ATTORNEY FOR ETHICAL VIOLATIONS OF OTHER LAWYERS

RPC 5.1(c) specifies when a lawyer is liable for another lawyer's violation of the Rules of Professional Conduct. In general, the liability is not vicarious, but only accessory. The RPCs apply only to individual lawyers and not to firms. Thus, liability under RPC 5.1(c) is imposed only on individual lawyers, and not on firms as entities.

Under RPC 5.1(c), a lawyer is responsible for the ethical violation of another lawyer in only two situations. The first is when "the lawyer orders, or, with knowledge of the specific conduct, ratifies the conduct involved." A lawyer generally can "order" or "ratify" conduct only if the lawyer is a partner or is a lawyer having direct supervisory authority over the offending subordinate. For practical purposes, this situation is limited to partners and supervisory lawyers. If the lawyer orders the conduct, the lawyer knows of the conduct in advance. If the lawyer ratifies the conduct, he or she is liable only if he or she knew of the specific conduct. The "Terminology" section of the RPCs defines the terms "knowingly," "known" and "knows" as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

Under RPC 5.1(c), a lawyer is also responsible for the conduct of another lawyer when "the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." Under this rule, a lawyer who is a partner has liability regardless of whether the offending lawyer is under his or her direct authority, but only if the partner knows of the misconduct at a time when it can be remedied and fails to take action to do so.

If, for example, a subordinate lawyer engaged in misconduct, and another subordinate lawyer and a partner (neither of whom themselves engaged in the misconduct) were each aware of the potential misconduct at a time when it could be remedied, the second subordinate lawyer would probably not be liable under RPC 5.1(c) (1) or (2) since it is unlikely he or she would be in a position to remedy the situation. The partner, however, would be liable under RPC 5.1(c)(2) if he or she failed to take remedial steps while there was time to do so. In this case, of course, such failure to timely remedy might also be seen as a "ratification" of the misconduct under RPC 5.1(c)(1).

If a lawyer is liable under RPC 5.1(c), the lawyer may well also be liable for misconduct under RPC 8.4(a). That rule states that it is professional misconduct to "violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another."

Responsibility of a Subordinate Lawyer

RPC 5.2 considers the question of ethical responsibility not from the perspective of the partner or of the supervisory lawyer, but rather from that of the subordinate lawyer. It recognizes that many lawyers work under the direction of other lawyers. It nevertheless requires the subordinate lawyer to comply with the ethical rules and does not, except in narrow circumstances, allow such subordination to excuse an ethical violation.

RPC 5.2(a) provides that "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." The only exception, provided by RPC 5.2(b), is very narrow: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional conduct."

A comment (not adopted by Washington) to the ABA Model Rule exemplifies this exception by noting that if a subordinate lawyer filed a frivolous pleading at the direction of a supervisory lawyer, the subordinate lawyer would not be guilty of an ethical violation unless the subordinate knew of the document's frivolous nature. Since RPC 5.2(b) does not have a lack-of-knowledge requirement, the comment implies either that the supervisory lawyer's resolution of the question was not "reasonable," or that the question was not "arguable." Thus, if we assumed the same facts, but also assumed that the subordinate lawyer had consulted a senior partner in the firm (other than the supervisory lawyer) who advised the subordinate that the pleading was clearly frivolous, and the subordinate lawyer filed the pleading anyway, the subordinate would not be protected by RPC 5.2(b) since either the question was no longer arguable or the subordinate lawyer was on notice that the supervisory lawyer's resolution was not reasonable. In such a case the subordinate lawyer should obviously seek to resolve the differences in view between the supervisory lawyer and the partner before taking further action.

Conclusion

The obligations imposed on partners and supervising lawyers under RPC 5.1 merely reflect to a large degree what any prudent partner or supervising lawyer is very likely already doing, and assures them they will not have ethical liability for the misconduct of other lawyers. The provisions of RPC 5.2 remind the subordinate lawyer that he or she must exercise independent ethical judgment, but also assures that lawyer that where he or she acts in accordance with his or her supervisory lawyer's reasonable resolution of an arguable question of professional duty, he or she will not be liable for an ethical violation.

Each of us, whether partner, supervising lawyer or subordinate lawyer, knows that legal ethics must form the foundation of our professionalism. Each of us knows that only so long as each of us is guided by and meets our ethical responsibilities, and only so long as we each aspire to the highest possible degree of ethical conduct, will the practice of law continue to be a noble profession.

Disciplinary Notices

For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board at 206-727-8280, leaving the case name and your address.

Disbarred

Walter V. Waltz (WSBA No. 18787, admitted 1989) of Spokane, Washington, has been ordered disbarred by Order of the Supreme Court of Washington. The Supreme Court's order of reciprocal discipline, pursuant to Rule 12.6 of the Rules for Lawyer Discipline, is based on a New Jersey Supreme Court order disbarring Waltz for disbursing legal fees to himself without authorization, attempting to con-

ceal the disbursements, and failing to cooperate with the New Jersey ethics authorities.

On May 15, 1997, the Washington State Bar Association (the Association) filed with the Washington Supreme Court an order from the New Jersey Supreme Court order disbarring Waltz. On the same day, the Court issued an order directing the Association to issue a notice of reciprocal discipline to Waltz pursuant to RLD 12.6. This notice, served on Waltz on June 6, 1997, advised Waltz to inform the Court within 30 days of any claim that reciprocal discipline should not be imposed in this state.

Thereafter, Waltz filed a pleading with the Supreme Court alleging that reciprocal discipline was unwarranted because he was denied due process in the New Jersey proceeding. Waltz attached to this pleading copies of motions he filed in the New Jersey Supreme Court to reconsider and to vacate/stay the New Jersey order of disbarment. These motions also alleged Waltz was denied due process. The Washington Supreme Court then ordered investigation into whether Waltz had constitutionally adequate notice of the New Jersey Supreme Court disbarment proceedings.

The New Jersey Supreme Court subsequently denied Waltz's motions to stay, to reconsider and to vacate. The Association and Waltz thereafter filed briefing with the Washington Supreme Court primarily concerning the alleged due process violation.

The Washington Supreme Court considered *en banc* the reciprocal discipline matter and imposed the reciprocal discipline.

The Association was represented by Disciplinary Counsel Maureen Devlin. Waltz represented himself.

Craig Palmquist (WSBA No. 5516, admitted 1974), formerly of Seattle, has been disbarred by order of the Supreme Court effective January 28, 1998, entered after a default disciplinary hearing and Disciplinary Board review. The Court also ordered Palmquist to pay costs of the disciplinary proceedings of $4,317 and restitution of $265,453. The discipline is based upon his abandonment of practice, misappropriation of client funds, and neglect of client matters.

The discipline arises from Palmquist's representation of 14 separate clients in their tax or tax-related bankruptcy matters. Palmquist requested that nine clients each deposit money with him ($5,000 to $20,000) for the purpose of presenting the IRS with an offer in compromise of the client's tax debt. Palmquist used the funds for his own business or personal purposes. He did not deposit seven of the clients' funds to a client trust account. When clients inquired about their funds, he told them that he was processing the offer in compromise and holding the funds in trust to transmit to the IRS. Further, he did not complete the processing of the offers in compromise with the IRS as promised.

Palmquist also used for his own purposes more than $100,000 of funds that three other clients deposited with him to pay to a third party. Palmquist had solicited one client to invest in a parcel of real property with him and others, falsely representing to the client that the property had been purchased.

Palmquist also set up bank accounts for two other clients and, without the clients' knowledge or permission, added his own name to the account signature cards and withdrew more than $40,000 from the accounts, using the funds for his own purposes.

Palmquist received $2,500 toward fees from another client, and, after minimal work, withdrew from representation two weeks later. He refused to refund any of the amount, claiming it had been a nonrefundable fee. The client understood the $2,500 to be an advance fee deposit because Palmquist had not mentioned the word "nonrefundable" but stated he would work for $125 per hour and would place the funds in trust. The client had written the check to "Craig Palmquist Trust Acct." Palmquist did not deposit the funds to a trust account.

Palmquist failed to keep three clients informed about the status of their matters. One client phoned for two months to determine the status of his audit without receiving a return call. A second client's Chapter 13 bankruptcy was dismissed because Palmquist had not told the client to appear at the Meeting of Creditors, of the necessity to make plan payments, or of the Chapter 13 Trustee's notices regarding these matters. A third client hired Palmquist to file two years' tax returns. Although the client provided all necessary information, Palmquist delayed nine months in filing them. After the client terminated Palmquist's services, Palmquist litigated a redetermination of the IRS' tax deficiency for more than a year without her knowledge or permission.

The abandonment of practice violated RPC 1.1, 1.2, 1.3, 1.4, 1.15, 8.4(c), 8.4(d), and RLD 1.1(c) & (p). The misappropriation of client funds violated RPC 8.4(b) & 8.4(c). The failure to deposit funds to a client trust account violated RPC 1.14. The neglect of client matters and failure to keep clients accurately informed violated RPC 1.2, 1.3, 1.4, & 8.4(c). The failure to withdraw when discharged violated RPC 1.15. The totality of the conduct demonstrated unfitness to practice law in violation of RLD 1.1(p).

The Hearing Officer was Thomas Bigsby of Everett. Respondent did not appear in the proceeding. The Bar Association was represented by Disciplinary Counsel Joy McLean.

CENSURED

Lynnwood lawyer Stephen B. Blanchard (WSBA No. 12294, admitted 1982) has been ordered censured by the Disciplinary Board, which, on April 8, 1998, approved his stipulation for discipline. The discipline is based on Blanchard's four-month neglect of a child support modification matter, failure to communicate his client's acceptance of a settlement offer, failure to communicate with his client, withdrawal of advanced fees from trust before they were earned, and failure to cooperate with the grievance investigation. Blanchard was also ordered to make restitution in the amount of $1,887.50.

In April 1995, Blanchard was retained to represent a client seeking a post dissolution modification of child support. The client paid Blanchard $1,500 in advanced fees and costs. Following some initial investigation and attempts at negotiation, Blanchard failed to file any pleadings with the court, failed to actively pursue negotiations, failed to communicate his

client's acceptance of a settlement offer increasing child support from $150 to $425 per month, and failed to timely respond to his client's requests for information. Blanchard also withdrew his client's advanced fees from trust before they were earned, offsetting the deficit by giving his client a credit balance on trust account records and billing statements. Finally, Blanchard failed to respond to the Bar Association's grievance investigation, requiring the Bar Association to serve Blanchard with a subpoena and deposition notice. Blanchard's conduct violated RPC 1.3 (diligence), RPC 3.2 (expediting litigation), RPC 1.2(a) (abiding by a client's decision to accept an offer of settlement), RPC 1.4 (communicating with client), RPC 1.14 (preserving client's property), and RLD 2.8 (respondent lawyer's duties in disciplinary investigation).

Blanchard represented himself. The Bar Association was represented by Disciplinary Counsel Marsha A. Matsumoto.

Reprimanded

James A. Heard (WSBA No. 12272, admitted 1974), of Aberdeen, has been ordered reprimanded by order of the Disciplinary Board dated August 26, 1997. The discipline is based upon his neglect of a client matter and failure to communicate with the client.

Although not admitted to the U.S. Claims Court Bar, Heard continued to represent a client in a matter that was transferred to the Claims Court. His failure to be admitted and to otherwise prosecute the case resulted in dismissal of the client's case, which acted as an adjudication on the merits. Heard did not advise the client of the dismissal.

Mr. Heard's actions violated Rule 1.3 of the Rules of Professional Conduct (RPC), requiring diligent representation and RPC 1.4, requiring that a lawyer keep a client advised of the status of a matter.

The hearing officer was Merrifield Rees. Mr. Heard represented himself. The Bar Association was represented by Disciplinary Counsel Maureen Devlin.

Suspended

Michael Sean McAllister (WSBA No. 22279, admitted 1992), of Tacoma, has been ordered suspended from the practice of law for eighteen (18) months pursuant to a stipulation for discipline, approved by order of the Supreme Court, effective March 11, 1998. The Court also approved a provision for two (2) years of probation following reinstatement. The discipline is based upon his conviction of the felony crime of possession of heroin, a controlled substance.

The hearing officer was Nancy Preg of Seattle. Respondent represented himself. The Bar Association was represented by Disciplinary Counsel Joy McLean.

S. Charles Sprinkle (WSBA No. 16090, admitted 1986) of Libby, Montana, has been ordered suspended for six months, commencing May 19, 1998, by order of the Supreme Court of Washington. The Supreme Court's order of reciprocal discipline, pursuant to Rule for Lawyer Discipline (RLD) 12.6, is based on the Montana Supreme Court's February 3, 1998 order adopting the recommendation of the Montana Commission on Practice, and accepting the six-month suspension agreed to in Sprinkle's January 5, 1998 Affidavit of Consent.

All relevant acts took place in Montana. Sprinkle was convicted of domestic abuse and disorderly conduct after entering pleas of guilty. The acts supporting these convictions occurred while he was the Lincoln County Attorney for the State of Montana. The acts involving the disorderly conduct conviction occurred while the deferred imposition of his sentence for the domestic abuse conviction was in effect. The disorderly conduct also resulted in personal injury to another person, and occurred while he was under the influence of alcohol.

After pleading guilty to the disorderly conduct that caused physical injury to another person, the Montana District Court revoked the deferred imposition of Sprinkle's domestic abuse sentence. He was sentenced to a one-year suspended sentence on the condition that he resign the office of Lincoln County Attorney. As a result of these criminal convictions, he served 10 days in jail, paid a $1,000 fine, and was required to serve a year of supervised probation.

Sprinkle's actions violated Rule of Professional Conduct 8.4(b) (commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and RPC 8.4(d) (engaged in conduct prejudicial to the administration of justice).

On March 2, 1998, the Washington State Bar Association (the "Association") provided the Washington Supreme Court with certified copies of the Montana Supreme Court Order imposing discipline on Sprinkle and his affidavit of consent, and asked the Court to issue an appropriate reciprocal discipline order pursuant to RLD 12.6. Thereafter, the issues were briefed. The Washington Supreme Court considered *en banc* the reciprocal discipline matter, and imposed the reciprocal discipline.

Respondent represented himself *pro se*. The Association was represented by Disciplinary Counsel Leslie Ching Allen.

Nondisciplinary Notice

Interim Suspension

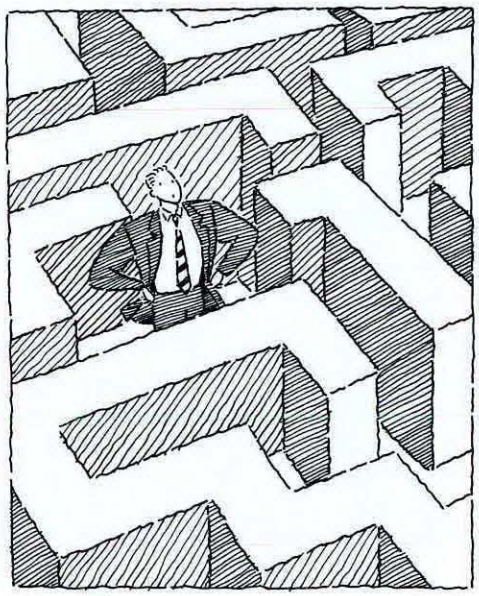
Irving Leroy "Lee" Dane (WSBA No. 6587, admitted 1976), of Vancouver, Washington, was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered May 5, 1998.

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

Disciplinary and nondisciplinary notices since September 1997 also appear in the online edition of the *Bar News* at: www.wsba.org

ETHICS HOTLINE OFFERS GUIDANCE FOR WSBA MEMBERS

What is a Washington lawyer to do when faced with an ethical dilemma? Fortunately, there is help and it doesn't cost anything. The Washington State Bar Association, through its Lawyer Services Department, provides an Ethics Hotline. By simply calling 206-727-8284, an inquirer may speak with a WSBA lawyer, outline the dilemma and, in return, receive ethical guidance about various courses of action. The Hotline is usually answered by Chris Sutton, the Bar's Professional Responsibility Counsel. Chris received his law degree from William and Mary Law School and then served four years as a military lawyer. During the balance of his career, Chris has been a partner in a firm, managed a high-volume law office and been a solo practitioner. After joining the Bar staff, Chris spent two years as disciplinary counsel.



There are four major sources of ethical guidance for Washington lawyers. The highest authority is the Washington State Supreme Court, which speaks through its opinions and through its promulgation of the Rules of Professional Conduct. Next is the Board of Governors, which issues formal opinions on ethical matters of wide concern to lawyers. At the third level is the Rules of Professional Conduct Committee, which answers written ethical inquires submitted by lawyers about their own prospective conduct. The Committee may not express an opinion about legal questions, matters that are in dispute or the conduct of another lawyer. The responses of the Committee are informal opinions which are provided for the education of the Bar and do not reflect the official position of the Bar. Finally, lawyers may call the Hotline and speak with the Professional Responsibility Counsel, who will discuss the situation with the caller to help clarify the ethical issues involved so that the inquirer may avoid unethical behavior.

Calls concern all aspects of the Rules of Professional Conduct. Most seek help with questions about handling trust accounts, maintaining client confidences and secrets, avoiding conflicts of interest, problems caused by termination of a lawyer's services, transference of client files, and lawyer advertising. Chris has practiced law in a wide variety of settings, which, combined with his experience as disciplinary counsel, enables him to give practical advice and insight into the ethical implications of the dilemmas faced by today's lawyer. His job is not to make the decisions but to help the inquirer understand the ethical component present in all legal decisions.

The Hotline is operated Monday through Friday during normal business hours. If the Hotline number is busy, a caller may leave a detailed message. Every effort is made to return all calls within one business day.

One Department, Many Services

We're pleased to announce our new name for the Lawyer Assistance Department — the Lawyer Services Department. Along with this new name come some exciting programs — some of which are in place now and some which will be coming soon.

Included in the department are the following:

- Lawyers' Assistance Program (LAP)
- Professional Responsibility, including the Ethics Hotline
- Law Office Management (LOMAP)—to be implemented later this year
- Mediation Service (coming in 1999)
- Alternative Dispute Resolution Service (Voluntary Fee Arbitration)

Why the name change? Many of us found it confusing that the Lawyer Assistance Department has been commonly referred to as LAD and the Lawyers' Assistance Program as LAP. And, since we're putting some new programs in place, we thought a new name would be appropriate to draw attention to the expanded scope of this department. Most important, though, is that "lawyer services" are what the department is all about — serving you, the lawyers of Washington State. Look for information about our new programs in future issues of *Bar News*.

Lawyer Services Department Staff

Barbara Harper - Director
Brian Smith - Program Assistant
Rebecca Nerison, Ph.D. - Clinician
Jean Johnson, MSW - Clinician
Veronica Nations - Secretary
Chris Sutton - Professional Responsibility Counsel

For inquiries, call 206-727-8268

Calendar

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

To announce a seminar, please send information to:
WSBA, *Bar News* Calendar
2101 4th Avenue
4th Floor
Seattle, WA 98121-2330.
fax: 206-727-8320
e-mail: comm@wsba.org

ADR

Interest-based Mediation—The Process: Philosophies, Proficiency and Procedures
July 20-24, Aug. 3-7, Oct. 19-23 – Spokane. 40 CLE credits (incl. 1 ethics). By Fulcrum Institute 509-838-2799.

Representing Your Client in Arbitration and Mediation
Aug. 14 – Seattle; Aug. 21 – Mt. Vernon. CLE credits TBA. By WSBA CLE and ADR Section 206-727-8202.

Advanced Mediator Skills Workshop
Sept. 24, 25 – Seattle. 6.75 CLE credits (incl. .75 ethics). By WSBA CLE 206-727-8202.

Business Law

Advising Business Clients About Distribution and Marketing Law
July 17 – Seattle. 6.75 CLE credits (incl. .75 ethics). By WSBA CLE 206-727-8202.

Branching Out: Franchising and Distribution
July 30 – Seattle. 6.5 CLE credits. By Lorman 715-833-3940.

Consumer Complaints and Unfair Business Practices
Aug. 7 – Seattle. CLE credits TBA. By WSBA CLE 206-727-8202.

Choice of Business Entity in WA
Aug. 19 – Seattle. 8.75 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

Pitfalls for the Business Lawyer
Sept. 10 – Seattle. CLE credits TBA. By WSBA CLE 206-727-8202.

Planning Public Record Filings in Mergers and Acquisitions
Sept. 17 – Seattle. 3 CLE credits. By CT Corporation System 212-315-7800.

Computer Law

Computer Law: What You Don't Know *Can* Hurt You
July 24 – Portland, OR. CLE credits TBA. By OSBA CLE 503-684-7413.

Software Licensing Agreements
Sept. 17 – Seattle. 7 CLE credits. By Sequoia Professional Development 202-955-9373.

Construction

OSHA and Construction
July 23-24 – Seattle. 8.5 CLE credits. By Healthcare Safety 520-818-1333.

WA Construction Law: What Do You Do When...?
Sept. 22 – Seattle. 6.5 CLE credits. By NBI 715-835-8525.

Creditor/Debtor

Overview of Creditor-Debtor Law
Sept. 25 – Seattle. CLE credits TBA. By WSBA CLE 206-727-8202.

Criminal Law

The Fifth Annual Criminal Justice Institute
Sept. 24-25 – Seattle. 10 CLE credits estimated. By WSBA CLE and Criminal Law Section 206-727-8202.

Employment

Qualified Pension and Profit-sharing
July 13-14 – Seattle. 15 CLE credits. By Accountant's Education Services 303-871-6239.

Employment Law: Litigation Tips, Strategies and Tactics
July 16 – Portland, OR. CLE credits TBA. By OSBA CLE 503-684-7413.

The Law and the Independent Contractor in WA
July 29 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

Family and Medical Leave Act: Beyond the Nuts and Bolts
Aug. 12 – Seattle. CLE credits TBA. By Lorman 715-833-3940.

Comprehensive Longshore Seminar
Aug. 18 – Seattle. 13.5 CLE credits. By The Longshore Institute 713-227-5665.

Handling Discharges Roundtable
Sept. 15 – Seattle/Bellevue. CLE credits TBA. By Foster Pepper & Shefelman PLLC 206-447-2881 or KRIEK@foster.com

ESTATE PLANNING

Strategies for Taxable Estates
July 9 – Seattle; July 10 – Spokane. 6.25 CLE credits. By WSBA CLE and RPPT Section 206-727-8202.

The Estate Planner's Guide: Estate Planning with Will Substitutes
(video replays with live moderator) July 16 – Port Hadlock; Sept. 10 – Vancouver. 6 CLE credits. By WSBA CLE 206-727-8202.

How to Handle Federal Estate Tax Returns
Sept. 11 – Seattle; Sept. 18 – Spokane. 6 CLE credits estimated. By WSBA CLE and RPPT Section 206-727-8202.

FAMILY LAW

Domestic Violence Training for Rural and Tribal Courts
Jul. 24 – Pomeroy; Sep. 29 – South Bend. 6.75 CLE credits. By Office of the Administrator for the Courts 360-705-5341.

Handling Domestic Relations Cases
July 10 – Portland, OR. CLE credits TBA. By OSBA CLE 503-684-7413.

4th Annual Winthrop Family Law and Mountain Bike Festival
Aug. 14 – Winthrop. 7 CLE credits. By Catalyst Publications 425-827-9909.

Adoption Law in WA: Adoption Practice Update
Aug. 21 – Seattle. 6 CLE credits. By Professional Development Network 414-798-5242.

Essentials of Family Law
Sept. 11 – Seattle; Sept. 17 – Tacoma. CLE credits TBA. By WSBA CLE and Young Lawyers Division 206-727-8202.

FINANCE

What Lawyers Need to Know about Investments
July 10 – Seattle. 4 CLE credits (incl. 1 ethics). By WA Law Institute 206-726-9337.

Understanding and Analyzing Financial Statements
Sept. 9 – Seattle. 6.25 CLE credits. By National Center for Continuing Education 850-561-3506.

Modern Financial Analysis
Sept. 10-11 – Seattle. 13.25 CLE credits. By National Center for Continuing Education 850-561-3506.

GENERAL

The Lawyer's Tool Box: Nuts & Bolts for New Practitioners
July 1 (civil litigation), 8 (business law), 15 (real estate) – Seattle. CLE credits TBA. By WSBA CLE 206-727-8202.

Effective Client, Seminar and Public Presentations
July 15 – Seattle. 3 CLE credits. By SpeechPower 206-583-8383.

Navigating the Rules of Evidence
July 17 – Seattle; July 24 – Olympia. 7 CLE credits (incl. 1.5 ethics). By WSBA CLE 206-727-8202.

The CD Law CLE
Aug. 7 – Whistler, BC. 3 CLE credits. By Unger & Baumann 360-452-7688 or mbaumann@tenforward.com

Summer CLE Video Week
Aug. 7-13 – Portland, OR. CLE credits TBA. By OSBA CLE 503-684-7413.

Getting the Judge to Say "Yes!"
Sept. 17 – Seattle. 7 CLE credits (incl. 1 ethics). By Kinder Legal 206-622-3810.

INSURANCE

Recent Developments in Insurance Law
July 31 – Spokane. 6.5 CLE credits. By Lorman 715-833-3940.

Insurance Law: Third-party Coverage in WA
Aug. 26 – Seattle. 6.5 CLE credits (incl. 1.25 ethics). By NBI 715-835-7909.

INTELLECTUAL PROPERTY

High Technology Protection Summit: Intellectual Property for the 21st Century
July 24-25 – Seattle. 15.25 CLE credits. By Center for Advanced Study and Research on Intellectual Property 206-685-2996.

LAW OFFICE MANAGEMENT

The Internet as a Law Office Tool
Aug. 8 – Whistler, BC. 3 CLE credits. By Unger & Baumann 360-452-7688 or mbaumann@tenforward.com

Collecting from and Communicating with Clients
Aug. 26 – Seattle. CLE credits TBA. By WSBA CLE 206-727-8202.

Winning Strategies for the Successful Private Practitioner
(for new admittees only) Sept. 24 – Seattle. 6.75 CLE credits estimated. By WSBA CLE 206-727-8202.

LITIGATION

WSTLA 1998 Annual Meeting and Convention
July 9-12 – Stevenson. CLE credits TBA. By WSTLA 206-464-1011.

Navigating the Rules of Evidence
July 17 – Seattle; July 24 – Olympia. 7 CLE credits (incl. 1.5 ethics) estimated. By WSBA CLE 206-727-8202.

Federal Civil Litigation
July 23 – Seattle. 6.5 CLE credits. By Lorman 715-833-3959.

Litigating the Class Action Lawsuit in WA
July 28 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-8525.

Medical Negligence Section Seminar
Sept. 9 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

Using the Medical Record as a Litigation Tool
Sept. 16 – Seattle. 7.25 CLE credits (incl. 1 ethics). By Professional Education Systems 715-833-5296.

Best of WSTLA Series: Commencing the Action
Sept. 18 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

Evidence and Ethics
Sept. 24 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

PERSONAL INJURY

Maritime Personal Injury
Aug. 7 – Seattle. 6.5 CLE credits. By Lorman 715-833-3940.

Post-concussion Syndrome and Differential Diagnosis
Sept. 26 – Seattle. 6.5 CLE nexus credits. By Dr. Daniel P. Dock 218-525-2033.

REAL ESTATE

Standard Provisions in Real Estate Documents with Drafting Tips
Sept. 11 – Seattle; Sept. 18 – Spokane. 6 CLE credits estimated. By WSBA CLE and RPPT Section 206-727-8202.

REAL PROPERTY

Section 1031 Exchanges of Investment Properties in WA
Sept. 25 – Seattle. 7.25 CLE credits (incl. 1.25 ethics). By NBI 715-835-8525.

TAXATION

WA/Federal Fiduciary Income Tax Workshop
Aug. 20 – Seattle. 7.25 CLE credits. By Professional Education Systems 715-833-5296.

Property Tax Law in WA
Aug. 20 – Seattle. 7.25 CLE credits. By NBI 715-835-7909.

Announcements

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Gregory J. Hollon
Carl E. Jensen
and
Johnathan E. Mansfield

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Seattle, Washington 98104

Bellevue Office
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Suite 410
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James Robert "Bob" Rogers: anyone having information on the last will of James Robert "Bob" Rogers of Seattle, deceased 02/13/98, please call the law office of J. Martin Sjolie, 206-860-3020.

William Thomas Kramer, Sr.: We are seeking anyone who has information regarding the last will and testament for the deceased, William Thomas Kramer, Sr., who was a resident of Snohomish County, WA. Please contact Barbara Isenhour, attorney at law, in Seattle at 206-340-2200.

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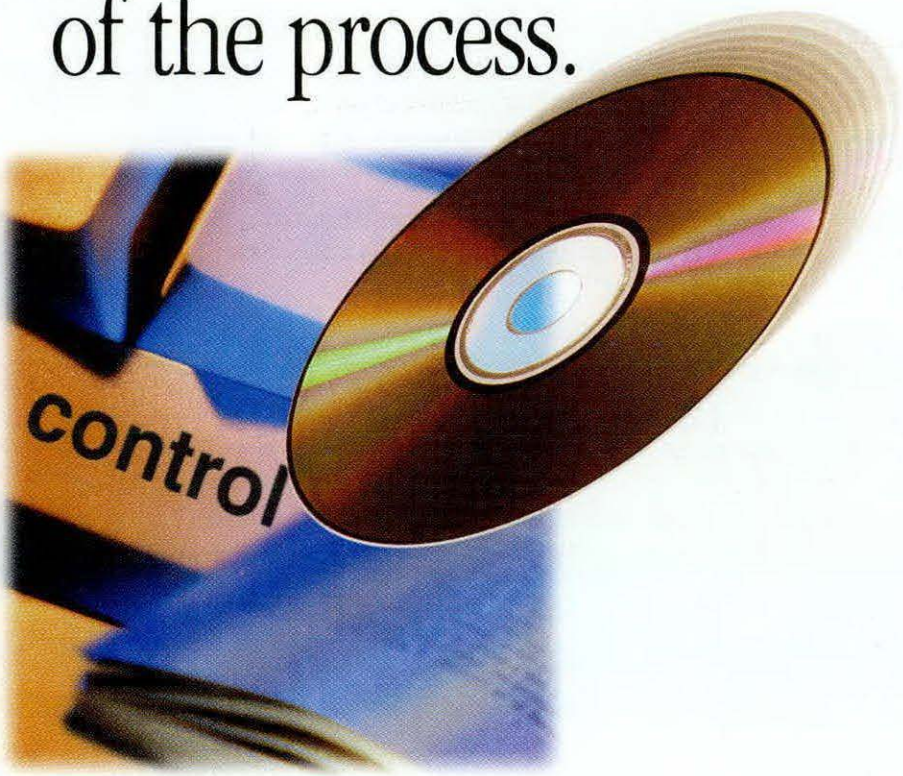

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