VOL. 52 NO. 8

FIVE DOLLARS

Washington State

BAR NEWS

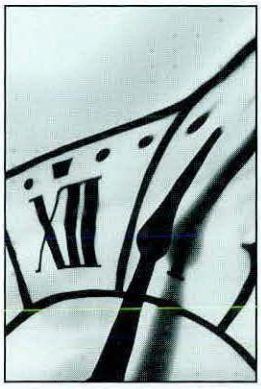
The Official Publication of the Washington State Bar

August 1998

WHEN THE CLOCK STRIKES 2000

Practical and Legal Y2K Issues

Washington State
BAR NEWS
August 1998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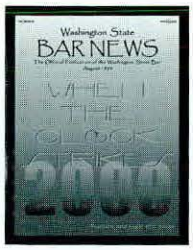

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The *Bar News* encourages correspondence and article submissions. The submission deadline is the 15th day of the month for the second issue following, e.g., August 15 for the October issue. We request a 3 1/2" disk (in any conventional format) and hard copy at the time of submission. Please include a SASE if you would like your material returned. Article submissions should run approximately 1,100 to 3,500 words. Graphics and illustrations are welcome. Address all correspondence and submissions to: *Bar News* Editor, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330.

THE MISSION OF THE WASHINGTON STATE BAR ASSOCIATION IS TO PROMOTE JUSTICE AND SERVE ITS MEMBERS AND THE PUBLIC.

Published by
WASHINGTON STATE BAR ASSOCIATION
2101 FOURTH AVENUE
FOURTH FLOOR
SEATTLE, WA 98121-2330

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Printed by Eagle Press, Redmond

Washington State Bar News (ISSN 886-5213) is published monthly by the Washington State Bar Association, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330, and mailed periodicals postage paid in Seattle, WA. $14.47 of a regular member's dues is used for a one-year subscription. The annual subscription rate for inactive members is $15. Nonmember subscription rate is $24 a year. Washington residents add 8.6% sales tax.

POSTMASTER: Send changes of address to WASHINGTON STATE BAR NEWS, 2101 4TH AVE, 4TH FL, SEATTLE, WA 98121-2330.

Printed with soy-based ink on recycled paper

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THANK YOU!

The twelve members of the Bar's CLE Department would like to thank the hundreds of you members who write to us each year to share with us how good you think our programs have become and what is good about them.

We are pleased to read weekly comments like Samuel Fleshman's of Port Orchard who attended our recent How to Advise Non-Profits course on June 26. He wrote to us: *"I think WSBA seminars are currently head and shoulders above those of most other CLE organizations."*

We would also like to thank the "ACLEA'S BEST" Awards Committee of the Association for Continuing Legal Education, which is the organization comprised of our peers in the hundreds of state bar, county bar, law school and private CLE providers in the United States, Canada and overseas. They have just awarded our program the 1998-99 Award of Professional Excellence in the Best Program category. This is their highest award given in any category.

WSBA-CLE Department

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CLE

Letters

JUST SAY "NO" TO RECIPROCITY

■ Editor:

I am responding to the Reciprocity Rule paragraph in the Board's Work column in the June 1998 issue of the *Washington State Bar News.*

I am one who took a bar examination in the District of Columbia because DC had a reciprocity rule at that time under which I did not qualify as a Washington State lawyer. While a reciprocity rule in Washington would have saved me the effort of that bar exam, I do not favor the proposed rule.

I object to reciprocity rules because they do not serve an appropriate purpose and are discriminatory. The purpose of bar examinations, of course, is to test the qualifications of prospective lawyers. That purpose is not met and the rules discriminate when they require some, but not all, persons who are equally qualified for admission without examination to take a bar examination. The failure of a state like Washington to admit experienced lawyers from other states without examination should not be visited upon Washington lawyers who otherwise would be eligible for admission without taking a bar exam. That failure is not their failure! Similarly, the failure of a California or a Florida to admit experienced Washington State lawyers without examination should not be visited upon experienced California or Florida lawyers who seek admission to practice law in Washington.

I urge the Board and the Supreme Court to determine the experience, if any, that should be required to qualify out-of-state lawyers to practice in Washington without first taking a bar examination. Then they should admit without examination all such lawyers with that experience irrespective of the rules in other states.

MILTON J. STICKLES JR.
Chevy Chase, Maryland

■ OPEN LETTER TO THE BOARD OF GOVERNORS AND THE RPC COMMITTEE:

Like almost every attorney, I try to adhere strictly to the Rules of Professional Conduct, being guided in this endeavor by the WSBA's formal ethics opinions. I am writing to voice my concern that the Bar has recently adopted an ethics opinion that, under certain circumstances, will require me, or lawyers similarly situated, to violate federal law. Last year, the Bar adopted Formal Ethics Opinion 194, regarding a lawyer's obligation to identify the client-payors of more than $10,000 in cash (or cash equivalents) to the Department of Treasury on an IRS Form 8300. The ethics opinion states that if client identity is a "client secret" under RPC 1.6, that information should not be divulged on the Form 8300, absent a court order, and if the government seeks to compel the attorney to provide the withheld information, the issue of disclosure should be litigated. I am concerned that the Bar Association may not have understood that the course of conduct counseled by the ethics opinion requires lawyers who receive more than $10,000 in cash to commit a five-year felony.

Section 7203 of the Internal Revenue Code provides a criminal penalty for a

"willful failure to supply information" to the Internal Revenue Service, and treats a failure to supply information required by § 6050I of the Internal Revenue Code as a five-year felony. There is also a civil penalty of $25,000 to $100,000 which may be imposed with respect to an intentional disregard of the Form 8300 requirements. While I am aware of no criminal prosecutions at the current time, the Internal Revenue Service has imposed the civil penalty on attorneys who have refused to supply the required information and had that penalty upheld by a federal Circuit Court of Appeals in a recent high-profile case.

Examining first the potential application of federal criminal statutes to the Washington state practitioner who follows the requirements of the proposed ethics opinion, the elements of the crime of willfully failing to supply information under § 7203 are (1) the defendant was required by law to supply information, (2) the defendant failed to supply the required information, and (3) willfulness.

With respect to the existence of a legal requirement, § 6050I imposes an obligation on all persons who receive cash (or certain cash equivalents) in their trade or business to report such receipt to the federal government on a Form 8300 within 10 days of receipt. As concluded by *United States v. Blackman,* 72 F.3d 1418 (9th Cir. 1995), *cert. denied,* 117 S. Ct. 275 (1996), and by every other federal circuit court of appeals to have considered the issue (*United States v. Goldberger & Dubin, P.C.,* 935 F.2d 501 (2d Cir. 1991); *United States v. Leventhal,* 961 F.2d 936 (11th Cir. 1992); *United States v. Sindel,* 53 F.3d 874 (8th Cir. 1995); *United States v. Gertner,* 65 F.3d 963 (*1st* Cir. 1995); *United States v. Ritchie,* 15 F.3d 592 (6th Cir. 1994)), the attorney-client privilege does not generally excuse an attorney from the obligation to follow federal law and report the names of cash payors. (It is significant that the attorneys in *Blackman* argued that Oregon statutes mandated the preservation of client secrets, just as the proposed formal ethics opinion would. The *Blackman* court summarily rejected this position, stating that the federal common law of privilege applied, rather than the various state laws.) The Ninth Circuit in *Blackman* identified a possible limited exception to this rule, where the attorney-client privilege may be properly invoked with respect to client identity and fee arrangements, i.e., where furnishing the name and fee arrangement may constitute "the 'last link' in an existing chain of evidence likely to lead to the client's indictment." The *Blackman* court construed this potential "last link" exception narrowly, rejecting extending it to situations where the information simply "might implicate" the client-payor. (The court cited *United States v. Gertner,* 65 F.3d 963 (1st Cir. 1995) for the proposition that the last link exception should be limited to situations where the IRS seeks disclosure of information regarding a client-payor who is being represented with respect to pending charges, and the disclosures are likely to incriminate the client in the pending proceedings.) Thus, in the majority of situations, criminal defense attorneys will have no reasonable basis from which to argue that they were not required to complete a Form 8300 with client identity information.

For criminal tax purposes, "willfulness" is defined as the voluntary and intentional violation or avoidance of a known legal duty. *United States v.*

Pomponio, 429 U.S. 10 (1976); Ninth Circuit Manual of Model Jury Instructions (Criminal 1995), 5.05 (comment). In *Cheek v. United States,* 498 U.S. 192 (1991), the Supreme Court considered a tax protector's somewhat tortuous rationale for his failure to file returns. The court ultimately held that, in tax cases, a defendant's genuinely held belief, albeit erroneous and unreasonable, in the legality of his conduct is a defense to tax offenses. However, the *Cheek* court also held that if the defendant understood the tax law's requirements, but believed the law to be unconstitutional and thus did not follow it, the "willfulness" requirement had been met for purposes of criminal prosecution.

In a situation where an attorney consciously determined to follow a WSBA formal ethics opinion, rather than well-established federal law, the "voluntary and intentional" nature of the failure to comply with the federal reporting obligation would seem to be beyond question. Even if the attorney in good faith mistakenly believed that ethical rules trumped federal law and precluded disclosure, the attorney would be in no better a position than the defendant in *Cheek* with respect to laws believed to be unconstitutional. Thus, it would clearly be within the discretion of an Assistant United States Attorney in Washington State to charge the practitioner who followed the letter of the new ethics opinion with a "willful failure to supply information" felony.

Turning next to the civil consequences, § 6721(e) of the Internal Revenue Code provides for a civil penalty in cases where "intentional disregard" of § 6050I's reporting requirements is established. The amount of the § 6721(e) penalty is $25,000, or, if greater, the amount of cash received, up to $100,000. I am aware of several cases in which proposed penalty assessments have been made against attorneys who prepared Forms 8300 but omitted identifying information with respect to their clients. I am also aware of one recent case in which a $25,000 minimum penalty was sustained *on summary judgment* by the Second Circuit. *Gerald B. Lefcourt, P.C. v. United States,* 125 F.3d 79 (2nd Cir. 1997).

The facts in *Lefcourt* ominously parallel the course of action advised by the ethics opinion. Lefcourt received over $10,000 in cash from a client. He filed a Form 8300, which did not identify the payor. He attached to his Form 8300 an affidavit asserting that revealing the information would prejudice the client, and that the confidentiality of such information was protected by the Fifth and Sixth Amendments, as well as the Lawyer's Code of Professional Responsibility. After the penalty was asserted, Lefcourt paid the penalty amount and filed a refund suit, alleging that he had "reasonable cause" for his failure. If "reasonable cause" had been shown, under § 6724, it would have excused Lefcourt's intentional disregard of the reporting requirements, and required the IRS to waive the penalty. In light of the case law, which without exception had ruled that the attorney-client privilege does not generally protect client identity and fee information, and Lefcourt's inability to articulate any "special exception," e.g., "last link," the court had no trouble finding that Lefcourt had intentionally disregarded the reporting requirement, and did not have "reasonable cause" for his failure to provide client identification information.

The ethics opinion recognizes that the failure to identify the name of the payor may generate IRS inquiry, and a summons enforcement action by the IRS in order to obtain the omitted information. With respect to a summons enforcement action, the opinion requires that the lawyer "litigate the issue of disclosure." However, if no "last link" or other special circumstance can be identified, for the lawyer to litigate a patently frivolous claim may expose the attorney to court sanctions.

As discussed above, a summons enforcement action is not the only type of proceeding that could arise if an attorney intentionally omits client information from a Form 8300. While an Internal Revenue Service summons is technically not self-executing, the consequences which may befall the attorney who consciously determines to comply with the ethics opinion rather than his obligations under the law can occur *even if* the Internal Revenue Service *never* brings a summons enforcement action.

In light of the fact that the ethics opinion requires attorneys to violate federal laws, risking criminal prosecution and onerous civil penalties, and instructs attorneys to litigate what will usually be frivolous claims, I believe that the ratio-

Correction

In the "Trust Account Overdraft Notification Agreement Bank Participation List" on page 31 of the July *Bar News*, the name of CityBank in Lynnwood was misspelled.

The *Bar News* apologizes for the error.

nale underlying this ethics opinion must be reevaluated.

The federally required disclosure of information not protected by an attorney-client privilege constitutes a situation in which otherwise confidential information, protected by ethical rules, must be divulged. The commentary to Rule 1.6 of the ABA Model Rules of Professional Conduct notes that there are two general sets of circumstances in which disclosure of otherwise confidential information may be required:

> [1] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.
>
> [2] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, *a lawyer may be obligated or permitted by other provisions of law to give information about a client.* Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession. [emphasis added]

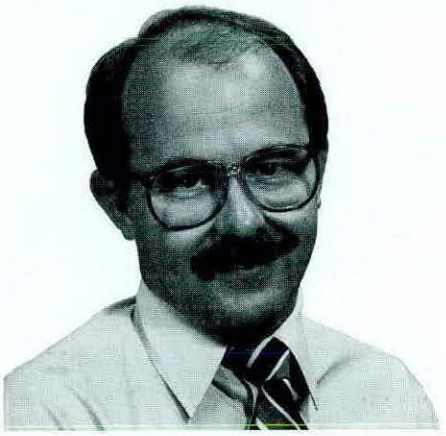
Given the flood of decisions in the federal Courts of Appeals uniformly rejecting the attorney-client privilege and other allied doctrines as a basis for withholding client information from Forms 8300 (except possibly in certain limited circumstances), the obligation imposed by § 6050I is clearly an "other provision of law," superseding the general secrecy requirement under RPC 1.6. Section 6050I thus should be understood as a statute which obligates a lawyer "to give information about a client," except to the extent that such information may be protected under some special application of the attorney-client privilege, e.g., a "last link" argument.

When the WSBA last considered this matter and adopted formal ethics opinion No. 189 in 1990, the law regarding an attorney's obligations under § 6050I was in a state of flux. Under those circumstances, it was perhaps appropriate to require stringent adherence to Washington Rules of Professional Conduct, and to insist on protecting the privilege. However, in light of changed circumstances, i.e., the now settled federal law which does not generally recognize the assertion of privilege as a basis for a refusal to provide client identifying information pursuant to the requirements of § 6050I, the advice proffered in the new ethics opinion is untenable.

The new ethics opinion presents the Washington State attorney with a Hobson's choice. If the attorney follows federal law and fully discloses, the attorney risks being sued by the client or sanctioned by the Bar for failing to keep a client confidence and violating the privilege. On the other hand, if the attorney follows the ethics opinion, the attorney personally risks ruinous civil and criminal penalties for intentionally ignoring his legal obligations. (Certainly, the attorney can take steps to avoid ever being placed in this dilemma by advising a client at the inception of representation that, if the client chooses to pay in cash, a Form 8300 will be filed. This is undoubtedly the best practice.) I believe that the WSBA opinion on the subject should be withdrawn or revised to take into account the civil and criminal sanctions which the government may employ against attorneys who fail to provide client identifying information when filing a Form 8300.

JOHN M. COLVIN
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.



The Phases of a Trial Lawyer

Jeff Tolman
Guest Editor

EDITOR'S PAGE

Dinner time at the Tolmans'. The family sits calmly, conversing, enjoying the fine meal. The only thing missing is Norman Rockwell and his paintbrush.

"Andy, pass the butter," Chris says.

Immediately the Rockwell scene is shattered. By me.

"Object! Leading!"

"About a week til trial, huh, Dad?" Chris calmly responds.

He has lived through this before. He knows well the phases his trial-lawyer dad goes through.

*****

Being a trial lawyer is a unique combination of masochism, long distance running, poetry and putting together a jigsaw puzzle. It is the thrill of victory and the agony of defeat, 80 times a day. Anyone who has seen Sally Field as "Sybill" knows how a trial lawyer feels hour by hour.

But there are some predictable phases, too:

Getting the Case

There is quiet euphoria when a good personal-injury case comes in. There are lots of bad cases and clients who won't present well to a jury. When a client comes in who Mother Teresa wants to be as kind as, with solid facts, a lawyer feels good. It is likely there will be a happy client and some money to cover the overhead, too. In many ways, that is the emotional high point in most trials.

At dinner I tell the kids that I got a good case. As a lawyer I am going to fight the evil insurance beast to the death. Justice will be done, I tell them. Having heard the speech many times before, they mouth the words with me.

Contact with the Adjuster

After the case is investigated, a letter of representation is sent to the insurance company. Contact is made by the adjuster. The primary emotion after the initial adjuster contact is usually annoyance. Annoyance that the adjuster won't entertain the notion that her drunk client has any liability. Or that your kind and reasonable client may be injured. Annoyance that what should be an easy resolution, won't be.

As my family tries to eat, I rant and rave about insurance companies. How they have no heart or soul. How they are trying to steal money my client has a right to.

My son, Andy, a realist at 13, leaves the table to call our broker friend to see if he has any money in his college account to buy some insurance stock.

Sending the Demand

After months of medical treatment and giving documentation to the adjuster, the time has come for the demand. P.I. lawyers spend hours trying to quantify, in words, the life change the at-fault party caused. As a prac-

tical matter the attorney may as well have only two form demand letters: (1) "Send us your limits," and (2) "Liability: ours. Damages: $****."

At this point in the process, there is hope. Hope that the graphic and melodic words the lawyer has put into the demand will melt even the stoniest heart an adjuster might have.

At dinner I tell the kids that I am hopeful we will be able to resolve the case quickly, smoothly and honorably. Having been through this speech before, they begin laughing. Chris asks Andy how much he paid, those months ago, for the insurance stock, and leaves the table to call his broker.

RECEIVING THE OFFER

Getting the response to the demand is an exciting time. Temporarily. As I open the letter I have visions of a reasonable offer. Perhaps the adjuster and I won't be far off in our evaluations of the case.

HOPE SPRINGS ETERNAL.

Until I read the response: "We believe the PIP carrier paid you more than the value of this claim."

Now it is war.

I am staring at my evening meal, quietly boiling, a cross between Marcel Marceau and Mike Tyson. Dinner goes on around me. Laurie and the boys talk about sports and school and our friends as if the insurance carrier has been reasonable. I don't understand how they can be so callous.

PRE-TRIAL MANEUVERING

Generally I like the insurance defense lawyers I work with. They feel less like I'm trying to steal money from them (no matter what the facts of my case are) than the adjuster. They are trained to see that there are two sides to most arguments and will be less hostile than the adjuster.

At the same time, their job is to make mountains out of molehills. The fact that my client didn't tell her gynecologist that her jaw was hurting suddenly becomes an assertion that she is cured. The fact that in her junior high sports physical (in 1965) the doctor noted a 5 percent scoliosis suddenly becomes a pre-existing condition. When my client admits she got a jaywalking ticket as a college student in the early '70s, she becomes a scofflaw.

Angst is the common emotion prior to trial.

At dinner I tell my kids to enter the clergy, a profession that is not adversarial. They ask if they need to be religious to do that. I am unable to answer as I think of what my medical records may reveal if I am ever crunched by a drunk driver.

THE TRIAL APPROACHES

As the trial approaches, exhaustion takes over. Juggling the cases that require daily work while working up a case for trial takes all of the energy that exists. "A day's work, then trial preparation" is how one of my colleagues describes this phase.

Then exhaustion becomes obsession. Within the last few pretrial weeks the lawsuit becomes the center of the lawyer's universe.

I vaguely recall eating and conversing with people hanging around my residence. I play every possible trial question and answer in my mind a thousand times. I give my opening statement to my wife, kids, neighbors, co-workers and friends until they run away screaming when they see me. My wonderful dog, Abby, is a better listener, but after a couple of days she, too, runs away when she sees me coming. I begin to search for neighborhood dogs to practice my argument on.

THE SETTLEMENT

On the courthouse steps I get a reasonable offer. My client, worn down (as the insurance company plans) by trial preparation and the costs of litigation, agrees to accept the amount. After an initial "To Hell With Them! We'll Take This Case to the Supreme Court if Need Be!," I realize that we would be crazy not to take this offer, and we do. My primary emotion is relief that we got the client a good result. Secondarily, I would have loved to try the case just to see what the result would have been.

*****

Dinner time at the Tolmans'. Dad's trial started today. Everyone knows I will be home soon. As I walk into the house all eyes are on me. The silent scene is shattered. By me.

"Anyone want to go to dinner? My treat."

"You got some money, huh, Dad?" Chris calmly responds. He has lived through this before. He knows well the phases his trial-lawyer dad goes through.

Mary Fairhurst
President

A Hit, But Not a Fatal Blow

PRESIDENT'S CORNER

There has been a lot of confusion about what the *Phillips v. Washington Legal Foundation* case means for us in Washington. In my next-to-last President's Corner, I wanted to take this space to try to clarify the confusion.

First, it is confusing because Washington Legal Foundation has a very similar name to this state's Legal Foundation of Washington. They are not the same.

The Washington Legal Foundation is a Washington, D.C. public interest group which has brought a number of lawsuits in a number of states, challenging Interest on Lawyers' Trust Accounts (IOLTA) rules. The Legal Foundation of Wash-ington is this state's not-for-profit organization designated by the Washington Supreme Court to receive and disburse the interest earned on lawyers' pooled trust accounts. IOLTA accounts are used by lawyers and limited practice officers who are mandated by the Supreme Court to hold their clients' funds in trust accounts when those funds are small in amount or will be held for a short period of time.

The Legal Foundation of Washington provides 34 percent of the funding in Washington state for civil legal services for the poor. In 1997, the Legal Foundation of Washington distributed $5.5 million to 36 programs that assisted more than 100,000 people. IOLTA is an innovative funding source used by every state in the country to fund equal justice for all, at no cost to taxpayers, lawyers or their clients.

Phillips v. Washington Legal Foundation was filed in Texas, challenging Texas' IOLTA rules. A separate case was filed here in Washington against our Legal Foundation of Washington and the Washington State Supreme Court Justices, challenging Washington State's IOLTA rules. The case in Washington is called *Washington Legal Foundation v. Legal Foundation of Washington.*

The Texas case challenged the Texas IOLTA rules as violative of the Due Process Clause. The United States Supreme Court, in a 5-4 decision, affirmed the Fifth Circuit Court of Appeals, and held that the interest earned on client funds in lawyers' pooled trust accounts is the private property of the client, thus meeting the first prong of the Due Process Clause test. The Supreme Court did not find the IOLTA rules unconstitutional. The Supreme Court also did not decide the second and third prongs of the Due Process Clause test and remanded the case to the Fifth Circuit (and from there likely to the District Court) to decide whether there is a taking of property and if so, whether any compensation is due.

In the Washington case, the Washington Legal Foundation challenged the Washington IOLTA rules as violative of the Due Process Clause also, but the case is brought by two Limited Practice Officers (LPOs) and two clients of LPOs. The case does not challenge the IOLTA program for lawyers. The Honorable John Coughenour granted summary judgment for the Legal Foundation of Washington, upholding the IOLTA rules. The case is currently on appeal to the Ninth Circuit Court of Appeals.

The United States Supreme Court decision in the Texas case is a setback, but it is not a disaster. The Legal Foundation of Washington and amici believe that because clients suffer no harm by placement of their small or shortly held funds in an IOLTA account that the IOLTA concept will prevail in future court decisions.

The Legal Foundation of Washington is operating as usual and no changes in their mission or their work are required or anticipated at this time. Washington lawyers and limited practice officers are not affected by the Supreme Court's decision. They must continue to comply with the Washington Supreme Court rules and use their IOLTA accounts when appropriate.

The Supreme Court decision underscores the reality of the crisis in funding for legal services. Loss of these funds is a possibility and one that all partners in the model public-private partnership that funds legal services for the poor will have to address. Possible loss of these funds affects all lawyers, even those without pooled trust accounts, because if we don't have adequate funding for civil legal services, then the entire civil justice system falters. If citizens see the justice system falter, then their confidence in the justice system wanes. As stewards of justice, we must work to ensure confidence in the justice system and accessibility of the justice system to all.

You are cordially invited to attend:

Washington State Bar Association Awards Luncheon and Annual Business Meeting

Friday, September 11, 1998
Awards Luncheon 12:00 noon
Annual Business Meeting 2:00 p.m.
The Seattle Space Needle — Skyline Level

Names of those attending:

_____ Please check here to order a vegetarian meal. ☐
_____ Please check here to order a vegetarian meal. ☐
_____ Please check here to order a vegetarian meal. ☐

Cost for the luncheon is $24 per person. To make your reservation, please return this form (or a photocopy) with your check payable to WSBA. Space is limited, so please make your reservations early. Reservations and payment must be received no later than September 1. Please send to:

Washington State Bar Association
Annual Awards Luncheon
2101 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330

If you are unable to join us for the Awards Luncheon, you are most welcome to attend the Annual Business Meeting. There is no charge for attending the meeting, and reservations are not required.

* Please note that the July issue of *Bar News* announced the Annual Business Meeting would be held at the WSBA offices; t*he meeting will now be held at the Space Needle.*

Jan Michels
Executive Director

Scoping the Horizon

EXECUTIVE'S REPORT

You, through your representatives, have entrusted to me the administrative side of the WSBA. But administration serves the masters of legal and delegated authority, vision and policy. From the complex organization of the WSBA's policy, vision and authorities, I offer these observations to the WSBA members for correction, validation and feedback. They fall short of my ambitious promise of "synthesis in my third month" (May *Bar News*, page 15), but they represent my best effort to discover the work before us.

• On the horizon is Y2K...a new millennium in need of acknowledgment and celebration.

• On the horizon is a challenge of the public's trust and confidence in their legal system, their access to it, their trust of its practitioners (those who have chosen to make it their profession), and their belief in its credibility.

• On the horizon is a shrinking world and growing national and international law in areas we're just starting to see.

• On the horizon are new ways to get and share information, and new ways to learn and process data.

• On the horizon are vague fears and trepidations of who regulates lawyers, who defines the practice of law, who protects due process and constitutional guarantees, and who watchdogs the independence of the judicial branch.

• On the horizon are the perennial issues of quality regulation and compensation to the aggrieved...the "who pays for what" issue.

On the horizon is a challenge of the public's trust and confidence in their legal system, their access to it, their trust of its practitioners...and their belief in its credibility.

• On the horizon is replacing the old challenge of finding relevant information with the new challenge of filtering, screening and choosing from the glut of easily available information.

• On the horizon is each individual finding a personal angle of repose in a tumultuous, invading and demanding world.

In this landscape, some priorities emerge:

• Public education about the law and its practitioners, whether the practitioner is in a public, private or alternative setting;

• Strong professional support services, from the ethics hotline and law office management consultants, to alternative dispute resolution and counseling, to formal discipline;

• Easily learned and accessible electronic information and communication services for lawyers;

• Partnerships, coalitions and alliances with law-related and law-concerned groups to broaden the WSBA constituency for branch-of-government and interdisciplinary issues;

• Financially responsible performance of mandatory functions and voluntary WSBA services and programs; revenue support for optional or specialized programs.

A WSBA long-range planning process is underway which will adjust and validate the elements of this horizon. From there, it is time for me to construct a concrete work plan which organizes our energy toward this horizon. That's my promise for next month.

When the Clock Strikes 20

Two decades ago, computers had very little memory and were extremely expensive. These constraints forced programmers to do everything they could to code small programs. One simple, but effective, programming trick was to delete the first two digits (1 and 9) from date items and just use the last two digits (e.g., 68). This widely accepted practice is the foundation of what has become known as the Year 2000 ("Y2K") problem. Computers that are not Y2K-compliant[1] will, at 12:00 a.m., 1/1/2000, believe it's 12:00 a.m., 1/1/1900. The most likely result will be a hard crash, or if the computer continues to work, miscalculations and/or corrupted data.

Many people believe they have until the millennium to implement a Y2K fix. In reality, Y2K problems have already appeared in budget estimates, sales forecasts, and scheduled projects or tasks that extend beyond Y2K. Furthermore, because many programmers used special logic that is triggered by the two-digit year field "99," additional Y2K-related problems will appear during 1999.

In its cover story, "Zap! How the Year 2000 Bug Will Hurt the Economy," *Business Week* recently reported: "[a]ll told the Year 2000 bug could cost the U.S. about $119 billion in lost economic output between now and 2001."[2] The Gartner Group has estimated that correct measures will cost $300 billion to $600 billion.[3] The Gartner Group has further estimated that more than 80 percent of all companies will have some Y2K-related system failures because they will simply run out of time. Moreover, about 30 percent of all companies will have mission-critical system failures that will directly impact the company's survival.

Capers Jones, chairman of Software Productivity Research Inc., and author of *The Global Economic Impact of the Year 2000 Software Problem*, analyzes the likelihood of Y2K-related business failures for all U.S. companies. Jones concludes that large corporations, which have immense financial resources and many applications, suffer a 1 percent risk of going out of business or declaring bankruptcy because of Y2K. Small companies, which have fewer financial resources and less software, have a 3 percent risk of a Y2K-related failure. Mid-sized companies (defined as 1,000 to 10,000 employees), which tend to use many applications but generally do not have the financial resources to properly maintain them, face a 5 percent to 7 percent Y2K-related failure rate. About 30,000 U.S. companies fit Jones' "mid-sized" definition.

Ian Hayes, co-author of *The Year 2000 Software Crisis*, predicts that the greatest Y2K business failure will not result from a computer crash, but will come from a disastrous financial decision that was based on an erroneous, non-Y2K-compliant spreadsheet.

Finally, in an article entitled "The Legal Nightmare That Is Y2K," *The San Francisco Examiner* reported, in June 1997, that Lloyds of London's Y2K task force told underwriters to expect $1 trillion in litigation costs in the U.S. alone.

Given these predictions, there are a handful of practical and legal issues that warrant your consideration.

Officer and Director Issues

Company officers and directors must diligently act in the best interest of their company.

Fiduciary Duty/Standard of Care

Most state incorporation laws require that corporate directors and officers act in good faith and in the best interests of the corporation, including reasonable inquiry, and in a manner that a reasonable person would use under like circumstances.[4]

Practical and Legal *y2K* Issues

Whether your clients know it or not, Y2K is probably one of the biggest legal issues they will face during the next few years.

by

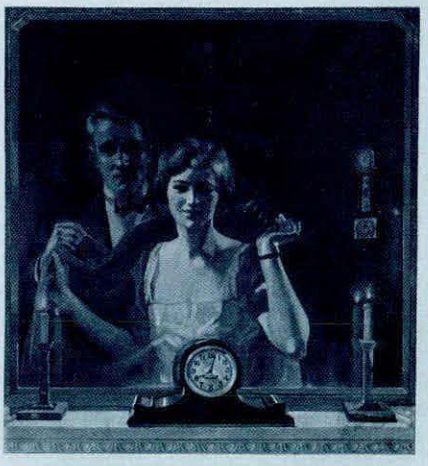
GREGORY S. JOHNSON

Washington courts have held that directors have a fiduciary duty to exercise ordinary care in performing their duties and to act reasonably and in good faith. Generally, a court will not substitute its judgment for that of corporate directors "[u]nless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence)."[5] Reasonable care is required.[6] Good faith is insufficient because a director must also act with such care as a prudent person, in a like position, would use under similar circumstances.[7] Because Y2K is a known event with foreseeable consequences, company directors and officers have a duty to ensure that their companies are Y2K-compliant.

Disclosure

Officers and directors must disclose certain information to their shareholders, potential shareholders and the SEC. Disclosure is a sticky issue. On one hand, the law requires disclosure. On the other hand, by disclosing "unpleasant" information, one may end up arming the other side for litigation. Nevertheless, companies have a duty to disclose issues that could materially affect them. Registration statements and prospectuses require similar disclosures. Public companies must file quarterly (10-Q) and annual (10-K) reports. These reports must contain a Management's Discussion and Analysis of Financial Condition and Results of Operations (MDA). The SEC originally addressed Y2K in a reporting context via Staff Legal Bulletin No. 5 (10/8/1997). On January 12, 1998, the SEC issued a revised Legal Staff Bulletin No. 5. The revised bulletin contains much of the original bulletin's language, but there were some noteworthy revisions. The revised SEC Bulletin states:

> If a company has not made an assessment of its Year 2000 issues or has not determined whether it has material Year 2000 issues, the Staff believes that the disclosure of this known uncertainty is required. In addition, the Staff believes that the determination as to whether a company's Year 2000 issues should be disclosed should be based on whether the Year 2000 issues are material to a company's business, operations, or financial condition, without regard to related countervailing circumstances (such as Year 2000 remediation programs or contingency plans). If the Year 2000 issues are determined to be material, without regard to countervailing circumstances, the nature and potential impact of the Year 2000 issues as well as the countervailing circumstances should be disclosed.



Computers that are not Y2K compliant will believe it's 1900.

In sum, disclosure of Y2K uncertainty is required. Y2K disclosure should be based on whether Y2K issues are material to a company's business, operations or financial condition. In addition, if Y2K issues are material, the nature and potential impact of the Year 2000 issues, as well as the countervailing circumstances, should be disclosed. The revised bulletin goes on to describe the nature of the disclosures companies should make. The bulletin states: "the Staff expects, at the least," the following topics will be addressed:

- The company's general plans to address the Y2K issues relating to its business and its operations (including operating systems);
- If material, its relationships with customers, suppliers and other con-stituents;
- The total dollar amount that the company estimates will be spent to remediate its Y2K issues, if such amount is expected to be material to the company's business, operations or financial condition; and
- Any material impact these expenditures are expected to have on the company's results of operations, liquidity and capital resources.

Finally, the Staff indicates that any disclosures must be reasonably specific and meaningful, rather than standard boilerplate.

Auditors

On October 31, 1997, a task force of practitioners in public practice and the staff of the American Institute of Certified Public Accountants issued a Y2K Accounting and Auditing Guidance publication. This publication indicates, among other things, that the auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. Thus, an auditor's responsibility relates to the detection of material misstatement of the financial statements being audited, whether caused by Y2K or by some other cause. Companies should expect that auditors will be asking them about Y2K, what steps they have taken to comply, and what the financial impact could be.

Due Diligence Issues

Companies that may be purchasing other companies need to determine if the selling company has a Y2K problem. The sale process should include Y2K-specific warranties, exclusions and indemnification clauses.

Companies that are purchasing any kind of date-dependent technology must conclusively determine if the technology is Y2K-compliant. This is a broad issue and could include anything from a "smart" building, to PBX telephone system, to a palmtop computer. *Caveat Emptor!* This sale process should include Y2K-specific warranties, exclusions and indemnification clauses.

Company personnel who are responsible for Y2K compliance should carefully document their due diligence, not only as it relates to purchases, but all of

the steps the company is taking to make itself Y2K-compliant. This documentation should demonstrate direct involvement with and unflinching commitment to a Y2K problem-fix at the highest management levels. As this documentation is created, keep in mind that it may end up in the hands of opposing counsel. The end goal is to create a positive, accurate, truthful and compelling record that will be clear to a jury (keep technical terms or management terms at a minimum). Company personnel should also be advised that Y2K frustrations should not be reduced to writing (e.g., memos and particularly e-mail) for they, too, could eventually end up in the hands of opposing counsel.

Insurance Issues

The Insurance Services Office Inc. of New York City, (information supplier to the insurance industry) has written a standard exclusion for Y2K claims and has sent it to all state regulators. "It's the most emphatic and clearest way that we could think of on short notice to tell policyholders that this coverage does not exist," said Christopher Guidette, a Services Office spokesman. "If they need coverage, they'll have to get it." Companies should contact their insurance carriers, request a policy review and determine, in advance, where they stand on Y2K coverage. Potential insurance issues include:

Business interruption insurance — coverage often pivots on interruptions that result from a "fortuitous event" (sometimes defined as an event dependent on chance). Insurance carriers may assert that Y2K is a known, correctable event, and therefore not a "fortuitous event."

Directors & Officers liability insurance — assume Y2K failures lead to losses and shareholder suits. Do the exclusions contained in the D&O insurance apply to these Y2K-caused events?

Errors & Omissions insurance — computer consultants are sued in negligence relating to Y2K issues. Is there coverage?

Property Insurance — the building's fire-sprinkler system microprocessor was not Y2K-compliant. Everything gets soaked, including the two floors below. Is there coverage?

Tax Issues

In October 1997, via Revenue Procedure 97-50, the IRS stated that in order to ensure their computer systems are Y2K-compliant, taxpayers may pay or incur costs to convert their existing software, to develop new software to replace their existing software, to purchase or lease new software to replace their existing software, or to develop or purchase software tools to assist them in converting their existing software to be Y2K-compliant. These Y2K costs fall within the purview of Rev. Proc. 69-21. Accordingly, the IRS will not disturb a taxpayer's treatment of its year 2000 costs if the taxpayer treats these costs in accordance with section 3 of Rev. Proc. 69-21 (developed software, including converted software), section 4 of Rev. Proc. 69-21 (purchased software), or section 5 of Rev. Proc. 69-21 (leased software).

Lloyds of London's Y2K task force told underwriters to expect $1 trillion in litigation costs in the U.S. alone.

The IRS further indicated that except in extraordinary circumstances, Y2K costs may not be deducted as "qualified research," because Y2K costs generally do not involve research undertaken for the purpose of discovering information that is technological in nature (where most of the research activities constitute elements of a process of experi-mentation). Taxpayers may not claim a research credit for Y2K costs except in those extraordinary circumstances in which those costs satisfy the definition of "qualified research" in § 41(d) and otherwise meet all the requirements of § 41.

Technology Provider Issues

Symantec Corp. is defending a class-action lawsuit which claims Symantec is improperly requiring customers who bought Norton AntiVirus software prior to V.4.0 to pay for upgrades that remedy a Y2K problem. The lawsuit alleges breach of implied warranty and related claims in connection with what it calls "defective computer software" that Symantec developed and sold.

Store owners in Warren, Michigan, have sued Tec-America Corp. and its local service vendor, All American Cash Register Inc., because of cash-register system crashes that occured when a customer's credit card listed Y2K+ as an expiration date. Between April '96 and May '97 the system shut down 105 times (sometimes for as long as five hours). Plaintiffs were unable to take charge cards and customers were leaving full shopping carts and walking out of their store. The suit alleges the defendants knowingly sold a defective product that they were unable to fix.

It's clear that technology providers (manufacturers, distributors, resellers, consultants, service providers and so forth) are on the leading edge of Y2K issues.

Contracts

Companies should locate all sale contracts, software licenses, and maintenance and service agreements, and competent counsel should review them to determine the parties' rights and obligations. The main issue, of course, is whether a particular technology item is Y2K-compliant. If it's not, who bears the responsibility (expense) for ensuring that the item becomes Y2K-compliant? In some instances, warranties or service or maintenance agreements may require the vendor to perform Y2K compliance work and fix it at their own cost. Getting vendors to actually do the work and absorb the Y2K compliance costs may prove difficult. If verbal conversations do not prove fruitful, an appropriate person should make a formal request in writing. If this is not done, the company may risk waiv-

ing its reimbursement rights.

THE UCC

Most technology purchases/licenses are a transaction in "goods" which fall under the Uniform Commercial Code ("UCC"). Under Article 2 of the UCC, warranties that are not specifically disclaimed are implied. Implied warranties include the warranty of fitness for a particular purpose and the warranty of merchantability.[8] If these warranties have not been specifically disclaimed, one can reasonably argue that they bought item X for long-term use and did not expect it to cease functioning merely because a new calendar year commenced.

TORTS

Many causes of actions have been bandied about. Some entities have discussed legal action based on latent defect. Others have discussed products liability, negligence, negligent misrepresentation, and even fraud (if the vendor knew of the problem and continued to provide defective products). Consumers may seek relief under the Consumer Protection Act.

STATUTES OF LIMITATION

The law sets forth various statutes of limitation for various legal issues. Y2K raises interesting statutes of limitation issues. When does the statute start to toll, when the item actually ceases to function on 1/1/2000, when the owner discovered the item was not Y2K-compliant, when the owner reasonably should have discovered that the item was not Y2K-compliant, or at the time the contract was executed? If a company possesses material, mission-critical technology that is not Y2K-compliant, it should contact competent counsel and discuss statutes of limitation issues.

EMBEDDED TECHNOLOGY

The most interesting Y2K issue may emanate from what's known as "embedded technology." Embedded technology generally refers to small microprocessors that have been encoded to perform certain computing tasks. Virtually every technology that's been sold during the past decade uses microprocessors. For example, today's automobiles have as many as 14 microprocessors that control everything from fuel flow, to the automatic transmission, to the ABS braking system. Consider a 747 airplane. Companies must Y2K-research their telephones, FAX machines, copiers, routers, security systems, heating and ventilation systems, and so forth.

BUSINESS RELATIONSHIP ISSUES

Most businesses work with customers and other businesses — suppliers, vendors, financial service providers, insurance carriers, electric utilities, telecommunications networks, Internet service providers and so forth. Companies that have interdependent relationships with other companies could be at risk.

For example, what if a manufacturing company has implemented just-in-time assembly? Will its suppliers be on time during the first week of, January 2000? What if a company manipulates data that is telecommunicated to it from other com-

panies? What if the incoming data is not Y2K-compliant? Companies cannot assume that their cohorts have solved their Y2K problems; they may well find that their cohorts' Y2K problem is *their* biggest Y2K problem.

Appropriate company personnel should frankly discuss their interdependent relationships. They should conclusively determine what is mission-critical and work on contingency plans. If contracts are involved, appropriate warranty, exception and indemnification clauses ought to be included. Companies that work with federal or state governments ought to be particularly vigilant. These governmental groups are more likely to have legacy systems that are more Y2K-vulnerable. Moreover, many of them have reluctantly admitted they got a "late start" on Y2K. Even if a company's essential suppliers are in great Y2K shape, they should get as much legal protection as possible. One way to do this is through new contractual clauses with each supplier which provide that the supplier will be Y2K-compliant by a certain date.

What if a company manipulates data that is telecommunicated to it from other companies? What if the incoming data is not Y2K compliant? Companies cannot assume that their cohorts have solved their Y2K problems; they may well find that their cohorts' Y2K problem is *their* biggest Y2K problem.

Business relationships are a two-way street. If a company is in front of the Y2K curve, it should use this as an opportunity to help its clients and create goodwill. On the other hand, if it has a Y2K problem, it should tell those who might be affected and keep them apprised of the situation. Open and honest communication will serve everyone better in the long run. If a company's cohorts know it has a Y2K problem, they can take steps to help themselves. Furthermore, notice will put the company in a better legal position than withholding information until the problem suddenly reveals itself.

Conclusion

Y2K is not just an information systems issue. It involves funding, management, human resources and legal problems. Whether your clients know it or not, Y2K is probably one of the biggest legal issues they will face during the next few years.

Best practices include, but are not limited to: detailed Y2K planning; unwavering commitment from upper-level management; external validators (Y2K test results should be verified via independent review); controlled, honest disclosure to customers and employees; a Y2K disaster recovery plan (run some scenarios and create plans that address them); a positive, accurate, truthful and compelling record that will be clear to a jury; and reporting and documentation that is created for outside counsel, so that it can be protected under attorney-client privilege.

Notes

[1] A system is Y2K-compliant if its components can successfully process dates before

and after 1/1/2000 at any time before or after 1/1/2000. The system clock must smoothly make the transition from 1999 and 2000 and recognize that 2000 (unlike 1900) is a leap year.

[2] M. Mandel, P. Coy, P. Judge, "Zap! How the Year 2000 Bug Will Hurt the Economy." *Business Week*, page 93, March 2, 1998.

[3] The Gartner Group is a highly respected technology research group in Stamford, CT.

[4] For example, RCW 23B.08.420, provides, in part, that: "An officer ... shall discharge the officer's duties under that authority: (a) In good faith; (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (c) In a manner the officer reasonably believes to be in the best interests of the corporation." *See also,* § 4.01 of the American Law Institute's Principals of Corporate Governance and § 8.30 of the Model Business Corporation Act.

[5] *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995).

[6] *Id.* (citing *Nursing Home Bldg. Corp. v. Dellart*, 13 Wn. App. 489, 498, 535 P.2d 137, *review denied*, 86 Wn.2d 1005 (1975)).

[7] *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 833-35, 786 P.2d 285, *review denied*, 114 Wn.2d 1023 (1990).

[8] Under RCW 62A.2-316, "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous."

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Assignment of Personal Injury Claims

By Lester (Larry) Kleinberg

Many lawyers may think unliquidated claims for personal injury are assignable, since a wide variety of other choses in action are assignable in accordance with the oft-cited modern trend of the law to allow freedom to alienate almost every conceivable type of property interest. Accordingly, some attorneys might be surprised to learn that, in most instances, courts throughout the United States have decided that unliquidated claims for personal injury (hereinafter referred to as "claims") cannot be validly assigned.[1]

The courts have given various rationales for prohibiting such assignments. Some courts have taken a rather technical approach by determining that a claim, before it becomes liquidated in amount by agreement or by reduction to judgment, has no established value and therefore lacks the elements of property sufficient to form the consideration required by contract law to support an enforceable assignment. Other courts have reasoned that such assignments are prohibited on public policy grounds, in order to avoid the evils of champerty and maintenance, and to prevent the unsavory "traffic in human misery" that might result if claims were freely assignable and saleable on the open market. The most frequent rationale for prohibiting assignments of claims, however, is that the common law does not allow such assignments, because at common law a claim would not survive the death of the injured party ("claimant"). A fair number of these latter courts (including the Washington Supreme Court; see *infra*) have also added a gratuitous corollary to their decisions, which says that if the foregoing common-law rule has been abrogated by a statute providing that a claim would survive the claimant's death, then the reverse would also be true, and the claim would thereby become assignable. Simply put, these latter courts have laid down the following general rule: If the claim would not survive, it is not assignable; but if (by statute) the claim would survive, it is assignable. This general rule is referred to as the "survivability test."

The question of whether assignments of claims are valid can arise in a surprising number of ways.

The question of whether assignments of claims are valid can arise in a surprising number of ways. For example, the question whether such assignments are valid can arise from: (a) agreements to pay or to secure payment of creditors of the claimant (including agreements with attorneys to secure payment of their legal fees); (b) outright sales or gifts of claims; (c) community property agreements or marital dissolution agreements that seek to transfer and/or divide claims; (d) agreements to compromise and settle claims; (e) insurance policies and other agreements that purport to subrogate insurance companies to claims; and (f) agreements among multiple victims of the same personal injury tort, entered into for the purpose of bringing suit or to settle claims among themselves.[2]

The validity of such assignments can be subject to attack in proceedings brought by creditors, as well as attacks arising out of probate, marital dissolution or bankruptcy proceedings involving estates of claimants who have executed such assignments.

If assignments of other types of claims are prohibited in a particular jurisdiction, then assignments of claims codified or created by statute ("statutory torts") are typically barred in the same jurisdiction. Accordingly, a prohibition against assignments of other types of claims in Washington would presumably mean that assignments of claims for such Washington "statutory torts" as invasion or violation of privacy (RCW 9.73.060), malicious harassment (RCW 9A.36.083), injury of a minor child (RCW 4.24.010), seduction of a child (RCW 4.24.020), unlawful disclosure of criminal history records (RCW 10.97.110), unlawful discrimination (RCW 49.60.225 and RCW 49.60.250(5)), unlawful requirement of a lie detector test (RCW 49.44.135), negligent failure of a state agency to comply with statutory obligations,[3] and infliction of emotional distress caused by intentional or willful violation of a statute[4] would also be barred in Washington.

The Bankruptcy Code provides that a debtor's interest in a claim becomes property of his or her bankruptcy estate notwithstanding any applicable state law "that restricts or conditions transfer of such interest by the debtor."[5] Accordingly, a bankruptcy trustee or creditor

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might have sufficient incentive to attack the validity of an assignment of a claim executed by the debtor prior to the filing of his or her bankruptcy petition, in order to acquire (for the bankruptcy estate) what might prove to be a valuable asset.

If a claim is reduced to an established dollar amount by agreement with the claimant, the claim is no longer unliquidated and is assignable. Similarly, once a claim has been reduced to judgment the claim is no longer unliquidated, and the judgment itself is assignable.[6]

Washington Cases

Only two Washington cases have comprehensively dealt with the subject of this article, and in both of those cases the assignments considered therein were deemed invalid.

In the early case of *Slauson v. Schwabacher Bros.*, 4 Wash. 783, 31 Pac. 329 (1892) the Court found that the assignment of a claim in the nature of defamation was invalid, because the claim failed to pass the survivability test.[7]

Seven decades later, the Court decided *Harvey v. Cleman*, 65 Wn.2d 853, 400 P.2d 87 (1965), which remains the most recent Washington case to deal directly with the assignability of claims.[8] The central issue in *Harvey* was whether two assignments of a claim (executed by Mr. Harvey and given as security to his attorney and another alleged creditor) were valid. In reaffirming the survivability test previously laid down in *Slauson*, the *Harvey* Court declared that:

> *The test of assignability in this jurisdiction is whether the cause of action survives to the personal representative of the assignor. If it does, the cause of action is assignable...* Although appellants...dub it an 'archaic and oft criticized rule', it is, nevertheless, the rule of this jurisdiction. No reason has been advanced why it should be abandoned in the absence of legislative direction. (citations omitted; emphasis added)

The Court then went on to decide that inasmuch as Mr. Harvey's claim would not have survived his death under the general survival statute then existing, his assignments were invalid and "of no effect."

Washington Statutes

No Washington statute allows, prohibits or regulates the voluntary or involuntary assignment of *all* types of claims. However, certain Washington statutes do specify that the Department of Social and Health Services and some providers of medical services can obtain liens upon claims.[9]

Furthermore, in *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn.App. 626, 513 P.2d 849 (1973) the Court decided that a sheriff's levy of execution upon a claim was valid, because a Washington statute[10] provides that "all property" not exempted by law is subject to such levies. And in *Jones v. Intl. Land Corp.*, 51 Wn. App. 737, 755 P.2d 184 (1988) the Court held that funds payable in the future upon a claim were effectively "attached" by a restraining order issued pursuant to supplemental proceedings statutes (RCW Chap. 6.32).

On the other hand, certain Washington

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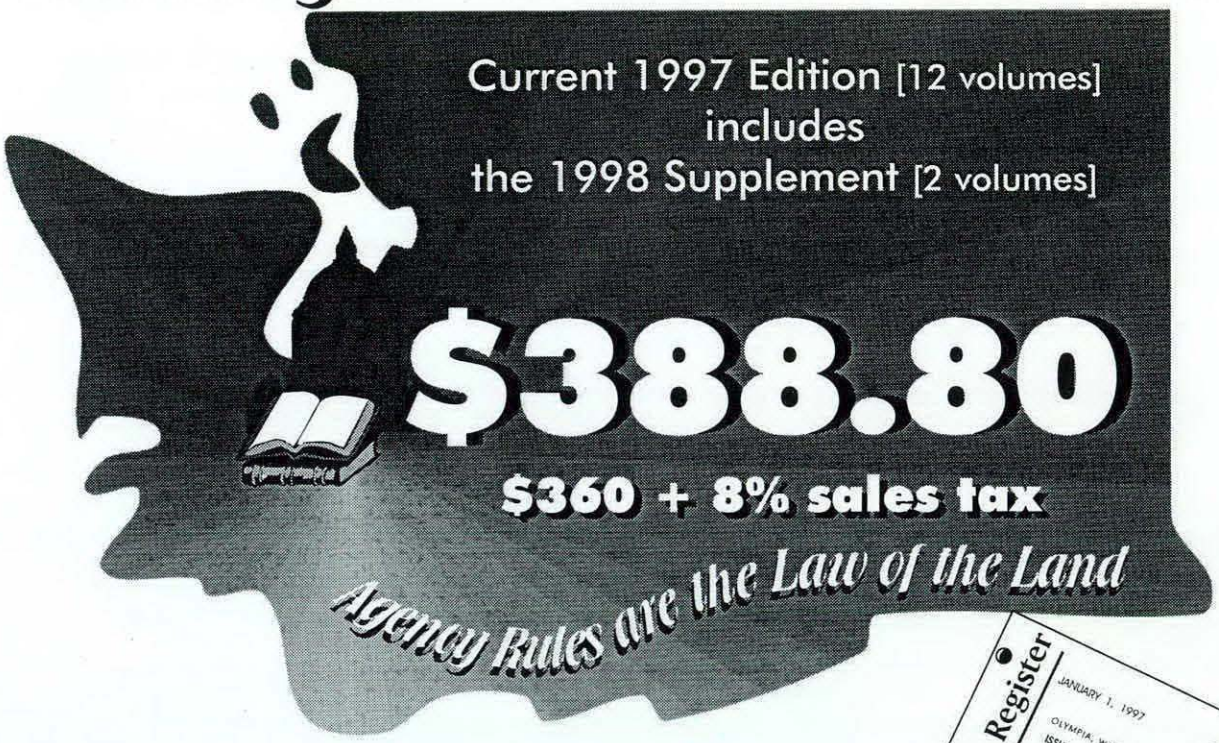

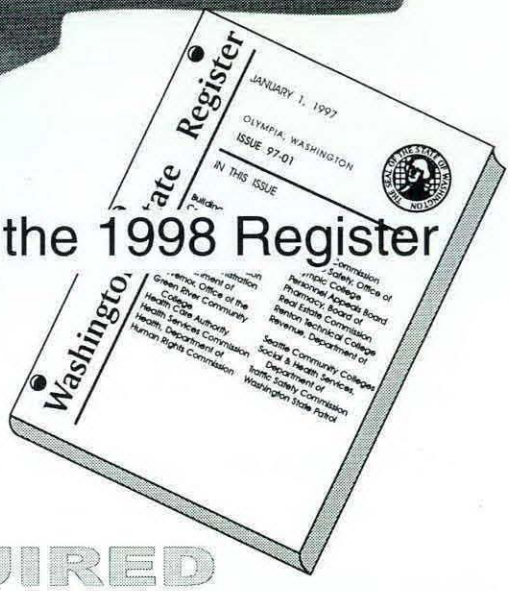

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statutes prohibit or restrict assignments of particular types of claims.[11]

Survival of Claims in Washington

Washington has two survival statutes. RCW 4.20.046, the "general" survival statute, preserves for the decedent's personal representative certain causes of action that the decedent could have maintained if he or she had not died.[12] And RCW 4.20.060, the "special" survival statute (also known as the "death by personal injury" survival statute) gives a claim to designated members of the decedent's family for the personal injuries that brought about the death of the decedent, to be maintained by the decedent's personal representative on behalf of those family members.[13]

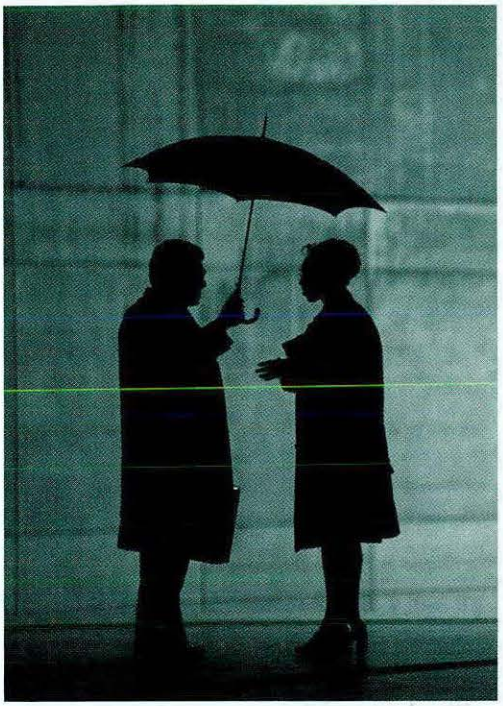
According to the *Slauson* and *Harvey* opinions, the survivability test is apparently based upon the hypothetical survival of claims under the general survival statute (and not the special survival statute), because only the general survival statute is analyzed regarding the Court's application of the survivability test in those two cases.

In 1965, when *Harvey* was decided, according to the general survival statute then in effect all claims survived the deaths of claimants, except that an important and far-reaching *proviso* then contained in the statute barred the recovery of damages "for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased." This meant that when *Harvey* was decided, claims for recovery of damages designated in the foregoing *proviso* did not survive and were not assignable under the survivability test, while claims for other elements of damages (such as future medical expenses and future lost earnings of the decedent) did survive, and were assignable according to the survivability test.

In 1993, the question of whether claims can be validly assigned in Washington was thrown into uncertainty when the Washington Legislature amended the general survival statute. Since 1993, the general survival statute has essentially provided that *all* claims survive the deaths of claimants.[14] Under the survivability test specified in the *Harvey* case, all claims are now assignable in Washington, because all claims would now survive the hypothetical deaths of claimants.

Under the survivability test specified in the *Harvey* case, all claims should now be assignable in Washington, because all claims would now survive the hypothetical deaths of claimants.

Unfortunately, there is no indication that the Legislature even remotely considered the survivability test when the 1993 amendment to the general survival statute was adopted. The legislative record pertaining to the 1993 amendment is silent about the effect the amendment might have upon the *assignability* of claims,[15] and it is logically apparent that any such effect was imposed inadvertently by the Legislature. Although an analysis of the applicable rules of law regarding legislative intent is beyond the scope of this article, it does seem safe to conclude (assuming that the above-quoted excerpt from the *Harvey* case remains controlling and effective to this day) that the 1993 amendment did make all claims assignable in Washington for the very first time.



Will the Survivability Test Be Abandoned?

The survivability test has remained as the only test of assignability of claims in Washington for more than a century now. Despite that longevity, however, it is not inconceivable that the survivability test might be abandoned by Washington courts if and when they are next faced with a proper opportunity to do so.

An overwhelming majority of courts throughout the United States has used the survivability test to rule that assignments of claims are *invalid* in cases where it has been determined that such claims *would not have survived* the deaths of claimants. (The *Slauson* and *Harvey* cases are typical examples of this kind of decision.) However, the flip side of such rulings has been less predictable; that is, there is a clear division of authority on the question whether assignments of claims are *valid* merely because such claims *would have survived* the deaths of claimants. A respectable number of courts have decided that such assignments are nevertheless invalid for reasons in addition to (and not involving) the survivability test.[16] One treatise[17] refers to this difference in views as follows:

> The traditional view makes survival of an action the test of its assignability, so that if the claim is the kind that survives, it may be assigned by the injured party to another person, otherwise not. It has also been held that if the claim is known to be assignable, it will also survive. Some courts, however, have rejected this tandem approach, insisting that the policies behind assignability and survival are quite different, and in such courts the two questions are independent of one another. (citations omitted)

The *Slauson* and *Harvey* courts had no need to address additional arguments against allowing assignments of claims, because in both of those cases the assignments at issue were deemed invalid under the survivability test. However, now that Washington's general survival statute has been amended so that, for the first time (according to the *Harvey* case and its survivability test), all claims are now assignable in Washington, such additional arguments will take on more importance to litigants seeking to invalidate such assignments.

The crucial question now is whether Washington courts might abandon the survivability test as the only test of assignability, in order to find that assignments of claims are invalid upon other grounds.

A good argument can be made that the survivability test should be abandoned in Washington. The survivability test is based upon mere analogy, and has never been entirely logical. Why should the validity of assignments of claims be determined by whether such claims would survive the hypothetical deaths of claimants?

As we have seen, legislatures change survival statutes from time to time, for reasons that have nothing whatsoever to do with the assignability of claims, and such changes will continue to affect the assignability of claims so long as the survivability test remains in effect as the only test of assignability. The legal and public policy ramifications of ongoing changes to the general survival statute are different from the legal and public policy ramifications that might result from allowing or prohibiting assignments of claims.

Southern Farm Bureau v. Wright Oil Co.[18] is a well-written decision wherein the Court held that the assignment of a claim was invalid even though the claim might have survived the death of the

At the present time it is not safe to predict whether assignments of claims are valid in Washington, because it is reasonably possible that the survivability test may be abandoned in this state. It would be imprudent for Washington attorneys to advise their clients to execute any assignments of claims with the expectation and desire that such assignments will be valid and immune to later attack.

claimant. In reaching that decision, the Court observed that:

> [W]henever courts have explored the policy considerations pertinent to the issue, they have held — without exception, we think — that survivability of personal injury claims does not attract assignability in its wake....We have no hesitancy in joining those courts which hold that a survival statute does not confer the power of assignment upon the holder of an unliquidated tort claim for personal injuries.

Conclusion

At the present time it is not safe to predict whether assignments of claims are valid in Washington, because it is reasonably possible that the survivability test may be abandoned in this State. Accordingly, it would be imprudent for Washington attorneys to advise their clients to execute any assignments of claims with the expectation and desire that such assignments will be valid and immune to later attack.

The Washington Legislature could clear up present uncertainties about assignments of claims by enacting a new statute that allows, prohibits or regulates such assignments. However, before considering the adoption of any such statute legislators should take note that such statutes are rarities in other states.[19] Almost all jurisdictions have left it to their respective courts to judicially determine whether assignments of claims are valid.

Instead of adopting any such new statute, it would make more sense if the Legislature were to simply incorporate into Washington's general survival statute an express declaration that the survival statute shall not be construed so as to authorize (nor affect) assignments of claims. Other states have adopted this latter approach.[20] The addition of such language to the general survival statute would leave it to Washington courts to determine the assignability of claims based upon public policy grounds, without regard to other provisions of the present general survival statute or future amendments thereof.

Unless the Washington Legislature adopts some kind of pertinent legislation in the interim, it appears that parties interested in resolving the present uncertainties about assignments of claims will simply have to wait until Washington courts are next faced with a proper opportunity to deal with the assignability of a claim.

Notes

[1] The cases are collected in *Assignability of Claim for Personal Injury or Death*, 40 ALR 2d 500.

[2] For an example of a similar agreement between such multiple victims see *Patterson v. Horton*, 84 Wn.App. 531, 929 P.2d 1125 (1997).

[3] *McKinney v. State*, 134 Wn.2d 388, 950 P.2d 461 (1998).

[4] See *White River Estates v. Hiltbruner*, 134 Wn2d 761, 953 P.2d 796 (1998).

[5] Bankruptcy Code § 541(a)(1) and § 541(c)(1)(A). See *Sierra Switchboard Co. v. Westinghouse Electric Corp.*, 789 F.2d 705 (9th Cir., 1986). However, ownership of the claim by the bankruptcy estate is subject to the debtor's limited exemption thereof, as provided by Bankruptcy Code § 522(d)(11).

[6] RCW 4.56.090.

[7] The survivability test set forth in *Slauson* is analyzed and reaffirmed in *Cooper v. Runnels*, 48 Wn.2d 108, 291 P.2d 657 (1955) (assignment of unliquidated tort causes of action for property damages valid because causes of action passed the survivability test).

[8] Also see Marriage of *Dugan-Gaunt*, 82 Wn. App 16, 915 p.2d 541 (1996) (assignment of claim for future workers compensation benefits deemed invalid because prohibited by statute).

[9] RCW 43.20B.060; RCW 74.09.180; RCW 74.09.185; and RCW 60.44.010.

[10] RCW 6.17.090 (formerly RCW 6.04.060).

[11] RCW 51.32.040(1) (workers' compensation benefits); and RCW 7.68.070(10) (crime victims' compensation).

[12] *Cavazos v. Franklin*, 73 Wn. App.16, 867 P.2d 674 (1994).

[13] *Higbee v. Shorewood Osteopathic Hospital*, 105 Wn.2d 33, 711 P.2d 306 (1985); and *Walton v. Absher Construction*, 101 Wn. 2d 238, 676 P.2d 1002 (1984).

[14] Claims for the damages designated in the aforementioned *proviso* survive under the present general survival statute only if certain members of the family of the decedent exist to become beneficiaries thereof.

[15] The 1993 amendment was enacted as Senate Bill 5077. See Washington Senate Journal For 1993 at page 2861; Washington House Journal For 1993 at page 4785; Washington Legislative Digest & History of Bills For 1993 at page 34; and Final Legislative Report (Washington, 1993) at page 217.

[16] See 40 ALR 2d 500, *supra*, § 5 and § 6 [b].

[17] Prosser And Keeton on *The Law Of Torts*, pages 944-945 (5th ed., 1984). Also see 6 Am.Jur.2d *Assignments* § 39, pages 222-223; and 6A C.J.S. *Assignments* § 38, page 645.

[18] 454 S.W.2d 69, 71-72 (Ark., 1970).

[19] Statutes in Georgia, New York and Virginia prohibit assignments of claims. 32 Official Code Of Georgia § 44-12-24; 23A McKinney's Consol. Laws Of New York § 13.101(1); and 2 Code Of Virginia § 8.01-26.

[20] West's Annotated California Codes, Code of Civil Procedure § 55-7-8a(f); and West Virginia Code § 55-7-8a(f).

Lester (Larry) Kleinberg has been a Seattle attorney for 40 years and has remained interested in the subject of this article since he represented the respondent in Harvey v. Cleman.

MAKING A BETTER RECORD

TIPS FROM A COURT REPORTER TO HIS LAWYER CHILD

BY

WILLIAM MACAULEY

What qualifies someone with only a high-school education to advise lawyers how to make a record? How about 50-plus years' experience as a court reporter in perhaps 200 tribunals, occupying a front-row seat at more than 10,000 trials and depositions, conducted by at least 20,000 lawyers, in nine countries, with stakes ranging from slap-on-the-wrist traffic tickets to billion-dollar claims and, in criminal cases, the death penalty? If I had a child who had just passed the bar and aspired to be a trial lawyer, here's what my graduation-day advice would be.

****

My dear child:

Congratulations on passing the Bar. You ask if I can pass along tips from my career as a court reporter that would help you in your chosen career as a trial lawyer. Boy, can I! Here's a buffet of tips you can choose from which I guarantee will help you make a better record in your practice and make you more record-conscious.

Lawyers spend years learning their craft and draft pleadings meticulously, yet when one speaks really well, we view him with wonder, gratitude and, yes, admiration. I feel safe in saying, with all due respect, that 90 percent of all trial lawyers leave room for improvement. Here are some omissions and commissions that apparently aren't dwelt upon in law school or CLE seminars, and that will help you produce a true, complete and impartial record.

GRAMMAR NOT IMPORTANT

For openers, court reporters customarily, within limits, repair ingrammaticisms of court and counsel as a professional courtesy. A witness's words, of course, remain inviolate. So if you say "was" instead of "were," or mumble "er" or "uh" a few times, as we all do, don't worry; the appellate court will never know. My test on so editing has always been: "Is it meaningful?" Not so, however, with the following:

Lawyers spend years learning their craft and draft pleadings meticulously, yet when one speaks really well, we view him with wonder, gratitude and, yes, admiration. I feel safe in saying, with all due respect, that 90 percent of all trial lawyers leave room for improvement.

POOR ENUNCIATION

Judges have said to me: "Mr. Reporter, the witness speaks so fast I can't understand him. Will you please read back the answer?" Even though at times we must write five words a second, speed itself is rarely the problem. Slurring, poor enunciation, is. Try hard to enunciate clearly. As examples, a refrigerator has both *installation* and *insulation;* people ail with *sinusitis* and *synovitis; abduction* and *adduction* aren't synonyms; the prefixes *hyper* and *hypo*, *inter* and *intra* radically change meanings. Did the pavement *crumple* or *crumble*? Did the doctor check the patient's *fiscal* or *physical* condition? Was he *racing* horses or *raising* horses? Were the stock certificates *worthless* or *worth less*? Did the *poor* or *pure* lady *so list* or *solicit* the gentleman? Did the money go to the *state* or the *estate*? Was it *massive* structures or *mass of* structures? And there are thousands more. Context may help, but not always. A witness may be deciphering fragmented handwritten notes. (Try saying these two words aloud: *once*, *wants*.) Help me to decide accurately. I've got other hot grounders to field. Yesterday a neurosurgeon expounded on dysdiadokokinesia, then an orthopod spoke on spondylolysthesis. Today a forensic chemist mouthed methylamphetamine and methyl-aminopropane for two hours.

In my early 20s, I was an official reporter for the United Nations. A-bombs were brand new then, international tensions ran high, and my most thrilling split second was spent puzzling whether the Soviet delegate, in fractured English, was proposing a *resolution* or *revolution*. I feared any error I made could vaporize more than just my career.

SPEAK LOUDLY AND CLEARLY

Word swallowers gulp a sentence's first or last word, often confusing meaning.

Identify yourself. Carry cards.

One morning, right before an ongoing trial in a federal court, a lawyer appeared, made a brief motion which the judge granted, saying, "Fine, Counsel. Give the Clerk your card." The lawyer grinned, patted his chest and said, "Sorry, your Honor, I don't have any cards with me." The judge stiffened and said, "Counsel, please approach the bench." The lawyer's smile sobered. "Who is the senior partner in your firm, Counsel?" On hearing his name, the judge said, "Tell him to appear here at 1:30 this afternoon." The lawyer said, "Sorry, your Honor, but he is in trial and can't make it." "Counsel, are you telling me I must send a couple of United States Marshals to assist him?" Needless to say, the senior partner did appear without the aid of marshals, and there followed a tongue-lashing that made even us court reporters wince. Word of this, however, traveled swiftly throughout that legal community, and henceforth all lawyers appearing in that court carried cards.

Federal judge; lifetime appointment.

Example:

Q. Was it raining *earlier?*

A. Yes, it was.

Suppose the reporter and six jurors heard *earlier* and the witness and six jurors didn't. "If" is a word commonly swallowed at the beginning of a sentence and, lo, a hypothesis becomes a declaration. You've heard people say "Feud gone," for "If you had gone" or "Jeet?" for "Did you eat?"

Court reporters, as guardians of the record, must at times interpret meaning and form conclusions. Punctuation, or lack of it, can reverse meaning.

Here's a real-life example:

Q. Was the knife eight inches long?

A. No shorter.

If the witness pauses after "No," and I insert a comma, butcher knife becomes a paring knife. Inflections, pauses, facial expressions, accents are helpful clues to a reporter. Veteran trial lawyers are acutely aware of this.

Reading

Facing the witness or the Court, you may come through fine. But when you bend your neck to read something lying on the counsel table, your windpipe kinks a bit, your Adam's apple jams into your larynx, and instead of your client going to Winnemucca, Nevada, the reporter writes, "He went amuck in Nevada." Honest, you may laugh, but it happened. And don't smirk if the reporter asks you to spell Mr. White's name. It could be spelled Wight, Weit, White, Whyte, Wite. It might even be Wyatt.

Numerals

Be mindful that 13 can be slurred to 30, 14 to 40, and so on through the teens. And if it's dollars or apples or steamships, say so. If I hear "twelve-fifty" I can't certify $12.50 or $1,250 or $12,050. I must pass that buck on to the appellate court for interpretation. Worse, maybe, suppose both sides rest and the jury wants it read back. You must listen helplessly, unable to clarify.

Echoing

This nervous habit is an offspring of the unwed couple, Tailgater and Overlapper, about which more later. Example:

Q. Where do you live?

A. 22nd Street, Cicero.

Q. Cicero. How long have you lived there?

A. About four years.

Q. Four years. Where did you live...

Harmless though this is, it wastes time and transcript and causes jurors to yawn.

Overlapping and Tailgating

A lawyer's demeanor often is contagious and infects a witness. Combativeness, loudness — even calmness — feed upon themselves. The Overlapper/Tailgater's anxiety won't let the witness finish, and once he's infected, the witness won't allow the lawyer to complete the question. The transcript reads:

Q. Did you call the police —

A. Yes, I did when —

Q. — at the time of the —

A. — I first discovered —

Q. — accident?

Every court reporter who's practiced for more than a week has heard this kind of colloquy. I try — Lord knows, I try — never, ever to interrupt, but to remain as unobtrusive as the furniture. If you're cross-examining a witness and backing him into a corner, and if he knows you're backing him into a corner, and if you

know he knows, I sure don't want to break the spell. At times, though, I must, if we are to get a true, complete and impartial record.

INDICATING

A reporter shouldn't editorialize more than a little bit. When a witness says, "He stabbed me here and here," all a reporter can do is write the word "indicating" in parenthesis after the answer. It's your job as lawyer — as a major participant in making the record — to say, "Let the record show the witness pointed to his left shoulder and abdomen," or ask opposing counsel to so stipulate. Be alert to nods or shrugs as answers, or a handclap to describe the force of an impact, with a verbal "whoosh" or "wham." In a deposition or in court when I see this happening I resist the urge to speak up to clarify; your opposing counsel sits impassive, hands folded. He's recognized it; he's mute. I butt out.

Watch out for gestures accompanied by pronouns: this, that, him, she, etc. If you don't now know, you should learn the dimensions of your office (for depositions) and the courtroom. When a witness says, "From here to that door," you'll have a distance to approximate for your record. (Judges usually, but not always, know the dimensions of their courtrooms.)

OFF THE RECORD

When counsel agree to go off the record you may see the veteran reporter stand up and walk a few steps from his machine, or at least expose his hands. This is his tacit signal to lawyers that he's inoperative. Let him know, however, when you're back on the record.

INTERPRETER

Ideally, the interpreter repeats spoken words as precisely as possible. If you say, "Ask the witness his name," that's what he says, verbatim. And the reporter writes just that. In court, the judge may intercede and conduct a bit of continuing education of the bar. Frame your questions as though the witness understands you. If, as frequently happens, the witness responds partly in English and partly in a foreign tongue, that's the reporter's worry, not yours. He's been there before.

****

There are many more obstacles we each face in making a good record. Jet planes, their sonic booms, coughs, sneezes, sirens, automobile backfires, rustling papers, air conditioners, telephones, sliding chairs on a wooden floor, all interfere. We must do the best we can with what we've got. As humans, we may err. If you have the slightest doubt that a reporter got it, ask him to read back. He'll be glad to; it's his job. Summing up, of all the problems in making a good record, from my point of view, poor enunciation ranks highest. A favorite story of a great judge I once worked for illustrates this. Two Englishmen peered out the window of a train approaching a station.

One asked, "I say, is this Wembley?"

"No," his friend replied, "it's Thursday."

"By Jove, so am I," the other said, "Let's get off and have a drink."

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Well, my child, that's about all I can think of now. I'll be seeing you in court. Oh, yes, one other thing: Be nice to your court reporter.

All my very best, truly, completely and impartially,

Your Old Man

****

William Macauley, now retired in Washington state, began his career in 1946 as an assistant reporter in Philadelphia Common Pleas Court. He has worked in various municipal, superior and federal courts, and he reported all plaintiff's depositions in the "Pinto" case, as well as the depositions of H. R. Haldeman and Richard Nixon. He was also lead reporter in the WPPSS cases. This article is his first professional writing effort.

Identify yourself. Carry cards. (But be careful.)

A court reporter at a deposition asked a lawyer for his name. The lawyer said, "I'll give you my card," took one from his wallet, and, without looking at it, handed it over. Problem was, it wasn't his card, but that of another lawyer who had given it to him the day before. The court reporter completed the deposition, noting the lawyer named on the card on the appearance page and throughout the ensuing proceeding. When the lawyer whose name appeared on the card received a copy of the deposition, he immediately returned it with the reporter's invoice and a letter saying, "I don't know what's going on, but I wasn't at this deposition, I don't recognize the captioned lawsuit, and I definitely am not going to pay your bill." The reporter made some phone calls, and eventually corrected things, but that's another story.

FYI Information

State Bar Highlights

Business Meeting, Annual Awards & Luncheon Coming in September — Change of Venue

The new members of the WSBA Board of Governors — James E. Deno, Second District; Stephen T. Osborne, Fourth District; Lindsay T. Thompson, Seventh District; Daryl L. Graves, Ninth District — will assume their positions at the Bar's Annual Meeting on Friday, September 11, at the Space Needle, Skyline Level. The meeting is open to everyone and begins at 2 p.m.

The meeting is preceded by the Annual Awards Luncheon at noon. Award winners are chosen in categories such as Professionalism, Lifetime Achievement and President's Award. Certificates also will be presented to lawyers who have been members of the Bar for 50 years. Cost for the luncheon is $24. See page 14 for luncheon registration form and more information.

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 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.

Court Rules — Suggestions Wanted

When it reconvenes this fall, the WSBA Court Rules and Procedures Committee is scheduled to review the Rules of Evidence and the Infraction Rules for Courts of Limited Jurisdiction. Your comments and suggestions are welcome. Please send them by October 30 to the attention of Steve Rosen, Staff Liaison, WSBA, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330.

ABA House of Delegates Appointment

The Board of Governors will appoint an interim representative to the ABA House of Delegates at its September 10-11 meeting in Seattle. The WSBA has a total of five representatives to the House. WSBA's most senior delegate, Scott Miller, will assume the interim appointment as the Washington State Delegate — as Tom Fitzpatrick assumes his new post as ABA delegate — until August 1999, when a statewide election will be held. This leaves one House of Delegates position open on a one-year, interim basis.

The control and administration of the American Bar Association is vested in the House of Delegates, the policy-making body of the ABA. The House has approximately 500 delegates, elects the ABA officers and Board, and meets twice a year.

Members interested in this appointment should contact their Governor or write to the Executive Director at the Bar office by August 24, 1998. Please include your resume or background information, which will be submitted to the Board for consideration when making the appointment.

Speakers Bureau Still Seeking Volunteers

The WSBA Speakers Bureau is a public education program that promotes public understanding of the law, increases citizen awareness of legal rights and responsibilities, and builds positive community relations. Through the Speakers Bureau, lawyers volunteer their time and expertise to help citizens understand how the legal system works and how the law affects their lives. Lawyers speak to civic, professional and school groups on a variety of different topics and may also volunteer to guide students through mock-trial programs. The benefits to attorney-volunteers are numerous: honing speaking skills, educating and inspiring others, achieving great personal satisfaction, cultivating respect for lawyers and the legal system, and obtaining potential future clients.

We have been rebuilding the WSBA Speakers Bureau in the last several months. The speaker pool is expanding daily. Many thanks to all of the attorneys who have graciously agreed to serve on the Speakers Bureau. There is, however, still plenty of room for interested lawyers who have not yet responded. Speaker referrals will begin in September. If you have ideas or questions or would like to join the Speakers Bureau, please contact the Law-Related Education Coordinator, Laurie Rosenfeld, at 206-727-8226.

Applause!

Congratulations to WSBA member Francis A. LeSourd, 90, who was recently honored for his role in establishing Yesler Terrace in 1941 — the first public-housing community in Seattle and what is believed to be the nation's first racially integrated public housing project.

Yesler Terrace honored LeSourd in June at the dedication of the Yesler Community Center, which reopened after a year of renovations. LeSourd was a member of the then

newly formed Seattle Housing Authority, and a founding partner of the law firm LeSourd and Patten. LeSourd was admitted to the Washington State Bar in 1932.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in July 1998 is 5.212 percent. The maximum allowable interest rate permissible for August 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

Exploring a New Communication Method

The WSBA CLE Department experimented in mid-May with the use of e-mail for notifying potentially interested lawyers about the 15th Annual Pacific Rim Computer Law Institute. Internet users were considered to be a receptive group for receiving information about a continuing education program with a schedule that included treatment of Internet-related issues. The department contracted with an outside source for use of an e-mail address list.

A message about the upcoming Institute was transmitted to approximately 5,200 individuals. This method for delivery of continuing education program information could be a quick, efficient and cost-effective procedure if acceptable to recipients. The e-mailed memo provided recipients with some details about the Computer Law Institute, as well as the URL (address) for locating a description of the Institute program and registration form found on the WSBA Web site and invited feedback on how recipients felt about e-mail notification. Less than 1 percent responded that they did not want e-mail about CLEs; about the same percentage responded indicating receptiveness to or support for the message.

The possible use of e-mail on a selective basis for notifying Washington attorneys about CLE seminars and other WSBA activities — as well as the posting of information on the WSBA Web site — is under discussion. If you haven't yet surfed the WSBA home page, we encourage you to visit http://www.wsba.org for a review of the many Web site features.

National Legal Ethics Library Goes Online — Washington State to be Added Soon

The American Legal Ethics Library by Cornell Law School Legal Information Institute is now online and on CD-ROM. The Library currently includes extensive materials on law and ethics arranged in a state-by-state format, provided pro bono by major law firms in each state. Currently it includes California, District of Columbia, Florida, Illinois, New York, Pennsylvania and Texas. Sixteen other states, including Washington, are preparing their materials. Washington's material is being prepared by Perkins Coie in Seattle.

The site also includes the ABA Model Rules of Professional Conduct, ABA Model Code of Professional Responsibility, and the ABA Code of Judicial Conduct.

The Web address is: http://www.law.cornell.edu/ethics

Kitsap County Bar Association President Andrew Becker presents the prestigious Liberty Bell Award to Robert Boddie in honor of Law Day on May 1. Boddie has given more than 4,000 hours of community service to gang members, at-risk youth and low-income families. In 1993 he founded POWER — People Organized Working for Ethnic Reality. POWER has developed innovative programs in Kitsap County to reduce gangs, drugs and youth violence.

The Kitsap County Bar also sponsored an essay contest for junior and senior high-school students, the Central Kitsap High Schol Mock Trial Team, awards for two Law Day Student Panel Sessions, an Attorneys School Speaker Programs, awards for free legal services, and the Merrill Wallace Scholarship Award for college tuition.
(Photo by Steve Landau)

FYI Information

MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS - UPDATE

As the MCLE reporting time approaches, attorneys in CLE Reporting Group 1 need to review their records to ensure that by December 31, 1998, they have accrued 45 CLE credits. Six of those need to be ethics. You will receive a CLE Certification form enclosed with your WSBA Licensing Form packet in December 1998, which you will need to return by February 1, 1999.
Note: It is the responsibility of the individual attorney to keep a record of CLE attendance.

CLE REQUIREMENTS

Admission to Practice Rule 11 (APR 11) as adopted by the Supreme Court of Washington, requires that each active member of the WSBA complete a minimum of 45 credit hours of approved legal education within a three-year period. A "credit hour" equals one clock hour of actual attendance. A maximum of 15 credits may be earned by self-study of approved audio/videotapes. All members are required to earn six CLE credits out of the 45 total in the areas of legal ethics, professionalism (including diversity and anti-bias training), or professional responsibility for each reporting period.

CURRENT REPORTING PERIOD 1996-98 FOR GROUP 1

You are in Group 1 if you were admitted through 1975 or in 1991, 1994 or 1997. Group 1 members are required to complete a minimum of six ethics credits out of the required 45 by December 31, 1998.*

REPORTING PERIOD 1997-99 FOR GROUP 2

You are in Group 2 if you were admitted from 1976 through 1983, or in 1992, 1995 or 1998. Group 2 members are required to complete a minimum of six ethics credits out of the required 45 by December 31, 1999.*

REPORTING PERIOD 1998-2000 FOR GROUP 3

You are in Group 3 if you were admitted between the years 1984-90, or in 1993, 1996 or 1999. Group 3 members are required to complete a minimum of six ethics credits out of the 45 required by December 31, 2000.*

*MEMBERS ADMITTED IN 1997, 1998 OR 1999

You are exempt from CLE requirements for the year you were admitted to the Bar (from the date of admission to the end of the same calendar year), as well as the following calendar year. However, any CLE credits you accrue during this period may be applied to your first reporting cycle. Your first three-year reporting cycle will begin following your period of exemption. For instance, if you were admitted in 1997, you are exempt from CLE requirements for the remainder of 1997, as well as all of 1998. Your first reporting cycle is January 1, 1999, through December 31, 2001, so you will need to file your Certification by January 31, 2002.

COURSE APPROVAL

To ensure review of a course for CLE pre-approval, it is important to submit a complete "Form 1" application well in advance of the program date. Under most circumstances, applications are processed in a few weeks. However, some applications must be reviewed by the Washington State Board of Continuing Legal Education, which meets bi-monthly. Seminars occurring outside Washington State may qualify for CLE credit — i.e., it is not necessary for out-of-state WSBA members to return to Washington State to obtain CLE credits. Standards for approval of CLE credit may be found in APR 11, Regulation 104.

LATE FILING FEE

To avoid a late filing fee, credits must be acquired by December 31 of the final year in your reporting period. Attorneys who fail to timely acquire the credits must pay a late filing fee of $150 for the first reporting period of non-compliance, and make up the credit deficiency by May 1 of the year following the close of their reporting period. Attorneys who fail to pay the filing fee and report credit compliance by May 1 will be subject to suspension. The late filing fee increases by $300 for each consecutive reporting period of non-compliance. For example: You incur a late filing fee of $150. Three years later, if you fail to comply with CLE requirements again, the late filing fee increases by $300 to $450.

CARRY-OVER CREDITS

If an active member completes more than 45 credits during a three-year reporting period, a maximum of 15 excess credits may be carried over and applied to the next reporting period. Of these 15 credits, a maximum of five audio/video credits may be carried over. Two ethics credits may be carried foward. (Additional carry-over ethics credits will be converted to general credits.)

TEACHING CREDIT

CLE credit for teaching or participation in a course can be earned only if the course itself is an approved CLE activity. Once a program has been approved for CLE credit, you may claim the actual preparation time, with a limit of 10

MCLE Tips:

- Please read all MCLE reporting and application materials thoroughly.
- Apply to have courses approved as they occur, to beat the year-end rush.
- If you call and get voicemail, please leave a detailed message so that we can find the answer before returning your call.
- Remember: an average of two ethics credits per year will satisfy the ethics requirement.

hours of preparation time for each hour of teaching. For example, if you spent seven hours preparing for a 45-minute lecture, you may claim seven hours credit for preparation, plus .75 for the 45-minute lecture, plus the credits for time attending the remainder of the seminar. If you spent 12 hours preparing for a 45-minute lecture, you have a limit of 10 hours you may claim for preparation, plus the .75 for the 45-minute lecture, plus the time spent attending the rest of the seminar. If your lecture continues into a second hour, then your limit on prep time is 20 hours (10 for each hour).

Credit for J.D., LL.M or LL.B Courses

Active members may receive CLE credit for courses that are part of the J.D., LL.M or LL.B curriculum at ABA-approved law schools. Credit is computed on the basis of one credit for each clock hour of instructed class time attended, up to a maximum of 15 hours per course.

Bar Review Courses

Credit is allowed for WSBA members who take an out-of-state bar review course when seeking admission elsewhere (*not* on a "refresher" basis). Credit is computed on the basis of one credit for each clock hour of instructed class time attended.

Judging Law School Competition

Members who volunteer as a judge for a law school competition may earn a maximum of five CLE credit hours per calendar year for moot court, client counseling and negotiation skills training competitions. Credit is computed on the basis of one credit for each clock hour of time spent judging (preparation time may not be claimed).

Nexus Credit

Individuals seeking accreditation of program that are not strictly continuing *legal* education courses may claim credit for such a course. For example, an attorney may claim credit for a medical seminar if the information presented is critical to the attorney's practice. When the attorney submits a Form 1 application to have the seminar approved for credit, he/she must make a statement showing the nexus between the seminar and the applicant's legal work.

Writing Credit

Credit for writing activities may be granted on a case-by-case basis.

MCLE Comity Agreement for Some Out-of-State Lawyers

On May 12, 1997, the Supreme Court of Washington entered an order approving a new provision in Washington's MCLE regulations:
Regulation 118: Out-of-state Compliance
(a) An active member whose principal office for the practice of law is not in the State of Washington may comply with these rules by filing a compliance report as required by APR 11.6(a) and Regulation 109 in which the member certifies that the member is subject to the CLE requirements of that jurisdiction and that the member has complied with the CLE requirements of that jurisdiction during the member's reporting period, *providing* that the Board has determined that the requirements established by these rules are substantially met by the requirements of the other jurisdiction.
(b) The Board has determined that the CLE requirements in Washington are substantially met by the CLE requirements of the following other jurisdictions: Oregon, Idaho and Utah.
(c) This regulation shall apply to compliance reports required to be filed after June 30, 1997.

By the time you read this, nearly 1,000 people will have taken the summer Washington State Bar Exam at the Meydenbauer Center in Bellevue. The average passing rate is approximately 75 percent, so look for about another 750 lawyers to enter the ranks in a few months. The names of all new admittees will be printed in the November issue of Bar News *in* FYI.

Voluntary Fee Arbitration

When you and a client disagree on fees, WSBA's Lawyer Services Department can help find a solution.

The Lawyer Services Department administers a voluntary fee arbitration program to help clients and lawyers settle fee disputes. The sole purpose of the program is to decide the fair and reasonable value of the lawyer's legal work for the client.Both parties must agree to arbitrate and to the amount in controversy. The process begins by either party paying a $50 fee and filing a completed petition with the Bar. A copy of the petition is sent to the other party, who must then agree to proceed and also pay a $50 fee. If the other side is unwilling to arbitrate the matter, the fee is returned to the petitioner and the file is closed. If both parties agree, an arbitrator is selected by the Bar and a hearing date set.

Fee arbitration is binding and any award is enforceable under the provisions of RCW 7.04. By agreeing to the arbitration, both sides waive the right to bring or defend an action in court. Fee arbitration only resolves the amount in dispute between the lawyer and the client. Neither side may seek fees for the arbitration itself. Either party may require the other side to deposit the disputed amount with the Bar, which will hold the money in trust until the arbitrator submits a written decision. The money earns no interest.

If the amount in dispute is $5,000 or less, the case will be assigned to one lawyer-arbitrator. If more than $5,000 is in dispute, a three-member panel, consisting of one lawyer and two lay persons, will hear the case. The arbitrator will hear testimony and consider other relevant evidence so that a full and complete hearing takes place. The arbitrator may issue subpoenas to compel witnesses to attend and testify. All the proceedings are confidential. Portions of the decision may be filed in court if needed to enforce the decision. There is no appeal of the decision unless procedural rules have been violated.

Some of the factors involved in establishing a reasonable fee include the time and labor required, the novelty and difficulty of the legal questions, the skill necessary to perform the service, the fee agreement, the experience, ability and reputation of the lawyer, the results obtained and the fee customarily charged locally for similar legal services.

The goal of the voluntary fee arbitration program is to resolve fee disputes quickly and efficiently.

Included in the Lawyer Services 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)

Call 206-727-8268

Setting Up and Maintaining A System to Check for Conflicts Of Interest

BY BARRIE ALTHOFF, WSBA CHIEF DISCIPLINARY COUNSEL

Conflicts of interest can easily arise in a busy law practice. The Supreme Court's Rules of Professional Conduct (RPCs) set out the minimum standards to avoid discipline in conflict-of-interest situations. The rules give no guidance, however, as to how to detect and avoid conflicts.

Purpose of Conflicts Rules

The conflicts rules are, to a large extent, intended to help you maintain your duty of loyalty to your client and your duty to protect and preserve the confidences and secrets of your clients and former clients.

The RPC 1.7 and 1.9 prohibitions on representing adverse parties prevent adverse representations, helping you to protect and preserve confidential information. The RPC 1.8 prohibition of certain transactions with clients assures that your self-interests will not interfere with your loyalty to your client. The RPC 3.7 prohibition on representing a client where you or someone in your firm is likely to be a necessary witness protects both the client and you from wasting resources in a case where you are likely to be disqualified for engaging in the incompatible roles of advocate and witness. Similarly, RPC 1.10 (dealing with imputed conflicts in a law firm), RPC 1.11 (dealing with successive government/private employment), and RPC 1.12 (relating to former judges, arbitrators and mediators), help you avoid breaches of confidential information and loyalty and wasting resources.

Purpose and Design of a Conflicts-Checking System

A conflicts-checking system, by helping you detect and avoid situations wherein the conflicts rules may apply, helps you implement and satisfy your duties of loyalty to your clients and your duty to preserve their confidences and secrets. You can detect and avoid conflicts of interest, however, only if you establish and maintain an effective conflicts-checking system. Your memory is not an adequate substitute.

A conflicts-checking system system should be designed to detect possible conflicts which exist before you undertake a representation and those which may arise during the course of the representation. You should check your system for conflicts when a potential client first contacts you, immediately after you first consult with the new client and have learned the names of other persons and entities involved in the representation, and periodically during the course of the representation (for example, when any new party enters the case or transaction).

At the time of the first contact with a potential client, you should explain to the client your need to comply with the ethics conflict-of-interest rules. Even before the client describes the situation, ask the client to name the persons involved in the matter for which consultation is being sought. If the matter is simple, this can be done over the telephone. If it is more complex, you may want to ask the potential client to complete (before meeting with you) a "New Client Information Form" which would include all the persons involved in the potential representation. You can send the form to the potential client in advance of the meeting, or provide it while the potential client is waiting in your reception room. If have an Internet home page, you can keep the form there for the potential client to download or print out. If you do so, however, also advise the potential client not to return the completed form to you via the Internet, due to concerns of possible loss of confidentiality and attorney-client privilege.

If you can check your conflicts system immediately on receipt of the preliminary list of names, you should be able to identify most conflicts and avoid the disclosure of any confidential information from the potential client. Obtaining such a list in advance is not always practicable, however. In that case, you should ask the potential client to do his or her best to describe his or her legal problem to you without disclosing confidential informa-

tion. You should promptly thereafter run a conflicts check and determine whether you can represent the potential client.

THE HEART OF THE SYSTEM: NAMES AND RELATIONSHIPS

The heart of a conflicts-checking system is a complete, organized and accessible list of client and former client names and of persons associated with them. Your initial source of information for names would include your current client lists, new or potential client intake sheets or checklists, ongoing conflict-check requests, and your litigation docket. The complete list would include your own name, the names of your partners (if any) and of your office staff, of spouses and close relatives. It would also include names of your own clients and those of your partners, of persons who have consulted you or your partners for possible representation (regardless of how brief that consultation may have been), and of persons who may otherwise be involved in the representation, litigation or transaction.

When dealing with corporate, governmental, nonprofit or other entity clients, you need to consider the RPC conflict rules and determine who your client is so that you can determine whether a potential conflict exists. For example, are you being asked to represent the entity as a whole, or just a subsidiary, or the officers or directors as a group, or just individually, or just one of them, or are you being asked to represent one or more dissident shareholders? In the context of litigation, your list would include the names of the plaintiffs, defendants, third parties, and, as appropriate, of witnesses and expert witnesses, of insurers/insureds, of spouses, guardians, opposing counsel, employers/employees, and so on.

In business transactions, your list might include the names of business partners, controlling or principal shareholders, officers and directors and key employees, affiliated and subsidiary corporations or entities, company auditors, underwriters, etc. If the transaction involves the purchase or sale of property, you might include the names of buyers and sellers as well as brokers, lenders, debtors, insurers, accountants, investment bankers, and others that might be involved in the transaction.

In a marriage dissolution or family law case, you would likely include spouse (and perhaps former spouses), children, and perhaps grandparents and siblings. In cases of estate planning or probate, you would include the names of your client, and, as appropriate, the client's spouse, guardian, children, personal representative, heirs and devisees. In a criminal law case, besides the name of your client, you would likely include witnesses, the victim, and co-defendants and their counsel.

You should also include in your list the names of any persons to whom you have sent non-engagement letters. For example, if you are asked by two persons to represent them in forming or dissolving a business venture, and you determine to represent only one of them due to potential conflicts of interest, the names of both your client and the other person should be included in your conflicts system. Similarly, if a couple seeking an "amicable" marriage dissolution consults you, you would normally represent only

one spouse, yet your conflicts system should include both spouses' names listed and the relationship of the other to your client. Likewise, if one spouse or partner consults you for a possible marriage or partnership dissolution, but decides not to pursue the dissolution at that time, that person's name (as well as the name of the marriage or business partner) should be entered into your system so that if at a later date the other spouse or partner contacts you you would know there may well be a conflict with the first spouse or partner.

Your system can be only as good and complete as the information you provide it. You, your staff and your partners must be careful to enter into the conflicts system all relevant names on an ongoing basis. Your new-client checklist should have on it a place to confirm that a conflicts check has been made. When entering information into, or doing a conflicts check on, your system, care should be taken to spell names correctly and to consider possible spelling variants in names (for example, "Ann" or "Anne"; or "McPherson," "MacPherson" or "Macphearson"; or "Thomson," "Thompson" or "Tomsin"; or the use of a maiden name rather than a married name.

Operating the System

One person who is very organized and attentive to detail should be primarily responsible for both entry of data into the system, and for actually making the conflicts check by retrieving the data from the system. The same person should also prepare file memoranda confirming that the conflicts check has been done. While it is probably more efficient to have a nonlawyer be primarily responsible for this task, an attorney should closely supervise.

Each time the system is checked, the check should be documented by a signed and dated file memorandum. The memo should include what names were checked, who checked them, at whose request the check was done, and when the checking was done. The memo may be kept either in a separate conflicts-check file or (preferably) in the client matter file.

When the system detects a possible conflict of interest, you need to review the possible conflict under the RPCs to determine if the apparent conflict is in fact an actual conflict. If a conflict does exist, you should determine if it is a conflict your clients can waive by consenting, usually in writing and after consultation with you and a full disclosure of all the facts, to your representation. You also need to decide whether you want to continue the representation even if the clients are willing to waive the conflict. Like the recital of "facts" told by many new clients, upon your further investigation the "facts" of the conflict may be deeper or more troublesome than your initial investigation discovered. If it is a conflict that can be waived by your clients after consultation, be sure to document that waiver and consultation as to all clients involved. This can be done in separate agreements, or as part of your engagement letter with the new client. Depending on the stage of the relationship with the individual, you may need to either decline the representation or withdraw from it. Where the conflict involves the same matter (and not just common clients), quite probably you will

need to withdraw from representing all parties. In either case, you should promptly send a nonengagement or disengagement letter. If you have been representing a person but find you need to withdraw because of a conflict that should have been apparent to you from the beginning, it is likely that you will need to refund all or a portion of any legal fees that you may have collected from the client.

You would be wise to regularly circulate a list of new clients and engagements within your firm to all staff. Even the best systems are only systems and may fail to detect the unusual conflict of which you, your partners or your staff may be aware. For example, a lawyer leaving employment should normally keep a list of his or her past clients, as well as present clients, and when starting new employment compare the new employer's client list with his or her own list to identify any possible conflicts. You should also check the system any time you add a new employee (whether a lawyer or support staff) to your office, and ask that employee to review the conflict list to identify any possible conflicts based on the employee's prior employment.

CONFLICTS CHECKING SYSTEM SHOULD BE APPROPRIATE FOR YOUR PRACTICE

The RPCs do not require any specific form of conflicts-checking system. The adequacy of your conflicts-checking system will depend on the nature and extent of your practice and of your firm. What is fully adequate for a sole practitioner will likely be wholly inadequate for a large law firm, while the complexity of a system needed for a large firm will likely be wholly inappropriate and wasteful for a sole practitioner.

A conflicts-checking system can be either maintained on a computer or can be a manual/paper index-card system. If you are a sole practitioner, or your firm has a very limited number of clients, a paper-based conflicts system may be adequate, although it is not recommended. Such a system may be as simple as a box of cross-referenced index cards. One card, for example, could have at the top the name of the client or potential client, and on the bottom a list of conflict names (other parties involved) and relationships of the person to your client. A separate card then could be made for each of the possible conflict names, and all cards could be kept in alphabetical order, thus permitting a single search for any name. Such a system becomes very burdensome, however, as your practice grows and will eventually have to be transferred to a computer-based system. Further, a paper-based system cannot easily be duplicated and archived, so that any loss or destruction of office records would likely also destroy your entire conflicts-checking system.

A computer-based conflicts-checking system is far preferable to a paper-based system. The system can be a simple word-processing document, an electronic spread-sheet, a database or a specific conflicts-checking system. Although you can maintain an adequate conflicts-checking system using a computer word-processing or spreadsheet program, you will generally find that a computer database program, or, better yet, a program designed

specifically for conflict checks, is preferable. Such programs permit great flexibility in accessing, searching, organizing, expanding, printing, and archiving the relevant information. If placed on networked computers, such computer programs can usually be accessed by more than one person at a time, allowing immediate conflicts updates and checks.

Almost any computer database program will be adequate for a conflicts-checking system provided that it permits entry and maintenance of a large number of records. For ease of use you may want to have the program integrated into your other computer software, including your case management software. Upon identifying a possible conflict, you could then retrieve the name and location of the relevant file to examine, the name of the attorney in the office who is handling the matter, and, if the matter involves litigation, the current stage of the proceedings. If the computer program you use for your conflicts-checking system is written for Microsoft Windows, you will likely be able to integrate the information with your other Windows-based programs. Like any files created and maintained on a computer, your conflicts-checking system's information files should be regularly backed up or archived and a copy stored in a fireproof safe or offsite.

Conclusion

A conflicts-checking system is essential. With a good system in place and maintained, you should be able to detect and avoid most conflicts of interest. Failure to detect and avoid conflicts can lead to dissatisfaction by potential clients, clients and former clients, unpaid billings, and possibly to your disqualification in the particular matter. It can also result in malpractice actions and disciplinary proceedings. Thus, you need to know the conflicts rules and how to satisfy them. A carefully implemented and maintained conflicts-checking system will help you to do so.

Disciplinary Notices

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

Disbarred

Judy C. Wolf (WSBA No. 14135, admitted 1984) of Seattle and Bothell has been disbarred pursuant to a stipulation for discipline approved by the Supreme Court effective May 14, 1998. In the stipulation, Wolf admitted that in 1996 she received $1,000,000 from a company's Swiss bank account. She promised to invest the funds in a High Yield Investment Program to produce a return of 400% within 40 weeks. She did not. Instead, she diverted about $800,000 for her personal benefit, including buying a new home and a new car for herself.

On November 3, 1997, the United States Attorney's Office filed a one-count information in the Federal District Court for the Western District of Washington at Seattle charging Wolf with the felony crime of wire fraud. Wolf pled guilty and was sentenced to 24 months incarceration with the Bureau of Prisons and was ordered to pay restitution.

In the stipulation to disbarment, Wolf stipulated that her conduct violated RPC 8.4(b), which prohibits a lawyer from engaging in a criminal act that reflects adversely on the lawyer's honesty or trustworthiness, and/or RPC 8.4(c), which prohibits a lawyer from engaging in acts involving dishonesty, fraud, deceit or misrepresentation and/or RLD 1.1(a) which prohibits a lawyer from committing acts which involve moral turpitude or which reflect disregard for the rule of law.

Jay Stansell of Seattle represented Wolf. Disciplinary Counsel Linda B. Eide represented the Bar Association.

Thomas A. Gish, Sr. of Mill Creek (WSBA No. 00318, admitted 1968) has been disbarred pursuant to a stipulation for discipline, approved by the Supreme Court effective May 14, 1998. In the stipulation, Gish admitted that he had filed a tax return for the 1994 tax year which under-reported his taxable income by approximately $134,450.

On April 23, 1997, the United States Attorney's Office filed a one-count information in the Federal District Court for the Western District of Washington at Seattle charging Gish with the felony crime of tax evasion. He pled guilty and

was sentenced to three years' probation, including 60 days of electronic monitoring.

Gish stipulated that the Association had sufficient evidence to meet its burden of proving by a clear preponderance of the evidence that his conduct violated RPC 8.4(b), which prohibits a lawyer from engaging in a criminal act that reflects adversely on the lawyer's honesty or trustworthiness; RPC 8.4(c), which prohibits a lawyer from engaging in acts involving dishonesty, fraud, deceit or misrepresentation; RLD 1.1(a), which subjects a lawyer to discipline for committing acts which involve moral turpitude or which reflect disregard for the rule of law; and/or RLD 1.1(c), which subjects a lawyer for discipline for failing to abide by the laws of the United States as required by the lawyer's oaths and duties as a lawyer. He also stipulated that the Association had sufficient evidence to meet its burden of proving that he violated RLD 1.1(p), which subjects a lawyer to discipline for engaging in conduct demonstrating unfitness to practice law.

Gish represented himself *pro se*. Disciplinary Counsel Leslie Ching Allen represented the Bar Association.

SUSPENDED

Yakima lawyer Frederick E. Porter (WSBA No. 3640, admitted 1967) has been ordered suspended for 18 months pursuant to a stipulation for discipline approved by the Supreme Court on June 9, 1998. The discipline is based on Porter's conviction for Possession of a Controlled Substance in violation of RLD 1.1(a). Porter's suspension is effective September 5, 1997, and will be followed by two (2) years of probation with conditions.

Porter was arrested on November 29, 1996, for possession of methamphetamine, a Schedule I controlled substance. He was convicted, on August 5, 1997, in Yakima County Superior Court, of Possession of a Controlled Substance in violation of RCW 69.50.401(d). He was sentenced to serve ten (10) days of confinement, with credit for two (2) days served and the remainder converted to 64 hours of community service. He was also sentenced to two (2) years of Community Supervision.

Porter was represented by J. Jarrette Sandlin. Disciplinary Counsel Sachia I. Stonefeld represented the Association.

CENSURED

Sherrie Bennett (WSBA No. 12159, admitted 1981), of Seattle, has been ordered censured pursuant to a stipulation for discipline, approved May 1998 by the Disciplinary Board. The discipline is based upon a misrepresentation to the court in violation of RPC 3.3(a)(1,) which prohibits false statements of material fact or law to a tribunal, and RPC 8.4(c) & (d) which provide it is misconduct to engage in conduct that involves dishonesty, fraud, deceit or misrepresentation or that is prejudicial to the administration of justice.

Bennett changed an agreed child-support order after it had been signed by the opposing party and the opposing lawyer. The changes increased the amount of support the opposing party would pay. Bennett placed her initials and the initials of the opposing lawyer next to the changes.

Bennett maintains that she had telephoned the opposing lawyer and left a message that she would make these changes and would enter the order a week later if she did not hear from the lawyer. The opposing lawyer denies receiving such a message. Bennett also maintains that she tried to reach the opposing lawyer from the courthouse before entering the order and was told the lawyer was in but unavailable to speak on the phone. Bennett did not attempt to send a revised order to the opposing lawyer for review and approval.

Bennett presented the order, as an agreed order, to the court *ex parte*. The Court entered the order. The Court later set aside the order, finding "changes to the order and fixing initials for another attorney with no 'in fact' agreement or permission was inappropriate," and imposed sanctions of $600 against Bennett. Bennett will also pay costs to the Bar Association of $750.

Respondent represented herself. Joy McLean represented the Bar Association.

ADMONISHED

Byron G. Powell (WSBA No. 3955, admitted 1971), of Spokane, has been

admonished by order of a Review Committee of the Disciplinary Board. The admonition is based on Powell's violations of RLD 1.1(d) (acting as a lawyer for a party without the party's authority to do so) and RPC 8.4(c) (conduct involving dishonesty and misrepresentation).

In 1993, Powell took actions on behalf of two claimants in a civil forfeiture action, including filing the claim, without the authority of the claimants. Powell believed that he had authority to represent the claimants because he represented the claimants' daughter and son-in-law, who had asked him to file the claim. However, Powell never spoke to the claimants to verify his belief. Later in the case, in a letter to the assistant United States attorney handling the forfeiture, Powell misrepresented his involvement in the case by stating that he did not represent the claimants and that his only involvement in the case was the preparation of certain real estate documents pertaining to the property subject to the forfeiture.

Respondent Powell represented himself. Disciplinary Counsel Maureen Devlin represented the Association.

JoAnne G. Comins Rick (WSBA No. 11589, admitted 1981), of Prosser, has been ordered admonished by a Review Committee of the Disciplinary Board. The admonition is based upon the Review Committee's finding that Comins Rick engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4(d).

During a trial at which Comins Rick represented a DUI defendant, Comins Rick had a loud and heated discussion in the hallway outside the courtroom with the prosecutor and a witness. Comins Rick pointed her finger in the direction of the prosecutor's face, who, in response, grabbed Comins Rick's finger and twisted it, fracturing the bone and separating the ligaments from the bone. The jury, which heard some of the disturbance, was excused. A Review Committee ordered that both the prosecutor and Comins Rick be admonished.

Respondent Comins Rick represented herself. Disciplinary Counsel Maureen Devlin represented the Association.

Carole L. Highland (WSBA No. 20504, admitted 1991), of Ephrata, has been admonished by order of a Review Committee of the Disciplinary Board. The admonition is based upon the finding that Highland, a Grant County prosecutor, committed an unjustified act of assault, in violation of RLD 1.1(a), and engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4(d).

During a DUI trial, Highland had a loud and heated discussion in the hallway outside the courtroom with the defendant's lawyer and a witness. The defense attorney pointed her finger in the direction of Highland's face, who, in response, grabbed the defense attorney's finger and twisted it, fracturing the bone and separating the ligaments from the bone. The jury, which heard some of the disturbance, was excused. A Review Committee ordered that both Highland and the defense attorney be admonished.

Kurt Bulmer represented Highland. Disciplinary Counsel Maureen Devlin represented the Association.

Interim Suspension

Dennis M. Brouner (WSBA No. 08859, admitted 1979), Tukwila, was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered June 2, 1998.

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

Olympia lawyer Thomas J. Westbrook (WSBA No. 4986, admitted 1973) was ordered suspended from the practice of law pending the outcome of proceedings by Supreme Court order entered May 26, 1998.

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

The *Bar News* online is also a resource for "Ethics and the Law" columns, disciplinary notices, lists of approved IOLTA banks and usury rates, attorney positions available, and other useful information — more added every month.

If you're an attorney who uses the Web, point your browser to:

www.wsba.org

Calendar

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

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

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

ADR

Interest-based Mediation — The Process: Philosophies, Proficiency and Procedures
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. 6.25 CLE credits (incl. 1 ethics). 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.

Training to be a Professional Mediator
Sept. 24-25 — Seattle. 15 CLE credits (incl. 1 ethics). By Alan Alhadeff J.D. Mediation 206-281-9950.

Bankruptcy

WA Foreclosure and Repossession
Sept. 17 — Seattle. 6.5 CLE credits (incl. 1 ethics) (A/V). By NBI 715-835-7909.

Business Law

Handling Cases Under the Consumer Protection Act
Aug. 7 – Seattle. 6 CLE credits (incl. .5 ethics). 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. 6.75 CLE credits (incl. .5 ethics). 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.

Representing Nonprofit Organizations
Sept. 17 – Portland, OR. CLE credits TBA. By OSBA CLE 503-684-7413.

Growth Management Act: Thinking Outside the Box
Sept. 18-19 – Seattle. 14.5 CLE credits. By LSI 206-567-4490.

Computer Law

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

Construction

WA Construction Law: What do you do when...?
Sept. 22 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

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.

Elder Law

Counseling Elderly Clients
Sept. 11 – Eugene, OR; Sept. 18 – Portland, OR. CLE credits TBA. By OSBA CLE 503-684-7413.

Employment

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 713-227-5664.

WA Labor and Employment Law
Aug. 27-28 – Seattle. 13.25 CLE credits. By LSI 206-463-4400.

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

Estate Planning

The Estate Planner's Guide: Estate Planning with Will Substitutes
(video replays with live moderator)
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. 7.25 CLE credits (incl. .75 ethics). By WSBA CLE and RPPT Section 206-727-8202.

Ethics

Council on Governmental Ethics Laws 20th Annual Conference
Sept. 14-16 – Seattle. 12.75 CLE credits (incl. 8 ethics). By Council on Governmental Ethics Laws 206-684-8577.

Family Law

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

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. 7.25 CLE credits (incl. 1 ethics). By WSBA CLE and Young Lawyers Division 206-727-8202.

CASA: the Eyes and Ears of the Court
Sept. 17-19 – Yakima. 13.5 CLE credits (incl. 1.5 ethics). By Washington State CASA 206-667-9716.

Finance

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

Local Government and Municipal Law
Aug. 6-7 – Seattle. 15.25 CLE credits (incl. 1 ethics). By LSI 206-621-1938.

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.

Communication in the Courtroom
Aug. 14 – Yakima. 7.5 CLE credits. By Carl Grant 206-364-5289.

Life Begins
Aug. 15 – SeaTac. 7.5 CLE credits (incl. 2 ethics). By WSBA CLE and Senior Lawyers Section 206-727-8202.

What Attorneys Need to Know About Attorneys Fees
Aug. 26 – Seattle. 6.5 CLE credits (incl. 1 ethics). By WSBA CLE 206-727-8202.

Juvenile Training Program
Sept. 13-15 – Leavenworth. 16 CLE credits (incl. 2 ethics). By WAPA 360-753-2175.

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

5th Annual (Tacoma-Pierce County) Bar Convention
Sept. 18-20 – Union. 7 CLE credits (incl. 2 ethics). By Tacoma-Pierce County Bar Assn. 253-272-8871.

Winning Strategies for the Successful Private Practitioner
Sept. 24 – Seattle, Spokane. 5.25 CLE credits. By WSBA CLE 206-727-8202.

INSURANCE

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

INTERNATIONAL LAW

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

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.

What Attorneys Need to Know About Attorney Fees
Aug. 26 – Seattle. 6.5 CLE credits (incl. 1 ethics). By WSBA CLE 206-727-8202.

Winning Strategies for the Successful Private Practitioner
(for new admittees only) Sept. 24 – Seattle. 5.25 CLE credits estimated. By WSBA CLE 206-727-8202.

LITIGATION

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.

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

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

Women of WSTLA Annual Retreat
Oct. 29-30 – Leavenworth. 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.

Cross-border Transactions Seminar—Focusing on Canada
Sept. 18 – Seattle. 7.75 CLE credits. By Golden Gate University School of Taxation 206-622-9996.

Changing Venues

Honors And Awards

New officers of the Washington State Association of Municipal Attorneys include **Greg A. Rubstello** (president), **Richard N. Little, Jr.** (first vice president), **Laurie Flinn Connelly** (second vice president) and **Daniel B. Heid** (immediate past president). WSAMA Directors include **Paul E. Sullivan, Judith Zeider, David E. Kahn, Michael D "Mick" Howe, Robin Jenkinson, Michael J. Finkle,** and **Patrick W. Mason.**

Nancy Thygesen Day, a Seattle attorney with the Perkins Coie firm, was recently appointed to the Girls Scouts Totem Council's Board of Directors Committee, where she will assist in policy making, financial management and strategic planning. She is also a board member of Washington Women Lawyers of King County and serves on the Judicial Evaluation Committee.

Renton attorney **Dan Kellogg** has been elected to the Board of Directors of the National Academy of Elder Law Attorneys. The immediate past chairman of Renton River Days, he is a member of the Rotary Club of Renton and gives programs at area senior centers focusing on legal issues affecting today's senior citizens.

Craig Allen was recently chosen as the

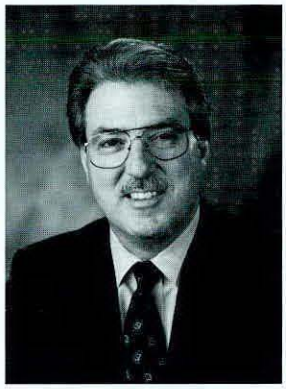
Nancy Thygesen Day

Professor of the Year by the student body of the University of Washington School of Law. He is assistant professor and director of the Law and Marine Affairs LLM program at the School. **Ralph W. Johnson**, also a UW Law professor, was honored by his alma mater, the University of Oregon, with a Distinquished Service Award for his work in the 1960s and 1970s which paved the way for a historic fishing rights decision.

The King County Bar Foundation has elected the following new officers for the coming year: **Marc A. Boman**, president; **Marilee C. Erickson**, vice-president; **Michael R. Wrenn**, secretary and **John E. Veblen**, treasurer. **John W. Widell** and **Barbara G. McIntosh** were elected to serve as trustees for the Foundation.

Seattle attorney **Lori Ichimura** was elected president of the Asian Managment and Business Association, a non-profit volunteer organization of Asian professionals and business leaders from around the Puget Sound region.

The Yakima County Bar Association has selected **Terry P. Abeyta**, a partner with Abeyta-Nelson, as upcoming president. **Don W. Schussler** of Halverson & Applegate will be vice-president; employment lawyer **Gary E. Lofland** will be secretary and **Diane Hehir** of Meyer, Fluegge & Tenney will be treasurer.



Dan Kellogg

Roy J. Koegen, a partner of Perkins Coie and chair of the firm's Public Finance Group, has been named chair of the Public Finance Committee of the American Bar Association.Koegen is also the chair of the Professional Responsibility Committee of the National Association of Bond Lawyers.

Barbara Shickich, with the Seattle law firm of Graham & James LLP/Riddell Williams P.S., was recently elected president of the Board of Directors for the Washington State Society of Healthcare Attorneys. Other newly elected Board members are Group Health Cooperative's **Jodi Palmer-Long** as president-elect, Assistant Attorney General **Sally Thieme Sanford** as secretary-treasurer, and Virginia Mason's **Lynne Chafetz** as immediate past president. Other board members include **Joel Wakefield** (Virginia Mason), **Pat Kuzler** (UW School of Law), **Cindy Strauss** (Sisters of Providence Health System), **Carla Dewberry** (Bennett Bigelow & Leedom), **Randy Revelle** (Washington State Hospital As-

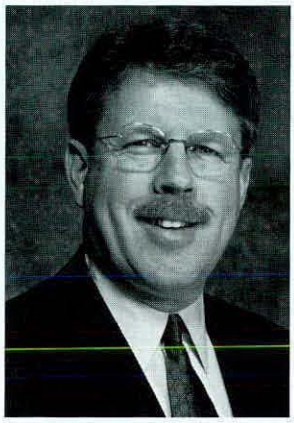
sociation) and **Susan Duffy** (Davis Wright Tremaine).

Jon Zulauf of Seattle has just begun his term as president of the Washington Association of Criminal Defense Lawyers. Other newly-elected officers are president elect **Mike Filipovic** of Seattle, vice president/west **Charles H. Williams** of Olympia, vice president/east **Julie Twyford** of Spokane, secretary **Anna Robinson** of Seattle and treasurer **Scott Engelhard** of Seattle. New members of the WACDL Board of Governors include **Bill Jaquette** of Everett, **Jon Ostlund** of Bellingham, **Carl Hueber** of Spokane, **Kris Costello** of Seattle, **David V. Marshall** of Bellevue, **David Heller** of Seattle and **Jackie McMurtrie** of Seattle. **James J. Dixon** of Olympia, **Garth Dano** of Moses Lake, **John Nollette** of Spokane, **Roger Hunko** of Port Orchard and **Margaret Smith** of Seattle were re-elected to serve a second term on the Board of Governors.

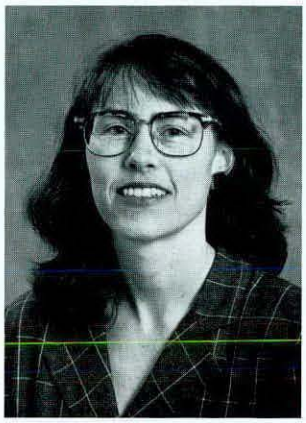
Tony Savage of Seattle has received the 1998 William O. Douglas Award presented by the Washington Association of Criminal Defense Lawyers in recognition of extraordinary courage and commitment in the practice of criminal law. WACDL also presented three President's Awards recognizing distinuqished service to the criminal defense bar. Seattle attorney **Lori Gustavson** received a President's Award for her work as a felony trial attorney for the Seattle King County Public Defender Association and her role as a federal criminal defense litigator. The second President's Award went to **Garth Dano** of Moses Lake, who is the Grant County Chair of the Washington State Trial Lawyers Association and has previously served as president of the Grant County Bar Association. The third President's Award went to **Kathryn Lyon**, in recognition of her work in relation to the Wenathchee child sex abuse prosecutions. Lyon, an attorney with the Department of Assigned Counsel in Tacoma, took a leave of absence from the agency to independently investigate allegations of sex rings in Wenatchee. She produced a 200-page investigative report that was the subject of national media attention and considered by U.S. Attorney General Janet Reno. Lyon's work laid the groundwork for a successful request that the Washington State Office of the Family and Children's Ombudsman investigate the Wentachee prosecutions. WACDL also presented Certificates of Appreciation for service to the association in the past year to **David Chapman** of Tacoma, **Steven W. Thayer** of Vancouver, **Peter K. Mair** of Seattle, **Kevin Dolan** of Seattle, **Jeffry K. Finer** of Spokane, **Lenell Nussbaum** of Seattle, **Margaret M. Smith** of Seattle, **Kristina Selset** of Seattle, **Kathleen Helfrich** of Seattle and **David Donna** of Seattle.

The Volunteer Lawyers Program of Spokane recently thanked the following hard-working attorneys who gave generously of their time:

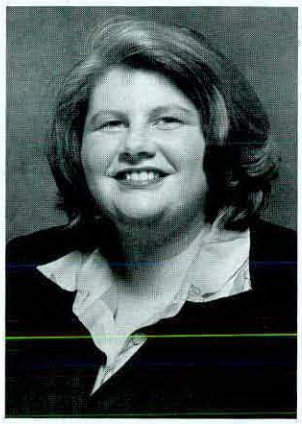
Ed Carroll, Marc Roecks, Mary Chavez, Tom May, Kristine DeMarce, Julie Watson, Sara Tingley, Steve Grovdahl, Mary Ronnestad, Mike Beyer, Terry Whitten, Marla Carey, Keith Glanzer, Sharlen Campbell, Ken Watts, Dan Johnson, Dean White, John Hancock, Ric Kayne, Betsy Field, Greg Decker, Bill Sorcinelli, Martin Peltram, Dave Cocco, Harold Clarke III, Robin Andrews, Norma Myers, Michael Meyer, Mark Callen, Edie Martinez, Cindy Jordan, Michael Connelly, Robert Crary, Janice Drye, Sean Anderson, Melvin Champagne, Matthew Sanger, Timothy Durkop, Max Etter Jr., Timothy Mangrum, Steven Schneider, John Nelson, Odin Maxwell, Milton Rowland, Peter March, Joe Shogan, Tood Startzel, Linwood Sampson, Richard Leland, Michael Cronin, Patricia Morgan, Uche Umuolo, Patrick Shine, John Sherrick, Rebecca Coufal, James Headley, Jane Bitz, Michael Perrizo, Gayle Puu, C. Raymond Eberle, Richard Kuhling, Douglas Phelps, Kathryn McKinley, Carol Hunter, Robert Douthitt, Tom Mableson, Dale Raugust, Jay Violette, Kristina Gibbs, Terry Deglow, Drew Bodker, Richard George, Brian Ragen, Gregory Heline, Terry Gobel, Scott Bridges, Fred Schuchart, Fred Dunham, Larry Mundahl, Brian O'Brien, Edward Goss, Carl Hueber, Elizabeth McBride, Garry Gibson, Timothy Fennessy, Allan Bonney, Jody McCormick, Robin Bale, Peter Lineberger, Mayree Beckett, Greg Lockwood, Jeannie Barrett, Susan



Paul V. McCarthy



Diane M. Butler



Michelle L. Valier

Gasch and John Powers, Jr. Paralegals **Diane Spaulding, Diana Rehn** and **Jeanne Johnston** were also thanked.

The Seattle firm of Bogle & Gates PLLC has received the King County Bar Association's 1998 Pro Bono Award. During the past year, the firm provided pro bono services for victims of domestic violence, flood victims and disabled persons, as well as food banks and other non-profit organizations benefitting low-income residents. The firm honored attorneys **Robert Mahon, Kathy Sheehan** and **David Zapolsky** with the 1998 Robert W. Graham Public Service Awards for providing representation to low-income apartment tenants participating in a federal Section 8 subsidized housing program and a domestic violence victim. The three award winners dedicated more than 1,000 hours last year to pro bono work, with firm-wide pro bono hours totalling 10,000 hours. Certificates of commendation went to **Tim Cranton, Andy Guy, Mona Hovnanian, Jennifer Kocher, Rita Latsinova, Karen McGaffey, Doug Morrison, Peter Nosek** and **Ann-Marie Schwartz**. In-house public service counsel **Chris Allen** vows that the firm will do even more next year.

Movers and Shakers

FIRST, THE SHAKERS...

Aaron Caplan has joined the staff of the American Civil Liberties Union of Washington as staff counsel, the first litigaton lawyer on the staff in 20 years.

Jacqualee Story has been elevated to vice president at Nintendo. Appointed general counsel in 1996, she oversees and manages all areas of the company's legal and business affairs, including international business, intellectual property, trademarks, copyrights and patents.

Mark Roellig has been appointed executive vice president, general counsel and secretary of US WEST, where he is responsible for all public policy, human resources and legal issues for the company. Now we know who to call.....

Kim D. Zak has become a partner at Shiers, Chrey, Cox, Caulkins, DiGiovanni & Zak in Port Orchard. She is a member of the Washington State Trial Lawyers Association and a charter board member of the South Kitsap Rotary Club.

Gordon, Thomas Honeywell Malanca Peterson & Daheim has acquired its first-ever executive director in the form of partner **Charles W. Begg**. Begg's appointment ends the firm's long-standing practice of rotating management duties among its senior attorneys.

David C. Spellman has been elected partner at the Seattle firm of Lane Powell Spears Lubersky LLP. Spellman's practice focuses on commercial litigation and business law, including intellectual property and antitrust issues.

Attorney General Christine Gregoire has appointed **Antoinette "Toni" Ursich** as Chief of the AG's Washington State University Division. She has been serving as interim division chief since November 1997.

Preston Gates & Ellis LLP has named **Steven R. Peltin** as a partner. Peltin's practice focuses on employment law, including contracts, counseling, claims and litigation.

AND NOW THE MOVERS...

Attorney **Frank Cuthbertson** has joined the Gordon Thomas Honeywell Malanca Peterson & Daheim PLLC firm as a member of the firm's business group. General litigation and business are the

Rose J. DeGiacomo

Martin T. Jones

Edward J. Novack

focus of newcomer associate **Juliana T. Kendall**, who is a former summer clerk for Washington State Supreme Court Justice Richard Guy. Also joining the Gordon Thomas firm to practice employment law is attorney **Valarie S. Zeeck**, who previously served as a Judicial Commissioner in the 16th Judicial Circuit of Missouri.

Paul V. McCarthy has joined the law firm of Lane Powell Spears Lubersky LLP as counsel to the firm and will concentrate his practice in the areas of real estate, commercial transactions, trust and estate administration issues and banking laws and regulations.

Diane M. Butler has also joined the firm as an associate and will emphasize business, immigration and maritime law.

Miller Nash LLP has added **Michelle L. Valier** as a new associate in the Seattle office. She practices labor and employment law, with an emphasis in employment discrimination and wrongful discharge issues. Prior to joining Miller Nash, Ms. Valier was a judicial clerk for the Honorable Jean C. Hamilton, in the District Court for the Eastern District of Missouri. Also joining Miller Nash as an associate is **Rosamund (Rose) J. DeGiacomo**, who will concentrate in the areas of commercial lending, bankruptcy and international commercial transactions.

Graham & James LLP/Riddell Williams P.S. in Seattle has added six new faces: **Sohee Ahn** (general litigation and environmental practice groups); **Barbara McIntosh** (general litigation and environmental practice groups); **John B. "Jody" Chafee** (corporate transactions, international business and intellectual property law); **Meredith Winters Dorrance** (general litigation and labor and employment law); **W. Michael Hutchings** (corporate finance, securities and general corporate law) and **Charles E. Smith** (corporate finance and corporate transactions law).

Charles P. E. Leitch and **Christopher S. Clemenson** have joined the Lee Smart Cook Martin & Patterson P.S., Inc firm in Seattle.

Keating, Bucklin & McCormack, Inc. P.S. in Seattle has added two new faces: **Stephanie E. Croll** (land use, tort defense and municipal liability) and **Michael D. Treger** (tort-based litigation, insurance defense and municipal liability).

Martin T. Jones has joined the Williams Kastner & Gibbs PLLC firm as Of Counsel, where his practice concentrates in the areas of land use law, real estate and commercial transactions.

Tracy Antley-Olander has been added to the Defense Litigaton Practice Group of Betts, Patterson & Mines P.S. Her areas of emphasis include insurance defense, premises liability and product liability. She is also an arbitrator for the King County Mandatory Arbitration Program. Also joining the firm's Defense Litigation Practice Group is **Thomas M. McBride**, past president of the Spokane County Bar Association Young Lawyers Division.

Bullivant Houser Bailey PC has expanded its Seattle and Vancouver offices, adding **John G. Barton** (insurance coverage), **Susan K. Fuller** (insurance defense), **Jodie M. Gahard** (product liability and professional liability defense), **Daniel J. Keefe** (general litigation), **Dean S. Lum** (professional and products liability and insurance coverage and defense) , **Todd L. Safon** (bankruptcy and creditors' rights issues) and **Mark W. Whitmore** (employment law issues) in the Seattle office. New additions to the Vancouver office include **Douglas C. Elcock** (real estate litigation, commercial litigation and employment law) and **Russell D. Garrett** (commercial and real estate litigation).

Perkins Coie LLP in Seattle has added **David P. Hoffer** (general litigation), **Charles (Chuck) Maduell** (land use, natural resources and environmental law) and **Alex B. Hayes** (tax) as associates.

In Memoriam

Edward J. Novack, former WSBA president, passed away June 10, 1998, at the age of 72. He was awarded the prestigious Order of the Coif and was particularly proud of his founding role as the first Board Chairman of Frontier Bank. Ed leaves behind his wife Lorraine, sons Mark Edward and Paul John and daughter Nancy Anne Pugh.

Todd M. Rutledge of the Vancouver firm of Boettcherm, LaLonde, Kleweno, Rutledge, Jahn & Holtmann PS, passed away after a long battle with cancer on March 18, 1998. He was 44 years old.

Omak attorney **Kelly Hancock**, 76, passed away suddenly on March 6, 1998, in Spokane. He is survived by his wife of 53 years, Mary, and his children, Kathryn

Mary Hancock, Phyllis Ann Hancock Lewis and Kelly David Hancock.

Criminal defense attorney **R. Brent Daniel** died on May 30, 1998, in Indonesia. An accomplished jazz guitarist, Mr. Daniel's clients over a 15-year span included many jazz musicians.

Jim Gillespie, former U.S. Attorney, died June 4, 1998, at the age of 70. His accomplishments included bringing a civil rights lawsuit on behalf of 2,000 inmates at the Washington State Penitentiary. Survivors include his wife of 47 years, Nancy, and daughters Janet Gillespie, Kathleen Gillespie and Robin Lightstone.

Enumclaw attorney and banker **Rufus C. Smith** passed away recently at age 89. A WSBA member, he also belonged to the Federal Reserve Board and the Washington State Bankers Association. He is survived by his wife, Helen Strangeland Smith, and daughters Suzanne Smith Cluett and Diana Smith Brown.

James E. Winton, who passed away January 28, 1998, practiced law in Spokane and was a WSBA member for 62 years. He was a state representative and the first president of the Community Welfare Council. He is survived by his wife, Mary, and daughter, Jane McKillip.

Rohan, Goldfarb & Shapiro, P.S.

is pleased to announce that

Anthony L. Rafel

has become a shareholder in the firm
and that the firm's name has changed to

Rohan Goldfarb Rafel & Shapiro, P.S.

Rohan Goldfarb Rafel & Shapiro, P.S.
1601 One Union Square
600 University Street
Seattle, Washington 98101-3112

Telephone: (206) 223-1600
Facsimile: (206) 467-0298
Email: RGSlaw@RGSlaw.com

July 1998

SEBRIS BUSTO, P.S.

is pleased to announce that

Elizabeth K. Maurer
Emily A. Sheldrick
and
Jillian Barron

have joined the firm as Associates

and

Cathryn V. Dammel

has joined the firm as "Of Counsel"

1500 Plaza Center • 10900 N.E. 8th Street
Bellevue, WA 98004
Telephone: (425) 454-4233
Fax: (425) 453-9005

JOHANNESSEN & ASSOCIATES, P.S.

is pleased to announce that

KEVIN P. GUICHON

has joined the firm, emphasizing environmental litigation and administrative appeals.
Mr. Guichon is a 1995 graduate of
Fordham University School of Law and
a 1990 Boston College graduate.

The firm is also pleased to announce the expansion and relocation of its offices as of August 1, 1998 to:

The Meridian Theatre Building
5413 Meridian Avenue North, Suite C
Seattle, WA 98103-6138
Telephone: (206) 632-2000
Facsimile: (206) 632-2500

COZEN AND O'CONNOR

is pleased to announce that

ALEXANDER A. BAEHR

formerly of Keller Rohrback, LLP,

SANDEEP BAWEJA

formerly with the
Washington State Court of Appeals

and

ERIC C. HANSON

formerly with the
Washington State Supreme Court

have become associates in the Seattle office.

Suite 5200, Washington Mutual Tower
1201 Third Avenue, Seattle, WA 98101-3071
(206) 340-1000

Other Offices:

Philadelphia, PA West Conshohocken, PA Atlanta, GA
San Diego, CA Los Angeles, CA New York, NY
Charlotte, NC Columbia, SC Dallas, TX
Newark, NJ Westmont, NJ

FOSTER PEPPER & SHEFELMAN PLLC
ATTORNEYS AT LAW

is pleased to announce the expansion
of our Seattle office with the addition of:

MARY-ALICE POMPUTIUS*
Of Counsel
INTELLECTUAL PROPERTY & TRADEMARK

* Admitted in California

ANCHORAGE BELLEVUE PORTLAND SEATTLE

GORDON MURRAY TILDEN
ATTORNEYS AT LAW

is pleased to announce that

JEFFREY M. THOMAS

and

FRANKLIN D. CORDELL

have been elected
Partners of the Firm.

1325 Fourth Avenue, Suite 1800
Seattle, Washington 98101-2510
Telephone: (206) 467-6477
Facsimile: (206) 467-6292
gmtlaw@gmt-law.com

Professionals

Burn Injuries

William S. Bailey, 1991 WSTLA Trial Lawyer of the Year, is available for association or referral of fire, explosion and burn injury cases.

Fury Bailey

1300 Seattle Tower
1218 Third Avenue
Seattle, WA 98101-3021
(206) 292-1700 or
(800) 732-5298

Criminal Charges

Lori K. Gustavson, specializing in the defense of major felony allegations, is available for referral

(206) 624-1060

Medical Negligence & Product Liability

Chemnick, Moen & Greenstreet is available for referral or association in plaintiff's medical negligence and product liability claims.

The firm's staff includes a nurse-attorney and a nurse-paralegal. Patricia K. Greenstreet and Eugene M. Moen are past chairpersons of WSTLA's Medical Negligence Section. Paul W. Chemnick organized WSTLA's Product Liability Section and served as its first chairperson.

Chemnick, Moen & Greenstreet
450 Market Place Two
2001 Western Avenue
Seattle, WA 98121
(206) 443-8600

Calif/WA Dual-License Personal Injury Brain & Spine Injury

AV Martindale-Hubbell Attorney Certified as a Civil Trial Advocate by the National Board of Trial Advocacy available for referrals or association of California (San Francisco Bay Area and Northern California) matters or trial in State or Federal Courts.

Michael M. Shea
Shea & Shea
408-292-2434 Phone
408-292-1264 Fax

New York/D.C./WA Licensed

Chinyere Okoronkwo of **Reid Dandridge Rodriguez Bressler & Okoronkwo, LLP** is accepting referrals, consultations and associations of matters involving NY and D.C. law.

36 W. 44th St.
New York, NY 10036
(212) 221-3956
(212) 354-1543 (Fax)

Appellate Consultant

Heather Houston

Offering an appellate perspective on every phase of your case. Sixteen years' experience evaluating, briefing and arguing appeals. Former law clerk to Justice Robert F. Utter, Ret.

Gibbs Houston Pauw
1111 Third Avenue #1210
Seattle, WA 98101
(206) 682-1080

Appeals

Douglass A. North announces his availability for referral, consultation or association on appellate arguments and briefs.

Douglass A. North

Maltman, Reed, North, Ahrens & Malnati, P.S.
1415 Norton Building
Seattle, Washington 98104
Telephone (206) 624-6271

Dental Malpractice & Disciplinary Proceedings

John J. Greaney announces his availability for referral of

1) plaintiffs' claims of dental malpractice, and
2) representation of healthcare providers in disciplinary matters.

(425) 451-1202, Bellevue

Disciplinary Proceedings Personal Injury Products Liability

Stephen L. Henley, Sr.
1325 Fourth Avenue, Suite 1700
Seattle, WA 98101-2509
Telephone 206-343-0191
Fax 206-682-8636
Internet SHenleysr@aol.com
Since 1976

Announces his availability to

(1) Represent health care providers in disciplinary matters and

(2) Represent plaintiffs in complex personal injury and products liability cases

Calif/Wa Dual-licensed

Michael A. Aronoff
Aronoff, McGoran & Sawyer P.S.

Available for referrals, consultation or association on California matters. Heavy family law background. 20 years' experience in California.

(253) 874-0189
fax (253) 874-8005

Labor Law
Employment Discrimination

Nina Harding, jd/mpa

Available for consultation, investigations, referral and association.

(206) 329-6370

Lawyer Ethics & Discipline
Former WSBA Chief Disciplinary Counsel

Leland G. Ripley
2442 N.W. Market St., #409
Seattle, WA 98107
(206) 781-8737
fax (206) 782-8111
e-mail: lawethics@juno.com

Appeals

Rob Lawrence-Berrey is available for referral or assistance on civil appeals. An objective and fresh view often reveals overlooked facts and arguments.

Rob Lawrence-Berrey
Finney, Falk & Lawrence-Berrey
117 N. 3rd St., Suite 201
Yakima, WA 98901
(509) 453-5604

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Associate: Seattle office of Bullivant Houser Bailey, a large, full-service law firm with six offices on the west coast, seeks an attorney with at least two years' experience in first party property insurance coverage and bad faith litigation. Excellent research and writing abilities required. Salary dependent on qualifications and experience. Written inquiries only. All inquiries are confidential. Send résumé, writing sample, law school transcript and cover letter detailing pertinent experience to Kelli Derrig, Hiring Coordinator, 1601 5th Ave., Ste. 2400, Seattle, WA 98101.

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Portland intellectual property firm seeks associate attorney with at least two years' experience preparing and prosecuting electronic patent applications. Candidates must have an EE or physics degree. Send résumé in confidence to Charles D. McClung, Chernoff, Vilhauer, McClung and Stenzel, LLP, One SW Columbia St., Ste. 600, Portland, OR 97258-2007.

Litigation attorney wanted for Seattle firm. Trial experience a must. Medical experience helpful. Reply to WSBA *Bar News* Box 561.

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Canadian firm seeks US securities lawyer: Clark, Wilson is a 50-lawyer firm with offices in beautiful downtown Vancouver, British Columbia. We are currently seeking a US securities lawyer to join our dynamic, team-oriented securities department. This lawyer will work from our office to assist our clients in listing on the NASDAQ stock exchange and fulfilling other US securities requirements. The successful applicant will have at least two years' experience in US securities law and will be highly motivated and well-organized and have a strong commitment to the profession. Strong interpersonal skills are required. Remuneration is commensurate with experience and comparable to salaries paid by US firms in the Pacific Northwest. This position offers excellent opportunities and is available immediately. We invite applicants to forward their résumé marked "Confidential" to: Bernard Pinsky, Clark, Wilson, Barristers & Solicitors, 800-885 West Georgia Street, Vancouver BC Canada V6C 3H1. References requested. Only candidates selected for interviews will be contacted.

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Estate planning and probate attorney: prominent South King County firm with 13 lawyers is looking to hire an attorney with a minimum of five years' experience to work in the area of estate planning and probate. Friendly, supportive workplace. Send résumé in confidence to Curran Mendoza PS, attn.: Pearl Emery, PO Box 140, Kent, WA 98035-0140.

The Seattle office of Miller Nash LLP seeks a lateral associate with at least two years' experience for its insolvency and reorganization practice group. Applicants should have experience with basic creditor's collection remedies, in addition to judicial and nonjudicial deed of trust foreclosures. Bankruptcy practice preferred, representing debtors or creditors. Please provide law school transcript and writing samples. Send résumé to: Libby Matheny, Miller, Nash, Wiener, Hager & Carlsen, LLP, 601 Union St., Ste. 4400, Seattle, WA 98101-2351. All replies confidential.

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Sharon Lee Dean: anyone who has prepared a will for Sharon Lee Dean, DOB 8/30/50, please call Patricia L. Gordon 425-454-4800.

Kathryn E. Bledsoe: looking for will of Kathryn E. Bledsoe, who died on May 5, 1998. Please contact Linda Simmons or Michael Dodd 206-632-8020.

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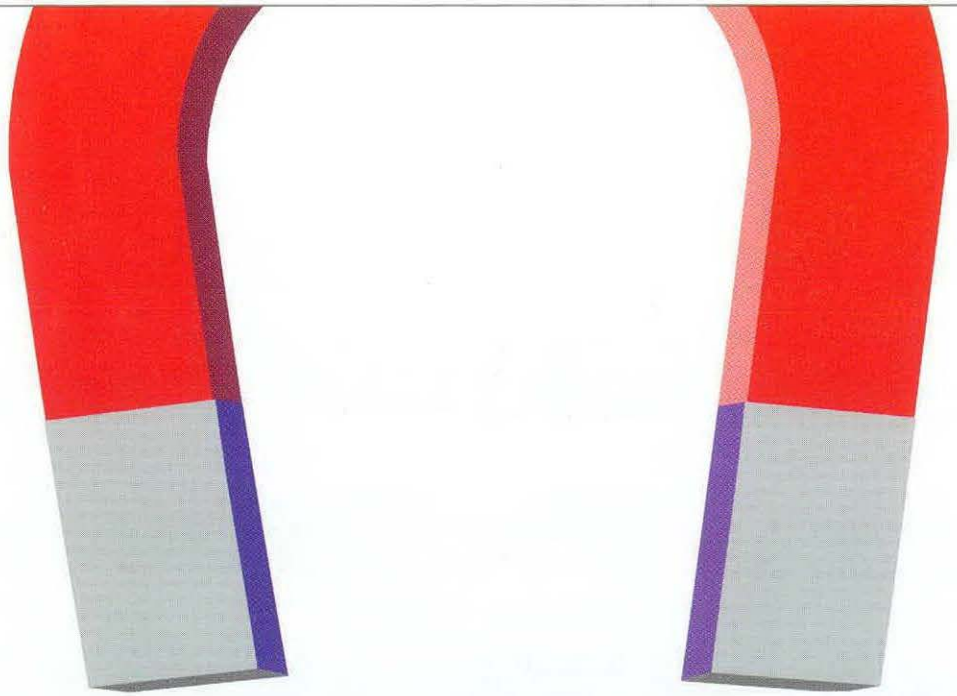

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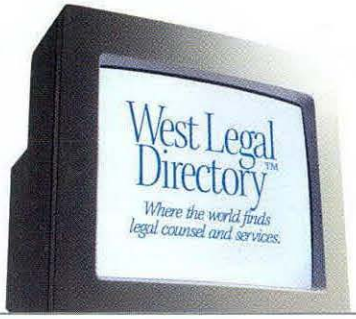

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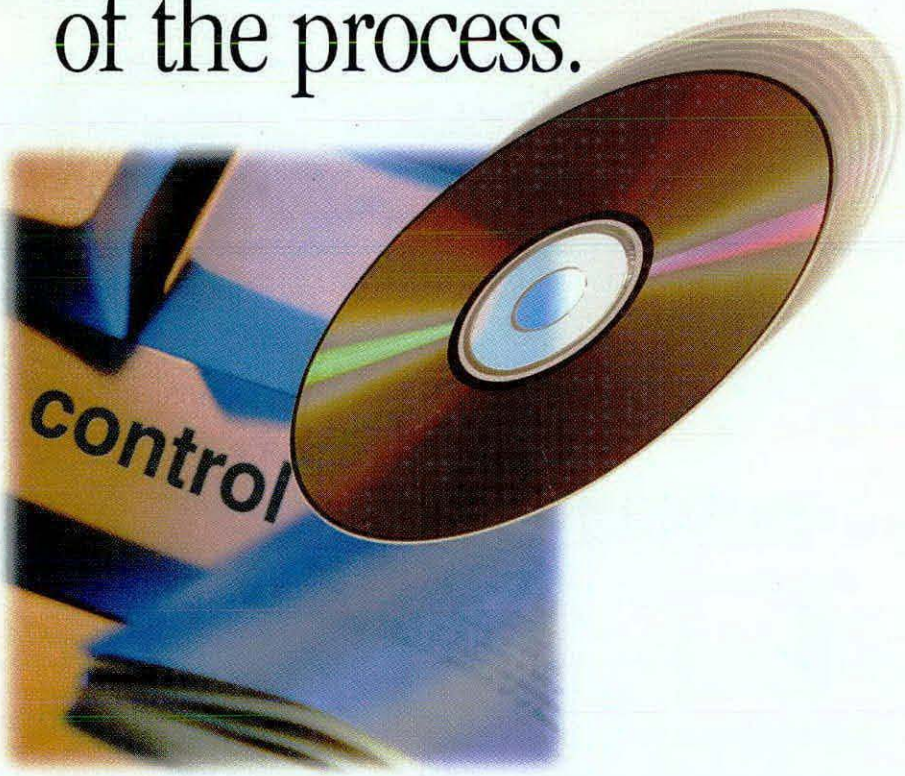

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