

Washington State BAR NEWS

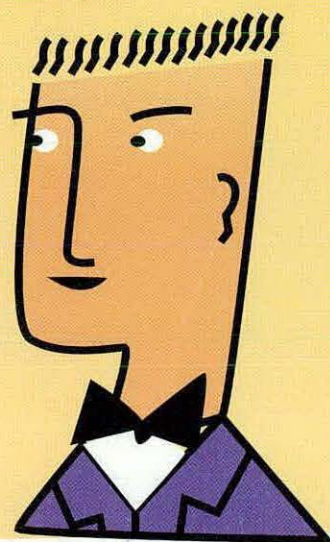
The Official Publication of the Washington State Bar
September 1998



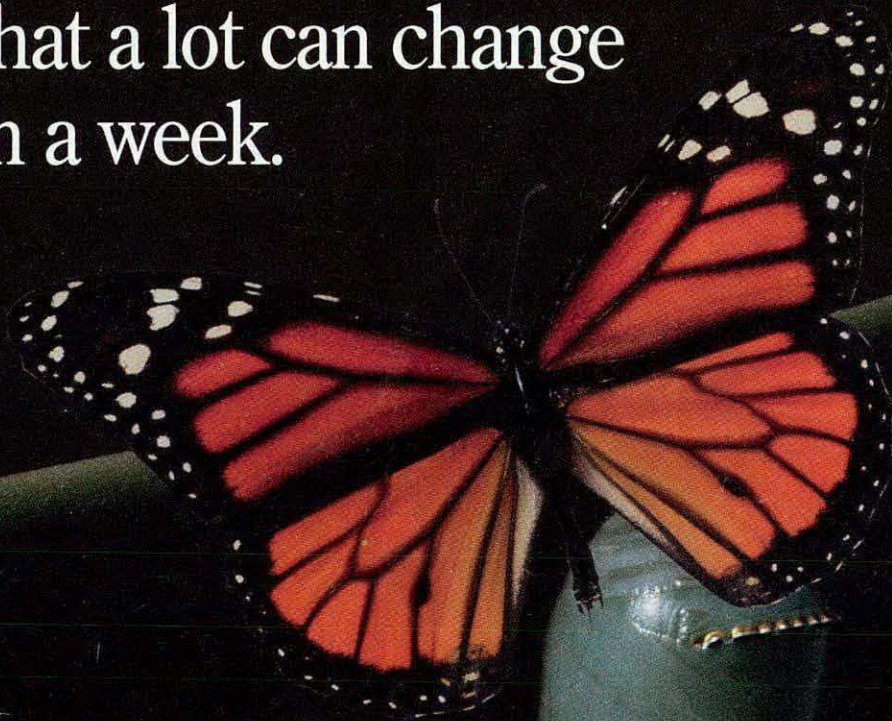
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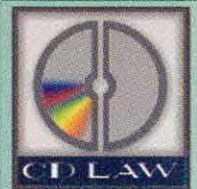
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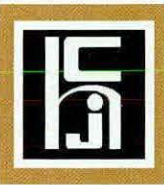
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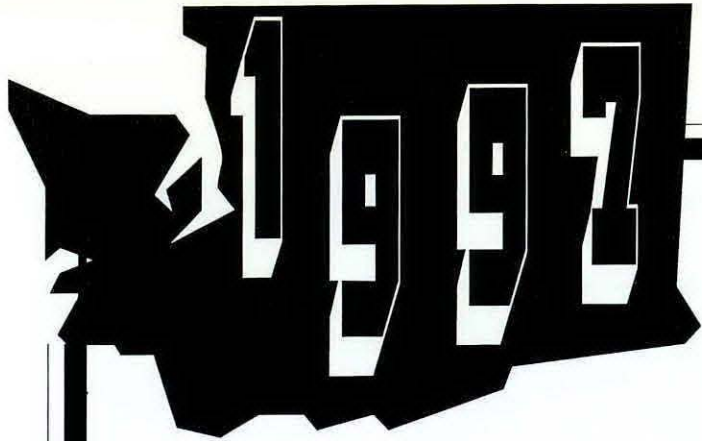
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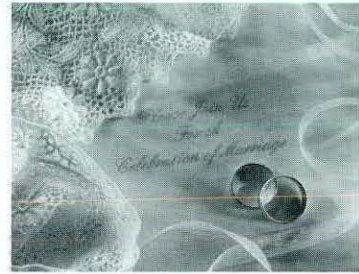
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Washington State BAR NEWS

September 1998

ARTICLES

- 14 SAME-SEX MARRIAGE: THE STATE OF THE LAW
by Patricia Novotny and Gwynne L. Skinner
- 20 ALTERNATE FEE ARRANGEMENTS
by John Ruhl
- 28 IT'S NO SHAME TO CLAIM — UNRAVELING THE MYSTERY OF
INSURANCE COVERAGE FOR CRIMINAL LOSSES
by R. Mark Keenan and Pablo Quinones



14

COLUMNS

- 10 EDITOR'S PAGE ■ 10 THINGS TO DO EVERY DAY TO SUCCEED
by Jeff Tolman, Guest Editor
- 11 EXECUTIVE'S REPORT ■ DEBUNKING CLE MYTHS
by CLE Director Tom Russell
- 13 PRESIDENT'S CORNER ■ STEWARDS OF JUSTICE NEED SUPPORT
by Mary Fairhurst

28



DEPARTMENTS

- | | | | |
|----|------------------|----|---------------|
| 7 | LETTERS | 50 | CALENDAR |
| 33 | THE BOARD'S WORK | 54 | ANNOUNCEMENTS |
| 36 | FYI | 55 | PROFESSIONALS |
| 40 | ETHICS & THE LAW | 58 | CLASSIFIEDS |



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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., September 15 for the November 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.

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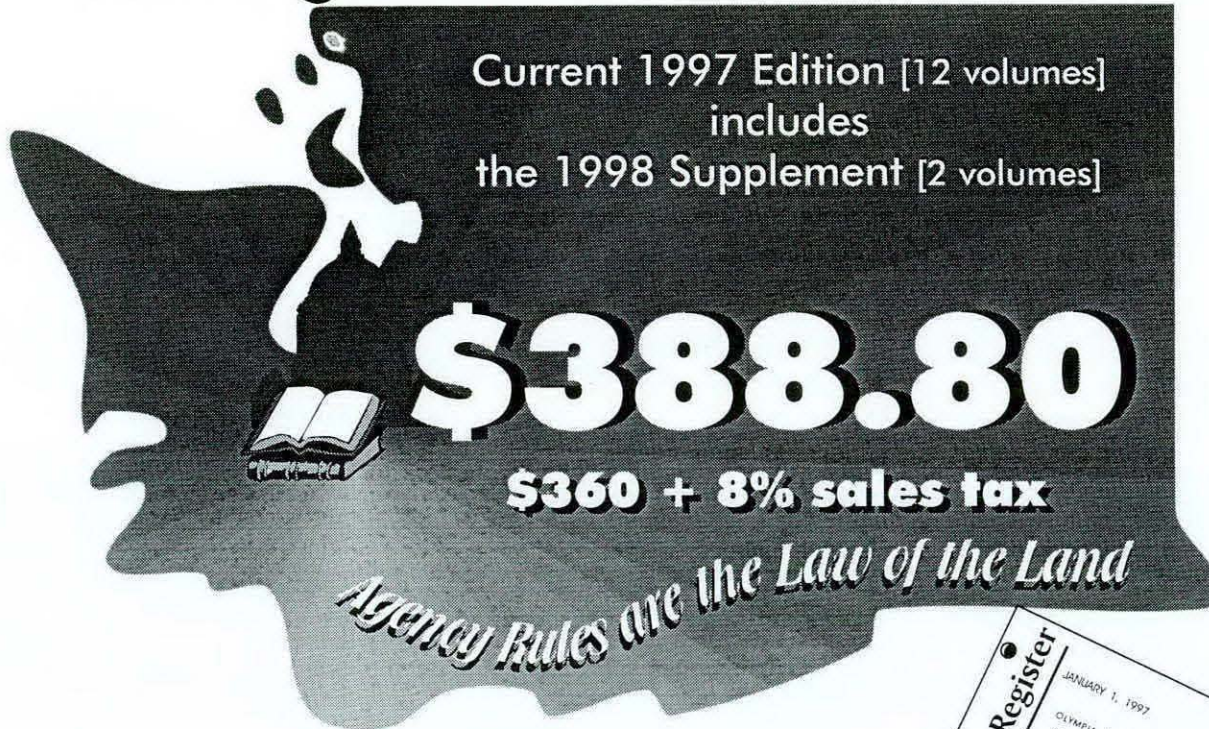
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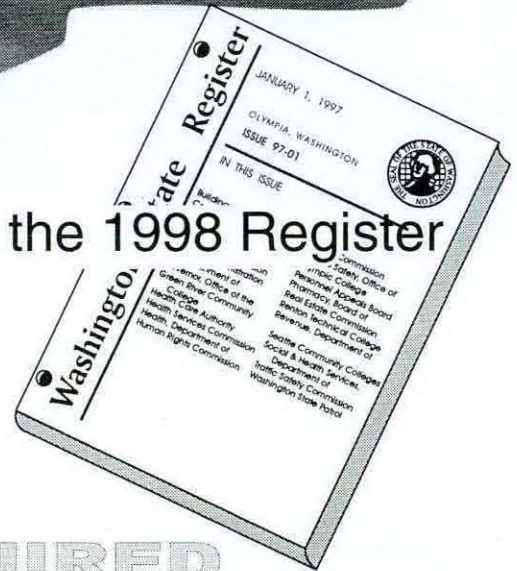
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PROPOSED FILING FEE INCREASES HIT MIDDLE CLASS HARD

■ Editor:

The July issue under "The Board's Work" I believe indicates that part of the Board's "work" is putting burdens on the backs of other people by proposing that the legislature increase superior court filing fees from \$110 to \$140, establish an answer fee of \$45 per filing, and add \$14 to district court filing fees. This is for the purported altruistic reason of helping the poor have access to justice, but arbitrarily makes access harder for those in the middle. The Board members in favor of this must think there are only two classes of people, those too poor to afford lawyers and filing fees, and those who can afford to always pay for them. As lawyers in touch with reality realize, many of the clients they serve, who are ultimately responsible for filing fees, are not poor enough to get everything for free, but are close enough to the poverty line that coming up with \$110 for a superior court filing fee to recover a loss sustained or \$41 for a district court filing fee (Spokane County) is already difficult enough without increasing this burden by increases far in excess of the rate of inflation (a 27 percent increase on the superior court filing fee alone). The answer fee of \$45 for the privilege of being sued prior to any determination of merit to the suit is adding insult to misery. I question the sincerity of someone who purports to solve a problem by putting a burden on someone who is not responsible for that problem. Those of us who do pro bono work have a choice; these proposals don't give that to the fee-payers. The Board of Governors represents attorneys, not the clients of attorneys, and if the legislature passes these proposals on the assumption that the Board of Governors knows what it is talking about, then what we have is taxation without representation. I urge attorneys with concerns about this to contact their governors and ask that these unfair proposals be dumped.

WILLIAM EDELBLUTE
Spokane

[Editor's Note: For an update on feedback received by the Board of Governors regarding this issue, see "The Board's Work" on page 33.]

LETOURNEAU CONTINUED...

■ Editor:

Mark Roe's attack against Mary LeTourneau in the July '98 *Bar News* deserves a reply.

Statutory rape (now deceptively mislabeled as "rape of a child") bears little resemblance to real rape. The government's case depends upon the age difference between the couple and the irrefutable presumption of lack of consent which is tied to the age of the younger

person. Real evidence of consent is barred from the trier of fact or disparaged from the bench as being legally irrelevant because of the irrefutable presumption.

Irrefutable presumptions in the law are suspect and disfavored as violations of due process. See *Jimenez v. Weinberger*, 417 U.S. 628 (1974). And criminal statutes, such as the statutory rape statute, which allow the government to "prove" its case by means of an irrefutable presumption can cause blatant miscarriages of justice. The Mary LeTourneau case is an example.

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

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

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

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

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

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

When Mr. Roe brands Mary LeTourneau as an "opportunistic crook" whom a jury would readily convict, he is relying upon an irrebuttable presumption, a gag order against the truth. If the irrebuttable presumption card at the bottom of the government's stacked deck is pulled out, then the government's entire "rape of a child" house of cards might collapse.

In the LeTourneau case, testimony from family, friends, and the couple themselves would have rebutted any presumption of lack of consent. Every account showed their relationship to be totally consensual, and even showed the boy to be the initiator of the relationship. Every account showed that no rape occurred. A fair cross-sectional jury chosen at random and allowed to hear and judge all of the evidence might very well have found Ms. LeTourneau not guilty of "rape."

The government should reconsider the harm that it does by some of these statutory rape prosecutions, not only to the defendant, but to the young person as well. What young person wouldn't be "screwed up," to use Mr. Roe's terminology, after seeing the person they love sent to prison and then being forced to endure hours of victimology "brainwashing" in

court-ordered counseling?

In the LeTourneau case the boy's guilt and depression are caused by the government's use of him as an unwilling instrument to imprison the woman he loves. Any harm done to this boy and his family has been done by the government.

TOM STAHL
Ellensburg

OPINION 194 RE-DENOUNCED

■ Editor:

Congratulations to John M. Colvin for his open letter denouncing Formal Ethics Opinion 194. For a year while I was on the Rules of Professional Conduct Committee, I urged without success the elimination of former Formal Ethics Opinion 189 as being in conflict with controlling federal law. After I left the RPC Committee, the Committee recommended to the Board of Governors what became Formal Ethics Opinion 194.

Like Mr. Colvin, I do not see how our Board of Governors can sustain the view that the ethics of our profession require us to flout federal law. As the Court of Appeals for the Ninth Circuit pointed out in the *Blackman* case, ethical rules gov-

erning lawyers are matters of state law, and are preempted and overruled when federal law is to the contrary.

As a practical matter, I cannot imagine the state Supreme Court would approve any discipline the Bar tried to impose on a lawyer who was following federal law in a manner that happened to contravene a formal ethics opinion. Compliance with federal law ought to be a complete defense.

I do not know if violations of formal ethical opinions are actionable. They are only opinions, after all, and not rules of professional conduct. Nevertheless, I urge the Board of Governors to reconsider Formal Ethics Opinion 194. It is not seemly, when unanimous controlling authority is to the contrary, for the official position of the Washington State Bar Association to be that we violate our ethical duties by complying with federal law.

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■ Editor:

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This is depressing. (*Sun Times*, 7-12-98). Yet we could save these lives overnight by legalizing the sale of human organs, either through their sale in the future after you die — a futures market in organs — or by legalizing their sale while you're alive. But selling organs has been illegal in the U.S. since 1984 (42 USC 274 (e)).

Many are simply repulsed at the idea of selling one's body just as they are about prostitution; it just seems so crude and desperate, exploitive and demeaning. Many fear visions of planeloads of poor Bangladeshis and Nigerians flying into New York to be carved up, paid off and shipped out, all for the benefit of rich Americans who need healthy organs. Farming humans? It can seem scary.

But what is scarier is that thousands die each year because of these sentiments, which really amount to nothing more than prudishness. Yet free contract and free consent should decide. It may be gross to legalize selling organs, but it is grosser to not do it and allow thousands to needlessly die each year while organs are rationed out Soviet-style. Let the market work and we'll save lives. Safeguards built into contract law like the defenses of incompetency, diminished capacity (including being too young), coercion, duress and unconscionability, can prevent abuses, along with the law of informed consent (re: medical treatment).

Might we see ads like "Eyes for \$50,000" or "Kidney Donors Wanted: Paying \$5,000/Kidney?" How'd you like to be paid \$500, say by an insurance company or hospital, right now while you're alive, in return for their right to harvest your organs after you die? Let's lift the ban and let markets and private morality decide.

JEFF E. JARED
Kirkland

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Washington State Bar Association Awards Luncheon and Annual Business Meeting

Friday, September 11, 1998 — Awards Luncheon 12:00 noon;
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The luncheon is \$24 per person (reservation deadline for luncheon has been extended to September 7). Please use the form on page 14 of the August *Bar News* to submit your reservation, or call Sharlene Steele at 206-727-8262.

There is no charge to attend the Annual Meeting, and no reservations are required.

Notice

If you received an August 1998 *Bar News* that was missing pages 3-6 and 55-58, please call us at 206-727-8203, and we'll send you a new copy. A small number of issues were missing pages due to a printing error.

Legal Foundation of Washington

Notice of Public Meeting

The trustees of the Legal Foundation of Washington will meet on September 10, 1998, at the Foundation office, 500 Union Street, Suite 545, Seattle, WA. The public may appear in order to comment on the Foundation's activities, between 8:30-9:00 a.m. This opportunity is made pursuant to Article I, Section 1.7 of the Bylaws of the Legal Foundation of Washington.

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Jeff Tolman
Guest Columnist

10 THINGS TO DO EVERY DAY TO SUCCEED

EDITOR'S PAGE

As I look at the lawyers I know who are successful, I see that they have good habits. They are organized and spend their days doing productive work and moving files. They get things done, and so get paid by clients and feel good about the time they have spent in the office.

The opposite is also true. The lawyers I know who are struggling, or who hate the practice of law, have one habit: they come to their office and put out the biggest fire. No forethought. No planning. No productivity. Just trying to keep from getting sued by the client who is the most mad, or sanctioned by the court most ignored.

In law school, I roomed with an engineer who felt there was an objective formula for everything. "Love," he said, "is predictable. We just don't know the formula yet." I disagree with him that love and lots of other things (kids come to mind) are predictable. It is clear to me, though, that the chance for success in the law can be quantified by a lawyer's good, and bad, habits.

Following are some things that should be done *every day*. Some are small habits, others bigger. They will, though, help get your practice, and you, on the right track.

1. **Answer all of your phone messages**, even if your message to the caller is that you are unavailable (in trial, etc.). It will tell clients that you are not ignoring them. Loneliness is one of the most powerful human emotions. Feeling uncared-about by someone you are paying \$2 a minute almost immediately turns loneliness into aggression.

2. **Call clients you have worked with in the past**, but don't have any cases with now, just to see how they are doing. A lawyer's number one referral source is existing clients, especially those you keep in touch with.

3. **Work 15 minutes on a case you are ignoring** (we all have them). Sometimes absence does make the heart grow fonder. Even if it doesn't, your attention to the file

may inspire you to contact the client, refer the case out or plot your next work project on the case.

4. **Read and immediately answer your mail**. This "quick in-quick out" system will be productive for you and your clients, and will keep today's mail from getting stacked on yesterday's.

5. **Ask staff members about their families**. The simple inquiry shows that you are interested in them as people and often you will learn interesting things about them. Never forget that your staff often has more "hands-on" contact with clients than you do. They can be your most ardent supporters.

6. At the end of your appointment, **genuinely thank the client** for coming in. There are lots of good lawyers in your community. This client has chosen you. She feeds your family. Let her know you appreciate it.

7. **Bring your receptionist a cup of coffee**. He or she is the first contact in your office and can make or break you.

8. **Take five minutes to talk to one of your colleagues**. Lawyers are a wonderfully interesting group if you ask and listen. They can, and will, help you with your cases if you ask.

9. **Give someone a compliment**. It will help that person and you, and is a good habit to get into. No one ever thought less of you for saying something nice.

10. Finally, **put in a hard day's work**. "Lawyer" is a verb. You get paid to do things, not think or talk about doing things. You will feel good, and ready to go home, when you have moved the files on your desk that greeted you in the morning.

When I look at the lawyers I know who are successful, I see that they began their good work habit one day. A day like today.

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Tom Russell
Director of CLE

Having recently celebrated the second anniversary of my passage from practicing trial lawyer to CLE Director, I am keenly aware of the most common myths members have about CLE, and would like to use this column to debunk them while increasing your understanding of how CLE really works.

Myth No. 1: CLE mails every program brochure to every attorney, several times over.

One Vancouver attorney told me that she gets more announcements about legal education seminars than credit card applications. When I was in practice I did too, when every seminar provider mailed every one of its program brochures to me (and, I was sure, to every other practicing, inactive and deceased attorney in the state!).

The reality at WSBA CLE is that we hand-pick the attorneys to whom we mail by their practice section affiliations and records of past attendance at our seminars. We do mail twice to that group because we track the results, and the number that responds to a second mailing shows the value of that reminder. Next to facility (hotel) charges, the cost of printing and mailing brochures is our highest expense. Believe me, if I could cut it down without overlooking the hand-picked people who do respond to our mailings, attend and, we believe, benefit from our seminars, I would do so in a minute.

Myth No. 2: CLE is high-priced to make lots of profit while running on member dues.

No part of our operation is funded from member dues. We pay the Bar for every labor hour, postage stamp, and square foot of office space we use. The Board of Governors tells us to operate on a business model, not a profit model. In plain terms that means we set our seminar registration fees not to make money but simply to meet our expenses and to cover those programs that don't generate enough revenues to meet their expenses. We are the lowest-priced statewide CLE provider in the state. We also offer various savings plans for members who want to attend our seminars at substantial savings.

Executive Director Jan Michels will periodically turn over her column space to WSBA department directors. She'll be back in the October issue with her promised "work plan" for the WSBA.

DEBUNKING CLE MYTHS

Myth No. 3: CLE puts on seminars only in Puget Sound, because the bulk of WSBA members live there.

The latter part of this myth is true: In the Puget Sound counties of King, Kitsap, Pierce, Snohomish and Thurston reside 78 percent of the lawyers in Washington. But we make a conscious effort to reach the other 22 percent because we are the provider to *all* WSBA members. So we regularly run live seminars in Vancouver, Spokane, the Tri-Cities, Wenatchee and Yakima. In addition, we work with local firms and county bars who sponsor video replays of our more popular seminars in other locations such as Friday Harbor and Port Hadlock (and we even tried one for the eight members of the Ferry County Bar in Republic). We offer telephone call-in seminars accessible by every lawyer's office in this state, and our fall schedule will be full of these opportunities, especially for the sorely needed ethics credits at the end of the year. In addition, every lawyer in the state can obtain our fine array of legal publications, our course books and, in the coming year, an even greater choice of taped seminars with course materials. By this time next year you will be able to purchase one CD-ROM containing all of the WSBA CLE publications, with hyperlinks to cited cases and statutes and a wonderful search engine.

Myth No. 4: Being the largest provider of CLE in the state, with 100 programs a year, dilutes the quality of the program.

I read every member's evaluation for every course. Let me give you a few quotes from the forms that happen to be lying here from this week's programs as I write this: "More practical pointers — extremely helpful." "Extremely relevant topics." "I think WSBA seminars are currently 'head and shoulders' above most other CLE orgs." In addition, I was just informed that the Association of Continuing Legal Education Administrators (ACLEA), the organization of all state, county and private CLE providers in the U.S., plus Canada and overseas countries, through its "ACLEA's BEST" Awards Committee, chose our "New Lawyers" program for the "Best Program Award of Professional Excellence," the highest award given in any category. This is not serendipitous. For every topic of every program, our CLE committee, professional staff, volunteer attorney chairs and volunteer faculty all point towards one goal: that as a registrant you will get a full period of practical items like forms, samples, tips and pointers that you can apply to good use right away, back in your office, the following day. We have accomplished that goal to a greater extent than most others and the award symbolizes the other folks recognizing that point.

The CLE Department welcomes and responds to member input. I would appreciate your comments and queries to me at 206-727-8220, or tomr@wsba.org.

EXECUTIVE'S SREPORT

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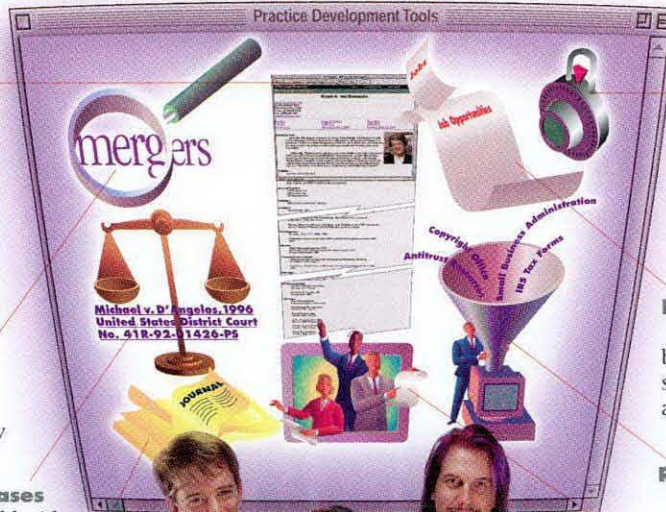
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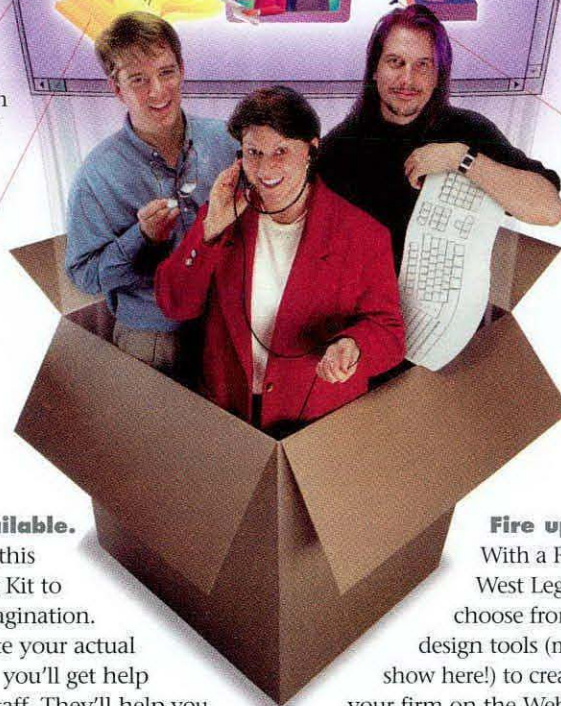
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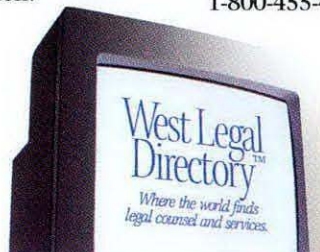
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Mary Fairhurst
President

STEWARDS OF JUSTICE NEED SUPPORT

My last column. Hard to believe the year is over. Normally one would write about all the accomplishments in a final column. I am fortunate to have, in essence, two columns this month.

One is in the Annual Report, inserted as part of this issue. In that President's Report, I talk about our vision, our goals, our progress this last year. Other parts address our future. I encourage you to read the Annual Report. This year's Annual Report includes less financial information than previous years' reports. While finances are important, in fact critical, to the Bar's existence and continuing vitality, we wanted the Annual Report to focus more on the human aspect, reflecting that we are an organization of involved people working to promote justice and to serve our members and the public.

In this, my extra column, I want to reflect on what it means to be involved in bar activities and why it is important to support lawyers who are willing to serve our profession, our justice system, and our society through bar activities.

When one is involved in bar activities, one has the opportunity to work with lawyers and others in non-adversarial ways. One discovers that we share common concerns as people and as professionals; one realizes that stereotypes and jokes about lawyers and subsets of lawyers aren't funny; one learns that a single person and a group of committed persons can and do make a difference.

Through bar activities, one can join with others in making suggestions and finding solutions to improve our profession and our justice system, and through these activities, positively impact society. I reflect on the year and the great involvement of a variety of people in the activities of the state bar, the local bars, the specialty bars, and the access to justice community, to name a few. I think of what a difference their involvement and commitment have made. I wonder where we would be without their dedication. I dream of where we might go if more could be involved.

As I talked to many people this year, I heard: "I would like to be involved in bar activities but my firm won't support me." or "My firm doesn't see the importance of bar work." or "My agency doesn't have a policy."

I believe a number of people would like to be more involved, but with limited time and resources, they cannot

do it without the support of their employers and families. I encourage employers to reflect on the many benefits that come to you and your firm by enabling your employees to participate in bar activities. I salute the agencies, firms and families of all those who are involved in bar activities. Without your support, we would not be able to contribute to our profession, the justice system and society.

I would like to recognize specifically the agencies, firms and families of the President-elect and Board of Governors:

President-elect: Wayne Blair, Montgomery, Purdue, Blankenship & Austin, PLLC, Seattle.

The third-year governors: Steve Crossland, Johnson, Gaukroger & Crossland, Cashmere; Denny La Porte, Thompson, Krilich, La Porte, Tucci, & West, Tacoma; Bill Nielsen, Western Washington Growth Management Hearings Board, Olympia; Lish Whitson, Helsell Fetterman LLP, Seattle.

The second-year governors: Terry Lee, Terrance J. Lee, Attorney at Law, Vancouver; Marijean Moschetto, Moschetto and Koplín, Inc., P.S., Bellevue; Don Powell, Tuell, Couture, Powell, Tuell, P.S., Tacoma; Mary Alice Theiler, Theiler, Douglas, Drachler & McKee, Seattle.

The first-year governors: Dick Eymann, Feltman, Gebhardt, Eymann and Jones, P.S., Spokane; Walt Krueger, Walter R. Krueger, Attorney at Law, Kirkland; Dick Manning, J. Richard Manning, Attorney at Law; Seattle.

Finally, I would like to recognize most appreciatively and affectionately my family and the Washington State Attorney General's Office, especially Attorney General Christine Gregoire, Chief Deputy Attorney General Kathy Mix, Division Chief Scott Blonien, Acting Team Leader Nancy Krier, Division Administrator Sue Phipps, my secretaries Cheryl Chafin and Darlene Jacobs, and all members of the Criminal Justice Division, Olympia. One cannot assume the responsibility of president without the support and encouragement of one's family and employer. Thank you. One cannot have a successful year without the support of colleagues and friends. Thanks to all of you.

A photograph of wedding rings and lace fabric with a handwritten note. The rings are silver and are placed on a white lace fabric. The note is written in cursive and reads "Please Join Us For A Celebration of Marriage". The background is a soft, light green color.

Same-Sex Marriage

*Please Join Us
For A
Celebration of Marriage*

The State of the Law

by
Patricia Novotny
and
Gwynne L. Skinner

The issue of whether same-sex couples have the right to marry legally is currently being litigated in three states: Hawaii, Alaska and Vermont. A decision is expected any day by the Supreme Court of Hawaii on whether Hawaii's denial of legal marriage to a same-sex couple violates Hawaii's constitution, thereby opening the door for same-sex couples to marry legally in Hawaii. The same issue is also now before a Vermont Supreme Court, where lawyers representing three same-sex couples seeking the right to marry filed legal briefs in early March. In Alaska, a superior-court judge ruled in February that marriage is a fundamental right, and that under the privacy clause of the Alaska constitution, the state must therefore demonstrate a compelling interest to support its decision to refuse to recognize marriages of same-sex couples.

COURTS HAVE HISTORICALLY REJECTED SAME-SEX MARRIAGE

In scattered litigation over the past several decades, courts have rejected same-sex couples' petitioning for the right to marry. These courts, while recognizing a constitutionally protected fundamental right to marry, have reasoned that, by definition, marriage can only be the union of a man and a woman.

More than two decades ago, a Kentucky court in *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973), summarily rejected constitutional challenges based on the right to marry, the right of association, and the right to the free exercise of religion.

For authority on the question, the court relied on the Webster's and Black's Law dictionaries. Within those volumes, marriage was defined as the union between a man and a woman. The *Jones* court rea-

soned that two women, or two men, therefore cannot, by definition, marry one another. Thus, it was not the laws of the state of Kentucky that prevented the two women from marrying. Rather, the union was prevented "by their own incapability of entering in a marriage as that term is defined." The court thus handily avoided the constitutional issues altogether.

A year later, the Washington Court of Appeals reached a similar result (al-

though it engaged in a more lengthy analysis) in *Singer v. Hara*, 11 Wn. App. 247, 522 P.2d 1187, review denied, 84 Wn.2d 1008 (1974). In particular, Division One rejected equal protection, due process, and equal rights amendment challenges to the denial of a marriage license to the two male applicants. Again, the denial was mandated by "the recognized definition of [the marital] relationship as one which may be entered into only by two persons who are members of the opposite sex." 11 Wn.App. at 255. The *Singer* court held that public policy favored that definition, as "society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children." 11 Wn. App. at 259.

At present, no state in the Union permits same-sex couples to marry. Several states, however, stand on the threshold of such recognition. In all likelihood, many if not all of the other states will be confronted with this issue through the remaining years of this decade.

PENDING LITIGATION IN HAWAII

In 1993, the Hawaii Supreme Court ruled in favor of same-sex couples challenging Hawaii's denial of marriage licenses to them, finding that the denial may violate the Hawaii constitution's guarantee of equal protection. *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993) (now entitled *Baehr v. Miike*). The court held that because Hawaii's constitution includes an explicit guarantee of sex equality, classifications based on sex survive the court's scrutiny only if they serve a compelling state interest. As no record was made on that question, the Hawaii Supreme Court remanded to the trial court. In December 1996, after presentation of evidence, the trial court found the state failed to meet this burden, but the court stayed its decision pending review by the state's high court, from which a decision is anticipated at any time.

In reaching its decision, the Hawaii court relied on the United States Supreme Court case of *Loving v. Virginia*, 388 U.S.

1 (1967). In *Loving*, the court struck down as violative of equal protection a Virginia statute that declared interracial marriages illegal and null. The Lovings, legally married in the District of Columbia, returned to their home in Virginia and were indicted for violating the miscegenation law.

The Supreme Court declared the Virginia law unconstitutional, reasoning that restricting the right to marry on the basis of race was nothing less than racial discrimination. The statute, in the Court's view, proscribed conduct otherwise generally acceptable when members of different races engaged in it. Of such a distinction, the court declared that "[t]here could be no doubt that restricting the free-

At present, no state in the Union permits same-sex couples to marry. Several states, however, stand on the threshold of such recognition. In all likelihood, many if not all of the other states will be confronted with this issue through the remaining years of this decade.

dom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S. 10-12. The majority rejected the dissent's argument that miscegenation statutes do not discriminate on the basis of race, since they treat the races equally, prohibiting both whites and blacks from intermarrying.

Nearly 30 years later, the Hawaii court found the same argument to be specious when applied to sex in the context of same-sex marriages. Hawaii's marriage law, "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex." (852 P.2d at 64.) Plaintiff Nina Baehr, in this court's view, was prevented from marrying the person of her choice because that person is a

woman. Consequently, the court undertook a constitutional analysis of this sex-based classification.

Meanwhile, various legislative actions in Hawaii cast doubt on the future of legal same-sex marriage in that state even if the state's highest court affirms the trial court and strikes down as sex discrimination the current marriage ban. In particular, the Hawaii electorate has been asked to ratify a constitutional amendment that would permit the legislature to define marriage to mean only unions between men and women.

RECENT AND PENDING LITIGATION IN ALASKA

In late February of this year, a trial court in Anchorage, Alaska, ruled in a declaratory judgment action that marriage, and more specifically, the recognition of one's choice of a life partner, is a fundamental right, and that Alaska's ban on marriage between persons of the same sex may violate Alaska's constitutional guarantee of privacy. *Brause, et al. v. Bureau of Vital Statistics, et al.*, Case No. 3AN-95-6562 Cl. As did the court in Hawaii, the judge ruled that to continue the ban on same-sex marriage, the state would need to show a "compelling interest" justifying the infringement on a gay couple's constitutional rights. Further, the court opined that if it had been necessary to reach the equal protection claim, the court would also have found the ban an unconstitutional form of sex discrimination, citing *Loving* and *Baehr*.

In the Alaska case, unlike Hawaii, the court had to deal with a statute (A.S. 25.05.011(a)) that explicitly defines marriage "as a civil contract entered into by one man and one woman." In the trial court's view, however, it was "not enough to say that marriage is marriage and accept without any scrutiny the law before the court." The court observed that "in some parts of our nation mere acceptance of the familiar would have left [racial] segregation in place."

In particular, the court took up the question of whether the marriage restriction violated Article 1, Section 22 of the

Alaska Constitution, the privacy protection added in 1972. That section provides in part that "[t]he right of the people to privacy is recognized and shall not be infringed." The court examined the nature of the interest in marriage and Alaska precedent. Relying on a case from several decades ago involving a successful challenge to a public school restriction on student hairstyles, the court concluded that "the right to choose one's life partner is quintessentially the kind of decision which our culture recognizes as personal and important." The Supreme Court has been asked to review this decision as an interlocutory matter (the parties had not proceeded to trial).

The trial court's decision set some Alaskan legislators in motion and talk abounds of constitutional amendments aimed at undoing the decision. In addition, a measure is being proposed that would require legislative confirmation for appointees to the Alaska Supreme Court,

Court of Appeals and the Judicial Council, the panel that selects candidates for Alaska courts. The lower court judge who made the ruling has come under attack and is being accused of pursuing his own personal agenda. He is, however, a life-long Republican and, in the words of the presiding judge of the courts in south-central Alaska, "his personal credentials are conservative."

... a trial court in Anchorage, Alaska, ruled in a declaratory judgment action that marriage, and more specifically, the recognition of one's choice of a life partner, is a fundamental right, and that Alaska's ban on marriage between persons of the same sex may violate Alaska's constitutional guarantee of privacy. ... Like the court in Hawaii, the

RECENT VERMONT LITIGATION

On July 22, 1997, three same-sex couples in Vermont filed a suit against the state for denying them marriage rights after clerks in three Vermont towns refused to issue them marriage licenses. (Vermont does not have a statute which specifically states that marriage can take place only between a man and a woman.) In December 1997, the trial judge dismissed the plaintiffs' case, finding that links between marriage, procreation and childrearing justified the State's denial of marriage licenses to same-sex couples. The plaintiffs filed a Notice of Appeal on January 15, 1998, and filed their briefs in March.

The plaintiffs in *Baker v. State* argued that the State's refusal to issue marriage licenses to same-sex couples violates the right to equal protection and the Common Benefit Clause of the Vermont Constitution, which provides in part that "government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part of that community. . . ." Vt. Const. Ch. I. Art. 7. When examining this clause, Vermont courts have relied on federal equal protection law for an analytic framework.

In dismissing the case, the judge rejected the plaintiffs' arguments that a heightened level of scrutiny should be used in reviewing the State's denial of marriage licenses to same-sex couples. The judge found that a fundamental right did not exist and sexual orientation was not a suspect class. With regard to whether marriage is a fundamental right, the judge acknowledged that mixed-gender marriages do receive constitutional protection, but held that the protections did not apply to same-gender marriages because they derive from the connections between marriage, sexual intercourse and procreation. Additionally, although noting a clear history of discrimination against gays, the judge found that sexual orientation was not a



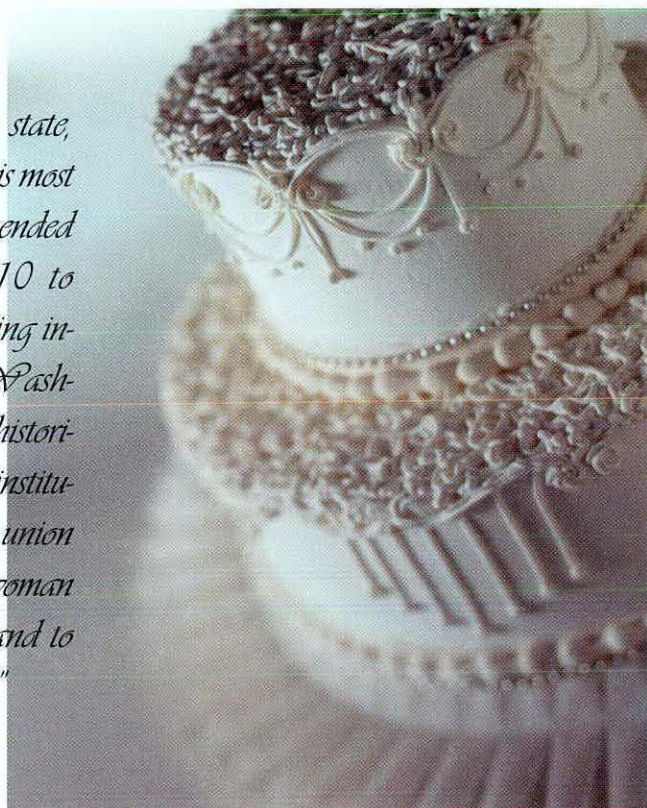
suspect class because sexual orientation is not a characteristic that is readily determinable by third parties, and because gays and lesbians cannot be seen as politically powerless. Finding that no heightened scrutiny was warranted, the judge employed the rational basis test and found that the State had a compelling interest in furthering the link between procreation and childrearing. The plaintiffs are expected to attack Vermont's stated reason by arguing that gay and lesbian couples can and do have children, and by arguing that the State's concern for stable homes for children is best accomplished by allowing same-sex couples to marry, not disallowing the marriages.

The judge did give some reason for the plaintiffs to be optimistic, however. The judge rejected six of the State's seven arguments under the rational basis test. In addition, she rejected the State's contention that the question of same-gender civil marriage should be reserved for the legislature, stating that it is the judiciary's job to review the constitutionality of all statutes. Despite this early defeat, many gay and lesbian activist groups feel that Vermont (considered one of the most gay-friendly states in the country) may be the likeliest place to legalize same-sex marriages. Legislative reaction in Vermont has not mirrored reaction in other states. Although a bill has been introduced to ban same-sex marriages, it has languished.

STATES HAVE REACTED BY STATUTORILY DEFINING MARRIAGE

The felt need for statutes in defense of marriage arose after the *Baehr* decision. Washington and several other states have in the past few years followed the lead of the United States Congress by statutorily codifying a definition of marriage that excludes same-sex couples. The federal legislation, known as the Defense of Marriage Act, which passed in 1996, seeks to limit the effect of legal same-sex marriage by defining, for all federal purposes, terms relating to marriage as contemplating only the union between a man and a woman. Thus, when the word "spouse"

In Washington state, legislation was passed this most recent session which amended RCW 26.04.010 to read: "It is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution."



appears in federal law or regulation, according to DOMA, it means only a member of an opposite-sex marriage. 28 U.S.C. 1738C(a).

Similarly, in Washington state, legislation passed this most recent session amended RCW 26.04.010 to read: "It is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution."

FULL FAITH AND CREDIT ISSUES

The outcome of litigation in Hawaii and other states is far from certain. Still, the litigation itself raises questions about the probable impact outside the affected state. What happens if same-sex couples can legally marry in one or more of the 50 states? It seems likely that couples from other states will travel to states in which they can legally marry, providing they can meet whatever other statutory conditions pertain. What might be a travel

agent's dream-come-true is a nightmare to others, including the federal and state legislators who have sought to nullify the effects of such marriage in advance of their occurring.

The question on everyone's mind, of course, is the effect of such provisions in the face of the federal Constitution's Full Faith and Credit Clause. As one means of ensuring that the states be united in more than name only (that the United States be a federalism, not a loose consortium), Article IV, Section 1 requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

Does this clause require Washington, for example, to extend recognition to a same-sex marriage legal in another state? The debate that rages around this question focuses on the second sentence of Article IV, Section 1: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The federal DOMA represents the congressional effort to do just that.

In DOMA, Congress urges the states to take advantage of what is referred to as a public policy exception to the Full Faith and Credit Clause. But the contours of that exception are far from clear. Whether state DOMAs will succeed in restricting the legal effect of marriages recognized in other states remains the subject of much debate.

THE UNITED STATES SUPREME COURT

The question of whether a state is compelled by the Full Faith and Credit Clause to recognize a same-sex marriage valid in another state will undoubtedly make its way to the United States Supreme Court. In predicting what analysis the Court is likely to employ, at least with regard to the underlying privacy and equality issues concerning gays and lesbians, two cases in particular will guide the Court: *Bowers v. Hardwick* and *Romer v. Evans*.

In 1986, the United States Supreme Court rejected a challenge by Michael Hardwick to Georgia's anti-sodomy law. Interestingly, that law did not criminalize conduct on the basis of the sexual identities of the partners, but, rather, on the nature of the acts themselves. A hetero-

When states forbid couples of the same sex from marrying, are they motivated by animus and hostility, morality, or some other concern that is legitimate?... Certainly, however attractive the simplicity and clarity of the "marriage = man + woman" equation, it fails to answer certain questions that might interest the high court. Among them: What purpose does marriage serve and what interest does the state have in regulating it?

sexual couple sought to join Hardwick's suit, but was dismissed for lack of standing (since the couple, unlike Hardwick, had not been arrested for violating the law). *Bowers v. Hardwick*, 478 U.S. 186 (1986).

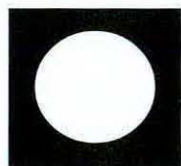
The majority in a divided court framed the issue before it as whether there exists a constitutionally protected fundamental right for citizens to engage in sexual con-

duct with members of the same sex. The Court answered "no" to this question. The Court also rejected the claim that homosexuals represent a suspect class. Consequently, the Court reviewed Hardwick's challenge under the most lenient standard of review: rational basis. The Georgia statute passed that test. The Court upheld as a legitimate exercise of governmental authority the expression of the Georgia citizenry's morality in the form of the statute. Dissenters took issue with the way the Court framed the question, preferring instead to view the issue as one of privacy, or the right to be let alone. Many commentators question whether the current Court would have ruled the way the *Bowers* Court did, and many believe the Court, if faced with a similar issue again, will find a way to distinguish *Bowers*.

Ten years after *Bowers v. Hardwick*, the high Court again considered the question of legitimate state purpose. In *Romer v. Evans*, 116 S.Ct. 1620 (1996), the Court reviewed, under the rational basis test, Colorado's constitutional amendment that prohibited governmental entities statewide from extending to homosexuals anti-discrimination protections. Proponents of the amendment characterized protection against discrimination as a special right. In defending the amendment, the state of Colorado offered that its purpose was to conserve state resources to fight other forms of discrimination and to protect its citizens' freedom to associate (or not to associate). This statement of purpose left the high Court exceedingly skeptical. In the Court's view, the amendment's actual motivation lay in animus, or hostility, toward the homosexual minority. Animus, pronounced the Court, is not a legitimate purpose for legislative action.

WHAT MOTIVATES MARRIAGE LAWS?

When states forbid couples of the same sex from marrying, are they motivated by animus, morality, or some other concern? It seems likely the courts will wrestle with some version of this question for the foreseeable future. In the past, courts were satisfied that same-sex unions fell outside



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the definition of marriage. But as can be seen recently, state courts, at least, find this tautology less persuasive.

Certainly, however attractive the simplicity and clarity of the "marriage = man + woman" equation, it fails to answer certain questions that might interest the high court. Among them: What purpose does marriage serve and what interest does the state have in regulating it? Congress gave its answer to that question directly when it passed DOMA: "Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship." Report for P.L. 104-199, 110 Stat. 2918 (House Report No. 104-644). Of course, courts will struggle with the fact that marriage is not now limited to couples intending or able to bear children; nor are all parents necessarily married.

Courts will undoubtedly continue to grapple with same-sex marriage and the legal issues which surround its recognition. Even if several states recognize same-sex marriage, the battle over whether other states must recognize such marriages will be a bigger battle, and undoubtedly, a bitter and divisive one. No matter what the eventual outcome, however, it will be one of the monumental decisions of our time.

Patricia Novotny practices law in Seattle, where she handles civil and criminal appeals. She lectures at the University of Washington School of Law and Women Studies Department.

Gwynne L. Skinner is Of Counsel with the Seattle firm of Stephson Askov, where she practices employment and labor, discrimination and civil rights law.



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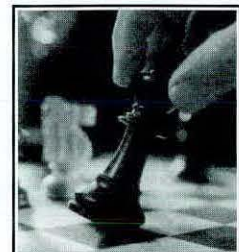
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ALTERNATE FEE ARRANGEMENTS

The purpose of this article is to describe several alternate fee arrangements, defined as any method other than a straight hourly-fee billing arrangement, currently being used by law firms.

Many clients see at least three problems with the straight hourly billing method:

(1) it encourages (or inadequately discourages) inefficiency by counsel;

(2) it makes it difficult or impossible to predict what the total fee will be, especially in matters involving litigation; and

(3) it is computed solely based on the lawyer's time devoted to the matter and thus ignores the value of the services to the client.

Similarly, a straight hourly billing method can be unfair for lawyers in those cases where the lawyer has spent a great deal of resources accumulating what is needed to handle legal matters efficiently (computers and software, legal research memoranda, business transactional forms, pleading forms, etc.), but then is limited to charging the client for services based solely upon the raw time required to reproduce the documents or information for the client.

From a client's standpoint, alternate fee arrangements can be attractive because they tend to promote efficiency

by counsel. They also allow the client to predict and budget more accurately for legal expenses and allow the legal fee more accurately to reflect the value of the legal services to the client.

From the lawyer's standpoint, an alternate fee arrangement can allow the legal fee more accurately to reflect not only the time spent by the lawyer, but also the other factors that should be considered in arriving at a fair and reasonable fee. "Time" is only one of the many factors listed in Rule 1.5(a) of the Rules of Professional Conduct as being relevant to determining a reasonable fee. RPC 1.5(a) states:

(a) **A lawyer's fee shall be reasonable.** The factors to be considered in determining the reasonableness of a fee include the following:

(1) The *time* and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

For counsel who are willing to share some of the client's risks by entering into a creative alternate billing arrangement, there can be an opportunity to be compensated at more than the lawyer's nominal hourly billing rate upon the successful resolution of the matter.

The following alternate billing arrangements are grouped into four categories: fixed-fee arrangement, variations on hourly-fee arrangements, contingency-fee arrangements and retainers. The various methods can be modified and combined to address the needs of the client and the lawyer in a given situation.

by John Ruhl

FIXED FEE PER CASE

Under a fixed-fee arrangement, the matter to be handled is defined in advance by the parties, and the services are performed for a preset fee, irrespective of the amount of time ultimately worked by the lawyer, and irrespective of the result obtained. A fixed fee is best suited for matters in which the parties can accurately predict the type and amount of legal services required, as well as the probable outcome.

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

A fixed-fee arrangement offers the advantage of protecting the client absolutely against the lawyer's fee overruns, and thus allows the client to predict and budget for its legal services in advance. By the same token, however, a fixed-fee arrangement also eliminates the possibility of the client's sharing in any savings created by the lawyer's efficiency in handling the matter (or, in a lawsuit, by early settlement of the case). Additionally, the client must be willing and able to monitor the lawyer's work product and results, especially if the lawyer achieves efficiency by reducing the time devoted to the project, or by attempting to settle cases prematurely, or by assigning the project to less experienced lawyers or non-lawyer staff.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

A fixed fee arrangement can be profitable if the lawyer can quantify in advance the amount of overhead and staffing that will be required to complete the matter. Billing is simplified. If the fixed-fee arrangement involves a large volume of cases, however, the lawyer must be sure that the client will do its part in preparing the case files before sending them to the lawyer. In litigation matters, the lawyer must be certain that there is a sufficient level of trust and respect between the lawyer and the client so that the client will not hold out unreasonably in settlement situations.¹

FIXED FEE PER TASK

This arrangement is similar to the fixed-fee arrangement described above, except that each case is divided into discrete segments and compensation is fixed for each segment. For example, in a lawsuit, the fee might be \$X for reviewing the file and preparing the initial pleadings, \$X for each deposition conducted and/or for a set amount of written discovery; \$X for certain kinds of motions, \$X for trial, etc. The fee for each segment is paid irrespective of the amount of work devoted to the particular task.

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The client knows in advance the amount of fees that may be incurred at each stage of the case, although the total amount of the fee is not absolutely established at the outset of the case. The client benefits from the lawyer's incentive to execute each task as efficiently as possible. Fee payments presumably are spread over the course of the case, rather than up front. In a lawsuit, if the case settles early, the client's total fee is less than would be paid under a pure fixed-fee arrangement. The client must, however, guard against the same kinds of potential disadvantages as those listed for fixed-fee arrangements above.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

As with a pure fixed-fee situation, the lawyer has the opportunity to profit by maximizing efficiency. The firm presumably enjoys a cash flow that matches its work during the pendency of the case. The lawyer's risks are generally the same as in the pure fixed-fee arrangement, above. The risk of loss, however, is spread out in the sense that if costs of providing the services are underestimated for one stage of the project, the loss may be balanced by an opposite effect at other stages.

SLIDING HOURLY RATE

The parties agree in advance as to what is likely to be a reasonable target number of hours of work for the project. The lawyer handles the project at a straight hourly billing rate until the target number of hours is reached. The lawyer can share in the client's savings if the project is completed in fewer than the target number of hours. For example, if the target is 100 hours, and the project is completed in 80 hours, and the lawyer is to share in 40% of the client's savings, then the premium might be calculated as follows:

$$(20 \text{ hours saved}) \times (\text{lawyer's hourly rate}) \times (.40 \text{ premium rate})$$

Conversely, if the lawyer works more than the target number of hours, the billable rate is reduced substantially for the "excess hours" worked. For example, assuming a 100-hour target, the fee might be 100 percent of the hourly rate for the first 100 hours, 85 percent of the normal hourly rate for the next 25 hours, 75 percent of the normal hourly rate for the next 25 hours and 65 percent of the normal hourly rate thereafter.

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The client acquires at least some protection against possible fee overruns by the lawyer. In some situations, the client may prefer a sliding-scale arrangement to a fixed fee arrangement because the sliding-scale method encourages lawyer efficiency and also allows the client to share with the lawyer the benefits of the lawyer's efficiency. A possible disadvantage for the client is that there is no absolute cap on the fees (although the parties may negotiate a cap in some cases).

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

The sliding-scale hourly-fee arrangement allows the lawyer an opportunity to earn a limited premium on those cases that are completed in fewer than the target number of hours (although the premium for the lawyer is less than would occur under a fixed-fee arrangement.) The lawyer assumes a limited risk of loss in the event that the target number of hours is underestimated, although the lawyer has at least a limited hedge against loss if the target number of hours turns out to be too low.

CAPPED HOURLY FEE

Under this arrangement, the law firm handles the project pursuant to a normal hourly billing arrangement, except that there is a cap on either the number of hours or the total fee that can be charged for the project.

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The cap on total hours or total fees protects the client against the lawyer's fee overruns. If the lawyer completes the project in less than the predicted number of hours, the client realizes a savings resulting from the lawyer's efficiency. Unlike the sliding-scale arrangement, however, there is no built-in incentive for the lawyer to complete the project for less than the target number of hours.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

This method allows the law firm to collect an hourly fee for the hours actually worked, up to the target number of hours. The law firm, however, is not allowed to share in the benefits of completing the project efficiently, because all savings from efficiency are passed on to the client. In this respect, there is no improvement over the standard hourly billing arrangement.

FLAT (OR BLENDED) HOURLY RATE

The law firm completes the project on the basis of a single hourly billing rate, regardless of which lawyer works on the case. A variation might be two flat rates, one for partners and one for associates.

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The client is shielded from paying the highest hourly billing rates for senior partners, which is an advantage to the extent that senior partners actually work on the project. Conversely, the blended hourly rate might be a disadvantage to the extent that the project is completed by lawyers whose normal hourly billing rate is less than the blended rate.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

The law firm can benefit from efficiency to the extent that the project can be completed by lawyers whose hourly rates are less than the blended rate. Billing tasks may be simplified. But the law firm can lose money on the arrangement if it does not accurately predict the extent to which senior partners will have to be involved in the project. Additionally, there can be client-relations problems, including potential malpractice problems, if inexperienced lawyers make mistakes that must be corrected by more experienced lawyers.²

DISCOUNTED HOURLY RATES

The client pays the lawyer based on the number of hours worked, except that the lawyer's standard hourly rate is discounted by a percentage. One possible variation is a sliding scale of discounts depending upon the volume of hours worked in a given billing period or periods (e.g., a 5 percent discount for the first 100 hours; a 10 percent discount for the next 100 hours, etc.) Another possible variation is to discount some (but not all) of the lawyers' hourly rates.

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The client receives the immediate benefit of legal services at a bargain rate. There is no cap, however, on the amount of fees. Nor is there any built-in incentive for the lawyer to be efficient in completing the project.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

The lawyer can use a discounted hourly rate to attract and establish relationships with new clients or to encourage existing clients to increase the volume of legal work being sent to the law firm or to permit the lawyer to learn how to handle a new type of legal transaction or litigation. The disadvantage is that the discount comes directly out of the law firm's bottom line. To that extent, it might be viewed by some as a disincentive to develop the economies of scale needed to compete with other law firms.

FULL CONTINGENCY FEE (LITIGATION)

The lawyer's compensation, if any, is deferred until the end of the litigation, is based on a percentage of the monetary amount recovered, and is entirely contingent upon whether any monetary amount is recovered.³ As a variation, the parties might negotiate a sliding scale of contingent fee percentages (e.g., increasing percentages if the case settles before specific target dates or events, or a higher percentage if the case goes to trial, etc.).

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The client is relieved of the responsibility of paying fees (but not costs) unless and until some monetary amount is recovered at the conclusion of the case. If the case is lost, the client is presumably no worse off financially (except for costs advanced) than if the case had not been filed. Proponents point out that a contingent-fee arrangement often is the only way of access to the courts for those who cannot afford to pay legal fees in advance. A potential disadvantage is that the total percentage fee can be substantially higher than what the total fee would be if the cases were handled on a straight hourly basis.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

There is a potential to earn fees substantially in excess of what the lawyer would earn at a standard hourly rate. The deferral of recovery of fees, however, can cause extreme cash-flow problems for the law firm, especially in a large case, which in turn might cause a dangerous tendency for the lawyer to devote an insufficient amount of work to the case. If a large case is concluded without any recovery, it can be financially disastrous for a solo practitioner or small firm. The potentially long delay in receiving compensation and the relatively high risk of going to trial can generate tension between the lawyer and the client, as well as ethical issues as to whether and when to settle the case and for how much.

PARTIAL CONTINGENCY FEE

The lawyer receives a discounted hourly fee for services performed while the case is pending, plus a contingent percentage of the amount recovered. One possible variation is that parties might specify that the total fee will be the greater of either the total amount of hourly fees paid, or the total contingency fee computed under the formula in the fee agreement.

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The contingent fee percentage generally is lower than the percentage that would be paid under a full contingency-fee arrangement. The trade-off for the lower premium, however, is that the client must pay at least a discounted hourly rate for the duration of the case (unless a cap is negotiated), irrespective of the outcome.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

The lawyer is assured of at least some cash flow during the pendency of the case, has the incentive of a potential premium, and avoids the full risk of loss in the event the suit is unsuccessful. Depending upon the level of the discounted hourly rate, however, the lawyer ultimately might recover only overhead and little or no profit in the case if there is no recovery.

REVERSE CONTINGENCY FEE

Sometimes referred to as a "negative contingency fee" arrangement, this method appears to have originated with the insurance defense bar. The client and the defense lawyer agree in advance as to a target settlement (or judgment) value of the case. If the settlement or judgment is less than the target value, then the lawyer is paid a fee equal to a percentage of the difference. The contingency is based on the amount saved rather than the amount recovered. In some cases, the contingency percentage constitutes the entire fee. In other cases, the lawyer may be paid a discounted hourly rate, together with a smaller reverse contingency percentage as a bonus for resolving the case for less than the target value.

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The reverse contingency percentage rewards the lawyer for resolving the case as quickly as possible and for the lowest possible settlement amount. The success of the method depends upon the client's and the lawyer's ability to predict accurately and agree upon what is the reasonable settlement value for each case.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

This method can be lucrative for the lawyer, but achieving a profit in each case requires a high degree of accuracy in estimating the eventual settlement amount, as well as the probable number of hours of legal work and other resources that will be necessary to settle the case for less than the target value.

REFUNDABLE RETAINERS (ADVANCE FEE DEPOSITS)

A refundable retainer, also referred to as an advance fee deposit, is a one-time or periodic advance payment by the client for certain well-defined and discrete legal services. The fee is not earned until the services are actually performed.⁴ Services generally are performed at a negotiated hourly rate or range or hourly rates. Any unearned portion of the advance payment is refundable to the client upon the conclusion of the matter or the termination of the lawyer's services.⁵

ADVANTAGES AND DISADVANTAGES FOR THE CLIENT

The client purchases the right to call the lawyer as often as necessary for advice or other services of the kind defined in the agreement, without incurring high legal costs. One potential disadvantage is that the lawyer may decline for economic reasons to include certain kinds of legal services within the retainer agreement.

ADVANTAGES AND DISADVANTAGES FOR THE LAWYER

The advance fee deposit helps assure the lawyer of a fixed periodic cash flow and also helps eliminate overdue receivables problems. In some cases, however, the lawyer may find it necessary to negotiate a limit on the number of hours, or limit the types of services, that will be provided under the agreement.

ISSUES IN NEGOTIATING AND DRAFTING ALTERNATE FEE AGREEMENTS

If a fee agreement purports to establish anything other than a simple hourly billing arrangement, the lawyer should use great care in negotiating, drafting and explaining the terms of the alternate fee arrangement to the client. Here are some suggestions:

Don't Rely On Forms — Never assume that any fee-agreement form is complete and ready to use in your situation. Fee-agreement forms should only be used as a starting point. Some forms may contain provisions that may be illegal in certain circumstances. For example, some older forms may contain "retaining lien" provisions, which permit a lawyer to keep a client's file until the bill is paid. Although Chapter 60.40 RCW allows a lawyer to claim a possessory lien against the client's papers or money in the lawyer's possession, WSBA Formal Ethics Opinion 181 (1987) prohibits a lawyer from asserting such a lien against the client's files and papers "when withholding these documents would materially interfere

with the client's subsequent legal representation."

Define Terms Carefully. Especially in contingency fee cases, it is critical to define the terms in the fee formula, and spell out the terms and conditions upon which the fee will be deemed to have been earned.⁶ Items that may seem perfectly clear at the outset of the case may be viewed entirely differently by the lawyer and the client after a settlement or a judgment is on the table months or years later. For example:

If a contingent fee is to be computed based on the "net recovery," and the total recovery is \$100,000 after deducting costs, and the client has paid \$30,000 in hourly fees, will the contingency fee be computed based on \$100,000 or \$70,000? If attorneys' fees are recoverable by statute or by contract, will the amount of such fees recovered be included as part of the "net recovery" for purposes of calculating a contingency fee? Are they to be considered a direct payment to the lawyer, or are they to be paid to the client as reimbursement for fees paid? If the fees awarded exceed the

amount of compensation to be paid to the lawyer under the fee agreement, is the excess a bonus to the lawyer, or is it to be awarded to the client? For example, if there is a 33 percent contingency fee arrangement, and the client is awarded \$100,000 plus \$50,000 in attorney fees, does the lawyer receive:

- \$33,000 (i.e., 33 percent of \$100,000)?
- \$50,000 (i.e., 33 percent of (\$100,000 + \$50,000))?
- \$83,000 (i.e., \$33,000 + \$50,000)?⁷

What if these sums are not judgment awards but settlement offers? Unless it is spelled out in the agreement, a court is likely to hold that the attorney fees are to be excluded from the "net recovery."⁸ What happens if the lawyer withdraws from the case, or is discharged before the settlement or judgment is obtained? Can the lawyer forfeit the entire contingent fee?⁹ If the fee is to be shared with substitute counsel, should it be on an hourly basis, or as a percentage of the contingency fee ultimately earned?¹⁰

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If a contingent fee case is appealed, does the lawyer have the duty to represent the client in the appeal?¹ If a final judgment in the client's favor is overturned and sent back for a new trial, will the lawyer have the responsibility to retry the case without amending the fee agreement? If not, or if the lawyer withdraws or is replaced at that point, does the lawyer have any interest in the proceeds of a later settlement or judgment?

These and other questions should be approached with the assumption that ambiguous terms will be construed against the lawyer.

CONCLUSION

Given the recent major technological developments that have affected the legal profession, and the prospect of even more changes in the future, the practice of measuring the value of legal services solely by billable hourly rates in many cases is obsolete and arguably unfair — for the client or the lawyer or both. It is imperative for lawyers and clients to continue to work together in establishing creative arrangements that harmonize their respective interests by attempting to achieve (1) the client's goal of obtaining an efficient resolution of the matter for a predictable price; and (2) the lawyer's goal of being compensated fairly for the reasonable value of the work performed without losing the benefit of implementing economies of scale in procuring a successful result.

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NOTES

¹ The fee agreement cannot modify a lawyer's obligation under RPC 1.2(a), which requires that "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." See also WSBA Formal Ethics Opinion 191 (1994), which precludes a lawyer from attempting to collect a contingency fee that is based upon a settlement offer rejected by the client during the course of the case.

² If different lawyers will be working on a client's case, the client must consent to that arrangement. See *Short v. Demopolis*, 103 Wn.2d 52, 53, 691 P.2d 163 (1984).

³ RPC 1.5 (c) requires all contingent fee

agreements to be in writing, and specifically requires such agreements to state the method by which the contingent fee is to be determined.

⁴Historically, a "true retainer" has been defined as a nonrefundable sum of money paid by a client in exchange for a lawyer's availability during a given period. The retainer is deemed to be earned when paid, and regardless of whether any services actually are rendered for the client. WSBA Formal Opinion 186 (1990) authorizes nonrefundable retainers, provided that the client agrees to the arrangement.

⁵ Advance fee deposits must be maintained in the lawyer's trust account until earned. WSBA Formal Opinion 186 (1990).

⁶ RPC 1.5(c)(1) provides, in part, that "[a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined...."

⁷ See *Luna v. Gillingham*, 57 Wn.App.574, 789 P.2d 801 (1990) [held, unless specified in contingency fee agreement, court-awarded attorney fees may not be included in "gross recovery," but rather must be applied as a credit against the contingent fee owed by the client].

⁸ See *In Re Immunex Securities Litigation*, 864 F.Supp. 142 (W.D.Wash 1994) [held, contingent attorney fee should be based on net, not gross recovery after costs are deducted].

⁹ In some cases, the lawyer may forfeit all rights to collect a fee. For example, professional misconduct may be grounds for denial of a lawyer's recovery of fees. *Yount v.*

Zarbell, 17 Wn.2d 278, 135 P.2d 309 (1943). See also *Ausler v. Ramsey*, 73 Wn.App.231, 868 P.2d 877 (1994), adopting the California rule that a client's refusal to settle does not by itself justify a lawyer in withdrawing from the contingency fee representation, and that a lawyer who terminates the contingent fee representation without good cause may be barred from recovering any fee, even under the theory of *quantum meruit*.

¹⁰ If a lawyer working under a contingent fee arrangement is discharged prior to the occurrence of the contingency, the general rule is that the measure of the fee is not the contingent fee agreed upon but rather reasonable compensation for the services actually rendered, based on the theory of *quantum meruit*. *Barr v. Day*, 124 Wn.2d 318, 329, 879 P.2d 912 (1994).

¹¹ Absent a contrary provision in a contingent fee agreement, the lawyer is obligated to represent the client on appeal, and the lawyer may not claim fees in addition to the contingent fee specified in the agreement for services rendered with respect to the appeal. *Ward v. Richards & Rossano, Inc.*, 51 Wn.App. 423, 754 P.2d 120 (1988).

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NOTICE

It's No Shame To Claim

Unraveling the Mystery of Insurance Coverage For Criminal Losses

BY
R. MARK KEENAN
AND
PABLO QUIÑONES



Your corporate client's vice president of finance, who has "faithfully" worked for the company for the last 10 years, has just abruptly absconded with \$5 million of embezzled company funds and the company car. The company immediately reports the stolen car to the insurance agent but delays reporting the embezzlement. Why?

Despite shelling out hundreds of millions of dollars in premiums to insure against such losses,¹ only 20 percent of victims ever end up pursuing insurance coverage for their criminal losses.² Why?

First of all, many Chief Financial Officers simply don't realize their companies are covered for fraud under existing policies. But there are other reasons. Chief among them is the possibility that the company is embarrassed because it might be shown that the company was negligent in allowing the dishonest acts to take place. Additionally, your client may think that the company cannot prove the "state of mind" requirements of the policy: "manifest intent" and "dishonesty." Both reasons are simply wrong!

POLICYHOLDER NEGLIGENCE

Insurance companies often prey upon a policyholder's guilt after a fraud loss by pointing to failures in the policyholder's internal controls. Generally, however, *there is no negligence exclusion*. The failure of a policyholder's internal controls is not a reason to disclaim coverage.

Courts repeatedly have held that negligence is not a defense to fidelity bond coverage. "[N]either negligence nor inattention, nor any failure to discover what by diligence might have been discovered,

nothing, in fact, short of actual discovery by the bank of dishonesty or a positive breach of an imperative condition, will defeat claims for loss caused by that dishonesty, unless it is otherwise provided in the contract." *United States Fidelity & Guar. Co. v. Commercial Nat. Bank*, 62 F.2d 718, 719-20 (5th Cir. 1933) (as cited in *FDIC v. St. Paul Fire and Marine Ins. Co.*, 738 F. Supp. 1146, 1162 (M.D. Tenn. 1990), *aff'd in part and vacated in part*, 942 F.2d 1032 (6th Cir. 1991).

Indeed, the "[m]ere negligence of the insured in failing to discover the default of a bonded employee is one of the risks covered by the fidelity insurance, and for that reason such negligence is no defense to payment on [a] bond." *First Nat. Bank v. Lustig*, No. 87-5488, 1990 U.S. Dist. LEXIS 7457, at 6 (E.D. La. June 19, 1990). See also *Miami Nat'l Bank v. Pennsylvania Ins. Co.*, 314 F. Supp. 858, 865 (S.D. Fla. 1970); *Arlington Trust Co. v. Hawkeye-Security Ins. Co.*, 301 F. Supp. 854, 858 (E.D. Va. 1969).

INSUFFICIENT PROOF

The current standard policy form for an Employee Dishonest Policy Loss is as follows:

The Underwriter, in consideration of the payment of the premium, agrees to indemnify the [company] against loss of money or other property which the company shall sustain resulting directly from one or more *fraudulent* or *dishonest* acts of an Employee, acting alone or in collusion with others, to an amount not exceeding in the aggregate the amount stated in Item 3 of the Declarations.

Dishonest or fraudulent acts as used in this Insuring Agreement shall mean only *dishonest* or *fraudulent* acts committed by such Employee with the *manifest intent*:
(a) to cause the Insured to sustain such loss; and
(b) to *obtain financial benefit for the Employee*, or for any other person or organization intended by the Employee to receive such benefit, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment. [*emphasis supplied*]

In considering dishonesty coverage, courts start from the presumption that people are presumed to act honestly, and the courts will not lightly infer dishonesty. Against that background, the elements necessary to establish coverage under existing bond provisions include:

- (1) Improper conduct by an employee which unfairly exposes the employer to a loss or risk of loss;
- (2) Moral turpitude, i.e., that the employee was aware of the impropriety of his or her conduct, and that it might or would cause a loss, which knowledge can be inferred from circumstances; and
- (3) Direct financial gain to the employee, or to some other individual intended by the employee to reap the gain.

While insurance companies won't tell you this, intent may be shown circumstantially, substantially easing the victim's burden of proof.

MANIFEST INTENT

"Intent to injure or defraud may be inferred from the fact of injury, if injury is the natural result of a voluntary act on the part of the employee." *Liberty Nat'l Bank v. Aetna Life & Cas. Co.*, 568 F. Supp. 860, 868 (D.N.J. 1983). See also *United States v. Levy*, 741 F.2d 915, 921 (7th Cir. 1984) (the "measure of intent is shown simply if 'the natural tendency of [defendant's] conduct would be to injure or defraud the bank.'"), quoting *United States v. Krepps*, 605 F.2d 101,104 (3d Cir. 1979); *Hanson PLC v. National Fire Ins. Co.*, 794 P.2d 66, 72 (Wash. App. 1990).

A recent Tenth Circuit decision addresses the meaning of manifest intent. In *Federal Deposit Insurance Corp. v. United Pacific Insurance Co.*, 20 F.3d 1070, 1078 (10th Cir. 1994), the court stated:

[M]anifest intent means intent that is "apparent or obvious." Manifest intent does not require that the employee wish for or desire a particular result; rather, manifest intent exists when a particular result is substantially certain to follow from the employee's conduct. Manifest intent to cause a loss may be inferred from an employee's reckless conduct and other circumstantial evidence. Direct evidence of the employee's intent is not required, and a claim by an employee that he intended no loss to the [company] is not conclusive.

DISHONESTY

Insurance companies sometimes allege that the employee's acts were not truly "dishonest" or that the theft merely was a "loan" which was intended to be repaid. Courts have established, however, that dishonesty is to be given a broad meaning in claims under fidelity bonds. *Citizens State Bank v. Transamerica Ins. Co.*, 452 F.2d 199, 203 (7th Cir. 1971). In *Citizens State Bank*, the court approved the following definition of dishonesty: "[a] want of integrity in principle; a want of fairness and straightforwardness; a disposition to defraud, deceive, or betray; faithlessness, or a course of conduct generally characterized in the common speech of men as lacking in principle." *Id.* (quoting *American Surety Co. v. Jay Lodge*, 196 N.E. 356, 361 (Incl. App. 1935)).

To fall within fidelity coverage, an employee's dishonest acts need not be criminal, but there must be more than negligence, mistake, carelessness, or incompetence. *Eglin Nat'l Bank v. Home Indem. Co.*, 583 F.2d 1281, 1285 (5th Cir. 1978).

In sum, companies that experience the misfortune of suffering through a criminal loss should not inflict further needless injury upon themselves by giving up on their insurance coverage.

Insurance companies often prey upon a policyholder's guilt after a fraud loss by pointing to failures in the policyholder's internal controls. Generally, however, there is no negligence exclusion. The failure of a policyholder's internal controls is not a reason to disclaim coverage.

Standard insurance coverage purchased by most companies usually includes several different types of insurance against financial losses experienced by business because of fraud or theft:

- "Fidelity" coverage: for losses arising from employees' dishonest acts;
- "On Premises" coverage: for loss of property (e.g., money, securities, CDs, notes, electronic records, while on the company's premises (wherever located));
- "In Transit" coverage: for loss of property while in transit (e.g., messenger, guard, or armored vehicle) due to theft, mysterious disappearance or damage;
- "Forgery or alteration" coverage: for losses arising from the forgery or alteration of negotiable instruments, CDs, letters of credit or certain other instruments;
- "Securities" coverage: losses arising from, for example, forged, altered, lost or stolen securities, titles, deeds, mortgages or guarantees;
- "Counterfeit" coverage: for losses arising from the acceptance of counterfeit currency;

- "Computer Systems Fraud" coverage: for losses arising from fraudulent entry of data or alteration of data causing the payment, transfer or delivery of property or funds; and

- "Fraudulent Mortgage" coverage: for losses on loans resulting from the acceptance of mortgages, deeds, "like instruments" or assignments that are defective because of trickery, fraud or false pretenses.

These coverage provisions provide an enormous amount of insurance protection which should be pursued. Such a claim should be prosecuted with integrity, intelligence, knowledge and thoroughness.

9 STAGES OF RECOVERING FOR FRAUD LOSSES

We suggest the following step-by-step approach to recovering for fraud losses:

1. Notice

- Immediately send notice of the loss to the broker/agent. The broker should notify all potentially responsible insurance companies. Some insurance policies state that notice should be given within seven days of a covered loss. *Do not delay in giving notice of a claim of potential loss — late notice may forfeit all of the insurance.*

2. Investigation

- Identify all the employees with knowledge of the fraud, and make sure each goes on the record as to what happened. Do *not* make any promises to a dishonest employee that you will refrain from contacting the authorities or that you will waive any claims against the employee without *complete* restitution.

- Determine the scope of the loss and the location of the stolen assets.

- Identify all documents that shed light on the scheme, or help in determining the amount of loss.

- Terminate dishonest employees.³

- Do *not* cede claim investigation responsibility to the insurance company. If you do, you may be disappointed.

3. Identify Potentially Applicable Insurance Policies

- Commercial crime policies.

- Dishonesty, disappearance and destruction policies.

- "Blanket" bonds.

- Financial institution bonds (banker's bonds, brokerage bonds, etc.).

- All-risk policies covering loss of property.

- Property policies covering theft, possibly through endorsements.

- Comprehensive general liability policies with credit card and depositor's forgery endorsements.

- Computer crime coverage.

4. Promptly Submit the Proof of Loss

- Some insurance policies state that this should be done within three months of discovery of the loss. It is important to identify potential coverage for the reasonable expenses in preparing your company's proof of loss. If your company needs more time, obtain the insurance company's approval — in writing.

- Don't worry about proving things to absolute perfection. Operate on the "pre-

ponderance of evidence" standard. Supplement your proof of loss after the proof has been filed.

- Your credibility is important. Don't overstate the case or damages.

- Focus on getting the insurance claim resolved.

- Don't get preoccupied with criminal or civil litigations.

- White-collar criminal prosecutions can be long, may result in no conviction, and can detract from the bond claim effort by absorbing limited resources. Let the law enforcement officials do the work.

- Civil cases can be expensive and time-consuming. Use discovery wisely.

5. Cooperate with Your Insurance Company

- Promptly respond to information requests.

- Upon payment, your insurance company has a contractual and common-law right to be subrogated to your company's interests against third parties on this claim. Consequently, the company *can-*

not jeopardize those subrogation remedies (e.g., settlements) without prior insurance company approval.

- Set a reasonable scope and timetable for joint completion of the investigative phase of the insurance company's review. Ascertain who is to be interviewed, and why. Know which documents will be reviewed, and what they are looking for.

- Produce witnesses after appropriate preparation. Be there when the interview takes place, and take notes.

- Always remember a key defense frequently utilized by insurance companies: that you failed to cooperate in the investigation. Consider producing privileged documents (after executing a confidentiality agreement).

- Do *not* settle with any party without first contacting the insurance companies. Again, insurance companies have subrogation rights — if those rights are adversely affected by your actions, you may forfeit your insurance.

- Insist on attendance at all employee and third-party interviews. Enter confidentiality agreements to restrict the dissemination of documents.

6. Stay on the Offensive

- Tie up loose ends. Locate cooperative witnesses. Analyze documents produced in criminal and civil actions. Uncover additional acts of dishonesty. Detect weaknesses in the bond carrier's position, and try to refute them.

- Do not assume a defensive, reactionary posture.

7. Take the Direct Approach to Insurance Company Defenses

- Be aware of these likely defenses, and preempt their use in any subsequent litigation: late notice, prejudice of insurance company's subrogation rights and prior acts/termination clause.

- Know what is excluded from damages coverage, and submit the Proof of Loss accordingly:

Potential income exclusion — "The policy does not apply to loss of potential income, including but not limited to interest and dividends, not realized by the insured because of a loss..."

The Federal Bar Association of the Western District of Washington

Questions:

- Do you practice in the Western District of Washington?
- Are you interested in developments affecting local federal practice?
 - Are you looking for opportunities to interact with the local federal bench and bar?

Answer:

- **The Federal Bar Association**

Annual Dues \$25.00
For Information on Membership Contact:

The Federal Bar Association of the Western District of Washington

P. O. Box 21006
Seattle, WA 98111-3006
Ph: 206 624-9777

1998 ANNUAL REPORT

WSBA



*Working
together to make
a difference*



Board of Governors

Left to right, front row: Marijean E. Moschetto, District 8; J. Richard Manning, King County at Large; Mary E. Fairhurst, President; Dennis J. La Porte, District 9; Mary Alice Theiler, King County at Large. Left to right, back row: William H. Nielsen, District 2; Lish Whitson, District 7; Steve Crossland, District 4; Terrance J. Lee, District 3; Richard C. Eymann, District 5; Walter R. Krueger, District 1; Donald N. Powell, District 6.

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Character and Fitness	Donald Curran
Civil Rights	Rebecca Warnock
Consumer Protection	Doug Walsh
Continuing Legal Education	Charles McCullough
Corrections	Talis Abolins
Court Improvement	Colleen Barrett
Court Rules and Procedures	John Monter
Disciplinary Board	Christopher Pence
Editorial Advisory Board	David Crump
Interprofessional	Kathleen Kilcullen
Judicial Recommendation	Michael Pontarolo
Law Clerk	Christopher L. Otorowski
Law Examiners	Frank Slak
Lawyers Assistance Program	Elliott Johnson
Lawyers Fund for Client Protection	Leonard Cockrill
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Legislative	Ellen Dial
MCLE Board	Scott Bergstedt
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General Practice	Michael S. Mitchell
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Real Property, Probate & Trust	Douglas C. Lawrence
Senior Lawyers	Philip DeTurk
Taxation Law	Garry Fujita
World Peace Through Law	James Hardman
Young Lawyers Division	Kathleen Hopkins (President)

*The mission of the
Washington State Bar Association
is to promote justice and serve
its members and the public.*

P R E S I D E N T ' S R E P O R T

Mary Fairhurst

Dear Stewards of Justice,

It is hard to believe that it is already time to write the President's Report for the Washington State Bar Association Annual Report. As I've said when asked: the days are long, but the months pass quickly. With great pride and fondness, I reflect on the last twelve months. With heartfelt appreciation, I recall how we have worked together to make a difference.

When I accepted the gavel from Tom Chambers and became president, I expressed my dedication to the profession and its advancement; my commitment to the Washington State Bar Association's mission to promote justice and to serve our members and the public; and my desire to be inclusive, attentive, thoughtful, communicative and responsive. But I did not speak only for myself, but for all who are involved with the work of the WSBA.

All year, I encouraged us to recognize how we as lawyers and a bar association can do very much positively to impact and influence our profession, our communities and our justice system. We have many gifts and talents. We have the education and training. We have the tools to make a difference.

This year we worked as Stewards of Justice. We acted when we saw injustice. We were problem solvers. We worked to make the law work in the real world. We used common sense and good judgment. We proposed changes in the rules and laws. We worked on equal and fair access to justice.

Our Vision

We began the year with a vision of all members having an increased sense of belonging and inclusion. We wanted all to know, and especially those who had felt disenfranchised, that they have a place at the table, a voice we want to hear, and ideas and suggestions we want to consider. We wanted to strengthen the relationships of the infrastructure of the Bar Association, internally with staff, boards, committees, sections, and the Young Lawyers Division and strengthen the ties and relationships of the WSBA externally with county, specialty and minority bar associations and law-related groups, and the public.

Our Goals

When we began the year, we knew we would be addressing the unauthorized practice of law; enhancing access to justice; finalizing the discipline system changes, and assessing and possibly adopting the intervention programs in the Lawyer Assistance Department (now called the Lawyer Services Department); developing a strategic communications plan; strengthening the Board's relationship with the

Supreme Court; understanding and exploring the use of electronic communications and computer technology; and defining and discussing reciprocity. Significant progress has been made in all of these areas.

Our Progress

Definition of the Practice of Law • The Definition of the Practice of Law Committee is close to finalizing its definition and this fall will be having focus sessions to discuss the definition.

Access to Justice • The access to justice area has had many successes and many setbacks. Some of the successes include another very successful ATJ conference during the spring; implementation of CLEAR in all but one county in the state; and the victory of the Legal Foundation of Washington in federal district court on the challenge to the IOLTA rule. (It is now on appeal to the 9th Circuit Court of Appeals and the WSBA will be filing an amicus brief.) The Board of Governors did not endorse any specific telelawyer provider, but appointed a committee to develop standards. Some setbacks were the U.S. Supreme Court decision in *Phillips v. Washington Legal Foundation* and the cutting of federal legal services funding. The WSBA with others is working on developing a legal services funding option for inclusion in the state's budget.

Discipline • The increased discipline staff has worked hard to reduce the backlog. The Board considered mandatory fee arbitration, which was one of the recommendations of the Joint Task Force on Discipline. After many revisions and significant, overwhelming negative reaction from members, the Board voted to "put a stake through the heart" of the proposal. Voluntary fee arbitration will continue to be offered. Another discipline task force recommendation was the creation of a Law Office Management Assistance Program. This program has begun and is part of the new Lawyer Services Department.

Communications • The Strategic Communications Committee will be making its report in September. We have a new communications director, Judith Berrett, who will be working on strategies for communicating both internally and externally.

Supreme Court • The Board has focused on its relationship with the Supreme Court. We have met several times during the year, and the President and Chief Justice and the Executive Director and Administrator for the Courts work closely. The Board had hoped to have a day-long meeting with the Supreme Court to discuss our role and relationship. Due to scheduling, this will not take place before September.

Electronic Communications • A number of ideas involve use of the WSBA website and Internet e-mail. Our Electronic Communications Committee continues to prepare for the future.

Reciprocity • The Board has adopted in concept the idea of reciprocity for admission. The Reciprocity Committee is working out the details.

Other Board Actions

New Executive Director • During the year, we were presented with the challenge of finding a new executive director. The Board developed a search and hiring process which reflected the desire for inclusion and involvement by internal and external groups. We wanted to select a person who would embrace the vision of inclusion and help us with the implementation of the substantive programs and plans for this year and into the future. We found such a person in Jan Michels. Because of the strength of prior leadership, both financially and technologically, Jan will be focusing on the membership and member services.

Mandatory Continuing Legal Education • The Board of Governors received the Mandatory Continuing Legal Education Task Force's report and over several months reviewed the recommendations. The MCLE Task Force, over a two-year period, reviewed all aspects of the MCLE rules and regulations. This was the first time since their adoption 25 years ago that the MCLE process had been reviewed. The recommendations have been forwarded to the Supreme Court.

License Suspension Rule Proposals • At the Supreme Court's request, the Board drafted rules related to suspension of license for student loan default and delinquent child support. The Supreme Court did not adopt the student loan default rule. The Supreme Court has not acted on the delinquent child support rule.

Court Rules Proposals • The Court Rules Committee reviewed criminal rules this year as well as a number of non-criminal rules suggested by the Supreme Court and others. Recommendations and responses have been provided to the Supreme Court.

No! on 200 • The Board voted to endorse the No! on 200 Coalition position in opposition to Initiative 200. This endorsement came after discussion of the Texas and California situations. Both states experienced significant reductions in law school enrollments after similar legislation was passed. Passage of Initiative 200 would impact the practice of law, because it would affect who attended Washington law schools and, correspondingly, who became lawyers and judges. The Board also noted GR12(a)(6) provides that the Bar Association should strive to promote diversity and equality in the Courts, the legal profession and the Bar.

Law Clerk Program • The Board reviewed and voted to continue the Law Clerk Program.

Amicus Committee • The Board created an Amicus Committee to develop and recommend a policy of whether, and under what circumstances, the WSBA should file amicus briefs.

Redistricting Recommendation • The Board is considering a recommendation to divide the 7th district into three subdistricts, each with one governor, and eliminate the King County at Large positions.

New Sections • The Board has approved of a request to form a Senior Lawyers Section. The Board is aware of interest by some in a Public Sector Lawyers Section and an Employment Law Section. No formal request has been received yet.

TVW • Following TVW's request, the Board invited TVW to televise Board of Governors' meetings. To date, they have not.

Committees, Sections and Young Lawyers Division • The Board made numerous appointments to WSBA committees and law-related committees. The WSBA committees tend to have specific tasks and may provide input and recommendations to the BOG, Supreme Court, judiciary, legislature, executive and WSBA departments.

The sections tend to represent substantive legal areas, and members who practice in or are interested in those areas may join. Sections often propose legislation and court rules, sponsor continuing legal education programs, and provide a forum for discussion of common interest and concerns of section members.

The Young Lawyers Division continues its herculean efforts in providing innovative services and programs. Some include: the half-hour law talk programs aired on public access television, the very successful pre-law minority conference for high school students, the aspiring youth program providing after school activities for youth, and sponsorship of the YMCA Mock Trial program.

WSBA Staff • The staff of the WSBA are essential, and they play an important and integral role in the day-to-day operation of the WSBA, as well as providing continuity to the membership over time. I want to especially thank them for all of their hard work, for the marvelous job they have done this year, and for their trust as we worked through the transition. Special thanks to Pat Dieken who served as interim Executive Director.

Making a Difference • Together we can make a difference and we do make a difference. Two handwritten sayings still hang on my office wall.

One says:

Wisdom does not reside in only one mind.

The other says:

Vision without action is a dream.

Action without vision passes the time.

Vision with action can change the world.

Together we have made a difference.

Together we will make a difference.

Thank you for the privilege of serving as your president.

Mary E. Fairhurst

EXECUTIVE DIRECTOR'S REPORT

As we look to the year ahead, my primary focus will be to provide leadership and inspiration to ensure the WSBA is an efficient organization and is responsive to member needs. Although our newly formed WSBA Service Center (800-945-WSBA and 206-443-WSBA) will play an important part in reaching that goal, our efforts will be much more far-reaching.

Electronic Technology

As technology opens new doors, we will explore the ways to best use these new tools for improving communication and streamlining operations. We will continue to add content and functionality to our website. We will evaluate our options and implement an online list-serve or forum, to enhance communication to and among lawyers and law-related agencies. Our new member database, which will be made available to you on-line, will enable us to more effectively track membership information, including MCLE credits. We also plan to implement automation support for ODC case management and CLE registration and order processing.

Lawyer Services

We will be expanding the scope of our Lawyer Services Department (LaSD), hence the name change from Lawyer Assistance Department. In addition to our existing programs - the Lawyers' Assistance Program (LAP), Alternative Dispute Resolution Program (Voluntary Fee Arbitration) and Professional Responsibility (including the Ethics Response Line) - we'll be offering Mediation Service and the Law Office Management Assistance Program (LOMAP). The continuum of services from advice to ADR to remedial consultation is aimed at minimizing the need for formal discipline.

LOMAP is a new program available to all members, but targeted primarily to lawyers in solo or small-firm practice. Through LOMAP, we will offer general "prevention maintenance" reviews; consultation on specific problems, systems or procedures; reference materials for office and practice setup; and other services.

Centralized Support for Bar Leaders

We have identified the need to better coordinate the liaison and support functions to the sections, the Access to Justice Board, the Young Lawyers Division, committees, the Board of Governors, and specialty and local bars. By centralizing support functions in the Office of the Executive Director, we will better coordinate information, calendars and events.

Statewide Visits

Continuing the initiative Mary Fairhurst and I began shortly after my arrival, the Bar President and I will continue to travel around the state to meet with specialty and local bars, committees and sections. Meeting as many of you as possible will help me tune in to your common and unique needs and concerns. Mary and I really enjoyed and benefited from meeting with local bars from Republic to Vancouver! Wayne Blair is eager to continue this initiative.

Throughout the next year and into the future, my commitment is to serve the lawyers of Washington by setting a standard of excellence for our organization and enabling effective communication. I eagerly embrace new technologies, systems and methods, as they help us serve better.

Jan Mickels

Financial Highlights

The Bar had another strong year of financial performance, supporting our goals to be a financially strong institution; to be accountable to our members and the public; and to use our resources wisely in ways that accomplish our mission. For fiscal year 1997 (October 1, 1996 through September 30, 1997), net income exceeded the amount budgeted, enabling us to maintain the 10% reserve recommended by our auditors. We received an unqualified opinion on our financial statements from our auditors.

Financial Achievements

Net income of \$372,000 exceeded the budgeted target. About \$200,000 of this amount was added to the general fund balance. This results in a general fund balance at 14.6% of operating expenses, thus meeting our goal of a 10% general fund balance.

CLE programs and products produced a profit, which was carried forward in the CLE fund balance for use for CLE activities in future years. Providing CLE opportunities for members is self-funded by seminar registration fees, sales of deskbooks, etc. No member license fees are used to support CLE activities.

Bar sections ended the fiscal year with a combined net profit of \$43,000. Sections are a voluntary activity for WSBA members and are fully self-supporting. No member license fees are used for section activities, and all net income from sections is carried forward in the section's fund balance for use by that section in future years.

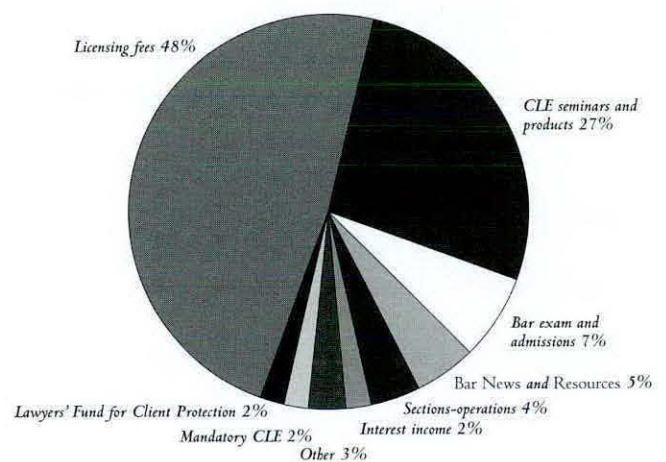
The Revenue Chart shows the percentage of revenues collected from various sources.

The Expense Chart shows the percentage of total expenses used for each regulatory activity and member service we perform. Regulatory activities such as discipline, voluntary fee arbitration, and the random audits of IOLTA accounts, as well as administration of the office and activities of leadership, are funded by member license fees. The chart identifies major programs that are self-funded, including CLE seminars and products, *Bar News* and the *Resources* directory, the bar exam and admissions, and sections activities.

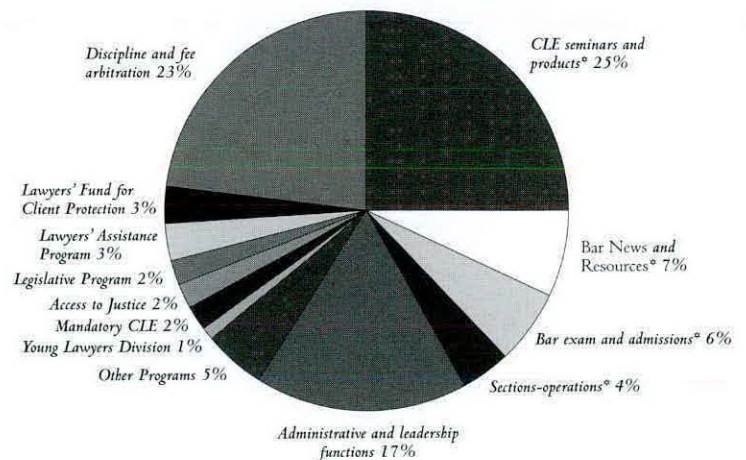
The Statement of Activities on page 5 lists revenues and expenses by program.

You can obtain a complete copy of the audited financial statements and auditor's report at the annual meeting. Or, if you would like a copy mailed to you, please e-mail your request to patd@wsba.org or call the Bar office at 206-727-8241.

Percentage of 1997 Revenues Collected from Various Sources



Percentage of 1997 Expenses Used by Activity (*activity is self-funded)



Statements of Activities

	Year ended September 30, 1997			Year ended September 30, 1996		
	Revenues	Expenses	Revenues over (under) expenses	Revenues	Expenses	Revenues over (under) expenses
Licensing fees	\$4,582,147	\$ -	\$4,582,147	\$3,840,232	\$ -	\$3,840,232
Access to Justice	16,000	169,675	(153,675)	-	126,862	(126,862)
Administration	205,075	920,050	(714,975)	186,599	780,656	(594,057)
Bar examination and admissions	737,224	561,033	176,191	680,382	568,441	111,941
Audits (random and for cause)	-	107,700	(107,700)	-	120,505	(120,505)
<i>Bar News</i>	391,096	621,751	(230,655)	372,199	606,098	(233,899)
Lawyers' fund for client protection	218,708	295,739	(77,031)	210,499	145,252	65,247
Continuing legal education - publications	780,481	717,892	62,589	381,491	400,698	(19,207)
Continuing legal education - seminars	1,863,769	1,721,166	142,603	1,617,907	1,581,104	36,803
Communications	12,887	153,633	(140,746)	20,101	99,793	(79,692)
Court rules	-	19,893	(19,893)	-	18,149	(18,149)
Discipline	48,188	2,175,145	(2,126,957)	42,761	1,896,601	(1,853,840)
Fee arbitration	5,850	23,898	(18,048)	5,000	20,122	(15,122)
Computer bulletin board service	17,245	33,970	(16,725)	19,222	18,383	839
Lawyers assistance program	20,280	241,778	(221,498)	18,409	221,772	(203,363)
Leadership	182	267,401	(267,219)	1,120	221,580	(220,460)
Legislative	-	172,629	(172,629)	-	170,650	(170,650)
Local bar support	1,127	14,568	(13,441)	1,277	18,539	(17,262)
Mandatory continuing legal education	190,172	150,063	40,109	124,462	127,438	(2,976)
Membership records	36,426	428,680	(392,254)	53,500	348,597	(295,097)
<i>Resources</i> directory	135,410	68,592	66,818	133,356	72,178	61,178
Sections - administration	131,505	110,839	20,666	81,185	100,220	(19,035)
Sections - operations	406,985	363,674	43,311	414,484	270,768	143,716
Young Lawyers Division	35,547	117,385	(81,838)	47,392	138,132	(90,740)
Other	-	6,958	(6,958)	-	12,816	(12,816)
	<u>\$9,836,304</u>	<u>\$9,464,112</u>	<u>\$ 372,192</u>	<u>\$8,251,578</u>	<u>\$8,085,354</u>	<u>\$ 166,224</u>

Working together to make a difference

- More than 14% of the WSBA's active members provide pro bono legal services to low-income people in Washington through the state's 23 volunteer attorney legal services programs.
- Five hundred (500) members participate in committees and boards, and 260 participate on panels (Law Examiners, Special District Counsel and Hearing Officers).
- In the last fiscal year, the CLE Department held more than 100 live programs across the state, attracting 11,875 attendees. Together with the 1,000 WSBA members who contribute their wisdom and time as faculty and authors on publications, this means over half of the Bar membership is involved in this activity.
- The WSBA's Ethics Response Line receives an average of 285 calls each month from lawyers facing ethical dilemmas.
- One hundred twenty (120) lawyers from all parts of the state volunteer their time to assist their colleagues through the Peer Counseling Program. The Lawyer Services Department hosted its first statewide Peer Counselor Training Conference in April.
- In a typical month, 177 people are counseled through the Lawyers' Assistance Program (LAP), which offers confidential assistance with mental/emotional, drug, alcohol, family, health and other personal problems.
- This fiscal year brought more than 1,400 applicants to the Bar Exam. Of the 927 applicants who took the summer 1997 exam, 690 were eligible for admission into the Bar. Of the winter's 504 applicants, 388 passed. The combined pass rate was 75%.
- Approximately 90 people serve on the Bar Examiners Committee. Twenty-four (24) committee members write questions for each exam, and each question-writer scores his or her own question.
- As of July 1, 1998 there were 20,716 active and 2,941 inactive Bar members. This compares with 20,076 active and 2,773 inactive members as of July 1, 1997 and 19,695 active and 2,519 inactive members in 1996.
- The Board of Governors appointed 62 people to serve on boards, committees, commissions and task forces of outside organizations.
- To promote public confidence and protection of the public, the WSBA administers the Lawyers' Fund for Client Protection. This program compensates clients who are victims of attorney misappropriation, and each lawyer contributes \$10 each year as part of his or her annual dues. At the beginning of fiscal year 1997, there were 26 pending applications to the fund involving 14 lawyers, and during the year 35 additional applications were received involving 24 lawyers. The Committee and Trustees acted on 43 applications as follows: 27 approved for payment; two denied as fee dispute or malpractice claims; two denied, restitution made; 10 denied, no evidence of wrongful taking of funds; two deferred. The total amount paid out from the fund was \$132,629.
- The Rule 9 Legal Interns Program reviews applications and arranges limited licenses for approximately 1,200 individuals each year.
- More than 60 county, specialty and minority bar associations throughout the state serve the needs of these groups and contribute leadership and ideas.
- Over the last calendar year, the Office of Disciplinary Counsel (ODC) managed a very active prosecutions and investigations caseload. Although Washington's lawyers continued serving the public very well, with fewer than .5 of 1% being sanctioned or subjected to disciplinary action, last year 14 lawyers were disbarred, 13 suspended from practice, 10 reprimanded (one lawyer twice), seven censured, and 49 admonished. During the same period, the ODC opened up 2,652 new matters and closed 2,896 matters, including most of its pre-1996 investigations. The ODC also continued its active preventative discipline program by presenting information about ethics and discipline in more than 50 CLE programs and writing numerous ethics articles for the *Washington State Bar News* and other publications.

Profit and loss calculations —
“This policy does not apply...to loss or that part of any loss the proof of which involves a profit and loss computation or comparison.”

Inventory calculations of a loss —
“This policy does not apply to loss or that part of any loss the proof of which involves...a comparison of inventory records with actual physical count; *however*, ...where the insured establishes wholly apart from such comparisons that it has sustained a loss...then it may offer its inventory records...”

- Don't estimate. Fidelity claims are audited by CPAs. Estimates are not proof in the eyes of auditors and adjusters.

8. Let Reason be Your Guide

- Your efforts should be cost-effective. *Try to avoid litigation.*

- Your recovery will be a function of how much work you and your client are willing to put in. If your client is not willing to commit early to a thorough investigation and assessment of damages, you can expect similar treatment from the insurance company.

9. Don't Take No For an Answer

- Upon rejection, commence legal action against the insurance companies. Some insurance policies require that the action against the insurance companies must be commenced within two years of discovery of the loss.

CONCLUSION

Perhaps the only thing worse than being the victim of theft from an employee's dishonest acts is simply ignoring the insurance coverage for which you have paid significant premiums to cover these types of business losses. Paying for insurance coverage that is never pursued is no better than letting your employees loot your company with impunity. A successful business cannot permit either to occur. A company may not be able to prevent the actions of all dishonest employees, but it can decide to unravel the mystery of insurance coverage for such acts by pursuing a claim with integrity, intelligence, knowledge and determination.

NOTES

¹ Banks alone spent over \$400 million in premiums for financial institution bonds in 1992. American Bankers Association, *1992 Bank Insurance Survey Report* (Sept. 3, 1993).

² CFO Magazine, *Double Jeopardy*, by John Goff (April 1996) at 89.

³ Under standard policies, there is a termination clause that excludes coverage as to any employee as soon as the policyholder learns of any dishonest or fraudulent act committed by such person. In other words, the insurance company is not going to pay if the policyholder has already learned of a fraudulent act and kept the employee on in any event. See, e.g., *Cooper Sportswear Mfg. Co. v. Hartford Cas. Ins. Co.*, 818 F. Supp. 721, 725 (D. N.J. 1993).

Mr. Keenan and Mr. Quinones are partners in the New York law firm of Anderson Kill & Olick, P.C. and regularly represent policyholders in insurance coverage matters.

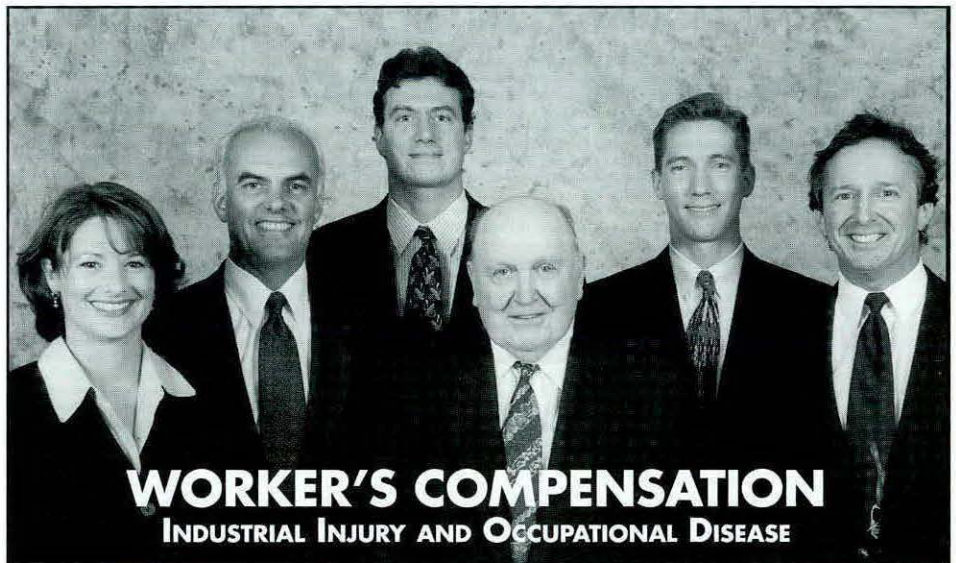
“It's No Shame to Claim: Unraveling the Mystery of Insurance Coverage for Criminal Losses” is one of over two dozen recent *Bar News* features currently available in our online edition at:

www.wsba.org

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:

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BY SHERRIE BENNETT, BAR NEWS EDITOR

The Board of Governors' meeting on July 17-18, held in Edmonds, was highlighted by a very spirited discussion regarding pro bono and legal services funding options.

The Board heard from many constituency and interest groups in an effort to consider what "rock-in-a-pond ripples" (to quote Governor Lee) there might be from the Board's June declaration of support for the obtaining of approximately \$10 million to expand legal services funding during the 1999-2001 state budgeting biennium.

Drawing the most fire was a proposal to assess response/answer fees in civil lawsuits. Jim MacPherson, on behalf of the Washington Defense Trial Lawyers Association, reminded the Board that civil defendants haven't chosen to voluntarily enter the legal system like civil plaintiffs. Mr. MacPherson also spoke of a fear that filing or response fee funds could be diverted to other unrelated state needs such as road repairs, etc. President Fairhurst reported that Washington Association of Prosecuting Attorneys representatives had also expressed concern that the response fee requirements as proposed did not distinguish between corporations and individual citizens such as elected officials. Governor Theiler noted that civil defendants in general are probably more impacted by the lack of available legal services than by any imposed response fees. Governor Whitson suggested that sliding scale response fees made sense. Governor La Porte agreed, suggesting that sliding scale fees would encourage commitment to go forward with a court case. Judge Judith Eiler reported that members of the District & Municipal Court Judges' Association were resistant to the response fee proposal.

Pam Daniels, Snohomish County Clerk, spoke at length about the overwhelming needs of county clerks around the state to respond to requests for help from pro se litigants. Jean Holcomb from the Law Librarians' Association also spoke of the efforts of law librarians statewide to fill the needs of pro se litigants looking for information in state law libraries. After hearing from Jim Bamberger from Columbia Legal Services and

Lucy Isaki from the Equal Justice Coalition, the Board agreed to forward on the initial proposal to the Governor's office for inclusion in the 1999-2001 biennium budget agenda, but also agreed that much more discussion was needed with judges and constituency groups as to the specifics of funding options.

RECIPROCITY DISCUSSION CONTINUES

After additional input from Michael Larson from the Reciprocity Committee, the Board voted to approve "in concept" the Committee proposal to grant reciprocity to attorneys admitted in other states

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wishing to become WSBA members, under certain circumstances. Although this matter will be discussed in further detail at the Board's September meeting, requirements to gain reciprocity in Washington could include a fee greater than bar exam fees, approval from the Character and Fitness Committee of this state, some experience requirement, a separate abbreviated bar exam, a separate ethics exam, and additional CLE requirements for the first year in practice in Washington.

DISCOVERY EXPANSION IN DISTRICT COURTS REJECTED

After extensive discussion and input from Judge Judith Eiler from the District & Municipal Court Judges' Association, the Board voted not to approve proposed changes to district court discovery rules intended to expand the current discovery process in district courts statewide. Local district courts are, of course, free to independently expand their own local rules.

SUSPENSION OF LICENSE FOR FAILURE TO PAY CHILD SUPPORT

The Board voted to send the following proposed APR Rule 16 to the state Supreme Court, in response to the Court's request for a rule regarding suspension from practice for noncompliance with a child support order.

"(a) Suspension from Practice. The Washington State Bar Association shall request that the Supreme Court suspend a member from the practice of law upon the execution of written findings from an adjudicative process that: (1) the member is more than six months delinquent in noncompliance with a valid and enforceable order entered by a court of competent jurisdiction requiring the member to pay child support, and (2) the member has had the opportunity for an adjudicative proceeding to contest the issue of compliance with the child support order, and (3) there are currently no good faith negotiations for a repayment agreement or other modification of the order, and (4) there are no pending judicial or administrative proceedings to determine whether child support is delinquent. A member shall be considered in compliance with an order of child support if the member is current with a payment arrangement pursuant to an order which contemplates payments for past due child support. The hearing shall otherwise be conducted pursuant to and in accordance with the Rules for Lawyer Discipline but will be for an administrative suspension only so long as the conditions set forth above exist.

(b) Order of Suspension. After 60 days from the execution of the written findings, the Court may enter an order suspending the member from practice, unless the member submits satisfactory proof one of the conditions set forth above does not exist.

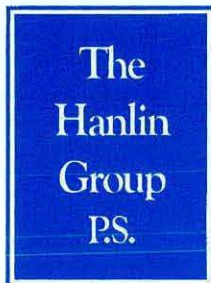
(c) Reinstatement. A member who has been administratively suspended under this rule shall have a right to submit proof of a condition for suspension no longer exists. The Court may enter an order of reinstatement upon determination said proof is satisfactory and so long as the member meets all other requirements to practice law.

(d) Rules of Professional Conduct Not Superceded. Nothing in this rule super-

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cedes any of the Rules of Professional Conduct.

UW LAW SCHOOL DIVERSITY UPDATE

Dean Roland Hjorth from UW Law School discussed the law school's position as defendant in an action challenging the law school's affirmative action program. Admissions personnel at the Law School are watching what California law schools are doing in terms of considering admission based on geographic origin, socio-economic background and demonstrated commitment to public service law.

RELAXING OF FOREIGN LAW CONSULTANT REQUIREMENTS

The Board voted to approve changes to APR 14 which eliminate residency and CLE requirements for foreign law consultants in Washington state.

BAR LEADERS' CONFERENCE EVALUATION

Doug Fair presented the Bar Leaders' Conference evaluations to the Board. The plenary session was once again criticized, and the committee recommended reworking or doing away with the plenary session altogether. Governor Manning complimented organizers of the Access to Justice Conference, saying that it has become the "tail that wags the dog," and suggested that more emphasis should be put on promoting the Bar Leaders' Conference. Governor Eymann, responding that "maybe we need a bigger dog," unveiled his proposal for a "Celebration 2000" WSBA meeting in the summer of 2000. After considerable discussion regarding the fact that previous state bar conventions have been perceived as a "sucking vortex" on WSBA resources and personnel, the Board endorsed in concept the idea of a "Celebration 2000" to be developed in greater detail at a later date.

REDISTRICTING THE 7TH DISTRICT

Governors are expected to make a decision at the September meeting on potential redistricting of the 7th District. Any interested members should voice their concerns to their representative governor before the September 10-11 meeting.

NATIONAL HONORS

The Association for Continuing Legal Education has awarded the Award for Outstanding Professional Achievement, in the "Best Program" category, to the WSBA for a program for new lawyers entitled "Winning Strategies for the Private Practitioner."

Bob Welden, WSBA General Counsel, has been appointed by Philip S. Anderson (president of the American Bar Association) to the ABA's Commission on Lawyer Funds for Client Protection.

NEW APPOINTMENTS

The Board appointed Barbara Clark and Meg Jones to the Law Clerk Committee. New MCLE Board members are Virginia Tee and Brain Tsuchida, with Scott Bergstadt as the new chair of that Board. The Board also appointed non-lawyer Les Eldridge to the MCLE Board and Roland Jankelson, Joanne Brook and Pamela Aden to the Character & Fitness Committee. In addition, Pamela Bartlett was appointed as the nonlawyer member of the Disciplinary Board.

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State Bar Highlights

WSBA APPOINTMENT — CERTIFICATION OF PROFESSIONAL GUARDIANS OVERSIGHT BOARD

On July 9, 1998, the Supreme Court issued Order No. 25700-B-345 establishing the requirements for provisional certification of professional guardians. The order also establishes an oversight board which will oversee the implementation of the program and develop final recommendations to the Supreme Court on implementing a full certification program. Two members of the 10-person oversight board will be appointed by the Chief Justice from nominations made by the WSBA Board of Governors.

At its September 10-11 meeting in Seattle, the Board of Governors will select two lawyers to represent the WSBA on this oversight board. Members interested in these positions should contact their Governor or the Executive Director at the Bar office by September 9, 1998. Please include your résumé or background information, which will be submitted to the Board of Governors for consideration when making the appointments.

SUPREME COURT APPROVES EMERITUS AND HOUSE COUNSEL RULES

The Supreme Court approved two new Admission to Practice Rules establishing limited licenses as Emeritus and House Counsel. Here is a summary of these two rules:

Emeritus (APR 8(e)): A lawyer admitted to practice in Washington or any other state or territory or the District of Columbia who is otherwise retired from practice, may be licensed to practice to provide legal services for no fee through a qualified not-for-profit legal services organization whose primary purpose is to provide legal services to low-income clients. To qualify for Emeritus status, the lawyer must be in current good standing as a lawyer, meet minimum active practice experience requirements (5 of the 10 years preceding application for Washington lawyers, 10 of 15 years for non-Washington lawyers), and be certified by a legal services provider as meeting the requirements of the rule. Emeritus members will pay the annual inactive membership fee, and are exempt from Continuing Legal Education requirements. However, prior to engaging in practice as an Emeritus member, the lawyer must complete a training program as approved by the Board of Governors.

House Counsel (APR 8(f)): A lawyer admitted to practice in any state or territory or the District of Columbia, who is employed as in-house counsel for a business in this state, may obtain a limited license as

House Counsel. The lawyer must be in current good standing as a lawyer, be certified by an employer that the lawyer meets the requirements of the rule, and must pass the Professional Responsibility portion of the state bar examination. The House Counsel is not authorized to appear in Washington courts or tribunals as a person admitted to practice law in Washington, except in association with a lawyer admitted to practice in Washington, nor may the House Counsel offer legal services to the public. The House Counsel must pay the annual active member license fee, and comply with the Continuing Legal Education requirements of active members.

Both Emeritus and House Counsel members are subject to the Rules of Professional Conduct and the Rules for Lawyer Discipline.

Implementation forms and procedures are being developed. Further information will be published in future issues of the *Bar News*.

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.

USURY RATE

The average coupon equivalent yield from the first auction of 26-week treasury bills in August 1998 is 5.233 percent. The maximum allowable interest rate permissible for September 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

WSBA CLE PUBLISHES 700-PAGE UPDATE TO MOTOR VEHICLE DESKBOOK

Washington State Bar Association CLE-Publications has just published more than 700 pages of updates to its popular Motor Vehicle Deskbook Trilogy.

The Motor Vehicle Accident Deskbook 1998 Supplement updates the law governing the most commonly litigated motor vehicle accident claims. David F. Ross,

Editor-in-Chief of the Supplement, is the managing attorney for the Unigard Insurance Company Legal Department.

Supplying in-depth coverage of accident insurance issues, the Washington Motor Vehicle Accident Insurance Deskbook 1998 Supplement was edited by Donald C. Harrison, Senior Attorney, Safeco Insurance Company, and Pamela Okano, Shareholder, Reed McClure Law Firm.

The Washington Motor Vehicle Accident Litigation Deskbook 1998 Supplement updates practitioners on the

latest developments in all aspects of litigation from initial investigation through filing the lawsuit, discovery and trial. Co-Editors-in-Chief John J. Soltys and Michael L. Schrenk are, respectively, partner and associate of Cozen & O'Connor.

The supplements range from \$35-\$50, with deskbook/supplement sets from \$115-\$165. Those ordering the publications prior to September 30 will receive a 10 percent discount. For further information regarding these publications, call 206-733-5918.

SECTIONS ANNUAL REPORTS

Excerpted from the sections' recently submitted Annual Reports. Look for the WSBA Committee Annual Reports in the October issue of FYI.

Administrative Law

The Administrative Law Section's primary mission is to enhance the education and involvement of its members. Accordingly, it is redesigning and increasing the frequency of its newsletters, and sponsoring or co-sponsoring relevant CLE seminars. Members also are extensively updating its Practice Manual on Washington Administrative Law. Other activities include work on a handbook to be used by hearing participants appearing pro se, and the development of various legislative initiatives. Next year, the section hopes to finalize a page on the WSBA website and publish a member directory that could also serve as an administrative agency directory.

Alternate Dispute Resolution

The ADR Section strives to educate and support the legal community through its committees. The ADR Conference Committee hosted the 7th Annual Northwest ADR Conference on April 24-25 at the Shoreline Conference Center. Attorney General Christine Gregoire spoke to more than 200 practitioners about the tobacco litigation and negotiations. The Education Committee created a series of training seminars. "From Conflict to Collaboration" was held in January, and "Commercial Mediation" will be held on October 2 during the section's annual meeting. The section also co-sponsored a WSBA CLE seminar, "Representing Your Client in Arbitration and Mediation," in which committee members wrote and acted in a videotape of an employee dispute involving possible sexual harassment. The video and written materials will be available to attorneys. The ADR Provider Directory was updated. It lists arbitrators, mediators and trainers and was provided to law libraries throughout the state, and is available to order. It also will be available on the ADR Section homepage on the WSBA website.

Business Law

The Business Law Section sponsored two major CLEs: the Northwest Securities Institute in Portland (co-hosted by the Oregon State Bar Association's Business Law Section); and the Business Law Section mid-year meeting. The Securities Committee hosted a popular four-hour "Meet the Securities Regulators" meeting, at which federal and state securities regulators discussed current issues with securities lawyers. The group also will co-sponsor an October CLE on the Revised Uniform Partnership Act, for which it worked with the WSBA lobbyist in recommending several statutory changes. The section also distributed to members its "BizLawDisk" — a computer disk of the business law sections of the Revised Code of Washington.

Consumer Protection, Antitrust and Unfair Business Practices

The Consumer Protection, Antitrust and Unfair Business Practices Section held its annual seminar last November, and plans another seminar again this fall. In June, the section completed its index of antitrust consent decrees obtained by the State Attorney General's Office, and distributed the index free to all its members. It will be available soon on the section's homepage on the WSBA website. This year, the section plans to update its handbook on state antitrust and consumer protection law.

Corporate Law Department

The Corporate Law Department Section sponsored its bi-annual Corporate Counsel Institute in March. The Institute is designed to educate corporate lawyers on key current issues. The section continued its program of quarterly dinners for members, which feature speakers addressing topics of interest to corporate lawyers, such as Year 2000

issues, practice management tips and the financial crisis in Asia. The group also sponsors informal breakfast and luncheon round tables with such subjects as "Top 10 Ways to Avoid Employment Litigation" and Antitrust Topics for Corporate Counsel." The section currently is completing an updated directory of corporate counsel in Washington.

Creditor/Debtor

In cooperation with the Oregon State Bar Association, the Creditor/Debtor Section sponsored the 11th Annual Northwest Bankruptcy Institute, including nationally prominent judges and attorneys, in Portland. Section members are active in editing materials and providing financial support to various community legal services organizations. The section chair participated in the annual conference of Washington bankruptcy judges, and members are routinely asked to comment on the administration of the courts and implementation of various court rules. The group also published a newsletter with case law updates.

Criminal Law

The Criminal Law Section spent a great deal of time reviewing and discussing proposed legislation and court rules that affect the criminal practitioner. They dealt with the Washington Defender Association, the Washington Association of Prosecuting Attorneys, and the Attorney General's Office concerning proposed legislation. In May the section sponsored its Criminal Law Section CLE on ethics at Gonzaga University School of Law, and was a major contributor to the upcoming Criminal Justice Institute, the largest CLE co-sponsored by WSBA CLE. The section also provided input to the WSBA concerning proposed rules and guidelines for the Bar Mediation Program, and to the King County Bar Association pertaining to inquest procedures.

Elder Law

The Elder Law Section published an updated section directory, which was provided to all members of the section. This year, the section took an active role in responding to federal legislation concerning the ability of attorneys to counsel Medicaid clients about all of the options available to them, without the fear of criminal sanctions. The WSBA Board of Governors, at the Section's request, issued a resolution urging the repeal of the legislation. The section also sponsored a CLE aimed at increasing the awareness of general practitioners who work with elderly clients.

Environmental and Land Use Law

The section sponsored its annual mid-year meeting CLE "Keeping Your Environmental/Land Use Law Practice Current" in May, and co-sponsored with WSBA CLE a

seminar entitled "Land Use & Environmental Law: A Checklist Approach to the Fundamentals." The group also co-sponsored, with the ABA's Section of Natural Resources Energy and Environmental Law, a CLE entitled "Competing for the Mighty Columbia River — Past, Present and Future: the Role of Interstate Allocation." The section also presented one-hour CLEs at each of its quarterly meetings. On Earth Day, section members participated in their second annual Earth Day Work Party, to help repair natural areas at the Woodland Park Zoo in Seattle and Luther Burbank Park on Mercer Island.

Family Law

The section's mid-year meeting CLE educated members on valuing pensions, ADR, remedies, evidence and discovery, privacy, meretricious relationships, military issues, spousal support and child support, as well as case law and legislative updates. In April the group sponsored its successful "Skills Training Institute," an annual CLE aimed at new practitioners. The new committee position of Legislative Coordinator was created to work with legislators and to testify before House and Senate Law & Justice committees. The section publishes a member directory, a "meaty" newsletter and has a homepage on the WSBA website. In September the group plans a broad-based meeting to discuss a legislative response to the issue of when a divorced parent seeks to move.

General Practice

The General Practice Section sponsored its "Best of CLE" in December and met regularly by phone and in person in both Ellensburg and Vancouver so that all members throughout the state could more easily participate. The section has initiated a poll of its membership so that it can compile a roster listing members' areas of practice.

Health Law

The Health Law Section continued its educational efforts to its members through short (1-1/2 hours), focused presentations on late-breaking issues in health law. Seminars have been held in Olympia, Spokane and Seattle, in an effort to "reach out geographically" to its members. The group used its newsletter to poll its members on issues of interest and to disseminate a membership directory. The Licensing subsection sponsored CLEs and published updates for members.

Indian Law

The Indian Law Section's dual mission is to expose all legal practitioners to Indian law concepts that may affect them in their usual practice of law, and to update seasoned practitioners on current Indian law issues. The section published two newsletters last year; produced an annual CLE focusing on real estate, natural resource and environmental

arenas; and continued the practice of updating "hot" topics in Indian law. The section's annual symposium will be held in September, and the subject of its 1999 CLE will be "The Three Sovereigns." The group awarded three scholarships to enrolled members of a federally recognized Indian Tribe at each of the state's three law schools.

International Practice

The section was very busy co-hosting the Annual Foreign Lawyers and Judges Reception with the King County Bar in November, completing cross-border discussions with the British Columbia Law Society to implement amendments to practice rules for foreign law consultants, and holding the 9th Annual International Law Institute in conjunction with the Washington Society of CPAs. The section also published *Doing Business in Washington State* in Japanese, initiated a bi-monthly round-table for section members, and co-sponsored a dinner in May for the solicitor general of Hong Kong, in conjunction with the Washington State China Relations Council.

Law Practice Management & Technology

The section has a homepage on the WSBA website, and has coordinated with the WSBA to have its brown-bag lunch topics recorded so that members throughout the state can download the programs and listen to them via free software, RealAudio. Brown-bag lunch topics include "Electronic Court Records," "Seven Most Common Law Office Management Errors and How to Avoid Them" and "Automated Case Management Systems." The section also has been working with other sections on producing a how-to manual on managing a firm efficiently, ethically and effectively. The group also has worked with WSBA CLE in producing seminars for new lawyers.

Litigation

The section weighed in strongly against legislative efforts to "reform" tort law and effectively abolish judicial review. The section helped persuade the RPC Committee to "scrutinize critically certain insurers' practice of using so-called independent fee auditors to review lawyers' fee statements, thus invading attorney-client privilege"; and opposed mandatory fee arbitration and the "telelawyer" proposal. The section also created a homepage on the WSBA website and is working on a new edition of the *Civil Trial and Evidence Manual*.

Public Procurement & Private Construction

About 400 active members of this section represent a mix of public and private attorneys. In September 1997, the section sponsored a CLE seminar, "Public Works in the New Millennium," which focused on several highly visible projects in the King County area and discussed the newer procurement processes being utilized on these projects, including design-build and public-private partnerships. Other presentations included

Emerging Labor Issues, Tax-exempt Financing by Non-profit Corporations, and Legislative and Case Law Updates.

Real Property, Probate & Trust

The section's executive committee commented on more than 30 bills in the last legislative session. The section introduced SSB 6191, which was passed into law in June, providing significant improvements in the Washington non-judicial Deed of Trust Foreclosure Statute. Seminars hosted include Real Estate Drafting, Practice Essentials, Real Estate Damage and Casualty, Federal Estate Tax, and Fiduciary Income Tax. The group also issued a comprehensive membership directory, including information about private and governmental service providers.

Senior Lawyers

The WSBA's newest section, created for bar members age 55 and over, hit the ground running with its first newsletter entitled "Life Begins" and its first annual meeting on August 15, with a CLE seminar worth seven credits. The section plans to initiate quarterly meetings throughout the state, and hopes to eventually affiliate with several volunteer organizations to provide legal services.

Taxation Law

The Taxation Law Section is active through its five committees: CLE, State & Local Tax, IRS Liaison, Gift and Estate Tax and Newsletter. The section also has an ongoing relationship with three other taxation-related organizations: Attorney-CPA Tax Clinic, The International Tax Roundtable and the Pension Round Table. The IRS Liaison Committee meets periodically with representatives from the local district IRS offices, focusing on current developments and administration plans for the examination, appeals and/or District Counsel branches. The committee plans a State and Federal Tax Controversy CLE seminar for the next fiscal year. The State and Local Tax Committee meets periodically with representatives from the Department of Revenue.

World Peace Through Law

The section plans an October 2nd CLE, "Are We Reaching World Law (and Peace) Through Business?" Topics will include the professional responsibility of attorneys to promote the rule of law, professional ethics in international transactions, and the effect of business and commerce on law and peace issues. The section's 1997 seminar on "World Law and Disorder: Creating a Permanent International Criminal Court" featured former Nuremberg War Crimes Prosecutor Benjamin Ferencz. A video of the 1997 seminar is available, and the section plans to tape the 1998 seminar. The section also holds monthly brown-bag lunches.

USING A TRADE NAME FOR YOUR LAW PRACTICE

by *Barrie Althoff*

WSBA Chief Disciplinary Counsel

Washington's Rules of Professional Conduct (RPCs) have generally prohibited a lawyer from using a trade name in private practice. The Washington Supreme Court recently amended RPC 7.5(a), however, effective September 1, 1998, to permit use of a trade name. This article looks at the prior and amended rules, and then more generally considers the use of trade names by lawyers.

PRIOR RPC 7.5(a): A ROSE BY ANY OTHER NAME WAS A THORN

Before being amended, RPC 7.5(a) restricted your ability to use a trade name other than one incorporating the names of lawyers connected with your practice, or a name using the words "legal clinic" (if that, in fact, described your type of practice) with an optional geographical designation, or a name including deceased or retired partners. It provided:

A trade name may not be used by a lawyer in private practice except that the use of the words "legal clinic" may be used alone or in conjunction with a geographical designation or the name of one or more of the lawyers connected with the practice so long as the name is not otherwise in violation of rule 7.1 and except if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

If your name were Sarah Doe, your deceased partner were Jill Morton, and you practiced law in Ritzville, Washington, with your remaining partner, James Smith, you could practice, for example, under the name of "Doe, Morton &

Smith," "Law Offices of Doe, Morton & Smith," or "Ritzville Legal Clinic" or "Doe, Morton & Smith Legal Clinic."

REASONS FOR CHANGE

For constitutional purposes, a trade name is a form of commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) recognized a lawyer's right to commercial free speech and permitted lawyer advertising. Although in 1979 the Court rejected a constitutional challenge to a prohibition on the use of trade names in professional optometry services, *Friedman v. Rogers*, 440 U.S. 1 (1979), that case is of questionable authority today given the progressively greater protection given to commercial speech in the interim. See, for example, *Central Hudson Gas & Elec. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985); and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Thus, the former RPC 7.5(a) prohibition on use of a trade name was arguably open to constitutional challenge on the basis of unduly restricting free speech. In addition, during those years, multi-jurisdictional practice by lawyers has become more common, significantly increasing the likelihood of conflicting obligations between Washington's and other jurisdiction's ethics rules.

AMENDED RPC 7.5(a): "SHARKS R US"?

The WSBA RPC Committee recommended to the WSBA Board of Governors in April 1997 that RPC 7.5(a) be amended to permit lawyers generally to use trade names. In June 1997, the Board examined the recommendation, held a public hearing, and voted unanimously

to approve it. In October 1997, the WSBA submitted the recommendation to the Supreme Court, which adopted it on June 4, 1998, effective September 1, 1998. *Supreme Court Order No. 25700-A-624*.

Amended RPC 7.5(a), which replaces former RPC 7.5(a), states:

A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1 or Rule 7.4. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or charitable legal services organization and is not otherwise in violation of Rule 7.1 or Rule 7.4.

Washington's RPC 7.5(a), as amended, is now identical to Rule 7.5(a) of the American Bar Association's Model Rules of Professional Conduct, except that in addition to the Model Rule's references to Model RPC 7.1 (false and misleading communications), Washington's rule adds references to Rule 7.4 (communication of claims of practice) not found in Model RPC 7.5(a).

Under the amended RPC 7.5, if you are in private practice, you may now use any available trade name you wish, subject to four ethical restrictions, each of which is intended to protect the public from being misled. First, the name may not improperly imply a connection with a government agency or charitable legal services organization. Second, the name may not violate RPC 7.1 by being a false and misleading communication regarding your services. Third, the name may not violate RPC 7.4, which permits you to state whether you practice, or do not practice, in a particular field of law, but restricts your ability to state or imply that

you are a specialist. Fourth, you must still comply with the other provisions of RPC 7.5(b), (c) and (d), discussed below, and your other ethical obligations. Otherwise, you are free to use your imaginative marketing skills in selecting a trade name. There is no requirement that your trade name be dignified, politically correct or tasteful.

USING THE NAMES OF DECEASED AND RETIRED PARTNERS: "DEAD, RETIRED & LIVING, ATTORNEY(S) AT LAW"

Amended RPC 7.5(a) deletes the explicit authorization of former RPC 7.5(a) to include in a firm name "the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession." The provision largely restates the common law. Its deletion should not affect the continued use of such names under amended RPC 7.5(a); instead, such use is now included within the broad authorization to use trade names and simply remains subject, as it did previously, to the provisions of RPC 7.1 and RPC 7.4.

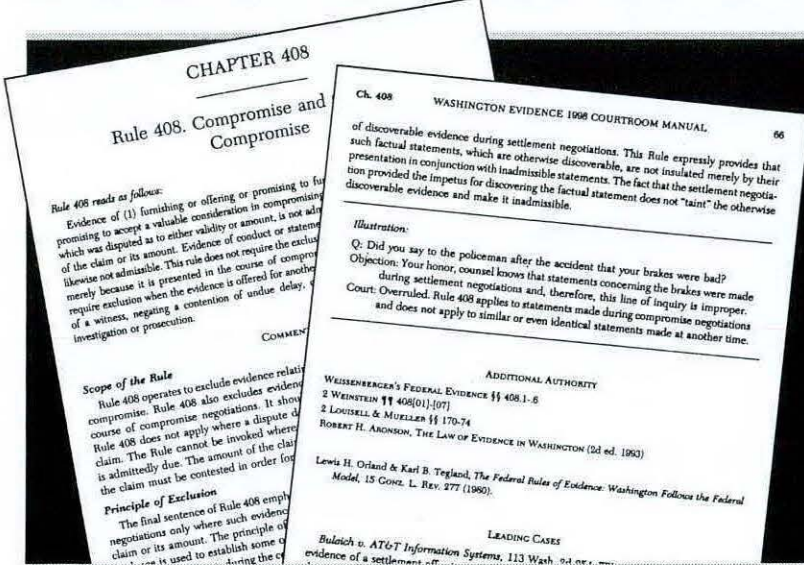
See *ABA Informal Opinion 85-1511* (March 26, 1985), and *New York State Ethics Opinion 45* (1967). Use of a trade name made up of the names of one or more deceased or retired partners, even if otherwise permitted by common law, may still be prohibited, however, if it is misleading or deceptive in violation of RPC 7.1, discussed below.

A firm's right to use in its name the names of deceased or retired partners is not unlimited. You may not name a firm after a deceased lawyer who has never been a partner in the firm. *ABA Informal Opinion 730* (1963). You may not continue to use a former partner's name in the firm name when the partner has left the firm to establish his or her own practice, or to practice in another firm. *WSBA Informal Opinions No. 1144* (September 18, 1987), and *No. 1486* (July 29, 1992). (WSBA informal opinions merely reflect the opinion of the RPC Committee, are not individually approved by the WSBA Board of Governors, and do not reflect any official position of the WSBA.) A law firm may continue to use a deceased partner's name in the firm name, however, even though a different attorney

with the same name has left the firm for his or her own practice. *WSBA Informal Opinion No. 1871* (April 12, 1994). Where a named partner in a firm dies and the firm then dissolves and breaks into two separate firms, one firm, but not both, may continue to use the deceased partner's name if there is substantial continuity of membership, clientele and professional practice, if the new firm is legally or contractually entitled to use the deceased partner's name, and if the use of the name is not misleading. See *New York State Bar Association Committee on Professional Ethics, Opinion 622* (1991).

Although there is no direct authority in Washington, if a named partner is suspended from the practice of law, the firm must probably drop the suspended lawyer's name from the firm's name and communications, including its letterhead, during the period of suspension. *Board of Overseers of the Maine State Bar, Opinion 132* (1993). Washington's RPCs and Rules for Lawyer Discipline (RLDs) would probably dictate the same conclusion regardless of whether the suspension is due to nonfulfillment of CLE requirements, nonpayment of licensing fees, or

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discipline, although arguably a distinction could be made between RLD 8.1(a) disciplinary suspensions for more than 60 days and RLD 8.1(c) suspensions for 60 days or less. A similar conclusion applies if the lawyer is disbarred, since Washington's RPC 5.4 prohibits a partnership with a nonlawyer, RPC 5.5 prohibits assisting a nonlawyer practice law, and Rule 1.1(h) of Washington's Rules for Lawyer Discipline subjects a lawyer to discipline for "[p]racticing law with or in cooperation with a disbarred or suspended lawyer . . . or permitting a disbarred or suspended lawyer to use his or her name for the practice of law." See *WSBA Formal Opinion 184* (1990) and RLD 8.2.

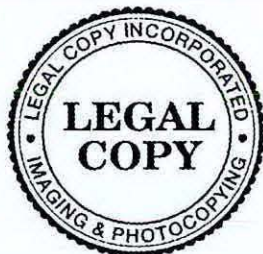
Does a firm's trade name say anything about its resources and thereby become misleading when the resources change? For example, if a firm once had six named partners, all but two of whom died or retired, under common law it appears the two remaining partners could continue to use the full partnership name. Does the same rationale apply if there is only one "partner" left, who is now effectively practicing as a sole proprietorship? Does the six-lawyer name imply a multiplicity

of lawyers and thereby become deceiving now that there is only one "partner" left? Does it matter if the surviving "partner" hires associates so that there are in fact a number of lawyers available to serve clients? *WSBA Formal Opinion 178* (1984) opines that "[i]t is inherently misleading for a sole practitioner to use the term 'and associates' when there are in fact no associates. . . . The use of the term 'and associates' in a firm name implies that the named lawyer or lawyers have other attorneys working for them. . . ." *Alabama Ethics Opinion RO-93-14* reaches the same conclusion. Referencing *WSBA Formal Opinion 178*, *WSBA Informal Opinion No 1764* (August 14, 1997) opines that where a lawyer's only partner retires and leaves only the one lawyer practicing in the firm, the lawyer may not continue to use the name "Doe and Doe, P.S." while practicing as a sole practitioner since "it suggests that more than one attorney is practicing in the law firm." If the lawyer hires an associate, can the lawyer continue to use the partnership name? A prior informal opinion opines that a lawyer may not continue to use a former partnership name where the lawyer's only former partner was now

employed as an associate, but could continue to use the name if both former partners were now shareholders in a professional corporation. *WSBA Informal Opinion No. 1231* (August 2, 1988). Does the rationale of these opinions imply that the last surviving partner of a partnership (who is thereby a sole proprietor), may no longer use the trade name "Dead, Retired & Living"? If it does, the rationale in effect removes much of the value of using a trade name, namely, the good will associated with that name. Or, can the surviving lawyer use the name but carefully disclose on the letterhead that he or she is the only practicing attorney in the firm?

RPC 7.1 PROHIBITIONS ON FALSE & MISLEADING COMMUNICATIONS

RPC 7.1 prohibits false and misleading communications about a lawyer's services. A communication is false and misleading if it (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (b) is likely to create an unjustified

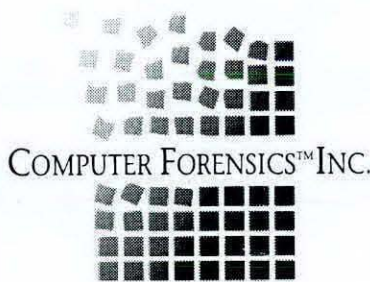


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expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the RPCs; or (c) compares the lawyer's services with those of other lawyers, unless the comparison can be factually substantiated.

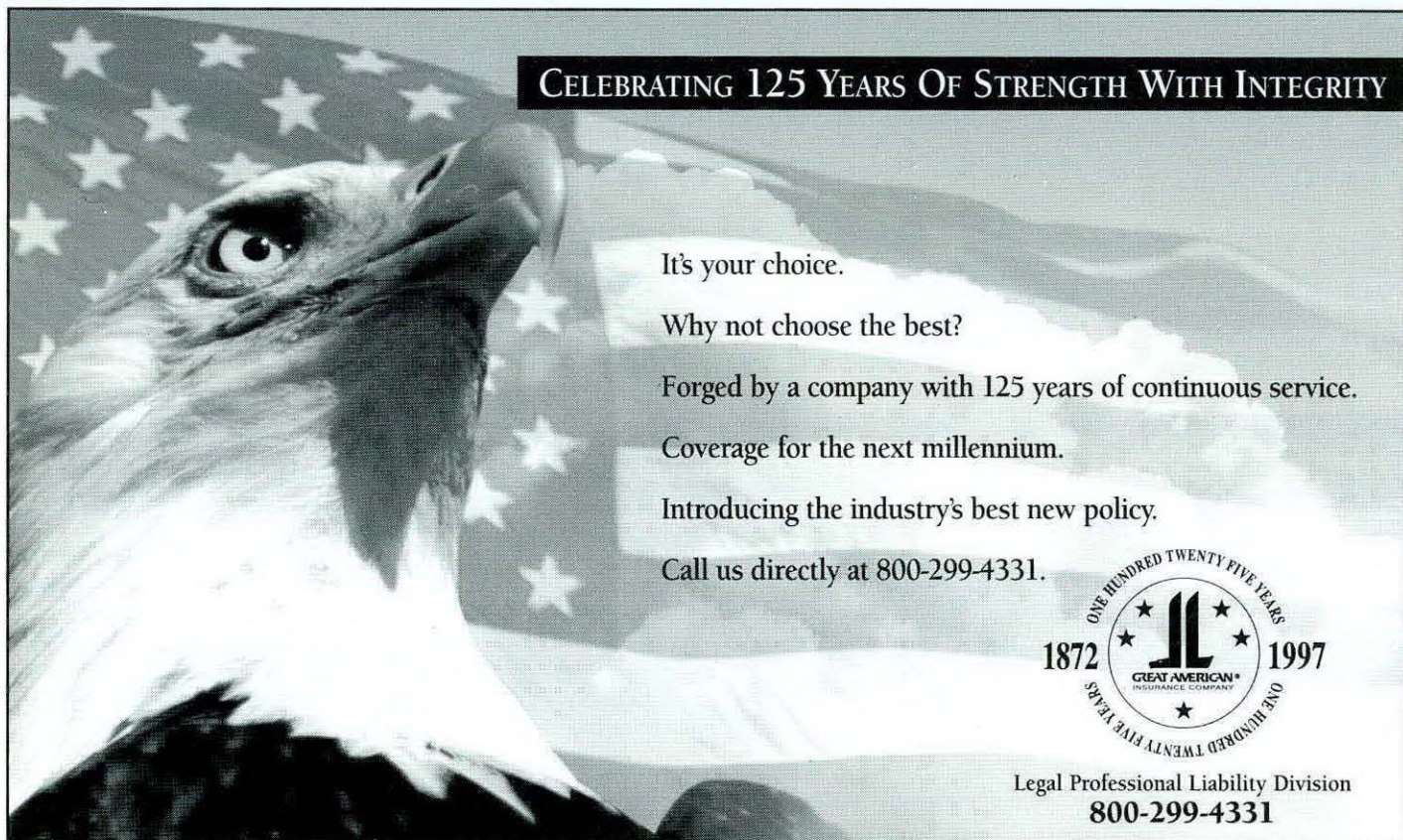
(a) *Misrepresentations/Omissions*: Although amended RPC 7.5(a) deletes the explicit authorization of former RPC 7.5 to use the term "legal clinic," it appears clear that the term may continue to be used if it is not otherwise misleading. The Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) held there was nothing inherently misleading in using the term "legal clinic" as part of a trade name for a firm which in fact charges low rates for standardized services or renders pro bono services. A similar result was reached in *Jacoby v. State Bar of California*, 562 P.2d 1326, 1331 (Cal. 1977). *Connecticut Bar Association Committee on Professional Ethics Opinion 89-15* (1989) permitted a lawyer with an office on Wall Street to use the trade name "Wall Street Legal Clinic" or "Wall Street Legal Services," but opined that the lawyer should include a

disclaimer that the firm was not a publicly sponsored legal aid agency. The trade name "Shannon and Johnson's Hollywood Law Center" was also found to be a permissible trade name. *In re Shannon*, 638 P. 2d 482 (Or. 1982). The Dallas Bar Association in its *Opinion 1981-4* (March 20, 1981) concluded that lawyers could not advertise (use as a trade name) a 24-hour jail release service as "Lawyer's Writ Service."

A legal clinic with a trade name of "Starbucks Legal Clinic" or "Boeing Legal Clinic" would likely be deceptive in implying an association with those companies, would thus violate RPC 7.1, and thereby would be prohibited under amended RPC 7.5(a). Similarly, a private law office with a name such as "United States Legal Office" or "Washington State Legal Office" or "Washington Law Center" may be both directly prohibited by amended RPC 7.5(a) as improperly implying a relationship to the government, and may also violate RPC 7.1 as being misleading. In *In re Shepard*, 92 App.Div. 2d 978, 459 NYS 2d 632 (1983), the court found "Peoples Law Firm" was deceptive because it falsely

implied a public connection. Similarly, *Mezrano v. Alabama State Bar*, 434 So.2d 732 (Ala. 1983), found the trade name "University Law Center" was misleading, even though it was located on University Avenue, because it had no official connection with the nearby University of Alabama.

(b) *Unjustified Expectations and Non-Factual Comparisons*: Names such as "A-1 Legal Clinic" and "Blue Ribbon Legal Services" might be questionable as implying a difference from other lawyers which cannot be factually substantiated. See Hazard & Hodes, *The Law of Lawyering*, Second Edition, §7.5:203. Similarly, *Iowa State Bar Formal Opinion 92-36* opines that inclusion of a lawyer's name in the publication "The Best Lawyers in America" violates the ethical rules and that a lawyer whose name appears therein is required to take affirmative steps to have the name removed. *Medina County Bar Assn. v. Pierre A. Grieselhuber*, 78 Ohio St. 3rd 373, 678 N.E.2d 535 (May 14, 1997) found a lawyer's maxim "We do it well" a non-verifiable comparison. Would the same rationale apply to use of "acme," "superior," "su-



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preme," "highest," "ultimate," "pinnacle," "stellar," or other comparative terms, since each implies a difference which cannot be factually substantiated? Would the use of such words equate the firm with specialists such that in a malpractice suit the standard of performance for everything the firm does must meet the higher standard of an expert rather than the standard of a general practitioner? Would the rationale also apply to names such as "Mt. Everest Legal Services" or "Mt. Rainier Legal Services"?

What about the use of names such as "Christian Legal Services" or "Jewish Law Offices" or "Islamic Legal Clinic," or statements that the lawyers practice law "in a Christian [or Jewish, or Islamic] manner"? Are such names or claims deceptive? Can such implied differences be factually substantiated?

Do such names also give rise to unjustified expectations about the results that a lawyer can achieve? Can we use as trade names "Sharks R Us Legal Services" or

"Sharks 4 U Law Offices" or "Piranha Litigators" or "Junk Yard Dog Lawyers" or "Bulldog Attorneys"? Do such names also create an unjustified expectation about results the lawyer can achieve? In your bitterly contested litigation, do you want to be represented by "Hummingbird Legal Services" or by "Mad Dog Lawyers"? Can lawyers at "Pitbull Law Clinic" ever compromise and reach a settlement without belying their name? Does "Atomic Legal Services" falsely promise something a lawyer cannot deliver? If you use a trade name implying aggressiveness, must you always be aggressive to avoid misleading clients and incurring a malpractice or consumer protection suit? If you and your partner call yourselves "Two Hungry Lawyers," can that be factually substantiated? If you are successful, must you forever starve yourselves to avoid deceit?

(c) *Restrictions On Names Claiming Specialization:* The authorization of RPC 7.5(a) to use a trade name requires the trade name not violate RPC 7.4. That rule generally prohibits communications that state or imply that a lawyer is a specialist, but permits communications about the fact that a lawyer does or does not practice in particular fields of law. Thus, a trade name which implies specialization is likely to violate both RPC 7.4 and RPC 7.5(a), but one which merely indicates the area of practice will not. But where is the line between the two?

A series of WSBA RPC Committee informal opinions give a sample of some trade names that were in the past opined to be prohibited: "Medical-Legal Consultants of Washington" (*Informal Opinion No. 837*, November 11, 1986); "AAA Divorce Services, a service of John Doe, Attorney" (*Informal Ethics Opinion No. 1244*, September 30, 1988); "Maritime Law Offices" (*WSBA Informal Opinion No. 1280*, March 30, 1989); "Real Estate Hot Line" (*Informal Opinion No. 1474*, May 8, 1992), and "Accident Hot Line" (*Informal Opinion No. 1479*, May 27, 1992). All of these were found violative at a time when trade names generally were prohibited. Would they be found violative now? Do the names imply specialization or merely areas of practice? Suppose you used the trade name "The Divorce Lawyer" or "The Bankruptcy Lawyer" or "The Personal Injury Lawyer," and that in each case you, in fact,

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limited your practice to the specified area. Do these names imply specialization or areas of practice?

FRANCHISE NAMES:

"MCLAWYERS"? "MCLAW OFFICE"?

ABA Formal Opinion 94-388 (1994) clearly prohibits a law firm's use of a franchise name (lawyers using a common law firm name but not being partners or having any control or responsibilities over each other) as a misrepresentation and violative of Model RPC 7.1 and 7.5(a) unless all the firms using the name are in fact part of the same firm and satisfy the Model RPC 5.1 and 5.3 requirements of partners being responsible to oversee the affairs of their partners and persons under their supervision. *Ohio Board of Commissions Ethics Opinion No. 97-1*, 1997 WL 85762 (Feb. 14, 1997) similarly opines it is improper under Ohio ethics law for attorneys to practice law in Ohio under a common trade name franchised to attorneys across the country, with the Commissioners stating that they "resolutely" believed that legal professionals cannot promote themselves as Century 21 does in the real estate market. A similar result was reached in *Michigan Bar Opinion RI-130* (April 27, 1992). Although Washington's RPC Committee has opined that a law firm could display the logo of a specified law firm association on its letterhead if the display and any brochures describing the association were not misleading or deceptive, *WSBA Informal Opinion No. 1215* (June 28, 1988), and although there is no direct Washington authority prohibiting a lawyer from practicing under a franchise name, use of a franchise name would likely be ruled deceptive and violate RPC 7.1 and 7.5 and the rationale of the ABA opinion.

USE OF MULTIPLE TRADE NAMES

Amended RPC 7.5(a) states that (emphasis added) "a trade name may be used . . ." Does this mean you can practice under only *one* trade name, or are multiple trade names permitted? If you were to use multiple trade names, is the mere multiplicity deceptive and misleading? Is the failure to disclose multiple names to clients and potential clients the omission of a fact necessary to make the statement (namely, the name of your practice) ma-

terially misleading? If you operated under 50 trade names and took out advertisements in the yellow pages for each, would not the average consumer likely be deceived and believe that each trade name was a separate law practice? While RPC 7.2(d) requires that an advertisement of legal services include the name of at least one lawyer responsible for its content, would it be misleading for a multi-lawyer law firm not to specify that the same law firm is behind all of the advertisements? It is also unclear whether a law

firm could operate its different departments under different trade names, using one name, for example, for its family law practice and another for its corporate or criminal law or litigation practices. *Professional Ethics Committee of the Florida Bar Association Opinion 94-6* (1995) opined that a law firm may not use the trade name of "Sunshine Mediation" for its mediation department because the trade name must be used in all aspects of the firm's practice; it is not clear whether the name would have been acceptable in

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Florida if the firm did only mediation. The name might still be troublesome in Washington, however, as claiming a specialization.

**RPC 7.5(b):
MULTIJURISDICTIONAL
PRACTICE ISSUES**

The recent amendment of RPC 7.5(a) has not changed any of the other provisions of RPC 7.5. If your Washington law firm has out-of-state offices, RPC 7.5(b) allows you to use the same name in each jurisdiction, but still requires that each office must identify the jurisdictional limitations of lawyers not licensed to practice in the jurisdiction where the office is located. If your letterhead lists all your partners, some of whom are not admitted in Washington, you need to indicate where they are admitted (usually done with parentheses or asterisks). The conclusion of the WSBA RPC Committee in *WSBA Informal Opinion No. 1690*, August 13, 1996, that RPC 7.5(a) and (b) must be read together remains correct, although its conclusion that the use of a trade name in Washington by a multi-state law firm would be in violation of those rules has been superseded now by the amendment to RPC 7.5(a) permitting such use.

RPC 7.5(c): PUBLIC OFFICE
RPC 7.5(c) still prohibits your firm

from using your name as part of its name if you are holding public office during any substantial period in which you are not actively and regularly practicing with the firm. Thus, if you were a named member of the firm and were elected or appointed to a public office, your firm would not be able to continue using your name as part of the firm name during the time you hold public office. This rule applies only to holding a public office on a substantially full-time basis, and would not apply, for example, if you held public office on a part-time basis but continued practicing law, or if you took an extended leave of absence to serve as an executive with a private corporation. If you are absent from the firm for a substantial period and are not practicing law, however, even though RPC 7.5(c) might not require you to delete your name from the firm name, RPC 7.1(a) might suggest not doing so was a deceptive communication.


**RPC 7.5(d): SHARING
SPACE, BUT FLYING SOLO**

RPC 7.5(d) still allows you to state or imply that you are practicing in a partnership or other organization only when that is the fact. If you are practicing out of the same office, but are not a partner, shareholder of a professional corporation, or a member of a professional limited liability company or partnership, you may not join your name together with the names of others in the office. Instead,

each of you must have separate letterheads, cards and pleading paper, and each of you must sign your name individually at the end of all pleadings and correspondence and not in conjunction with the names of other lawyers, unless, however, you are employees or "of counsel" to another such person or entity. Thus, if you are a sole practitioner and share office space with another, you cannot list yourselves as "Law Offices of Doe & Smith" on the door/lobby or use common letterhead or professional cards; instead, you must still each have separate letterhead and cards, and the door/ lobby listing must be separate ("Law Office of Doe" and "Law Office of Smith"). *WSBA Informal Ethics Opinion No. 1466* (March 20, 1992) opined that use of the trade name "Eastside Law Offices" by office sharers was an improper trade name and was misleading because it implied more than office sharers; under amended RPC 7.5(a), however, it would appear that trade name would be permissible if used by a partnership, although not by lawyers merely sharing office space.

If you are a sole practitioner, RPC 7.5(d) still prohibits you from practicing under the name "John Doe & Associates," unless you, in fact, regularly have lawyer employees; similarly, you may not use the term "of counsel" unless you are an active WSBA member and have a close, that is, regular and frequent, continuing relationship with a lawyer or law firm, for example, as a retired or semi-retired former partner who remains available to the firm for consultation and advice. *WSBA Formal Opinion 178 (1984)* concludes that attorneys who are not partners may not hold themselves out as partners by using the term "law offices," that it is inherently misleading for a sole practitioner to use the term "and associates" when there are in fact no associates, and that the "of counsel" designation can be used only in limited circumstances (including that the lawyer must be an active WSBA member having a close, regular, frequent and continuing relationship with the lawyer or law firm). *WSBA Informal Opinion No. 1613*, February 16, 1995, similarly opines that lawyers may not join names as a professional service corporation while in all other respects acting as sole practitioners.


WSBA Informal Opinion 1656, March 21, 1996, opined that under RPCs 7.1,



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7.5(a), and 7.5(d), use of a trade name such as "____ & Company" was prohibited unless there was further explanation of the organizational structure of the law practice, while *WSBA Informal Opinion 1657*, March 21, 1996, opined that "a professional limited liability company must not refer to itself as either a 'firm' or a 'company', but must refer to itself as either a 'professional limited liability company' or a 'P.L.L.C.'", and that, "[f]urther, to comply with RPC 7.5(d), the name must say 'P.L.L.C., which consists of individuals and professional services corporations' if that is the nature of its organization." It would appear that under the amended RPC 7.5(a), it will be permissible to use the terms "firm" or "company" provided that appropriate disclosure is made of the structure of the firm.

REGISTERING YOUR TRADE NAME, AND OTHER CONSIDERATIONS

If you plan to use a trade name, you will need to register it with the Washington Department of Licensing pursuant to RCW 19.80.010. Under RCW 19.80.005(1), a trade name includes any name used to identify a business (which is defined to include a profession) which (a) is not, or does not include, the true and real name of *all* persons conducting the business, or (b) which suggests additional parties of interest, such as "company," "and sons," or "and associates." If you fail where required to register a trade name, RCW 19.80.040 will prohibit you from instituting any suit, for example, for unpaid legal fees, until you have registered the trade name; the failure to register does not, however, invalidate the underlying fee/retainer agreement, and once you register it you would be able to institute such suit.

Aside from registration of the trade name, you would also want to be careful not to unlawfully infringe on someone else's trade name since such infringement is subject to statutory penalties as an unfair or deceptive practice (see RCW 19.86.020) and may also subject you to the Consumer Protection statute (RCW 19.86). The use or infringement of a trade name would likely be included within the "entrepreneurial aspects" of law subject to that statute. See *Short v. Demopolis*, 103 Wn.2d 52 (1984); *Quinn v. Connelly*, 63 Wn. App. 733, 742 (1992), review

denied 118 Wn.2d 1028. See 107 Wn.2d 735.

With Washington lawyers now authorized to use trade names, it may be appropriate to review your internal conflicts-checking systems to assure that you have appropriate systems in place to identify possible conflicts so as to comply with the RPCs. Since most systems likely already take into consideration the name of a lawyer's law firm, it is not likely that many changes will be needed.

Before using the trade name, you may also want to seek an informal opinion from the WSBA's RPC Committee as to the propriety under the RPCs of your selected name. Requests for such opinions should be addressed to the Committee in care of the WSBA Professional Responsibility Counsel.

CONCLUSION

Amended RPC 7.5(a) allows us to practice law using a trade name beyond merely the names of our partners. Most of us spend our careers building our name and reputation, and for most of us the only name we want to practice under is our own and that of our partners. We were proud to become lawyers, we are proud to be lawyers, and it is our name, not some trade name, that we want our clients to remember when they need our personal professional services. For many of the nostalgic, the use of any name other than our own, or our partners' name, will be a reluctant manifestation and acknowledgment that perhaps the practice of law is increasingly a trade, and less a profession. For the entrepreneurial minded, amended RPC 7.5(a) permits flexibility, creativity and marketing opportunities. If you decide to use a trade name, choose it carefully to attract and retain clients and to comply with the ethics rules and the consumer protection laws. You will likely be living with it for years.

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

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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

Barbara Tomaszewski (WSBA No. 12430, admitted 1982), of Seattle, has been disbarred by order of the Supreme Court effective June 24, 1998. The discipline follows a default hearing and is based upon her conversion of funds due her employer.

Ms. Tomaszewski was an immigration law associate in a small law firm. Between October 1993 and April 1995, she retained for herself approximately \$20,000 in funds paid to her by 17 of the firm's clients, and deposited those funds in her personal bank account. She did not claim the payments from the clients on her 1993 and 1994 income tax returns. In one instance, she commingled client

funds with her own by depositing into her personal account client funds earmarked for a bond required by the Immigration and Naturalization Service.

Ms. Tomaszewski's conduct violated RPC 8.4(b), which prohibits a lawyer from engaging in criminal acts; RPC 8.4(c), which prohibits a lawyer from engaging in acts involving dishonesty, fraud, deceit or misrepresentation; RPC 1.14, which prohibits commingling of funds; 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.

The Hearing Officer was Nancy Preg of Seattle. Respondent did not appear. Disciplinary Counsel Joanne S. Abelson represented the Bar Association.

Dennis J. O'Shea (WSBA No. 12249, admitted 1952), of Spokane, has been disbarred effective July 10, 1998, by order of the Supreme Court of Washington. The

Supreme Court's order of reciprocal discipline, pursuant to Rule for Lawyer Discipline 12.6, is based on the June 3, 1997, judgment of the Supreme Court of the Commonwealth of the Northern Mariana Islands (CNMI) disbaring O'Shea.

In response to the Bar Association's petition for reciprocal discipline, O'Shea sought a stay of the proceedings to allow him to attempt to overturn the judgment of disbarment that had been entered by default by the Supreme Court of CNMI. The Supreme Court of Washington placed the reciprocal discipline proceedings on hold pending disposition of O'Shea's motion to set aside the CNMI judgment of disbarment. On May 27, 1998, the Superior Court of CNMI denied O'Shea's motion to set aside the judgment of disbarment. The Washington Supreme Court considered *en banc* O'Shea's request that the reciprocal proceedings be further placed on hold to allow an appeal to the Supreme Court of CNMI. The Washington Supreme Court denied O'Shea's request for a further extension and adopted the order of the Superior Court of CNMI, disbaring O'Shea from the practice of law in the State of Washington.

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

ADMONISHED

Mark L. Lorbiecki (WSBA No. 16796, admitted 1987), of Seattle, has been admonished by a Review Committee of the Disciplinary Board. The admonition is based upon his negligent failure to disclose pertinent facts to a Superior Court Commissioner during an *ex parte* proceeding regarding two Writs of Review, in violation of RPC 3.3(f), which requires a lawyer, in *ex parte* proceedings, to inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

The Writs of Review also contained language ordering injunctive relief in the form of a stay of proceedings in the mat-

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ter related to the Writs. In orally presenting the Writs of Review to the Commissioner ex parte, Lorbiecki represented that he was seeking two Writs of Review, but neglected to advise the Commissioner that he was also seeking injunctive relief. Lorbiecki did not give notice of his motion to the opposing party. The Commissioner signed the two Writs of Review, unaware that they contained an order for injunctive relief. The next day, the Commissioner granted the opposing party's motion to quash the Writs.

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

NONDISCIPLINARY NOTICE

INTERIM SUSPENSION

Gig Harbor lawyer Michael A. McKean (WSBA No. 4438, admitted 1971) was ordered suspended from the practice of law pending the outcome of proceedings by Supreme Court order entered June 17, 1998.

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

"Ethics and the Law" columns can be found in the *Bar News* online edition, along with more than two dozen recent *Bar News* articles, columns, lists of approved IOLTA banks and usury rates, attorney positions available, and other useful information.

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

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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
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Seattle, WA 98121-2330.
fax: 206-727-8320
e-mail: comm@wsba.org

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

ADR

Interest-based Mediation — The Process: Philosophies, Proficiency and Procedures

Oct. 19-23 – Spokane. 40 CLE credits (incl. 1 ethics). By Fulcrum Institute 509-838-2799.

Advanced Mediator Skills Workshop

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

Professional Mediation Training Skills

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

Training to be a Professional Mediator

Oct. 1-2 – Seattle. 15 CLE credits (incl. 1 ethics). By Alan Alhadeff J.D. Mediation 206-281-9950.

BANKRUPTCY

WA Foreclosure and Repossession

Sept. 17 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

BUSINESS LAW

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.

Local Telecommunications Infrastructure

Sept. 24-25 – Seattle. 14 CLE credits. By LSI 206-567-4490.

Collection Law in WA

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

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Washington State Bar Association Awards Luncheon and Annual Business Meeting

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

The luncheon is \$24 per person; please use the form on page 14 of the August *Bar News* to submit your luncheon reservation, or call Sharlene Steele at 206-727-8262.

There is no charge to attend the Annual Meeting, and no reservations are required.

*Reservation deadline for the Awards Luncheon has been extended. Reservations must be received at the WSBA office by Monday, September 7.

COMPUTER LAW

Software Licensing Agreements

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

The Legal Ramifications of Year 2000 Compliance in WA

Oct. 29 – Seattle. 6.5 CLE credits. By NBI 715-835-8525.

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. 6.75 CLE credits (incl. 1.25 ethics). By WSBA CLE 206-727-8202.

CRIMINAL LAW

The Fifth Annual Criminal Justice Institute

Sept. 24-25 – Seattle. 11 CLE credits (incl. 1.25 ethics). 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.



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EMPLOYMENT

Americans with Disabilities Act Workshop

Sept. 11 – Seattle. 7 CLE credits. By National Employment Law Institute 415-924-3844.

Handling Discharges Roundtable

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

Financial Strategies for Successful Retirement

Sept. 29 – Bellevue. 10 CLE credits. By Secure Start Seminars 425-456-0071.

Human Resources Law

Oct. 14 – Seattle. 6.5 CLE credits estimated. By NBI 715-835-7909.

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. 1 ethics). By WSBA CLE and RPPT Section 206-727-8202.

Basic Estate Planning Skills

Sept. 23-26 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

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.

Ethical Dilemmas for the Practicing Lawyer

Oct. 2 – Spokane; Oct. 16 – Tacoma; Oct. 30 – Yakima; Nov. 6 – Mt. Vernon; Nov. 13 – Vancouver; Nov. 20 – Seattle. 4 CLE ethics credits. By WSBA CLE 206-727-8202.

FAMILY LAW

Domestic Violence Training for Rural and Tribal Courts

Sept. 29 – South Bend. 6.75 CLE credits. By Office of the Administrator for the Courts 360-705-5341.

Essentials of Family Law

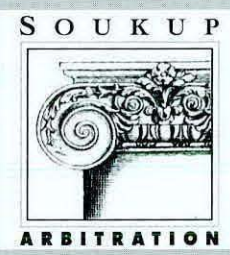
Sept. 11 – Seattle; Sept. 17 – Tacoma. CLE credits TBA. By WSBA CLE and Young Lawyers Division 206-727-8202.

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.

Tax Aspects of Divorce

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



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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

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.

Off the Written Transcript: Nonverbal Communication in Court

Sept. 25 – Vancouver. 6.5 CLE credits. By Center for Nonverbal Studies 509-459-1303; nonverbal2@aol.com

Advanced Legal Writing and Editing

Oct. 1 – Seattle. 6.5 CLE credits. By LawProse 214-691-8588.

Choice of Limited Liability Entities—LLC, LLP, S-Corps

Oct. 9-11, 24-25 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

Taxation for the General Practitioner

Oct. 9 – Seattle. 6.75 CLE credits. By WSBA CLE 206-727-8202.

INDIAN LAW

11th Annual Indian Law Symposium

Sept. 17-18 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

INSURANCE

5th Annual Insurance Law Basics Seminar

Oct. 9 – Seattle. 5.75 CLE credits pending. By WSTLA 206-464-1011.

INTELLECTUAL PROPERTY

Fundamentals of Intellectual Property

Sept. 15-18 – Seattle. CLE credits TBA. By UW CLE 206-543-0059.

Copyright Law

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

INTERNATIONAL LAW

Are We Reaching World Law (and Peace) Through Business?

Oct. 2 – Seattle. CLE credits TBA. By WSBA World Peace Through Law Section 206-447-1560.

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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**
Sept. 24 – Seattle. 6.25 CLE credits
(incl. 1 ethics) pending. 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.

- Emerging Issues in Civil Rights
Litigation**
Oct. 28 – Seattle. 6.5 CLE credits
(incl. 1.25 ethics) estimated. By NBI
715-835-7909.
- Women of WSTLA Annual Retreat**
Oct. 29-30 – Leavenworth. CLE
credits TBA. By WSTLA 206-464-
1011.

PERSONAL INJURY

- Post-concussion Syndrome and
Differential Diagnosis**
Sept. 26 – Seattle. 6.5 CLE nexus
credits. By Dr. Daniel P. Dock 218-
525-2033.
- Impairment and Disability Evaluation**
Oct. 9 – Spokane, 8.5 CLE credits;
Oct. 10-11 – Seattle, 17 CLE credits.
By SEAK 508-548-7023.

REAL ESTATE

- Commercial Real Estate Drafting**
Sept. 11 – Spokane; Sept. 18 –
Seattle. 6.5 CLE credits (incl. 1
ethics). By WSBA CLE 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

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

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Public Notice: Reappointment of incumbent magistrate judge: The current term of office of United States Magistrate Judge Gilbert H. Kleweno at Vancouver, Washington is due to expire March 23, 1999. The United States District Court is re-

quired by law to establish a panel of citizens to consider the reappointment of the Magistrate Judge to a new four-year term. The duties of the Magistrate Judge position include the following: (1) conduct of regular calendars involving charges of traffic offenses and violations of park regulations; (2) conducting initial appearances in criminal cases. Magistrate Judge Kleweno serves Mount St. Helens, the Veteran's Hospital, Gifford Pinchot National Forest, and other facilities in the Vancouver area. Comments from members of the bar and the public are invited as to whether the incumbent Magistrate Judge should be recommended by the panel for reappointment by the court and should be directed to: Bruce Rifkin, Clerk, U.S. District Court, 215 U.S. Courthouse, 1010 5th Ave., Seattle, WA 98104. Comments must be received by October 30, 1998.

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The Washington State Attorney General's Office, Regional Services Division, has two openings available for assistant attorneys general in the Yakima office. Duties would include representing the Department of Social and Health Services in juvenile hearings, and the Department of Labor and Industries in worker's compensation cases. These are starting attorney, litigation-oriented positions and applicants must be licensed to practice in the state of Washington. The AGO is an equal opportunity employer. For disability accommodation, contact Vicky Biscay, ADA Coordinator, at 360-407-0664 or TDD#1-800-276-9883. Interested applicants should contact Kent Nakamura, Attorney Recruitment Coordinator, at 360-407-0424, and Recruitment Assistant Linda Payne at 360-407-0397, to obtain an application.

Family law attorney: Fast-paced Vancouver, WA firm seeks associate with at least three years of relevant experience. Trial experience a plus. The successful candidate will be highly motivated and possess excellent written, verbal and client relation skills. Horenstein & Duggan, PS offers a comprehensive package, cutting edge technology and

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Tacoma 20+ attorney law firm is seeking an associate with minimum two years of experience in estate planning and probate and with an LL.M. in tax. Candidates should possess superior written, oral and research skills. Salary and benefits commensurate with experience. Reply to WSBA Bar News Box 563, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330.

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Appellate Deputy Prosecuting Attorney: The Kitsap County Prosecuting Attorney's Office seeks an attorney with a minimum five years' experience to head the office's appellate unit. The position involves the monitoring of all appellate matters, drafting appellate pleadings, trial support, and supervision of other deputy prosecutors who are responsible for preparing appellate briefs. The job requires a commitment to quality and teamwork, excellent writing skills, and the ability to manage a large caseload and meet deadlines. Starting salary is approximately \$50,000 plus the county benefits package. The job will commence November 2, 1998. Please send your cover letter, résumé and writing sample by September 15, 1998 to: Jeffrey J. Jahns, Kitsap Prosecutor's Office, 614 Division Street, MS-35, Port Orchard, WA 98366. Kitsap County is an equal opportunity employer and does not discriminate on the basis of race, religion, color, sex, age, national origin or disability.

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Wenatchee assistant city attorney/city prosecutor: the offices of Carlson, Drewelow, McMahon & Kottkamp, PS has an associate position available for assistant city attorney/prosecutor. Prosecution for City of Wenatchee takes approximately 2/3 of the time. Remainder of time will be spent assisting the city attorney and/or the firm partners with civil litigation. Compensation commensurate with experience and qualifications. No phone inquiries accepted. Mail inquiries with résumé to Associate Attorney Recruitment, PO Box 2965, Wenatchee, WA 98807-2965.

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WILL SEARCH

Michael William Hulse: anyone who has prepared a will for Michael William Hulse please call Walt Potebnya, attorney at Oles Morrison Rinker & Baker, 206-623-3427.

Dorothy C. Thompson: searching for will of Dorothy C. Thompson, deceased, mother. Born July 13, 1921, SS#543-05-8676. Resided in Pendleton, OR (Umatilla Co.). Contact Nancy White, 720 SE 9th, Pendleton, OR 97801, fax 541-278-1205.

Arthur S. Marshall: anyone having information as to the last will of Arthur S. Marshall of Enumclaw, who died 4/19/76, please call Donald A. Cable, attorney at law, 206-292-8800.

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