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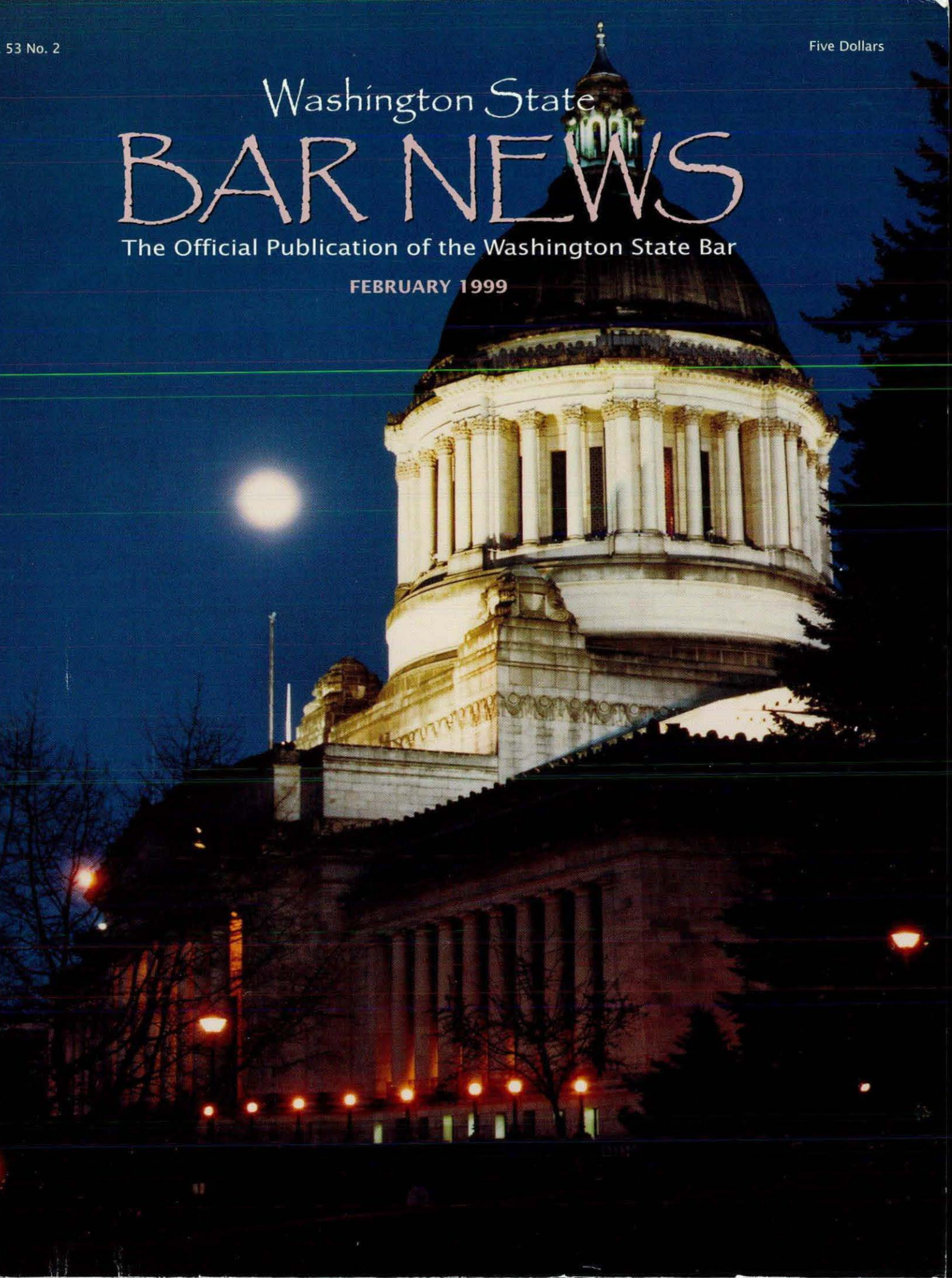
The Official Publication of the Washington State Bar

FEBRUARY 1999



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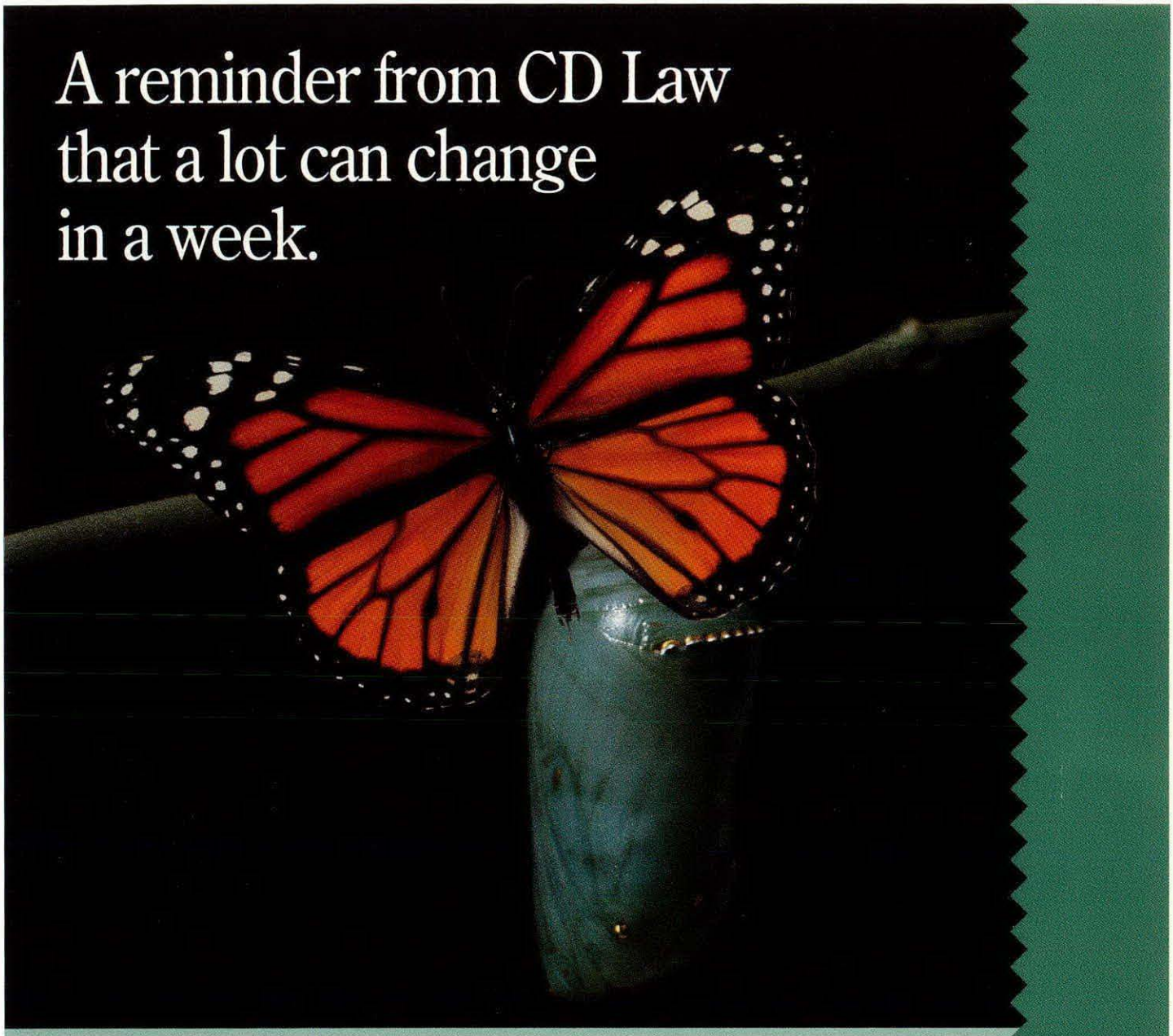

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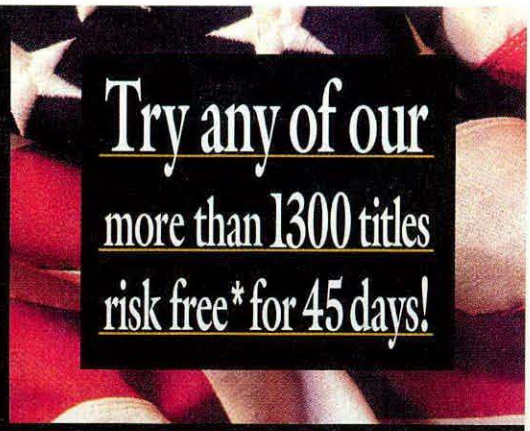

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Washington State
# BAR NEWS
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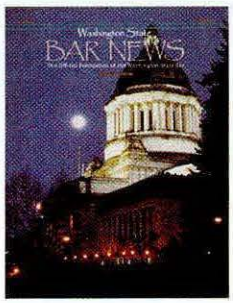


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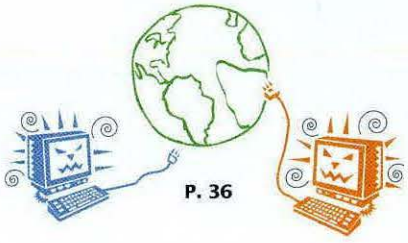

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The *Bar News* encourages correspondence and article submissions. The submission deadline is the 15th day of the month for the second issue following, e.g., February 15 for the April issue. We request a 3-1/2 inch disk (in any conventional format) 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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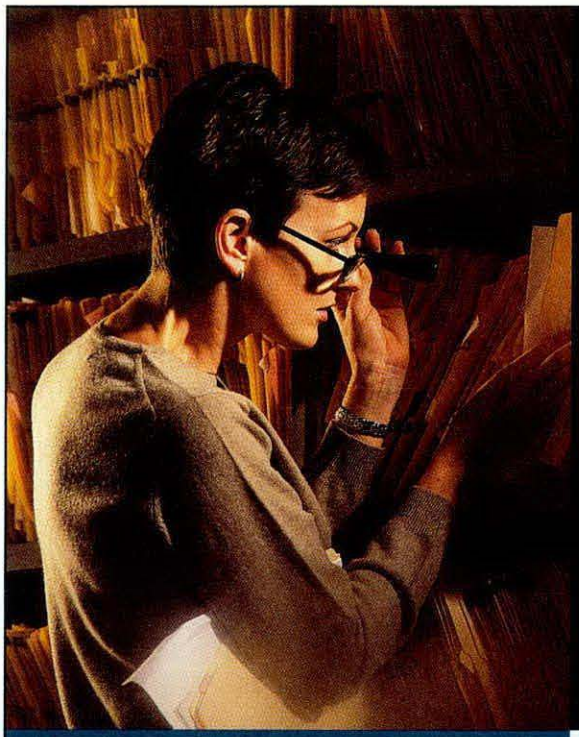

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# Letters

**I-200 Feedback Continues**

*Editor:*

WSBA President M. Wayne Blair states in his October *Bar News* column that it would not be appropriate for the Board of Governors (BOG) to spend our licensing fees opposing Initiative 200. He takes this position even though the BOG opposed the Initiative 9:1. I would urge the BOG to exercise such wisdom in the future. The members of the WSBA are now too diverse a group for the BOG to take sides in social policy legislation.

President Blair did exercise the prerogatives of power in his column to argue against I-200. Noticeably absent from the column, however, is mention of the law. Most conduct prohibited by I-200 has already been declared to be unconstitutional in the little-discussed case of *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

When forming my opinion as an attorney, the constitutional law regarding issues such as I-200 is not only relevant, but compelling.

*James Rigby*
*Seattle*

*Editor:*

On reading the October issue of the *Bar News* I note that there is a letter to the editor with respect to I-200 which appears to significantly exceed what I understood to be the word limit for such letters. Similarly, the banner headline on the President's column is "Lawyers Should Oppose Initiative 200!"

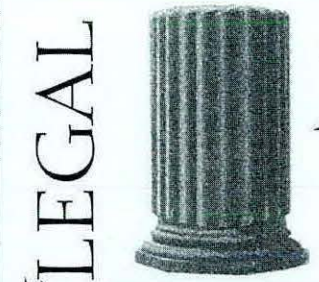
Obviously, Initiative 200 was on the ballot. I would appreciate it if you would outline for me what, if any, guidelines cover when and how the *Bar News* or columns therein may take a position on electoral matters. While I do not necessarily oppose the views of these authors, I would like to know what guidelines exist with respect to utilizing the Bar's dues and resources to take positions on ballot issues. Would the same resources be available to someone taking the opposite position on Initiative 200 and, if so, how would they know of this opportunity?

*Irving "Buddy" Paul*
*Spokane*

*Editor's Note:*

*The WSBA Board of Governors decided in January of 1998 that the I-200 issue was a "political or social issue that related to or affected the practice of law or the administration of justice" under GR 12(c)(2), the rule which governs the purposes of the WSBA and regulates topics on which the WSBA may take official positions. President Blair, in his monthly column, chose to voice his personal opinion and the majority position of the Board of Governors opposing I-200.*

*We have printed and will continue to print letters to the editor which we have received on this topic, regardless of the position taken by the author. Indeed, we print every letter to the editor we receive which is not deemed libelous by the WSBA's General Counsel and has not already been addressed by the same author in a previous letter to the editor (although we sometimes have to edit letters in order to fit them into the available space). For an update on the implementation of I-200, see page 21 of this issue.*

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### Appellate Judges Shouldn't Endorse Superior Court Candidates

*Editor:*

I am writing you concerning the matter raised by Yakima attorney John Moore's letter "Should Appellate Judges Endorse Superior Court Candidates?" [*Bar News*, December 1998].

I too am bothered by the practice criticized by Moore. Unfortunately, this is not confined to Yakima County. I have noted instances of appellate judges endorsing Superior Court candidates in King County as well. While the practice is not specifically prohibited by Canon 7 of the Code of Judicial Conduct, it does violate the spirit of the Canon and good judgment. When an attorney decides to become a judge, he/she gives up certain rights. One is the right to be publicly partisan on any matter that may come before him/her as a judge. One matter that will come before an appellate judge is the conduct, rulings, reasoning and fairness of a Superior Court judge. To endorse a candidate and then have to pass on his/her decision violates the appearance-of-fairness doctrine. I would hope that our appellate judges would be more sensitive to that doctrine.

The practice is a new phenomenon. Like John Moore, I was a trial attorney for more years than the majority of attorneys in King County have practiced law. Previously, it was unthinkable for an appellate judge to endorse a candidate for Superior Court. I have tried cases in the majority of counties of this state. With one or two exceptions, I have always felt that my client and I were receiving a fair shake from the trial judge. I have tried several cases in Yakima and never felt that I was being "hometowned." The appearance of fairness is important for client and counsel alike and is what maintains our confidence in the system. Those one or two exceptions I still remember, and they hurt the system. Let us keep our appellate judges above the fray. Do not demean your high office which we are all taught to respect and revere.

*Roy J. Moceri*
*Kailua-Kona, Hawaii*

### Clinton Lies Worse Than Halverson Lust

*Editor:*

Why don't you do something interesting for a change and poll your readership on the following question: Which do you find more repugnant, lawyer Lowell Halverson having sex with a client or lawyer Bill Clinton lying in a deposition and before a grand jury?

My own opinion is that Clinton's lies are infinitely more pernicious to our profession and to our legal system than is Halverson's lust. Why have I read nothing from WSBA or KCBA about the irreparable damage Clinton has wrought?

*J.R. Nowell*
*Seattle*

### Clinton Broke Ethical Rules

*Editor:*

I recently attended a CLE program on ethics the day after watching Judge Kenneth Starr testify before the House Judiciary Committee. I couldn't help being struck by the contrast.


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"A lawyer shall not knowingly: (1) Make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6" (RPC 3.3).

"It is misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice" (RPC 8.4).

Even from the ardent skeptic's view there appears to be ample credible evidence that the President engaged in perjury while testifying before the grand jury and tampered with a witness.

Certainly, if a lawyer is held to the standards stated above how much more so should the President of the United States, who is also a lawyer, be held? How much more should congressmen, congresswomen and senators, many of whom are lawyers, hold the President to these standards?

And yet I hear congressmen, congresswomen and senators excusing his conduct. Have we lost all common sense? Is our moral compass in a tailspin? Are political idealogies to prevail over justice and the rule of law? If the answer to these questions is affirmative, then it is a dark, sad day for the judicial system in the United States; the aftermath of this conduct will have a ripple effect far into the future.

*Thomas A. Tutton*
*Port Angeles*

**Counting the Reasons for Opposing Rule Against Sex with Clients**

*Editor:*

I would like to weigh in with those members of the Board of Governors who oppose proposed RPC 1.8(k), the no-sex-with-your-client rule [*Bar News*, December 1998]. There are several reasons why lawyers should oppose this rule.

First, the rule is an inappropriate intrusion into the private sexual relationships of consenting adults. It violates the rights of the client and lawyer to freedom of association under the First Amendment.

Second, there is no rational connection between the rule and the interest it purports to protect, namely, the welfare of clients. It rests upon the unproven assumption that a sexual relationship between a lawyer and client is per se damaging to the client. Where is the proof for that?

And where is the logic in excepting from the rule a client-and-lawyer sexual relationship that existed before the lawyer was hired? Arguably, if the sexual relationship existed prior to hiring, the lawyer had even more time to lose "independent judgment" before entering the lawyer-client relationship.

Finally, the rule could have unintended consequences. The ban on sexual relationships will affect even serious, committed relationships, and the ban could be particularly harsh in cases in which the lawyer's representation lasts for a period of years.

The Bar should oppose the irrational and puritanical values promulgated by this rule.

*Patricia Michl*
*Sumner*


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**Bill Bowman**

Former Deputy Prosecutor and Public Defender; Executive Board, WSBA Criminal Law Section; Member, Washington Association of Criminal Defense Lawyers; Instructor, WFCJ Annual DUI Defense Seminar; Graduate, National College of DUI Defense

**Feedback to Rosenfeld Letter**

*Editor:*

I read with interest the letter from David Rosenfeld of the Center for Long-term Care Financing [*Bar News*, November 1998]. Readers should know that Mr. Rosenfeld works for the Center. The Center, which is really a lobbying arm of the long-term care insurance industry, and was formerly part of Long Term Care, Inc., a long-term care nursing home insurance sales organization, is dedicated to the sale of long-term care insurance to seniors and the elimination of Medicaid and other needs-based programs as its best vehicle to encourage sales of this product. If you scare them, they will buy. Of course, only seniors who are in the pink of health and who can afford the rather substantial premiums required for the products promoted by Mr. Rosenfeld and the Center are eligible for such insurance. The rest, presumably, are part of our surplus population, and should be punished for their lack of planning, money or health by total and devastating impoverishment so that Mr. Rosenfeld's employers can make more money than the fortunes they already derive from sales of their products. Make no mistake, long-term care insurance is an important component of any estate plan for those who are healthy and who can afford such protection; however, it is equally important that Mr. Rosenfeld's readers understand who he works for, and what they sell, so they can fully understand his perspective on this important issue.

The issue before the Board of Governors was the unconstitutional restriction of free speech, the very speech which allows Mr. Rosenfeld and his clients to lobby through silly legislation designed to scare seniors into purchasing their product.

The solution to long-term care financing for the lower and middle economic class is incredibly complex, and the proposals pushed by the so-called "Center" are but one very narrow perspective in a difficult, emotional and compelling national debate over just how we, in the United States, will care for our parents and ourselves when we become old and infirm; how we are going to pay for it; and when we are going to face up to that call.

*Richard L. Sayre*
*Spokane*

**Public Defenders Underpaid**

*Editor:*

I am an attorney in Grays Harbor County who has practiced primarily criminal law for the last 20 years. It is interesting how individuals are treated by our legal criminal system. I actually received a notice from the Grays Harbor County Prosecutor's Office for the Grays Harbor County Commissioners requesting individuals to request 1999 District Court contracts. They will pay, pursuant to that letter, the amount of $2,361.55 per month for up to 300 cases, plus an additional $95 per cases over 300, up to 350 cases. The attorney is not required to accept more than 300 cases.

I have seen the individuals who handle these contracts. They try very hard to meet the demands of their clients. Of course, the Prosecuting Attorney's Office in Grays Harbor County has a virtually unlimited amount of funds for deputies and investigations. They get those drug dealers and put them in jail as long as possible. Of course, the attorneys do not have to request to receive

those contracts. Unfortunately, however, there are many lawyers and a lot of individuals who need to feed themselves and their families. Even at these rates people bid on these contracts. I should not have said "bid": they either accept them or request that they receive them.

In addition, the juvenile court for Grays Harbor County has indicated that they will accept bids on handling two factors in the juvenile court. The two cases are for minors charged with criminal offenses and a second for representation of minors or their parents in dependency proceedings. The notice indicates that the contract will be awarded to the best and lowest bid. In addition, of course, Grays Harbor County reserves the right to reject any and all bids and waive any informality in the bidding.

I have written to the Bar Association before in regard to this lack of concern of individuals and their representation. I received a lot of letters and comments that this is fairly well documented throughout the state of Washington. I realize that our society is not perfect. I see in the future that either huge corporations or computers will represent defendants.

*John L. Farra*
*Ocean Shores*

**Withdraw RPC 8.4 (g) & (h)**

*Editor:*

I object to playing again RPC 8.4(g) and (h), which make it unethical to express ideas not sanctioned by the Washington State Bar. Once upon a time, this rule was passed as an attempt to comply with "state law," but that pretense is now gone; the State Bar now wants to suspend you, punish you, disbar you, whatever, for "conduct manifesting prejudice" on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation and marital status. So, it is now, or will be, illegal to say it is wrong to be gay. It will be illegal to criticize gays. It is illegal to criticize a religion or creed, even if they believe in murdering members of any other religion or creed. It is illegal to say that it is wrong to have a baby without getting married. The Bar doesn't even have to prove that you intended to communicate a forbidden thought; they just have to show that some mythical reasonable person would interpret your remarks as "manifesting prejudice."

This is not right.

It is not a crime to say that membership in some group implies something about the person.

First, most people are timid enough talking about race, sexual orientation and religion with persons of that different race, sexual orientation or religion. How can we ever make progress in understanding and accepting each other if we can't talk? This rule makes it more difficult to talk. Most people will simply shut their mouth in an area far more expansive even than the proscribed topics, whatever they are, in order to avoid anything that might lead to disbarment.

Second, what about voir dire? Lawyers regularly make decisions in jury selection on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation and marital status. There is no time to interrogate every juror sufficiently to determine whether to

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strike a juror because of group membership. Everyone does this — brown eyes over blue — but now you can be suspended or disbarred for selecting a jury with consideration of group membership. Since lawyers must keep their clients informed, they must discuss the prohibited issues with their clients. It is not right to make lawyers choose between keeping their clients informed and risking disbarment by talking about group membership, and it is not right for a client to be convicted, or a suit to be lost, because a lawyer was afraid to discuss jury selection with a client.

Third, what about lawyers bringing and defending sex-based, religion-based, disability-based lawsuits? Perhaps this regulation is designed to intimidate defense lawyers, but I think it will intimidate plaintiffs as well. I have no proof of any of this, but regardless of the intent, the effect will be to intimidate all lawyers. And what about divorce? The client wants custody because she thinks the disabled spouse will be a bad custodian, or perhaps she finds the spouse's religion or creed offensive. Is the lawyer to tell her he can't champion her because he's afraid of the Bar? Disability has been interpreted very broadly in ADA cases, so almost any position with regard to any person with any possible disability, such as addiction, might "manifest prejudice to a reasonable person." This rule will not help the public, especially the part of the public that does not agree with the Bar Association's politics, to obtain access to justice.

Fourth, the Board proposes that the Washington Supreme Court, acting as a regulatory agency, review and adopt this extremely sensitive regulation. If that happens, upon challenge, the Supreme Court will rule on whether its own regulation violates the first amendment, the right to counsel in a criminal case, and the due-process clause. This cannot be. A government agency cannot create a law and then rule on whether it is constitutional. This violates the due-process clause, the concept of division of power, and the republican-form-of-government clause, even if the state constitution does not limit the court to "cases and controversies." (IOLTA has the same problem.) This is particularly an intractable conflict because RPC 8.4 strikes at freedom of speech and the right of lawyers to represent their clients, but the implication is that the entire Bar Association act is unconstitutional. Courts do not have inherent power to regulate lawyers, because the Federal Constitution, not somebody's idea of natural law, is the supreme law of the land. I think that whatever power courts may have to regulate lawyers and enact rules, like rules of evidence, are ancillary to their power to decide cases.

To rebut, I have heard people say the purpose of the rule is to punish those who make racial slurs. If you are going to have freedom, the necessary corollary is that people will abuse it. If you are going to have censorship, the necessary corollary is that censors will always threaten democracy, because they will always have the power to constrict the flow and exchange of ideas. I think it is pretty obvious that the Washington State Bar Board does want to cut off the flow of ideas. They want to intimidate people who have political or other ideas they do not like. This, as I said earlier, is not right. The people, acting as jurors, elected judges, reporters, and most of all as clients — not some Bar committee or court — should decide for themselves what speech they find offensive. This is the concept of the Bill of Rights.

I hope the Board of Governors withdraws this regulation.

*Roger B. Ley*
*Seattle*

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

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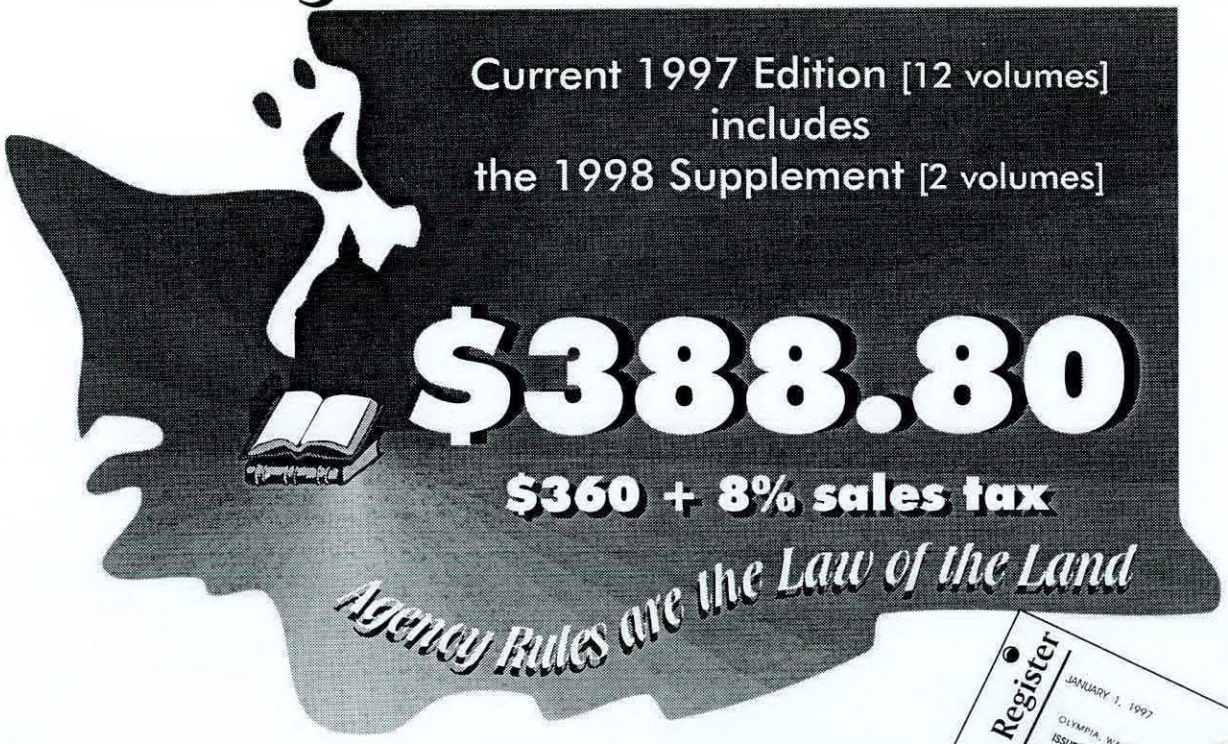


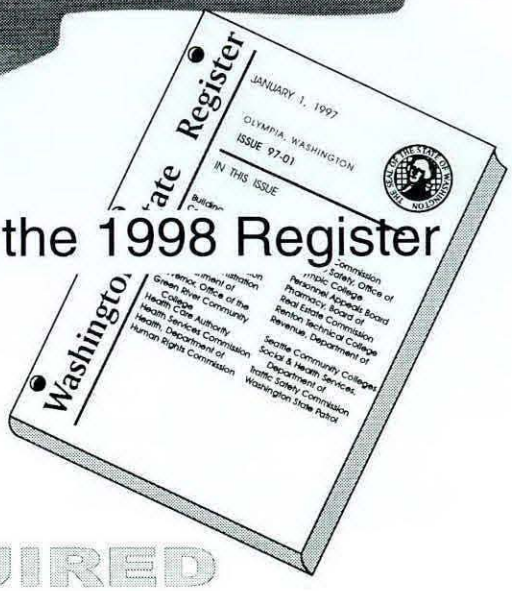


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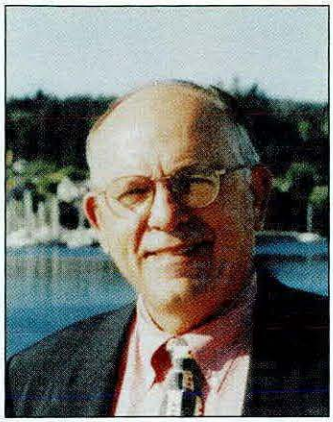

# "We Need a Few Good Men" Folks? Lawyers? People?

**by M. Wayne Blair**
*President*

While the old Marine Corps aphorism (title), used many years ago to recruit men to the Marines, is not applicable to the Washington State Bar Association, it does allow me to make a point. The WSBA needs "a few good people" (who are also lawyers) to run for election to the Board of Governors.

The election process for the Board of Governors is starting again, even though the lawyers who are elected will not take office until September 1999. At that time, four Governors will have finished their three-year terms — Mary Alice Theiler (King County-at-Large; now eastern side of Seventh District), Don Powell (Sixth District), Terry Lee (Third District) and Marijean Moschetto (Eighth District). Two men and two women will thus be leaving the Board. Who will replace them?

**I have yet to hear a former member of the Board say, "I wish that I had never served." I do not believe I ever will.**

According to WSBA bylaws, a lawyer who desires to run for the Board of Governors must submit to the WSBA his or her petition, together with the signatures of 20 active members, by March 1, 1999. Between now and March 1 you have an opportunity to seriously consider running for election to the Board of Governors. I strongly urge you to do so.

I have several purposes in writing this article on recruitment. My first purpose is to encourage people to run for the Board of Governors. Of the four elected candidates last year, three were elected without opposition. It is true that these three persons were highly qualified, and undoubtedly would have been difficult to defeat in a contested election. Nevertheless, it is healthy for the WSBA to have contested elections. We all benefit from the colloquy and public dialogue produced by contested elections.

My second purpose in writing is to state simply and clearly that we need diversity on the Board of Governors. I am not talking about just gender diversity, although that is very important. I am also not talking about just racial or ethnic diversity, although that too is very important. I am talking about practice diversity, age diversity and diversity of perspective. For the continued health and vitality of the WSBA, we need a variety of lawyers with a range of backgrounds and experiences on our Board of Governors.

To my knowledge, only one African-American has served on the Board of Governors, the ubiquitous Lembhard G. Howell. We need more people like him, even with all of his opinions. Serving on the Board with Lem Howell in 1991-92 was a pleasure.

Last year two members of the Board of Governors were women, as was the President, Mary Fairhurst. The previous year, three women were on the Board, as well as the President-elect. In September, both Marijean Moschetto and Mary Alice Theiler will be leaving the Board. The WSBA should not return to an all-male Board of Governors. We need women to run for election.

My third purpose in voicing this recruitment request is to dispel some of the myths regarding the makeup of the Board of Governors. If you ask a cross-section of lawyers outside Seattle, many would say the Board is controlled by large Seattle law firms. While that may have been true in the past, it has clearly not been true for the past eight years. The largest firm represented on the Board is my firm — Montgomery, Purdue, Blankinship & Austin, PLLC. While it falls into the category of what the late Alva Long would have called "elevator lawyers," the firm has only 23 lawyers. Most members on the Board over the last eight years have been from small firms. The WSBA risks having no large-firm perspective on the Board.

Another myth is heard from lawyers in big law firms. Several weeks ago, in an offhand comment, David Tang, managing partner of Preston, Gates & Ellis, advised me that many lawyers from large law firms believe that the Board of Governors has a bias against large law firms. While I do not share that view, many lawyers from large law firms apparently do. I urge you "good folks" from large firms to stand for election. This is your opportunity to reverse the

trend and help assure that the WSBA benefits from a range of viewpoints and practice experiences.

My fourth purpose is to discuss the time commitment. What is it like serving on the Board of Governors? How much time does it really take? Were you to ask the 11 Governors individually, you probably would get eleven different answers. If you are considering running for the Board, I suggest that you contact any of the incumbent Governors. I know they would be pleased to discuss their Board experiences with you.

As a Governor, one can spend an inordinate amount of time. With a little self-discipline (such as learning to say "no") it does not take as much time. At a minimum, Governors attend nine Board meetings around the state each year. The meetings last one and one-half days (Friday 9:00 a.m. through Saturday noon). Preparation for the meeting involves substantial reading. Serving on the Board also means serving as liaison to four or five standing committees and sections of the WSBA. The extent to which one participates in the activities of these committees and sections is up to each Governor. Obviously, the more one participates, the more one becomes involved in the work of the Board and the issues affecting the WSBA and the profession. As I discussed in my column last month, much of the work of the Board involves working with the Supreme Court, the Office of the Administrator for the Courts, the Superior Court Judges Association, the District and Municipal Court Judges Association and many other judicial associations. Each Governor is also asked to maintain a liaison with local bar associations in his or her geographic area. Finally, each Governor is asked to serve on two or three Board committees. Much of the Board's important work is done through these committees.

As a Governor, you will find yourself, over time, being slowly but surely drawn into the "sucking vortex" of State Bar activities, as former Governor Vickie Norris has characterized it. As a member of the Board of Governors, you will have many opportunities to work closely with your fellow lawyers in an other-than-adversarial context, and to learn more of the "good things" about lawyers. That is not to say, however, that Board members do not have major debates and disagreements. We do — from time to time. We are, nonetheless, able to put our differences aside and enjoy one another's company while we work constructively toward accomplishment of the goals of the WSBA.

From my perspective, serving on the Board of Governors from 1991 to 1994 was an exceedingly rewarding experience. While at times the experience was stressful and demanding, such experience was a unique opportunity to "make a difference" within the profession. I have yet to hear a former member of the Board say, "I wish that I had never served." I do not believe I ever will.

So, if you reside in the Third District, the Sixth District, the Seventh District (Eastern region) or the Eighth District, now is the time to give serious thought to running for the Board of Governors. The WSBA needs a few good people!


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# Relevance

**by Jan Michels**
*Executive Director*

EXECUTIVE'S REPORT

Webster's analysis of the word *relevant* notes that it is derived from *relieve*, "to help or aid." Only later did it come to mean "pertinent to the issue in question."

At a summer function on mentoring I had the privilege of sitting with Mr. Thomas Wampold, a 30-year member of the WSBA. In discussing the WSBA, he lamented that it "used to be my union and is now my oppressor." I was new as WSBA Executive Director and I wanted to be responsive. As we talked and drew out each other's evidence and observations, we compromised on the words "WSBA is irrelevant to many lawyers." It was hard for me to swallow. Was the WSBA irrelevant — not providing help or aid? I wanted it to be more. I've worked with the concept of relevance and its implications since then. Here are some realizations:

**The issue of irrelevance can't be all about the money paid for licensing, but as in many human conditions, money becomes a symbol for other things that really matter but are harder to articulate and deal with.**

### It's Not Just About Money

The issue of irrelevance can't be all about the money paid for licensing, but as in many human conditions, money becomes a symbol for other things that really matter but are harder to articulate and deal with. WSBA license fees are in the low-to-middle range for attorneys nationally — 20% less than most other professions' fees (physicians, accountants, architects, psychologists) and nowhere near trade-union dues. In addition, WSBA license fees make concessions for start-up attorneys, judges and inactive lawyers. Yet the amount paid for license fees seems a lightning rod for other aggravations and shortcomings captured under the word *irrelevant.*

### Recent WSBA Changes Haven't Been Perceived as Enough

I've learned from my court experience that it takes three to five years for changes to become widely known and part of the legal culture. The renovations made in the WSBA's culture about being cautious spenders — moving CLE, *Bar News, Resources*, sections, the bar exam and other WSBA functions toward being self-supporting; adopting open-meeting and open-records bylaws; and committing to member enfranchisement — are now all mature concepts. But somehow the WSBA is still not perceived to be any more "relevant," or any more helpful to many attorneys.

### It Takes Doing the Right Things, Not Just Doing Things Right

When I hear lawyers talk about what would be relevant and what they want from the WSBA, it sounds like this: "help me learn how to run the day-to-day business of a sole/small-firm practitioner"; "get me pointers on technology and communication tools"; "get the CPAs, non-attorneys and forms-publishers out of the business of practicing law in competition with me"; "help improve the public image and respect of lawyers"; and "help me figure out how to practice law at the turn of the century/millennium."

### WSBA's Required Functions are Not Perceived as Helpful

Besides the particulars of practicing law, there is a more universal burden on the WSBA to protect and promote the rule of law, work for access to justice for all citizens, run a $10 million nonprofit organization, and perform statutory and regulatory functions. It may be hard to perceive these universal services as being "relevant" to each member.

### The Practice of Law is Changing, Some Say For the Worse

There is deep professional dissatisfaction and fast erosion to the prestige, lucrativeness and "helping" aspects of the profession of law. It makes lawyers mad, frustrated, depressed or restless in this quick-changing profession. This can be expressed as animosity.

In this setting it is common and expected for lawyers to ask, "What has my association done for me lately?" Mem-

bers deserve to be heard and the WSBA needs a straightforward, honest response about the services members need and ask for.

The issue with relevance may be that what the WSBA thinks it has done and is doing for members is not perceived as valuable and relevant. It may be that the WSBA can't solve the cultural, social and personal dilemmas of its members. It may be that the dual functions of professional regulation and professional affiliation are too dichotomous for people to think of the WSBA as both. It may be that the WSBA has to change to supply more "help and aid" (i.e., become more relevant to the membership).

To meet members' needs and expectations, the WSBA needs to hear and discuss them. Thus, we are looking for ways in which members can provide their input. One way is by responding to an upcoming survey, which will be published next month in *Bar News* as well as on our Web page (www.wsba.org). Please watch for the survey and respond — it's important that we hear from you.


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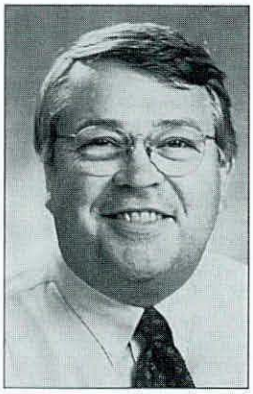

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# Implementing Initiative 200: The Initial Issues

The following article is excerpted from an issue paper written by an ad hoc task force within the Washington State Attorney General's Office in response to requests from state agency directors. An annotated version can be found at http://www.wa.gov:80/ago/pubs/i200/home.html.

***This "issue paper" represents a first step in identifying the major issues raised by the passage of Initiative 200 and suggests a framework for analyzing the issues. It is not, however, possible to provide definitive answers at this time to the questions which are raised. Due to the fact that the measure does not define the term "preferential treatment" and does not specify how continued implementation or enforcement of existing laws would be affected, the effect of the initiative will depend on how its provisions are interpreted and applied.***

**Issue No. 1:**
***Interpreting the Language of the Initiative, Particularly "Discriminate" and "Preferential Treatment"***

The heart of Initiative 200 is Section 1(1), which provides:

> *The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.*

The provision that the state shall not discriminate overlaps existing law and makes no changes in the administration of state programs. The prohibition of "preferential treatment" is new. This term does not have a well-established meaning and will have to be construed using rules of statutory construction and legislative history.

While California's Proposition 209 contains some language similar to Washington's Initiative 200, it may be of limited relevance to interpretation of Initiative 200. There are important differences which may result in different application in the two states. Most significantly, Proposition 209 amends the California Constitution (overriding any conflicting statutes), while Initiative 200 is a Washington statute and will have to be interpreted in light of existing statutory law.

**Issue No. 2:**
***Harmonizing Initiative 200 with Current Statutory Law***

One of the most significant initial questions of interpretation will be how to square the language prohibiting "preferential treatment" with several existing statutes that mandate "affirmative action" or enhancement of opportunities for women and racial and ethnic minorities in public employment, education and contracting. The Initiative does not expressly repeal or amend any of these statutes. Where there are multiple statutes on the same subject, courts will attempt to harmonize new and existing statutes to give effect to both. If a court finds a direct conflict between two statutes, however, it must decide whether more specific language prevails over more general language, or whether a later statute impliedly repeals an earlier statute. Courts also consider the intent of the electorate. Where possible,

**One of the most significant initial questions of interpretation will be how to square the language prohibiting "preferential treatment" with several existing statutes that mandate "affirmative action."**

this intent will be derived from the initiative's language. Where language is ambiguous, however, the courts will look to the history of the measure, primarily the statements and explanatory material in the Voters' Pamphlet.

Principles of statutory construction would need to be applied to determine the potential effect of the Initiative on the following statutes:

*State Personnel Laws*

RCW 41.06.150 mandates "affirmative action" in the administration of the state personnel system, including development of affirmative-action goals and timetables. RCW 41.06.150(22). The Personnel Resources Board has adopted rules which set goals for affirmative action and require agencies to develop affirmative-action plans. The principal method used to make progress toward those goals is the "supplemental referral" or "plus three" system. Up to three persons in protected categories who have passed the personnel test are certified to agencies for filling vacancies, in addition to the seven persons who scored highest in the testing process. The effect of the supplemental certification is to broaden the pool of candidates from which the agency can choose.

Initiative 200 does not explicitly repeal the statute providing for the adoption of affirmative-action programs in the state personnel system, but provides that the state shall not grant preferential treatment on the basis of race, sex, color, ethnicity or national origin in the operation of public employment. The question of interpretation will be whether the two statutes can be harmonized, or whether Initiative 200 will be deemed to have impliedly repealed some or all of the provisions of RCW 41.06 relating to affirmative action.

*Office of Minority and Women's Business Enterprises*

RCW 39.19 establishes the Office of Minority and Women's Business Enterprises (OMWBE) with the task of increasing the participation of minority- and women-owned business enterprises in state contracting and procurement. OMWBE (1) certifies businesses as minority- and women-owned and controlled; (2) sets overall annual goals for the participation of these businesses in state agency and educational institution contracts for public works or the procurement of goods or services; (3) enforces compliance with the laws; and (4) conducts outreach and education to assist women- and minority-owned businesses in participating in state contracts. Several other statutes require certain agencies to invite proposals from certified minority- and/or women-owned contractors.

Initiative 200 does not expressly repeal any part of RCW 39.19 or other statutes regarding participation by minority- and women-owned and controlled businesses. The critical question will be the interpretation of "preferential treatment." Will the courts find an inherent conflict between the entire OMWBE program and the language of Initiative 200, or will they attempt to preserve as much of RCW 39.19 as possible, consistent with the goal of "harmonizing" multiple statutes?

It is unlikely that certification of a business as minority- or women-owned and controlled, by itself, would be construed as "preferential treatment." Such certification simply establishes that the business meets certain qualifications. In addition, the certification would continue to be relevant as used to "establish or maintain


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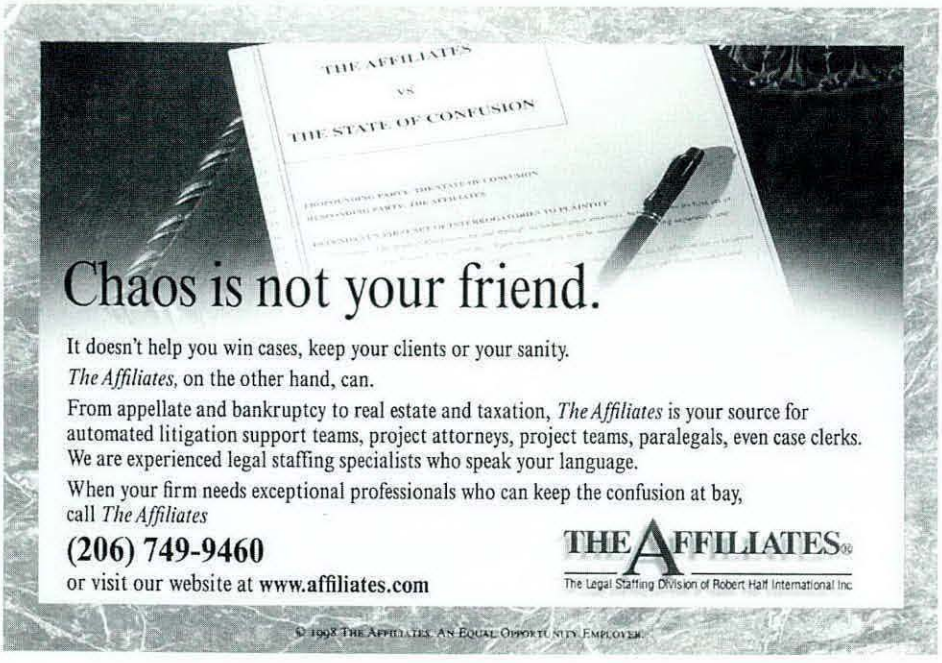


**One question is whether Initiative 200 would prohibit OMWBE's outreach and education programs or other training and business assistance programs for minority- and women-owned small businesses that the Legislature has established.**

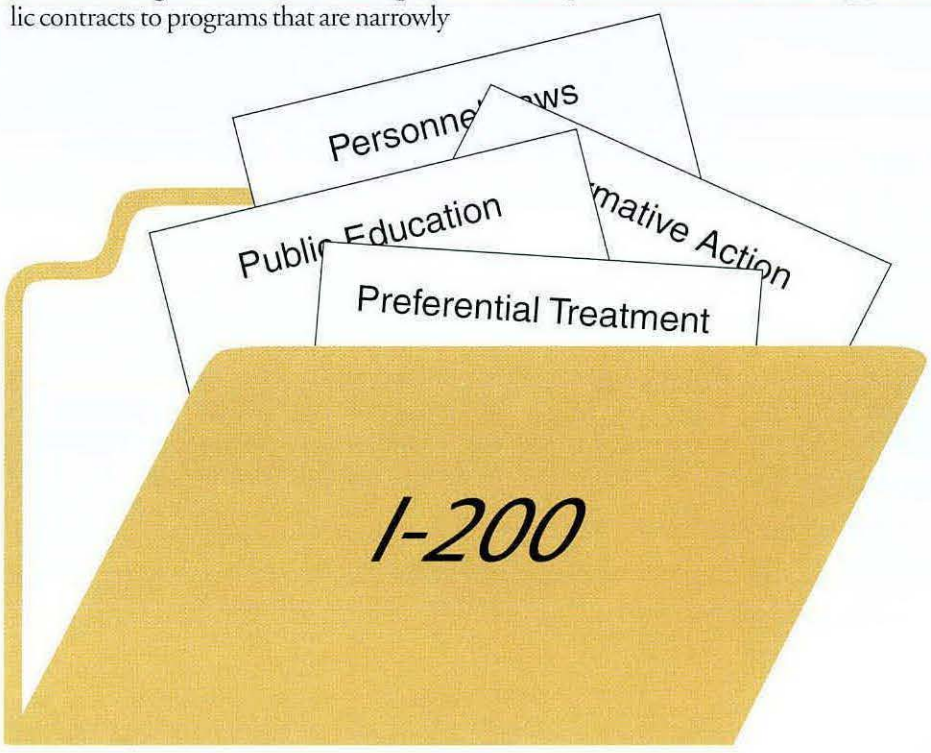
eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." Initiative 200, §1(6).

One question is whether Initiative 200 would prohibit OMWBE's outreach and education programs or other training and business assistance programs for minority- and women-owned small businesses that the Legislature has established. There is no well-accepted definition of the term "preferential treatment" which would indicate with certainty whether it encompasses such targeted recruitment and outreach programs. Courts have upheld as "non-discriminatory" outreach programs designed to ensure that advertisements for bids are distributed in a manner to assure that all persons, including women- and minority-owned firms, have a fair opportunity to bid. It is possible, though uncertain, that such programs would also be upheld against all claims of "preferential treatment" in the context of Initiative 200.

With regard to setting goals for participation, the federal constitution limits use of race or gender in the award of public contracts to programs that are narrowly tailored to remedy the continuing effects of past discrimination. The goals must be set only for the particular racial or other classifications, geographical areas and types of business where such discrimination can be identified. The question becomes whether Initiative 200 will be interpreted to prohibit the use of race or gender in the award of public contracts, even in those limited situations where the federal constitution would permit consideration of those factors. If so, the question becomes how the provisions of Initiative 200 and RCW 39.19 (which requires establishment of goals) will be read together.

*Human Rights Commission Statutes*

Section .005 of RCW 49.74, entitled "Affirmative Action," finds that racial minorities, women, persons in protected age groups, persons with disabilities, Vietnam-era veterans and disabled veterans are underrepresented in Washington state government employment. RCW 49.74 provides enforcement measures against state agencies which fail to comply with affirmative action laws, with the Human Rights Commission given enforcement responsibility. The enactment of Initiative 200 calls into question the authority of the Commission or of the courts to require compliance with RCW 49.74, at least as to race, sex, color, ethnicity or national origin. Also, because the Initiative is codified by its own terms in RCW 49.60, it might be argued that the Commission is the enforcement agency for any violations of the Initiative itself, or could adopt rules relating to the Initiative. The Commission could thus be under a simultaneous obligation to require agencies to comply with "affirmative-action" goals but to refrain from any practice amounting to "preferential treatment." The Commission will have to carefully review its rules, policies and guidelines in light of this simultaneous obligation.




*Statutes Concerning Women and Racial Minority Representation in Apprenticeship Programs — RCW 49.04*

RCW 49.04.100 mandates that any apprenticeship programs approved by the Washington State Apprenticeship and Training Council must demonstrate participation of women and minorities in the apprenticeship program in a ratio equal to the ratio of women and minorities in the labor force in the program sponsor's labor market area. The State is not the employer of the apprentices and does not directly participate in the training of apprentices. There is thus an initial question whether the apprenticeship program sufficiently relates to public employment, public education, or public contracting as to be affected by Initiative 200. If apprenticeship programs are considered "public education" or "public contracting," further questions would arise concerning the need to maintain the affirmative-action program in order to continue qualifying to administer parallel federal programs. See Initiative 200, § 1(6). The Council's authority to review and

regulate apprenticeship flows largely from a federal law, the Fitzgerald Act, 29 U.S.C. §50. Federal regulations mandate affirmative action as a requirement for approval of an apprenticeship program.

**Issue No. 3:**

***Interpreting the Phrase "Preferential Treatment" in the Context of "Public Employment"***

Threshold questions may arise regarding what actions are included in the term "operation of public employment." The term clearly would include the traditional employer-employee relationships and decisions, such as hiring and firing, promotions, wages and working conditions. Issues may arise regarding whether other specific situations constitute the "operation of public employment."

As in public contracting, a recurring question in public employment is whether Initiative 200 bans targeted recruitment or outreach. Again, as in public contracting, there appears to be no consensus on whether such outreach and recruitment constitutes "preferential treatment." One reading of the Initiative would be to permit targeted recruitment and outreach efforts that are designed to make traditionally underrepresented groups aware of programs and openings, and are not designed to exclude or discourage any other group. Because neither the Initiative nor case law have defined "preferential treatment" or applied the term in this context, it is not possible to predict that this is how Initiative 200 would be applied to such programs.

Another issue is whether an agency, by setting a qualification for a job, such as knowledge of a foreign language which is legitimately related to the duties of the position, may favor applicants of a particular ethnic background. In equal protection and Title VII cases, the courts have viewed factors like foreign language ability as "race-neutral" even though such factors may bear a close relationship to race or ethnicity.

**Issue No. 4:**

***Interpreting the Phrase "Preferential Treatment" in the Operation of "Public Education"***

The main definitional questions for "public education" are whether the initiative applies to functions performed by schools and educational institutions that are beyond "education" in the narrow sense, such as operation of bookstores, coffee shops and student housing. These are typically not funded as part of the educational institution. There may also be questions about whether a public school or college may be involved in choosing the recipient or publishing information about a privately funded scholarship that is available only to members of one sex or to members of a racial minority. Questions could also arise about services a school or college provides to students. These could include tutoring, language assistance, counseling, health-care programs or classes either specifically designed for particular groups or far more likely to be used by some groups than others.

As with public contracting and employment, questions arise whether targeted recruitment in education is "preferential treatment." Among other targeted-recruitment and outreach programs, existing laws establish a minority teacher recruitment program and a program to encourage women and minority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**The questions that must be answered include not only whether "preferential treatment" should be read to include such outreach and recruitment, but how to harmonize Initiative 200 with statutes that specifically call for such outreach and recruitment.**

students to acquire skills needed for post-secondary study in mathematics, engineering or related sciences. More generally, existing laws require the Higher Education Coordinating Board to make recommendations to increase minority participation in higher education. As with other identified issues, the questions that must be answered include not only whether "preferential treatment" should be read to include such outreach and recruitment, but how to harmonize Initiative 200 with statutes that specifically call for such outreach and recruitment.

One question is the impact Initiative 200 will have on public college and university admission processes. There appear to be two possible approaches to defining "preferential treatment" in the context of public education admissions. The first, more limited definition would be that "preferential treatment" is the reservation of seats in a college or university for which only students of a particular race or gender can compete, or a similar system where race or gender are used as admissions criteria without any individualized consideration of the applicant's background or qualifications. The second possible definition is that "preferential treatment" is accorded when the race or gender of an applicant is one of many considerations in comparing all candidates for the available seats and selecting a student body that achieves educational diversity.

The first reading would be consistent with the use of the terms "preferential treatment, "preference program," "preferential classification" and "preferential purpose" in the opinions in *Regents of Univ. of Cal. v. Bakke.* For example, Justice Powell contrasted a system that reserves seats for minority students with a system that takes race or ethnic background into account as one factor in comparing all applicants and selecting from among them to achieve overall educational diversity. He used the terms "preferential treatment" or "racial preference" only to describe the former. Our courts may look to these uses of the terms "preferential treatment" and "preference" to assist in determining the meaning of Initiative 200 as applied to college and university admissions. But no one can be certain of how the issue ultimately will be resolved.

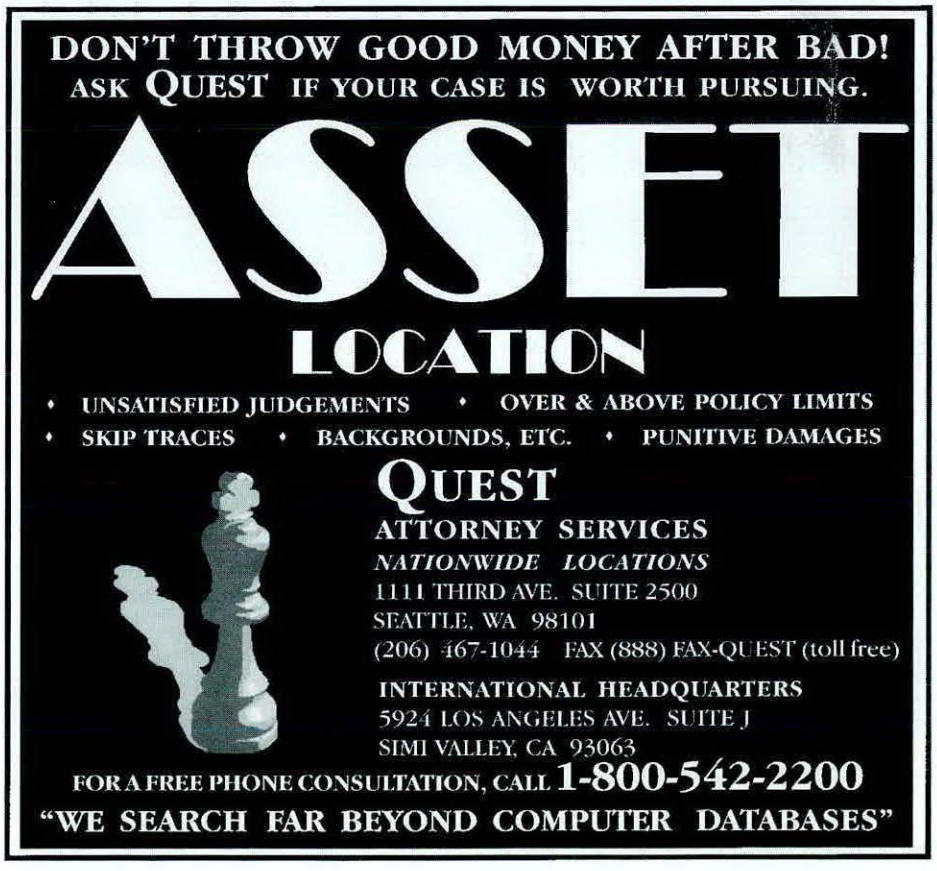
Title VI of the Civil Rights Act of 1964 is also relevant to public education. Section 601 provides:

> *No person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C.§2000(d).*

Because all public educational institutions in Washington state receive federal financial assistance, their programs and activities must comply with Title VI. This includes admission decisions and the award of financial aid. Many courts and the Office of Civil Rights, Department of Education have, however, held that educational institutions may lawfully consider race or ethnicity as a "plus factor," or one of many factors, when making admissions or financial aid decisions in order that they may further their legitimate interests in creating a diverse student body. It is not clear whether practices considered consistent with Title VI would nonetheless be held inconsistent with the Initiative.

**Issue No. 5:**
***Definition of "Public Contracting"***

Issues may arise concerning what constitutes "public contracting" within the meaning of the Initiative. Most of the discussion about public contracting in the past has been about public works and government procurement contracts,

which are the contracts covered by the OMWBE statute. As a general matter, these are also the contracts let by public bid. In areas other than public works and procurement, RCW 39.19 may not explicitly apply, but questions could still arise whether, for instance, the Initiative would allow an agency to follow a "diversity" policy in the selection of consultants, trainers, mediators, experts and others to perform services under contract.

Another question is whether the provision against "preferential treatment" applies to a private person performing a public contract if the government plays no role in the selection of personnel to perform the contract. Similarly, many state grants or loans finance services provided by contract. Although the argument seems strained, it might be argued that these contracts are "public" because of their financing or other agency participation.

**Issue No. 6:**

***Concerning the Exception in Section 1(4) for "Otherwise Lawful" Classification of Certain Kinds***

Initiative 200 provides for specific limited exceptions. Section 1(4) states that it does not affect any "otherwise lawful" classification that is based on sex and is necessary for sexual privacy or medical or psychological treatment; undercover law enforcement work; film, audio and theatrical casting; or provides for separate athletic teams for each sex. A particular decision may be challenged as not truly "necessary" and thus not within the exception of subsection 1(4). On the other hand, the word "necessary" could be read less strictly, as having a meaning more in the sense of "appropriate."

**Issue No. 7:**

***The Enforceability of Pre-Existing Court Decrees***

Section 1(5) of the Initiative provides that "[t]his section does not invalidate any court order or consent decree that is in force as of the effective date of this section." This section could give rise to interpretive issues relating to the timing or circumstances of a particular court order. While Section 1(5) does not contain any exception for *post*-enactment court orders or consent decrees, the measure does not explicitly purport to restrict judicial discretion. In any case, the language of the Initiative would be one factor for the court to consider in deciding an issue or in phrasing a decree.

**Issue No. 8:**

***Interpreting the Exception for Maintaining Eligibility for Federal Programs***

Section 1(6) provides that the Initiative "does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." Federal agencies often require states to have "affirmative action" programs, but most allow discretion in how to structure and operate those programs. The federal agency then approves or disapproves the program. Thus, the interaction of federal law and Initiative 200 could be somewhat complex for agencies who must submit proposals which will satisfy federal funding requirements without overstepping any limits imposed by Initiative 200. Also, there may be arguments about the likelihood of loss of federal funds with regard to various programs. For several agencies, this provision of Ini-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tiative 200 would be read in conjunction with existing statutes which authorize the agencies to take actions necessary to qualify for federal funds, which are usually worded more broadly than Section 1(6) of the Initiative.

### Issue No. 9:
### *The Relevance of the California Experience*

Proposition 209 is similar to Initiative 200, but it is not identical. Sections 1(1) (no discrimination or preferential treatment) and (2) (applies to actions after effective date) of Initiative 200 are identical to language in the California Proposition. Section 1(5) (does not invalidate existing court orders or decrees), 1(6) (does not prohibit actions to avoid loss of federal funds), 1(7) (definition of "state" to include local government), and 1(8) (available remedies for violations) are very similar to provisions in the California measure. That measure, however, contains no provisions equivalent to Section 1(3) (does not affect law or governmental actions that do not discriminate) or 1(4) (exceptions for certain classifications such as sexual privacy, theatrical casting and separate athletic teams) of the Washington statute.

As noted above, these differences limit the relevance of any California cases interpreting Proposition 209. Also, Proposition 209 amends the California Constitution, while Initiative 200 is a statute. Thus, the California Proposition supersedes any inconsistent state statutes. Conversely, the Washington initiative will be read in light of existing statutes on the same subject. Finally, any interpretation of ambiguities in the Washington initiative would consider the understanding of the Washington voters. The contents of the Voters' Pamphlet, as well as the public debate, is legislative history that is quite different from the legislative history of Proposition 209. Thus, even language in Initiative 200 identical to language from Proposition 209 might be interpreted differently by the courts of the two states.

### Conclusion

The enactment of Initiative 200 requires state agencies to re-examine a number of laws and programs. Since the Initiative is phrased as a broad principle, the examination will necessarily involve developing working hypotheses about its intent, based on its language and the available legislative history, while recognizing that many issues can only be finally decided by the courts. Without coordination, agencies and institutions could adopt inconsistent views, leading to confusion and additional litigation. It is important for agencies to work with coordinated legal advice and to set reasonable priorities as to which issues to take up first.


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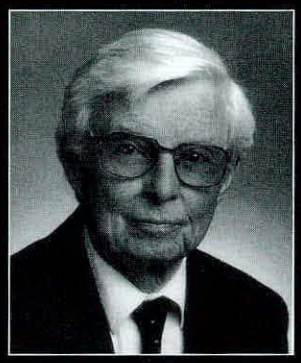

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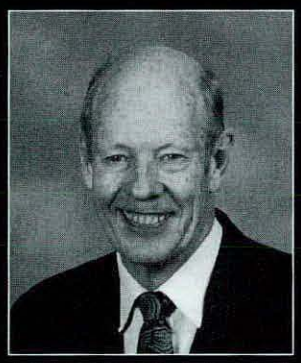

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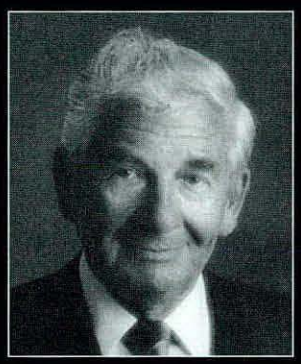

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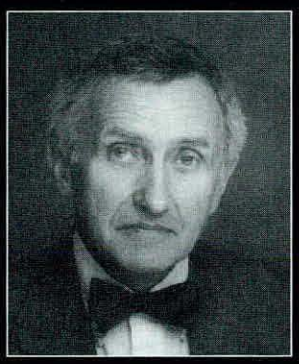

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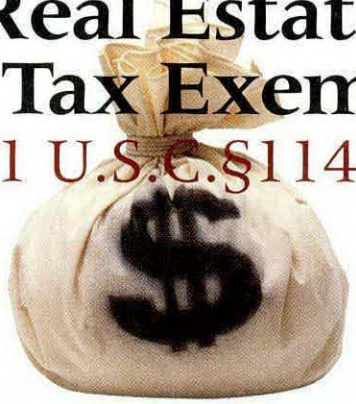
# Real Estate Excise Tax Exemptions & 11 U.S.C.§1146(c)



by Zachary Mosner

**It has become clear through a few court challenges over the years, and pending audits of real-estate transactions conducted pursuant to RCW 82.45.150,[1] that there is a misunderstanding in the legal community as to the import of 11 U.S.C.§1146(c) governing real estate excise tax exemptions and how it applies in Chapter 11 proceedings. Audits and assessments can raise serious economic difficulties for unsuspecting clients or prior purchasers, and eventually lead to legal malpractice claims. This article reviews the status of case law to date, and suggests the best ways to use the tax exemption provided for by federal preemption.**

### State Law Imposes a Stamp Tax Upon the Sale of Real Estate

Under state law, an excise tax is due upon the sale of real estate.

> RCW 82.45.060 Tax imposed on sale of property Additional tax imposed.
> *(1) There is imposed an excise tax upon each sale of real property at the rate of one and twenty-eight one-hundredths percent of the selling price....*
> *(2) There is imposed an additional excise tax through June 30, 1989, upon each sale of real property at the rate of six one-hundredths of one percent of the selling price. The tax imposed under this subsection shall be deposited in the conservation area account under RCW 79.71.110.*

The tax is the initial responsibility of the seller, but also remains a lien upon the real estate if unpaid upon closing of the sale (RCW 82.45.080). Under RCW 82.45.010(3) certain limited exemptions to stamp-tax assessment are detailed; none apply to bankruptcy proceedings. If anything, it is clear that the legislature intended to tax sales in bankruptcy. Under RCW 82.45.020, the term "seller" is intended to include the following:

> *"... any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, quasi municipal corporation, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit or otherwise; but it shall not include the United States or the state of Washington."*

"Trustee in bankruptcy" is a term of art that is defined by federal bankruptcy law and is not susceptible to differing meanings. Because the particular focus of this article is real estate sales tax exclusions in Chapter 11 proceedings under 11 U.S.C.§1146(c), it is imperative that an inquiry be made as to whether a Chapter 11 debtor-in-possession could be deemed to be a "trustee in bankruptcy." The answer is clear: under 11 U.S.C.§1107(a) the debtor inures to the duties of the trustee under §1106. As RCW 82.45.020 makes no reference to any particular chapter of bankruptcy, and as the Chapter 11 debtor is deemed to be a trustee and fiduciary, any sale of real estate by a Chapter 11 debtor is subject to the state stamp tax, absent overriding federal law.

Some practitioners have attempted to fashion a state law exemption from an administrative code provision, the text of which follows shortly. Several preliminary matters must be raised in reference to any such rule-making efforts. First, rule-making must not exceed legislatively delegated power. Thus, the regulation will be upheld if reasonably consistent with the statute being implemented. *Armstrong v. State*, 91 Wn. App. 530, 537, __ P.2d __ (1998) citing: *In re Myers*, 105 Wn.2d. 257, 264, 714 P.2d 303 (1986); *Keene v. Board of Accountancy*, 77 Wn.App. 849, 854, 894 P.2d 582, *review denied*, 127 Wn.2d 1010 (1995); *Gugin v. Sonico, Inc.*, 68 Wn.App. 826, 829, 846 P.2d 571 (1993). The court's purpose is to ascertain and give effect to the Legislature's intent. *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975).

Second, promulgated rules must not be inconsistent with specific state statutes. *State v. Garrison*, 46 Wn.App. 52, 54-55, 728 P.2d 1102 (1986); see also, *State v. Smith*, 48 Wn.App. 33, 35, 737 P.2d 723 (1987), *aff'd*, 111 Wn.2d 1 (1988) (questionable

term not looked at in vacuum; rather, statute is construed in context to determine word's meaning); *Hartman, supra* at p.179 (look to statutory context as a whole to derive legislative intent).

Third, where there is any ambiguity in administrative rules, the interpretation must be "harmonized" with applicable statutes in order to give full meaning to the underlying legislative provisions. General principles of statutory construction apply to administrative regulations, particularly when they are adopted pursuant to express legislative authority. *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979); *Hayes v. Yount*, 87 Wn.2d 280, 552 P.2d 1038 (1976). There is no demonstrated state statutory basis for providing any sort of excise tax exemption for Chapter 11 bankruptcy real estate sales, which leaves the administrative regulation without any legal underpinning. Attempted rule-making is an effort to recognize limited areas of federal preemption which might grant tax exemptions. These things being said, it is conceded that the administrative regulation that follows is not a model of clarity:

> **WAC 458-61-230 Bankruptcy.**
> *The real estate excise tax applies to conveyances of real property by a trustee in bankruptcy when made under either a chapter 7 plan or chapter 13 plan, but not when made under a chapter 11 plan or chapter 12 plan.*
>
> *The court case and bankruptcy chapter number must be cited on the affidavit when claiming this exemption. [Statutory Authority: RCW 82.32.300 and 1993 sp.s. c 25.94-04-088, § 458-61-230, filed 2/1/94, effective 3/4/94. Statutory Authority: RCW 82.45.120 and 82.45.150.90-01-003, § 458-61-230, filed 12/7/89, effective 1/7/90; 86-16-080 (Order PT 86-3), § 458-61-230, filed 8/6/86; 84-17-002 (Order PT 84-3), § 458-61-230, filed 8/2/84; 82-15-070 (Order PT 82-5), § 458-61-230, filed 7/21/82.]*

The only basis for an exemption is "under a chapter 11 plan or chapter 12 plan." Those exemption rights clearly do not stem from state law, and thus federal law is determinative as to the statutory construction to be afforded this administrative regulation if it is to have any legal significance in light of rules of statutory construction previously discussed. In any event, statutes exempting persons or property from taxation are to be strictly construed under state law. *Pacific Northwest Conference of the Free Methodist Church v. Barlow*, 77 Wn.2d 487, 492, 463 P.2d 626 (1969), overruled on other grounds in *Corporation of Catholic Archdiocese of Seattle v. Johnston*, 89 Wn.2d 505, 509, 573 P.2d 793 (1978). Moreover, exemptions should not be extended by judicial construction other than as expressly designated by law. *Pacific Northwest Conference, supra* at p.492. There is no viable way of finding a statutory exemption strictly utilizing state law, and there is no way of construing a right of exemption under federal law for the reasons that follow.

As discussed in *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 722 P.2d 808 (1986), an agency's rules must be encompassed within its statutory framework. *Anderson, Leech & Morse, Inc. v. State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221(1978). Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes they implement. *Brennan v. Department of Labor & Indus.*, 104 Wn.2d 55, 60, 700 P.2d 1139 (1985). The federal statute must be analyzed alone, with the recognition that under state law, exemptions are disfavored. The federal authority that follows demonstrates that any excise tax exemption is further held to careful scrutiny under rules of federal statutory construction, and that tax immunity in bankruptcy proceedings is an eroding judicial doctrine. As discussed in *Sacred Heart v. Dep't of Revenue*, 88 Wn. App. 632, 637 (1997), a tax exemption statute that creates "doubt or ambiguity" must "be construed strictly, though fairly and in keeping with the ordinary meaning of [its] language, against the taxpayer." *Group Health Coop. of Puget Sound, Inc. v. Washington State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201(1967). "Strained, unlikely or unrealistic" statutory interpretations are to be avoided. *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380(1993).

### Construing a Statute to Give It Plain Meaning

11 U.S.C.§1146(c)[2] states as follows:

> *The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.*

A real estate excise tax imposed by state law might be considered a "stamp tax."[3] Many debtors and/or counsel have gone to the Auditor's window in the county where the real estate sale closes and have filed affidavits with statements such as "sale closed consistent with Chapter 11 pending," "sale closed consistent with Chapter 11 plan subject to future court confirmation," and "Chapter 11, Cause No.xx-yyyyy W.D. Washington@Seattle." This demonstrates a fundamental misunderstanding not only of the law, but the basic practicality of putting the horse in front of the cart. If, *at the time of the transfer*, there was *no confirmed plan*, then you don't have a right to an exemption under §1146(c).[4] If you don't have a right to a federal exemption, there is no surviving state right of exemption, because the WAC is only intended to "parrot" or make reference to federal statute and case law.

The applicable bankruptcy statute is plain on its face:

> *It is evident that whatever immunity the bankrupt estate once enjoyed from taxation on its operations has long since eroded...* Cal.State Bd. of Equal. v. Sierra Summit, *490 U.S. 844, 109 S.Ct.2228, 2232, 104 L.3d 2d 910 (1989).*

The gravity of the tax exemption issue exceeds the simple interplay and application of statutory construction. The U.S. Supreme Court has clearly spoken to the constitutional and policy issues inherent in consideration of state tax exemptions in bankruptcy proceedings.

> *Although Congress can confer immunity from state taxation [cites omitted], we have stated that "[a] court must proceed*

*carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed.* Rockford Life Ins. Co. v. Illinois Dept. of Rev., *482 U.S.182, 191, 107 S.Ct.2312, 2317, 96 L.Ed.2d 152 (1987). See also* Oklahoma Tax Comm. v. U.S., *319 U.S.598, 607,63 S.Ct. 1284, 1288, 87 L.Ed. 1612 (1943);* Graves v. N.Y., *306 U.S. 466, 479, 59 S.Ct. 595, 597, 83 L.Ed.927 (1939).* Cal.State Bd., supra, *p.2234.*

The statutory construction mandate is clear: unless an exemption from state taxation is clearly expressed, it should not be granted.

### The Existing Case Law That Attempts to "Trump" §1146(c) Is Neither Persuasive nor Binding in the Ninth Circuit

There are two cases of note that have held that a post-petition, pre-confirmation sale of a Chapter 11 debtor's assets qualifies for exemption under 11 U.S.C. §1146(c) — *In re Permar Provisions, Inc.*, 79 B.R. 530, 533

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(Bankr. E.D.N.Y. 1987) and *Anne Arundel County Md v. NVR Homes, Inc.*, 222 B.R. 514 (Bankr. E.D.Va. 1998).[5] *Permar* issues from a bankruptcy court in the Second Circuit, hardly offering precedential value in the Ninth Circuit. Moreover, the case disregards rules of statutory construction. A pre-confirmation sale yields what ultimately proves to be about 75% of the estate's funds. However, the sale precedes confirmation of a liquidation plan by more than one year. On the theory that absent a sale a plan would not have been confirmed, the court takes a quantum leap and concludes that the sale was under a plan. As the legal action taken was nothing more than liquidation of assets, it is mystifying that the court concludes that no plan would have otherwise been confirmable. Clearly, a good trustee in a Chapter 7 could have effectuated such a result,[6] and the court, other than in accepting self-serving Disclosure Statement conclusions to the contrary, did not ever have evidence that the Chapter 11 liquidation yielded more to creditors than a Chapter 7 would have. In any event, any such inquiry would have been neither relevant nor material given the clear language of 11 U.S.C. §1146(c). The *Cal. Bd. of Equalization* case that followed two years later made it clear that such exemptions should only be granted in specifically enumerated circumstances. No exceptions exist to the statute and no exceptions were warranted in this case.

It is questionable whether the Second Circuit would support the interpretation of *Permar*. In *In re 995 Fifth Ave. Assoc., L.P.*, 963 F.2d 503, 510 (2nd Cir. 1992), the court was called upon to determine whether a New York "gains tax" was in reality a stamp tax and thus precluded from implementation under 11 U.S.C. §1146(c). The court looked to relevant legislative history in this regard and noted that the original source of the exemption was under Section 77B(f) of the 1934 Bankruptcy Act. That exemption issued only as to transfers "pursuant to a plan of reorganization." It is therefore submitted that the Second Circuit, had it heard the *Permar* matter on appeal, would (if it had


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**date is clear: unless an exemption pressed, it should not be granted.**

consulted legislative history) have rejected the trial court's efforts to carve an exception out of a statute that offered no exceptions. The *Cal. Bd. of Equal.* case has been duly noted in *In re Amsterdam Ave. Dev. Assoc.*, 103 B.R. 454, 459-460 (Bankr. S.D.N.Y. 1989) for the proposition that any exemptions should issue *under a plan*[7] and should be narrowly construed. The *Amsterdam* court further declined to invoke §105 relief in order to implement a confirmed plan and afford tax relief.[8] Other courts called upon to interpret §1146(c) have made it clear that the inquiry is first made as to whether the transfer is under a confirmed plan. See: *In re Bel-Aire Investments, Inc.*, 142 B.R. 992, 996 (Bankr. M.D.Fla. 1992).

### *Anne Arundel* and the Trip to "Never-Never Land"

The recent case of *Anne Arundel County v. NVR Homes, Inc.*, 222 B.R. 514, (E.D.Va. 1998) has caused considerable consternation among the states, has stirred a hornets' nest as to *nunc pro tunc* application of §1146(c) and for good measure, plays games with states' sovereign immunity rights, only recently clarified in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In a nutshell, a home builder in Chapter 11 in the ordinary course of business, post-filing, sold numerous homes and paid stamp tax as a cost of closing. The debtor filed April 6, 1992 and had its plan confirmed on July 22, 1993. Apparently as much as $6.3 million in stamp taxes was paid from April 6, 1992 to September 30, 1993, as the court notes at fn.2, p.516.[7] In the Chapter 11 plan submitted for consideration to creditors at §41.3 the debtor proposed to exempt taxes paid "under, in furtherance of, or in connection with the Plan." *Supra*, pp.516, 517. The District Court places considerable stock in the fact that no governmental entity objected to this provision.

This analysis is faulty, in that no plan can be confirmed that fails to comply with all provisions of the Bankruptcy Code. In particular, 11 U.S.C.§1123(b)(6), dealing with contents of a plan, makes it clear that no plan may have a provision inconsistent with the applicable provisions of the Code.[8] In that respect, the trial court and district court were in error, because the plan violated states' rights and the clear statutory mandate of 11 U.S.C.§1146(c) and 28 U.S.C.§959(b). During the years 1994 and 1995, the debtor sought refunds in various states and some states relented. NVR filed a contested matter under BR 9014 requesting a "declaration" that it was entitled to such refunds. In this regard, BR 9014 requires service of any such motion "in the manner provided for service of a summons and complaint." In short, it was a lawsuit. The District Court knew that to make any such finding would be the death-knell of the claim for a money-starved bankruptcy estate consistent with *Seminole*, so the court twisted and turned the case so much it amounted to torture. When done, the District Court as a first court of appeal reversed the trial court below, finding the states could be sued for refund in bankruptcy court.[9]

The court's demolition of *Seminole* rests upon the premise that while governmental entities brought before the court under BR 9014 had to be served as if this


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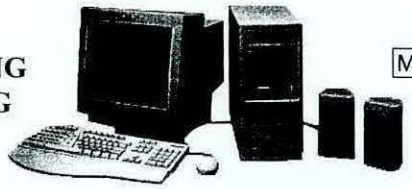

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were a suit, if they were not specifically named, it was not a "suit."[10] The rationale has a storyline that resembles the fable of "The Emperor's New Clothes." As an example, the court at p.520 indicates that the states were not "served with process *mandating* that they appear in a federal court" [emphasis added]. This is nonsense; under BR 9014 the contested motion had to be served in the same manner as if served under BR 7004. There is no exclusion of subpart (a) relating to summons. In short, the states were summoned to appear. Moreover, any claim seeking "declaratory relief" is governed by BR 7001(9) and a claim to force turnover is governed by BR 7001(1). These are adversary proceedings which are "suits" against the states. The court posits that the states were always free to "not appear." Really? Finally the court rests its decision to deprive states of Eleventh Amendment sovereign immunity upon a bankruptcy rule. Apparently, rule-making has risen in constitutional stature!

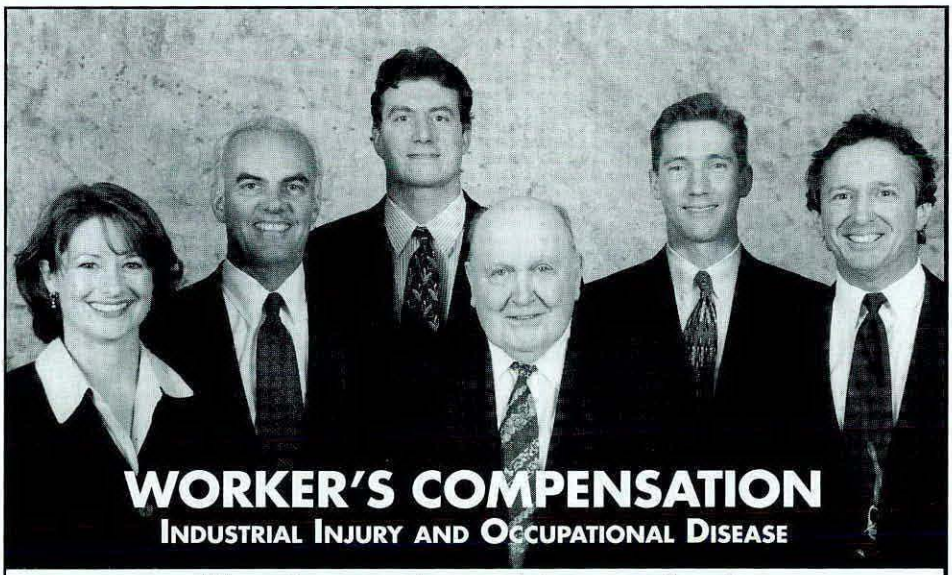
Not surprisingly, the Ninth Circuit is not joining in this charade. In *In re Lapin*, 1998 WL 784579 (Bankr. 9th Cir. 1998) [10/16/98] the California Franchise Tax Board sent the former Chapter 7 debtor a post-discharge "dunning" letter and issued a wage garnishment, applying funds and a tax refund to unpaid taxes. The debtor sought to reopen his case and obtain a show-cause order for contempt for violation of his bankruptcy discharge injunction. The trial judge granted relief, but the BAP[11] rejected the premise that the bankruptcy court could abrogate sovereign immunity by exercising *in rem* jurisdiction. The BAP further rejected the premise that a violation of a court order should change sovereign immunity analysis. In short, the debtor was compelled to find the relief he sought in state court proceedings.

### Is There a Rational Basis for §1146(c) That Will Survive Constitutional Challenge?

Any congressional action that impairs constitutional rights implied or reserved to the states, such as the right to impose taxes (Tenth Amendment), must have a rational basis. The states have been given the right under 28 U.S.C.§959(b)[12] to expect full compliance with all laws of the state, and there is no stated exception therein as to any particular chapter proceeding. As the U.S. Supreme Court noted in *California Board, supra* at p.2233, fn.5 there are numerous state tax reporting functions and payments imposed by §346(c) and by implication §1107. In short, 11 U.S.C. § 1146(c) is in direct contravention of several bankruptcy code provisions and any exception to state law compliance must be strictly construed. *California Board, supra*, p.2234. As noted in *California Board, supra*, pp.2231, 2232, the historic reasons for not allowing state taxation of transactions in bankruptcy court have been "thoroughly repudiated." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). As Congress has freely ceded states' rights to tax real estate transactions in Chapter 7 and 13, what is the rational basis for impairing states' rights in Chapters 11 and 12? Under the theories advanced by several courts discussed earlier, the court might apply §1146(c) "prospectively," anticipating eventual plan confirmation, only to find the plan cannot be confirmed. Now there is no money to pay the tax, and the public policy favoring job preservation and retention of a viable tax base for future revenues is not advanced. What then is rational about a Chapter 11 liquidation done under a plan, allowing real estate to be sold excise tax-free, where no business or assets are preserved? Clearly, the same liquidation sale in a Chapter 7 sale is taxable, so the rationality issue and potential constitutional challenge by the states is alive and well.

### What's a Reasonable Practitioner To Do?

Obviously, reasonable practitioners can differ, but here are some thoughts. The most obvious thing to do when you know you are filing a case dependent upon proceeds of real-estate sales is to file a pre-packaged plan and not close any sales until final plan confirmation. A certain amount of cost-benefit analysis must also attend any decisions to craft plan-filing strategies so as to utilize §1146(c). The savings to the bankruptcy estate of a 1.78% excise tax on a single

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sale of a $200,000 property may not justify the rush to file and confirm, and may expose you to other dangers lurking in Chapter 11-land.

Early in the case you can seek declaratory relief as to the application of §1146(c) to sales pre-confirmation, but you'll be buying yourself protracted, costly litigation and be on the road to the Ninth Circuit and beyond. Of course, don't try the *Anne Arundel* pay-and-seek-a-refund-in-the-Bankruptcy-Court routine, because the doctrine of sovereign immunity will be employed, setting you on the same appellate travel path.

Here is some practical advice on how to package your excise tax exemption affidavits, assuming you have taken the right sequential path to the Auditor's window. Bring the following items with you:

1. A certified copy of the court order confirming plan of reorganization along with a certified copy of the court docket to verify that ten (10) days have elapsed without appeal of plan confirmation.
2. A certified copy of the plan of reorganization.
3. A statement under oath that the sale is consistent with a confirmed plan of reorganization, approved by the court on (date) and that the subject sale is referenced therein at page _____ .
4. A legend at the top of the first page of any instrument of transfer in caps and bold that states as follows:

**THIS INSTRUMENT IS EXECUTED AND DELIVERED PURSUANT TO A CONFIRMED PLAN OF REORGANIZATION AS APPROVED BY JUDGE _____ ON (DATE), IN THE CASE OF IN RE IN U.S. BANKRUPTCY COURT FOR THE_____ .D. OF AT: _____ CAUSE NO. _____ AND IS NOT THE SUBJECT OF ANY APPEAL AT THIS TIME.**

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*Zachary Mosner is an Assistant Attorney General in the Bankruptcy and Collections Unit of the Office of the Attorney General of Washington.*

## Notes

1 The statutory "reach-back" by audit is at least four years, and can be more "for cause."

2 A similar exclusion from stamp taxes is afforded in Chapter 12 under §1231(c).

3 See in particular RCW 82.45.090 making specific reference to "stamps" being affixed to pertinent documents filed with the auditor.

4 This issue has already been tested in two proceedings before the Hon. Thomas T. Glover, with rulings in favor of the State; no written decision was placed in the court record.

5 This court cites some additional New York courts and one Florida court that applied §1146(c) *nunc pro tunc* without really considering the judicial doctrine aloud.

6 However, the sale in Chapter 7 would not be tax-exempt.

7 It is not clear why the Court did not use the confirmation date as the "dividing line" in considering the evidence, thus reducing this number, as any sales after confirmation would clearly be exempt from excise tax under §1146(c). It is possible that September 30, 1993 was the plan "effective date," but the sloppiness of the court's analysis carries over to this important element as well as in its written decision.

8 In turn, no plan may be confirmed if the proponent does not comply with applicable provision of the Code. 11 U.S.C. §1129(a)(1). Further, the proponent must comply with the Code, or the plan is not confirmable. 11U.S.C. §1129(a)(2).

9 It is not clear whether this case is on appeal at this time. WESTLAW does not show an appeal pending.

10 This follows the illogical analysis posited in *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777.786 (4th Cir. 1997). It is hard to believe that members of the Fourth Circuit are talking to each other, no less following stare decisis, when you contrast *Antonelli* to *Creative Goldsmiths of Washington, D.C.*, 119 F. 3d 1140, 1147 (4th Cir. 1997).

11 Judge Philip H. Brandt (U.S. Bankruptcy Court, W.D. Washington) wrote for the panel, which included Judge Paul B. Snyder of the U.S. Bankruptcy Court, W.D. Washington at Tacoma.

12 See also the *California Board* reference to 28 U.S.C. §960 at page 2233, footnote 7.


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## The Greyhaired Cyberpunk

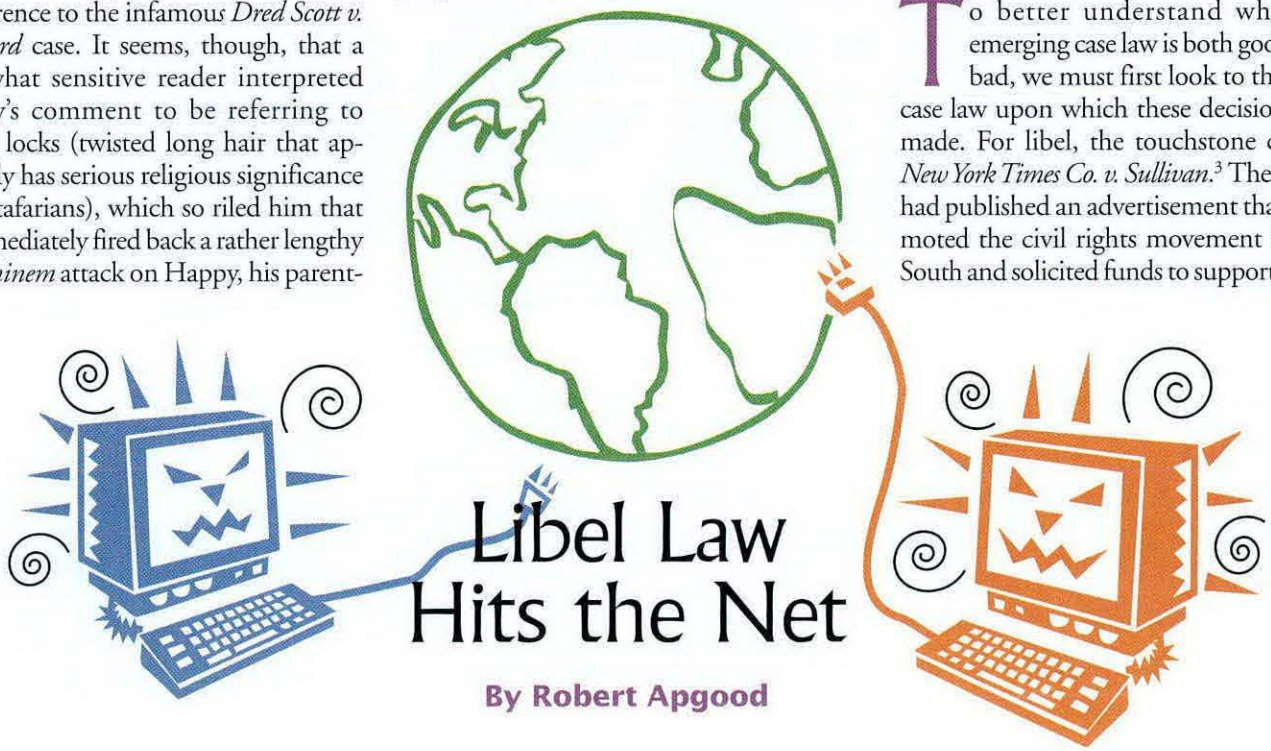
A couple of days ago, I got a call from my Rastafarian friend "Happy," who claimed he had been rather seriously "flamed" in a posting on one of the Usenet news groups he belongs to. (You wouldn't know he's Rastafarian by looking at him — first off, he's bald.)

Quick step back. For the uninitiated, Usenet news groups are a series of loosely managed discussion areas on the Internet where people with similar interests can carry on worldwide discussions on topics of similar interests. These groups range from serious, highly technical topic areas with names like "comp.tech.operating.system.details" to generally humorous topics such as "alt.jokes.about.oj" or "alt.tasteless.jokes" to very specific topics similar to "alt.rastafarianism.for.bald.guys." With well over 12,000 such groups, you'd think that just about everything was covered. I guess not, since new groups pop up every day. You get the picture.

Back to Happy's plight. Happy apparently made the offhand comment, in one of his postings to a rather focused group that concerns itself with obscure Supreme Court decisions, that "Dred is Dead!" Happy adamantly protests that this was in reference to the infamous *Dred Scott v. Sandford* case. It seems, though, that a somewhat sensitive reader interpreted Happy's comment to be referring to "dred" locks (twisted long hair that apparently has serious religious significance to Rastafarians), which so riled him that he immediately fired back a rather lengthy *ad hominem* attack on Happy, his parentage and his general genetic composition. Happy was not, well, very happy about it. So, quite sure that he'd been "defamed, libeled, slandered and generally dissed," Happy asked me what he could do.

The Internet has changed, and is changing, the way the world works. It is estimated that online purchases this year will exceed $2.3 billion, or about double the figure from 1997.[1] Certainly, the Internet is changing the way we communicate globally and locally. E-mail, web-based "chat rooms" and the increasing use of Internet telephony (kiss those long-distance charges goodbye!) are, if not supplanting, certainly taking a large bite out of the use of traditional mail ("snail-mail") and the inclination to pick up the telephone for more immediate interaction. Along similar lines, where once we belonged to "political discussion groups" and "book clubs" meeting on a regular basis, we now can engage in these discussions with an even larger group of participants daily (or more frequently). And, as is not unusual when large numbers of people convene to discuss a topic of mutual interest, individual personalities clash and tempers flare. Sometimes, when an attack is particularly vehement, the "attackee" (perhaps feeling that his or her reputation has been damaged) has sought legal recourse for that slander. When an attack has manifested itself in print (say, in a letter to the editor of the local newspaper, or in news-article coverage of the meeting), the injured party pursues a libel action. (Yeah, yeah, I know you covered all of this in Con Law I.) I remind you of the distinction because, with all of this "written" flaming happening on the Internet, there is a remarkable scarcity of defamation lawsuits arising from it. Arguably, due to the Internet, libel (like Dred?) is dead.

Mike Godwin points out in his book, *Cyber Rights*,[2] that "even though the law of libel is very old, the law of the Internet is still forming." As with any new medium of communication, the courts wrestle with new rules to ensure that users of that medium are afforded basic protections stemming from the Constitution; which protections must balance the rights of an aggrieved party against the rights of the party against whom the protection is sought. And, as with any new question, the courts make both good and bad law as the question matures.



# Libel Law Hits the Net

**By Robert Apgood**

To better understand why the emerging case law is both good and bad, we must first look to the root case law upon which these decisions are made. For libel, the touchstone case is *New York Times Co. v. Sullivan*.[3] The *Times* had published an advertisement that promoted the civil rights movement in the South and solicited funds to support those

efforts. The advertisement contained some minor factual errors not tolerated by libel law at that time, and Sullivan, an elected commissioner of the city of Montgomery, Alabama, brought a civil suit against the *Times* and others. Losing at the outset, the *Times* fought the suit all the way to the Supreme Court. The Court found that Alabama libel law conflicted with the First Amendment guarantee of freedom of the press, and in its opinion, fundamentally altered the legal definition of the "malice" element of the tort. This change ultimately created a distinction between "public" and "private" figures, establishing differing standards for each in the determination of whether the element was satisfied in libel claims. Predictably, the standard was raised for public figures, reasoning that they have greater access to the printed media to refute allegations of wrongdoing than do private figures — refutation being the primary and preferred response to the wrong to minimize damage to one's reputation. Because very few private individuals had access to the media, the libel law created a means to level the playing field by providing a forum where the wronged private figure could make this refutation. In the *Times* case, the Court's definition of "malice" required a showing that the publication was *known to be false* or was published with *reckless disregard* as to its truth or falsity. As a result, libel cases have historically held the media liable for publishing a defamer's statements.

One of the most influential and lasting cases of libel on the Internet is *Cubby v. CompuServe*,[4] decided on summary judgment in favor of CompuServe. CompuServe had contracted with a third party to conduct a special-interest forum called "Rumorville." Cubby claimed that defamatory material about its business had been posted by a user to the forum on CompuServe's computers and sued both the third party and CompuServe. Knowing that a "republisher" of a defamation (alleging CompuServe) is as liable as the original publisher (here, the third party), Cubby felt confident that it would win. Analogizing CompuServe to a newspaper or television (all "publish" information to large numbers of people), this assumption was probably reasonable. A "common carrier" such as a telephone service provider who typically does not and cannot exercise any prior control on what is said, hence, has no liability for libel. Acknowledging that CompuServe is not a common carrier, the CompuServe attorneys posited a third model that fell somewhere in between the two traditional models. They argued that CompuServe acted as a "provider-as-bookstore" and, as such, was not liable to any greater degree than a bookstore that sells magazines and books that may contain defamatory material. In this vein, they argued, absent some prior "actual knowledge" of the contents of the postings, CompuServe should not be liable to Cubby for the postings. The court agreed and granted CompuServe's motion for summary judgment. In the opinion, the court noted that "[w]hile CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a given publication, it will have little or no editorial control over that publication's contents." This was a tacit recognition that, although it has the right to exercise broad controls, CompuServe does not function as an editor/publisher in doing so. This is the good law.

**As is not unusual when large numbers of people convene to discuss a topic of mutual interest, individual personalities clash and tempers flare. Sometimes, when an attack is particularly vehement, the "attackee" has sought legal recourse for that slander.**

But every coin has two sides. Many readers of the *Cubby* decision wrongly interpret the holding in that case as requiring a forum service-provider to elect to exercise all-or-no controls on the content of its publications. It was this wrong interpretation that led to the decision in *Stratton Oakmont v. Prodigy*.[5] Like CompuServe, Prodigy is a provider of Internet services and forums in which members may participate in a manner akin to Usenet news groups. And, like Cubby, Stratton Oakmont suffered libelous postings in one of Prodigy's forums. However, because Prodigy had *at one time* exercised "editorial" censuring of postings to its forums (and still does on a lesser basis in the form of a "filter" that edits out postings containing profane language), the court, in a misinterpretation of *Cubby*, found Prodigy liable. The court reasoned that, due to this prescreening, Prodigy acted as a traditional "publisher" and not a "distributor" like CompuServe. In fact, Prodigy is little different from CompuServe and its ilk. This is the bad law.

Conflicting holdings notwithstanding, what you find when you look under the sheets is that parties who are libeled on the Internet are remarkably like public figures in traditional libel settings. When they are libeled in public forums, unlike their private predecessors, they are not victims of lack of access to the media. In fact, they can (and frequently do) quickly respond with lengthy point-by-point refutations of the accusations by invoking the Supreme Court's preferred method of defense. Further, by "thrusting himself into the vortex" of public debate, the typical poster crosses the threshold from private into public figurehood[6] and bears the heavier burden of proof of the "malice" element of the tort, a standard that is difficult to meet. It is here that we find the answer to why there are so few libel cases arising from Internet discourse.

And, although Happy may well have been insulted, he will most likely find it difficult to prove his case.

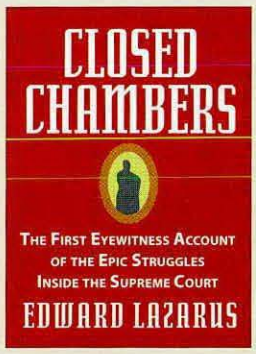
## Notes

1 This must be true; I heard it on the radio just today!
2 Great book! You can order at http://www.panix.com/~mnemonic/
3 376 U.S. 254 (1964).
4 776 F.Supp. 135 (1991).
5 1995 NY Misc. Lexis 229; May 24, 1995 N.Y. Sup.
6 See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

# The U.S. Supreme Court in Conflict:
## A Review of *Closed Chambers*

**by Mark H. Adams**

**Closed Chambers**
*by Ed Lazarus*
*Times Books, 1998*
547 pages
Hardcover, $27.50




High-school social studies and introductory college classes in American history and political science teach that the United States Supreme Court is a place of cool reason, where the Rule of Law and the principle of *stare decisis* guide the Court inexorably to the right decision. The other branches of government, the executive and legislative, may tack to the winds of political change and cater to partisan constituencies. But the Supreme Court, whose members have life tenure, remains aloof from popular trends and base influences, interpreting the Constitution rationally and dispassionately. Such is the ideal, anyway.

Edward Lazarus dashes these romantic notions in his provocative new book, *Closed Chambers*, an insider's exposé of the United States Supreme Court. According to Lazarus, the modern Court is as politicized, and polarized, as any institution in America.

Lazarus served as law clerk to Justice Harry A. Blackmun during the October 1988 Term. As a liberal clerk to a liberal judge, Lazarus found himself engaged in a desperate struggle inside the Court against the rising tide of conservatism, which has been swelling slowly but steadily ever since liberalism reached its zenith in the 1960s under Chief Justice Earl Warren. As Lazarus paints the scene, most Justices have bunched into two entrenched political camps, liberal and conservative, fiercely opposed on many issues, neither side speaking to the other except through formal channels — and even then only when necessary. Lazarus explains how this dismaying state of affairs came to pass, describing its corrosive effect upon the Court's process of constitutional interpretation.

The three liberal stalwarts on the 1988-89 Court were old (all of them at least 80) and sick. William J. Brennan, an icon of the Warren Court, had served since 1956. Thurgood Marshall, a patriarch of the Civil Rights Movement, joined the Court in 1967, near the end of the Warren era. Blackmun arrived at the Court in 1970. A fourth Justice, John Paul Stevens, age 68, often voted with the liberals; he had served since 1975.

The ascendant conservative Justices were generally younger and more vigorous. William H. Rehnquist, age 64, originally a Nixon appointee, had succeeded Warren Burger as Chief Justice in 1986. The firebrand Antonin Scalia, age 52, was a 1986 appointee of President Reagan. Byron R. White, 71, a former football star and Rhodes scholar, had grown increasingly conservative since his appointment by President Kennedy in 1962.

Two Justices were less predictably conservative. Sandra Day O'Connor, age 58 and a Reagan appointee, often (but not always) voted with the conservatives; she provided a swing vote on some issues. Anthony M. Kennedy, 52, was new at the Court, appointed by President Reagan in 1988 after the Senate's tumultuous rejection of Robert Bork. Kennedy had not fully revealed his political colors, but the liberals feared the worst.

Lazarus regards the October 1988 term as among the most significant in Supreme Court history. Not only did landmark rulings issue on topics important to all Americans, but in reaching their decisions the Justices seemed only to deepen their disharmony and polarization. Lazarus takes as his main text three areas of constitutional law and societal discord — the death penalty, race discrimination and abortion — and traces the history of events leading to the fragmented Court's decisions in those areas. This is not the place to replicate that history in detail, but the cases warrant a brief retelling.

With regard to the death penalty, Lazarus documents a pattern of racial bias in its application, starting in the 1930s with the Scottsboro Boys, who ultimately escaped execution in Alabama after two successful appeals to the Supreme Court. In the October 1988 Term, a sharply divided Court issued 5-4 decisions in three death-penalty cases: *South Carolina v. Gathers,* 490 U.S. 805 (1989) (reaffirmed holding of *Booth v. Maryland,* 482 U.S. 496 (1987), that the prosecutor cannot introduce victim-impact statements in capital sentencing proceedings); *Penry v. Lynaugh,* 492 U.S. 302 (1989) (Eighth Amendment does not prevent states from executing mentally retarded persons; but by a different 5-4 majority, with O'Connor the swing vote, the Court held that jurors deciding whether to impose death can consider evidence of mental retardation as a "mitigating factor"); and *Stanford v. Kentucky,* 492 U.S. 361 (1989) (Eighth Amendment does not prevent the execution of juveniles 16 and 17 years old). Because death-row inmates are

disproportionately black, these cases will affect the black population most. And in *Teague v. Lane,* 489 U.S. 288 (1989), a case in which a black criminal defendant in Illinois protested the prosecutor's use of peremptory challenges to exclude black jurors, the Court adopted restrictions on the use of federal habeas corpus that, in Lazarus's view, set the stage for a conservative "habeas revolution" in the courts (pages 504 and 510).

In the area of race discrimination and affirmative action, a divided Court decided three cases — *Wards Cove Packing Co., Inc. v. Antonio,* 490 U.S. 642 (1989); *Martin v. Wilks,* 490 U.S. 755 (1989); and *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989) — that, according to Lazarus, Congress nullified by passing the Civil Rights Act of 1991. But one other affirmative-action case from the October 1988 Term survived: *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). Lazarus tells how in *Croson,* a case involving the constitutionality of minority business set-asides, a majority of the Court adopted the same strict-scrutiny standard of review for state affirmative-action programs that had been applied to measures discriminating *against* minorities. Summing up the Justices' several conflicting opinions in *Croson,* Lazarus describes the result as "a multifaceted sham that only confirmed the worst view each side held of the other: that the conservatives didn't give a damn about racial justice and that the liberals lived in a self-righteous haze that warped their vision of morality and law" (page 306).

On the subject of abortion, the big case — the one both sides had anticipated with a mixture of hope and dread — was *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), the Court's revisiting of *Roe v. Wade,* 410 U.S. 113 (1973). In the end, after much backroom maneuvering detailed by Lazarus, the Court upheld Missouri's restrictive abortion law by the slimmest of margins. Chief Justice Rehnquist wrote a plurality opinion joined by Justices White and Kennedy, with separate and widely disparate concurrences by O'Connor and Scalia. Justices Blackmun (author of *Roe*), Brennan, Marshall and Stevens filed two dissents. Although the anomalous result of these opinion fragments was to preserve *Roe,* Lazarus acknowledges *Roe*'s precarious foothold at the Court, sharing Blackmun's concern that "a chill wind blows" against its future (page 419).

**The upshot of delegating nearly all writing to the law clerks is that most Justices are left to function as editors, giving overall guidance to the clerks and tinkering with clerk drafts, but rarely crafting their own opinions.**

According to Lazarus, a "cabal" of 10 conservative law clerks, most of whom were members of the Federalist Society and worked for conservative Justices, labored strenuously behind the scenes to reinforce their bosses' conservative instincts and to persuade anyone on the fence, especially O'Connor and Kennedy, to go their way. Lazarus himself was among a larger but relatively unorganized group of liberal clerks who tugged in the opposite direction, battling to preserve whatever they could of the Warren Court's legacy.

An underlying theme of *Closed Chambers,* which will come as a revelation to many readers, is the extent to which competing factions of liberal and conservative law clerks influence the content of opinions, the outcome of cases, and even the Court's decisions whether to grant certiorari in the first place. Lazarus says that of all the Justices in the 1988 Term, only Scalia and Stevens regularly drafted their own opinions. The others left virtually all drafting to their law clerks. The clerks also write bench memos to their own Justices, ghost-write memos to other Justices on disputed points in opinions being hashed out, and, as members of the "cert. pool," write memos recommending whether the Court should grant certiorari in particular cases. This last duty, although inherently tedious because of the sheer volume of cert. petitions filed each term, can have momentous consequences: A law clerk has the power to slant facts and law in a cert. memo, thereby influencing whether a petition will garner the four votes necessary for the Court to accept review.

The upshot of delegating nearly all writing to the law clerks is that most Justices are left to function as editors, giving overall guidance to the clerks and tinkering with clerk drafts, but rarely crafting their own opinions. That picture, if true, goes a long way toward explaining why the legendary judicial stylists of the past — Holmes and Cardozo come quickly to mind — have few modern counterparts. If youthful law clerks are doing all the writing, Justices are denying themselves the personal opportunity to craft memorable judicial prose. More significantly, they are not subjecting themselves to the discipline of working out the *substance* of constitutional analysis on paper. (Those who take it upon themselves to write an opinion sometimes find that the trail of logic leads to a different place than where they thought they could go.) Lazarus writes ironically of Justice Kennedy's forlorn request to a law professor to find him a clerk "who could write like Oliver Wendell Holmes" (page 428). If the judge could not be a phrase-maker, a law clerk might be found who could.

Summing up the outcome of the doctrinal struggles of the October 1988 Term, Lazarus describes it as a "mismatch of vaguely pathetic liberal rage against the bullying swagger of ascendant conservatism" (page 419). But Lazarus does not aim his criticisms exclusively at conservative Justices and their clerks. Evenhandedly, he documents many instances of hypocrisy and connivance in the formulation of liberal Justices'

opinions. When it comes to the Supreme Court, Lazarus is, at bottom, an idealist. His book cries out for a return to civility, open communication, the application of *stare decisis,* and principled decision-making by the Justices — all of them.

In the years since Lazarus left the Court, in his view the situation has not improved. After the retirements of Brennan, Blackmun, Marshall and White, and their replacement by Justices Souter, Breyer, Thomas and Ginsburg, the Court remains in "two camps divided intractably over the pressing issues of the day," where the majority "insists on making huge legal leaps on the slim authority of five votes triumphs over four" (page 514). Nowadays, the conflict essentially boils down to the conservatives' push to restore power to the states in the name of federalism, versus the liberals' dogged belief that the national government usually serves best. The conservatives usually prevail, with Kennedy and O'Connor providing the decisive votes. And ideologically zealous law clerks of both stripes still exert too much influence.

There is much more in *Closed Chambers.* Lazarus retells the politically charged confirmation hearings of Robert Bork (1987) and Clarence Thomas (1991). Lazarus describes the astonishingly intense political pressure brought to bear on the Court by both sides in the abortion debate. He shares the experience of applying and interviewing for a Supreme Court clerkship. He discloses details about the inner workings, physical layout and customs at the Supreme Court — things unknown to most lawyers.

Some readers will condemn this book's breach of the code of silence attached to all judicial clerkships. Law clerks are supposed to keep to themselves the intimate behind-the-scenes details to which they are privy. But this taboo does not deter Lazarus from gossiping freely about individual Justices, their pettiness as well as their brilliance. He obviously dislikes some, including Chief Justice Rehnquist. Lazarus says that during the 1988 Term, a group of law clerks complained to the Chief that the Court's practice of erecting a Christmas tree and playing Christmas music compromised its objectivity in "establishment of religion" cases. Rehnquist waved the clerks away.

Lazarus regards his former boss, Harry Blackmun, as a great man and a quiet hero. And although Lazarus admits that Blackmun "will not agree with some of the views" expressed in the book, he must know that this is an understatement. Any Justice, past or present, would wince at this exposé of the Court's deliberations and personalities.

Lazarus is an excellent writer, and for the most part the book flows, informs and even fascinates. But this book is not for everyone. Its audience will consist mainly of lawyers, judges, and students of Supreme Court history and constitutional law. Even lawyers with a scholarly bent will find it occasionally too trivial, analytically dense and somewhat repetitive. Those who cheer the demise of Warren Court liberalism will not share the author's sense of loss.

*Closed Chambers* performs a valuable service by ventilating much of the mystery shrouding the Supreme Court. If, in doing so, the book embarrasses some and feeds the cynicism of many, the price is not too high, for the glare of public scrutiny can bring a welcome corrective to institutions of government. We cannot expect Supreme Court Justices to put political ideology entirely aside. But Lazarus may at least nudge the Justices toward adopting a higher degree of civility and communication among themselves, ultimately resulting in more principled, less politically driven decisions. The Republic could only benefit from that.

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*Mark H. Adams is a staff attorney at the Washington Court of Appeals, Division Two (Tacoma).*

## Poetry in Law

### Motion Day

The weekly one-acts will soon begin;
Perhaps like Vaudeville used to play.
I'm down the bill a bit this day,
So there is time to gauge the troupe's performances.

With sonorous style and solemn nods,
The first two tread the boards.
Seems boggling that they could both locate
Striped suits in fabric so pitch-blue.
They hardly speak above a whisper,
And the Judge must even crane to hear.
Their words so profound and weighty,
All that's missing is "M' Luds" —
Or perhaps a *Pater Noster.*

The next pair's mismatched, no bookends these:
He has arms and legs akimbo,
With an argument to fit.
If a point in each direction
Is really no point at all, then
He ran the compass rose around
And mystified the Hall!

The deep-browed frown's ill-suited as her style;
More effective than a strident scowl
'Twould be to risk a smile.
Her message must be somewhat less
Than a Proclamation of War!
One wonders if the Judge is swayed
By all the furious sound conveyed.

The time grows near to speak my lines,
So no more can I mimic.
The resident critic in the House
Will soon rate my own discourses.
Then when my scene has curtained,
I'll leave the stage to Actresses
And Actors yet to try their roles.
They may wonder why I played mine so,
And how they might do better.

Next week is soon upon us;
The cast will change, the lines will too —
More drama and comedy are sure to ensue,
Ah, yes; the Play's the Thing!

*Dan Caine*

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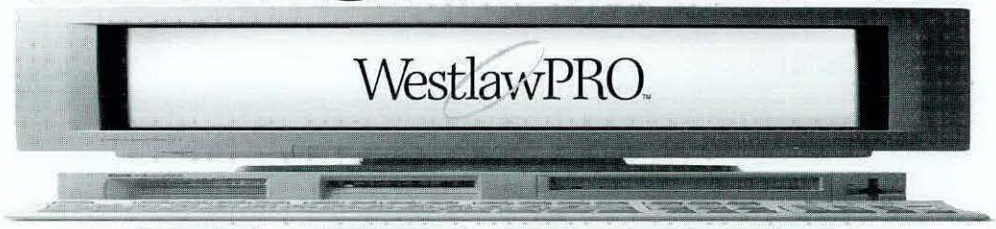


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# Getting the Small Law Office Up and Running

**by Marty Potter**
*Law Office Management Assistance Program Advisor*
**and Zella Ozretich**
*Lawyer Services Coordinator*

The WSBA's Law Office Management Assistance Program, part of the Lawyer Services Department, started as an advisory committee in the Fall of 1997. The committee quickly decided that they could best serve the needs of solo and small-firm practitioners by creating a manual to guide lawyers through the process of starting their own firm. The result of a year's work by dedicated committee members is *Up and Running: Operating Instructions for the Small Law Office.*

The Law Office Management Assistance Program (LOMAP), in operation since August 1998, is available to all members of the Washington State Bar, and is particularly aimed at solo and small-firm practitioners. The program provides low-cost, professional assistance with office management questions and/or problems.

LOMAP's services (delivered either by on-site or telephone consultation) include: general "preventive maintenance" reviews; consultation on specific problems, systems or procedures; reference materials for office and practice set-up; and referrals to outside consultants and vendors suitable to a lawyer's specific practice needs. Concerns outside of the office management area can also be referred to other Lawyer Services Department programs such as Ethics Assistance, Alternative Dispute Resolution or Mediation, and for personal problems, the Lawyers' Assistance Program (LAP).

The LOMAP Manual, *Up and Running: Operating Instructions for the Small Law Office*, is a tool that can be used in conjunction with other LOMAP services, or on its own for lawyers who do not require one-on-one assistance. All solo and small-firm practitioners sooner or later realize that they were never taught how to run a business in law school. Yet those are exactly the skills needed to run the administrative side of a law office. Many small-firm lawyers have had to learn business skills by the "sink or swim" method. In a nutshell, *Up and Running* is "written swimming lessons." Having this manual as a reference can help lawyers avoid problems before they occur.

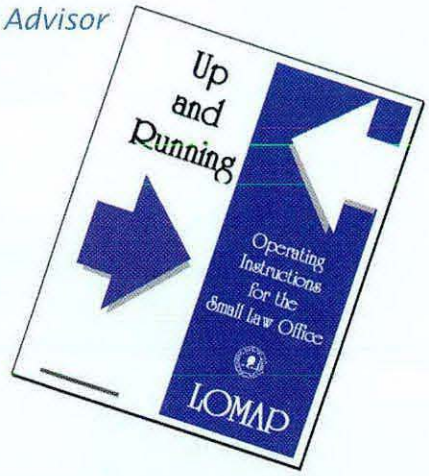
*Up and Running: Operating Instructions for the Small Law Office* consists of seven chapters covering:

**1) The Business Plan**
The premise of this chapter is that it is necessary to plan for success (one who does *not* plan courts failure). Every solo practitioner and small firm needs a plan to stay on track and to reach its goals.

**2) Facilities**
This chapter covers the process required when deciding what type of office to have, where to locate the office and how to find space.

**3) Operations**
Operating an office covers a wide range of issues including time management, staffing, retaining clients, calendaring and docketing, records management, library, office manuals, and disaster recovery planning.

**4) Client Relations**
Without clients, a law firm has no reason to exist. This chapter is full of ideas on how to serve clients in the best manner possible.




**5) Financial Management**
This chapter provides an overview of the financial aspects of running a law firm.

**6) Technology**
Technology is an integral part of today's practice of law. This chapter offers assistance with the design and installation of hardware and software to maximize office efficiency.

**7) Ethics**
Sometimes business choices may conflict with ethical considerations. This chapter identifies the specific ethical issues that a lawyer must consider when making business decisions. A portion of the discussion includes frequently asked questions and answers in keeping with the Rules of Professional Conduct.

These chapter topics and brief summaries give just a sample of the information included in *Up and Running.* This book is filled with down-to-earth, practical advice on how to efficiently run a small law office.

Washington solo and small-firm practitioners should be aware that the LOMAP manual and the LOMAP program are both available as resources. Copies of *Up and Running* may be obtained for $40, plus tax and shipping, by calling

the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. To schedule a LOMAP consultation or for questions on Law Office Management issues, call program advisor Marty Potter at 206-727-8237.

The LOMAP Advisory Committee members, all of whom contributed substantial time and knowledge to create this manual, include: **Randy Beitel**, WSBA Disciplinary Counsel; **Ann Guinn**, Law Office Consultant; **Barbara Harper**, Director WSBA Lawyer Services Department; **David Hedger**, Lawyer; **Sherry Johnson**, WSBA Information Systems Manager; **Rick Kimbrough**, Lawyer; **Marijean Moschetto**, Lawyer; **Rebecca Nerison**, WSBA Lawyers' Assistance Program Psychologist; **Marty Potter**, WSBA Law Office Management Assistance Program Advisor; **Peter Roberts**, ALA Bar Liaison; **Richard Schenkar**, Lawyer; **Chris Sutton**, WSBA Professional Responsibility Counsel; and **Darcia Tudor**, Lawyer.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# The Board's Work

*by Sherrie Bennett*

**Gearing Up the Legislative Machinery**

The Olympia siting of the January 8-9 meeting of the WSBA Board of Governors was fitting, given the Board's discussion of upcoming legislative matters. WSBA lobbyists John Fattorini and Gail Stone and court lobbyist Chuck Foster briefed the group on some of the bills for consideration in the coming legislative session (some of which are highlighted in the "Legislative News" article on page 46 of this issue of *Bar News*). The Board voted unanimously to adopt a resolution in support of the proposed Court Improvement Bill. Governor Powers noted that funding legal services was the "right thing to do" and that the resolution demonstrated good cooperation with the Courts. Governor Powell remarked that some judges resist funding civil indigent legal services by raising filing fees, but that this was a "necessary evil" in light of the critical need for legal services funding.

Each Wednesday beginning on January 20, there will be a legislative committee meeting via telephone, with Board of Governors phone conferences to be scheduled if immediate Board input is necessary.

The Board also endorsed a proposed constitutional amendment requiring a specified number of years of practice before lawyers would be eligible to run for various court judgeships.

**Guidelines for Mediation Program Approved**

The Board adopted new guidelines for implementing proposed ARP 18, which has been submitted to the Supreme Court for review.

**Criminal Law and Intellectual and Industrial Property Section Dues Increase**

At the request of both WSBA sections, minimal dues increases were approved by the Board. These increases will be effective retroactively from October 1998 for the 1999 year.

**Long Range Strategic Planning**

The Board met with consultant Chris Veit to discuss proposed methods for gathering member input as to how the WSBA can best serve members. After a long and somewhat heated discussion, the Board endorsed the concept of a member survey (in the March issue of *Bar News*) and "stakeholder interview meetings" with specific targeted member groups. The Board also explored the possibility of in-person meetings with members around the state, with decided disagreement on the format and topics appropriate for the meetings. Ultimately, these issues were referred back to the Long Range Planning Committee for further discussion. Each governor will provide at least five proposed survey questions to Executive Director Michels for collation.

**RPC Committee Recommendations for Formal Opinion Regarding Outside Audit of Attorney Billing**

Nick Wagner and Brian Putra presented to the Board a revised version of a formal opinion on the topic of outside auditing (often at the request of insurance companies) of attorney billing. The Board is expected to make a decision on this matter at the February 12-13 Tacoma meeting. The complete version of this proposed formal opinion can be accessed at http://www.wsba.org/barnews.html.

**Consumer Protection Committee Report**

Peter Harris presented a report regarding the Consumer Protection Committee's recent work and obtained the Board's permission for the Consumer Protection Committee to support proposed legislation to increase the civil penalty for violation of the consumer protection act from $10,000 to $35,000.

**Access to Justice Report**

Ken Davidson discussed the highlights of the most recent Access to Justice Report with the Board. He reported that the CLEAR line of statewide referral and information sharing will be completed in January with the installation of services for the King County area. The Access to Justice conference will be held this year in conjunction with the Board's June 25-27 meeting in Wenatchee.

**LASER Project Report**

Mary Barrett presented a report on the Lawyers and Students Engaged in Resolution Project, which continues to grow with the addition of many more lawyer volunteers. The project, which is sponsored by the Superintendent of Public Instruction, WSBA and the Attorney General, assists Washington schools in developing and sustaining peer mediation and conflict resolution programs. Interested volunteers can call 360-586-7671 for information.

**Future Government Lawyers Section?**

Former Governor Bill Nielsen discussed with the Board the possibility of the formation of a WSBA Government Lawyers section, potentially functional by the end of 1999.

**International Section Bylaw Changes Proposed**

Michael Herbst presented a set of section bylaw changes which have been approved by the Section. The issue of whether it is appropriate to conduct official business without a business meeting, using only electronic communication (in potential conflict with open-meetings requirements), was referred back to the Section. The Section is expected to address this issue at the Board's June meeting.

**Personnel Committee Report**

Governor Theiler presented a proposed Executive Director evaluation process and timeline. A proposed charter for the Personnel Committee was approved by the Board.

**"Celebration 2000" Plans Continue**

President-elect Eymann reported that WSBA, Access to Justice and court personnel groups have fixed on September 13-17, 2000 as the date for the WSBA's "Celebration 2000," expected to be the closest thing to a bar convention the WSBA has seen in many years. The Spokane Bar Association has agreed to be the host bar association.

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# Legislative News
## as of January 13, 1999

*Bill numbers are included where available. As we went to press three days into the legislative session, only a few bills had been introduced.*

**Judicial Qualification:**
Chief Justice Guy is requesting a constitutional amendment to require minimum qualifications for judges. The joint resolution requires a minimum 10 years of practice in Washington State for eligibility to the Supreme Court, seven years for the Court of Appeals, and five years for Superior Court.

Moving in the opposite direction, Sen. Bob McCaslin has introduced SB 5116, which eliminates the current five-year minimum for Court of Appeals judges and eliminates all qualification requirements for district court judge except the requirement that a candidate be a registered voter in the district court or electoral district.

**Adverse Possession:**
Two bills have been introduced. Rep. Mary Skinner is the prime sponsor of HB 1038, which provides a 20-year statute of limitations for actions to recover real property and repeals the entirety of RCW 7.28, Ejectment, Quieting Title. Sen. Mike Heavey is the prime sponsor of SB 5129, which codifies the elements of adverse possession, adds an element of "honest belief," and requires all elements be proven by clear and convincing evidence.

**Employment Discrimination:**
Sen. Jeanne Kohl-Welles is the prime sponsor of SB 5130, which extends the employment discrimination statute, RCW 49.60, to employers who employ one or more persons. The law currently applies to those who employ eight or more persons.

**Unified Family Court:**
Part of the Supreme Court's legislative package, this bill provides for unified family court pilot projects in at least three counties of varying sizes. These courts would be a division of superior court and would handle all civil matters dealing with families, including dissolution, paternity, domestic violence and truancy.

**Parental Relocation:**
A hotly debated issue; there will likely be at least two proposals to respond to the Supreme Court's decision in *Littlefield*. Both provide notice provisions but differ on the threshold for determining when a relocation triggers a change in primary residence of the child.

**Shared Parenting:**
Expect a bill similar to last year's HB 2407, creating a presumption that each parent will have at least one-third of all residential time.

**"Friendly Parent" Presumption:**
This idea was introduced last year in HB 2406. It amends RCW 26.09.187(3) by including as a factor in establishing a parenting plan an examination of which parent is more likely to encourage the child's relationship with the other parent.

# Changing Venues

### Building a Different Kind of Foundation

Spokane lawyers and legal personnel calling themselves "Corpus Juris Spokanum" have begun building the foundation of a Habitat for Humanity house. Volunteer coordinators are **Dave Thorn** and **Art Hayashi.**

### What Do the Arts and Lawyers Have in Common?

No, this isn't some bad lawyer joke. The Arts Legal Clinic, beginning its fourth year in Seattle, is a volunteer service offered by Washington Lawyers for the Arts which provides artists and arts organizations with advice on specific art-related legal questions. To volunteer, call Natalie-Pascale Boisseau at 206-328-7053.

*Douglas L. Cowan*

*Vernon A. Smith*

*Gary F. Farrall*

*Rainier A. Frank*

### Thumbs Up to...

the attorneys at the Marler Clark firm for donating $5,000 to the Bailey-Boushay House in Seattle. Attorney **Denis Stearns** from Marler Clark, who has acted as General Counsel for an organization known as the "Bunny Brigade," acknowledges that he has been seen wearing bunny ears and selling Easter eggs to raise money for AIDS-related charitable organizations.

### Honors and Awards

The King County Bar Association recently gave a special thanks to the following attorneys for their work with Volunteer Legal Services: **Christine Cole, Stephen Moriarty, Barbara Kochan, Laurence Shaw, Janet Irons, Bradford Anderson, Fred Betts, Norman Winn, James Baker, Ann Whitmore, Tom Kelly, Peter Perron, Howard Pruzan, Michael Leong, Geoffrey Patterson, Karen Bertram, Matthew LeMaster, Robin Lester, Aimee Willig, Jacqueline Bell and Mike Gearin.**

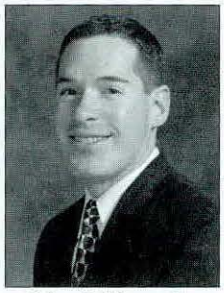
Seattle's own Perkins Coie LLP firm was ranked by *American Lawyer* magazine as the best place on the West Coast to work, according to a national survey of mid-level and summer associates. The magazine polled nearly 8,000 associates and law students who had served as summer associates on such topics as whether the work they did was interesting and how they were treated by partners.

### Movers and Shakers

Four attorneys have been elevated to senior attorney status at Bogle & Gates PLLC in Seattle. **Kimberley R. Anderson** assists clients with private placements of securities, initial and secondary stock offerings, and merger and acquisitions, as well as compliance and reporting matters under the federal securities laws. **Scott M. Edwards**' practice focuses on securities litigation, and representing brokerage firms in customer and employment disputes. **Wendy S. Goffe**'s practice emphasizes estate planning, estate and gift taxation, probate and trust administration, family-owned business succession planning, charitable giving, and nonprofit trusts and corporations. **Steven Winters**' practice concentrates on intellectual property, including copyright trademark and contract-related matters as they pertain to the areas of entertainment, multimedia, computer, Internet and technology-related matters. The firm has also added three new members: **John F. Boespflug, Jr.** in the construction and design law practice group, **Craig S. Gilbert** in the real estate law practice group, and **Patrick M. Madden** in the employment law practice group.

*Tracie D. Paul*

*Lee B. Tinney*



*Brian J. Meenaghan*

Bellevue attorneys **Douglas L. Cowan** and **Vernon A. Smith** have joined forces to form The Cowan Law Firm, concentrating in DUI defense work.

**Leonard Feldman** has become a shareholder in Heller Ehrman White & McAuliffe's Seattle office. The firm has also tapped **Michael R. Thorp** as the new chair of its Environmental Practice Group.

The Spokane firm of Paine, Hamblen, Coffin, Brooke & Miller, LLP has recently added **Stephanie G. Holder** and **Travis L. Sines** as associates.

Everett's Anderson Hunter PS firm has welcomed **Gary F. Farrall, Rainer A. Frank, Tracie DeMatteis Paul** and **Lee B. Tinney** as new associates.

**William Andrew Myers** has joined the Spokane firm of Huppin Ewing Anderson & Paul PS as an associate. His practice will emphasize commercial litigation, creditor-debtor and bankruptcy work.

**Brian J. Meenaghan** is the new associate at Lane Powell Spears Lubersky LLP in Seattle. He will concentrate his practice in the areas of commercial litigation, hospital and professional malpractice law.

Layman, Layman & Fennessy in Spokane have added two new associates: **Jim A. Bledsoe** and **Katherine M. Jensen.**

**Tisha F. Pagalilauan** and **Jason D. Ryning** have joined Lee, Smart, Cook, Martin & Patterson, PS, Inc. as associates in the civil litigation area.

### In Memoriam

**George Robinson Huff** passed away on November 22, 1988 at the age of 68. A former president of the Adams County Bar Association, he was a Judge Pro Tem for the Adams County Superior Court.

# Billing Ethics

**by Barrie Althoff**
*WSBA Chief Disciplinary Counsel*

In three recent lawyer disciplinary opinions, the Washington State Supreme Court has provided important guidance to lawyers about the ethics of fees and billing: *In re Discipline of Dann*, 136 Wn.2d 67 (1998); *In re Discipline of Haskell*, 136 Wn.2d 300 (1998); and *In re Discipline of Heard*, 136 Wn.2d 405 (1998). This article first reviews provisions of the Rules of Professional Conduct (RPCs) that relate to billing and fees,[1] and then looks at those three opinions.

**Billing clients is another form of communication with a client. When we bill our clients, we must be honest with them and not lie to them.**

## RPC Provisions Relating to Fees/Billing

### *Fees Must be Reasonable*

The RPCs set out several requirements relating to fees and billing. The most directly relevant is RPC 1.5. RPC 1.5(a) requires fees to be reasonable and states that the factors to be considered in determining whether a fee is reasonable include: (1) the time and labor required, the novelty and difficulty of the questions involved, and 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. It is also unreasonable for a lawyer to charge lawyer rates for performing services that could equally well be performed by a nonlawyer staff member with a lower billing rate.[2]

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

### *Communication of Fee Basis and Practices*

RPC 1.5(b) requires us to communicate to new clients and, if our fee arrangement is now different from what we have used in the past with a client, to that past client, "the basis or rate of the fee or factors involved in determining the charges for legal services and the lawyer's billing practices." This basically elaborates on our RPC 1.4 duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. RPC 1.5(b) also requires that on request of a client we must communicate with them *in writing* the basis or rate of the fee.

### *Honesty in Billing*

Billing clients is another form of communication with a client. When we bill our clients, we must be honest with them and not lie to them. This is required by RPC 8.4(c) which provides that "[i]t is professional misconduct for a lawyer to: . . . (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

### *Contingent Fees Permissible*

RPC 1.5(c) generally permits contingent fee agreements, except those prohibited by RPC 1.5(d), namely, in criminal cases and in certain domestic relations cases. RPC 1.5(c)(1) requires contingent fee agreements to be in writing and to "state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." RPC 1.5(c)(1) also requires that upon conclusion of a contingent fee matter, we must provide our client with "a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination." RPC 1.5(c)(2) requires that a "contingent fee consisting of a percentage of the monetary amount recovered for a claimant, in which all or part of the recovery is to be paid in the future, shall be paid only (i) by applying the percentage to the amounts recovered as they are received by the client or (ii) by applying the percentage to the actual cost of the settlement or award to the defendant."

### *Division of Fees between Lawyers*

RPC 1.5(e) prohibits the division of fees between lawyers who are not in the same firm (other than with an authorized lawyer referral service), unless the division is in proportion to the services provided by each lawyer, or, if the client agrees in writing, each lawyer assumes joint responsibility for the representation, the client is advised of and does not object to the participation of all the lawyers involved, and the total fee is reasonable.

*Sharing Fees with Nonlawyers Prohibited*

RPC 5.4(a) prohibits a lawyer from sharing legal fees with nonlawyers. In certain cases, fees may be shared with the estate or designees of a deceased lawyer, and may be shared with nonlawyer staff of a law firm through the firm's compensation and retirement plans.

*Preserving Client Property*

RPC 1.14 requires lawyers to preserve the identity of client funds and property, including as-yet-unearned legal fees, by maintaining them in trust accounts.

*Possible Refund of Advance Fees on Withdrawal*

RPC 1.15(d) requires that when a lawyer withdraws from a representation the lawyer must take steps to protect the client's interests, including "refunding any advance payment of fee that has not been earned." Thus, the lawyer must evaluate his or her performance and determine if he or she has or has not earned the fee, and if not, refund the unearned portion.

**Recent Supreme Court Decisions**

*The Dann Case*

In *In re Discipline of Dann*, the Court unanimously suspended a lawyer from the practice of law for one year for misrepresentations in billing statements to his clients. The lawyer billed clients on an hourly basis. Lawyers and staff members recorded their time spent on client matters, with those entries then being collected in periodic work-in-progress (WIP) statements, which listed each person's time, billing rate, service rendered and client identification. Final billings were then prepared from these.

The lawyer in this case switched initials on a number of the work-in-progress statements, giving one person credit for work performed by another. The result was that a client reading the final bill would be misled as to who did the work for the client. If the billing rates differed between the person identified as doing the work and the person who actually did the work, the client might also be paying more or less for the work than the client should have paid.

Although the lawyer had also been specifically directed by the client, and agreed, not to use a particular support person on the lawyer's staff for the client's work, the lawyer used that person. The lawyer then switched the staff person's initials on the work-in-progress statement so that the client would not know the unauthorized person was doing the work. Another client had directed the lawyer, and the lawyer had agreed, to use a particular support person on his work. The lawyer instead used another support person and switched initials on the work-in-progress statements so that the client mistakenly believed the designated person was doing his work, when in fact another person was doing it. In other cases, work was done by a lower-paid associate in the lawyer's firm for a particular client, but the lawyer switched the lawyer's own initials (and higher billing rate) for those of the associate, such that the final bill gave the impression that the lawyer, and not the associate, was doing the client's work.

The lawyer, while keeping track of time he spent on client matters, did not keep records contemporaneously. Instead, "[he] would often write billing information on pieces of paper and then put them in his time book so that he could later remember what work he had done. At the end of the month . . . [the lawyer] would reconstruct the time that he had worked from these pieces of paper and dictate it for entry into the WIP format. He would also jog his memory concerning his billable hours by reviewing the WIPs for his associates."[3]

The hearing officer found the lawyer had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of RPC 8.4(c). Or, as Justice Alexander, writing for the Court, stated, "Simply put, the question is whether the attorney lied. No ethical duty could be plainer. However, [the lawyer's] . . . argument talks around the fact that he *lied* to clients about who was doing their legal work. He does not deny initial-switching. Rather, he offers various explanations as to why this lying occurred. That goes to mitigation and not to the truth of the underlying charges."[4]

The Court rejected the lawyer's attempts to justify the misrepresentations on the basis of belated billing or non-contemporaneous recordkeeping. The Court quoted approvingly,[5] several federal court opinions: "The Tenth Circuit has written that 'we believe that reconstructed records generally represent an overstatement or understatement of time actually expended.' [Cite omitted.] The Second Circuit has noted that '[t]here is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records.' [Cite omitted.]" The Court went on to cite several Washington Supreme Court opinions to the effect that the attorney-client relationship is a fiduciary one and thus the lawyer owes the highest duty to the client, but that in this case the lawyer's "actions are not in keeping with the high responsibility that rests with attorneys. Lying to client is an assault upon the most fundamental tenets of attorney-client relations."[6] The Court concluded its opinion by citing one of its own previous opinions to the effect that "[t]he duty of this court is to protect the public from dishonest, deceitful lawyering."[7]

*The Haskell Case*

The Washington Supreme Court continued its examination of honesty in lawyer billings in *In re Discipline of Haskell*, with another opinion by Justice Alexander. In this case the Court suspended a lawyer from practice for two years for initial-switching, making false representations on travel expenses and billing clients for personal expenses.

The lawyer revised draft bills similar to the work-in-progress statements of *Dann*, switched initials of lower-paid associates to his own, and then sent his clients bills indicating he had done work actually done by others in his firm. The hearing officer found that the lawyer did this not for financial gain but to retain his clients, since his clients had expected the lawyer personally to do the work.

Although the lawyer was directed by a client to fly coach class rather than the more expensive first class, the lawyer in fact flew first class. He then billed his client for the higher fare, misrepresenting it as the fare for coach-class ticket. He docu-

mented this by securing a false travel voucher indicating that the travel was for coach-class but reflecting the higher first-class fare. He then obtained reimbursement for his actual expenses which were greater than the amounts to which he was entitled to receive. The lawyer also billed the client for other higher-priced tickets than those he actually used, and used the excess reimbursements he received to pay for personal travel expenses of himself and his wife. The lawyer also billed personal telephone calls to his client. The hearing officer found these acts constituted ethical violations under, among other things, RPC 1.4(b) (communication with client), 1.5 (unreasonable fee), and 8.4(c) (dishonesty). The hearing officer and the Disciplinary Board (by a vote of 10-1) recommended that the lawyer be disbarred. The Supreme Court instead suspended the lawyer for two years, citing its recent *Dann* decision as a basis for its lower sanction.

The Court's opinions in the *Dann* and *Haskell* cases should lead to some records-searching, if not soul-searching, by lawyers as to their own honesty in billing their clients. If you bill clients on a time-spent basis, you clearly may not switch initials of who performed the work, even if the switch does not result in additional fees to clients. Nor may you bill your clients for personal expenses. Nor may you bill your clients for expenditures at a rate higher than you actually incur. If your client has told you to limit the expenditures, you may not bill the client for amounts in excess of that limitation even if you actually incur those added expenses.

Equally important, the *Dann* and *Haskell* cases also make it clear that, unless you have your client's specific permission, you may not "value bill" your client by adjusting upward the amount billed to reflect your special expertise, an especially favorable result or your efficiency. If you or your firm, for example, have performed a particular legal service in the past so that now, with the use of your in-house forms and procedures, you can accomplish it in, say, one hour, whereas most other attorneys would take four hours, you may not bill your client for any more time than you actually and reasonably expend on the project. Or, if your partner, associate, secretary or paralegal perform services for your client, for example, you may not instead simply put their time under your own initials, even if you reduce the amount of time reflected so that there is no overbilling in amount. Instead, you need to reflect their work for your client honestly and openly with your client.

The Court's opinion in *Dann* also makes it clear that if you bill on a time-spent basis, you must keep contemporaneous and accurate time records. It is not acceptable to attempt to reconstruct your actual time by relying on memory, on miscellaneous unorganized scraps of paper, on comparisons to the time expended by others working on the project, or by evaluating the complexity or extent of the work-product ("I usually take one-half hour to write a letter," or "this is an excellent brief, it must have taken me at least eight hours to write") to jog your memory. This need for accurate and contemporaneous records may be most important to lawyers who traditionally bill on a time-spent basis, but it can also be important to others. For example, lawyers who enter a contingent-fee agreement with clients may find that, for whatever reason, they do not complete the representation, yet believe they are entitled to some compensation. If they seek compensation it will likely be on a *quantum meruit* basis and they will likely need to be able to prove the time they actually spent on the matter. Unless they have kept accurate contemporaneous time records, they are unlikely to be able to do so.

**The Court's opinion in Dann also makes it clear that if you bill on a time-spent basis, you must keep contemporaneous and accurate time records.**

### *The Heard Case*

The third of the Court's recent fee-related lawyer disciplinary opinions is *In re Discipline of Heard*, wherein the Court suspended a lawyer for two years from the practice of law. Unlike *Dann* and *Haskell*, which were primarily fee/billing cases, *Heard* involved both a lawyer's mishandling of a client's personal injury settlement and his contingent fee, as well as the sexual exploitation of that client, an issue not relevant in this discussion. The Court's opinion, by Justice Talmadge, as it related to the financial issues, was concurred in by six other justices, with two justices (Sanders and Dolliver) dissenting. The sex-with-client aspect of the case divided the Court 6-3, with Justice Johnson joining the dissent.

In *Heard*, a lawyer represented a 23-year-old woman seriously head-injured as a passenger in a motorcycle accident, as a result of which she was comatose for a week and remained hospitalized for several weeks thereafter. The lawyer entered a written ⅓ contingent fee agreement with the woman's mother to represent the woman. The lawyer sought and obtained from insurers $50,000 in payments. By way of a lawsuit he also recovered various other assets, substantially all of which were of highly questionable value, which he valued at $100,000. He then took all $50,000 of the cash insurance proceeds as his ⅓ fee, leaving the other questionable assets for his client. The lawyer never obtained his client's consent for this arrangement, nor did he ever provide her an accounting of the settlement proceeds.

A disciplinary complaint charged the lawyer with, as it related to the financial aspects, violating RPC 1.5(a) (unreasonable fee and fee contrary to fee agreement); RPC 1.5(c) (failure to provide written accounting); RPC 1.1 (incompetence, basically by advising client to sign the settlement agreement without determining whether the settlement in fact had any value); and RPC 1.4 (failure to communicate with client regarding settlement). The hearing officer dismissed the case for lack of proof. The Disciplinary Board rejected the hearing officer's findings, and instead found substantially all of the violations charged and recommended a two-year suspension.

The Supreme Court upheld the Dis-

ciplinary Board's determination and ordered the lawyer to pay restitution, stating that the lawyer "put his own interests ahead of those of his client. He negotiated a settlement of . . .[his client's] personal injury claims that largely reserved the tangible, cash benefits of the settlement to himself. The inflated or illusory settlement assets were . . . [the client's]. [The lawyer] . . . neither explained the implications of the settlement to the client before recommending she agree to it nor accounted to her for his decisions regarding the disposition of the settlement proceeds. [The lawyer] . . . violated the RPC by such conduct."[8]

### Conclusion

The lawyers in *Heard*, *Dann* and *Haskell* each mishandled their billings and fees. They owed their clients a duty to treat them fairly, but instead took advantage of them. The Court has made clear that a lawyer may not do so. In each case the lawyers failed to properly communicate with their clients, either by affirmatively lying and making misrepresentations to the clients, or by failing to communicate material information needed by the client for the client to make informed decisions.

Billing, as a form of communication with clients, needs to be open and honest. Most lawyers remember when they are billing their clients that they have a fiduciary duty to be honest with them. These three cases remind us that not all lawyers do so, and that the Supreme Court will take action to protect the public from dishonest, deceitful lawyering.

**Notes:**

1 See also the following discussions of lawyer fees: Joy McLean, "Practical Suggestions to Avoid Problems with Fees," *Washington State Bar News*, January 1997, p. 40 and February 1997, p. 48; Anne Seidel, "Nonrefundable Retainers and Advanced-Fee Deposits," *Washington State Bar News*, September 1996, p. 39; Anne Seidel, "Billing Practices," *Washington State Bar News*, October 1996, p. 40; and Anne Seidel, "Determining, Dividing and Collecting Fees," *Washington State Bar News*, November 1996, p. 47.
2 *Estate of Larson*, 103 Wn.2d 517 (1985).
3 136 Wn.2d 67, 72.
4 136 Wn.2d 67, 77.
5136 Wn.2d 67, 78.
6 136 Wn.2d 67, 80.
7 136 Wn.2d 87.
8 136 Wn.2d 405.

## DISCIPLINARY NOTICES

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

Tukwila lawyer Dennis Brouner (WSBA No. 8859, admitted May 15, 1979) has been disbarred by order of the Supreme Court effective November 5, 1998. The discipline is based upon his knowingly practicing and fee-splitting with a suspended out-of-state lawyer, misappropriating client funds, making misrepresentations under oath, making misleading statements in advertising, and failing to diligently represent a client.

*RLD 1.1(h) — practicing and splitting fees with a suspended lawyer.* From 1995 through early 1998, Mr. Brouner allowed Duane Varbel to be an equal partner in firm management and client representation provided by Brouner and Associates PSC and the successor firm of Brouner and Associates of Washington. Mr. Brouner knew that Mr. Varbel was not admitted to practice in Washington and was suspended from practice in Arizona from March 1994 through April 1998. Mr. Brouner and Mr. Varbel received approximately equal compensation from Brouner and Associates PSC and the successor firm. Mr. Brouner's conduct violated RLD 1.1(h).

*RPC 1.14(b), RPC 8.4(c) and RLD 1.1(a) — failing to promptly deliver client's property when requested and acts of dishonesty regarding client property.* In one matter, Mr. Brouner received two checks for his client's personal injury settlement. One check was payable jointly to the client and an insurance company, and the other was payable jointly to the client and Brouner and Associates. Mr. Brouner deposited both of these checks into his trust account. Mr. Brouner sent the client a check for $15,000 and took $5,851.98 for fees. Although Mr. Brouner agreed to accept the $5,851.98 as full payment, he deposited three additional checks written against client funds totaling $5,000 into the Brouner and Associates general account for fees in this matter. Mr. Brouner was not entitled to these additional fees. Mr. Brouner paid the insurance company four months after depositing their check.

In another matter, Mr. Brouner deposited $6,000 of client funds into his trust account. Five days later, without the client's consent, Mr. Brouner transferred the client's $6,000 to Brouner and Associates. When the client's case settled, the client asked Mr. Brouner to make the required settlement payment with the $6,000. Mr. Brouner told the client that he did not have any of the client's funds in his trust account.

In a third matter, a client paid Brouner and Associates $920 in advance fee deposits and costs. These funds were not deposited into the trust account. The client retained new counsel and requested return of her funds and file. The associate working on the client's case prepared an accounting. Mr. Brouner did not send the client the accounting, the file or a refund. Mr. Brouner's conduct violated RPC 1.14(c), RPC 8.4(c) and RLD 1.1(a).

*RPC 8.4(b) — committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.* Brouner and Associates filed a chapter 13 bankruptcy petition, which the Court later converted to a chapter 7 proceeding. Mr. Brouner falsely declared under oath that he was the only 'insider' of Brouner and Associates and that during the prior year, he was paid $30,000. In fact, Mr. Brouner received $51,000 in "owner's draws." Mr. Brou-ner also failed to disclose approximately $106,050 in payments, during the same year, to business ventures in which Mr. Brouner and Mr. Varbel had an interest, and to Mr. and Mrs. Varbel. Mr. Brouner's conduct violated RPC 8.4(b).

*RPC 3.3(a) — knowingly making a false statement of material fact or law to the tribunal* and *RPC 1.3 — failure to diligently represent a client.* Mr. Brouner represented a client in an automobile accident case. In the case assignment declaration, Mr. Brouner misrepresented the location of the accident, as part of his motion to have the case transferred from Seattle to Kent. On this same case, no one from Mr. Brouner's office attended the mandatory status conference.

The opposing lawyer notified Mr. Brouner's office that the status conference had been continued. Mr. Brouner's office failed to attend the rescheduled status conference and the Court dismissed the client's case and imposed $500 sanctions. Mr. Brouner violated RPC 3.3(a).

*RPC 7.1— misrepresenting the nature of services in advertising.* During 1997, Brouner and Associates television and radio advertisements stated that the firm would start a bankruptcy immediately with "no money down." The firm would not begin work on a bankruptcy until the client paid $175 for the filing fee and at least a portion of the attorneys' fees. Mr. Brouner's conduct violated RPC 7.1.

Christine Gray represented the Bar Association. Mr. Brouner represented himself.

**Suspended and Censured**

Tacoma lawyer Christopher Eichhorn (WSBA No. 7427, admitted May 13, 1977) has been suspended for 45 days and ordered to receive a censure pursuant to a stipulation approved by the Supreme Court on November 9, 1998.

*First Matter.* In 1988, Mr. Eichhorn represented clients in a real estate foreclosure action. He drafted the Resignation and Appointment of Successor Trustee Form (Trustee Form) to have himself appointed trustee under the deed of trust. Although he obtained all the necessary signatures, Mr. Eichhorn never recorded the form. This form is statutorily required to vest authority to conduct a nonjudicial foreclosure. Mr. Eichhorn conducted the nonjudicial foreclosure without curing this defect. Believing that title to the property had been returned to them, the clients attempted to resell the property. Mr. Eichhorn acted as escrow agent in the new sale. Mr. Eichhorn received the preliminary title report stating that the Trustee Form must be filed and the Trustee's Sale rescheduled. Mr. Eichhorn closed the sale without informing the parties of the title defect. He then wrote a letter to the title company, falsely stating that the reported defect had been "taken care of." The title company decided not to issue a title insurance policy. Neither the buyers nor the sellers were aware that the title company did not issue a policy until 1993, when the buyers attempted to sell the property. Mr. Eich-horn's conduct in failing to record the required Trustee Form violated RPC 1.3. His conduct in failing to inform the parties of the potential conflicts caused by his representation violated RPCs 1.4 (communication) and 1.7. His conduct in not telling the parties about the title defect violated RPCs 1.4 and 8.4(c)(dishonesty).

*Second Matter.* In 1988, Mr. Eichhorn represented clients in a mobile home purchase. The mobile home was subject to a lien. The sellers deposited money in escrow to satisfy the lien, but prior to closing, the lien holder filed for bankruptcy protection. The parties closed the sale in 1991, with the lien pending, deciding that they would settle the lien after the bankruptcy. Both buyer and seller then retained Mr. Eichhorn to act as a "collection or escrow agent," to collect and disburse payments. In January 1992, Mr. Eichhorn removed $1,014 from the escrow/trust account, without consent from or notice to either party. In February 1992, Mr. Eichhorn removed an additional $500 from escrow/trust without consent from or notice to the parties. In this same month, Mr. Eichhorn met with the parties and obtained signatures on a written disclosure of conflict in representing both of them in the lien matter. Mr. Eichhorn did not explain the potential conflict caused by his continued collection/escrow duties for both parties. Mr. Eichhorn disbursed some of the payments to the lender late, incurring late fees, and damaging the client's credit. He did not consistently inform the client of the late fees. The sellers retained new counsel to foreclose the buyer's interest. Mr. Eichhorn filed suit on behalf of the buyers. In February 1994, the buyers sold their interest in the mobile home. The lien was paid during this transaction. In September 1994, the foreclosure lawsuit settled. Mr. Eichhorn handled all of the funds involved in this transaction. He did not keep separate or accurate ledgers of these transactions. He also did not provide the parties with an accounting of their funds. Mr. Eichhorn's lack of records made it impossible to accurately reconstruct the account history. His conduct in failing to explain and obtain a written waiver of the conflicts in representing both parties in these matters violated RPC 1.7. His conduct in representing the buyers in a lawsuit against the sellers, after representing both parties, violated RPC 1.9. His conduct in removing fees from the trust account without the clients' consent violated RPC 1.14. His conduct in failing to diligently settle the lien matter violated RPC 1.3.

*Third Matter.* In 1987, Mr. Eichhorn represented a client in a paternity and custody matter. The client's children were born while he lived with the mother, who was married to someone else. In 1987, the Court granted the client temporary custody of the children. The parents reconciled and Mr. Eichhorn took no further action until 1992, when the mother left the home. Mr. Eichhorn served the mother by publication and then took an order of default against her in 1993. In May 1993, a Pierce County Superior Court Commissioner told Mr. Eichhorn that he would not sign the paternity decree without service on the children's presumptive father, the mother's legal husband. After this conversation, Mr. Eichhorn did no further work on the client's case. In August 1994, after several unanswered phone calls, the client retained new counsel, who was able to finalize the case in two months. Mr. Eichhorn's conduct in failing to work on the client's case for several months violated RPC 1.3 (diligence). His conduct in not returning his client's phone calls violated RPC 1.4 (communication).

Joy McLean represented the Bar Association. Mr. Eichhorn represented himself. Ronald Bland served as the hearing officer.

## NONDISCIPLINARY NOTICES

**Interim Suspensions**

Melinda Monet (WSBA #25676, admitted 1996), Oregon, was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered December 9, 1998.

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

Claere Shea (WSBA #24938, admitted 1995), Oregon, was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered December 3, 1998.

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

# Opportunities for Service

*Are you interested in being appointed to special ad hoc task forces, assignments, committees, etc.? Please watch for the WSBA Committee/Board/Volunteer Panel Preference Form, which will be mailed in mid-February.*

**WSBA President**

The Board of Governors of the WSBA is seeking applicants to serve as President of WSBA for 2000-2001. Pursuant to Article IV(A)(2) of the WSBA Bylaws, the President for that term shall reside in King County.

Applications will be accepted through May 15, 1999, and should be limited to a current résumé, a concise application letter, and selected references. Endorsement letters received by May 31, 1999 will be considered by the Search Committee and the Board of Governors. Applications and endorsement letters should be sent to the WSBA Executive Director, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330.

Interviews before the Search Committee will be conducted between May 15-31, 1999 at the WSBA offices. Finalists will be invited to the June Board of Governors meeting for an interview before the full Board of Governors, in open session. Applicants are discouraged from conducting active campaigns for this office.

The WSBA member selected as President will have an opportunity to provide a significant contribution to the legal profession. While prior experience on WSBA's Board of Governors may be helpful, there is no requirement to have been a member of the Board of Governors or to have had previous experience in Bar activities. The candidate must be willing to devote a substantial number of hours to WSBA affairs and be capable of being a positive representative for the legal profession. The position is unpaid. Some expenses, such as WSBA-related travel, are reimbursed.

The commitment begins in June 1999. The term as President-elect will begin at the annual business meeting in September 1999. In September 2000, at the WSBA's annual business meeting, the President-elect will assume the WSBA Presidency. The candidate will be expected to attend two-day Board meetings every six weeks, as well as numerous subcommittee, section, regional, national and local meetings. He or she will also be required to meet with members of the Bar, the courts, the media, and public and legal interest groups, as well as be involved in the Bar's legislative activities. Appropriate time will need to be devoted to communication by letter and telephone in connection with these responsibilities.

The Presidential Search Committee consists of Mary Alice Theiler (chair), J. Richard Manning, Stephen Osborne and Donald Powell.

**Board of Governors**

Four positions on the WSBA Board of Governors will be up for election this year, representing the 3rd, 6th, 7th-East*, and 8th Congressional Districts. These positions are currently held by Terrance Lee (3rd District), Donald Powell (6th District), Mary Alice Theiler (7th-East, formerly known as one of two King County at Large), and Marijean Moschetto (8th District).

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

Nominating petitions are available from the Office of the Executive Director, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330; tel. 206-727-8244; e-mail oed@wsba.org. Petitions must be received by the Executive Director of the WSBA by 5 p.m. on March 1, 1999. The Board of Governors determines the official dates of the election. Ballots are usually mailed around the first of June and counted approximately the first of July.

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

*Per a bylaw change, the 7th Congressional District has been subdivided into three subdistricts, East, Central, and West. These subdistricts are distinguished by ZIP codes and will each have one elected governor. For the coming year, the East sub-district (ZIP codes 98105, 98115, 98118, 98122, 98125, 98144, 98155, and 98178) will elect a new governor.

**LASER Board**

The LASER Project Foundation Board is seeking a Board member or members who can help support this important project. The LASER Project trains and supports volunteer lawyers who team with participating public schools to provide conflict-mediation training to students in elementary, middle and high schools. The Board seeks enthusiastic and energetic members who can contribute up to 20 hours per year in LASER-related activities. Interested persons should contact Jan Michels or Wayne Blair at WSBA, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330.

*(continued on next page)*

## Opportunities for Service

### Washington Pattern Forms Committee

The Pattern Forms Committee's function is to develop and revise pattern forms and the mandatory forms. The committee meets four times per year. Subcommittees meet monthly to work on specific form projects. As the courts are becoming more computer-oriented, so are the forms; therefore, the representative should be comfortable with computers. Representatives to the Pattern Forms C· mmittee are appointed for four-year terms. Please submit a letter of interest to Office of the Executive Director, Washington State Bar Association, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330 no later than February 11, 1999. For more information please call 206-727-8244 or e-mail: oed@wsba.org.

### Statute Law Committee

This 12-attorney committee seeks to foster accurate publication of laws and agency rules services in a professional and strictly nonpartisan and cost-effective manner. The primary responsibilities are to periodically codify, index, and publish the Revised Code of Washington and to revise, correct, and harmonize the statutes of administrative or suggested legislative action as may be appropriate. The committee meets at least twice a year. Send letter of interest with résumé by February 28, 1999 to: Executive Director, WSBA, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330; e-mail: oed@ wsba. org.

## *Seattle Pilot Aspiring Youth Program a Success*

Judge Elaine Houghton, Senator Ken Jacobsen and attorney Karen Jorgenson-Peters recently spoke about their work with Seattle Meany Middle School students participating in the Aspiring Youth Program. The eight-week after-school program, which ran for the first time in Seattle this fall, is sponsored by the Public Service Committee of the Washington Young Lawyers Division and the King County Bar Association.

Designed for at-risk youth, the "stay-in-school" program stresses the importance of education and provides kids with productive activities and role models during the "latch-key" hours after school. Participating Meany students met twice a week with professionals and law-school students to learn and to play basketball. The program is modeled on an after-school basketball tournament first developed by the Texas Young Lawyers Association, and was also run in Spokane last year.

The program at Meany Middle School was organized by the Fall 1998 Aspiring Youth Committee, chaired by Evan Loeffler. Melissa McGonigal, Lisa Biernbaum, Michael Scruggs, David Reed, Steve Vanderhoef, Sandeep Baweja, Laurie Johnston, Lori O'Tool, Nichole Gaines, Curtrice White, Kathleen Hopkins and Heather Stuart Moore were members of the committee. University of Washington law student Roger Brodniak coordinated over a dozen UW law students who volunteered with the program.

Volunteers are needed for future Aspiring Youth Programs. The programs are being developed to allow volunteers not only to talk about their professional life, but to share other talents and pastimes such as the arts, hobbies, etc. If you are interested in helping to organize a program, in speaking about your work or other activities, or simply in playing basketball with the kids, please contact Melissa McGonigal at 206-583-8699 or mcgoe@perkinscoie.com.

### WSBA Staff Raises Money for Holiday Charities

The staff of the WSBA office in Seattle raised nearly $2,500 in one November afternoon to benefit worthy causes during the holidays. The money was raised at an in-house "silent auction" of goods donated by staff members as well as by outside businesses and individuals. Buyers specified which of two charities they would like to receive their money. Proceeds were donated to the Make-a-Wish Foundation and Lawyers Helping Hungry Children. The silent auction is an annual holiday event for Bar staff.

### Electronic Filing Introduced for State Taxes

Washington has become the first state in the country to allow businesses, including law offices, to file and pay their taxes directly over the Internet. The electronic filing system walks taxpayers through the return process, calculates taxes automatically, flags errors and omissions *before* a return is filed, and provides instant online access to the latest tax information. The system also lets users customize returns to list only the taxes they usually report, and helps businesses avoid missing filing deadlines by letting them file their returns in advance, yet have their payments delayed until the due date.

For more information on electronic filing, visit the Department of Revenue's web page at www.wa.gov/dor/elf/ or call 800-647-7706, menu option 9.

### Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in January 1999 is 4.585 percent. The maximum allowable interest rate permissible for February is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates for June 1988 – June 1998 appear on page 52 of the June 1998 *Bar News*. Information from January 1987 to date appears at www.wsba.org/barnews/usuryrate.html.

# FYI *(continued)*

**Law Office Management Institute and Legal Expo Coming in March**

The 1999 Law Office Management Institute and Legal Expo with Marketing Your Law Firm Workshop will be held Wednesday, March 24, 1999 at the Washington State Convention and Trade Center in Seattle. The event is designed to help attorneys promote their firm, control law-firm costs, use cutting-edge technology, and find law-related services.

Registration to tour the Legal Expo Exhibit Hall is free. In addition, the first 300 Expo Exhibit Hall Tour registrants, as well as the Institute registrants, will receive free admission to the Marketing Your Law Firm Workshop.

The event is sponsored by the Association of Legal Administrators (Puget Sound Chapter) and the Washington State Bar Association (Law Practice Management and Technology Section and CLE Department). Watch next month's *FYI* for more details, or call 800-945-WSBA or 206-443-WSBA to request a brochure.

**Conference to Address Child Witnesses of Domestic Violence**

The Spokane County Domestic Violence Consortium is sponsoring the conference "Child Witnesses and Juvenile Perpetrators: Addressing the Impact of Intimate Partner Violence," to be held April 22-23 in Spokane. The conference is designed to bring together members of the community working with the younger generation and the judicial system to learn the impact intimate partner violence has on children: often an involvement in juvenile crime, teen dating violence, animal cruelty, chemical dependency, teen suicide and other societal problems. Conference attendees will also determine the gaps and overlaps in the system, so they can be properly addressed. For more information please call 509-487-6783.

**WYLD Award Nominees Sought**

The Washington Young Lawyers Division of the State Bar honors three attorneys every year for their outstanding contributions to the legal profession. The WYLD is accepting nominations for the Thomas Neville Pro Bono Award, the OutstandingYoung Lawyer of the Year Award and the Professionalism Award. Please contact Sheri Borgford at 206-727-8239 or sherib@wsba.org for the criteria and nominations procedure. Nominations must be received by April 1, 1999.

**Luncheon CLE Series Addresses Young Lawyer Issues**

The WSBA Young Lawyers Division CLE Committee is sponsoring a free brown-bag lunch series on issues that new lawyers face. The series will be held on three Thursdays—March 18, April 22 and May 20, 1999—from 12 noon to 1:30 p.m. at the WSBA offices. These CLEs will focus on ethics, with further details in the upcoming *De Novo*. Call Katrina Glogowski at 206-684-4526 with any questions.

**Performance Evaluation for Executive Director**

The Board of Governors is beginning its evaluation of the performance of the WSBA Executive Director during the past year. Governor Mary Alice Theiler, chair of the Board's personnel committee, will be coordinating the evaluation. Members who would like information about the performance-evaluation process may contact her at 206-623-0900.

**Support Group for Women Lawyers**

The WSBA Lawyers' Assistance Program invites women lawyers to participate in a group provided in a supportive and confidential setting. Biweekly meetings will be held on Thursdays 12 noon - 1:30 p.m. Co-facilitated by Jean Johnson, MSW, and Rebecca Nerison, Ph.D., LAP therapists.

**Fee: $10 per session**

For further information and initial meeting date, please call Jean Johnson or Rebecca Nerison, Lawyers' Assistance Program

**206-727-8268**

*Services provided by LAP are confidential.*

# Calendar

## BUSINESS

**Northwest Securities Institute**
Feb. 19-20 – Seattle. 9.75 CLE credits (incl. 1 ethics). By WSBA-CLE and Business Law Section 800-945-WSBA or 206-443-WSBA.

**Choice of Business Entity**
Feb. 25 – Seattle; March 4 – Spokane. CLE credits TBA. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

**Purchase & Sale of Smaller Businesses**
March 5 – Seattle; March 12 – Spokane. CLE credits TBA. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

**Counseling the Corporation: A Guide to Success**
March 12 – Seattle. 6.5 CLE credits pending. By WSBA-CLE and Corporate Law Department 800-945-WSBA or 206-443-WSBA.

## COLLECTIONS

**Complying with the Fair Debt Collection Practices Act in WA**
March 16 – Seattle. 6.5 CLE credits. By NBI 715-835-8525.

**Collection Law in WA**
March 18 – Seattle. 6.5 CLE credits. By Lorman 715-833-3940.

## CONSTRUCTION LAW

**Construction Law: Can This Be Saved?**
Feb. 10 – Seattle. 6.5 CLE credits. By Lorman 715-833-3940.

**WA Construction Law: Preventing the Avoidable**
Feb. 10 – Seattle. 6.5 CLE credits. By Lorman 715-833-3940.

## ELDER LAW

**Elder Law Update: Medicaid, Medicare and More**
Feb. 11 – Seattle; Feb. 12 – Spokane. 6.5 CLE credits (incl. .75 ethics). By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

## EMPLOYMENT LAW

**Employment and Labor Law in WA**
Feb. 4 – Seattle. CLE credits TBA. By Lorman 715-833-3940.

**Strategies for Effective Employee Recordkeeping in WA**
March 3 – Seattle. CLE credits TBA. By Lorman 715-833-3940.

**Workers Compensation**
March 12 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

**Employment Law Institute**
March 24-25 – Seattle. CLE credits TBA. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

**Current Issues in WA Public Sector Labor Law**
March 25 – Seattle; March 26 – Spokane. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-8325.

# Calendar

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

**To announce a seminar, please send to:**

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

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

**Labor Law & Labor Arbitration**
March 26 – Seattle. 7.5 CLE credits. By Labor ARB Institute 507-663-1220.

## ENVIRONMENTAL

**Environmental and Land Use Law**
Feb. 12 – Seattle. CLE credits TBA. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

## ESTATE PLANNING

**Estate Planning for the Small to Medium-sized Estate**
Feb. 19 – SeaTac. 7.25 CLE credits. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

**Use of Limited Liability Companies in Business & Estate Planning in WA**
March 11 – Spokane. 7 CLE credits (incl. .5 ethics). By Lorman 715-833-3940.

**Advanced Will Drafting**
March 17 – Seattle; March 19 – Spokane. CLE credits TBA. By WSBA-CLE and RPPT Section 800-945-WSBA or 206-443-WSBA.

## ETHICS

**Sanctions Competence & Diligence**
Feb. 15. By phone. 2 ethics credits pending. By TRT 800-672-6253.

**Twin Professional Problems: Substance Abuse & Elimination of Bias**
Feb. 16. By phone. 2 ethics credits pending. By TRT 800-672-6253.

**Psychology & the Legal Profession**
Feb. 22. By phone. 2 ethics credits pending. By TRT 800-672-6253.

**Professionalism and Character: How Intertwined?**
Feb. 23. By phone. 2 ethics credits pending. By TRT 800-672-6253.

**Ethics and Professionalism in Family Law**
March 12 – Seattle. 7.5 CLE credits. By American Academy of Matrimonial Lawyers 425-822-1220.

## FAMILY LAW

**3rd Annual Inter-County Guardian Ad Litem Workshop Forum**
March 3 – Seattle. 6.75 CLE credits pending. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

**Adoption Law in WA**
March 12 – Seattle. 7.25 CLE credits. By Lorman 715-833-3940.

**Child Abuse Investigation and Interviewing**
March 25 & 26 – Vancouver, WA. 15 CLE credits. By Harborview Medical Center 360-417-5404.

## GENERAL

**Financial Strategies for Successful Retirement**
Feb. 2 – Bellevue. 10 CLE credits. By Secure Start Seminars 425-456-0071.

**Regulatory Reform**
Feb. 4-5 – Seattle. 12.5 CLE credits (incl. 1 ethics). By LSI 206-567-4490.

**Brownfield – Creative Solutions for Contaminated Site Problems**
Feb. 4-5 – Seattle. 13 CLE credits. By LSI 206-567-4490.

**WALI Annual Professional Development Seminar**
Feb. 6 – Seattle. 6.75 CLE credits. By WALI 206-625-9254.

**Using the Internet for Legal Research**
Feb. 12 – Portland, OR. CLE credits TBA. By Oregon State Bar 503-684-7413.

**Current Issues in Forensic Practice**
Feb. 18 – Seattle; March 18 – Seattle. 2.0 CLE credits. By Seattle Forensic Institute 206-322-6605.

**Time Management for Lawyers**
Feb. 25 – Portland, OR. CLE credits TBA. By Oregon State Bar 503-684-7413.

**Covenants Not to Compete in WA**
Feb. 26 – Seattle. 4 CLE credits. By Lorman 715-833-3940.

**Foreclosure, Repossession and Bankruptcy in WA**
Feb. 26 – Seattle. 7 CLE credits (incl. 1 ethics). By Lorman 715-833-3940.

**Discipline From the Inside**
Feb. 19 – Seattle; Feb. 26 – Spokane. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

**WA Tax-Exempt Organizations**
March 4 – Seattle. CLE credits TBA. By Lorman 715-833-3940.

**Road & Access Law in WA**
March 9 – Seattle. 6.5 CLE credits (incl. .5 ethics). By NBI 715-835-8525.

**The Drug Recognition Expert Mystery**
March 11 – Spokane; March 12 – Seattle. CLE credits TBA. By La Pier & Associates 280-754-4643.

**Legal Citations**
March 16 – Tacoma. 3.5 CLE credits. By AGO (AV) 360-493-9500.

**Communication in the Courtroom**
March 16 – Bellevue; March 24 – Vancouver, WA. 7.5 CLE credits. By Carl Grant 800-862-9922.

**Premises Liability**
March 25 – Seattle. CLE credits TBA. By WSTLA 206-464-1011.

## INTELLECTUAL PROPERTY

**Annual Intellectual Property Program**
March 26 – Seattle. 6.5 CLE credits pending. By WSBA-CLE and Intellectual & Industrial Property Section 800-945-WSBA or 206-443-WSBA.

## LAW OFFICE MANAGEMENT

**Law Office Management Institute & Legal EXPO Exhibit Hall**
March 24 – Seattle. 6.25 CLE credits, (incl. 1 ethics). By WSBA-CLE and Law Office Management Section, and Association of Legal Administrators, Puget Sound Chapter 800-945-WSBA or 206-443-WSBA.

## LITIGATION

**How to Win Your Trial and Win on Appeal**
Feb. 5 – Seattle. CLE credits TBA. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

**Bad Faith Litigation in WA**
Feb. 9 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-8525.

**Winning Your Case with Experts**
Feb. 12 – Seattle. 6.75 CLE credits. By WACDL 206-623-1302.

**Project Development from A to Z**
Feb. 25 – Seattle; March 3 – Spokane. CLE credits TBA. By WSBA-CLE and RPPT Section 206-443-WSBA or 800-945-WSBA.

**6th Annual Litigation Institute**
March 5-6 – Stevenson. CLE credits TBA. By Oregon State Bar 503-684-7413.

**Spring Training for Litigators**
March 17-20 – Seattle. 9 CLE credits (incl. 1 ethics). By WSTLA 206-464-1011.

## REAL ESTATE

**Project Development from A to Z**
Feb. 25 – Seattle; March 3 – Spokane. 6 CLE credits (incl. 1 ethics). By WSBA-CLE and RPPTS 800-945-WSBA or 206-443-WSBA.

**Commercial Real Estate**
Feb. 26 – Seattle. 6.5 CLE credits. By UW Law School 206-543-0059.

## TAXATION

**How to Handle Tax Matters Before the "Reformed" IRS**
Feb. 4 –Seattle. 6.5 CLE credits. By WSBA-CLE and Taxation Section 800-945-WSBA or 206-443-WSBA.

**The Essentials of Individual, Estate and Gift Taxation**
Feb. 5 – Portland, OR. CLE credits TBA. By Oregon State Bar 503-684-7413.

## Y2K

**Effects of Year 2000 in the Practice of Law**
Feb. 26 – Seattle. 5.75 CLE credits (incl. ethics). By WSTLA 206-464-1011.

# Kenyon Law Firm

*Serving Washington Cities*

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Lisa M. Marshall
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Anne C. Jackson
Lisa R. Podell
Sandra S. Meadowcroft

***We are pleased to announce that***

**Anne C. Jackson**
Anne is a 1988 graduate of Iowa College of Law. Prior to joining our firm, Anne served as an Assistant City Attorney in Seattle, and as bailiff to the Honorable Nicole K. MacInnes.

**Lisa R. Podell**
A 1997 graduate of the University of Denver College of Law, Lisa comes to us after having served as a Special Deputy Prosecutor in King County. She joins the firm's Prosecution Team.

**Sandra S. Meadowcroft**
Sandy graduated from the Northwestern School of Law in 1991. We welcome Sandy after five years at Cairncross & Hemplemann and two years as a King County Deputy Prosecuting Attorney.

***have joined our firm***

**11 Front Street South • Issaquah, Washington 98027**
**425-392-7090 • Fax 425-392-7071**
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announces his availability to serve as arbitrator in cases involving personal injuries or wrongful death and in any matters involving disputes concerning insurance coverage for motor vehicles, homeowners, fire and life.

Large conference room with video and amenities.

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**Phone: 206-622-3720**
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**julinlaw@nwlink.com**

# Foster Pepper & Shefelman PLLC

**Attorneys at Law**

**We are Pleased to Announce**

Kyle L. Branum
Litigation & Municipal Law
Seattle

Steve P. Calandrillo
Securities & Corporate Finance Law
Seattle

Chryssa V. Deliganis
Litigation
Seattle

Joyce J. Dillon*
Intellectual Property
Seattle

Vicky J. Kelley**
Employment, Litigation & Native American Law
Anchorage

Jacob A. Scholl
Corporate Banking
Seattle

Erin P. Snodgrass
Intellectual Property
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* Admitted in New York
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## Stoel Rives LLP

We are pleased to announce that

Christopher J. Voss
*Corporate, Securities & Finance*

has become a partner in the firm.

We are also pleased to announce that

Amy S. Christophersen*
*Construction & Design Law*

Craig A. Fielden
*Real Estate Law*

Ivan A. Gaviria*
*Corporate, Securities & Finance*

Kristi L. Helgeson
*Litigation*

Sherri L. Jefferson
*Labor & Employment Law*

Karyn S. Johnson*
*Litigation*

David S. Levin
*Labor & Employment Law*

Timothy J. O'Connell
*Labor & Employment Law*

Kenneth M. Odza
*Litigation*

and

Katriana L. Samiljan
*Corporate, Securities & Finance*

joined us in 1998.

600 University Street, Suite 3600
Seattle, Washington 98101
Telephone 206-624-0900
Facsimile 206-386-7500
www.stoel.com

*Ms. Christophersen is admitted in MN, Mr. Gaviria is admitted in CA, Ms. Johnson is admitted in NY

## Stritmatter Kessler Whelan Withey

**is pleased to announce the following changes and additions to its Seattle office.**

Peter O'Neil, a long-time paralegal specializing in complex product liability cases who recently passed the Bar following four years of legal studies in the Washington State Bar Association Law Clerk Program, will join the firm as a member specializing in complex product liability litigation with an emphasis on motor vehicle crashworthiness design cases.

J. Murray Kleist, veteran trial lawyer and former President of the Washington State Trial Lawyers Association, and Paul O'Neil, Professor of Law at Pace University Law School, will join with Leonard W. Schroeter as Of Counsel to the firm.

Stritmatter Kessler Whelan Withey
1200 Market Place Tower
2025 First Avenue
Seattle, Washington 98121
206-448-1777

Stritmatter Kessler Whelan Withey
413 Eighth Street
Hoquiam, Washington 98550
360-533-2710

## Stanislaw Ashbaugh, LLP

is pleased to announce that

Michael T. Zoretic

has been named a partner in the firm, and will continue his practice in construction litigation, commercial litigation and employment law.

And we are also pleased to announce that

Christopher A. Wright

has joined the firm as an associate and will be practicing construction and commercial litigation.

701 Fifth Avenue
Suite 4400
Seattle, Washington 98104-7012
206-386=5900
info@stanislaw.com

Thomas M. Keller
formerly of Krutch Lindell

is pleased to announce the formation of

THOMAS M. KELLER, P.S.

of Counsel to the Law Firm of
Thompson & Howle

1250 Union Bank of California Center
900 Fourth Avenue
Seattle, Washington 98164

Telephone: 206-682-8400
Fax: 206-682-9491
E-mail: tkeller@nwlink.com

Mr. Keller's practice will continue to emphasize matters of trust and estate planning, probate and guardianship law, and commercial and business transactions and planning.

GARDNER BOND TRABOLSI MCDONALD & CLEMENT PLLC

announces
Lynn R. McDonald is now Lynn R. St. Louis
and the new firm name is

GARDNER BOND TRABOLSI ST. LOUIS & CLEMENT PLLC

The firm is pleased to announce that

Jennifer L. Whatley,
former law clerk to the Honorable Thomas J. Wynne,
has joined the firm as an associate.

Michael J. Bond
W. Scott Clement
Ronald C. Gardner
Robert A. Meyers
Lynn R. St. Louis
Gary A. Trabolsi

2200 Sixth Avenue, Suite 600
Seattle, Washington 98121
206-256-6309

ROSE RIX & BENNETT LLP
ATTORNEYS AT LAW

is pleased to announce that

William McKay Bennett
has become a named partner in the Firm

and

Miharu Furihata
has joined the Firm as an Associate.

Mr. Bennett, J.D. University of Washington,
was previously with Cooley Godward LLP
in San Francisco.

Ms. Furihata, J.D. Vanderbilt University,
was In-house Counsel with NEC Corporation
in Tokyo prior to attending law school
in the United States.

Rose Rix & Bennett LLP
is a full service Corporate Immigration Law Firm
that provides strategic counseling to both
corporations and individuals.
Our clients include Fortune 500 companies,
small technology start-ups,
and world-renowned artists and entertainers.

Mr. Bennett and Ms. Furihata can be reached
by phone at the number below or by e-mail
at billbennett@roserix.com and
miharu@roserix.com, respectively.

413 Main Street
Half Moon Bay, California 94019
Tel: 650-712-8819 • Fax: 650-712-8021
www.roserix.com

# Professionals

## CONSTRUCTION SITE INJURIES

**William S. Bailey**, 1991 WSTLA Trial Lawyer of the Year, is available for association or referral of construction site injury cases.

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

## MEDICAL NEGLIGENCE & PRODUCT LIABILITY

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

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

**CHEMNICK, MOEN & GREENSTREET**
450 Market Place Two
2001 Western Avenue
Seattle, WA 98121
**(206) 443-8600**

## HIGHER EDUCATION LAW Education Law

**Thomas K. Dalglish, J.D.,Ph.D.**
Former counsel to state universities, state Superintendent of Public Instruction. University teaching, research, administrative experience. 20+ years public, private practice of law.

Available for referrals, consultation, association or mediation in disputes involving faculty, students.

**THOMAS KILLIN DALGLISH**
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**Heather Houston**
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**(206) 682-1080**

## DENTAL MALPRACTICE & DISCIPLINARY PROCEEDINGS

**John J. Greaney** announces his availability for referral of

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

**(425) 451-1202, Bellevue**

## LABOR AND EMPLOYMENT LAW

**William B. Knowles** is available for consultation, referral and association in cases involving employment discrimination, wrongful termination, wage claims, unemployment compensation and federal employee EEOC or Merit System Protection Board appeals.

**(206) 441-7816**

## STATE & LOCAL TAX

**Frank Dinces** is available for consultation and referral on any aspect (planning, audits, litigation or lobbying) of state and local taxation.

With over 10 years of focused experience, Mr. Dinces seeks to represent clients being audited, engaging in major transactions, pursuing legislation, challenging tax assessments, seeking tax refunds or under investigation for tax evasion or fraud.

**THE DINCES LAW FIRM**
**Seattle Office**
720 Olive Way, Suite 1300
Seattle, WA 98101-1812
**(206) 713-1287**

**Pierce County Office**
4607 Saddleback Drive NW
Gig Harbor, WA 98332-7859
**(253) 858-1400**

## CHILDHOOD ABUSE REPRESSED MEMORY

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Hoge Bldg., Seattle
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**Amy Stephson** and **Nalani Askov** are available to conduct independent investigations of employee discrimination complaints. Extensive experience.

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**(206) 623-1628**

## LABOR AND EMPLOYMENT LAW— MANAGEMENT ATTORNEY

**Joseph G. Marra** is available for consultation, referral and association. Emphasis on defending management in cases involving employment discrimination, wage claims, wrongful discharge, etc. Also representing management only in union matters including election campaigns, collective bargaining, picketing, grievance/arbitration, defending unfair labor practices, strikes, etc. 3+ years as an attorney for the NLRB, 11+ years representing management.

**(206) 447-0182 or 800-427-6058**

Referrals, Associations and Consultations in

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**Mary Anne Vance**, co-author of the chapters on Estate Planning and Probate in Butterworth's Washington Civil *Practice Deskbook*, is available for association, consultation or referral of probate and guardianship cases, both contested and noncontested.

**THE LAW OFFICE OF MARY ANNE VANCE, P.S.**
1111 Union Bank of California Ctr.
Seattle, Washington 98164
(206) 682-2333
fax: (206) 682-2382
e-mail: lomav@nwlink.com

## APPEALS

**James E. Lobsenz** announces his availability for referral, consultation, or association in appeals. Past successful appeals include:

*State v. Head*
126 Wn.2d 619 (1998)

*Swinomish Indian Tribal Community v. Island County*
87 Wn.App. 552, 942 P.2d 1054 (1997)

*State v. Stegall*
124 Wn.2d 719 (1994)

*Wash. State Physicians Insurance v. Fisons*
122 Wn.2d 299, 858 P.2d 1054 (1993)

**CARNEY, BADLEY, SMITH & SPELLMAN, P.S.**
2200 Columbia Center
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Seattle, WA 98104
**206-622-8020**

## APPEALS

"A discourse on argument on an appeal would come with superior force from the judge who is in his judicial person the target and trier of the argument . . . Supposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on fly-casting . . . if the fish himself could be induced to give his views on the most effective methods of approach?"
*— John W. Davis*

**CHARLES K. WIGGINS**
Former Judge, Court of Appeals
**(206) 780-5033**

## APPEALS

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

**Douglass A. North**
**MALTMAN, REED, NORTH, AHRENS & MALNATI, P.S.**
1415 Norton Building
Seattle, Washington 98104
**Telephone (206) 624-6271**

## CHILD ABUSE ALLEGATIONS

**David S. Marshall** handles cases involving allegations of child abuse.

**(206) 382-0000**

# Classifieds

**Reply to WSBA *Bar News* Box Numbers at:**

**WSBA *Bar News* Box ____**
*Bar News* Classifieds
2101 4th Avenue, 4th Floor
Seattle, WA 98121-2330

**Positions available are also posted by telephone at:**
206-727-8261
and online at www.wsba.org

## FOR SALE

**Law Library, updated through August 1, 1998:** Washington Practice; RCW; Washington Digest 2d; Washington Appellate Reports; Washington Reports; and Washington Reports 2d. Make offer 425-529-3915.

## SPACE AVAILABLE

**Bellevue downtown:** views of downtown Bellevue, Lake Washington and Seattle skyline in prestigious City Center Bellevue. Reception, library, conference room, kitchen included. Possible referrals. 425-451-8301.

**Hayne, Fox & Bowman** offers a huge office for rent in the most desirable location in Bellevue. Includes secretarial space, free parking, beautiful setting, great people, excellent amenities. Call 425-451-3512.

**Commercial/office spaces** available in Kent (248th & Pacific Hwy. S.), 1,200, 1,600 & 1,800 sq. ft. Will build to suit, $12 and up psf, including CAM; call Connie 253-584-7000.

**Charles R. Meyer,** Attorney at Law, is going on the bench effective January 1999. Will lease beautiful office space for up to three attorneys plus staff. Complete turn-key operation available. Call 360-793-1222 for more information. Office is located at 106 4th St., Sultan, WA 98294.

**Sweeping, unobstructed view of Olympics and Elliott Bay** (First Interstate Building, 41st Floor) – Elegant, law office near courthouse. Reasonable rates include receptionist, basic messenger service, mail delivery, fax, two conference rooms, law library, fully equipped kitchen. For more information, please call AnnaMarie at 206-624-9400.

**Downtown Seattle office-sharing:** $175 per month. Also, full-time offices available on 32nd floor, 1001 Fourth Avenue Plaza. Close to courts. Furnished/unfurnished suites, short-term/long-term lease. Receptionist, legal word processing, telephone answering, fax, law library, legal messenger and other services. 206-624-9188.

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**Columbia Center,** available 3/1/99. Two attorney offices, one secretary's space, ample shared file and workspace, in attractive four-attorney suite. 21st floor, south view; $2400/mo. Call George at 206-624-3718 for more details.

## POSITION AVAILABLE

**Business attorney** wanted to work on part-time (up to ¾) contract basis with principal in small, high-quality corporate practice in downtown Seattle. Hours flexible. Some experience in business transactions required; experience in financings, M & A work, licensing and corporate governance highly desirable. Richard E. Monroe, PS, 206-516-0348, fax 206-624-5469.

**Quality attorneys, law clerks and paralegals** sought to fill temporary and permanent positions in law firms and companies throughout Washington. Contact Legal Ease, LLC 425-822-1157; e-mail legalease@legalease.com; web www.legalease.com

**Levy & Associates, PS,** a small, downtown Seattle law firm, seeks an associate with WA/OR dual license and at least three years' experience in civil litigation. Would prefer an emphasis in construction law. Applicant must have superior writing and analytical skills. Send résumé to: Sanford Levy, 1601 5th Ave., Ste. 2370, Seattle, WA 98101 or fax to 206-382-5527; e-mail: srlevy@levy-law.com

**Tax attorney:** Landerholm, Memovich, Lansverk & Whitesides, PS, a 22-attorney law firm in Vancouver, WA, seeks a business tax attorney with an LL.M. in taxation for an associate position in the firm's fast-growing business practice. Applicants must have a minimum of two years' experience. The attorney's practice will focus on the formation, capitalization and sale of, and tax planning for, closely held corporations, partnerships and limited liability companies and unique state and federal tax issues involving the structuring of cross-border (Washington-Oregon-California) mergers and taxable and tax-free acquisitions. The position involves frequent client contact and responsibility for negotiations and appeals with state departments of revenue and the Internal Revenue Service. Must have strong academic credentials and an ability to manage rapid practice growth in a thriving business practice. Please send résumé, law school transcript and a short writing sample to Executive Director, Landerholm, Memovich, Lansverk & Whitesides, PS, PO Box 1086, Vancouver, WA 98666.

**Minzel & Associates** is a temporary placement agency for lawyers and paralegals. We are looking for quality lawyers and paralegals who are willing to work on a contract basis for law firms, corporations, solo practitioners and government agencies. If you are interested, please call 206-328-5100 for an interview.

**An experienced attorney sought** to assume felony defense caseload, private caseload possible. Attorney must be willing to relocate and interested in long-term situation. Please send résumé and statement of professional goals to WSBA *Bar News* Box 570.

**Spokane, WA** intellectual property law firm of 12 attorneys and one patent agent has excellent opportunities for highly motivated attorneys. We have one opening primarily for a combination of litigation and patent prosecution, and one opening primarily for preparation and prosecution. Preferred: EE, physics or semiconductor-processing background/experience and at least one year of patent law practice. The positions involve all phases of intellectual property. Client contact and responsibility are provided. The firm represents small to prominent multinational Fortune 500 companies. The firm enjoys continuing growth and a very bright future in a beautiful part of the country. Spokane is noted for its outstanding quality of life and a wide range of outdoor activities. Rural living is still available.

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***Rates:*** *WSBA members:* $25/first 25 words; $0.25 ea. add'l. word. *Non-members:* $35/first 25 words; $0.75 ea. add'l. word. Blind-box number service: $7. (Responses will be forwarded.) Check payment (to WSBA) must accompany order. We do not bill for classified ads or accept payment by credit card.

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

***Qualifying experience for positions available:*** State and federal law allow minimum, but prohibit maximum, qualifying experience. No ranges (e.g., "5-10 years").

***Questions?*** 206-727-8213; comm@wsba.org

We enjoy the best of both worlds: (1) a growing, stimulating and first-rate law practice, and (2) a first-class lifestyle without most of the hassles of larger cities and long commutes. Excellent salary and benefits. Reply in confidence to Linda Haft at Wells, St. John, Roberts, Gregory & Matkin, PS, 601 West First Avenue, Spokane, WA 99201-3828; telephone 509-624-4276; fax 509-838-3424.

**Attorney jobs:** Harvard Law School calls our publication "probably the most comprehensive source of nationwide and international job openings received by our office and should be the starting point of any job search by lawyers looking to change jobs." Each monthly issue contains 500-600 current (public/private sector) jobs. $45/three months. Contact: *Legal Employment Report*, 1010 Vermont Ave. NW, Ste. 408-WB, Washington, DC 20005. 800- 296-9611. Visa/MC/AmEx. http://www. attorneyjobs.com/

**Business attorney:** Landerholm, Memovich, Lansverk & Whitesides, PS, a 22-attorney firm in Vancouver, WA, seeks a business law attorney for an associate position in the firm's fast-growing business practice. Applicants must have a minimum of two years' experience in the areas of general corporate and business matters, with emphasis on business organizations (corporations, limited liability companies and partnerships), business transactions, and commercial matters. Experience in federal and state tax matters and research is preferred, but not required. Must have an ability to manage rapid practice growth in a thriving business practice, a superior academic background, and excellent writing and interpersonal skills. Please send résumé, law school transcript and a short writing sample to Executive Director, Landerholm, Memovich, Lansverk & Whitesides, PS, PO Box 1086, Vancouver, WA 98666.

**ERISA attorney:** part-time or full-time. Employee Benefits Institute of America LLC, Shoreline, WA (www.ebia.com). Work involves legal research, writing, editing and speaking at seminars. At least four years of experience as an ERISA attorney representing employers is required. Superior writing and presentation skills are a must. Job-related travel is required. Wear blue jeans to work, as do our other three attorneys. Send e-mail with résumé to tmccormick @ebia.com

**Family law attorney:** Seattle firm looking for associate. Prefer at least three years' experience in family law. Salary plus bonus structure. Please send résumé to: Hiring Partner, Goldberg, Fancher & Jones, PLLC, 2200 Sixth Avenue, Suite 1200, Seattle, WA 98121.

**Campbell, Dille & Barnett, PLLC,** seeks an attorney to assist in the areas of business, corporate and litigation. Please reply to hiring coordinator, Campbell, Dille & Barnett PLLC, PO Box 488, Puyallup, WA 98371-0164.

**Plaintiff personal injury firm** seeks an attorney to assist with practice. J.D; minimum of three years' civil litigation experience required. Must have excellent oral, research and writing skills. Washington State Bar membership is required. Immediate opening. Send or fax cover letter with detailed description of litigation skills and experience, and résumé to: Arthur D. Miller, Attorney at Law, 1220 Main St., Ste. 355, Vancouver, WA 98660, fax 360-694-5919.

**Real estate attorney:** 20-plus law firm located in Vancouver, WA is seeking an associate attorney in our real estate area. The ideal candidate will have three+ years of experience and will be licensed in Oregon and Washington. The position will emphasize a fast-paced real estate and land use practice in Washington and Oregon. The applicant must have strong verbal, research and writing skills coupled with an excellent academic record. Applicants should send their résumé and writing sample to: Executive Director, PO Box 1086, Vancouver, WA 98666. All replies are confidential.

**Family law attorney** needed immediately for small firm located on Lake Union. Experience in family law preferred. Must be quick-minded, and able to think on your feet for show cause hearings. Nice office, benefits, free parking, salary negotiable. Call 206-322-2060 for Lysa or send résumé to 207 E. Edgar St., Seattle, WA 98102.

**Spokane plaintiff firm** needs a lead litigator to try complex medical negligence and products liability cases as lead attorney and manage the law firm. 40+ hrs./wk. Requires J.D. degree in law and a minimum of five years' experience as a trial attorney, including experience (which may be gained concurrently) in: a) handling 50 medical negligence or products liability cases of which at least 15 must have been as plaintiff's attorney; b) trying to completion, as lead counsel, 30 civil cases; c) managing a law firm for six months. Must be licensed in WA to practice law. Must have proof of legal authority to work permanently in the United States. Résumé and/or cover letter must reflect all requirements or it will be rejected. Send résumé by 3/5/99 to: The Markan Group Inc. PS, 421 Riverside, Suite 1060, Spokane, WA 99201.

**Office of the Prosecuting Attorney,** Colville Confederated Tribes. Deputy prosecuting attorney position available. Prosecution of child dependency cases will be major part of the work for the position. Experience in Indian law and tribal court practice preferred, but not required. Member WSBA or willingness to take bar examination in one year required. Member of Colville Tribal Court Bar required. Indian preference applies, but all qualified candidates will be considered. Salary is competitive and DOQ. Apply or inquire: Personnel Office, Colville Confederated Tribes, PO Box 150, Nespelem, WA 99155 or 509-634-2835.

**Attorney – commercial litigation:** 20-plus attorney law firm located in Vancouver, WA is seeking an associate attorney in our commercial litigation area. The ideal candidate will have three+ years of litigation experience and will be licensed in Oregon and Washington. Must have demonstrated abilities in the areas of: identifying legal issues; developing strategies; working efficiently with court staff and opposing counsel; locating and analyzing applicable law; preparing court documents; drafting correspondence and pleadings. Excellent oral and written skills essential. We offer an exceptional working environment including state-of-the-art technology, and a high degree of collegiality where personal growth and family values are encouraged and promoted. Please send résumé and writing sample to: Executive Director, PO Box 1086, Vancouver, WA 98666. All replies are confidential.

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**Brown Davis and Roberts, PLLC,** which limits its practice to the areas of business, real estate (including environmental) and estate planning, seeks an associate or contract attorney with two or more years of relevant experience. Offices are located in Gig Harbor. Applicant must have excellent writing skills and work habits. Please send résumé and cover letter to Hiring Coordinator, Brown Davis and Roberts, PLLC, 7525 Pioneer, #202, Gig Harbor, WA 98335.

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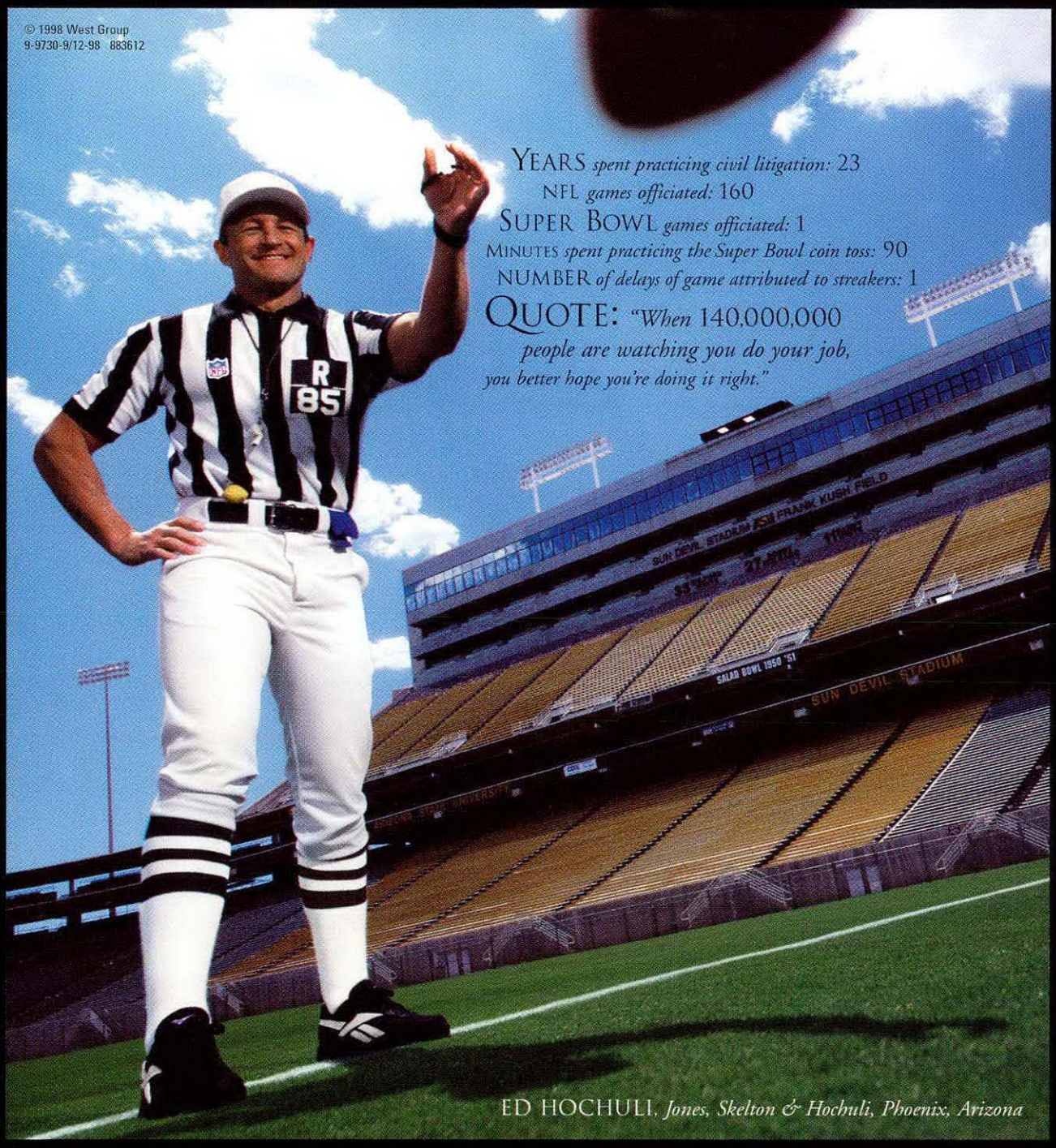


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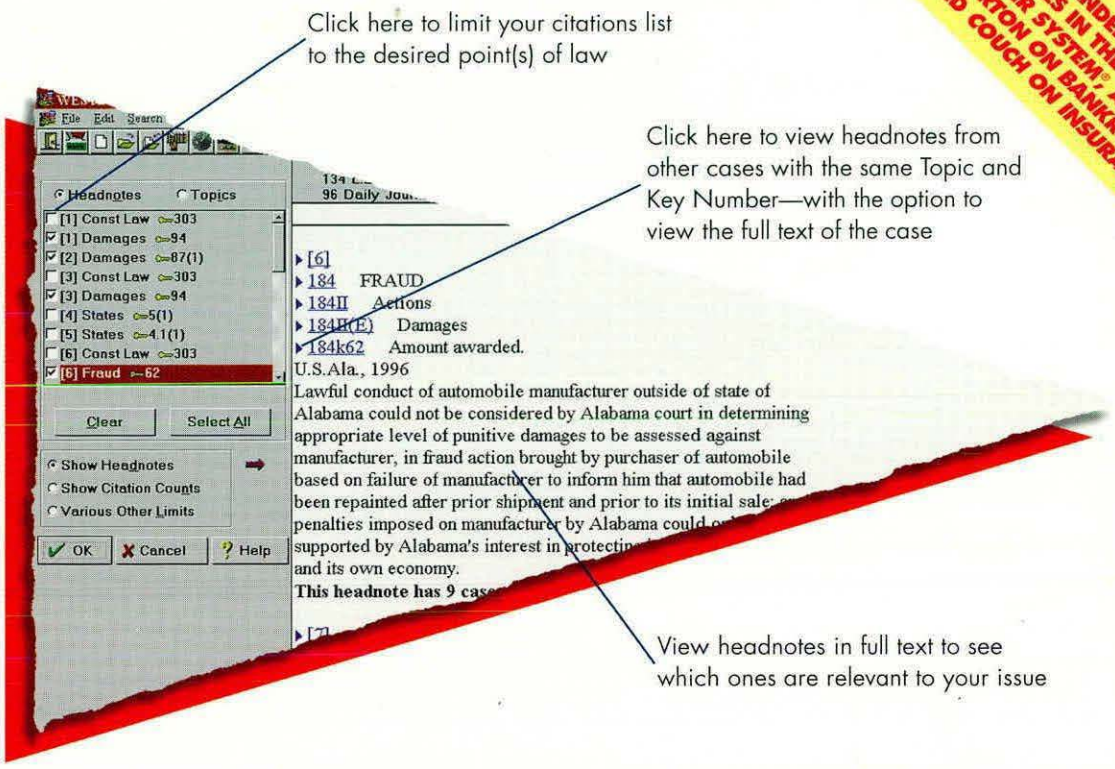


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