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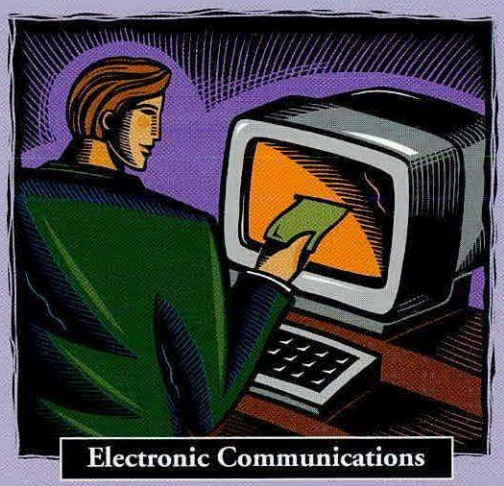
JULY 1999



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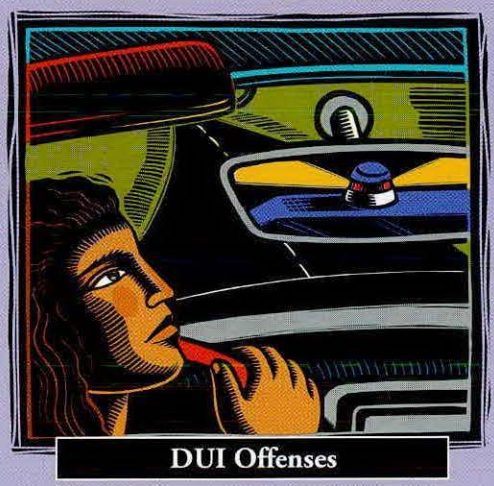

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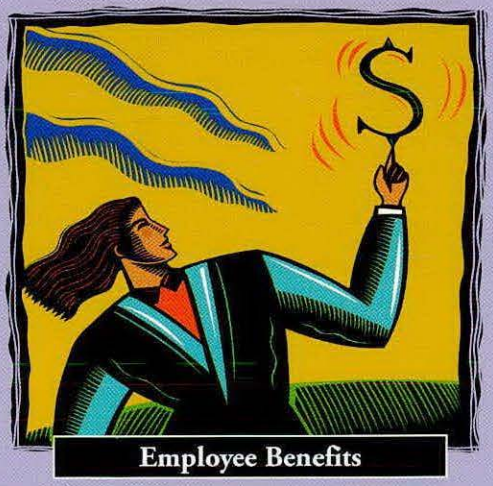

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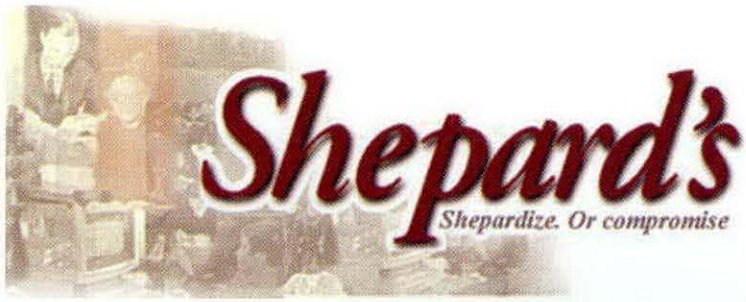

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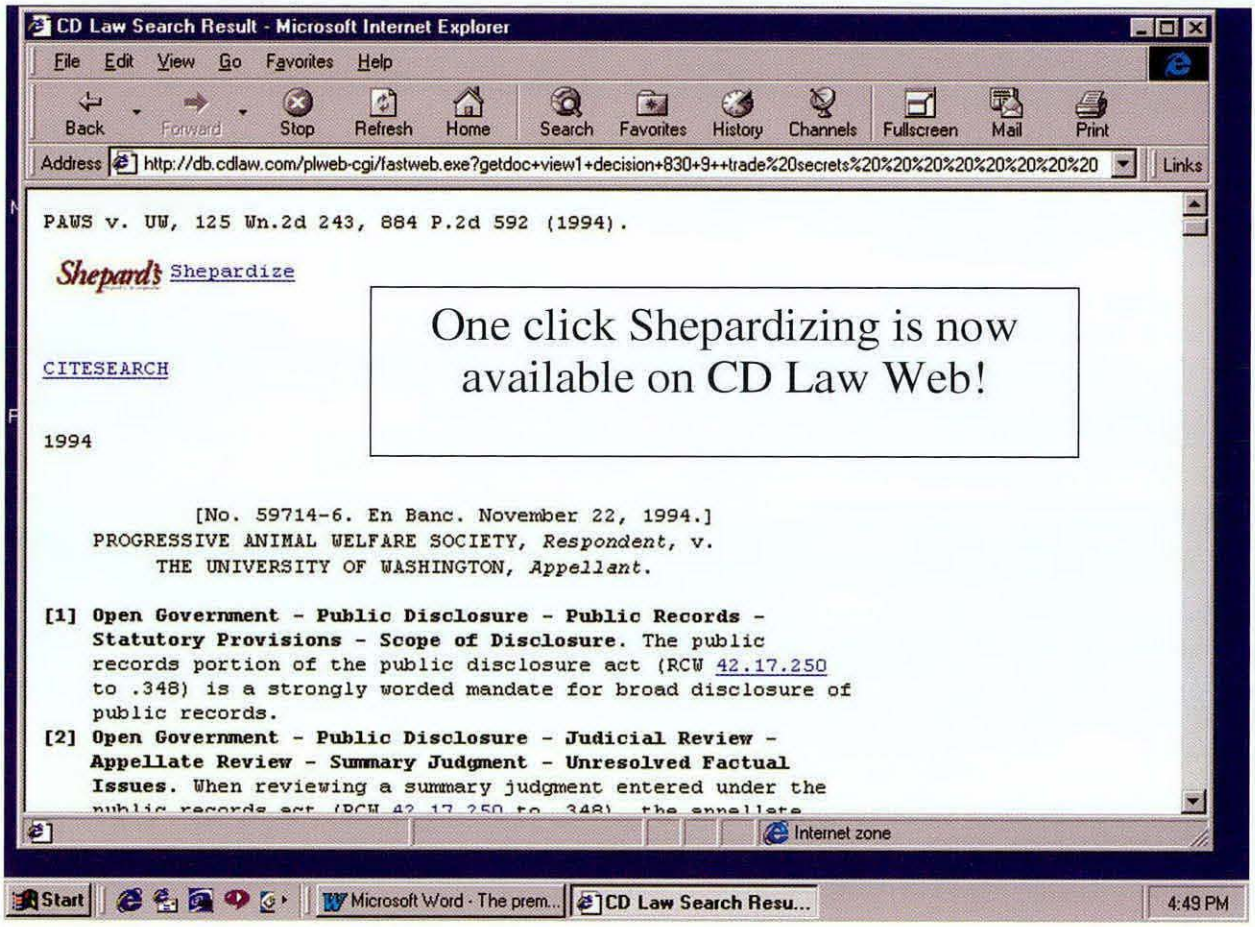

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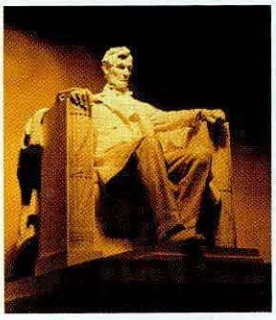

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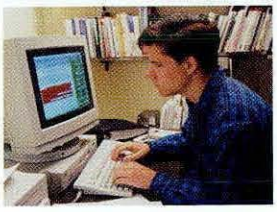

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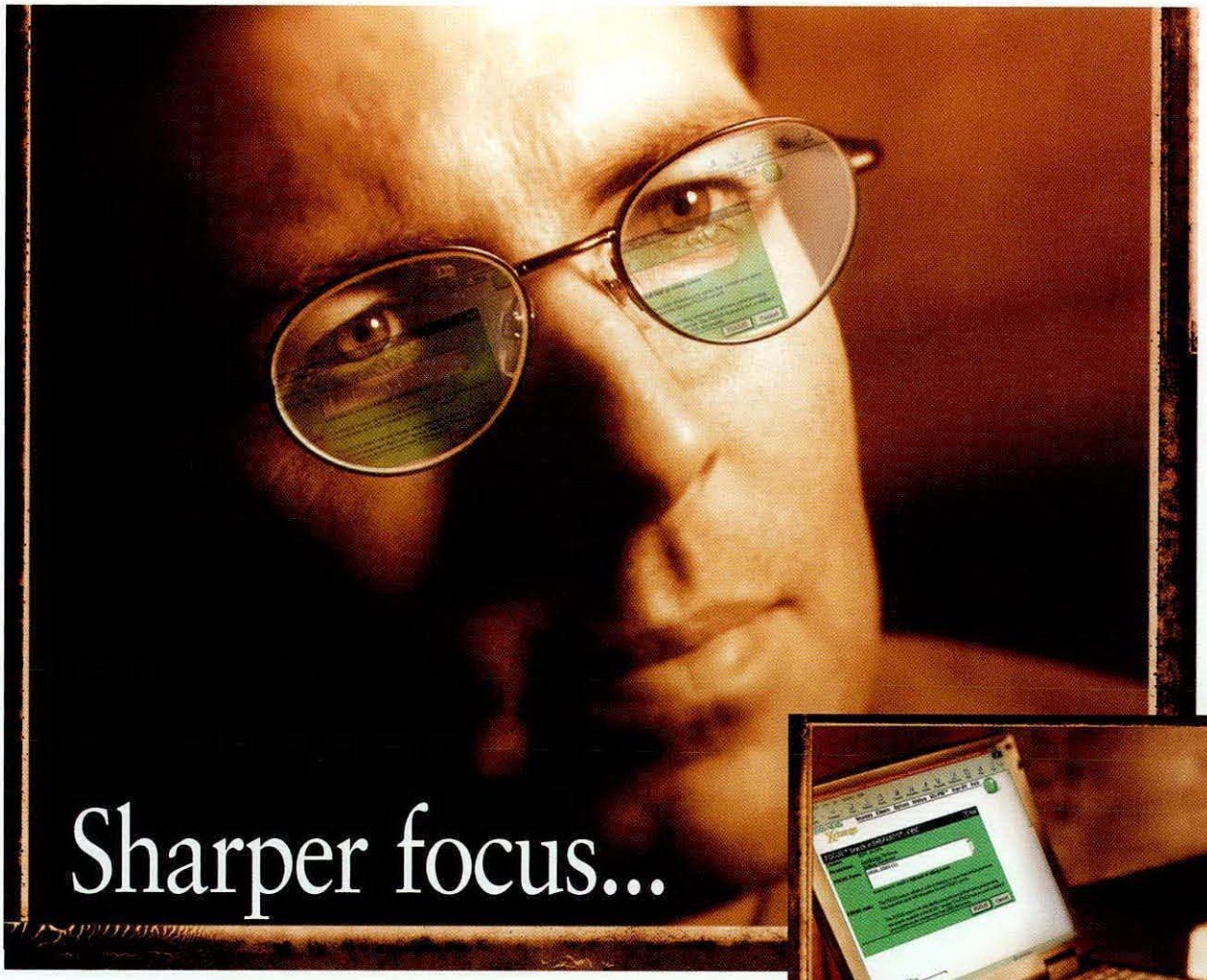

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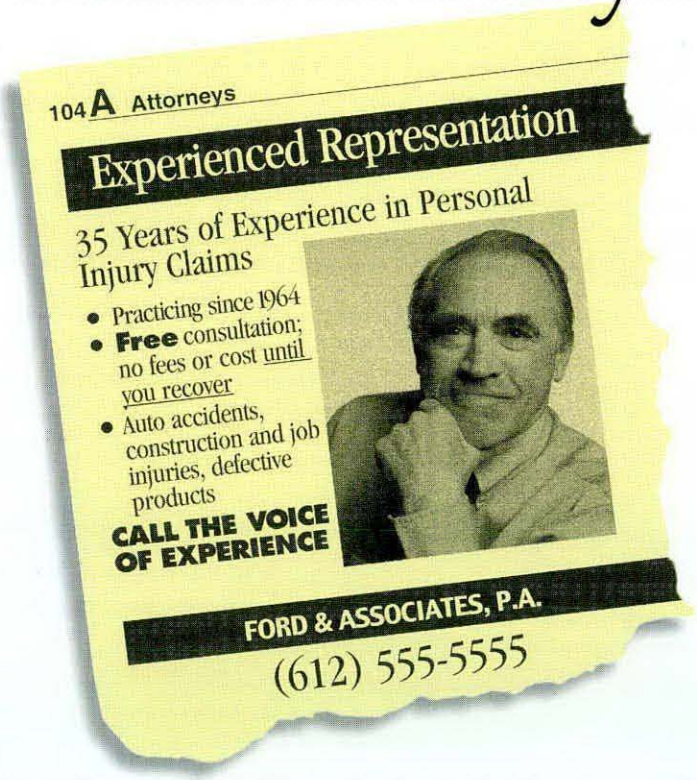

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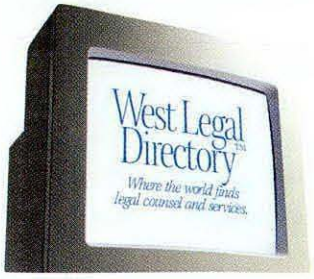

WEST GROUP

Letters

You Can Provide Pro Bono Services Without Joining a Formal Organization

Editor:

I have read the various articles and exhortations in the May *Bar News* regarding pro bono legal services. Obviously all lawyers should provide some pro bono services. So should all physicians and all grocery stores.

What apparently is not obvious to some people whose offices are far above street level is that many lawyers need join no organization or make any formal attempts in order to have the opportunity to provide all the pro bono services we can afford, and then some. People in need find us. Once you have provided pro bono legal services to anyone, you will be asked to provide them to others.

The same *Bar News* had a letter from Levy Johnston upon his retirement. Levy is an example of what I am talking about. Levy was the kind of lawyer who made practicing law enjoyable. He seemed to be more interested in solving problems than chalking up wins. His telephone agreement was worth more than most people's signatures. He gave away countless hours to many people. I doubt that he ever needed to seek out anyone to serve. Many people had his home phone number. If all of us were half as generous as Levy, the Bar Association could close all of its formal pro bono programs.

George R. Landrum
Seattle

NATO Bombings Illegal?

Editor:

Fifteen dead in Colorado and 21 civilian dead in Yugoslavia — so why more media coverage of Colorado? Is the Colorado media blitz fueled by federal propaganda meant to distract us from the illegal killings of women and children in Yugoslavia by American bombs? Both seem like murder.

Some argue that NATO air strikes which accidentally kill civilians are not the same as gunning down teenagers in a school because it's war, and because it is legal under international law. But NATO's offensive bombings in non-NATO territory may be illegal under the NATO Treaty, Art. 5 (1950 referencing U.N. Charter, Art. 51-1948), which allows only defensive force. Yugoslavia is currently arguing this before the U.N. International Court of Justice (ICJ) at The Hague, Netherlands (which has only civil jurisdiction between nations, unlike the 1998 International Criminal Court (ICC), which has criminal, or war crimes, jurisdiction over individuals).

The NATO Treaty created a defensive organization for use only when another member is attacked. NATO has become — without authority — an offensive force/world cop involved in land outside any member state. NATO's Preamble references defending only "the North Atlantic area" without mentioning Southeast Europe.

The U.S. in its press conferences has probably violated another international law, Article 20 of the U.S.-adopted 1966 U.N. International Covenant on Civil and Political Rights, which forbids pro-war propaganda by governments. As usual, truth is the first casualty of war. Article 3 of the Geneva Conventions (1864, 1906, 1929 and 1949) against killing civilians in war may also have been violated by the

U.S. when it bombed civilians and civilian sites in Yugoslavia.

Bring on the U.N.'s new ICC investigators and focus on the real criminal — the imperialistic U.S. government that kills Yugoslavian civilians to support a bloated military-industrial complex. Unfortunately, the U.S. didn't approve the ICC treaty last year in Rome, so technically, the U.S. doesn't come under its jurisdiction. The U.S., China, Libya, Iraq and other pariah states opted out of the ICC, citing threats to "sovereignty." What these nations are really saying is "we think we're above universal laws prohibiting war crimes."

Regional conflicts should be resolved by regional police authorities, not by a U.S. World Cop. NATO's Article 12 even encourages new and more regional security arrangements. Let the European Union start paying for its own defense, since U.S. taxpayers have been doing it for 50 years. The U.S. should withdraw from Kosovo, Europe and NATO, and then ratify the ICC.

Jeff E. Jared
Kirkland

Proposed RPC 8.4 Too Vague

Editor:

Our ever busy and paternalistic Board of Governors (BOG) has once again proposed a sexual orientation amendment to RPC 8.4 which the Washington State Supreme Court has published for comment.

Like recently defeated Initiative 677, the proposed amendment to RPC 8.4 would elevate "sexual orientation," a class established by conduct, to the status of legally protected classes based upon traits, such as sex, race or age. The amendment would also prohibit speech which manifests bias toward all protected classes. Comments will be accepted by the Clerk of the Supreme Court at P. O. Box 40929, Olympia, Washington 98504-0929 until June 30, 1999.

The rationale for the amendment is that the current rule is "woefully inadequate to stop the behavior we wanted to stop because it prohibits only acts of discrimination that are 'prohibited by law'" (David M. Horn, *Bar News*, February 1997, p. 9). The examples given of discrimination to be avoided were an attorney referring in court to another attorney as "boy," a judge who observed that a defendant appeared to be homosexual, and the hypothetical of an associate who was fired when his firm discovered that he was homosexual.

The proposed amendment creates an RPC violation for "conduct" which "manifests" bias on the basis of "sexual orientation." The term "sexual orientation" is so vague as to unfairly expose even the most open-minded attorney to an unreasonable risk of sanction. What precisely does the term mean? It is not defined. Literally taken, the term is defined by the individual who perceives that he or she has been wronged. The term has no precise meaning, but encompasses whatever orientation the self-perceived victim may have for sex. Take prostitution for instance. Some are apparently oriented toward prostitution, male and female, vendor and vendee. Would not the adoption of the proposed amendment create a professional violation for manifesting disapproval of or bias against prostitution?

A rule which measures bias based upon the orientation of the perceived victim is unworkable. There must be an objective standard against which to measure an alleged violation. The proponents of the amendment argue, disingenuously, that the meaning of the communication is subject to the reasonable-person test. So far so good. The issue, though, is not what meaning is communicated, but what communication is prohibited.

The determination of what communication is prohibited is not subject to the reasonable-person test. As a society we no longer have a consensus on whether certain sexual behavior is appropriate. Seattle, for instance, has different rules from the rest of the state. Certainly it is acceptable to hold in disdain, to be prejudiced against, those who engage in sexual conduct which we all as a community still hold to be inappropriate. Examples would be prostitution, bigamy and polygamy. The rule is apparently meant to protect homosexuals, so why not just say so? A rule which specifically protects homosexuals by name cannot later be expanded by clever plaintiffs to protect groups with a different orientation. (The issue would arise, however, whether all types of homosexual behavior are protected from communications of discrimination or if only certain types of behavior are protected.)

The amendment proponents argue that existing law, outside of Seattle, is inadequate to coerce their idea of appropriate behavior (973 P.2d No. 2, Ct.R-8; *Bar News,* February 1997, p. 9). The Congress of the United States, the Washington State Legislature and the people of the state have seen fit to not provide special treatment based upon sexual orientation, while Seattle has. This fact does not predicate a policy argument for expanding such protection for ethical reasons. In fact, since the local laws do not apply to businesses with less than seven employees, they should be viewed as economic in nature, not ethical. This is because there is no logical basis for exempting any business, no matter how small, from a law which is ethical in nature rather than economic.

The BOG should as a policy decision avoid regulation of the entrepreneurial aspect of the practice of law, which is already regulated by federal, state and local jurisdictions. Expanding the mandate of the BOG will further distract it from its core purpose: regulating the practice of law. Indeed, based upon the BOG's dismal performance regulating attorney discipline, its most important function, the ABA has recommended that the BOG be relieved of that responsibility (927 P.2d Proposed Rules LXVII). The BOG should focus upon and master its existing responsibilities before it seeks to expand its horizons to include social engineering of the business of law.

So far freedom of speech has been a basic tenet of American jurisprudence. Our criminal laws govern conduct, not speech or thought. Our civil rights laws and RPCs govern conduct, not speech, and certainly not thought. The amendment drafters carefully chose the term "conduct." They could have used the term "act," but that would not address the grievance complained of, verbal disrespect. "Conduct" is more broad and more far-reaching in its meaning than "act." One could argue that "conduct" should not include speech, but read the rule. In the legal arena, an attorney conducts himself

or herself by articulating a legal position. This is only done effectively with words. Moreover, two of the examples provided by the proponents are oral statements made during a court proceeding. The amendments will, if adopted by the Supreme Court, ultimately be interpreted to include speech. The unfortunate disbarred attorney who makes such case law will be forced to pursue the freedom of speech matter in the federal courts, while unable to earn a living, having lost his or her license to practice law.

The stated purpose of the proposed amendment is to protect people from the degradation of bias in the legal system; in a word, disrespect. This could readily be codified into an amendment which would create an RPC violation for being disrespectful while engaged in the practice of, but not the business of, law. My proposal, however, would not achieve the unstated goal of the rule's proponents, which is to coercively normalize conduct which many consider to be inappropriate, or even immoral. I know the members of our profession do not believe that this is appropriate — the question is, do we have the courage to act? For it was Yeats who said, "The best lack all conviction, while the worst are full of passionate intensity." Write to the Supreme Court.

James Rigby
Seattle

Jury Nullification Constitutionally Authorized in 24 States

Editor:

On February 8, 1999 the *Washington Post* published a front-page story entitled, "In Jury Rooms, a Form of Civil Protest Grows." According to the *Post* article, jurors are not always following judges' instructions to the letter.

The article recounted that sometimes in jury trials, when those facts which the judge chooses to allow into evidence indicate that the defendant broke the law, jurors look at the facts quite differently from the way the judge instructed them to. The jurors do not say, "On the basis of these facts the defendant is guilty." Instead, the jurors say, "On the basis of these facts the law is wrong," and they vote to acquit.

Or, they may vote to acquit because they believe that the law is being unjustly applied, or because some government conduct in the case has been so egregious that they cannot reward it with a conviction. In short, a passion for justice invades the jury room. The jurors begin judging the law and the government, as well as the facts, and they render their verdict according to conscience. This is called jury nullification.

Dr. Jack Kevorkian, recently convicted, was acquitted several times in the past, despite his admission of the government's facts, of assisting the suicide of terminally ill patients who wanted to die. Those acquittals were probably due to jury nullification. And Dr. Kevorkian might have been acquitted again if the trial judge had allowed him to present his evidence, testimony of the deceased's relatives, to the jury. A corollary of jury nullification is greater latitude for the jury to hear all of the evidence.

If the practice of jury nullification continues to grow, it will mean that in criminal cases, everything will be on the table in every case. Whenever a defendant is on trial, the government and its laws will be on trial also. With most criminal laws this will make no difference. But with controversial laws, like drug prohibition, it may make an enormous difference.

The *Washington Post* took a dim view of this and suggested that jury nullification is an aberration, a kind of unintended and unwanted side-effect of our constitutional system of letting juries decide cases. But the *Post* couldn't be more wrong. Far from being an unintended side-effect, jury nullification is explicitly authorized in the Constitutions of 24 states.

All Criminal Cases

The constitutions of Maryland, Indiana, Oregon and Georgia currently have provisions guaranteeing the right of jurors to "judge" or "determine" the law in "all criminal cases."

> *In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction. The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved.* (Maryland Constitution, Declaration of Rights, Article 23)

> *In all criminal cases whatever, the jury shall have the right to determine the law and the facts.* (Indiana Constitution, Article I, Section 19)

> *Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.* (Oregon Constitution, Article I, Section 16)

> *The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be judges of the law and the facts.* (Georgia Constitution, Article I, Section 1, Paragraph XI)

These constitutional jury-nullification provisions endure despite decades of hostile judicial interpretation.

Libel Cases

Twenty other states currently include jury nullification provisions in their constitutions under their sections on freedom of speech, specifically with respect to libel cases.

These provisions, cited below, typically state: "...in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court." But New Jersey, New York, South Carolina, Utah and Wisconsin omit the phrase "under the direction of the court." South Carolina states: "In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and facts."

The provisions: Alabama (Article I, Section 12), Colorado (Article II, Section

10), Connecticut (Article First, Section 6), Delaware (Article I, Section 5), Kentucky (Bill of Rights, Section 9), Maine (Article I, Section 4), Mississippi (Article III, Section 13), Missouri (Article I, Section 8), Montana (Article II, Section 7), New Jersey (Article I, Section 6), New York (Article I, Section 8), North Dakota (Article I, Section 4), Pennsylvania (Article I, Section 7), South Carolina (Article I, Section 16), South Dakota (Article VI, Section 5), Tennessee (Article I, Section 19), Texas (Article 1, Section 8), Utah (Article I, Section 15), Wisconsin (Article I, Section 3), Wyoming (Article I, Section 20).

Delaware, Kentucky, North Dakota, Pennsylvania and Texas add the phrase "as in other cases." Tennessee adds the phrase "as in other criminal cases." These phrases suggest that the jury has a right to determine the law in more than just libel cases.

> *... and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.* (Tennessee Constitution, Article I, Section 19)

The phrase "under the direction of the court," omitted by five states, provides for the trial judge to give directions, like road directions, which the jury may or may not choose to follow, to assist the jury in its deliberations. Our forefathers did not intend by this phrase for the trial judge to infringe in any way upon the sole discretion of the jury in rendering its verdict. Although later courts have held otherwise, the Tennessee Supreme Court in *Nelson v. State*, 2 Swan 482 (1852), described the proper roles of the judge and jury as follows: The judge is a witness who testifies as to what the law is, and the jury is free to accept or reject his testimony like any other.

The Maine Constitution affirms these roles in its section on libels:

> *... and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine,* at their discretion, *the law and the fact.* (Maine Constitution, Article I, Section 4 [emphasis added])

All Political Power Is Inherent in the People

In addition, 40 state constitutions, like the Washington State Constitution in Article I, Section 1, declare that "all political power is inherent in the people," or words to similar effect.

And 34 state constitutions expound on the principle of all political power being inherent in the people by saying that "the people...have at all times...a right to alter, reform, or abolish their government in such manner as they may think proper," or words to similar effect. For example, the Pennsylvania Constitution declares:

> *All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.* (Pennsylvania Constitution, Article I, Section 2)

If the people have all power, and have at all times a right to alter, reform or abolish their government in such manner as they may think proper, then they certainly have the right of jury nullification, which is tantamount to altering or reforming their government when they come together on juries to decide cases.

A single nullification verdict against a particular law may or may not alter or reform the government, but thousands of such verdicts certainly do. Witness the decisive role of jury nullification in establishing freedom of speech and press in the American colonies, defeating the Fugitive Slave Act, and ending alcohol prohibition.

Right of Revolution

Of special note is the Right of Revolution in the New Hampshire Constitution:

> *Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.* (New Hampshire Constitution, Bill of Rights, Article 10)

If the people have the ultimate right of revolution to protect their liberties, then they certainly also have the lesser included and more gentle right of jury nullification to protect their liberties.

It should also be noted that New Hampshire declares an unalienable Right of Conscience:

> *Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.* (New Hampshire Constitution, Bill of Rights, Article 4)

If the right of conscience is unalienable, then it cannot be taken away from people when they enter the courthouse door to serve on juries. The people have an inherent and unalienable right to vote their conscience when rendering jury verdicts.

Ninth and Tenth Amendments

There is no doubt that jury nullification was one of the rights and powers that the people were exercising in 1791 when the Bill of Rights of the United States Constitution was adopted. As legal historian Lawrence Friedman has written:

> *In American legal theory, jury power was enormous, and subject to few controls. There was a maxim of law that the jury was judge both of law and of fact in criminal cases. This idea was particularly strong in the first Revolutionary generation when memories of royal justice were fresh.* (*A History of American Law* [Simon & Schuster, 1973] p. 251)

Jury nullification is therefore one of the "rights...retained by the people" in the Ninth Amendment. And it is one of the

"powers...reserved...to the people" in the Tenth Amendment.

Jury nullification is decentralization of political power. It is the people's most important veto in our constitutional system. The jury vote is the only time the people ever vote on the application of a real law in real life. All other votes are for hypotheticals.

As Jefferson put it:

> *Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making of them.* (Letter to the Abbé Arnoux, 1789; *The Papers of Thomas Jefferson*, Vol. 15, p. 283, Princeton University Press, 1958)

One wonders why these jury nullification provisions are not given full force and effect today with proper jury instructions? Perhaps judges, who charge juries to follow the law, do not follow it themselves when they disagree with it.

List Source: Alan W. Scheflin, "Jury Nullification: The Right To Say No," 45 *Southern California Law Review* 168, 204 (1972) [list has been updated to 1999]

Tom Stahl
Ellensburg

Tolman Article Appreciated

Editor:

Thanks very much for Jeff Tolman's "Red Flags" article in the June issue [p. 13]—easily the most practical and useful bit of advice *Bar News* has published in many a moon. This is the kind of thing they don't teach you in law school — but it ought to be required reading for every Bar candidate.

Robert C. Cumbow
Seattle

Readers are invited to submit letters of reasonable length to the editor. They should be typed on letterhead, signed and, if possible, also provided on disk in any conventional format. Letters may also be sent via e-mail to comm@wsba.org. Due date is the 10th 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.

So You Wanna Sue the Soccer Bully?

by Sherrie Bennett
Editor

It was the kind of weather even a die-hard soccer mom dreads. The rain came down sideways across the field and collected in big puddles, which the young players gleefully plowed through. It was so cold that any feeling in my extremities was a distant memory. As I contemplated whether it would be child abuse to hose down the very muddy children before allowing them back into the car, my 10-year-old son announced that he wanted to sue the player from the other team who had pushed, kicked and otherwise bullied his way to victory. Before my cold-numbed brain could connect with my mouth, my 12- and nine-year-olds launched into a sophisticated discourse on why a lawsuit against the soccer bully was a bad idea. How would he prove his allegations, when all the other players wouldn't want to get involved? How had he been damaged? Wouldn't he need to schedule some visits with a doctor to document his mental anguish? And hadn't he been contributorily negligent in mouthing off to the bully? As I listened to the legally accurate analysis more appropriate to a law office than the back seat of a soccer mom's car, I couldn't help wondering if the conversation might have taken a different turn had the children involved not been the offspring of lawyers.

While most of the time I would like to think that being a lawyer has a positive effect on my children, I also have days when I wonder if there are harmful effects as well.

While most of the time I would like to think that being a lawyer has a positive effect on my children, I also have days when I wonder if there are harmful effects as well. Are your children impacted by your choice of profession? Here's a little quiz to find out — examples gleaned from the lawyer parents I know:

- Does your four-year-old give Miranda warnings to his teddy bear when cookies are discovered missing from the jar?
- Does your child complain that her First Amendment rights have been violated when you punish her for swearing?
- Are your children the only kids on the block who lecture the other bike riders on the dangers of not wearing bike helmets?
- Do your children always sit in the back seat of your vehicle for fear of being suffocated by an expanding airbag?
- Has your son told his grandmother that he wants to be "a client" when he grows up?
- Have you overheard your child explaining to her baseball teammates that the letters "PLLC" after your firm name on the team jerseys stand for "Please Leave Lotsa Cash"?
- Does your son secretly make fun of his friend who thinks a tort is a little pie?
- Do your children think insurance companies are a hotter investment than Internet startups?
- Do your children refer to your trial briefcase as "Mom's big purse" and appear horrified when an uninitiated person suggests it might be left in the car temporarily?
- Does your son complain that it's not "equitable" for him to have to clean his room when his brother doesn't have to?
- Do your children employ mediation negotiation techniques on you when discussing their curfews?
- Does your child ask "Where's the evidence?" when confronted with the suggestion that she broke your wife's favorite vase?
- Have you overheard your teenager explaining the intricacies of search and seizure law to her friends?
- Do your children analyze in agonizing detail all the alternatives available to them in a particular dilemma?
- Does your son charge his siblings the current statutory interest rate when they borrow money?

Undoubtedly, you've had your own experiences in realizing that your children pay more attention to what you say and do than might be indicated by their non-response to your questions while glued to their favorite TV show. They really *are* listening and absorbing your attitudes and feelings regarding lawyering and how lawyers interact with their clients and other members of society. Whether they think lawyer jokes are funny, or a grossly distorted insult to a noble profession, hinges on their take on your own perceptions of the daily tasks of law work. Do you pay attention to what you tell your kids about how lawyers interact with others? Are you instilling basic ethical values in your offspring, or reinforcing the truth of those lawyer jokes? Whether or not you're alert to the fact of your role modeling, your children will learn from your actions and words what it's like to be a lawyer. So what do you want them to be telling your grandchildren?

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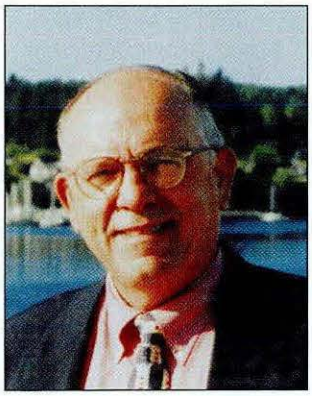


Building Public Trust and Confidence in the Justice System

by M. Wayne Blair
President

The good news, according to a recent national survey funded by the Hearst Corporation, is that 80 percent of Americans believe that "in spite of its problems, the American justice system is the best in the world."

The bad news is that respondents to the survey also rated their confidence in 17 different institutions in American society. They had the most confidence in the U.S. Supreme Court, but with only 50 percent showing strong confidence in this institution. Confidence in other federal courts, in judges, and in the justice system overall was even lower, with only about one-third of the respondents having strong confidence. Only 18 percent of respondents showed strong confidence in the U.S. Congress. Only 14 percent indicated strong confidence in lawyers. The media fared the worst, with strong confidence from only eight percent of the respondents.

Women, non-whites, those with lower incomes, and those with less education are less likely to agree that people are treated equally by the justice system.

To measure knowledge of the justice system, survey participants answered a series of 17 questions identifying the three branches of government, the function of each branch, the U.S. Chief Justice, and the accuracy of 10 statements pertaining to the function of courts. Not surprisingly, people's knowledge of the justice system is uneven. For example, 99 percent knew one of the basic tenets of our system — that anyone accused of a crime has the right to be represented in court by a lawyer. However, only 39 percent could identify all three branches of government, and 25 percent could not identify any branch of government. Overall, only 26 percent of the total sample could be considered highly knowledgeable about the justice system, and most of those were educated white males with higher incomes.

When survey questions addressed "trust in" rather than "knowledge about" the justice system, the results suggested an additional reason for "low confidence." A substantial number of people believe that the justice system treats different groups of people unequally. Only about half of the respondents believe that men and women are treated equally. Even fewer believe that the treatment is equal among racial or ethnic groups, or between wealthy and poor people. Women, non-whites, those with lower incomes, and those with less education are less likely to agree that people are treated equally by the justice system.

An important point reflected in the survey results is that the more a person understands about the justice system the more that person trusts the system.

Issues Affecting Public Trust

These survey results were discussed at a national symposium on Building Public Trust and Confidence in the Justice System, held May 13-15 in Washington, D.C., sponsored by the American Bar Association, the Conference of Chief Justices, the Conference of State Court Administrators, and the League of Women Voters, all in cooperation with the National Center for State Courts. Participants at this symposium were provided the survey results, and additional information collected in two other national symposia: the first symposium discussed the history of our system of government with its three independent branches, and the place of an independent judiciary within that system; the second symposium examined public understanding and perceptions of the judicial system. The third symposium used the information from the prior two symposia to discuss issues affecting public trust and confidence in the justice system, and to develop strategies to address the issues. Each symposium brought together scholars, judges, lawyers, court administrators and citizens. Each state sent a delegation.

The Washington state delegation included the Hon. Bobbe J. Bridge, Presiding Judge of the King County Superior Court; Sue Donaldson, President of the Seattle City Council; Mary McQueen, State Court Administrator; Wendy Ferrell, Public Information Officer from the Office of the Administrator for the Courts; and me, as President of the WSBA. Also attending from Washington were Hon. Paul Beighle, President of the American Judges Association and a Judge of the Seattle Municipal Court, and Ragan Powers, a member of the ABA Committee on State Justice Initiatives. Llew Pritchard, who is very involved in ABA activities, also attended the symposium.

Through the use of electronic polling, the approximately 300 participants identified 10 critical issues affecting public trust and confidence in the justice system. The four issues receiving the highest priority ranking were:

1. unequal treatment in the justice system (i.e., gender, race, ethnic bias; political/financial influence; inadequate training for judges and court personnel);
2. the high cost of access to the justice system (i.e., high cost of legal services; high court fees; complex procedures; inaccessibility of court information; lack of affordable alternatives);
3. lack of public understanding in the justice system (i.e., poor flow of information from courts to public; lack of school, media and other programs which promote understanding); and
4. unfair and inconsistent judicial process (i.e., abuses of adversary system; lack of control of lawyer behavior; discovery abuse; frivolous suits).

The participants also voted on the overarching strategies to address the critical issues, and identified the four highest-ranking strategies:

1. to improve education and training (i.e., improve school curricula about courts; improve internal education programs for judges, attorneys and court staff, including bias sensitivity training in ethics);
2. to make the courts more inclusive and outreaching (i.e., court-community collaboration; appoint citizens to court advisory committees; create a user-friendly court environment; more public appearances by judges);
3. to improve external communication (i.e., improve media relations; improve dissemination of court information to the public and to court users); and
4. to provide swift, fair justice (i.e., resolve cases with reasonable promptness and cost).

At the conclusion of the symposium, each individual and each state delegation accepted the responsibility of taking the tools and the information gained from the symposium back to our home states to begin a process to address the issues. The Washington delegation will be meeting over the next few weeks in anticipation of developing an action plan.

Clearly, one of the important components of any action plan is the need to educate the public. Unfortunately, the relatively low level of public understanding revealed in the survey about our overall system of government was not a surprise, given the low priority civics education has received in our public school system over the last 30 years.

Public Legal Education

The Public Legal Education Workgroup, an initiative of the Access to Justice Board, and its Education Committee, chaired by lawyer (and former teacher) Mary Wechsler, and the education community (in which the WSBA is playing a significant role) is an important educational project in this state. Judge Marlin Applewick and Judith Billings, the immediate past Superintendent of Public Instruction, co-chair the Workgroup. It includes judges, lawyers, educators and citizens, and has as its goal the design and implementation of a plan of public legal education in Washington in order to heighten public civic participation. The plan would include both K-12 education and education for the community at large. The work group, composed of nearly 60 individuals, has been meeting intensely over the last six months to design this plan. The plan will be a significant first step in reintroducing legal education into the public schools and the community.

Law Day 2000

Another step to educate the public about lawyers, judges and their role in the justice system is a potential WSBA program to place a lawyer or a judge in every school on Law Day 2000. Russ Speidel, a lawyer in Wenatchee, developed such a plan for Law Day 1999 for Chelan and Douglas Counties. According to Speidel, "the objective of this project was to educate students about laws, the legal system, and our rights and responsibilities as citizens." On May 7, the Chelan/Douglas County Bar Association placed nearly 30 lawyers and judges, who volunteered their time, in more than 60 classrooms in Chelan and Douglas Counties to teach law-related education to approximately 1,500 elementary, middle- and high-school students.

WSBA Executive Director Jan Michels, working with Speidel, the Board of Governors and a host of others, hopes to conduct a similar program statewide. Although the program has not yet been authorized by the Board of Governors, the plan would be to work with the other 58 local, specialty and minority bar associations in this state in designing and implementing a similar program for Law Day 2000.

There is much to be done in educating the public about laws, the justice system, our rights and responsibilities as citizens, and the role of lawyers and judges in that system. While the programs described above are only small steps in the right direction, they are, nonetheless, significant as beginning points for increasing the public's knowledge of and trust and confidence in our justice system.

Electronic Court Records: A Dream or a Possibility?

by Jan Michels
WSBA Executive Director

When I was with the King County Courts, the County Council and Executive were concerned about the increasing expense for storage and microfilming of documents, and wondered whether there was a better way to deal with records in the electronic age. It was clear that electronic technology had improved greatly and would continue to improve, so I proposed an Electronic Court Records (ECR) project to the County, who were impressed by the potential for greater efficiency and better service to the justice system.

By the time I left the courts and came to the WSBA, it was already clear to everyone on the project that the success of ECR is in the hands of the people who file: the legal community. So I'm continuing, from the Bar side, to support the project. Many lawyers already recognize that new technologies such as e-mail and online research are changing the practice of law — and that such basic changes are only the tip of the iceberg. To file, store and access court records electronically as easily as we send e-mail or look at the RCWs online is not only a dream, but a real possibility.

Many lawyers already recognize that new technologies such as e-mail and online research are changing the practice of law — and that such basic changes are only the tip of the iceberg.

First, clarifications: There's a difference between "digitized" and "digital" electronic documents. Digitizing is imaging — taking an electronic "picture" of a paper document for an electronic screen. Our goal, on the other hand, is *digital* documents — electronically created using word processing, encoded to identify the data within, searchable and hyperlinked to citations. Most electronic court-case files and client records will probably contain a mix of digitized (made from hard copy) and digital (word-processed) documents.

A number of pilot projects and special situations already use electronic records: motion practice in the Court of Appeals, Division I; briefs in Washington's Supreme Court; imaged files in Chelan County; imaged and digital documents in class actions (such as the asbestos or tobacco cases). This fall, King County will introduce document imaging and workflow in a Superior Court of substantial size (about 7,000 documents are filed there each day), moving toward a fully electronic court record. And the state of Utah is starting a digital court record for criminal cases.

These projects variously use imaging, word-processing files, and/or digital documents, each using specialized electronic document capture software. So far, however, none purports to have electronic files as the *original*, nor do they have a goal of building predominantly digital court files, available online for filing and for accessing. This is the goal of the ECR project. The following are a few considerations that favor the goal and some that need our attention.

Factors in Our Favor

The Washington State Digital Signature Act RCW Chapter 171
This statute enables electronic authentication of signed court documents. By having a digital signature, judges and officers of the court can file documents and instruments with their authentication, unalterability, and non-repudiability assured.

Court Leadership
Under Justice Phil Talmadge's chairmanship, the statewide Judicial Information System Committee (JISC), which oversees the implementation and use of technology in the courts, will soon be discussing the conventions and statewide practices necessary to assure usability and compatibility statewide. This could constitute a statewide forum for resolving questions and promulgating best practices.

The Emergence of XML (eXtensible Markup Language)
For ECR to be cost-effective for the courts, and to attract the filers of documents and those who access legal records, key data in documents must be "marked up" so the document can, as much as possible, be processed by software rather than by reading and re-keying information from it into the recipient's data system (SCOMIS or a firm's client files). "Tagging" or "marking up" documents tells the software what kind of document it is reading, where it goes, and what needs to be done with it. On traditional documents, such information is positional and idiosyncratic. For example, the first name in a civil filing is traditionally the plaintiff (positional), but to figure out who filed it requires interpreting the name of the document (idiosyncratic). With the emergence of XML, markup of such features is becoming more robust and flexible, meaning that electronic documents can be pro-

cessed more intelligently by software. Staff in courts, clerk's offices and law firms can automate the data re-entry chores, so they are free to do much more valuable work with information.

Court Incentives

Many Washington courts are already learning the conveniences of imaged documents for processing, storage and access. More than one person can look at a file at one time; they don't have to be in the file room to do so; and they don't have to worry about the document, page or file folder getting misfiled, lost or stolen. Nevertheless, the greatest savings to court record-keepers lies in the conversion to digital, self-effectuating documents. The court can encourage this sort of digital filing, but the ultimate success will depend on whether those filing court documents will take the trouble to use markup. Since XML is something that can be embedded into "fill-in-the-blanks" forms and templates, the writers of digital documents will have to be amenable to using structured writing tools.

Issues Needing Our Attention

Citation Form

The flexible display options of digital documents conflict with maintaining page and line numbers. Accordingly, the ABA and the American Association of Law Librarians have endorsed citation to paragraphs. Some states have adopted this system by Supreme Court rule; others require both forms. Washington state needs to decide to take advantage of digital documents without destroying proper citation.

Authentication/Certification Levels

Not all documents in a court file, where there are many safeguards and remedies for assuring genuine and unaltered documents, need a full-fledged digital signature. Court rules need to address the unique circumstances of digital records; there is more than one way to attribute a writing to its author.

Practical Questions

The implementation and use by lawyers and the public of XML markup software will require planning and training. Widely used desktop tools such as Word 2000 are being designed with XML included. The electronic availability of the official court file documents may reduce the law firm's need to keep its own duplicate set of those records. There are likely to be many other practical ramifications to the online availability of court files that the Bar will want to study with a view toward developing guidelines.

The WSBA is stepping up to this exciting technological challenge. In June, we sponsored a demonstration of the Chelan County imaging system; in the fall, we will hold a series of focus groups around the questions of citing, authentication and court rules. We are making sure that the WSBA's representative to JISC, Virginia Kirk, is well equipped with information to convey our interests and ideas. We believe strongly that our members have important interests at stake and advantages to gain from the development in Washington of digital court records.

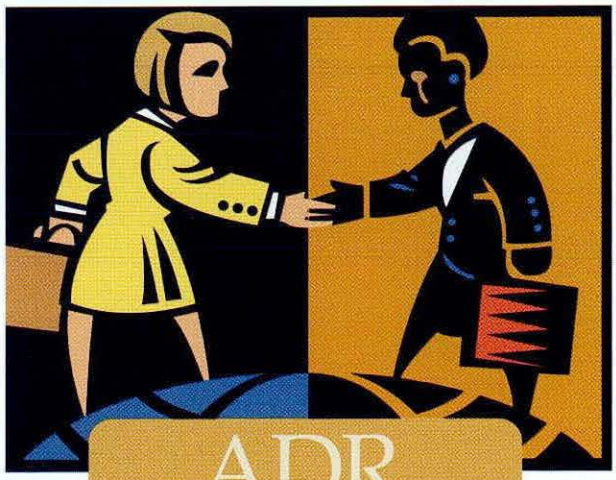
Alternate Dispute Resolution Comes of Age in Washington

by Washington Supreme Court Justice Philip Talmadge

Over the course of my career in the Washington State Legislature and on the Washington Supreme Court, I have had the opportunity to participate in the development of Washington's law on alternate dispute resolution (ADR). The future of ADR, both mediation and arbitration, inside and outside the traditional court system, is bright in no small part because our courts are increasingly focused on criminal matters and certain identified civil case priorities, such as child dependency/termination of parental rights. Simply stated, ADR is crucial to the present ability of Washington's judiciary to handle its civil caseload. It is difficult to imagine how our courts would function without mandatory civil arbitration of smaller cases, ADR in the family law context, or private ADR for civil disputes. ADR is expeditious and in many instances employs simplified evidentiary and discovery rules to facilitate dispute resolution. (These rules might well be employed in our traditional civil justice system more often.)

In the near future, ADR will be even more important to Washington's judiciary. ADR will soon be used for additional matters such as minor criminal cases, and nearly all family law cases. Out of the reality of too few judges, too many criminal cases, speedy trial mandates, and other imperatives, I predict our traditional civil justice system in the near term will largely be handled in ADR. What does this mean for Washington law and Washington's citizens?

Plainly, Washington has a rich tradition of support for ADR upon which to build. As early as 1891, our law permitted trials by referees.[1] Our Arbitration Act, now chapter 7.04 RCW, was first enacted in 1943. In 1979, the Legislature enacted mandatory arbitration of smaller civil actions in superior court.[2] In 1984, as part of the Court Improvement Act, the Legislature created alternative dispute resolution centers (chapter 7.75 RCW). Funding for those centers was later created by allowing counties to keep a portion of civil filing fees to support the centers and expanded trials by referees.[3] In 1991, the Legislature provided for mediation confidentiality.[4] In addition to enactment of procedures to support ADR, the Legislature provided for application of ADR to a wide variety of specific disputes in numerous statutory enactments over the last decade and a half.[5]



ADR

Out of the reality of too few judges, too many criminal cases, speedy trial mandates, and other imperatives, I predict our traditional civil justice system in the near term will largely be handled in ADR.

Complementing legislative support for ADR, Washington's court system has adopted court rules and decided cases providing support for ADR. Indeed, in a 1994 OAC (Office of the Administrator of the Courts) survey, 81 percent of Washington's judges agreed with the proposition, "judges should establish mediation/arbitration dispute resolution options." The Supreme Court has adopted court rules to implement mandatory civil arbitration and mandatory mediation of medical negligence cases.[6] Washington courts have, in fact, repeatedly upheld arbitration awards and declined to permit judicial review of arbitration decisions except under very narrow circumstances.[7]

Finally, ADR has substantial support in our private Bar and in the private sector. The Washington State Bar Association has a very active ADR section. We have seen explosive growth of ADR by firms, panels and individual attorneys in recent years. If I read recent *Bar News* ads correctly, many of the lawyers with whom I formerly litigated have transformed themselves into mediators/arbitrators.

Thus, Washington has a rich tradition of ADR support, and ADR is an ever-increasing part of our civil system of dispute resolution. Given this significant growth in ADR, however, a variety of unaddressed challenges have emerged, requiring the attention of the Legislature, the courts, the Bar, and the public. In particular, two key questions loom large at present:

1. Have we adequately described the public policy of ADR in Washington?
2. Is ADR sufficiently fair for all participants?

With respect to the first question, a cursory statutory review reveals no compre-

hensive definition of the terms *mediation*, *arbitration* or *ADR* in the Revised Code of Washington. Absence of a definition presents practical problems. Do different ethical standards apply? Who may do the work?

As to the qualifications for mediators and arbitrators under Washington law, in some instances (in particular mandatory civil arbitration) state law specifies qualifications for arbitrators. Can anybody, however, be a mediator or arbitrator in other settings in Washington? Should we allow only attorneys under Washington law to be mediators and arbitrators? What training is necessary for them?

Associated with these questions is the issue of ethical standards for mediators and arbitrators. Plainly, where lawyers or other licensed professionals are involved in arbitration, they must subscribe to appropriate ethical professional standards, insofar as they exist, involving the proceeding. But if the mediator or arbitrator is not a licensed professional, who assures the public that appropriate ethical standards are applied in the resolution of disputes? Moreover, should mediators and arbitrators enjoy an immunity from suits similar to that enjoyed by judicial officers when deciding cases?

For example, suppose a mediator mediates a dispute between parties to a satisfactory conclusion on all but one issue. Thereafter, the parties ask that mediator to resolve the final dispute as an arbitrator. Can the mediator, privy to the positions of both parties in settlement, ethically resolve a dispute as an impartial decisionmaker? What facts may the mediator/arbitrator ethically use to decide the case?

At present, there is no general standard in Washington law as to ADR process rules. In particular, should there be basic rules of the procedure for mediation and arbitration apart from those that apply in contexts like mandatory civil arbitration? Should the records and the thought processes of participants, mediators and arbitrators in ADR be confidential? While confidentiality is a valuable attribute of ADR for some, I am concerned that the continuing development of common law, based on *stare decisis*, will wither away with the increase in essentially nonappealable ADR results. As ADR is conducted, with the only result typically being either an award of damages or no award, without analysis, who will write the *McPherson v. Buick* cases of the future? Will our common law cease developing? Also, to what extent does the public have a right to know about the resolution of disputes?

Finally, the relationship of ADR to our traditional civil justice system is poorly articulated in Washington law. Judges are foreclosed, for example, from requiring the parties to mediate child support disputes.[8] Perhaps state law should more carefully delineate when judges themselves may mediate/arbitrate or may directly order ADR. Indeed, perhaps judges should more often invoke ADR in the criminal context.[9] Chief Justice Guy has asked Justice Barbara Madsen to study this possibility.

ADR

A subsidy could be funded by allowing judges to mediate or arbitrate at a higher civil filing fee than we traditionally charge for civil cases, and then using the funds to support ADR for low-income persons.

With respect to fairness, a number of questions arise. Particularly in the consumer context, large institutions such as banks, health-care insurers, home-construction firms, telecommunications firms, brokerage houses, and auto dealerships have placed mandatory arbitration provisions in their agreements with consumers. Are these mandatory mediation/arbitration provisions in consumer contracts sufficiently fair to consumers?[10] Due process standards have been advocated by a number of organizations in the consumer context. In particular, the American Arbitration Association has developed a consumer due process protocol that may serve as a model for how due process standards should apply in the consumer context.

Additionally, the cost of ADR must be addressed. The cost of private ADR can very often be substantial, running to several hundred dollars per hour. Is it fair to have a two-tier system of civil justice in which those people who have the resources can seek out and pay for private ADR while all the rest of the people must wait, and wait, and wait, for a trial date in our traditional civil justice system? Should we consider a specific public support or subsidy for low-income people to access private ADR? A subsidy could be funded by allowing judges to mediate or arbitrate at a higher civil filing fee than we traditionally charge for civil cases, and then using the funds to support ADR for low-income persons. Plainly, we must avoid an unfair two-tier system of justice in which the wealthy access ADR while low-income people are forced to use the traditional court structure for dispute resolution.

In conclusion, ADR is part of the future of Washington's court system, particularly our civil justice system. Its very success in recent years, however, requires us to carefully consider the challenges ADR creates and to take appropriate steps in the Legislature, the courts and the Bar to address those challenges and to ensure our state policy on ADR is clear and fair to all citizens of Washington.

NOTES

1 RCW 2.24.060.
2 Chapter 7.06 RCW.
3 Chapter 4.48 RCW.
4 RCW 5.60.070-.072.
5 *See, e.g.,* RCW 7.06.020(2) (by majority vote of superior court judges, establishment, termination, or modification of maintenance or child support payments); RCW 18.130.098(1) (providing for ADR to resolve complaints under the Uniform Disciplinary Act); RCW 28A.193.070 (providing for ADR of disputes arising from the provision of education programs for juvenile inmates); RCW 39.10.070(1)(f) (requiring ADR clauses in contracts entered into by a public body utilizing the alternative public works contracting procedures); RCW 43.17.330 (requiring ADR for interagency disputes); RCW 43.330.120 (requiring department to provide ADR to resolve growth management disputes).
6 *See* Superior Court Mandatory Arbitration Rules (MAR) and CR 53.4.
7 *See, e.g.,* Boyd v. Davis, 127 Wn.2d 256, 897 P.2d 1239 (1995) (limited ability to disturb arbitration award absent infirmity on the face of the award); Price v. Farmers Ins. Co., 133 Wn.2d 490, 946 P.2d 388 (1997); Davidson v. Hensen, 135 Wn.2d 112, 954 P.2d 1327 (1998).
8 RCW 26.12.190.
9 Washington law has permitted financial compromises to misdemeanors since 1881. Chapter 10.22 RCW.
10 *See, e.g.*, "Fine Print Erases Consumers' Right to Sue," *Seattle Times*, May 24, 1999, at p. A10.

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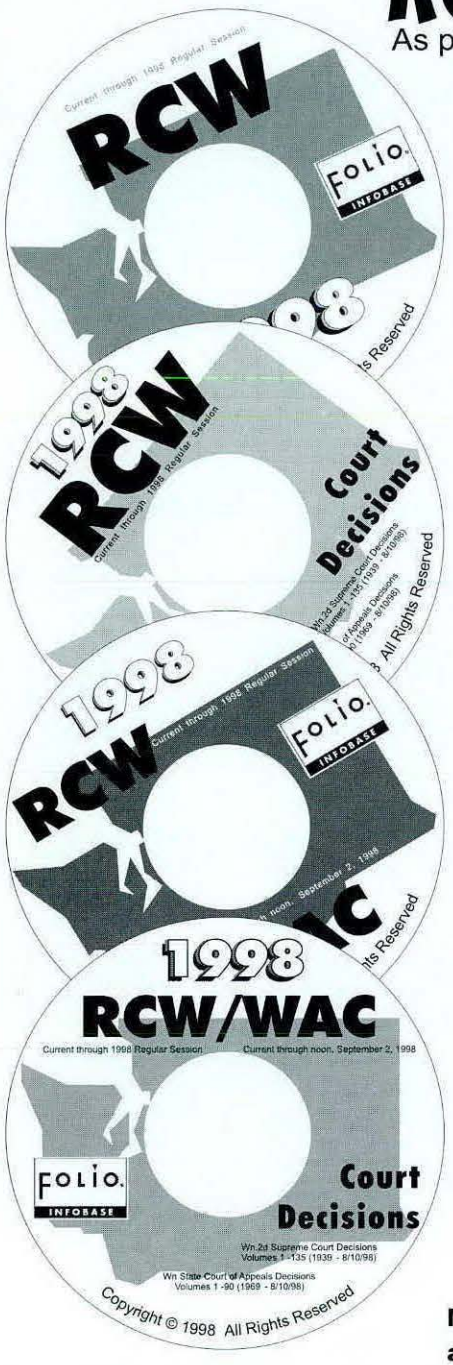

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by David Skeen

Proving Pre-Trial Prejudice in

Criminal defense attorneys making pre-trial motions are often asked by the trial judge to explain how their client has been "prejudiced" by the actions of the state. While answering the judge's question is often difficult, arguing legal prejudice is one of the most important pre-trial tasks of defense counsel. Even losing a properly researched and argued argument may mean relief on appeal or in another post-conviction proceeding. Conversely, an allegation of illegal state action without a showing of prejudice will likely result in an appellate court finding of harmless error.[1]

What is "prejudice" as used in the legal context of a criminal case to define pre-trial rights and/or privileges, and why is it important to a defendant? Pre-trial legal prejudice may be defined as a detriment to a defendant's ability to present an effective defense as the result of an error of law, or as a consequence of state action which deprives the defendant of a constitutional right to life, liberty or property.[2]

While the Federal and Washington State Constitutions do not specifically mention the word *prejudice* in the context of defining a defendant's rights, a significant number of the criminal rules of procedure do mention prejudice and have specific provisions which, in conjunction with constitutional standards, seek to protect the rights of the accused.[3] Some of the more important constitutional provisions and court rules concerning prejudice involve the statute of limitations (Art. I, §§ 10 & 22, Washington State Constitution and the Sixth Amendment, United States Constitution); preaccusatorial delay (Due Process Clause of the Fifth and Fourteenth Amendments); pre-trial delay (Art. I, §§ 10 & 22, Washington State Constitution and the Sixth Amendment, United States Constitution); joinder and severance (CrR 4.3, 4.3A and 4.4); speedy trial rights (CrR 3.3); and governmental misconduct (CrR 8.3(b)). The interpretation of these provisions is really the meat of the legal prejudice issue.

Allegations of statutes of limitation violations involve Art. I, §§ 10 & 22, Washington State Constitution, and the Sixth Amendment, United States Constitution, and permit judicial inquiry into the reasonableness or the constitutionality of delays within the applicable charging period. Prosecutors beware: a judge will scrutinize why a charge was filed shortly before the statute of limitations expired.[4]

In *State v. Chavez*, the prosecution took the view that courts could not review charging decisions prior to the time the statute of limitations expired.[5] In rejecting that argument, the court explained:

> *Statutes of limitations specify the limit beyond which there is an irrebuttable presumption that the defendant's right to a fair trial is prejudiced. However, while statutes of limitations continue as the primary guaranty against bringing stale charges, they do not preclude courts from raising a rebuttable presumption of prejudice where as here there is a prearrest delay short of the period set by the statute of limitations. Nor do statutes of limitations automatically excuse unreasonable delay or failure to prosecute at an earlier time. Indeed, statutes of limitations do not preclude judicial inquiry into the reasonableness or constitutionality of delays within that period. This conclusion is supported by the court's ability to review prearrest delays to determine whether a defendant's due process rights have been violated.*

The statute of limitations rule is directly related to the seldom-used concept of "preaccusatorial delay." As a general proposition, preaccusatorial delay in bringing adult charges does not violate a defendant's right to speedy trial, but may violate Fifth Amendment due-process guarantees and the Fourteenth Amendment. For adults, the bar is set even higher to excuse state actions with the introduction of the actual prejudice standard.

In *State v. Gee*, the court discussed the elements necessary to prove that a claim of preaccusatorial delay violates due process by explaining that a defendant must first show the delay caused *prejudice*.[6] The court continued its analysis by observing "a mere allegation that witnesses are unavailable or the memories have dimmed is insufficient. The defendant must specifically demonstrate the delay caused *actual prejudice* to his defense."[7] [emphasis added] What the court is saying is that if the state needs time to investigate, then so be it, even if the cost is the effectiveness of the defendant's case.

It is important to remember the court's caveat that "if the State is able to justify the delay, the court then must balance the State's interest against the prejudice to the accused in determining whether due process violations have occurred."[8] As the court in *Gee* noted, "ultimately, the test suggested by the United States Supreme Court is whether the action complained of...violates those fundamental conceptions of justice which lie at the base of our civil and political institutions."[9]

What are those "fundamental conceptions of justice which lie at the base of our civil and political institutions"? We all attempt to answer this question on a case-by-case basis, but any argument on prejudice must be more specific than general.

Consider the fate of a defendant who has made a preliminary showing of prejudice based on a delay in charging. Having met this difficult threshold, our courts have decided that once a defendant has established the "minimal prerequisite of prejudice, the court must also consider the state's reasons for the delay in

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order to find a due process violation. The state must show that the delay was neither intentional or negligent."[10] While placing some burden on the state, this rule may simply mean that the prosecutor informs the judge that law enforcement was or is "still investigating." For this reason, prosecutors rarely lose a motion to dismiss based on preaccusatorial delay, as there is considerable discretion in deciding when to charge.

In *State v. Norby*, 122 Wn.2d 258, 858 P.2d 210 (1993), the Washington Supreme Court stated that "a preaccusatorial delay may violate a defendant's right to due process under the United States Constitution, citing *United States v. Lovasco*, *supra. Id.* at 262.

The *Norby* court explained how its three-part test adopted from *Lovasco* may be used by the defendant for determining when a preaccusatorial delay violates an individual's right to due process:

> *(1) The defendant must show he [or she] was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused.* Lidge, *111 Wn.2d at 848, 765 P.2d 1292 (quoting* State v. Alvin, *109 Wn.2d 602, 604, 746 P.2d 807 (1987)).* Id.

The *Norby* court concluded by commenting that "the 3-part test clearly indicates a defendant cannot prevail on a claim of preaccusatorial delay unless he or she demonstrates *actual prejudice* resulting from this delay. If a defendant demonstrates this *actual prejudice*, the court will then consider the State's reason for the delay and balance the State's interests against this prejudice."[11] *Id.* [emphasis added]

What is "actual prejudice" as mentioned by the *Norby* court? In *Norby*, the defendants asserted that even if they met an initial burden of showing actual prejudice, the court could still infer prejudice from the pre-filing delay alone. The court disagreed, declaring:

> *[T]he mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice.* State v. Ansell, *36 Wn.App. 492, 498-99, 675 P.2d 614, review denied, 101 Wn.2d 1006 (1984). A mere allegation that witnesses are unavailable or that memories have dimmed is insufficient; the defendant 'must specifically demonstrate the delay caused actual prejudice to his defense.'* State v. Gee, *52 Wn.App. 357, 367, 760 P.2d 361 (1988) (quoting* State v. Bernson, *40 Wn.App. 729, 729, 734, 700 P.2d 758, review denied, 104 Wn.2d 1016 (1985)), review denied, 111 Wn.2d 1031 (1989). 122 Wn.2d 265.*

Norby all but concludes that a defendant will rarely be able to show "actual prejudice," but defense counsel should still argue the three-part test from *Lovasco* and specifically cite those facts which constitute prejudice within the context of their particular case. Standing before the judge and merely stating "my client has been prejudiced by the actions of the state" is not sufficient.

The area of pre-trial delay is a separate and distinct concept from preaccusatorial delay, or statutes of limitation, and involves a potential violation of a defendant's Sixth Amendment rights, Art. I, §10 & 22 of the Washington State Constitution and CrR 3.3. The fundamental rule in deciding whether a defendant's Sixth Amendment right to a speedy trial has been violated was stated over 25 years ago in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

The United States Supreme Court held in that case "[A] balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we can identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 92 S.Ct. at 2192. [emphasis added]

This state, in *State v. Wernick*,[12] adopted the *Barker* rule. In applying the rule to actual case facts, the court identified specific forms of prejudice, which may occur from pre-trial delay:

> *The Barker opinion also delineated three forms of prejudice to the defendant: (1) oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) the possible impairment of the defense. This last form of prejudice is the most serious, 'because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'* Barker, *407 U.S. at 532, 92 S.Ct. at 2193.*

These three specific forms of prejudice form the basis of a claim under the Sixth Amendment and Art. I, §§ 10 & 22 of the Washington State Constitution, alleging pre-trial delay. Defense counsel should, however, view these three factors as non-exclusive and also seek to utilize the more generalized three-part test in *Barker* to articulate additional, specific forms of prejudice applicable to their client's case.

What is interesting about the speedy trial rules is the shifting burden of proof. A defendant alleges he/she has been prejudiced by the delay in trial. The court then requires the defendant, not the state who has violated the rule, to offer evidence of how the state's errors violate his/her rights. If the defendant cannot prove "actual

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prejudice," then the error is deemed harmless.

In a decision which restores hope to the hopeless, an interesting subplot to the normal rules regarding pretrial prejudice has emerged. In *State v. Michielli,* 132 Wn.2d 229, 244, 937 P.2d 587 (1997), the court held that, while a late amendment of charges by the state may not result in a violation of the defendant's rights, it may constitute the separate violation of "governmental mismanagement" which warrants dismissal of prosecution in the interests of justice pursuant to CrR 8.3(b), citing *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

While governmental mismanagement may not be a novel concept, what is unique about this rule is that the prosecution has the initial burden of explaining why it delayed action in a case. But remember that "CrR 8.3(b) is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their judgment for that of the prosecutor." See *State v. Starrish*, 86 Wn.2d 200, 544 P.2d 1 (1975). The rule requires a showing of "governmental misconduct or arbitrary action" which materially infringes on the defendant's right to a fair trial."[13] So in reality, the bar is so high that only the truly inefficient prosecutor will suffer an adverse ruling of the court, and then only if the complained-of action materially infringes on the defendant's right to a fair trial.

There have been numerous governmental mismanagement cases decided in Washington state and it is not difficult to ascertain the parameters of this rule. Defense counsel need to be more conscious of all situations where governmental mismanagement may result in prejudice to the pre-trial rights of a defendant, as this is one area which just might provide a defendant with some relief.

In construing the provisions of CrR 4.3(a) on joinder of offenses, the Washington Supreme Court in *State v. Robinson*, characterized this as a "liberal joinder rule, vesting the trial court with 'considerable discretion in matters such as joinder of offenses.'"[14]

The Robinson court also commented that "[a]lthough joinder should not be used to prejudice one charged with a crime, or deny him a substantial right, *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), the *defendant* bears the heavy burden of demonstrating that the trial court's denial of severance was an abuse of discretion."[15] [emphasis added]

Most importantly, the Robinson Court described how a defendant may be prejudiced by joinder, declaring that:

> *(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury*

may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration. (citations omitted) Id. at 882.

Also of considerable interest was the Court's explanation of the reasons that could mitigate prejudice to a defendant:

(1) the strength of the state's evidence on each count, (2) the clarity of defenses to each count, (3) the court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined.[16]

The rules governing joinder and severance of defendants are similar to the rules involving counts, but are governed by CrR 4.3(b) and 4.4(c) and were adopted for different reasons. For instance, CrR 4.4(c) was adopted to avoid the constitutional problem in *Bruton v. United States*,[17] of a defendant who was deprived of his confrontation rights under the Sixth Amendment when he was incriminated by a pre-trial statement of a co-defendant who did not take the stand at trial.

In applying this principle, the Washington Supreme Court explained in *State v. Bythrow*:[18]

In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice. State v. Grisby, *97 Wn.2d 493, 507, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). In* Grisby, *we rejected defendants' argument that when mutually antagonistic defenses are offered, severance must be granted as a matter of law. While we recognized that mutually antagonistic defenses may on occasion be sufficient to support a motion for severance, the burden is upon the defendant to demonstrate undue prejudice resulting from a joint trial.*

In *State v. Canedo-Astorga*, the court held, in a case involving one defendant appearing pro se and the other defendant appearing with counsel, that "the defendant has the burden of demonstrating that a joint trial was so manifestly prejudicial as to outweigh the concern for judicial economy. To meet this burden, the defendant must point to specific prejudice."[19] The court described the potential difficulties in such a circumstance by noting:

Although Washington has no cases analyzing the effect of one defendant's self-

representation on another defendant's right to severance, a number of federal cases hold that a trial involving a pro se defendant and a represented co-defendant is not prejudicial per se and thus does not generate automatic severance. Generally, these cases hold that severance is required only when the moving co-defendant shows that a joint trial will cause specific prejudice.[20]

The court went on to explain that a defendant demonstrates specific prejudice by showing:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; or (4) gross disparity in the weight of the evidence against the defendants.[21]

All of the non-exclusive factors listed provide guidance, but each case must be reviewed on its own merits. So-called *Bruton* issues may provide a source of relief for defendants, but the courts will be balancing the cost of duplicate trials against any alleged prejudice to a defendant.

In conclusion, "prejudice" is often a concept that defense attorneys and their clients feel strongly about but have trouble articulating and even more trouble proving. Even those who are neutral about the competing interests of the prosecution and defense will acknowledge that prejudice rules sometimes protect the state when they commit errors. In effect, the state concedes it made an error, but argues that the weight of the evidence is overwhelming and that the defendant is guilty, and therefore the case should not be dismissed.

The only recourse for defense counsel is knowing what prejudice is in a given factual situation, which requires hard work to find facts in support of the argument to dismiss. Mere rhetoric that a defendant has been prejudiced will never suffice.

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NOTES

1 A recent example of alleging prejudice but failing to prove it is presented in State v. Martin, 137 Wn.2d 149, Wash 969 P.2d 450 (1999).

2 In the Matter of the Personal Restraint of Gary Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), the Court stated the rule for obtaining relief in a personal restraint petition: "To obtain relief in this personal restraint petition, the defendant must show he was actually and substantially prejudiced either by a violation of his constitutional rights or by a fundamental error of law." [citations omitted]

3 CrR 1.2 – Purpose and construction; CrR 2.1 – The indictment and the information; CrR 2.3 – Search and seizure; CrR 3.1 – Right to and assignment of lawyer; CrR 3.3 – Time for trial; CrR 3.4 – Presence of the defendant; CrR 3.5 – Confession procedure; CrR 3.6 - Suppression hearings – Duty of court; CrR 4.1 – Arraignment; CrR 4.2 – Pleas – Written Statement; CrR 4.3 – Joinder of offenses and defendants; CrR 4.4 – Severance of offenses and defendants; CrR 4.7 – Discovery; CrR 4.8 – Subpoenas; CrR 5.1 – Commencement of actions; CrR 5.2 – Change of venue; CrR 6.1 – Trial by jury or by the court; CrR 6.3 – Selecting the jury; CrR 6.4 – Challenges; CrR 6.5 – Alternate jurors; CrR 6.6 – Jurors' oath; CrR 6.7 – Custody of jury; CrR 6.9 – View of premises by jury; CrR 6.12 – Witnesses; CrR 6.13 – Testimony in lieu of witnesses; CrR 6.15 – Instructions and argument; CrR 6.16 – Verdicts and findings; CR CrR 7.1 – Procedures before sentencing; CR CrR 7.2 – Sentencing; CrR 7.5 – Probation; CrR 7.6 – New trial; CrR 7.8 – Relief from judgment or order; CrR 8.3 – Dismissal; and, CrR 8.7 – Objections.

4 State v. Chavez, 111 Wn.2d 548, 560, 761 P.2d 607 (1988) and United States v. Lovasco, 431 U.S. 783, 52 L.Ed.2d 752, 97 S.Ct. 2044, 2048 (1977).

5 State v. Chavez, 111 Wn.2d at 560.

6 *See* State v. Gee, 52 Wn.App. at 366-367, citing State v. Calderon, 102 Wn.2d at 352.

7 *See* State v. Gee, 52 Wn.App. at 367.

8 *See* State v. Gee, 52 Wn.App. at 367, citing State v. Calderon, 102 Wn.2d at 353, which relied upon Lovasco, *supra*.

9 *See* State v. Gee, *supra* at 367, citing United States v. Lovasco, 431 U.S. at 790.

10 *See* State v. Gee, 52 Wn.App. at 367, citing State v. Calderon, 102 Wn.2d at 353. *In accord,* State v. Lidge, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989); State v. Alvin, 109 Wn.App. 602, 604; and State v. Schifferl, 51 Wn.App. 268, 270, and fn 2 at 271, 753 P.2d 549 (1988).

11 Citing United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1050-51 (9th Cir.1990) (where the court did not consider the government's reasons for the preaccusatorial delay because the defendant had failed to show actual prejudice).

12 State v. Wernick, 40 Wn.App. 266, 271-272, 698 P.2d 573 (Div. I,1985).

13 *See* State v. Boldt, 40 Wn.App. 798, 800, 700 P.2d 1186 (1985), citing State v. Whitney, 96 Wn.2d 578, 637 P.2d 956 (1981); State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976); and, State v. Starrish, 86 Wn.2d 200, 544 P.2d 1 (1975).

14 *See* State v. Robinson, 38 Wn.App. 871, 882, 691 P.2d 213 (1985), citing, State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977).

15 State v. Robinson, 38 Wn.App. at 881, citing State v. Hentz, 32 Wash.App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

16 State v. Robinson, 38 Wn.App. at 881-82, citing State v. Dowell, 16 Wn.App. 583, 585, 557 P.2d 857 (1976); and State v. Harris, 36 Wn.App. 746, 750, 677 P.2d 202 (1984).

17 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

18 114 Wn.2d 713, 720, 790 P.2d 154 (1990).

19 79 Wn.App. 518, 527, 903 P.2d 500 (1995).

20 Id. at 527-28.

21 Id. at 528.

During the 1999 session of the legislature just concluded, the Judiciary Committee dealt with a vast array of bills affecting the Bar, including criminal law, family law, traffic and alcohol violations, corporations and business law, civil law, and other court-related issues. Despite a 49-49 tie in the House of Representatives, the Judiciary Committees in the House and Senate were able to enjoy a very productive year and enact legislation that will benefit the justice system of this state. We worked well with the co-chairs of the House Judiciary Committee, Dow Constantine and Mike Carrell, and co-chairs of the House Criminal Justice and Corrections Committee, Ida Ballisiotes and Al O'Brien.

This article focuses on Bar-related legislation that passed this year. The Judiciary Committee, however, is only one of 14 committees in the Senate.

Depending on one's area of expertise or interest, it might be beneficial to check the legislative website (http://www.leg.wa.gov) for details about other bills or to obtain more specific information about the bills described below. In addition, the Judiciary staff can be contacted at:

360-786-7462

or by writing to:

P.O. Box 40482
Olympia, WA 98504-0482

And, as in past years, a full description of all bills that passed the 1999 legislature can be obtained by ordering the Legislative Report. The Report will be available for approximately $10 (the price in previous years) by contacting the Bill Room at the address above.

by Senator Mike Heavey

New Legislation of Interest to Attorneys: *Highlights*

CRIMINAL LAW

E2SHB 1006:
Crimes Related to Drugs or Alcohol
Prime Sponsor: Representative Ballasiotes

- Expands the eligibility for the Drug Offender Sentencing Alternative program and excludes drug offenders from the Work Ethic Camp.
- Allows persons with serious drug problems to petition the court for intensive drug treatment in custody and after they are released from custody.
- Specifically allows counties to create drug courts for offenders with limited records.

E2SHB 1007:
Counterfeiting Intellectual Property
Prime Sponsor: Representative Ballasiotes

- Makes it a crime for anyone who, without authorization, produces or sells goods with counterfeit trademarks or who represents herself/himself as authorized by the company, if it is done for financial gain.
- Creates a graduated sentencing scheme based on the number of prior convictions for counterfeiting, the number of counterfeit items, or the aggregate retail value of the counterfeit items, ranging from a misdemeanor to a class C felony.
- Also creates a new class C felony for knowingly manufacturing, producing or distributing counterfeit items which endanger the health or safety of others.

HB 1011:
Harassment and Stalking Using Electronic Communications
Prime Sponsor: Representative Scott

- The statutory definition of criminal harassment includes a person who, by words or conduct, places another person in reasonable fear that the threat will be carried out. "Words or conduct" includes the sending of an electronic communication.
- The definition of "contact" in criminal stalking includes the sending of an electronic communication.
- For the purpose of obtaining an anti-harassment protection order due to a course of conduct, "course of conduct" includes the sending of an electronic communication.

HB 1027:
Criminal Justice Training Commission
Prime Sponsor: Representative Scott (SB 5038 Senator Goings)

- Adds two additional members, front-line law enforcement officers, to the Criminal Justice Training Commission.

EHB 1067:
Amending Statutory Double Jeopardy Provisions
Prime Sponsor: Representative O'Brien

- Allows the state to prosecute a defendant (e.g., for DUI) who has already received administrative or non-judicial punishment from another sovereign (e.g., military).

ESHB 1131:
Impounding Cars of Persons Patronizing Prostitutes
Prime Sponsor: Senator/Representative Sheahan (SB 5602 Senator West)

- Law enforcement may impound the vehicle of a person arrested for patronizing a prostitute (or juvenile prostitute) if the vehicle was used in committing the crime, if the arrested person is the owner of the vehicle, and if the person has been previously convicted of the same crime.

HB 1142:
Technical Corrections to Criminal Laws
Prime Sponsor: Representative Constantine

- Various criminal statutes are revised by the Code Reviser to correct technical defects.

SHB 1181:
Treatment for Crimes Involving Domestic Violence
Prime Sponsor: Representative Edwards
- When a respondent is ordered to participate in batterers' treatment, it is clarified that this means a domestic-violence perpetrator treatment program approved by DSHS.
- The Department's standards for approval of domestic-violence perpetrator treatment programs must include a requirement that, if the perpetrator or the victim has a minor child, treatment will include education on the effects of domestic violence on children.
- If either the offender or the victim of domestic violence has a minor child, the court may order the offender to participate in an approved domestic-violence perpetrator treatment program as part of any term of community supervision.

HB 1388: Crimes in Airspace
Prime Sponsor: Representative Keiser
- The criminal jurisdiction of Washington state is extended to any crime committed aboard an airplane, train, boat, or other conveyance while that conveyance is within Washington state if the conveyance has to land, dock or stop within the state.

HB 1394:
Defense of Duress Unavailable for the Crime of Homicide by Abuse
Prime Sponsor: Representative Hurst
- The defense of duress is not available in prosecutions for homicide by abuse.

HB 1442:
Assault on Transit Employees
Prime Sponsor: Representative Edwards (SB 5492 Senator Haugen)
- The statute that makes it a felony to assault a transit driver who is performing official duties is expanded to cover assaults against transit mechanics, transit security officers and the immediate supervisor of a transit driver, if such persons are performing official duties at the time of the assault.

HB 1544: Sentencing Corrections
Prime Sponsor: Representative O'Brien (SB 5376 Senator Costa)
- Makes technical corrections in the sentencing laws to clear up inconsistencies as a result of prior amendments with unintended consequences.
- Ranked felonies that were previously unranked on the sentencing grid, seriousness level.
- This was requested legislation from the Sentencing Guidelines Commission.

HB 1849: Exceptional Sentences
Prime Sponsor: Representative Kagi
- Allows the court to justify giving an aggravated sentence when an adult has developed a relationship with a homeless teen for the purposes of victimization.

SHB 2086: Creating the Crimes of Unlawful Discharge of a Laser
Prime Sponsor: Representative Esser
- It is a class C felony to knowingly and maliciously discharge a laser at:
  – a law-enforcement officer in his/her official duties and create the reasonable belief that the officer is being targeted by a laser-siting device;
  – a law-enforcement officer, airplane pilot, firefighter, or public or private transit- or school-bus driver and impair their ability to deliver services or impair the safety of their vehicle.
- It is a gross misdemeanor to knowingly and maliciously discharge a laser at:
  – anyone not named in the felony section and impair their ability to operate a vehicle;
  – anyone named in the felony section, causing a substantial risk of impairment;
  – a person to threaten or intimidate.
  The first offense by a juvenile is a civil infraction resulting in a fine of not more than $100.

SSB 5134: Foreign Protection Orders
Prime Sponsor: Senator Wojahn (HB 1160)
- A procedure for the filing and enforcement of foreign protection orders is created.
- The order must be issued by a court of another state, United States territory or possession, a military tribunal, or a tribal court in a civil or criminal action.
- It is a gross misdemeanor for a person under restraint to violate the foreign protection order or restraining order.

- Violation of a foreign protection order is a class C felony under circumstances specified in the bill.
- The person entitled to protection must divulge other orders between the parties, and disputes dealing with custody of children or visitation are to be resolved judicially.
- A peace officer is not to remove a child from his or her current placement unless a writ of habeas corpus is produced or the child would be injured or could not be taken into custody if it were necessary to first obtain a court order.

SSB 5234:
Custodial Sexual Misconduct
Prime Sponsor: Senator Long (HB 1177)
- Creates the new crimes of Custodial Sexual Misconduct in the First and Second Degree.
- Makes it illegal for a correctional officer, jail guard or other law-enforcement officer to have intercourse or sexual contact with a prisoner or other person under their custody or under arrest.
- First degree requires intercourse and is a class C felony.
- Second degree requires sexual contact and is a gross misdemeanor.
- Consent of the victim is not a defense, but sex by forcible compulsion is a defense.

E2SSB 5421:
Offender Accountability Act
Prime Sponsor: Senator Hargrove (HB 1252) (Human Services & Corrections, Fara Daun)
- Creates a single system of supervising offenders in the community and expands number of offenders sentenced to community supervision.
- Both the Court and the Department of Corrections (DOC) can set affirmative conditions of supervision, including treatment.
- Gives DOC tools to monitor and enforce conditions and sanction violators.
- Requires sex-offender treatment providers to be certified by the Department of Health.

SSB 5573: Improving Criminal History Record Dispositions
Prime Sponsor: Senator Horn (HB 1555)
- Allows criminal charges to be disseminated as non-conviction data in the same manner as arrest information.

SSB 5671: Changing Provisions Relating to Anarchy and Sabotage
Prime Sponsor: Senator Kline
- All but two sections of the anarchy and sabotage statutes are repealed.
- Two sections of the anarchy and sabotage statute are amended to define the crimes of assembling to commit criminal sabotage and committing criminal sabotage.

CHILD SUPPORT/FAMILY LAW

ESHB 1514: Modification of a Parenting Plan or Custody Order
Prime Sponsor: Representative Kastama
- A court may order a minor modification in the residential schedule of a parenting plan when it does not change the primary residence of the child and the modification does not result in more than 90 overnights per year in total.
- If the nonprimary residential parent voluntarily fails to exercise residential time for an extended period, the court may make adjustments to the parenting plan.

SB 5127: Child Abuse Investigations
Prime Sponsor: Senator Kohl-Welles
- A law-enforcement officer is prohibited from participating as an investigator of

alleged abuse or neglect concerning a child for whom the officer is, or has been, a parent, guardian or foster parent.

The following contains provisions from HB1692.

- Various provisions are created to guide investigators from DSHS, law-enforcement, prosecution, and local advocacy groups who investigate and/or interview child victims of alleged sexual abuse. Law-enforcement, prosecution, and Child Protective Services workers are provided with ongoing specialized training in interviewing child victims of sexual abuse.
- The Washington State Institute for Public Policy must convene a work group to develop state guidelines for child sexual abuse investigations protocols.
- Three pilot projects using different methods to conduct and preserve interviews with alleged child victims of sexual abuse are to be established by DSHS.

ALCOHOL/TRAFFIC

SHB 1124: DUI Electronic Monitoring

Prime Sponsor: Representative Constantine (SB 5162 Senator Goings)

- Courts may waive otherwise mandatory electronic home monitoring in DUI cases if the offender has no dwelling or phone, or the offender resides outside the state, or there is reason to believe the offender will violate the terms of the monitoring.
- Whenever a court waives the monitoring, it must impose an alternative sentence with similar punitive consequences. Alternatives include jail time, work crew or work camp.
- If the total of jail time and electronic monitoring would exceed one year, the jail time is to be served first and the monitoring (or alternative) is to be reduced so the combination does not exceed one year.

SHB 1774: Regulating Occupational Driver's Licenses

Prime Sponsor: Representative Wolfe (SB 5377 Senator Kline)

- Persons whose driver's licenses have been administratively suspended due to failure to pay a traffic ticket, violation of financial responsibility laws, or multiple infractions within a specified period may apply for an occupational driver's license.
- In order to qualify for an occupational driver's license a person must be in one of the following programs where a driver's license is required: (1) a member or an applicant for an apprenticeship program or an on-the-job training program; (2) a program that assists persons who are on welfare to become employed; or (3) undergoing substance-abuse treatment or participating in a 12-step program such as Alcoholics Anonymous.
- The Department of Licencing is prohibited from issuing an occupational driver's license to persons participating in substance-abuse programs or 12-step programs who have access to transit services.

HB 2205: Mandatory Court Appearance Following DUI Arrest

Prime Sponsor: Representative McDonald

- Local courts may waive the requirement that persons arrested for DUI appear within one judicial day following arrest if these persons are required to appear at the earliest practicable day following arrest. Each court is to identify, by rule, the method for setting the earliest practicable day.

SB 5211: Drunk Driver Jurisdiction

Prime Sponsor: Senator Costa (HB 1200)

- The statutes that deal generally with district and municipal court jurisdiction over criminal defendants are made to explicitly reflect the five-year jurisdiction granted in the 1998 DUI law changes and the enforcement of ignition interlock orders is exempt from the jurisdictional time restrictions.

SB 5301: Traffic Offense Processing

Prime Sponsor: Senator Heavey

- Courts are allowed to electronically transfer traffic-offense disposition information to the DOL.
- Requirement that speed and speed-zone information be recorded and printed on hearing notice forms is removed.
- Courts can simultaneously generate and issue the failure to appear notice with the warrant of arrest whenever the person violates his or her written promise to appear in court.

SSB 5304: Relating to Penalties Imposed for Violations of the State Liquor Code

Prime Sponsor: Senator Costa (HB 1201)

- Keg registration violations and furnishing kegs to minors are gross misdemeanors.
- Consuming liquor in public is a class 3 infraction punishable by a fine of up to $50. The violation of selling liquor to a minor, RCW 66.44.320, is repealed due to the fact it is addressed in another section of law which makes a similar violation a gross misdemeanor.

SSB 5399: Changing Provisions Relating to Traffic Offenses

Prime Sponsor: Senator Rossi

- Prior DUI-related convictions are not considered when computing the offender score for a current offense of vehicular homicide while under the influence, but a two-year sentence enhancement is added for each prior DUI-related offense.
- In cases where a person is convicted of DUI with a blood alcohol content (BAC) of .15 or more, the DUI is the person's second or subsequent DUI, or the person refused the Breathalyzer test, the court must order the person to drive only a vehicle equipped with an ignition interlock device.
- As a condition of granting a DUI-related deferred prosecution, the court must order installation of an interlock device when the DUI involved a BAC of .15 or higher, the person refused the Breathalyzer test, or it is the person's second or subsequent DUI.

  The following contains provisions from SB 5443.
- The Department of Licensing may waive the required $100 fee if the person requesting a hearing regarding administrative license suspension or revocation is an indigent as defined by law.

CIVIL LAW

HB 1199: Defining the Jurisdiction of Civil Antiharassment Actions

Prime Sponsor: Representative Lantz (SB 5302 Senator Roach)

- A district court must transfer an action or proceeding relating to a civil antiharassment protection order to the superior court when the respondent is under 18 years of age.

SHB 1671: Actions Arising Out of Public Works Contracts

Prime Sponsor: Representative Constantine (SB 5764 Senator Heavey)

- All public works contract disputes are subject to the offer-of-settlement and prevailing-party attorney fees law, regardless of the dollar amount of the alleged damages.
- The current dollar limit of $250,000 is deleted from the statute.

EHB 2015: Liability for Y2K Issues

Prime Sponsor: Representative Radcliff (SB 5889 Senator Kline)

- State and local agencies, plus private and public gas and electrical utilities, are severally liable (not jointly) for damage relating to Y2K problems.
- The state and local agencies are also immune from liability for the first $100 of damages per claimant.

  The following contains provisions from SB 6035.
- An individual has an affirmative defense in any court action if he or she defaults on a contract because of a Y2K problem.
- Insurance coverage is reinstated with full coverage, with no penalties or interest, if a person can demonstrate that payment was not made because of Y2K and

payment is ultimately made in a timely fashion.
- No interest or penalties if employer cannot pay L&I premium because of a Y2K problem and payment is ultimately made in a timely fashion. "Employer" means only an individual or a business entity with 50 or fewer employees.
- No interest of penalties if a person cannot pay real or personal property taxes or state excise taxes because of a Y2K problem and payment is ultimately made in a timely fashion. "Person" means only an individual or a business entity with 50 or fewer employees.
- Person asserting the Y2K problem must not be the cause of the problem.
- The bill does not apply to injuries or death caused by Y2K.

SHB 2071:
Limited Liability Companies Exclusion from Workers' Compensation
Prime Sponsor: Representative B. Chandler (SB 5721 Senator Heavey)
- Members and managers of limited liability companies whose positions are similar to those of certain high-level partnership or corporation positions are excluded from mandatory industrial insurance coverage.

SSB 5154: Limiting the Liability of Electric Utilities
Prime Sponsor: Senator Hargrove (HB 1230)
- Electric utilities are granted immunity from liability for damages when their workers cut vegetation that has damaged their facilities, or that poses an imminent hazard or potential threat to damage.
- The terms "imminent hazard" and "potential threat" are defined and these conditions must be determined by a certified arborist or qualified forester.
- Provisions regarding notice to landowners is detailed for those situations where the vegetation has already come in contact with electric facilities, for those that pose an imminent hazard, and for those that present a potential threat.

SB 5196:
Resolving Trust and Estate Disputes
Prime Sponsor: Senator Johnson (HB 1098)
- The Trust and Estate Dispute Resolution Act (TEDRA) is created to centralize all procedures for resolving disputes that occur regarding trusts and estates.
- The common-law doctrine of "virtual representation," which allows a member of a class to an inheritance (e.g., a grandchild) to determine the rights of all members of the class, is adopted.

SSB 5197: Making Technical Corrections to the Disclaimer Statute
Prime Sponsor: Senator Johnson (HB 1138)
- A written disclaimer of interest in an estate does not have to refer to specific statutory language in order to avoid tax consequences.
- Unless otherwise designated within the disclaimer, the minimum requirements of the IRS Tax Code are presumed to be met.
- Applies retroactively to all disclaimers made after the date of the change in the IRS Tax Code.

SB 5198: Comporting with IRS Tax Code Language
Prime Sponsor: Senator Johnson (HB 1159)
- Technical correction that deletes the word "unified" from the term "unified credit" as that term is used in the marital deduction survivorship sections of the law.

- Harmonizes state law with the terminology of the federal tax code.

SSB 5928: Extending Immunity to Those Who Communicate a Complaint to Organizations that Regulate the Securities or Futures Business

Prime Sponsor: Senator Prentice (HB 2242)

- Provides immunity to persons who communicate a complaint or information to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state or local agency.

DEBTOR/CREDITOR

HB 1233: Executing on Homestead Property

Prime Sponsor: Representative Edmonds

- When a person attempts to collect on a debt by executing on homestead property, the net value of a homestead is calculated at the time the judgment is executed.
- All liens and encumbrances are included in the calculation except that of the specific judgment being executed upon, and all encumbrances junior to that judgment, are excluded from the calculation.
- The amount of the homestead exemption is increased from $30,000 to $40,000.

ESSB 5195: Protecting Employee Benefits

Prime Sponsor: Senator Heavey

- Various forms of retirement savings (including Roth IRAs, tax-sheltered annuities, etc.) are exempt from legal process, such as garnishment.
- Language is added conforming the act to the numerical changes of the IRS Tax Code and to the alternate dispute resolution provisions that are required with disputes of wills or trusts.

CORPORATIONS/BUSINESS

HB 1139: Judicial Removal of a Director of a Nonprofit Corporation

Prime Sponsor: Senator/Representative Sheahan

- In addition to existing mechanisms, nonprofit corporations are also authorized to remove a director by filing suit in superior court.
- The court will remove a director if it finds that the director engaged in dishonest conduct with regard to the nonprofit and that removal is in the best interest of the nonprofit.

SB 5652: Increasing Statutory Limits on Appraiser Fees in Eminent Domain Proceedings.

Prime Sponsor: Senator Bauer (HB 1785)

- Raises to $750 the current $200 limit on reimbursement to landowners for an independent appraisal and other expenditures in eminent domain proceedings.

COURTS

EHB 1232: Judgment Summaries

Prime Sponsor: Senator/Representative Sheahan (SB 5601 Senator Costa)

- County clerks are required to include the legal description of any real property awarded in a judgment in the judgment summary.
- Clerks are also required to place a clear statement in the judgment summary that the Department of Licensing must be notified, as required by the financial responsibility law, if the judgment provides for damages from a motor vehicle accident.

EHB 1263: Regulating the Use of Official Seals on Court Documents

Prime Sponsor: Senator/Representative Sheahan (SB 5582 Senator Heavey)

- Seals are no longer required on process issued by district and municipal courts.
- The Washington State Supreme Court may determine by rule which process must be stamped with a seal.
- Legal process issued by municipal courts in cities under 400,000 population runs throughout the state.

SHB 1525: Authorizing Mediation in Guardianship Proceedings

Prime Sponsor: Representative Dickerson

- Whenever it appears that the incapacitated person or incapacitated person's estate could benefit from mediation and such mediation would likely result in overall reduced costs to the estate, the court may order the parties subject to its jurisdiction into mediation.
- The court must establish the terms for the mediation and allocate the costs of the mediation among the parties and

the estate of the incapacitated person as justice requires.

SHB 1663:
Creating a Unified Family Court
Prime Sponsor: Representative Lambert

- The Administrator for the Courts (OAC) is directed to conduct a unified family court pilot project, and the sites for the pilot will be established in no more than three superior court judicial districts with authority for at least five judges.
- OAC will study the pilot program measuring improvements in the judicial system's response to family involvement in the judicial system.

The following contains provisions from SB 5487.

- The fee for requesting a jury of six in a civil trial in superior court is increased from $50 to $125 and if the demand is for a jury of 12, the fee is increased from $100 to $250.
- Counties are given the authority to impose a fee not to exceed $250 for filing a request for a trial de novo of an arbitration award.

HJM 4015:
Immigration Laws and Policies
Prime Sponsor: Representative Lisk

- Asks the federal government and the Immigration and Naturalization Service to review policies and laws that have allowed the INS much greater power to detain and deport suspected illegal aliens and that have curtailed the due process rights of all aliens, illegal or legal.

ESB 5036:
Additional Superior Court Judges
Prime Sponsor: Senator McCaslin (HB 1046)

- The number of superior court judges in Okanogan County is increased from one to two. The number of superior court judges in Grant County is increased from two to three.
- The new positions take effect only upon approval by the legislative authority in each county. The additional judicial position in Okanogan County is effective only if the county agrees to pay the expenses of existing judicial positions as provided in state law.

SB 5037: Creating Court of Appeals Position for Pierce County
Prime Sponsor: Senator McCaslin (HB 1047)

- An additional judicial position is authorized for Division II of the Court of Appeals. The judgeship is added to Division I, Pierce County.

SB 5606:
Discipline and Termination of Judges in the Environmental Hearings Office
Prime Sponsor: Senator Heavey
(HB 1869)

- Judges with the Environmental Hearings Office can be terminated or disciplined only for cause.
- Judges who are disciplined or terminated for cause may request a written reason for the action.
- The written decision may be appealed to the superior court of Thurston County.

SSCR 8406: Determining Whether the Legislature Should Commence Proceedings to Remove Judge Grant Anderson from Office
Prime Sponsor: Senator Snyder

- Within two weeks or the release of the state Supreme Court's decision on the discipline of Judge Grant Anderson, or no later than December 10, 1999, the House and Senate Committees on Judiciary are to schedule a meeting to review the matter.

FIREARMS

SSB 5214: Firearms on School Premises
Prime Sponsor: Senator McAuliffe (Education Committee, William Bridges)

- Persons at least 12 and not more than 21 years of age must be detained up to 72 hours if they have been arrested for illegally possessing a firearm on school premises.
- Except for probable cause and bail, courts may not release the persons until they have been examined by the county-designated mental health professional (CDMHP) and, if recommended by the CDMHP, a chemical-dependency specialist.
- School officials must search a student's locker if they reasonably believe the student is illegally possessing a firearm on campus.

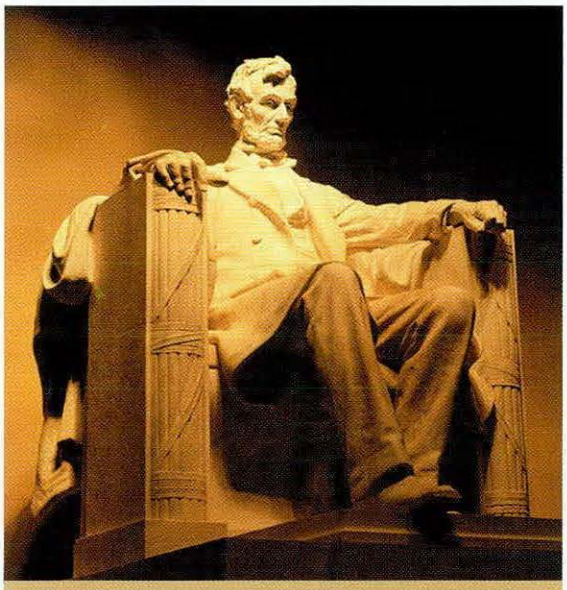
Senator Mike Heavey is a Washington state Senator, representing the 34th Legislative District (West Seattle, Burien and Vashon Island).

The Declaration of Independence:

The Precursor of Equal Justice Under Law

by Leonard W. Schroeter

This month we celebrate the birth of our nation, for the last time in this millennium. Almost two and a quarter centuries ago, "our fathers brought forth on this continent a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."[1]



The two decades of the American Revolution produced a remarkable, perhaps unparalleled explosion of political, philosophical and constitutional thought and writing — state constitutions, declarations of rights, the Federalist Papers, the Constitution of the United States, and the Bill of Rights.

Lincoln's Gettysburg Address was a renewal and affirmation of our most fundamental constitutional document — the Declaration of Independence. It is "altogether fitting and proper" that we rededicate ourselves to the soaring ideas and spirit of the Declaration, which remains not only our American Scripture, but a precursor of, and a commitment to, the Universal Declaration of Human Rights.

We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness — That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.[2]

There is a crisis of the legitimacy of political democracy in the United States, and throughout the world, despite, or perhaps because of, a massively changing technology, means of production, and communication and the globalization and concentration of corporate power. This leads to the obscenity of the chasm between rich and poor, the powerful and powerless, and the apparent triumph of rampant materialism over the ideas and ideals of rule of law, freedom, justice and peace.

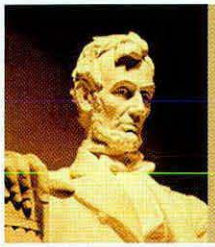
But there are countervailing forces, including an access to justice movement not only in the United States, but in other countries in our interconnected world. Access to justice is a fundamental right and can be seen as implicit in those unalienable rights encompassed in the Declaration. The thrust of this review is a reminder of the vital continuity of constitutional principles — which have no beginning and no end — but continually evolve. For us, in the United States, the Declaration of Independence is our birthright, but for the Founders, it was a continuation and reaffirmation of English constitutionalism and natural law. For them, the common law heritage, incorporating the Magna Carta and other charters of constitutional rights, was adopted by the new nation, just as were the fundamental philosophic principles from Greek and Roman law, and the Enlightenment.

The Meaning of Our Constitutional History

The two decades of the American Revolution produced a remarkable, perhaps unparalleled explosion of political, philosophical and constitutional thought and writing — state constitutions, declarations of rights, the Federalist Papers, the Constitution of the United States, and the Bill of Rights. All of these help

us to understand our heritage, including its flaws and its compromises. But the Preamble is worthy of revisiting:

> *We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*



The Constitution in large part established the political arrangements of a tri-partite Federal government. It was deeply flawed by compromises over slavery, regionalism, mindless sexism and elitism.

In his Foreword to the Bicentennial of the United States Constitution, Chief Justice Warren E. Burger wrote:

> *The delegates who wrote this Constitution in Philadelphia in 1787 did not invent all the ideas and ideals it embraced, but drew on the wisdom of the ages to combine the best of the past in a conception of government of rule by "We the People" with limits on government to protect freedom.... It sought to fulfill the promises of the Declaration of Independence of 1776, which expressed people's yearning to be free and to develop the talents given them by their Creator.*

The Constitution in large part established the political arrangements of a tripartite Federal government. It was deeply flawed by compromises over slavery, regionalism, mindless sexism and elitism. The Bill of Rights was largely adopted to curtail Federal power. Wisely, however, the Ninth Amendment provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

During the next 75 years, slavery, sectionalism, expansion, and the industrial revolution preoccupied this nation. The Civil War and President Lincoln profoundly altered the nation's consciousness. In Lincoln's constitutional views, "the Declaration of Independence was closer to being *the* founding document of the United States than was the Constitution."[3] In his Gettysburg Address, Lincoln revolutionized the Revolution, giving people a new past to live with that would change their future. He undertook a new founding to correct the Founders' imperfections involving their declaration that "all men are created equal." The Civil War was seen as testing whether our nation "or any nation so conceived and so dedicated can long endure."

Lincoln's high resolve was "that this nation, under God, shall have a new birth of freedom — and that government of the people, by the people, for the people, shall not perish from the earth." This was not only a readoption of the Declaration of Independence, but a renewal of it, saving it so that "succeeding millions of free happy people, the world over, shall rise up and call us blessed to the latest generation."[4] The Address became a major pillar of our "American Scripture":

> *The Gettysburg Address has become an authoritative expression of the American spirit — as authoritative as the Declaration itself, and perhaps even more influential, since it determines how we read the Declaration. For most people now, the Declaration means what Lincoln told us it means, as a way of correcting the Constitution itself without overthrowing it. It is this correction of the spirit, this intellectual revolution, that makes attempts to go back beyond Lincoln to some earlier version so feckless. The proponents of states' rights may have arguments, but they have lost their force, in courts as well as in the popular mind. By accepting the Gettysburg Address, its concept of a single people dedicated to a proposition, we have been changed. Because of it, we live in a different America.*[5]

The post–Civil War constitutional amendments banned slavery, granted citizenship and suffrage, and imposed upon the states the Federal proscriptions on impairment of individual rights. The 14th Amendment made all persons, born or naturalized, citizens of the United States and the state where they reside. It also forbade states to abridge the privileges of immunities of citizens, nor to deprive any person of equal protection of the law; or of life, liberty or property without due process of law. But these vital expansions of rights were rapidly curtailed or aborted during the next half-century. Continued racism, the rise of corporate wealth and power, and class struggle limited access to justice for most people, and negated ideas of equality, unalienable rights and the pursuit of happiness. Certainly, despite a flurry of populism, particularly in the West, government of the people, by the people, and for the people became chimerical.

The state of Washington is fairly typical of western state constitutionalism. Its Enabling Act of 1889 required that "(t)he constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."[6]

The Washington Constitution itself, adopted in 1889, includes in its Bill of Rights, Article I sections that enact broad declarations of constitutional rights, which incorporate and implement the intent of the Declaration of Independence and the Gettysburg Address:

> *Section 1:*
> ***Political Power —***
> *All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.*
>
> *Section 10:*
> ***Administration of Justice —***
> *Justice in all cases shall be administered openly and without unnecessary delay.*
>
> *Section 12:*
> ***Special Privileges and Immunities Prohibited —***
> *No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall*

not equally belong to all citizens, or corporations.

Section 29:
Constitution Mandatory —
The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

Section 30:
Rights Reserved —
The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

Section 32:
Fundamental Principles —
A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

Subsequent constitutional amendments created power in the people for initiatives, referendum and recall. Constitutional provisions in Article XII, on Corporations, in Section 1, made corporations subject to alteration, amendment or repeal and subject to regulation, limitation and restraint by law. Monopolies or trusts "shall never be allowed in this state" under Section 22, and strict provisions for regulation and forfeiture of corporate franchises are permitted.

The United States Constitution in 1912 added the 17th Amendment, providing for direct election for U.S. Senators, creating more direct election and participation *by the people*. And in 1920, the 19th Amendment was ratified. It provided for women's suffrage — a massive step of inclusion and democratization. Retrospectively, it seems incredible that any American political order could have been thought to be acceptable for more than 130 years, when it constitutionally excluded half the adult population.

As the United States became a world power in the first decades of the twentieth century, constitutionalism was largely neglected in favor of economic growth and expansion and government prioritization of enhanced corporate power and public order. But the Depression of the 1930s revived respect for the Declaration. Franklin D. Roosevelt referred to it in his first inaugural. The first term would prioritize the people's unalienable rights to liberty and the pursuit of happiness, he said. He continued in a more ominous vein, warning those who resist change:

> *We have learned a great deal of [liberty and pursuit of happiness] in the past century. We know that individual liberty and individual happiness mean nothing, unless both are ordered in the sense that one man's meat is not another man's poison.... Faith in America in our tradition of personal responsibility, faith in our institutions, faith in ourselves demands that we recognize the new terms of the old social contract.*[7]

Perhaps the most significant broadening of the promises of the Declaration, constitutional doctrine, and the fundamental rights of all people, occurred at the end of World War II. It had long been clear that American constitutional jurisprudence was a legitimate child of natural law, common law, English constitutionalism, and the mainstream of enlightened social thought through the ages. But now the American constitutional experience had been universalized by the peoples of the world, yearning for the protection of rule of law and recognition of rights. With U.S. leadership, the Universal Declaration of Human Rights was proclaimed by the General Assembly of the United Nations and ratified by member nations, thus being incorporated into constitutional law as the consensus of civilized society. The 30 articles spell out fundamental rights, more commonly seen in U.S. constitutions, but also rights that could reasonably be seen as exemplars of the Declaration's "Pursuit of Happiness."

The Preamble of the Universal Declaration reads:

> *Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*
>
> *Whereas disregard and contempt for human rights have resulted in barbarous acts which have enraged the conscience of mankind, and the advent of a world in which human being shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,*
>
> *Whereas it is essential that human rights should be protected by the rule of law,*
> *Whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,*
>
> *Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,*
>
> *Now, Therefore, The General Assembly proclaims This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations.*

The Applications of the Declaration of Independence Today and Tomorrow

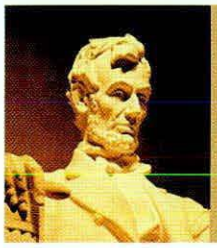
As the millennium ends, will the self-evident truths of the Declaration of Independence and the world-wide civilized consensus of the International Declaration of Human Rights be secured? That is the purpose for which governments are instituted. That is the duty of the judiciary to implement. But intransigence remains. Many courts still insist that legislative bodies are the sole implementers of fundamental rights, despite their political character and their vulnerability to powerful special interests. And many nations, although affirming support of human rights, state as China's President Jiang did, in October 1997, at White House meetings with President Clinton: "I also believe that the world we are living in is a rich and diverse one; and therefore, the concepts on democracy, on human rights and on freedoms are relative and specific ones and they are to be determined by the specific national situations of different countries." President Clinton responded, as follows: "We believe all individuals, as a condition of their humanity, have the right to life, liberty, and the pursuit of happiness." Subsequently, Clinton told Jiang (noting that the Chinese president was to visit Independence Hall and the Liberty Bell in Philadelphia): "We believe liberty includes freedom of religion, freedom of speech, and freedom of association. We believe governments must pro-

tect those rights."[8]

Later, Clinton showed Jiang an original copy in Lincoln's handwriting of the Gettysburg Address. Jiang immediately recited the first paragraph in English. Clinton's commitment to the most fundamental scriptures of our society, the Declaration of Independence and the Gettysburg Address, and Jiang's knowledge of the Gettysburg Address reflect their universality. It is important that our President, speaking for our country, stated that we, "as a condition of [our] humanity accept as fundamental the 'right to life, liberty and the pursuit of happiness.'" It is very important that our rights jurisprudence believes that "liberty includes freedom of religion, freedom of speech, [and] freedom of association." But most important of all, the President affirmed that "we believe government must protect those rights."[9] Thus, there is a committed recognition that rights require the implementation of society if they are to be meaningful.

When we add to the Declaration of Independence the Lincoln commitment that we will always be a nation "of the people, by the people, for the people," we should have no difficulty in also recognizing, as a fundamental part of our jurisprudence, the positive duties of governments and the law, to protect rights, including economic rights.

In our Fourth of July celebrations, we need a refresher course as to what we celebrate. It has become fashionable to trash the Declaration for omitting the mention of "property" as an unalienable right, and including a fuzzy concept such as the "pursuit of happiness." Yet, the unalienable right to pursue happiness was consciously written into the Declaration of Independence by Thomas Jefferson and his Committee. It appears in many state constitutions, and is omnipresent in our national mores. Books have been written about the constitutional character of this term, and it has been adopted and discussed in major constitutional case law.[10] The *Slaughterhouse Cases,* of 1869,[11] 1872[12] and 1883[13] are notable in the history of our jurisprudence for having wrenched the 14th Amendment from the protection of Negroes to protection of free enterprise, but they also represent a notable phase in the legal history of "happiness." "Pursuit of Happiness" was propounded by the plaintiff's lawyer, John Campbell of Alabama, a former Justice of the Supreme Court, as necessarily including the right to one's labor and livelihood, the right to dispose of one's services, and thus a constituent part of freedom of contract, liberty and property. Justice Field thought highly of this unalienable right, and referred approvingly to the earlier case of *Corfield v. Coryell.* In 1825, Supreme Court Justice Washington was sitting as a circuit judge in *Corfield v. Coryell,* pondering what the privileges and immunities of citizens were in the several states, and asked which were, in their nature, fundamental. Justice Washington had "no hesitation" confining rights "to those privileges and immunities" which were in his judgment "fundamental," and which are all comprehended under "protection by the government; the enjoyment of life and liberty; the right to acquire and possess property of every kind, and to pursue and obtain *happiness and safety*" (emphasis mine).



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Justice Bradley also referred approvingly in the *Slaughterhouse Cases* to *Corfield v. Coryell,* to Blackstone, and above all, to the Declaration of Independence, which he said laid the foundation for our national existence. Thus, the pursuit of happiness remained viable more than 160 years after the Declaration and has been cited frequently since that time.

What is basic here is the principle that the pursuit of happiness has historically incorporated essential economic rights, most particularly "the constitutional justice of livelihood," as Professor Charles L. Black, Jr. has recently noted. But more particularly it has been clear in the multiple delineations of what are fundamental rights. These also include habitation, education, health care, family rights, privacy, dignitary interests, and safety. To Thomas Jefferson, these were well understood, commonsensical, self-evident truths. The inherent right to pursue happiness was, in short, an absolutely conventional view among Americans of his time, detailing what the Founders meant by "Pursuit of Happiness," and by common terms such as "estate" or "property." The eighteenth century usage of those terms related to the essential rights or values of individuals, which among others included their rights to habitation, to livelihood, and to be free of intrusive interferences.

We must leave for a later time a fuller explication of what *fundamental* constitutional rights are or should be. But, there is no question that in the eighteenth century, "pursuit of happiness" had rich and easily understood meanings that cannot and should not be trivialized by flippant commentators and uptight judges. And as to what are thought to be "fundamental rights" today, we need look no further than to the Universal Declaration of Rights, and the common-sense understanding of the fundamentality of change, and thus, the reality of essential values.

Conclusion

Recently, America's most eminent constitutional scholar, Charles L. Black, Jr., Emeritus Professor at Columbia Law School, wrote a powerful monograph, *A New Birth of Freedom: Human Rights, Named and Unnamed.*[15] Black's thesis, distilled from more than half a century of constitutional thought, work and feeling is that:

> *a sound and satisfying foundation for a general and fully national American law of human rights exists in three imperishable commitments — the Declaration of Independence, the Ninth Amendment, and the "citizenship" and "privileges and immunities" clauses of Section 1 of the Fourteenth Amendment (as those clauses ought to have been and still ought to be interpreted). These three commitments speak in solemn organic harmony. They ought at long last to be attended to as they stand — for as they stand, in their harmony, they are all we have and all we need of prime authority for our build-*

ing, by the methods of law, a never-to-be-finished edifice of human rights.

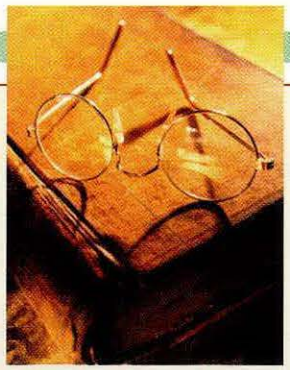
To Black, "law is reasoning from commitment." We Americans were the first people who formally dedicated their power and destiny to the commitment of securing human rights, and the rule of law. Our first constitutional document was the Declaration, in 1776 — "a distinctly juristic act." That "juristic act" remains the cornerstone of our freedom. It makes access to justice possible, because it treats equality as self-evident, because all people have natural rights which are unalienable. We can use terms such as "substantive due process" as our courts have done to protect the right to teach; or to learn foreign languages; or the rights of parents to send their children to schools; or the right to practice contraception; or the fundamental right to marry. But all of these legal captions are self-evident truths as to what is fundamental to the human condition, and why, to secure these rights, governments are instituted. This is common-sense constitutionalism.

We can do no better celebrating the last Fourth of July in this century than to read Charles Black's book, *A New Birth of Freedom*, and then to read, understand and feel the commitment to our Declaration of Independence, and to the expanding freedom that all of us require in the new millennium.

NOTES

1 The Gettysburg Address (1863), with apologies for changing "four score and seven years ago."
2 The Declaration of Independence (1776).
3 Garry Wills, *Lincoln at Gettysburg: The Words That Rewrote America* (Simon & Schuster 1992), p. 130.
4 *Id.* at 89.
5 *Id.* at 146-47.
6 "Enabling Act," Constitution of the State of Washington, adopted August 22, 1889 at Olympia, Washington.
7 David Freeman Hawke, *A Transaction of Free Men: The Birth and Course of the Declaration of Independence* (De Capo Press 1964), pp. 236-37.
8 *Seattle Post-Intelligencer*, October 30, 1997, p.1.
9 *The New York Times*, October 30, 1997.
10 *See* Howard Mumford Jones, *The Pursuit of Happiness* (Harvard Univ. Press, 1953). The book is dedicated to Mark Howe, "who should have written it." Professor Howe taught me constitutional law at Harvard Law School. The phrase is also discussed in Pauline Maier's *American Scripture: Making the Declaration of Independence* (Alfred A. Knopf 1997).
11 77 U.S. 273, 19 L.Ed.915, 10 Wallace 273 (1869).
12 83 U.S. 36, 21 L.Ed. 394, 16 Wallace 36 (1872).
13 111 U.S. 746, 4 S.Ct. 652 (1883).
14 4 Wash. Cir. Ct. 380 (1825).
15 Grosset/Putnam 1997.

Book Review



Business and Commercial Litigation in Federal Courts
(ABA Section of Litigation/ West Group, 1998)
Robert L. Haig, *Editor in Chief*
6 vols. hardcover, 6,434 pp. and forms CD-ROM. $485

Practical Treatise is Exceptional Value

by Lindsay Thompson

Just a decade ago, when I was a wee lad at *Bar News*, West Publishing Co. was a colossus on the legal-publishing stage. Lawyers spoke in awe of taking tours of the century-old edifice on the riverbank in St. Paul, then the vastly bigger new plant out in Eagan. (I have a T-shirt from such a visit. It reads, in Latin, "I came, I saw, I walked and walked and walked.")

Now, of course, West Publishing is West Group, part of a vast legal information combine, and having a sales rep show up at the office to shoot the breeze and hawk some books is about as common as sighting a passenger pigeon, or a well-mannered trial lawyer in Seattle.

But they still publish some pretty good stuff, and this treatise is an exceptional value for the price.

New York lawyer and editor-in-chief Robert Haig coordinated the efforts of 152 authors, all federal judges or federal court practitioners. They managed to get the work written in a year, itself a noteworthy feat.

Haig notes, and I agree with him, that while there are plenty of books on federal practice and procedure, none goes as far as this set in making plain the arcana of business and corporate litigation in the federal system. The authors treat their subjects in practical terms that the trial lawyer will find immediately understandable and applicable to cases underway or to be started. It includes a remarkable array of forms and checklists on everything from essential allegations and defenses to pleading forms and jury charges.

The series begins with subject matter jurisdiction and charges on through complaints, class actions, derivative and international disputes, discovery, motion practice, jury selection, trials, cross examination, appeals, enforcement of judgments, patents, trademark, copyright, labor law, ERISA, product liability, trade secrets, competition, franchising, construction and environmental claims. At the end there are tables of jury instructions, forms, statutes, cases and rules.

A number of Washington practitioners are contributors to the set, and useful contributions they make, too.

What impressed me about this set is its practicality. Go to a chapter on something you need to know more about, and it will tell you things in an in-the-trenches, here's-what-to-expect way — for both sides. I pulled these volumes down regularly for a number of months, both for reference on cases and just to read through. Having trudged through an awful lot of really boring treatises over the years, I can recommend this one without hesitation. It deserves — no, demands — high marks for scope, content and organization. The only thing I'd fault it for is its generally unimaginative layout in standard West typeface. It's one of those things I notice as I continue my drift into middle age.

Lindsay Thompson practices law in Seattle and was the editor of Bar News *from 1988 to 1995.*

The Electronic Communications and Privacy Act of 1986

And a Closer Look at the ABA Opinion on Unencrypted E-mail

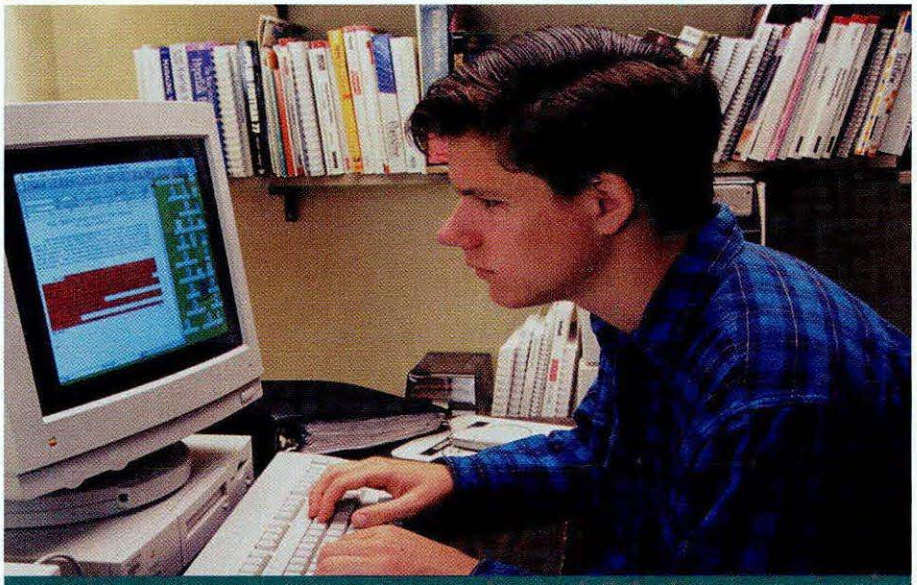
A fair bit of confusion seems to exist about the expectation of privacy in electronic communications. Curiously, some of the more legally knowledgeable folks I have spoken to recently persist in a mistaken belief that these communications must be absolutely private before legal protections are available. Not so.

by Rob Apgood
roba@sidlon.com

What began as the Wiretap Statutes was subsequently amended and renamed the Electronic Communications and Privacy Act of 1986 (ECPA). Codified at 18 U.S.C. § 2510, *et. seq.*, the Act provides a surprisingly concise enumeration of the range of protection of electronic communications. Extending its authority over just about every communication except those made via telephone, telegraph, hearing aid, or by voice-through-air (these being covered by other statutes), ECPA provides that anyone who:

- intercepts or causes others to intercept;
- uses a device to intercept or causes others to use a device to intercept just about any communication;
- interferes with such communication;
- transports such devices through interstate or foreign commerce;
- uses such devices on business premises;
- uses such devices for the purpose of obtaining information about the operations of any business, operations which affect interstate or foreign commerce on U.S. turf;
- discloses the contents of such communication;
- endeavors to have others make such disclosure of information obtained either legally or otherwise;
- shall be liable for criminal and or civil penalties, depending on the circumstances.

Retaining its roots as a vehicle for allowing law-enforcement agencies to tap into conversations (the majority of the Act is devoted to authorization and process formalities), ECPA is unequivocal about the level of privacy protections that are granted electronic communications.



... if your electronic communication either originates from, or is transmitted to, somewhere outside the United States and its territories, that communication is subject to scrutiny as a matter of course, and without the need for additional authorization.

The Act also provides for immunity for providers of electronic communications services (read: Internet service providers and online service providers) who have been ordered to assist law-enforcement agencies in investigations conducted under authority of the Act, or who have need to monitor communications as a normal and necessary part of providing their services. These service providers are nevertheless prohibited from divulging any monitored communications except as otherwise authorized by the Act, or with the lawful consent of the originator or recipient of the communication, or to a person employed or authorized, or whose facilities are used to forward such communication to its destinations, or which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law-enforcement agency.

All exceptions aside, section 2517(4) clearly provides that "[n]o otherwise privileged wire, oral, or electronic communication intercepted *in accordance with, or in violation of* [emphasis added], the provisions of this chapter shall lose its privileged character." What isn't emphasized in the Act, but should not be overlooked,

is the ability of the United States, in the normal course of its official duty, to conduct surveillance as authorized by the Foreign Intelligence Surveillance Act of 1978 (FISA). In other words, if your electronic communication either originates from, or is transmitted to, somewhere outside the United States and its territories, that communication is subject to scrutiny as a matter of course, and without the need for additional authorization. In the June 1999 *Bar News* (p. 40), we briefly reviewed the ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 99-413 — Protecting the Confidentiality of Unencrypted E-mail. In many respects, that opinion squares with the notions of privacy provided by ECPA. Like ECPA, the opinion specifically notes that cordless and cellular telephone conversations have limited expectations of privacy (although communications intercepted when made in these media are afforded the same *legal* protection as land-line telephone conversations, the expectation of privacy is minimized due to the ease of such interception). However, the opinion appears to make the assumption that e-mail communications between attorneys and their clients occur within the confines of the U.S. and its territories. The opinion observes that "[i]t uniformly is agreed that lawyers have a reasonable expectation of privacy in communications made by mail (both U.S. Postal Service and commercial)" and makes similar observations regarding the use of land-line telephones and fax machines. This assumption is punctuated in the opinion's conclusion, which states:

> *Lawyers have a reasonable expectation of privacy in communications made by* all forms of e-mail *[emphasis added], including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information related to a client's representation.*

While this may be true in most circumstances, the authority granted the government by FISA, and acknowledged by ECPA, to monitor electronic communications crossing U.S. boundaries provides an exception that may affect you and your clients. Arguably, the use of unencrypted e-mail across these boundaries may be viewed as a negligent use of the medium, thereby breaching the duty of confidentiality and giving rise to arguments of waiver. Clearly, the solution lies with encryption.

LawGuru.com
(http://www.lawguru.com)

Another great, sole-source legal research site, **LawGuru.com** has recently added the world-famous Internet Law Library (formerly housed at the U.S. House of Representatives) to its site. With an extensive Q&A section, links to law lists and other legal and non-legal sites, **LawGuru.com** boasts a sophisticated Multiple Resource Research Tool that allows you to search numerous different legal resources, many at the same time. This site is quickly becoming one of my favorites due to its breadth and depth of available resources. But beware: it's easy to spend hours there just looking at what they have available.

Two events of significance have transpired very recently which affect access to encryption schemes and governmental regulation of the process:

1. In the case of *Bernstein v. U.S. Dept. of Justice*, No. 97-16686 (9th Cir. May 6, 1999), in a 2-1 decision the court held that a mathematics professor's First Amendment rights were violated by U.S. policy when he was prohibited from posting crypto code on his website on the grounds that the source code is a "language" that enjoys free speech protection (http://www.epic.org/crypto/export_controls/bernstein_decision_9_cir.html).

2. Hush Communications, a company based in Anguilla, British West Indies, announced the release of a Web-based e-mail product that provides strong encryption for e-mail users of its service. The product uses Java (a Web-savvy programming language) to perform the encryption and decryption of messages, the encoded versions of which are the only copies that can be found on machines other than the sender's or recipient's (http://www.hushmail.com).

While it is expected that the Department of Justice will appeal the *Bernstein* decision, just how it will ultimately play is completely unpredictable. And while this skirmish drags out in the courts, strong encryption without the need for learning key-based encryption (e.g., PGP) will undoubtedly become more available and easier to use.

Obviously, the only *accurate* prediction we can make is that we'll hear more on this topic in the months to come.

ABA Commission on Lawyer Assistance Programs
12th Annual National Workshop

by Barbara Harper
WSBA Director of Lawyer Services
and Zella Ozretich
WSBA Lawyer Services Coordinator

In its 1983 report, the American Bar Association's Task Force on Professional Competence concluded that the widespread adoption and improvement of lawyer assistance programs should play an important role in the profession's overall efforts to improve lawyer competence. Following a series of regional conferences on lawyer competence at which the subject of lawyer impairment had been a major focus, the ABA Standing Committee on Lawyer Competence (no longer a task force) invited representatives of lawyer assistance programs to a meeting in Philadelphia in February 1988. At the meeting, the activities of the various programs were discussed and suggestions offered as to the role the ABA could play in this area. These supporting entities felt that the ABA could surely make a major contribution toward educating the bar and the public and toward legitimizing the notion that lawyers and judges — together with their families and colleagues — should do everything possible to encourage those lawyers addicted to alcohol or other drugs to enter into appropriate treatment programs.

At the recommendation of the Lawyer Competence Committee and the Standing Committee on Bar Activities and Services, the ABA Board of Governors created a seven-member commission at the annual meeting in Toronto in August 1988. The Commission was charged with the development and implementation of a comprehensive association-wide program for lawyer impairments of varying natures and degrees of severity, arising from emotional or behavioral problems that affect their well-being and work performance, and which include drug and alcohol dependency.

12th Annual National Workshop
September 29 – October 1, 1999
Stevenson, Washington
Skamania Lodge

Whereas only 26 Lawyer Assistance Programs (LAPs) existed in 1980, today all 50 states have developed programs or committees focused on quality-of-life issues. These programs employ the use of mental health professionals, intervention, peer counseling, and referral to "12-step" and other programs to assist lawyers. Leaders of state and local LAPs across the nation have urged the ABA to play a leadership role to assist them in communicating with each other to create supplemental and centralized national lawyer-to-lawyer assistance services for impaired lawyers. The National Workshop for Lawyer Assistance Programs is the ABA's response to this request for assistance from LAP leaders. This year, the national workshop will be held in Washington state.

The ABA's 12th National Workshop for Lawyer Assistance Programs provides an educational opportunity for bar leaders; lawyer assistance program directors and staff; members of the judiciary and disciplinary agencies; and all lawyers concerned with stress, depression and addictions in the profession. This workshop is a must for chairs and volunteer members of state and local lawyer assistance programs, as well as anyone in the profession who may have had personal experiences with partners, associates, clients or family who have suffered from these impairments. The workshop is also designed to help bar leaders develop, expand and utilize lawyer assistance programs in their regions. Information on how to fund, staff and operate a successful program will be presented.

Lawyer Assistance Programs (LAPs) work to prevent or alleviate problems before they jeopardize a lawyer's practice, to protect the public from harm, and to improve the public's perception of the legal profession. In keeping with these goals,

The WSBA Lawyer Services Department offers these four programs:

The Lawyers' Assistance Program (LAP) – 206-727-8268: Confidential assistance for lawyers with emotional, drug/alcohol or other personal problems.

The Law Office Management Assistance Program (LOMAP) – 206-727-8237: Offers consultation and information to help solo and small-firm practitioners deliver legal services of the highest quality.

The Professional Responsibility/Ethics Program – 206-727-8219: Lawyers can call a WSBA lawyer for assistance in resolving ethical dilemmas.

The Alternative Dispute Resolution Program (ADR) – 206-733-5923: Offers two low-cost methods of resolving disputes: voluntary fee arbitration and mediation.

Please call our department at the phone numbers listed above for additional information and/or assistance in these areas.

Windsurfing on the Columbia River

peaceful haven away from city life. The area around the lodge in the gorge offers numerous opportunities for outdoor activities such as hiking, rock-climbing, and windsurfing, while more urban attractions are also easily accessible nearby. Skamania Lodge is just 45 minutes east of Vancouver, Washington and Portland, Oregon. The lodge is a 3½-hour drive from Seattle, and a 2½-hour drive from the Washington or Oregon coast.

To receive a brochure containing additional details on this workshop, including a full agenda, information on continuing education credits, reservation information, and a workshop registration form, please contact either the WSBA Lawyer Assistance Program at 206-727-8268 or the ABA Commission on Lawyer Assistance Program Assistant, Debi Taylor, at 312-988-5325.

the workshop provides education to attendees on various topics which are relevant to LAP programs and the lawyers they serve. Some of the topics for educational seminars to be offered at this year's workshop include: diversity issues; career options for disenchanted or disbarred lawyers; landmark cases rooted in lawyer impairment; confidentiality and immunity; depression/dual disorders; gambling; family issues; intervention; and helping a lawyer retire from or re-enter the profession. First-time program attendees will be assigned a mentor who will guide them to sessions of particular interest to them.

Speakers and attendees come from all over the United States and Canada, and Washington will be particularly well represented this year. Washington lawyers will want to make note of these sessions in particular:

- **Welcome and Introductions:** including WSBA Executive Director Jan Michels and WSBA President-elect Richard Eymann

- **Dealing with Discipline — LAP and LOMAP Working Together:** a panel discussion including WSBA Chief Disciplinary Counsel Barrie Althoff and WSBA Law Office Management Assistance Program (LOMAP) Advisor Marty Potter

- **Helping a Lawyer Retire:** presented by WSBA Director of Lawyer Services Barbara Harper and WSBA Lawyers' Assistance Program Psychotherapist Rebecca Nerison

- **How to Reach the Minority Population Suffering from Chemical Dependency:** presented by Yvonne Terrell-Powell, Director of the Multicultural Education Center at Shoreline Community College, a dynamic and provocative speaker on diversity issues who was recently featured at the WSBA Lawyers' Assistance Program's 2nd Annual Statewide Conference

This year's workshop is being held at Skamania Lodge in Stevenson, Washington, located in the magnificent Columbia River Gorge. The lodge's natural setting, tucked amidst the waterfalls, peaks, forests and canyons of the gorge, provides breathtaking views and a

Multnomah Falls

Changing Venues

Jumping Through the Hoops...

Kelly Harris, **Matt Lapin**, **Sam Chapin**, **Craig Sims**, **Rich Anderson**, **Andrew King-Ries** and **Andy Colusurdo** (otherwise known as the "Renegade Prosecutors") have captured the 1998-99 Lawyers Basketball League Championship, defeating Stokes Lawrence, a perennial powerhouse who trounced the defending champs, Johnson & Associates, in the Final Four semifinals. Everyone's looking forward to next season already.

Honors and Awards

King County Superior Court Presiding Judge **Bobbe J. Bridge** is the new president of the State Superior Court Judges' Association.

The King County Bar Association, at its Annual Awards event on June 24, 1999, honored retired **Justice James M. Dolliver** (William L. Dwyer Outstanding Jurist Award), The Honorable **Bobbe J. Bridge** (Outstanding Judge), **Mary H. Wechsler** (Outstanding Lawyer), Chief **Norm Stamper** (Friend of the Legal Profession), **Colleen Kinerk** (Helen Giesness Award), **Steve Rovig** and **Steve Fredrickson** (Individual Pro Bono Awards), **Davis Wright Tremaine** (Firm Pro Bono Award) and **Edsonya Charles** (Outstanding New Lawyer).

Movers and Shakers

Allen D. Israel has become the leader of Foster Pepper & Shefelman's business practice group in Seattle.

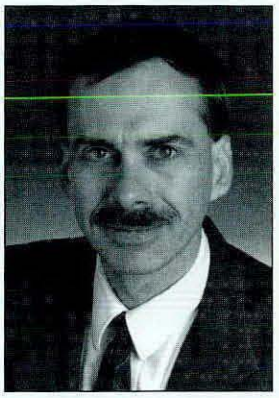
Lee, Smart, Cook, Martin & Patterson, PS, Inc., has elected **Patricia K. Buchanan** as the firm's newest Seattle shareholder. Her practice includes school district and employment law.

Douglas S. Morrison has joined the Seattle firm of Lane Powell Spears Lubersky LLP as a partner. Morrison concentrates his practice in environmental and natural resources law.

Stephen D. Fisher has become a shareholder in the business practice group of Bullivant Houser Bailey PC's Seattle office. Fisher advises businesses on capital formation, mergers, acquisitions, financing, and technology transfer and licensing.

Douglas S. Morrison

Christopher K. Shank



Michael A. Herbst

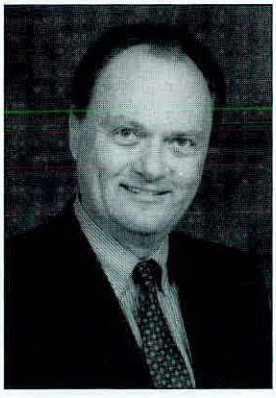
Christopher K. Shank has rejoined the Seattle office of Williams, Kastner & Gibbs, PLLC as a member. He has almost 20 years of experience in family law. **Michael A. Herbst** joins the firm as Of Counsel, with many years of experience in domestic and cross-border corporate and commercial transactions, including commercial loans, real estate transactions, and buying and selling businesses.

The Graham & Dunn PC firm in Seattle has announced that **Elaine L. Spencer** has joined the firm as a shareholder and member of the firm's litigation group. She will continue her litigation practice with an emphasis in land use and natural resources law.

Miller Nash Wiener Hager & Carlsen LLP has added **D. William (Bill) Toone** as a partner practicing in the areas of intellectual property licensing and infringement litigation. **Valerie du Laney**, a new associate with the firm, practices in the areas of trademarks, intellectual property licensing, litigation and business matters.

Perkins Coie LLP has doubled the size of its Bellevue real estate practice with the addition of four attorneys. **Craig Shrontz**, joining the firm as a partner, focuses his practice on commercial real estate and general business. **Craig S. Gilbert**, also joining the firm as a partner, emphasizes commercial real estate transactions and related matters and general business in his practice. Joining the firm as Of Counsel, **Jeffrey D. Wyszynski** focuses his practice on general corporate and business law and commercial real estate transactions. New associate **Brett N. Wiese** practices real estate, and corporate and business law, with an emphasis on purchase and sale transactions and commercial leasing.

Elaine L. Spencer



D. William (Bill) Toone

Valerie du Laney

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The Ethics of Incivility

by Barrie Althoff
WSBA Chief Disciplinary Counsel

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

For many lawyers, incivility and "sharp" practices by other lawyers, judges and clients are among the most irksome aspects of the practice of law. Many lawyers believe such behavior is increasingly common and that professionalism among members of the legal profession is declining. This article looks at some ethical issues related to incivility and professionalism, gives some examples of conduct for which lawyers have been sanctioned or disciplined, and raises some questions about possible consequences of both incivility and of mandating civility or professionalism.

Concerns over declining civility and professionalism usually focus on the behavior of other persons, since few lawyers or judges ever perceive themselves as either uncivil or unprofessional. The concerns usually center on either the personality or the "sharp" practices of the offending person.

Few lawyers and judges have never uttered in the heat of argument words which, on reflection, they regretted as intemperate. While lawyers and judges can disagree without being disagreeable, some lawyers and judges are more than just occasionally disagreeable. Some are consistently and almost universally disagreeable, uncivil, impolite, discourteous, acerbic, acrimonious, obstreperous, ill-mannered, antagonistic, surly, ungracious, insolent, rude, boorish, uncouth, insulting, disparaging, malevolent, spiteful, demeaning, vitriolic and rancorous — and sometimes all of these in one short deposition or hearing. They manifest such behavior to other lawyers, judges, witnesses, clients and the public generally. These lawyers might do well to study the 16-year-old George Washington's school transcription exercise, *Rules of Civility and Decent Behavior In Company and Conversation*, and particularly the very first of the 110 rules: "Every action done in company ought to be with some sign of respect to those that are present." The conduct of these lawyers suggests little or no respect for the innate dignity and worth of other persons, although it may be highly attractive to some clients who prize pugnacity over decorum.

There are .... lawyers and judges whose behavior, while not personally obnoxious, is consistently less than what most lawyers and judges would reasonably expect from a professional.

There are also lawyers and judges whose behavior, while not personally obnoxious, is consistently less than what most lawyers and judges would reasonably expect from a professional. They refuse to extend normal courtesies and engage in "sharp" practices. They refuse reasonable requests for extensions of time or to stipulate to undisputed facts to avoid needless costs or inconvenience; do not consult with others before scheduling depositions or hearings; fail to provide copies of required documents; intentionally send pleadings or messages at the end of the day or week knowing opposing counsel will not get them until much later, and intentionally schedule matters at times known to be inconvenient to others; send letters "confirming" conversations that do not fairly reflect the conversations; intentionally delay matters; engage in "hardball" or "scorched-earth" litigation regardless of the justice of their client's cause; promise responses or documents that never arrive; and so on.

Lawyers viewed as uncivil or unprofessional often justify their conduct as being mandated by an ethical requirement for "zealous advocacy." They may imply that lawyers bemoaning a lack of civility or professionalism are too thin-skinned and put politeness and political correctness ahead of their ethical obligation to vigorously serve their clients.[1]

The American Bar Association's 1983 Model Rules of Professional Conduct, on which Washington's Rules of Professional Conduct are based, does not mandate "zealous advocacy" or even use the term "zeal." Instead, it requires a lawyer to represent a client "with reasonable diligence and promptness." The official comment to the Model Rule, not adopted by Washington, explains that a "lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf," but that "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued." As an officer of the court, a lawyer cannot be a mere zealot, but must balance obligations both to the client and to the legal system. See *State v. Richardson*, 514 N.W.2d 573 (MN. Ct. Appeals, 1994). How to properly balance these obligations to the client and the system is often perplexing and underlies much of the concern over civility and professionalism.

The Problem

Although lawyers find declining civility and professionalism in all aspects of the practice of law, concern centers on litigation, particularly in pretrial discovery and depositions. The decline is sometimes attributed to the large increase in the number of lawyers resulting in fierce client competition; the lack of ongoing relationships between lawyers who may never

again litigate against one another; changes in law practice making it more a business than a profession; lawyers not wanting to appear to be weak to scarce clients; and a general increase in stress in life exacerbated by increasingly fast technological changes and demands.

The perception of declining civility and professionalism is not unique to Washington lawyers. A report of the Committee on Professionalism in Litigation of the Commercial and Federal Litigation Section of the New York State Bar Association, *Report on Uncivil Conduct in Depositions* (May 9, 1996), observes:

> *Intolerance for unprofessional and uncivil conduct during the course of depositions is appearing in the courts with more frequency. Litigants and courts alike seem less willing to tolerate such misbehavior. When behavior in a deposition crosses the line from zealous advocacy to uncivil or unprofessional conduct, no one wins. Costs are unnecessarily increased, judicial resources are wasted, the public image of lawyers is diminished, and perhaps most importantly the clients' legitimate interests are far from advanced.*
>
> *...Counsel should bear in mind that even if court intervention is not sought to curb uncivil conduct occurring during a deposition, the courts could very well act sua sponte....The rationale for such action is that regardless of the abuse to an adversary or witness, such conduct is considered an affront to the judicial system.*

The report also quotes *A Report on the Conduct of Depositions,* 131 F.R.D. 613 (1990), by the Federal Bar Council's Committee on Second Circuit Courts, noting that "[d]epositions have often become theaters for posturing and maneuvering rather than efficient vehicles for the discovery of relevant facts or the perpetuation of testimony." Not surprisingly, the reports conclude that incivility has deleterious consequences on the legal profession and the administration of justice.[2]

The Rules

The Rules of Professional Conduct neither explicitly prohibit incivility nor require lawyers to be civil, let alone be witty, urbane, polished and magnanimous of heart. Indirectly, however, a number of the RPCs and other court rules encourage civility and professionalism.[3]

The RPCs state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. They point the way to the aspiring, but leave it to the individual lawyer to decide to what extent the lawyer's conduct should rise above the minimum. If lawyers are satisfied with merely the minimum, there will inevitably be a decline in professionalism, since by definition professionalism manifests itself by an individual's dedication and aspiration to go beyond the minimum.

Several RPCs relate indirectly to incivility and limit the permissible scope of a lawyer's personal behavior to others.[4] RPC 3.5(c) prohibits a lawyer from engaging in conduct intended to disrupt a tribunal, and covers conduct within and outside a courtroom. RPC 4.4 prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay or burden a third person. RPC 8.4(d) prohibits a lawyer from engaging in conduct prejudicial to the administration of justice, such as racial slurs, physical attacks, abusive language and the like. Examples of such conduct are given below. In addition, RPC 5.1 and RPC 5.3 make partners and supervisory lawyers vicariously liable, and thus subject to discipline, for certain misconduct of subordinate lawyers and nonlawyer assistants, which could include the disruptive and prejudicial behavior referenced above. RPC 1.1 requires a competent lawyer to exercise the legal skill reasonably necessary for the representation; a lawyer who frustrates the lawful purpose of a deposition by engaging in uncivil or unprofessional conduct could be viewed as lacking the competence required under RPC 1.1. Failure to meet an RPC subjects a lawyer to discipline under Rule 1.1(i) of the Rules for Lawyer Discipline (violation of an RPC), and perhaps also under RLD 1.1(p) (conduct demonstrating unfitness to practice law).

On admission to the Bar, each lawyer takes an oath agreeing to "abstain from offensive personalities." (Admission to Practice Rule 5(d)(7)). This does not require the lawyer to stay away from persons whose personality the lawyer finds offensive. Rather, it requires the lawyer not to engage in conduct which others would reasonably see as demonstrating an "offensive personality." Failure to do so subjects the lawyer to discipline under RLD 1.1(c) (violation of oath), and perhaps also under RLD 1.1(p).

Washington's Superior Court Civil Rule 30(h)(6) mandates a courtroom standard of behavior for lawyers during depositions and is in effect a mandatory, but limited, statewide civility rule. It requires that "All counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial." In fact, when the cat is away, the mice play, and without the active presence of a judge some lawyers abuse depositions. If lawyers fully implement the spirit of CR 30(h) at depositions, dissatisfaction with depositions would significantly lessen. Failure to satisfy CR 30 subjects a lawyer to sanctions under CR 37.

Lawyers practicing before the U S. District Court for the Eastern District of Washington are subject to the "civility code" set out in that court's Local Rule 83.1(k). The code attempts to balance lawyers' duty to represent clients with their duty to make the system of justice work. It requires lawyers to "try to act with dignity, integrity and courtesy." Recognizing that some clients equate incivility with prowess and expect lawyers to be merely hired attack dogs, the code requires lawyers to advise their clients "that civility and courtesy are not to be equated with weakness."

Numerous voluntary "civility codes" also attempt to promote civility.[5] Although compliance with such codes is voluntary, a lawyer's conduct inconsistent with such a code may also violate the RPCs or other court rules and subject the lawyer to discipline or court sanctions. Lawyers would do well, in any case, to discuss such codes with their clients, and to adhere, and encourage others to adhere, to such codes. It will enrich their appreciation of the legal profession, set an example for others, better serve the client, and lead to a deeper enjoyment of the practice of law.

Judges, unlike lawyers, are specifically required by rule to be courteous to others. Canon 3(A)(3) of the Code of Judicial Conduct requires that "Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity, and should require similar conduct of lawyers, and of the staff, court officials, and others subject to their direction and control." More practically, if judges do not show respect to lawyers and litigants, they are unlikely to receive it, since respect begets respect just as disrespect begets disrespect.

Didn't Your Mother Teach You How to Behave?

The following cases illustrate some problems of incivility and a lack of professionalism.

A lawyer was suspended from the practice of law in *In re Williams*, 414 N.W.2d 394 (MN. 1987) for, among other things, stating at a deposition: "Just get your foul, odious body on the other side," and "Don't use your little sheeny, Hebrew tricks on me." The lawyer unsuccessfully argued he was denied due process because the target of his attacks, who was not disciplined, had responded to his attacks with the statement "You son of a bitch....Tell the Judge I called him a rotten son of a bitch for calling me a sheeny Hebrew...."

In *Attorney Grievance Commission v. Alison*, 317 Md. 523, 565 A.2d. 660 (1989), the court suspended a lawyer from practice for, among other things, verbally abusing court clerks and engaging in a course of conduct that was rude, vulgar and insulting.

In *Castello v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776 (7th Cir. 1991), plaintiff's counsel repeatedly directed his client not to answer deposition questions and then claimed harassment when defense counsel demanded responses. At a second deposition the lawyer again objected to the questions, which the court had previously approved, and again directed his client not to answer. The trial court dismissed plaintiff's case with prejudice, and assessed fees and expenses, describing the conduct as "the most outrageous example of evasion and obfuscation that I have seen in years" and "a deliberate frustration of defendant's attempt to secure discovery." The appellate court affirmed.

In *Principe v. Assay Partners, HRO Int'l Ltd.*, 154 N.Y. Misc. 2d 702, 586 N.Y. S. 2d 182 (Sup. Ct., N.Y. County, 1992), the court sanctioned a lawyer for repeated objectionable comments to opposing counsel, including: "I don't have to talk to you, little lady," "Tell that little mouse over there to pipe down," "Be quiet, little girl," and "Go away, little girl."

In *Matter of Schiff*, 190 A.D. 2d 293, 599 N.Y. S.2d 242 (1st Dept. 1993), a lawyer was disciplined for conduct held to reflect adversely on his fitness to practice law, namely, behavior that was "unduly intimidating and abusive" toward opposing counsel, including using "vulgar, obscene and sexist epithets toward her anatomy and gender" during the course of a deposition.

If lawyers truly are guardians of law, then *they* more than others need to embody in their practices and lives that very same respect for the dignity of the individual.

In *Paramount Communications, Inc. v. QVC Network*, Inc., 637 A.2d 34 (Del. 1994), the court sanctioned the deposition misconduct of a Texas lawyer, who, in the court's words, "(a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the court in this matter." The lawyer's objectionable deposition comments included: "Don't 'Joe' me, asshole...I'm tired of you. You could gag a maggot off a meat wagon."

In *Matter of McClure*, 652 N.E. 2d 863 (Indiana 1995), a lawyer was suspended from practice for deposition misconduct including throwing a soft drink at opposing counsel and grabbing him around the neck and restraining him in his chair. The court found the conduct reflected adversely on his fitness as a lawyer and was prejudicial to the administration of justice.

In *Corsini v. U-Haul Int'l Inc.*, 212 N.Y. A.D. 2d 288, 630 N.Y.S.2d 45 (1st Dept. 1995), the court dismissed a lawyer's pro se complaint because of the lawyer's deposition misconduct, which included repeatedly refusing to answer questions, improperly responding to others, and engaging in personal attacks against defense counsel and others, including calling defense counsel "scummy and so slimy," a "slimebag," a "scared little man," and "in the sewer."

In *Grievance Administrator v. Sanford L. Lakin*, No. 96-166-GA (Michigan, October 22, 1997), a lawyer was reprimanded for twice striking opposing counsel during an argument at a deposition.

In *In re Golden*, 496 S.E.2d 619 (S.C. 1998), the court reprimanded a lawyer for, among other things, leaning across a table and pointing at the adverse party while screaming at her: "You are a mean-spirited, vicious witch and I don't like your face and I don't like your voice, and what I want, what I want is to be locked in a room with you naked with a very sharp knife....What we need for her is a big bag to put her in without the mouth cut out." The court found the conduct prejudicial to the administration of justice in violation of RPC 8.4, and agreed with the hearing panel that the lawyer's conduct "exemplifies the worst stereotype of an arrogant, rude and overbearing attorney. It goes beyond tactical aggressiveness to a level of gratuitous insult, intimidation, and degradation of the witness. It is behavior that brings the legal profession into disrepute."

Conclusion

Should consistently disagreeable lawyers or judges be allowed to continue in the profession? Should courts, or the bar on behalf of courts, regulate the degree of permissible nastiness of legal professionals? Should disciplinary counsel become civility/courtesy police? Should only civil or polite or nice people be allowed to be lawyers or judges? Who should set the standards for being a nice person or for being an uncivil one? Should gender, age, cultural, ethnic, and racial differences and sensitivities be considered? If civility stan-

dards are mandated, will issues of civility be litigated as yet another way to delay the litigation and harass the other side? Does a lawyer become uncivil by complaining about incivility? Are civility codes attempts by one group of society to impose their own standards of politeness on others and exclude or control another group?[6] Or do such standards instead attempt to recognize the innate dignity and respect each person is entitled to merely because the person is a person?

Concern over declining civility and professionalism is not just a nostalgic yearning for a passing of bygone social graces or outmoded conventions. Rather, civility and professionalism relate to the basic level of trust and respect accorded by one person to another, of the level of confidence a lawyer or a judge can have in the word of another lawyer or a judge. Civility and professionalism form a framework for common expectations of mutual trust, of being treated with dignity, and ultimately set the stage for justice to be done. But are mandatory codes the proper way to assure that? Or do such codes risk silencing the very voices that may be raising, perhaps rudely, an unpopular or minority view that needs to be heard and recognized if justice is to truly exist in our society?

The legal profession has always had room and need for both the polished and the scruffy lawyer. It is a noble profession not because its members are, or may be required to be, polite or civil or politically correct to one another, but because the profession's overriding goal is to make the promise of justice a reality. The preamble to the RPCs reminds us that justice is based on a rule of law grounded in respect for the dignity of the individual. If lawyers truly are guardians of law, then *they* more than others need to embody in their practices and lives that very same respect for the dignity of the individual. Lawyers need to treat one another with dignity and respect because the very purpose of law, and thus the very reason for the legal profession's existence, is to attain respect and protection for the dignity of the individual. Modeling civility and professionalism is an important way for each lawyer and judge to express gratitude to other legal professionals, to honor the innate dignity of one another, and to celebrate the cacophony of justice that is attained through the legal process.

NOTES

1 The concept of "zealous advocacy" is based on the superceded Canon 15 of the ABA's 1908 Canons of Professional Responsibility, which required a lawyer to represent clients with "warm zeal," and Canon 7 of the 1969 Model Code of Professional Responsibility, which required a lawyer to "represent a client zealously within the bounds of the law."

2 New York sought to deal with incivility and to reaffirm appropriate and necessary standards of civility in the practice of law through the issuance in November, 1995 of a *Final Report of the New York Chief Judge's Committee on the Profession and the Courts* (the "Craco Committee"), which recommended that New York's disciplinary rules be amended to make "gross and persistent" incivility an ethical violation. Washington does not have such a provision. Should it?

3 At least four methods exist for enforcement of possible civility requirements: disciplinary sanctions, court sanctions, adverse public/professional opinion, and malpractice actions. In practice, disciplinary and court sanctions are rare, malpractice actions are usually inappropriate for resolving civility or professionalism issues, and adverse opinion, although perhaps widespread, is likely ineffective against the worst offenders.

4 Other RPCs not discussed herein prohibit a lawyer from making false statements, unlawfully obstructing access to evidence, destroying evidence, and so on. Proposed amendments to RPC 8.4 might also limit a lawyer's ability to engage in conduct evidencing a discriminatory bias.

5 *See, e.g.*, the King County Bar Association's "Guidelines on Professional Courtesy" (http://www.kcba.org/guidelin.htm), the American Bar Association Section of Litigation's Guidelines for Conduct (http:www.abanet.org/litigation/litnews/practice/guidelines.html) and the New York State Unified Court System's "Standards of Civility" (http://www.nylj.com/links/standard. html). See also Mary Gallagher Dilley, "Courtroom Decorum and Practice Guidelines – Interim Report," *Bar News,* May 1993, p. 39; the WSBA Court Congestion and Improvement Committee's "Courtroom Decorum and Practice Guidelines," *Bar News*, May 1993, p. 41. See also Shawn Otorowski, "Civility and Rule 11," *Bar News*, May 1993, p. 23, which summarizes the findings of the 1992 report of the Ninth Circuit Rule 11 Study Committee regarding courtroom behavior and sanctions.

6 For an argument that civility codes are a "patrician reaction" by attorneys in a privileged group of large law firms to impose "class" standards on the bar and resist the power shift to other nonprivileged attorneys, see Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 Valparaiso University Law Review 657 (1994). See also, Freedman, "Civility Runs Amok," *Legal Times* (August 14, 1995), arguing that such codes undermine the duty of the attorney to represent the client with zeal by judges tending to enforce them as though they were mandatory despite their acknowledged aspirational nature.

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

Roland O. Foster Balloun (WSBA No. 20884, admitted 1991) has been disbarred, following a hearing, by order of the Supreme Court, effective May 27, 1999. The discipline is based upon multiple acts of misconduct involving litigation matters.

Matter 1. In 1992, Mr. Balloun filed a complaint on behalf of his client, Skilcraft Fiberglass Inc., regarding a contract a dispute with Hermanson Corporation and a mechanic's lien foreclosure action against the Boeing Company. Mr. Balloun notified Hermanson's counsel that he would move for default against all defendants unless Hermanson filed a release of lien bond. On this same day, Hermanson filed a release of lien bond for twice the disputed value. This bond released Boeing's real property from any lien claim. Hermanson's counsel requested that Mr. Balloun dismiss Boeing from the suit. Mr. Balloun told Hermanson's counsel that he believed he had no choice other than to drop Boeing from the lawsuit. Later, Mr. Balloun discovered what he decided were intentional errors in Hermanson's bond. Mr. Balloun obtained an ex parte default judgment against Boeing, without providing notice to Hermanson. Although both Hermanson and Boeing requested that Mr. Balloun agree to vacate the default, he refused. The court vacated the judgment and awarded $22,047.99 in CR 11 sanctions against Balloun and his client. Mr. Balloun appealed the judgment. The Court of Appeals, finding the appeal frivolous, awarded $7,337 in attorney's fees. Mr. Balloun has not paid any of the sanctions or attorney's fees awards.

Matter 2. In April 1992, Mr. Balloun agreed to represent two minority shareholders of a small company in a dispute with the majority shareholder. On Mr. Balloun's advice, his clients called an emergency Board of Directors meeting ousting the majority shareholder, without giving the statutorily required notice to the majority shareholder.

On April 9, 1992, the majority shareholder's wife filed a petition for dissolution of their marriage. Mr. Balloun submitted a pleading in the dissolution case falsely declaring that he had been retained by a majority of the company stockholders. At about this time, Mr. Balloun began a sexual relationship with the wife. The majority shareholder filed a lawsuit, and the court granted a restraining order against the company, preventing any action implementing the decisions made at the earlier board meeting. Mr. Balloun wrote to the majority shareholders' counsel stating that the majority shareholder was only entitled to vote one half of his shares and that the wife was entitled to vote the remaining half. The lawyer objected and advised Mr. Balloun that the majority shareholder had terminated him as corporate counsel. On that same day, Mr. Balloun filed a notice of appearance as counsel for the company. Later, at a special shareholders meeting, with the majority shareholder only allowed to vote one half of his shares, the shareholders voted to remove the majority shareholder, install the wife as president, and retain Mr. Balloun as counsel.

The company settled the lawsuit for $20,000. The clients wanted to use the company's $9,000 previously deposited into Mr. Balloun's trust account to make the final settlement payment. Mr. Balloun told the clients that he had disbursed the $9,000 to himself to pay attorney's fees for the company and for the minority shareholders personally. After Mr. Balloun's resignation as counsel, the company received a writ of garnishment for the remaining settlement funds. Mr. Balloun advised the clients that they did not have to respond to the garnishment because it was served after the day he resigned. The court granted a default judgment against the company for $10,000. During this same time period, Mr. Balloun substituted as attorney for the wife in the dissolution, and then made a formal demand against the company on her behalf. Mr. Balloun did not seek or receive the company's agreement to represent the wife, and used information obtained during his representation of the company against the company in his representation of the wife.

Matter 3. In February 1993, Mr. Balloun agreed to perform 40 hours of legal work per month for a client, in exchange for use of furnished office space owned by the client. The employment agreement stated that all files, correspondence, pleadings and attorney work product would remain on the client's property and be readily available to the client. Later, the client terminated Mr. Balloun's representation, gave him a notice to vacate the property, and asked that he immediately return all files, except one. Mr. Balloun indicated that he would return all files that week. Several months later, while responding to a lawsuit, the client's new lawyer was unable to locate several documents that should have been in the client's legal files. Mr. Balloun filed a declaration with the court stating that he had returned "virtually all files," except duplicated copies and work product to his former client. The court ordered Mr. Balloun to return all non-privileged files and arrange for an in-camera review of privileged files. Mr. Balloun then turned over 24 files, consisting of about 1,300 non-privileged documents, including stock certificates, birth certificates and promissory notes. After the court issued an order to show cause, Mr. Balloun produced the alleged privileged documents, including pleadings, letters and handwritten notes relevant to the parties' intent in the lawsuit.

During the investigation of these cases, Mr. Balloun failed to respond to requests for response and failed to provide subpoenaed documents.

Mr. Balloun's conduct violated RPCs 3.3 (f), candor toward the tribunal; 3.4(c), fairness to opposing counsel; 4.4, respect for rights of third persons; 8.4(c), conduct involving dishonesty, fraud, deceit or misrepresentation; 8.4(d), conduct prejudicial to the administration of justice; 1.15, withdrawal; 1.1, competence; 1.14(b)(4), trust accounting rules; 1.7(b),

conflict of interest; 1.9(a) and (b), conflict of interest-former client; and 2.8(a), non-cooperation.

Mr. Balloun represented himself. Bernadette Janét and Douglas Ende represented the Bar Association. The hearing officer was Lawrence Mills.

Disbarred

John C. Huddleston (WSBA No. 18942, admitted 1989), of Seattle and Everett, has been disbarred, following a hearing, by order of the Supreme Court, effective April 8, 1999. The discipline is based upon his using misleading and false statements to obtain magazine publisher customer lists, and using these lists to solicit unauthorized subscription renewal fees using false statements.

In 1990 and 1991, Mr. Huddleston started Northwest Subscription Service and Pinnacle Subscription Service, businesses purporting to be magazine telemarketing services. Knowing that magazine publishers rented their subscriber lists for pre-approved mail marketing, Mr. Huddleston created a "product." He used a non-existent company name and created a flyer advertising an oak towel rack. Mr. Huddleston did not intend to mail the flyers or manufacture the products. He testified that he intended to "trick" the publishers into providing him their customer lists. Mr. Huddleston obtained approximately 300,000 customer names. Each customer list stated that it was to be used for a one-time mailing only.

Using the publishers' customer lists, Mr. Huddleston and his agents (Huddleston) contacted the customers and solicited subscription renewals. Huddleston convinced the customers that the agents were authorized to solicit renewals, and falsely told the customers that if they did not renew immediately, the subscription prices would increase. Huddleston collected the renewal funds directly, retaining 75 to 85 percent of the funds, and forwarding the remainder to publishing clearinghouses. Mr. Huddleston admitted that he deprived the magazine publishers of hundreds of thousands of dollars.

The publishers received many complaints about Huddleston and contacted him, requesting that he stop his unauthorized solicitation of their customers. Mr. Huddleston used many deceptive means to continue his business, including giving false and misleading information about how he obtained the customer lists and changing the companies' names. During a lawsuit brought by a publisher, Mr. Huddleston twice filed bankruptcy petitions the week prior to the scheduled trial date. On the day the Court entered a non-dischargeable $825,000 judgment against Mr. Huddleston, he filed articles to incorporate his law practice and transferred assets to the corporation. Mr. Huddleston entered a payment plan with the publisher and made all required payments.

Mr. Huddleston's conduct violated Rules of Professional Conduct (RPC) 8.4(a), violating RPCs, or doing so through the acts of others; 8.4(b), committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer; and 8.4(c), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. His conduct also violated RCW 9A.56.020-040, theft by deception and 18 U.S.C. 1341 and 1343, mail fraud. Mr. Huddleston's conduct also violated his Oath of Attorney. For additional information on this case, please see *In re Huddleston,* 137 Wn.2d 560 (1999).

Kurt Bulmer represented Mr. Huddleston. Maria Regimbal, Peter Jarvis and Kathryn Milam represented the Bar Association. The hearing officer was Jack J. Cullen.

NONDISCIPLINARY NOTICE

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

Interim Suspension

Grant Harken (WSBA No. 11842, admitted 1981), of Burien, was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered May 26, 1999.

Welcome to the WSBA's New Governors!

New governors Dale L. Carlisle, Jenny A. Durkan and Victoria L. Vreeland will take their seats at the WSBA Board of Governors (BOG) table beginning September 9, 1999, while new governor Stephen J. Henderson, from the 3rd District, will take his seat starting July 1, 1999, due to the early departure of Terrance J. Lee. Ballots were counted at the WSBA office on June 14, 1999.

Dale L. Carlisle won the 6th Congressional District race, with 484 votes to Bertha B. Fitzer's 248 votes. Forty-one (41) percent of the approximately 1,778 members of the 6th District returned their ballots. Carlisle lives in Tacoma, where he has practiced real estate and business law with Gordon Thomas Honeywell since 1966. He has also served as an assistant U.S. attorney, an Air Force JAG, and in-house counsel for a real estate development company. Carlisle has been a member of many county bar, WSBA and ABA committees; he recently served as chair of the WSBA Business Section and is currently is a member of the VLS Committee for the Pierce County Bar. He has regularly participated in lobbying efforts for the Bar and Access to Justice. He frequently speaks at seminars and has been an adjunct professor at Seattle University Law School.

Jenny A. Durkan was unopposed in the 7th-East District. Durkan, a Seattle native, has an active trial practice, with broad experience in civil and criminal cases. She is an adjunct professor at the UW Law School, has taught at NITA, is a frequent CLE lecturer, and has served on various Bar committees. Additionally, Durkan has held several civil positions, including service on the Governor's Executive Counsel and as Citizen Observer, Police Firearms Review Board. She recently co-chaired the merit selection committee for U.S. District Court judge.

Stephen J. Henderson was unopposed in the 3rd District. In private practice in Olympia since 1975, Henderson's practice includes worker's compensation, personal injury, and estate planning. He served as president of the Thurston County Bar Association in 1992 and was twice voted Boss of the Year by the Legal Secretaries Association. Community activities include service as president of the West Olympia Rotary Club (1991) and membership in the Olympia Highlanders Bagpipe Band.

Victoria L. Vreeland won the 8th Congressional District race with 333 votes to Don M. Gulliford's 268 votes. Twenty-six (26) percent of the approximately 2,371 members of the 8th District returned their ballots. Vreeland is a partner in Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim – Seattle. Before entering private practice in 1983, she clerked for Judge Dale M. Green, Washington State Court of Appeals, Division III, and served as Assistant Attorney General, Consumer Protection/Anti-Trust and Crime Victims Compensation Divisions. Vreeland is a past member of the WSBA Disciplinary Board and has served as Special District Counsel. She has also served on the WSTLA Board of Governors and on the SKCBA Judicial Selection Committee, in addition to numerous other Bar committees and task forces.

WSBA's Court Improvement Committee and the **Access to Justice Board's Status Impediments Committee** are conducting a survey of physical accessibility in court facilities. Please visit WSBA's website (www.wsba.org) to complete the survey or call Gail Stone (**206-733-5925**) for a copy.

LOMAP: The Doctor Is In

The WSBA Law Office Management Assistance Program is presenting its first annual "Law Office Check-up" program to promote healthy, successful solo and small law firms. Just as you periodically have a medical check-up, join us for a self-evaluation of your law office practices and procedures to ensure that you are efficiently providing the best service possible to your clients.

This one-half day program is scheduled for the following locations and dates:

Okanogan	July 26	**Yakima**	August 23
Wenatchee	July 27	**Goldendale**	August 24
Colville	July 28	**Richland**	August 25
Spokane	July 29	**Walla Walla**	August 26
Moses Lake	July 30	**Pullman**	August 27

CLE credit (3.5 hours, including 1 hour of ethics) is pending. The cost of this program is just $30. Reserve your space by contacting Kaitlin Mee at 206-733-5914 or kaitlinm@wsba.org.

WSBA Wins ABA Award

The WSBA will receive the American Bar Association's Harrison Tweed Award for achievement in preserving and increasing access to legal services for the poor. The award will be presented at the ABA Annual Convention on Friday, August 6 in Atlanta. The WSBA shares the award with the Saginaw County (Michigan) Bar Association.

The Harrison Tweed Awards were created in 1956 to recognize the extraordinary achievements of state and local bar associations that develop or significantly expand projects or programs to increase access to civil legal services for poor persons or criminal defense services for indigents.

Mark Your Calendar: WSBA Annual Awards Dinner

The WSBA Annual Awards Dinner will be held from 6 to 9 p.m. on Thursday, September 9, 1999 at Cavanaugh's on Fifth Avenue, Seattle. Watch future issues of *Bar News* for further information.

Judicial Recommendation Committee Seeks Applications

The WSBA Judicial Recommendation Committee is currently accepting applications from attorneys and judges seeking consideration for appointment to fill potential appellate-court vacancies. Interested candidates will be interviewed by the Committee at its September 24 meeting. The deadline for receipt of applications to the WSBA is 5:00 p.m., July 30, 1999.

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

If you are interested in applying, please contact the WSBA at 2101 Fourth Avenue, 4th Floor, Seattle, WA 98121-2330, 206-727-8227, or e-mail scots@wsba.org, to obtain an application. Please specify whether you need the application designed for a judge or for an attorney.

Public Legal Education Workgroup to Present Draft Final Report

The Public Legal Education (PLE) Workgroup presented its draft final report at the Access to Justice Conference in Wenatchee June 25-27. The Workgroup, product of a recommendation from the 1998 ATJ Conference and approved by the WSBA Board of Governors in June 1998, was formed to develop a comprehensive plan to educate and to involve the people of Washington in the law and the legal system.

Co-chaired by former Superintendent of Public Instruction Judith Billings and Judge Marlin Appelwick, the Workgroup has attracted the support and participation of community leaders from government, law and education. "It's amazing to see the dedication of so many high-level people to this project," said Billings. "Their enthusiasm for legal education is contagious."

The 55+ members of the Workgroup reflect a diverse, collaborative effort between judges, lawyers, educators, administrators, teachers, principals, school boards, law schools, legal services, media, community groups, and more. The Workgroup is divided into four committees: PLE in Formal Education Communities, PLE in the Community, PLE and the Formal Legal Process, and PLE Organizational Structure. "Each committee has made an outstanding contribution," said Applewick. "I compliment the members for what they brought to the group and what they produced."

The Workgroup is preparing to present its final report at the July meeting of the WSBA Board of Governors. The report, which will include both short- and long-term recommendations, will serve as a framework for the design and implementation of a public legal education system in Washington state.

Volunteer Speaker Educates Students about the Law

Attorney Zulema Hinojos-Fall made a lasting impression on a group of Islander Middle School (Mercer Island) students when she spoke to them about trial preparation on April 30. As a member of the WSBA Speakers Bureau, Hinojos-Fall had helped out with last year's mock trial preparation at Islander, and she made such an impact on the students that their teacher, Kathy Karlsberg, was thrilled when she agreed to do it again.

Hinojos-Fall's presentation included a Mock Trial Notebook that she gave to each student to keep as a reference. She spent two hours with each class of 30, but that wasn't enough for the students. They were so inspired and eager to learn more about the legal profession that Karlsberg asked her to stay and have lunch with the students so they could continue with the question-and-answer session.

The students were full of great questions, Hinojos-Fall said, and they were fascinated by the legal profession. A week later she received personalized thank-you notes from each one of students she spoke with. She was very touched and honored to have had the opportunity to make a positive impact on the lives of 60 middle-school students.

The WSBA Speakers Bureau is a public-education service provided by lawyers who volunteer their time and expertise to help citizens understand how the legal system works and how laws affect their lives. Lawyers speak to civic, professional and school groups on over 100 topics in addition to offering guidance in mock trial programs. If you have ideas or questions or would like to join the Speakers Bureau, please contact the Speakers Bureau Coordinator, Amy O'Donnell, at 206-727-8213 or e-mail amyo@wsba.org.

Lawyers' Fund for Client Protection

A Thank You to the Lawyers of the WSBA:

The persons to whom gifts are made from the WSBA Lawyers' Fund for Client Protection have been the victims of theft by their lawyers. They have generally had to wait more (sometimes much more) than a year to receive any compensation from the Fund. For these reasons, it is not too surprising that they seldom make an effort to say "thank you." However, an applicant who was recently reimbursed for $500 — which he had paid to disbarred lawyer Dennis Brouner (WSBA No. 8859) for preparing and filing a bankruptcy petition which was never done — sent a card:

> **To the Lawyers of the Washington State Bar Association:** Thanks for giving me confidence in trusting the legal system again. I am forever in your debt and honor for your patience and your Lawyers' Fund for Client Protection gift. The gift provided was a complete relief from my problems and losses.

Fund Procedural Rule Changes:

The Supreme Court approved a Fund rule change which provides that after payment is authorized, the names of lawyers causing the loss may be public. The applicants' names remain confidential.

Committee Actions:

At its meeting on May 14, 1999, the Lawyers' Fund for Client Protection Committee took the following action:

- The Committee approved payment of $1,800 to a former client of William J. Wigen (WSBA No. 2305, now deceased). The $1,800 was given to Wigen to pay the fee of an Arizona lawyer who had been associated in the client's case. The fees were never paid and the $1,800 was never accounted for.
- The Committee approved payments regarding two lawyers in matters where the underlying disciplinary proceedings are pending. Pursuant to the Fund rules, payment under these circumstances must be approved by the Fund Trustees, the Board of Governors. One application concerns $595 paid to a lawyer to prepare and file a bankruptcy which was never done. The other matter concerns 30 applications filed regarding one lawyer (a Fund record). Most of them were also for fees and costs in bankruptcies that were never filed or completed, and for other bankruptcy-related matters. The total of recommended payments on these applications is $9,325. The Trustees will review these recommendations at the June BOG meeting.

(continued on next page)

USURY RATE

The average coupon equivalent yield from the first auction of 26-week treasury bills in June 1999 is 4.958 percent. The maximum allowable interest rate for July is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates for January 1989 – June 1999 appear on page 53 of the June 1999 *Bar News*. Information from January 1987 to date appears at http://www.wsba.org/barnews/usuryrate.html.

FYI *(continued)*

- The Committee also approved payment of $20,613.89 to an applicant whose court-appointed lawyer, Jeffrey Spence (WSBA No. 4598), misappropriated her guardianship estate funds. Spence was disbarred on March 9, 1994, and subsequently convicted of third-degree theft. The Committee is authorized to pay $3,000 to the applicant now; the balance is subject to Trustee approval at the end of the WSBA fiscal year (September 30).
- The Committee also denied one application because of lack of adequate documentation of the claimed loss, denied two others as restitution has been fully recovered, and one application was withdrawn because restitution had been made.

The Committee chair is Seattle attorney Barbara J. Selberg. WSBA General Counsel Robert Welden is staff liaison to the Committee.

Scholarship Dinner Aids Law Students

On May 28, the Loren Miller Bar Association (LMBA) held the 1999 Philip L. Burton Scholarship Dinner. The Philip L. Burton Memorial Foundation is the arm of the LMBA that administers scholarships to financially disadvantaged ethnic-minority third-year law students at University of Washington, Seattle University and Gonzaga University who are studying for the Washington State Bar Exam. Students are selected based on their academic achievements and commitment to community service.

The foundation awarded $1,000 scholarships to Juan Gabriel Ibarra, Stephanie Kiger, Lorraine Wade and Jeffrey Younger of the University of Washington, and to Antoinette Davis of Seattle University. The guest speaker at the dinner, introduced by the Honorable Jack E. Tanner, was Johnnie Cochran. Armando Martinez, Hadassah Gill, Rachel Valentine, Jordan Knox and Mutanda Kwesele, five Seattle public-school students, gave a tribute to the late John Stanford, former Superintendent of Seattle Public Schools. Patricia Stanford accepted the LMBA's Civil Service Award on behalf of her husband. Millicent D. Newhouse, former Washington Women Lawyers President, received the LMBA's 1999 Outstanding Young Lawyer Award.

Over 400 people from the legal profession attended the dinner, including members from nearly all levels of judicial service. LMBA is grateful for those who attended and to those who contributed to the event's success.

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 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330
Fax: 206-727-8320
e-mail: comm@wsba.org.

Information must be received by the first day of the month for placement in the following month's calendar.

ALTERNATE DISPUTE RESOLUTION

Training to be a Professional Mediator
July 29-30 – Seattle. 15 CLE credits (incl. 1 ethics). Advanced 3-hour session held on July 20. By Alan Alhadeff, Mediation 206-281-9950.

EMPLOYMENT LAW

Critical Issues in Employment Law
July 23 – Portland. 6 CLE credits (incl. 1 ethics) pending. By OSB 503-684-7413.

ENVIRONMENTAL LAW

WA Growth Management and Urban Land Use
July 28 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-8525.

ESTATE PLANNING

The Lawyer's Toolbox: Nuts & Bolts of Estate Planning
July 14 – Seattle. 3 CLE credits (incl. 1 ethics). By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

WA Federal Estate Tax Workshop
July 20 – Seattle. 7.25 CLE credits. By Professional Education Systems Inc. 715-833-5896.

Advanced Probate
July 21 – Seattle; July 22 – Spokane. 7 CLE credits (incl. 1 ethics) pending. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

FAMILY LAW

Adoption Law in WA
July 21 – Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-7909.

Collecting Child Support *(morning)* and Economic Issues in Family Law *(afternoon)*
July 29 – Seattle. 3.5 CLE credits (morning or afternoon). By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

GENERAL

1999 WSTLA Annual Convention
July 8-11 – Chelan. 12.5 CLE credits. By WSTLA 206-464-1011.

Jury Selection: Method, Not Madness
July 16 – Portland. 6 CLE credits pending. By OSB 503-684-7413.

A Day on Trial: Advocacy for the New Millennium
July 16 – Seattle. 6.5 CLE credits (incl. 1 ethics). By Washington Law Institute 206-726-9337.

1999 High Technology Protection Summit
July 23-24 – Seattle. 16.5 CLE credits. By UW-CLE 206-543-0059.

Smart Growth: From Rhetoric to Reality
July 23-24 – Portland. 12.5 CLE credits. By 1000 Friends of Oregon 503-497-1000 or e-mail joyce@friends.org.

INTELLECTUAL PROPERTY

Patent & Intellectual Property Law & Practice Summer Institute
July 12-30 – Seattle. 70.5 CLE credits. By UW Law School Foundation 206-685-7810.

LANDLORD/TENANT LAW

Residential & Commercial Evictions in WA
July 8 – Seattle; July 9 – Spokane. 6.5 (incl. 1 ethics). By NBI 715-835-8525.

LAW OFFICE MANAGEMENT

Employee Mobility in WA: Protecting Your Rights When an Employee Leaves
July 29 – Seattle. 6.25 CLE credits. By Lorman 715-833-3940.

REAL ESTATE

The Lawyer's Toolbox: Nuts & Bolts of Real Estate Law
July 21 – Seattle. 3 CLE credits (incl. .5 ethics). By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

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