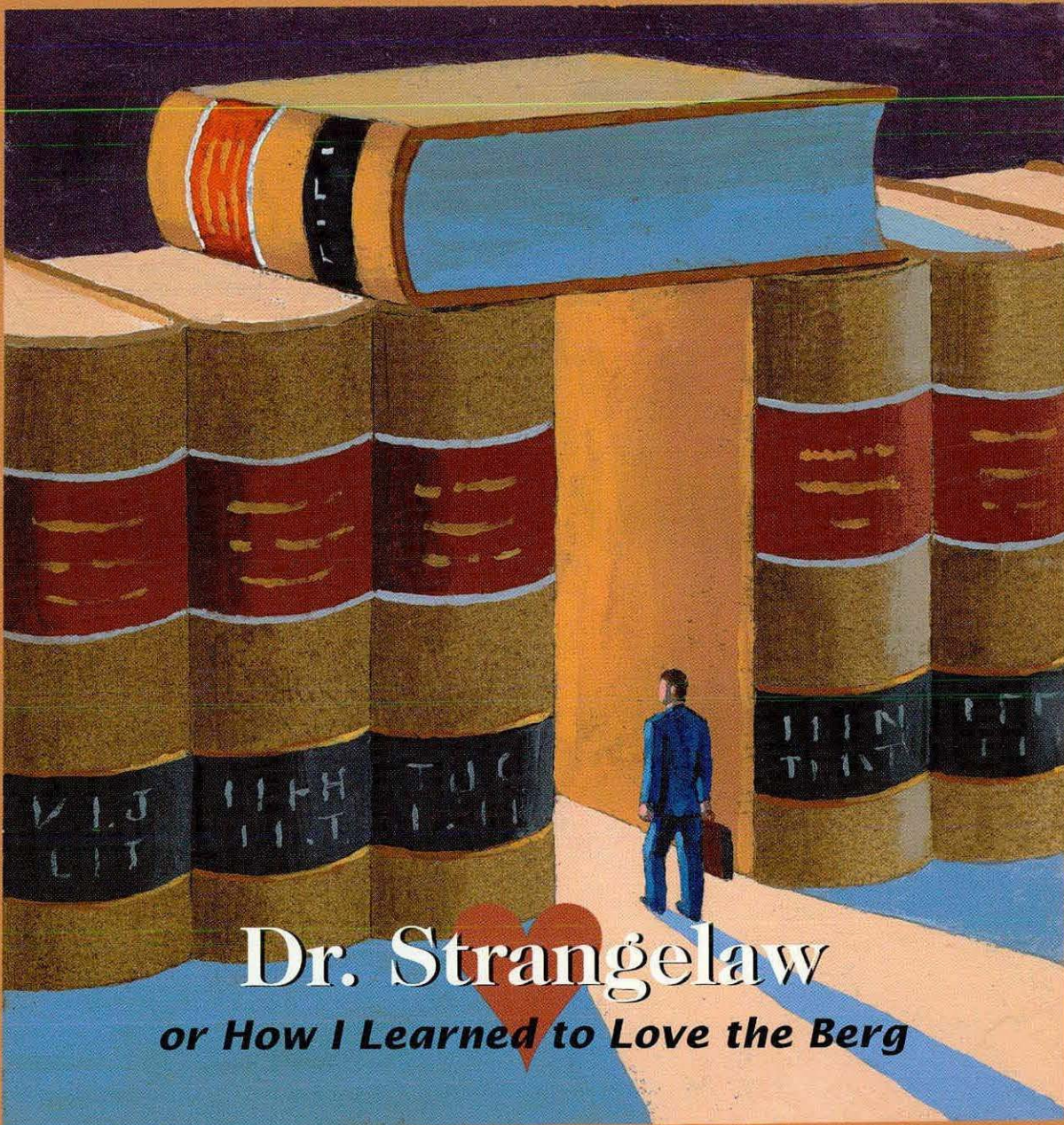


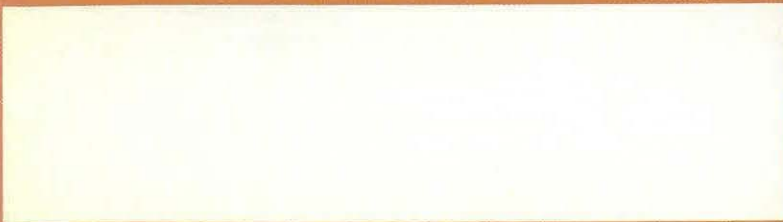
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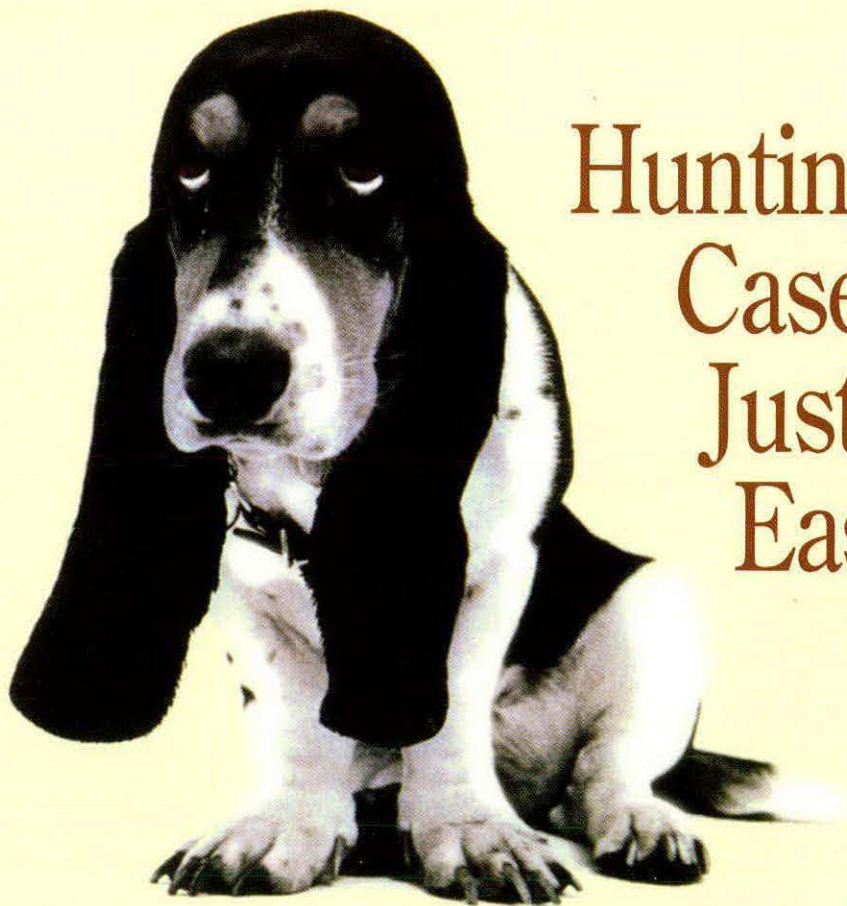
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Dr. Strangelaw
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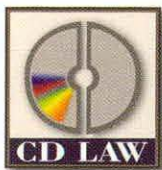
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Washington State
BAR NEWS

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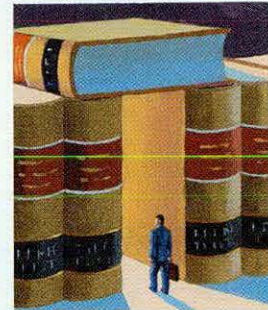
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Lawyer Jokes Absorbing Societal Venom

Editor:

What's black and brown and looks good on a lawyer? *A Doberman*. What do you have when you've got 10,000 lawyers at the bottom of the ocean? *A good start*. What's the difference between a dead lawyer in the road and a dead skunk in the road? *There are skid marks in front of the skunk*.

In his article on lawyer-bashing ["The Lawyer as Hero: A Pride of Lions, a Justice of Lawyers," *Bar News*, June 1999, p. 24], Randolph Gordon points out that lawyer jokes, if directed at ethnic or religious groups, would be considered highly offensive. That's certainly true. What I find fascinating, however, is that many lawyer jokes seem to have started out as ethnic or religious slurs.

On many occasions, I've heard a lawyer joke, like the ones above, that is familiar because I first heard it in elementary school as a racist taunt — with the target, of course, being African Americans rather than lawyers. And I don't need to tell you what word replaced "lawyers."

Strangely enough, I think this movement toward targeting lawyers may be a sign of progress. Lawyers are a minority — at least outside Washington, D.C. — but they aren't an oppressed, discrete, or insular ethnic or religious minority. As a result, they seem to have "absorbed" these taunts as our society has become (perhaps) a little less racist and close-minded and (certainly) a little less openly racist and close-minded.

When I identify myself as an attorney, and then hear the inevitable lawyer joke, I try to concentrate on the fact that I'm absorbing some of the societal venom that used to be directed at religious and ethnic minorities. That's not much comfort, to be sure, but at least it's an optimistic approach.

Meanwhile, I'm slowly building up a collection of jokes about real estate agents.

*Douglas M. Garrou
Richmond, Virginia*

Level of Professional Civility is Disappointing

Editor:

I have been reading the recent articles on professionalism and civility. Allow me to share the following with others, so lawyers who may have experienced similar problems will see they are not alone. Hopefully, those engaging in such rudeness will re-think their behavior.

I have been practicing law for four years. The first year I practiced I worked in an Olympia law firm, a very good firm

with respected and professional partners. I was working in the area I had dreamed of practicing in — labor law. One of my first cases involved a wage claim by a former Oak Harbor employee. The opposing counsel was well-known and had many years of experience. I eagerly investigated the case, filed the complaint and waited for an answer. Twenty days passed — no answer. I went to my supervising partner for advice. "Call and remind opposing counsel." I called his office, no less than three times, and never received a re-



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turn call. More time passed. I again went to the partner for advice. "Call again and tell him you will have to move for default if you don't get an answer." I called again, and still no return phone call. After 30 days I was told to set it for default and see if that generated an answer. I was also told that this lawyer was notorious for doing things only when he had to. I set the matter for default in the correct county, which was an hour's drive from Olympia. The matter was set on a Monday. On Friday at 4:30 p.m. I received a call from an associate in the firm asking if I would delay the proceeding. I did so for one week. The following Friday I again received a call asking for another delay. I said, "No, by the time I get to court it will have been 42 days since I filed the complaint. If I don't have the answer before I leave on Monday, I'm going to court."

Needless to say, I did not get an answer before I left Olympia. The opposing counsel filed an answer by fax at 9 a.m. while I was standing in court obtaining the default judgment. Being the ethical, nice person that I am, I kept checking in the Clerk's office to see if the answer had

been filed by fax. I even checked after I got the judgment. When I checked again after court, the filed answer was there. Being new to the practice of law, I wasn't sure how to proceed. It never occurred to me to go back and talk to the judge. This was, after all, my first time in court. I drove back to my office and asked my supervising partner what to do. I was told, "Well, there are two ways to handle it, but the outcome will be the same. The court will set aside the default because they don't like them. So, you can either agree to set it aside or make the opposing counsel move to have it set aside." Since it seemed pointless to go back to court, an hour away, I was prepared to agree to have it set aside. I then received a phone call from the opposing counsel, who immediately burst into a tirade. He called me sneaky and unethical, implying I had gone behind his back to get the judgment. He told me if I continued to practice this way my reputation as a lawyer would be mud. He even swore at me. Then after all this yelling he calmly asked if I would agree to set aside the default. I simply replied, "No." He didn't deserve the courtesy, since he was

showing none to me.

I filed an affidavit with my reply to his motion, explaining the unreturned phone calls, the last minute request for delay, and my discovery of the filed answer after I obtained the judgment. We went to court, where this attorney implied to the judge that I had been unethical. He used my honesty against me and implied that I knew about the answer and got the judgment anyway. I was stunned, shocked and speechless. The judge asked me why I hadn't come back into court with my discovery. Speechless, I didn't know how to tell him I was new, didn't know how to proceed, needed advice, and had never been in court before. I could not believe that I had followed all the rules, been honest, and was being called on the carpet. The judgment was set aside. I drove back to Olympia determined to quit the practice of law. I was disappointed that a system of rules didn't follow its own rules. I was disillusioned that a fellow attorney could be so despicable.

I didn't quit. I garnered much from my first legal experience — all of it bad. I learned that honesty is not always re-

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warded in the law, and that there are lawyers who are lazy and shift the blame for their inadequacies to others. I discovered that lawyers who should be mentoring and teaching young lawyers sometimes fail in that area.

Now, four years later, I have met many attorneys like my first opposing counsel. I have had my integrity called into question by attorneys who think they somehow gain the upper hand when they malign opposing counsel. It no longer shocks or stuns me. It just disappoints. The law is a system of rules designed to bring order, civility and justice to a society. When lawyers sink to unprofessional behavior and when they yell at opposing counsel, they denigrate the system which I hold in high esteem. I refuse to allow myself to sink so low. I will continue to zealously advocate for my clients in my own nice, honest way. I disagree that civility codes are an effort by some to squelch the voice of the different. Civility and professionalism don't recognize class. These concepts do not belong to the rich and privileged. They belong to every person on the planet. All people deserve to be treated with respect and dignity. Do we need a code? I don't think so. Be civil and professional even when faced with conduct that shocks and stuns. It will wear off on those around you. In the end, legal cases are won or lost on the merits, not on who yells the loudest. And, in case you are curious, my client eventually prevailed and I never raised my voice.

*Christine L. Zackula
Spokane*

Jury Nullification Consequences Are Enormous

Editor:

Tom Stahl's recent letter to the editor [*Bar News*, July 1999, p.12] advocating the principle of jury nullification raises interesting questions. That principle allows juries to decide the law as well as the facts. It is most often cited in support of nullifying unpopular laws, and certainly in a few isolated but notable cases, nullifying juries have altered the course of our nation's history, perhaps for the better. However, in other cases, juries governed by passion or prejudice have repudiated

the law in convicting innocent defendants because of their religion, skin color or ethnicity. Jury nullification, once unleashed, will be hard to keep on the path of righteousness.

To be intellectually honest, if we embrace jury nullification we must do so without qualification. The consequences of that choice are enormous. Imagine a criminal justice system in which, as Mr. Stahl suggests, juries were truly allowed greater latitude "to hear *all* of the evidence." Confessions and evidence seized

in violation of our constitutional rights would be routinely admitted at trial. The exclusionary rule would lose most, if not all, of its ameliorative effect. Is that what Mr. Stahl and other advocates of jury nullification envision?

As a prosecutor, I have reservations about the sweep of the exclusionary rule as applied in our courts today, but I am not yet ready for the courts to abdicate their role in determining the law in favor of piecemeal interpretation of the constitution by juries in individual cases. The

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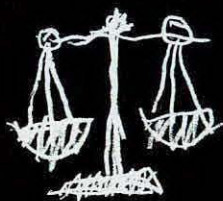


law derives much of its force (and acceptance) through its devotion to precedence and consistency. Jury nullification is the antithesis of those virtues. It is the misguided elevation of "popular justice" above settled principles of law, evolved in a variety of contexts over the generations by our elected representatives and learned jurists, entrusted by the people with the solemn responsibility of establishing the rules by which we live and judge the conduct of others. Jury nullification can only work to undermine confidence in our system of justice.

The rule of law and jury nullification are inherently incompatible. To choose one is to forsake the other. I vote for the rule of law, warts and all.

*William H. Redkey, Jr.
Seattle*

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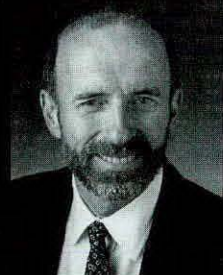
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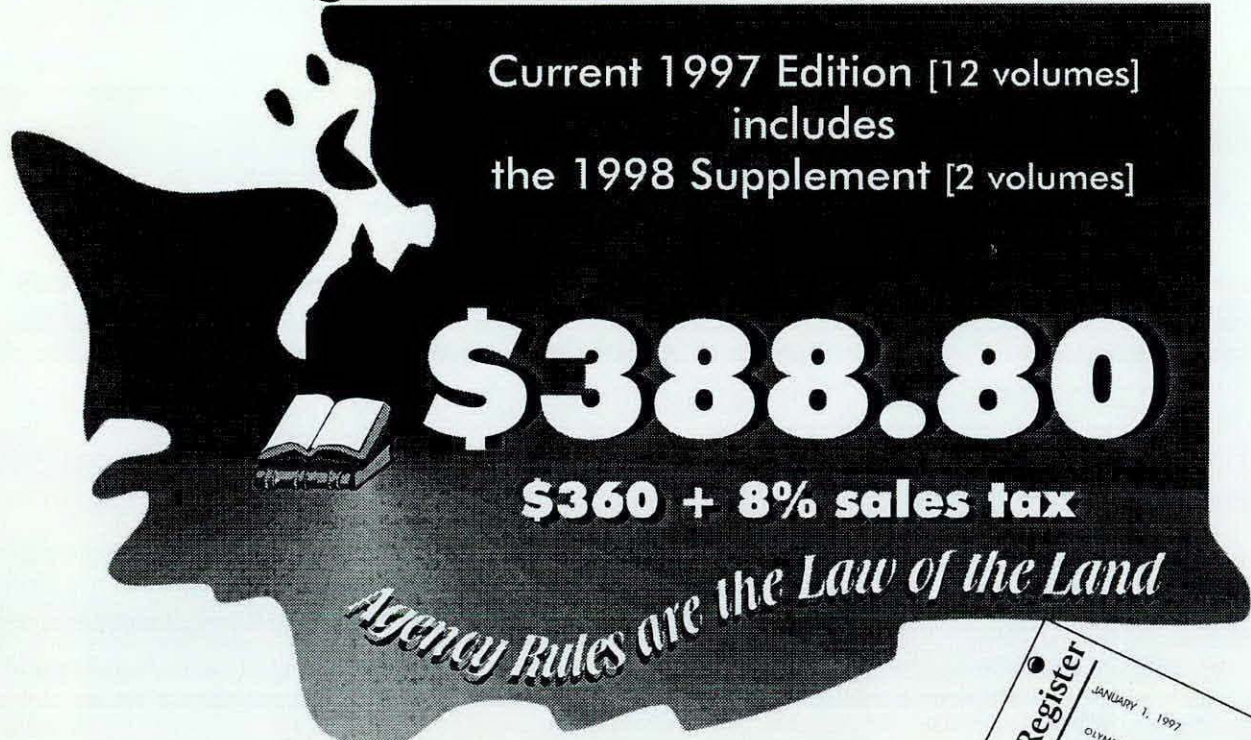
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We're All in This Together

by **Jeff Tolman**
Guest Editor

When one of my best friends was dying of lung cancer, I asked him what he had learned about life as its door began to close. He didn't hesitate in saying, "Throughout our lives we are told that we are all in this (life) together. Right now, I feel like we are all in this alone."

I have thought a lot about what he said. How it fits or doesn't fit in my life. How it fits or doesn't fit in my profession.

When I opened my law practice, I felt I was totally alone. I assumed that every other lawyer understood how to keep his overhead down and successfully work with clients, and always knew the answer to his clients' questions. My clients (whom I feared would stump me with their straightforward legal questions) and my colleagues (whom I thought could never be stumped by any legal question) were almost perceived as enemies. I believed I had somehow been chosen to be the only lawyer struggling with such issues. The dunce. Alone.

Then I got to know other practitioners. Shocking to me, I discovered they were dealing with the same issues. Some of their clients were happy with their services and some were not. Like me, they had huge accounts receivable. Some even asked for my input about issues. The more I spoke with my colleagues, the more I realized that we attorneys had more similarities than not. We were in the law business, with all its good and bad, ups and downs — together.

That feeling has been ratified daily in my practice. Very frequently I call a lawyer to bounce a question off him, or one calls me. I have dropped my practice to help colleagues in need, as they have done for me. When I went to Trial Lawyers' College for a month, the lawyers in my office (and many others) took excellent care of my clients. Recently, two local lawyers had surgery. I, and many other attorneys, called and offered to assist with their practices during the recovery. It seemed natural. We are, when all is said and done, all in this life — and profession — together.

The more I spoke with my colleagues, the more I realized that we attorneys had more similarities than not. We were in the law business, with all its good and bad, ups and downs — together.

As much as I know this is true, many others don't. And this is, from my view, a great benchmark of how one feels about practicing law. Some lawyers don't pal around with other lawyers or have a support group of colleagues. They make mistakes or arguments before the court that a mentor or friend could help them avoid. They forge ahead, doing their best, without the benefit of any group experience or wisdom. Alone.

My belief that I am part of a community gives me strength, confidence and optimism. Help is always available if I need it. Those of my colleagues who believe each of us is alone in the profession are more frequently dissatisfied and at risk for burning out. The practice

of law is a terribly hard business to bear alone. Those who feel part of a bigger group survive; many excel. The journey is at least palatable with company.

Law, at least the kind of law I practice, also gives me the team concept with clients. We go forward (usually, anyway) together. I see them at the store, the baseball field and the mall. My duty is to help them feel that they are not fighting a major issue in their life alone.

The rewards of working together stretch throughout a lawyer's life. My son, Chris, has a delightful girlfriend. Our office has represented her great-grandparents, both of her grandparents and her parents. In many ways, she has been a part of my family (and I, hers) for decades.

Perhaps at the dusk of my life, or my practice, I will believe the words of my friend. Not now, though. There are too many lawyers to help and from whom to get help; too many clients to work with; too many adventures to have with my family; and too much life to live with others. Together. ✍️

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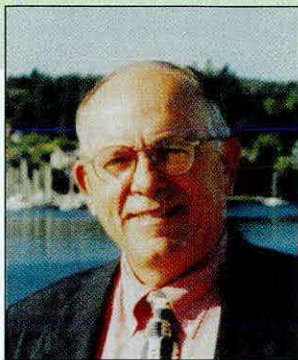
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Miscellaneous Subjects and Onward!

by **M. Wayne Blair**
WSBA President

For my last *Bar News* article as your President, I have selected several topics for discussion.

Definition of the Practice of Law

Since February 1998, a blue-ribbon committee appointed by the Board of Governors has been working diligently to draft a working definition of the practice of law. The Committee, chaired by former Governor Steve Crossland, and which includes several former members of the Board of Governors, two retired Supreme Court justices, a retired superior court judge, and a number of practicing lawyers, has just issued its final report. The Committee went about its work very deliberately and with careful attention to process. In that process, many of you commented on a preliminary draft of the definition, and revisions were made based on these comments. The definition, which includes exclusions, is published on page 47 of this issue of *Bar News*.

As with all efforts addressing this subject, the proposed definition is controversial. The Committee adopted a practical approach and did not simply draft a definition to protect lawyers.

The Governors are currently discussing the proposed definition and are considering potential action. The Committee has recommended to the Board of Governors that the proposed definition be sent to the Supreme Court with a recommendation that it be adopted as a court rule.

What happens next? If the Board recommends the proposed rule to the Supreme Court, will the Court act on it? Should a rule, if adopted, then be used as a basis to seek legislation that would provide that the practice of law by persons who are unlicensed or unauthorized under this rule constitutes a *per se* violation of the Consumer Protection Act? As a part of the long-range planning process, I believe we need to adopt an overarching strategy — one that protects the public, and at the same time is in the best interests of consumers. Lawyers are educated in the law, undergo continual training, operate under a code of ethics, and are subject to discipline for their transgressions. If nonlawyers are

authorized to practice law in some circumstances, how would they be regulated?

American Bar Association Report on Multidisciplinary Practice

As you know, Washington Rule of Professional Conduct 5.4(a) provides that (subject to very narrow exceptions) a lawyer or law firm cannot share legal fees with a nonlawyer.

The ABA initially drafted the Model Rules of Professional Responsibility, including 5.4(a) which Washington incorporated into its rules. A special commission of the ABA studying the concept of multidisciplinary practice for a year recently issued its final report. Among other recommendations,

the report proposed that a lawyer be permitted to share legal fees with a nonlawyer, subject to certain safeguards which prevent erosion of the core values of the legal profession. The commission cited independence of professional judgment, protection of confidential client information, and avoidance of conflicts of interest as core values that exist to protect the public and are essential to preserving lawyer-client relationships.

At its July 30 meeting, the Board of Governors received an oral report from Tom Fitzpatrick, a Washington lawyer and a member of the ABA Board of Governors. Tom advised the WSBA Board that, in his view, this issue of multidisciplinary practice is the most significant issue to come before the ABA in the last 50 years. If approved by the ABA and by each of the rule-making authorities in each of the states, i.e., by the WSBA Board of Governors and by the Washington State Supreme Court, the practice of law will undergo significant changes. For example, one might see lawyers and accountants practicing together, a firm selling both estate-planning services and life insurance, or a plaintiff's personal injury lawyer and a chiropractor practicing together.

As I write this article, the final report is before the ABA House of Delegates for debate, discussion and possible action at its meeting on August 9 and 10. I anticipate that the issue will be debated, but a vote will likely be deferred until

As a part of the long-range planning process, I believe we need to adopt an overarching strategy — one that protects the public, and at the same time is in the best interests of consumers.

the ABA's February 2000 Mid-year Meeting in Dallas. The WSBA Board voted to instruct its ABA delegation to vote, after debate on the issue, to defer any action on the proposal until the February meeting. We will keep you advised as this issue develops further. The WSBA will convene a forum for local discussion.

Proposed RPC 8.4 (g) and (h)
Setting Minimum Standards Relating to Certain Discriminatory Acts, Including Sexual Orientation, and Prohibiting Conduct Manifesting Bias in Representing a Client

Proposed rule 8.4 (g) was recommended to the Supreme Court by the Board in 1995, only to have the Supreme Court take no action. A slightly revised form of RPC 8.4 (g) and new section RPC 8.4 (h), recommended by the RPC Committee to address problems faced by women and minorities in the legal profession, were sent to the Court in November 1998.

About two weeks before the end of the comment period (June 30, 1999), the Supreme Court received an anonymous letter from the Washington Advocates for Constitutional Legal Expression, also known as "WACLE," strenuously opposing the proposed changes to RPC 8.4 (g) and the addition of RPC 8.4 (h). The letter criticized the rule changes as vague, overly broad and politically correct. The letter was sent to most lawyers in the state, urging them to express their opposition to these proposed rule changes to the Supreme Court. Within a few days, 975 of you responded to the Court. Substantially all your comments were in opposition to the proposed rule changes.

The group has since voluntarily identified itself. According to Poulsbo lawyer Jim Johnson, a leader of the group, the anonymity of the letter was due more to miscommunication than an effort to hide identity.

Upon my receipt of the letter, I requested Justice Charles Johnson, Chair of the Supreme Court Rules Committee, not to act on the proposed changes until the Board of Governors had an opportunity to respond to this letter. Justice Johnson advised me that the Rules Committee would not act before its meeting on September 2.

At the Board of Governors' Meeting on July 29, the issue before the Board was how to respond to the WACLE letter. Representatives of WACLE (Jim Johnson of Poulsbo and others) were present. At the meeting, the Board was asked to reconsider its recommendation to the Supreme Court to adopt such rules. The discussion that followed, with approximately 30 people observing, was both heartening and gut-wrenching.

The discussion was heartening because it reminded me of what is great about our profession: lawyers being their most articulate in strenuous debate over difficult issues about which they feel strongly. The discussion was gut-wrenching as members of the Board, listening to the debate and debating among themselves, tried to determine the proper course of action.

It is important for lawyers to understand that the Board of Governors is a diverse group. Most of the Board members these days come from small firms throughout the state. Although not ethnically diverse, the Board otherwise reflects lawyers of different genders, ages, practice experiences and political persuasions. The Board is an able group of lawyers working hard to represent their constituents, and at the same time acting in the public interest. The Board did not lightly consider its initial recommendation to the Supreme Court in October. The Board also recognizes that the proposal is controversial, and that there are well-meaning people on all sides of the issue who feel quite strongly. After debate, the Board declined on a vote of eight to one to reconsider its proposal to the Supreme Court. The Board is preparing its response to the Court in support of the rule.

I pass this along to you to emphasize that the kind of information WACLE submitted at the last minute should have been made available much earlier in the process for adequate debate and discussion. The debate at this meeting, from the standpoint of the Governors, was difficult because of the issues raised at the last minute, and because of the strongly held views on all sides of the issue.

Communication with Members

The discussion regarding RPC 8.4 raised a broader issue — and that is communi-

cation between the Board of Governors and WSBA members. The Board would have preferred to have this kind of discussion months ago, when it was initially considering the matter. How do we, as a Board, better communicate with members, so that we assure the proper kind of debate as the Board formulates a position on a contentious issue?

Our primary means of communicating with the membership is through *Bar News* and the WSBA website (www.wsba.org). Both of these issues were timely raised in *Bar News* and on the website, and the response, up until now, has been mostly silence. Both the Board of Governors and the membership need to work together to improve communication on these contentious issues.

Best Wishes to President-elect
Richard Eymann

I am highly honored to have served as the 108th President of the Washington State Bar Association. It has been an incredibly rewarding personal experience. I have thoroughly enjoyed my year. Thank you.

I know that Dick Eymann of Spokane is ready, able and eager to assume the position as the 109th WSBA President. Dick has served this past year as President-elect, and brings to the position of President vast experience as a highly successful trial lawyer and active community volunteer. Best wishes, Dick!

Many thanks to retiring Governors Terry Lee of Vancouver, Marijean Moschetto of Bellevue, Don Powell of Tacoma, and Mary Alice Theiler of Seattle. Your experience and insight will be missed.

Welcome to the incoming Governors, Dale Carlisle of Tacoma, Jenny Durkan of Seattle, Stephen Henderson of Olympia, and Vicky Vreeland of Seattle and the Eastside. While the decisions you must make may not always be easy or clear-cut, you will find serving on the Board challenging and professionally rewarding.

Finally, I want to express my appreciation to Executive Director Jan Michels for her support, advice and friendship over the years, to her assistant, Lori Lee, as well as to the WSBA directors and the entire WSBA staff for their assistance during this past year. Onward! ☺



Implementing the Vision

by Jan Michels

WSBA Executive Director

You've all heard the homily – it's not enough to just build a better mousetrap... it takes packaging, marketing, sales and continuous market testing to achieve and maintain real success. In the WSBA 1998-1999 year, the Bar leaders built, from member input, trend analysis and consideration of our mission to promote justice, a vision — a shared dream for the “raised” Bar of the future. In the August issue of *Bar News*, you read about what you, our members, told us. Now the strategic goals have been articulated and described. Statements describing how the WSBA will look when we achieve these goals have been developed and are on our website (www.wsba.org). You can find the 11 strategic goals on page 58 of this issue of *Bar News*.

These steps are a beginning — a launch, but what now? The movie “Field of Dreams” brought the slogan, now fully colloquialized: “If you build it, they will come.” In WSBA parlance, this translates to: “We will build the dream – will members join us?”

The Dream, The Core Values

The dream is a Bar that members find relevant, that takes its regulatory function seriously *as a member and public service*, that champions the good that lawyers do, that works for universal access to representation, and that advocates independence of the judicial branch. It's where members turn for questions, help or collegiality. It shepherds new lawyers into the profession and advocates for the best the profession can be. It watches out for members' interests. Even members with little interest in the organized Bar are offered something for the license fees they pay.

The Goal and Outcome Statements

From the dream and the core values that make it real, the Board of Governors has developed 11 goal statements to guide the coming years. Without an implementation plan, though, the grand WSBA plan for a “raised” Bar is at risk for languishing on a shelf.

Implementation!

I have experience with implementing change, mobilizing energy to action, leading, confronting challenges and achieving success. To borrow some of the relevant and true clichés, “the song must get sung” (over and over and over), “the talk

must be walked” (by many), and “change is not for the short-winded.” All these clichés are true, and more. Moving the WSBA toward its vision will take significant focus and effort. What we need to do is:

1. Use a Symbol

To give the new vision a symbol we've updated our WSBA logo. This symbolizes that we're an enhanced, service-oriented and more vital Bar. We hope everyone will associate this new symbol with the “raised” Bar.

2. Promote the Plan

To keep the vision in front of the Board, staff, Bar leaders and members, we will post it, advertise it, report on it, talk about it, and tie initiatives and actions to it. We want everyone to hold the vision of where we are heading and participate in forming the “field of dreams.”

3. Establish Accountability

Another essential implementation action is accountability to the plan. We will support Bar leaders and staff who demonstrate commitment to this enhanced Bar, review programs and functions in light of the new goals, and reward with thanks and acknowledgment those who help us reach our goals. We will constantly ask ourselves how we are doing on our goals.

4. Use Discipline

The practice of law is a disciplined practice. We must apply the same self-control, deliberateness and advocacy to the Long-Range Strategic Plan that we would apply to a client's interests. The direction of the plan and the outcomes to which it commits need to be honored and respected over “programs du jour” or distracting ephemera. Sometimes actually trimming and thinning (like in agriculture) non-strategic programs is good for the overall health of the harvest. It's the *plan* that needs our full support, and we will need to say no to idiosyncratic wishes.

5. Develop an Implementation Plan

A plan needs concrete strategies and objectives. Each of the 11 goals needs to be broken down into definitive steps, with assigned volunteers and staff resources allocated and timelines

Ethics, Professionalism and Civility: *The Hard Questions*

WSBA Professionalism Committee Chair Edward E. Wolfe and members of the Committee invite you to spend an enlightening and exciting morning with a top-notch panel of Washington lawyers and judges, while you earn 3.0 ethics credits!

Our distinguished panelists, led by skilled and experienced facilitators, will discuss a number of hypothetical fact patterns – raising issues of proper ethical conduct as well as how attorneys relate to each other professionally.

The seminar will be held:

Friday, September 24, 1999
9:00 a.m. to 12:00 noon
Emerald One Ballroom
Cavanaugh's on Fifth Avenue
1415 Fifth Avenue, Seattle



Facilitators **Peter R. Jarvis** and **Bradley F. Tellam** are frequent writers and speakers on legal ethics issues. They know how to ask “the hard questions,” and their lively and engaging style brings rave reviews time after time!

Joining Mr. Jarvis and Mr. Tellam will be an outstanding panel of notable Washington attorneys and judges:

- Well-known criminal defense attorney **John Henry Browne**
- Chair of the WSBA Character & Fitness Committee **J. Donald Curran**
- WSBA President-elect **Richard C. Eymann**
- Chair of Foster Pepper & Sheffelman PLLC's Business Practice Group **Allen D. Israel**
- Chair of the WSBA Family Law Section **Patricia L. Morgan**
- United States District Judge for the Western District of Washington **Judge Thomas S. Zilly**

To register, please call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. You may also register at the door.

The registration fee is \$75.

The seminar has been approved for 3.0 ethics credits.

set. This implementation plan becomes the basis for budgeting, reporting and accountability. Without an implementation plan, we'll never be sure we're reaching our goals. Starting with the input from the information-gathering exercise, and adding staff input, the Board will develop a detailed implementation plan this month.

6. Live It

We must all understand that the 1999 Long-Range Strategic Plan is not simply goal statements and new programs. It is really a new way of life for the WSBA. It's a beacon around which to orient our energy, and it is a commitment to continue listening. The Plan is dynamic; we will keep it in front of us every step of the way, modifying and updating it as we go.

7. Budget to It

Any *one* long-range plan has little chance of survival without it being built into an annual process that includes budgeting, staffing and resource allocations. The planning and updating process must be respected by each board and officer over the coming years.

8. Institutionalize Planning

To keep our focus and to assure continuity, the planning process must relate to the core of how the WSBA operates. A designated group needs to “own” it and watch out for it. There has to be a systematic system for passing the baton, board to board. We must adopt a formal mechanism for reporting on progress or suggesting updates or modifications. A long-range plan is not complete without these institutional mechanisms.

So Here We Go!

We have 11 goal statements and have defined the outcome that describes our idea of the Bar we want. As we break each goal down into action steps and assign these steps to volunteer bars, sections, committees and staff, we commit to regular reporting and ongoing planning. These 11 goals and our progress on them will be kept in front of us, through my column and a page on the WSBA website dedicated to the Long-Range Plan. Please stay in touch with these plans for *your* Bar. *LD*



Dr. Strangelaw

or *How I Learned to Love the Berg*

by Steven A. Reisler

When the Washington Supreme Court decided *Berg v. Hudesman*¹ in 1990, it dropped a bomb on the legal community. No longer could contracts be read in black and white, groaned the business lawyers; no longer could contracts be confined to their four corners, moaned the civil litigators; no longer could courts grant summary judgments in contract disputes, intoned the trial judges.²

Now, 10 years later, we know that the *Berg* bombshell left only a broad, shallow crater, and its fallout was harmless. In some ways, *Berg* cleared the way for a more intelligent approach to contract law. Rather than have us hew literally to the two-dimensional words of a contract, *Berg* held that a *third dimension*, the intent of the parties making the contract, was the *starting point* for interpreting the parties' agreement.³ No one will argue that this is bad. It makes perfect sense. The evil inherent in the *Berg* approach, say its critics, is that it made the enforcement of contracts more difficult, less certain and more time-consuming.

Not entirely true. The evil inherent in *Berg* was that it stated very straightforward principles of law in a not very straightforward way. It used many words, sometimes obscurely expressed, to describe a sensible approach to contract interpretation.⁴ Here, in wallet-sized version, is the essence of *Berg*:

- The construction of a contract (that is, its legal consequences) is an issue of law;
- The interpretation of a contract is the ascertainment of its meaning;
- The meaning of a contract depends on what the parties intended it to mean;
- Extrinsic evidence is always admissible to determine the context of a contract, regardless of whether the contract is ambiguous;
- If a contract is fully integrated, extrin-

sic evidence can be used to understand or explain the context of the agreement and what the parties intended. But extrinsic evidence cannot be used to add or subtract language in the agreement;

- If a contract is not fully integrated, extrinsic evidence can be used to prove additional terms, provided that the additional terms are not inconsistent with and do not diminish the written terms of the contract;
- Unilateral and unexpressed intentions mean nothing in understanding the intentions of the contract;
- Reasonableness and justice trump blind and illogical adherence to mere words.

The saw heard since *Berg* was decided is that no one will ever again win a summary judgment on a litigated contract. This has not proven true: since *Berg*, trial judges can, do and should grant summary judgment motions in contract disputes in appropriate circumstances. A survey of recent cases in particular areas of law helps to illuminate how courts deal with *Berg*-like situations.⁵

Insurance Contracts

The basic principles of interpreting insurance contracts did not change after *Berg*. These principles include:

1. Ambiguities in an insurance contract are construed against the insurer;

2. Insurance contracts are construed as if read by an ordinary insurance purchaser;
3. Exclusions from insurance coverage will be strictly construed and not read beyond their clear meaning;
4. If an insurance contract, or an exclusion, can have different reasonable meanings, the courts will favor the meaning that most favors the insured;
5. An insurance clause is ambiguous if, on its face, it can have two different, reasonable interpretations;
6. The courts will enforce insurance contracts that are clear and unambiguous and they will not create ambiguity where there truly is none.

The "super-rule" imposed on all of these rules, however, is that they merely aid in determining the intention of the parties to a contract of insurance. And, as with all contracts, no strict interpretation of the insurance agreement should prevail over reason, nor cause a contorted or forced resolution.⁶

Thus, in *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678 (1994), a majority of the Washington Supreme Court found a key provision in a directors' and officers' liability policy to be ambiguous. Central to the decision was the context in which the insurance policy was purchased.⁷ Months later, in *Key Tronic Corporation v. Aetna*, 124 Wn.2d 618 (1994), the Supreme Court, on direct review, reversed summary judgment for the insurers on the basis of an ambiguous pollution exclusion. It was an issue of fact, a majority of the Court concluded that, in reality, the insurer had to satisfactorily resolve. "If there is no extrinsic evidence offered to resolve the ambiguity in the pollution exclusion, or if extrinsic evidence

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which is offered does not clarify the contract, then the ambiguity will be resolved against the insurer.⁸

Likewise, in *Clayton v. Grange Insurance Ass'n.*, 74 Wn.App. 875 (Div. 3 1994), the appellate court reversed summary judgment in favor of the insurer where the insured claimed UIM benefits for injuries sustained while operating his tractor on the shoulder of the road. The court found the insurance policy's lack of any definition for the term "motor vehicle" ambiguous, and the case was sent back to the trial court for a factual determination of what the parties intended by that undefined term in the insurance contract.⁹

Nevertheless, in *U.S. Life v. Williams*, 129 Wn.2d 565 (1996), the Supreme Court affirmed summary judgment for the insurer in a case where a husband and wife had purchased insurance to continue payments on their new van should the insured die or become disabled before the vehicle had been paid off. Only the husband was identified as an insured, and premiums for only one insured were charged. Nevertheless, the certificate of insurance itself had double Xs in the boxes next to the types of insurance coverage purchased by the insured. When Mrs. Williams became disabled, however, she demanded that the insurance policy pay off the new van because, she contended, extrinsic evidence would show that the double Xs meant both she and her husband were intended to be insured under the policy. The Supreme Court could not countenance this argument, however, because to do so might lead to a rewriting of the plain language of the insurance certificate itself.¹⁰ Unlike *Clayton* and *Lynott*, *supra*, the language of the insurance contract itself was not ambiguous, only the extrinsic evidence surrounding the contract.

Similarly, in *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777 (1998), the Supreme Court reinstated summary judgment in favor of the insurer because plaintiff could not, under his automobile UIM policy, recover for emotional damages unrelated to personal physical injury. The Court found that the language of the pertinent clause was not ambiguous on its face, so there was nothing to resolve at trial.¹¹

The counterpoint to this series of cases

is *Reynolds v. Farmers Ins. Co.*, 90 Wn.App. 880 (Div. 3 1998), in which the court reversed the trial judge's summary judgment in favor of the insured and ordered judgment for the insurer. In *Reynolds*, the insured's automobile accident was clearly covered under the terms of the reinstatement declaration defining when coverage began. Although the insurer complained that the clear language of the policy was simply a mistake, the insured wanted to prevent the admission of any extrinsic evidence which might rewrite that clear language. The appellate court held that whereas extrinsic evidence would not ordinarily be admissible to contradict, modify or add to a clearly worded contract of insurance, extrinsic evidence would be admissible to show that there had been an accident or mistake.¹² Because the intent of the parties in this particular case, as evidenced by the context and circumstances, was that there should be no insurance coverage, there would be no insurance coverage.

Wills and Trusts

In *Estate of Catto*, 88 Wn.App. 522 (Div. 2 1997), the husband and wife had entered into a community property and survivorship agreement. Later, the wife left her husband, cut him out of her will and filed for divorce. The day after filing for divorce, Mrs. Catto died. Notwithstanding the protestations of Mrs. Catto's heirs, the surviving husband received the bulk of her estate pursuant to the community property and survivorship agreement entered into during their marriage. The Court of Appeals affirmed even though the decedent had changed her will and had filed for divorce.

The Court applied these principles:

1. The same rules of construction apply to community property agreements as to any other contracts;
2. When reviewing a community property agreement, the objective is to understand and implement the parties' bilateral intent;
3. "Intent" can be established directly or by "inference";
4. Whether established directly or by inference, "intent" can only be derived from its objective manifestations; and
5. Objective manifestations of "intent"

can be read either in the written agreement itself, or in the context of the agreement.¹³

The community property and survivorship agreement in this case lacked a termination clause, perhaps because the parties deliberately omitted it ... or perhaps because someone neglectfully forgot to put in that standard language. Regardless, the appellate court agreed with the trial judge that the agreement itself did not provide for termination in the event the marriage failed, and nothing about the context of the agreement when it was formed suggested any different intent. Although Mrs. Catto clearly intended to divorce her husband and effectively cut him out of her will, the expression of "intent" was not part of the context when the original agreement was put together. Thus, the winner was the estranged husband, not the decedent's heirs.¹⁴

In *Estate of Lindsay*, 91 Wn.App. 944 (Div. 3 1998), two people married and signed reciprocal wills. Almost four years later, they split and signed a separation agreement relinquishing any claim to each other's property from the date of their separation. Following that, the couple's relationship was schizophrenic — sometimes they lived together, sometimes not. At one point, however, the husband executed a new, handwritten will and simultaneously revoked his prior will. After separation, the wife had also executed a new will cutting out her husband. After the husband died in a motorcycle accident, his spouse petitioned to admit "Will Numero Uno" to probate. In the alternative, she demanded an award in lieu of homestead under RCW 11.52.020.

The Court affirmed the trial judge who gave nothing to the surviving spouse. The second, handwritten will was admitted to probate, and she was also denied an award under the statute in lieu of a homestead allowance. In examining the written separation agreement of the couple, the Court concluded that it clearly reflected their intent to give up inheritance rights that would usually apply to legal spouses. This was the clear intent expressed in the written separation agreement, and it was the surrounding circumstances, including the subsequent acts of the parties, that reinforced that intent.¹⁵

Employment Law

In *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn.App. 1 (Div. 2 1997), the former officer of a company sued his former employer for compensation and bonuses he contended were due under a written employment agreement. Adhering to the "four corners" of the written employment agreement which, in the trial court's words,

contained "not even a hint" of any contrary intent, the trial court summarily dismissed the CEO's complaint against his former (and now bankrupt) employer. The Court of Appeals, however, looked at correspondence exchanged by the parties, saw surrounding circumstances that suggested (objectively speaking) two competing but equally reasonable interpretations of their

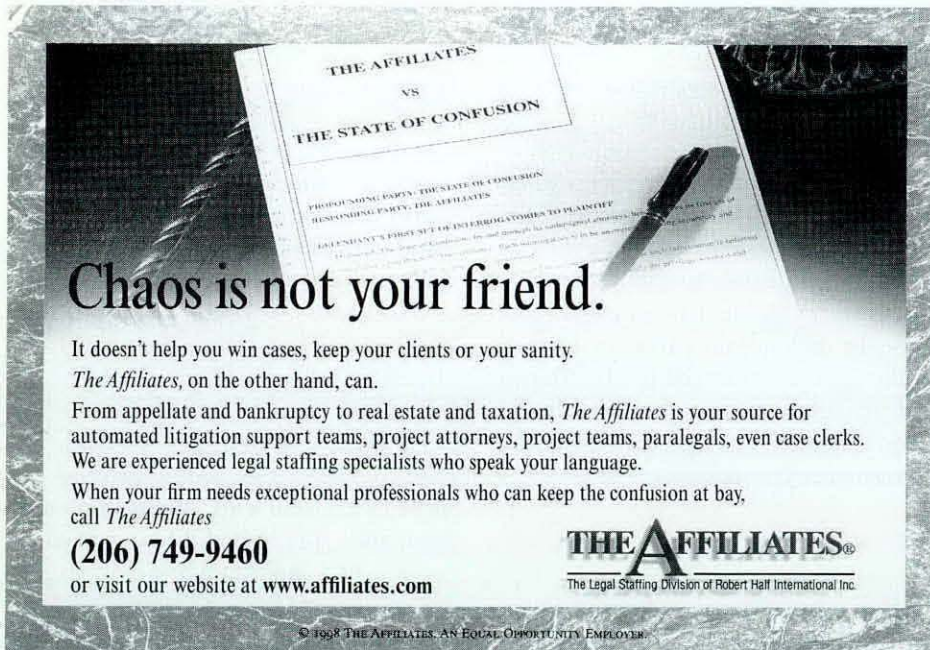
contract, and reversed the summary judgment.¹⁶ Thus, when examining an employment agreement, the courts will examine not only the written agreement itself, but also "the circumstances leading up to and surrounding the writing."¹⁷

Consider, however, *Miller v. Arctic Alaska*, 133 Wn.2d. 250 (1997). A seaman on an Alaskan crab-processing boat was injured when, in separate events, a door smacked his knee, a 500 lb. crab cage struck his back, and boiling water seared his buttocks (all this on one voyage of the good ship Westward Wind!). The injured seaman sued for breach of contract, negligence, and under the Jones Act, for maintenance and cure, punitive damages and attorneys' fees. At the close of trial, the trial judge dismissed the breach of contract claims, among others, leaving only negligence for the jury. The jury found 50 percent contributory negligence, and awarded the net miserly award of \$687. The Court of Appeals reversed based on an ER 904 error (an issue worth studying in itself). The Supreme Court, however, reversed again and reinstated the jury verdict.¹⁸

The issue of contract law revolved around the seaman's written employment agreement. Federal law required the maritime employer and its employee to set forth in writing the length and pay of the job. Although the seaman wanted the trial court to consider extrinsic evidence about his understanding of the employment agreement, the Supreme Court nixed the idea.¹⁹ Citing general *Berg* principles, the Washington Supreme Court explained that extrinsic evidence could not be used to alter the written terms of an agreement. More interestingly, however, the Supreme Court also wrote that:

We do not believe where federal law requires the maritime employer and seaman to agree in writing on the length and terms of employment we will permit variation of the terms of the agreement by parole evidence.²⁰

In *Syputa v. Druck, Inc.*, 90 Wn.App. 638 (Div. 1 1998), the Court considered a contract for commissioned sales in the aerospace industry. The employer paid commissions on orders placed during the term of employment, but refused to pay commissions or orders placed after the date



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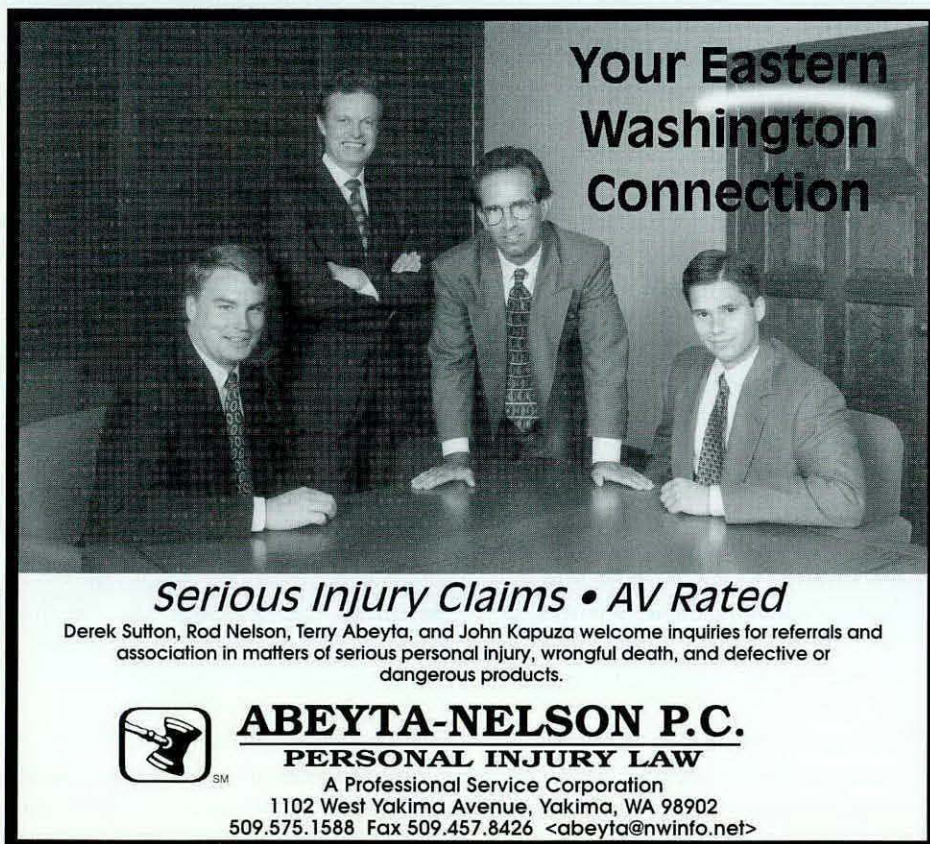
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of termination. The plaintiff sales representative's claims based on contract were denied by the trial court on summary judgment, and the appellate court affirmed. The Court was unwilling to admit parole evidence that the parties agreed to additional terms because, under standard *Berg* analysis, the parties could not, with parole evidence, import into a written contract words or intentions not contained within it.²¹

The *Syputa* Court did, however, resuscitate the sales representative's claims for post-termination commissions under the procuring cause doctrine. As the Court explained, you generally can terminate a sales agent at will, but you cannot terminate an agent's right to compensation if the agent caused a sale. "In the absence of a contractual provision specifying otherwise, the procuring cause doctrine acts as a gap-filler."²² Thus, the Court tipped its hat to *Berg*, but still found a way to permit factual consideration of compensation beyond the scope of the written employment agreement.

Landlord Tenant Law

A landlord-tenant case worth reviewing is *Pacific N.W. Group A v. Pizza Blends*, 90 Wn.App. 273 (Div. 1 1998). The Court of Appeals reversed summary judgment in favor of the landlord in a commercial tenancy. Although the written lease agreement of the parties clearly prohibited oral modifications, the Court pointed out that "no-oral-modification clauses have consistently been deemed unenforceable in this state."²³ "A paradox of the common law is that a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification."²⁴ Thus, the Appellate Court reversed summary judgment in favor of the landlord and remanded to the trial court the factual question of whether there was an oral lease modification agreed to by the parties.²⁵

Family Law

In re Marriage of Sievers, 78 Wn.App. 287 (Div. 1 1995) is a rags-to-riches-to-rags story involving the dissolution of a couple who made millions in the adult "1-900" telephone business. In nine years of marriage, the couple's fortunes went from "nada" to about \$10 million. Husband and

wife entered into a property settlement agreement that, ultimately, allocated money and stock. Tax liabilities were to follow the distributed assets and, accordingly, be shared.²⁶ In a roughly hewn late-night settlement memorandum, the parties set forth, somewhat inarticulately, their intentions regarding tax liabilities. Thus everyone was happy – until the IRS came calling, seeking about two million dollars in unpaid taxes!

The ex-husband had written a detailed memorandum to his accountant describing his anxiety about the tax liabilities. In

the memorandum, the ex-husband told his accountant he sought accounting advice that would saddle his ex-wife with a disproportionate share of the federal income-tax burden. Nevertheless, the ex-husband wrote his accountant, "I hope the advice is that we can accept this [language in the property settlement agreement] as written so we don't have to discuss this, and draw their attention to a problem that they have not focused on."²⁷

The ex-wife testified that her understanding of the property settlement agreement was that there was no problem to

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focus on in the first place; taxes were to be shared and tax liabilities were to follow the assets.²⁸ In other words, just like the old gypsy curse, the ex-husband got exactly what he wished for. The trial court concluded that the parties both agreed in their understandings that the property settlement agreement meant exactly what it said: the ex-wife thought there was no tax problem to focus on, the ex-husband knew she had not focused on the tax problem, and, as written, the agreement said exactly what both parties thought it said. This is one of those contract situations where it does not pay to leave some ambiguous language in a contract provision that you know the other party simply has not considered. The Court of Appeals, in a complicated mixed-bag decision on various issues, ultimately found there was no need to allow the ex-husband to introduce extrinsic evidence about the divorcing couple's actual intentions in executing the property settlement agreement. There really had been a meeting of the minds; the plain language of their agreement proved it. Thus, no extrinsic evidence was necessary or permitted.²⁹ Compare this with the

insurance cases previously discussed.

In re Marriage of Sievers was cited in *In re Marriage of Boisen*, 87 Wn.App. 912 (Div. 2, 1997). Once again, the divorced parties disputed the meaning of their separation agreement (and its tax ramifications). Once again, the Court tried to ascertain their intent by examining the objective manifestations of their intent in the written agreement itself, and by examining the context of the agreement.³⁰ Although one party thought the unintended tax consequence of the property settlement agreement was so grossly unfair that the agreement had to be reformed, the Court of Appeals declined to do so. It focused not on the current situation of the parties, but on both of their subjective beliefs about what the language of the agreement meant in the first place. The parties initially had agreed, and the language of the agreement supported their subjective understandings at the time they signed it. By split decision, the Court of Appeals affirmed the trial court's judgment because it was based on fundamental fairness as well as the intent of the parties.³¹

In re Marriage of Monaghan, 78

Wn.App. 918 (Div. 2 1995) was a case involving a dentist and his wife. The Court of Appeals reversed the judgment of the Superior Court. At issue was the wife's right to part of the proceeds from the post-dissolution sale of her husband's dental practice in the context of their decree of dissolution. The Court of Appeals held that the trial court's finding of facts was insufficient to explain its ultimate conclusion.³² More interestingly, however, the Court of Appeals cited the wife's *Berg* argument that the trial court had mistakenly failed to interpret the sale of the dental practice as a whole, rather than simply consider the transaction documents themselves.³³ The issue revolved around the valuation of a closely held business, the value ascribed to goodwill, and whether a covenant not to compete was a business asset. These were all "big picture" and contextual issues which the Appellate Court held the trial court needed to consider before it could decide whether the spouse was entitled to an award of money from the sale of the dental practice.³⁴ The unmistakable *Berg* theme of the Appellate Court decision was that fairness and common sense had to prevail over a literal interpretation of a contract.

In re Marriage of Schweitzer, 132 Wn.2d 318 (1997) is a family law case that laps at estate planning issues. The disputants married but kept their separate assets separate. Prior to Mr. Schweitzer embarking on a major vacation, he and his wife sauntered over to their local business-supply store, purchased and signed a standard-form community property agreement.³⁵ This was a three-pronged agreement that, according to both parties, they intended would provide for Mrs. Schweitzer in the event of Mr. Schweitzer dying during his vacation. Mrs. Schweitzer, however, also testified that the first prong of the community property agreement was intended to be permanent, i.e., if her husband died on his travels, all their separate property would still be unquestionably converted to community property.³⁶ "Gadzooks!" exclaimed Mr. Schweitzer (or something similar, I am sure), because he did not recall having even read the community property agreement in the first place!

The trial court found the community property agreement was really an estate planning document and did not express



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the intent of both parties to permanently convert separate property into community property. Both the Court of Appeals and the Supreme Court disagreed with the trial court, however. The factual record showed that, although their long-term intentions might have differed, they both agreed that the agreement served to convert their separate property into community property. Beyond that, however, the Supreme Court would not go. The essential and initial paragraph of the boilerplate three-pronged community property agreement converted separate property into community property. The parties had never revoked that paragraph. Although Mr. Schweitzer trotted out *Berg* to show what his intent was *not*, the Court would not allow extrinsic evidence to delete the clear written terms of the agreement.³⁷ There had been no fraud and no mutual mistake, and there could be no sympathy for a man who had freely signed what he had not read. Therefore, the Court also refused to void the agreement.³⁸

Real Property

In the arena of real estate law, contract cases decided in the last five years generally adhere to the *Berg* principles described above – with some twists. One twist pertains to restrictive covenants. Two cases involving restrictive covenants reported in 1994 were *Shafer v. Board of Trustees*, 76 Wn.App. 267 (Div. 1 1994), and *Thorstad v. Federal Way Water & Sewer*, 73 Wn.App. 638 (Div. 1 1994). In both cases, the Court of Appeals cited liberally to *Berg* and used *Berg*-like analysis to ascertain the intentions of the affected parties.

In *Shafer*, the Court affirmed summary judgment for a non-profit corporation which had developed a residential community on Whidbey Island. The two themes in *Shafer* were that: (1) extrinsic evidence was always admissible to understand the context of a restrictive covenant, even if the language of the covenant was not ambiguous; and 2) unambiguous language in a restrictive covenant will be enforced as written, unless its terms are unclear or susceptible to more than one reasonable meaning. 76 Wn.App. at 275.³⁹

Likewise, in *Thorstad*, the Court accepted extrinsic evidence of the contracting parties' intent, both before and after the execution of their agreement, as an

aid in understanding whether an otherwise buildable lot was burdened by a decades-old covenant that prohibited construction. In counterpoint to the panel which had decided *Shafer*, however, the *Thorstad* Court focused less on the covenant and more on the real-estate transaction itself. Partly reversing and partly affirming the trial court, the Court of Appeals found that the contracting parties themselves had never even considered the restrictive covenant when they did their deal, and the covenant itself was not recorded until after the transaction, nor

was it ever executed.⁴⁰

By 1997, however, the Court of Appeals' analysis of restrictive covenants had become a blunter instrument. Thus, in *Ackerman v. Sudden Valley Community Association*, 89 Wn.App. 156 (Div. 1 1997), the Court wrote that the interpretation of a restrictive covenant is a question of law, and clear, unambiguous language in a restrictive covenant will be interpreted exactly as it reads. *Hollis v. Garwall, Inc.*, 86 Wn.App. 220 (Div. 3 1997) gave the nail an additional whack when it cited *Mountain Park Home Own-*

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ers Association, Inc. v. Tydings, 125 Wn.2d 337, 344 (1994), for the proposition that "[a] court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document." To drive the message home, the Hollis Court wrote:

The applicability of the context rule announced in *Berg* to the interpretation of restrictive covenants is impliedly rejected by *Mountain Park Home Owners Ass'n, Inc. v. Tydings*, 125 Wn.2d at 344: "A court must construe restrictive covenants by discerning the intent

of the parties as evidenced by clear and unambiguous language in the document.... *Only in the case of ambiguity* will the court look beyond the document to ascertain intent from surrounding circumstances." 87 Wn.App. at 225. [emphasis added]

To the practitioner, it is unclear whether the law pertaining to restrictive covenants has evolved back to where it was before *Berg*, whether *Berg* never really changed anything in the first place, or whether sloppy language in certain reported cases has created an opportunity for others to

try to turn back the clock. The wise practitioner knows, however, that while jurisprudential questions are best left for law-school professors, the most recent statement of the law is the one that will carry the weight with your trial judge.

In some real-estate contract cases, the *Berg* rules have become very streamlined. Thus in *State v. Brown*, 92 Wn.App. 586 (Div. 2 1998), the Court of Appeals affirmed summary judgment in favor of the state in a drug forfeiture of 20 acres of land used for marijuana agribusiness.⁴¹ Stripped of citations, the Court wrote:

In construing a written contract, basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. Interpretation of an unambiguous contract is a matter of law. If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.⁴²

Paradoxically, even though a contract may be unambiguous, a court may still grant summary judgment for the wrong party. A case in point is *Meyer v. Consumers Choice, Inc.*, 89 Wn.App. 876 (Div. 1 1998). The issue was whether \$25,000 deposited by a buyer of a Bellingham site for a prospective supermarket was "earnest money." How this sum was characterized was relevant because, relative to the land's purchase price, the true earnest money either did, or did not, exceed five percent of the sales price. This, in turn, was relevant because, under RCW 64.04.005, forfeiture of the earnest money was the exclusive remedy for breach of the real-estate purchase and sale agreement if the earnest money did not exceed five percent of the purchase price.

The trial court found the contract language was unambiguous – only \$10,000, not \$25,000, was the earnest money amount. Therefore, the earnest money was less than five percent of the purchase price, and the would-be buyer's lawsuit for specific performance and for damages was dismissed on summary judgment.⁴³ The Court of Appeals, on the other hand, examined the exact same purchase and sale

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

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

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agreement, also found the issue of the earnest money amount unambiguous, but held that it totaled \$25,000, not \$10,000. Therefore, the earnest money exceeded five percent of the purchase price and summary judgment should have entered for the buyer.⁴⁴

There is yet another wrinkle in real estate contract law that is worth noting. In *Olson v. Trippel*, 77 Wn.App. 545 (Div. 2 1995), the Court of Appeals reversed the trial judge's grant of summary judgment in favor of defendants and granted summary judgment to plaintiffs. The case concerned a written easement agreement that predated the current owners of the appurtenant properties. Defendants built a fence to block the easement across their property, and plaintiffs sued to maintain it in a quiet title action. The parties both relied on the recorded documents, but the defendants also introduced, and persuaded the judge to rely upon, four affidavits concerning their intentions in acquiring their property.⁴⁵ The affidavits were all extrinsic to the public record, and all related to events predating the plaintiffs' acquisition of their property. Although the trial judge held that "evidence of the intent of the parties is always admissible,"⁴⁶ the Court of Appeals threw out the affidavits altogether. The Court wrote:

Assuming without holding that the context rule may be applied in a dispute between an original grantor and an original grantee of real estate, it cannot be applied in a dispute between an original party and a subsequent purchaser who is not under a duty of inquiry. To hold otherwise would be to require that a subsequent purchaser investigate not only the chain of title, but also the "context" within which each conveyance in the chain was executed. That would be an impractical burden, perhaps an impossible one, and would virtually destroy the utility of the real-estate recording system.⁴⁷

In granting summary judgment to the plaintiffs, the Court of Appeals stated its holding unequivocally: "[W]e hold that in a dispute involving a subsequent purchaser of real estate, as opposed to a dispute between the original grantor and grantee, the inquiry rule displaces the context rule."⁴⁸

Business

Washington courts apply *Berg* analyses to general and special types of business-related lawsuits. Thus, in *Confederated Tribes v. Johnson*, 135 Wn.2d 734 (1998), the Washington Supreme Court recited the standard *Berg* touchstones in the context of a suit to prevent public disclosure of information relating to tribal-state gambling compacts. As in so many previous cases before it, however, the Supreme Court affirmed the principle that no extrinsic evidence (and, specifically, not an after-the-fact declaration of "intent")

should be considered if: (1) the extrinsic evidence tended to change the meaning of what was written; and (2) that the meaning of the agreement was apparent in itself.⁴⁹

Nevertheless, a lawyer is cautioned to carefully define terms in a business agreement that one ordinarily takes for granted. Otherwise, a loosely defined or undefined term can become the proverbial hole big enough to drive a truck through. A case in point is *Chatterton v. Business Valuation Research, Inc.*, 90 Wn.App. 150 (Div. 3 1998), a quirky little case in which a mi-

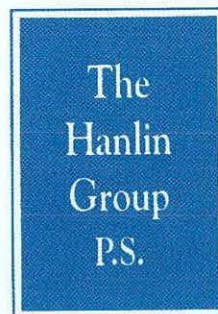
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minority shareholder of a closely held business sued a mutually agreed-upon business evaluator (as well as the minority shareholder's own business from which he was retiring) in order to upset the buy-out price established by the business evaluator.

The key issue was the meaning of the word "value," as used in the parties' agreement for the business valuation by a third

party. The court found the word "value" was undefined and "inherently ambiguous." It could mean, for example, "fair value, intrinsic value, market value, fair market value, true value, liquidation value, earnings value and actual value."⁵⁰ Thus, the Appellate Court upheld the trial court's consideration of the "circumstances surrounding the formation of the agreement,"

and held that the business evaluator was wrong to conclude that the business's fair market value was its liquidation value.⁵¹ Rather, the Court agreed that the circumstantial evidence showed the parties intended that the business be valued as a going concern — a 100 percent gain to the retiring minority shareholder.⁵²

In another lawsuit between "friends," *DeBenedictis v. Hagen*, 77 Wn.App. 284 (Div. 2 1995), the Appellate Court affirmed the trial court's decision not to award any fee to a collection agency hired by the one friend to "motivate" his debtor buddy to make good on the balance of his \$45,000 debt. The lender had signed a form agreement with Vito DeBenedictis, proprietor of the collection agency. When the lender ultimately settled up directly with his old friend and paid no collection fee to Mr. DeBenedictis, he sued for his 35 percent commission.

The debt collector contended that the written agreement between his company and the lender proved without question that the lender had sold the claim to him. The lender, on the other hand, contended that he had only entered into a principal-agent relationship that he terminated prior to settling with the debtor.⁵³

The courts looked beyond the mere language of the collection agreement and examined the context in which it came about. That context, in combination with the language of the agreement itself, caused the Appellate Court to agree with the trial judge that the litigants' relationship was an assignment for collection, rather than a complete sale of a claim.⁵⁴

Indeed, the Washington Supreme Court has held that "[i]nterpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Tanner Electric Cooperative v. Puget Sound Power & Light*, 128 Wn.2d 656, 674 (1996) (summary judgment reversed in contract dispute regarding which utility had the right to provide electric power to a large industrial customer straddling their service boundaries).

Another corollary to the *Berg* rule sometimes surfaces in business-contract litigation: the parties are presumed to contract in the context of existing law. In *State*

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v. Farmers Union Grain Co., 80 Wn.App. 287 (Div. 3 1996), the Court affirmed a 100 percent condemnation award in favor of the owner of a WASHDOT-condemned building, and denied a tenant's claims to a portion of the condemnation proceeds. At issue was the meaning of a condemnation clause contained in the lease between the owner and the tenant.

The Court not only examined the factual context of the lease and the parties' testimony about what they thought they were trying to accomplish, but also considered the existing statutes and rules of law that pertain to judicial condemnation.⁵⁵ This is consistent with what the Washington Supreme Court wrote in 1996 in the *Tanner Electric Cooperative* case: "Contractual language also must be interpreted in light of existing statutes and rules of law." *Tanner Electric Cooperative v. Puget Sound Power & Light*, 128 Wn.2d 656, 674 (1996), citing 3 Arthur L. Corbin, Contracts § 551, at 198 (1960). This is not so much another rule of contract interpretation as a rule of common sense. No matter how unambiguous the contract, and no matter what the intentions of the contracting parties, the courts will not enforce an illegal contract or one that makes no sense in the context of legal precedent.

Conclusion

This survey of contract cases should not lead you to the conclusion that the legacy of *Berg v. Hudesman* was chaos and anarchy in contract law. Where it should lead you is to the realization that our Washington courts are not always bound by the written language of contracts to give effect to absurd or unfair consequences. This is bad if you want to gain from a literal, absurd and unfair result, but good for the general principles of what the legal system should do.

On the other hand, the *Berg* legacy has also limited the extent to which courts may throw out wholesale carefully crafted and clear contract language. If there is any theme which permeates all of these cases, it is that the courts will not permit an equally absurd and unfair result to occur by admitting extrinsic evidence that conveys ambiguities.

Ultimately, *Berg* and its progeny are mere tools that lawyers and judges can use to do better justice in contract law than

could be done by a more rigid, black-and-white, four-corners-of-the-document rule of analysis. Though we live in an age of technology and precision, the *Berg* approach to contract analysis reaffirms that contracts are agreements between people, not machines. The human insight of a judge into the context of an agreement and the intent of the parties may be the most just, if not the most efficient, method of resolving contractual disputes. ▽

Steven A. Reisler is a senior member of the Seattle law firm Ogden Murphy Wallace,

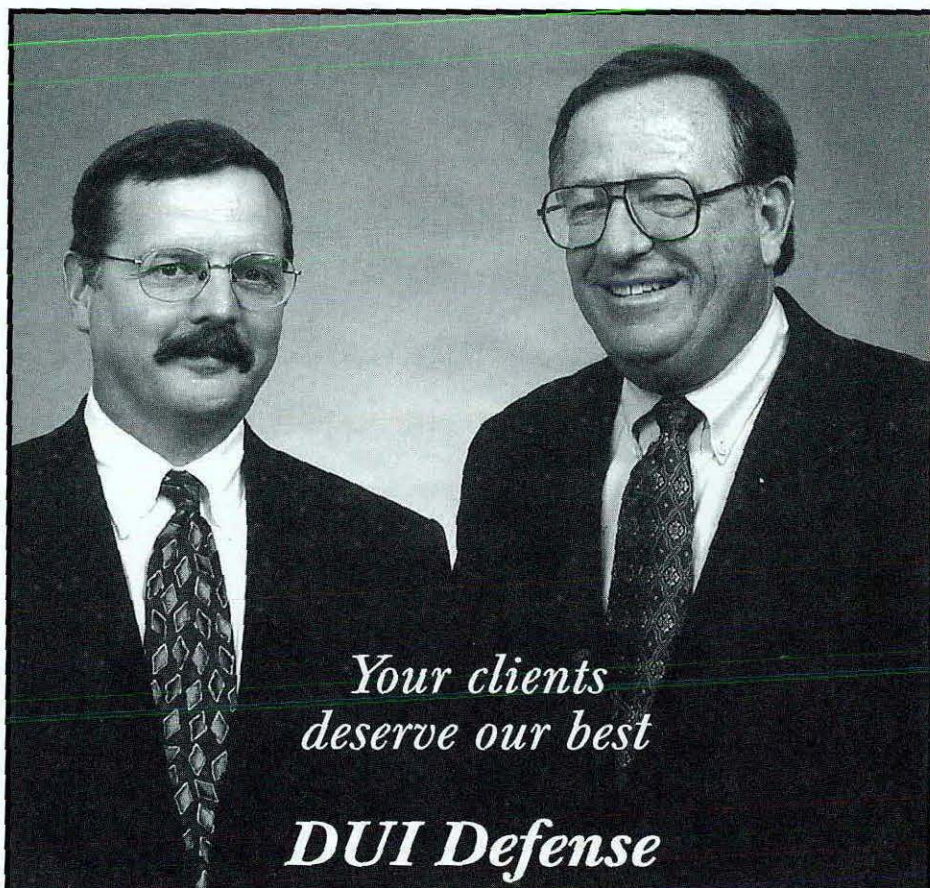
PLLC where he practices contract and commercial litigation. He was Bar News editor from 1981 to 1985, served on the WSBA Board of Governors from 1985 to 1988, and was a member, and later chair, of the Washington Commission on Judicial Conduct.

NOTES

1 115 Wn.2d 657 (1990).

2 In fact, *Berg* did not create the context rule in Washington. It merely harmonized the prior confusion in the cases which sometimes cited the "four corners" of a contract as the courts' divining rod and sometimes cited the "context rule."

3 115 Wn.2d at 663, quoting Corbin, *The Interpretation of Words and the Parole Evidence Rule*, 50 Cornell L.Q. 161, 162 (1964-65).



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4 For an overview of Washington cases discussing Berg, see *Contract Litigation Post Berg v. Hudesman, Did Your Black & White Contract Turn a Lighter Shade of Pale* by Steven A. Reisler, published in two parts in *Bar News*, June and July 1994.

5 This survey is not intended to cover every reported case of contract litigation. It begins roughly where the 1994 survey left off. See footnote 3, above.

6 See, generally, *City of Bremerton v. Harbor Ins. Co.*, 92 Wn.App. 17, 21-22 (Div. 2 1998).

7 *Id.* at 689-90. Although the dissenters in *Lynott* contended that the directors and officers insurance policy was clear and unambiguous as written, the fact that the nine Justices of the Supreme Court could not even agree among themselves what the pertinent language meant, must mean ipso facto that it truly was ambiguous. 123 Wn.2d at 698.

8 *Id.* at 630.

9 *Id.* at 878-79.

10 *Id.* at 570-71.

11 *Id.* at 784.

12 *Id.* at 884-85.

13 *Id.* at 528-529.

14 *Id.* at 529.

15 *Id.* at 951.

16 *Id.* at 9-10.

17 *Id.* at 8.

18 *Id.* at 269.

19 *Id.* at 267.

20 *Id.* This begs the question: Is the context rule of contract interpretation out of context when the contract is subject to federal mandates? Or does this exception apply to any contract that must be in writing, such as contracts for real estate subject to the statute of frauds? Compare *Jones v. Best*, 134 Wn.2d 232 (1998), in which the Washington Supreme Court reversed the Court of Appeals and reinstated summary judgment for plaintiff in a real estate commission dispute. *Jones* turned on an analysis of an attempted, but unsuccessful modification of a valid contract, i.e., there must be

mutual assent to modify a contract. *Id.* at 240. The dictum, though, was more interesting:

Having decided there was no modification of the original, written contract, we need not determine the outcome of this case under the Statute of Frauds. We note only that contracts for the sale of land are required to be in writing, as are agreements authorizing agents to sell or purchase real estate for a commission. It is well settled that subsequent oral agreements to modify such contracts can run afoul of the Statute of Frauds if not performed. We do not reach this issue because there was no agreement, oral or otherwise, to modify the valid written contract. *Id.* at 241.

21 *Id.* at 644-45.

22 *Id.* at 645-46.

23 *Id.* at 281.

24 *Id.* at 277-78.

25 *Id.* at 280-82.

26 *Id.* at 293.

27 *Id.* at 295.

28 *Id.* at 295-96.

29 *Id.* at 303-304.

30 *Id.* at 920. At issue was whether the former wife could collect reimbursement from her ex-husband for his share of the hundreds of thousands of dollars it cost to give their kids a college education.

31 *Id.* at 921.

32 *Id.* at 925.

33 *Id.* at 924.

34 *Id.* at 926-929.

35 This is the perfect "do-it-yourself brain surgery" story to tell your clients who ask why they should pay you to prepare a standard legal document that they can buy for a few bucks at a bookstore.

36 *Id.* at 322-323.

37 *Id.* at 326-327.

38 *Id.* at 327-328.

39 The essential subplot of the case was that restrictive covenants could be applied to everyone who, knowingly or unknowingly, had bought into the community's by-laws and plat restrictions; and, furthermore, that more stringent covenants could, through authorized processes, later be imposed even on those who did not want or know about them.

40 *Id.* at 643-644.

41 Criminal law aficionados will love this twisty little bar-exam-like case that interweaves contract law, Oregon's civil RICO law, Washington's Criminal Profiteering Act, the Uniform Controlled Substances Act and real estate law.

42 *Id.* at 594.

43 *Id.* at 879-880.

44 *Id.*

45 *Id.* at 549.

46 *Id.* at 550.

47 *Id.* at 553.

48 *Id.*

49 *Id.* at 752.

50 *Id.* at 156.

51 *Id.* at 156.

52 *Id.* at 156-157.

53 *Id.* at 286-287. This was not the only factual dispute. The lender testified how he told the collector that he was a friend of the debtor, and that he did not want undue pressure brought to bear. The collector, on the other hand, testified that the lender "was hoping that [DeBenedictis] was gonna jack the man up [sic.]," and that he was told, "I don't care what you do to that man... whatever you want to do, whatever way you want to do it, just get me my money."

54 *Id.* at 292-293. The court did believe that the collector could have pursued a claim *in quantum meruit* for his contingent services rendered up to the time of the allegedly wrongful discharge of his agency. The court pointed out, however, that the collector had failed to introduce evidence to support a claim for the reasonable value of his services.

55 *Id.* at 292-293.

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Attorney Representation: An Essential Right or Not?

Leonard W. Schroeter

What is the Standard for Civilized Nations?

On June 27, 1999, at the Access to Justice Annual Conference in Wenatchee, Washington, there was a workshop program on "Civil Gideon: If Not, Why Not?"¹ The keynote speaker was the Hon. Earl Johnson, Jr., Justice of the Court of Appeals of the State of California, Los Angeles.² He stated that:

Some propositions are so elemental and some developments so long overdue that once implemented most Americans wonder how democratic society could have functioned any other way. Women's suffrage, the elimination of *de jure* racial discrimination and the right to counsel for indigent felony defendants are among these phenomena.³

In this article we discuss another fundamental right, as yet unrealized, which in retrospect probably will appear self-evident and pre-ordained. That is the right to counsel, or more accurately, the right to appropriate representation in civil cases. At some point, Americans will look back and ask how concepts like "due process," "equal protection of the law," and "equal justice under law" were anything but hollow phrases while our society still tolerated the denial of counsel to low-income civil litigants.

This seemingly unarguable right to counsel was first introduced in Common Law more than three centuries before the United States Constitution was adopted and almost four centuries before the Washington State Constitution came into existence. In 1495, during the reign of Henry VII, the King signed a law which read, translated from ancient English into current vernacular:

At some point, Americans will look back and ask how concepts like "due process," "equal protection of the law," and "equal justice under law" were anything but hollow phrases while our society still tolerated the denial of counsel to low-income civil litigants.

After the said writ of writs be returned, ... the justices ... shall assign to the same poor person or persons, counsel learned by their discretions, which shall give their counsels nothing taking for the same, and in likewise the same justices shall appoint an attorney and attorneys for the same poor person and persons ... which shall do their duties without any rewards.

This right did not apply in criminal cases, but applied in civil cases in the common-law courts for centuries and was extended to equity courts as well. In present-day England, the right to counsel in civil cases is even broader and lawyers are fully compensated out of government funds for the services they provide. In 1851, France enacted legal aid providing free attorneys to indigent persons. Germany followed in 1877; Norway, 1915; Sweden, 1919; and thereafter, Denmark, Belgium, The Netherlands, and virtually all of northern Europe passed such laws to provide counsel for indigents, and to provide for public responsibility for their representation. In central and southern Europe, Austria had the right to counsel in civil cases beginning in 1895. Spain had such a statutory right since at least 1855, and Portugal since 1899. Italy created the right in 1865, and in virtually all countries, there was public responsibility.

A major international body, the Committee of Ministers of the Council of Europe, in 1978 declared that: "A right to necessary legal aid" and the "right of access to justice and to a fair hearing" constitute "an essential feature of *any* democratic society." In 1979, the European Convention on the Protection of Human Rights and Fundamental Freedoms established a minimal level of basic human rights that signatory European nations were expected to maintain. The Convention is interpreted by the European Court of Human Rights, containing justices drawn from member states. In 1979, in a case called *Airey v. Ireland*, an indigent Irish woman complained that she had been denied a lawyer to litigate her judicial separation case. The Court held for her and granted a financial award to pay for a lawyer. This led to Ireland expanding its legal-aid program to comply with the standards of the European court. Justice Johnson wondered: "[S]ince the right to counsel in civil cases is now deemed 'a fundamental human right' by most of western civilization, how much more is required before it becomes an essential ingredient of due process in this country?"⁴

Another panelist at the Wenatchee Conference was the Hon. Richard B. Sanders, Justice of the Washington State Supreme Court, who spoke on "Access to Justice: A Noble Principle in Beggar's Rags." Justice Sanders in his presentation and paper asked:

If it is a legitimate role of the government to build courthouses and hire judges, is it not only a difference in degree, not kind, to assure litigants adequate representation so they may properly present their case when they go to court? Indeed, is not legal representation a practical necessity that those

knowledgeable in the law would have to admit: That the man who represents himself has a fool for a client?

So the first point is this: Access to justice is no more a welfare program than maintaining a court system is a welfare program. Maintenance of a civil court system is so close to the core purpose of government that it justifies governance even when all other justifications fail.

But I suggest the availability of legal representation is not itself the driving principle which serves as its own justifi-

fication. Rather it is simply an application of a more basic principle we call access to justice. I would define this to mean the legal right of every individual to have his or her grievance determined on the merits by an independent judiciary. But if we are to be principled in the defense of this principle, we must identify, and confront, barriers to access beyond those represented by poverty or indigence. After all, what good is even a retained attorney by your side if the doors to the courthouse are locked against you?

... [I]f we are truly to access *justice*, we must facilitate that access in a *just* way. We must recognize that the civil justice system is a core function of government, which is not only available to *all*, but the responsibility of *all* to maintain. If attorney fees for indigent criminal defendants and judicial salaries are properly borne by the taxpayers as a whole, it is equally appropriate of all of society, not just the unfortunate few who happen to be involved in the judicial system, to make sure the doors of the courthouse remain open in form and substance.

... In conclusion, let us then defend access to justice in the manner this great principle should become accustomed. Let us promote it fairly and consistently across the board, recognizing that its origin is not the welfare state but rather the state of affairs which exists when the government fulfills its basic purpose. To secure our lives, our liberty, our property, and our private pursuit of happiness in the civil context. As this is a public benefit, it is equally a public responsibility to be shared by us all, not to be shouldered by the few.

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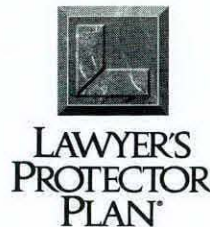
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Why is the United States a Human Rights Laggard?

Paraphrasing a common witticism: "Great ideas have many parents. Failures have none." The parentage of the "civil gideon" idea is murky. It clearly connotes the right to be represented by legal counsel in civil actions, but all of us know that this is not implemented in real life in the United States. Nor is there any general consensus that the existence of the "right" has found wide acceptance in American politics and judicial politics. As a lawyer for almost half a century, it has seemed to me intuitively that it is a no-brainer. The opportunities for meaningful access to the civil justice system are largely dependent upon legal representation, and the likelihood of a just result is hugely increased by competent representation. For this reason, and because as a nation we are constitutionally committed to meaningful access to equal justice under law, the creation of the Legal Service Corporation (LSC), and the acceptance by government to provide legal services for some poor, was simply the overdue recog-

nition of the responsibility of the first duty of government — protection of the people.

But times have changed. So have the political bodies of government, including the U.S. Supreme Court. The pursuit of justice of the Warren Court was followed by the unsettling years of the Burger Court and then the sometimes frightening constrictions of the Rehnquist Court. Political attacks upon the LSC, and the growing disparity between rich and poor eventuated in the present access to justice movement.

But the language of America's founding constitutional document, the Declaration of Independence, must be the beginning of our inquiry. 1. "We hold these Truths to be self-evident" (fundamentality — natural law); 2. "that all Men are created equal" (equality principle); 3. "that they are endowed by their Creator with certain unalienable Rights" (human rights cannot be taken away); 4. "that among these are Life, Liberty and the Pursuit of Happiness" (the triad of fundamental rights); 5. "that to secure these Rights, Governments are instituted among men" (positive duty of government to protect the people's rights); 6. "deriving their just Powers from the Consent of the Governees" (the people are sovereign; their consent is required — democracy).⁵

The United States Constitution and its Bill of Rights speak of justice, due process of law, equal protection, equal protection of the law, privileges and immunities of citizenship, and other terms construed to mean right of counsel. Right of counsel explicitly is found only in the Sixth Amendment, but since a basic principle of the *federal* constitution was that civil justice was to be done in the states, it was understandable that these provisions were not included. The founders felt that the principles were covered by terms such as privileges and immunities of citizenship and the Ninth Amendment, which states: "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The subsequently added Fourteenth Amendment forbids the states from making or enforcing any laws which shall abridge the privileges and immunities of citizens: "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws." State constitutions without exception provided for right to counsel, and much of the backwardness of clarifying the meaning of that right has arisen from a conscious lacuna between federal and state power and a duty to enforce rights which it inherited at the birth of this nation.

What understanding should we have as to the role of right to counsel within the meaning of rule of law, due process of law, equal protection of the law, and our other cherished constitutional precepts in this century? It is useful to see what the perceptions of those learned in the subject matter have said, in a past well beyond the memories of any of us today.

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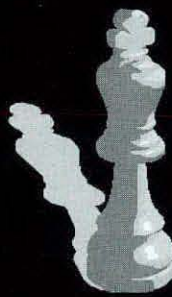
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In 1921, Reginald Heber Smith, who modestly described himself as “of the Boston bar,” republished a book entitled *Justice and the Poor: A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law, with Particular Reference to Legal Aid Work in the United States*.⁶ Smith was a renowned attorney, an established scholar, a national leader of the bar, and a proponent of justice. In a foreword to the first edition in 1919, Elihu Root (1845-1937), distinguished lawyer, diplomat, United States Senator, Secretary of State, and President of the Carnegie Foundation, wrote:

No one, however, doubts that it is the proper function of government to secure justice. In a broad sense, that is the chief thing for which government is organized. Nor can anyone question that the highest obligation of government is to secure justice for those who, because they are poor, and weak, and friendless, find it hard to maintain their own rights. This book shows that we have not been performing that duty very satisfactorily, and that we ought to bestir ourselves to do better We

have been slow to appreciate the changes of conditions which to so great an extent have put justice beyond the reach of the poor.

Smith had begun his pioneer work in the study and formation of “Legal Aid Societies” before World War I, writing to call the American Bar Association’s attention to these problems. His last chapter, “A More Equal Administration of Justice,” noted that the right to legal counsel has been implemented in other countries with success, and then stated:

We can end the existing denial of justice to the poor if we can secure an administration of justice which shall be accessible to every person no matter how humble, and which shall be adjusted so carefully to the needs of the present day world that it cannot be dislocated, or the evenness of its operation be disturbed, by the fact of poverty.... In the existing machinery of justice, there are three defects, which in their practical results destroy the impartiality of the administration of justice and thereby make impossible that absolute equality before the law which

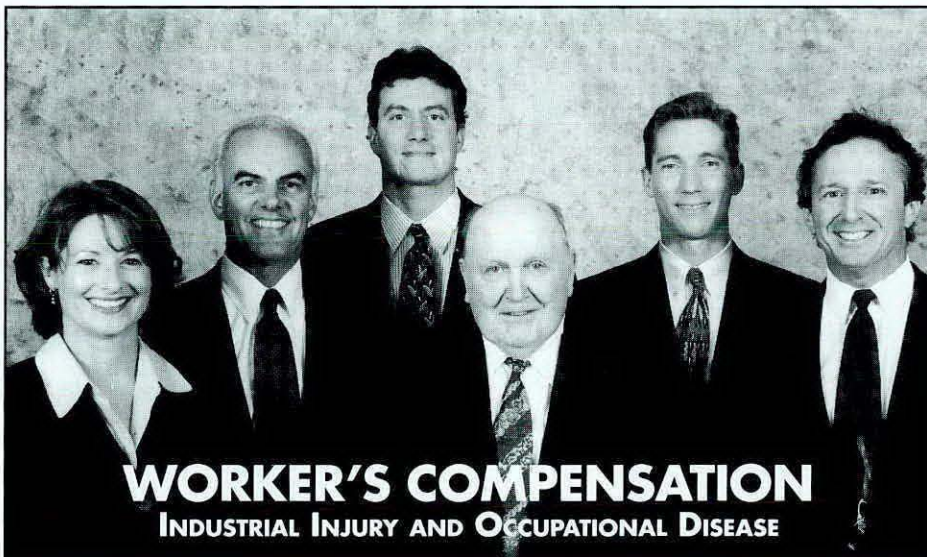
the ideal of democracy demands, which our form of government was designed to secure, and which it is trying to guarantee through a fair and sound substantive law.⁷

With respect to the right to legal counsel, Smith urged “that the machinery of justice can be operated only through attorneys,” and since

attorneys must be paid for their services, and that the poor are unable to pay for such services, this is the great, the inherent and fundamental difficulty — inherent because our legal institutions were framed with the intention that trained advocates should be employed, and fundamental in the sense that no amount of reorganization or simplification, short of a complete overturn of the whole structure, can entirely remove the necessity for the attorney.⁸

In this last sentence, written more than 80 years ago, Smith noted that his plea for justice for the poor contains “our best immediate hope for a realization of our ideal of such an equal administration of the laws that denial of justice on account of poverty shall forever be made impossible in America.”

Smith, and others who valued our heritage, understood that no United States Supreme Court decision in the 196 years since *Marbury v. Madison*, 5 U.S. 137 (1803), has altered its understanding of the constitutional duties of our judiciary. It is far more than a judicial decision, despite its simple factual context. It is a constitutional document, essential and mandatory, prescribing constitutional judicial duties. It tells us that our courts must be guided by English constitutionalism “from whence we derive many of the principles of our political institutions,” as well as from the constitution and laws of the United States. Our courts inherited the Common Law and equity and the powers that flow from that. It reminds us that James Madison, as Secretary of State, “is a high officer, but is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law in



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the exercise of those duties." It reminds us that those who exercise judicial power "should be independent." It tells us that withholding of Marbury's commission was an act "not warranted by law, but violative of a vested legal right." Justice Marshall then proclaims what for almost 200 years has been the most basic constitutional description of the fundamental right to access to justice:

If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.... In the 3d vol. of his *Commentaries*, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law. "In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right there is also a legal remedy by suit or action at law whenever that right is invaded." ... It is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress. The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

But *Marbury v. Madison* is best known for its enunciation of another central principle of our jurisprudence — judicial review. This flows from the constitutionally mandated judicial power. It is an essential principle of the separation of powers. It helps preserve for us and our posterity, protection from the political pandering of the moment, and the policy passions and prejudices of those who know not, or disregard, our fundamental constitutional principles. It is worth reading and re-reading. Justice Marshall, at the close of his historic opinion, reminds those who have the solemn duty of exercising judicial power, what their oath of office is:

I do solemnly swear that I will administer justice without respect to persons,

and *do equal right to the poor and to the rich*; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States.

Perhaps he intended that lawyers and

judges who followed him would refresh their sense of responsibility by knowing their heritage.

In the two hundred years since *Marbury v. Madison*, the United States Supreme Court has seriously lost its mooring as it relates to the fundamentality of access to justice; the essentiality of right to counsel; the certainty of equal protection under law;

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and the responsibility and duties of the judiciary to implement individual rights. The Court has affirmed and reaffirmed its jurisprudence, often in rhetoric rather than in meaningful action. Yet, the obvious fact is that justice often remains tortured, and individual rights, particularly of the poor and oppressed, have been sadly ignored and abused.¹⁰

Next month we will review the strange and tortuous jurisprudence of the right to counsel in civil cases, analyzing why we, almost alone in civilized industrial societies, still fail to provide justice for the poor. 

NOTES

1 This was the Fourth Annual event, conducted by the Washington State Access to Justice Board, in coordination with the Washington State Bar Association and the Washington State Supreme Court. These confer-

ences are attended by judges, bar leaders, and those interested in working in access to justice activity. Each conference has included a workshop by the Jurisprudence Committee of the ATJ Board. Each of the workshops has had as a basis for its discussion a paper distributed to participants and written by the author of this paper who is the chair of the committee. This year's 94-page paper can be procured from Joan Fairbanks at the Washington State Bar Association, or from the author. This article seeks to introduce the reader to the issues involved but for further and more detailed understanding of the questions, the conference paper, its cited authorities, and papers and articles of other participants can be consulted.

2 Justice Johnson was the chair of the working group that led to the creation of the California ATJ Commission and a member of it since its inception. He was a Director of the Legal Service Program, Professor of Law at the University of Southern California, appellate lawyer, and author of 16 books and some 40 articles. Among them are "The Case for Legally Enforceable Right to Representation in Civil Cases for Indigent Litigants," 11 Loy. L.A. L. Rev. 249 (March 1978), and "The Right to Counsel in Civil Cases: An International Perspective," 19 Loy. L.A. L. Rev. 341 (1985).
3 See Johnson, *ibid.*, 19 Loy. L.A. L. Rev. 341 at 445-ff.

4 Justice Johnson's speech at the ATJ Conference covered much of this material. A videocassette of it is available from the Washington State Bar Association or from TVW. Details can be found in both the "Right to Counsel in Civil Cases," 19 Loy. L.A. L. Rev. 341.

5 "Declaration of Independence," Washington State Bar News, July 1999.

6 Published for the Carnegie Foundation for the Advancement of Teaching by Charles Scribner's Sons (New York 1921).

7 Smith, at 240.

8 Smith, at 241.

9 See Schroeter, "Civil Gideon: If Not, Why Not?," pp. 10-91, for discussion of some of the reasons and the citations of those relevant cases.



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Gun Control 101: The Legal Underpinnings

Gun control becomes a matter of intense public interest every time there is another terrible mass shooting. We hear about gun control, but the frequent debate is not of immediate importance to most people, and probably most lawyers do not understand the basic issues and fundamental federal and state laws regarding gun control. This article, which discusses the basic issues and law, is not intended to take a position on gun control or fully expound on this complex issue.

The Federal Constitutional Underpinnings

Part of the gun-control debate centers around the Second Amendment to the U.S. Constitution, which provides: "A well regulated militia, being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed."

Some people reading this amendment focus primarily on the first phrase. They believe that the amendment, alone or in conjunction with the rest of the Bill of Rights, gives people a right to have firearms *only if they are associated with a well regulated militia*; these are the "collectivists." Others — the "individualists" (or personal possessionists) — focus on the latter part of the amendment, asserting that the framers would not have used words similar to those used to grant individual guarantees in other amendments in the Bill of Rights (such as the First Amendment's right of the "people" to "peaceably assemble," and the Fourth Amendment's "right of the people to be secure"), if they had really meant to grant only a collective right to possess firearms.

In the 1939 case of *United States v. Miller*,¹ the Supreme Court affirmed a conviction under the National Firearms Act of 1934 when the defendant carried a sawed-off shotgun across state lines. The Court reasoned that a sawed-off shotgun was no part of ordinary military equipment, nor could its use contribute to the common defense. In deciding the defendant had no right to keep a weapon that could not be part of any militia's ordinance, the Court certainly implied that people *do* have the right to possess appropriate weapons which could be used as part of a militia.

A major difficulty, however, is that there are no militias today. Militias were the mainstay of early colonial defense because the Anglo-Americans disdained a standing army and because Britain could not support one overseas; the colonies had to provide for their own defense. Massachusetts, for example, adopted this law in 1648:

[The militia commander] is hereby enjoined once every year at least, and oftener upon needful occasion ... to put every captain and officer of their companies in their places, and to instruct them in their duties according to the rules of military discipline, and to exercise [the militia] according to his best skill and abilities as if he were to lead them forth against an enemy.²

In the Uniform Militia Act of 1792, Congress gave the old colonial/state militia the only federal direction it was to have for the next 111 years. It provided that all able-bodied white males of the state should be enrolled in the militia under state control and provide themselves with a "good musket or firelock."³

The state militias deteriorated during the early 19th century, and many states entirely abolished any compulsory militia system between 1831 and 1856. In 1903, the Dick Act (named after its sponsor, Ohio Congressman Charles Dick) took what was left of the militia and changed it into "two classes — the organized militia, to be known as the National Guard ... and the remainder to be known as the Reserve Militia." The Dick Act states: "organization, armament and discipline of the organized militia ... shall be the same as ... prescribed for the Regular and Volunteer Armies."⁴ With the enactment of the National Defense Act of 1916, the National Guard was federalized as a component of the United States Army. Today, the President drafts the Guard for federal service and they "... stand discharged from the militia and shall be subject to such laws and regulations for the government of the Army of the United States."⁵ The militia of the United States consists of all able-bodied [males and females] who are members of the National Guard."⁶

Federal Regulation

Whether the Second Amendment gives people the right to personal possession of non-military firearms is certainly debatable. It does seem that the amendment deals with "well organized militias," though what to make of it, given that there are no longer any militias, is a point to ponder. At any rate, a number of federal laws have conditioned and regulated firearms possession, and there has been no broadly successful attack on the right of the federal government to do that.

The National Firearms Act of 1934 (NFA), mentioned above in connection with the *Miller* case, was adopted in response to Prohibition-era gangsterism (à la *The Untouchables*). The NFA

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established strict registration requirements and prohibitions on the interstate transfer of fully automatic firearms (such as machine guns) and on short-barreled shotguns and rifles. It required anyone purchasing one of these weapons to submit to an application process that included fingerprinting, a photograph, a four- to six-month waiting period and background check, and a \$200 transfer tax. The law was not retroactive, but it did require those who already owned affected firearms to register their arms within 60 days of enactment.⁷

The next federal foray into gun control came with the Omnibus Crime Control and Safe Streets Act of 1968 (the Gun Control Act).⁸ This law was adopted following the assassinations of John and Robert Kennedy, and Martin Luther King, Jr. It was intended to keep firearms out of the hands of those deemed unfit to possess them for reasons of age, criminal background or incompetency (unlawful users of narcotics and mental incompetents), and to assist state law-enforcement authorities in combating increasing crime rates. It provided a more rigorous licensing system for firearms than the 1934 Act had, and unlike that act, it regulated handguns, tightening control over the shipment and sale of destructive devices.⁹ The Gun Control Act also established federal control over all persons in the business of importing, manufacturing or dealing in firearms, and it required licensing of and reporting by such persons. Finally, it channeled interstate commerce in firearms through federally licensed businesses, generally confining firearms transactions by nonlicensees to their states of residence, prohibiting the importation of semi-automatic weapons into the United States. The Supreme Court validated this Act in 1980.¹⁰

In 1993, Congress adopted the Brady Handgun Violence Prevention Act¹¹ in response to the attempted assassination of President Reagan. The Brady Act imposed a five-business-day waiting period (for states that did not have one) before allowing the purchase of a handgun, and looked toward the eventual establishment of a national instant criminal point-of-purchase background check system. In 1997, in *Printz v. United States*,¹² the U.S. Supreme Court ruled that the Brady Act's obligations to conduct background checks on

prospective handgun purchasers and to accept completed handgun-applicant statements from firearms dealers imposed unconstitutional obligations on state officers to execute federal laws.

The Violent Crime Control and Law Enforcement Act of 1994¹³ responded to the 1989 school-yard killings of five children by a Stockton, California drifter who used a Chinese-made AK-47 semi-automatic weapon. The Act contained provisions for hiring 100,000 new police officers, building more jails, and promoting innovative incarceration programs (such as "boot camp"). The Act also provided money to states to develop crime-prevention programs, similar to those established in the 1960s and 1970s, to focus on the root causes of crime. The most incendiary part of the Act (sponsored by Senator Diane Feinstein) was its ban on "assault weapons." The ban prohibited the sale or possession of 19 specific semi-automatic assault weapons, copycat guns and large-capacity ammunition-feeding devices. Semi-automatic guns, which fire one bullet or round every time the trigger is pressed, automatically load the bullet for the next shot. As long as the trigger is depressed, automatic weapons (machine guns) continue to spray bullets. They have generally been illegal since 1934.

Overall, federal law prohibits people who are not eligible to possess, receive or transport firearms (children, incompetents, fugitives, illegal aliens, etc.) and regulates dealers, requiring that they fill out paperwork, including information about purchasers and guns sold. Federal law also restricts interstate sales of guns or mail-order purchase by individuals (antique firearms are exempt from regulation) and prohibits semi-automatic weapons sales. Shipping or mailing of guns is also restricted, and manufacture or sale of armor-piercing ammunition is illegal. Authority to administer and enforce these laws rests with the Secretary of the Treasury. The Secretary has delegated responsibility of enforcing the law to the Bureau of Alcohol, Tobacco and Firearms (ATF) and to the United States Customs Service for overseeing exportation restrictions.

Washington State Gun Control

Regardless of how the Second Amendment to the U.S. Constitution is interpreted, it

restricts the federal government from interfering with some aspects of gun ownership. The U.S. Supreme Court has never, however, incorporated the Second Amendment against any state.¹⁴ The states could, in theory, have absolute control of guns. The Washington State Constitution addresses gun ownership in Article 1, Section 24 of the state Constitution:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

The main body of Washington state gun-control law is at RCW 9.41. Like the federal law, state law operates on three levels: it regulates commercial sales, restricts possession to competent people, and prohibits possession of some kinds of firearms. The law restricts convicts' possession of firearms, limits the carrying of a concealed weapon to those with permits (except in a person's home or business), restricts carrying guns in motor vehicles (not including law-enforcement personnel and hobbyists), regulates the issuing of licenses to carry pistols or concealed weapons (requiring application to the sheriff or police, giving name, address, description and fingerprints), and provides that the sheriff issue the four-year permit within 30 days, unless the applicant is disqualified (minors, or those who are insane or drunk). Washington law regulates commercial sales of pistols to licensed persons and provides a five-day waiting period, but no one convicted of a crime of violence or any person who has an outstanding arrest warrant may be sold a gun. The law allows for confiscation of guns from people who violate the state gun-control law, and requires licensing and regulation of dealers. Additionally, it prohibits the possession of machine guns (with some exceptions for law-enforcement officials) and carrying guns in certain places (schools, jails, courtrooms, bars, mental-health facilities). The act also preempts local regulation. RCW 77.16 (hunting laws) prohibits carrying loaded shotguns or rifles in cars and shooting across roads. (This is not a complete summary of the law.)

Efficacy of Gun-Control Laws

If the purpose of the Second Amendment is to allow the citizenry to defend itself against an oppressive federal government (which seems to be part of what the Amendment was, or is, about), then disallowing people possession of such firepower as would be necessary to confront an armed federal force undermines the Amendment. But allowing people to possess machine guns and other weapons as would be needed to deal with the regular Army seems highly inconsistent with good social policy and a shocking admission that ours is, at least potentially, a lawless society. The Second Amendment does make mention of a "well-regulated militia," but there is no militia anymore. Some people have faith that our government will not — like the German government in the 1930s or the Yugoslav government in the 1990s — oppress us. They believe that we have a strong rule of law and must work to create a decent society where guns are not part of the culture. Others have no such faith in government. History does not say they are wrong, and the arguments about the Second Amendment continue.

No one argues that criminals, incompetents and unsupervised children should be denied access to firearms, nor that those who commit crimes with guns should be punished. No one denies that ours is a violent society, and that guns contribute to some of the violence. Whether controlling access to guns or addressing the circumstances which cause gun violence is the proper way to deal with the problem is much debated.

The debate rages with statistics. Some people look at the statistics generated from gun-control laws and say that many acts of violence have been prevented by, for example, the background-check requirement in the Brady Bill. Statistics back up that claim, and it seems reasonable. Others say that if you force law-abiding folks to surrender their firearms, then only criminals will have guns, and crime will increase because criminals are more likely to assault unarmed victims, a claim supported by statistics. Stating that allowing citizens to carry concealed handguns reduces violent crimes makes some sense.¹⁵ At an individual level, for one person to carry a gun is reasonable, but at the collective level it causes social disaster. Gun-con-

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trold advocates cite statistics demonstrating that in other developed countries there is much less lethal violence than in the

United States, mostly attributable to the availability of guns. Gun-control opponents cite statistics to demonstrate that if only more people in the United States had guns, there would be less gun violence. Gun-control advocates cite statistics showing that most Americans favor gun control, but opponents note that most Americans don't know which gun-control laws are in effect, nor do they have any consistent sense of what "gun control" ought to be. Assault weapons, say gun-control advocates, serve no useful social purpose. Not so, say their opponents; the guns "are . . . useful for hunting and recreational purposes."¹⁶ Moreover, they state, only very few guns used in crimes are assault weapons.

Gun-control opponents insist that gun control is not crime control, and that, fundamentally, gun possession is necessary for the maintenance of the liberties that make the United States the freest and most dynamic society in the world; only with guns can the weak protect themselves against the abusive strong. Gun-control proponents, insisting that U.S. gun-control laws are too lax and feebly enforced, believe gun control is a requirement for any civilized society. What do *you* think? ζ


Daniel Warner is an associate professor of business law at the College of Business at Western Washington University. He is the author of a college textbook titled The Legal Environment of Business and is a periodic contributor to Bar News.

NOTES

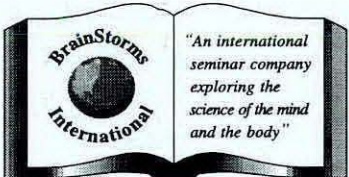
- 1 307 U.S. 174 (1939).
- 2 *The Laws and Liberties of Massachusetts*, 41-42 (Max Ferrand, ed., 1929).
- 3 *Laws of the United States 1789-1857*, at 619 (Frederick C. Brightly ed.).
- 4 32 Stat 196 (1903).
- 5 39 Stat 134 (1916).
- 6 10 U.S.C. Section 311 (1993).
- 7 48 Stat 1237 (1934).
- 8 18 U.S.C. Chapter 44.
- 9 18 U.S.C. Section 922(h).
- 10 *Lewis v. U.S.*, 445 U.S. 55 (1980) (the issue was the legitimacy of Lewis' conviction, not the legitimacy of the act in view of the Second Amendment). In 1995, the Supreme Court invalidated another federal gun-control law, holding that Congress had no constitutional authority to ban guns from school zones absent any showing that interstate commerce was affected. The Gun Free School Zones Act is no longer law.
- 11 18 U.S.C.A. Section 922 (1993).
- 12 521 U.S. 898 (1997).
- 13 Pub. L. No. 103-322, S 170101, 108 Stat 1796, 2038 (1994).
- 14 See *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982) (preventing the Klan from conducting private military training camps); and other materials cited by Kevin A. Fox and Nutan Christine Shah, *Natural Born Killers: The Assault Weapons Ban*, 10 St. John's J. Legal Comment. 123 (1994), note 52.
- 15 See, e.g., John R. Lott, Jr., *More Guns, Less Crime*, 19 (1998).
- 16 Kristine R. DeMay, *Violent Crime Control and the Law Enforcement Act of 1994*, 16 Hamline J. Public Law and Policy 199 (1994), text accompanying note 147.

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Modern-Day Stress: Our Survival Mechanism Gone Awry

by Jean L. Johnson

Clinical Social Worker, WSBA Lawyers' Assistance Program

Judy sat at her desk feeling completely exhausted. She had been working on a case fraught with complicated issues. There was a lot at stake for her client, and opposing counsel was particularly exasperating due to a contentious style that included the creation of meaningless obstacles as a primary strategy. Judy's sleep had suffered for weeks; she constantly felt a constriction in her chest and had a churning stomach. Initially her focus on the case had been sufficient. In fact, at times the work unfolded at an accelerated pace because the adrenaline was flowing, but unfortunately this feeling didn't last. After a while, mental confusion took hold as a constant demon, and she was barely able to slog through the day. Now, just thinking about the trial date caused her heart to audibly pound. How was she going to carry this out with a reasonable degree of professionalism? More importantly, how could she continue practicing as an attorney when this pattern was becoming the norm? Judy was experiencing a generalized sense of fear and felt that many facets of her life were spinning out of control. Her circumstance illustrates how the elegantly designed life-saving stress response can convert into the dreaded *sustained* stress response that inevitably wrecks physical and emotional havoc.

What Is Stress?

Stress has become that ubiquitous term for our response to the enormity of life's experience, specifically the inevitability of life's disappointments, sorrows, tragedies and all those little things that go wrong. Any concept that encompasses such a vast scope of human experience is unquestionably complex, yet the essence of stress can be described in very simple terms. One

basic definition of stress is "a cognitive, emotional and physiological response to a life demand." Those cognitive and emotional aspects of the definition suggest that individual perceptions of stress are subjective. The stress response, however, also triggers a series of significant, identifiable physiological changes which, in the face

Colossal surges from the adrenal glands and the mobilization of other hormones cause increases in heart rate, blood pressure, blood sugar, muscle tension and brain activity.

of real danger, maximize one's chances for survival. Colossal surges from the adrenal glands and the mobilization of other hormones cause increases in heart rate, blood pressure, blood sugar, muscle tension and brain activity. Digestion ceases and peripheral blood vessels constrict. The body is braced for an emergency with enhanced strength and alertness.

Stress Response Turned Against Us

The stress response can be a lifesaver if there is an immediate, physical threat that must be faced. If, however, this stress response is frequently tripped and becomes established as a chronic hyper-alert state, its protective purpose is turned upside down. In fact, medical research provides compelling evidence of a strong relationship between chronic stress and certain illnesses, specifically heart disease, hypertension, depression and compromised immune response. Immune suppression is particularly problematic, as it leaves one vulnerable to a vast array of diseases and physical malfunction.

How does this life-saving reaction paradoxically transmute into a potentially for-

midable threat to our physical and emotional well-being? Modern life dishes up a vast array of complex situations, and our hardwired capability has created an anxiety state that is often out of proportion and out of place in the circumstance, like Judy's response to her difficult case and contentious opponent. Repeated bouts of anxiety triggering high levels of stress are related to situations that we actually *can* live with, not ones that pose actual danger of the saber-toothed-tiger variety that we need to fight with or flee from.

Many circumstances and events in our lives are, by themselves, neutral. They are infused with specific meaning as a result of our learned perceptions and interpretations. Society's master teachers, usually our primary caregivers, lay the groundwork when we are children, and the prevailing culture continues to shape and define our reality as we become adults. Over time our stress responses happen automatically and unconsciously, as though they are part of our very fiber. What accounts for the variability among individuals as to what is stress-provoking is the idiosyncratic sensitization process each person is exposed to. In other words, what each of us experiences and learns shapes our perceptions and interpretations of situations and events. These are very powerful influences in our lives, yet we may be totally oblivious to the often distorted lens through which we view our perceptions.

The legal profession is particularly susceptible to stress because of unrealistic performance demands, the inherent adversarial nature of law, and seemingly endless deadlines. Add to that unreasonably high expectations, established and reinforced by one's incessant internal messages and insidious cultural influences. These

powerful stresses come in the guise of thoughts and beliefs such as:

- Making mistakes is terrible.
- It is essential to be loved by everyone.
- I must always be competent.
- Every problem has a perfect solution.
- If others criticize me, I must have done something wrong.
- I can't change the way I think.
- I must rarely show weakness or cry.
- Strong people do not ask for help.

- Everything is within my control.
- Other people should see things the same way I do.
- The world ought to be fair.

In a profession that provides the perceived possibility of an enviable level of prestige and status, along with the potential for lucrative income, one's self worth and intrinsic value are constantly on the line. Humans are a unique species among the animal kingdom in that we have the

capacity for self-awareness. The judgment of others, as well as our own judgment (whether in the form of criticism *or* approval), can smother our spirit. Criticism inflicts the obvious wounds, but the need for approval leaves us no resting place and fosters relentless striving. Even as we receive approval we're fearful of its withdrawal, so we spend our lives pursuing it. So much time and energy is squandered on maintaining this elusive high approval rating that we lose our direction and, in the process, our sense of who we are.

We live in a society of unprecedented wealth. We are well-fed, sheltered and educated. Yet, ironically, our sense of self worth and what is satisfying eludes us as never before. This is not on the mind of the lion battling for dominance, nor the rabbit scurrying from becoming some other beast's prey. We are an anomaly among living creatures as we desperately try to protect ourselves and survive both physically *and* psychologically, as even a mild criticism of one's performance can be responded to as though it were a mortal attack, a threat to one's very survival. There is an instinctive inclination to eliminate the stress. Some favorite coping mechanisms that can temporarily alleviate stress are, however, disastrous in the long run. They provide only temporary refuge, escape or release, and at considerable personal cost.

Ineffective Ways of Coping with Stress

- *Alcohol and Drug Use.* Misuse and abuse of substances is a serious problem for many members of the legal community, often leading to the destruction of careers in the absence of timely intervention.
- *Uncontrolled Anger.* Anger, used appropriately, can be activating and effective. Excessive, unconfined anger is physiologically damaging, besmirching to one's professional reputation, and devastating to relationships.
- *Work Addiction.* Don't use your profession as a means of avoiding the examination of life's problems. Work addiction is rampant within the legal profession and takes its toll, as the unexamined issues inevitably come back to haunt us in some inescapable fashion.

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Effective Ways of Coping with Stress

- Take honest inventory of all that you ingest, and then make healthy selections. Dramatically increase vegetables, fruits and whole grains in your diet, and minimize sugars. You are what you eat, and foods have very specific effects on body chemistry.
- Determine your sleep requirements and try to maintain a consistent sleep schedule. Research shows that the majority of Americans are sleep-deprived, which can affect work performance and emotional equilibrium.
- Incorporate physical exercise into your life. If you're not accustomed to regular exercise, select something easy to begin with, like walking; it can be done just about anywhere, in just about any kind of weather, with or without a companion. It can be slow or vigorous, depending on conditioning or mood.
- Examine those expectations that are riding roughshod on your life. If there's a whiff of perfectionism or intolerance for frailties, flaws and mistakes, know it for what it is — irrational thinking. Reset standards so they accommodate your humanness and are reality-based.

How to Eliminate Some Stress

- Look at your professional and personal environments. Remove the clutter. Identify what you find to be aesthetically pleasing, and set up an organizational plan that makes sense to you. Make efforts to create physical spaces that reflect those preferences.
- Scrutinize your attitudes and values and become more attuned to how you interpret life events. How do they influence your choices and responses? Our culture does not contribute to our feeling good about ourselves. If we're not productive or accomplishing something "significant," feelings of failure seep in. Reassess the beliefs governing your life. Changes one might make that "fly in the face" of our cultural norms may, in fact, provide immense relief by opening our minds and broadening our perspectives.
- Allow time for planning, yet realize much is out of one's control. Stress and dissatisfaction occur if we have deter-

mined that our happiness and contentment can be experienced only when life provides us with specific outcomes. We have then given over the control of our well-being to external, often random forces.

- Learn how to comfortably and respectfully say "no."
- Become attuned to *your* natural rhythm and pace. You will experience a sense of personal control, be less fatigued and resentful, be more efficient, and gen-

erally feel more authentic and "in sync" with who you are.

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- Reduce disturbing, anxiety-producing input and stimulation. American society is barraged with seemingly limitless, indiscriminate information and visual images. Become your own editor and "delete" those sources of stress-provoking material.
- Learn the art of relaxation. Look into

- meditation, yoga, catnaps, short walks.
- Talk out your problems with a trusted friend or professional. Talking can normalize a situation that can take on frightening proportions if not verbalized.
- Establish a support network of caring people. It can, but does not need to, include family; it can be just one significant

person. Initially, it may be a professional who is trustworthy.

The truth is there is no magic wand, no sure-fire formula for that elusive life of minimal stress. The good news is that it is within anyone's capability to make changes and to bring about some attitudinal shifts so that life can actually be experienced in a different and expanded way. It takes time, effort, patience, and a suspension of firmly held beliefs as to just when and how this process will unfold. There may be dramatic epiphanies or "light bulb" realizations, but more often there is subtle movement and gradual shifting. It is about bringing grace, a sense of balance, and humor to the unexpected, difficult and strange times. Just toying with the idea of cultivating appreciation for ambiguity, mystery and the complexity of human life takes us off the hook of trying to control, explain, change and judge. Having allowed some room to be really present with oneself and with others, our miraculous stress response can operate as it should, working *for* us instead of against us. ☞

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Please note the name(s) of those attending and indicate your dinner selection(s).

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

Changing Venues

Honors and Awards

East Gates Ministries International, a Washington nonprofit organization active in China, has appointed Seattle lawyer **David J. Dove** to serve a two-year term as Chairman of the Board. He is a real estate attorney with Ryan, Swanson & Cleveland, PLLC.

James L. Austin, Jr. and **Floyd L. Newland** of Karr Tuttle Campbell in Seattle have been appointed members of the Board of Governors of the newly formed Bar Association of America and the Commonwealth of Independent States. The association is the first and only nonprofit organization devoted to bringing members of the legal profession in the United States and Canada together with their counterparts in the former Soviet Union.

James Luce of Vancouver, an attorney with the Bonneville Power Administration, has been named to a four-year term on the Columbia River Gorge Commission. The 13-member panel was created to oversee the Columbia Gorge National Scenic Area.

Thumbs Up to . . .

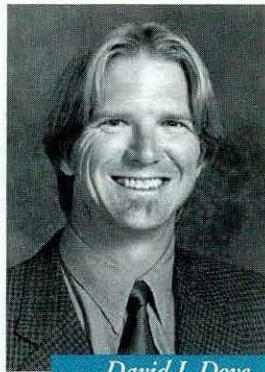
Lawyers Helping Hungry Children, an all-volunteer organization of lawyers who raise money from the legal community to help fund childhood hunger programs in Washington. This year's fundraising breakfast will be held on October 12th from 7:30-8:30 a.m. at the Sheraton Hotel & Towers in downtown Seattle. For more information, call 206-292-5858.

Movers and Shakers

Al Van Kampen has announced the opening of Van Kampen & Associates in Seattle. The new law firm focuses on intellectual property, antitrust and health care law.

Cindy Fein Strauss has been named as the first-ever vice president for legal services at Swedish Medical Center in Seattle. She will be responsible for addressing all legal issues related to Swedish, either directly or by coordinating legal services through outside law firms.

Traci A. Sammeth has been promoted to Of Counsel in Perkins Coie LLP's Seattle office. Sammeth focuses her practice on antitrust and trade regulation, consti-



David J. Dove



Al Van Kampen

tutional law, corporate and commercial litigation, and intellectual property.

Five new associates have joined Preston Gates & Ellis LLP in Seattle. **Robert J. Dzielak** practices commercial litigation in federal and state court. **John R. Knapp, Jr.** represents and advises debtors, Chapter 11 trustees, liquidating trustees, landlords, major secured creditors and banks. **Ben Orndorff** focuses his practice on tax issues covering corporate tax, estates and gift tax, and partnership tax. **Maja Chaffe** works on a variety of legal issues, including toxic tort, employment, insurance coverage and environmental litigation. **Anthony R. Miles** is developing a practice in the firm's business department, with a particular emphasis on health care law.

Eric H. Matson is the new Senior Vice President-Worldwide Alliances and General Counsel of HaloSource Corporation in Seattle.

Steven D. Jensen has joined Lane Powell Spears Lubersky LLP, in the Seattle office, as an associate. He concentrates his practice in tort litigation, ERISA litigation and employment law.

Shawn Carter Lilley is now General

Counsel of Lone Star Northwest in Seattle.

Richard C. Martin is a new associate at Leggett & Kramm. A former Boeing engineer, his practice emphasizes intellectual property, labor law and criminal defense.

The Tacoma firm of Davies Pearson, PC has announced the addition of new associate **Mark B. Anderson**.

In Memoriam

Frank S. Hallett passed away June 1 at the age of 84. The former deputy prosecuting attorney also served as the City Attorney for Castle Rock.

John S. Hutson, a member of the Clark County Bar Association and Washington State Trial Lawyers Association, passed away June 18 at his home in Vancouver. He was 45.



Cindy Fein Strauss



Steven D. Jensen

Douglas Smith, of Everett, passed away in June at the age of 70. He was perhaps best known as a former advisor to President Gerald Ford and for his frequent political aspirations (U.S. Senate 1988, U.S. House of Representatives 1990, Snohomish County Executive 1991 and 1995, and State Supreme Court 1996 and 1998).

LEGAL FOUNDATION OF WASHINGTON NOTICE OF PUBLIC MEETING

The trustees of the Legal Foundation of Washington will meet on September 9, 1999, at the Foundation office, 500 Union Street, Suite 545, Seattle, WA. The public may appear in order to comment on the Foundation's activities between 8:30-9:00 a.m. This opportunity is made pursuant to Article I, Section 1.7 of the Bylaws of the Legal Foundation of Washington.

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The Board's Work

by Sherrie Bennett

License Fee Increases Ahead

The July 30-31 meeting of the Board of Governors in Port Ludlow found the governors wrestling with ways to soften the blow of an inevitable fee increase for the members. Having previously digested the news that an increase was necessary, the Board stepped up to bat and designed a phase-in process to increase license fees over the next three years. This incremental program will also be accompanied by an investigation into potential alternative payment arrangements (such as paying by credit card).

Prodded by the necessity of keeping the WSBA reserve fund at the optimal eight percent, the Board approved increases over the next three years (see chart below).

The Board also approved an increase of \$3 per year to the Lawyers' Fund for Client Protection assessment, raising the annual fee from \$10 to \$13 for each WSBA member.

The Board approved the final version of the 1999-2000 fiscal year budget.

Defining the Practice of Law

After struggling with the definition of what it means to "practice law" for at least 60 years (according to records kept by the Bar Association), the Committee to Define the Practice of Law presented a working definition to the Board. Committee members Steve Crossland, Zanetta Fontes, Peter Ehrlichman, Jim Andersen and Peter Harris unveiled the following definitive proposal to the Board:

"Definition of the Practice of Law"

(a) *General Definition:* The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

- 1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
- 2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
- 3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
- 4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

(b) *Exceptions and Exclusions:* Whether or not they constitute the practice of law, the following are permitted:

- 1) Practicing law authorized by a limited license to practice pursuant to Admission to Practice Rule 8 (special admission for: a particular purpose or action; indigent representation; educational purposes; emeritus membership; house counsel), 9 (legal interns), 12 (limited practice for closing officers), or 14 (limited practice for foreign law consultants).
- 2) Serving as a courthouse facilitator pursuant to court rule.

3) Acting as a lay representative authorized by administrative agencies or tribunals.

4) Serving in a neutral capacity as a mediator, arbitrator, conciliator or facilitator.

5) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.

6) Providing assistance to another to complete a form provided by a court for protection under chapters 10.14 (harassment) or 26.50 (domestic violence) RCW when no fee is charged to do so.

7) Acting as a legislative lobbyist.

8) Sale of legal forms in any format.

9) Activities which are preempted by Federal law.

10) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law.

(c) *Nonlawyer Assistants:* Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.

(d) *General Information:* Nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(e) *Governmental Agencies:* Nothing in this rule shall affect the ability of a governmental agency to carry out responsibilities provided by law.

(f) *Professional Standards:* Nothing in this rule shall be taken to define or affect standards for civil liability or professional responsibility."

WSBA Membership License Fee Change for 2000*

Category	Number of members	2000 license fee	8%		8%		8%		New fee in 2003	Increase in Revenues in 2003
			Increase in 2001	New fee in 2001	Increase in 2002	New fee in 2002	Increase in 2003	New fee in 2003		
Active: Yrs. 6 and over **	17,939	\$290	\$25	\$315	\$26	\$341	\$27	\$368	\$1,404,265	
Active: Yrs 4 and 5	1,561	\$238	\$19	\$257	\$21	\$278	\$22	\$300	\$96,488	
Active: Yrs 2 and 3	1,566	\$145	\$12	\$157	\$13	\$169	\$14	\$183	\$58,973	
Year Admitted*: spring	400	\$68	\$22	\$90	\$7	\$97	\$8	\$105	\$14,790	
Year Admitted*: fall	600	\$38	\$12	\$50	\$4	\$54	\$4	\$58	\$12,192	
Inactive and Emeritus	3,262	\$51	\$49	\$100	\$8	\$108	\$9	\$117	\$214,118	
Total	25,328			\$672,200		\$1,221,708		\$1,800,826		
Amount needed to maintain 8% general fund reserve					\$1,000,000		\$1,300,000		\$1,800,000	

Increase inactive and new admittee fees substantially in 2001 because they are low. Other increases are about 8% per year. Achieves 8% general fund target by 2003. *Assumes no additional license fee change for 2000. **Includes all House Counsel. Note: Since license fees are collected for the calendar year, only three-fourths of the increases benefit that fiscal year. This has not been factored into these numbers. Partially offsetting this is the fact that membership increases every year.

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Peter Ehrlichman explained to the Board that the Committee was most concerned with striking a balance between protecting those doing a good job of servicing the public versus those doing an abysmal job of servicing the public. Steve Crossland told the Board that the Committee's focus was not one of protectionism, but of consumerism, looking toward the goal of protecting the public in setting a bright line standard. He also emphasized that the Committee envisioned a continuing ad hoc committee to advise as specific issues arise, as the definition is a "living and breathing rule," designed to be adaptable to change as needed.

After much discussion, the Board decided to table the matter until the September 9th meeting in Seattle. The Committee invites comments prior to that meeting, which can be addressed to Steve Crossland by e-mail, srcrozz@aol.com, or phone, 509-782-4418.

Public Legal Education Workgroup Report

Judge Marlin Appelwick and Judith Billings presented the Public Legal Education Workgroup report to the Board. The Board approved the report in concept and approved the addition of one full-time-equivalent employee position at the WSBA. Governors Theiler and Powers emphasized the special importance of educating children as to the "underpinnings of democracy," and underlined the necessity of looking toward long-term benefits.

Legislative Committee Appointments

The Board appointed Klaus Snyder, Kathleen Coghlan, Vernon Harkins, Daniel Glenn, Harold Federow, Paula Littlewood, Todd Ungerecht and Laurie Connelly to the Legislative Committee. Remaining appointments to the committee will be made by President-elect Richard Eymann, to reflect a mix of practice areas, diversity, geographic locations, age, experience and other factors.

Proposed Court Rule Changes

The Board adopted a new change to CR40(f) regarding disqualification of pre-assigned judges, to be forwarded to the


state Supreme Court for consideration. The new proposal reads: "Any right under RCW 4.12.050 to seek disqualification of a preassigned judge will be deemed waived unless, in addition to the limitations in the statute, the motion and affidavit are filed with the court no later than thirty days prior to trial before a preassigned judge. For purposes of this rule, 'trial' includes any review of or appeal from an administrative body. If a case is reassigned to a different judge less than forty days prior to trial, a party may then move for a change of judge within ten days of such reassignment, unless the moving party has previously made such a motion."

The Board also considered proposed new Guardian Ad Litem Rules, which can be reviewed at www.wsba.org/cl/crc/home.htm. The Board is expected to take action on these proposed rules at the September 9th meeting. Please let the governor of your district know what you think.

Allstate Meets the Consumer Protection Committee

Regional counsel for Allstate Insurance met with the Board regarding a complaint from the Consumer Protection Committee that Allstate was providing a "Quality Service Pledge" and a "Do I Need an Attorney" brochure to claim victims that may violate the Consumer Protection Act. Committee chair Peter Harris urged the Board to write to Insurance Commissioner Deborah Senn advising of a possible consumer protection violation as well as an unauthorized practice of law violation. The Board referred the matter back to the Consumer Protection Committee to meet with Allstate representatives and anyone else who wants to be heard on the issue.

ABA Multi-Disciplinary Practice Report

Tom Fitzpatrick presented an ABA proposal to change the rules regarding sharing fees with and being in business with nonlawyers. The proposed rules stress that there must still be undivided loyalty to clients, absolute confidentiality and independent judgment of the involved lawyer. The Board instructed Washington ABA delegates to seek a continuance of the ABA vote until the mid-year ABA meeting. 

Reporting Professional Misconduct

by **Barrie Althoff**

WSBA Chief Disciplinary Counsel

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

Few of us like reporting someone else's misconduct. Whether it is called reporting, informing, squealing, snitching, ratting, tattling or whistleblowing, it reminds us of primary-school days and sibling squabbles. It is simply not something you did, especially if you wanted to remain "friends" with someone.

The legacy of the past and reality of the present lives in each of us and forms our judgment. We are inclined not to report the offender because we want to give the offender the benefit of the doubt, because we may prefer not to publicize misconduct in our profession, because reporting the offender may make it difficult or impossible thereafter to deal with the offender, and because we don't want to get involved. We may also forgive or discount misconduct since we ourselves may have erred or fear we may do so. Who are we to throw the first stone?

The necessity of exposing ethical misconduct, however, has long been recognized by the profession. Canon 29 of the American Bar Association's Canons of Professional Ethics, adopted by the ABA in Seattle on August 27, 1908, directed that "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession." Washington long ago adopted that directive.¹ Although the former canons have been superseded, current ethical rules still echo this directive. And yet we still hesitate to do so and rationalize not doing so. Perhaps because of this mixed legacy of the past and reality of the present, there are many questions about a lawyer's duty to report misconduct. This article looks at and answers some of those questions.

The Rules

Washington lawyers are governed by the Supreme Court's Rules of Professional Conduct (RPCs). RPC 8.3, captioned "Reporting Professional Misconduct," governs a lawyer's duty to report misconduct. It states:

- (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects,

Perhaps because of this mixed legacy of the past and reality of the present, there are many questions about a lawyer's duty to report misconduct.

should promptly inform the appropriate professional authority.

- (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should promptly inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

Thus, RPC 8.3 requires and limits reporting of another lawyer's misconduct to (1) a known violation, (2) of the Rules of Professional Conduct, (3) that raises "a substantial question" as to that lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects," but only if (4) disclosure of the misconduct is not prohibited by RPC 1.6. Each of these factors is further discussed in this article.

Judges, as lawyers, are subject to RPC 8.3's duty to report. In addition, Canon

3(C) of Washington's Code of Judicial Conduct states that when judges have actual knowledge of another judge's or of a lawyer's misconduct which raises a substantial question as to their fitness for office (judges) or as a lawyer (lawyers), they "should take or initiate appropriate corrective action, which may include informing the appropriate authority."

Aspirational, Not Mandatory Duty

RPC 8.3 states that a lawyer having knowledge that another lawyer or a judge has violated applicable ethical rules "should" inform the appropriate professional authority. The RPCs use the word "shall" to require a lawyer to engage in specified conduct or face discipline for failing to do so, but use the word "should" to exhort a lawyer to engage in specified conduct for

which there is no sanction if not done. Thus, Washington's RPC 8.3 urges a lawyer to report misconduct, but if the lawyer does not, the lawyer will not be disciplined. Even though not subject to discipline for not reporting misconduct, during 1998, lawyers filed 125 (six percent), and judges 56 (three percent), of the 1,976 written reports of misconduct filed with the WSBA Office of Disciplinary Counsel.

In adopting RPC 8.3 as aspirational, Washington rejected the mandatory reporting required by Rule 8.3 of the American Bar Association Model Rules of Professional Conduct (applicable in most states), upon which Washington's RPCs are generally based. The WSBA Special Task Force appointed to review the Model RPCs observed in its 1984 report that some of its members felt that the mandatory rule would not in fact be followed by attorneys and would thus "place an honorable attorney in a difficult position because he or she would be violating an

ethical rule." Other members of the Task Force felt the rule made an important policy statement and provided protection to an attorney who complied with the rule.

The Task Force ultimately rejected mandatory reporting based also on its concern that "a mandatory rule would inhibit the usefulness of alcohol and drug abuse committees, which operate successfully because of the confidentiality of the situation. This [ABA] rule appeared to require such committees to report violations to the disciplinary agency." In 1987, the Washington Supreme Court adopted Rule 12.17 of the Rules for Lawyer Discipline which makes privileged confidential communications between a lawyer and staff or a peer counselor of a lawyer-assistance program. Since there is now specific protection for such communications, part of the stated rationale for rejecting mandatory reporting no longer remains. There has been no action since that amendment, however, to make reporting mandatory.

Client Confidences/Secrets Must Not Be Disclosed

Both Washington's aspirational reporting and the Model Rules' mandatory reporting recognize that a lawyer's duty to maintain client confidences and secrets is a core value of the profession and thus must supersede any duty to report misconduct. Washington's RPC 8.3 recognizes this primacy by specifically cautioning that the rule does not require disclosure of client confidences or secrets protected by RPC 1.6. Thus, if a lawyer's knowledge of another lawyer's or a judge's misconduct arises from a client's confidences or secrets, a lawyer may not disclose that misconduct unless the client gives his or her informed consent or unless otherwise permitted by RPC 1.6. Similarly, RPC 8.3 does not permit a lawyer to disclose another lawyer's misconduct when the lawyer learns of that misconduct in the course of representing the other lawyer as to that misconduct, since that communication is governed by the usual attorney/client privilege. Nor, as discussed above, does RPC 8.3 require a lawyer acting as a peer counselor in the WSBA Lawyers' Assistance Program to report misconduct communicated to him or her in that capacity,

since RLD 12.17 protects that communication.

Comment 2 to ABA Model RPC 8.3, not adopted by Washington, states that "a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." Since disciplinary authorities protect primarily the public interest, they may not be able to directly benefit the client. Thus, the client may have little desire to permit disclosure or become involved in a lawyer disciplinary proceeding. Further, disclosure and consequent discipline may remove the lawyer's ability to earn an income from the practice of law and ability to pay the client damages or settlement amounts.

Under RPC 8.3, where the client's interest in confidentiality and the public's interest in disclosure conflict, the client's interest prevails and the lawyer is prohibited from reporting the confidential information unless the client gives his or her informed consent. For example, *Arizona State Bar Committee on Rules of Professional Conduct Opinion 90-13* (1990), under a mandatory reporting rule, opines that a lawyer must respect his client's privileged and confidential communication when the client advised she did not want reported to any disciplinary or law-enforcement authority that she was raped and impregnated by her former lawyer. The new lawyer had no duty to report the misconduct. Similarly, in *In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317 (1993), the Rhode Island Supreme Court upheld the duty of confidentiality over mandatory reporting where a lawyer learned through his representation that his predecessor had embezzled and repaid client funds where the client directed the successor not to report the embezzlement to disciplinary authorities. Similarly, *Kansas Bar Association Ethics Advisory Services Committee Opinion 94-13* (January 1995) opined that if the spouse client consented to the disclosure, two partners learning of a third partner's sexual relationship with a client (whose spouse was also represented by the same third partner) may have a duty to report the conflict of interest to disciplinary authorities.

Reasons to Report Even if Reporting is Not Mandatory

If a Washington lawyer will not be disciplined in Washington for not reporting misconduct, why should the lawyer report misconduct or read the rest of this article?

Washington lawyers regulate themselves through a discipline system administered by the Washington State Bar Association. The legal profession and that system are accountable to the public. For the profession and self-regulation to survive and have credibility, lawyers must themselves adhere to ethical requirements, demand that others do so, and actively assure that the system works. When lawyers turn a blind eye to known misconduct, the public has little reason to trust the profession or to permit self-regulation. If lawyers do not act against unethical lawyers, those lawyers will continue to harm the public and the profession. What may appear to a reporting lawyer to be an isolated case of misconduct may, in fact, be a widespread pattern of misconduct which would likely only appear to a centralized disciplinary authority.

With many lawyers engaged in multi-jurisdictional practices, offending lawyers may be harming clients and the profession in many jurisdictions, and reporting lawyers may be subject to many different reporting requirements, some of which are likely mandatory since most other jurisdictions mandate reporting professional misconduct. Even though a Washington lawyer may not be obligated to report misconduct under Washington's RPC 8.3, if the lawyer is admitted elsewhere, even on a limited *pro hac vice* basis, the lawyer will be subject to other jurisdictions' reporting requirements. If a lawyer is admitted in Washington and, for example, Illinois (which mandates reporting), and knows of another lawyer's misconduct, must the first lawyer report the misconduct? To Washington or to Illinois, or to both? Does it matter where the misconduct occurred or where the other lawyer is admitted? (See discussion on page 52 to whom to report misconduct.)

The leading case on requiring a lawyer to report another lawyer's misconduct is *In re Himmel*, 533 N.E.2d 790 (Ill.,

1988), wherein an Illinois lawyer was suspended from practice for failing to report the unprivileged information (a more narrow standard than Washington's "confidences and secrets") that his client's prior lawyer had converted client funds. Instead of reporting the misconduct, the lawyer negotiated a settlement on behalf of his client whereby his client agreed not to initiate any criminal, civil or disciplinary action against the first lawyer. The court's decision, the first reported case of a lawyer being disciplined solely for failure to report known misconduct of another lawyer, has been criticized on a number of grounds, but has also served as a wakeup call to the profession.²

Knowledge Required, Not Suspicion

The RPC 8.3 obligation to report misconduct only applies to a lawyer "having knowledge" of the violation. The terminology section of the RPCs defines knowledge as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Thus, mere belief, suspicion or rumor of another lawyer's misconduct does not trigger the duty to disclose. *South Carolina Bar Ethics Advisory Committee Opinion 95-13* (1995) opines that a lawyer having only secondhand knowledge of alleged misconduct does not have the requisite "knowledge" required to have to report that misconduct. The South Carolina court also concluded that a lawyer's duty to report misconduct remains even if the lawyer's client or another lawyer has also reported the misconduct.

Authorities differ on whether the "knowledge" must be objective or subjective. Compare, for example, *Attorney U. v. Mississippi Bar*, 678 So.2d 963 (Miss. 1996) with Rhode Island Supreme Court *Ethics Advisory Opinion 95-40*. The Mississippi case, adopting an objective standard, held that a lawyer is not obligated to report misconduct unless the lawyer has supporting evidence whereby a reasonable lawyer under the circumstances would form a firm opinion that the conduct in question had occurred and was of the reportable type.

Self-Reporting Generally Not Required

Since RPC 8.3 uses the phrase "knowledge that another lawyer has committed a violation of the Rules of Professional Conduct," the rule generally does not require a lawyer to self-report his or her own direct ethical misconduct, although self-reporting may mitigate any disciplinary sanction imposed for such misconduct.³ RPC 8.3 should similarly be interpreted

To be reportable, the known misconduct must raise a "substantial" question. The terminology section of the RPCs defines "substantial" as "denoting a material matter of clear and weighty importance."

to not require a judge (nearly all of whom are also lawyers) to report his or her own ethical misconduct as a judge.

A lawyer is required to report his or her own misconduct, however, when applying for admission to another jurisdiction, since RPC 8.1 requires that a lawyer be candid and provide full disclosure in connection with bar admission applications. And, subject to a lawyer's constitutional right not to incriminate himself or herself, a lawyer may be obligated to report misconduct of another lawyer even though the first lawyer may have imputed liability as a partner or supervising lawyer under RPC 5.1 for that other lawyer's misconduct. For example, *Connecticut Bar Association Committee on Professional Ethics Informal Opinion 89-2* opines that a lawyer must report his former partner's missing a filing deadline and making misrepresentations to a client even though by doing so he might himself have imputed responsibility for that conduct under RPC 5.1(c)(2).

Only Serious RPC Misconduct to Be Reported

RPC 8.3 limits reporting to a known violation "of the Rules of Professional Conduct" that raises "a substantial question" as to that lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." Other misconduct for which a lawyer might be sanctioned (for example, violations of RLD 1.1), but which is not a violation of the RPCs, is not subject to reporting under RPC 8.3. Similarly, as to a

judge, the only misconduct subject to reporting is a violation of "applicable rules of judicial conduct that raises a substantial question as to a judge's fitness for office."

To be reportable, the known misconduct must raise a "substantial" question. The terminology section of the RPCs defines "substantial" as "denoting a material matter of clear and weighty importance."

Comment 3 to the ABA's Model RPCs states that the term "substantial" refers to the "seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." Thus, a lawyer's minor neglect of a case, or minor

failure to communicate, or an isolated act of low-level malpractice are likely not misconduct of the type that should be reported. *Texas State Bar Professional Ethics Committee Opinion 523* (1997), for example, opines that an associate has no duty to report known negligent advice of another associate in the firm. *Illinois State Bar Association Advisory Opinion on Professional Conduct No. 90-36* opines that a lawyer is not required to report another lawyer for sending a letter threatening criminal and civil charges against the first lawyer's clients even if that conduct would be prohibited by Illinois ethics rules, because the conduct does not raise a substantial question of the type envisioned by Illinois's reporting rule.

RPC 8.3's standard of reportable misconduct relating to a lawyer's "honesty" or "trustworthiness" likely includes such misconduct as misappropriation of client or other funds, theft, forgery, bribery, kickbacks and lack of candor. It is less clear what RPC 8.3's standard of misconduct relating to "fitness as a lawyer in other respects" is intended to cover. Conceivably, it could include substantially all other serious RPC violations.

Threats to Report Misconduct

Although there is no direct Washington authority, *ABA Formal Opinion 94-383* (July 5, 1994) opines that in a civil case a lawyer should not threaten to report known misconduct in order to gain an advantage because the lawyer already has a duty to report the misconduct, and that

such threats would also be improper if the misconduct was not related to the civil suit, if the possible charges were not well-founded in law or fact, or if the threat had no substantial purpose other than to embarrass, delay or burden another person. It would appear that a threat of disciplinary action, unless in fact justified by the circumstances of the case, might in some cases constitute criminal extortion, itself the basis for disciplinary action.

Settlement Agreements Purporting to Preclude Reporting

A lawyer accused of misconduct might seek to condition settlement with a client on the client's agreement not to report the misconduct to disciplinary authorities. Although Washington does not have any authority on point, such a bar on reporting may well be unenforceable against the client as against public policy. If a lawyer's client has agreed not to report misconduct, however, the client's new lawyer is not free to report that conduct unless the client gives his or her informed consent to such disclosure.⁴

To Whom to Report Misconduct

RPC 8.3 states that misconduct should be reported to "the appropriate professional authority." For misconduct by a lawyer admitted to Washington, the appropriate professional authority is the Office of Disciplinary Counsel, Washington State Bar Association, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330. For judicial misconduct by a Washington judge, the appropriate professional authority is the Washington Commission on Judicial Conduct, P.O. Box 1817, Olympia, WA 98507.

If the misconduct occurs other than in Washington, or the reporting or offending lawyer or judge is admitted to practice in other jurisdictions, the "appropriate professional authority" may also include the disciplinary agencies of other jurisdictions. *Illinois State Bar Association Committee on Professional Ethics Opinion 94-23* (1995) opines that under Illinois's mandatory reporting rule, an Illinois lawyer who, as a corporate director, learned that the company's president and counsel (both lawyers licensed only in New York)

had engaged in what was for the opinion assumed to be dishonest acts must report the two to the Illinois disciplinary authority and also "should" report them to the New York disciplinary authority.

Merely reporting misconduct to the client, or being assured such report is made, does not satisfy a lawyer's duty to report misconduct. For example, in *District of Columbia Bar Legal Ethics Committee Opinion 270* (1997), a lawyer admitted to his contract lawyer that he had repeatedly deceived a client into believing that he sent aggressive letters as demanded by his client. In fact, the lawyer wrote the letters and provided copies to his client, but never sent them to the addressee. The contract lawyer asked the lawyer to advise the client of the deception, which he did. The opinion opined that the contract lawyer was still obligated to report the misconduct to disciplinary authorities.

If a lawyer who has engaged in known misconduct is believed to have emotional, substance-abuse, or other personal problems, a reporting lawyer may also want, but is not obliged, to inform the WSBA Lawyers' Assistance Program, which may be able to help the lawyer confront and deal with those problems. While Comment 3 to the ABA Model RPCs (not adopted by Washington) states that a "report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances," it is clear that informing such a program alone does not satisfy a lawyer's duty to report the misconduct to the lawyer disciplinary authority, since the disciplinary authority's mandate to hold the lawyer accountable for, and protect the public from, misconduct cannot be accomplished if the misconduct is not known to it.

A lawyer does not satisfy the duty to report misconduct to the appropriate authority, however, merely by reporting it to a lawyer assistance program. For example, *Utah Ethics Opinion 98-12* (December 4, 1998) opines that a lawyer does not satisfy Utah's mandatory reporting duty by merely reporting to a voluntary lawyer assistance program his knowledge of a lawyer's illegal use or possession of controlled substances unless the program

has (which Washington's Lawyers' Assistance Program does not) "some measure of authority or official advisory role in the Bar's lawyer-discipline function." Similarly, *West Virginia Committee on Legal Ethics Opinion 92-04* (undated) opines that a lawyer who reports to a lawyer assistance program an alcoholic lawyer who had misappropriated client funds must also report the lawyer to the disciplinary authority. Knowledge of another lawyer's misconduct gained through participation in such a program is, however, generally confidential under RLD 12.17 and should not be reported to disciplinary authorities.

When to Report Misconduct

Washington's RPC 8.3 states that a lawyer knowing misconduct should "promptly" inform the appropriate professional authority. ABA Model RPC 8.3, on which Washington's RPC 8.3 is based, does not use the term "promptly." *U.S. v. Cantor*, 897 F.Supp. 110 (S.D.N.Y., 1995) suggests that reporting be within a reasonable time under the particular circumstances of the case. More helpfully, ABA Formal Opinion 94-383 (1994) suggests that misconduct of the type envisioned by RPC 8.3 should be reported promptly and not be used as a bargaining chip in a civil case, while less serious misconduct not covered by RPC 8.3, or not within the jurisdiction of the trial court, should instead not be reported until the conclusion of the civil action.

The author generally recommends that misconduct sanctionable by a court, unless truly egregious in nature and likely to threaten imminent and serious harm to other clients or the public if not reported, not be reported to the WSBA until the conclusion of the civil or criminal proceeding. This attempts to reconcile competing interests and the reality that disciplinary authorities generally will defer taking action until other proceedings are concluded, so as not to interfere with, become a party to, or be used for leverage or discovery advantages by the other parties in the underlying litigation.⁵

Consequences of Reporting or Being Reported

If a lawyer's misconduct is reported, both

the reporting lawyer and the reported lawyer are likely concerned about the consequences of the reporting. The reporting lawyer may be concerned about retaliation. RLD 12.11(b) provides that communications to the disciplinary authority "are absolutely privileged, and no lawsuit predicated thereon may be instituted against any grievant, witness or other person providing information." The reported lawyer may be uncertain what to do. RLD 2.8 generally requires that the reported lawyer must cooperate with the disciplinary authority's investigation into the alleged misconduct, and that failure to cooperate is, of itself, misconduct. *ABA Formal Opinion 94-384* (July 5, 1994) opines, however, that a lawyer against whom a disciplinary complaint has been filed by an opposing counsel in an ongoing matter is neither required nor permitted on that account alone to withdraw from the representation. Otherwise, of course, merely filing a grievance would disqualify opposing counsel.

If the reporting lawyer is a public employee, Washington's whistle-blower statute (RCW 42.40) and various federal statutes give the employee some protection against retaliation.⁶ The statutes do not, however, authorize the lawyer to disclose client confidences or secrets. In *U.S. ex rel. Doe v. X Corp.*, 862 F. Supp. 1502, 1507 (E.D. VA. 1994), an in-house counsel unsuccessfully claimed whistleblower protection after being fired for using confidential client information to try to prove his former client violated federal law. More recently, *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364 (5th Cir. 1998) held that disclosure by an in-house lawyer of confidential employer information violated Louisiana's RPCs and that she was thus not protected by federal law from being fired for the disclosure.

Where the reporting lawyer is not a public employee, or is a partner instead of an employee, interesting questions arise. For an overview of some issues, see Cynthia Gendry, "Comment: Ethics – An Attorney's Duty to Report the Professional Misconduct of Co-Workers," 18 *Southern Illinois University Law Review* 603 (1994).

In *Wieder v. Skala*, 80 N.Y.2d 628, 609

N.E.2d 105 (NY, 1992), a law firm associate engaged in reportable misconduct while representing another associate. The second associate reported the misconduct to the firm and asked the firm to report it to disciplinary authorities. When the firm declined, the second associate reported the misconduct but afterwards withdrew his complaint. Later, the firm reported the misconduct. Still later, the second associ-

If the reporting lawyer is a public employee, Washington's whistle-blower statute (RCW 42.40) and various federal statutes give the employee some protection against retaliation.

ate was fired, allegedly for insisting that the firm report the other associate's misconduct. The New York Court of Appeals held that a lawyer's duty to report misconduct to the appropriate disciplinary authority is a term implied in law in every employment contract between a law firm and an employed lawyer and that an employed lawyer fired for insisting that the firm report misconduct of one of its lawyers could bring a breach of contract action against the firm. In *Kelly v. Hunton & Williams*, 1999 WL 408416 (U.S.D.C., E.D.N.Y., 6/17/99), the Court applied *Wieder* to an unadmitted law firm associate (law clerk).

In *Bohatch v. Butler & Binion*, 41 Tex. Sup.Ct. 308, 977 S.W.2d 543 (1998), a partner believed another partner over-billed clients, and internally reported it to the firm's managers, who investigated and discussed it with the client (who stated it was satisfied with the bills as reasonable). It is unclear from the opinion whether the matter was ever reported to disciplinary authorities. The managers told the reporting partner that the investigation did not support her allegations. She was also told she should begin seeking other employment, with various representations allegedly being made to her about interim continuation of her partner benefits. Ultimately, the benefits were discontinued, she sued the firm for breach of fiduciary duty and of partnership agreement, and the firm expelled her from the partnership. The court observed that a law firm can expel a partner to protect rela-

tionships both within the firm and with clients, citing among other authorities, *Holman v. Coie*, 11 Wn.App. 195, 522 P.2d 515 (1974); a law firm did not breach fiduciary duty for expelling two partners because of contentious behavior during meetings and because one, a state senator, made speech offensive to a major client. The Texas court concluded that the firm did not owe the expelled partner a duty not to expel her for reporting suspected over-billing by another partner, but that the firm had breached its partnership agreement in the manner it had expelled the partner.

Employed Lawyers

An employed (or "subordinate") lawyer is likely to feel torn between the RPC 5.2(a) admonition that the lawyer is bound by the RPCs notwithstanding that the lawyer acted at the direction of another person, and the RPC 5.2(b) safe harbor that a subordinate lawyer does not violate the RPCs if that lawyer acts in accordance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty." The dilemma is in determining what in a particular case is "reasonable" and what is "arguable."

An employed lawyer may want, or be required by the employer, to first report to the employer known misconduct of another lawyer (whether or not an employee). Model RPC 1.13, relating to an organization as a client, although not adopted by Washington, may give some guidance to a lawyer who learns of misconduct by another organization employee. If the other lawyer works within the same organization, such initial internal reporting permits the employer to learn of and remedy the misconduct, mitigate damages, report it to liability insurers or risk managers, and formally report it to the disciplinary authority. While the employer may also decide under RLD 8.3 that the questioned conduct need not be reported, the employer may not prohibit the employee from reporting the misconduct to the disciplinary authority (subject to the employee's duty not to disclose client confidences or secrets). Thus, *WSBA RPC Committee Informal Opinion #1858*

Disciplinary Notices

(May 14, 1999) (not approved by the WSBA Board of Governors or reflecting an official WSBA position, but reflecting that committee's opinion), opines that an elected prosecutor's direction to a deputy prosecutor not to report, under the deputy's own name, known misconduct to the disciplinary authority violates RPC 8.3 (duty to report) and RPC 5.2(a) (responsibilities of subordinate attorney). If the employer is the lawyer whose conduct the employee believes should be reported, however, public policy would likely not support any purported organizational duty to first report the misconduct to the employer.

Conclusion

Reporting another lawyer's serious misconduct to disciplinary authorities is an important, if unpleasant, duty of every lawyer. Lawyers do not comply with the RPCs merely because they can be disciplined for not doing so; they do so because they are ethical and want to serve their clients and the public well. Even though lawyers cannot be disciplined in Washington for not reporting misconduct, they should do so when permitted as part of their obligation to the public and to the profession. When they do so, we, as a profession, prove to the public and to ourselves that we take our professed ethics seriously and that we are worthy of being entrusted to regulate ourselves. If we fail to do so, we forfeit that trust and have no right to self-regulation or the respect of the public. ☐

NOTES

1 WA Session Laws, 1917, Section 20.

2 See, for example, authorities collected at *ABA Center for Professional Responsibility*, Annotated Model Rules of Professional Conduct, Third Edition (1996), pp. 554-555.

3 Standard 9.32(e), ABA Standards for Imposing Lawyer Sanctions.

4 For a thoughtful analysis of the difficult competing interests of clients and of the disciplinary system as they relate to such settlement agreements, see Irwin Miller, *Breaking the Written Code of Silence in Legal Malpractice Settlements*, 6 Georgetown Journal of Legal Ethics, 187 (1992).

5 See, for example, *In re Discipline of Gillingham*, 126 Wn.2d 624, 896 P.2d 656 (1995), footnote 3, and WSBA Board of Governors' policies of May 17 and July 19, 1991.

6 See Roger Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 Georgetown Journal of Legal Ethics 291 (1991).

These 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.

Correction

The Craig R. Ritchie (WSBA No. 4818) discipline notice published in the August 1999 *Bar News* contains incorrect Rules of Professional conduct violations. Mr. Ritchie's conduct violated RPC 8.4(d), prohibiting conduct prejudicial to the administration of justice, and RPC 3.5(b), prohibiting *ex parte* contact with the tribunal. The references in the original notice to RPC 1.1, RPC 8.4(c), and to conduct involving falsifying evidence or counseling or assisting a witness to testify falsely are incorrect.

Censured

Kristina Gibbs (WSBA No. 5361, admitted 1973), of Spokane, has been censured pursuant to a stipulation approved by the Disciplinary Board on May 21, 1999. The discipline is based on her failure to properly disburse third-party funds.

Ms. Gibbs represented clients who owned and operated a construction business. The clients asked Ms. Gibbs to represent them in a Chapter 13 bankruptcy proceeding because they were having trouble financing ongoing projects. The clients then received a \$100,000 loan from a doctor to finish work on a residential project. Ms. Gibbs prepared a promissory note and deed of trust in favor of the doctor, which her clients signed. Just prior to closing, the title company suggested that Ms. Gibbs ask the doctor to release a portion of his security interest to pay other outstanding lien-holders. The sale was in jeopardy of failing if it did not close on time. Ms. Gibbs estimated the amount of outstanding liens on the project at \$10,000, and the doctor agreed to waive this portion of his security. Ms. Gibbs used \$6,376 of the doctor's money to pay outstanding liens on the project.

Instead of returning the remaining \$3,624 to the doctor, Ms. Gibbs disbursed \$620 to the clients for "punch list" items and family living expenses, \$81 to another creditor, and \$2,923 to the bankruptcy trustee to make payments to the clients' creditors. Ms. Gibbs believed that the bankruptcy would fail if she did not make these payments to the trustee. By making these payments, an unrelated project in which the doctor had also invested ultimately succeeded. Consequently, the payments to the bankruptcy trustee may have indirectly benefited the doctor. The doctor retained counsel and requested an accounting. Ms. Gibbs promptly provided an accurate accounting. Ms. Gibbs agreed to repay the \$3,624 to the doctor. By failing to return the doctor's \$3,624 to him, Ms. Gibbs' conduct violated RPC 8.4(c), prohibiting engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Jonathan Burke represented the Bar Association. J. Donald Curran represented Ms. Gibbs.

Patrick Stiley (WSBA No. 0679, admitted 1971), of Spokane, has been censured pursuant to a stipulation approved by the Disciplinary Board on May 21, 1999.

Mr. Stiley represented a husband and wife. Both suffered separate workplace injuries and received benefits from the Department of Labor and Industries. Several years later, the clients pled guilty to felony charges. The Department of Labor and Industries issued an order suspending the clients' benefits during the time they served their sentences. Mr. Stiley appealed this order to the Industrial Insurance Appeals Board (Board). The Industrial Appeals Judge issued a scheduling order with deadlines for submitting factual stipulations and briefing. Mr. Stiley failed to file the required pleadings prior to the ordered deadlines. The Judge granted Mr. Stiley additional time to file his pleadings. Mr. Stiley submitted a factual stipulation two days after the continued date and did not submit a brief. The Department of Labor and Industries filed a motion to dismiss the clients' appeal. Mr. Stiley did not file a response to the motion to dismiss. During this time period, Mr. Stiley was repre-

senting other clients in out-of-county and out-of-state proceedings. Mr. Stiley sent two legal interns to the dismissal hearing to inform the Judge that he could not attend, because he was representing another client in a federal court criminal proceeding. The Judge entered a proposed order dismissing the clients' appeal, citing the "unexcused failure of Mr. Stiley to present evidence at the time set for hearing and for otherwise failing to comply with the pre-hearing order." The Board denied Mr. Stiley's petition for review of this order. The Superior Court affirmed the Board's decision. By failing to timely file a brief supporting his clients' claims, Mr. Stiley's conduct violated Rules of Professional Conduct 1.3, requiring a lawyer to exercise reasonable diligence and promptness in representing a client.

Jonathan Burke represented the Bar Association. Mr. Stiley represented himself. ☞

Notice of Hearing on Petition for Reinstatement

A petition for reinstatement after resignation with discipline pending has been filed on behalf of Anton J. Miller, who resigned effective May 15, 1987. Miller practiced in Pierce County, Washington.

Hearing on Miller's petition will be conducted before the Character and Fitness Committee on Saturday, October 9, 1999. On or before the date of the hearing, anyone wishing to do so may file with the Character and Fitness Committee a written statement for or against reinstatement, setting forth factual matters showing that the petitioner does or does not meet the requirements of RLD 9.6(a). Except by its leave, no person other than the petitioner or petitioner's counsel shall be heard orally by the Character and Fitness Committee. Statements should be submitted to Robert D. Welden, General Counsel, Washington State Bar Association, 2101 Fourth Avenue, 4th Floor, Seattle, WA 98121-2330.

This notice is published pursuant to RLD 9.5(a) and WSBA By-laws Art. II(G)(3)(c).

Update Published to WSBA's Washington Community Property Deskbook

Get the latest developments in Washington community property law and analysis of their impact from the experts who teach it at Washington's three law schools. The update to the *Washington Community Property* deskbook has just been completed by Thomas R. Andrews, Professor of Law at the University of Washington Law School; William C. Oltman, Professor of Law at Seattle University School of Law; and Gary C. Randall, Professor Emeritus of Law at Gonzaga University School of Law. The 378-page cumulative supplement interleaves with the original deskbook, previously supplemented in 1997, to create an 800-page treatise.

The update features coverage of new developments, including: unmarried cohabitants and "pseudo-community property"; new family allowance provisions added by Chapter 11.54 RCW; federal preemption (particularly under ERISA); treatment of disability-insurance benefits; conflict-of-laws issues in characterization of marital property (when one spouse abandons the other and takes up a new domicile and a new spouse without divorcing the first one); and liability of step-parents for non-custodial children.

The Supplement is priced at an affordable \$75, plus tax and shipping. The cost of the 800-page deskbook and supplement set has been reduced from \$150 to \$110, plus tax and shipping. You can save an additional 10 percent if you sign up to automatically receive and be invoiced for additional updates and new editions. To purchase the book or for further information, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Volunteer Attorney Speaks on Estate Planning

When asked why he volunteers for the WSBA Speakers Bureau, attorney John A. Rorem of Gig Harbor said, "I'm here because I love to speak on the law." Rorem did just that on July 20, when he gave a presentation on "Simplifying Estate Planning" to Weyerhaeuser Forestry Research Company employees in Centralia.

Rorem spent an hour with the employees, many of whom are nearing retirement age, during their monthly staff meeting. His presentation focused on how particular types of estate-planning documents can be used, explaining the pros and cons of each. Rorem used stories from his own experiences as examples to aid in the employees' understanding.

Weyerhaeuser Company event organizer Gary Ritchie said: "Rorem is a delightful and entertaining speaker!" The Weyerhaeuser employees were appreciative of the service offered by the WSBA and will request a speaker again in the future as the need arises.

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. You can help make a difference in other people's lives by supporting the WSBA Speakers Bureau. 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 amy@wsba.org.

Thurston County Young Lawyers Fundraiser

The Thurston County Young Lawyers Association will host its second annual fundraising dinner and silent auction Saturday, September 25, 1999. Proceeds from the event will be used to provide a college scholarship to a Thurston County high-school senior interested in pursuing a legal career. The 1998 silent auction resulted in the award of a \$1,000 scholarship to a student from Capital High School.

The public is invited to attend this event, to be held at Ramblin' Jack's Restaurant (banquet room) in Olympia. Tickets are \$20 per person and can be purchased in advance or at the door. The silent auction will begin promptly at 6:30 p.m.

The Thurston County Young Lawyers Association is a nonprofit organization whose membership consists of Thurston County lawyers in their first five years of practice and/or those under 36 years of age. The Association provides programs and services of special interest to its members and to the Thurston County community.

For tickets or information, please contact Christy Todd at 360-455-9595.

Section Annual Reports

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

Alternative Dispute Resolution

The Section's 8th Annual Northwest ADR Conference, jointly sponsored with the University of Washington Law Foundation, drew record attendance. Easy access to the Section's ADR Directory is now available through the Section's page on the WSBA website. The Court Rules and Legislation Committee considered a number of matters; study and comment were prepared on: (1) the Trust and Estate Dispute Resolution Act (TEDRA), (2) a proposed statute to authorize mediation in guardianship proceedings, and (3) the WSBA's proposed rule defining the practice of law. The Section continued its outreach efforts, focusing especially on the law-school community and practitioners who live and work outside the greater Seattle area.

Antitrust, Consumer Protection and Unfair Business Practices

The Section reports that its annual seminar, held in November, was well received and financially successful, with uniformly excellent presentations. In June, revised Section by-laws were adopted. The Section is well underway toward the publication of a new revision of its handbook on state antitrust and consumer protection law.

Business Law

The Section sponsored two major CLEs: the Northwest Securities Institute and the Mid-year Meeting. The Securities Committee continued its informal "Meet the Securities Regulators" program, and the Partnership Committee co-hosted with the WSBA a seminar on the new Revised Uniform Partnership Act. The Section's Ad Hoc Committee on Legal Opinions published its report on opinion letter practices in Washington. The Committee on Conflicts of Interest in Business Law is working on an updated version of its *Conflicts of Interest in Business Transactions* deskbook, while the Corporate Act Revision Committee has begun a project to assemble and publish the comments prepared by the Committee over the last 10 years in connection with RCW 23B (the Business Corporation Act). The Law of Commerce in Cyberspace Committee commented on proposed changes to Washington's Digital Signatures Act, and during the upcoming year anticipates an active agenda including consideration of two proposed uniform acts – the Uniform Computer Information Transactions Act and the Uniform Electronic Transactions Act.

Corporate Law Department

The Section sponsored a Corporate Counsel Institute, a one-day program designed to educate and update corporate lawyers on key current issues. The Section continued its successful program of quarterly dinners, as well as informal luncheon and breakfast CLE round-table sessions. The Section also published an updated directory of corporate counsel in Washington and a quarterly newsletter, *Corporate Counsel*.

Creditor/Debtor

Together with the Oregon State Bar, the Section sponsored the 11th annual Northwest Bankruptcy Institute, bringing over 200 people to Seattle for the seminar. The Section has been active in editing materials and in providing financial support for various community legal-services organizations. The Section remains the only institution with a statewide membership involved in

the creditor/debtor law field, and as such, it is routinely requested to comment on the administration of the courts and the implementation of various court rules. For the second consecutive year, the Section, through its chair, participated in the annual conference of Washington bankruptcy judges.

Criminal Law

The Section hosted two seminars – an ethics seminar (the Section's third), and a seminar focused on sentencing. Both were well attended, had outstanding faculty, and included law students. The Section also co-sponsored the annual Criminal Justice Institute with the WSBA-CLE. Section Chair David Skeen served as moderator, and several members of the Executive Board and Section were speakers. The Section's web page continued to grow.

Elder Law

This was a busy year legislatively, as the Section was involved in reviewing draft recommendations of the Washington Health Care Association concerning code directive surrogate decisions. A dialogue was created with the Washington Health Care Association, the Department of Social and Health Services, the Attorney General's Office, and the King County Bar Association Elder Law Section concerning the policies. The Section supported House Bill 1525, which proposed that mediation and alternative dispute resolution be available by court order in guardianship cases under appropriate circumstances in post-appointment disputes. Senate Bill 5447 attached to House Bill 1525 was unanimously opposed by the Section for its attempts to treat RCW 11.88 guardians ad litem the same as RCW 26.09 guardians ad litem under one broad umbrella. The Elder Law Consumer Information pamphlet was completed and is now available in printed format and on the WSBA website. The Section sponsored a CLE titled Elder Law Update and Other Areas, held in Seattle and Spokane.

Family Law

The Section's Executive Committee devoted the majority of its meeting time to the review of proposed legislation. With the addition of the Section's Legislative Coordinator, the views of Section members are being heard in the Legislature, where House and Senate members now look to the Section for counsel on issues such as relocation, third-party access to children, and parenting plans. The Section takes pride in the enactment of Chapter 174 of the Laws of 1999, which deals with the modification of parenting plans. In conjunction with its Mid-year Meeting, the Section presented awards to King County Superior Court Judge Deborah Fleck (Jurist of the Year), Martha Cohen and the King County Superior Court Office of Interpreters Services (Professional of the Year), and Bellevue attorney and WSBA Governor Marijean Moschetto (Attorney of the Year).

Health Law

The Section continues to provide educational services to its members through mini CLE seminars. These short (1-1/2 hour) presentations focus on late-breaking issues in health law. Topics covered ranged from compliance with the federal Emergency Medical Treatment and Active Labor Act to legal issues affecting health-care provider Y2K compliance efforts. The Section's newsletter provides a forum for Section activities and more thorough exposition of recent legal developments.

Law Practice Management and Technology

The Section worked with WSBA-CLE to sponsor the first an-

nual "New Lawyer" CLE presentation aimed at solo practitioners with less than three years' experience. The Section has continued to have a presence on the Law Office Management Assistance Program (LOMAP) steering committee, currently focusing on promoting the awareness of this service to WSBA members. The Section's brown-bag lunches have continued; topics have been as diverse as "Marketing for the Law Office" and "Motivating Associates." Members are kept informed through a quarterly newsletter and an e-mail discussion group.

Public Procurement and Private Construction

The Section focuses on statutes regulations and cases that relate or pertain to the field of public procurement and private construction contracts. The Section sponsored a CLE titled "Keeping Current," with Secretary of Transportation Sid Morrison as the luncheon speaker. The Section's tradition of forum meetings was continued – these small, informal, after-work gatherings keep members abreast of timely topics of interest, and provide the opportunity for professional networking and the exchange of information, experience and ideas.

Real Property, Probate and Trust

The Section continued its involvement in legislative matters, reviewing and commenting upon numerous proposed bills. 1999 saw the passage of the Trust and Estate Dispute Resolution Act (TEDRA), a bill drafted and sponsored by the Section. The Section presented several successful CLE seminars in conjunction with WSBA-CLE, and conducted its annual 2-1/2 day mid-year meeting and conference. The Section distributed to its members a CD-ROM containing all state statutory and administrative code materials most closely associated with a real property or trust and estates practice, continued publication of its quarterly newsletter, and established pages on the WSBA website.

Senior Lawyers

Membership in the Section is now 150 members strong. A newsletter focusing on post-law-practice activities is produced quarterly. The Section's Second Annual Meeting, an all-day event, was held in August. The Annual Meeting gave attendees the opportunity to meet and socialize with fellow members, while its educational programs provided attendees with CLE credits.

We regret that reports from the following sections were not received in time for publication: Administrative Law, Environmental and Land Use, General Practice, Indian Law, Intellectual Property, International Practice, Litigation Law, Taxation Law, and World Peace Through Law.

Mandatory Continuing Legal Education (MCLE) Reporting (Group 2 – Reporting January 2000)

Every active lawyer is required to file a report only every third year, but must report a minimum of 45 credit hours earned during that three-year period. This year, Group 2 (defined below) is required to report 45 CLE credits, including 6 ethics credits.

All active members are divided into three reporting groups based upon year of admission:

Group 1: Admitted through 1975 and in 1991, 1994 or 1997*

Group 2: Admitted 1976 through 1983 and in 1992, 1995 or 1998*

Group 3: Admitted 1984 through 1990 and in 1993, 1996 or 1999*

*New admittees are exempt; see "Newly Admitted Members."

Group 1 will be required to report 45 credits, including 6 ethics credits by February 1, 2002.

Group 2 will be required to report 45 credits, including 6 ethics credits, by February 1, 2000.

Group 3 will be required to report 45 credits, including 6 ethics credits, by February 1, 2001.

If you need to file a compliance report, the form should be in your licensing packet. If you need a form, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or e-mail questions@wsba.org.

Carry-over CLE Credits

Any carry-over credits from your last reporting period must be claimed in the next reporting period. After deducting 45 credits for the current reporting cycle, you may carry over a maximum of 15 credit hours toward the next three-year reporting period, of which 5 may be audio/video (A/V) credits, and 2 may be ethics credits. Additional ethics carry-over credits may be converted to general credits.

Late CLE Filing

All active members who are not in compliance by December 31 of the final year of a reporting period must pay a late filing fee of \$150 for the first reporting period of noncompliance. The late filing fee increases by \$300 for each consecutive reporting period of noncompliance.

Newly Admitted Members

Newly admitted members are exempt from reporting CLE credits during their year of admission and the following calendar year. However, credits may be earned during this period, starting from date of admission, and these credits may be applied toward their first reporting period.

MCLE Comity for Active WSBA Members in Oregon, Idaho or Utah

An active member of the WSBA whose principal office is in Oregon, Idaho or Utah may meet his or her mandatory CLE requirements by either (a) complying with Washington's CLE requirement, or (b) providing proof of current compliance with the CLE requirements of Oregon, Idaho or Utah.

Group 2 members who do not need to comply with the CLE requirements for 1997-1999 are:

- Members admitted to practice, as new admittees in Washington, in 1998 and 1999.
- Members who have been specially exempted from the 1997-1999 requirement by the Washington State Board of Continuing Legal Education.
- Inactive, Judicial and Honorary members.

If you have questions or if we may be of assistance, please call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or e-mail questions@wsba.org. You can also find answers to frequently asked questions on the WSBA website (www.wsba.org).

Usury Rate: The average coupon equivalent yield from the first auction of 26-week treasury bills in August 1999 is 4.947 percent. The maximum allowable interest rate for September is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates 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>.

Supreme Court Ethics Advisory Committee

This is a seven-member committee consisting of five judges, a representative of WSBA and the Administrator of OAC, established by GR 10. The committee's function is to provide judicial ethics advisory opinions to the judges on the Code of Judicial Conduct. They meet three to five times a year in Seattle. The WSBA repre-

sentative is nominated by the Board and appointed by the Supreme Court. The two-year term will commence November 1, 1999.

If you are interested in serving, please submit your letter of interest and résumé to the WSBA Executive Director, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330 or e-mail oed@wsba.org by September 30, 1999.

1999 WSBA Award Winners

The Washington State Bar Association Board of Governors takes great pleasure in announcing the winners of the 1999 awards. They will be honored at the Awards Dinner, Thursday, September 9 at Cavanaugh's on Fifth Avenue in Seattle. To make your reservation, please see the form on page 44.

Award of Merit	Douglas Lawrence
President's Award	Fred Diamondstone
Professionalism Award	Jane Seymour
Angelo Petrus Award for Lawyers in Public Service	Joseph Montecucco
Outstanding Judge	Hon. William Knebes
Pro Bono Award	Susan Daniel
Courageous Award	Faye von Wrangel
Affirmative Action Award	Williams, Kastner & Gibbs

Raising the Bar – Planning for the Future

During the last year, we have endeavored to "Raise the Bar" and plan for the future of the WSBA. We sought member input in a variety of ways, including statewide Town Meetings and a written survey. The Long-Range Strategic Planning Committee developed a list of 234 issues, and from that list 11 strategic goals emerged. While these goals have not yet been approved by the Board of Governors, we are hopeful that they will be adopted at the September 10 meeting. The goals are listed below, in not any particular order of significance.

Strategic Goals with New Focus

1. The WSBA will continue to provide and improve services and benefits to members statewide in response to their needs and desires.
2. The WSBA will conduct a public legal education program to broaden public knowledge about the law and the role of lawyers within the legal system.
3. The WSBA will improve the professional development of new lawyers.
4. The WSBA will promote civility and professionalism in the practice of law.
5. The WSBA will address member concerns about external influences and market pressures that impact the delivery of legal and law-related services, such as the unlicensed practice of law and multidisciplinary practice.

Continuing Strategic Goals

6. The WSBA's regulatory services will be responsible, accountable, timely and fair.
7. The WSBA will continue to support and provide leadership for programs and initiatives that benefit access to justice.
8. The WSBA will be a leader in using and promoting technology for the benefit of its members, the courts and the bar.
9. The WSBA will support the independence of the judiciary and appropriate court reform.
10. The WSBA will continue to promote diversity and equality in the courts, the legal profession and the bar.
11. The WSBA will be fiscally responsible.

WSBA Honored with Harrison Tweed Award



A delegation of nearly 20 Washingtonians attended the August 6th luncheon at the American Bar Association Annual Meeting in Atlanta, where the WSBA received the prestigious Harrison Tweed Award. This annual award is given jointly by the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and the National Legal Aid and Defender Association (NLADA). The plaque reads:

In recognition of the outstanding leadership and commitment demonstrated through its contributions to planning and implementing a comprehensive, integrated statewide system for providing civil legal services for the poor, rendering for its community a vital public service to the credit of the legal profession. And helping to make real the American ideal of Equal Justice for All.

WSBA President M. Wayne Blair and Executive Director M. Janice Michels accepted the award. President Blair, Chief Justice Richard Guy and Access to Justice Board Chair-elect Michele Jones made a presentation about WSBA's contributions at a separate meeting of the SCLAID Committee. The WSBA was nominated for the Harrison Tweed Award by the Washington State Access to Justice Board.

Washington State Bar Deskbooks Now on the Internet

The WSBA, in partnership with Loislaw.com, Inc., is pleased to announce the availability of its CLE books on the Internet. You can preview these online publications, plus the other 50,000,000 pages of state and federal law published by Loislaw, for 10 days, free of charge, through their website at www.loislaw.com.

The first WSBA deskbooks, with latest supplements, to be available are:

Real Property (8 volumes); the *Motor Vehicle Deskbook* series (3 volumes), *Civil Procedure, Appellate Practice, Alternate Dispute Resolution Deskbook: Arbitration and Mediation in Washington, Family Law, Washington Life Insurance Trust, and Commercial Law*. Other deskbooks and CLE course materials will be added in the near future.

Loislaw's extremely easy-to-use search engine enables you to search WSBA deskbooks quickly and efficiently. Citations in WSBA deskbooks are hyperlinked to the statutes and cases cited, so you can easily see the original text of the case or statute. For further information about the deskbooks or to try the program on a free trial basis, call Loislaw at 800-364-2512 or access their website at www.loislaw.com.

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Associate

*formerly with the Attorney General's Office and
The Law Office of Tyler M. Johnson*

Lori O'Tool

Associate

formerly with King County Housing Authority

Aaron Dean

Associate

*formerly with Lee Smart Cook Martin & Patterson
and*

Jeffrey W. Daley

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Seattle, WA 98101-3052

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BONAPARTE, ELLIOTT, OSTRANDER & PRESTON, P.C.

is pleased to announce that

Karen Wetherell Davis

has joined our firm as Of Counsel

Ms. Davis, formerly with Koler, Fitzsimmons & Wetherell in Seattle, will continue her intellectual property, entertainment, new technologies, Internet, and media practice in both Seattle and Portland. Ms. Davis is currently Chair of the Intellectual Property Section of the Washington State Bar, and she is a graduate of Stanford Law School.

We are also pleased to announce the

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Fax: 206-325-3269

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BUSINESS

Handling Cases Under the Consumer Protection Act - Video Replay with Live Moderator

September 15 - Pullman. 6 CLE credits (incl. .5 ethics) pending. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

How Bankruptcy Law Can Affect Your Clients (Bankruptcy 101)

September 23 - Seattle. 6.75 CLE credits. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

CONSTRUCTION LAW

Construction Law

September 9-10 - Seattle. 13.5 CLE credits. By Law Seminars International 206-463-4400.

CRIMINAL LAW

Sixth Annual Washington Criminal Justice Institute

September 22-23 - Bellevue. 11 CLE credits (incl. 1.5 ethics). By WSBA-CLE and Criminal Law Section in cooperation with various professional associations, 800-945-WSBA or 206-443-WSBA.

EMPLOYMENT LAW

Employee Privacy Rights in the WA Workplace
September 28 - Seattle; September 29 - Spokane. 6.5 CLE credits. By NBI 715-835-8525.

ESTATE PLANNING

Estate Planning for the Small to Medium-Sized Estate: Video Replay with Live Moderator
September 14 - Olympia. 7.25 CLE credits pending. By WSBA-CLE 800-945-WSBA or 206-443-WSBA.

ETHICS

Ethics, Professionalism and Civility: The Hard Questions

September 24 - Seattle. 3 CLE ethics credits. By WSBA Professionalism Committee 800-945-WSBA or 206-443-WSBA.

FAMILY LAW

Community Property: A Problem-Solving Workshop (morning); An Introduction to TEDRA Trusts and Estates Dispute Resolution Act (afternoon)

September 15 - Seattle. 3 CLE credits (morning); 3.25 CLE credits (afternoon). By WSBA-CLE and Real Property, Probate & Trust Section 800-945-WSBA or 206-443-WSBA.

Financial Issues in Dissolution Cases

September 23 - Portland. 3.5 CLE credits pending. By Oregon State Bar 503-684-7412.

GENERAL

Successful Judgment Collections in WA

September 15 - Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-8525.

Government Contracts in WA

September 15 - Seattle. 6.5 CLE credits. By Lorman 715-833-3940.

Salmon Listings

September 16-17 - Seattle. 11.25 CLE credits. By Law Seminars International 206-463-4400.

Domestic Violence in the New Millennium

September 17 - Seattle. 6 CLE credits. By Seattle Forensic Institute 206-322-6605.

This information is submitted by providers. Please check with providers to verify approved CLE credits. To announce a seminar, please send information 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 1st day of the month for placement in the following month's calendar.

Winning Strategies for the Successful Private Practitioner*

September 17 - Seattle. 6.75 CLE credits (incl. 3.25 ethics). By WSBA-CLE 800-945-WSBA or 206-443-WSBA. *For 1996-1999 bar admittees.

WA Underinsured Motorist Law

September 21 - Seattle. 6.5 CLE credits (incl. 1 ethics). By NBI 715-835-8525.

Domestic Partnerships

September 23 - Portland. 3 CLE credits pending. By Oregon State Bar 503-684-7412.

Killer Cross-Examination

September 24 - Portland. 6 CLE credits pending. By Oregon State Bar 503-684-7412.

School Law Issues in WA

September 24 - Seattle. 6.5 CLE credits (incl. .5 ethics). By NBI 715-835-8525.

Women of WSTLA Annual Retreat

September 30-October 1 - Kirkland. CLE credits TBA. By WSTLA 206-464-1011.

HEALTH LAW

Winning Brain Injury Cases:

Legal and Medical Issues

September 16-18 - Phoenix. CLE credits TBA. By Brain Injury Association 703-236-6000, ext.104 or www.biausa.org.

Planning for Your Client's Long-Term Care

September 30 - Portland. 6.5 CLE credits pending. By Oregon State Bar 503-684-7412.

INDIAN LAW

1999 Indian Law Symposium

September 17-18 - Seattle. 12.25 CLE credits. By UW-CLE 800-CLE-UNIV or 206-543-0059.

INSURANCE LAW

Insurance Law Basics

September 29 - Seattle. CLE credits TBA. By WSTLA 206-464-1011.

INTERNET RESEARCH

Internet Legal Research: Basic Power Searching (morning); Tax Research (afternoon)

September 1, 14 - Seattle. 3.5 CLE credits. By UW-CLE 206-543-0059.

Internet Legal Research: Basic Power Searching

September 8, 15, 21 - Seattle. 3.5 CLE credits. By UW-CLE 206-543-0059.

Internet Legal Research: Basic Power Searching (morning); Environmental Law (afternoon)

September 9 - Seattle. 3.5 CLE credits. By UW-CLE 206-543-0059.

Y2K

Doing Business in the U.S. and Canada: Structuring for Y2K

September 24 - Seattle. 7 CLE credits. By Lorman 715-833-3940.

LABOR AND EMPLOYMENT LAW

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

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— John W. Davis

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Paul W. Chemnick organized
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Classifieds

FOR SALE

\$59.95: 1999 WA State Child-Support Worksheets and Financial Declaration computer program. Program calculates wages, FICA, taxes (schedule A, head of household, daycare credit, earned-income credits, etc.), imputes income, residential-care credit, and Arvey (split custody) allocation. 1999 update \$17.95. Call Law Office of Frederick L. Hetter 253-759-6853.

RCWs: complete set in excellent condition. Current as of July 1, 1999. Asking \$600. Call 360-379-2510, ask for David.

Current Washington Reports and Wn.2d with advance sheets, \$3,350; current Wn.App. with advance sheets, \$1,250; Washington Digest, \$1,000; RCWAs (not all current), \$600 or best offer; other publications and miscellaneous office furniture, price negotiable. 360-629-4593.

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Bar News Classifieds

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Downtown Seattle office space: Bank of California building, choice of extra-large corner office with western and northern views (\$1,350), or medium-sized office with western view (\$900). Includes conference rooms, library, receptionist, voice-mail, kitchen. Available now. 206-623-5221.

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

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Business associate: dynamic, collegial Pacific Northwest law firm in Portland, OR, seeks mid-level associate with at least two years of general business/corporate finance/transactional practice experience. Applicants must have a strong background in business/corporate law and business transactions, including excellent writing and analytical skills. Superior academic credentials and a commitment to excellence required. Position offers opportunity for a challenging practice in a friendly working environment. Reply in confidence to: John San Fellipo, Garvey, Schubert & Barer, 121 SW Morrison, 11th Fl., Portland, OR 97204.

Ryan, Swanson & Cleveland, PLLC is seeking a tax attorney to join our strategic business planning, finance and transactions group. An LL.M. in taxation or CPA degree a plus. Applicants should send cover letter and résumé to: Mary Blazek,

NEW RATES BEGINNING OCTOBER 1, 1999

TO PLACE A CLASSIFIED AD:

Rates: WSBA members: \$40/first 25 words; \$0.50 ea. add'l. word. Non-members: \$50/first 25 words; \$1 ea. add'l. word. Blind-box number service: \$12 (responses will be forwarded). Check payment (to WSBA) must accompany order. We are unable to bill for classified ads or accept payment by credit card.

Deadline: Text and payment must be received (not postmarked) by

the 1st day of each month for the issue following, e.g., September 1 for October issue. No cancellations after deadline. **Mail to:** WSBA Bar News Classifieds, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330.

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

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

Please Note: Our previous rates will remain in effect for the October 1999 issue.

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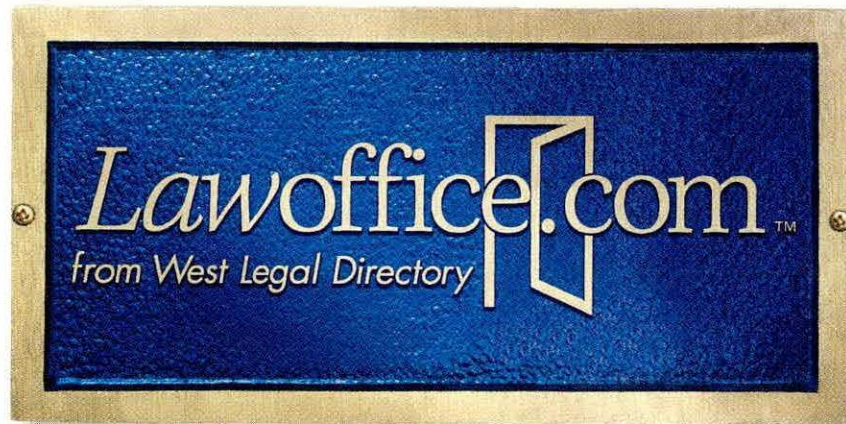
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Raising The Bar



1999
Annual
Report

WSBA

WASHINGTON STATE BAR ASSOCIATION
SUPPLEMENT TO WSBAR NEWS MAGAZINE

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

President's Report

M. Wayne Blair



The year has passed quickly. My immediate predecessor, Mary Fairhurst, said it best (as she usually does): "Serving as President means long hours and short months." Truer words were never said. The year has been eventful, challenging, and for me personally, very rewarding. I have traveled; I have listened; and I have learned. My wife, Anne Blair, has a favorite saying above her desk from Natasha Josefowitz: "The person to the left of me knows more than I do, I can learn. The person to right of me knows less than I do, I can teach. I need both for me to be."

Vision

Important values guiding me this year as president are: open and accessible • inclusive — in which all members are fairly and equally treated • progressive • service oriented, responsive to your needs as a lawyer, relevant to your practice • good value for the money • a leader, a statewide voice for lawyers, a champion of justice • financially stable • well-run and managed • responsible, accountable, timely and fair in its regulation of lawyers to protect the public.

Long-Range Planning

The focus of the Board of Governors this year has been on the role of the WSBA as a professional association of more than 24,000 lawyers, rather than on its role as a regulator of this state's lawyers. At the beginning of my term as President, the Board authorized the WSBA to engage in long-range planning. Much has been written in *Bar News* about "Raising the Bar, Planning for the Future."

Following membership surveys, 12 town meetings, an internal assessment with WSBA staff, and interviews with the Governors, we compiled a list of 240 issues. Over 1,000 of you responded to the request for input. This list of issues was revised, combined and reorganized into 22 strategic goals, plus numerous short-term and administrative matters. Following several all-day meetings of the Long-Range Strategic Planning Committee and the Board of Governors, we prioritized this list of goals to 11, which are listed here in no particular order of significance.

Strategic Goals with New Focus

1. The WSBA will continue to provide and improve services and benefits to members statewide in response to their needs and desires.
2. The WSBA will conduct a public legal education program to broaden public knowledge about the law and the role of lawyers within the legal system.
3. The WSBA will improve the professional development of new lawyers.
4. The WSBA will promote civility and professionalism in the practice of law.
5. The WSBA will address member concerns about external influences and market pressures that impact the delivery of legal and law-related services, such as the unlicensed practice of law and multidisciplinary practice.

Continuing Strategic Goals

6. The WSBA's regulatory services will be responsible, accountable, timely, and fair.
7. The WSBA will continue to support and provide leadership for programs and initiatives that benefit access to justice.

8. The WSBA will be a leader in using and promoting technology for the benefit of its members, the courts, and the bar.
9. The WSBA will support the independence of the judiciary and appropriate court reform.
10. The WSBA will continue to promote diversity and equality in the courts, the legal profession, and the bar.
11. The WSBA will be fiscally responsible.

While these new and continuing strategic initiatives have not yet been approved by the Board of Governors, I am hopeful that they will be adopted at its September 10 meeting.

Definition of the Practice of Law

In my President's Column in this September issue of *Bar News*, I discussed the great work of the Committee to draft a working definition of the practice of law. Their carefully written and thoughtful final report has just been issued to the Board of Governors. Many thanks to Chair Steve Crossland and members of the committee: Justice James A. Andersen, Jr. (Ret.), Justice Keith M. Callow (Ret.), James E. Deno, Peter S. Ehrlichman, Peter J. Harris, Zanetta L. Fontes, Peter R. Jarvis, Howard H. Marshack, Judge James A. Noe, Jr. (Ret.), Narda D. Pierce, Steven B. Tubbs, Darren C. Walker, Lish Whitson, and staff liaison Robert D. Welden, WSBA General Counsel.

Access to Justice

The Board of Governors finally approved a set of standards for tele-lawyer services, as advocated by Susan Daniel and many others from the access to justice community. While the version adopted by the Board is much different than that initially proposed several years earlier, i.e., that the Board own and operate a tele-lawyer service, the standards, nonetheless, should be helpful by providing minimum acceptable standards for those who operate telephone services linking a lawyer with a person needing legal information and advice. I would like to extend our thanks to Susan Daniel for her unwavering leadership on this issue.

One of the primary focuses of the Board of Governors during the legislative session was an all-out effort to secure \$10 million dollars in new funding from the state for Columbia Legal Services and other legal services providers. Unfortunately, the legislation did not pass. Nonetheless, much was learned about legislative advocacy, and we will try again. The WSBA appreciates the support of the Supreme Court and the Board for Judicial Administration in this advocacy effort.

Congratulations to the WSBA as recipient of the Harrison Tweed Award from the American Bar Association. This award, one of the ABA's most prestigious, recognizes the extraordinary achievements of bar associations that develop or significantly expand projects or programs to increase access to civil legal services to poor persons or criminal defense services to indigents. This award was presented at the ABA annual meeting in August and recognizes the WSBA's long-term commitment and leadership, in close partnership with the Access to Justice Board, the Northwest Justice Project, Columbia Legal Services and many others, in planning and implementing an integrated, comprehensive statewide system for providing civil legal services for the poor.

Celebration 2000

Under the leadership of President-elect Richard Eymann, the Board of Governors approved holding its first state bar convention since 1992 — but a traditional convention it will not be. Celebration 2000 will be held in conjunction with the Fall Judicial Conference, the Access to Justice Conference, and the Bar Leaders Conference. Bringing all these major constituents together for the first time promises an exciting and educational event. Mark your calendars for September 13-16, 2000 in Spokane.

Public Legal Education Workgroup

The Public Legal Education Workgroup, a statewide workgroup with broad representation, was convened in November 1998 by Governor Gary Locke, Attorney General Christine Gregoire, the Washington State Bar Association and the Access to Justice Board to develop and implement a statewide plan for public legal education in Washington. Judge Marlin Appelwick, Court of Appeals, and Judith Billings, former Superintendent of Public Instruction, served as co-chairs. The Workgroup of nearly 60 people included judges, lawyers, educators and citizens. A final report has just been issued and was approved in concept at the July meeting of the Board. The plan will be a significant first step in re-introducing legal education into the public schools and the community.

WSBA Annual Award Winners

The Board of Governors, at its Annual Meeting the evening of September 9, will present the following awards: Award of Merit, Douglas Lawrence; President's Award, Fred Diamondstone; Award of Professionalism, Jane Seymour; Angelo Petrus Award for Lawyers in Public Service, Joseph Montecucco; Outstanding Judge, Hon. William Knebes; Pro Bono Award, Susan Daniel; Courageous Award, Faye von Wrangel; and the Affirmative Action Award, the law firm of Williams, Kastner & Gibbs. Congratulations to all of you! You make us proud to be lawyers.

WSBA Service Center At Your Service

The WSBA Service Center is up and operating. For information about licensing, CLE, sections, the Young Lawyers Division, publication orders, address changes, status certificates, requests for brochures, general information and much more, call 800-945-WSBA or 206-443-WSBA, or e-mail questions@wsba.org.

Implementation of Work of the MCLE Task Force

The work of the MCLE Implementation Task Force continues. Although still not officially approved by the Court, we anticipate that the new rules with regard to reporting and receiving CLE credit will take effect in some form this fall. These rules expand the number of courses in which credit will be given, expand the subject matter of such courses, and significantly change the reporting of these courses, because providers will be required to report those who attend CLEs, and the WSBA will track accumulated credits. Also, the new rules will allow five or more lawyers, in a proper setting, to take a CLE course and receive credit.

WSBA Rules Committee, and Changes to GR 9, the Rule Making Procedures

It was a very busy year for the WSBA Rules Committee and its chair, Fred Diamondstone. This year the Supreme Court Rules Committee and the WSBA Rules Committee made significant effort to work together more closely than in the past. The result was an active meeting schedule with a full agenda. Fred Diamondstone spent considerable time before the Board this year discussing proposed rules. Thanks also to Steve Rosen for his strong staff support.

After considerable study and debate, the WSBA Rules Committee, working closely with several of the Justices, proposed significant revisions to GR 9. The proposed revisions open the rule-making process

and formally incorporate a role for the Superior Court Judges Association and the District and Municipal Court Judges Association. The Board of Governors approved the changes and has recommended them to the Supreme Court for adoption.

Legislative Advocacy, Work of Legislative Committee and Reconfiguration of the Legislative Committee

Many thanks to John Fattorini, Gail Stone, John Cary and the work of the sections for another successful year in the legislature. Out of the 10 bills that the WSBA sponsored, nine passed. The other is under study by the Governor's office. Of course, we supported many other bills and opposed others. Some of these passed and others did not. With the exception of the issue of funding on legal services, our efforts were very successful (despite the "49/49" makeup of the House).

During the last couple of meetings of the Board of Governors, it approved a reconfiguration of the Legislative Committee, based on recommendations of John Cary, John Fattorini and Gail Stone. The Committee will be approved annually by the Board as a whole. Approximately 11 members of the Committee will be highly experienced in legislative matters and be exempt from the three-year term limitation requirement. Each Board member will then appoint or reappoint one representative from their district. Guided by the objective of making the Committee diverse and representative, the President-elect will appoint the remaining 11 members, subject to Board approval.

Law Office Management Assistance Program (LOMAP)

The Board of Governors authorized a new standing committee, the Law Office Management Assistance Program Committee, to assist and advise the LOMAP Program operating within the Lawyer Services Department. The Committee is chaired by Lewis H. Zieske, Jr. With the assistance of WSBA staff, the LOMAP Committee has written a manual to assist solo practitioners and small firms in the management of their offices. The Committee and Bar staff also are traveling around the state conducting seminars on law office management. Call Marty Potter at 206-727-8237 or 800-945-WSBA for more information.

Alternate Dispute Resolution (ADR) Committee

Also this year, the Board of Governors authorized the formation of a new standing committee charged with using alternative dispute resolution mechanisms to resolve fee disputes on a voluntary basis and some eligible discipline matters. The ADR Committee, chaired by Stew Cogan, will be working closely with WSBA staff.

Workgroup on Multi-State Admissions

The Board of Governors recently received a letter from the President of the Oregon State Bar Association suggesting a workgroup of representatives from the states of Oregon, Washington, Idaho and Utah to study the idea of multi-state admissions of lawyers. Such cooperation among these four states arises from their cooperation several years ago regarding mutual approval of CLE credits. If the idea is approved, a lawyer admitted in Oregon, for example, would also be authorized to practice in the other three states. The Board of Governors authorized participation in the workgroup, with the understanding that there is no commitment to endorse the concept and that the parties must agree how the workgroup would proceed. The idea of four representatives from each state (one each from the Board of Governors, the Supreme Court, the Committee of Bar Examiners and Bar staff) is under discussion.

Thank you for the opportunity to have served as your President. I appreciate your support and the many kind comments received during the year.

Executive Director's Report

Jan Michels

1999 was the year of creating a new vision for the WSBA. It was a year to watch and listen to members and trends in the profession. It was an intense year of meetings and discussions among Bar leaders to validate what we were hearing and to see what the WSBA should do toward our mission of promoting justice and serving our members and the public. We decided we will "Raise the Bar" to higher standards. The raised standards will be faster discipline, easier MCLE tracking, more and faster electronic communication, more direct member services, and a vigorous campaign to educate and inform the public about the rule of law and the beneficial public work of lawyers. In this new Bar we will take on "practice-of-law" issues, and we will look for new ways to achieve equal access to justice. We will advocate for the independence of the judicial

branch and needed court reform. We will maximize and leverage the thousands of hours members volunteer to the WSBA to promote these issues in this enhanced Bar.

The horizon we've been scanning is in focus. It's an enhanced WSBA – responsive, timely, there-for-members, collegial, and ambitious in our goals. In the enhanced Bar, we support committees, sections, and local and specialty bar associations in choosing their focus and defining their partnership roles with the WSBA. We're diverse, inclusive and cooperative. There is a huge amount of work to be done, and we welcome this chance to make a real difference together, to our profession, the courts and the public.



Financial Highlights

The WSBA had another strong year of financial performance, supporting our goals to be a financially strong institution; to be accountable to our members and the public; and to use our resources wisely in ways that accomplish our mission. For fiscal year 1998 (October 1, 1997 through September 30, 1998), net income exceeded the amount budgeted, enabling us to maintain a sound reserve for future years, as recommended by our auditors. We received an unqualified opinion on our financial statements from our auditors.

Financial Achievements

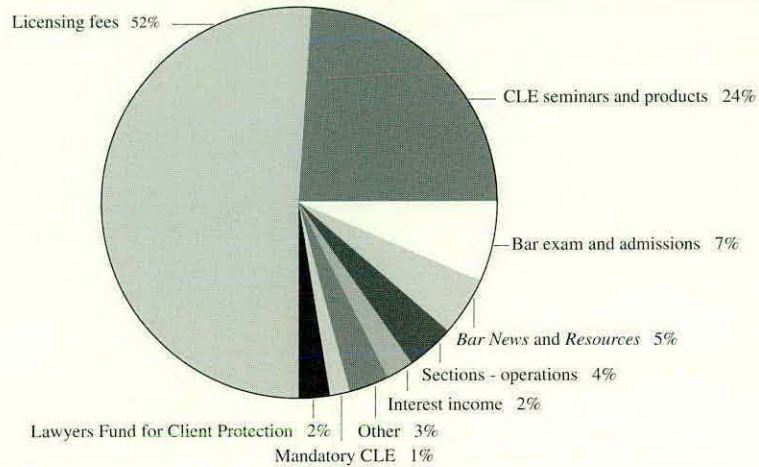
Net income of \$426,726 exceeded the budgeted target. About \$200,000 of this amount was added to the general fund reserve. At year end, the general fund reserve was 15.6% of total operating expenses.

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

The bar's 22 sections ended the fiscal year with a combined net profit of \$78,000. Sections are a voluntary activity for WSBA members and are fully self-supporting through section dues and fees for products or services. No member license fees are used for section activities, and all net income from sections is carried forward in each section's fund balance for use by that section in future years.

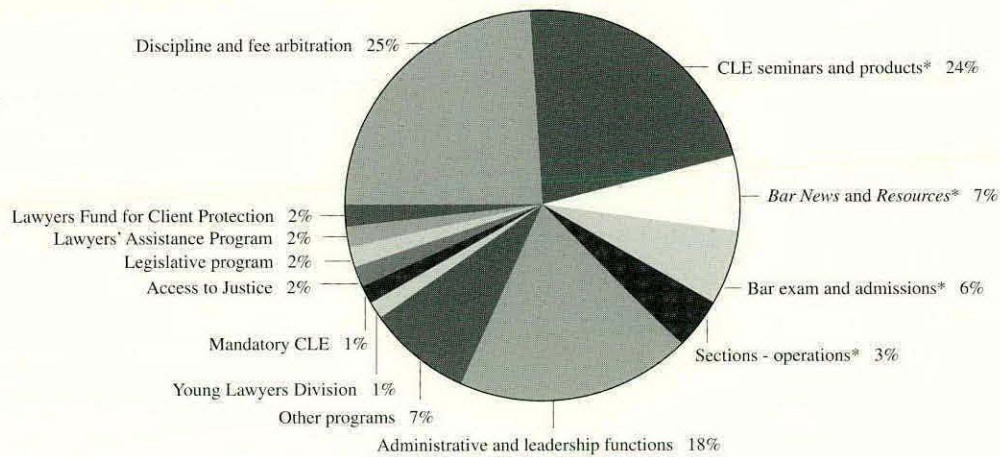
The revenue chart shows the percentage of revenues collected from various sources.

Percentage of 1998 Revenues Collected from Various Sources



The expenses chart shows the percentage of total expenses used for each regulatory activity and member service we perform. Regulatory activities, such as discipline and fee arbitration, random audits of trust accounts, mandatory continuing legal education administration, licensing of members, administration of the office and leadership activities, are funded by member license fees. The chart identifies major programs that are entirely or substantially self-funded, including CLE seminars and products, *Bar News* and the *Resources* directory, the bar exam and admissions, and section activities.

Percentage of 1998 Expenses Used by Activity (* activity is self-funded)



The statements of activities on page 5 list revenues and expenses by program.

A complete copy of the audited financial statements and auditor's report is on the WSBA website (www.wsba.org), can be mailed to you upon request (e-mail patd@wsba.org or phone 206-727-8241), or can be picked up at the WSBA Annual Meeting.

Statements of Activities

	Year ended September 30, 1998			Year ended September 30, 1997		
	Revenues	Expenses	Revenues over (under) expenses	Revenues	Expenses	Revenues over (under) expenses
Unrestricted						
Licensing fees	\$ 5,407,586	\$ -	\$ 5,407,586	\$ 4,582,147	\$ -	\$ 4,582,147
Access to Justice	14,500	245,562	(231,062)	16,000	169,675	(153,675)
Administration	250,678	1,044,664	(793,986)	205,075	920,050	(714,975)
Bar examination and admissions	751,114	589,996	161,118	737,224	561,033	176,191
Audits (random and for cause)	-	138,490	(138,490)	-	107,700	(107,700)
<i>Bar News</i>	400,973	615,967	(214,994)	391,096	621,751	(230,655)
Continuing Legal Education - publications	699,555	608,931	90,624	780,481	717,892	62,589
Continuing Legal Education - seminars	1,785,725	1,743,604	42,121	1,863,769	1,721,166	142,603
Communications	11,377	161,118	(149,741)	12,887	153,633	(140,746)
Court rules	-	20,464	(20,464)	-	19,893	(19,893)
Discipline	53,874	2,425,663	(2,371,789)	48,188	2,175,145	(2,126,957)
Fee arbitration	4,200	33,427	(29,227)	5,850	23,898	(18,048)
Computer bulletin board service	7,730	66,257	(58,527)	17,245	33,970	(16,725)
Lawyers' Assistance Program	16,759	245,209	(228,450)	20,280	241,778	(221,498)
Lawyers practice assistance program	-	173,827	(173,827)	-	-	-
Leadership	2,776	391,532	(388,756)	182	267,401	(267,219)
Legislative	-	176,838	(176,838)	-	172,629	(172,629)
Local bar support	1,082	14,033	(12,951)	1,127	14,568	(13,441)
Mandatory continuing legal education	153,082	133,497	19,585	190,172	150,063	40,109
Membership records	42,695	396,871	(354,176)	36,426	428,680	(392,254)
<i>Resources</i> directory	122,255	67,645	54,610	135,410	68,592	66,818
Sections - administration	142,229	131,652	10,577	131,505	110,839	20,666
Sections - operations	432,252	353,494	78,758	406,985	363,674	43,311
Young Lawyers Division	39,969	137,806	(97,837)	35,547	117,385	(81,838)
Other	-	12,694	(12,694)	-	6,958	(6,958)
Total Unrestricted	10,340,411	9,929,241	411,170	9,617,596	9,168,373	449,223
Restricted						
Lawyers' Fund for Client Protection	223,192	207,636	15,556	218,708	295,739	(77,031)
Total	\$10,563,603	\$10,136,877	\$426,726	\$9,836,304	\$9,464,112	\$372,192

Washington State Bar Association
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WSBA Service Center: 800-945-WSBA / 206-443-WSBA
Fax: 206-727-8320
Website: www.wsba.org

The **WSBA Service Center** handles close to 4,000 calls per month. The Service Center plays an important role in helping to fulfill the mission of the WSBA: "...[to] serve its members and the public," and welcomes the opportunity to be of assistance. Call 800-945-WSBA or 206-443-WSBA, or e-mail questions@wsba.org.

More than 400 members participated in **Town Meetings**, a key part of the WSBA's "Raising the Bar" long-range strategic planning process. Meetings were held in Bellevue, Bellingham, Everett, Kennewick, Olympia, Seattle, Spokane, Tacoma, Vancouver and Wenatchee, and at the Washington Young Lawyers Division meeting in Skamania.

More than 35,000 low-income residents of our state benefited from assistance from more than 4,000 attorneys volunteering through **pro bono programs**. (This number does not include lawyers providing free or reduced-fee services outside organized programs.)

Washington state has 37 **legal service programs**, including pro bono programs, specialized legal service programs, Northwest Justice Project and Columbia Legal Services. Three hundred sixty-five (365) volunteer attorneys serve on pro bono and legal services boards.

Seventy (70) attorneys serve on the **Access to Justice Board** and its committees.

In 1999, 13 attorneys participated in the new **Emeritus Program**, which creates a limited license status for attorneys otherwise retired from the practice of law. The program's goal is to encourage pro bono participation by experienced attorneys and judges who want to make a significant contribution to access to justice-related efforts.

At the 1999 Annual ABA Meeting, the WSBA was presented with the prestigious **Harrison Tweed Award** for achievement in preserving and increasing access to legal services for the poor.

The Education Committee of the Access to Justice Board formed a **Public Legal Education Workgroup** to develop, oversee and coordinate a law-related education vision for Washington state. In November 1998, this group was convened by the Governor, Attorney General, WSBA, and Access to Justice Board. Of the more than 55 workgroup participants, 29 are WSBA members.

Nearly 700 members participate in **WSBA committees, boards and panels**.

The Board of Governors appointed 64 members to serve on boards, committees, commissions and task forces of **outside organizations**.

This year, **WSBA-CLE** produced 115 educational events for 8,500 participants utilizing 900 volunteer members as program chairs and faculty. Programs were presented in Port Hadlock, Olympia, Mount Vernon, Vancouver, Stevenson, Tacoma, Spokane, Wenatchee, Yakima, Sea-Tac, Kelso, Walla Walla, Chelan and Seattle. Several new CLE innovations were introduced: the Tele-CLE™ series for ethics courses by practice area, via an interactive telephone format; a focused course specifically for newer admittees; and WSBA's Computer Camp for Counselors™, focusing on e-mail and Internet skills. WSBA-CLE also introduced the Automated Update Service, which keeps all participating deskbook subscribers current with new supplements. Additionally, the WSBA, in partnership with Loislaw.com, Inc., announced the availability of its CLE books on the Internet and on CD-ROM.

The **Lawyers' Assistance Program (LAP)** offers confidential assistance with emotional, drug, alcohol, family, health and other personal problems. Services include assessment, referral, short-term or long-term counseling, group and individual therapy, as well as treatment follow-up and training. From July 1998 through June 1999, LAP had 2,216 contacts with Washington lawyers. LAP has 110 peer counselors throughout the state; 90 attorneys were helped through peer counseling. LAP's annual statewide conference, held at Lake Chelan, included seminars on helping styles, diversity, bankruptcy, and leading a balanced life.

The **Law Office Management Assistance Program (LOMAP)** offers lawyers a wide range of services, including general "prevention maintenance" reviews; consultation on specific problems, office systems or procedures; reference materials for office and practice setup; and referral to consultants and vendors. From July 1998 through June 1999, LOMAP made contact with nearly 1,900 Washington lawyers. In July and August 1999, LOMAP representatives toured Eastern Washington, presenting half-day "Law Office Check-up" programs in

Colville, Goldendale, Moses Lake, Okanogan, Pullman, Richland, Spokane, Walla Walla, Wenatchee and Yakima.

The **Alternative Dispute Resolution Program (ADR)** includes Voluntary Fee Arbitration and Mediation. From July 1998 through June 1999, the ADR program averaged nearly 90 contacts per month with lawyers and others seeking assistance in resolving disputes.

The **Professional Responsibility Program** provides information and assistance in: 1) Ethics Assistance – a WSBA lawyer assists callers in resolving ethical dilemmas; 2) Informal Opinions – issued by the RPC Committee responding to written ethical inquiries from lawyers; 3) Formal Opinions and Published Informal Opinions – ethical opinions issued by the Board of Governors; and 4) Rules of Professional Conduct – rules for ethical conduct promulgated by the Washington State Supreme Court. The Ethics Line took calls from an average of nearly 240 lawyers per month from July 1998 through June 1999.

The members of the **Lawyer Services Department** made 16 presentations from October 1998 through June 1999. These presentations were made to specialty and county bar associations in Aberdeen, Auburn, Bellevue, Bellingham, Ephrata, Everett, Lake Chelan, Olympia, Port Orchard, Seattle, Snoqualmie, Tacoma, Vancouver and Wenatchee.

During this fiscal year, over 1,400 applicants sat for the **Bar Exam**. Of the 897 applicants who took the summer 1998 exam, 610 were eligible for admission into the Bar. Of the winter's 539 applicants, 418 passed. The combined pass rate for the two exams was 72%.

The Washington State Bar Examination is the 13th largest bar exam in the country and is the only bar exam that still uses, exclusively, practicing members of its bar to write and grade questions. The WSBA's dedicated **Committee of Law Examiners** prepares and grades two bar exams each year.

WSBA membership continues to grow. As of July 1, 1999, there were 21,141 Active members, 3,192 Inactive members, and 626 Judicial members. This compares to 20,716 Active, 2,941 Inactive, and 607 Judicial members as of July 1, 1998.

There are currently approximately 860 individuals participating in the WSBA's **Rule 9 Legal Intern Program**. An intern license is good for two years.

There are more than 60 **county and specialty bar associations** in the state.

Significant efforts to enhance the **WSBA website** (www.wsba.org) have resulted in a record amount of information being available online. The website is updated weekly – with new additions highlighted in the "Featured This Week" section. The authoritative database of lawyers licensed to practice in Washington, updated daily, is available through the website.

During the year, **listserv service** was inaugurated, facilitating communication among WSBA member groups such as committees and sections. These listservs are group e-mails centrally maintained by the WSBA.

To promote public confidence and protection of the public, the WSBA administers the **Lawyers' Fund for Client Protection**, which makes discretionary gifts to at least partially compensate clients who have been victims of attorney misappropriation. The Supreme Court assesses each lawyer \$10 for the Fund each year. During fiscal year 1998, the Lawyers' Fund for Client Protection approved gifts from the fund totaling \$193,000. These involved 22 applications concerning 11 lawyers.

The WSBA has 14,850 members participating in its 22 **sections**.

During calendar year 1998, the **Office of Disciplinary Counsel (ODC)** managed a very active prosecutions and investigations caseload. Although Washington's lawyers continued serving the public very well, with fewer than 1/2 of 1% being sanctioned or subject to disciplinary action, last year 15 lawyers were disbarred, 11 were suspended from practice for disciplinary reasons, seven were reprimanded (one lawyer twice), and eight were censured. Twenty-four (24) lawyers were formally admonished. Eleven (11) were suspended from practice on an interim basis (not a disciplinary sanction) pending disciplinary proceedings. The ODC continued its active preventative discipline program by presenting more than 70 programs around the state, and by writing numerous ethics articles for *Bar News* and other publications.