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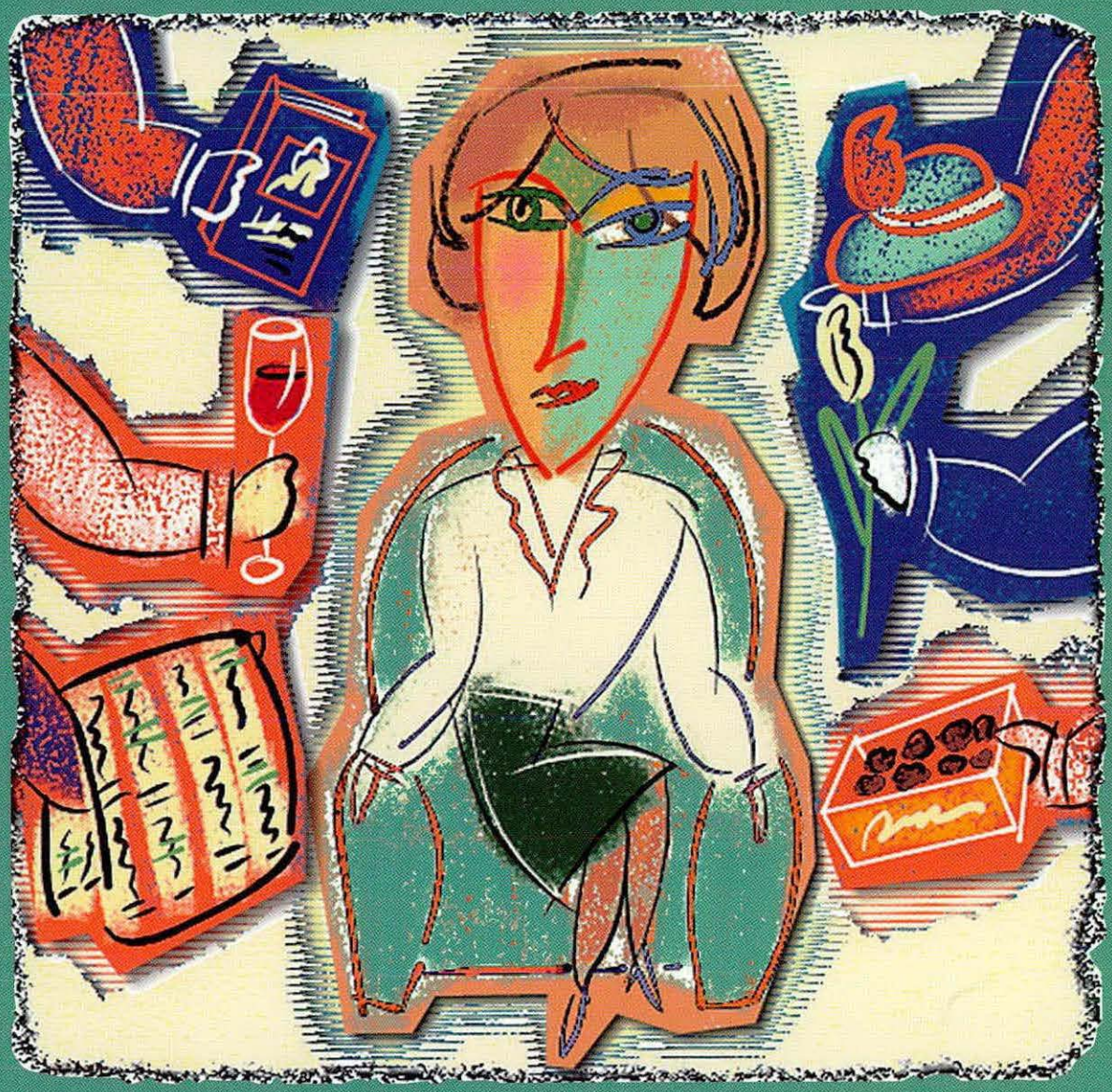

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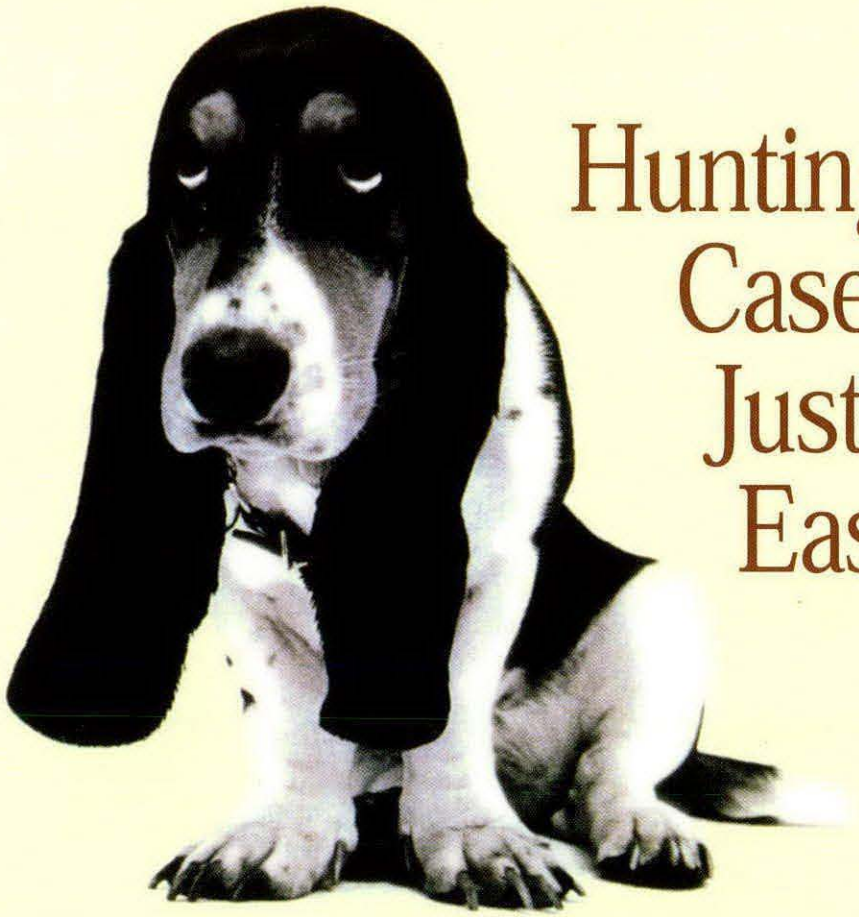

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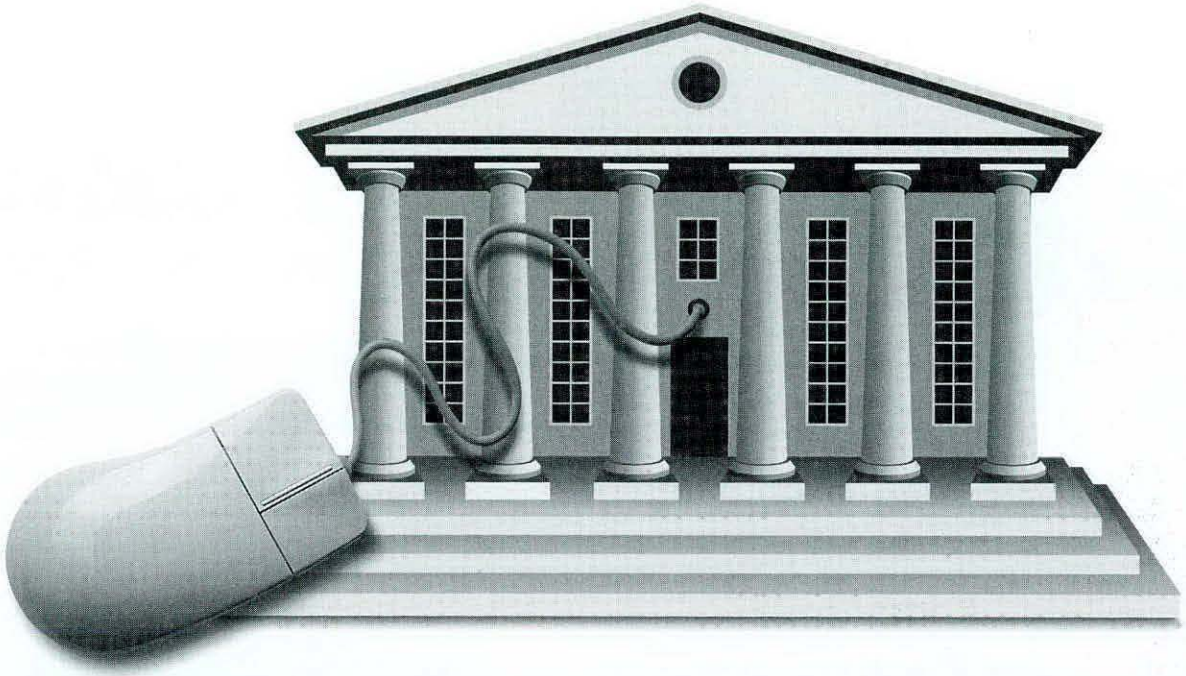

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BAR NEWS

JANUARY 2000

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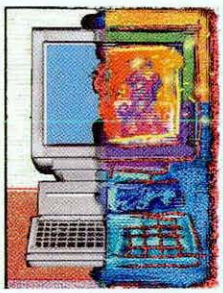

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Columns

Departments

Listings

Sherrie Bennett Editor 206-283-4015; bennsl@aol.com
Judith M. Berrett Director of Communications 206-727-8212; judithb@wsba.org
Amy Hines Managing Editor 206-727-8214; amyh@wsba.org
Jack Young Advertising Manager 206-727-8260; jacky@wsba.org
Randy Winn *Bar News* Online 206-733-5913; randyw@wsba.org
Amy O'Donnell Professionals, Classifieds and Subscriptions 206-727-8213; amyo@wsba.org
Communications Department e-mail: comm@wsba.org

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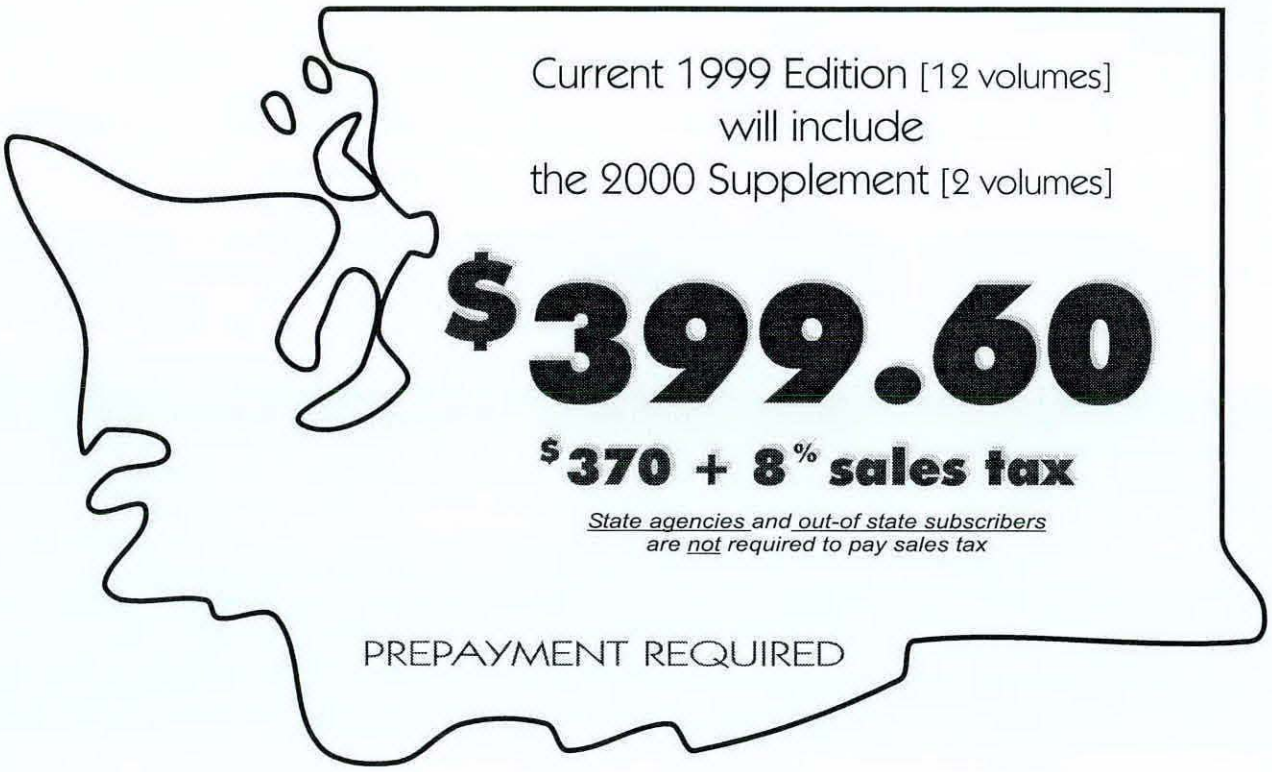

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Stopping the Hacker Can Be Enough

Editor:

I am responding to Mr. Apgood's column, The Greyhaired Cyberpunk, in the November 1999 issue of *Bar News* [p. 44]. Mr. Apgood neglects to mention that, at least at the federal level, the decision not to prosecute might be made for reasons other than not understanding the subject matter. As just one example, the data or system the hacker was accessing, or the technology used to identify the hacker, may have been highly enough classified that the government was not willing to expose the information in a courtroom. For an investigation to be justified, the result need not always be a criminal conviction but can simply be to stop the hacker.

Martin H. Sinclair
Black Eagle, MT

Bar President Should Be Less Partisan

Editor:

I was surprised by Richard Eymann's "President's Corner" article in the October issue of *Bar News*. As the new President of the Washington State Bar Association, I expected Mr. Eymann to be more inclusive. I certainly expected he would be less partisan than when he was president of the Washington State Trial Lawyers Association. I am disappointed on both expectations.

Just as Mr. Eymann laments how we lawyers endure the "humiliation of the distortion, unfair accusation and unwarranted attacks" from "pea-brain mentalities who brainwash listeners into thinking that all lawyers are bad," Mr. Eymann's own stereotypes and *ad hominem* attacks reflect an equally insensitive and misleading view — a view beneath the dignity of his office.

For example, Mr. Eymann praises lawyers who "courageously represent both unpopular and popular parties in all types of court cases." Great! That's admirable and passionate advocacy for our profession.

But then, Mr. Eymann excoriates his fellow lawyers who practice law in the property and casualty insurance industry and accuses a majority of the insurance companies of acting to "pollute the jury pool" and "pollute justice itself."

Insurance protects individuals and facilitates commerce, yet Mr. Eymann seems unwilling to recognize that. Some insurance claims are made to defraud insurance companies and their policyholders, yet Mr. Eymann seems unwilling to recognize that. Defending against fraud is a legitimate part of our justice system, yet Mr. Eymann seems unwilling to recognize that.

By discounting or ignoring facts like these, it is Mr. Eymann himself who makes "truth a victim."

Obscuring truth should not be the role of the WSBA President. Unfortunately, Mr. Eymann's statements do not reflect the "extremely high ethical standards" he admonishes us as colleagues to practice.

Mr. Eymann says we lawyers should "hit a home run for our profession" because we should have "respect for ourselves and for all lawyers who zealously represent the needs of their clients."

That's what lawyers do when defending against fraudulent insurance claims, Mr. Eymann. They zealously represent their clients. So, next time you "step up to the plate," please bring a healthy serv-

ing of respect for *all* your colleagues! That's what the Washington State Bar Association has always been for!

James W. Ruddy
Seattle

Nullification is Power to Say "No"

Editor:

I am writing to correct two typographical errors unintentionally inserted by *Bar News* staff into my last letter, "Jury Nullification Debate Continues" [*Bar News*, November 1999, p. 12]. These corrections are necessary for clarity.

The correct cite for the landmark exclusionary rule case of *Boyd v. U.S.* is 116 U.S. 616 (1886). The case was decided in 1886, not 1186 as printed in *Bar News*.

The third paragraph of my previous letter, which lists the nullification powers of various elites, should have read, "prosecutors have vast powers of prosecutor nullification to refrain from charging a defendant under established laws (see RCW 9.94A.440)" and not "vast powers of prosecutor laws" as printed in *Bar News*.

It is curious to hear prosecutors make objections against jury nullification, considering that prosecutors enjoy far greater powers of nullification than any juror. Nullification is simply the power to say "no." A juror has power over one case which he shares with 11 others. A prosecutor has unshared power over hundreds of cases.

Even aside from RCW 9.94A.440, prosecutors, especially the elected ones, have an unrestricted and unreviewable power to enforce some laws and ignore others. Laws against cruelty to animals, commonly violated by corporations, university research departments and medical schools, are rarely enforced by prosecutors. See any PETA (People For Ethical Treatment of Animals) magazine for documentation. But prosecutors ferociously and unrelentingly persecute recreational drug users, and even persecute suffering medical patients and their caregivers. See any newspaper for documentation.

Law is not some self-executing perfection that drops down out of heaven. Law is political. It is made by men, and interpreted and enforced by men, for the benefit of some and the detriment of others. Law is a weapon used by the more powerful — the police, prosecutors and politicians — against the less powerful, the rest of us.

Only by sharing power over the law as widely as possible, and that includes sharing power over the law with trial jurors, can we hope to achieve justice.

Tom Stahl
Ellensburg

California DUI Standards Lower Longer

Editor:

I read with interest the article by Ken Fornabai, "Defending the Sober Driver" [*Bar News*, January 1999]. In California, the state legislature lowered the *per se* standard from .10 to .08 on January 1, 1990. So it has been 10 years that this lower standard has been in place in the State of California.

I will concede that Mr. Fornabai is correct that the new lower standard has raised some troubling issues at trial and has re-

sulted in confusion on the part of juries. However, in society-at-large no such confusion reigns. In the last 10 years, people in California have become accustomed to the new lower standard, and have changed their behavior accordingly.

Teenagers applying for drivers' licenses in California have been for years keenly aware of the .08 standard, and many of them scrupulously avoid alcohol altogether. Similarly, young people in their 20s and 30s have adjusted their habits to include the taking of mass transit when they are out celebrating and partying. Many people bring a "designated driver" on their outings, and this driver does not partake in alcohol while at a restaurant or party, and therefore can drive his group home in safety. Still others have taken to walking home, particularly in summer when the weather permits.

Hosts at private parties and get-togethers in California are getting smarter, too. They offer coffee or plain water at the end of the evening, and encourage guests to sit for an hour, sober up, and watch late night TV before driving home. Many hosts insist that obviously intoxicated partygoers sleep over. They offer beds, sofas and sleeping bags to guests.

Some hotelkeepers in California offer free taxis home or discounted hotel room rates to celebrants at wedding receptions or other galas taking place at hotel ballrooms.

So Mr. Fornabai is correct that a low *per se* standard poses an array of new problems in the courtroom, but in California the law does have the intended effect of changing society's perceptions of what constitutes responsible behavior.

Legislators pass laws with the goal of changing the behavior of ordinary people. The .08 law in Washington will prove to be a good law if it has an impact upon how people use alcohol and what choices people make in connection with that use.

Thomas M. Nickel
San Diego, CA

Public Funding of Lawyers Bad

Editor:

I object to Len Schroeter's argument that taxpayer-funded lawyers should be provided for all civil litigation.

Lawyers and everyone else tend to be loyal to the person who pays them, more than to the person supposedly served. As an example, I think that Columbia Legal Services, funded (improperly) by the Supreme Court through IOLTA, is not likely to challenge the authority of the Supreme Court too aggressively. No lawyer paid by a court will aggressively challenge the authority of the court.

The same is true if the lawyer is paid by the legislature or the executive; the lawyer will not challenge the authority of the legislature or executive.

But lawyers do only two things: they ask the court to take money from people, or they defend against it. (They similarly ask the court to take liberty from people.) Often, it is government lawyers asking the court to take money or liberty from someone. Tort lawyers ask the court to order the defendant to give the money of the defendant (who is usually the taxpayer or the public) to them and their client. Defending against all this is what lawyers do. It is important to have energetic, enthusiastic and motivated lawyers to defend against all this, and this means lawyers not paid by political entities. I think the con-

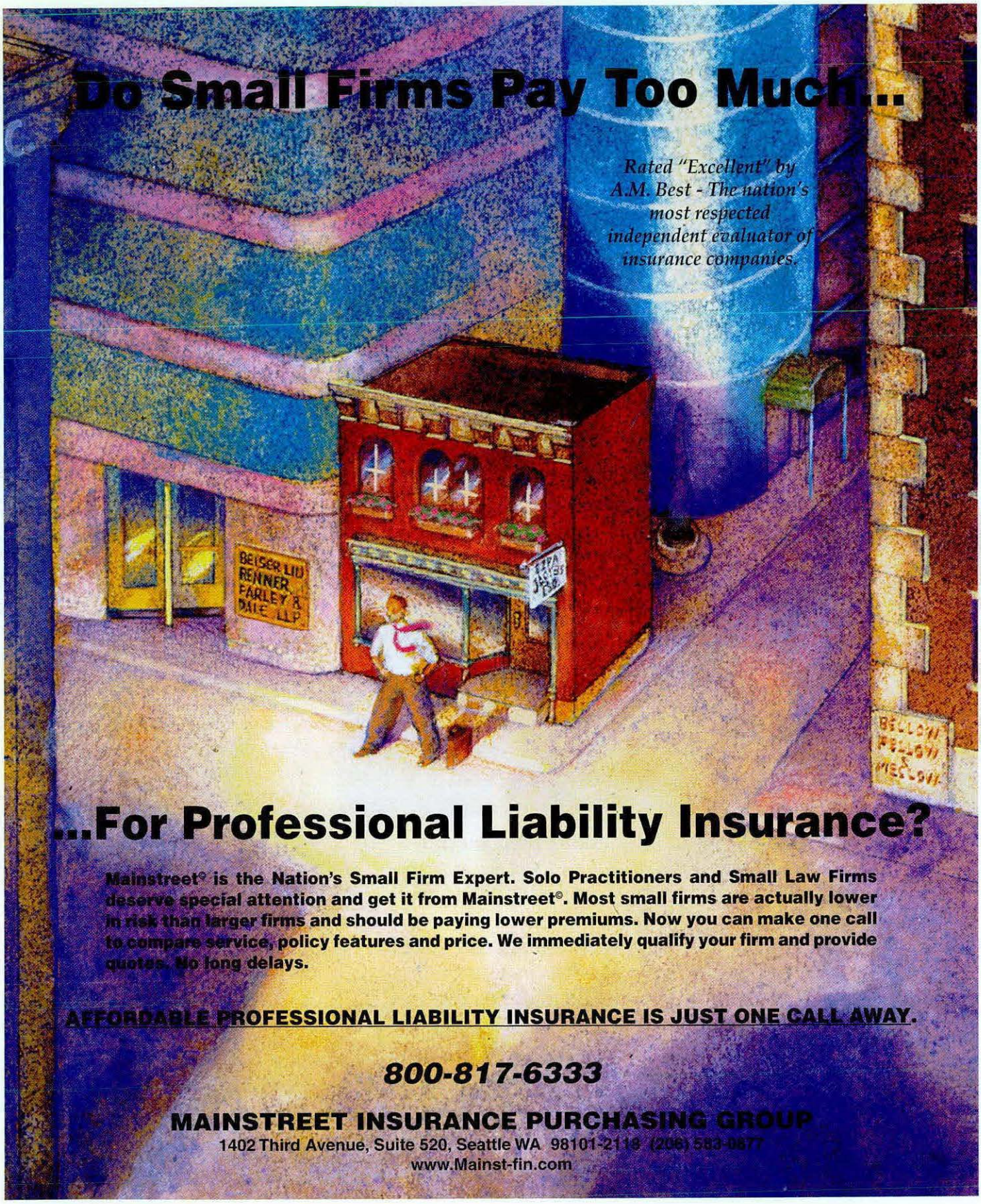
stitution contemplates this lawyer function, because it specifically refers to the right of counsel to defend against the power of state and court, and to the right to a jury, which implies the right to a lawyer to defend civil actions. The jury as a representative of the public is a further bulwark against executive and judicial government. But, I have to admit I have found no support for this role of lawyers either in the Federalist papers or in the Declaration of Independence.

Gerry Spence, in his book "How to Argue and Win Every Time," talks about how the lawyer's vitality and beliefs show through to the jury even if his grammar is bad, his sentences are distorted, and his voice is cracking. He is right. A lawyer should care about the client, but the lawyer will care primarily about her personal concerns and her financial well-being, i.e., job, if she is paid by someone else. That someone else is necessarily a governmental agency or delegate which always has its own institutional ideology, its own desire to survive and its own desire to increase its power. Therefore every lawyer who works for a public agency such as Columbia will owe her allegiance not to the client but to her employer and to her employer's ideology, desire for power and desire to survive. Columbia, as a matter of fact, seems to reflect this, directing most of its attention to welfare entitlement and political cases, all congruent with Columbia's political views.

Public funding of lawyers is a bad way to operate a system of justice. Mr. Schroeter might talk about the helpless litigant, the person who cannot take care of herself. This is really an argument about welfare, a huge topic, but there are a few points that I think bear on this. The availability of welfare surely encourages people to rely on it and not prepare for times of need, and this is not good. Specifically, the availability of welfare discourages people from learning job skills in school, so they can protect themselves in the future, and it discourages parents from encouraging their children to learn in school, so their children will survive and prosper. Also, welfare is based on taxes. A tax which helps one person forces another into poverty, and it encourages people to be tax evaders. This is not good. Each little tax adds to all the other little taxes to make a burden which hurts everyone.

The claim for free legal services is different in different contexts. Some legal interests are different from others. When people seek something such as a dissolution, it is a benefit, or a change of status, which is no different from any other benefit, and so the case saying a party has a right to a free divorce filing fee, which is a user fee, is wrong. This is quite different from being the party that another party is trying to take something — money or liberty — from.

Divorce, where each party tries to take something from the other: the best case for public paid civil lawyers. What is best in divorces? Judges are elected and the voting public cares about a fair verdict if there is a disparity between lawyers and unrepresented parties. Most judges do try to accommodate unrepresented parties, partly because they have to answer to the electorate. A person who goes to school will be better able to represent herself in court, so here again is the inducement to go to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school and learn. In general, people have far better survival skills than Mr. Schroeter gives them credit for. In many cases, there is an estate which can be used for fees, as long as this option is not regulated out of existence by the WSBA. Also, most people have the ability to consult a lawyer even if they cannot hire one for court. Also, the executive branch can intervene in divorces and participate as needed to protect economic and child welfare interests, and in fact, years ago, the prosecutor was a statutory party to all divorces.

These are all amelioratives, my word, to the demand for publicly supported lawyers, and yet there is potential for things to go wrong when a pro se opposes an attorney. On the other hand, there is a potential for things to go wrong when the lawyer for the impoverished wife answers to two masters, a political employer and a client. The Bar, by the way, makes it harder to be loyal to the client by promoting a list of politically correct positions which lawyers oppose on penalty of possible disbarment. It is difficult to be loyal to the client in the enthusiastic way I have described above if the client is not only politically incorrect in the eyes of the WSBA, but also in the eyes of the lawyer's employer.

One could ask the impossible about dissolution: what the quality of justice in divorce was like in the days before Evergreen Legal Services and what it was like during their regency? The answer to that question would tell us whether there should be any kind of Evergreen Legal Services at all.

There is always a sort of moral tone to the call for more publicly paid legal services. I think this is wrong. After all, publicly paid lawyers make a living at someone else's expense. There is no market system to prove that they provide service worth their tab, and there is no mechanism to prevent them from using their position to promote their personal agendas. The Bar should reject this attempt to diminish the legal profession.

Roger B. Ley
Seattle

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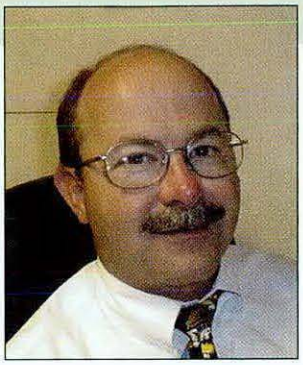

"I Hope You'll Come Back"

by Jeff Tolman
Guest Editor

I got my hair cut recently. Not a big deal; not really even many hairs to chop off. Barbers don't lie awake at night wondering how they'll handle the chore if I stroll into their shop. Like many aspects of my life, this is not much of a challenge.

As cutting what's left of my locks is simple, there are three or four different local barbers I go to. Most recently I went to Sarah, a pleasant lady and a good barber. As always, she did a nice job on what hair I still have. As I paid her, Sarah said, "Bye," and I left — a short-haired, satisfied customer.

On my way back to the office, it struck me that Sarah never "closed the deal." If she had simply said, "I hope you'll come back in a few weeks and see me again," or "Come on back next time," to let me know she wanted my business, she would always cut my hair. The reason I shop around is because neither she, nor any of the other barbers in town, seems very enthused about having me as a regular customer.

So I took a look at how I treat my clients. Do I let them know that I appreciate their business, that I want to be their only lawyer, and that I don't want them to shop around?

My self-assessment wasn't what I'd hoped for. Though I always strive to be cordial and professional, too often I assume good work will, by itself, assure a client's return. Perhaps that was true in the old days when lawyers were revered and it was a seller's market. In the present buyer's market, consumers (like me with my haircuts) want something more. We want to be thanked, appreciated, romanced a little and asked to return. Good service and these expressions will almost always get a client or a long-haired customer back.

In the present buyer's market, consumers (like me with my haircuts) want something more. We want to be thanked, appreciated, romanced a little and asked to return.

In response, I decided to make a special effort to get my clients to return. Each client was greeted with an enthusiastic handshake and welcome. My staff and I decided to take an extra minute to talk to clients in the office. We had laminated cards made for clients' estate planning documents: "My Original Will, Directive to Physician and Durable Power of Attorney are at Tolman Kirk." I made sure to thank my clients after each appointment. I let new clients know there are a lot of fine lawyers around, that I appreciate their business, and that I want to be their lawyer — their only lawyer — forever.

As I thought about appreciation of customers, I recalled my first doctor's appointment in Poulsbo, a routine visit. At the end of my exam, the doctor asked, "Do you have any questions?"

"Yes," I responded, "What is your home telephone number?"

"WHAT?" the doctor asked.

"Your home telephone number. If I'll trust you with my health, I certainly would expect you to trust me with your home phone number."

"You're kidding."

"Not at all," I replied. "If you won't give it to me, I'll find a doctor who will."

Begrudgingly, he gave me the number and has been my doctor ever since. I have never called him at home. He had shown me that he was willing to make some effort to keep my business. That's all I needed to know.

A client came in for a will today. Not a big deal — not many assets to distribute. I had not lain awake last night wondering how to handle the case. When she left, I thanked her and let her know I appreciate having her business and want her to see me if she has future legal needs. Next time, maybe I'll ask if she knows a good barber.

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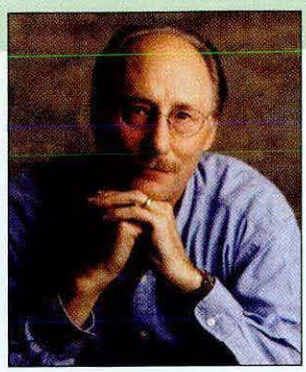

Criminal Lawyers: You Have to Love Them!

by Richard C. Eymann
WSBA President

I had lunch the other day with one of my long-time colleagues who often frequents state district courts and whose practice involves a large amount of criminal defense work. My friend is one of that wonderful breed of lawyers who devote themselves to protecting the rights of those who run afoul of the government. I was surprised to learn that approximately 40 percent of his cases, in one form or another, involve the charge of "driving while license suspended (DWLS), third degree." He told me this specific area of criminal defense work has seen a 10-fold increase in the past three years. He went on at length about the injustice of this charge, which includes the suspension of a person's driver's license if outstanding speeding tickets are not paid within 30 days. I also learned this new twist. Any car driven by a person with a suspended license can be impounded up to 90 days, even if the actual car owner did not know that the person driving did not have a valid driver's license. He told me, "Yeah, Dick, my [expletive deleted] car was impounded last week!" and continued on.

Being any type of criminal lawyer these days ... has got to be extremely hectic and very demanding of time and mind. Those who make a career in this area are, indeed, a very special breed.

"Recently, I had a client who didn't have any money, but he offered, and I agreed, to let him work on my truck to pay his fee. He owns a repair shop down the street and employs many mechanics, and I didn't think much about it. Plus, my old Ford truck needed a little work. Well, he called me one morning a couple of days after I dropped off the truck. One of his employees was test-driving the truck after the repairs were made and was pulled over for having a taillight out. As it happens, this mechanic had an unpaid speeding ticket — you only get 30 days to pay those tickets now — and his license was suspended in the 'third degree.' Apparently, unbeknownst to my client, his mechanic had failed to pay a previous speeding ticket. My truck was impounded! Well, gall darn it, Dick, I figured I'd go down to the towing yard and tell them I didn't know anything about it and get my truck back. After all, it was not my fault the mechanic has had some problems with this DWLS law. Boy, was I in for a shock! It turns out that according to this law, unless I am married to this n'er-do-well or unless I am a bank, the current law has no provision for getting my truck back." He then unloaded his "true" feelings about the matter. "I tell you, I don't know what's going on in Olympia, for crying out loud! They've forgotten about the Constitution. They've forgotten that before they take a person's property, there must be due process and some kind of reasonableness in the law. In their zeal to catch people who haven't paid their speeding tickets in 30 days, they've completely lost their minds."

I took my friend's comments with a grain of salt and assured him it couldn't be that bad. In any event, he'd have his truck back in time for next year's elk season. I was certain the legislature could not have set up a scheme without safeguards for all those concerned, even knowledgeable criminal defense attorneys. But, I looked up RCW 46.55 and saw that he was right; the law does not have any provision for people caught in this situation. I also found out that impounding was implemented to save the government the cost of jail time. The ironic twist is its financial impact on innocent people.

In addition, my attorney friend told me of a situation where a young Russian immigrant came to him and told him he had purchased his dream car, a used Cadillac, for $22,000, and had it fully insured. While out of town, he loaned it to his uncle, who had assured him he had a driver's license. Apparently, this uncle deceived the young man. Although the uncle showed him a license which indicated that everything was fine, he was really a third-degree DWLS. The young man said that after the uncle was pulled over, his dream car had been towed and would be impounded for 90 days. He was also told that he must pay, in advance, half of the total amount of the impound storage fees and tow charges, which amounted to approximately $2,200, in order to save his car from being sold at auction. My friend tells me that the vehicle may be redeemed only by the registered owner, the legal owner, a person authorized in writing by the registered owner, the vehicle insurance company, or by someone who has purchased the vehicle with proof of purchase (RCW 46.55.120(1)(a)). He went on to say, "The kicker is that the person has to pay all of the towing and

storage fees that would accrue within the impound period in order to redeem the vehicle. The penalty, even for those who are guilty of not paying a speeding ticket, is ridiculously severe."

At the end of lunch, my buddy got up, slammed down what was left of his coffee, and declared, "This law has a profound economic impact, not only on the targeted drivers, but on their families, other drivers in the household and often on innocent people like me." He added, "I'm not too worried about it for myself. I enjoy the benefits of being an attorney and I really can't complain when I'm a victim of the system. But, can you give me a lift? It will be a couple of weeks before I can get my truck back, and I need to be at the district court for eight misdemeanor cases at 1:30."

Driving back from the courthouse, I thought about my friend's criminal law career. Being any type of criminal lawyer these days, prosecutor or defender, has got to be extremely hectic and very demanding of time and mind. Those who make a career in this area are, indeed, a very special breed. Handling the hundreds of cases they face at any one time is a feat easily ignored by not only civil attorneys, but the public as well. I know many of these dedicated men and women often work for free (clients cannot pay), while prosecutors and public defenders work many hours beyond what their salary provides in compensation. The next time you talk to one of your criminal law compatriots, ask them how it's going and let them know how appreciative you are of their gift to our profession and to society. Who knows, he or she may also need a lift to the courthouse.

Next month: Proposal adding two members to our WSBA Board of Governors and Celebration 2000 update.

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CHANGE: It's Not a Choice

by Jan Michels
WSBA Executive Director

Only a person who *sees* the future can *seize* it. That was the theme of a two-day futurist conference that WSBA President Richard Eymann and I attended. The speakers were world-renowned portenders of the future: Tom Peters, Gary Humel, Roberta Katz, Malinda Brow (Lotus General Counsel) and Barrie Melancon (CEO of the American Institute of Certified Public Accountants). There were prolific notes, notebooks, books and summaries prepared by the speakers and attendees; most will soon be available on the Web (www. futurelaw. com).

The problem, as I see it, is the same problem the futurists talked about — *too much* information. The dilemma: how to sort it into "what is relevant to me today" and "what should I know and do, right here and right now"? The challenge: to accommodate and cope with the swiftly changing norms of this new *information age.* Following is my best effort to relate the content of the presentations.

Many services that used to be intellectual capital for doctors, lawyers and accountants have become commodities accessible or purchasable without professional intervention. The concept is called *commodification.*

NEW NORM: *No Command, Intelligence, Argument, Rationalization, Logic, Plea or Prayer Can Stop this Change*

The change from the industrial age to the information age is as tumultuous as was the change in the 19th century from the agrarian age to the industrial age. We are less than half way into the massive social and economic changes that produce the shifting base of how we work and live. We are becoming a knowledge-based world. Everyone with a computer and an Internet connection has access to all the raw knowledge that used to be the market base of an educated elite. Databases, spreadsheets, decision grids, step-through "how-to" programs and websites are making it easy for consumers to help themselves to services and advice. Many services that used to be intellectual capital for doctors, lawyers and accountants have become commodities accessible or purchasable without professional intervention. The concept is called *commodification.*

... So NOW WHAT?!

Reinvent law practice to be consumer driven. Package services around the commodity of forms packages, do-it-yourself wills, Internet divorce kits and instruction kits. *Add the value of innovation and judgment to commodities.*

NEW NORM: *Talent, Nimble Thinking, Creativity and Innovation are the Market Values of the Future*

Incumbency and history are no longer important; heritage is no longer destiny. The market is going to those who innovate new ways to get the consumer what they want. Cottage industries in information brokering, funneling and packaging are *hot.* "Stare decisis" is a dangerous enemy of adaptability to the future. The "client environment" is very different from firm and law school dynamics and education. A serious problem is that the law profession does not attract or retain the creative innovator.

... So NOW WHAT?!

Become a novelty addict. Find ways to include, in strategic thinking, wide swaths of diverse groups in age, culture, goals and points of view. Don't discount foreign ideas. Adapt to new market pressures rather than resist them.

NEW NORM: *The Internet is Ruler*

Unique and new types of relationships, both social and economic, exist on the Net. The Internet removes the need for a third party between the consumer and service, whether the service is advice, purchasing, information brokering or referral. The Internet has also created a habit of immediacy; it has opened the public to the expectation that they have a right to all the information they desire — and it should be free! This has demystified the law, medicine and other professional knowledge bases. Lawyers who have banked on the mystique of the law and have seen their roles as cornering certain information will find themselves without their unique edge and identity.

... So NOW WHAT?!

Get to understand the religion/philosophy/economics/culture of the Internet. Nothing beats getting out there! Listen to 20-year-olds who have grown up with these new norms; talk about their expectations and service needs. Ennunciate the real value which lawyers represent.

NEW NORM: *Flex-time, Flex-place and Virtual Firms Will Meet Consumer Demands*

Future viability will require adaptability, ditching the concepts that clients must come to the lawyer, that hours measure value, that a traditional day meets consumer demands, and that consumers will wait for services.

... So NOW WHAT?!

Lawyers must move toward "24 x 7" (24 hours a day, seven days a week) presence and availability. They must develop a sense of urgency to their practice, add excitement and spirit to their customer relations and marketing techniques.

NEW NORM: *Looking Backward, Circling the Wagon; Protectionistic or Monopolistic Thinking Will Put Others into the Driver's Seat for the Future of the Practice of Law*

Consumer demand will drive what the future of law practice looks like. Consumers are done with mystique, monopolies, patronization and rigid forms of service delivery. They will take their business to those lawyers and firms that ask them, "How can I help *you* solve this problem?" and offer, "Here are possible tools; let's see what fits," and "Here is how you can save yourself some money," or "Here is a place to get other information."

... So NOW WHAT?!

Define what lawyers do to protect rights and resolve disputes. Be clear and simple about how that can be done. Unbundle total representation into component parts. Be flexible and forthcoming about what consumers can do themselves and what value a lawyer can add. Avoid giving the impression that "only a real lawyer can do that," or "just let me handle it; you don't need to understand or participate."

NEW NORM: *Consumers Will Become Their Own Middle Person and Drive the Market Directly*

Consumers are developing the Internet habits of finding their own information, customizing their product requests, and choosing from a vast array of places to do business. They are skipping car dealers, bookstores, libraries and professional offices in favor of direct source information and products. They don't want or need "relationships" with service or product vendors unless the relationship with a person adds value to the product.

... So NOW WHAT?!

Reinvent how legal services are offered. Package them; customize them; offer bundles, options and choices to consumers for flat rates. Encourage consumers to participate in tailoring a legal package that will meet their needs at the lowest possible cost.

Can we, together, *seize the future* before the future norms seize the profession?

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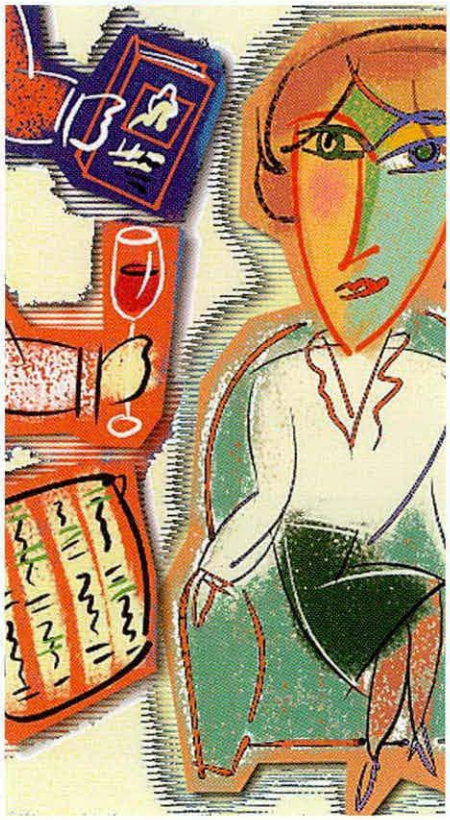
Money and Ethics:

THE YOUNG LAWYER'S CONUNDRUM

Courses on legal ethics are among the least popular courses in the law school curriculum, even less popular than courses on taxation. Nothing makes a law student's eyes glaze over as quickly as the phrase "legal ethics." There are many reasons for this, but the most important is probably that law students do not think they will become unethical lawyers. Students think of unethical lawyers as the sleazeballs who chase ambulances (think Danny DeVito in *The Rainmaker*), run insurance scams (think Bill Murray in *Wild Things*), or destroy evidence (think Al Pacino's crew in *The Devil's Advocate*). Students have a hard time identifying with these lawyers. When students think of life after graduation, they see themselves sitting on the 27th floor of some skyscraper in a freshly pressed dark suit doing sophisticated legal work for sophisticated clients. Students imagine that such lawyers do not have to worry about ethics.



by Patrick J. Schiltz

In fact, as I tell the students I teach, they will probably begin to practice law unethically in at least some respect within their first year or two in practice. This happens to most young lawyers. It happened to me, and it will happen to my students, unless they do something about it.

Let's first be clear on what I mean by practicing law unethically. I mean three things. First, a lawyer has to comply with the formal disciplinary rules — in most states, the Model Rules of Professional Conduct. This is necessary, but far from sufficient. Complying with the formal rules will not make an attorney an ethical lawyer, any more than complying with criminal law will make him an ethical person.

Second, a lawyer must act ethically in his work, even when he isn't required to do so by any rule. To a substantial extent, formal disciplinary rules have lost touch with ordinary moral institutions. To practice law ethically, an attorney must practice law consistently with those institutions. For the most part, this is not complicated. Treat others as you wish to be treated. Be honest and fair. Show respect and compassion. Keep promises. Being an ethical lawyer is not much different from being an ethical doctor or mail carrier or gas station attendant.

Third, a lawyer must live an ethical

life outside of work. Many successful lawyers ignore this point. So do many law professors who, when writing about legal ethics, tend to focus solely on the lawyer at work. But being admitted to the bar does not absolve a lawyer of his responsibilities outside of work — to his family, friends, community and, if he is a person of faith, to his god. To practice law ethically, he must meet those responsibilities, which means he must live a balanced life.

It is hard to practice law ethically. Complying with the formal rules is the easy part. The rules are not very specific and they don't demand very much. Acting as an ethical lawyer in the broader, non-formalistic sense is far more difficult. Most of a lawyer's working life is filled with the mundane. It is unlikely that one of his clients will drop a smoking gun on his desk, or ask him to deliver a briefcase full of unmarked bills, or invite him to have wild, passionate sex. These things happen to lawyers only in John Grisham novels. The typical lawyer's life is filled with the kind of things that drove John Grisham to write novels: dictating letters, talking on the phone, drafting memoranda, performing "due diligence," proofreading contracts, negotiating settlements and filling out timesheets. Because a lawyer's life is filled with the mundane, whether he practices law ethically depends not upon how he resolves the one or two ethical delimmas he will confront during his entire career, but upon the hundreds of little things he does. When a lawyer is on the phone negotiating a deal, or when he is at his computer drafting a brief, or when he is filling out his timesheet at the end of the day, he is not going to have time to reflect on each of his actions. He is going to have to act almost instinctively.

What this means is that an attorney will not and cannot practice law ethically unless acting ethically is habitual for him. He has to be in the habit of being honest. He has to be in the habit of being fair. He has to be in the habit of being compassionate. These qualities have to be deeply ingrained in him, so that he can't turn them on and off. Acting honorably is not something he has to *decide* to do, so that when he is at work he will automatically apply the same values in the workplace that he applies outside of work.

Here's the problem, though: A young person who begins practicing law today will find himself immersed in a culture that is hostile to the values with which he was raised (unless he was raised to be rapaciously greedy), for the defining feature of the legal profession today is obsession with money. Now, almost all lawyers work for money. But there seems to be widespread agreement that something has changed in the past decade or two.

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Many commentators have lamented the increasing commercialization of the legal profession, but few have captured the extent of this affliction. Perhaps that is because it almost defies description. How can one explain why so many attorneys lead absolutely miserable lives so that they can earn very, very large salaries instead of just very large salaries? Young lawyers find themselves under tremendous pressure to act in ways that make money for their firms, their clients and themselves.

The pressure is usually not direct. No one takes a young lawyer aside and says, "Jane, we here at Smith & Jones are obsessed with money. From this point forward the most important thing in your life has to be billing hours and generating business. Family and friends and honesty and fairness are okay in moderation, but don't let them interfere with making money." No one tells a young attorney, as one lawyer told another in a Charles Addams cartoon, "I admire your honesty and integrity, Wilson, but I have no room for them in my firm." Instead, the culture pressures young lawyers in more subtle ways to replace their values with the system's values.

Here is an example of what I mean: During his first month working at a law firm, a young associate will be invited by some senior partner to a barbecue at his home. This "barbecue" will bear absolutely no relationship to what the associate's father used to do on a Weber grill in their driveway. The associate will drive up to the senior partner's home in his rusted Escort and park at the end of a long line of Mercedes Benzs, BMWs and sport utility vehicles. The house will be enormous. The lawn will look like a putting green, and be bordered by perfectly manicured trees and flowers. He will walk through the rooms, each of which will be decorated with expensive carpet and expensive wallpaper and expensive antiques. As he enters the partner's immaculately landcaped backyard, he will be offered pâté or miniature quiche or shrimp and be given a drink of the most expensive brand of whatever liquor he likes. In the corner of the yard, a caterer will be grilling swordfish. In another corner will stand the senior partner, sipping a glass of white wine, holding court with a worshipful group of junior partners and senior associates. After a couple of hours, the associate will walk out the front door, slightly tipsy from the free liquor, and say to himself, "This is the life."

In this and a thousand other ways, young lawyers absorb law firm culture — a culture of long hours of toil inside the office and short hours of conspicuous consumption outside the office. They work among lawyers who talk about money constantly and who are intensely curious about how much money other lawyers are making. Any lawyer who wants to get some sense of this should leave his tax return on the photocopier glass sometime. (At least one hapless lawyer seems to do this every spring at most firms.) Every lawyer in the firm will know how much money the lawyer made last year in about 15 minutes, and every lawyer who joins the firm during the next quarter-century will hear the story of the lawyer's tax return.

Twenty years ago, talking about income and clients and fees just wasn't done, even within the huge Wall Street law firms. Today, it sometimes seems that lawyers talk of little else. Just about every issue of the *National Law Journal or the American Lawyer* includes at least one article about how much money some law-

yer somewhere is making. A couple of times a year, these journals publish extensive surveys of lawyers' incomes, focusing in particular on the incomes of associates and partners in big firms. These surveys are pored over by lawyers with the intensity of kids poring over the statistics of their favorite baseball players.

Law firm culture also reflects the many ways in which lawyers who are winning the game broadcast their success. A first-year male associate will buy his suits off the rack at a department store. A couple of years later, he'll be at Brooks Brothers. A few years after that, a salesperson will come to his office with tape measures and fabric swatches in hand. Similar ostentatious progress will be demonstrated with regard to everything from watches to cell phones to running shoes to child-care arrangements to private social clubs. When lawyers speak with envy or admiration about other lawyers, they do not mention a lawyer's devotion to family or public service, or a lawyer's innate sense of fairness, or even a lawyer's skill at trying cases or closing deals, nearly as much as they mention a lawyer's billable hours, stable of clients or annual income.

It is very difficult for a young lawyer immersed in this culture day after day to maintain the values he had as a law student. Slowly, almost imperceptibly, young lawyers change. They begin to admire things they did not admire before, be ashamed of things they were not ashamed of before, find it impossible to live without things they lived without before. Somewhere, somehow, a lawyer changes from a person who gets intense pleasure from being able to buy his first car stereo to a person disappointed with a $100,000 bonus.

As the values of an attorney change, so too does his ability to practice law ethically. The process I have described will obviously push a lawyer away from praticing law ethically in the broadest sense — that is, in the sense of leading a balanced life and meeting non-work-related responsibilities. When work becomes all-consuming, it consumes all. If a lawyer is working all the time, he cannot meet other responsibilities that require any appreciable commitment of time or energy. This much is obvious. Absorbing the values of law firm culture, however, will also push a lawyer away from practicing law ethically in the narrower sense of being honest, fair and compassionate. In the highly competitive, money-obsessed world of law firm practice, most of the incentives push lawyers to stretch ethical concerns to the limit.

Of course, unethical lawyers do not start out being unethical. They start out just as my students do, as perfectly decent young men or women who have every intention of practicing law ethically. And unethical lawyers do not become unethical overnight, but a little bit at a time. They do not become unethical by shredding incriminating documents or bribing jurors. They become unethical just as my students are likely to — by cutting a corner here, by stretching the truth a bit there.

For the typical young attorney, acting unethically starts with his timesheets. One day, not too long after he starts practicing law, he will sit down at the end of a long, tiring day and he just won't have much to show for his efforts in terms of billable hours. It will be near the end of the month. He will know that all of the partners will be looking at his monthly time report in a few days, so what he'll do

Unethical lawyers do not start out being unethical. They start out just as my students do, as perfectly decent young men or women who have every intention of practicing law ethically. And unethical lawyers do not become unethical overnight, but a little bit at a time.

is pad his timesheet just a bit. Maybe he'll bill a client for 90 minutes for a task that really took him only 60 minutes to perform. He will, however, repeatedly promise himself that he will repay the client at the first opportunity by doing 30 minutes of work for the client for "free." In this way, he'll be "borrowing," not "stealing."

Then what will happen is that it will become easier for the young lawyer to take these little loans against future work. And after a while, he will stop paying back these little loans. He will convince himself that, although he billed for 90 minutes and spent only 60 minutes on the project, he did such good work that his client should pay a bit more for it. After all, his billing rate is awfully low, and his client is awfully rich.

And then he will pad more and more. Every two-minute telephone conversation will go down on his timesheet as 10 minutes, every three-hour research project will go down with an extra quarter-hour or so. He will continue to rationalize his dishonesty to himself in various ways until one day he stops doing even that. And, before long — it won't take him much more than three or four years — he will be stealing from his clients almost every day, and he won't even notice it.

And just as easily, the young lawyer will also become a liar. A deadline will come up one day, and for reasons that are entirely his fault, he won't be able to meet it. So he will call his senior partner or his client and make up a white lie about why he missed the deadline. And then he will get busy, and a partner will ask whether he proofread a lengthy prospectus and he will say yes, even though he didn't. And then he will be drafting a brief and he will quote language from a Supreme Court opinion even though he will know that, when read in context, the language does not remotely suggest what he is implying it suggests. And then, in preparing a client to answer a difficult question that will likely be asked, he will create an answer that will be "legally accurate" but that will mislead his opponent. And then he will be reading through a big box of his client's documents, a box that has not been opened in 20 years, and he will find a document that would hurt his client's case. Because no one knows it exists, he will simply "forget" to produce it to his opponent.

After a couple of years of this, the young lawyer won't even notice that he is lying and cheating and stealing every day that he practices law. None of these things will seem like a big deal individually — an extra 15 minutes added to a timesheet here, a little white lie to cover a missed deadline there. But after a while, the young lawyer's entire frame of reference will change. She will still be making dozens of quick, instinctive decisions every day. But those decisions, instead of reflecting the notions of right and wrong by which she conducts her personal life, will instead reflect the set of values by which she will conduct her professional life, a set of values that embodies not what's right or wrong, but what is profitable, and what she can get away with. The system will have succeeded in replacing her values with the system's values, and the system will be profiting as a result.

How can a young lawyer avoid this fate? The most important thing, I tell my students, is to avoid getting sucked into the game. Don't let money become the most important thing in your life. Don't fall into the trap of measuring your worth as an attorney, or as a human being, by how much money you make. If a lawyer lets his law firm or clients define success for him, they will define it in a way that is in their interests, not his. It is important for them that his primary motivation be making money and that no matter how much money he makes, his primary motivation continues to be making money. If he ends up as an unhappy

or unethical attorney, money will most likely be at the root of his problem.

Young lawyers need to understand that they cannot win the game. If a young lawyer falls into the trap of measuring his worth by money, he will always feel inadequate. There will always be a firm paying more to its associates than his firm. There will always be a firm with higher per-partner profits than his firm. There will always be a lawyer at his firm making more money than he does. No matter how hard he works, he will never be able to win the game. He will run faster, but there will always be a runner ahead of him, and the finish line will never quite come into view. That is why the game will make his clients and partners so rich, and make him so unhappy.

When we were children, most of us were told by our parents and grandparents that money does not buy happiness. They were right. Even scientists now say they were right. In part, they were right because much of what determines whether we will be happy is outside our control. We cannot control our genetic makeup, upon which happiness seems in part to depend (according to recent studies). Nor can we control many of the events in life that, for better or for worse, will affect our subjective well-being. For example, we can't control whether we will be permanently injured in a car accident or whether our spouses will perish at a young age. But the main reason our parents or grandparents were right about money not buying happiness is because it's true.

Research has shown that with the exception of those living in poverty, people are almost always wrong in thinking that more money will make them happier. Once people are able to afford the necessities of life, material wealth matters surprisingly little. When people experience a rise in income, they quickly adjust their desires and expectations accordingly, and conclude, once again, that more money will bring them happiness. Thus, when more money means more work, money not only fails to buy happiness, but it actually buys unhappiness.

Law students and young lawyers, particularly those who have enjoyed academic success at the best schools, have to get their priorities straight. It saddens me that the objects of envy and admiration of so many of my students today are not lawyers like Thurgood Marshall or Charles Hamilton Houston — lawyers who sacrificed much personal gain to do much public good — but rather the nameless, faceless attorneys who populate giant law firms, grinding out thousands upon thousands of billable hours, often toward no end other than getting rich and determining whether one huge corporation will have to write out a check to another huge corporation.

Law students and young lawyers have to stop seeing workaholism as a badge of honor. They have to stop talking with admiration about lawyers who bill 2,500 hours per year. Attorneys whose lives are consumed with work, who devote endless hours to making themselves and their clients wealthy at the expense of just about everything else in their lives, are not heroes. And that is true whether the lawyers are workaholic becuase they truly enjoy their work, because they crave wealth, or because they are terribly insecure. At best, these attorneys are people with questionable priorities. At worst, they are immoral. There are certainly better lawyers after which to pattern one's professional life.

Law students and young lawyers must consider the costs, as well as the benefits, of private practice. The benefits of big-firm life — the high salaries, the plush offices, the conspicuous consumption — are paraded before young lawyers and are easy to understand. Any law student can divide $90,000 by 12, subtract 40 percent for federal and state taxes, and fantasize about how he will spend $4,500 a month. By contrast, the *costs* of big-firm life are not paraded before young lawyers and are not fully appreciated until a lawyer actually works at a large firm. But the costs are just as real as the benefits.

I tell my students that when they are at that barbeque at the senior partner's house, instead of wistfully telling themselves, "This is the life," they should ask the senior partner some questions. (I'm speaking figuratively here. My students probably shouldn't actually ask these questions aloud.) Ask that senior partner how often he sees the gigantic house in which he lives, how often he's actually sat on that antique settee in that expensively decorated living room. Then ask him when was the last time he read a good book, or watched television, or took a walk, or sat on his porch, or cooked a meal, or went fishing, or did volunteer work, or went to church, or did anything that was not in some way related to work.

That is the best advice I can give my students. Right now, while they are still in law school, they need to make the commitment not just in their heads, but in their hearts, that although they are willing to work hard and they would like to make a comfortable living, they are not going to let money dominate their lives to the exclusion of all else. And they must not simply structure their lives around this negative; they should embrace a positive. They must believe in something, *care* about something, so that when the culture of greed presses in on them from all sides, there will be something inside of them pushing back. They must make the decision now that they will be the ones who define success for themselves — not their classmates, not law firms, not clients of law firms, not the *National Law Journal.* They will be happier, healthier and more ethical attorneys as a result.

I know of what I speak. I had my pick of high-paying, big-city, big-firm jobs in 1987 as I was completing a clerkship with Supreme Court Justice Antonin Scalia. In fact, many big firms were supplementing their usual astronomical salaries with special bonuses for Supreme Court clerks. I decided to turn down the big money and return home to Minnesota, where I joined a large firm with a reputation for treating people well. Within a couple of years, I was married and our first child was on the way.

I had every intention of leading a balanced life. And by New York or Washington standards, I suppose I did. By anyone else's standards, I did not. I worked three or four nights and one or two weekend days every week. When I was preparing for a trial or arbitration or appellate argument, I worked almost around the clock. I put hundreds of hours into business development, and, within three years or so, had created a self-sustaining practice. I traveled constantly. What I remember most about the times my children first talked or walked or went to the potty was the hotel room in which I was sitting when my wife *told* me about the event over the phone. I was in Seattle when my grandmother died. I was in Pittsburgh when the worst snowstorm of

the century trapped my family in our house for two days. I was in Williamsburg when my wife learned that our third child, with whom she was four months pregnant, had Down Syndrome. I failed miserably in my resolve to lead a balanced life, and neither my family nor I will ever be able to get back what we lost as a result.

My students may be able to do better than I did, but I wouldn't count on it. No matter how pure a young lawyer's intentions, no matter how firm his resolve, when he goes to work at a firm, the culture will seep in. I grew up in a lower-middle-class neighborhood. I literally never met anyone who could be characterized as wealthy. I almost never talked about money or thought about money. That all changed when I started practicing law, despite my best intentions. Slowly, imperceptibly, the things I cared about and the way I thought about others and the way I thought about myself changed. I got sucked into playing the game, and even today, four years after leaving the big firm, I still find myself playing the game at times.

Fortunately, though, I have learned that it is never too late to change, even when you've failed as much as I have. In 1994, my firm won a judgment for more than five billion dollars. We partners all knew that, if and when we collected that judgment, even the smallest partner's share would be a few hundred thousand dollars. Most of the partners would become millionaires. Because my wife and I would both be partners, we would enjoy two slices of this enormous pie. At about the same time of the verdict, my wife and I were beginning to feel that somewhere along the line we had lost our way. We were constantly feeling guilty about the hardships we were imposing on each other and on our children. The life we were leading was not the life we had envisioned. We had strayed from the values with which we were raised. In 1995, we decided to leave the firm and the money behind, so that we could accept appointments to the Notre Dame faculty. We decided to give up a ton of money in return for work that was more enjoyable and less stressful, and for more time with each other and our children. We decided all of this was more important than money, even lots of money.

I don't claim that we made an enormous sacrifice. We did give up a lot of money, but we still get paid well, and we have great jobs. Nor do I claim that we have stopped playing the game — that we have no regrets, that we never look back, that we don't care about money any more. None of that would be true. Living a balanced life and defining success for yourself are lifelong struggles, and they don't end once you leave a big law firm. The one thing I can promise my students is that as we rediscover every day, they are struggles well worth undertaking.

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Patrick J. Schiltz is associate professor of law at Notre Dame Law School. The preceding is adapted from "On Being a Happy, Healthy, and Ethical member of an Unhappy, Unhealthy and Unethical Profession," published in the May 1999 Vanderbilt Law Review, *and "Witness for the Prosecution," published in the Autumn 1999 issue of* Notre Dame Magazine.

Major Criminal Law Decisions of the United States Supreme Court's 1998-99 Term: Part II

by Craig Hemmens and Rolando V. del Carmen

This article continues a survey of United States Supreme Court cases handed down during the 1998-99 term (the first part of the survey was published in the December 1999 *Bar News*.) More than one third (27) of the written opinions handed down by the high court dealt with criminal procedure issues. As usual, several cases involved the interpretation of federal statutes, including the recently enacted carjacking statute and the Federal Death Penalty Act. The Court issued several major decisions interpreting the reach of the Fourth Amendment. These included the expectation of privacy in a home, an anti-gang loitering ordinance, and several issues arising from traffic stops.

Following is a continuation of the summary of significant criminal justice-related decisions, arranged alphabetically by subject. The case history, rationale of the Court and the vote totals are included.

Liability Under Section 1983

Conn v. Gabbert
67 USLW 4222 (1999)

Gabbert was a criminal defense attorney representing the ex-girlfriend of a man charged with murder. Prosecutors had reason to believe Gabbert had in his possession a letter written by the murder defendant to his ex-girlfriend, asking her to testify falsely at his upcoming trial. The prosecutors obtained a search warrant for Gabbert and executed it upon him as he was accompanying his client to the grand jury investigating her ex-boyfriend. Gabbert's client testified before the grand jury without the benefit of Gabbert's counsel, and Gabbert did not request that his client's testimony be delayed. The search turned up portions of the letter the prosecutors were seeking. Gabbert subsequently filed a Section 1983 action, alleging that the handling of the search violated his Fourteenth Amendment right to practice his profession without unreasonable governmental interference. He also alleged that the search violated his client's right to consult with an attorney. The district court granted summary judgment for the prosecutors on the ground that they possessed qualified immunity. The Ninth Circuit reversed, holding that the prosecutors were not entitled to qualified immunity because their intent was to prevent Gabbert from consulting with his client, and that such action was unreasonable.

The Supreme Court unanimously reversed the decision of the Ninth Circuit and held that the prosecutors' actions did not constitute a constitutional violation. Chief Justice Rehnquist's opinion for the Court held that while the 14th Amendment does create a general right to choose a profession, that right is not absolute, but instead subject to reasonable governmental regulation. The prosecutors' actions did not deprive Gabbert of his liberty interest in practicing law. The "brief interruption" of the search was reasonable. The Court also dismissed Gabbert's claim that the search violated his client's rights, noting that he lacked standing to raise the issue. The proper basis for a challenge to the manner of execution of the search warrant is the Fourth Amendment, not the Fourteenth Amendment. Additionally, the Court noted that it has never held that a grand jury witness has a constitutional right to consult with an attorney present outside the jury room, but declined to decide this issue. Many jurisdictions allow counsel to be present outside the grand jury room; this opinion may invite challenges to that practice. 9-0 decision.

Haddle v. Garrison
67 USLW 4029 (1998)

Haddle cooperated with federal law-enforcement agents in an investigation of his employer for Medicare fraud. After being named as a potential witness in the criminal trial, he was fired by his employer. Haddle brought suit under 42 U.S.C. 1985, which prohibits conspiracies to deter or intimidate witnesses. He alleged he was fired in retaliation for his cooperation with the federal investigation, and that his firing was an attempt to intimidate him and influence his trial testimony. His employer sought dismissal of the suit on the ground that Haddle had failed to state a claim for relief, as the statute required that the complaint state an injury to person or property. The Eleventh Circuit upheld the dismissal of the lawsuit.

The Supreme Court, in a unanimous opinion authored by Chief Justice Rehn-

quist, held that interference with employment was sufficient to state a claim for relief, even though the employment was "at-will" and not a constitutionally protected property right. He noted that the purpose of the statute was to prevent witness intimidation and harassment, and that limiting claims to injury to person and property unduly limited the clear intent of the statute. 9-0 decision.

West Covina, California v. Perkins
67 USLW 4058 (1999)
Police officers acting pursuant to a search warrant for evidence in a murder case seized personal property from the home of Perkins, who was not home at the time of the search. In accordance with department procedure, the police left behind a notice that the search had taken place and a list of the items taken. The officers did not leave the search warrant number (it was under seal) or any information about how to reacquire the seized evidence. Perkins contacted the police department, where he was informed that he would have to obtain a court order authorizing the return of the property. Perkins did not obtain the order, instead filing a 42 U.S.C. 1983 suit in federal court claiming that his due process rights were violated because the police failed to provide him with information on how to obtain his seized property. The district court dismissed the suit, but the Ninth Circuit reinstated on the due process issue, holding that the city had an obligation to inform Perkins how to obtain his property. No other circuit had a similar requirement.

In a unanimous decision penned by Justice Kennedy, the Supreme Court reversed the Ninth Circuit and held that the due process clause does not require police agencies to provide property owners with instructions on how to go about seeking the return of legally seized property. Rather, the agency need only provide fair procedures for obtaining the property and notice that the property has been seized, both done in this case. Due process requires notice that items have been seized, so the owner will know who is responsible for the loss of property. Due process does not require, however, that the property owner be informed about how to get the property back. Justices Thomas and Scalia concurred in the judgment, but added that they believe due process does not require even the giving of notice. Instead, they asserted the proper basis for determining the propriety of the police officers' actions was under the Fourth Amendment reasonableness clause. 9-0 decision.

In* Wilson, *a team of federal and local law-enforcement officers permitted a local newspaper reporter and photographer to accompany them as they executed an arrest warrant for a fugitive at the home of his parents.

Wilson v. Layne and *Hanlon v. Berger*
67 USLW 4322, 4329 (1999)
These two cases dealt with the issue of whether police violate the Fourth Amendment when they allow media representatives to accompany them while they execute a warrant at a person's residence. In *Wilson*, a team of federal and local law-enforcement officers permitted a local newspaper reporter and photographer to accompany them as they executed an arrest warrant for a fugitive at the home of his parents. The group entered the house in the early morning but did not find the fugitive. Instead, they found his parents, still in bed and rather scantily clad. The news crew photographed the activity but never used the pictures. The parents filed

a Section 1983 action (against the state police) and a *Bivens* action (against the federal officers), alleging the law enforcement officers violated their Fourth Amendment rights by allowing the news media to witness the warrant execution. The Fourth Circuit held the officers were immune from liability. In *Hanlon*, a television news crew accompanied federal agents executing a search warrant at the ranch of a man suspected of poisoning eagles. He filed a *Bivens* claim, and the Ninth Circuit held that the police were liable, as no reasonable officer would have thought it appropriate to allow the news media to enter a private residence with them.

The Supreme Court, via Chief Justice Rehnquist, held that the Fourth Amendment does not permit police to bring along the press or any third party who is not a law enforcement officer, unless that person can aid in the execution of the warrant. The reasonableness requirement of the amendment requires that police actions in executing warrants be related to the objectives of the authorized intrusion. The majority opinion stressed the sanctity of the home and discounted the police argument that media ride-alongs serve an important public-relations function and help to discourage police misconduct. These law-enforcement interests did not override the right of privacy enjoyed by homeowners. The Court was careful to note that when third parties can aid in the execution of a warrant, as when the third party can identify property to be seized, that person may accompany the officers into a residence. The Court did not address the common police practice of allowing third person ride-alongs in public areas. Finally, while the Court held that the Fourth Amendment prohibits media ride-alongs in these cases, it also held that the police were not liable in *Wilson* or *Hanlon*, as the rule prohibiting ride-alongs was not "clearly established" at the time the warrants were executed.

In dissent, Justice Stevens agreed with the majority that the Fourth Amendment barred such media ride-alongs, but disagreed with the majority that the police were immune from liability due to a lack of awareness of the appropriate conduct. He argued that the rule was clearly established at the time of the raids, and that the officers were therefore not entitled to qualified immunity. 8-1 decision in *Wilson*; per curiam decision in *Hanlon*.

Prison Law

Martin v. Hadix
67 USLW (1999)

The Prison Litigation Reform Act (PLRA), passed by Congress in 1995, contains a number of provisions limiting the ability of inmate plaintiffs to file lawsuits. One provision of the PLRA limited the hourly rate for attorneys' fees for post-judgment monitoring services to $112.50 per hour. The plaintiffs in this case had contracted, prior to the enactment of the PLRA, to perform such services at $150 an hour. The attorneys performed work both before and after the passage of the PLRA. They argued that they were entitled to compensation at the higher rate, as they had signed the contract before the PLRA was enacted. The Sixth Circuit Court of Appeals held that application of the PLRA's cap on attorneys' fees was invalid because it would have an impermissible retroactive effect; other federal courts had held otherwise.

The Supreme Court reversed the Sixth Circuit. The majority opinion, written by Justice O'Connor, held that the PLRA could limit attorneys' fees for work performed after its enactment, even though

the work had been previously contracted at a higher rate. The majority refused, however, to limit fees for work done prior to the enactment of the statute. Justice Ginsburg dissented, arguing that permitting a limitation on fees after a contract had been signed interfered with the expectations of the lawyers, who could not ethically abandon the case and were thus forced to work for less than they had contracted for. 7-2 decision.

Search and Seizure Law

Florida v. White
67 USLW 4311 (1999)
Police officers observed White use his automobile to deliver cocaine, but they did not arrest him. Several months later, White was arrested at his workplace on charges unrelated to the drug transactions. The police seized his automobile from the parking lot where he worked, saying that it was an asset subject to forfeiture. This claim was not based on the crime for which he was arrested but on their prior observations. The police then conducted an inventory of the vehicle and found cocaine. White was subsequently charged and convicted on drug charges, based on the cocaine found during the inventory search. On appeal, White argued that the seizure and subsequent inventory search of his car violated the Fourth Amendment. Prior case law clearly established that police may search a car without a warrant when they have probable cause to believe the car contains contraband. White asserted that in his case the police lacked probable cause to believe the car contained contraband; instead the police merely believed the car itself was contraband. The Florida State Supreme Court held that the search was invalid because the police lacked an exigent circumstance to search the car.

In an opinion written by Justice Thomas, the U.S. Supreme Court reversed the state court. The majority opinion relied heavily on early American admiralty law as the basis for its holding that the police do not have to obtain a warrant before seizing an automobile from a public place, so long as they have probable cause to believe the car is forfeitable as contraband under the asset forfeiture laws. The majority refused to distinguish between probable cause to believe a car contains contraband and probable cause to believe the car is contraband. The dissent, by Justice Stevens, argued that the exigency so often present in vehicle searches was not present here because the conduct creating probable cause to believe the car was forfeitable contraband occurred several months prior to the actual seizure of the car. 7-2 decision.

Knowles v. Iowa
67 USLW 4027 (1998)
An Iowa police officer stopped Knowles for speeding. After issuing a speeding ticket, the officer ordered Knowles out of the car and searched it, finding marijuana. Knowles was then charged and convicted of drug possession. The officer searched the car under the authority of two state statutes: one which authorized police to either arrest or issue a citation for traffic offenses, and one which authorized police to conduct a "search incident to arrest" even in those situations where the officer chose not to actually take a person into custody but instead merely issue a traffic citation. The trial court and state supreme court upheld the search on the ground that a search incident to arrest is appropriate in any situation where an officer is authorized to arrest, even if an arrest does not actually take place.

The U.S. Supreme Court, in a unanimous opinion authored by Chief Justice Rehnquist, struck down the Iowa law as violative of the Fourth Amendment. The Court acknowledged that the "search incident" was a continuing exception to the rule requiring a warrant, but noted that the exception was created for two reasons: (1) to protect officers from a potentially armed person about to be taken into custody; and (2) to preserve evidence for later use at trial. Neither of these two justifications existed in this case. First, Knowles was not in custody. Second, it was unlikely that the search could turn up any evidence of speeding, the offense that Knowles was charged with when the search commenced. The court did not decide whether the search incident rationale would extend to situations where a state eliminated citations altogether and mandated custodial arrests for minor traffic offenses. Also unanswered was the issue of whether the court might extend the search incident exception to other situations where there is only the issuance of a citation (such as offenses more serious

than a traffic offense, where a stronger case can be made that the person might be a danger to the officer). The context and fact-specific language of the opinion leaves these issues unresolved. 9-0 decision.

Maryland v. Dyson
67 USLW 3770 (1999)
Maryland police received a tip from a reliable informant that Dyson would be returning to Maryland in an automobile containing drugs. The officers did not obtain a search warrant, but instead waited 13 hours for Dyson to drive by, stopped the car and searched it, finding cocaine. On appeal the state appellate court ruled that while the police clearly had probable cause to search the car, the search was unconstitutional because the police officers lacked an exigent circumstance justifying their failure to obtain a warrant.

The U.S. Supreme Court reversed in a brief per curiam opinion without benefit of briefing or oral argument. The majority reiterated that police may search a car without a warrant, so long as they have probable cause. The nature of the car creates an automatic exigency excusing the failure to obtain a warrant, even when there is time to obtain the warrant. Justices Stevens and Breyer dissented only from the summary nature of the decision, not on the merits. 9-0 decision.

Minnesota v. Carter
67 USLW 4017 (1998)
An anonymous informant notified an Eagan, Minnesota, police officer that he had just observed people in an apartment bagging cocaine. Following up on the tip, the officer walked to the window of the apartment and looked in. The blinds were closed, but the officer was able to see through a gap between the blinds, and observed two men and a woman, in fact, bagging cocaine. While the police were still in the process of obtaining a search warrant, the men left the apartment and drove away. The police stopped and arrested them and then returned to the apartment and arrested the woman. A search of the car and apartment revealed cocaine. At trial the men sought to have the cocaine found in their car and the apartment suppressed as the fruit of an unlawful seizure. They argued that the police officer who peered through the window violated the Fourth Amendment, as they had a reasonable expectation of privacy while in the apartment. The woman was renting the apartment, while the two men were there visiting from Chicago for the admitted sole purpose of packaging the cocaine. The trial court and state appellate court upheld the search, but the Minnesota Supreme Court reversed, holding that the Fourth Amendment applied to guests engaged in a "common task" with their host.

The U.S. Supreme Court, in an opinion by Chief Justice Rehnquist, reversed the state court and upheld the constitutionality of the police officer's actions in this case. According to the majority, the Fourth Amendment simply did not apply, as the officer's conduct did not constitute a search for Fourth Amendment purposes. In previous cases the Court has stressed that the Fourth Amendment applies not simply to places or things, but also when there exists a "reasonable expectation of privacy." In a prior case, (*Rakas v. Illinois*, 439 US 128 (1978)), the Court held that merely being present on the premises does not automatically create standing to assert a Fourth Amendment violation. In another case (*Minnesota v. Olson*, 495 US 91 (1990)), the

Court held that an overnight guest had an expectation of privacy. The Court distinguished Olson on the ground that the defendants in this case were not overnight guests, but merely short-term guests. Justice Scalia, joined by Justice Thomas, took a broader view — that the Fourth Amendment offers no protection to guests of any kind. He argued the Court should abandon the "expectation of privacy" analysis and interpret the Fourth Amendment in light of the law at the time of its passage. Justice Kennedy provided the crucial fifth vote, but added a concurrence limiting somewhat the effect of the majority opinion. In his view, social guests have a reasonable expectation of privacy, but commercial guests (such as these defendants) did not. In dissent, Justice Ginsburg argued that the majority's view of the Fourth Amendment was overly restrictive and that protection should extend to any guests, as they are there at the invitation of the homeowner. 6-3 decision.

Wyoming v. Houghton
67 USLW 4225 (1999)

A Wyoming Highway Patrol officer stopped a car for speeding. While speaking with the driver, he noticed a syringe in the driver's shirt pocket, which the driver admitted using to inject drugs. Having probable cause to believe there were drugs in the car, the officer ordered the driver and his two female passengers (all of whom were sitting in the front seat) out of the car and conducted a search of the passenger compartment. On the back seat of the car was a purse containing methamphetamine. One of the passengers, Houghton, admitted it belonged to her. She was arrested and convicted of felony drug possession. On appeal, she argued that the drugs in her purse should have been excluded from evidence as the product of an illegal search. She acknowledged the officer had probable cause to search the car for drugs, but did not have probable cause to search inside her purse, as it belonged to her, a passenger not suspected of criminal activity at the time the search took place. The Wyoming Supreme Court reversed, holding that when an officer has notice that a container within a car does not belong to the person suspected of criminal activity, the officer may not search the container.

The U. S. Supreme Court disagreed

In previous cases the Court has stressed that the Fourth Amendment applies not simply to places or things, but also when there exists a "reasonable expectation of privacy."

and upheld the search of Houghton's purse. Writing for the majority, Justice Scalia determined that the long line of cases regarding search of vehicles supported the application of a bright-line rule: once a driver's conduct gives the police probable cause to believe there may be contraband in the car, the police may search the car without a warrant, and the scope of the search extends to all containers within the car that are capable of holding the contraband. This even includes the search of the purse in this case, although it was no doubt obvious to the officer before he opened it that the purse did not belong to the male driver but to one of his female companions. Adopting a "passenger property" exception or the "notice" rationale of the state court would impair effective law enforcement. While such a bright-line rule clearly affected the privacy interests of passengers, Scalia asserted that such interests were generally weak, as the passengers had no reasonable expectation of privacy when riding in a car belonging to another and being driven on the public highways.

Justice Stevens dissented and argued that police should be required to establish probable cause before searching belongings which clearly belong to passengers rather than to the driver of a vehicle. He suggested that the majority's rationale would permit such absurd results as the warrantless search of a taxi passenger's briefcase if there was probable cause to believe the driver had contraband in the taxi. 6-3 decision.

Self-Incrimination

Mitchell v. United States
67 USLW 4230 (1999)

Mitchell pleaded guilty to charges related to a drug distribution conspiracy, reserving her right to contest the drug quantity, an important factor in determining the length of her prison sentence. The judge accepted her guilty plea after advising her of the rights she was waiving, including the right to remain silent "at trial." At the sentencing hearing, the prosecution presented evidence regarding the extent of the defendant's participation in the cocaine distribution scheme. The defendant elected not to testify. The trial judge, relying in part on the defendant's refusal to contradict the testimony of her co-conspirators, determined that the defendant's offense involved an amount of cocaine that made her eligible for a 10-year mandatory-minimum sentence. Mitchell appealed her sentence, but the Third Circuit upheld it, holding that the guilty plea constituted a waiver of her right to remain silent at the sentencing hearing, and that it was therefore appropriate for the trial judge to use her failure to testify against her. This ruling was in conflict with several other circuits.

In an opinion penned by Justice Kennedy, the U.S. Supreme Court disagreed with the Third Circuit. The majority acknowledged that the general rule is that a witness may not, in a single proceeding, voluntarily testify about a matter and then assert the privilege against self-incrimination during cross-examination. This is known as the "stop and go" rule. Thus the defendant could have been cross-examined at her plea hearing. The defendant retained her privilege against self-incrimination at her sentencing hearing because it is part of the criminal case and what she says there can be used against her. The majority also refused to permit the drawing of adverse inferences from her refusal to testify. A similar ban exists regarding trial testimony, and the majority asserted that the same logic applied to testimony at sentencing hearings. The dissent by Justice Scalia took issue with the majority's unwillingness to allow the trial judge to draw adverse inferences from the defendant's silence. Scalia suggested that the majority was improperly extending the rationale of a prior case (*Griffin v. California*, 380 U.S. 609 (1965)). Justice Thomas also dissented, going beyond Scalia's argument and suggesting that the Court reconsider *Griffin*.

Summary

The Supreme Court's 1999 term was marked by some significant decisions involving criminal law. As in past terms, several cases involved the interpretation of

federal criminal statutes. These cases appear to be increasing in number, perhaps as a result of Congress criminalizing additional activity. Several decisions involved traffic stops. Of note is a continued decline in the number of decisions involving the imposition of the death penalty.

In most cases, the Court continued its record of upholding law-enforcement authority. There is little reason to think this trend is about to change. Several cases have already been accepted for consideration during the 1999 term that present the Court with the opportunity to further expand the authority of law enforcement officers. These include a case involving whether a person's sudden and unprovoked flight from police in a high-crime area creates reasonable suspicion to justify a *Terry* stop (*Illinois v. Wardlaw*), and a case focusing on whether an officer may extend a traffic stop to ask unrelated questions about criminal activity (*Potts v. United States*). Another decision that will likely be reviewed by the Court is *U.S. v. Dickerson*, 166 F.3d 667 (1999). In this case, the Fourth Circuit reinstated the voluntariness test for the admissibility of custodial statements, holding that *Miranda* warnings are not constitutionally required in federal courts. The decision is based on a rather obscure statute, 18 U.S.C. 3501, passed by Congress in 1968 as part of the Omnibus Crime Control and Safe Streets Act. Decisions in these cases could have a substantial impact on the administration of justice.

Many of the decisions were narrow or without a clear majority. Others featured a bare majority of five. This reflects the clear ideological divisions on the court. Conservatives are not winning all the battles over law-enforcement authority: the Chicago gang ordinance was struck down and Iowa's attempt to expand the search incident exception was refused. The language in both decisions, however, left many unanswered questions.

Justices Kennedy and O'Connor are at the ideological center of the court and have emerged as the key votes in many cases. Justice Scalia remains the most acerbic and iconoclastic member, while Justice Stevens is often a lone liberal holdout, especially in criminal cases. Indications are that Justice Thomas has stepped out of Scalia's shadow. Since 1991, they have agreed in about 90 percent of all cases, with Thomas often just signing on to Scalia's opinion. This has changed, however, since Justice Thomas is writing more opinions and establishing his own identity.

Given the narrow margin in so many cases, the 2000 presidential election is likely to have a major impact on the composition of the Supreme Court. Several justices are reported to be contemplating retirement. President Clinton thus far has appointed two justices (Ginsburg and Breyer); his successor will likely be presented with more opportunities than that to shape the composition of the Court.

Craig Hemmens is assistant professor of criminal justice administration at Boise State University in Boise, Idaho. He has a J.D. from North Carolina Central University School of Law and a Ph.D. in criminal justice from Sam Houston State University. He has published more than 60 articles on a variety of criminal justice topics.

Rolando V. del Carmen is professor of criminal justice at the College of Criminal Justice, Sam Houston State University, in Huntsville, Texas. He has several law degrees and has written numerous books and articles on a variety of legal topics. The fifth edition zof his best-selling textbook, Criminal Procedure *(West Publishing), is at press.*

POINT/COUNTERPOINT:

Obstacles to Civil Gideon Part II: The Washington State Experience

by Leonard W. Schroeter

This article continues a survey of access-to-justice jurisprudence in Washington state. The first installment appeared in the November 1999 issue of Bar News.

The second *Carter v. University of Washington* case[1] followed a remand factual determination by the trial court that the three requirements imposed by the court in *Carter I* (of indigency, good faith and probable merit) were met. Now *Carter* was before the Supreme Court for the order waiving all costs of his appeal. In the meantime, however, Justice Finley died and was replaced by Justice Dolliver, who delivered the opinion for the Court in *Carter II*. Carter's motion was denied, finding that the criteria of "probable merit or lack of frivolity" was not met. In the view of Justice Dolliver, the appellant had "very little or practically no chance of prevailing on the merits."

Four months after *Carter II*, the Washington State Supreme Court decided *Housing Auth. of King County v. Saylors*,[2] taking the opportunity to overrule its historic *Carter I* opinion reached 18 months earlier. This was an appeal by a tenant from a judgment in favor of the Municipal Housing Authority in an unlawful detainer action. The tenant had moved for an order of indigency and for the expenditure of public funds to pay the costs of prosecuting the appeal. The shift in Court personnel seemed to mimic the Burger Court's anti-poverty virus, which now had reached the chambers in Olympia.

Ms. Saylors conceded that she was given a hearing on the question of good cause for eviction required by law, was given statutory notice to vacate, and did not deny that there was in fact good cause for eviction. It was, therefore, not unreasonable to conclude that no constitutionally cognizable injustice had been done. For that reason, Justices Utter and Horowitz concurred in the results, with Justice Horowitz authoring an opinion that may well be the most balanced and comprehensive analysis of the constitutional jurisprudence of poverty and justice authored by our Court. It eloquently stated the jurisprudence of our constitution and remains an instructive text for those concerned with access to justice.

Because the opinion was a concurrence in the result, it has been generally ignored, to the detriment of legal understanding and public interest. The Court's opinion sought to demonstrate the error of *Carter I*, claiming that it was "without foundation in law and contrary to public policy." The basis for the Court's opinion was that right to counsel was not available to litigants making claims in "the field of economics and social welfare." The majority reasoned that there could not be a fundamental right involved if the indigent person was seeking to secure justice in fields such as employment, housing or welfare rights. The majority denied that there were equal protection issues or state public policy considerations arising from being poor, concluding that this was a legislative question rather than one for courts.

Justice Horowitz's opinion is not only scholarly and buttressed by historical and bibliographical references, but its powerful reasoning is as trenchant and persuasive today as it was a quarter of a century ago. His opinion demonstrated that it was the "state whose duty it was to provide for the peaceful settlement of disputes in a manner conformable to justice under law." Justice Horowitz explained:

> *Carter* charted a new course that would better protect an indigent's right of court access to pursue a civil claim of probable merit. It substituted for the notion of court discretion to permit court access on appeal, the principle that the state was constitutionally required to grant court access 'to all regardless of economic status.'... The right of court access for purposes of appeal was part of the general right of court access. Construing article 1, sections 4 and 12 of our state constitution, it held an indigent's access to the courts is itself a fundamental interest or right properly protected by law; that the legitimacy of legislative classification abridging the right of court access was to be determined under article 1, section 12, so that only a compelling state interest would justify any such abridgement; that 'classifications based on wealth are indeed dubious'; and that there is not 'a compelling state interest that justifies opening the gates of the judicial system to the affluent but closing them to the poor.'
>
> ... The right of court access in a civil case was itself a fundamental right and the right did not depend on its subject matter.

(continued on page 38)

POINT/COUNTERPOINT:

Fundamental Rights and the Role of Government

by Brian McCoy

I am intrigued by the subject of constitutional law and was fascinated with Mr. Schroeter's article in the September Bar News. *This article is intended as a response thereto and a discussion of the broader question of the role of government in a democratic society.*

To restate Mr. Schroeter's thesis: the right to counsel is a "fundamental right" derived from the basic purpose and function of government to preserve the principles of "due process of law" and "equal protection of the law." Ergo, the government should provide lawyers for all indigent civil litigants at public expense. In support of this thesis, Mr. Schroeter first cites a 1395 English law which called for the appointment of counsel to represent the poor "which shall do their duties without any rewards." Thus, the English common law cited was really just a precursor to our present pro bono system, not a precedent for government-paid lawyers. Secondly, Mr. Schroeter points to several European nations which have enacted laws providing for "free attorneys to indigent persons." In my mind, however, that's almost reason enough in itself for us not to do it in America. We separated ourselves from Europe a long time ago for good reason, and we should closely scrutinize any invitation to imitate the institutions of European nations prone to embrace socialist methods for solving problems. Indeed, Mr. Schroeter's statement that "access to justice" via free lawyers is not a "welfare program" belies the fact that that's exactly what it is.

We in America set up a political system based on democracy and an economic system based on capitalism. Individual freedom and accountability are the hallmarks of the American way and have produced the most powerful and wealthiest nation in the history of mankind. With good reason, we look askance at any government program designed to "enhance" the rights of its citizens, because we know that government by its very nature represents raw power — a ravenous beast that can turn on us at any moment. Thus, the federal and state constitutions, which clarify two very important concepts: (1) government is *not* the source of our rights, as those rights are *inherent* in our very existence as human beings, and (2) government, as our appointed trustee charged with safeguarding certain rights, is granted expressly *limited powers.*

Thus the question: what rights do we consider so fundamental as to justify granting government special powers to enforce? The federal constitution articulates three: life, liberty and property. All other "rights" are appendages thereto and serve to give form and shape to those fundamental rights. Article I, Section 2 of the Washington State Constitution articulates the same three basic rights (though there are other "rights" set forth in the State Constitution's Declaration of Rights). But even in the case of those fundamental rights and other ancillary rights such as due process and equal protection, they are embodied in the constitution solely as a reminder of the limitations on the power of government to interfere with those rights, *not* as a mandate for government to enforce those rights as between private contestants. So what is the government's constitutional role in the resolution of disputes between individual citizens? In other words, to what extent should the government constitutionally exercise its power and dedicate its resources to the resolution of purely private disputes among its citizens?

Currently in Washington state, the government provides a free forum (except for the filing fee, which can be waived), a jury in cases at law (as opposed to cases which are equitable in nature), a means for compelling the attendance of witnesses, a record of the proceedings, and representation by an attorney in all civil cases where confinement (loss of life or liberty) is a possibility. See *Tetro v. Tetro,* 86 Wn.2d 252, 544 P.2d 17 (1975). The Washington State Supreme Court has also held that there is a constitutional right to counsel at public expense for indigent parents in dependency proceedings, but again, that is designed to pro-

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tect the individual against the power of the government to terminate the parent/child relationship. See *In Re Myricks,* 85 Wn.2d 252, 533 P.2d 841(1975).

Where an alleged property interest is threatened by a private party, rather than the government, the question of whether an indigent litigant has a right to counsel at public expense has been answered in the negative by our state's Supreme Court. In *In Re Grove,* 127 Wn.2d 221, 891 P.2d 1252 (1995), the Court held, in the context of a worker's compensation claim, that where "the interest at stake is only a financial one, the right which is threatened is not considered 'fundamental' in a constitutional sense." Citing *United States v. Kras,* 409 U.S. 434, 93 S.Ct. 631 (1973). See also *Housing Authority v. Saylors,* 87 Wn.2d 732 at 740-41(1976) (no constitutional right to appeal and thus no right to counsel on appeal in civil cases generally). The Court went on to hold that even though the government may waive filing fees and other costs for the benefit of indigents, "this does not mean that a state acts unfairly because it does not provide counsel and public funding at every stage of every lawsuit." *In Re Grove,* 121 Wn.2d at 239.

The *Grove* Court also dealt with two other consolidated cases involving publicly funded counsel (one involving termination of parental rights in a dependency proceeding and the other involving commitment of a person accused under the Sexually Violent Predator Act). In both cases, the Court held that the indigent litigants were entitled to attorneys at public expense, but the court reached its conclusion based on two separate statutes providing for the appointment of counsel for indigents, and thus did not reach the issue of whether they had a constitutional right to counsel. In *In Re Myricks* and *Tetro*, cited above, where the Court previously held that in such civil actions where "fundamental rights" were threatened by the government, indigent litigants do have a constitutional right to counsel.

Does government have a constitutional obligation to provide free attorneys to indigents in all civil cases involving purely private disputes over "property" interests? I would suggest that the government already does enough to provide representation for indigents without setting up another welfare program to serve the dual purpose of providing full employment for lawyers. Our judicial system is already so over-taxed (no pun intended) that providing free lawyers for anyone claiming to be "indigent" in every civil dispute that might arise would completely overwhelm our system of justice and lead to utter collapse. (As it is, we're almost there in Pierce County.) The real question is whether we consider private disputes over money (property disputes) so fundamental in nature as to impose upon government the obligation to provide free representation to those who cannot otherwise afford to fight over it. It is an interesting irony — give people the money (through free lawyers) to fight over something they didn't have in the first place. Is that how we take care of indigents? Or would the money be better spent educating and training them in the skills necessary to compete and succeed in a capitalistic economy? I for one am not prepared to appoint government in loco parentis to resolve, at absolutely no charge, every dispute over property that might arise between private parties. Indeed, many problems go away by themselves because they're "not worth fighting over." There is a certain social utilitarianism associated with having to pay to fight.

What, if anything, can or should be done to assist indigent civil litigants with "access to justice"? Several possibilities emerge. The Bar, regulated primarily by the State Supreme Court, could institute a pro bono program requiring some participation by all attorneys in the interest of community service. Maybe some CLE hours could be satisfied by providing pro bono services.

Secondly, in the interest of fairness, where a litigant is pro se due to indigence, the court could treat the matter as a "small claims" case by referring it to an arbitrator and requiring both sides to present their case pro se.

A third possibility might be some sort of "loser pay" arrangement similar to that embodied in RCW 4.84.250 and CR 68. Such an approach requires the litigants to scrutinize the merits of their case and provides a means of shifting the cost of litigation for the benefit of the prevailing party; if that party happens to be indigent, it would thus provide a means of defraying the cost of an attorney.

A fourth possibility might be to alter the current rigidly adversarial approach to justice. Courts of law with all their procedural and evidentiary rules and interpretations have almost become arenas of sophistry and theatrics, where justice is a casualty rather than an achievement. If judges were specialists in certain aspects of the law, what would be so difficult about having parties to a controversy simply tell their side of the story to the judge who would then render a decision in accordance with the law? All courts would then essentially become "people's courts."

Finally, there is always the possibility of insurance — a privately funded program providing for representation in those cases where an otherwise indigent litigant could not afford retained counsel. Ideally, that is the theory behind insurance, to spread the risk and provide for backup in case of emergency.

In summary, the fundamental rights articulated in our federal and state constitutions are intended as limitations on the power of government to interfere with those rights, not as a mandate for government to enforce those rights as between private litigants. Nevertheless, in the case of certain civil disputes involving potential loss of life or liberty enforceable by the government, publicly funded representation is provided. In other types of civil disputes involving only property interests between private parties, however, the government has discharged its obligation to safeguard its citizens' "fundamental rights" by providing a free tribunal to hear and resolve such disputes. There are plenty of other ways to help indigent persons have their day in court without America taking another step toward socialism and providing government-paid lawyers for "indigents" in all civil cases.

Brian L. McCoy, a 1979 graduate of the University of Puget Sound School of Law, has a private practice in Puyallup. His areas of emphasis are personal injury, malpractice, insurance and civil litigation. A former Green Beret, Mr. McCoy is the WSTLA Pierce County Roundtable Chairman and is listed in Who's Who in American Law. He serves on the Bethel School District Task Force Committee on AIDS and is on the Board of Directors for the East Pierce County Chamber of Commerce.

Schroeter: *continued from page 35*

> ... [T]he civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney. . . . I believe there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes. This court, in construing our own state constitution, may, but is not required, to follow the federal interpretations or corresponding provisions of the federal constitution. A state does not lack power to protect its people in a manner more protective of their rights under its state constitution than is permitted by the federal cases cited in construing the Fourteenth Amendment. The Supreme Court of the United States has recognized that it has no right to review a state court's interpretation of its own constitution.... State courts have interpreted their own constitutions differently in a manner more protective of individual's rights than the interpretations of the Supreme Court of the United States of corresponding provisions of the federal constitution.

The decimation of *Carter* by *Saylors* in 1976 resulted in a dismal pall on Washington State's jurisprudence. Inappropriate application of United States Supreme Court holdings, which ignored the mandate of access to justice jurisprudence, was compounded by utilization of the uncomfortable criteria for decisionmaking found in *Mathews v. Eldridge*.[3] There, the Court enunciated the tests "to determine when due process requires certain procedural safeguards," for example, right to counsel. The balancing tests, in and of themselves, are a rejection of fundamentality.

Consequently, there were few Washington appellate court decisions in almost a quarter of a century. The fundamental character of access to justice was also unfortunately eroded by Washington courts during the lean years following *Saylors*, as evidenced by *In re Giordano*[4] and *Ford Motor Co. v. Barrett*.[5] But *John Doe v. Blood Center*[6] was an interesting case because it recognized the relationship of the discovery process in civil actions as closely connected to meaningful access to courts. To Justice Brachtenbach, the discovery process was essential in an action seeking damages for negligence from a blood center. The Court stated:

> Plaintiff has a right of access to the courts.[7] In this civil case that right of access includes the right of discovery authorized by the civil rules....Our constitution mandates that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Const. art. 1, § 10. That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations. Indeed, the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights. Const. art. 1, § 1. Const. art. 1, §§ 1-31 catalog those fundamental rights of our citizens. The drafters of our constitution placed such great importance upon rights that they provided: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Const. art. 1, § 32. It is important to note that our consideration here is of the right of access.

The Court's opinion cited *Carter* and ignored *Saylors*, except to state, "Unfortunately, the court did not explore the rationale for its conclusion."

The current status of our Washington State Supreme Court's right to counsel jurisprudence is best reflected by the carefully crafted opinion in *In re Dependency of Grove*.[8] It reflects the consensus mustered four years ago by Justice Guy, now Washington's Chief Justice. The questions reviewed here were seen as important and troubling. The Court consolidated three cases to "begin the process of clarifying the standard to be applied in determining when an indigent litigant's civil appeal will be funded by the state of Washington." Justice Guy initially stated, "This court has not published an opinion in this area since 1977." On its facts, *Grove* does not involve the right to counsel at any stage of justice system processes, but is limited to appeals. Furthermore, it only concerns itself with documented indigency and appellate costs and expenses, not payment to counsel. Lastly, the question is limited to funding by the state of Washington — the people.

Inappropriate application of United States Supreme Court holdings, which ignored the mandate of access to justice jurisprudence, was compounded by utilization of the uncomfortable criteria for decisionmaking found in *Mathews v. Eldridge*.[3]

The *Grove* case included juvenile court dependency action appeals, a petition under the Sexually Violent Predator Act (which requires evaluations as a part of the statutory proceeding), and review of a jury verdict resulting in the termination of workers' compensation benefits. All parties were indigent. Each asked for counsel to be appointed to represent them at public expense. Justice Guy began:

> Increasingly the cost of civil litigation weighs against easy access to our courts. The question of who pays for the efficient use of the appellate system is a difficult one. Where fundamental constitutional rights are not threatened, the answer to this properly belongs with the legislature....Because public resources are limited and the number of indigent criminal cases is high, the State is forced to prioritize those cases in which the public will be required to fund civil appeals. (Emphasis in original.)

The Court acknowledged that it is its duty to resolve issues involving fundamental constitutional rights. It is outside the power of the legislature. Therefore, the fiscal issues allocated to legislative judgment cannot be relevant considerations in ju-

dicial decisionmaking. The Court recognized a built-in conflict for the judicial branch, as they must look to the legislature for funding their own operations and salaries.

In two of the three cases, where the parties had statutory rights to counsel at "all stages of a proceeding," the legislature had already determined the right included representation through an appeal. The Washington State Supreme Court therefore held indigent civil litigants have a right to counsel on appeal at all stages of the proceeding. The Court also held that civil litigants need not prove a constitutional right to appear at public expense, nor demonstrate probable merits of their claim to appeal at public expense. Issues of costs, filing fees and other expenses are covered by the policy of "effective legal representation." Thus:

> The right to counsel without a corresponding right to present a record to the reviewing court is an empty right. The legislature's intent... would be thwarted were we to hold that the statutory right to counsel on appeal did not include the instruments necessary to permit effective presentation of the issues.... Effective legal representation contemplates the public payment of expenses and fees necessary to provide an adequate record and to present the appeal.

The question that was not answered was whether these rights, which exist because they flow from the fundamental right of access to justice, would have provided a remedy if they had not been implemented by legislative action. What if the legislature had ignored this problem? What if there were no statutes or rules on the subject? The problem would be the same. The issue for the Court is much easier in a state where the legislature is responsible and accepts their duties to protect individual rights. But what if they don't? Is there no constitutional right without legislative blessing? Is it not essential that courts provide remedies if legislatures don't provide implementation?

Justice Guy stated that these issues were "governed by" *In re Welfare of Lewis*.[9] There, an indigent minor charged with committing a crime sought to appeal an order of the juvenile court declining jurisdiction. He claimed a constitutional right to appoint counsel and expenditure of public funds for the purpose of appeal. Justice Utter, for the Court, held that the petitioner has that constitutional right and thus directed the entry of an order providing appointed counsel and the expenditure of public funds to facilitate appellate review. Justice Utter stated:

> Equal protection requires the state to provide appointed counsel for appeal and a right of appeal at public expense in those classes of cases in which indigents are entitled to appointed counsel at trial level and right of appeal is provided. This principle was developed in criminal cases, but it applies to other disputes involving matters of such a fundamental nature as to require appointments of counsel at the trial level, such as juvenile delinquency proceedings, and proceedings concerning possible permanent deprivation of parental rights.

The Washington State Supreme Court, in its rulings in *In re Grove*, protected the fundamental right of meaningful access to justice in many ways that exceeded the rulings of the United States Supreme Court. In part, this is because of its own rules and the greater rights sensitivity of our legislature as compared to Congress. Yet the Washington State Supreme Court is still much too fearful of the legislature, and too intimidated by the United States Supreme Court and the political rationalizations that they have imposed on straightforward fundamental rights that should not be in controversy at the end of the twentieth century.

Recent cases have been reported in our Court of Appeals and the Washington State Supreme Court dealing with right to counsel and access to justice. In each of them, the jurisprudential confusions arising from more than a quarter of a century of internecine judicial struggle over basic rights jurisprudence has marred these decisions. None appear to clearly recognize that the essential character of the fundamental right of access to justice is that the right bearer must (if those rights are to be meaningful) be able to have, in all stages of the justice system, the opportunity to be heard, to be able to present his case,[10] to be able to secure a remedy,[11] and to not be disabled by his poverty from full and meaningful participation. Generally, this right exists, whatever the subject matter of the lawsuit is, whether it be criminal, civil or hybrid, as some often are. Clearly, if the cause being advanced is civil rights or civil liberties, this by itself may make the constitutional deprivations more palpable and more clearly facilitate the assistance of the Court because it more easily understands familiar, concrete constitutional violations. But in most of the cases, it is the denial of the *access* that is the violation of right, whatever other constitutional handle we choose to apply to the underlying issues involved.

There has been a failure by attorneys to advocate, and judges to enunciate, the carefully reasoned jurisprudential basis for judicial implementation of meaningful access to justice. It may well be that in some situations, justice can be secured by a party acting pro se, although these must be few and far between. In some situations, there are mechanisms apart from court-appointed counsel or government-paid counsel that will still make it possible for meaningful access to be secured by indigent parties. Certainly, there are meaningful solutions and approaches in existence such as the legal services programs, the contingent fee system, court-awarded or statutorily awarded attorneys' fees, effective pro bono assistance and a host of other legal reforms that will not necessarily place the burden of justice directly upon the taxpayer. But whatever else is true, as commentators and courts have said for much of this century, equal justice under the law is too precious to not be a major priority of society and an obligation of government and its citizens.

Conclusion

Unhappily, the fundamental right of access to justice is still wrestling for public and judicial legitimacy, although it has been declared in the Magna Carta, English constitutionalism, the American Scriptures, explicitly or implicitly in all of our constitutions, and often clearly in our courthouses, which proclaim their existence for the purpose of "Equal Justice Under Law."

Our nation and our justice system have survived *Dred Scott*, *Plessey v. Ferguson*,

cruel, political, arrogant judicial decisions, of which *Saylors* was one. No constitutional case is ever settled which involves human freedom and decency, until it is decided in accordance with our "American Scriptures."

The Washington State Constitution incorporates these "fundamental principles."[12] Because we believe that a frequent recurrence to "fundamental principles is essential to the security of individual rights and the perpetuity of free government," in the next few months we will bring current an analysis of the most recent access to justice decisions of the highest courts of our state and nation.

Leonard W. Schroeter is Of Counsel to the Seattle/Hoquiam law firm of Stritmatter Kessler Whelan Withey. He can be reached at schroeter@skww.com. His series of articles on the jurisprudence of access to justice can be found at the Washington State Bar Association website at www.wsba.org.

NOTES

1 87 Wn.2d 483 (1976).
2 87 Wn.2d 732 (1976).
3 424 U.S. 319 (1976).
4 57 Wn. App. 74 (1990).
5 115 Wn.2d 556 (1990).
6 117 Wn.2d 772 (1991).
7 Justice Brachtenbach cited the opinion, *supra*, at Note 4.
8 127 Wn.2d 221 (1995).
9 88 Wn.2d 556 (1977).
10 *See* Edward Imwinkelreid, "The Blockbuster *Adams* Decision: The Constitutional Right to Present Evidence," *TRIAL* (October 1998). Imwinkelreid is a Law Professor at the University of California, Davis. *See* the article for other citations including an earlier article by the author in 1990 UTAH L. REV. 1.
11 *See* Ned Miltenberg, "The Revolutionary 'Right to a Remedy,'" *TRIAL* (March 1998), and authorities cited in this short article. Miltenberg is an Associate Director and Robert Peck is the Director of the Association of Trial Lawyers of American Legal Department. They have assiduously developed a remarkably documented research base, and produced in multiple appellate briefs an extraordinary impetus for preserving right to a remedy and access to justice, generally.
12 Constitution of the State of Washington, Article I, Section 32.

Taking a Bold Step Forward into a New Age of Ludditism

by Rob Apgood • *roba@sidlon.com*

Well, the world didn't end. As we face the 21st century with bright-eyed optimism, I'd like to take the first installment in a new era to offer a thought on how we might benefit from a slightly different look at how we consider the use of technology in the days to come.

I confess that I really don't like computers (and I'm not all that crazy about TV remote controls, either). Symptomatic of a society that has become fast-forward, call-forward, e-mail-forward, caller-ID-checking-to-decide-if-I'll-answer, pushing-the-desired-floor-button simultaneously with the elevator-door-close-button (which I have always suspected doesn't do anything no matter how many times you push it), we seem to be rushing entropically into the embrace of the "hows" and "whats" of technology at the expense of the "whys"... and that makes me just a little sad.

I'm not saying that technology is bad. I'm not even implying it. Technology has been extremely useful to me and will continue to be so. Having used technology for so many years and having watched it evolve, I rarely find an innovation that dazzles me. Computers are merely tools. They allow us to find information at speeds that make the mind boggle. Oh yeah, they're good for games, too. But I find it very tedious to see the technology being used just because it's there and not necessarily because it's needed, or because we find it more convenient to rely on the results of a computational process at the expense of rolling a problem around in our minds and considering it from different angles and viewpoints, (essentially at the expense of using our minds). Moreover, because information is so readily available, it seems that some folks are losing their abilities to view that information with a critical eye. Clearly, the only printed word that is to be taken at face value is mine.

Norbert Weiner had this to say regarding *The Human Use of the Human Mind* in 1950:

> Any machine constructed for the purpose of making decisions, if it does not possess the power of learning, will be completely literal-minded. Woe to us if we let it decide our conduct, unless we have previously examined the laws of its action, and know fully that its conduct will be carried out on principles acceptable to us! On the other hand, the machine...which can learn and can make decisions on the basis of its learning, will in no way be obliged to make such decisions as we should have made, or will be acceptable to us. For the man who is not aware of this, to throw the problem of his responsibility on the machine, whether it can learn or not, is to cast his responsibility to the winds, and to find it coming back seated on the whirlwind.
>
> I have spoken of machines, but not only of machines having brains of brass and thews of iron. When human atoms are knit into an organization in which they are used, not in their full right as responsible human beings, but as cogs and levers and rods, it matters little that their raw material is flesh and

blood. What is used as an element in a machine, is in fact an element in a machine. Whether we entrust our decisions to machines of metal, or to those machines of flesh and blood which are bureaus, and vast laboratories and armies and corporations, we shall never receive the right answers to our questions unless we ask the right questions...

Well, maybe it's not that I dislike computers so much. Maybe it's just that I'm not too keen on how they tend to be abused. We've revved ourselves up to such a pace that we seem to be forgetting the very essence of why we do what we do. We're forgetting the meaning of commitments to friends and families, simply because "we just don't have the time" or because the goal of the pursuit is being confused with the ancillary fiscal aspects of the pursuit. Perhaps the beginning of the new millennium is a great time to reassess our real goals. Having done so, hopefully the exponentially increasing pace of our professional lives will be tempered by a renewed, clear view of what we hold most important. But, don't stop to think, and then forget to start again, as our lives will increase in pace.

Researchers at Cavendish Laboratory in Cambridge, UK (in true Luddite fashion) have resurrected a technology that has always "warmed" my heart: the vacuum tube! More accurately, they have created a prototype "nanotriode," or vacuum-based electronic switch. The millions of transistors in today's silicon chips are basically triode switches. Vacuum triodes have a distinct edge over transistors in several areas: vacuum tubes can support higher currents, their electrons travel faster, and their performance isn't significantly affected by temperature changes. The bottom line is that an estimated 10 billion of these devices could be manufactured on a "platform" about the size of a dime, having the computing power of approximately one million of today's high-end laptops. Where can I buy *that* stock???

Similarly, an Israeli company is demonstrating applications of a technology they call fluorescent multilayer, or FM. A prototype FMD-ROM disk can store 140 gigabytes (roughly 30 times as much as a DVD and over 200 times as much as a CD-ROM). A ClearCard, about the size of a credit card, can store 10 GB, or 2500 times as much as a standard smartcard. (Embedded in the plastic of a smartcard are electronics capable of memory and processing.) Storing data in multiple layers brings about these stunning capacities. The company says they are working with 20-layer technology in the lab and see no practical upper limit. They have filed over 70 patents for the technology and hope to have FM storage devices and media on the market within a year. Of greatest significance is their ability to achieve one gigabyte per second reads.

These are only two examples of the technologies we will see in the very near future: the "whats" and "hows." Why we use them is a question we should continually ask ourselves. While the phenomenal growth of information requires the use of quick access tools, we need to remain vigilant in our efforts not to be lulled into a false sense of security. Being able to access enormous amounts of information in mere seconds tends to lead us away from acquiring knowledge that is inherent in reading and pondering.

Have a great month and a great new year! Next month, I'll pack away my soapbox and we'll take a look at the effects of what will likely become one of the more controversial decisions in recent years.

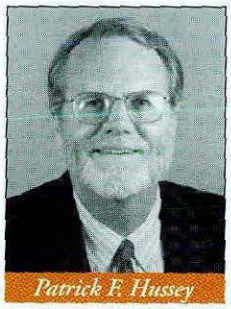
After spending 25 years in software engineering and development, Rob Apgood suffered a mid-life crisis that seriously affected his judgment. As a result, he relinquished his pocket-protector, acquired a law degree, and, when not out riding on his Harley, can be found most days at the law offices of Siderius Lonergan indulging in latent Luddite tendencies.

Changing Venues

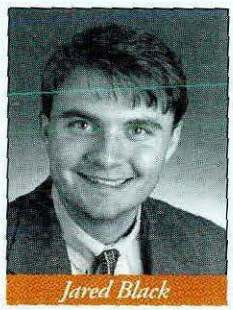
Honors and Awards

Charles Bates has been elected Chairman of the Civil Service Commission of Bellevue, Washington. Bates has served as a Bellevue Civil Service Commissioner since 1997 and is Director of Human Resources for All & Grand Auto Supply, Inc.

The Young Lawyers Division of the WSBA walked away with two national awards at recent American Bar Association meetings: the "LawTalk" program took third place for outstanding service programs and *De Novo* won second place (for the second year) for best newspaper.


Patrick F. Hussey


Megan O.Masonholder


Jared Black


Christopher Dahl

Thumbs Up!

To the Foundation for Washington State Courts, an organization established jointly by the Washington Defense Trial Lawyers and the Washington State Trial Lawyers Association, for the gift of three network printers to the King County Superior Court. Foundation President Mary Spillane described the gift as a first step in bridging the gap left by shrinking budgets and increasing caseloads.

Movers and Shakers

Paul E. Brain and **John E. Oswald** have attained Of Counsel status at the Seattle firm of Short Cressman & Burgess PLLC. Brain's practice is concentrated in the areas of securities, real estate and shareholder/partnership disputes. Oswald joins the firm's real estate practice group, practicing in the areas of complex real estate business transactions, financing, development, private placements and environmental law. **Michael J. Layton**, new associate at the firm, has a business and litigation practice encompassing the areas of business, corporate, real estate and securities, and e-commerce.

New partners at Perkins Coie LLP in Seattle include **Maurice J. Pirio** and **Christopher Daley-Watson**. Pirio's practice focuses on software-related and e-commerce patent matters. Similarly, Daley-Watson's practice emphasizes electrical, software, Internet and electronic commerce-related patents. Also joining the firm as Of Counsel are **Steven D. Lawrenz**, **Paul T. Parker** and **Robert G. Woolston**. Lawrenz handles computer software patent matters; Parker's practice emphasizes mechanical patents, semiconductor device fabrication patents and trademark matters; and Woolston focuses his practice on mechanical patent prosecution. Other new arrivals at the firm include associates **John M. Wechkin** and **James A. D. White**. Wechkin is a mechanical patent prosecutor, while White's practice emphasizes software and Internet-related patent prosecution.


Geoffrey Hymans


Angelique D. Robertson


Carolyn Ladd


Maryann Yelnosky


Sarah Haushild


William W. Lin

Carolyn Ladd has joined the Labor and Employment Department in the Office of General Counsel at The Boeing Company in Seattle, where she provides advice and manages litigation involving employment discrimination and family leave issues.

Heller Ehrman White & McAuliffe in Seattle has announced that **James Donohue** has joined the firm as a shareholder in the Intellectual Property Litigation Group. Donohue has significant experience in copyright, trade secret and patent litigation, and is a past chair of the WSBA's Intellectual Property Section.

Marsha M. Jenkins has rejoined the Vancouver firm of Greenen & Greenen PLLC, with a trial practice including personal injury, real estate and business matters.

The Barran Liebman LLP firm in Portland has added **Maryann Yelnosky-Smith** as a partner. She will represent Oregon and Washington healthcare providers in employment litigation.

Adding to the blend at Starbucks Coffee Company are new directors and corporate counsel **Lucy Helm** and **Vollie Scott**. Helm will focus on litigation, and Scott will concentrate on commercial practice.

Patricia J. Parks has joined Karr Tuttle Campbell as Special Counsel. Parks brings to the firm over 25 years' experience in employee benefits work including ESOPs.

Craig Blackmon and **James Owen** have begun work as civil litigation associates at Lee Smart Cook Martin & Patterson P.S. Inc. in Seattle.

Betts, Patterson & Mines P.S. new associate **Robert E. Matthews** will practice in the construction litigation and employment practice areas.

Associating with the firm of Hillis Clark Martin & Peterson are **D. Christian (Chris) Addicott** (in real estate and

The Board's Work

by Sherrie Bennett

Governors Set Legislative Agenda

Meeting in SeaTac December 3-4, 1999, the Board of Governors heard the recommendations of the Legislative Committee and various section representatives, and set the following initial agenda for the upcoming legislative session:

UCC Revisions

The WSBA will sponsor a proposed major overhaul and expansion of Uniform Commercial Code Article 9, designed to reflect technological advances (such as electronic commerce) and advances in commercial finance (such as asset securitization). The proposed revised article also fills in a number of gaps, addressing issues not resolved by the 1972 version of the statute and on which courts have differed. The proposed revision would also streamline the filing system, using a simplified national form of financing statement which need not be signed by the debtor. Electronic filing would also be permitted. The proposal would upgrade computer systems for the Department of Licensing to accept electronic filings and to be able to respond to information requests within two business days as specified by Article 9.

Limited Liability Company, Limited Partnership and General Partnership Act Amendments

The WSBA will sponsor proposed revisions of the limited liability company and limited partnership acts resulting from changes in IRS tax rules. The proposed legislation would make explicit current statutory authority for single-member LLCs and clarify the rules for dissociation of an LLC from a general partnership.

Mandatory Arbitration Offer of Compromise

The WSBA will support legislation relating to offers of compromise in appeals of mandatory arbitration decisions. In its present form, the bill would increase the caps on mandatory arbitration (from $15,000 to $25,000 statewide and from $35,000 to $50,000 in counties where the bench approves the higher limit), and allow the non-appealing party to offer a compromise of a mandatory arbitration award and to recover costs and reasonable attorney's fees if the appealing party does not better the offer on appeal. The bill defines the phrase "costs and reasonable attorney's fees" to mean costs and fees provided by statute as well as expert witness expenses related to testimony.

Electronic Proxies and Notice for Non-Profit Corporations

The WSBA will sponsor a bill amending the Nonprofit Miscellaneous and Mutual Corporation Act to authorize electronic notice as well as electronic communication of proxies in connection with meetings of non-profit corporations.

Estate and Gift Tax Amendments

The WSBA will sponsor amendments to RCW 83.110 (the Washington Estate Tax Apportionment Statute) relating to new IRC Section 2057 (the deduction for Qualified Family-Owned Business Interests) and eliminating references to the now repealed federal retirement account excise tax. There will also be a proposed amendment to RCW 11.02.005 (Definitions and Use of Terms), adding a new section deeming references in documents to the now repealed IRC Section 2033A to refer to its successor statute IRC Section 2057. Additionally, proposed amend-

(continued on next page)

Changing Venues:
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commercial litigation) and **Michelle S. Chang** (in real estate and business matters).

Sarah Elyse Haushild has joined Lane Powell Spears Lubersky in Seattle. She concentrates her practice in torts and insurance litigation. New associate **William W. Lin** focuses his practice in securities, corporate and business law.

Ross Ann Clark-Childs is now associated with the law office of John Cooney & Associates in Spokane.

Stacey L. Romberg, formerly an attorney with Williams & Williams, P.S.C., announces the opening of her new law office in Seattle. Ms. Romberg represents clients in the areas of estate planning, probate and the incorporation of small businesses. In addition, Ms. Romberg assists other attorneys as a contract attorney, primarily in litigation.

The Coeur d'Alene, Idaho, firm of Glen Walker & Associates has added new associate **Susan K. Servick**, who will provide general legal services with an emphasis on family law and criminal defense matters.

New associates at Everett's Anderson Hunter P.S. include **Patrick F. Hussey**, practicing in the bankruptcy area, and **Megan O. Masonholder**, a litigator.

Williams Kastner & Gibbs PLLC has announced the addition of four new associates. **Jared Black** is a transactional and corporate lawyer with an emphasis in securities, tax and Internet law. **Christopher Dahl** will focus on commercial litigation in addition to maritime and business matters. **Geoffrey Hymans**' practice will emphasize land use matters and intellectual property litigation. **Angelique Davis Robertson** will concentrate her practice in the area of employment counseling and litigation.

In Memoriam

John Boespflug, Jr. passed away October 7, 1999 at age 55. He was a former chairman of the Bellevue Art Museum board and of the Bellevue Human Services Commission, and a former trustee of the Children's Home Society of Washington.

Renton attorney **John Dobson** passed away October 11, 1999 at age 91. Former City Attorney for Renton, he played Renton City League baseball, and served as a member or officer of Renton's Historical Society, Chamber of Commerce, Elks Club and Lions Club.

Thomas H. MacBride passed away October 20, 1999 at age 87. He was formerly a senior partner in the firm of Macbride, Sax & MacIver, and a member of the Overlake Golf and Country Club and St. Thomas Episcopal Church.

Donald Vincent Murphy of Yakima passed away September 26, 1999 at age 86. He was a senior claims manager for Allstate Insurance for 35 years.

ments to RCW 11.86.051 (When Right to Disclaim is Barred) would protect against the inadvertent waiver of the right to disclaim JTROS accounts and similar assets when the disclaimant has a previously acquired part ownership interest in the asset to be disclaimed.

Exemption of Administrative Tribunals From Attorneys' Fees Liability

The WSBA will support a bill exempting administrative tribunals from liability for attorneys' fees and costs.

Presenters to the Board on the various legislative proposals included Keith Baldwin, Joel Bodansky, Kit Carlson, John Cary, John Fattorini, Peter Harris, Judge William A. Harrison, Jean Holcomb, Dan Hungate, Michael Longyear, Alan Montgomery, Dan Ritter, and Gail Stone.

Law Week 2000 Project

Russ Speidel reported to the Board on the "Lawyer and Judge in Every School" event planned for May 8-12, 2000. The goal is to reach tens of thousands of school children in grades one through 12 during that week. Lawyers interested in getting involved may e-mail LawWeek@wsba.org or call 206-727-8270.

Definition of the Practice of Law

The WSBA's definition of the "practice of law" has been forwarded to the state Supreme Court for review. Questions to be sorted out by the Supreme Court include whether limited practice exceptions will be made, and if so, whether the WSBA or the Supreme Court will be responsible for implementation and enforcement. A defining moment in the discussion came when Judge Paul Bastine voiced his concern that the WSBA may be "hoisting ourselves on our own petard" by creating expectations among lawyers and others that defining the practice of law will solve the underlying problems. He urged the Board to "put meat on the bones" of the definition by finding ways to implement it. The Board voted to recall the committee drafting the definition back into service to advise the Supreme Court on the underlying issues and develop an implementation plan as soon as possible, after hearing from all the stakeholders.

Discipline Update

The Board is seeking input from the state Supreme Court regarding an overhaul of the Rules for Lawyer Discipline and has authorized a Discipline 2000 Task Force. Members of the Task Force will include Governors Manning and Henderson, Barrie Althoff, Professor Thomas Andrews, Randy Beitel, Kurt Bulmer, Don Curran, Bob Ford, Joy McLean, Lee Ripley, Julie Shankland and Charlie Wiggins.

Unofficial Fiscal Year Results on Target

Governor Krueger reported on the final unaudited fiscal year 1999 results, which show the WSBA finished the budget year on target, with $8,000 more in the coffers than anticipated. CLE seminar and product sales were lower than projected, but the Lawyers' Fund for Client Protection ended the year with $79,000 to add to its reserves, and *Bar News* had a very productive advertising revenue year.

Long-Range Communications Implementation

Governor Thompson reported on efforts to enhance communication with members through informational "road shows," brochures, assessing what services need to be added, targeting new lawyers and law students, Young Lawyers Division support, and continuing to upgrade the WSBA website and *Bar News*.

Appointments

The Board appointed Michelle Gonzalez and Margaret Smith to the Northwest Justice Project Board.

John W. Phillips is the new Board member for the Legal Foundation of Washington.

Timothy Bradbury was added to the Ethics Advisory Committee.

Shannon Skinner was appointed by the Board to the CLE Committee.

Governor Henderson was designated as the Board representative to attend a multistate Admission Study Group to consider joint admissions requirements or procedures with Oregon, Idaho and Utah.

The Package Tailored for Washington Lawyers

Lawyer's Professional Liability Insurance Sponsored by the Washington State Bar Association

Quality coverage. Affordable premiums. And designed specifically to meet an attorney's needs. That's the value of WSBA-sponsored Professional Liability Program.

Our unique package of products and services includes the following:

- Annual Aggregate Deductible
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Ethical Considerations for Lawyers and Judges When Dealing with Unrepresented Persons

by Barrie Althoff • *WSBA Disciplinary Counsel*

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

Lawyers and judges dealing with persons who are not represented by counsel, or whose representation is a limited representation, must satisfy various ethical standards in those dealings. This article explores those standards, asks many questions, answers some of them, and provides some guidance on dealing with unrepresented persons.

Is the "system" obligated to structure itself in such a way as to be understandable by the average person? If it does not do so (or, even if it does), is it required to provide to the self-represented person some sort of assistance or help?

Introduction and Background

Natural persons have a right to represent themselves in a trial court. The Supreme Court recognized this right in criminal cases as "a basic right of free people." *Faretta v. California*, 422 U.S. 806 (1975). In the civil context, the concept of a right to self-representation is often thought of as part of the greater concept of access to justice through access to the courts. Whether the right of self-representation in a trial court also constitutionally extends to the right of a convicted defendant to represent himself or herself on appeal is presently pending before the U.S. Supreme Court. *Martinez v. Court of Appeal of California* (Dkt. 98-7809).

While self-representation is a right, it is also a heavy burden for persons exercising this right. As our legal system tries to meet competing demands and needs of an increasingly complex society, the system itself becomes increasingly complex. Exercising the right to self-representation often becomes perilous to the self-represented person, a challenge to other participants in the system, and a strain on the system's limited resources. It is a right that most unrepresented persons would gladly give up if they could afford to retain legal counsel.

If a person has the right of self-representation in the legal system, does that system then have a duty to make that right a meaningful right? At the same time, the right of self-representation also necessarily includes the right to be a fool, where a self-represented party insists on self-representation even though legal assistance or counsel is available, and the self-representation works to the detriment of the self-represented person. See Justice Blackmun's dissent in *Faretta v. California*, 422 U.S. 806, 852. That criminal law case makes it clear that a person who elects to represent himself or herself cannot thereafter complain that the poor quality of his or her own self-representation amounted to denial of the effective assistance of counsel. But, should it make a difference whether the "right" of self-representation is being exercised because of the personal preferences of the individual as opposed to economic necessity?

Is the "system" obligated to structure itself in such a way as to be understandable by the average person? If it does not do so (or, even if it does), is it required to provide to the self-represented person some sort of assistance or help? If it is, must that assistance be in the form of a lawyer, or can it be some person with lesser expertise in the law? Or, does access to a computer, a book, or a law library suffice? In the criminal law context, the clear answer has long been that some assistance is required. Of course, a defendant has no right to personal instruction by the judge on courtroom procedures, nor is the judge required or permitted to act as the defendant's attorney. See *McKaskle v. Wiggins*, 465 U.S. 168, 183-4 (1984).

Is the civil legal system so complex that self-representation cannot be meaningful without assistance? If it is, should every self-represented person be provided legal assistance, or even legal counsel? Are there certain fundamental civil rights for which, when they are endangered, the legal system must provide assistance if it is to retain any sense of legitimacy? Important articles by Leonard W. Schroeter in the *Washington State Bar News* explore these and related issues of access to civil justice. See "The Fundamental Right to Access to Justice: The Historical Antecedents (May 1999, p.32); "The Declaration of Independence: The Precursor of Equal Justice Under Law" (July 1999, p. 39); "The Duty of the Judiciary to Ensure Access to Justice" (August 1999, p.32); "Attorney Representation: An Essential Right or Not?" (September 1999, p. 31); "The Right to Counsel as Developed in the United States Supreme Court" (October 1999, p. 30); and, "Obstacles to Civil Gideon: The Washington State Experience" (November 1999, p. 29 and this issue, p. 35). See also various letters to the editor in the *Bar News* responding to those articles and contesting certain of their premises.

On a more prosaic level, even though lawyers and judges may often complain about one another, dealing with unrepresented persons usually leads both law-

yers and judges to more greatly appreciate, if not cherish, each other. This is not disrespect for the unrepresented person, but rather a practical appreciation of the fact that lawyers generally make more efficient use of limited judicial resources than do unrepresented persons. While judges and lawyers clearly recognize that justice, not efficiency, is the goal of our legal system, justice often cannot be accomplished without efficient use of limited resources. A judge or lawyer dealing with an unrepresented person will almost certainly spend far more time than if that person were represented by a lawyer. For the judge, this means his or her docket will likely be delayed and less productive, and thus justice will be delayed for other litigants. It also means the issues of the case will likely be more poorly argued, and thus place a greater burden on the judge to assure that justice is done. For the lawyer, it means the additional time required for the representation will inevitably result in a higher bill for his or her client, (who may well become dissatisfied because of the increased costs) and less time to represent other clients. Further, both the lawyer and the client may fear that the court will go easy on, and require less of, the unrepresented person, thereby giving the unrepresented person an unfair advantage in the litigation.

An excellent source for further background information on dealing with unrepresented persons is *Meeting the Challenge of Pro Se Litigation – A Report and Guidebook for Judges and Managers* (American Judicature Society/ State Justice Institute, 1998) by Jona Goldschmidt, Barry Mahoney, Harvey Solomon and Joan Green.

The Rules of Professional Conduct as to Dealing with Unrepresented Persons

RPC 4.3: Dealing with the Unrepresented Person

The RPC most directly applicable to a lawyer dealing with unrepresented persons states:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The rule refers to "persons," not "parties." It is thus not restricted merely to a lawyer's dealings with an unrepresented person in litigation, but applies also to all dealings by the lawyer with an unrepresented person, whether in litigation, transactions, negotiations or whatever. Under the rule, the lawyer must make clear that he or she is not a disinterested or neutral person, but rather serves as an advocate for his or her client. If the lawyer knows or should know the unrepresented person does not understand the lawyer's role, the lawyer must try to correct that misunderstanding.

The rule seeks in effect to put the unrepresented person on clear notice that the lawyer is an opponent and thereby lessen the possibility of overreaching by a lawyer since the lawyer will often have, by education, training and practice, knowledge and skills not posessed by the unrepresented person and will thereby likely be in a superior position. Thus, the lawyer may not imply that he or she is neutral or is looking after the interests of both the client and the unrepresented person, or that the unrepresented person should not hesitate to speak freely, since such statements could disarm the unrepresented person, leading to an unwarranted advantage for the lawyer's client.

The application of RPC 4.3 will vary depending on the sophistication, knowledge, skills and training of the unrepresented person. For example, a lawyer dealing with an uneducated manual laborer about family law matters will more likely need to take greater care under this rule than will a lawyer dealing with a sophisticated business executive over a commercial lease.

RPC 4.3 does not prohibit a lawyer from negotiating a transaction and preparing documents on behalf of his or her client for signature by the unrepresented person. Although RPC 4.3 does not explicitly prohibit a lawyer from giving legal advice to a non-client (a prohibition that was included in the prior ethics code), Comment 1 to Rule 4.3 of the ABA Model Rules of Professional Conduct states that a lawyer should not give legal advice to the unrepresented person (other than recommending that the person seek legal advice). See *ABA Annotated Model Rules of Professional Conduct* (Third Edition, 1996), Rule 4.3, Comment 1, page 409. Other authorities, however, suggest that a lawyer is not prohibited from making truthful statements of the law to an unrepresented party. See, for example, *W.T. Grant v. Haines*, 531 F.2d 671 (2d Cir. 1976). Thus, if asked, a lawyer may truthfully advise an unrepresented person, for example, that documents must be signed and filed to be effective. See *Restatement of the Law Third – Restatement of the Law Governing Lawyers* (Tentative Draft No. 8, March 21, 1997), Section 163, Comment D, Illustration 1, pages 281-2. The lawyer may, perhaps more safely, respond to that person that he or she cannot provide that person any legal advice. If the lawyer provides false information, the lawyer is liable and subject to discipline for those false statements. See RPC 4.1 and RPC 8.4, discussed below.

The submission by a lawyer of documents for signature to an unrepresented person should not of itself constitute the provision of legal advice to that person, although it would probably be safer for the lawyer to have the lawyer's client submit the documents to the unrepresented person. If the lawyer does so directly, however, the lawyer should take care to make clear that the lawyer is not disinterested and is not representing the unrepresented person. For example, a lawyer handling a house financing for a bank may send the documents to the buyer for signature, but should make clear that he or she represents the bank and not the buyer and should not advise the buyer whether or not to sign the documents. The lawyer should, however, be able (if true) to tell the buyer that the financing will not be consummated if the documents are not signed. See *ABA Annotated Model Rules of Professional Conduct* (Third Edition, 1996), pp. 410-412.

Conduct of Lawyer's Staff

RPC 8.4(a) prohibits a lawyer from do-

ing indirectly what he or she cannot do directly. RPC 8.4(a) states that "it is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another." Further, RPC 5.1, RPC 5.2 and RPC 5.3 require a lawyer to be responsible for the professional conduct of subordinate persons, including a lawyer's staff. Thus, the lawyer must take care that these other persons, for whose conduct the lawyer has any responsibility, do not, when dealing with an unrepresented person, give the unrepresented person the misimpression that they or the lawyer are disinterested.

If a judge passively allows a pro se to jeopardize his or her claim or defense by significant errors, the unrepresented party may not in fact receive either a meaningful hearing or due process.

False Statements Prohibited

Several other RPCs, while not specifically addressing the lawyer dealing with unrepresented persons, also have particular importance to such a lawyer. RPC 4.1 requires a lawyer in the course of representing a client to not knowingly "make a false statement of material fact or law to a third person" or "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . ." Clearly, a lawyer or the lawyer's staff cannot lie to an unrepresented person any more than they may do so to anyone else. But do RPC 4.1 and 4.3 taken together suggest that a lawyer dealing with an unrepresented person may not rely on verbal or linguistic technicalities or niceties of the type which might arguably be acceptable when dealing with another lawyer?

Who is Pro Se? What About Unbundled Legal Services?

Who is an unrepresented person? Sometimes it is hard to know whether a self-proclaimed pro se person is in fact unrepresented or whether there are undisclosed lawyers assisting the person. The self-proclaimed pro se, for example, may be receiving some, but limited, assistance from a lawyer, and the uncertainty of the extent of the assistance can be troublesome for both the opposing lawyer and for a judge. For example, a self-proclaimed pro se may be receiving coaching in procedural matters, or drafting or writing assistance in pleadings from a lawyer. Is that person truly an unrepresented person? The question is not purely academic since practical consequences follow from differing responses.

If the self-proclaimed pro se is in fact being represented by counsel, lawyers will be concerned about violating RPC 4.2, which prohibits them from communicating about the subject of the representation with a party the lawyer knows to be represented by another party unless the lawyer has the consent of the other lawyer to do so (or they are otherwise authorized by law to do so). If the unrepresented person proclaims himself or herself a pro se, is that sufficient for the lawyer to freely communicate directly with that person without regard to RPC 4.2? Where a pro se acknowledges that he or she is receiving coaching or drafting assistance from another lawyer, and the opposing lawyer knows another lawyer is involved, how freely can the opposing lawyer deal with the pro se? Where an opposing lawyer knows or suspects that a self-proclaimed pro se is in fact being assisted by another lawyer, the opposing lawyer would be wise to confirm, and to document that confirmation with the pro se's lawyer, that the pro se's lawyer has no objection to the opposing lawyer contacting the pro se. For a discussion of some opportunities and dangers offered by such limited legal representation (sometimes referred to as "discrete task representation" or "unbundled legal services"), see Barrie Althoff, "Limiting the Scope of Your Representation: When Your Client Wants, or Can Afford, Only a Part of You" [*Bar News*, June 1997, p. 45], and Barrie Althoff, "Limiting the Scope of Your Representation: Questions of Cost, Candor & Disclosure" [*Bar News*, July 1997, p. 33].

Subsequent to those two articles, the Colorado Supreme Court adopted, on June 17, 1999, amendments to Rule 1.2 (scope of representation), Rule 4.2 (communication with person represented by counsel), and Rule 4.3 (dealing with represented party) of the Colorado Rules of Professional Conduct, and Rule 11 of the Colorado Rules of Civil Procedure, which together specifically permit unbundled legal services. The rules permit a lawyer to limit the scope of the representation with client consent and to provide limited representation to an otherwise pro se person pursuant to Civil Rule 11, which in turn requires that pleadings drafted with the assistance of counsel identify the counsel and contain a certification (which is not required where a lawyer assists a pro se client complete pre-printed forms issued by the court). Thus, the new Colorado rules permit unbundled legal services to be performed, but not anonymously, and any pleadings drafted by the lawyer are not "ghost-written," since the assisting lawyer's identity must be specified on the pleadings. The Colorado court also added a comment to its Rule 4.3 to make clear that a pro se party to whom limited drafting representation is provided under Civil Rule 11 is considered to be an unrepresented party for purposes of Rule 4.3, unless the opposing party knows in fact that the pro se is represented by counsel more generally.

In response to those changes, the United States District Court for the District of Colorado renewed its opposition to unbundled legal services and specifically rejected, by Administrative Order 1999-6, dated June 30, 1999, the Colorado Supreme Court's changes for practice in the Colorado Federal District Court as not being consistent with the District Court's view of Federal Civil Rule 11 or "with the view of the judges of this court concerning the ethical responsibility of members of the bar of this court." That court has previously opposed unbundled legal services and especially "ghost-writing." See *Johnson v. Board of County Commissioners*, 868 F. Supp. 1226 (D. Colo. 1994), aff'd on other grounds, 85 F.3d 489 (10th Cir. 1996).

Where a pro se says nothing to op-

posing counsel about receiving assistance from another lawyer, but the lawyer "knows" or "reasonably should know" that the otherwise unsophisticated pro se could not possibly have drafted the pleadings or made the legal arguments without having received legal assistance, is the lawyer then put on notice of such representation? If he or she is, is there any obligation to inquire of the pro se? Or, is it sufficient merely to rely on the pro se's declaration of not being represented?

Judges will likewise be concerned over whether a self-proclaimed unrepresented person is in fact receiving legal counsel. To satisfy the litigant's right to due process and access to the courts, a judge must assure a fair and meaningful hearing for the litigant. If a judge passively allows a pro se to jeopardize his or her claim or defense by significant errors, the unrepresented party may not in fact receive either a meaningful hearing or due process. On the other hand, if a judge assists the unrepresented party, the opposing party and that party's lawyer may well feel they have been denied a fair and impartial hearing since the judge has assisted the pro se against them. This will be especially true where the self-proclaimed pro se is in fact receiving undisclosed legal assistance.

Undisclosed drafting by a lawyer of pleadings for a self-proclaimed pro se litigant (a practice sometimes referred to as ghost-writing) raises particular concerns for judges. While *Haines v. Kerner*, 404 U.S. 519 (1972) holds that a pro se's complaint must be held to a less stringent standard than the formal pleadings drafted by lawyers, it is unclear whether that reduced standard also applies to documents other than pleadings, and whether it applies in other than federal courts. It seems clear, however, that where a self-proclaimed pro se submits pleadings ostensibly prepared by himself or herself, but which in fact were prepared by legal counsel, those pleadings should be held to the same standard as pleadings drafted by a lawyer, and thus the self-proclaimed pro se should not benefit from the reduced standard.

Does a judge have an obligation to inquire of each pro se whether he or she received drafting or coaching assistance? Some judges believe the undisclosed rendition of assistance by a lawyer is a violation by that lawyer of RPC 3.3, which requires lawyers to be candid with the court. Pro se litigants may, by analogy, be expected to comply with the same ethical standards as lawyers, even though those provisions do not on their face apply to non-lawyers. If a pro se litigant fails to disclose the role of the ghostwriting or coaching lawyer, can the pro se be sanctioned by the court for a lack of candor? Can the ghost-writing/coaching lawyer be sanctioned by the court even though the lawyer has not technically "appeared" before the court? Suppose the lawyer directs the pro se to disclose the lawyer's role in drafting pleadings or coaching the pro se, and the pro se agrees to do so, but in fact does not do so? May or must the drafting/coaching lawyer disclose his or her role, or would that disclosure be a breach of the lawyer's duty under RPC 1.6 to maintain the client's confidences and secrets?

While a judge may be tempted to sanction a pro se submitting allegedly self-prepared pleadings to a court by disregarding or expunging the pleadings, there is some non-Washington authority that a self-proclaimed pro se's pleadings found to have in fact been drafted by a previously undisclosed *nonlawyer* may not be disregarded or expunged, nor may the court prohibit such filings. See Tennessee Attorney General *Opinion 94-101*, 1994 WL 509446 (September 9, 1994); and *Opinion 94-46* of the Committee on Standards of Conduct Governing Judges, Sixth Judicial Circuit, Florida (December 16, 1994) at http://circuit6.co. pinellas.fl.us/sixth/OCSCGJ/ninet4/96-46.h.

Some courts also take the position that undisclosed ghost-writing is a violation of Rule 11 of the state or federal Rules of Civil Procedure, which require that every pleading be signed by the attorney of record or, where there is no attorney, by the pro se person. (See cites in two Althoff articles cited above.) While it would seem that to these courts a pleading signed by a drafting lawyer on behalf of the self-proclaimed pro se should be acceptable, this conclusion may be questionable given the position (cited above) of the U.S. District Court for the District of Colorado rejecting the Colorado Supreme Court's rules permitting unbundled legal services. Such a lawyer-signed pleading may also raise the issue of whether that signing constitutes an appearance in the litigation of the drafting lawyer, and if it does, whether it thereby limits the ability of the lawyer and his or her client under RPC 1.2 to agree to a limited scope of representation, as the court may seek to impose greater responsibilities on the lawyer than the lawyer and the client have agreed to. The Colorado Supreme Court rules seek to resolve these issues. In Washington, there is no authority on the issue.

Some Concerns of Judges Under the Code of Judicial Conduct

In dealing with unrepresented persons, judges may be concerned that if they provide any assistance to the unrepresented person they may violate their own fundamental duty to provide a fair hearing to the litigants, to maintain complete impartiality, and to maintain control over their own docket of cases. Unfortunately, Washington's Code of Judicial Conduct, and the comments thereto, provide only very general guidance and are silent as to the special problems that arise when dealing with unrepresented parties.

Impartiality and Fairness

The judge's duty of impartiality is referenced several times in Washington's Code of Judicial Conduct. Canon 2, entitled "Judges Should Avoid Impropriety and the Appearance of Impropriety in All Their Activities," provides: "(A) Judges should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3, entitled "Judges Shall Perform the Duties of Their Office Impartially and Diligently," states (in part (A)(3)): "Judges should be patient, dignified, and courteous." The official comment to that canon notes: "The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate." Canon 3(A)(6) reinforces this by providing: "Judges should dispose promptly of the business of the court."

Canon 3 goes on to provide:

> (A)(4) Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding . . .; (5) Judges shall perform judicial duties without bias or prejudice.

The comment to Canon 3(A)(5) states: "A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute." To safeguard impartiality, judges must also take care that their staff and other officers of the court also maintain that same freedom from bias and prejudice.

The Court of Appeals commented in *State v. Ladenburg*, 67 Wn.App. 749, 754-5 (Div.II, 1992): "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." A recurring problem for a judge dealing with unrepresented persons is that if the unrepresented person is to receive a fair hearing, the person may need assistance. In this context the test of impartiality and fairness is not merely whether the judge assisted an unrepresented party, but rather whether that assistance would lead a "reasonably prudent and disinterested observer" to conclude that all parties had not had a fair, impartial, neutral hearing." The judge's role is neither to so assist an unrepresented party as to equalize the resources of the litigants nor to oversee a travesty of justice. But it is difficult for a judge to know where between the Scylla of seeking a level playing field and the Charybdis of presiding over a litigation massacre the judge may safely sail.

If there is no one else to provide assistance to the unrepresented person, the judge or the judge's staff may need to do so, and the more assistance given, the more likely the opposing parties will be deprived or feel deprived of themselves receiving a fair and impartial hearing. While the judge and the judge's staff clearly cannot provide the unrepresented party with legal advice or advise as to courtroom tactics (since Canon 5(F) of the Code of Judicial Conduct expressly prohibits judges from practicing law), that advice is sometimes the very advice the unrepresented party needs if she or he is to receive a fair hearing. Although the prohibition on judges practicing law does not apply to part-time judges (see Code of Judicial Conduct – Application of the Code of Judicial Conduct (A)(1)(ii) and *Washington State [Judicial] Ethics Advisory Opinions 94-4* and *96-8*), in the context of a judicial proceeding, the part-time judge is subject to the same restrictions as a full-time judge in assisting an unrepresented party. While court staff such as courthouse facilitators may lessen the need for the judges themselves to directly assist unrepresented persons, the distinction between providing prohibited "legal advice" and possibly permissible "legal information" is perilously fine and fraught with adverse consequences.

While court staff such as courthouse facilitators may lessen the need for the judges themselves to directly assist unrepresented persons, the distinction between providing prohibited "legal advice" and possibly permissible "legal information" is perilously fine and fraught with adverse consequences.

Prompt Disposal of Cases

A judge has a duty to dispose of cases promptly. The judge may find difficulty in doing so when dealing with an unrepresented person because the person's unfamiliarity with appropriate procedures will often cause repeated and significant delays in proceedings. Should a judge, remembering the aphorism that "justice delayed is justice denied," allow delays in a pro se case which will effectively delay justice for other cases on his or her docket?

A Sliver of Guidance

Little guidance is available to judges on how to meet their duty of impartiality and yet assure a pro se litigant of his or her right to a fair hearing. *Advisory Opinion 1-97* of the Indiana Commission on Judicial Qualifications (http://www.state.in.us/judiciary/admin/judicial/1-97.html) is one of the very few opinions that explores this issue. It concludes that a judge's ethical obligation to treat all litigants fairly obligates the judge to ensure that a pro se litigant in a non-adversarial setting is not denied the relief sought only on the basis of a minor or easily established deficiency in the litigant's presentation or pleadings. It states:

> Neutrality and impartiality are virtues which are essential to the integrity of the judiciary. Perhaps because those virtues so often are extolled, it appears to the Commission that, from time to time, judges who have before them pro se litigants whose pleadings or presentations are deficient in some minor way, sometimes take an unnecessarily strict approach to those deficiencies, turn the litigants away on those grounds, and, in the name of strict neutrality, violate other sections of the Code of Judicial Conduct.
>
> Fairness, courtesy, and efficiency also are hallmarks of an honorable judicial system. . . . [Indiana citations omitted.] The Commission members believe that in presiding in a case with a pro se litigant in a non-adversarial setting, where the litigant has failed in some minor or technical way, or on an uncontroverted or easily established issue, to submit every point technically required or which would be required from an attorney, the judge violates the Code by refusing to make any effort to help that litigant along, instead choosing to deny the litigant's request or relief. For example, if a pro se litigant seeking a name change pays the required fees, submits proof of publication, establishes the basis for the request, but inadvertently or for lack of experience does not state an

element which the judge requires, such as that the name change is not sought for a fraudulent purpose, the judge should make that simple inquiry during the litigant's presentation to the court rather than simply deny the petition on that basis alone. Neither the interests of the court nor of the litigant are served by rejecting the petition on the basis of this type of deficiency. Similarly, for example, a married couple seeking a divorce, each acting pro se, with no contest or issues in dispute, might unknowingly omit from their pleadings their county of residence. A judge should make inquiry of the parties to establish this element of their petition, and proceed appropriately, rather than deny the petition and excuse the parties from the courtroom on the basis of their omission.

The Commission stresses the obvious here that a judge in no way has an obligation to cater to a disrespectful or unprepared pro se litigant, or to make any effort on behalf of any citizen which might put another at a disadvantage. Of course, normally a judge should not "try a case" for a litigant who is wholly failing to accomplish the task. However, on the occasion where a citizen has the simplest kind of matter to bring before the court, with no adversarial context, and no indication of any untoward motive or disrespect for the court, the judge has a duty and a responsibility to not simply turn that citizen away on the basis of a minor failure to establish every pertinent detail.

Florida also wrestled with this issue. The Committee on Standards of Conduct Governing Judges of the Florida Sixth Circuit concluded in *Opinion 93-8* (1993) that a judge could provide pro se litigants with appropriate forms. But the Committee was divided as to whether it would be the prohibited practice of law for a judge to distribute a four-page brochure entitled "Family Law Division, Pro Se Pointers" which contained a checklist of 12 documents, two pages of explanations of forms and procedures, and a request that the pro se sign and date the brochure and return it to the judicial assistant for review shortly before a final hearing. (Available at http://circuit6.co.pinellas.fl.us/sixth/OCSCGJ/ninet3/93-08.html.) The Committee's doubts as to the permissibility of assistance to pro se litigants may subsequently have been resolved, however, since by *Administrative Order No. PA/PI-CIR-99-34* (April 29, 1999), the Florida Sixth Circuit established a Family Law Self-Help Center to be operated under the auspices of the court to assist self-represented litigants filing family law actions. See http://circuit6.co.pinellas/fl.us/sixth/aos/subjectao/familycw/ap99%2D34.doc.htm).

In a tone somewhat similar to the earlier Florida opinion, the New Mexico Advisory Committee on the Code of Judicial Conduct in its *Judicial Advisory Opinion 93-3* (June 8, 1993) concluded that a judge could not ethically develop forms for litigants in the judge's court since doing so would constitute the practice of law and would engender doubts as to the judge's impartiality. The author believes that contrary to this opinion and the earlier Florida opinion, the clear nationwide trend will be for courts, perhaps through their administrators, to provide more, rather than less, forms and assistance to unrepresented parties.

Conclusion

The personal mission statement of every lawyer should be, as it is of the Washington State Bar Association, to promote justice and to serve the public and the legal profession. The Preamble to the RPCs reminds us that "justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government." Lawyers and judges live this belief by respecting the dignity of the unrepresented persons with whom they deal, by treating them with deference and patience, by assisting them where they ethically may, and by respecting their attempts to exercise their ability to govern their own affairs through their own self-representation.

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.

Suspended

Arthur Boelter (WSBA No. 9213, admitted 1979), of Seattle, has been suspended for six months following a hearing. The suspension became effective October 12, 1999, by order of the Supreme Court. The Court also ordered Mr. Boelter to pay restitution. The discipline was based on his threatening to disclose a client's confidences in a suit to collect fees, falsely claiming that he had tape-recorded a conversation with his client, and charging excessive and unreasonable fees. For additional information, see *Discipline of Boelter*, 139 Wn.2d. 81 (1999).

In August 1990, a client revealed to Mr. Boelter confidential information regarding assets concealed from the IRS. When the client disputed Mr. Boelter's $1,824.33 fee, Boelter wrote, "If we are not paid in full by October 15, 1991, we will file suit for the fees. You should understand that if we are forced to file suit, you forego the attorney-client privilege and I would be forced to reveal that you lied on your statements to the IRS. . . . This would entail disclosure of the tapes of our conversations about your hidden assets. There is a federal statute, 18 U.S.C. §1001, which provides for up to one year in jail for such perjury. The choice is yours." In a later speed memo, Mr. Boelter added, "I would suggest that you liquidate one of the undisclosed artworks you have and pay us by November 25, 1991." In 1992, Mr. Boelter's firm filed suit in a county district court to collect the fees. During this litigation, Mr. Boelter signed an affidavit stating that he had tape-recorded the client, but that the tape had been either erased or destroyed. In his later response to the WSBA, Mr. Boelter stated that he had not tape-recorded his client and his letter referred to dictation tapes. Mr. Boelter did not mention the affidavit

in his response. If Mr. Boelter had charged the client amounts consistent with the "Terms of Engagement" pamphlet given to the client, the bill would have been $186.48, instead of $1,824.33. Mr. Boelter charged the client interest for several months while the $800 advance fee deposit sat in the trust account. Additionally, Mr. Boelter added some monthly charges to the account that were not explained to the client.

Mr. Boelter's conduct violated RPC 8.4(c), prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by 1) sending the letters to the client falsely stating that a tape recording existed; 2) falsely stating that Boelter would be forced to reveal client confidences; and 3) signing an affidavit stating that a tape recording existed, but had been destroyed, when a tape recording had not been made. By adding unauthorized charges to the client's bill and failing to apply the advance fee deposit to avoid interest charges to the client, Mr. Boelter's conduct also violated RPC 1.5, requiring lawyers' fees to be reasonable.

Kurt Bulmer represented Mr. Boelter. Linda Eide represented the Bar Association. The hearing officer was Fred R. Butterworth.

Reprimand

Sam K. Eck (WSBA No. 13111, admitted 1969), of Bellevue, has been ordered to receive a reprimand following a hearing. The discipline is based upon his failure to avoid conflicts of interest.

Mr. Eck drafted several estate-planning documents for a husband and wife, including a Family Trust. Mr. Eck also formed a limited liability company for the clients. Over approximately four years, Mr. Eck drafted several amendments to these documents. In 1996, the couple's relationship deteriorated to the point that the husband wanted to disinherit the wife. During this time, and without disclosing the conflict of interest to the parties, Mr. Eck made changes to the estate planning documents which were potentially detrimental to the wife. Mr. Eck also drafted a gift of $50,000 from the husband to himself. Mr. Eck strongly suggested to the client that he obtain independent legal advice prior to executing the gift to Mr. Eck, which the client did.

Mr. Eck's conduct violated RPC 1.7, prohibiting lawyers from representing clients whose interests are directly adverse, unless the lawyer reasonably believes that the representation will not adversely affect the lawyer's relationship with the clients and each client consents in writing, after full disclosure. Mr. Eck's conduct also violated RPC 1.8(c), prohibiting lawyers from preparing an instrument giving the lawyer a substantial gift from the client, including a testamentary gift, except when the lawyer is related to the donee.

Leland Ripley represented Mr. Eck. Linda Eide represented the Bar Association. The hearing officer was Ron Bland.

Lawyers' Fund for Client Protection

The Lawyers' Fund for Client Protection Committee meets quarterly to review applications for gifts from the Fund. The Committee is authorized to make gifts to qualified applicants of up to $3,000. On applications for more than $3,000, the Committee makes recommendations to the Board of Governors, who are the Fund's Trustees. At their meeting on November 12, 1999, the Committee took the following action:

Irving Leroy Dane (WSBA No. 6587, Vancouver) – The Committee recommends payment of $30,000 and $10,494, respectively, to two clients in separate personal injury actions. In the first, an insurer paid $50,000, which the client endorsed to Dane for deposit in trust. Dane misappropriated the client's funds, including using $25,000 for his house payment. The other involved a settlement payment of $22,872 in a personal injury action, which Dane did not disclose to the client. He misappropriated $10,494.

William R. Hebeler (WSBA No. 14373, Lynnwood; deceased) – Two applications approved. One recommends payment of $6,500 to immigration clients seeking resident alien visas. After his clients paid the fee, Hebeler abandoned the case, moved out of state, and did not return the unearned fee. In the other case, the client paid $500 to prepare an application for citizenship. Hebeler failed to prepare the application or perform any service to earn the fee.

Melinda Monet (WSBA No. 25676, Seattle; suspended) – (The Committee approved 28 applications from former clients of Monet's during 1999.) Two applications were approved. One for $380 which had been paid to prepare and file a marriage dissolution; no service of value was performed, and fees were not returned. The second application was for $175 paid to Monet as a bankruptcy filing fee that she appropriated to her own use.

Jerold R. Weidenkopf (WSBA No. 12438, Tacoma; disbarred) – Approved payment of $450 to a client who paid Weidenkopf for representation in a parenting plan proceeding. His only actions on behalf of the client were to file a notice of appearance and subsequently a notice of withdrawal. He performed no services of value and failed to return the unearned fee.

The Committee also denied seven applications as fee disputes, two as malpractice, two because there was no evidence of a dishonest taking of funds, and one as moot, since restitution had been made. Committee members deferred action on one for further investigation.

In other business, the Committee reviewed the refusal of an applicant who was previously given $23,560 from the Fund to repay that amount pursuant to a subrogation agreement entered into with the Fund as a condition of payment. The applicant received a $90,000 settlement from the lawyer's insurer. The applicant is a lawyer in another jurisdiction, and the Committee voted to recommend to the Board of Governors that a disciplinary grievance be filed against the former applicant.

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

Opportunities for Service

WSBA Presidential Selection

The Board of Governors of the Washington State Bar Association is seeking applicants to serve as WSBA President for 2001-2002. Pursuant to Article IV(A)(2) of the WSBA bylaws, the President's primary place of business is that area west of the Cascade mountain range generally known as western Washington, but outside of King County.

Applications for 2001-2002 President of the WSBA will be accepted through May 15, 2000, and should be limited to a current résumé, a concise application letter and selected references. Endorsement letters received by May 31, 2000 will be considered by the Selection Committee and the Board of Governors. Applications and endorsement letters should be sent to the WSBA Executive Director, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330.

Interviews will be conducted May 16-31, 2000 at the WSBA office. In addition to the interview in May before the Selection Committee, finalists will be invited back to the June Board of Governors meeting for an interview before the full Board of Governors in open session. Applicants are discouraged from conducting active campaigns for this office.

The Washington State Bar Association member selected to be President will have an opportunity to provide a significant contribution to the legal profession.

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

The commitment begins in June 2000. The term as President-elect will begin at the Annual Business Meeting in September 2000, and the term as President will begin at the September 2001 Annual Business Meeting. The candidate will be expected to attend two-day board meetings every six weeks, as well as attend numerous subcommittee, section, regional, national and local meetings. During his or her service, the candidate will also be required to meet with members of the Bar, the courts, the media, and public and legal interest groups, as well as be involved in the Bar's legislative activities. Appropriate time will need to be devoted to communication by letter, electronic mail and telephone in connection with these responsibilities.

Presidential Selection Committee:

J. Richard Manning, Chair; Daryl L. Graves; Stephen J. Henderson

Appellate Court Vacancies

The WSBA Judicial Recommendation Committee is currently accepting applications from attorneys and judges seeking consideration for appointment to fill potential appellate-court vacancies. The Committee will interview interested candidates at its March 24, 2000 meeting.

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

If you are interested in scheduling an interview, please contact the WSBA at 2101 Fourth Avenue, 4th Floor, Seattle, WA 98121-2330, phone 206-727-8227, to obtain a questionnaire. Please specify whether you need the questionnaire designed for a judge or an attorney. The deadline for receipt of questionnaires by the WSBA is 5 p.m., February 25, 2000.

LAW WEEK 2000:

A Lawyer and Judge in Every School Seeking Local Organizers

Committee Chair Russ Speidel is leading an energetic team of 40-plus people in promoting Law Week 2000, A Lawyer and Judge in Every School, scheduled for the week of May 8-12, 2000. During that week, hundreds of lawyers and judges throughout the state will celebrate and promote public legal education, reaching thousands of students in grades one through 12.

The Law Week 2000 Committee is recruiting local Law Week organizers from county and specialty bar groups to match lawyers and judges with local schools. If you would like to serve as an organizer, e-mail LawWeek@wsba.org or call 206-727-8270.

The Committee is preparing a Law Week website which will contain ready-to-use lesson plans, presentation tips, and links to public legal education resources around the state and the country. The site (in-progress) may be found at www.wsba.org/lawweek/default.htm.

Lawyers Helping Hungry Children Needs You!

Since 1991, Lawyers Helping Hungry Children (a 501(c)(3) nonprofit corporation), a volunteer organization of members of the legal community and other concerned citizens, has raised money to provide thousands of meals to young children through several local organizations. The group is seeking enthusiastic, talented people to volunteer their time to help end childhood hunger in our area.

For more information, contact Steve Parkinson at Marten & Brown, 206-292-6300.

WSBA Staff Milestones

The WSBA has many dedicated staff members, and each January and July we'll be recognizing those who have reached significant milestones. But first, we have a little catching up to do. We're listing the names of all those who have reached the five-year mark or higher as of January 2000. Congratulations to the following staff members who have a combined total of 324 years of service!

23 years
Shirley Naccarato

20 years
Ken Barclay
John Fattorini

18 years
Bob Welden
John Redenbaugh
Cindy Jacques

15 years
Maria Regimbal

14 years
Steve Rosen

12 years
Barbara Harper
Michele Kramer
Sharlene Steele

11 years
Randy Beitel

10 years
Bethel Webb
Jean McElroy

9 years
Mary Barnes
Pat Dieken

8 years
Sheri Borgford
Sherry Johnson
Marty Potter
Jacki Browning
Jack Young

6 years
Pat Hafford
Lorraine Maust
Mike Saelee

5 years
Barrie Althoff
Joan Fairbanks
Joy McLean
Margaret Morgan
Cathy Newton
Sonia Pagonakis
Carey White

Senior Lawyers Section

For those of you who are not already members of the Senior Lawyers Section (lawyers "55 and counting"), consider joining this enthusiastic group by signing up now. In the words of Chairman Fred Frederickson, "We have the best time of any section in the Association. Our longtime friends and compatriots at the Bar have much to offer each other." The annual section seminar will be held Friday, April 14, 2000 (please note: this is different than the usual August seminar date).

The Section's quarterly publication, *Life Begins*, is geared toward active senior lawyers. Section members are encouraged to submit articles of general interest and on legal issues.

If you are interested in becoming a member, please complete the form below, send a check for $20 payable to the Washington State Bar Association, and mail with the form to:

Sheri Borgford, Senior Lawyers Section
Washington State Bar Association
2101 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330

Dues cover October 1, 1999 through September 30, 2000. Your cancelled check is acknowledgment of membership.

Please check one:
❑ I am an active member of the WSBA.
❑ I am not a member of the WSBA.
Name _____
Address _____
City/State/Zip _____
Phone No. _____
E-mail address _____
State Bar Membership No. _____
_____
Office use only:
Date _____ Check No. _____ Total $_____

Notice of Public Meeting

Year 2000 quarterly meetings of the Board of Directors of Northwest Justice Project, a 501(c)(3) not-for-profit organization which provides civil legal services to eligible low-income clients, will be held on the following dates:

January 22, 2000; April 29, 2000; July 8, 2000; Oct. 14, 2000

The Northwest Justice Project, which maintains nine offices throughout Washington state, is the current recipient of federal funding made available through the Legal Services Corporation. These public meetings generally commence at 9:30 a.m. While they are usually held in Seattle for cost-economy reasons, and to accommodate board-member travel, specific meeting sites may vary from meeting to meeting based on space availability or other program purposes. All meetings are open, except that limited portions may be closed pursuant to a vote of a majority of the Board of Directors, to hold an executive session. In such sessions, the board reviews, considers, and in some cases, votes upon matters related to: 1) litigation to which the program is or may become a party or 2) internal personnel, operational, investigative and sensitive labor-relations matters. Any such closed sessions will be authorized by pertinent laws and regulations and will be duly noted, in summary form, in open session and corresponding minutes. Closed sessions will also be formally certified by the program's Executive Director or General Counsel as authorized. A copy of the certification will be maintained for public inspection at the program's main office located at 401 Second Ave. S., Ste. 407, Seattle, WA 98104, and will be otherwise available upon request.

For specific meeting site information, please call Lisa Giuffré at 206-464-1519 or toll-free at 888-201-1012.

Goldmark Award Luncheon

The Legal Foundation of Washington will celebrate its 15th Anniversary on February 25, 2000. The Legal Foundation is a not-for-profit organization which has provided over $45,000,000 for legal services to the poor since 1985. Gregory R. Dallaire will receive the Goldmark Award for Distinguished Service. Mr. Dallaire, Managing Director of Garvey, Schubert & Barer of Seattle, was founding Director of Evergreen Legal Services, recognized as one of the most successful and effective legal services programs in the country prior to its evolution into Columbia Legal Services.

The Goldmark Award honors the memory of Charles A. Goldmark, Seattle attorney, community leader, and ardent supporter of access to justice. Mr. Goldmark served as the Legal Foundation's president at the time of his death in 1986. The 14th annual Goldmark Award Luncheon will be Friday, February 25, 2000 at the Washington State Convention & Trade Center from 12:00 p.m. – 1:30 p.m. The luncheon is open and the public is invited to attend.

Show your support for access to justice by purchasing an individual ticket to the luncheon or accepting one of the other donation opportunities. Please clip out and return the coupon below with your check payable to the Legal Foundation of Washington.

Legal Foundation of Washington • February 25, 2000
Goldmark Awards Luncheon

❑ Yes, I would like to honor the work of legal services by attending the luncheon. I will bring _____ additional guests. ($30/person enclosed).

❑ My firm would like to be an Equal Justice Supporter ($325 enclosed). Four members of our firm will attend and six seats will be donated. (A charitable contribution of $205 will help cover luncheon expenses.)

❑ I would like to be a Goldmark Donor ($100 enclosed). Two lunches will be provided and a charitable contribution of $40 will help cover luncheon expenses.

❑ No, I cannot attend the luncheon, but I would like to support the luncheon with a donation of $_____.

Names (s): _____

Make checks payable to: Legal Foundation of Washington, 500 Union Street, Suite 545, Seattle, WA 98101

USURY RATE

The average coupon equivalent yield from the first auction of 26-week treasury bills in December 1999 is 5.525 percent. The maximum allowable interest rate for January 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 on the WSBA website at http://www.wsba.org/barnews/usuryrate.html.

Herman Wacker, Attorney at Law
is pleased to announce we have changed
our firm's name to:

Employee Legal Advocates

Our new name reflects our growth and the
expansion of our primary practice:
Federal and State Trial Work for employees.

We are also pleased to announce
D. Jill Hawkins has joined the firm.

Employee Legal Advocates continues the firm's
commitment to excellence in client representation
and legal professionalism.
Find us on the web at: **www.employ-law.com**.

Herman Wacker will continue to be
available for mediation and arbitration of labor
and employment disputes.
Find him on the web at: **www.employ-adr.com.**

217 Pine Street, Suite 620
Seattle, Washington 98101
206-467-5090
Fax 206-467-5095
www.employ-law.com

Elizabeth D. Stephenson

is pleased to announce the opening of her office.

Bellevue Place
800 Bellevue Way N.E.
Suite 400
Bellevue, Washington 98004
Telephone 425-462-4052
Facsimile 425-462-5638
seattledefense@aol.com

Ms. Stephenson, formerly associated
with the City of Bellevue as a criminal prosecutor,
will focus her practice primarily in the
area of criminal defense.

Lathrop, Winbauer, Harrel, & Slothower, L.L.P.

is pleased to announce that

James T. Denison, Jr.

has joined the firm.

Mr. Denison is a graduate of
Seattle University School of Law and was
a deputy prosecuting attorney for Kittitas County
for three years. Mr. Denison's practice will
include criminal defense, corporate
and family law.

With the addition of Mr. Denison,
the firm has enhanced its ability to provide
quality legal services to our clients.

Post Office Box 1088
201 West Seventh Avenue
Ellensburg, WA 98926
509-925-6916 Phone
509-962-8093 Fax

Montgomery Purdue Blankinship & Austin PLLC

Attorneys/Seattle

takes pleasure in announcing
the growth of our firm with the addition of:

Inger C. Brockman
Associate

and

Kristiana L. Farris
Associate

October 1999

58th Floor, Bank of America Tower
701 Fifth Avenue
Seattle, Washington 98104-7096
Telephone: 206-682-7090
Fax: 206-625-9534

SMYTH & MASON, PLLC

announces its formation effective

NOVEMBER 1, 1999

The firm will continue the practice concentrations of its principals in the areas of commercial litigation, including public works construction, complex civil litigation and class actions, employment law, and catastrophic personal injury.

The Firm's principals are

Jeffrey A. Smyth

and

Christopher C. Mason

The Firm is also pleased to announce the association of

Shaunta M. Knibb

Ms. Knibb is a 1997 graduate of the University of Washington School of Law, where she was elected to the ORDER OF THE COIF and served as a managing editor of the Washington Law Review.

71st Floor, Bank of America Tower
701 Fifth Avenue
Seattle, Washington 98104
206-621-7100
www.smythlaw.com

The Lawyers of

STOKES LAWRENCE, P.S.

are pleased to announce that

LORA L. BROWN

has become a Shareholder

and

RHE E. ZINNECKER

DENISE A. BANASZEWSKI

are now associated with the firm.

800 Fifth Avenue • Suite 4000
Seattle, Washington 98104-3179
Telephone: 206-626-6000

TRUNKENBOLZ & ROHR PLLC

is pleased to announce that

Cary P. Driskell

has become a partner of the firm.

The new name of the firm is

TRUNKENBOLZ | ROHR | DRISKELL PLLC

and will continue to emphasize legal issues concerning:

Real Estate
Business
Litigation
Estate Planning

in our Washington office at:

12704 East Nora
Spokane, Washington 99216
509-928-4100
trdvalley@dmi.net

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Washington State Bar Association

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For more information,
please contact

Jack Young

Advertising Manager, *Bar News*
at 206-727-8260
or
e-mail: jacky@wsba.org

Calendar

ESTATE PLANNING

Estate Planning for Small- to Medium-Sized Estates
February 17 – Seattle; February 24 – Mt. Vernon. 7.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

FAMILY LAW

Family Law 2000: Spousal Support
January 28 – Portland. 6 CLE credits pending (incl. 1 ethics). By Oregon State Bar; 503-684-7413.

Family Law Tax Issues
February 25 – Seattle. 6.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

GENERAL

Professional Mediation Skills Training
January 7-9, 22-23 – Seattle. CLE credits TBA. By UW-CLE; 206-543-0059.

Chapter 13: Entering the New Millennium
January 13 – Seattle. 6.75 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Fee-Based Electronic Resources
January 17 – Seattle. CLE credits TBA. By UW-CLE; 206-543-0059.

Bridging the Gap
January 22 – Seattle. 6.5 CLE credits pending. By King County Bar Association; 206-340-2578.

Interactive Negotiation with Professor Martin E. Latz and Dr. Judith M. Wolf
January 27 – Portland. 7 CLE credits pending (incl. 1.5 ethics). By Oregon State Bar; 503-684-7413.

Trial Tactics
February 18 – Vancouver. 4 CLE credits pending. By Washington Defense Trial Lawyers; 206-521-6559.

Americans with Disabilities Act/ Discrimination
February 24 – Seattle. 7 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Covenants Not to Compete in Washington
February 12 – Seattle. 4 CLE credits. By Lorman; 715-833-3940.

REAL ESTATE

Debtor/Creditor Issues in Real Estate
February 2 – Portland. CLE credits TBA. By Oregon State Bar; 503-684-7413.

Commercial Leasing
February 10 – Spokane; February 11 – Seattle. CLE credits TBA. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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.

INSURANCE LAW

22nd Annual Insurance Law Seminar
January 20 – Spokane; January 21 – Seattle. 6 CLE credits pending. By WSTLA; 206-464-1011.

RESEARCH

Computer Camp for Counselors™: Basic Hands-On Workshop for Using the Internet in Your Practice *(morning session)*
January 26 – Seattle. 4 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA. *Discount available if registering for more than one workshop.

Computer Camp for Counselors™: Legal Research Over the Internet *(afternoon session)*
January 26 – Seattle. 4 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA. *Discount available if registering for more than one workshop.

Computer Camp for Counselors™: Advanced Net Use for Lawyers and Paralegals.
January 27 – Seattle. 4 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA. *Discount available if registering for more than one workshop.

Using the Internet for Legal Research with Leigh Webber
February 11 – Portland. CLE credits TBA. By Oregon State Bar; 503-684-7413.

Professionals

CHILD ABUSE

Steve Paul Moen
is available for assistance and referral of civil and criminal cases involving child abuse, delayed recall and mental health counseling.

SHAFER, MOEN & BRYAN, P.S.
Hoge Building, Seattle
206-624-7460

CONSTRUCTION SITE INJURIES

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

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

CALIF/WA DUAL-LICENSED

Michael A. Aronoff
Aronoff & McGoran P.S.

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

253-874-0189
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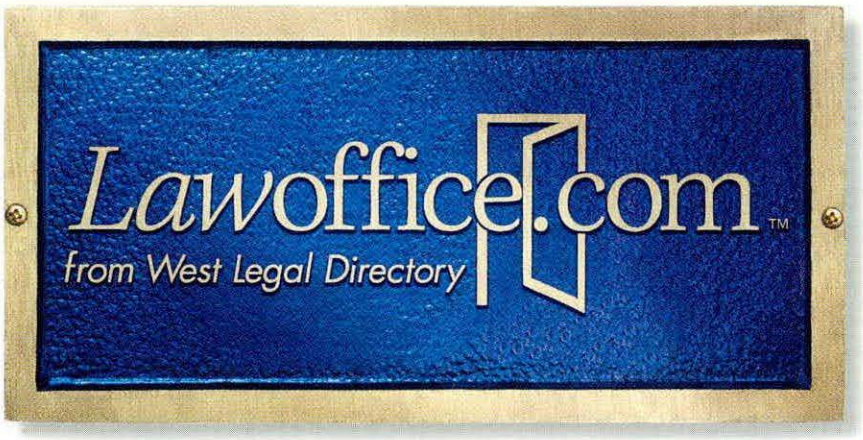

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Difference of opinion.

536 Minn. 367 NORTH WESTERN REPORTER, 2d SERIES

Eleanor Louis BOOM, Respondent,
v.
Rolland David BOOM, Appellant.
No. C2-83-1956.
Court of Appeals of Minnesota.
April 23, 1985.

536 Minn. 367 NORTH WESTERN REPORTER, 2d SERIES

Eleanor Louis BOOM, Respondent,
v.
Rolland David BOOM, Appellant.
No. C2-83-1956.
Court of Appeals of Minnesota.
April 23, 1985.

Review Denied June 27, 1985.

Upon motion of wife, appeal by husband from a judgment entered in a marriage dissolution proceeding was dismissed. Husband petitioned for reinstatement of appeal. The Court of Appeals, Peter S. Popovich, J., denied the petition, and husband petitioned for further review. The Supreme Court, Coyne, J., 361 N.W.2d 34, reversed and remanded. Upon remand, the District Court, Traverse County, Bruce N. Reuther, J., divided the parties' property. Appeal was taken. The Court of Appeals, Sedgwick, J., held that: (1) disproportionate award of marital property to husband was justified where 13 years lapsed between service of summons and complaint and marriage dissolution and property was acquired solely by husband during that period, and (2) trial court may amend its judgment any time before appeal time on judgment expires.

Affirmed.

1. Divorce ⇐252.3(3)

Disproportionate award of marital property to husband was justified, where 13 years lapsed between service of summons and complaint and the marriage dissolution and the property was acquired solely by husband during that period.

2. Judgment ⇐297

Trial court may amend its judgment any time before appeal time on judgment expires. 48 M.S.A., Rules Civ.Proc., Rules 52.02, 59.03.

3. Divorce ⇐254(1, 2)

Property divisions are final and are not subject to modification except when they are product of mistake or fraud; however, this does not preclude trial court from reviewing award if the appeal period has not expired and a party timely moves for amendment pursuant to rule. 48 M.S.A., Rules Civ.Proc., Rule 52.02.

4. Divorce ⇐254(1)

A property distribution in a judgment and decree is not "final" until after the appeal period expires.

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus by the Court.

1. A disproportionate award of marital property to the husband is justified where 13 years elapsed between service of the summons and complaint and the dissolution and the property was acquired solely by the husband during that period.

2. A court may amend its judgment anytime before the appeal time on the judgment expires.

Robert E. Van Nostrand, Wheaton, for respondent.

John E. Mack, New London, for appellant.

Heard, considered and decided by POPOVICH, Chief Judge, and SEDGWICK, and NIERENGARTEN, JJ.

OPINION

SEDGWICK, Judge.

Appellant Rolland Boom and respondent Eleanor Boom both challenge the trial court's division of property. Rolland also alleges the trial court erred: (1) in amending its judgment decree without any findings, explanation or justification; and (2) awarding Eleanor attorney fees. We affirm.

FACTS

Appellant Rolland and respondent Eleanor Boom were married in 1951. They

Case synopsis

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