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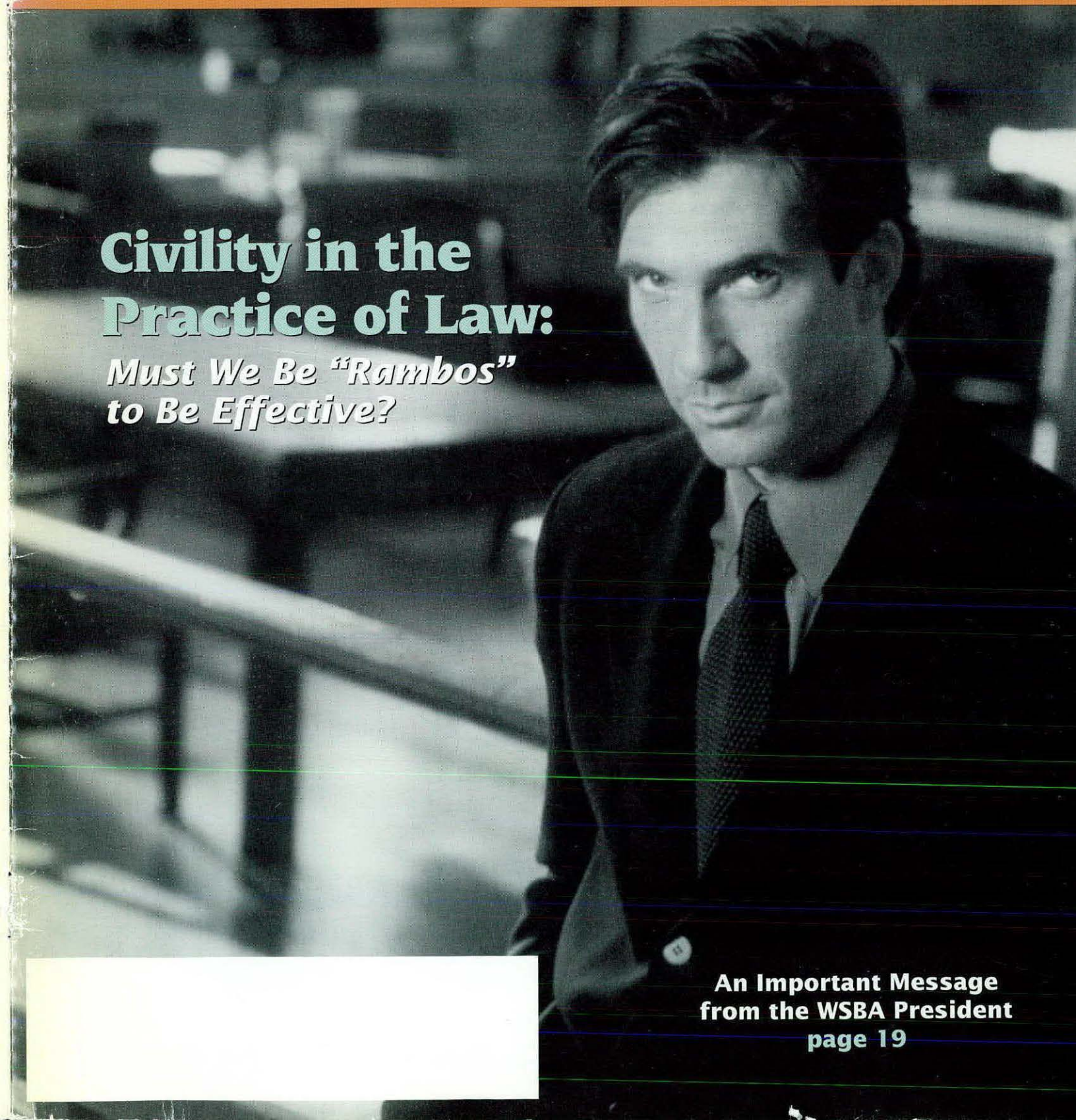

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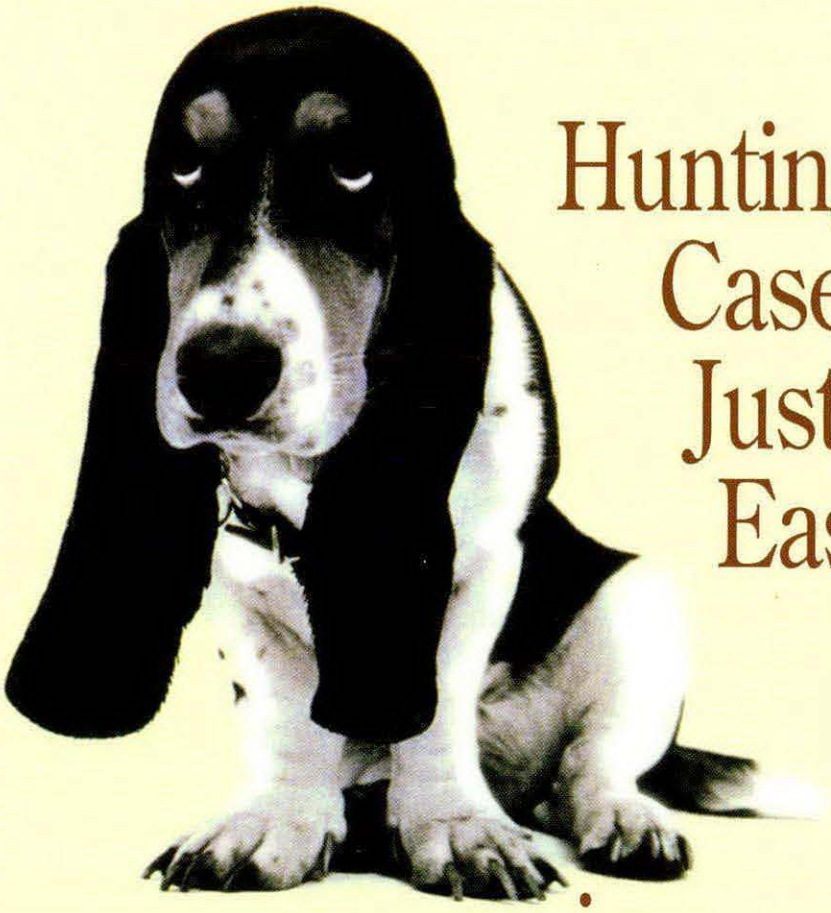

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Editor:

I have been practicing family law in Snohomish County for 25 years, and over the past decade or so, I have come to the conclusion that McDonald's has sold many of the billions of burgers purchased during that period as a result of family law issues.

Parents in both divorces and non-marriage parenting cases have become increasingly contentious over the years. This has necessitated a need for a "neutral" spot for visitation pickup and delivery. The number of family law cases in my practice and the practices of my colleagues which require the finding of a safe place for the visitation exchange to occur has increased dramatically in the past few years. One wonders if split-family relationships are becoming more violent, or if it is just that parents are becoming more aware of avenues to voice their concerns over what they consider inappropriate behavior.

In any case, more and more split-family visitation plans seek out a neutral place for the visitations to occur. And what location could be more ideal than a McDonald's? The reasons for such a location choice are obvious:

1. There is one in nearly every community, and sometimes even multiple sites to choose from.
2. The hours that the usual McDonald's is open will almost always cover all visitation hours, regardless of the parenting plan in question.
3. If the children get hungry, or if the other parent is late in arriving, the food is cheap.
4. There are play areas for the children while they wait.
5. And lastly, there seems to be an almost church-like aura to a McDonald's. Except for boisterous kids, people are rarely loud and unruly. Everyone knows where to line up, what food is available, what it will cost, and where to sit.

The ritual-like atmosphere lends a tranquility to visitation exchanges. As much as anyone may dislike or distrust the other parent, it would be improper to make a scene, and there are usually lots of witnesses to verify which parent is acting badly. But it is not only the angry parents who utilize McDonald's as a neutral spot. More and more parents are living further apart geographically, and mid-point transfer spots are being utilized. Where else to go but a McDonald's so often conveniently located in every possible neutral location?

I'm sure the McDonald's owners didn't have these visitation issues in mind when franchises began popping up in every conceivable nook and cranny of our nation. And the owners might not, to this day, realize what a bonanza they have on their hands. But billions and billions of family attorneys know it to be true.

Richard W. Swanson
Marysville, WA

Justice O'Connor Hits ATJ Nail on Head

Editor:

I'm just a lawyer from Bellingham and I don't get out much, so it was quite a thrill for me to attend a panel discussion which featured three sitting U.S. Supreme Court Justices at a class reunion for my husband's

alma mater. The topic was one on which three justices could actually hold a discussion — what they had learned from and contributed to in discussions with judges from other nations.

As treasurer of Legal Aid for Washington (LAW) Fund, my ears pricked up when the facilitator, Stanford University Law School Dean Kathleen Sullivan, asked Justice Sandra Day O'Connor to comment on the quality of justice in the U.S. in contrast with that in other countries. Justice O'Connor could have responded, "Ours beats them all hands down." But she didn't. She answered that while we have much to be proud of, as long as we significantly limit access to justice due to lack of income by those in need of civil redress, ours has much room for improvement. Her statement received a round of applause from an audience clearly touched by her observation and humanity.

As treasurer of LAW Fund, which raises money statewide to support access to justice for the poor in this state, I would like to commend members of this association who assisted this effort through actual pro bono efforts and financial support through LAW Fund and local providers. I also challenge us all to come up to the plate with increased financial support to meet the critical needs of those who need legal advice and assistance but cannot obtain it due to lack of funds.

We all have a role to play in trying to achieve "justice for all."

Wendy Bohlke
Treasurer, Seattle LAW Fund

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Lincoln Then and Now

by the Honorable William L. Dwyer
Guest Editor

[The following is excerpted from the Lincoln Day 1999 address given to the Tacoma-Pierce County Bar Association.]

Why have we chosen to honor this man, Abraham Lincoln, so often and for so long? One reason is that Lincoln was one of us. He was a trial lawyer and the best lawyer ever to serve as President of the United States. And of course, it follows as the night the day, he was also the best President.

But the main reason for this celebration is that Lincoln personifies what we want our country to mean and to stand for. He was born a backwoodsman. He had a grand total of about one year of school. Yet in all of history, no braver, no nobler or more humane man ever led a nation through its supreme crisis.

By the standards of his own time, Lincoln was widely thought to lack what was called "dignity." He had some habits that were irritating to Mrs. Lincoln. For example, he liked to read newspapers aloud to himself, was a careless dresser, and his feet were often on the desk or chair or whatever else was elevated.

We still miss Lincoln, especially when election years approach. Suppose he were to come back today and enter the field of candidates now shaping up for the 2000 presidential election. What would he do? What would he say? And how would we react to him?

Let us imagine his arrival. He is now 51 years old, as he was when he first ran for President in 1860. What would strike us about this man? We would notice that he is six feet, four inches tall. He is on the skinny side. He has a high-pitched, metallic voice. In appearance he could fairly be called homely; tall, lanky, with drooping eyelids. His hands would impress us as looking awkward. Some of his movements would look awkward. We would soon find out, the press being as diligent as it is these days, that his feet hurt a good deal of the time.

He was a man who spoke plainly and with an accent. As one biographer described it:

> A southern Indiana dialect affected much of Lincoln's speech all his life. Like his neighbors, young Lincoln said "howdy" to visitors. He "sot" down and "stayed a spell." He came "outen" a cabin and "yearned" his wages and "made a heap." He "cum" from "whar" he had been. He was "hornswoggled" into doing something against his better judgment. He "keered" for his friends and "heered" the latest news. He pointed to "yonder" stream and addressed the head of a committee as "Mr. Cheermun."

By the standards of his own time, Lincoln was widely thought to lack what was called "dignity." He had some habits that were irritating to Mrs. Lincoln. For example, he liked to read newspapers aloud to himself, was a careless dresser, and his feet were often on the desk or chair or whatever else was elevated.

He was absent-minded. He once took one of the young Lincoln children out for a walk, towing the boy in a wagon behind him. The child fell off, but Lincoln did not notice. Deep in thought, he walked on for block after block, towing the empty wagon through the streets of Springfield.

He was a fine lawyer, but a slipshod record-keeper. One visitor to the law office of Lincoln and Hernden even claimed that seeds were sprouting in the cracks between the floorboards.

Unlike many men of his time, Lincoln did not hunt, fish or drink. But he had no objection to others doing any of these things. He relished the company of men. He loved to tell stories, and he loved to hear them.

He had three moods. There was the mood of exuberance and laughter. There was the working mood, in which he was totally absorbed with what he was doing, especially during court trials. And there was what he called "the hypo." The hypo was his mood of black depression, and he suffered from bouts of it all his life. In those harder times, Lincoln

suffered the deaths of his mother at a young age, of his only brother in infancy, of his only sister when she was 21, of his beloved friend Ann Rutledge when she was 22, and eventually of two of his own young sons.

Lincoln had a literary gift. He wrote some poetry himself, but his favorite verse was by a Scotsman by the name of William Knox. The poem, "Mortality," is a profoundly sad comment on the human condition. Lincoln often quoted it, and sometimes muttered the words to himself as he stared out a window. The poem closes with this stanza:

'Tis the wink of an eye, 'tis the
draught of a breath,
From the blossoms of health, to the
paleness of death,
From the gilded saloon, to the bier
and the shroud.
Oh, why should the spirit of mortal
be proud!

Although he had strong religious feelings, Lincoln never joined a church. In the mid-nineteenth century there was no undue exposure of marital details, and to this day the quality of Lincoln's marriage is largely a mystery. The *Macmillan Dictionary of Biography* says that he and Mary Todd were "temperamentally unsuited" and had an "unhappy marriage." Meantime, the *Dictionary of American Biography* says "Their marriage seems to have been a happy one, their love for each other deep and sincere." What we do know with certainty is that Lincoln as a young man thought he would never marry because he was too awkward and shy with women. He anticipated Groucho Marx by a century when he said, "I can never be satisfied with anyone who would be blockhead enough to have me." He courted Mary Todd without much hope before their marriage. He pointed out that God only needed one "d" to spell his name whereas the Todds needed two. The Todd family rejected Lincoln for a long time, because he was beneath their station.

He came from a family of poor homesteaders. His mother and father were illiterate. As a boy and young man, Lincoln cut timber, split fence rails, plowed, threshed wheat, and hired out to other homesteaders and gave the wages to his father. He worked as a riverboat man, became a renowned ax-swinger, and was a fine wrestler.

For a time, he had a reputation for hanging around with ruffians. But he was a ruffian with a difference, because in him was the soul of a poet. He learned how to read. He read deeply the few books he could find, especially Shakespeare, the Bible, and the political document we call the Declaration of Independence.

He became a store clerk and a part-time surveyor. He opened a store with a partner, but the business did not prosper. They ran up what Lincoln called for years afterward, "the national debt"; eventually he paid it off. He volunteered and served in the Blackhawk Indian War. He never claimed more for his military service than that he survived "a good many blood struggles with mosquitoes."

Then came the great turning point: Lincoln became a lawyer. He was self-taught, reading the books to himself and then taking a brief oral bar exam, after which he took the three lawyers who had examined him out to dinner.

It was the law that opened the world to Abraham Lincoln, and our profession can take special pride in him. He became

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one of the best lawyers in Illinois and practiced law for 23 years. He rode the circuit of the smaller towns on horseback, trying cases of all kinds: murder cases, collection suits, railroad battles, torts, contracts, larceny defenses. Although it was said of our profession that lawyers who defended horse thieves were very well mounted, Lincoln never rode a noteworthy horse.

He was a friendly, capable adversary who spoke in plain words. He once gave advice to would-be lawyers. He said, "There is a vague popular belief that lawyers are necessarily dishonest . . . [Do not] yield to this popular belief. Resolve to be honest at all events; and if in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer."

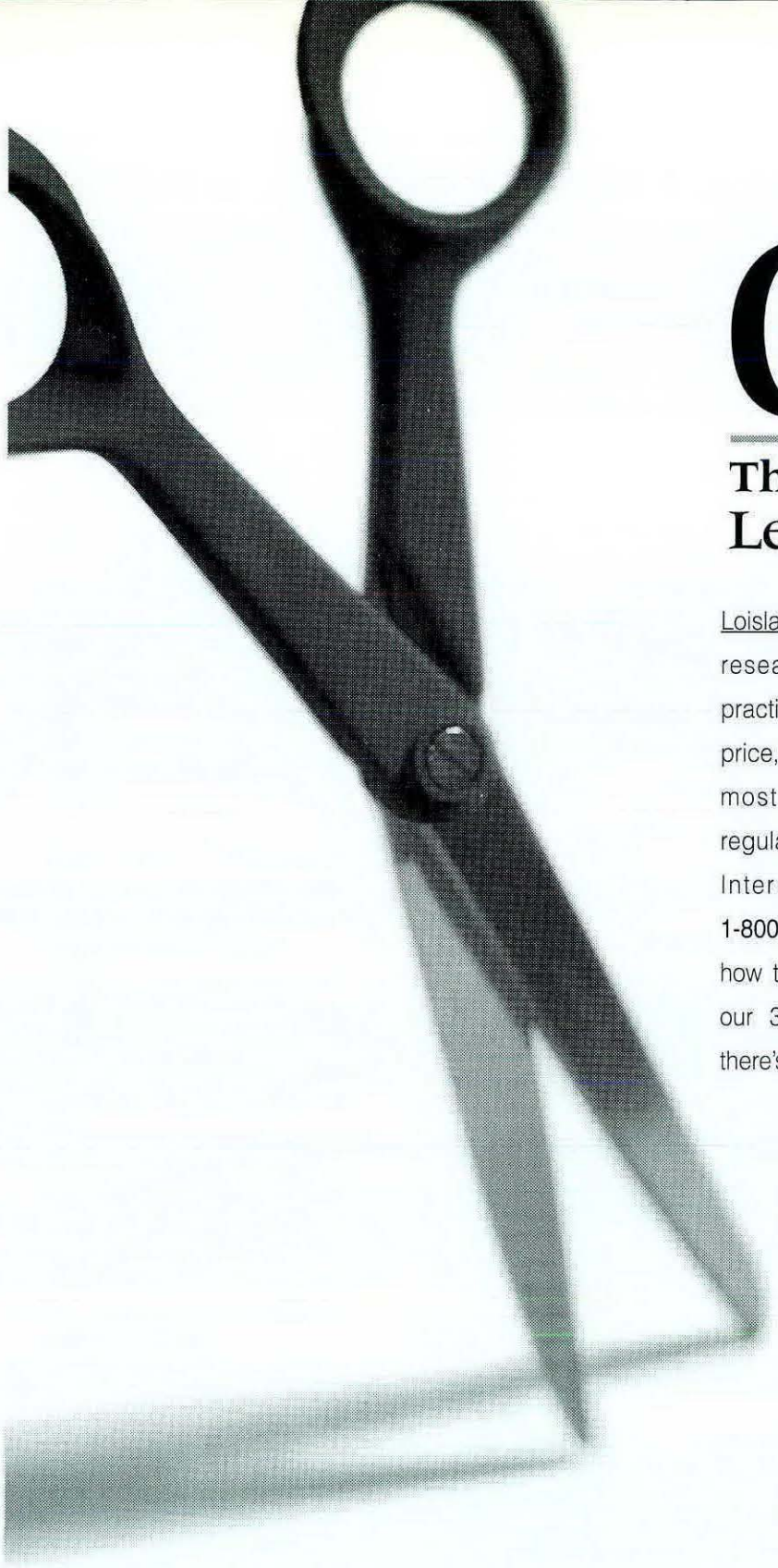
Other lawyers practicing in Illinois said Lincoln was unsurpassed in working with a jury. He did have certain biases, as many trial lawyers do. He believed that fat men were ideal jurors because they were jolly by nature and easily swayed. He rejected people with high foreheads because he thought they had already made up their minds. And he considered blond, blue-eyed males to be inherently nervous and likely to side with the prosecution.

The most famous story about Lincoln as a trial lawyer is the one where he was defending a neighbor charged with murder. A prosecution witness claimed to have seen the deed done by moonlight. Lincoln drew the witness out about the brilliance of the moonlight, and then pulled out an almanac showing that on the night in question, the sky was dark with barely a sliver of late-rising moon. The witness was discredited and the defendant was acquitted.

But the story I like best about Lincoln as a trial lawyer concerns a much more obscure case. He represented a man who had sold a team of oxen and a plow to two young men. The two young buyers had given a promissory note in payment. They were both under age, as it happened. They soon defaulted on the note and Lincoln's client sued to collect. The defense, of course, was infancy — lack of capacity to make a promissory note.

The evidence came in, and Lincoln gave his closing argument. He pointed out that the young men had received full value — the plow and the team of oxen were worth the amount of the note. He said the defense of infancy should not be used to facilitate cheating. Then he took a task which exemplifies our profession at its best. He turned the appeal for his client into an appeal for the two young buyers. He told the jurors they should not do a disservice to these two young men. "Gentlemen of the jury," he said, "are you willing to allow these boys to begin life with this shame and disgrace attached to their character?" He meant the shame of evading a just debt. And he quoted Shakespeare:

> Good name in man and woman,
> dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash;
> 'tis something, nothing;
> 'Twas mine, 'tis his, and has been
> slave to thousands;
> But he that filches from me
> my good name
> Robs me of that which not
> enriches him
> And makes me poor indeed.



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The jury saved the character of the two young men, and Lincoln's client won his case. In trial Lincoln took no notes — yet he could marshal the evidence in detail in closing argument. In a day of few appellate precedents, he became a leading appeals court lawyer. He handled 243 cases before the Illinois Supreme Court. He followed the golden rule of brevity in writing. When asked once to comment on another lawyer's windy brief, Lincoln said, "He got to writing and was too lazy to stop."

When he left Springfield to go to Washington to be President, he told his law partner, Billy Hernden, "Give our clients to understand that the election of a President makes no change in the firm of Lincoln and Hernden."

By the age of 50 he had been active a long time in politics, with mixed results. In his early twenties he ran for the state legislature. He said that if the people elected him he would regard it as a favor. If not, "I have been too familiar with disappointments to be very much chagrined." He lost.

In later years he did serve, with distinction, in the state legislature. In the 1840s he served one term in the United States House of Representatives, where he voted against the war with Mexico, saying it was unjust and had been started by our government on a pretext. When his term was nearly up he said, "I neither seek, expect nor deserve a second term."

In 1858 he ran for the Senate. He had a famous series of debates with Stephen Douglas over the slavery issue. Lincoln said he often heard arguments from people who maintained that slavery was a good thing, but he never met a man who wanted to try out this good thing by becoming a slave himself.

Lincoln was widely known by then, but he had no delusions of grandeur. When Douglas accused him of being two-faced, Lincoln answered: "I leave it to my audience. If I had another face, do you think I'd wear this one?"

Again he lost. And he said, "I feel like the boy who stubbed his toe — I am too big to cry and too badly hurt to laugh."

By 1860, he was renowned as a speaker. In his shrill voice, he could argue forcefully, cogently and with great convincing power. But by the standards of 1999 he would certainly not be telegenic. Picture then, this man as a candidate for President. What would he do? Well, in the first place he would not lie. And he would not make a speech saying he wasn't going to lie; he just wouldn't do it. He would not smile excessively. These days, every campaign seems to be sponsored by the American Dental Association.

He was used to the tradition of real political speeches, long speeches. They amounted to a kind of open-air theater. People would come from miles around to listen to political orators. Of course that was before television reduced our attention span to 30 seconds. Lincoln preferred those long set-pieces to an exchange of slogans. But in a contest of one-liners, he would win. He would respond with wit and kindness to personal attacks against him. And he would speak to the issues that he saw as important, whether or not they were on the table for public debate at the time.

Beyond these generalities, do you really think I am fool enough to believe I could tell you exactly what Lincoln would say on the complex and profound issues of our day? Of course I am. How do you think federal judges are picked? But as fate

would have it, I cannot tell you, because the canons of judicial ethics prohibit me from making a political speech. What I can say, and it is true, is that Lincoln would appeal to the best in us. He would argue with force and logic, and he would speak to our reason, decency and common humanity.

How would we react to him? Would we be able to see any of his greatness? Would he get past the polls, the Iowa caucuses, New Hampshire and Super Tuesday? If you feel as skeptical about the answers to those questions as I do, perhaps we can take some comfort in the knowledge that his quality was not widely recognized in 1860 either. While Lincoln was running for President, he was called such names as ass, huckster, lunatic, mobocrat, bloodthirsty tyrant and chimpanzee. He never held a grudge, saying it didn't pay to hold grudges.

He was elected with 39 percent of the vote because the Democratic vote was split three ways. And six weeks after the election, South Carolina seceded, the other southern states followed, and the Civil War was on.

The war proved more terrible than anyone imagined, seeming endless. Lincoln was faced with a crushing series of military defeats, the heartbreaking loss of thousands of young men, generals who were incompetent, an unpopular draft, riots in northern cities, and demands for compromise with the South. But he saw what was at stake — the fate of democratic government. He said, "We can nobly save, or meanly lose, the last best hope of earth."

Even as the war aged him, as we see in his face in the photographs, he never lost his sense of humor. He was always beset by a horde of office-seekers. In 1863, he came down with a mild form of smallpox, and he said, "Now I have something I can give everybody."

By 1864 Lincoln was unpopular and stridently criticized from all sides. Hundreds of thousands had been killed. No end was in sight. There was a movement in his own party to nominate John Fremont to replace him. Lincoln said Fremont reminded him of a fellow back home who was "the damnedest scoundrel that ever lived, but in the infinite mercy of providence, he was also the damnedest fool."

It seemed certain in 1864 that he would lose the election, but in the nick of time came victories — victories under General Grant and General Sherman. And with the victories on the battlefield the political tide turned, and Abraham Lincoln was re-elected.

Lincoln wrote every word of his own speeches. In his second inaugural address, late in the war, when victory at last was in sight, he spoke in his merciful and goodhearted way about rebuilding the country:

> With malice toward none; with charity for all; with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; . . . to do all which may achieve a just and lasting peace. . . .

He did not live to do that work. Abraham Lincoln was imperfect, as all men are imperfect. But the shorthand description we learned in school — that he saved the union and freed the slaves — is largely true. He guided us through our greatest struggle and kept our ideals alive through four years of fratricide. On the slavery issue, he progressed from opposing the extension of slavery to the Emancipation Proclamation which abolished it in the South, to backing the 13th Amendment which ended it throughout the country forever.

Lincoln became one of the last casualties of our most terrible war. Many who were killed then, as in any war, had no idea why they died. But Lincoln expected to lose his life, and he knew why he was willing to give it. We honor him first among the many who fell. And let us always remember what he asked us to do — a message as beautiful and urgent today as when he first delivered it on the battlefield of Gettysburg:

> . . . that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion; that we here highly resolve that these dead shall not have died in vain; that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people, for the people, shall not perish from the earth.

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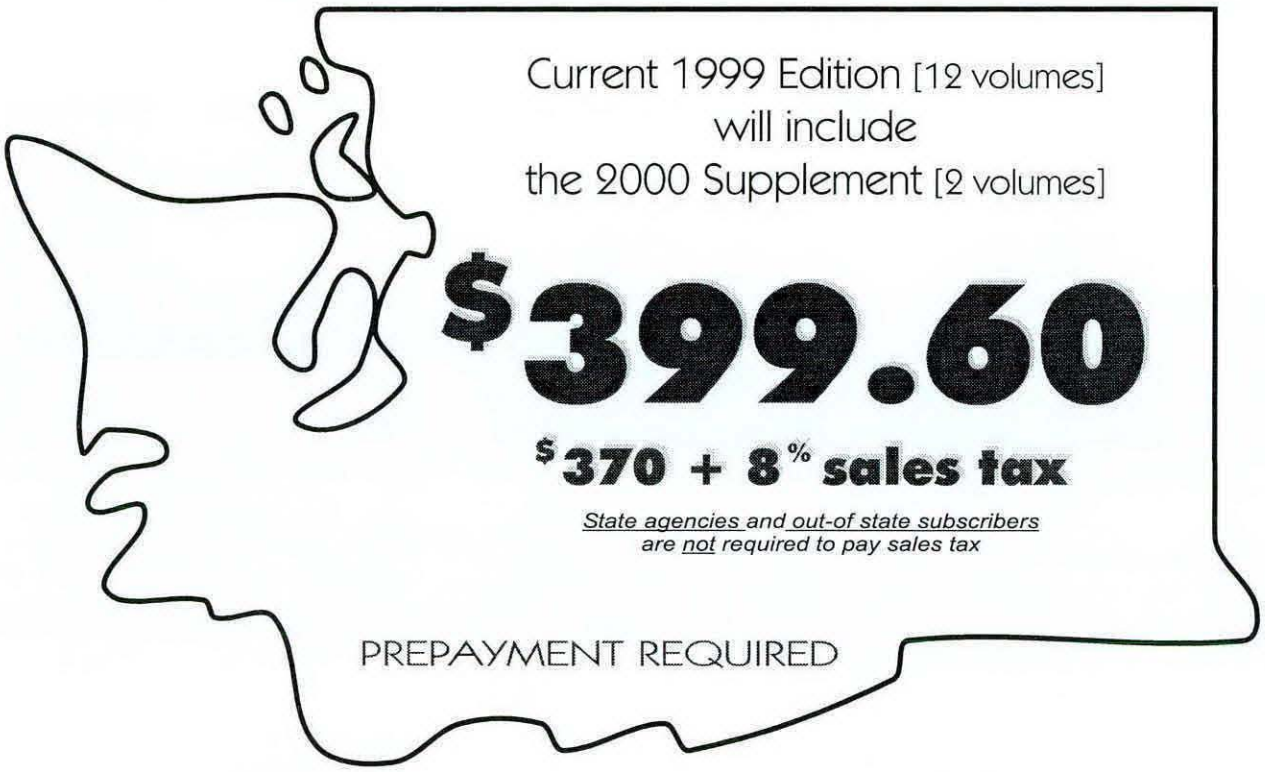

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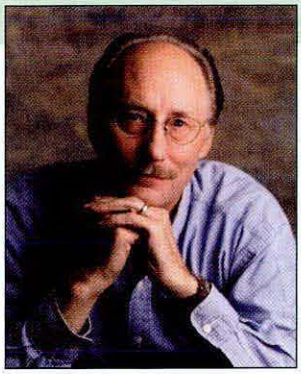

It Is Time...

by Richard C. Eymann
WSBA President

I was not elected to the position of Washington State Bar Association President to be non-controversial, to not rock the boat, nor to please every one of the 25,000 members of the Bar.

At the annual meeting where I was sworn in last September, my 80-year old dad, who is rapidly going blind, traveled from Oregon to be present for the occasion, along with my seven sisters and my mother. My dad is very wise, observant and well-informed. He approached me at the end of the evening and said, "Richard, I can't see very well, but I can see well enough to ask you, Mr. President, where are your people of color? Where are your young people? Their absence here is not a good message to the people of your state." "I know," I said, and searched my mind for a reason — there was none that made sense. That incident and others confirm my commitment and bring me to make a rather simple but significant request.

I ask for your support in changing our Washington State Bar Association Bylaws to add two members to our Board of Governors — one to be jointly selected by the Presidents/Chairs of our minority bar associations and one to be selected from our Young Lawyers Division.

I ask for your support in changing our Washington State Bar Association Bylaws to add two members to our Board of Governors — one to be jointly selected by the Presidents/Chairs of our minority bar associations and one to be selected from our Young Lawyers Division. An amendment to change our Bylaws can be accomplished by a majority vote of the current Board of Governors, but since this may be seen as a major change, I want you to know why I feel so strongly.

We do not have a governing body which reflects our diverse membership. Despite good intentions, we have never had a minority President, and have had only one person who would qualify as a "young lawyer" on the Board of Governors or as President. We have tried recruitment programs and making some specific minority appointments, and we have tried recruiting to get more diverse representation in our Sections, Committees and on the Board of Governors. But we must face the fact that these efforts have not resulted in more diversity in these bodies. Women have faced similar obstacles, even though they represent nearly 40 percent of our membership. Over the years, only a few women have been elected to the Board of Governors, but at least those numbers are improving, however slightly.

Let me first address the need for a Governor from the minority bar associations. Some may ask, "Why do we need minority lawyers in leadership positions such as the Board of Governors?" The answer is that they represent a significant and very important part of the Washington State Bar Association and have unique life experiences which must be represented. Minority populations in the United States are consistently growing. By the year 2050, more than 50 percent of the U.S. population will be composed of people who are now considered racial minorities. We need to ask ourselves how our society will have confidence in a legal system that, by its appearance at the highest leadership level, is usually 80 percent older Caucasian males. Make no mistake, the issue of racial bias is potentially (some say probably) the most serious problem in our country today. Our profession must provide the kind of leadership that promotes and actually applies the principles of equality.

During my 23 years of involvement or activity in the American Bar Association, the Washington State Bar Association, the Washington State Trial Lawyers Association and other legal organizations, I have heard such comments as, "We must initiate programs that will ensure sensitivity and diversity. We must deal with racial issues. We must have more people of color advance to leadership roles." You may have heard these types of well-intentioned sentiments too, but they have not brought about a meaningful change in the diversity of our Board of Governors. We need to take positive, constructive steps to cause a change. No more lip service — it is time to take action.

Some suggest that the lack of minority representation reflects disinterest on the part of minorities in shaping the future or accepting positions of leadership. Based on conversations with minority lawyers, this notion is far from true. More likely, this absence reflects shortcomings of our current selection process for the Board of Governors. To

put it simply, we need diverse insight and we need it now. What we do not need is more time spent on goals and programs of the future called "minority recruitment" or "diversity task force." I know from personal contacts that lawyers of color are extremely interested in the work of the Bar Association and in meeting the dramatic challenges in our profession. My proposal is that we make an abrupt departure from the outdated and ineffective tradition of merely encouraging minorities to rise up slowly into positions of leadership. We must create a new Governor position and ask minority bars to select/elect that WSBA Governor.

I expect that some minority members may initially view this as tokenism or patronizing and say, no thank you. From personal contacts with elder minority members, I know that they do not share such a belief, and indeed have encouraged me to proceed with this proposal. You should also know that the American Bar Association created two similar minority positions on its Board of Governors several years ago and their presence has added much more than token "diversity" and "sensitivity."

The need for a young lawyer on the Board of Governors is also compelling. Of the 25,000 lawyers in this state, nearly 8,000 are "young lawyers." Despite their numbers, it is easy to think they are too young and inexperienced to be our leaders. This attitude is short-sighted. It is foolish for older lawyers to discount the valuable, innovative ideas from young lawyers. Some might say, "Let younger lawyers run for office in their districts . . . let them campaign." The "system" that has shut them out for 100 years will likely continue to shut them out, even though they make up nearly one-third of the Bar.

Over the past few years, I have heard the Young Lawyers Division's annual oral reports to the Board of Governors and am repeatedly impressed that they put their ideas into actual practice. Although many older lawyers fret and worry about the "drug scene," the young lawyers are out in the schools talking to students about drugs, about justice, about civil rights, about challenging harmful peer pressure. They have created teaching videos, and organized and delivered community service programs. Yet, they have no "vote" on the Board of Governors, and some may feel like "children" and disenfranchised as a group.

Tell me — what do we have to lose by having the Young Lawyers Division select their representative to sit on our Board of Governors to discuss, consider and vote?

In the past, proposals have come from both the Governance Task Force of the Board and the Young Lawyers Division to add a young lawyer member to the Board of Governors. Although those proposals never came to fruition, that is not a reason to walk away from what is right. This change is right. It is overdue. It is time.

The details of the selection process for each of these two new Governors need to be worked out, but this would not be difficult. I would like to see it happen now so that before I leave office, I can report to you that we have made an indelible impression this first year of the 21st century and the new millennium. The Washington State Bar Association has always been viewed as a leader among the state bars of this country. This change would be leadership from you in its purest sense.

I need your input. I ask you to endorse this proposal with your district governors. Their mailing and e-mail addresses follow this column. Please let your Governor know how you feel about this proposal. I urge you to ask questions and keep an open mind, even if you initially disagree with this proposal or are unsure. I am absolutely confident that endorsing this proposal will, in the long run, have a far-reaching, positive effect for the Washington State Bar Association and its individual members. The rewards will be realized over the rest of your career and the rest of your life.

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Discipline Prevention — A Valued Member Service!

by Jan Michels
WSBA Executive Director

The WSBA's Strategic Goal #1 is to offer the services and benefits that members want. The WSBA's Strategic Goal #5 is to conduct timely, fair, just and accurate regulatory functions. This article is about the convergence of these goals, providing members with a snapshot of the discipline function from a service perspective.

At our Town Meetings, members told us they want lawyers disciplined quickly and stringently, but they don't want the torture of a grievance to take years to resolve. We also heard how much better it is to educate lawyers so that fewer grievances occur. Members told us that they appreciated the education and prevention programs that the WSBA has developed, but that many other members don't know about these programs. Each year the WSBA gets over 12,000 calls, letters or drop-in questions about lawyer conduct from other lawyers, clients and third parties. The WSBA's first response, as long as there is no public protection risk, is to resolve the issue by using the following service programs.

Each year the WSBA gets over 12,000 calls, letters or drop-in questions about lawyer conduct from other lawyers, clients and third parties. The WSBA's first response, as long as there is no public protection risk, is to resolve the issue.

1. Education:

a) Programs

Each year the Office of Disciplinary Counsel (ODC) personnel make over 80 presentations to CLE audiences, law schools, local bar associations and others. Topics range from particular ethical dilemmas to broad presentations about the purpose and functioning of the discipline system and the regulation of the practice of law. For more information call Barrie Althoff, WSBA Chief Disciplinary Counsel, at 206-727-8255 or 800-945-WSBA, ext. 8255.

b) *Bar News* Disciplinary Notice Publication

The WSBA regularly publishes the outcome of discipline matters to help members avoid repeating the errors of others. Additionally, the Board of Governors recently changed the policies for the Lawyers' Fund for Client Protection to require the publication of attorney names and their actions if the result was the award of client protection funds.

c) *Bar News* Ethics Articles

Chief Disciplinary Counsel Barrie Althoff is a regular contributor to *Bar News* with analysis and counsel about the ethics of practicing law. With the increasingly complex maze of ethics and professionalism in a fast-changing legal culture, his explanations and advice can help avoid conduct problems.

d) Consultation to Members

The ODC often gets calls from lawyers about the conduct of partners or opposing counsel. As a courtesy to members, ODC counsel will review relevant rules and formal opinions to assist the caller in determining whether unethical conduct has occurred, and walk the caller through a likely scenario if a grievance were filed. As a result, a more informed decision can be made by the member. What often happens is that members come up with alternate ways of resolving problems with their colleagues.

2. Professional Responsibility Counsel — "Ethics Hotline"

The WSBA makes available to all members a trained disciplinary counsel to discuss and review prospective situations when a member has questions about ethical rules. These discussions are confidential. Input from the WSBA is based on an understanding of the rules, accumulated formal ethical opinions, and Supreme Court rulings. The hotline fields 70-80 calls a week. A formal opinion can be requested but may take longer than a quick call. The Ethics Hotline can be reached at 206-727-8284 or 800-945-WSBA, ext. 8284.

3. Law Office Management Assistance Program (LOMAP)

This new program (inaugurated in 1999) offers consultation and training on "best practices" for the business side of the practice of law. LOMAP has guidelines, publications, checklists, suggested forms, and other material aimed at assuring appropriate conflict checking, trust fund management, fee agreements and case-tracking systems that minimize risks.

4. Consumer Affairs Program

Three specially trained ODC paralegals intervene in situations when the concern is lack of communication from a lawyer or there are file ownership disputes. The paralegals' primary tools are their familiarity with the Rules of Professional Conduct, proximity to the discipline system, and their understanding of the nature and facets of the lawyer-client relationship. With their nudging, early alerts and explanations to both the attorney and client, they are able to resolve 85 percent of the 4,000 annual potential grievances without the need for discipline.

5. Alternate Dispute Resolution: Arbitration and Mediation

These voluntary programs can be used for attorney/client or interprofessional fee disputes. Both parties agree to the process and provisions of the program. While arbitration awards are binding and enforceable, mediation services encourage the parties' resolution of their differences. Nearly 1,200 cases per year take advantage of alternate dispute resolution.

6. Diversion of Less Serious Matters *(to be implemented in 2000)*

In 1998, the Board of Governors and the Supreme Court approved the concept of diversion from discipline with less serious matters. The BOG Discipline Committee is currently developing the definitions and procedures for diverting matters such as minor neglect, non-intentional acts or other violations where the sanction would not restrict the practice of law. Education programs, mediation, arbitration, counseling or other remedial program participation would be in lieu of discipline proceedings. When conditions were met, the discipline matter would be dismissed and the record cleared.

The end result of these prevention and early intervention programs is that the number of grievances filed has seen only minimal growth in the 1990s. On the other hand, when a grievance *is* filed, the WSBA is able to investigate and prosecute if necessary, in a much more timely way.

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Civility in the Practice of Law:

Must We Be "Rambos" to Be Effective?

by
Robert W. Ritchie

We are the advocates of those who find themselves embroiled in disputes and disagreements, the counselors for those whose lives are disrupted or broken, and the advisors of those whose business and personal endeavors must follow the laws governing such matters.

The practice of law has always been subject to abuse by those outside the profession. During significant periods of history, however, disparaged lawyers were taking the lead in founding our nation and in fostering every significant social and economic development.

We have been frequently criticized, vilified and abused by anyone who was on the losing end of a court proceeding and by those whose power or pocketbook was subject to challenge in a judicial proceeding. Some of the criticism of individual lawyers has been justified, but most of it has not. We have been able to withstand such criticism because of the irrefutable fact that lawyers are the foundation of a justice system that is the cornerstone of democracy. We are the advocates of those who find themselves embroiled in disputes and disagreements, the counselors for those whose lives are disrupted or broken, and the advisors of those whose business and personal endeavors must follow the laws governing such matters.

We can deal with and survive the criticisms of those outside the profession, meeting those criticisms that are false, and accepting and using those criticisms that are constructive. What we cannot survive is the deterioration of the professionalism we extend to each other — the decline in the civility among lawyers.

The word "civility" may be misleading. It sounds as if we are talking about nothing more than social graces or supposedly outmoded courtesies, such as a gentleman walking on the curbside or standing when a woman enters a room. Without deprecating these old-fashioned customs, I suggest that we are talking about the deterioration of something that can, and in some cases does, endanger the effectiveness with which our profession is practiced and our legal system is operated.

United States District Judge Marvin E. Aspen, in an article for the *Valparaiso University Law Review,* Val. U. Law Review 28:513, quoted an exchange between two veteran trial lawyers at a deposition in a multi-billion-dollar lawsuit. The exchange was reported in the *Chicago Tribune*. Attorney V had just asked Attorney A for a copy of a document he was using to question the witness:

Mr. V: Please don't throw it at me.
Mr. A: Take it.
Mr. V: Don't throw it at me.
Mr. A: Don't be a child, Mr. V. You look like a slob the way you're dressed, but you don't have to act like a slob....
Mr. V: Stop yelling at me. Let's get on with it.
Mr. A: Have you not? You deny I have given you a copy of every document?
Mr. V: You just refused to give it to me.
Mr. A: Do you deny it?
Mr. V: Eventually you threw it at me.
Mr. A: Oh, Mr. V, you're about as childish as one can get. You look like a slob, you act like a slob.
Mr. V: Keep it up.
Mr. A: Your mind belongs in the gutter.

This is an extreme example, but recent studies and the increased concern over such matters indicate that incivility among lawyers is growing to an extent that it is interfering with the effective administration of civil and criminal justice. When lawyers attack another's position as motivated by an intentional effort to mislead the court, when lawyers conveniently forget that to which they have orally agreed, when trials become battles by personal attacks between adversaries, and when these things are not isolated occurrences by an identifiable few, we have a problem. When exchanges like this are reported in the *Chicago Tribune*, we have an even bigger problem.

I do not believe that it is a problem that has infected the

There are pressures because of allegiance to our clients, and pressures because we know that if we do not win, at least sometimes, we may see our practice evaporate.

majority of our profession, but even if it has infected only an increasing minority of our profession, we must recognize it and effectively deal with it.

The Causes

The Nature of the Adversarial Process

The seeds of incivility are present in any adversarial or combative engagement. We are adversaries, after all. Even in compromise one side will often feel that he or she has prevailed or been defeated. We want to win. Often, the pressures are tremendous. There are pressures because of allegiance to our clients, and pressures because we know that if we do not win, at least sometimes, we may see our practice evaporate. Emotions become involved; the more emotion, the less reason. The adversary becomes the enemy. His or her conduct becomes suspect. "He is trying to beat me. He is trying to hurt me," you start thinking. Is it any wonder that we have a problem with civility in our profession?

Yet, as Gee and Garner point out in an essay in *The Review of Litigation*, even deadly combatants had their codes of civility:

> Over the centuries, and throughout the world, those humans who have followed the contentious callings — even the deadly ones — have developed their own codes and striven mightily to conform to them, from the chivalry of the Medieval knights and the Code of the Samurai to the duelists on yesterday's Field of Honor, from the fighter pilots in the World Wars down to the Sumo wrestlers, bullfighters and British barristers of today. Why this should be so is hard to tell, but so it has been: not logic but experience, as Holmes said in referring to the life of the law. (citing Oliver Wendell Holmes, *The Common Law* 1 (1881)). 15 *Review of Litigation* 169 (1996).

Surely, if those who are about the business of killing each other can adhere to basic principles of civility, we can do no less. All of the emotion and pressure will surely drive us to the lowest common denominator unless we become determined to take a different course.

The Increase in the Size of the Bar

If there is an increase in the lack of civility, however, it cannot be attributed solely to the adversarial nature of our profession. Those pressures have always been with us. What is different now?

One thing that is different is the increase in the size of the bar. The number of lawyers has increased nationally between 1970 and 1990 from approximately 275,000 to nearly 800,000.

The fact is, we don't know each other as well as we have in the past. Why has that had an impact?

When we were few, we not only knew each other, but often we knew each other's families. In the late 1960s and early 1970s, up to a third of the Knoxville, Tennessee, bar ate lunch at the same cafeteria almost every day, and most of the offices were within two blocks of each other, in one of five or six office buildings. If you "messed over" a colleague, everyone knew it within 24 hours, and you were looked upon with scorn and disdain. Across the United States, many cities and towns had a similar physical proximity and familiarity. That created a sense of collegiality and peer pressure that was a deterrent to incivility.

To be sure, there were problems from time to time. In Knoxville, there were about a half-dozen lawyers about whom the word was spread, "to get agreements in writing." But today, with almost three times the number of lawyers at the bar, we have the increased challenge of anonymity. It is far easier to attribute base motives to an adversary you do not know than someone with whom you have dined and shared war stories. It is easier to misunderstand the statement of an adversary when that adversary is little more than a name on a page.

The Increase in the Spirit of Competitiveness

Another cause of an increase in incivility is an increase in the spirit of competitiveness. Instead of a noble and learned profession imbued with the spirit that produced Jefferson, Madison and Lincoln, there is an increased tendency to view the practice of law as a business, a commercial enterprise in which the emphasis is on the billable hour and the bottom line. In a day in which even a small firm can have an astounding overhead, there is tremendous pressure to bring in fees. In this latter aspect, there is a tendency for a client to become a "piece of business," not a person who has come to you for help to solve a problem in his or her life.

With the number of lawyers increasing faster than the population and faster than the growth of the economy, there is a substantial increase in the competition for the available clientele. This level of competition, which has resulted in chapters of yellow page ads and letters to people who are injured or arrested, results in crass commercialism, not the spirit of a learned profession. Has this not produced an edge to our relationships and contributed to the deterioration in civility? Probably so.

The Age of Rambo and Clint Eastwood: No One Wants to Appear Weak

The kinds of tactics which have epitomized the increase in incivility have been called hardball, scorched earth and Rambo tactics. Clients often speak of wanting the meanest, most aggressive lawyer they can find. They have seen the Rambo movies and *Magnum Force,* starring Client Eastwood. The heroes of these movies have always come out on top. They not only win their battles, they have the respect of all those around them. Don't we want to be like that — strong, brave, disregarding all the rules to get the job done? Civility has little chance in that arena.

Is civil or courteous behavior a sign of weakness? In "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 *Columbia L. Rev. 509* (1994), Ronald J. Bilson and Robert Mnookin wrote:

> Those lawyers who believe that 'scorched earth' tactics are key to suc-

The first thing we must do is decide for ourselves that conducting our relations with fellow lawyers and the courts in a civil manner is not just the "nice thing to do," but is sufficiently important to warrant our dedicated effort.

cess in matrimonial litigation justify their 'win at any cost' behavior on the basis of zealous advocacy on the client's behalf. In some cases this approach intimidates or wears down the opponent, resulting in victory for the offensively aggressive (and aggressively offensive) lawyer. More often, however, such tactics simply cause delay and divisiveness, increase expense, and waste judicial resources. Enlightened lawyers hold the view that courteous behavior is not a sign of weakness, but is consistent with forceful and effective advocacy. The spirit of cooperation and civility does not simply foster collegiality of the Bar, although that is a welcome side effect, but also promotes justice and efficiency in our legal system.

There is a great difference between being aggressive and forceful and being mean and obnoxious. Perhaps one of the causes of the decline in civility is that we have confused the concepts, and, in doing so, have not only undermined the collegiality of the bar, but greatly damaged our effectiveness as advocates.

Advanced Technology

Some feel that the atmosphere conducive to a decline in civility has been created, in part, by the advances in technology during the last 20 years. Computers, overnight mail and fax machines have helped create a far more hectic pace in the practice of law. When someone mailed a letter that you would receive in three days, he or she did not expect to receive a response the same day. Now a fax is often sent with the expectation that a reply will be forthcoming within the next few minutes or at least during the same day.

You have a conversation with someone, and within an hour you may receive a letter than purports to memorialize that conversation. If you do not respond immediately, you fear that your adversary will take the ensuing half hour of silence as agreement, when in fact, the contents of the letter are not exactly as you recalled the conversation. In the meantime, you are working on something totally unrelated, which must go out that afternoon. You feel you have to stop what you are doing to respond. Meanwhile, three more calls or faxes come in. The pace, the stress and the pressure are often unrelenting.

Under these conditions, it is little wonder that we get edgy, and civility takes a back seat. In fact, it is just that type of pace, stress and pressure that have driven many lawyers from our profession.

Solutions

If the legal profession has a problem with

an increase in incivility, as it appears we do, what can we do about it? We can look to ourselves, to the courts, and to the educational programs of the bar.

Looking Inward

The first thing we must do is decide for ourselves that conducting our relations with fellow lawyers and the courts in a civil manner is not just the "nice thing to do," but is sufficiently important to warrant our dedicated effort. In "Be Just to One Another: Preliminary Thoughts on Civility, Moral Character and Professionalism," published in the *St. Thomas Law Review*, Mark Neal Ironstone wrote:

> Generally speaking, civility is important because it frames common expectations about trust and respect in seeking resolutions through dialogue. Without such mutual confidence, there cannot be an effective meeting of the minds as a way to resolve social disputes and problems. Instead, individuals wind up talking past each other or sinking to the lowest common denominator to strike a short-term advantage or to achieve a cheap gain. Virtues of any sort require much more in terms of human dependability and self-discipline. They represent a concern for doing what is right regardless of the circumstances. 8 *St. Thomas L. Rev.* 113 (1995).

Despite the abuse which lawyers have endured throughout history, and the increased abuse we have endured during recent years, we have good reason to be proud of our profession. We should resolve that this profession, which has given so much, will not be destroyed from within. We will not "eat our own." We will be strong and forceful advocates, but in a manner which does not destroy our professionalism, collegiality and effectiveness.

Recently, I had an illustrative experience with an adversary that began on a sour note. Without foundation, a response to a routine motion suggested that I was intentionally misleading the court. I was very upset when I received the response. I had barely met this attorney, and my first impulse was to reply in kind, harshly and in the strongest terms. Instead, I responded that perhaps there had been a misunderstanding, proceeded to deal with the issues factually, and gently suggested that making such allegations of misconduct without foundation was detrimental to the process. A short time later my adversary called me and suggested that we have lunch. He said something to the effect that this was going to be a tough trial and perhaps it would be good to have a friendly visit before we got into the thick of it. We did so, and established a rapport that carried us through an otherwise highly contentious and hard-fought trial without rancor or further personal problems.

Even with a large bar, we do not have to remain strangers. Perhaps having lunch with your adversary on a basis separate from the litigation is a positive way to approach the problem.

Looking to the Courts

If lawyers are the first line of civility defense, judges are the second line and a very important one. It is no secret that some lawyers will go as far and take as much advantage as they can. If the judge presiding over a proceeding in which such a lawyer is participating takes control early and forcefully, much of that type of tactic could be avoided.

I had occasion to see a judge in a small town in east Tennessee effectively illustrate that principle a couple of years ago. A prosecutor in his court made a remark which was personal in nature, casting aspersions on his adversary. Judge Thomas immediately stopped the proceedings and admonished the prosecutor, saying that he was not going to tolerate that kind of conduct in his courtroom. The prosecutor, an honorable attorney who probably had been caught up in the emotion of the moment, did not take that approach again, at least not that day.

The judge sets the tone of the courtroom. If the judge is short-tempered and uncivil, he or she invites incivility. If the judge is firm in refusing to tolerate personal attacks and incivility by either side, an atmosphere conducive to a more orderly and civil trial is created.

Looking to the Bar

Lastly, the American Bar Association, together with state and local bar associations, can do their part. We can focus on the issue, discuss it, and encourage the treatment of each other as we want to be treated. We can study suggested guidelines such as the "Proposed Standards for Professional Conduct within the Seventh Federal Judicial Circuit." Most of what we find there should come automatically to an attorney who cares about our profession and our system of justice, but it certainly does not hurt to read them and use them as guides. Perhaps then we can return to the day described by D. A. Frank, in the *Texas Bar Journal* in 1939, when he wrote:

> One of the finest characteristics of the legal profession is its good sportsmanship. To the casual observer. . . lawyers in fighting each other would seem to be perennial enemies. Yet, when a case is completed and especially when court has adjourned, these same lawyers may be found visiting in offices and homes of their opponents, as friends. . . . No profession is so imbued with the chivalry of combat as the law. It thrives upon combat, contests and fights. It does not engender hatreds, jealousies and envy. It does produce respect, appraisement of ability and warm friendship. 2 *Tex. B. J.* 357, 357 (1939).

Despite the problems that have become manifest, I strongly believe that the great majority of lawyers want that type of relationship between and among the members of the bar. We have not strayed so far from that ideal that a little focus and a little additional effort on our part cannot reverse the trend against it.

Robert W. Ritchie is Chair of the Federal Criminal Procedures Committee of the American College of Trial Lawyers. He is also a partner in the Knoxville, Tennessee, law firm of Ritchie Fels and Dillard, P.C.

Recent Developments in the WSBA's ADR Programs

Chris Sutton • *WSBA Lawyers' Assistance Program*

The Board of Governors recently authorized the creation of an Alternative Dispute Resolution (ADR) Standing Committee. Stew Cogan chairs the 23-member committee, which acts as a steering committee for the WSBA's alternative dispute resolution programs (composed of the Fee Arbitration Program and the Mediation Program). The Committee will make recommendations to the Board of Governors on ADR policy issues, and publicize the Fee Arbitration and the Mediation Programs.

From January 1,1999 through September 30, 1999, 156 petitions for fee arbitration and 40 requests for mediation were filed. During this period, the percentage of fee arbitration hearings scheduled rose 22 percent from 1998. The percentage of fee arbitration petitions filed by attorneys was about seven percent. Non-lawyer professionals filed over 90 percent of the requests for mediation.

A discussion regarding the number of lawyers who participate in the WSBA's ADR programs, the amounts in dispute, the desirability of detailed award decisions and consumer satisfaction resulted in the Committee's decision to take the following two steps: the Committee will develop a tool to evaluate the programs' effectiveness and participant satisfaction; secondly, a subcommittee was formed to assess the impact of possible changes in the current rules of procedure. Changes such as the establishment of a time frame for requesting arbitration or an appeal of an arbitration award and the establishment of a cap on the maximum amount that may be arbitrated are under consideration. The liability of arbitrators and mediators is an issue to be addressed in the future.

The consideration of procedural changes will not impact the service delivery of the WSBA's ADR programs. The Fee Arbitration Program and the Mediation Program continue to be available to Bar membership and the public. The Fee Arbitration Program is voluntary and has only one purpose: to decide the fair and reasonable value of a lawyer's legal services for a client. If both the lawyer and the client agree to arbitrate, the result is binding on the parties. The voluntary Mediation Program is an informal dispute resolution process that seeks to facilitate settlements of disputed matters through negotiation. Matters that may be mediated are limited to disputes between lawyer and lawyer, lawyer and other professional, and lawyer and client. The program is not intended to settle disputes between client and client.

The WSBA's ADR programs provide effective, low-cost alternative means of resolving disputes. For further information call the WSBA at 206-733-5923 or 800-945-WSBA, ext. 5923.

The WSBA Lawyer Services Department offers these four programs:

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

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

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

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

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

Court-Ordered Alternative Dispute Promises and Pitfalls

by Steven C. Bennett[1]

Alternative dispute resolution (ADR) includes a well-established array of procedures for private resolution of disputes. Federal and state courts are increasingly employing ADR processes in an attempt to reduce their dockets and decrease litigation delays and costs. Court-ordered ADR is not, however, a cure-all for the ills of modern litigation. There are inherent limitations on the ability of courts to sponsor and participate in ADR.

For the practitioner, participation in court-ordered ADR requires a careful balancing of burdens and benefits. This article aims to introduce the practitioner to some of the principal procedures and issues involved.

Forms of ADR

"ADR" is a loose term, encompassing various forms of procedures sponsored by various organizations with various rules. The one thing common to all forms of ADR is that they are generally private dispute resolution methods, which parties may choose as an alternative to conventional litigation, and fashion to fit their particular needs.

One classic form of ADR is a settlement discussion between parties or their counsel, which may occur before or during litigation proceedings. Such discussion often leads to non-judicial resolution of disputes.

Another classic form of ADR is mediation, in which a neutral party attempts to facilitate settlement of a dispute by listening to the parties (together and/or separately) and uncovering the strengths and weaknesses of their positions so they can more rationally discuss settlement. A mediator may gather additional information (reviewing documents, receiving briefing positions from the parties, or interviewing witnesses) and may suggest solutions to the dispute. The mediator's suggestions are generally not binding on the parties.

A final classic form of ADR is arbitration. An arbitrator or panel of arbitrators conducts an information-gathering process, which may include document exchange, briefing and testimony of witnesses. The arbitrator's decision is generally binding on the parties, subject to limited review by a court on a motion to confirm or vacate the arbitration award.

These classic forms may be modified to create new forms. For example, in mediation/arbitration, a mediator is authorized to attempt to fashion a settlement of the case. If no settlement is reached, the mediator serves as the arbitrator for the matter. In a "mini-trial," a mediator or advisory "jury" hears a summary version of each party's case and renders a non-binding advisory decision which may help the parties to reach consensus on a settlement.

Sponsoring organizations vary in their approaches even when they implement classic forms of ADR. For example, the rules of the International Chamber of Commerce (Paris) and London Court of International Arbitration (London) favor a European approach to issues like discovery. By contrast, the American Arbitration Association (New York) follows an American approach. There are dozens of additional sponsoring organizations in the United States and throughout the world. Many sponsoring organizations offer either specialized rules adapted to a specific kind of dispute (e.g., National Association of Securities Dealers and World Intellectual Property Organization), or lists of potential arbitrators/mediators with experience in particular subject matters and specialized geographical or language backgrounds.

Parties are generally free to agree to specialized rules, and to choose mediators and arbitrators with experiences and skills that meet their needs. The watchword of ADR is "flexibility."

Courts Warm to ADR

Courts have always had inherent power to form creative procedures for dispute resolution, which can include ADR. However in 1983, Rule 16 of the Federal Rules of Civil Procedure was amended to grant express authority to federal district courts at pre-trial conferences to consider "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."[2]

In 1990, Congress required federal district courts to implement "civil justice expense and delay reduction" plans.[3] The congressional statement of findings for the Expense and Delay Reduction statute noted that "effective litigation management, and cost and delay reduction principles" might incorporate a variety of interrelated programs, including "utilization of alternative dispute resolution programs in appropriate cases."[4]

The federal statute suggested a variety of forms of ADR, including programs administered directly by the court, such as:

1) Conferences before the presiding judge to explore "the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation[.]"[5]
2) A "neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a non-binding conference conducted early in the litigation."[6]
3) A "requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference[.]"[7]

In 1998, Congress enacted the Alternative Dispute Resolution Act, which required every federal district court to authorize, by local rule, "the use of alterna-

Resolution:

In 1998, Congress enacted the Alternative Dispute Resolution Act, which required every federal district court to authorize, by local rule, "the use of alternative dispute resolution processes in all civil actions," and to designate a judge or other employee to be knowledgeable in ADR practices.[8]

tive dispute resolution processes in all civil actions," and to designate a judge or other employee to be knowledgeable in ADR practices.[8] Congress required each federal district court to offer at least one form of ADR, including such procedures as mediation, early neutral evaluation, mini-trial or arbitration,[9] but permitted each court to exempt specific cases, or categories of cases, as not "appropriate" for ADR.[10] Congress required that the neutral parties used in ADR processes be adequately trained, and specifically suggested training of magistrate judges or use of professionals from the private sector.[11] Congress permitted referral to arbitration, where parties consented, but only in cases valued at less than $150,000 in damages.[12]

Individual federal district courts have adopted many forms of ADR. Some of the more common forms include:[13]

1) Assignment of an independent judge to conduct settlement discussions;[14]
2) Court-annexed mediation, either for specific cases, or on a voluntary or "as needed" basis;[15]
3) Voluntary court-annexed arbitration;[16]
4) Mandatory, non-binding arbitration.[17]

State courts have also been experimenting with various forms of ADR.[18] Federal and state statutes, moreover, may increasingly encourage ADR.[19]

Unclear Value of Court-Ordered ADR Programs

Despite the increasing emphasis on court-ordered ADR, there is little hard evidence to support claims that ADR processes necessarily reduce litigation delays and costs. A RAND study of the mediation and early neutral evaluation components of court-sponsored ADR programs in six federal district courts concluded that there was "no strong statistical evidence" that such programs significantly affected time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management. The RAND report concluded that such programs are "not a panacea for perceived problems of cost and delay."[20]

Some commentators suggest that the reason for the lack of demonstrated significant value of court-sponsored ADR programs is that such programs have been established only recently, and that some ADR programs are not funded and administered well. The time required to educate and train judges, arbitrators, mediators and lawyers may also impede the full effectuation of such programs.[21] Other commentators suggest that, even though court-sponsored ADR (especially mediation) may not be "the revolution some expected," the emphasis on negotiation, rather than traditional litigation, may allow open communication, enhance litigant understanding and satisfaction, and offer at least the possibility for reducing litigation delay and cost.[22]

Limits on Court-Ordered ADR

The involvement of courts in ADR processes presents some unique problems. Courts must administer justice with "impartiality."[23] The requirement of impartiality generally requires that a judge avoid "even the appearance of impropriety whenever possible."[24] For example, courts may suggest the possibility of "settlement,"[25] but may not "impose settlement negotiations on unwilling litigants."[26] As a result, court-ordered "settlement" of a case is clearly inappropriate.[27]

Even short of forced settlement, a suggestion that failure to settle a case may result in an adverse ruling from the court may be considered inherently coercive.[28] Similarly, "preliminary" opinions on settlement may also be improper.[29]

Courts and juries are generally required to decide a case based solely on the evidence presented at trial.[30] Information gathered by a judge in connection with settlement discussions may improperly affect the judge's later substantive decisions. As a result, informal fact-gathering in aid of settlement may be considered improper.

Settlement discussions also often involve ex parte communications with the neutral person (mediator or judge). Generally, judges should "neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."[31] Thus, it is considered "impermissible for a trial judge to deliberately set about gathering facts outside the record."[32] Settlement discussions may include unsworn statements from witnesses and counsel which, if later relied upon by the court in substantive proceedings, could be considered improper.[33]

Given these limitations, the better practice may be for courts to direct the appointment of private mediators or magistrates, independent of the judge who will decide the merits of the case, for purposes of fostering settlement negotiations.[34] The system of "early neutral evaluation," adopted in many jurisdictions, follows this

approach. Absent independent settlement facilitators, a judge's direct participation in settlement discussions may require disqualification from making subsequent substantive rulings in the case.[35] At a minimum, a court probably should not conduct settlement discussions without the consent of the parties. The "consent" given, however, may be suspect, and does not necessarily cure the appearance of impropriety.[36]

Settlement, mediation and arbitration all depend upon the consent of the parties.[37] Some decisions have held that court-ordered binding arbitration is inappropriate,[38] but non-binding forms of ADR may be compelled.[39] Some courts have also adopted procedures where "consent" is manufactured by virtue of a party's failure to object to ADR procedures.[40] A court may not, however, prevent a party from at least objecting to a court-ordered ADR process.[41]

A Checklist of Issues for Court-Ordered ADR

A practitioner faced with the prospect of court-ordered ADR will be well advised to study the advantages and disadvantages of the available ADR system. The following is a checklist of issues that may be useful in organizing thinking about strategic responses to court-ordered ADR.

What are the rules? Many courts have been quite specific about how ADR programs are operated. Others have provided only vague (or terse) directives. Some programs are so new that the precise operation of the program has not yet been determined. In deciding whether to participate in court-annexed ADR, it is important to know how the ADR program will operate.

What are the potential benefits of participation in the program? Ideally, ADR will lead to resolution of the case. Even if not, other benefits may be derived. Issues may be narrowed for trial. Discovery may be streamlined (and "free" discovery obtained). Parties may wish to "get it off their chests." They may also wish to assess the appearance, competence and credibility of opposing witnesses and counsel, for purposes of estimating their likelihood of success in litigation.

Who pays for the program? Some courts have established an ADR program without providing adequate funding to implement the program. As a result, the mediators and arbitrators in the program may not have the experience and training required to conduct the program effectively. Other courts have used volunteer mediators and arbitrators. These self-selected officiants may not be as well qualified as is desirable. Still other courts will expect the participants in the ADR program to pay the costs of the mediation or arbitration, which may be an issue for some clients.

How is the ADR officiant selected? Where the court-annexed ADR program depends upon a specific list of mediators and arbitrators, it may be possible to determine, by reviewing the list, the general quality of the program. Even if the quality is generally good, an issue may arise about whether the "best" officiants will be available. Some courts insist on allocating mediators and arbitrators on a random basis. Others let the parties choose, often using a "strike" system.

Will the ADR process likely resolve the dispute? Some cases are difficult to settle, for a variety of reasons. If it is clear in advance that the case will not likely settle, then "going through the motions" of mediation may be pointless. Similarly, some adversaries will never give up, unless they have no further options. In such cases, going through non-binding ADR may merely add to the cost of the proceedings, without producing an effective resolution. Some methods for avoiding ADR may include:

1) Agreeing to a form of ADR in advance of litigation (if ADR has been tried and has failed, a court may be less inclined to compel further ADR processes in connection with the litigation);
2) Agreeing to a private form of ADR (other than the procedure offered by the court);
3) Making a motion for excuse from the ADR procedure (most courts permit such excuse where it is apparent that ADR would not be productive or appropriate).

Is it possible to opt out of the process once it has started? Many court-annexed mediation programs, for example, permit termination of the mediation if discussions have not produced progress toward settlement. Some programs, however, re-

quire a minimum amount of participation, or give discretion to the mediator to determine whether he/she believes that further sessions would be effective.

What are the total costs of participation in the program? In addition to mediator/arbitrator fees, a party will have to pay its own counsel's fees, and may have to bear the cost and business interruption associated with attendance of representatives at the mediation or arbitration sessions. Participation in ADR may also delay processing of the litigation in court.

When is the best time to engage in ADR? Many programs assume that ADR should be instituted at the outset of litigation. However, litigants may require a ruling on some key issue before ADR can become effective, or may prefer ADR only on certain specific issues.

What will be the impact on the court of resisting ADR? Many judges routinely admonish parties to settle their disputes without any real consequences for refusal. Other judges may, consciously or inadvertently, suggest that adverse consequences may result from refusal to engage in settlement discussions or other forms of ADR. Some judges have been bitten by the ADR bug and may be irritated with parties and counsel who do not share their enthusiasm for these innovative programs. It is a good idea not only to know something of the judge's attitude toward ADR, but to also have a rational position on the merits and on the form of ADR that may be offered.

Conclusion

If there is anything certain about court-ordered ADR, it is that such programs are here to stay and will probably only grow in popularity and scope. The well-rounded practitioner of today (and certainly of tomorrow) will need to be a master not only of basic litigation skills, but also of the unique rules and strategies required to compete in an increasingly mixed public and private dispute resolution arena.

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NOTES

1 The views expressed are solely those of the author, and do not necessarily represent the views of the author's firm or clients.
2 Fed. R. Civ. P. 16(c)(9).
3 *See* 28 U.S.C. Sec. 471.
4 Section 102, P.L. 101-650, 109 Stat. 292 (1990).
5 28 U.S.C. Sec. 474(a)(3)A).
6 28 U.S.C. Sec. 474(b)(4).
7 28 U.S.C. Sec. 474(b)(5).
8 28 U.S.C. Sec. 651.
9 28 U.S.C. Sec. 652(a).
10 28 U.S.C. Sec. 652(b).
11 28 U.S.C. Sec. 653.
12 *See* 28 U.S.C. Sec. 654.
13 For a complete summary of ADR processes in various jurisdictions, *see* Federal Judicial Center, *The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook* (1995) (listing ADR methods approved in various districts).
14 *See, e.g.*, Civil Justice Expense and Delay Reduction Plan ("CJEDR Plan"), S.D.N.Y., Part 5 (magistrate judge to be assigned in every case, with possibility that magistrate judge may conduct settlement discussions); CJEDR Plan, E.D.N.Y., Part II(F) (preliminary conference to discuss possibility of use of independent "settlement judge"), Part III(A)(2) (settlement conference to be convened in every case, unless judge considers it "unwarranted").
15 *See, e.g.*, CJEDR Plan, S.D.N.Y., Part 16 (mandatory mediation for expedited cases, and for a "sample" of other civil cases); CJEDR Plan, E.D.N.Y., Part III(A)(4) (litigants may choose mediators from court's panel on their own or through a reputable ADR organization).
16 *See, e.g.*, CJEDR Plan, S.D.N.Y., Part 17 (voluntary arbitration to be discussed at preliminary conference).
17 *See, e.g.*, CJEDR Plan, E.D.N.Y., Part III(A)(1) (mandatory non-binding arbitration for civil dam-

age claims involving $100,000 or less, subject to trial de novo).

18 *See, e.g.*, Operating Statement, Commercial Division, New York County Supreme Court (1995) (providing for mandatory mediation at discretion of trial judge, and encouragement of additional forms of ADR); Cal. Bus. & Prof. Code Sec. 465(d) (providing that courts should encourage greater use of ADR techniques); *see generally* Thomas L. Fowler, *Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure*, 21 Campbell L. Rev. 191 (1999); Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settlement: Court-Ordered Civil Case Mediation*, 19 Justice Syst. J. 311 (1997); Hon. Robert P. Murrian, *Mediation From the Court's Perspective*, Tenn. B.J., Sept.-Oct. 1995, at 12; Andrea Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 Ohio St. J. on Disp. Resol. 287 (1992).

19 *See, e.g.*, Y2K Act of 1999, H.R. 775, 106th Cong., 1st Sess., Sec. 7 (requiring pre-litigation notice as condition to pursuing Y2K claims, to which defendant may respond by offering to engage in ADR, thus suspending period for litigation by at least 60 days); Fla. Stat. Ann. Sec. 44.102 (court-ordered mediation and arbitration); Minn. Stat. Ann. Sec. 484.74 (providing for non-binding private trials, neutral expert fact-finding, mediation, mini-trials, and other forms of ADR when amount in controversy exceeds $50,000).

20 *See* James S. Kakalik, et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (1996).

21 *See* Sanford M. Jaffe and Linda Stamato, *Views on RAND's CJRA Report*, 15 Alternatives to High Cost Litig. 67 (1997).

22 *See* Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 Judicature 224 (1999).

23 *See* 28 U.S.C. Sec. 455(a) (judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); *see also* Code of Judicial Conduct, Canon 2A (judge's obligation to avoid "appearance of impropriety").

24 Union Planters Bank v. L & J Dev. Co., 115 F.3d 378, 383 (6th Cir. 1997) (quotation omitted).

25 Fed. R. Civ. P. 16(c)(9).

26 Advisory Committee Notes, Rule 16; *see generally* In re NLO, Inc., 5 F.3d 154, 157 (6th Cir. 1993) ("Although judges should encourage and aid early settlement," they should not "attempt to coerce that settlement.").

27 *See* Weddington Productions, Inc. v. Flick, 71 Cal. Rptr.2d 265, 282 (Cal. App. 1998) (reversing attempt to "push the envelope" into "new territory" where private judge's recommended settlement agreement was implemented by court without consent of the parties).

28 *See* In re Ashcroft, 888 F.2d 546, 547 (8th Cir. 1989) (court must avoid "appearance (as well as the reality) of coercion" caused by "linkage between settlement and the Court's ruling" on pending motion); Wolff v. Laverne, Inc., 233 N.Y.S.2d 555, 557 (1st Dep't 1962) ("gross abuse of discretion" for court to "penalize" litigant for "not succumbing to the pressure" of judge to settle); *see also* Cropp v. Woleslagel, 485 P.2d 1271, 1276 (Kan. 1971) (settlement efforts by court "should never work to coerce or compel a litigant to make a settlement").

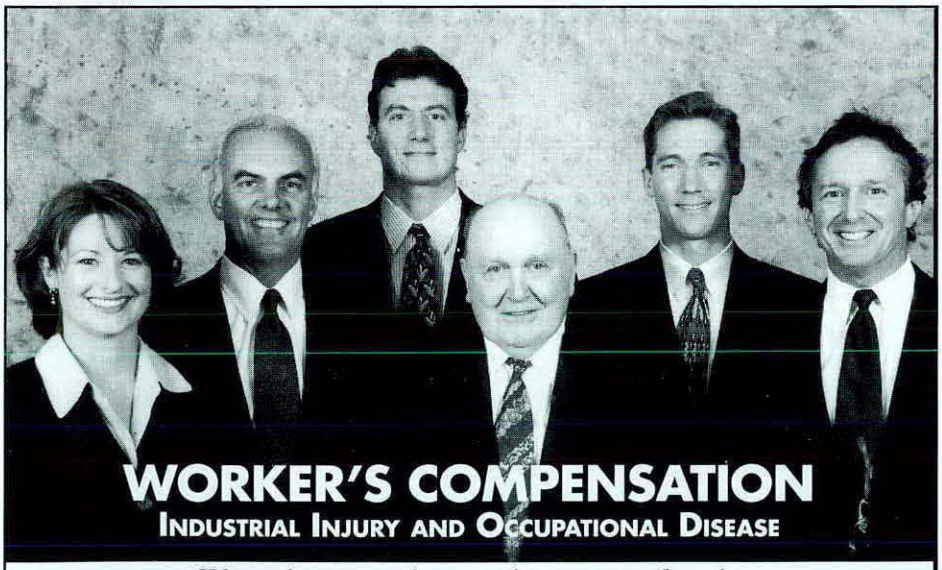
29 *See* Krattenstein v. G. Fox & Co., 236 A.2d 466, 469 (Conn. 1967) (disapproving as "inconsistent with the proper exercise of the judicial function" procedure whereby trial judge expressed opinion as to dollar value of case and persisted in efforts at settlement by requiring counsel to convey that opinion to his client); Rosenfield v. Vosper, 114 P.2d 29, 33 (Cal. App. 1941) (error for judge to instruct attorneys to tell their clients that "it would be in their best interests to settle").

30 *See* Fed. R. Evid. 408 ("Evidence of conduct or statements made in compromise negotiations is ... not admissible."); *see also* Breining v. Trimble, 669 N.E.2d 494 (Ohio Ct. App. 1995) (plain error for court to disclose settlement discussions to jury).

31 Code of Judicial Conduct, Canon 3A(4).

32 Knop v. Johnson, 977 F.2d 996, 1011 (6th Cir. 1992) (quotation omitted), *cert. denied*, 507 U.S. 973 (1993); *see also* Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41 (4th Cir. 1995) (judge required to recuse himself on remand due to ex parte contacts with counsel); United States v. Microsoft Corp., 56 F.3d 1448, 1464 (D.C. Cir. 1995) (judge required to recuse himself based, in part, on improper acceptance of ex parte submissions); United States v. Furst, 886 F.2d 558, 582 (3rd Cir. 1989) (judge required to recuse himself from sentencing based on ex parte communications with counsel), *cert. denied*, 493 U.S. 1062 (1990); Buckley v. Snapper Power Equip. Co., 813 P.2d 125, 128-29 (Wash Ct. App.) (judge required to recuse himself due to ex parte communications with guardian ad litem and counsel), *review denied*, 822 P.2d 287 (Wash. 1991).

33 *See* Lynn v. Smith, 281 F.2d 501, 507 (3rd Cir. 1960) (receipt of "oral statements" by witnesses at pre-trial conference "opens a Pandora's



Box"); *see also* In re Fernandez-Lopez, 37 B.R. 664, 670 (Bankr. App. Panel 9th Cir. 1984) (citing Lynn rule with approval); Gullett v. McCormick, 421 S.W.2d 352, 354 (Ky. Ct. App. 1967) (disapproving "the attendance of witnesses and the taking of testimony at a pretrial conference").

34 *See* H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 Rutgers L. Rev. 431, 437 (1986) (suggesting that settlement negotiations should be conducted by magistrates, masters, lawyers or law panels).

35 *See* Schellin v. North Chinook Irrigation Assoc., 848 P.2d 1043, 1045 (Mont. 1993) (where a judge "participates in pre-trial settlement negotiations which subsequently fail, he should, upon request, disqualify himself from sitting as the trial judge") (quotation omitted); Fabber v. Wessel, 604 So.2d 533, 534 (Fla. Dist. Ct. App. 1992) (judge disqualified where disclosure of mediation communications might "poison" the ultimate judgment), *review denied*, 617 So.2d 322 (Fla. 1993).

36 *See* Timm v. Timm, 487 A.2d 191, 193 (Conn. 1985) ("When a judge engages in a pretrial settlement discussion in a court case, he should automatically disqualify himself from presiding in the case in order to eliminate any appearance of impropriety and to avoid subtle suspicions of prejudice or bias.").

37 *See generally* Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) (arbitration is a matter of "consent not coercion"); Volt Information Sciences, Inc. v. Stanford Univ., 489 U.S. 468 (1989) (policy favoring arbitration "does not require parties to arbitrate when they have not agreed to do so").

38 *See* Smith v. Smith, 1998 WL 10213 at *2 (Tenn. App. Jan. 14, 1998) (although court may order non-binding arbitration, it has no authority to order binding arbitration); Massey v. Farmers Ins. Group, 837 P.2d 880, 885 (Okla. 1992) (statutory requirement for private appraisal of damages resulted in non-binding award, because parties had not consented to waive their right to jury trial on damages issue); *see generally* United States v. Paramount Pictures, Inc., 334 U.S. 131, 176 (1948) (court has "no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress").

39 *See* Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988) (Rule 16 authorizes court to order parties to engage in pretrial summary jury trial); McKay v. Ashland Oil Co., 120 F.R.D. 43 (E.D. Ky. 1988) (Rule 16 and inherent power of court authorizes mandatory summary jury trial); *but see* Strandell v. Jackson County, Ill., 838 F.2d 884 (7th Cir. 1987) (court may not compel summary jury trial).

40 *See* Enyart v. Columbus Metro. Area Comm. Action Org., 685 N.E.2d 550, 559 (Ohio Ct. App. 1996) (party's failure to respond to court-ordered arbitration, and failure to demand trial de novo, waived objection to arbitration procedure and result).

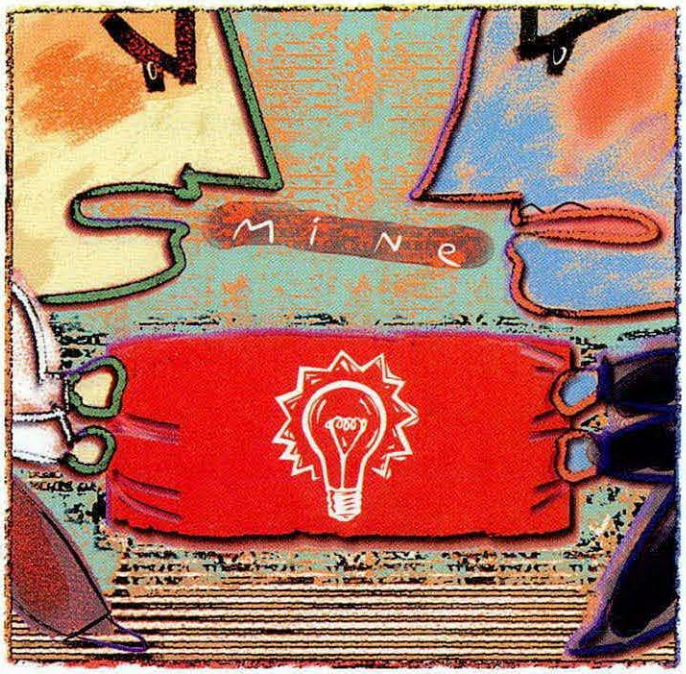
41 *See* Keene Corp. v. Gardner, 837 S.W.2d 224, 232 (Tex. Ct. App. 1992) (reversing order imposing costs on party for failure to appear at mediation session with representative holding settlement authority, where session was scheduled on 24-hours' notice, and party was not given an opportunity to object to the referral to mediation).

E-commerce and Patents: The Changing Face of the "Free" Internet

by Robert S. Apgood • *e-mail: rob@apgood.com*

I guess I'm going to have to accept it: the Internet just isn't the open, "share everything we have" erstwhile environment that it was. Business has dominated it, and dominated it with a vengeance. Like the tear gas-laden streets of WTO Seattle, the thought brings a (sniff, sniff) tear to my eye.

But change is not necessarily a bad thing. Business, specifically e-commerce, has facilitated the demand that continues to finance the phenomenal advances in technology that make the Internet the profound, multi-faceted environment that it is. I like that part. But, developing these capabilities isn't *inexpensive* and like any other business investment, the creators are entitled to protection of the fruits of their labors.



To be patentable, the subject must be novel and (patently?) non-obvious. Further, the criteria used in the determination of what is "novel and non-obvious" are complex and, some argue, fairly subjective. The subject matter covered by a patent may be quite broad. Additionally, numerous aspects (claims) of the methods or processes may be made in a single patent, the infringement of any one constituting an infringement of the whole. Ironically, an interesting twist exists that allows for the patentee to obtain a patent which he may not be able to use without infringing on someone else's patent. For example, Company ABC develops and patents a device that enhances the output efficiency of framus makers (machines patented and manufactured by Company XYZ). ABC cannot sell its own product without making an infringing clone of XYZ's machine. More critically, you can infringe a patent even if you are not aware of the patent or the patentee's product. Neither does a patent owner have to prove knowledge or copying to prevail in an infringement suit.

Many critics portend that patents will slow the growth of the Internet as a commercial medium by stifling innovation and putting an emphasis on patents, not business and technology, asserting that patents of business models and methods for commerce on the Internet are absurd.

The statutory scope of patentable inventions is defined at 35 U.S.C.§101 (1994), which states that "any process, machine, manufacture or composition of matter" is patentable subject matter. The Supreme Court has defined unpatentable subject matter to include "laws of nature, natural phenomena and abstract ideas,"[1] typically construing mathematical algorithms as "abstract ideas" and therefore unpatentable under §101.[2] However, after some bumpy excursions by the courts into the scope and applicability of patenting mathematical algorithms, the current state of the law is that algorithms may be patented,[3] on the theory that once a mathematical expression is reduced to something tangible (e.g., a computer system or program), it becomes patentable.[4]

This relaxing of the strict construction of patent scope has inevitably led to challenges to other, well-established restrictions. One such restriction is the "business method exception" doctrine[5] that precluded the patenting of business methods and processes such as bookkeeping. Although the precedent was frequently cited in cases before the Federal Circuit, those decisions were invariably based on something other than the business method exception. Consequently, the exception was ripe for attack.

In March 1991, R. Todd Boes filed an application for the patenting of "[a] data-processing system [to provide] for monitoring and recording the information flow and data, and making all calculations, necessary for maintaining a partnership portfolio and partner fund (Hub and Spoke) financial services con-

figuration."[6] This patent was issued in March 1993, whereupon it was assigned to Signature Financial Group, Inc. Subsequently, Signature entered into negotiations with State Street Bank & Trust Co. with the intent of licensing the Hub and Spoke technology to State Street, who is in a similar business to Signature. When negotiations between the two broke down, State Street filed a partial summary judgment motion seeking to invalidate the patent as being subject to the business method exception. The motion was granted and Signature appealed. In reversing the summary judgment, the U.S. Court of Appeals for the Federal Circuit called the business method exception "ill-conceived" and held that it "represented the application of some general, but no longer applicable legal principle" and abolished the exception in its entirety.[7] In doing so, the Court made business methods subject to the same requirements for patentability as those applied to any other method or process.

Although only decided in July 1998, *State Street* created the "teeth" needed to enforce the multitudes of patents applied for and awarded to software companies for the past several years. Patents provide broad protections for technological developments that are frequently manifested in software. As a matter of practical necessity, e-commerce developments are typically embodied in software and its algorithms, making these systems ideal candidates for patent protection. Internet-based enterprises are finding that patent protections may provide the needed edge to prevail in ever-increasing competition for online business. Consequently, the U.S. Patent and Trademark Office (USPTO) is being besieged by patent applications at such a rate that they are seemingly making only pro forma investigations prior to the issuance of the patent sought, arguably on the theory that infringement claims will be litigated in any event.

In the rush to the USPTO to acquire a competitive edge, numerous e-commerce companies have taken the controversial step of patenting elements of their business plans in addition to their technologies. Many critics portend that patents will slow the growth of the Internet as a commercial medium by stifling innovation and putting an emphasis on patents, not business and technology, asserting that patents of business models and methods for commerce on the Internet are absurd. Nevertheless, well-heeled players are getting patents and suing for infringements. Priceline.com filed suit against Microsoft in October 1999, claiming that Microsoft's *Expedia.com* hotel-matching service violates Priceline's patented business model. In December 1999, Amazon.com sought and received an injunction against barnesandnoble.com on a claim that Barnes & Noble's *Express Lane* shopping system infringed on Amazon's *1-Click* method.

While *State Street* widely opened the door to patenting business methods historically denied such protection under §101, the Court was clear in its holding that judging whether a claim is too broad to be patentable is to be judged under §§102, 103 and 112. Of the three, it is perhaps §112 that gives the greatest insight into the Court's position. 35 U.S.C. 112 reads, in part:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.
>
> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

While we can expect to see ever-increasing applications for business method patents in the "Internet Universe," we will also likely see the *State Street* door inched closed by strict application of § 112, invalidating overly broad patent claim language. However it plays out over the next few years, *State Street* will figure prominently in infringement claims.

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 and acquired a law degree. When not out riding on his Harley, he can be found most days in his office muttering to himself and indulging in latent Luddite tendencies.

NOTES

1 Diamond v. Diehr, 450 U.S. 175, 185 (1981).
2 *See* Parker v. Flook, 437 U.S. 584 (1978).
3 Diamond v. Diehr at 191.
4 In re Alappat, 33 F.3d 1526 (Fed. Cir. 1994).
5 *See* Hotel Security Checking Co. v. Lorraine Co., 160 F. 467 (2d Cir. 1908).
6 United States Patent 5,193, 056.
7 149 F.3d 1368 (Fed. Cir. 1998), cert. denied, 119 S. Ct. 851 (1999).

Changing Venues

Honors and Awards

Seattle attorney **Scott Fredericksen** has been named by U.S. Attorney General Janet Reno to head the Federal Campaign Finance Task Force of the U.S. Department of Justice. Fredericksen will be senior counsel to the assistant attorney general in charge of the Justice Department's criminal division investigating alleged campaign-finance irregularities in the 1996 presidential race.

The 22,000-member Defense Research Insitute (DRI), the nation's largest association of civil litigation defense lawyers, has elected Seattle attorney **Sheryl J. Willert** as Second Vice-president. The first female and first African-American officer of the organization, she will progress through other officer positions in the next couple of years, becoming DRI's President in 2002.

Judge **Tom Warren** of the Chelan County District Court in Wenatchee has become Chair-elect of the National Conference of Special Court Judges. Composed of hundreds of judges around the nation, the Conference is a part of the American Bar Association Judicial Division. Judge Warren is a past President of the Washington State District and Municipal Judges Association and is a national speaker on the subject of judicial outreach and a judge's obligation to his or her community.

Reed McClure's **William R. Hickman** has been named to the International Amateur Athletic Federation (IAAF) Anti-Doping Commission. The IAAF Council is the governing body for amateur track and field events. The Anti-Doping Commission advises the Council regarding developments and proposed solutions for the technical and legal problems associated with the IAAF's anti-doping activities.

Five members of the Bullitt family, including attorneys **Stimson Bullitt** and **Dorothy C. Bullitt**, have received the Seattle-King County First Citizen Award from the Seattle-King County Association of Realtors. The family's record of community service spans four generations.

The Seattle law firm of Cairncross and Hempelmann has been honored with a "Better Workplace Award" by the Association of Washington Business (AWB) Board of Directors for its job-training programs that focus on helping employees realize their potential.

Spokane attorney **Peter S. Lineberger** has been admitted to the Washington Chapter of the American Academy of Matrimonial Lawyers.

John W. Hough

J. Daniel Ballbach

Mergers

The Vancouver, Washington, firm of Horenstein Bremer has joined forces with Miller Nash Wiener Hager & Carlsen LLP. Attorneys **Steve Horenstein** and **LeAnne Bremer** are looking forward to the assistance of 128 new cohorts in their practice.

Sheryl J. Willert

George Finkle

Movers and Shakers

Dorsey & Whitney LLP has announced that **Edward Bulchis** and **Paul Meiklejohn** have joined the firm as new partners in the Seattle office. Both have substantial intellectual property law experience.

After 10 years as a King County Superior Court Judge, **George Finkle** has joined Judicial Dispute Resolution as its newest panel member. As a Superior Court Judge, he conducted mediations in a broad range of civil cases.

John W. Hough, former Chief of Complex Litigation for the Washington Attorney General's Office, has joined the law firm of Lane Powell Spears Lubersky LLP as Counsel to the Firm in the Olympia office. He will concentrate his practice in complex litigation, antitrust and natural resource law.

Heller Ehrman White & McAuliffe has promoted two associates to shareholder status. **Pamela Charles Brown** practices federal and Washington tax law and provides transactional tax planning advice in domestic and international business transactions, with an emphasis on mergers and acquisitions. **Scott W. MacCormack**'s practice emphasizes real estate acquisitions, development, sales and exchanges, and transactional energy work.

The Olympia office of Perkins Coie LLP has added Of Counsel **Thomas McDonald**. He will practice in environmental law, including water resources, shoreline and coastal zone law, water quality and the Endangered Species Act.

Marten & Brown LLP has announced the hiring of Chief Executive Officer, environmental mediator and facilitator **J. Daniel Ballbach.**

Lora L. Brown, who practices in the areas of estate planning, probate and elder law, has become a shareholder at Stokes Lawrence P.S. New associate **Denise A. Banaszewski** emphasizes tax, business and aviation law in her practice. New associate **Rhe Zinnecker** focuses her practice in family law.

Four new associates have joined the ranks at Short Cressman & Burgess PLLC in Seattle. **Michelle Y. Clark** concentrates

her practice in business and real estate transactional work. **Derek D. Crick** joins the firm's Construction Industry Practice Group in the areas of construction and government contract law. **Christopher L. Ottele** practices in the area of employment law and litigation. **Alex J. Rose**'s practice is in Washington state federal and superior court litigation.

Preston Gates & Ellis LLP in Seattle has added 15 new attorneys. New partner **Michelle A. Gammer**'s practice is concentrated on advising clients on employment and labor law, litigation and training. Of Counsel **David J. Lenci** will practice business litigation, including antitrust, trademark and copyright infringement, franchise disputes, insurance coverage, environmental remediation, land use permit denials and employment discrimination/wrongful discharge. New associates include **James Andrus** (business), **Amber M. Turchi Beckman**, **Janet S. Chung** (employment), **David V. H. Cohen** (technology and intellectual property), **Shannan L. Frisbie** (technology and intellectual property), **Kevin Lee Gruben** (business), **Stephen A. Mutkoski, Jr.** (copyright and trade secret matters), **Todd L. Nunn** (products and premises liability), **Hillery L. Nye** (intellectual property), **Jessica C. Pearlman** (business and technology and intellectual property), **Jacqueline M. Ryall** (intellectual property), **Elizabeth Soscia** (business) and **Athan E. Tramountanas** (construction litigation and transactions).

New associates **Randy L. Baldemor**, **Julie M. Florida** and **Diana S. Shukis** have joined Reed McClure in Seattle. Baldemor is involved with the firm's corporate, real estate and litigation practice groups. Florida works with the firm's business, corporate and health care law practice groups. Shukis is involved with the litigation, appellate and employment law practices at the firm.

Beginning litigation associates at Heller Ehrman White & McAuliffe include **Rima J. Alaily**, **Kevin J. Craig** and **A. J. Taylor**. Also joining the firm are new business associates **Leo S. Batalov**, **Chad P. Webster** and **Ryan J. West**.

Ramsden & Lyons in Coeur d'Alene, Idaho, has recently hired WSBA member **Michael A. Ealy**. Ealy's practices areas include professional malpractice defense, construction law and civil litigation.

In Memoriam

Emory Edwin Bundy passed away November 15, 1999 at the age of 95. His primary career was with the Federal Bureau of Investigation, where he served for more than 30 years.

Mary Jenny, professor of law at the University of Wyoming, passed away August 6, 1999 at age 58.

Former Pacific/Wahkiakum County Superior Court Judge **Robert A. Hannan** passed away October 31, 1999 in Clark County at the age of 87.

Former state senator and WSBA Board of Governors member **Pat McMullen** passed away November 12, 1999 at the age of 54. In practice in Sedro Wooley, he was also a former Skagit County prosecutor.

The Board's Work

by Sherrie Bennett

January 14-15, 2000 Meeting:

Refining the Definition of the Practice of Law Tops Talk with Supreme Court

WSBA's Board of Governors met with the Washington State Supreme Court on January 14, 2000 to discuss a proposed definition of the practice of law now being considered by the Court. After over a year of drafting, the WSBA has forwarded the definition to the Court for further review. The Board of Governors and former governor Steve Crossland of Wenatchee fielded questions from the Court regarding how a potential rule would be enforced and how exceptions to the rule would be carved out. President Dick Eymann of Spokane described the mood of the Court as ranging from a sort of caveat emptor "you get what you pay for" stance to one of very strict regulation. Governor John Powers of Spokane saw the two main questions of the Court as (1) who is going to enforce the rule and (2) will the rule impair access to justice agendas? Governor Powers suggested that these two questions are in reality financial issues, and that the membership must decide whether it is important enough to pay more in dues to police the unauthorized practice of law. Governor Steve Henderson of Olympia articulated the issue as being one of whether it is cost efficient to license and regulate a "sublayer of paraprofessionals," citing the continuing discussion regarding enforcement as one of the reasons why the WSBA has been struggling with these issues for the past 70 years. Governors Walt Krueger of Kirkland and Dale Carlisle of Tacoma suggested that the Board should look at how prosecutors might be able to enforce the rule as it is currently drafted and begin to hone a philosophy as to how exceptions should be carved out. Governor Jenny Durkan of Seattle cautioned that the Board should not be relying on criminal prosecution as a primary enforcement vehicle, as prosecutors do not necessarily have the funds or time to devote to the issue. Liaison Jim Kaufman from the Washington Association of Prosecuting Attorneys (WAPA) will report back to the Board on WAPA's position on enforcement. Steve Crossland will report back to the Board in March with a draft of a potential philosophy statement as to how exceptions to the rule would be granted.

Deno Discusses Diversity

Governors Jim Deno (of Everett), Jenny Durkan and Lindsay Thompson (of Seattle) bent other Board members' ears discussing the perception that the Board of Governors is a "closed society" that doesn't include minority and specialty bar members. Governor Thompson suggested that efforts to change perception must be long-term and constant in order for truly diverse discussions to become the norm around the Board of Governors' table. A town meeting has been set for February 7, 2000 from 12 noon until 2:00 p.m. at the WSBA offices to discuss how to improve WSBA communications with minority and specialty bar members. All interested parties are invited.

Legislative Update

WSBA lobbyists John Fattorini and Gail Stone briefed the Board on pending legislation in the current legislative session. As *Bar News* goes to press, the following are bills of potential interest to attorneys:

Pro Se Attorneys' Fees in Civil Actions
HB 2474 proposes to allow pro se attorneys' fees in civil actions.

Geographic Relocation of Children after Dissolution
HB 2475 proposes to override a Washington State Supreme Court decision on relocation of children after dissolution, delineating specific legislative intent.

Protection of Dependent Persons
HB2509 provides specific protections for dependent persons.

SB 6382 proposes to make reliable hearsay of vulnerable adults admissible, similar to the child hearsay statute RCW 9A.44.120.

SB 6401 would provide for protection of vulnerable adults.

Disclosure of Information to Persons against Whom Successor Tax Liability is Asserted
HB 2516 would revise RCW 82.32.330 relating to persons against whom successor tax liability is asserted.

Excise Tax Code Simplification
HB 2519 proposes to simplify the excise tax code through revision terminology, correcting mistakes, streamlining procedures and deleting obsolete provisions.

District Court Jurisdiction
HB 2522 proposes to increase district court jurisdiction to claims up to $50,000. HB 2434 would give district courts jurisdiction over civil actions for damages for injuries to the person, or for taking or detaining personal property, or for injuring personal property, or for injuring real property when no issue raised by the answer involves the plaintiff's title to or possession of the property, or for recovering possession of personal property, regardless of the value of the claim or the amount in issue.

Guardian Duties
SB 6214 proposes to amend RCW 11.92.043 relating to the duties of guardians and limited guardians under probate and trust law.

Crime Victim Restitution
SB 6243 would confirm that restitution must be paid to the estate of a crime victim who dies.

Violation of Foreign Protection Orders
SB 6268/HB 2339 proposes to rank the penalty for foreign protection order violations.

Garnishment Proceedings
SB 6295 would revise provisions of Chapter 6.27 relating to garnishment proceedings.

Guardians Ad Litem
SB 6305 proposes revisions relating to guardians ad litem.

Superior Court Commissioners
SB6351/HB 2504 would provide addi-

(continued on page 46)

(continued from page 44)

tional authority for Superior Court Commissioners, authorizing them, in adult criminal cases, to preside over arraignments, preliminary appearances, and initial extradition hearings; accept pleas if authorized by local court rules; appoint counsel; make determinations of probate cause; set, amend and review conditions of pretrial release; set bail; set trial and hearing dates; authorize continuances and accept waivers of the right to speedy trial.

Growth Management Hearings Board
SB 6355 would require the Growth Management Hearings Board to find compliance with growth management plans unless it finds by a preponderance of the evidence that the state agency, county or city erroneously interpreted or applied RCW Chapter 36.70A.

Court Jurisdiction in Dependency Proceedings
SB 6389 would extend juvenile court jurisdiction over permanency planning matters in dependency proceedings.

Domestic Violence
SB 6400/HB 2402 would change current provisions relating to domestic violence.

Environmental Hearings Bonds
SB 6409 provides that if a person, who is neither a permit applicant nor the issuing agency, appeals a decision by a board identified in RCW 43.21B.005 to a court, the permit applicant may request the court to require the person to post a bond. The permit applicant would have to show that the combined cost of appeal and the costs of delay of the permit would not exceed $10,000.

Judgment Descriptions
HB 2329 would amend RCW 4.64.030 to provide an alternative method of providing property descriptions in judgments involving real property.

Shoreline Planning
HB 2394 would change provisions relating to review and amendment of shoreline master program guidelines, amending RCW 90.58.060.

Consumer Protection Violations in Manufactured/Mobile Home Landlord-Tenant Act
HB 2448 would apply the Consumer Protection Act to violations of the manufactured/mobile home landlord-tenant act.

Department of Corrections Contracts with Attorneys
HB 2455 would limit the authority of the department of corrections to contract with attorneys for the provision of legal services in correctional facilities.

Satisfaction of Judgments
HB 2461 provides that if a judgment creditor fails to file an acknowledgment of satisfaction of judgment with the court within 60 days of receiving payments, the judgment creditor would be liable for an amount equal to interest on the amount of the judgment computed at 12 percent per year from the 61st day after the payment of the judgment by the judgment debtor until the judgment creditor acknowledges the satisfaction with the court. The bill also provides for the payment of actual damages or $250, whichever is greater, and any costs and attorneys' fees associated with actions taken by the judgment debtor to get the satisfaction of judgment properly acknowledged by the court. More information on these bills and their progress through the legislative process can be monitored at http://www.leg.wa.gov/wsladm/bills.htm.

Board Amends Bylaws Regarding Setting of Membership Fees

In order to avoid the necessity of having to return to the State Supreme Court each time license fees are changed, the Board adopted a Bylaw amendment which does not set fees, but which empowers the Board to do so. The Board will request the Supreme Court to approve adoption of the Bylaw change consistent with court rules granting the WSBA authority to collect, allocate, invest and disburse funds. This amendment would not affect members' rights to a referendum vote.

Emeritus Program Report

The Board received a report on the fledgling Emeritus Program, designed to encourage inactive-status and other attorneys to provide pro bono legal services through the Washington State Access to Justice Network legal service providers. During the past year, the 13 participating attorneys provided 377 hours of free legal advice. Plans for the coming year would expand training sessions to eastern Washington and rural areas statewide, allowing detailed and customized presentations regarding volunteer opportunities geared specifically for each region. Interested volunteers can contact Sharlene Steele at 206-727-8262.

Public Access Records Policies

The Board adopted public records access policies, setting the cost for copying Bar records at 15 cents per page. Public records can also be provided in electronic form if the WSBA already has the information in electronic form and staff can readily and easily determine that the information would not include any information that is exempt from public records disclosure. The cost for providing copies of records in electronic form will be the cost of the disk or electronic media used, postage, and three cents per "page" (approximately 66 lines of information), plus cost of an envelope, with a minimum fee of $10. Listserve correspondence can be viewed at no charge by participating as a member of the listserve.

American Judicature Society

Judge William Baker reported on the Washington Chapter of the American Judicature Society now being formed. The Board approved the use of WSBA offices for meetings of the new group, and also approved the use of staff support of approximately 15 hours per year, to be reimbursed by the group as soon as it collects membership fees.

American Bar Association Doings

William Neukom reported that the ABA will discuss the issue of multidisciplinary practice at its mid-year meeting in February in Dallas. The Board will support the nomination of Karen Wong by the ABA Nominating Committee to sit on the ABA Board of Governors.

Communicating with Represented Persons

by Barrie Althoff • *WSBA Disciplinary Counsel*

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

Students of the law and television viewers know that a lawyer generally may not communicate about the subject matter of a representation with a person who the lawyer knows is represented in the matter by another lawyer. Exceptions are made where the other lawyer authorizes the communication or the communication is otherwise authorized by law. This "no-contact" principle, now embodied in Rule 4.2 of Washington Rules of Professional Conduct (RPCs), attempts to balance several conflicting legal and societal values. Implementation of the rule, while often clear, demonstrates the adage that the "devil is in the details." This article looks at the rule and its predecessors and catalogues some of those devils, especially those arising when dealing with persons in organizations and in criminal law cases.

Students of the law and television viewers know that a lawyer generally may not communicate about the subject matter of a representation with a person who the lawyer knows is represented in the matter by another lawyer.

The Rule and Its Background

RPC 4.2 has a considerable heritage. Washington's first no-contact rule was Canon 9 of the American Bar Association's 1908 Canons of Ethics, adopted by Washington in 1917 (1917 Session Laws, Ch. 15, Sec. 20). Canon 9 stated that "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but he should deal only with his counsel."

In 1972, Washington replaced the Canons with the Code of Professional Responsibility, based on the ABA Model Code of Professional Responsibility. The Code's no-contact rule, captioned "Communicating with One of Adverse Interest," was continued in Disciplinary Rule 7-104(A)(1): "During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

In 1985, Washington replaced the Code with the Rules of Professional Conduct (RPCs), largely based on the 1983 ABA Model Rules of Professional Conduct. The new no-contact rule, set out in the still-current version of RPC 4.2, retains the same underlying principles as its predecessor:

> **Rule 4.2: Communication with Person Represented by Counsel**
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Washington's RPC 4.2 is identical to ABA Model RPC 4.2 as promulgated by the ABA in 1983. In 1995, however, the ABA amended Model Rule 4.2 by replacing the word "party" with the word "person," so that the ABA version (but not the Washington version) now reads ". . .a lawyer shall not communicate about the subject of the representation with a ~~party~~ person . . . ." The ABA stated that the purpose of the change was to clarify that the rule applies (as the caption for both the ABA and the Washington versions indicate) to any "person" represented by counsel, not merely a litigant "party." Most commentators and jurisdictions agree with this interpretation. See ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* (Fourth Edition, 1999), pp. 400-401 [hereafter cited as *Annotated*]; The American Law Institute, *Restatement of the Law (Third) — The Law Governing Lawyers* (Tentative Draft No. 8, March 21, 1997), Section 158 (pages 234-236) [hereafter cited as *Restatement*].

Rationale for Rule

The no-contact rule seeks to safeguard the lawyer-client relationship and to protect the represented party/person from possible overreaching by an adverse lawyer. It is also intended to lessen the likelihood that represented persons, when dealing with opposing counsel but without the immediate protection of their own counsel, will inappropriately disclose privileged communications, client confidences or client secrets, or other information that might harm them. For a useful catalog of stated rationales, see *Wright v. Group Health Hospital*, 103 W.2d 192 (1984), 196-197.

Application of the Rule

Knowledge Required

RPC 4.2 only applies when the lawyer "knows" the person is represented by a lawyer. The RPCs define "know" succintly as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." For example, a Washington lawyer was recently admonished for continued contact with

an opposing party after being repeatedly informed that the party was represented by counsel. *In re Discipline of Kathleen Schmidt, Washington State Bar News* (October 1998, p. 49.)

Since RPC 4.2 uses the term "know," and not the term "reasonably should know," which the RPCs define to include a duty of inquiry, *ABA Formal Opinion 95-396* (July 28, 1995) concludes there is no duty on the part of a lawyer to inquire if the other person is represented in a matter. The opinion cautions, however, that "a lawyer may not avoid Rule 4.2's bar . . . simply by closing her eyes to the obvious." If the lawyer is in doubt whether the person is (still) represented by another counsel, and wants to practice proactive ethics, the lawyer would be wise simply to inquire of the (perhaps former) opposing lawyer whether the opposing client is represented and to document the response.

Where a lawyer is representing himself or herself pro se, authorities differ on whether the lawyer may communicate directly with the represented party. One side contends that the lawyer as a principal may communicate directly with an opposing person just as any non-lawyer might freely do. For example, a tenant lawyer in dispute with the landlord and contacted by the landlord's lawyer could contact the landlord directly without going through the landlord's lawyer. More authorities, however, reject this and argue that where the other person is represented, the lawyer must communicate only through the other person's counsel, or at least where that person or counsel have so directed. For example, a Washington lawyer was admonished for communicating in his own pro se representation directly with an opposing person represented by counsel. See *In Re Michael E. Carroll, Washington State Bar News*, (June 1998, p. 46). Similarly, *Runsvold v. Idaho State Bar*, 925 P.2d 1118 (1996) held that RPC 4.2 prohibited a lawyer representing himself in a divorce action from communicating directly with his represented ex-wife over her counsel's objection. A pro se lawyer would be wise to avoid the no-contact problem by always communicating through the other person's counsel. If the pro se lawyer represents another person on the same matter in addition to himself or herself, the lawyer is acting in a representational capacity and must communicate through the other person's counsel.

A lawyer representing a client opposing a class action is subject to the no-contact rule. Before the class is certified, the lawyer may, unless otherwise ordered by the court, communicate directly with potential class members, but not the named plaintiffs. Thereafter, the lawyer may contact class members only through the known class-action lawyer. If there are competing classes, care should be taken. See *Annotated* (p. 410) and *Restatement* (pp. 232-233).

Parties or Persons?

Although Washington has not adopted the 1995 ABA amendment substituting "person" for "party," Washington's RPC 4.2, as that of most jurisdictions, has been read flexibly to apply to non-represented "persons," and is not limited merely to opposing "parties" in litigation. It applies to litigation (civil or administrative), negotiations and other representations. The rule also applies to represented co-parties and to non-party fact witnesses.

If a person represented by counsel contacts a lawyer not representing anyone else in a matter, seeking either a second opinion or to change counsel or to add an additional counsel, the no-contact rule does not prohibit the new lawyer from responding to such a contact. The new lawyer in effect has an independent basis for communicating with the represented person.

Where corporations or other multi-employee organizations are involved, the issue of who is considered off-limits to opposing counsel is complicated and involves conflicting policies of the right of an entity to defend itself and the right of opposing counsel to gather needed information. Washington's leading no-contact case provides some guidance as to whom is covered by the no-contact rule. Applying the predecessor to RPC 4.2, namely DR 7-104(A)(1) of the Code of Professional Responsibility, the Supreme Court held that the current employees of a hospital should be considered "parties" under that rule only if they had managing authority sufficient to give them the right to speak for and bind the corporation, and that non-managing/non-speaking employees and former employees of the corporation should not be considered parties. *Wright v. Group Health Hospital*, 103 Wn.2d 192, 201 (1984). Accordingly, a plaintiff's lawyer could ethically seek to communicate directly with such non-managing/non-speaking employees and former employees without the presence of the hospital's counsel. Although the Court was concerned to protect a client from being bound by statements made by managing/speaking employees without the protection of counsel, it is unclear whether the same rule would apply to a former managing/speaking employee who could no longer bind the client, but who might have extensive confidential information which the employer might still have a legitimate interest in protecting. The Court also held that the hospital could not prohibit its non-managing/non-speaking employees or former employees from communicating with adverse counsel, but that nothing required such persons to meet ex parte with adverse counsel if they did not wish to do so. 103 Wn.2d 192, 203. This is consistent with other jurisdictions. For example, *Polycast Technology Corp. v. Uniroyal Inc.*, 129 F.R.D. 621 (1990), held that lawyers were not barred from having ex parte contacts with a former employee of the opposing party and that there was no showing that that former employee had access to privileged information.

The Washington Supreme Court in *Wright* declined to follow the hospital's suggestion to adopt the "flexible 'client' test extending coverage to many nonmanagerial employees" enunciated by the U.S. Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Washington Court noted that the policies behind the attorney-client privilege rule considered in *Upjohn* were different from the policies behind the disciplinary rules, and that *Upjohn* read "client" broadly to apply the protection of attorney-client privilege to many employees. The Washington Court, on the other hand, was construing the disciplinary rules which had a policy of trying to protect the corporation so that its managing/speaking employees would

not be unduly influenced by adverse counsel. The Court observed that "a corporate employee who is a 'client' under the attorney-client privilege is not necessarily a 'client' for purposes of the disciplinary rule." 103 Wn.2d 192, 202.

Further applications of the rule can be found in several Washington Supreme Court cases. For example, in *Loudon v. Mhyre*, 110 W.2d 675 (1988), the Court held that as a matter of public policy, defense counsel in a personal injury action may not communicate directly with the plaintiff's treating physician, even when the plaintiff has waived the physician-patient privilege, but may do so only through formal discovery methods. The Court feared that ex parte contact would disclose irrelevant privileged medical information, and that the "plaintiff's interest in avoiding such disclosure can best be protected by allowing plaintiff's counsel an opportunity to participate in physician interviews and raise appropriate objections." The Court declined, however, in *Holbrook v. Weyerhaeuser*, 118 Wn.2d 306 (1992), to extend its *Loudon* no-contact holding to workers' compensation cases. Instead, it held that defense counsel could communicate ex parte with claimants' treating physicians during administrative proceedings before the Board of Industrial Insurance Appeals. The Court based its conclusion primarily on the public/state interest in the workers' compensation system and the specific statutory waiver of physician/patient privilege as to such claims.

In *In Re Firestorm 1991*, 129 Wn.2d 130 (1996), the Court found that a lawyer's ex parte contact of an expert witness was a violation of CR 26(b)(5) (relating to discovery of experts), but was not an ethical violation, and concluded that no sanction was appropriate. Although the case centered on application of Civil Rule 26, the Court noted (p. 137, note 2):

> No express ethical prohibition prohibits ex parte contact with an expert witness of an opposing party. ABA Comm. on Ethics and Professional Opinion, Formal Op. 378 (1993). Terry El. Nilles, *Ex Parte Contacts with Expert Witnesses*. Wisconsin Lawyer, Dec., at 18 (1994). The ABA opinion finds that Model Rule 3.4(c) (knowingly violating an obligation of a tribunal) may be violated by ex parte contact with an expert witness if the jurisdiction has a discovery rule based on Fed. R. Civ. P. 26(b)(4)(A). ABA Formal Op. 378.

The Court went on to conclude, however, that "Based on the plain language of the rule [CR 26(b)(5)], we hold as a general principle ex parte contact with an opposing party's expert witness is prohibited by CR 26. . . . Discovery of expert witnesses retained by a party to the litigation may only be done within the strictures of CR 26." 129 W.2d 130, 137-138.

A represented person, not knowing of or understanding the no-contact rule, will sometimes start the communication. At other times, the lawyer may start the communication, seeking to determine whether the person is represented by counsel as to the matter at hand.

Irrelevant Who Initiates Communication

The no-contact rule applies regardless of who initiates the communication. A represented person, not knowing of or understanding the no-contact rule, will sometimes start the communication. At other times, the lawyer may start the communication, seeking to determine whether the person is represented by counsel as to the matter at hand. In either case, if the lawyer learns that the opposing client is represented as to the matter, the lawyer must immediately terminate the communication. The lawyer would be wise after any such communication to immediately contact that person's counsel and advise him or her of the communication with that lawyer's client, and to document that contact.

Oral and Written Communications Prohibited

Rule 4.2 covers all communications, whether oral or written. For example, a lawyer was admonished for sending to the opposing client copies of correspondence addressed to the client's counsel after being told not to do so. *In re Discipline of Eugene N. Bolin, Washington State Bar News* (June 1999, p. 52). Another lawyer was admonished for in-person ex parte communications with persons known to be represented by counsel. *In re Gary Ackerman, Washington State Bar News* (May 1999, p. 52).

Indirect Lawyer Communications Prohibited

Although RPC 4.2 does not by its terms prohibit doing indirectly what the lawyer cannot do directly, RPC 8.4(1) does so by providing that "It is professional misconduct for a lawyer to: (1) 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." Thus, a lawyer cannot escape RPC 4.2 by having his or her agents or staff make ex parte communications on his or her behalf. Generally, law enforcement personnel are not considered to be a prosecutor's staff or agents, and thus such personnel are generally not subject to RPC 4.2. (See discussion below regarding "Communication Authorized by Law.") *ABA Formal Ethics Opinion 95-396* (1995) concludes that a lawyer would be ethically responsible for ex parte contacts by an investigator over whom the lawyer has direct supervisory authority if the lawyer did not make reasonable efforts to prevent such contacts, or had instructed the investigator to make them, or knowing that the investigator was going to make such contacts, failed to direct the investigator not to make them. The opinion also concludes, however, that if the lawyer has instructed the investigator not to make such contacts, but the investigator does so anyway, the lawyer may use the results of the contacts.

Direct Client-to-Client Communications Permitted

The rule does not prohibit opposing clients from communicating directly with one another, nor prohibit a lawyer from advising her client on the strategy to be

undertaken in such direct client-to-client communications. The lawyer should not be present during such direct communications, however, nor should the lawyer in effect seek to bypass the other lawyer by scripting her client's direct conversation with an opposing client. For example, a lawyer should not be present in person or on a telephone line while her client converses on another line with the opposing client and regularly places the opposing client on hold while she consults her lawyer.

Subject Matter of Representation

The rule only prohibits the lawyer from communicating about the subject matter as to which the opposing counsel is represented. A lawyer may communicate with the opposing client as to matters for which the opposing client is not represented by counsel. This distinction, however, can be perilous to rely on unless the representations are clearly distinct and the distinctions are documented.

If the proposed communication with a represented person is not prohibited by RPC 4.2, then that person is considered to be unrepresented by counsel as to that matter. The lawyer's conduct towards that person is then governed by other provisions of the RPCs, including RPC 4.1, prohibiting the lawyer from making false statements or material omissions; and RPC 4.3, prohibiting the lawyer from stating or implying that the lawyer is disinterested and requiring the lawyer to make reasonable efforts to correct any misunderstanding by that person of the lawyer's role in the matter.

RPC 4.2 only applies if there is a "matter." It is not clear whether this relates to timing or to the client's posture or the substantiality of the representation. In the criminal law context, using somewhat artificial distinctions, there is usually a "matter" if there has been an indictment. See *Annotated* (pp. 402-403).

Consent by Other Counsel

The rule specifically permits communication with a person represented by counsel where that counsel has consented to the communication. Although the rule does not require the consent to be in writing, a lawyer would be wise to document the consent by letter to that counsel (or to the client with a copy to that counsel), or at least by a memorandum to the file. Consent by the client alone is not sufficient to satisfy RPC 4.2.

Communication Authorized by Law

RPC 4.2 permits communication with a person known to be represented by counsel where that communication is "authorized by law." This clearly permits routine interrogations at depositions and at trial. But the words "authorized by law" also convey a host of problems, particularly in the criminal law setting, and especially when those seeking to avoid the restrictions of RPC 4.2 claim the authority to promulgate "laws" purporting to exempt themselves from complying with standards applicable to all other lawyers.

Prosecutors generally do not like RPC 4.2. The RPCs do not exempt prosecutors from RPC 4.2. Limiting a prosecutor's ability to engage in ex parte communications will likely result in fewer cases being made and some prosecutions never being brought because sufficient evidence cannot be obtained other than through ex parte communications. If rigidly applied, RPC 4.2 could limit the use of jailhouse snitches and undercover and sting operations. However, it is argued that leaving such operations solely in the hands of law-enforcement personnel, who as nonlawyers are not subject to the RPCs, would likely worsen the situation for many persons charged with crimes. In effect, by merely retaining counsel, knowledgeable criminal suspects would benefit from a windfall immunity from "routine" interrogations, while other unrepresented suspects would suffer.

The argument against applying RPC 4.2 to prosecutors is sometimes accompanied by a litany or parade of horribles that will occur if undercover or sting operations are not permitted to combat terrorists, drug dealers, child pornographers, sexual predators and so on. Federal law enforcement officials also claim that the necessity of complying with state ethics laws severely limits their ability to enforce federal laws, and that their investigations are far more complex than the work of other lawyers. Evidence is seldom provided in support of such contentions.

While there is clearly a public interest in having both federal and state criminal laws enforced, there is an even stronger public interest in preserving a very broad right to legal counsel. A cynic might well see attempts to exempt prosecutors from application of RPC 4.2 as merely attempts to delay or deny criminal suspects any access to legal counsel until after law enforcement personnel have had an opportunity to make their case against the suspect unimpeded by objections from the suspects' legal counsel.

The U.S. Department of Justice has long sought to exempt its attorneys from state lawyer ethics standards, and particularly from RPC 4.2. It has claimed that its own regulations have the force of law and thus preempt state ethics standards for its prosecutors under RPC 4.2's "authorized by law" exception. In effect, it has claimed that federal prosecutors should only be subject to ethics rules promulgated by themselves.

The Department's claims have been repeatedly rejected by most commentators, state lawyer disciplinary agencies, and by the courts. In *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288 (E.D. Mo., 1997), affirmed 132 F.3d 1252, 1257 (8th Cir., 1998), the Court held that the Department lacked authority to exempt its employees from compliance with state ethics rules and struck down the regulations purporting to do so. The Department's contention that its attorneys were not subject to discipline for violation of state ethics rules was rejected in *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992) and *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995).

Congress has also rejected the Department's exemption claims by enacting the Citizens Protection Act of 1998 (also known as the "McDade Amendment" or the "McDade-Murtha Amendment"), set out as Section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations Bill for fiscal year 1999 (Public Law 105-277), and codified at 28 U.S.C. 530B. The Act provides that federal government lawyers are subject to state laws and rules and local federal court rules governing attorneys in each state where such attorneys engage in their duties, to the same extent and in the same

manner as other attorneys in that state.

Despite passage of the Act, the Department has continued its campaign to exempt itself from the same ethical standards applicable to all other lawyers, including seeking legislation to do so. For example, in January 1999, Senator Orrin Hatch introduced a bill which would allow state ethics rules to be the controlling rules unless they would interfere with the investigation of violations of federal law" — a provision which the Department would likely interpret as, in effect, a repeal of the Act. The Department has claimed that granting state ethics authorities jurisdiction over federal prosecutors would cause significant problems for federal civil and criminal law enforcement. The problem of RPC 4.2 for the Department is that it may be less able to engage in the ex parte communications prohibited by RPC 4.2, which substantially all states, but not the Department, consider unethical.

For a more detailed discussion of these issues, see *Annotated* (pp. 413-415). *Restatement* (pp. 230, 239-243); Cramton and Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291 (1992); Burke, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 Stanford L.Rev. 1635 (1994); Little, *Who Should Regulate the Ethics of Federal Prosecutors?* 65 Fordham L. Rev. 355 (1996); and Salon, *Prosecutors and Model Rule 4.2: An Examination of Appropriate Remedies*, 12 Geo.J. Legal Ethics 393 (1999).

WSBA Ethics Opinions

The WSBA has issued a number of opinions interpreting the no-contact rule. *WSBA Formal Opinion 12* (1951) concluded that Canon 9 of the Code of Ethics prohibited Washington-admitted lawyers representing the Veterans Administration from directly communicating with an opposing party represented by counsel. *WSBA Formal Opinion 21* (1953) concluded that Canon 9 prohibited a lawyer from giving an opposing represented client a copy of a proposed settlement agreement and reading it aloud to her in his office even though he advised her to consult her own counsel. *WSBA Formal Opinion 66* (1960) concluded that Canon 9 prohibited a lawyer from sending a copy of a proposed settlement demand directly to an opposing client at the same time he sent it to the opposing lawyer, observing that "the vice in the situation lies in the fact that it tends to encourage the opposing party to deal directly with the attorney proposing the settlement." *WSBA Formal Opinion 96* (1961) clarified that opinion in the context of statutory provisions for service on opposing parties and concluded that opposing counsel should be served with litigation pleadings even though statutes may permit direct service on the opposing client. *WSBA Informal Opinion 86-2* provides guidance to prosecutors on interviewing represented defendants on matters unrelated to the representation, including jail-house snitches.

While there is clearly a public interest in having both federal and state criminal laws enforced, there is an even stronger public interest in preserving a very broad right to legal counsel.

Consequences of Violating the No-Contact Rule

The possible consequences to a lawyer of violating the no-contact rule will depend on whether the lawyer knew of the representation, the severity and frequency of the violation, the consequences to others, and the jurisdiction in which the prohibited contact took place. Consequences may include disqualification of the lawyer from the representation, suppression of evidence secured from the ex parte contact, court fines and penalties, injunctions against use of improperly obtained information, and disciplinary action. For example, the Court in *United States v. Hammad*, 858 F.2d 834 (2d Cir 1988), cert. denied 498 U.S. 871 (1990), suppressed evidence a federal prosecutor obtained in violation of the no-contact rule.

Further Reading

Useful information about RPC 4.2 can be found in ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* (Fourth Edition, 1999, pp. 397-417); ABA Committee on Professional Responsibility *Formal Opinion 95-396* (1995); The American Law Institute, *Restatement of the Law Third — The Law Governing Lawyers* (Tentative Draft No. 8, March 21, 1997), Section 158; ABA/BNA *Lawyers' Manual on Professional Responsibility*, Section 71:301 et seq.; and *WSBA Informal Opinion 86-2* (relating to interviews by prosecuting attorneys of represented defendants concerning matters unrelated to the representation).

Conclusion

Washington's no-contact rule, RPC 4.2, seeks to protect the lawyer-client relationship and safeguard client confidences and secrets. In day-to-day practice the rule is not difficult to apply. Where organizations or criminal law suspects are involved, however, conflicting values may give rise to difficult issues requiring great care by the lawyer considering engaging in communications with a represented person.

Disciplinary Notices

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.

Disbarred

Donovan R. Bigelow (WSBA No. 20455, admitted 1986), of Seattle, has been disbarred by order of the Supreme Court effective December 7, 1999, following a stipulation approved by the Disciplinary Board on September 17, 1999. The discipline is based upon his unlawful attempt to induce a witness in an official proceeding to fail to attend the hearing.

Mr. Bigelow represented the criminal defendant in a rape of a child in the third-degree charge. Mr. Bigelow spoke with the victim's mother by telephone on at least four occasions. During the first conversation, Mr. Bigelow told the mother that the prosecutor's case would not be successful without her son's testimony. He also told her that if the client did not go to jail, the client would be in a position to compensate the child for what the client did. He told the mother that the Prosecutor's Office would threaten to arrest the mother and son if they did not show up for court, but that nothing would really happen.

During the next phone call, Mr. Bigelow told the victim's mother they should meet in person to discuss her son's attendance at the Art Institute of Seattle. The mother stated that she met with Mr. Bigelow and they discussed the client paying for the victim's schooling and counseling, and what would happen if the victim and the mother did not testify against the client. Although the prosecutor had not notified Mr. Bigelow of the date of the defense interview with the victim, Mr. Bigelow appeared on time the next day. During this interview, the victim's mother told the prosecutor and Mr. Bigelow that she did not want to cooperate and that the lawyers should settle the case.

Mr. Bigelow left a phone message for the mother two days prior to the trial date, stating that he desperately needed to talk to her. At this point, the court authorized recording of any telephone conversations between the mother and Mr. Bigelow. When the mother returned the call, Mr. Bigelow referred to earlier conversations and his client's willingness to compensate the mother and her son. He also stated that if the mother and son testified as expected, the client would surely end up in prison and a civil suit would not be successful. Mr. Bigelow asked whether the witnesses would be appearing in court. When the mother said no, Mr. Bigelow told her he would let her know whether the prosecutor sought a warrant for their arrest. As a result of his actions, Mr. Bigelow pleaded guilty to Attempted Tampering with a Witness in violation of RCW 9A.72.120(1)(b), a gross misdemeanor. Mr. Bigelow's conduct violated RPC 8.4(c), prohibiting committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; and RPC 8.4(c), prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. Mr. Bigelow's conduct also violated RLD 1.1(c) by violating his Oath of Attorney to abide by the laws of the State of Washington.

Timothy Leachman and Joy McLean represented the Bar Association. Mr. Bigelow represented himself.

Disbarred

Gerald Bopp (WSBA No. 404, admitted 1970), of Issaquah, has been disbarred by order of the Supreme Court effective November 17, 1999, following a default hearing. The discipline is based upon his failure to diligently represent a client, practicing law while his license was suspended, and failure to cooperate with a Bar Association investigation.

Mr. Bopp represented a client in the Superior Court appeal of a small claims judgment. Mr. Bopp knew that statutes and court rules required his client to have the opposing party served with the Notice of Appeal, case schedule and other pleadings. Although Mr. Bopp told his client he would serve these documents, he did not. The court continued the hearing, specifically indicating in the order that the opposing party had not been served. Mr. Bopp again failed to serve the opposing party. The court granted Mr. Bopp's motion for an Order of Default, Dismissal and Order to Disburse Funds.

After learning of the appeal and order, the opposing party obtained an order reinstating the original judgment and assessing $1,250 in terms against Mr. Bopp's client for failure to serve the Notice of Appeal. Mr. Bopp did not attend this hearing, notify his clients of the hearing date, or send his clients copies of the pleadings or the court's order. Mr. Bopp did not respond to the Bar Association's requests for information in this case. Mr. Bopp's conduct violated RPC 1.3, requiring a lawyer to exercise reasonable diligence in representing a client; RPC 3.4(c), prohibiting lawyers from knowingly disobeying an obligation under the rules of the tribunal; and RLD 2.8(b), requiring lawyers to cooperate with Bar Association investigations.

In October 1996, the Supreme Court suspended Mr. Bopp's license for failure to comply with the Continuing Legal Education requirements. In May 1998, Mr. Bopp continued to advertise his legal practice in several phone directories. Mr. Bopp's staff answered his phone "law offices" and were unaware of his suspension. The staff stated that Mr. Bopp continued to work on real estate transactions during his suspension. Mr. Bopp failed to respond to the Bar Association's requests for response and deposition subpoena on this issue. Mr. Bopp's conduct violated RLD 1.1(b) and (l), prohibiting lawyers from practicing while their license is suspended, and RLD 2.8(b), requiring lawyers to cooperate in Bar Association investigations.

Jonathan Burke represented the Bar Association. Mr. Bopp represented himself. Philip VanDerhoef was the hearing officer.

Suspended

Thomas Brothers (WSBA No. 9653, admitted 1980), of Everett, has been suspended for three months pursuant to a stipulation approved by the Disciplinary Board on September 20, 1999 and by the Supreme Court on December 6, 1999. The discipline is based on his failure to properly handle client funds and trust accounts.

Matter 1: In 1992, Mr. Brothers represented a brother and sister, the only known heirs of their father's estate. The estate was worth more than $400,000, consisting of securities and other property in Washing-

ton and a partial interest in real estate in Switzerland. Additionally, the father may have had an illegitimate child in Switzerland. Mr. Brothers told the clients that estate costs usually end up around three percent of the estate assets, but could be higher if the matter was complicated. Mr. Brothers did not set a specific fee and did not explain the basis for his fee in writing.

In October 1992, Mr. Brothers established a Shearson Lehman Brothers account (Shearson account) to be funded by estate assets. The clients and Mr. Brothers were listed on the account as having check signatory authority. Mr. Brothers listed his office address as the account address and did not designate this as a trust account. During 1993, Mr. Brothers obtained $22,000 in fees by writing six separate checks against the Shearson account. The clients approved these fees by telephone.

In 1994, Mr. Brothers traveled to Switzerland for a week to resolve the partial real estate interest and attempt to locate the illegitimate child. The clients indicated they authorized the trip, so long as the fee for the entire case did not exceed $25,000.

In the fall of 1994, Mr. Brothers obtained $35,000 in fees by writing four checks on the Shearson account. He did not keep time records or provide any invoices to the clients. He also wrote a $1,704 check to pay for his personal credit card. In November 1994, the clients realized they had not been receiving monthly statements on the Shearson account and requested copies from Shearson. When the clients received copies of the account statements, they notified Mr. Brothers that they disputed his fees. The clients contacted the Bar Association in April 1995. In November 1995, at Disciplinary Counsel's suggestion, Mr. Brothers returned $25,000 to the Shearson account and reimbursed the $1,704.

From 1992 through 1994, Mr. Brothers made several disbursements from the Shearson account, including a $103,000 disbursement. He did not maintain records of these transactions. WSBA auditors traced these disbursements to other accounts in the clients' names.

Matter 2. Between July 1994 and January 1996, Mr. Brothers maintained some client funds in a business account instead of an IOLTA account. These funds accumulated $529.67 in interest that was not remitted to the Legal Foundation of Washington. Additionally, in 1996, Mr. Brothers' trust account contained an unidentified balance of $7,176. Mr. Brothers determined that $4,625 of this money belonged to a business venture separate from his law practice and the remaining $1,200 belonged to the estate clients. In 1999, Mr. Brothers reimbursed the estate. On seven occasions Mr. Brothers paid funds out of the client trust account in excess of the amount that the particular client had deposited. In all of these instances, sufficient funds were ultimately deposited.

The stipulation in this matter required that Mr. Brothers pay restitution. He paid $529.67 to the Legal Foundation of Washington as interest that should have accumulated in an IOLTA account, $1,200 in attorney's fees to the estate clients' current lawyer, and formally withdrew all claims to the $25,000 returned to the clients' Shearson account.

Mr. Brothers' conduct violated RPC 1.5(b), requiring that lawyers communicate to the client the basis or rate of the lawyers fee and the factors involved in determining the charges for legal services; and RPC 1.14, requiring that client funds be placed in a trust account, that the lawyer only remove funds to which he is entitled, and that the lawyer maintain complete records of all funds, properties and securities coming into the lawyer's possession.

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

Suspended

John F. Warner (WSBA No.14571, admitted 1984), of Seattle, has been suspended for two years pursuant to a stipulation approved by the Disciplinary Board on September 17, 1999 and by the Supreme Court on December 7, 1999. The discipline is based on his entering a sexual relationship with a client, marrying that client while married to someone else, making false statements to conceal the prior marriage, and taking money that belonged to his firm without authorization.

Matter 1: In 1996, Mr. Warner represented a client suffering from severe depression in a social security overpayment matter. Mr. Warner entered into a personal and sexual relationship with the client, while continuing to represent her until he resigned from his firm in May 1998. During this relationship, Mr. Warner falsely told the client that he was divorced. He prepared a two-page fake "Decree of Dissolution," using falsified pleading paper and a fictitious King County Superior Court cause number. Mr. Warner applied for a marriage license, falsely stating he was divorced. In July 1997, he married his client while still married to his wife. Mr. Warner intentionally concealed the marriage to his client from his family and coworkers, and made false representations to his medical insurance company and the firm office manager that he was divorced. Mr. Warner was divorced in March 1998.

In May 1998, after learning that Mr. Warner had deceived her about his marital status, the client commenced an action to invalidate their marriage. Mr. Warner's conduct violated RPC 1.7(b), prohibiting representing a client if the lawyer's own interests will materially limit the lawyer's representation; RPC 8.4(c), prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; RPC 8.4(b), prohibiting commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer (bigamy in violation of RCW 9A.64.010); and RLD 1.1(a) prohibiting committing an act of moral turpitude.

Matter 2: In 1998, Mr. Warner received $13, 715 in funds belonging to his firm. Mr. Warner instructed an inexperienced temporary secretary to deliver the checks to him, instead of to the firm's bookkeeper. Mr. Warner cashed the checks and retained the funds for his personal use. Mr. Warner stated that the funds were to replace bonuses that the firm had failed to pay him. The firm discovered the missing funds after Mr. Warner resigned. Mr. Warner paid back all of the funds. Mr. Warner's conduct violated RPC 8.4(c), prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. The sanction imposed in this case involved significant mitigating factors and probation conditions.

Douglas Ende represented the Bar Association. Leland Ripley represented Mr. Warner. Jan Eric Peterson was the hearing officer.

Opportunities for Service

WSBA Presidential Search

The Board of Governors of the Washington State Bar Association (WSBA) is seeking applicants to serve as President of WSBA 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 stating interest and qualifications, and no less than five or more than 10 selected references. Endorsement letters received by May 31, 2000 will be considered by the Search Committee and the Board of Governors. Applications and endorsement letters should be sent to the WSBA Executive Director, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330.

Confidential interviews with the Presidential Search Committee will be conducted between May 16–31, 2000 at the offices of the Washington State Bar Association. In addition to these interviews before the Search Committee, candidates will be invited back to the June Board of Governors meeting for an interview before the full Board of Governors, in open session. Direct contact with the Governors is encouraged.

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

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

The commitment begins in June 2000. The term as President-elect will begin at the Annual Business meeting in September 2000. In September 2001, at the WSBA's Annual Business meeting, the President-elect will assume the position as President of the Association. The President-elect 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.

Board of Governors Election Notice

Three positions on the WSBA Board of Governors will be up for election this year (Governors representing the 1st, 5th, and 7th West* Congressional Districts). These positions are currently held by Walter Krueger (1st District), John Powers (5th District), and J. Richard Manning (7th West, formerly known as one of two King County at Large).

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

Nominating petitions are available from the Office of the Executive Director, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330; 206-727-8244; e-mail: OED@wsba.org. The Executive Director of the WSBA must receive petitions by 5:00 p.m. on March 1, 2000. The Board of Governors determines the official dates of the election. Ballots are usually mailed around the first of June and counted approximately the first of July.

Note: The May issue of *Bar News* will include a section with biographical statements of 100 words or less from all the nominated candidates. Those statements should accompany the nominating petitions.

*As per a Bylaw change, the 7th Congressional District has been subdivided into three sub-districts: East, Central and West. These sub-districts are distinguished by ZIP codes and will each have one elected governor. For the coming year, the West sub-district (ZIP codes are 98013, 98070, 98106, 98107, 98116, 98117, 98119, 98121, 98126, 98133, 98136, 98146, 98199) will elect a new Governor.

Applications for Appointment to the Legislative Committee

The Legislative Committee of the WSBA is seeking new members. The Committee meets once in October and again in November, usually for a full day. Depending on work load, the Committee may also meet in December and January. The Committee deals with proposals for legislation that relate to the improvement of justice. It also reviews proposed legislation of interest to the Bar and the judiciary, and makes recommendations to the Board of Governors on positions to be taken by the Bar

(continued on next page)

Association. Additionally, the Committee maintains liaisons with sections and other committees in order to coordinate the legislative activities of the WSBA.

Anyone interested in being considered for an appointment to the Legislative Committee should submit a letter of interest and résumé to: Executive Director, Washington State Bar Association, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330. Materials must be submitted by March 31, 2000.

Applicants should include the following information in their submissions:

- Name
- Office address
- Nature of practice (including years in practice, size of firm and areas of expertise)
- Experience in legislative process
- Experience in state and local bar sections and committees
- Reason for interest in Legislative Committee

For more information, contact John Fattorini or Gail Stone at 360-943-9977; e-mail: legis@wsba.org.

OAC Updates Forms

On November 30, 1999, the Washington Pattern Forms Committee and the Office of the Administrator for the Courts published updates to the following Domestic Relations, Domestic Violence, Anti-harassment and Juvenile Court forms. Forms may be ordered by calling the OAC forms line at 360-705-5328, or by writing to P.O. Box 41174, Olympia, WA 98504-1174. Updates are also available online at http://www.wa.gov/courts/forms.

Domestic Relations Forms

Chapter 26.09: DR 01.0260; DR 01.0300; DR 04.0170; DR 04.0180; DR 04.0250; DR 04.0400; DR 06.0300; DR 07.0100; DR 07.0120; DR 07.0200; DR 07.0250; DR 07.0300; DR 07.0400; DR 08.0100; DR 08.0200.

Chapter 26.10: CU 02.0200; CU 03.0170; CU 03.0200; CU 03.0320.

Chapter 26.26: PS 04.0170; PS 04.0180; PS 04.0200; PS 04.0250; PS 05.0200.

Domestic Violence Forms

DV 1.010; DV 1.015; DV 1.020; DV 1.040; DV 1.050; DV 2.010; DV 2.015; DV 2.020; DV 3.010; DV 3.015; DV 3.020; DV 7.010; DV 7.020; DV 7.030; DV 9.040.

Anti-harassment Forms

UH 01.0400; UH 02.0200.

Juvenile Court Forms

JU 02.0200; JU 06.0100; JU 06.0120; JU 07.0100; JU 07.0400; JU 12.0100.

New Medical Paralegal Program Created

A new medical paralegal certificate program, the first of its kind in the Northwest, has been created at Edmonds Community College to meet the need for professionals trained in both medicine and law.

Students with medical or nursing backgrounds can add a new career skill in the legal arena as medical paralegal specialists, according to Michael Fitch, director of the paralegal program at the college. Graduates could work with law firms, hospitals, insurance companies, healthcare systems, and government and non-profit agencies. For further information, contact 425-640-1658 or paralegal@edcc.edu.

Thanks to Goldmark Sponsors

The Legal Foundation of Washington thanks the following sponsors for supporting the Goldmark Awards Luncheon to be held Friday, February 25, 2000. The luncheon will honor Gregory R. Dallaire and the Legal Foundation's 15 years in partnership with legal, financial and real estate professionals: Davis Wright Tremaine, LLP; Frank Russell Trust Company; Garvey, Schubert & Barer; Lane Powell Spears Lubersky, LLP; MacDonald, Hoague & Bayless; Preston Gates & Ellis, LLP; Schroeter, Goldmark & Bender, P.S.; Wells Fargo; Williams Kastner & Gibbs, PLLC.

Special thanks to the following Goldmark Heritage Circle donors: Bennett Bigelow & Leedom, P.S.; Danielson Harrigan & Tollefson, LLP; Foster Pepper & Shefelman, PLLC; Mills Meyers Swartling; Perkins Coie; Turner Stoeve & Gagliardi, P.S.; Wickwire, Greene, Crosby, Brewer & Seward.

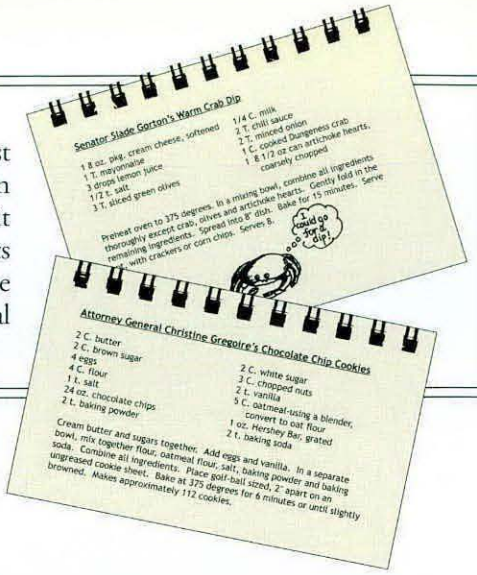
Western States Bar Conference

The 52nd Annual Western States Bar Conference will be held on the Hawaiian island of Maui, March 1-4, 2000 at the Outrigger Wailea Resort. Keynote speaker Ward Bower of Altman Weil, Inc. will speak on the "Future of the Legal Profession: Impact of MDPs, Technology and the Globalization of the Practice of Law." Bar leaders and volunteers from 16 western states and the ABA will gather to assess these topics and how the legal profession might deal with the significant challenges ahead. Social activities will include a golf tournament, and a traditional Hawaiian luau and dinner cruise.

For further information, contact Charles Turner or Dana Vocate of the Colorado Bar Association at 303-860-1115 or cturner@cobar.org. Visit the Colorado Bar website at http://www.cobar.org/wsbc/index.htm to view the hotel and get further information about the conference. CLE credit is anticipated.

Buy Cookbook to Support Legal Services

Cookin' Up Justice, a cookbook featuring the best recipes of Equal Justice Coalition supporters, is on sale now for $9.95 plus shipping. Proceeds benefit Summer of Justice 2000, a statewide, grassroots campaign to promote legal services for low-income people. For more information, contact the Legal Foundation of Washington at 206-447-8160.



King County Superior Court Reinstates Arbitration

By general order of the Presiding Judge, King County Superior Court has reinstated the Arbitration Program. No new cases will be accepted after the Arbitration Program appropriation is exhausted or March 31, 2000, whichever occurs first. Cases proceeding on the arbitration track must have hearings completed by June 30, 2000 or they will be re-routed back to their regular civil case schedule. For more information, contact Paul L. Sherfey at 206-296-9300.

Court Appointed Special Advocates Needed

King County Superior Court is looking for volunteers to train as Court Appointed Special Advocates (CASA) to represent children involved in custody and visitation disputes in family law cases. CASA volunteers will receive extensive training and supervision, and will conduct interviews, write reports, and testify in hearings or trials on behalf of children. The maximum time commitment will be approximately four hours per month. For more information or an application packet, call the CASA office at 206-296-9320.

Law Office Management Institute and Legal EXPO

The WSBA and the Association of Legal Administrators (Puget Sound Chapter) will present the 2000 Law Office Management Institute at the Washington State Convention & Trade Center on March 16.

The Institute includes an executive forum for administrators and managing partners, diversity training, and over 40 exhibitors featuring legal products and services. David Horsey, the *Seattle Post-Intelligencer*'s Pulitzer Prize winning editorial cartoonist and columnist, will be the keynote speaker.

For more information or to request a program brochure, please call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Information is also available on the WSBA website at www.wsba.org/cle/2000/00626/default.htm.

WSBA Service Center... at Your Service!

Communicating with the WSBA has never been easier! The Service Center can help you with status changes, licensing fees, course accreditation, requests for forms, seminar registrations, CLE credits, section membership, publications, address changes, status certificates, events, dates and deadlines...and much more!

800-945-WSBA / 206-443-WSBA
questions@wsba.org

WSBA Staff Raises Money for Holiday Charities

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

YMCA Seeks Volunteer Judges for Mock Trial Competition

More than 80 attorneys and 30 judges are needed to judge the courtroom skills of high school students as they compete in the 2000 YMCA Mock Trial Competition. This volunteer opportunity will be held in Olympia at the Thurston County Courthouse March 25 - 26, 2000.

Designed as an educational tool, the competition gives students the chance to argue the plaintiff and defense sides of a fictional, but near-real civil case in five rounds over two days. Attorneys are needed as audience raters to evaluate each school's performance, while judges are needed to preside over the mock trials.

For more information or to volunteer, contact Allison Roberts at 360-534-0155 or e-mail djrasr@aol.com.

Lawyer/*Bar News* Photographer Remembered

WSBA member and former *Bar News* photographer Jack McLauchlan died of heart failure at age 90, on Christmas Eve. His photographs graced the pages of *Bar News* for more than 20 years, earning him the nickname "McLauchlan at Large." Mr. McLauchlan was a graduate of the University of Washington School of Law, and in 1985, he received the WSBA Award of Merit for his work in immigration law.

ABA Techshow™ 2000 – Special Discount for WSBA Members

The American Bar Association's Techshow 2000, to be held March 30 through April 1 in Chicago, bills itself as the world's leading legal technology conference, and the only exposition developed by and for lawyers and legal professionals. Techshow 2000 features "Courtroom 21," showcasing the latest in high-tech trial equipment; numerous exhibitors showing the latest high-tech products; a variety of educational sessions; and exciting speakers.

Because the WSBA is a Program Partner for this event, the ABA is offering WSBA members a discount of $100 off the registration fee. To obtain the discount, be sure to mention Program Partner Code PP15. For more information, see the Techshow website at http://www.techshow.com, or call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Justice Needs Talent

The justifiably famous Access to Justice Conference musical skit will hold auditions Friday, March 3, 2000 at the WSBA office. Artistic Director Marla Elliott and Executive Producer Joan Fairbanks are looking for unusual talent to create a spectacular presentation at Celebration 2000. Actors, singers, musicians, jugglers, comedians, acrobats, impressionists, balloon sculptors and legal vaudevillians of all stripes are encouraged to audition. All performers must have some connection to legal work, such as lawyers, legal workers or supporters of access to justice activities. Contact Joan Fairbanks at 206-727-8282 for an appointment.

Func Pro Tunc, the Access to Justice house band primarily composed of law-employed persons, is seeking a new lead guitarist. Must be a lawyer or legal worker. A love of justice, funk/soul-related dance music, and good times also required. Contact Marla Elliott at 360-943-6260, ext. 228.

Celebration 2000 – The Excitement Grows!

Be sure to mark September 13-16 on your calendars. You won't want to miss this once-in-a-lifetime event, as the Washington State Bar Association, Washington State Judiciary and Access to Justice community gather to celebrate "Working Together to Champion Justice."

Celebration 2000 is really taking shape, as we confirm exceptional speakers like Gerry Spence; develop a wide variety of CLE seminars and plenary sessions; and plan a host of exciting social activities including golf tournaments, a family BBQ in the park, an evening of dancing and a cruise on Lake Coeur d'Alene. *(continued on next page)*

Use *Resources* To Your Advantage

Would you like your name and/or firm listed under your area of practice in the Yellow Pages of the upcoming (May 2000) WSBA *Resources* annual directory? List yourself or your firm under Appeals, Workers' Compensation, Contract Attorneys, Environmental Law or any heading you choose.

Resources is used by thousands of your fellow attorneys, and the Yellow Pages is a one-stop shopping resource for all your legal-service needs. Find consultants, paralegals, contract attorneys, business appraisers and more.

The cost for a listing is still just $25. Listings may include the firm name, individual's name, address, phone, fax, e-mail and website. (More than one phone number, such as an 800 number, may be listed.)

To reserve your Yellow Pages listing in the May 2000-2001 *Resources* directory, complete this form and return by March 15 with your check for $25 (payable to WSBA) to:

Washington State Bar Association
Resources Yellow Pages
2101 Fourth Avenue – Fourth Floor
Seattle, WA 98121-2330

(If you wish to be listed under more than one category, the cost is $25 for *each* listing.)

Questions? Call 800-945-WSBA or 206-443-WSBA.

Firm/Individual's Name _____

_____

Address _____

City _____ State ____ Zip _____

Phone _____ Fax _____

E-mail _____

Website _____

Category _____

Corpus Juris Spokanum Completes Habitat for Humanity Project

Corpus Juris Spokanum (CJS) recently completed the construction of a Habitat for Humanity house. The group, comprised of legal professionals, spent over two years raising funds and building the house in conjunction with Habitat for Humanity-Spokane. Theirs was the 65th Habitat house to be built in Spokane.

Based on the number of pre-registration forms we have received, we anticipate a very large crowd at Celebration 2000, so we encourage you to make your hotel reservation now. Send in your registration by March 31 to take advantage of early-bird registration. See the Celebration 2000 brochure included in this issue of *Bar News* for details. We hope to see you in Spokane at Celebration 2000!

WTO Panel Discussion: Government Action/ Civil Rights

The WSBA's Civil Rights Committee is sponsoring a public information and educational panel discussion for attorneys and the general public on the issues of constitutional law arising from the recent WTO protests in Seattle. Persons from the City of Seattle, academia, protest groups, and attorneys involved in WTO matters have been invited to participate as panelists. David Skover, constitutional law professor at Seattle University, will moderate the discussion in March. You may check the WSBA website at www.wsba.org for developing details on panelists, location, date and time. For additional information, contact Pete Roberts at peter@wsba.org

Supreme Court Information Online

The Washington Supreme Court is now providing online advanced notice of the Court's anticipated opinion filings. Online notices are posted every Wednesday at http://www.courts.wa.gov. Opinions filed by the Court can be accessed on Thursday mornings at the same website. Issue summaries of upcoming cases are available there as well. Go to http://www.tvw.org for RealAudio of both live and archived oral arguments.

Law Week 2000: A Lawyer and Judge in Every School

You can make a difference in your community by participating in Law Week 2000, an exciting program which will educate and inspire students about the law and our legal system. During the week of May 8 -12, hundreds of lawyers and judges throughout Washington will spend all or part of a day in their local schools, reaching tens of thousands of students in the 1st through 12th grades.

To learn more about Law Week 2000, check out the WSBA website at www.wsba.org/lawweek/default.htm. You'll be amazed at the resources you'll find there! From the website, you can sign up to volunteer in a classroom or be a local organizer. You will discover excellent lesson plans for all ages, classroom presentation tips, and information about Washington's many public legal eduation programs. You can also learn more about Law Week 2000 or sign up to volunteer by calling 206-727-8270 or 800-945-WSBA, ext. 8270.

USURY RATE

The average coupon equivalent yield from the first auction of 26-week treasury bills in January 2000 is 5.844 percent. The maximum allowable interest rate for February is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates for 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.

GROFF & MURPHY, PLLC

is pleased to announce that

Jason S. Newcombe

has joined the firm as an associate.

Mr. Newcombe is a summa cum laude graduate of Boston College Law School.

Mr. Newcombe's practice will focus on litigation, construction and employment law.

1191 Second Avenue, Suite 1900
Seattle, Washington 98101
206-628-9500
Fax 206-628-9506
E-mail: jnewcombe@groffmurphy.com

JOHANNESSEN & ASSOCIATES, PS

ENVIRONMENTAL, LAND USE & CONSTRUCTION LAW

is pleased to announce the addition of

Misty A. Edmundson,

a 1999 graduate of Seattle University Law School, as an associate

and

Alison J. Avery,

who receiveda Master's Degree from the University of Toronto in 1993, as a paralegal.

5413 Meridian Avenue N., Suite C
Seattle, Washington 98103-6138
Telephone 206-632-2000
Facsimile 206-632-2500
E-mail: envirolaw@johanassocs.com

MUNDT MACGREGOR LLP

ATTORNEYS AT LAW

is pleased to announce that

Joe B. Stansell

has become a partner of the firm.

Mr. Stansell is an honors graduate of the University of Utah College of Law, where he served as Editor-in-Chief of the Utah Law Review.

Mr. Stansell will continue his practice of counseling entrepreneurs and investors in the formation, financing and strategic development of emerging businesses.

MUNDT MACGREGOR LLP
999 Third Avenue, Suite 4200
Seattle, Washington 98104-4082
Telephone 206-624-5950
Facsimile 206-624-5469
Email: jstansell@mundtmac.com

The Law Offices of

Schroeter Goldmark & Bender

is pleased to announce that

MARTIN S. GARFINKEL

has become Of Counsel to the firm.

For more than 18 years, Mr. Garfinkel has concentrated his litigation practice in the areas of wrongful termination, employment discrimination, sexual harassment, wage and hour violations, and union representation. Most recently, Mr. Garfinkel was a partner in the Seattle law firm of Frank Rosen Freed Garfinkel & Roberts LLP where he represented employees and unions in a wide range of employment matters.

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500 Central Building, 810 Third Avenue, Seattle, WA 98104
Phone (206) 622-8000 / Toll free 1 (800) 809-2234
www.schroeter-goldmark.com

Calendar

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.

BUSINESS LAW

Business Law Institute: Representing Start-up and Emerging Growth Companies
March 2 – Seattle. 6.75 CLE credits (incl. 1 ethics) pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Business Law Institute: Drafting Considerations and Strategies for Business Lawyers
March 2 – Vancouver. 6.75 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Business Law Institute: Litigation Issues Arising When the Employment Relationship with a Key Employee Goes Sour
March 3 – Seattle. 6.5 CLE credits (incl. .75 ethics) pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

18th Annual Winter Bankruptcy Seminar
February 17-19 – Coeur d'Alene, ID. 11 CLE credits pending. By Idaho State Bar Association, Commercial Law and Bankruptcy Section; 208-994-4500.

DEBTOR/CREDITOR

Collection Law in Washington
March 9 – Seattle. 7 CLE credits. By Lorman; 715-833-3940.

EMPLOYMENT LAW

Investigations of Employee Discrimination and Harassment Complaints
February 11 – Seattle. 6 CLE credits pending. By King County Bar Association; 206-340-2578.

Introduction to Workers' Compensation in Washington
February 16 – Spokane. 6.5 CLE credits. By Lorman; 715-833-3940.

Americans with Disabilities Act (ADA)/ Employment Discrimination
February 24 – Seattle. 6.75 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Employment Law Institute
March 16 – Seattle. 6 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ESTATE PLANNING

Estate Planning for Small to Medium-Sized Estates
February 17 – Seattle; February 24 – Mt. Vernon. 7.5 CLE credits (incl. 1 ethics). By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

8th Annual Estate Planning Institute for Mid-Sized Estates and the Small Business Owner
February 18 – Seattle. 7 CLE credits (incl. 1 ethics) pending. By King County Bar Association; 206-340-2578.

Estate and Income Tax Planning for Qualified Retirement Plans and IRA Benefits
Mar. 16 – Seattle. CLE credits TBA. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Estate Planning and Retirement Issues with Natalie Choate
March 31 – Portland. CLE credits TBA. By Oregon State Bar; 503-684-7413.

ETHICS

Fees/Billing/Ethics
March 10 – Bellevue. 6.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

FAMILY LAW

Family Law Tax Issues
February 25 – Seattle. 6.75 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Washington Adoption Practice, Procedure and Pitfalls
March 10 – Seattle. 6.25 CLE credits. By Lorman; 715-833-3940.

4th Annual Guardian Ad Litem Workshop Forum
March 10 – Seattle. 7 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

GENERAL

Suing the Government
February 10 – Seattle. CLE credits TBA. By WSTLA; 206-464-1011.

Covenants Not to Compete in Washington
February 17 – Seattle. 4 CLE credits. By Lorman; 715-833-3940.

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

20th Annual Northwest Securities Institute
February 24-26 – Portland. CLE credits TBA. By Oregon State Bar; 503-684-7413.

Civil Rights
March 10 – Portland. CLE credits TBA. By Oregon State Bar; 503-684-7413.

Sunbreak Seminar
March 16-19 – Scottsdale, AZ. 6 CLE credits pending. By Washington Defense Trial Lawyers; 206-521-6559.

Intellectual Property Institute
March 24 – Seattle. CLE credits TBA. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Professionals

IMMIGRATION LAW

Northwest Immigration Conference
February 24-25 – Seattle. CLE credits TBA. By King County Bar Association; 206-340-2578.

LAW OFFICE MANAGEMENT

Law Office Management Institute and Legal Expo
March 16 – Seattle. 6 CLE credits (incl. up to 4 ethics) pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

LITIGATION

7th Annual Litigation Institute with Michael Tigar
March 3-4 – Portland. CLE credits TBA. By Oregon State Bar; 503-684-7413.

REAL ESTATE

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

Drafting Real Estate Documents
March 17 – Portland. CLE credits TBA. By Oregon State Bar; 503-684-7413.

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February 10 – Spokane; February 11 – Seattle. 6.75 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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— John W. Davis

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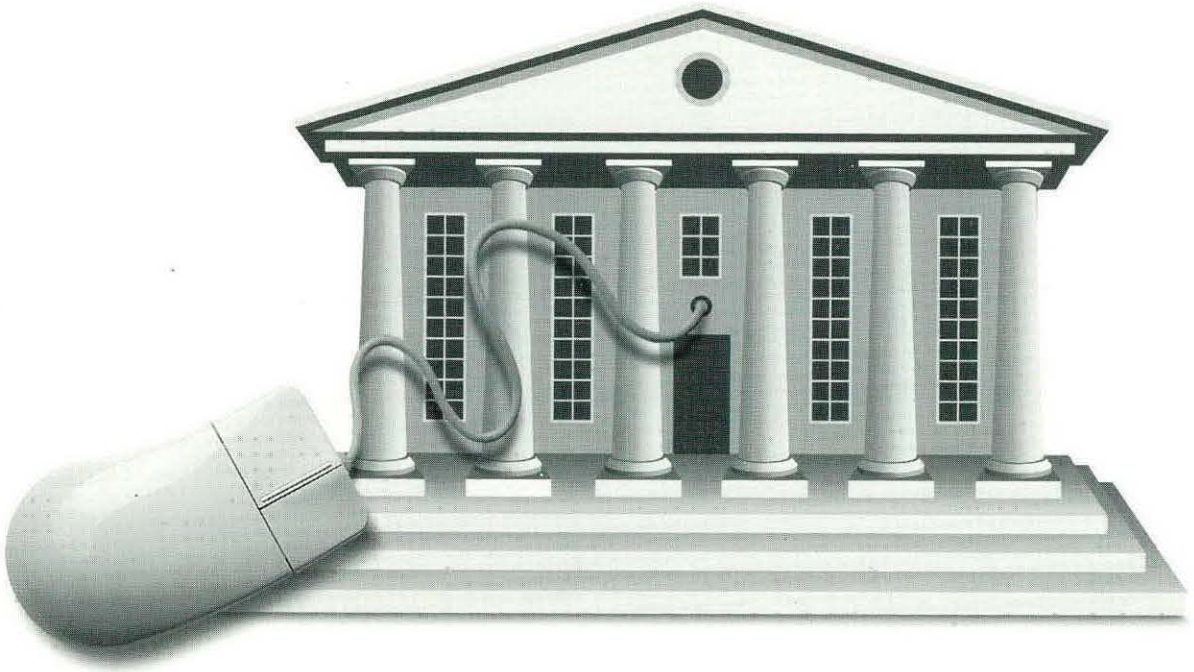

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WEST GROUP

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.

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

KeyCite® warning flags appear on the cases in Westlaw®

Key Numbers link cases on same point

Index to where point is discussed in opinion

Headnotes summarize each point in case

Opinion with citations verified, errors corrected and parallel cites added

WEST CASES

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.

OPINION

SEDGWICK, Judge.

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FACTS

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

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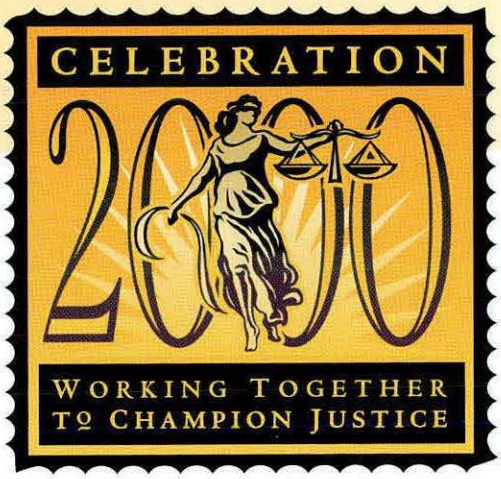

Celebration 2000

Celebration 2000 — it's a combination of the Annual Judicial Conference, Access to Justice Conference, Bar Leaders Conference, and a revival of the Washington State Bar Association Convention — and it's a once-in-a-lifetime event you won't want to miss! Celebration 2000 will be packed with events to interest everyone, including exceptional speakers, section-sponsored CLE seminars, meetings and workshops, an Exhibitor Fair, and plenty of opportunities to socialize with your friends and colleagues from all around our state.

Highlights include a WSTLA-produced blockbuster CLE featuring **Gerry Spence**, and scholar **Clay Jenkinson** playing Thomas Jefferson at a program produced by the Washington State Judiciary that will "look back to the future." A number of Washington state dignitaries will also be on the program.

Celebration 2000 Preliminary Program

Please note that all events listed below are subject to change, and events may be added. All non-ticketed events are open to all conference registrants and are included in your registration fee. Also included in your registration fee are beverage breaks and four meals (breakfast on Thursday and Saturday, hors d'oeuvres buffet on Thursday, and the Awards Luncheon on Friday).

Wednesday, September 13

8:00 a.m.-5:00 p.m.	WSBA Board of Governors Meeting
8:00 a.m.-5:00 p.m.	Judges' Association Committee Meetings
10:00 a.m.-5:00 p.m.	Registration
10:00 a.m.-12 noon	Elder Law Section Membership Meeting
12 noon	Lunch on Your Own
12 noon-5:00 p.m.	Exhibitor Fair
1:00 p.m.-5:00 p.m.	Section CLEs (separately ticketed events; see registration form for prices); length and times of CLE seminars will vary.

- Access Issues in Administrative Agency Programs (Administrative Law)
- Bankruptcy: 21st Century Style (Creditor-Debtor)
- Electronic Commerce and the Business Lawyer (Business Law)
- Elder Law Update 2000 (Elder Law)
- The Endangered Species Experience in Washington (Environmental and Land Use Law)
- The Law and Hate Crimes (Criminal Law)
- Partnering with Your Clients Across Borders (International Practice)

Afternoon	Minority & Justice Commission Meeting (tentative)
Evening	Dinner on Your Own
6:00 p.m.	Washington Women Lawyers Dinner (tickets available through WWL)
6:30 p.m.-8:00 p.m.	Town Meeting/Public Forum: Definition of the Practice of Law (tentative)

Thursday, September 14

6:30 a.m.- 8:00 a.m.	"Friends of Bill W." Meeting
8:00 a.m.-9:30 a.m.	All-Conference Buffet Breakfast
8:00 a.m.-9:30 a.m.	WSBA Minority Members Breakfast with the WSBA Board of Governors
8:00 a.m.-5:00 p.m.	Registration
8:00 a.m.-5:00 p.m.	Exhibitor Fair
10:00 a.m.-12 noon	Official Grand Opening Ceremony featuring Clay Jenkinson as Thomas Jefferson. This program will "look back to the future" with a conversation between Jefferson and 21st century futurists; sponsored by The Washington State Judiciary
12 noon	Lunch on Your Own (possible ticketed luncheon event)
12 noon-2:00 p.m.	Access To Justice Board Meeting
12 noon-3:00 p.m.	LAW Fund Board Meeting
12 noon-5:00 p.m.	Northwest Justice Project Board Meeting
12 noon-5:00 p.m.	Legal Foundation of Washington Meeting
12 noon-5:00 p.m.	Courthouse Facilitators Meeting
12 noon-5:00 p.m.	Volunteer Legal Service Programs Meeting
12 noon-5:00 p.m.	Specialized Legal Services Meeting
Afternoon	WSBA Break-out Sessions (may include multi-disciplinary practice, public legal education, public trust and confidence in the justice system, technology and the law)
1:00 p.m.-3:00 p.m.	Bar Leaders Conference Workshop: Ethics, Professionalism and Civility: The Hard Questions, produced by the WSBA Professionalism Committee
1:00 p.m.-5:00 p.m.	Section CLEs (separately ticketed events; see registration form for prices); length and times of CLE seminars will vary.

- ADR for ATJ — Ways that Appropriate Dispute Resolution Can Enhance Access to Justice (Alternative Dispute Resolution)
- Counseling Challenges for the Corporate Lawyer (Corporate Law)
- Ethics and Family Law: The Perfect Marriage (Family Law)

- Federal Civil Litigation: An Appropriate Tool for Social Reform? (Litigation, in conjunction with the Federal Bar Association)
- Nuts and Bolts of Construction Law (Public Procurement and Private Construction Law)
- Nuts and Bolts of Litigation: Basic Trial Skills and Practice Tips (Young Lawyers Division)
- Taxation in the New Millennium: A Look Back and to the Future (Taxation Law)

1:00 p.m.-5:00 p.m.	Judicial Conference Choice Sessions
1:00 p.m.-5:00 p.m.	Washington State Paralegal Association Board Meeting
2:00 p.m.	Golf Tournament at Downriver (separately ticketed event)
3:15 p.m.-5:15 p.m.	Bar Leaders Conference Workshop: "Getting to Know You" and Current Issues Facing the Bar
6:00 p.m.-midnight	Welcoming Reception and Hors d'oeuvres Buffet hosted by WSBA President Richard Eymann and Washington Supreme Court Chief Justice Richard Guy; Access to Justice Skit, featuring *The Moderately Talented (Yet Plucky) Repertory Theatre of Justice* and *Func Pro Tunc*, sponsored by the ATJ Conference; "Bar Mixer" with dancing featuring *Nobody Famous*, sponsored by the Spokane County Bar Association
9:30 p.m.-11:00 p.m.	"Friends of Bill W." Meeting

Friday, September 15

6:30 a.m.-8:00 a.m.	"Friends of Bill W." Meeting
7:00 a.m.-8:00 a.m.	Fun Run Fundraiser and Continental Breakfast "On the Run" (separately ticketed event)
8:00 a.m.-1:00 p.m.	Exhibitor Fair
8:15 a.m.-9:45 a.m.	ATJ Track Programs
8:15 a.m.-9:45 a.m.	Multi-Disciplinary Practice Seminar
8:15 a.m.-9:45 a.m.	Association of Legal Administrators and WSBA Law Office Management Program Joint CLE Seminar
8:15 a.m.-11:30 a.m.	Bar Leaders Conference Workshop: Leadership Development, featuring Janet Boguch, "Non-Profit Works"
8:15 a.m.-11:30 a.m.	Judicial Conference Plenary: "When Bias Compounds"
9:00 a.m.-11:30 a.m.	Ninth Circuit Court of Appeals — Sitting of the Court with Oral Arguments followed by Q&A Session and Discussions with Judges
9:00 a.m.-5:00 p.m.	Washington State Paralegals Association Meetings and Seminars
10:00 a.m.-11:30 a.m.	ATJ Track Programs
10:00 a.m.-11:30 a.m.	WSBA Break-out Sessions
10:00 a.m.-11:30 a.m.	WSBA Civil Rights Committee Seminar
11:45 a.m.-1:45 p.m.	WSBA Awards Luncheon and Annual Business Meeting
2:00 p.m.-5:00 p.m.	Blockbuster CLE produced by WSTLA: "The Jury Trial" featuring Gerry Spence, Part One
2:00 p.m.-3:30 p.m.	ATJ Track Programs
Afternoon	WSBA discussion groups (may include multi-disciplinary practice, public legal education, public trust and confidence in the justice system, technology and the law)
3:45 p.m.-5:15 p.m.	ATJ Track Programs
5:30 p.m.-7:00 p.m.	Gonzaga Law School Opening Ceremony and Reception
7:00 p.m.-midnight	Receptions
8:30 p.m.-10:00 p.m.	"Friends of Bill W." Meeting

Saturday, September 16

6:30 a.m.-7:30 a.m.	"Friends of Bill W." Meeting
7:30 a.m.-8:30 a.m.	All-Conference Buffet Breakfast
9:00 a.m.-12 noon	Blockbuster CLE produced by WSTLA: "The Jury Trial" Part Two, followed by Closing Keynote Speaker and Passing of the WSBA Presidential Gavel
9:00 a.m.-10:30 a.m.	ATJ Track Programs
9:00 a.m.-10:30 a.m.	Bar Leaders Conference Workshop: Membership Issues
10:45 a.m.-12:15 p.m.	ATJ Track Programs
10:45 a.m.-12:15 p.m.	Bar Leaders Conference Workshop: The Future of Law
12:00 noon-5:00 p.m.	Columbia Legal Services Board Meeting
12:30 p.m.-2:00 p.m.	Family BBQ in Riverfront Park (separately ticketed event)
1:30 p.m.	Golf Tournament at Indian Canyon (separately ticketed event)
4:00-6:00 p.m.	Cruise on Lake Coeur d'Alene (separately ticketed event)

Hotel Information

Hotels listed below are within walking distance of each other and the Spokane Center, and shuttle service will also be available. **Please note that room reservations must be made directly through the hotel.** When making your reservation, be sure to state that you are part of the Washington State Bar Association, WSBA Celebration 2000, or Access To Justice Conference room block in order to get the special room rate. Rooms will be released to the general public on **August 13**, so please make your reservation before then. **Reserve early to get your choice of hotel!**

Hotels with Room Blocks

Cavanaughs Inn at the Park
303 West North River Drive, Spokane, WA 99201
509-326-8000 or 800-325-4000
room rates start at $92
Access to Justice Conference and most Bar Leaders Conference meetings will be held here

Cavanaughs River Inn
700 North Division Street, Spokane, WA 99202
509-326-5577 or 800-325-4000
room rates start at $92

Doubletree
322 North Spokane Falls Court, Spokane, WA 99201
509-455-9600 or 800-222-8733
room rates start at $89
Judicial Conference meetings will be held here

Holiday Inn Express – Downtown
North 801 Division, Spokane, WA 99202
509-328-8505 or 800-HOLIDAY
room rates start at $67

Travelodge
33 West Spokane Falls Boulevard, Spokane, WA 99201
509-623-9727
room rates start at $76

Other Nearby Hotels (no room blocks)

Cavanaughs Ridpath
West 515 Sprague Avenue, Spokane, WA 99204
509-838-2711 or 800-325-4000
room rates start at $92

Courtyard Marriott
North 401 Riverpoint Boulevard, Spokane, WA 99202
509-456-7600 or 800-321-2211
room rates start at $89

Celebration 2000 Registration

General Celebration 2000 Attorneys

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General Celebration 2000 Non-attorneys and Students

•

Access to Justice Conference

•

Annual Judicial Conference *(register with OAC)*

•

Bar Leaders Conference

•

Guests

•

Separately Ticketed Events — Social Activities

•

Separately Ticketed Events — Section CLE Seminars

Registrant's Name: _____ Bar No. (if WSBA member): _____

Name as you would like it to appear on your name badge: _____

Law Firm or Organization: _____

Address: _____

Phone: _____ Fax: _____ E-mail: _____

❑ Please check here if you require vegetarian meals.

Notify in Case of Emergency: Name _____ Phone: _____

Important: Please find the category which best describes your participation in Celebration 2000 and use the corresponding area of this form to register (e.g., general Celebration 2000 attorneys use the purple section). If you are unsure about the category in which you should register, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or e-mail questions@wsba.org. **All registrants are welcome to attend any non-ticketed event in any conference.**

Cancellation policy: If canceling before September 1, 2000, you will receive a refund of all fees paid, minus $25. After September 1, 2000, you may transfer your registration, but no refunds can be given.

Scholarships: A limited number of scholarships are available for those attending the Access to Justice or the Bar Leaders Conference. For information and an application, please contact Sharlene Steele at 206-727-8262 or sharlene@wsba.org.

Hotel reservations: All Celebration 2000 registrants are responsible for their own hotel reservations and must contact the hotel directly. See previous page for hotel information.

Childcare: Please check here if you anticipate needing childcare. ❑ Information will be sent to you.

General Celebration 2000 Attorneys

Early registration (received no later than March 31)	$195	$____
Regular registration (received April 1 to June 30)	$245	$____
Late and on-site registration (received July 1 or later)	$295	$____

General Celebration 2000 Non-attorneys and Students

Early registration (received no later than March 31)	$95	$____
Regular registration (received April 1 to June 30)	$145	$____
Late and on-site registration (received July 1 or later)	$195	$____

Access to Justice Conference

Registration fees for ATJ Conference participants are being subsidized by ATJ Conference grants. Attorneys are eligible for this reduced fee if employed by, or volunteering for, a program providing civil legal services to low-income people.

Name of legal service provider you are working or volunteering for: _____

Access to Justice Attorneys

Early registration (received no later than March 31)	$80	$____
Regular registration (received April 1 to June 30)	$90	$____
Late and on-site registration (received July 1 or later)	$100	$____

Access to Justice Non-attorneys or Students

Early registration (received no later than March 31)	$50	$____
Regular registration (received April 1 to June 30)	$60	$____
Late and on-site registration (received July 1 or later)	$70	$____

Annual Judicial Conference

Judges: Please do not return this form to the WSBA; you will register through OAC. If you have questions, please contact Karen Allen at 360-705-5308 or karen.allen@courts.wa.gov.

Bar Leaders Conference

Early registration (received no later than March 31)	$195	$____
Regular registration (received April 1 to June 30)	$245	$____
Late and on-site registration (received July 1 or later)	$295	$____

Guests

Use this section for guests who are not registered for any conference but want to attend some meals. Guests are also invited to participate in any social events or purchase tickets for any "Separately Ticketed Events — Social Activities," listed on the next page.

Name(s) of guest(s): _____

(Please see next page for a list of meals.)

Registrant's Name: _____ Phone: _____

Thurs., Sept. 14 Buffet Breakfast (8:00 a.m.-9:30 a.m.)	___ @ $11.50	$_____
Thurs., Sept. 14 Reception and Hors d'oeuvres Buffet (6:00 p.m.)	___ @ $19.50	$_____
Fri., Sept. 15 Awards Luncheon (11:45 a.m.-1:45 p.m.)	___ @ $16.00	$_____
Vegetarian meal(s) required for guest(s)?_____ If yes, how many? _____		
Sat., Sept. 16 Buffet Breakfast (7:30 a.m.-8:30 a.m.)	___ @ $15.00	$_____

Separately Ticketed Events — Social Activities

All registrants and guests desiring to attend any of the following must purchase a ticket. Depending upon space, some tickets may be available at the event. Prices for Golf Tournaments and Lake Coeur d'Alene Cruise include ground transportation. Prices for Golf Tournaments include golf cart rental and prizes.

Golf Tournament at Downriver (Thurs., Sept. 14, 2:00 p.m.)	___ @ $60	$_____
Fun Run & Continental Breakfast (Fri., Sept. 15, 7:00 a.m.-8:00 a.m.)	___ @ $15	$_____
Family BBQ in Riverfront Park (Sat., Sept. 16, 12:30 p.m.-2:00 p.m.)		
Adults	___ @ $12	$_____
Children 12 and under (hotdogs will be served to children)	___ @ $4	$_____
Golf Tournament at Indian Canyon (Sat., Sept. 16, 1:30 p.m.)	___ @ $60	$_____
Cruise on Lake Coeur d'Alene (Sat., Sept. 16, 4:00 p.m.-6:00 p.m.)		
Adults	___ @ $29	$_____
Children 12 and under	___ @ $19	$_____

Separately Ticketed Events — Section CLE Seminars

All registrants desiring to attend any of the following must purchase a ticket. Depending upon space, some tickets may be available at the seminar.

Wednesday, September 13, afternoon

- Access Issues in Administrative Agency Programs (Administrative Law); $35 $_____
- Bankruptcy: 21st Century Style (Creditor-Debtor); $35 $_____
- Electronic Commerce and the Business Lawyer (Business Law); $10 for section members; $30 for non-members $_____
- Elder Law Update 2000 (Elder Law); $10 for section members; $30 for non-members $_____
- The Endangered Species Experience in Washington (Environmental & Land Use Law); $50 $_____
- The Law and Hate Crimes (Criminal Law); $35 $_____
- Partnering with Your Clients Across Borders (International Practice); $15 for section members; $30 for non-members $_____

Thursday, September 14, afternoon

- ADR for ATJ — Ways that Appropriate Dispute Resolution Can Enhance Access to Justice (Alternative Dispute Resolution); $15 for section members; $30 for non-members $_____
- Counseling Challenges for the Corporate Lawyer (Corporate Law); $35 $_____
- Ethics and Family Law: The Perfect Marriage (Family Law); $50 $_____
- Federal Civil Litigation: An Appropriate Tool for Social Reform? (Litigation, in conjunction with the Federal Bar Association); $10 for section or Federal Bar Association members; $25 for non-members $_____
- Nuts and Bolts of Construction Law (Public Procurement & Private Construction Law); $50 $_____
- Nuts and Bolts of Litigation: Basic Trial Skills & Practice Tips (Young Lawyers Division); $25 $_____
- Taxation in the New Millennium: A Look Back and to the Future (Taxation Law); $20 for section members; $30 for non-members $_____

Registration Fee	$_____
Total of Guest Meals	$_____
Total of Separately Ticketed Events — Social Activities	$_____
Total of Separately Ticketed Events — CLE Seminars	$_____
TOTAL ENCLOSED	$_____

Credit card information: ❑ MasterCard ❑ Visa

Name as it appears on card: _____
(PLEASE PRINT)

Authorized signature: _____

Card number: _____ Expiration date: _____

Office Use Only:

Date: _____ Check #: _____ Total $: _____ Initials _____

To register for Celebration 2000, please complete this form and return with your check (payable to the Washington State Bar Association) or credit card information to:

Washington State Bar Association
Celebration 2000 Registration
2101 Fourth Avenue
Fourth Floor
Seattle, WA
98121-2330

If you are paying by credit card, you may fax this form to: **206-727-8320.**

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