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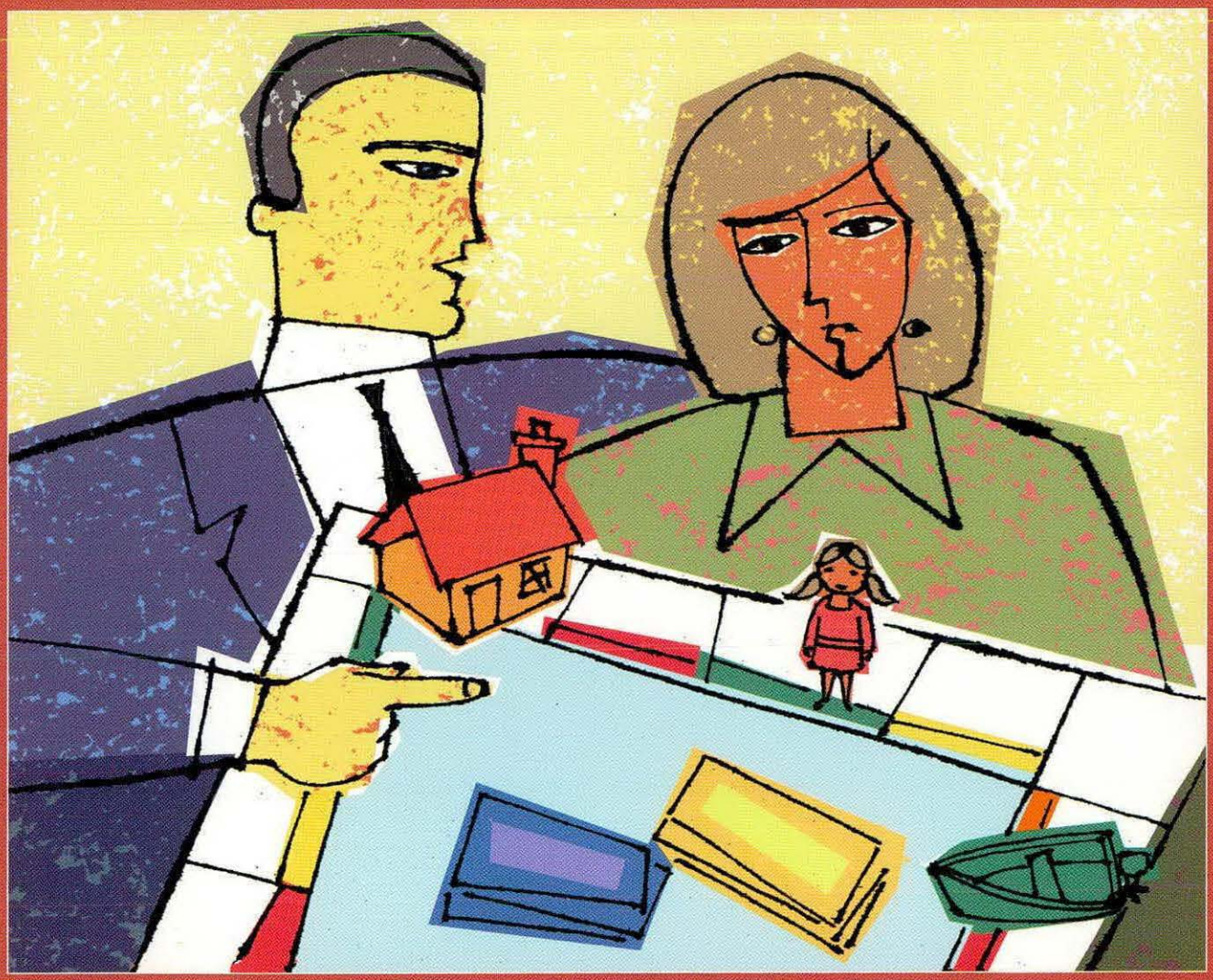

Yours, Mine, Ours?

Property Interests of Unmarried Couples

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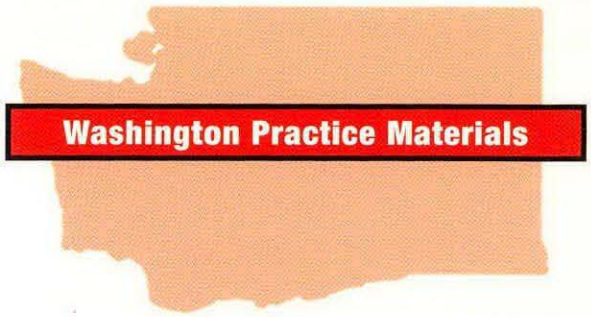

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Working together to champion justice.

Submission Guidelines

Readers are invited to submit correspondence and articles. They may be sent via e-mail to comm@wsba.org or provided on disk in any conventional format with accompanying hard copy and sent to *Bar News* Editor, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330. Article submissions should run approximately 1,500 to 4,000 words. Graphics and photographs are welcome. The editor reserves the right to edit articles as deemed appropriate.

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Pictured clockwise from left: Dale Carlisle, Donald Thompson, Elizabeth Martin, Thomas Greenan and Albert Malanca.

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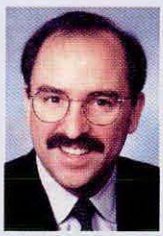

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Praise for Peterson

Editor:

On November 15, in his hometown of Pasco, WSBA President Jan Eric Peterson presented the keynote address to the annual legislative conference of the Washington State Association of Counties (WSAC). The WSAC is a nonprofit association for the elected county commissioners, executives and council members of Washington's 39 counties.

WSAC members want to publicly thank Mr. Peterson for his remarks and his reminders that public servants — whether lawyers, bureaucrats or elected officials — do valuable work of which they (we) should be proud. We congratulate the WSBA on its choice of leadership for the new millennium.

We also thank Mr. Peterson and the WSBA for their support of access to justice programs and civil legal services. Counties, as providers of indigent defense in criminal cases and child dependency cases, recognize the importance of quality legal services for all citizens. While county budgeting constraints can involve some difficult decisions on this matter, we fully support the principles of access and look forward to working with the Bar Association to ensure "equal justice for all."

Mike Shelton
President
Washington State Association of Counties
Olympia

8th Circuit Ruling Revisited

Editor:

You used a prominent, highlighted, column-long box to take a backhanded slap at the decision of the appellate court in *Dwyer v. Kislak*, ___ Wn. App.___, 13 P.3d 240 (2000), last month (January *Bar News*, p. 7). You implied that the court imposed sanctions for citation of unpublished authority despite the lawyer's principled discussion of the constitutional grounds permitting such citation.

I am the appellate lawyer representing the class of homeowners who prevailed in that Consumer Protection Act (CPA) case. Let me suggest a bit more investigation be done before making such accusations. I'd like to outline what really happened here.

It is inaccurate to say that the court sanctioned opposing counsel "after first calling the Court's attention to the 8th Circuit decision holding them [no-citation rules] unconstitutional." In fact, after I filed the opening brief — which was based solely on published authority — the mortgage lender filed a response relying almost exclusively on unpublished, out-of-jurisdiction, trial court decisions for its CPA argument. Those trial courts typically have rules barring citation of such unpublished authority.

That response brief then cited an unpublished decision from the Washington Court of Appeals, and criticized me for failing to call it to the panel's attention. The brief's exact words were, "The Dwyers do not cite this Court's recent decision in *Cain v. Source One Mortgage Servs. Corp* ... which affirmed summary judgment in favor of the mortgage servicer on identical claims ...." Response, pp. 21-22.

That response made no argument about the unconstitutionality of RAP 10.4(h), which bars citation of such unpublished decisions. That response did not cite the *Anastasoff*[1] case, though you im-

ply they did. In fact, that response is dated Dec. 20, 1999, and the *Anastasoff* case was decided in 2000. (Further, *Anastasoff* has now been vacated.)

The first mention of the propriety or impropriety of citing those unpublished cases was in my reply. I'm sure that if you had had the opportunity to see that reply, you would know that the respondent was made aware of the court rules of various jurisdictions (including our own) barring citation of unpublished decisions.

Anastasoff was cited for the first time by respondent's attorney at argument. It was in response to Judge Baker's statement to him, at the beginning of argument, that he had made the error of citing unpublished authority in violation of Washington's court rule in his brief and should not repeat that error in argument. Despite this direct warning, no further briefing on publication or citation occurred.

In fact, the sanction that ensued was not for relying almost exclusively on unpublished out-of-jurisdiction trial court decisions. Instead, the appellate court took the more restrained course of imposing a minimal sanction for citing the unpublished Washington decision — something clearly barred by our longstanding rule.

Your highlighted alert concluded with a call for Washington Supreme Court review "to gain a definitive ruling on this issue." Certainly, RAP 10.4(h), a Supreme Court rule, and Division I's decision are "definitive" now.

I don't mean to diminish the importance of the debate about publication, and how it impacts both judicial accountability and the development of the law. But your decision to call for Supreme Court review in this pending case, at the expense of my clients, is inappropriate. This case does not satisfy the prerequisites to review because it presents no real constitutional issue: in Washington, the Legislature has specifically enacted a statute (RCW 2.06.040) barring courts from publishing decisions lacking precedential value. Thus, any purported constitutional conflict with the legislative branch is absent here, and there is certainly no conflict with any judicial decision that counts.

The policy debate can continue elsewhere. I am glad that it continues in this magazine. I just want this part of the debate to be based on an accurate understanding of the facts.

Thank you.

Sheryl Gordon McCloud
Seattle

1 Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated, ___ F.3d ___, 2000 WL 1863092 (8th Cir. 2000).

Bar News appreciates Ms. McCloud's insight into this issue. The information we receive is limited to the Court's *published* opinion, which was quoted at some length. We believe that the Bar is served by a lively public debate over the availability and use of "unpublished" opinions. (See, *Bar News*, 54:12, Dec. 2000, p. 28). We also believe that this is an issue that deserves review by our highest courts. We take no position on the merits of any particular case. — *Ed.*

BOG Diversity Position Opposed

Editor:

I was thrilled to read that the Board of Governors has decided to add a "diversity" position to the board for minority attorneys. Finally, a position just for us

minority members of the WSBA. I'm applying for the female, Norwegian-American, small-town Eastern Washington native, arthritic, conservative Republican, gun owning, low-rise suburban office, sole practitioner, gender-bias family law reform anti-elitist activist/rabble-rouser seat on the board. Where do I send my application?

Lisa D. Scott
Bellevue

Civility in *Bar News*, Please

Editor:

Unless required by zealous advocacy and well supported by facts, for a lawyer to call a woman a prostitute is generally considered ungentlemanly — or uncivil, if you prefer. The same goes for claiming that a man has committed the crime of hiring a prostitute. And to call a fellow attorney either a perjurer or a coward for not suing her employer for sexual harassment is likewise ungentle, to say the least. Yet *Bar News* printed just such accusations in its December 2000 Letters section (p. 7).

It is ironic that these cheap shots appeared in a letter ostensibly discussing the reputation of the legal profession. For *Bar News* to print near-libel does nothing to solve the problem, nor to improve understanding of the problem.

Bar News is not a public forum required to print everything it gets. Like commercial periodicals, it may require that even its most contentious content be phrased with decorum. Now that *Bar News* letters go to the Internet, it is doubly important that the WSBA not spend member dues providing a vanity press for hate mail.

I urge the editors to require civility in all they print. Most contributors make strong points without calumny; those who lack the skill should seek a more suitable venue, and perhaps a more suitable profession.

R. Edwin Winn
Mercer Island

Proud to Be a Trial Lawyer

Editor:

I don't know Mr. Ley. (Letters, December 2000 *Bar News*, p. 9.) I don't know what he has been doing in life for the past 30 years. I don't dispute his absolute right to have an opinion and an equally precious right to voice it. However, I do know what I have been doing for 30 years, and I do know how much I disagree with Mr. Ley's comments regarding contingent fees.

First, his implication that anyone who doesn't produce or create a "thing" in life causes higher taxes, regulations and social destruction is ridiculous. "The world according to Mr. Ley," in other words, doesn't need lawyers, doctors, clergymen, bartenders, cab drivers, waiters, musicians, artists, writers, poets, public servants, etc., because they provide services and not "bricks, cars or shirts"!

Mr. Ley's belief that there is no legimate and historical need for checks and balances on those who do make those cars, toys, bricks, ships and chemicals is proof that he has been sleepwalking those 30 years.

His assertion that somehow lawyer contingent fees have dramatic or even measurable effects on taxes or insurance premiums is fiction and patently false! There does not exist even one credible study that supports that nonsense.

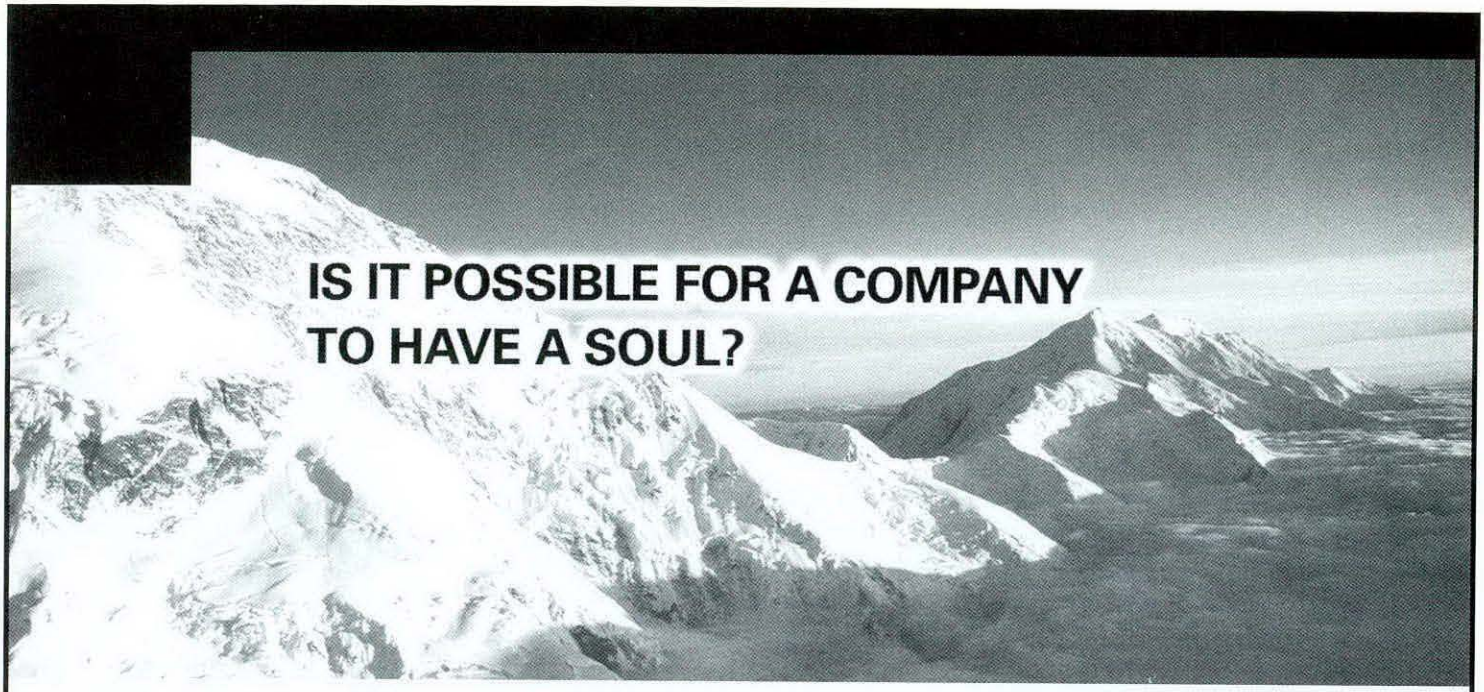
Recoveries do not come from the tooth fairy, Mr. Ley; by the way, there is no tooth fairy! Sorry! However, there are industries, corporations and entities that produce "things" for unimaginable profit that indiscriminately kill and maim those who supply those "profits."

I am a litigator; I am not a hero. I am, however, incredibly proud to do what I do. Not forgetting the countless hours of pro bono work freely provided by my colleagues — save the wealthy, how else would a child burned beyond recognition or a father crippled for life or the mother vegetablized by, at best, negligent producers of things and worst, intentionally dehumanized by the theory of "acceptable losses," possibly afford to be compensated for terrible wrongs but for the willingness of my colleagues to risk thousands of hours, tens of thousands of dollars of their own to champion the cause(s) for those less fortunate or incapable to do so on their own?

The legislators make the laws; the jucidiary enforces those laws. Mr. Ley is mixed up, ill-informed and sleepwalking. Yo! Wake up!

Joseph J. Ganz
Seattle

Readers are invited to submit letters of reasonable length to the editor via e-mail at comm@wsba.org, by fax (206-727-8319) or mail. Due date is the 10th of the month for the second issue following, e.g., February 10 for publication in the April issue. Letters to Bar News *will be published, unless the writer specifically asks us to withhold publication. The editor reserves the right to edit letters as deemed appropriate.*



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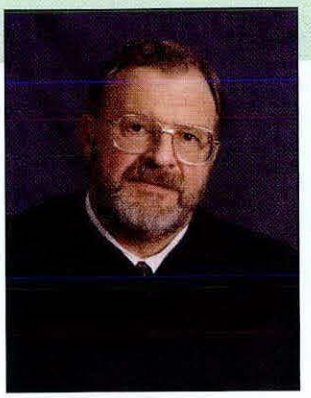


Address to the Federal Bar Association

by The Honorable Robert J. Bryan
Guest Columnist

At the marking of nearly 42 years as a lawyer and nearly 32 years as a judge, I want to take this opportunity to share some thoughts with you about being a lawyer.

I grew up with lawyers. My dad, my grandfather and an uncle were all lawyers in Bremerton. They spent their lives helping others — helping to solve family problems, dealing with the problems of death, helping people who found themselves in trouble with the law, helping with property and business transactions, and advising businesses to direct them toward success. They also spent time in court trying cases of all kinds that did not lend themselves to settlement. I learned from them that lawyers are problem solvers, using the law and common sense to resolve disputes, both in court and out.

My pride in our profession is reaffirmed daily as highly skilled and professional lawyers submit work to my court, and appear in my court.

The lawyers in my family helped our government to run. They served as prosecutors, city attorneys, legislators and judges. They were always involved in community affairs and politics. Pro bono work was always part of their practices. They held the respect of their fellow citizens. I now know that they were typical lawyers in the way they led their lives. From an early age, I wanted to be like the lawyers in my family, and I never wavered from that desire. In 1959 I reached that goal, and I've been proud to be a lawyer these 41 years since.

I learned a great deal from my father. He said that a lawyer is one skilled in the law, while an attorney is one who represents another. In that sense, a judge may stop being an attorney, but hopefully, never stops being a lawyer.

I learned that judges are lawyers practicing in a specific area of law — judicial dispute resolution — and that while judges hold a special place in our legal system, that doesn't make them better or smarter than the lawyers who present issues in court. Dad said that judges and attorneys are partners as lawyers in the search of justice.

I also learned that the practice of law is a profession, not just a business, and that the hallmark of a profession is that service to clients comes first. Dad said the clients come first, ahead of profit.

Our profession has always been under some attack — usually from those who are ignorant of what we do and how we do it — but some attacks come from within our profession as well as from the outside. In a January 2000 article in *Bar News*, an author made the statement that "the defining feature of the legal profession today is obsession with money." I strenuously disagree. Certainly, a few lawyers put money over their clients' interests, but they are darn few. To them I say they are in the wrong work, and should find a way outside of the practice of law to engage in a business where they can seek profit without trying to disguise themselves as professionals.

The December 2000 issue of *Bar News* more accurately speaks of the legal profession. It has article after article trumpeting successes of our profession and urging all of us to be better and even more professional lawyers. In that issue, Bill Bailey complimented Glenn Phillips of Woodinville for the way he conducted himself as opposing counsel in a case. WSBA President Jan Eric Peterson exhibited his pride in our profession in his column. WSBA Executive Director Jan Michels wrote of liberty and justice for all through the rule of law, and wrote of improving access to justice for all of our citizens.

In the same issue of *Bar News*, Disciplinary Board citizen member Kimberly Goetz wrote of the professional attitude of the lawyer members of that board, and David Hall reminded us that we "are not just lawyers, but moral leaders," and "not just judges of cases, but healers of people." He urged us to continue to chase the dream of justice and equality for all. WSBA Chief Disciplinary Counsel Barrie Althoff reminded us that "one of the greatest pleasures in practicing law is helping a client know justice, especially where the lawyer does so without any compensation." And Barrie told us of pro bono activities ongoing throughout the state.

In that issue was also the good news of new members of our profession who passed the bar exam, and the bad news of members disciplined because they did not meet the high standards of our profession. The December issue of *Bar News* reaffirmed my pride in being a lawyer.

Also reaffirming my pride are the recent events surrounding the presidential election. When we as a people have a problem, where do we turn if it is a problem not easy of solution? We turn to lawyers, and the lawyers turn to courts, and the public accepts the decisions made. That is as it should be in a free country.

I received a letter from Bill Bender yesterday. He served as a mediator in a prisoner case — without fee — and reported that the case was pursued by pro bono counsel and the University of Washington Law School Clinic "with complete dedication and in the highest tradition of the bar." Bill said the assistant attorney general also approached the case "with the dedication and imagination necessary to craft a just settlement."

My pride in our profession is reaffirmed daily as highly skilled and professional lawyers submit work to my court and appear in my court. The daily court wars are fought honestly and professionally for the benefit of the clients. The clients — winners and losers alike — learn to know justice.

These are not unusual examples of the work lawyers do. Most work to solve problems in the most just, speedy and inexpensive way available. Most lawyers contribute time and money to better our profession, our communities and our nation. Most lawyers understand that their daily work is part of the fabric of American freedom, and that they are the guardians of freedom and of the rights of Americans.

As the world becomes smaller and more complex, the need for lawyers will grow. Individuals will continue to need our help, as will businesses and governments and our nation. We lawyers will meet the challenges of the future. I am so proud to be a lawyer.

A final comment: old federal judges are like old soldiers. They never die, but just fade away. I'm here to tell you that although I've reached senior status, I'm not ready to start fading yet. Being a lawyer is too much fun to stop.

Thank you, members of the bar, for the daily work you do serving your clients, and thank you for making our world better by the work you do as lawyers.

The Honorable Robert J. Bryan is a judge on the U.S. District Court for the Western District of Washington.

Segregation as a Constitutionally Protected Right:

The Legacy of Washington Supreme Court Justice Joseph A. Mallery

by Michael C. Subit
Guest Columnist

This month, we are pleased to include an article by Michael C. Subit, a member of the WSBA Civil Rights Committee. The views expressed herein are those of the author and not necessarily those of the WSBA or the committee. In honor of Black History Month, the committee sponsors publication of this article as part of a continuing series for the purpose of educating the public about the law and the legal system. — Ed.

On June 28, 2000, the U.S. Supreme Court ruled by a 5-4 margin that the First Amendment precludes New Jersey from applying to the Boy Scouts its laws prohibiting discrimination on the basis of sexual orientation.[1] Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Kennedy, Scalia and Thomas. Justice Stevens dissented along with Justices Souter, Ginsburg and Breyer. The conflict between what the majority saw as the "freedom not to associate" and the dissent described as a "free pass out of antidiscrimination laws" is not a new one. Forty years ago, this same debate played out in the Washington Supreme Court. In 2000, the issue was sexual orientation. In 1960, it was race.

Forty years ago, there was no federal Civil Rights Act preventing race discrimination. At that time, even the Washington Law Against Discrimination (WLAD) did not contain an explicit civil remedy. In *Browning v. Slenderella Systems of Seattle*,[2] the plaintiff, whom the Court described as "colored and the wife of a dental surgeon," had made an appointment by telephone for a courtesy "reducing treatment." When she arrived for her appointment, the business establishment refused to serve her because of her race. In a landmark decision, the Washington Supreme Court held 6-3 that there was an implied right of action to redress racial discrimination in places of public accommodation.[3]

Justice Joseph A. Mallery,[4] joined by Justice Richard B. Ott, authored a dissent that can only be described today as notorious. Justice Mallery declared that the majority had "stricken down the constitutional right of all *private* individuals of every race to choose with whom they will deal and associate in their *private* affairs."[5] After railing against the Warren Court's elimination of the "separate but equal doctrine" in public institutions, the dissent proclaimed that the "right of discrimination in private businesses is a constitutional one."[6] According to Justice Mallery, the issue was whether any "person, whether white, black, red, or yellow, has any right whatever to compel another to do business with him in his *private* affairs."[7] In the name of constitutionally protected "free choice," the dissenters also defended the right of whites to create segregated residential neighborhoods.[8] They contended that the "right of exclusiveness" was "essential to freedom."[9]

Justices Mallery and Ott argued that the majority's decision violated the 13th Amendment to the U.S. Constitution (which had eliminated slavery) by requiring white business owners to open their stores to black customers. They concluded that the majority had reached the "opposite extreme" of the *Dred Scott* decision by "subjecting white people to 'involuntary servitude' to Negroes."[10]

One year later, in *Price v. Evergreen Cemetery Co. of Seattle*,[11] Justice Mallery reiterated his view that racial segregation enjoys constitutional protection as freedom of association. At issue was a recently enacted state law prohibiting racial segregation in private cemeteries. Justice Ott, writing for a majority of six, struck down the provision on the ground that it was enacted as part of legislation that violated the state constitution's single-subject requirement.[12] In a concurring opinion, Justice Mallery declared that:

> This case demonstrates that the Negro desegregation program is not limited to *public* affairs. The right of white people to enjoy a choice of associates in their *private* lives is marked for extinction by the N.A.A.C.P. Compulsory total togetherness of Negroes and whites is to be achieved by judicial decrees in a series of Negro court actions. *Browning v. Slenderella Systems of Seattle*, 54 Wash. 440, 341 P.2d 859, was the opening gun of the campaign.[13]

Justice Mallery again argued that antidiscrimination laws placed at risk the constitutional right to freedom of association:

> [Those] who have relied on the white restriction in question have acquired a right to the association of their own race exclusively. It is this specific right of segregation which this particular case in a series was brought to eliminate....This lawsuit is but an incident, the second of a series, in the over-all Negro crusade to judicially deprive

white people of their rights to choose their associates in their private affairs.[14]

He claimed that the true goal of the civil rights movement was the creation of "*special privileges* for the Negro in *private* affairs."[15]

Justice Mallery recounted that, during his re-election campaign in 1960, the NAACP had urged voters to defeat him based on the segregationist views expressed in his dissent in *Browning*. He charged that the "N.A.A.C.P. administers massive retaliation upon judges for opinions that do not advance the Negro cause."[16] He then predicted:

> A victorious crusade of the N.A.A.C.P. for the special privilege of Negroes to intrude upon white people in their private affairs can only be won at the expense of the traditional freedom of personal association which has always characterized the free world. ... From time immemorial the scope and extent of an individual's choice in his private affairs has been the Anglo-Saxon measure of his liberties. No individual right has been more cherished than the right to choose one's associates. ... Experience has shown that an aggressive minority can frequently exact special privileges from an indifferent majority. It may be that the realization of the Negro dream of compulsory total togetherness is just around the corner.[17]

The following year, the Washington Supreme Court invalidated an amendment to the WLAD prohibiting discrimination in the sale of publicly assisted housing. In *O'Meara v. Washington State Board Against Discrimination*,[18] a plurality of three justices found the new law violated the federal Equal Protection Clause because it banned discrimination *only* in publicly assisted housing. Four dissenters would have sustained the law. In a concurring opinion, Justice Mallery, again joined by Justice Ott, characterized the state antidiscrimination statute as an impermissible intrusion on the freedom of private association: "[I]f a white man refuses to sell his home to a Negro, his constitutional right not to be disturbed in his private affairs shields him from coercion on the part of the Negro."[19] He described the Washington State Board Against Dis-

crimination "as a flying squadron to be called anywhere to bargain on behalf of any disgruntled Negro who has complained against a white man."[20] In Justice Mallery's view, the state antidiscrimination law anticipated the "voluntary written surrender of the white man's private constitutional rights."[21] Two months after authoring this concurrence, Justice Mallery retired from the Washington Supreme Court. He lived until 1982.

Over the past 40 years, society has rendered a condemnatory judgment on racial segregation. Today, no Supreme Court justice in this or any other jurisdiction would dare to make the arguments propounded by Justice Mallery and his supporters. Society's current struggle with the issue of equality and sexual orientation is at a stage reminiscent of the fight over racial integration circa 1960. Forty years ago, in *Price* and in *O'Meara*, the Washington Supreme Court held that the state Legislature had gone too far in prohibiting discrimination against a group hated by certain segments of the community. In *Dale*, the U.S. Supreme Court reached the same result. Dissenting, Justice Stevens charged the majority with homophobia and drew an explicit analogy to racial prejudice.[22] Forty years from now, we will see whether history views the U.S. Supreme Court's recent recognition of a constitutional right to exclude on the basis of sexual orientation any differently from earlier decisions upholding racial segregation.

Michael Subit is an attorney at Frank Rosen Freed Roberts LLP in Seattle, where he represents plaintiffs in employment cases. He is a graduate of Yale University and Stanford Law School, and was a judicial law clerk to the Hon. Stephen Reinhardt of the U.S. Court of Appeals for the 9th Circuit.

NOTES

1 Boy Scouts of America v. Dale, 530 U.S. —, 120 S. Ct. 2446 (2000).
2 54 Wn.2d 440, 341 P.2d 859 (1959).
3 54 Wn.2d at 446.
4 Justice Mallery was appointed to the Court in November 1942. According to Charles Sheldon's *The Washington High Bench* (1992), Justice Mallery was a Winlock, Washington, native who attended Reed College and the University of Washington Law School. He had served as an assistant U.S. attorney and a judge on the municipal and superior courts in Tacoma.
5 *Id.* at 452-453 (emphasis in original).
6 *Id.* at 454.
7 *Id.* at 453 (emphasis in original).
8 *Id.* at 455.
9 *Id.*
10 *Id.* at 456-57. In Dred Scott v. Sandford, 19 How. 393, 15 L.Ed. 691 (U.S. 1857), the U.S. Supreme Court held that black slaves could not be citizens of the United States.
11 57 Wn.2d 352, 357 P.2d 702 (1960).
12 Const. art. II, sec. 19. The bill at issue was entitled "an act related to the regulation of cemeteries." Among its other provisions, it provided for a cemetery fund and a cemetery administrative board. The majority essentially held that "cemeteries" and "civil rights" were two subjects. 57 Wn.2d at 354. Three justices dissented.
13 *Id.* at 355 (emphasis in original).
14 *Id.* at 355-56.
15 *Id.* at 356 (emphasis in original).
16 *Id.*
17 *Id.* at 357-58.
18 58 Wn.2d 793, 365 P.2d 1 (1961). Current Washington Supreme Court Justice Charles Z. Smith was among the lawyers who participated in the case.
19 58 Wn.2d at 806.
20 *Id.* at 805.
21 *Id.*
22 120 S. Ct. at 2477-78.

Selected Readings:

Parting the Waters: America in the King Years, 1954-63 *by Taylor Branch* (paperback – November 1989)

Pillar of Fire: America in the King Years, 1963-65 *by Taylor Branch* (paperback – January 1999)

The Black New Yorkers: The Schomburg Illustrated Chronology *by Howard Dodson, et al.* (hardcover – October 1999)

Africana: The Encyclopedia of the African and African American Experience *by Kwame Anthony Appiah and Henry Louis Gates, Jr. (editors)* (hardcover – November 1999)

My Soul Is a Witness: A Chronology of the Civil Rights Era, 1954-1965 *by Bettye Collier-Thomas and V.P. Franklin* (hardcover – January 2000)

Hidden Witness: African American Images from the Dawn of Photography to the Civil War *by Jackie Napolean Wilson* (hardcover – January 2000)

The New York Public Library African American Desk Reference (hardcover)

The Face of Our Past: Images of Black Women from Colonial America to the Present *by Kathleen Thompson (editor), et al* (hardcover – June 2000)

BREAKING NEWS

Ninth Circuit Says IOLTA a "Taking"

The 9th Circuit held that Washington's Interest on Lawyers' Trust Accounts (IOLTA) program constitutes a "taking" of clients' interest by the state. In a decision filed on January 10, Hon. Andrew J. Kleinfeld wrote: "...[W]e conclude that plaintiffs are entitled to relief on their Fifth Amendment claim," asserting that the IOLTA program constitutes a taking without just compensation.

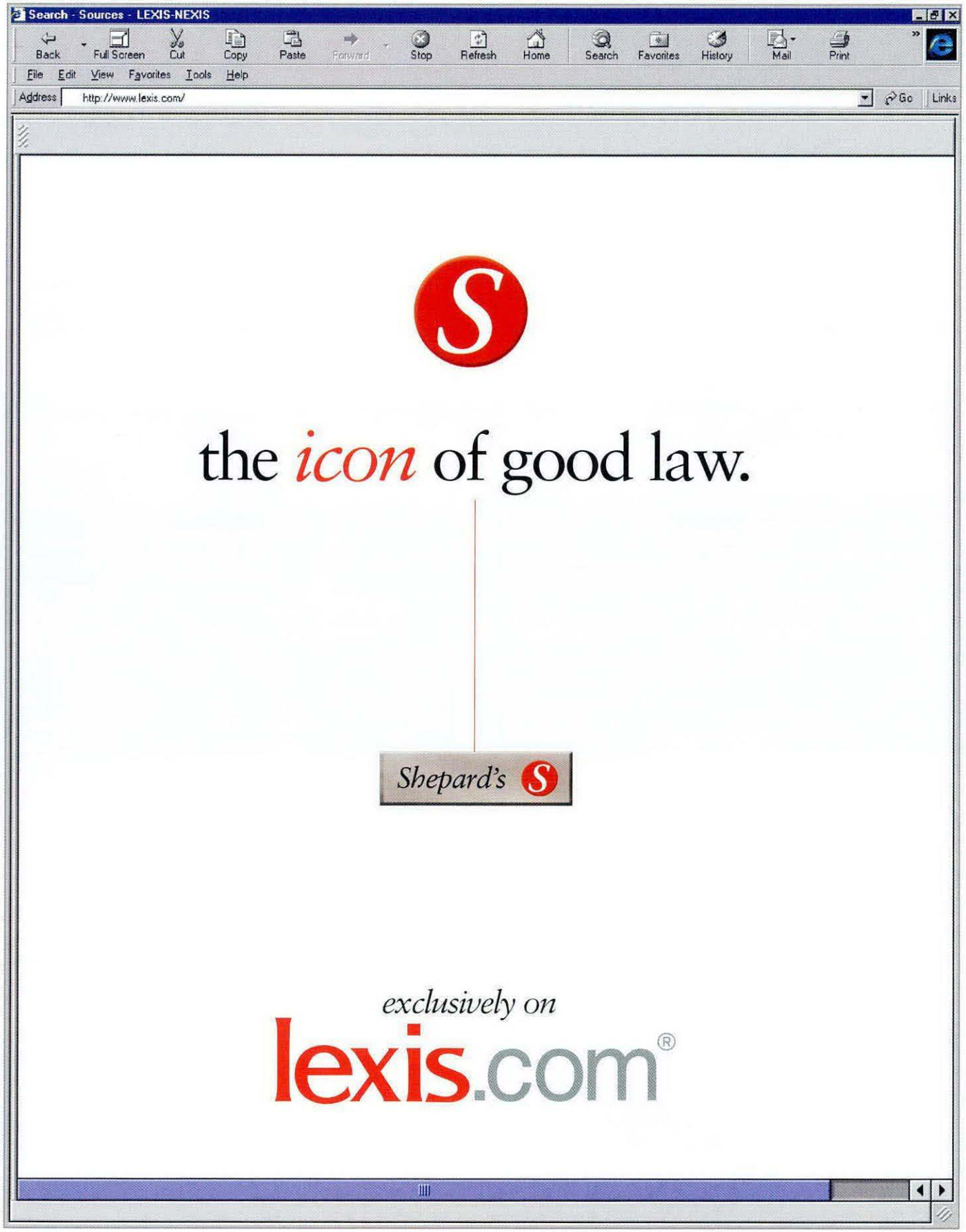
However, the Court was clearly sympathetic to the underlying purpose of the program. "IOLTA programs spread rapidly because they were an exceedingly intelligent idea."

The IOLTA program was established by the Supreme Court and codified in the Rules of Professional Conduct in 1984. The program, similar to ones in most other states, pools interest from lawyers' trust accounts and uses the proceeds to fund the Legal Foundation of Washington. The LFW in turn funds legal programs and services for low-income citizens of the state.

The Court noted that a major issue in this case is what actually constitutes "just compensation." The defendants (Washington Supreme Court and the Legal Foundation of Washington) had argued that "the Fifth Amendment ... affords no remedy because the 'just compensation' is zero."

The Court sent the case back to the district court, stating "... [J]ust compensation for the takings may be less than the amount of interest taken, or nothing, depending on the circumstances, so determining the remedy requires a remand."

Bar News will follow up on this important case in next month's issue. — *Ed.*



AL2950

"A Grievance Has Been Filed Against You..."

by Jan Michels
WSBA Executive Director

The Dreaded Words

Notice of a grievance can be the most unwelcome piece of correspondence you receive from your bar association. It conjures up visceral reactions, like those to a bad report card. The first place most of us look when we open *Bar News* is the Disciplinary Notices section. We fear the possibility of seeing the name of someone we know.

In town meetings we hear how disruptive and embarrassing it is to have a grievance pending. We want quick resolution, hopefully a dismissal. We want investigators and disciplinary counsel who understand the exigencies of our particular area of practice. We want to be kept informed each step of the way. And we all want bad lawyers out of the practice. We agree on the goals of the discipline system.

How do cases get assigned to disciplinary counsel?

Discipline cases are handled by 16 lawyers, some of whom work part time. All have at least eight years' legal practice experience, many have significantly more, and several have more than 20 years' experience. The WSBA strives to balance staff by practice area, size of practice, experience, and geographic area of practice. It is common for disciplinary counsel to consult one another to ensure that adequate scope and experience are applied to each case. The WSBA seems unable to attract many lawyers with rural practice experience, and attracts more than a balanced share of lawyers with government experience. The salary range for disciplinary counsel is $50,000 to $75,000.

What happens in the process?

- Written grievance is received and preliminary assessment is made.
- If not dismissed, grievance is referred for assignment and investigation.
- If not dismissed, recommendation is made to a review committee, a subset of Disciplinary Board members (matter becomes public).
- If not dismissed, grievance is set for a hearing.
- Hearing officer hears case and enters findings.
- Sanction may be imposed.
- Grievant or WSBA may appeal.
- Costs are paid, and lawyer usually returns to active status.
- Occasionally, conditions are imposed.

What are the odds?

Of the 5,000 complaint calls to the WSBA Office of Disciplinary Counsel annually, over 60 percent are resolved by consumer affairs personnel intervention concerning file ownership and client contact misunderstandings. For the remaining 2,000, a formal grievance is filed and investigated. About 85 percent of these 2,000 are dismissed, and another six percent have deferrals or miscellaneous closing actions. That leaves about 150 lawyers facing formal disciplinary action. With an active membership of over 20,000 lawyers, only .75 percent of Washington lawyers are found to have acted unethically each year.

What is the most common professional misconduct?

Though anyone can file a grievance against a lawyer, 53 percent of grievances are filed by current or former clients, and another 31 percent by opposing parties, other counsel, or the WSBA (after being alerted by others), with various others filing the remaining 16 percent.

Family law and criminal law each constitute 25 percent of grievances. The next largest proportion is the 12 percent related to tort cases. Over half of the grievances are due to "performance," including such things as delays, failure to communicate, missed dates, bad judgment calls, and incompetence. In equal proportions (at about five to 10 percent each) are allegations of interfering with justice, personal behaviors, fees and overdrafts, and violation of duties to client.

What should I do in response to a notice that a grievance has been filed?

Responding promptly and cooperating with disciplinary counsel's requests for information speeds up the process.

Board of Governors' Role

The role of the BOG is "oversight of the discipline system." The executive director is responsible for the administration of the discipline system and its staff. Neither the board members nor the executive director have any role in the resolution of any particular case.

Prevention Programs

We'd rather prevent than discipline. Our prevention programs include:

- Rules of Professional Conduct Committee which issues ethics opinions;
- 70-plus seminars and articles annually;
- Many formal CLE programs;
- Telephone ethics line for discussion of prospective conduct;
- Law Office Management Assistance Program for consultation about trust fund management, billing, staffing and other business matters; and
- Lawyers' Assistance Program for issues related to addiction or mental health problems.

Having a *responsible, accountable, timely and fair regulatory system* is WSBA Strategic Goal No. 6. We meet this goal by responding to grievances within our established timelines — three months for 90 percent of grievances, six months for another 8 percent, and only a few very complex cases deferred beyond that. As of December 31, 2000 the WSBA met these timelines for all investigations.

WSBA Challenges

To continue to meet our timelines and to complete the public process for all cases ordered to hearing, the WSBA faces some challenges. Remedies are being discussed by a special Discipline 2000 Task Force, whose recommendations are expected this spring. Discipline 2000 is working with the process of discipline in the Rules for Lawyer Discipline, not dealing with the Rules for Professional Conduct themselves.

Some challenges include:

- Recruiting and retaining experienced disciplinary counsel;
- Securing well-qualified, trained hearing officers so that rulings are consistent;
- A considerable time commitment by Disciplinary Board members; and
- Recovering costs — the discipline system consumes about 40 percent of license fees; cost recovery from sanctioned lawyers covers less than five percent of these costs.

Our goal statement sets an ambitious standard that we intend to meet. Discipline system improvements are constant, and with the recommendations of the Discipline 2000 Task Force, we expect many procedural improvements. For more information about the task force, see the WSBA Web site at www. wsba.org/odc/d2000.

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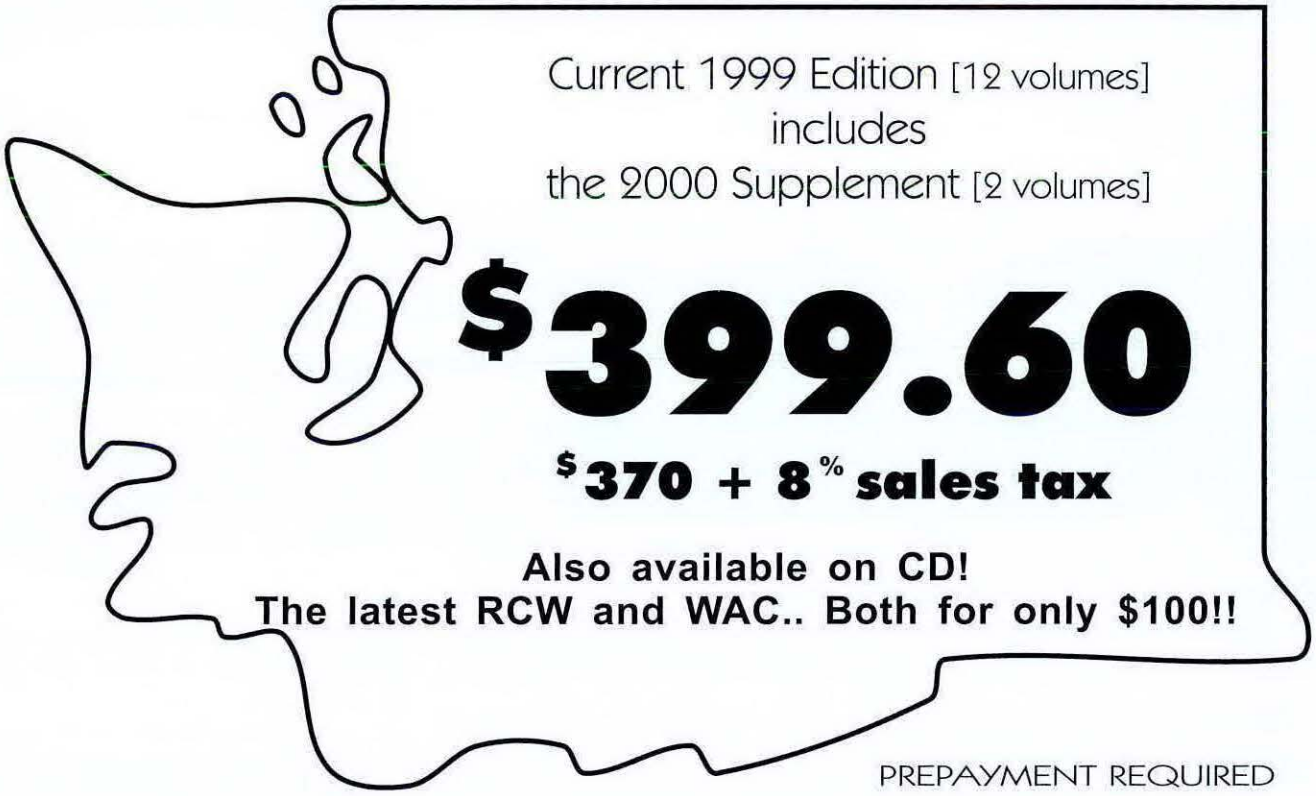

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Yours, Mine, Ours?
Property Interests of Unmarried Couples

by Patricia Novotny

Since 1984, unmarried couples in Washington have enjoyed access to the courts for equitable distribution of property acquired by the parties during their relationship, thanks to the meretricious relationship doctrine[1] first recognized in *Marriage of Lindsey*.[2] Refined in 1995 by the Washington Supreme Court in *Connell v. Francisco*,[3] this equitable doctrine applies to couples who are in stable, marital-like relationships, cohabiting with knowledge that a lawful marriage between them does not exist. At separation, and presumably at death,[4] the parties to such relationships are entitled to a just and equitable distribution of property acquired during the relationship that would be community property if the parties had been married. The doctrine does not extend to the myriad other benefits and privileges that attend marriage, but is limited to property that would be community property. While this equitable doctrine could hardly be described as a precision tool, it has been the only tool available to growing numbers of unmarried couples.

During the pendency of *Pennington*, a more specific question was raised by another Division II case. In *Vasquez v. Hawthorne*,[11] the court held that "marital-like" means marriageable, putting the doctrine off limits to same-sex couples (as well as to minors, close relatives and the already married).[12]

In two recent cases, the Supreme Court confirmed the continued vitality of the *Connell* rule.[5] In consolidated cases from Divisions I and II of the Court of Appeals, *Chesterfield v. Nash*[6] and *Pennington v. Pennington*,[7] the Supreme Court approved the *Connell* definition of meretricious relationship as "marital-like," while also reiterating that "marital-like" does not mean "marital."[8] Rather, five factors which "are neither exclusive nor hypertechnical," but "helpful," broadly outline the evidence relevant to determining whether a meretricious relationship exists: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.[9] Whether a relationship may properly be characterized as a meretricious relationship depends upon the facts of each case.

The court in *Pennington* also clarified *Connell's* three-prong analysis for application of the doctrine. First, the court undertakes to determine whether a meretricious relationship existed. Upon finding that it did, the trial court "evaluates the interest each party has in the property acquired during the relationship." Finally, the court "makes a just and equitable distribution of such property," guided by the principles that apply in marital dissolution cases.[10] While the facts in neither *Pennington* nor *Chesterfield* satisfied the definitional prong, the definition itself and the analysis first fully articulated in *Connell* remain unchanged.

During the pendency of *Pennington*, a more specific question was raised by another Division II case. In *Vasquez v. Hawthorne*,[11] the court held that "marital-like" means *marriageable*, putting the doctrine off limits to same-sex couples (as well as to minors, close relatives and the already married).[12] The court reasoned that since Washington public policy forbids same-sex couples to marry, it likewise excludes them from the benefits of the meretricious relationship doctrine. The Supreme Court accepted review and will hear argument on February 13, 2001. *Vasquez* raises directly the question whether and to what extent a court-created equitable doctrine is constrained by legislative policy statements on marriage.

The state, in both local and national forms of government, has long expressed its bias that intimate relationships be formed within the state-approved institution of marriage. To this end, the state defines who may be married and the procedure for becoming married.[13] Those who satisfy these prerequisites gain access

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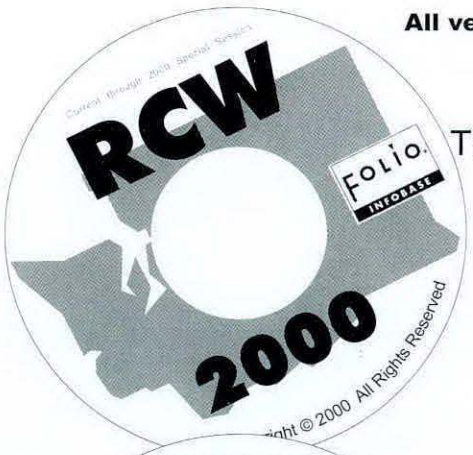

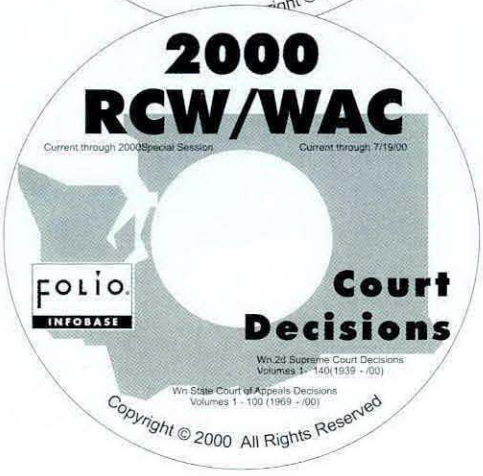

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to a system that regulates property distribution and familial bonds.

Those who do not marry, including those who cannot marry, nevertheless accumulate both property and family. Formerly, children of such unions, described as "illegitimate," endured both legal and societal burdens.[14] The refusal to accord legal rights to children born out of wedlock furthered public policy by "the discouragement of illicit commerce between the sexes, and the fostering of marriage and the sustaining of the interests of the family created by lawful marriage."[15] Now the legal taint of such births has been all but eradicated, and parentage statutes provide for treatment of such children similar to that provided the children of marriage. As regards property accumulations, however, unmarried couples are largely on their own.

When unmarried couples cannot agree on property division at dissolution of the relationship, or when one party to the couple dies leaving unclear property ownership, the couples or the survivors bring their troubles to the courts. How they will fare depends a lot on the state in which they find themselves.

Historically, some courts, demonstrating moral disapproval similar to that found in legislative enactments and society generally, refused to enforce even written agreements between the parties to a sexually intimate but unmarried relationship.[16] Other courts, often driven by equitable concerns, recognized long-term sexual unions created without statutory compliance as common-law marriages. Proponents of this doctrine viewed such marriages as valid private contracts (formed *per verba de praesenti*, by present words of assent) deserving of judicial enforcement. Their position was animated in part by broader tensions regarding state intrusion into private realms and formed against a backdrop of a nation of commingled cultures developing across a vast continent.

Opponents saw common-law marriage as a threat to the sanctity of marriage and an abdication of state control over intimate relationships.[17] To no small extent, the debate about common-law marriage exposed substantial variations in community norms regarding marriage, including variations attributable to class, culture,

race and religious differences. However, the most salient difference was sex. Not surprisingly, most common-law marriage cases "were claims for the material support of women left, by death or desertion, without male partners to provide for them."[18] After all, for most of this nation's history, the status of women has been inferior to that of men. In particular, by operation of law and custom, women enjoyed few choices but to marry; yet, in marriage, their rights and freedoms were substantially curtailed.[19] Common-law marriage, according to one commentator, was a mechanism for dealing with female poverty, shifting the burden for dependent women from the state to private (male) actors.[20]

The debate over common-law marriage occupied the better part of the 19th century and concluded with widespread rejection of the doctrine. Washington counted itself among the states rejecting the doctrine in favor of an exclusive statutory mechanism for marriage formation.[21] However, Washington courts continued to construct creative solutions to ameliorate some of the harsh results that ensued, such as presuming the existence of a lawful, statutory marriage from the appearance of marriage (i.e., from solemnization and cohabitation).[22]

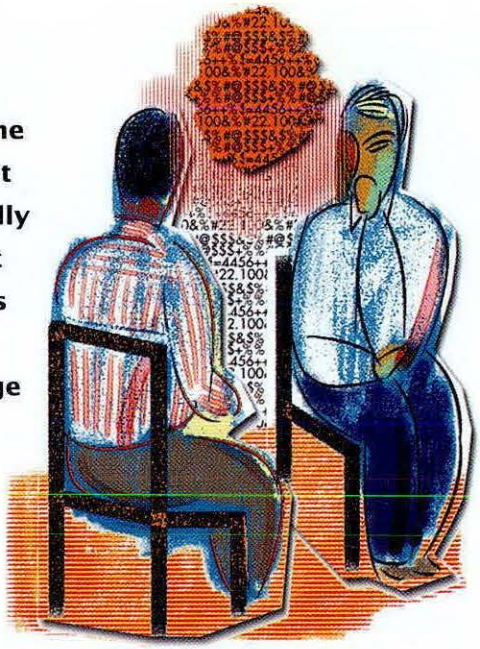
Despite state preference for and regulation of marriage, people continued to mate outside the prescribed system and continued to bring their disagreements to the courts. Perhaps the best-known case involving a property dispute between the parties to an unmarried intimate relationship is the California case, *Marvin v. Marvin*.[23] In *Marvin*, the California court said it would enforce express contracts between unmarried but intimate cohabitants except to the extent the contract was founded on consideration of meretricious sexual services. If there was no express contract, the court would look at conduct to see if there was an implied contract. The court also approved the use of quantum meruit (i.e., quasi-contract and unjust enrichment) or trust doctrines where appropriate.

Claims such as that advanced in *Marvin* are made on a services-rendered theory. Interestingly, the claim often seeks recovery for performing tasks that in a marriage would be performed gratuitously. Because public policy forbade, and still forbids, payment for sexual services, recovery is allowed only to the degree the contract for other services can be severed from the sexual services.[24] Thus, married women for most of our history could not be compensated for their domestic labor, even if specifically contracted, because they were obligated by law to perform those services for free.[25] At the same time, unmarried women in sexual relationships generally could not be compensated for their labor because the illicit sexual aspect of the relationship tainted all other aspects.

Various states, including most community property states, have adopted the *Marvin* approach in whole or in parts.[26] Some states, rejecting the trust and quantum meruit theories, permit recovery only on the basis of oral or written express contracts,[27] while others require written contracts.[28]

Some fewer states have rejected all theories of recovery by unmarried intimate cohabitants on the grounds that they contravene the public policy expressed by the states' marriage statutes.[29] In Mississippi, for example, the court relied in part on the state's criminal prohibition against

However, the court's hesitation ... to contravene legislative policy against same-sex marriage logically extends to an argument against the meretricious relationship doctrine altogether, since marriage law can be viewed as disapproving non-marital intimacies of any kind.[31]



non-marital cohabitation to reject claims by an unmarried intimate cohabitant.[30] This minority viewpoint resonates with Division II's refusal in *Vasquez* to apply the meretricious relationship doctrine to same-sex couples because they are forbidden by statute from marrying. However, the court's hesitation there to contravene legislative policy against same-sex marriage logically extends to an argument against the meretricious relationship doctrine altogether, since marriage law can be viewed as disapproving non-marital intimacies of any kind.[31] In fact, the selective attention Division II pays to legislative pronouncements on same-sex marriage raises obvious constitutional concerns.

The fact that the Mississippi-type approach represents a minority viewpoint may be attributable to simple demographics. Non-marital cohabitation has increased dramatically in recent decades, such that "marriage decreasingly indexes the significant transitions normatively associated with it: sexual relationships, a shared household, and often even childbearing are likely to have occurred before marriage."[32] Indeed, between 1970 and 1994, the nation experienced a sevenfold increase in heterosexual unmarried-couple households (from 523,000 to 3.7 million).[33] Another study shows an increase in unmarried partner households from 439,000 in 1960 to 4.2 million in 1998.[34] Data suggest that about 30 percent of these households are headed by same-sex couples.[35] Not only have the raw numbers trended upward, the ascent is dramatic: between 1990 and 1994, cohabitation among opposite-sex couples increased at a rate of 28 percent (compared to a rate of four percent for same-sex households).[36]

These facts are likely to elicit different remedial responses from different people. To some, the numbers announce loudly the need to defend and protect marriage as the preferred social building-block of the nation, a response exemplified by state and federal Defense of Marriage Acts. According to this view, those who do not or cannot comply with legislative requisites for the formation of sexually intimate relationships will not enjoy recognition of those relationships in any legal setting, however limited. Others will find in the increased incidence of intimate but unmarried cohabitation the need for flexible, practical solutions to the disputes and difficulties that inevitably arise and find their way into the courts. Indeed, Justice Finley long ago argued on behalf of such equitable relief that the court had a duty to use its equitable power "to meet and provide real solutions for the real problems of real people."[37]

Two decades ago, in reaction to the reality of marital-like cohabitation, the Washington Supreme Court fashioned a *Marvin*-like response unique among the states. In *Lindsey*, the court overturned what had become known as the *Creasman* presumption, after the 1948 case which declared that title presumptively reflected

the intended ownership interests in the property of unmarried cohabitants, absent evidence of some contrary intent.[38] Readers of *Creasman* today find significant the fact that the petitioner rejected by the court in that case was a black man who had been involved sexually and economically with a white woman, whose death left him, the untitled partner, with nothing. Indeed, the Washington meretricious relationship cases, like those nationally, tend to reflect wider social inequities, particularly, though not exclusively, related to gender. So pronounced were these power imbalances that they prompted one justice to call for the rejection of the *Creasman* presumption on the grounds that it "often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship."[39]

Indeed, in *Vasquez*, echoes of traditional sex-role specialization can be heard. Schwerzler, the deceased partner, controlled all of the finances and promised the financially unsophisticated Vasquez that he "would never want for anything and would be set for life." For whatever reason, no such arrangements were made, leaving Vasquez — at age 61, after 28 years of financial interdependency and employment in the couple's business, illiterate, unable to drive, and with no independent income or property — with nothing.

While inequities related to sex and to race may have diminished over the past half-century, inequities in these particulars and in general persist. Moreover, people persist in forming intimate relationships with apparently even less regard for legislative preferences than their predecessors. While the Supreme Court has made clear in *Pennington* that the meretricious relationship doctrine is alive and well, and that the Washington courts remain available to those who choose not to marry, the court must now answer whether to exclude from such equitable relief those whom the Legislature has declared cannot marry.

Patricia Novotny, a Seattle attorney, practices appellate law in state and federal courts. In addition to her practice, Ms. Novotny teaches at the University of Washington Women Studies Department and School of Law. She represents the Northwest Women's Law Center as amicus curiae in the Vasquez *case.* *The author gratefully acknowledges the research assistance of Tamara Watts and Lior Strahelevitz of Preston Gates & Ellis LLP.*

NOTES

1 The word "meretricious" derives from the Latin meretricious, meaning of prostitutes, which itself is derived from merre, meaning to earn money. The American Heritage® Dictionary of the English Language: Fourth Edition, 2000 (electronic version). Today, the word may mean "attracting attention in a vulgar manner," or, for purposes of this discussion, "of or relating to prostitutes or prostitution." *Id.* Despite recognition that the term is "offensive, demeaning, and sexist[,]" the Washington Supreme Court has reluctantly retained it for lack of a better one. Peffley-Warner v. Bowen, 113 Wn.2d 243, 246 n. 5, 778 P.2d 1022 (1989). "Non-marital cohabitation" might serve, since cohabit implies a sexual relationship. The American Heritage® Dictionary of the English Language: Fourth Edition, 2000 (electronic version) (Cohabit: "To live together in a sexual relationship, especially when not legally married").

2 Marriage of Lindsey, 101 Wn.2d 299, 304, 678 P.2d 328 (1984).

3 Connell v. Francisco, 127 Wn.2d 339, 898 P.2d 831 (1995).

4 *See* Peffley-Warner v. Bowen, 113 Wn.2d 243, 253, 778 P.2d 1022 (1989) ("The division of property following termination of an unmarried cohabiting relationship is based on equity, contract or trust, and not on inheritance.").

5 In re Marriage of Pennington, — P.2d ——,

2000 WL 1862689 (Wash. Dec 21, 2000).
6 Chesterfield v. Nash, 96 Wash. App. 103, 978 P.2d 551 (1999).
7 Pennington v. Pennington, 93 Wash. App. 913, 971 P.2d 98 (1999).
8 Pennington, citing Connell, 127 Wn.2d at 346.
9 *Id.*
10 *Id.*
11 Vasquez v. Hawthorne, 99 Wash. App. 363, 994 P.2d 240 (2000).
12 *See* RCW 26.04.020.
13 Who the state deems marriageable changes over time. In the Middle Ages, for example, consanguinity rules that prohibited marriage between those related by blood to the fourth degree expanded in the 9th century to prohibit marriage between those related to the seventh degree, then changed again in 1215 back to the fourth degree. Richard Burtsell, The Catholic Encyclopedia, Volume IV (Online Edition, 1999: www.newadvent.org/cathen). Moreover, the degrees were different for some non-European races. *Id.* In colonial and revolutionary America, slaves were prohibited from marrying, presumably to protect the slaveowner's ability to buy and sell free of any consideration to family ties. As late as 1967, 15 states still prohibited interracial (i.e., white plus "colored") couples from marrying. (Most statutes did not restrain members of nonwhite races from intermarrying.) The purpose of these statutes, as described by the Virginia Supreme Court, was "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," a purpose the U. S. Supreme Court interpreted as "an endorsement of the doctrine of White Supremacy." Loving v. Virginia, 388 U.S. 1, 8, 87 S. Ct. 1817, 1967 U.S. Lexis 1082, 18 L. Ed. 2d 1010 (1967) (internal citations omitted).
14 *See* Pitzer v. Union Bank of California, 141 Wn.2d 539, 542 n.1, 9 P.3d 805 (2000) ("We recognize that the term illegitimate child is an offensive holdover from an era in which society was much less sensitive to the rights of children born out of wedlock.").
15 Wallace v. Rappleye, 103 Ill. 229, 247 (1882).
16 *See, e.g.*, Wallace v. Rappleye, 103 Ill. 229, 249 (1882) ("An agreement in consideration of future illicit cohabitation between the parties is void, and past cohabitation does not form an adequate consideration for a promise not under seal. Chitty on Contracts, 734; 1 Story's Eq. Jur. sec. 296.").
17 *See* Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 Yale L. J. 1885, 1886 (1998).
18 *Id.*, at 1887.
19 *See* Norma Basch, *In the Eyes of the Law* (1982), 17, 19-20, 22-23.
20 Dubler, at 1915-1918.
21 *See* In Re McLaughlin's Estate, 4 Wash. 570, 30 P. 651 (1892).
22 *See, e.g.*, Summerville v. Summerville, 31 Wash. 411, 72 P. 84 (1903) (where husband seeks to abandon wife, court presumes all the statutory requisites preceded the couple's marriage ceremony, which, along with cohabitation gives rise to presumption of lawful marriage); McDonald v. White, 46 Wash. 334, 89 P. 891 (1907) (in property dispute between husband and wife's blood relatives, following death of wife, marriage presumed from ceremony and cohabitation where evidence fails to show whether or not a license was obtained).
23 Marvin v. Marvin, 18 Cal.3d 660, 134 Cal.Rptr. 815, 557 P.2d 106 (1976).
24 *Compare* Jones v. Daly, 122 Cal.App.3d 500, 176 Cal.Rptr. 130 (1981) with Whorton v. Dillingham, 202 Cal.App.3d 447, 248 Cal.Rptr. 405 (1988); *see also* Anno: Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 A.L.R.3d 552.
25 *See, e.g.*, Graham v. Graham, 33 F.Supp. 936 (E.D. Mich. 1940).
26 *See, e.g.*, Watts v. Watts, 137 Wis.2d 506, 405 N.W.2d 303 (1987); Carroll v. Lee, 148 Ariz. 10, 712 P.2d 923 (1986); Hay v. Hay, 100 Nev. 196, 678 P.2d 672 (1984); Dominguez v. Cruz, 95 N.M. 1, 617 P.2d 1322 (1980); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979).
27 *See, e.g.*, Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980).
28 *See, e.g.*, Minn. Stat. Ann. § 513.075.
29 *See, e.g.*, Hewitt v. Hewitt, 77 Ill.2d 49, 31 Ill.Dec. 827, 394 N.E.2d 1204 (1979); Carnes v. Sheldon, 109 Mich. App. 204, 311 N.W.2d 747 (1981).
30 Davis v. Davis, 643 So.2d 931, 935 (Miss., 1994) ("[T]he legislature has neither condoned cohabitation nor extended the rights enjoyed by married individuals to those who merely cohabit. To the contrary, pursuant to Miss. Code Ann. §97-29-1 (1972), cohabitation remains a crime against public morals and decency ...").
31 Precisely this reasoning motivated the Illinois court in Hewitt, *supra*.
32 Bumpass and Sweet, *National Estimates of Cohabitation*, 26 Demography 615 (1989), in Brinig, et al, Family Law in Action (Anderson, 1999), at 85.
33 U.S. Dept. of Commerce, Bureau of the Census, Marital Status and Living Arrangements: March 1994 (Current Pop. Rep. P-20-484, February 1996).
34 Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 Cornell L. Rev. 1492 (2000).
35 *See* Mary Fellows et. al, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 3 n.6 (1998).
36 *Id.*
37 Humphries v. Riveland et al., 67 Wn.2d 376, 398, 407 P.2d 967 (1965) (Finley, J. dissenting).
38 Creasman v. Boyle, 31 Wn.2d 345, 196 P.2d 835 (1948).
39 West v. Knowles, 50 Wn.2d 311, 316, 311 P.2d 689, 693 (1957) (Finley, J., dissenting).

Alaska Airlines Flight 261 Update

The Causal Mystery is About to Be Solved

by Robert F. Hedrick

On January 31, 2000, Alaska Airlines Flight 261 crashed into the ocean off Southern California, killing all 88 persons aboard. Author Robert Hedrick practices and teaches aviation law in Seattle, and represents several of the victims' families. Last December, the National Transportation Safety Board held a hearing in Washington, D.C., to establish the facts surrounding the crash. The facts and probable cause for the crash, as established by the NTSB, may play a critical role in the litigation over this event pending before a multidistrict litigation judge in U.S. District Court in San Francisco. Hedrick attended the hearing and reports here on the detailed and highly technical evidence presented at the hearing, which explains why the frantic effort of the flight crew to control their aircraft was ultimately unsuccessful.

This article represents the views and opinions of the author – Ed.

The National Transportation Safety Board (NTSB) is the federal agency responsible for investigating aviation accidents. Although the agency has no rulemaking authority, it wields significant influence because of its mandate to determine the facts and probable cause of aviation disasters. Immediately after Flight 261 crashed, the NTSB sent its "go team" to the scene, and assigned board member John Hammerschmidt to lead the investigation.

NTSB investigative units for aircraft operations/human performance; air traffic control; witnesses; structures; systems/powerplants; and maintenance records were assigned to the case. There were also groups formed to investigate the flight data recorder, cockpit voice recorder, aircraft performance, and lubricating grease. In addition, the Federal Aviation Administration (FAA), Alaska Airlines, The Boeing Company, Pratt & Whitney Engines, the Air Line Pilots Association, the Aircraft Mechanics Fraternal Association, the Association of Flight Attendants, and the National Air Traffic Controllers Association were invited to participate in the investigation, and to provide outside technical assistance.

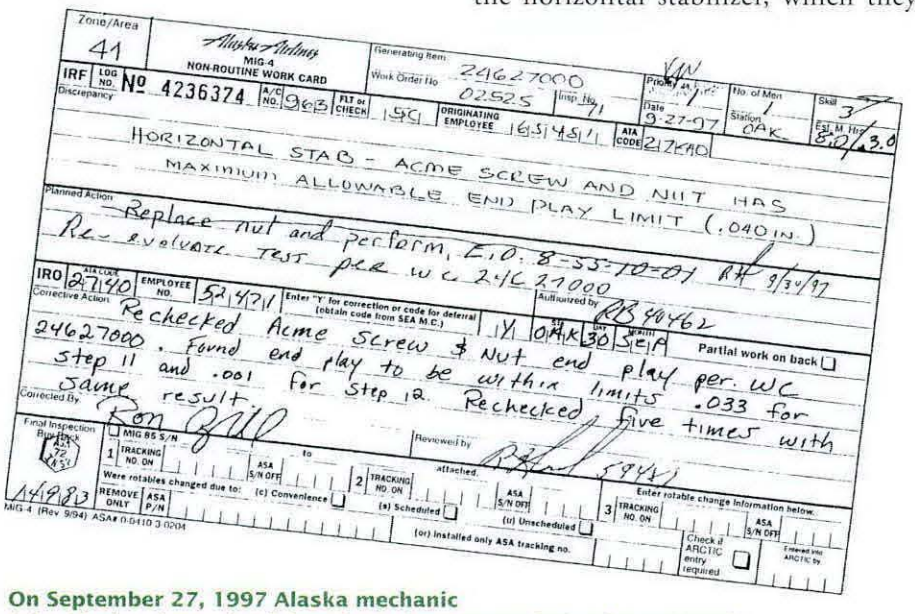
In major air disasters a public hearing is held to create a full record of the facts, circumstances and conditions of the accident. Such hearings are not adversarial, but are fact-finding proceedings. In this case, hundreds of exhibits were submitted and many witnesses were examined by NTSB technical staff, board members, and other parties to the investigation. Later this year, after all post-hearing test results are in, the NTSB will issue its final accident report containing its factual determinations and probable cause findings. The report does not allocate fault to the culpable parties, but sets out the relevant factors that likely caused the accident.

Brief History of the Flight

The crew for Flight 261 arrived in Puerto Vallarta, Mexico, on January 30, 2000, the day before the accident. The crew who had flown the MD-83 south to Puerto Vallarta (the next day) did not report any significant problems. The aircraft departed Puerto Vallarta at 1:37 p.m. PST, with one scheduled stop in San Francisco, and a final destination of Seattle.

The flight data recorder indicated that the autopilot was engaged during climb-out, but was turned off 13 minutes later. At 3:46 p.m., the autopilot was re-engaged for three minutes, disengaged for 20 seconds, and then re-engaged.

At 3:49 p.m., the crew contacted Alaska Airlines dispatch and maintenance control in Seattle to discuss a problem with the horizontal stabilizer, which they


Zone/Area 41 — Alaska Airlines — MD-83 NON-ROUTINE WORK CARD — Work Order No. 24627000 0252.5 — Date 9-27-97 — Station OAK

IRF Log No. № 4236374 — A/C No. 963 — Flt or Check — Discrepancy: HORIZONTAL STAB - ACME SCREW AND NUT HAS MAXIMUM ALLOWABLE END PLAY LIMIT (.040 IN.)

Planned Action: Replace nut and perform, E.O. 8-33-10-01 RII 9/30/97 Re-evaluate test per WC 24627000

IRO — Corrective Action: Rechecked Acme Screw & Nut end play per WC 24627000. Found end play to be within limits .033 for step 11 and .001 for step 12. Rechecked five times with same result.

Corrected By: Ron Gill — Reviewed by: RAF 5944

On September 27, 1997 Alaska mechanic John Liotine determined that the jackscrew needed to be replaced. However, three days later another mechanic overruled that decision based on a re-check of the end-play clearance.

thought was jammed, and to consider diverting to Los Angeles. After an extended discussion, the crew decided to land at Los Angeles.

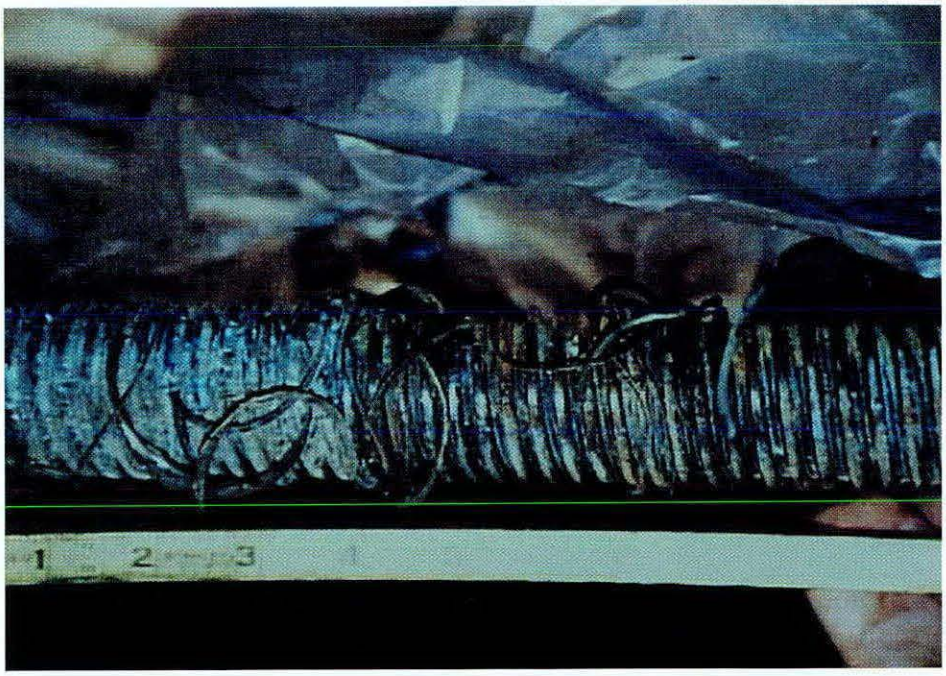
At 4:09 p.m., as the aircraft was at 30,000 feet over the Pacific Ocean (west of L.A. and east of Santa Catalina Island), the autopilot was turned off. At that moment, two faint thumps are heard on the cockpit voice recorder (CVR), and the pitch trim position moved 2.4 degrees, nose down, over the next two seconds. This was the first recorded stabilizer movement since climb-out from Puerto Vallarta.

At 4:10 p.m., the crew reported: "Center, Alaska 261, we are, uh, in a dive here ... yeah, we're out of 26,000 feet, we're in a vertical dive ... not a dive yet, but twenty-three seven request, uh ... yeah we've got it back under control there." At this moment, a second voice from the background disagrees, "No, we don't." The aircraft descended for two minutes, reaching a maximum speed of 353 knots. Speed brakes were deployed, and the elevator was used to pull the aircraft out of the dive. Once level, leading edge slats and trailing edge flaps were deployed on the wings, but were retracted 20 seconds later.

The flight stabilized at 24,000 feet. The crew reduced airspeed and began to troubleshoot the problem. At 4:12 p.m., they told Alaska's Los Angeles maintenance base that they thought they had a runaway trim. According to an Alaska mechanic, the crew stated: "We are in a worse situation than we were ... I'm afraid to try it again to see if we can get it to go in the other direction."

At the same time the crew told the passengers: "We have a flight-control problem up front here. We're working it. That's Los Angeles off to the right there. That's where we're intending to go. I'd anticipate us parking there in about 20 to 30 minutes."

At 4:15 p.m., the crew reported to Los Angeles Air Traffic Control: "We have a jammed stabilizer and we're maintaining altitude with difficulty, uh, but uh, we can maintain altitude we think. ... I need to, uh, get down about 10, change my configuration, make sure I can control the jet, and I'd like to do that out here over the bay. ..." The controller read the L.A. altimeter setting, and the crew acknowledged: "Thank you." This was the last radio call from Flight 261.



This post-accident photo shows threads stripped from the acme nut wound around the jackscrew.

By 4:18 p.m., the flight had descended to 18,000 feet. At 4:19:35 p.m., holding an airspeed of 270 knots (about 300 mph), the flaps started to deploy. At that time, an extremely loud noise is heard on the CVR. The aircraft then rapidly pitched nose down with a pitch rate of nearly 25 degrees per second. The G-forces reached negative three Gs within three seconds. After six seconds, the aircraft reached 80 degrees nose down and then rolled over, flying upside down.

The pilots struggled for control. They applied forces to the rudders, ailerons and elevator. They deployed the speed brakes, but nothing worked. The aircraft dove nearly straight down for three miles at a high rate of speed, impacting the ocean at 4:20:57 p.m.

The crash occurred in the Channel Islands National Marine Sanctuary, off Point Loma, California, 2.7 miles from Anacapa Island. The debris and wreckage sank in 700 feet of water, spreading out on the ocean bottom across an area the size of a football field. Approximately 90 percent of the wreckage was recovered.

On February 8, 2000, most of the horizontal jackscrew assembly was recovered. Even on sight of the untrained eye, the jackscrew appeared to have failed, as threads torn from the acme nut wrapped around the screw as if they had been torn clean from the nut.

Technical Evidence Presented at the NTSB Hearing

The Horizontal Stabilizer

The horizontal stabilizer is the fixed horizontal surface on the tail of an airplane. On the MD-83 it is on top of the tail. The stabilizer is 40 feet long and moves up and down in flight, allowing the pilot to set the trim of the aircraft in either nose up, nose down or level attitude. The horizontal stabilizer is normally a long-term control, which is set and left alone for extended periods of flight. The elevator is the moveable (hinged) control surface located at the trailing edge of the horizontal stabilizer. It is operated by the pilot's yoke control, and allows immediate changes in flight trim (up/down) attitude. With a proper trim setting the aircraft can fly at any normal attitude without undue forces on the pilot controls.

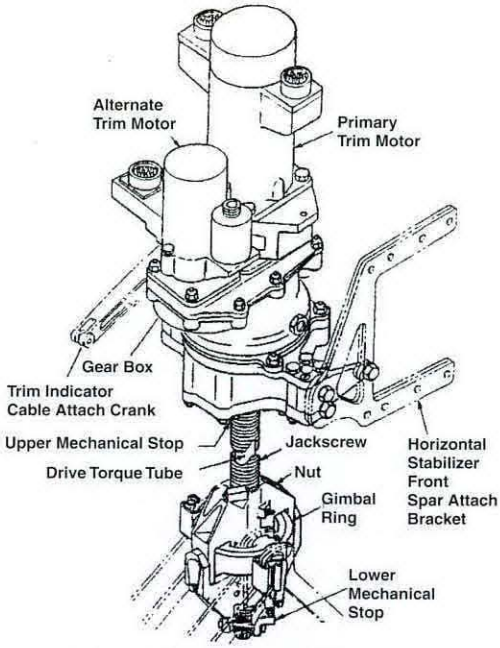
On MD-83 aircraft, the horizontal stabilizer is operated by one threaded shaft called a "jackscrew." It is two feet long and attached to the forward edge of the stabilizer. Two electric motors (primary and secondary) rotate the shaft, which is located directly below the motors. The jackscrew rotates through a stationary acme nut that is attached to the vertical stabilizer. Jackscrew rotation causes the entire assembly to move up and down. Since the nut is fixed to the vertical stabilizer, rotation of the screw moves the forward edge

of the horizontal stabilizer up and down, which helps control aircraft pitch in flight. Horizontal stabilizer trim is set by the pilot or operated through the autopilot.

Jackscrew Design and Operation

The type of jackscrew assembly involved in the accident was originally designed by Douglas Aircraft in 1965 for the DC-9. It weighs 100 pounds, is two inches in diameter, and costs $60,000. The accident jackscrew was supplied to McDonnell Douglas on June 28, 1990 by the Peacock Company of Norwalk, California. Boeing took over McDonnell Douglas in 1997.

The jackscrew has a maximum up-and-down limit, and a two-part failsafe system. First, the electric motors (primary and secondary) that turn the screw have a built-in electrical shutoff. Second, there are mechanical stops at the upper and lower limits, which are set to stop the screw from rotating when the acme nut meets the mechanical end stops (the secondary backup). The electrical shutoff stops just short of the mechanical stops. If the electrical shutoff fails, the mechanical stops are supposed to prevent further travel. The operating mechanism (including the motors) is located at the top of the assembly, and the screw is located below it.



The jackscrew assembly unit.

The maximum movement limits for the electrical shut-off are 2.2 degrees up stop (which moves the horizontal stabilizer up, causing the aircraft nose to go down) and 3.1 degrees down stop. The mechanical stops are set at 2.6 degrees up and 3.6 degrees down. Importantly, even if the horizontal stabilizer is stuck at any of these maximum limits, aircraft pitch can still be controlled by the elevator. However, if these maximums are exceeded, at a certain point (depending on various aerodynamic factors) the elevator will no longer be able to counter the forces of the horizontal stabilizer, and the aircraft will not be able to maintain level flight.

In light of the sensitivity in trim changes, the electric motors on the jackscrew assembly have a trim rate of one-third degree per second when operated by the primary electric motor, and one-tenth degree per second when operated by the alternate motor. Primary pitch during flight is controlled by the elevators, not the horizontal stabilizer.

The screw part of the assembly is a titanium core (quill) torque tube with a double-threaded outer layer of hardened steel. The two independent threads that wind the screw are supposed to be redundant design, with one winding backing up the other.

A washer and a nut, screwed directly

into the torque tube, are at the bottom and top of the screw. Attached to the screw on the inside of the nuts are the mechanical stops that prevent the screw from rotating beyond the maximum limits. The stops were not designed to handle direct vertical loads in the unlikely event that the acme nut becomes stripped.

The load is carried primarily on the torque tube and is transferred through the acme nut assembly, which is stationary and attached to the vertical stabilizer. The nut is eight inches long and pivots to accommodate the slight rotation of the jackscrew assembly as it moves up and down. The acme nut is made of aluminum bronze, which is a softer metal than the hardened steel on the jackscrew. As such, the acme nut will wear before the jackscrew, allowing the less expensive acme nut to be replaced once wear limits are reached. There is a single grease zerk fitting on the acme nut for injecting lubricating grease into threads contained in the nut. A four-by-six-inch access panel is located in the vertical stabilizer, which is used for inspection and maintenance of the jackscrew.

When the jackscrew was found, threads stripped from the acme nut were wrapped around it. At the NTSB hearing, the jackscrew design was challenged for a number of reasons. There does not appear to be a redundancy (backup) in the event the jackscrew threads are stripped. The dual thread design is not redundant when threads are stripped (by lack of lubrication) because all the threads will strip. Larger aircraft, such as the DC-8, DC-10 and MD-11, have two jackscrew assemblies operating the horizontal stabilizer. If there is a complete failure of one jackscrew, the other will take the load. It appears that the mechanical end stop/nut and bolt located at the bottom of the jackscrew severed off. In other words, the torque tube fractured. In order for the aircraft to pitch down at a rate of 25 degrees per second (going into the last dive), the horizontal stabilizer would have likely rotated up 22 degrees (or more), which is at least 10 times the maximum design limit. Though disputed by Boeing, it was suggested that the mechanical end stop broke off in flight and not when the aircraft hit the water. This might explain the loud noise right before the dive, and the horizontal stabilizer deflection well beyond its normal limits.

Jackscrew Maintenance

Like most moving mechanical parts, the jackscrew assembly has to be maintained or it will eventually fail. The acme nut and jackscrew must have adequate lubrication in order to operate properly. In addition, jackscrew wear must be periodically checked to ensure it is within safe limits.

Lubrication

There are two main lubricating issues: lubricating intervals, and the type of lubricating grease used.

Originally the DC-9 jackscrew was to be lubricated every 600 to 900 flight hours. Over time, lubrication intervals were increased, but varied from airline to airline because of "demonstrated reliability." For example, at the time of the accident, Alaska had the longest interval between jackscrew lubrications. Alaska and US Airways checked the jackscrew and lubricated every 2,500 flight hours. At that same time the interval was 500 hours at Airborne Express, 600 hours at Scandinavian Airlines (SAS), 900 hours at American Airlines, and 1,000 hours at Hawaiian Airlines.

After the accident, the FAA ordered inspection of all jackscrews on the DC-9/

MD-80 series aircraft. Alaska had the most reported problems — six, of which five failed the acme nut wear test. Airborne Express and American did not report any problems. However, Hawaiian Airlines had three aircraft (out of 15) that reported problems. The FAA issued an Airworthiness Directive mandating that the jackscrews be checked for lubrication every 650 hours.

Mobil 28 was the lubricating grease used throughout the U.S. on the jackscrew (and flight controls, doors and landing gear) on the DC-9 and MD-80 series aircraft. In 1995, based on Boeing specifications, Aeroshell 33 was developed. The advantage of Aeroshell 33 was that it performed better and had stronger corrosion protection for steel surfaces, which would increase part life.

Boeing had "no technical objection" to Alaska changing from Mobil 28 to Aeroshell 33 on MD-80 series aircraft. But Alaska was the only major U.S. airline that used Aeroshell 33 to lubricate jackscrews in its fleet. The transfer from Mobil 28 to Aeroshell 33 was accepted by the FAA as a "routine change," and considered insignificant. In December 1997, Alaska began replacing Mobil 28 with Aeroshell 33.

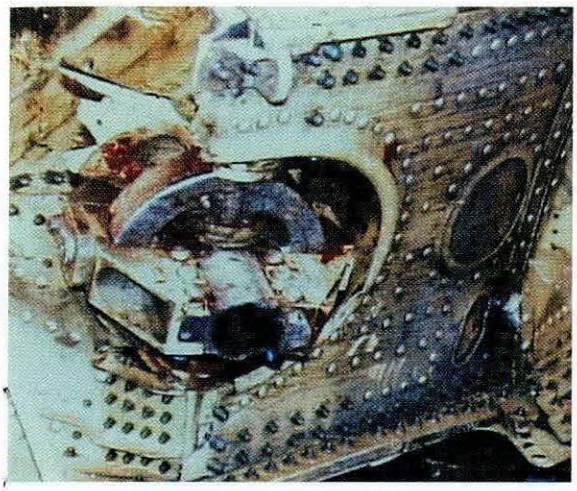
The procedure for changing lubricant was to remove all Mobil 28, add Aeroshell 33, run the system to spread the Aeroshell 33, remove all lubricant again, and then lubricate a second time with Aeroshell, and run the system. Mobil 28 and Aeroshell 33 are considered incompatible, and produce an inferior product when mixed together. In May 1999, Boeing suggested that aircraft operators avoid mixing the two greases and remove all old grease from their systems.

Testing at the U.S. Naval Laboratory determined that the grease on the Flight 261 jackscrew was "contaminated" because it contained both Mobil 28 and Aeroshell 33. It could not be determined what percentage of each grease was in the test sample. The sample did contain aluminum bronze particles that were from the stripped threads of the acme nut. Further tests are being performed to determine whether or not Aeroshell 33 causes aluminum bronze (the acme nut material) to corrode.

It was also determined that the zerk fitting on the acme nut was clogged, and had to be cleared with a flat punch. (A zerk fitting allows lubricant to be injected into a closed system under pressure without leaking out. The zerk fitting has a ball shape on the outside that is gripped by the nozzle of a grease gun pushed into it. The grease flows to the threads through a one-way valve. When grease is seen flowing out of both ends of the acme nut, the nut is considered to be lubricated. When the grease gun is removed, the valve in the Zerk fitting closes and prevents grease from leaking out and debris from getting in.) The acme nut contained eight inches of threads which would not have been lubricated if the fitting was clogged at the time of the last lubrication before the accident. In addition, Alaska may not have followed its own internal steps for approving the change from Mobil 28 to Aeroshell 33.

End-Play Checks

When originally certified by the FAA, the jackscrew assembly could be used as long as it passed the end-play test. The test measures the clearance between the threads of the screw and the threads of the nut, and reflects the amount of wear. If the clearance was more than .040 of an inch, the assembly had to be replaced. According to Boeing, when the clearance is at the .040 limit, the unit should handle



LEFT: The threads of the acme nut stripped, allowing the jackscrew (and horizontal stabilizer) to move up and down, without pilot control.

10 times the anticipated structural load. Even when the clearance is doubled to 0.080, it should hold five times the load. In cruise flight at 300 knots and proper trim, the load is 4,000 pounds.

Originally, wear checks were required every 3,600 hours; this was eventually increased. McDonnell Douglas required the jackscrews to be inspected for wear every 30 months or 7,200 flight hours, whichever came first. In 1996, Alaska convinced the FAA to increase those inspections by removing the flight-hour requirement, leaving only the 30-month inspection, no matter how many hours were flown.

The airplane that crashed was scheduled for inspection two months after the accident. At the time of the accident, the aircraft had logged 8,884 hours since the last inspection in September 1997. During the inspection at Alaska's Oakland repair facility, lead mechanic John Liotine performed the end-play check and determined that the play was .040 inch, the maximum limit. Technically, replacement was required if play is more than .040, but Liotine wanted the jackscrew replaced because it was showing a lot of wear related to the age of the aircraft. A few days later Liotine was overruled by a supervisor, who tested the jackscrew and determined that it was within its normal limits. Liotine was never told that his decision had been reversed. Sixteen months before the crash, Liotine told federal investigators that maintenance records were being falsified at Alaska. It is not known if Alaska had a replacement jackscrew assembly available at the time (as the aircraft was due to return to service), raising speculation about the word "panic" written in a log entry about efforts to obtain more parts for the aircraft. Liotine believed that replacing the jackscrew would have delayed release of the aircraft.

Had the 7,200-hour interval been in effect at Alaska, the jackscrew on Flight 261 would have undergone an end-play check 1,684 hours before the accident. After the accident, the FAA's airworthiness directive decreased the wear-check interval to every 2,000 hours.

Concern was also raised about the accuracy of the measuring instrument, which was apparently made by Alaska, and not subject to mandatory calibration. A related issue exists regarding the possibility that grease on the jackscrew could cause inaccurate test results. Alaska now requires the jackscrew assembly to be wiped clean before wear tests are performed.

Prior to the accident, an internal computer alerted Alaska of potential wear problems with the jackscrew. In 1999, Alaska commenced computer tracking of the jackscrew end-play test results. In June of that year, a jackscrew failed the test

during heavy maintenance. Five months later, another jackscrew failed the test, and a third was checked and later replaced. Three days after the accident, company software generated statistical analysis of maintenance that triggered an alert to the jackscrew problem. At the time of the accident, Alaska was not tracking wear rates of individual jackscrews.

FAA Oversight

The Federal Aviation Agency (FAA) is the primary rulemaking and oversight authority for airlines and the aircraft industry. The FAA approved the jackscrew assembly design and was responsible for overseeing maintenance practices at Alaska Airlines.

With regard to aircraft design, the cardinal safety rule (which is also in the Federal Aviation Regulations (FARs)) is that no single failure of a critical aircraft part should cause a crash. Heavier aircraft have two jackscrew assemblies that operate the horizontal stabilizer, and back up each other. On the DC-9 and MD-80 series aircraft, there is only one jackscrew assembly. The alleged redundant design is (1) the dual thread screw winding, and (2) the mechanical end stops. The FAA approved this system.

Concerns were raised at the hearing about the FAA's approval of the design, which did not appear to have adequate redundancy in the event that the threads stripped. Nevertheless, the FAA believed that the design met the relevant design regulations at the time.

With regard to aircraft maintenance, the FAA has a Maintenance Review Board (MRB), which outlines the minimum scheduled inspection program for specific aircraft. The MRB recommends certain maintenance practices, however those recommendations are not mandatory.

Pursuant to the FARs, each airline establishes its own maintenance program (consistent with the manufacturer's recommendations), and that program is reviewed and accepted by the designated FAA principal maintenance inspector (PMI). PMIs establish close working relationships with air carriers, and are allowed considerable discretion in reviewing and approving maintenance practices and procedures. That is why the practices vary from carrier to carrier. If a carrier demonstrates reliability, it can request that the PMI modify the maintenance schedule, usually to lengthen the intervals for inspection, lubrication and overhaul, which saves the carrier money.

The PMI approved the changes at Alaska involving the increased lubrication interval, the increased end-play check interval, and the change of lubrication from Mobil 28 to Aeroshell 33. Some of these decisions will probably be criticized in the NTSB's report. It was also suggested that the FAA was lax in its oversight of Alaska maintenance, and that the FAA failed to discover or take action on maintenance items before the accident.

Conclusion

There is no doubt that failure of the jackscrew caused Flight 261 to crash. One might consider the failure a product defect, but the story of human error begins more than 35 years before the accident. A complex series of mistakes, including errors in design, maintenance, testing and government oversight, all likely contributed to the eventual failure of the horizontal stabilizer system, resulting in the loss of 88 lives. Despite the intense investigation of the NTSB, we will never know to what extent each element contributed to the disaster.

SCHWABE, WILLIAMSON & WYATT

ATTORNEYS AT LAW

OUR NEW SHAREHOLDERS

D. Daniel Chandler
Known throughout Southwest Washington for his land use, wetland and environmental practice, Mr. Chandler joins our Vancouver office.
Harvard Law School, 1989

Andrew J. Gerlicher
Before joining our firm, Mr. Gerlicher served as senior vice president of Corporate Banking and Finance at KeyBank, as well as senior vice president and general counsel for First Interstate Bank.
Gonzaga University School of Law, 1977

Douglas D. Osterloh
After a successul career with his own Seattle firm, Mr. Osterloh brings with him expertise in assisting individuals and business owners in a broad range of immigration matters.
University of Oregon School of Law, 1986

Martha O. Pagel
Ms. Pagel previously served as Director of the Oregon Water Resources Department, and is a recognized expert in water rights and natural resources law.
Willamette University, 1983

RECENTLY JOINING THE FIRM

SEATTLE

Thomas Brennan, Seattle University, 2000

Steven A. Miller, University of Washington Law School, 2000

VANCOUVER

Sarah Kamman, University of San Diego School of Law, 1996

Michael Karber, Northwestern School of Law, Lewis & Clark College, 1993

PORTLAND

Lisa Carey Alan, Northwestern School of Law, Lewis & Clark College, 2000

Bryan W. Cavaness, Northwestern School of Law, Lewis & Clark College, 1987

Lisa Cohen Greenfield, Washington University School of Law, 1996

Darius L. Hartwell, Northwestern School of Law, Lewis & Clark College, 2000

Christopher J. Lewis, Northwestern School of Law, Lewis & Clark College, 2000

Debra Maldonado, Fordham University School of Law, 1995

Joseph E. "Jay" O'Brien, University of Oregon School of Law, 1997

William J. Ohle, Willamette University, 1991

Joel A. Parker, University of Oregon School of Law, 1999

Timothy M. Sullivan, Northwestern School of Law, Lewis & Clark College, 2000

Pamela Loh Veljacic, Seattle University, 2000

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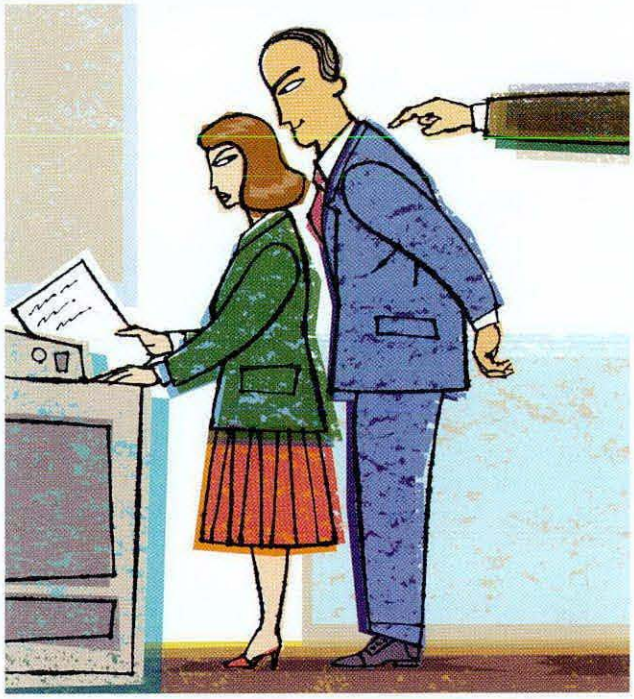
Is It Against the Law to Be a Jerk?

by Paul Buchanan

With more and more employers highly sensitized to recognize and respond to classic forms of sexual harassment, and with all but the most Neanderthal of employers responsive to clear incidents of racial or religious discrimination, the often less obvious, but sometimes highly pernicious, general "workplace jerk" frequently goes unnoticed. Yet the workplace jerk may pose more of a threat to the employer than the instantly recognizable lecherous sexual harasser or the obvious racist. Even if the workplace jerk does not fire anyone or take any other adverse employment action, and even if the workplace jerk makes no overt sexual, racial or other discriminatory comments, his or her actions may give rise to "hostile work environment" liability if an employee can credibly claim that the jerk's abusive behavior was motivated by some protected characteristic of the employee.



Another challenge facing employers under this increasingly expansive application of harassment law is recognizing when the company may be "on notice" that discriminatory harassment is occurring and that the company should be taking action.

The law governing what is termed "hostile work environment" harassment has become so expansive that the safest course for employers is to maintain a vigilant stance against the workplace jerk. Because the true equal-opportunity jerk usually is breaking no law, proving that the offending employee doled out abuse without discrimination may be a difficult and awkward task for an employer. Employers who fail to discipline aggressively and weed out (or at least train and reform) the boor, the bully, the power-monger, and even the person who simply lacks basic interpersonal skills may find themselves vulnerable to expensive and difficult employment lawsuits as disgruntled employees ascribe some unlawful motivation to the abusive conduct. And, of course, eliminating such negative forces from the workplace also yields numerous other benefits in the way of productivity and morale.

It is well known that Title VII of the Civil Rights Act of 1964 — the source of harassment law — makes no mention of sexual or any other form of harassment. Rather, the law provides that "[i]t shall be an unlawful employment practice for an employer... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (1994). In 1986, however, the U.S. Supreme Court made clear that sexual harassment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" violates Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) (brackets in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

Two companion decisions issued by the U.S. Supreme Court in 1998 further spotlighted the issue of employers' responses to traditional forms of sexual harassment. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). These cases established that employers who can show they have "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" may be rewarded with an affirmative defense that may cut off liability or damages. The Court's rulings in these cases have helped to galvanize what already was a cottage industry of lawyers and human resources consultants performing sexual harassment training, revising sexual harassment policies, etc. There is no doubt that employers are well advised to undertake such efforts.

But with all the attention focused on sexual harassment, other forms of potential harassment liability have received far less attention. While some employers now recognize that the prohibition on sexual harassment extends to harassment based on race, color, religion, national origin, and even to age and disability (which are covered by statutes other than Title VII), few employers comprehend that, as the 6th Circuit recently explained, "[a]ny unequal treatment of an employee that would not occur but for the employee's gender [or other protected characteristic] may, if sufficiently severe or pervasive..., constitute a hostile en-

vironment in violation of Title VII." *Williams v. General Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999).

That is to say, discriminatory harassment need not be explicitly linked to sex, gender, race, or other protected characteristics; rather, it can be simply bad conduct that is alleged to be motivated by some protected characteristic. While the plaintiff may face problems of proof on the issue of whether the harassing conduct was motivated by a discriminatory animus or whether it was sufficiently severe or pervasive, a lawsuit can, of course, exact an enormous price before those issues are decided; and if the issues survive summary judgment and are to be decided by a jury, the "equal opportunity harassment" defense may be particularly unpalatable.

In an important 1998 U.S. Supreme Court decision on sexual harassment, Justice Scalia, writing for a unanimous court, addressed the concern that Title VII was being transformed "into a general civility code for the American workplace."

In the U. S. District Court for the District of Oregon, a judge ruled in an unpublished 1997 decision that two female plaintiffs stated a viable hostile work environment claim under Title VII based on their claims that their male manager repeatedly yelled at them, waved his arms in a threatening manner, and pounded his fists on the table in apparent agitation over their failure to fill out purchase orders correctly. *Vantulden v. Tactica Corp.*, (No. 96-1647-MA). The court in that case ruled that to assert viable claims of gender harassment the plaintiffs had to show "(1) that they were subjected to abusive physical or verbal conduct because of their gender; (2) that other similarly situated male employees were not so treated; (3) that the conduct was unwelcome; and (4) that the conduct was sufficiently severe or pervasive so as to alter the conditions of employment." The result in that case was a lengthy jury trial in which the employer, a struggling new high-technology company, ultimately prevailed on the harassment claims, but incurred an enormous cost and distraction that ultimately contributed to the company's demise.

Some courts have recognized that a gender harassment claim that involves no overt sexual harassment calls for a "more fact intensive analysis ... to determine if the conduct was motivated by gender." *Spain v. Gallegos*, 26 F.3d 439, 447 (3rd Cir. 1994). It is on the requirement of demonstrating discriminatory motive that many of the meritless cases ultimately founder. See, e.g., *Rand v. Windall*, 1996 WL 183043 (N.D. Cal. 1996) (dismissing plaintiff's hostile work environment complaint which alleged "little more than [a description of] the stresses of being in a managerial position and her general perception that it was because of sex"). However, this search for gender animus or other impermissible animus on the part of the alleged harasser is fraught with possibilities for abuse. For example, in the unpublished case from the District of Oregon noted above, the plaintiffs sought discovery concerning whether the alleged harasser had ever attended any adult entertainment shows while on business trips, and whether he had ever hit a woman, on the theory that such evidence could show a general animus against women. While the court reined in these efforts somewhat and sought to keep the inquiries limited to the workplace, the possibilities for this kind of intrusive inquiry into legally impermissible motivations has troubling ramifications.

Another challenge facing employers under this increasingly expansive application of harassment law is recognizing when the company may be "on notice" that discriminatory harassment is occurring and that the company should be taking action. Two 9th Circuit decisions issued last summer — one involving obviously objectionable sexual conduct, and the other involving more routine unpleasant interactions — help illustrate the point that it is sometimes the less obvious form of discriminatory harassment that goes unattended and therefore leads to liability. In *Brooks v. City of San Mateo*, 2000 WL 1568680 (9th Cir. 2000), the plaintiff, a 911 operator, alleged that her co-worker forcibly touched her stomach and subsequently placed his hand inside her shirt and fondled her breasts while she was handling a call. Following the plaintiff's complaint to her employer, the employer swiftly responded

with an investigation and termination of the employee (who later served jail time for the sexual assault). Notwithstanding the clearly reprehensible sexual workplace conduct, the 9th Circuit upheld the trial court's grant of summary judgment for the employer on the plaintiff's sexual harassment claim, finding that the conduct was not sufficiently severe or pervasive to alter the conditions of employment.

In *Fielder v. UAL Corp.*, No. 98-35511, 2000 WL 914140 (9th Cir. July 10, 2000), a decision handed down the very next month, the 9th Circuit determined that the plaintiff could assert a viable hostile work-environment claim based, in substantial part, on her claim that her coworkers were unfriendly, ostracized her, and failed to provide normal assistance because she had previously complained of sexual harassment. In examining the series of incidents that formed the basis for the plaintiff's claim, the court noted that "[m]ost instances of hostile environments are not capable of facile identification. '[I]nstead, the day-to-day harassment [is] particularly significant, both as a legal and practical matter, in its cumulative effect.'" Id. at 7 (citation omitted; second brackets in original).

Taken together, these two recent cases indicate that employers are well served by responding as seriously to generalized complaints of unfair or abusive treatment as they do to the obvious sexual harassment scenario. Indeed, the differing results in the *Fielder* and *Brooks* cases are almost entirely a function of the employers' differing responses. In *Brooks*, the employer recognized the obvious sexually inappropriate conduct, vigorously responded — and was freed of any liability. In *Fielder*, the employer either failed to recognize the less obvious discriminatory conduct or failed to respond to the conduct, thereby paving the way to further legal exposure.

In an important 1998 U.S. Supreme Court decision on sexual harassment, Justice Scalia, writing for a unanimous court, addressed the concern that Title VII was being transformed "into a general civility code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1000, 140 L. Ed. 2d 201 (1998). Justice Scalia reemphasized that the critical inquiry in a sexual harassment case is whether the conduct occurred "because of sex." He emphasized as well that the objective severity of the conduct is measured in part by reference to the context in which the conduct occurred and concluded, somewhat optimistically: "[C]ommon sense, and appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which [a] reasonable person in plaintiff's position would find severely hostile or abusive." 118 S. Ct. at 1000.

However, in order to avoid finding themselves in the unenviable position of having juries or judges in hostile work-environment cases apply their own versions of common sense to what may, at the time, have seemed like routine outbursts or displays of excess, employers must be assertive in the first instance in dealing with abusive behavior of all kinds from employees, especially from employees in supervisory positions. The alternative may be for the employer to face the kind of schoolyard justice meted out by jurors who may be all too happy to give the workplace jerk his or her comeuppance.

Paul Buchanan is a partner in the Portland, Oregon, office of Stoel Rives. He is chair of the firm's Labor & Employment Group.

Cross-examination Strategies

by Jeff Tolman

Cross-examination is one of the sexiest, most written about aspects of trial practice. Attorneys, young and old alike, pride themselves in being good cross-examiners. The wonderfully entertaining San Francisco lawyer Jim Brosnahan tells the story of an English witness who, after being cross-examined, rides his horse to Scotland and kills himself. "That," Brosnahan says, "is effective cross-examination." Examination of an opponent's expert is a pivotal point in any trial. Trials have become more and more a thermometer of a lawyer's ability to examine her opponent's expert, and prepare her expert for a barrage of pointed questions from opposing counsel.

Watching my opponent cross-examine the treating physician in an injury case recently, I saw again the common themes that appear in the interrogation of experts. Themes I had told my doctor to expect. Themes that, hopefully, would keep her away from the hemlock counter.

1. You could not possibly recall anything about this case

This strategy is primarily used during examination of busy doctors to show that they have so little contact with their patients they could not possibly recall the details of the interaction.

"Doctor, how many patients do you see in an average day?"

"How many appointments did you have on May 3rd when you saw Mr. Blevins?"

"How much actual time, on the average, do you spend with a patient?"

"Do you know how much time you spent in your examination of Mr. Blevins?"

"Was there anything remarkable about Mr. Blevins' examination that would cause you to remember it specifically today?"

"Do you recall what Mr. Blevins was wearing?"

"Doctor, aside from your notes, what do you recall about the seven-minute exam you performed on Mr. Blevins 18 months ago, during a day you saw 23 other patients?"

2. You really know nothing about this kind of medicine

This area of cross-examination dissects the case into minute parts, attempting to show that the doctor is, at best, a willing amateur in this area, not an expert who should be believed.

"Doctor, describe your medical practice."

"What portion of your practice deals with persons injured in car wrecks?"

"Doctor, of the 15 percent of your practice dealing with persons injured in car wrecks, what portion relates to balding 46-year-old males, weighing 155 to 165, blue eyes, born in Wyoming?"

3. Your opinion is based on invalid information

Inquiry in this area attempts to show that the expert is basing her entire testimony on second-hand information — that her opinion is only as good as the unsubstan-

tiated, uninvestigated, taken-on-its-face data from someone else.

"Doctor, you were not in the ER when Mr. Blevins came in, were you?"

"You did not see Mr. Blevins, or hear his complaints?"

"You did not examine Mr. Blevins in the ER, did you?"

"You have no first-hand knowledge of what Mr. Blevins told the admitting nurse, do you?"

"You cannot know how accurately the ER notes actually reflect what was said by Mr. Blevins, can you?"

"Doctor, what independent investigation have you done to confirm the information in the ER notes?"

"Doctor, your testimony is only as good as the information you received, isn't it?"

"And, Doctor, you have no idea how accurate that information is, do you?"

4. Your opinion is based on insufficient information

Good defense attorneys often go into the information a doctor would have in a perfect world, as if the injured person should have had an exam immediately prior to the drunk driver smashing his car. This attempts to show that the doctor is opining based on incomplete information, therefore her testimony should be discounted.

"Doctor, have you reviewed the plaintiff's birth records to determine if Mr. Blevins had a predisposition to back and neck problems?"

"Doctor, it would be helpful, would it not, to have reviewed any prior x-rays of Mr. Blevins before making any opinion?"

"Doctor, have you acquired, before forming the opinion you give today, any medical reports on the plaintiff prior to this collision?"

"Do you know, aside from what Mr. Blevins told you, whether he has had prior, similar complaints?"

5. Is it your testimony that ...?

This watch-what-you-say, the-perjury-police-are-nearby approach can work on a timid witness. I have seen it tried to mischaracterize the testimony.

"Doctor, is it your testimony that Mr. Blevins is a lying hypochondriac who is actually *better off* as a result of the collision?"

Advocates also use this carve-it-in-stone method to draw distinctions between what the records reflect and what the physician would expect.

"Doctor, is it your testimony that Mr. Blevins' recovery was faster than you would have anticipated from the complaints he had in the ER?"

"Doctor, is it your testimony that a person with Mr. Blevins' injuries would normally have been screaming much louder from the pain than the records reflect?"

Usually, though, the restatement is simply to establish the doctor's testimony for the jury, and for their expert to respond to.

"Doctor, is it your testimony that there are no objective findings to support Mr. Blevins' complaints of neck pain?"

6. Do you have an explanation for ...?

"Do you have any explanation for" questions give the impression that there is no more of a reason for the plaintiff's complaints than for why people fall in love. Just the question "do you have an explanation for?" implies the ending: "I can't think of one." It implies that the idea makes so little sense that the defense attorney seeks *any* explanation.

"Doctor, do you have an explanation

for the plaintiff not telling his dentist, two weeks later, about his collision?"

"Doctor, do you have an explanation for the plaintiff waiting 72 hours — 4,320 minutes — after his release from the ER to see his doctor?"

"Doctor, do you have an explanation for the plaintiff missing his May 3rd appointment with his doctor?"

7. Open-ended questions

With certain expert witnesses, a good defense attorney will throw slow pitch after slow pitch, waiting for the witness's ego to come to the forefront, showing the witness to be an over-educated, egocentric buffoon.

"Doctor, what makes you think Mr. Blevins was injured at all when there are no objective findings?"

Answer: "As a physician I have seen thousands of cases like this — perhaps millions. As an astute student of human nature in general, and my patients specifically, I can ascertain, in seconds, those persons who are injured and not. Mr. Blevins was injured. Through my graduation as Summa Cum Laude at the University of Professional Snobbery, through my Magna Cum Laude graduation from the Medical School at Insurance U., through my residency at Sacred Claim Hospital, and my years of practice in this community, I can tell!"

The Antidote

A lawyer must prepare the expert witness to tell what she knows, and understand the jury will give the testimony whatever weight they feel is appropriate. It is not the expert's job to surmise or guess. In any human contact there will be strong and weak points. Just tell, as the oath says, your understanding of "the truth, the whole truth, and nothing but the truth."

Go over the defense strategies and remind your witness that nothing the expert says will convince the opposing lawyer one iota. The lawyer is there as an advocate, not a juror.

Assure the expert that she can't get it right. There is always a counter-move and defense, no matter what the testimony, no matter who the expert is.

Remind your witness that he knows more about what occurred than the attorney examining him. Don't back down. In my example, certainly having more information or being at the ER would have been nice. The patient's examination findings, though, justify the diagnosis. Stick to it.

Emphasize that the defense usually gains through a free-flowing dialogue. An expert's job, while testifying, is to listen to a question and answer it. The attorney's job is to put the questions and answers together into a story.

Finally, a good witness will not get stuck on the details. Whether the patient coughed three or four times during the exam is a lot less important than the jury finding an expert credible. An expert should just tell what he knows, and admit what he doesn't. There will be a lot of both in any cross-examination.

Cross-examination is also one of the most painful aspects of a trial. There have been times after my expert has been successfully cross-examined that I have been tempted to drive my car to Canada and kill myself. To cause a lawyer such grief, now, *that* is effective cross-examination.

Jeff Tolman, a lawyer and the part-time municipal court judge in Poulsbo, is still a true believer in the profession of law after 22 years of practice.

The WSBA Lawyer Services Department:

Serving Members' Needs

by Zella Ozretich • *Lawyer Services Coordinator*

The WSBA Lawyer Services Department (LaSD) is made up of the Lawyers' Assistance Program (LAP), the Law Office Management Assistance Program (LOMAP), the Professional Responsibility/ Ethics Program (PRP), and the Alternative Dispute Resolution Program (ADR). The LaSD exists to serve WSBA members and the public. Our focus is prevention, and our goal is to make all WSBA members aware of our services, so they will know where to turn when assistance is needed.

The Lawyer Services Department is headed by **Barbara Harper** (M.A., CMHC, CMFT), who is also a LAP therapist. Barbara supervises all LaSD programs and staff, acts as the liaison to several WSBA committees, and works directly with the WSBA executive director and department directors. She also counsels clients and makes presentations on LAP-related topics, both locally and nationally, several times a year.

Barbara Harper is assisted by Lawyer Services Coordinator **Zella Ozretich**, who works closely with Barbara on departmental and committee projects, edits department newsletters, organizes meetings including the LaSD yearly conference, and provides support in the LAP office.

To contact Barbara or Zella, please call 206-727-8268.

The Lawyers' Assistance Program (LAP)

The Lawyers' Assistance Program offers WSBA members confidential assistance with emotional, drug, alcohol, family, health, and other personal problems. Services include assessment, referral, short-term or long-term counseling, group and individual therapy, as well as treatment follow-up and training. The LAP professional staff is qualified to identify, assess, treat and refer lawyers needing assistance. Lawyers who seek LAP services often self-refer by calling our office; others are referred by concerned third parties. Initial consultations are provided at no charge, and fees for continuing therapy are based on a sliding-fee scale. No lawyer is turned away for lack of ability to pay, and all LAP services and contacts are kept *confidential.*

In addition to our professional staff, the extended staff includes LAP-trained peer counselors — lawyers who are available to support their colleagues through difficult times. Other LAP services include a lending library of books and newsletters on topics including mental health, law practice, substance abuse, and other health issues. Materials may be checked out from the LAP office.

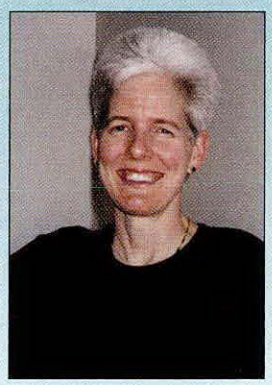
Rebecca Nerison (Ph.D.) is a full-time LAP staff counselor. Rebecca conducts ongoing therapy with lawyers seeking assistance, and provides career consultations and information to telephone and e-mail inquiries. She also offers educational presentations and training to lawyers on mental health topics. To contact Rebecca, please call her at 206-727-8269, or call the general LAP number, 206-727-8268.

Jean Johnson (MSW, CSW) is a part-time LAP staff counselor. Jean provides psychological services to lawyers including assessment and referral, individual therapy, and crisis management. Jean and LAP counselors are involved in regular professional consultations, providing information and referrals, and making contact with peer counselors to assist with particular cases when appropriate. If you would like to make an appointment with Jean, please call the general LAP number, 206-727-8268.

Mike Hoff recently joined the LAP staff as a part-time counselor specializing in alcohol and substance addictions. One of the original founders of the LAP program, Mike enriches the LAP staff by offering the insight he has gained through his years as a lawyer in recovery and as a LAP peer counselor. Mike offers individual counseling, group presentations, information and referrals, and also provides the LAP with a liaison to the recovery community. To contact Mike, please call him at 206-733-5988, or call the general LAP number, 206-727-8268.

Barbara Harper

Zella Ozretich



Rebecca Nerison

Jean Johnson

The Law Office Management Assistance Program (LOMAP)

The Law Office Management Assistance Program (LOMAP) offers lawyers, especially those in solo or small firm practice, a wide range of services. These services include general "prevention maintenance" reviews; consultation on specific problems, office systems or procedures; reference materials for office and practice setup; and referral to consultants and vendors suitable to the attorney's specific practice needs. The program is designed to be low cost, so fees for in-person consultations are based on a sliding fee scale. The LOMAP also offers a lending library of books and articles on law office management topics which can be referenced by phone, in person or through the WSBA Web site (www.wsba.org/lasd/lomap).

Peter Roberts is the LOMAP advisor. Pete consults with members about law office management concerns, makes presentations on law office management-related topics, and acts as liaison to the LOMAP Committee. If you have a question or would like to set up a consultation or presentation with Pete, please call him at 206-727-8237.

The Professional Responsibility/Ethics Program (PRP)

This program provides information and assistance in the following areas: ethics assistance, in which a WSBA lawyer assists callers in resolving ethical dilemmas; Informal Opinions, which are issued by the RPC Committee in response to written ethical inquiries from lawyers; Formal Opinions, which are ethical opinions approved by the Board of Governors; and Rules of Professional Conduct, which are the rules for ethical conduct promulgated by the Washington Supreme Court. There is no charge for the services of the PRP program.

Chris Sutton, professional responsibility counsel, manages the PRP. Chris answers ethics calls and e-mail inquiries by analyzing factual situations and discussing applicable ethics rules. He also acts as the liaison to the RPC and ADR Committees, supervises the ADR Program, and gives presentations and seminars to lawyers on ethical matters. If you would like to speak with Chris about an ethical issue, please call the ethics line at 206-727-8284.

The Alternative Dispute Resolution Program (ADR)

The goal of the ADR program is to provide a relatively quick, efficient and inexpensive alternative to court for parties seeking dispute resolution. The program has two components: fee arbitration, to settle disputes about the fair and reasonable value of legal services through binding arbitration; and mediation, to help resolve all types of disputes between lawyers, and between lawyers and other individuals through a designated mediator. Participation in either program is voluntary, and the fee for participating in an arbitration or mediation is $50 for each involved party.

Talia Clever, the ADR coordinator, administers the ADR program, responds to phone and mail inquiries from members and the public, contacts arbitrators and mediators, organizes meetings, and assists and supports the functions of the ADR Committee, as well as the professional responsibility counsel. For more information on the ADR program or how to become an arbitrator or mediator, please call Talia at 206-733-5923.

All four programs of the Lawyer Services Department work together when necessary to serve members' needs. If you or someone you know could benefit from our services, or if you have any questions, please call us.

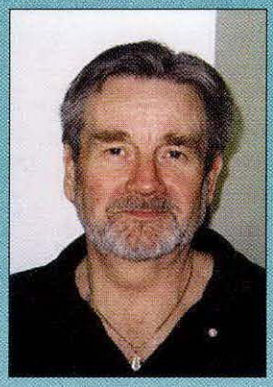
The WSBA Lawyer Services Department offers these four programs:

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: 206-727-8284
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.



Mike Hoff

Peter Roberts

Chris Sutton

Talia Clever

Changing Venues

Honor and Awards

Cynthia Imbrogno

The Board of Trustees of the Legal Foundation of Washington has elected the following officers: president, Honorable **Cynthia Imbrogno**; vice-president, **Katrin E. Frank**; treasurer, **Jeanne J. Dawes**; and secretary, **John R. Kephart**. **Victor H. Lara** and **David A. Leen** were appointed to the board.

The following officers and trustees were elected to serve the Federal Bar Association for the coming year: president, **Michele A. Gammer**; vice-president, **James A. Smith, Jr.**; treasurer, **Scott E. Collins**; secretary, **Steve Y. Koh**; and trustees, **Laura J. Buckland**, **John S. Congalton**, **Sheryl Gordon McCloud**, **James M. Shaker** and **Kevin D. Swan**.

Among lawyers selected by their peers for inclusion in the 2001-2002 edition of *The Best Lawyers in America* are the following who are with the firm of Miller Nash LLP: **Joyce M. Bernheim**, **Dean D. DeChaine**, **Jeffrey C. Thede** and **Robert J. Walerius**.

The following lawyers with Lane Powell Spears Lubersky LLP were selected for inclusion in *The Best Lawyers in America*: **Charles R. Ekberg**, **D. Wayne Gittinger**, **Robert E. Maloney, Jr.**, **Michael E. Morgan**, **James L. Robart** and **Reed P. Schifferman**.

The following lawyers with the Seattle firm of Foster Pepper & Shefelman PLLC were selected for inclusion in *The Best Lawyers in America*: **Bradley J. Berg**, **Jack J. Cullen**, **Robert J. Diercks**, **Dwight J. Drake**, **Gary E. Fluhrer**, **Camden M. Hall**, **Willard Hatch**, **Dillon E. Jackson**, **Richard E. Keefe**, **Patrick F. Kennedy**, **Judith M. Runstad** and **Lee R. Voorhees**.

The **Northwest Justice Project** has received an award of $292,000 pursuant to the Violence Against Women Act to implement a new project that will increase free legal services for immigrant women in King County. The project will have two lawyers representing low-income and limited English-speaking, domestic-violence victims.

Movers and Shakers

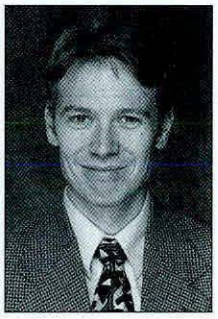
The **Honorable Richard P. Guy** has joined the Seattle office of JAMS, following his retirement from the Washington Supreme Court. He will be one of 200 neutrals participating in arbitration and mediation.

The Washington State Attorney General's Office has appointed the following assistant attorneys general: **Mark Anderson**, **Sarah Bendersky**, **Jim Brusselback**, **Ted Callow**, **Allison Croft**, **Rachael DelVillar**, **Amy Estes**, **Rusty Fallis**, **AnnaLisa Gellerman**, **Donna Hamilton**, **Bourtai Hargrove**, **Beth Holmes**, **Lisa Hornfeck**, **Nels Johnson**, **Sam Jordan**, **Damian King**, **John Level**, **Andrea LeWinter**, **Robert Lundgaard**, **Barbara Markham**, **Margaret McLean**, **Mona McPhee**, **Jean Meyn**, **Shelley Mortinson**, **John Nicholson**, **Kenneth Orcutt**, **Joe Panesko**, **Lisa Petersen**, **Carole Ressler**, **ElShon Richmond**, **Happy Rons**, **Alexandra Smith**, **Christopher Swanson**, **Michael Tribble**, **Bruce Turcott**, **Steve Vinyard**, **Judith Warner**, **Josh Whited**, **Sonia Wolfman**, **Melissa Wood** and **Mark Yamashita**.

Minaksi Bhatt

Paul V. McCarthy

Erik D. Price



Daniel F. Johnson

Richard A. Staeheli has become of counsel with the law firm of Paine, Hamblen, Coffin, Brooke & Miller LLP in Spokane. His practice emphasizes estate planning and IRS, death and gift tax administration. **Christina B. Edmundson** has joined the firm as an associate focusing on estate planning and trust and probate administration. **J. Michael Keyes** has joined the firm as an associate with an emphasis on intellectual property. **Sok-Khieng Lim** joins the firm as an associate. Her practice emphasizes commercial and complex litigation. **Andrew J. Mitchell** joins the firm as an associate with

IN MEMORIAM

John Hume Chapman, a member of the WSBA for 40 years, died October 24, 2000 at the age of 67. A graduate of Harvard Law School, Mr. Chapman practiced business and commercial law. For over 20 years, he was a board member and supporter of the Northwest Center for the Retarded.

Retired Walla Walla County Superior Court Judge **James B. Mitchell** died October 27, 2000 at the age of 71. Former co-workers remember him fondly as a man who loved a good joke. Judge Mitchell was in private practice from 1960 to 1976. During that time, he also served as the Walla Walla city attorney and a U.S. court commissioner. He was elected to the Walla Walla County Superior Court in 1976, and retired from the bench in 1989.

Theodore Francis (Ted) Zelasko, 75, died of a heart attack on November 2, 2000. A graduate of the University of Washington School of Law, Mr. Zelasko, the son of an Aberdeen lawyer, practiced law in Aberdeen for 42 years. He was an active member of the Grays Harbor County Bar Association, Elks Club, VFW, Knights of Columbus and Lions Club. For 18 years he served on the board of directors of the Grays Harbor Housing Authority. He also served on the board of trustees for the Aberdeen-based Anchor Savings Bank.

an emphasis in commercial litigation, as well as environmental, natural resources, Indian and water law. **Darrin L. Murphey** (member of the Idaho State Bar) has also joined the firm as an associate. His practice emphasis is in commercial transactions, real estate and business law.

Tad H. Shimazu

Holly Benton

Gabe Galanda

Ryan Moore

Khanh Tran

Michael J. Thorner

Minaksi Bhatt and **Paul V. McCarthy** have been elected partners in the Seattle office of Lane Powell Spears Lubersky LLP. Ms. Bhatt focuses on intellectual property and antitrust litigation. Mr. McCarthy concentrates on real estate, commercial transactions and banking law. **Erik D. Price** has joined the firm's Olympia office as an associate. He focuses on civil litigation, administrative and environmental law.

John S. Cullen, **Aaron Dean** and **Petrea Knudsen Reilly** have joined the Seattle office of Bullivant Houser Bailey PC. As a member of the business practice group, Mr. Cullen focuses on business transactions, taxation issues and intellectual property issues. An associate, Mr. Dean is a member of the insurance practice group. Ms. Reilly is also a member of the firm's insurance practice group and concentrates on litigation.

Michael J. Crisera, **Daniel F. Johnson**, **Robin G. McPherson**, **Maureen Mitchell** and **Jamie Walker** have joined Short Cressman & Burgess as associates. Mr. Crisera concentrates on employment law and general litigation. Mr. Johnson focuses on employment, civil rights and consumer protection law, providing employment law, litigation and counseling services. Ms. McPherson practices general litigation and environmental law. Ms. Mitchell focuses on employment, environmental and insurance law, as well as general litigation. Ms. Walker's practice emphasizes litigation, construction law and real estate. She is a member of the California Bar.

J. Bradley Buckhalter, **Stone Grissom**, **Jason Schauer** and **Timothy Scott** have joined the Tacoma firm of Gordon Thomas Honeywell as associates.

Tad H. Shimazu has joined Williams, Kastner & Gibbs PLLC as of counsel. His practice emphasizes environmental law and litigation. **Holly Benton**, **Gabe Galanda**, **Ryan Moore** and **Khanh Tran** have joined the firm as associates. Ms. Benton focuses on employment law, family law and general litigation. Mr. Galanda concentrates on general civil litigation; labor, employment, and Indian law. Mr. Moore's practice includes appeals, municipal law, commercial litigation, and real estate and land use. Mr. Tran focuses on commercial and civil litigation.

Charmaine Clark has joined the litigation group at the Seattle firm of Skellenger Bender. **Peter Offenbecher** has also joined the firm, focusing on commercial litigation, criminal defense and disciplinary cases.

Michael J. Thorner has joined the Yakima firm of Thorner, Kennedy & Gano PS as an associate.

Jill C. Yen has joined the Seattle office of Karr Tuttle Campbell as an associate in the business and finance department's corporate finance practice group.

Foster Pepper & Shefelman PLLC has added **Diana L. Dietrich**, **Laurie D. Heinz**, **Hunington Sachs**, **Nancy V. Stephens** and **Michelle M. Carmody** to the firm's Seattle office. Ms. Dietrich, a member, concentrates on antitrust and trade regulations. Ms. Heinz joined the firm as of counsel, and focuses on the commercialization of developing technologies and the licensing of patent rights, trade secrets, copyrights and trade regulations. Mr. Sachs joined the firm as of counsel, focusing on emerging growth companies, and corporate, securities, intellectual property and entertainment law. Ms. Stephens, who is of counsel, concentrates on trademark matters. Ms. Carmody focuses on creditors' rights and bankruptcy. She joined the firm as an associate.

A special counsel and three new associates have joined the Seattle office of Heller Ehrman White & McAuliffe LLP. **Anne R. Voegtlen** joined the firm as special counsel in the business practice group. **Gillian R. Apfel**, **Matthew A. Carvalho** and **Michael Dion** are associates in the litigation department.

Washington Rule of Professional Conduct 1.8(e)(1)

Should Be Amended to Permit Repayment of Litigation Costs Advanced by an Attorney to Be Contingent upon Recovery

by Mark Johnson

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

Washington Rule of Professional Conduct 1.8, denominated Conflict of Interest; Prohibited Transactions; Current Client, provides that a lawyer:

> (e) Shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to his or her client, except that:
> (1) A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, *provided the client remains ultimately liable for such expenses* ... (emphasis added).[1]

As required, our firm's contingent fee contract contains a provision advising clients that they must remain ultimately responsible for repayment of costs. See *Walthew, Warner, Keefe, Arron, Costello & Thompson v. State Dept. of Revenue*, 103 Wn.2d 183, 691 P.2d 559 (1984). In almost every circumstance in which I discuss the terms of our fee agreement with a new client, the client has only one question regarding the contract — a question that pertains to their exposure to costs. I advise my clients that Washington law requires that they remain ultimately responsible for payment of litigation expenses. However, I also tell them that I have never pursued a client for costs, and that I have no intention of pursuing them for costs if the case does not result in a recovery, although under the existing ethical rules I must reserve the right to do so.

State	Allows "repayment contingent on the outcome of the matter"
AK	YES
AL	YES
AR	YES
AZ	**NO**
CA	YES
CO*	**NO**
*The following language is added: A lawyer may forego reimbursement of some or all of the expenses of litigation if it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship.	
CT	YES
DC	**NO**
DE	YES
FL	YES
GA	YES
HI	YES
IA	**NO**
ID	YES
IL	YES
IN	YES
KS	YES
KY	YES
LA	YES
MA	YES
MD	YES
ME*	YES
*The RPC does not specify, but Ethical Opinion 1.53 approves.	
MI	**NO**
MN	YES
MO	YES
MS	YES
MT	YES
NC	**NO**
ND	YES
NE	**NO**
NH	YES
NJ	YES
NM	**NO**
NV	YES
NY	**NO**
OH	**NO**
OK	YES
OR*	**NO**
*Includes the following language: ultimately liable for such expenses to the extent of the client's ability to pay.	
PA	YES
RI	YES
SC	YES
SD	**NO**
TN*	**NO**
*Proposed rule change changes it to YES. Comment period ends 4/30/01.	
TX	YES
UT	YES
VA	**NO**
VT	YES
WA	**NO**
WS	YES
WV	YES
WY	YES

The rule is intended to prevent a conflict of interest by barring an attorney from acquiring a proprietary interest in a client's cause of action. See RPC 1.8(a). Instead, the rule creates a conflict between the contingent fee lawyer's obligation to adhere to the Rules of Professional Conduct and the lawyer's consideration of, and empathy for, the client's circumstances, a conflict that is unwarranted given the realities of modern practice, in which few seriously injured contingent fee clients have a realistic prospect of supporting the litigation.

In 1983 the American Bar Association replaced the Model Code with newer modern rules of professional conduct. Taking into account modern litigation practices, Model Rule 1.8 (e)(1) was amended to eliminate the prior version of the rule's requirement that the client remain ultimately liable for litigation expenses; it embraced the reality of the modern practice of law as follows:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

Washington did not adopt the ABA's 1983 version of this rule, but instead returned to prior rule, fearing that the ABA's approach would give an unfair advantage to those lawyers who could afford to advance costs and expenses, and that a lawyer who advances such costs might incur Washington excise tax liability on the advanced amounts.[2]

Set forth at left is a survey of the rule in the 50 states and the District of Columbia with regard to whether the jurisdiction permits contingent repayment of litigation costs.

Washington, therefore, is one of 14 states, with the District of Columbia making a 15th jurisdiction, which has accepted the current Model Rule 1.8(e)(1), and which prohibits contingent repayment of litigation costs. Oregon tempers its provision by requiring a client to repay expenses only "to the extent of the client's ability to pay." Similarly, Colorado adds language prescribing: "A lawyer may forego reimbursement of some or all of the expenses of litigation if it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship." Tennessee has also recently proposed changes which will permit the contingent repayment of litigation costs.

The reality is that contingent fee lawyers are required by their clients' circumstances to advance costs and to accept the risks of non-repayment of those costs in order to give the less advantaged of our society equal access to the courthouse.

While Washington's version of the RPC 1.8(e)(1) requires that the client remain ultimately liable for all litigation costs advanced by a law firm, Washington and a number of other jurisdictions that adhere to the "client responsible" rule still hold the attorney liable for advancements made to finance litigation unless the attorney *expressly* disclaims responsibility. In *Copp v. Breskin*, 56 Wash. App. 229, 782 P.2d 1104 (1989), a law firm that retained an expert witness on behalf of its client was found to be liable for the expert's fee after the client refused to pay the bill. The expert witness established that he relied on a local custom where experts look to the attorney or law firm for payment of their fees. In agreeing with the witness's position, the *Copp* court stated that "[t]he statement that litigation costs were being paid and were to be paid by the client [as enumerated in Washington's RPC 1.8(e)(1)] does not address the situation when the client is unwilling or unable to pay ... [and] [p]utting the burden on the attorney [to make an express disclaimer] promotes public trust and confidence in the legal profession." Id. at 234.

The court continued: "The service provider reasonably expects that the attorney will be responsible, as surety or guarantor of the client's performance, RPC 1.8(e), and any contrary expectation of the attorney is unreasonable, if not fraudulent." Id. at 233-34. See also *Sommer v. French*, 684 N.E.2d 739 (Ohio 1996) (attorney bears burden of clarifying his intent regarding payment of service providers in furtherance of litigation); *Urban Court Reporting, Inc. v. David*, 158 A.D.2d 401 (N.Y. A.D. 1 Dept. 1990) (attorney held personally liable unless he expressly disclaims such responsibility); *Monick v. Melnicoff*, 144 A.2d 381 (D.C.App. 1958) (holding the same).

Washington's RPC 1.8 (e)(1) should be amended to permit the repayment of litigation costs contingent upon a recovery. The RPCs should reflect the reality of the practice. The reality is that contingent fee lawyers are required by their clients' circumstances to advance costs and to accept the risks of non-repayment of those costs in order to give the less advantaged of our society equal access to the courthouse. Also, the reality is that if the litigation is not successful, the clients will not be able to pay to provide care for a child, parent, spouse or themselves, much less repay litigation costs that can total hundreds of thousands of dollars.

While simultaneously advising clients that they are responsible for litigation costs, and assuring them that we have no intention of pursuing them for the costs, the rule creates an atmosphere of dishonesty, an unnecessary ethical tension between an attorney's obligation to adhere to the RPCs and his consideration of his clients' interests. This is not supportive of the modern realities of the honorable practice of representing the disadvantaged in the context of a merit-based compensation system.

Mark Johnson practices in Seattle with the firm of Johnson Flora PLLC and represents plaintiffs in medical and legal malpractice cases. *Mr. Johnson extends his appreciation to Anna Johansson, a third-year law student at the University of Washington, for her assistance in authoring this article, and to Barrie Althoff for his constructive editing.*

NOTES

1 Washington's Rules of Professional Conduct became effective Sept. 1, 1985.

2 *See* Barrie Althoff, "Gifts and Loans to or from Clients," *Washington State Bar News*, December 1998, p. 42 at 46 for a discussion of Washington's adoption of this rule.

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 206-733-5926, leaving the case name and your address.

Suspended

Bruce Brunton (WSBA No. 1866, admitted 1965), of Bainbridge Island, has been suspended for five months, censured, and ordered to pay restitution following a stipulation approved by the Supreme Court on May 5, 2000. The discipline is based upon his entering a business transaction and conflict of interest with a client, and failure to adequately communicate with another client.

Matter 1: Mr. Brunton and his wife assisted Mrs. H, a personal friend, for several years. Mr. Brunton also assisted Mrs. H with legal matters. In the 1980s, Mr. Brunton drafted Mrs. H's will. In 1984, she requested that Mr. Brunton act as executor of her estate, and that he draft a Durable Power of Attorney naming himself as her attorney-in-fact if she became disabled. Mr. Brunton drafted these documents and Mrs. H executed them.

In 1989, Mr. Brunton referred Mrs. H to another lawyer to change her will. Although Mr. Brunton shared office space with the other lawyer, they were not associated. The other lawyer discussed with Mr. Brunton potential conflicts that could exist because Mr. Brunton drafted Mrs. H's earlier will and was named as executor. Additionally, the client now named Mr. Brunton as a residual beneficiary to one-third of her estate.

In June 1991, Mrs. H asked Mr. Brunton to draft a new will for her. She requested that Mr. Brunton remain a residual beneficiary, but he refused. At Mrs. H's request, Mr. Brunton removed himself as a beneficiary, but included his wife as a residuary beneficiary of the same one-third of Mrs. H's estate. In July 1991, a bank trust officer wrote to Mr. Brunton about the conflicts related to his participation in drafting a will that provided for a gift to his wife.

In 1991, Mr. Brunton again drafted a will for Mrs. H. He referred her to another lawyer to review the will because he was concerned about the conflict created by his wife being a beneficiary. The other lawyer read the will to Ms. H and she agreed that the will reflected her desire to give Mr. Brunton's wife a substantial gift. In June 1993, after meeting with bank employees, Mrs. H requested that Mr. Brunton reduce the size of the general bequests in her will. Mr. Brunton assumed that these changes were made to reflect the size of the anticipated estate, but he did not know the exact size of her estate. Mrs. H died on January 4, 1997. Mr. Brunton administered her estate as the executor and as the attorney for the executor. He charged the $2,728.22 administrative expenses against the general bequests and the residuary pro rata. This provided a benefit of $909.40 to Mrs. Brunton.

In 1990, Mrs. H told Mr. Brunton that she would like to sell her home to him. Mr. Brunton paid for two appraisals. The first stated the property was worth $93,000; the second, $110,000. Mr. Brunton showed both appraisals to Mrs. H. Mr. Brunton then purchased the house for less than the appraised value. The purchase and sale documents indicated that Mr. Brunton was a beneficiary under Mrs. H's will, and that the additional $40,000 that could have been added to the purchase price was agreed to be a reduction in his portion of her estate. Mr. Brunton also paid the closing costs in the sale, even though they are usually paid by the seller. Mr. Brunton fully paid the purchase price in March 1994, including a 10 percent interest rate. There is no indication that Mr. Brunton pressured Mrs. H to sell her house to him. He did not, however, advise her to seek independent advice about the documents he drafted or the conflicts of interest created by selling her house to him.

Matter 2: From 1981 through May 1997, Mr. Brunton leased office space to Mr. R. Mr. Brunton and Mr. and Mrs. R were long-time friends. In the 1980s, Mr. Brunton drafted a will and durable power of attorney for Mr. and Mrs. R. In late 1997 or early 1998, both Mr. and Mrs. R experienced health problems and asked Mr. Brunton to become more involved in their affairs. Mr. R asked Mr. Brunton to add his signature to the Rs' bank account so that Mr. Brunton could pay the Rs' bills. The form prepared by the bank teller made Mr. Brunton a co-signer and indicated the account was joint with right of survivorship. Neither Mr. Brunton nor the Rs realized that Mr. Brunton received an ownership interest in the account.

In April 1988, Mr. Brunton started to pay the Rs' bills and pick up their bank statements. Mr. Brunton provided services to Mr. R regarding medical insurance, home refinancing, medical bills and home caregivers, and met with Mr. R's accountant. Mr. Brunton did not explain his billing rate or procedure to Mr. R. He also did not keep track of all of his time. Between March 30 and July 10, 1998, Mr. Brunton billed Mr. R $4,330.50. None of the bills reflect a breakdown for the amount of time spent or for an hourly rate charged. On June 5, 1998, Mr. Brunton issued two checks to himself from Mr. and Mrs. R's account totaling $1,972, significantly depleting the available funds in the account.

Mrs. R died on June 11, 1998. Mr. Brunton paid himself for his remaining bills after Mrs. R's death. This left $174.59 in the Rs' account. Mr. R's caregiver told Mr. R about the checks Mr. Brunton had written to himself. Mr. R told the caregiver that Mr. Brunton did not have authority to pay himself from the checking account. On July 20, 1998, Mr. Brunton returned all of the money he had disbursed to himself to the Rs' checking account.

Mr. Brunton's conduct violated RPC 1.8(a), prohibiting entering a business transaction with a client, unless the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client, and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client, the client is given a reasonable opportunity to seek the advice of independent counsel, and the client consents; RPC 1.8(c), prohibiting lawyers from preparing an instrument giving the lawyer or a person related to the lawyer, as a parent, child, sibling or spouse, any substantial gift from a client, including a testamentary gift, except where the client

is related to the donee; RPC 1.7(b), prohibiting lawyers from representing a client if the representation will be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after a full disclosure; RPC 1.3, requiring lawyers to diligently represent a client; RPC 1.4, requiring lawyers to keep clients reasonably informed about the status of their matters; and 1.5(b), requiring lawyers to explain fee agreements to new clients.

Jonathan Burke represented the Bar Association. David Swartling represented Mr. Brunton.

Reprimand

Arthur H. Boelter (WSBA No. 9213, admitted 1979), of Seattle, has been ordered to receive a reprimand, pursuant to a stipulation approved by the Disciplinary Board on January 12, 2000. The discipline is based upon his failure to maintain a trust account with interest payable to the Legal Foundation of Washington, depositing funds belonging to the lawyer in the trust account, and failure to maintain complete records of client funds.

In March 1996, the Bar Association auditor issued a report regarding a random audit of Mr. Boelter's trust account. The auditor found that the pooled client trust account was not an interest-bearing account, all client funds were not maintained in the trust account, and that credit card fees and other bank charges against the trust account were not being reimbursed by Mr. Boelter's firm. The firm did not reconcile its client records to the bank statements. After working with the firm and accounting for accumulated charges, $3,570 remained unidentified. The firm maintained two pooled trust accounts, and the two accounts were frequently confused. Money deposited into one account was disbursed from the other. Additionally, the firm deposited earned fees and non-legal business money into the trust accounts.

In 1998, the WSBA auditor re-examined Mr. Boetler's trust account records. The auditor found that Mr. Boelter had opened an interest-bearing trust account in May 1996, but had not paid $1,646, the estimated amount of the lost interest, to the Legal Foundation of Washington. Mr. Boelter also reimbursed his trust account for the credit card charges and other bank fees. The auditor found an accumulation of small errors in the trust account. Mr. Boelter did not reconcile his records to his bank statements on a monthly basis.

Mr. Boelter's conduct violated RPC 1.14(c)(1), requiring lawyers to maintain interest-bearing trust accounts and pay the interest to the Legal Foundation of Washington; RPC 1.14(a), requiring lawyers to deposit client funds into a trust account; and RPC 1.14(b), requiring lawyers to maintain complete records of client funds.

Linda B. Eide represented the Bar Association. Kurt Bulmer represented Mr. Boelter.

Censured

Alan Seago (WSBA No. 22574, admitted 1993), of Tacoma, has received two censures pursuant to a stipulation approved by the Disciplinary Board on January 12, 2000. This discipline is based on Mr. Seago's failure to diligently represent and keep accurate trust account records for one client, and failure to diligently represent another client.

Matter 1: In July 1995, Mr. Seago agreed to represent a client in a dissolution action. The written fee agreement provided for an hourly fee. The client signed a written settlement agreement with the opposing party and wanted to finalize the dissolution as quickly as possible. The settlement agreement included a $24,500 payment to Mr. Seago's client; $10,000 of this amount was to come from a second mortgage on the home. The client's ex-husband was not able to obtain the second mortgage and did not pay the agreed $10,000. Without consulting his client, Mr. Seago agreed to changes in the already signed settlement agreement. The changes included omitting the $24,500 judgment from the judgment summary, although retaining the obligation to pay that amount, and obligating his client to pay the shipping costs for her personal property.

In May 1997, Mr. Seago received a $14,314 check in partial payment of the client's settlement. After depositing this check into his trust account, Mr. Seago disbursed $4,020 to himself for fees and costs and $10,294 to his client. Although Mr. Seago's trust account records were not complete, the parties agreed that he failed to credit the client with $1,005 in payments she made. Mr. Seago did not respond to the client's inquiries regarding this disbursement.

Matter 2: In 1995, Mr. Seago represented a client in a criminal matter. The client pleaded guilty on three felony counts and was sentenced to 67-89 months to be served concurrently with another charge. Another lawyer (lawyer B) represented the client on the other charge.

In January 1997, the client attempted unsuccessfully to contact Mr. Seago because the client believed that his sentence had been calculated incorrectly. The client contacted lawyer B, who then wrote to Mr. Seago indicating that the client's offender score may have been incorrect. Mr. Seago did contact the client, but did not advise the client what action to take, or take any steps himself to change the sentence. Lawyer B then filed a motion requesting that the court correct the sentence. Although lawyer B's motion requested that Mr. Seago appear at the hearing, as he remained attorney of record, he did not appear. The court reduced the client's time served by 13 months.

Mr. Seago's conduct violated RPC 1.4, requiring lawyers to keep clients reasonably informed about the status of their cases; RPC 1.3, requiring lawyers to diligently represent their clients; and RPC 1.14(b), requiring lawyers to maintain complete records of client funds and property, and to promptly pay the funds to the client upon request.

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

Censured

Michael G. Sandona (WSBA No. 8983, admitted 1979), of King County, has received two censures following a stipulation approved by the Disciplinary Board on November 29, 1999. This discipline is based on his failure to diligently represent and adequately communicate with several clients during 1996 and 1997.

In 1996 and 1997, Mr. Sandona was employed by the Brouner and Associates law firm. The following clients retained Brouner and Associates (the firm) to represent them, and Mr. Sandona was assigned to their cases.

Matter 1: In May 1996, a client retained the firm to represent him in a residential placement and child support matter. On October 3, 1996, the court ruled on several issues, including residential placement. Mr. Sandona met with the client prior to filing the orders with the court. The client asked Mr. Sandona to file the orders so that the case could continue. Mr. Sandona did not file the orders and did not return his client's phone calls. In December 1996, the client retained another lawyer.

Matter 2: In April 1996, a client retained the firm to represent him in a dissolution action. Mr. Sandona was assigned to this case in late November 1996. On December 18, 1996, Mr. Sandona failed to appear at a temporary child support hearing; the court lowered the amount of child support the client received. The firm received notice of the hearing the day before the case was transferred to Mr. Sandona. Mr. Sandona indicated that the prior lawyer in his firm did not inform him of the hearing date. Also, the client was not informed of the hearing date. In December 1996 and January 1997, Mr. Sandona failed to answer telephone calls from his client. Also in January 1997, the CASA (court-appointed special advocate) investigator attempted to reach Mr. Sandona by phone to set up a settlement conference. Mr. Sandona did not return the investigator's calls. On January 30, 1997, Mr. Sandona withdrew from the case.

Matter 3: In August 1996, a client retained the firm to represent him in an action for modification of a parenting plan and child support. In October 1996, Mr. Sandona and opposing counsel reached an impasse in choosing a guardian ad litem. Although the client requested that the case move forward quickly, Mr. Sandona waited approximately nine weeks before asking the court to resolve this issue. In January 1997, Mr. Sandona failed to timely confirm a court hearing, causing a several-week delay in the case. In late 1996 and early 1997, the client was not able to reach Mr. Sandona by telephone. On March 10, 1997, Mr. Sandona withdrew from the case.

Matter 4: In November 1996, a client retained the firm to represent her in a dissolution and child residential placement matter. Mr. Sandona failed to timely respond to the dissolution petition. On December 11, 1996, Mr. Sandona failed to appear for a hearing on temporary orders. The court postponed the hearing until the next day. This hearing also involved a request for protection orders. Mr. Sandona submitted only his client's uncorroborated affidavit. Mr. Sandona withdrew from this representation on December 23, 1996.

Matter 5: In January 1997, a client retained the firm to represent her in a dissolution matter. Due to a miscommunication with another lawyer in the firm, Mr. Sandona failed to appear on February 14, 1997 for a hearing on a restraining order, but he did appear on February 21, 1997, the date he believed the hearing was scheduled. When he discovered his mistake, he took no corrective action. Mr. Sandona did not file an answer on behalf of his client until two weeks after a motion for default had been filed. In May 1997, the client retained new counsel.

Matter 6: In April 1997, a client retained the firm to represent him in a dissolution and residential placement case. On May 6, 1997, Mr. Sandona filed a summons and petition for dissolution for the client. On June 11, 1997, Mr. Sandona failed to appear at a hearing for a temporary parenting plan. The client did appear at the hearing and informed the court that he wished to represent himself.

Matter 7: In February 1997, a client retained the firm to represent her in a child support matter. Mr. Sandona filed a petition for child support modification based on a substantial change in childcare expenses. However, when the expected change in childcare expenses did not occur, Mr. Sandona agreed to a dismissal of the action. Mr. Sandona did not provide his client with a copy of the order of dismissal or communicate adequately with her about this order.

Mr. Sandona's conduct violated RPC 1.3, requiring lawyers to diligently represent their clients; and RPC 1.4, requiring lawyers to keep clients reasonably informed about the status of their cases and to promptly comply with reasonable requests for information.

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

Admonished

Terry R. Nealey (WSBA No. 5756, admitted 1974), of Dayton, has been admonished pursuant to a stipulation approved by the Disciplinary Board on July 11, 2000. The admonition is based upon his ex parte contact with a judge regarding an order.

On June 6, 1997, a wife obtained a restraining order prohibiting her ex-husband and his father from entering her property, including her driveway. The order also scheduled a hearing on this matter for June 9, 1997. Mr. Nealey represented the father. On June 9, 1997, prior to the hearing, Mr. Nealey telephoned the judge, requesting that the restraining order be modified to allow access to the driveway, so the father could access his farm. The judge agreed to modify the order and entered a new order that day. Mr. Nealey did not notify the opposing party of his conversation with the judge.

Mr. Nealey's conduct in contacting a judge ex parte when not permitted by law violated RPC 3.5(b).

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

Admonished

Steven A. Crumb (WSBA No. 6396, admitted 1975), of Spokane, has been admonished pursuant to a stipulation approved by the Disciplinary Board on September 17, 1999. The admonition is based upon his failure to diligently represent a client and failure to keep the client reasonably informed about the status of her case.

In 1996, Mr. Crumb represented a client whose employment had been terminated with five weeks remaining on her contract. The client filed an EEOC complaint, because she believed her employment had been terminated because of a perceived disability. The client discussed the EEOC proceedings with Mr. Crumb, and believed that he agreed to represent her in that proceeding. Mr. Crumb be-

lieved that he agreed only to monitor the EEOC proceedings. Mr. Crumb did not enter a fee agreement with the client and she did not pay any fees. Mr. Crumb wrote a letter to the EEOC investigator indicating that he had been retained to investigate the client's termination from her employment.

Between May 1996 and August 1998, the EEOC investigator and the client attempted to contact Mr. Crumb by letter and telephone. The client spoke with Mr. Crumb once during this period and learned only that her case was pending. In August 1998, the EEOC dismissed the client's claim. Mr. Crumb wrote the client a letter advising her of her right to file a lawsuit and indicating that his firm was not interested in representing her in this suit.

Mr. Crumb's conduct violated RPC 1.3, requiring lawyers to diligently represent their clients; and RPC 1.4, requiring lawyers to keep their clients reasonably informed of the status of their cases and promptly comply with reasonable requests for information.

Jeffrey Julius represented the Bar Association. Mr. Crumb represented himself.

Admonished

Richard K. Clyne (WSBA No. 21556, admitted 1993), of Seattle, has been admonished pursuant to an order of a review committee of the Disciplinary Board. The admonition is based upon his failure to diligently represent and communicate with a client, and his failure to protect the client's interest upon withdrawal.

In September 1997, Mr. Clyne agreed to represent the husband in a dissolution action. The client lived out of state and trial was initially set for January 23, 1998. In October 1997, Mr. Clyne wrote opposing counsel that he did not want to continue the trial date and anticipated sending a settlement proposal in the next two weeks. Mr. Clyne did not send a settlement proposal, and the client file did not contain documentation of settlement discussions. The trial date was continued. Mr. Clyne returned interrogatories with blanks and incomplete answers, causing opposing counsel to file a motion to compel answers.

On January 27, 1999, Mr. Clyne filed a notice to withdraw. The client file does not indicate that this pleading was sent to the client. The notice to withdraw indicated that trial was set for May 13, 1999. Mr. Clyne spoke with the client on May 3, indicating that the client's file was in archives. The next day, Mr. Clyne told the client to find another lawyer if he was disputing the dissolution. The client called Mr. Clyne on May 13 to find out how the trial went. Mr. Clyne did not return his call.

Mr. Clyne's conduct violated RPC 1.3, requiring lawyers to diligently represent their clients; RPC 1.4, requiring lawyers to keep clients informed of the status of their cases and to promptly comply with reasonable requests for information; and RPC 1.15, requiring lawyers to protect their clients' interests when withdrawing from representation.

Linda B. Eide represented the Bar Association. Mr. Clyne represented himself.

Admonished

Gerald L. Casey (WSBA No. 2587, admitted 1965), of Port Orchard, has been admonished pursuant to a stipulation approved by the Disciplinary Board on March 10, 2000. The admonition is based upon his removal of disputed client funds from his trust account.

In 1992, Mr. Casey represented a client in the appeal of the denial of two Department of Labor and Industries claims. At the time he pursued the medical claims, Mr. Casey knew the client was receiving unemployment benefits. His fee agreement indicated that he would receive 33 percent of any gross recovery. He successfully obtained L&I medical coverage for the client's injuries and time-loss payments for the same time period that the client collected unemployment benefits.

In March 1993, Mr. Casey received a check from L&I, which notified the Department of Employment Security of the time-loss payments. The client indicated that she asked Mr. Casey to return the time-loss portion of the check to L&I. Mr. Casey negotiated with L&I because time-loss payments are tax-exempt, while unemployment compensation payments are taxable.

In September 1993, Mr. Casey received a copy of a notice from the Employment Security Department that it would garnish the client's wages. Mr. Casey then deposited the check into his trust account, and in October wrote Employment Security agreeing to return the time loss if they would compromise the amount due. In November 1993, Employment Security issued a warrant to the Kitsap County Clerk to enter a judgment against the client for overpayment.

In January 1994, Employment Security issued a notice and order to withhold and deliver to Mr. Casey in the amount of $3,981.52, plus interest. In February 1994, Mr. Casey sent Employment Security $2,534.89, the amount of the judgment less his attorney's fees. Mr. Casey knew that the client did not believe that he was entitled to attorney's fees for this part of the representation. Eventually, the client paid the remaining amount of the Employment Security judgment by a month-ly deduction from her unemployment entitlement.

Mr. Casey's conduct violated RPC 1.14(a)(2), prohibiting lawyers from withdrawing disputed funds from their trust accounts.

Leslie Allen represented the Bar Association. Kurt Bulmer represented Mr. Casey.

Admonished

Matthew J. Bean (WSBA No. 23221, admitted 1993), of Seattle, has been admonished pursuant to a stipulation approved by the Disciplinary Board on September 17, 1999. The admonition is based upon his making a false statement to an administrative law judge.

In 1995, Mr. Bean represented a client in a review of an administrative law judge's (ALJ) decision to deny unemployment benefits. The client's case had been remanded for a second hearing to obtain testimony from a witness who refused to testify at the first hearing. The ALJ subpoenaed the witness to the second hearing and the witness again did not appear. Following the second hearing, the client's benefits were reinstated. During the second hearing, the ALJ asked Mr. Bean if he had contacted the witness, and Mr. Bean told the ALJ that he had not. In fact, Mr. Bean had contacted the witness and

knew that the testimony would not be helpful to his client. At the time the ALJ asked the question, Mr. Bean was concerned about disclosing his client's secrets and confidences in his answer. The client's employer filed a petition to review the ALJ's decision to reinstate benefits, alleging that Mr. Bean had suggested that the witness not attend the hearing. Mr. Bean indicated that he told the witness that the subpoena was only enforceable by a superior court. Mr. Bean agreed that his remarks could have been interpreted as a suggestion that the witness not attend the hearing.

Mr. Bean's conduct violated RPC 3.3(a)(1), prohibiting lawyers from making false statements of material fact or law to a tribunal.

C. Elizabeth Williams represented the Bar Association. Leland Ripley represented Mr. Bean.

NON-DISCIPLINARY NOTICE

Interim Suspension

Jonathan T. Zackey (WSBA No. 21657, admitted 1992), of Seattle, was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered March 20, 2000.

Opportunities for Service

Applications for Appointment to the Legislative Committee

Application deadline: March 15, 2001

The WSBA Legislative Committee is seeking new members. The committee meets once in October and once 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 WSBA. Additionally, the committee maintains liaisons with sections and other committees to coordinate the legislative activities of the WSBA.

Those interested in being considered for an appointment to this committee should submit a letter of interest and résumé to the Office of the Executive Director, WSBA, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330, or e-mail oed@wsba.org.

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 activities
- Reason for interest in Legislative Committee

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

2001 Notice of Board of Governors Election

Petition deadline: March 15, 2001

Four positions — those representing the 2nd, 4th, 7th-Central and 9th Congressional Districts on the WSBA Board of Governors will be up for election this year. These positions are currently held by James Deno (2nd District), Stephen Osborne (4th District), Lindsay Thompson (7th District; the position up for election is 7th-Central*), and Daryl Graves (9th District).

The WSBA Bylaws provide that any member in good standing, except a member previously elected to the Board of Governors, may be nominated for the office of governor from the congressional district in which such member is entitled to vote. Nominations are made by filing a petition signed by at least 20 active members of the WSBA entitled to vote in that district. All active out-of-state WSBA members are now eligible to vote in the district of the address of their agent within 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, WSBA, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330; 206-727-8244, or e-mail oed@wsba.org. 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 carrying biographical statements of 100 words or less from all the nominated candidates. Those statements should accompany the nominating petitions.

*Per a bylaw change, the 7th Congressional District has been subdivided into three sub-districts: East, Central and West. These sub-districts are distinguished by ZIP codes and each has one elected governor. For the coming year, the Central subdistrict (ZIP codes are 98101, 98102, 98103, 98104, 98108, 98109, 98112, 98134, 98168) will elect a new governor.

WSBA Presidential Search

Application deadline: May 15, 2001

The Board of Governors of the WSBA is seeking applicants to serve as president of WSBA for 2002-2003. Pursuant to Article IV(A)(2) of the WSBA Bylaws, the president's primary place of business must be in King County. The member selected to be president will have an opportunity to provide a significant contribution to the legal profession.

Applications will be accepted through May 15, 2001, 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, 2001 will be considered by the Presidential Search Committee and the Board of Governors. Applications and endorsement letters should be sent to the Office of the Executive Director, WSBA, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330.

Confidential interviews with the Presidential Search Committee will be conducted May 16-31, 2001 at the WSBA office. Direct contact with the governors is also encouraged. All candidates will have an interview with the full Board of Governors in open session at the June meeting. Selection of the president will be made by the board following the interviews.

Although prior experience on the Board of Governors may be helpful, there is no requirement that one must have been a member of the Board of Governors or 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 2001 following selection. A one-year term as president-elect will begin at the annual business meeting in September 2001. The president-elect is expected to attend the two-day board meetings held every five to six weeks, as well as numerous subcommittee, section, regional, national and local meetings. At the annual business meeting in September 2002, the president-elect will assume the position as president. During his or her service, the president-elect and president will also be required to meet with members of the Bar, courts, media, 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, e-mail and telephone in connection with these responsibilities.

The duties and responsibilities of the president are set forth in the WSBA Bylaws. For more detailed examples, please see the WSBA Web site (www.wsba.org/bylaws).

Presidential Search Committee: Victoria L. Vreeland, Chair; Dale L. Carlisle; Daryl L. Graves; Lucy Isaki; Jan Eric Peterson; Lindsay T. Thompson.

Volunteer Opportunities

Law Week

Under the leadership of Seattle lawyer Ron Bemis, the WSBA Law Week 2001 Committee is actively recruiting volunteer lawyers and judges to participate in Law Week during the week of May 1. The program is designed to increase students' understanding of the important role the law plays in their lives. Last year, over 12,000 Washington students and nearly 500 lawyers and judges participated in the program. For more information or to volunteer, visit the Law Week Web site at www.lawweek.org, or call Lisa KauzLoric at 206-733-5944.

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. Volunteers will receive extensive training and supervision, and will conduct interviews, write reports, and testify in hearings or trials on behalf of children. Orientation training is scheduled on a regular basis. Volunteers do not have to be lawyers. For more information and an application packet, call 206-296-9320.

YMCA Seeks Volunteers Judges for Mock Trial Competition

The YMCA Mock Trial State Finals are March 24-25, 2001 at the Thurston County Courthouse in Olympia. Volunteer lawyers and judges are needed to score and comment on student case analysis, trial techniques and composure. Shifts are Saturday from 3:30 p.m. to 6:00 p.m., and Sunday from 8:30 a.m. to 11:00 a.m. To volunteer, please call Jason Leggett at 360-534-0155 or e-mail yandg@olywa.net by February 28.

Court Rule Amendments

Please be advised that proposed amendments to the Washington Rules of Court were published for comment in the Supreme Court Advance Sheets dated January 9, 2001 (142 Wn.2d, No. 4). They were also published in the Washington Register and are available online at http://www.courts.wa.gov or www.wsba.org. Comments are due by April 30, 2001, and should be directed to the Clerk of the Supreme Court, PO Box 40929, Olympia, WA 98504-0929. E-mail comments, not to exceed 1,500 words, may be directed to Lisa.Bausch@courts.wa.gov.

PROUD TO BE A LAWYER: Start your day off with an inspirational story or quote! The WSBA Web site (www.wsba.org) features a new "Proud to Be a Lawyer" item each day. Please help us gather stories about your fellow members of the Bar, or share your favorite quote. Contact Allison Parker at allisonp@wsba.org or 206-733-5932.

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 Spring 2001 WSBA *Resources* annual directory?

Resources is used by thousands of lawyers, and the yellow pages are a valuable one-stop resource for all your legal service needs. Find consultants, paralegals, contract attorneys, business appraisers and more.

The cost for a listing, which may include the firm name, individual's name, address, phone, fax, e-mail and Web site, is $35. A toll-free number may be listed in addition to a general number.

To reserve your yellow page listing in the 2001-2002 *Resources* directory, complete this form, enclose a $35 check payable to the WSBA, and mail by February 28 to:

Washington State Bar Association
***Resources* Yellow Pages**
2101 Fourth Ave., Fourth Fl.
Seattle, WA 98121-2330

If you wish to be listed under more than one category, the cost is $35 for each listing. For more information, contact Allison Parker at 206-733-5932 or allisonp@wsba.org.

Firm/Individual's Name _____

Address _____

City/State/Zip _____

Phone/Fax _____

E-mail _____

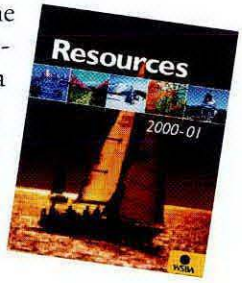
Website _____

Category _____

Resources on Sale for Half Price

The 2000-2001 *Resources* membership directory is now on sale for half-price.

$8.69 — WSBA members in-state
$8.00 — WSBA members out-of-state
$18.46 — non-WSBA members in-state
$17.00 — non-WSBA members out-of-state



To order a copy of *Resources*, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or mail a request to WSBA Order Processing, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330. Payment may be made by check (payable to WSBA), MasterCard or Visa, and must accompany your order.

Goldmark Award Luncheon

The Legal Foundation of Washington will host the 15th Annual Goldmark Award Luncheon on Friday, February 23, 2001 at the Washington State Convention & Trade Center from noon to 1:30 p.m. The Legal Foundation is a not-for-profit organization which has provided over $51,000,000 for legal services to the poor since 1985.

Kenneth A. MacDonald of MacDonald Hoague & Bayless will receive the Goldmark Award for Distinguished Service in recognition of his exceptional leadership and tireless lifelong efforts to expand access to our justice system. The Honorable Robert F. Utter, retired Chief Justice of the Washington State Supreme Court, will give the keynote address.

The Goldmark Award honors the memory of Charles A. Goldmark, Seattle attorney, community leader, and ardent supporter of access to justice. Mr. Goldmark was the Legal Foundation's president at the time of the tragic assault in 1985 that led to his death.

Show your support for access to justice by purchasing an individual ticket to the luncheon or accepting one of the other donation opportunities. Please contact Dee Thierry at 206-626-2536, ext. 10, or e-mail dtheories@legalfoundation.org.

Upcoming BOG Meetings

The Board of Governors meeting schedule follows:

Feb. 9-10	Inn at Gig Harbor, Gig Harbor
April 6-7	LaConner Country Inn, LaConner
May 4-5	Coeur d'Alene Resort, Coeur d'Alene, ID

With the exception of a one-hour executive session the morning of the first day, BOG meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated, but not required. Please contact Lisa KauzLoric at 206-733-5944 or e-mail oed@wsba.org.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in January 2000 is 5.586 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 June 1988-June 1999 appear on page 53 of the June 1999 *Bar News*. Information from January 1987 to date appears at www.wsba.org/barnews/.

Western States Bar Conference

The 53rd Annual Western States Bar Conference will be held on the island of Hawaii, March 7-10, 2001 at the Outrigger Waikoloa Beach. Keynote speaker Toby Brown of the Utah State Bar will speak on "Staying Relevant: the Internet and the Practice of Law." Bar leaders and volunteers from 17 western states and the ABA will gather to discuss how the legal profession might deal with technology challenges in the future. Social activities will include a golf tournament and a traditional Hawaiian luau and sunset cruise. For more information, contact Dana Weatherby or Diane Minnich of the Idaho Bar Association at 208-334-4500 or dminnich@isb.state.id.us. Visit the Idaho Bar Web site at http://www.state.id.us/isb for more information about the conference. CLE credit is anticipated.

Nominations Sought

ABA Seeks Award Nominations

Nominations for the Livingston Hall Juvenile Justice Award are now being accepted by the American Bar Association (ABA). Nominees should be active members of the bar of the highest court in any state, should devote a significant portion of their professional activity to advocacy on behalf of children, and should demonstrate commitment to representing their juvenile clients with the highest degree of skill and professionalism. Nominations must be made on the official form available from the ABA, and are due by March 31, 2001. For more information and nomination forms, e-mail Sadie Rosenthal at RosenthS@staff.abanet.org.

WYLD Seeks Award Nominations

The WYLD is accepting nominations for the Thomas Neville Pro Bono Award, Outstanding Young Lawyer of the Year, and the Professionalism Award. Nominations are also being accepted for Outstanding YLD Affiliate or Organization for recognition of public service and/or member service programs. Nomination letters should include the nominator's name, address, and daytime phone number, and the nominee's résumé or list of accomplishments. Nominations must be received by February 15, 2001, and should be mailed to Sherri L. Jefferson, WYLD President-elect, Stoel Rives, 600 University St., Ste. 3600, Seattle, WA 98101.

Law Office EXPO, Management and Technology Institute

The WSBA and the Association of Legal Administrators Puget Sound Chapter will present the 2001 Law Office EXPO, Management and Technology Institute as part of Super CLE Day on March 2, 2001. Registrants will receive free admission to the Law Office EXPO Exhibit Hall.

The Institute features 19 sessions, a day-long technology track, the opportunity to earn up to 4.5 ethics credits, and more than 50 exhibitors with information about law firm-oriented products and services.

For more information or to request a program brochure, contact the WSBA Service Center at 800-945-WSBA, 206-443-WSBA, or e-mail questions@wsba.org. Information is also available on the WSBA Web site at www.wsba.org/cle/2001/lomi.htm.

WestCoast Hotels Contribute to LAW Fund

WestCoast Hotels, the WSBA and Legal Aid for Washington (LAW) Fund have created a partnership to raise funds for low-income legal services. Through the end of 2001, WestCoast Hotels will make donations to LAW Fund, based on the number of nights that anyone associated with the WSBA stays at any of the 47 Washington WestCoast Hotels. By simply asking for the WSBA rate, guests will receive a reduced room rate, and LAW Fund will receive $5 for each night's stay. Contact WestCoast Hotels at 800-325-4000.

MCLE Changes

The Supreme Court has approved changes to APR Rule 11, effective January 1, 2001, which will streamline Mandatory Continuing Legal Education (MCLE) program CLE reporting. The main changes are that the WSBA will track your credits, and sponsors of CLE activities will report attendance directly to the WSBA.

MCLE Requirements

The MCLE credit requirements will remain the same:

- 45 total credits for the three-year reporting period: 39 general and six (6) ethics.
- A maximum of 15 credits can be from audio/video programs.

Changes in Reporting

- Each sponsor will report your attendance at approved CLE courses to WSBA. It will be your responsibility to sign the attendance roster at every approved CLE activity.
- You will be able to view your CLE attendance record online. To ensure privacy, you will have a confidential password.
- You will receive a report of your attendance records twice a year.
- You will be able to apply online for approval of CLE activities.
- You will be able to view approved CLE courses online, searching by date, title, sponsor or location.
- You will receive a report and affidavit at the end of your reporting period to verify the courses you attended. The signed affidavit must be returned to the WSBA.

Changes in Rules and Regulations

- Pro bono credits – limited approval under specific parameters.
- In-house seminars – relaxed parameters for approval.
- Tracking system for reporting attendance.
- Substance-abuse training – will be approved for ethics credits.
- Mealtime presentations – may now be accredited if a presentation is given during the meal.
- Judging law school competitions – no credit available.

Phasing in the New System

- **Group 1** (reports for 1999, 2000 and 2001 by January 31, 2002) – you must submit attendance for 1999 and 2000. Attendance for 2001 will be reported by the CLE sponsors.
- **Group 2** (reports for years 2000, 2001 and 2002 by January 31, 2003) – you must submit attendance for 2000. Attendance for 2001 and 2002 will be reported by the CLE sponsors.
- **Group 3** (reports for years 2001, 2002 and 2003 by January 31, 2004) – all attendance will be reported by the CLE sponsor.

The full text of the APR 11 regulations may be viewed online at http://www.courts.wa.gov/rules/state/apr/regs.txt.

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For more information,
please contact Jack Young,
Advertising Manager, *Bar News*,
at 206-727-8260 or
jacky@wsba.org.

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.

BANKRUPTCY

14th Annual Northwest Bankruptcy Institute
March 30-31 – Seattle. 10.5 CLE credits, including 1 ethics pending. By Creditor-Debtor Sections of Washington State and Oregon State Bars; 800-452-8260, ext. 413.

BUSINESS

Corporate Governance – Responsibility and Liability of Officers and Directors
February 9 – Seattle. 7 CLE credits, including .5 ethics. By WSBA and National Practice Institute; 800-328-4444.

21st Annual Northwest Securities Institute
February 23-24 – Seattle. 10.25 CLE credits, including 1.25 ethics estimated. By WSBA-CLE and Business Law Section, Oregon State Bar Securities Section, CLE Society of British Columbia, and SEC State-Federal Securities Conference; 800-945-WSBA or 206-443-WSBA.

Cross-Border Venture Transactions
March 9 – Seattle. 7.25 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Negotiation Strategies for Business and Transactional Lawyers *(with Martin E. Latz)* (morning)
March 15 – Seattle. 3 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

CIVIL RIGHTS

Section 1983 Civil Rights Cases in Oregon
March 9 – Portland. 6 CLE credits pending. By Oregon State Bar Association; 503-684-7413.

COMPUTER SKILLS

Computer Camp for Counselors™
February 14 – Seattle (basic – morning; intermediate – afternoon); February 15 – Seattle (advanced – morning; PowerPoint – afternoon). 4 CLE credits per session estimated. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Using the Internet for Legal Research *(with Leigh Webber)*
February 23 – Portland. 6 CLE credits pending. By Oregon State Bar Association; 503-684-7413.

An Introduction to Cyberlawyering: Firm Web sites, Niche Publishing, and other Internet Opportunities for Attorneys
March 2 – Portland. CLE credits TBD. By Phi Delta Phi, Oregon Law Institute, Briefsmart.com, Oregon Law Journal; 503-293-4309.

CRIMINAL LAW

Forensic Criminal Evidence
March 29 – Seattle. 6 CLE credits estimated. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ELDER LAW

Annual Inter-County Guardian Ad Litem Workshop Forum
March 15 – Spokane. CLE credits TBA. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

EMPLOYMENT LAW

Employment Law Briefing
February 24-March 3 – Breckenridge, CO. CLE credits TBD. By National Employment Law Institute; 303-861-5600.

8th Annual Employment Law Institute
March 2 – Seattle. 6.75 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ENVIRONMENTAL LAW

Who'll Stop the Rain? The Science and Law of Stormwater, Wetlands and Groundwater
February 2 – Seattle. 7.25 CLE credits, including .75 ethics. By WSBA-CLE and Environmental and Land Use Law Section; 800-945-WSBA or 206-443-WSBA.

ESTATE PLANNING

Understanding Business Entities in the Estate Planning Arena (morning) plus **Trust & Estate Litigation and Alternatives** (afternoon)
February 15 – Spokane; February 16 – Seattle. 7.5 CLE credits, including up to 1 ethics estimated (full day). By WSBA-CLE and Real Property, Probate & Trust Section; 800-945-WSBA or 206-443-WSBA.

Crunching Numbers in Estate Planning and Probate Cases 8th Annual Legal Assistants' Workshop
February 16 – Portland. 6.5 CLE credits, including .5 ethics pending. By Oregon State Bar Association; 503-684-7413.

Estate Planning for Small to Medium-Sized Estates
March 2 – Seattle. 7.75 CLE credits, including 1 ethics estimated. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

GENERAL PRACTICE

The Lawyer's Guide to Effective Legal Writing
February 13 – Seattle; March 7 – Seattle. 6.75 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Discovery: Where There's Smoke, There's Fire
February 15 – Seattle. 6.25 CLE credits, including .5 ethics. By WSTLA; 206-464-1011.

Police Misconduct Law and Litigation
February 16 – Oakland, CA. CLE credits TBD. By the National Police Accountability Project of the National Lawyers Guild and the Ella Baker Center for Human Rights; 212-614-6432.

National Lawyers Association Educational Conference
February 17 – Orlando, FL. CLE credits TBD. By National Lawyers Association; 800-471-2994.

Time Management
March 1 – Spokane; March 2 – Seattle. 7 CLE credits estimated. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Keys to Practice Development
March 12-14 – Seattle. 18 CLE credits estimated. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

INTELLECTUAL PROPERTY

6th Annual Intellectual Property Institute
March 30 – Seattle. 6 CLE credits estimated. By WSBA-CLE and Intellectual Property Section; 800-945-WSBA or 206-443-WSBA.

LAW PRACTICE MANAGEMENT

Law Office EXPO, Management & Technology Institute
March 2 – Seattle. 6.5 CLE credits, including up to 4.5 ethics pending. By WSBA-CLE, WSBA Law Practice Management & Technology Section, and Association of Legal Administrators Puget Sound Chapter; 800-945-WSBA or 206-443-WSBA.

LITIGATION

Demonstration of a Neck/Back Injury Trial
February 2 – Seattle. 6 CLE credits. By WSTLA; 206-464-1011.

Pretrial Preparation – The Essential Foundation for Success in the Courtroom
February 8 – Tacoma; February 9 – Seattle. 7 CLE credits, including 1.5 ethics. By WSBA-CLE and Washington Young Lawyers Division; 800-945-WSBA or 206-443-WSBA.

8th Annual Litigation Institute
(with Charles Becton and Monroe Freedman)
March 2-3 – Stevenson. 6.5 CLE credits, including 1.5 ethics pending. By Oregon State Bar Association; 503-684-7413.

Litigators Negotiation Strategies
(with Martin E. Latz) (afternoon)
March 15 – Seattle. 3 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Evidence for the Trial Lawyer
(with Professor Faust Rossi)
March 23 – Portland. 6.5 CLE credits, including .5 ethics pending. By Oregon State Bar Association; 503-684-7413.

REAL ESTATE

Drafting Real Estate Documents that Work: Condominiums (morning) and **Commercial Projects** (afternoon)
February 1 – Seattle. 6.25 CLE credits, including .75 ethics (full day). By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Real Estate Financing: The Forms & Formulas for Successful Transactions
March 8 – Spokane; March 9 – Seattle. 7 CLE credits estimated. By WSBA-CLE and Real Property, Probate & Trust Section; 800-945-WSBA or 206-443-WSBA.

TAX LAW

Tax Considerations in Mergers & Acquisitions
March 8-9 – Miami Beach, FL. CLE credits TBD. By University of Miami School of Law; 305-284-6276.

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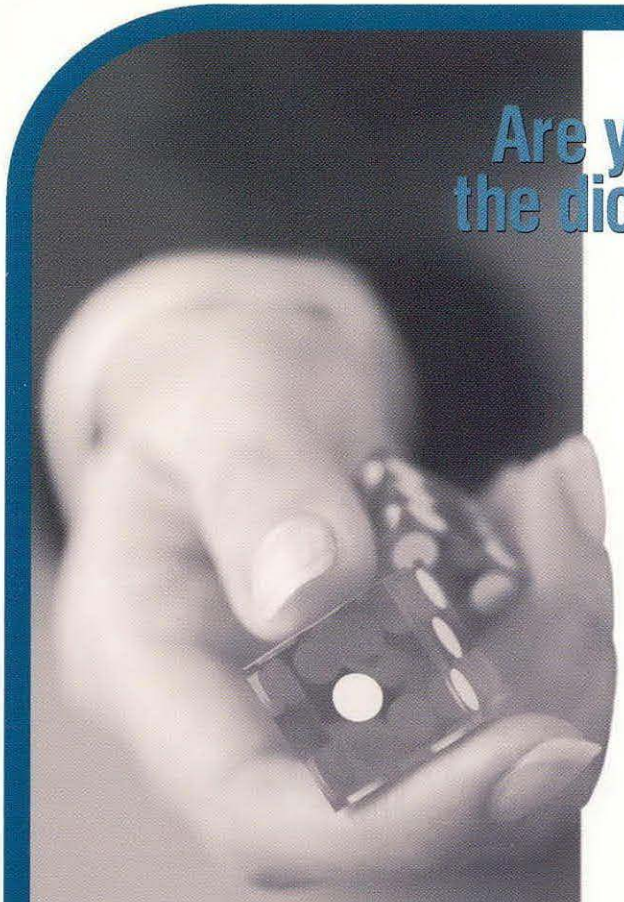

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UNITED STATES
IMMIGRATION NEWS
JANUARY 1, 2001

New U.S. Immigration Law Provides for Reunion of Families

On December 15, 2000, the U.S. Congress passed a new U.S. Immigration Law entitled "Legal Immigration and Family Equity Act of 2000 (LIFE Act)", the Title XI of H. R. 5548, enacted by reference in H. R. 4942 and H. R. 4577, H. Rep. 106-1003, which makes it possible for families to be reunited in United States and pursue their Applications for Immigrant Visas, as well as to seek relief for Adjustment of Status to Permanent Resident/s under Section 245 (i). President Clinton signed/enacted this law on December 21, 2000.

NEW "K" VISA/S FOR SPOUSES OF U.S. CITIZENS AWAITING IMMIGRANT VISA/S

In view of the severe back-logs by INS to process Visa Petitions for family members, the new law has created relief for the spouses of U. S. citizens who are living outside of the United States and waiting for the approval of an Immigrant Visa Petition.

The minor children of the spouses who are seeking to accompany the parent are also provided this new relief.

The new law shall expand the eligibility for a "K" Visa and allows the spouse of a US citizen to enter the United States and obtain Work Authorization while waiting for the Visa Petition to be approved by INS.

Expanding Fiancé(e)'s Temporary "K" Visas

The new law expands the "K" Visa (which presently allows Fiancé(e)'s of U.S. citizens to enter the United States for the purposes of getting married) to be made available to spouses of U.S. citizens and their minor children who are already married and are waiting outside of the United States for the approval of their Forms I-130 Alien Relative Visa Petitions. The minor children of these spouses who accompany the spouse can be included in the Visa Petition. The spouses and minor children of U. S. citizens must meet the following criteria in order to qualify:

1. A Form I-130 Alien Relative Visa Petition must have been previously filed by the U. S. citizen spouse. The new law requires that the U. S. citizen spouse must file the Form I-130 Alien Relative Visa Petition before a "K" Visa can be issued to his or her spouse by the American Consulate overseas. The "K" Visa will allow the spouse and minor children to be admitted into the United States and wait for the approval of Form I-130 Alien Relative Visa Petition.
2. The "K" Visa recipient must be outside of the United States. The new law only allows the "K" Visa to be issued by a U. S. Consular Officer outside of the United States. A spouse who is already in the United States in an unlawful status, shall not be able to "adjust status" to a "K" Visa.
3. The "K" Visa Petition (Form I-130), must be filed in the United States by the U. S. citizen spouse.
4. The spouse and minor accompanying child/children must have a valid non-immigrant "K" Visa to enter into the United States. In those cases where the marriage by an alien spouse to a U. S. citizen spouse occurred outside the United States, the "K" Visa recipient must have a valid non-immigrant "K" Visa issued by the U. S. Consulate in the country where the marriage occurred.

The new law applies to current and future applicants as well. The new "K" Visa status is available both to individuals who have currently pending Forms I-130 Alien Relative Visa Petitions and future applicants, as well as Employment Authorization. The current law provides that "K" Visa holders are permitted to work in the United States and they shall receive their "work permits" stamped into their passport/s by U.S. Immigration Officers upon arrival at the U. S. Ports of Entry.

NEW "V" VISA FOR SPOUSES AND MINOR CHILDREN OF PERMANENT RESIDENTS

In view of the severe and long-waiting backlogs on the availability of Immigrant Visas for families of Permanent Residents, the new U. S. Immigration Law provides a new remedy for the spouses and minor children of Permanent Residents.

As spouses and minor children of Permanent Residents are deemed to be "intending immigrants", there has been no way for these individuals to legally come to the United States, even for a short visit. The new "V" Visa now allows family members and grants them legal status with Work Authorization in the United States.

The new "V" Visa allows the spouses and minor children of Lawful Permanent Residents (the Family 2 classification) who have been waiting for more than three years for an Immigrant Visa to be admitted into the United States and be granted Work Authorization. The spouse or child of the Permanent Resident must meet the following qualifications:

1. A Form I-130 Alien Relative Visa Petition must have been filed with INS by the Permanent Resident spouse on or before the date of the enactment of the new law.
2. The Form I-130 Alien Relative Visa Petition must have been pending with the INS for three (3) years or more, or if the Visa Petition was approved, the spouse or minor child must have been waiting at least three (3) years for their "turn" on the Immigrant Visa Waiting List.

Grounds of Inadmissibility Waived for Adjustment of Status

The new law provides that the spouses and minor children of Permanent Residents who have been in an unauthorized status in the United States will not be prevented from obtaining a "V" Visa and Section 212 (a) (9) (b) shall not apply.

The new law also allows for the spouses and minor children of Permanent Residents who are already in the United States to apply for "Adjustment of Status" to the new "V" Visa Classification even though they may be illegally in the United States and Section 212 (a) (6) (A), (7), and (9) (B) shall not apply.

Accordingly, the reinstatement of Section 245 (i) will make it possible for "V" Visa Holders to adjust their status to Permanent Residents.

SECTION 245 (i) EXTENDED UNTIL APRIL 30, 2001

Under the new immigration law, Section 245(i) has been extended from January 14, 1998 until April 30, 2001.

This section of the law which was "grandfathered" until January 14, 1998 and now extended until April 30, 2001, provides the opportunity for the Adjustment of Status to a Permanent Resident by any alien in the United States for whom an Immigrant Visa Petition (Form I-130, Form I-140 or Form I-360), or Labor Certification is filed before April 30, 2001.

At the same time, any applications which were filed after January 14, 1998 and before April 30, 2001, shall make it possible for the applicant/s to adjust his/her status to a Permanent Resident in the United States, provided that the applicant is physically present in the United States on the date of the enactment of the new law.

The applicants shall be entitled to receive Employment Authorization and process their applications at the U.S. Immigration Service in the location where they reside. It will not be necessary for the applicant/s to travel overseas to apply for an Immigrant Visa at an American Consulate under the new law.

The three-year and ten-year Bars from receiving a Visa shall not apply to applicants who are Adjusting their Status to Permanent Residents in the United States as such Bars apply only for Visa Applicant/s at overseas American Consulates.

Brochures on New Immigration Laws

As you are aware, there is widespread confusion and panic regarding the new immigration law and the April 30, 2001 deadline under Section 245(i) for undocumented aliens.

Background on the Issue: The immigration law of 1996 imposed new penalties for undocumented immigrants who have been in the U.S. without status for 180 days since April 1, 1997. After September 27, 1997 undocumented immigrants who have been in the U.S. since April 1, 1997 are penalized by being barred from re-entering the U.S. for three years. The bar is triggered when the immigrant leaves the U.S. and tries to re-enter the U.S.

Those who remained in the U.S. for more than 12 months are barred from re-entering into the U.S. for 10 years. Congress enacted the extension of a provision of law (Section 245(i)) which allowed undocumented immigrants who are otherwise eligible for an immigrant visa, to go through the adjustment process in the U.S., instead of at a U.S. Consulate in their home country. The extension of Section 245(i) allows undocumented immigrants who are in the process of becoming permanent residents to avoid the three or ten-year bar, because they will not have to leave the United States and re-enter the United States.

The extension of Section 245(i) will expire on April 30, 2001.

The new brochures are available at the ***Law Offices of Dan P. Danilov***, located at Suite 2303, One Union Square, in Seattle, WA 98101-3192 Telephone: 206/624-6868. FAX: 206/624-0812.

SECTION 245(i) ADJUSTMENT OF STATUS AND GROUNDS OF INADMISSIBILITY

Questions and Answers

1. *What are the new bars to admission relating to unlawful presence, and how will they apply to people who marry U.S. citizens?*

A: 1. The law of 1996 know as IIRAIRA has new 3 and 10-year bars to admission for those who have been unlawfully present in the U.S. The bar is triggered by the person's departure from the United States after having been unlawfully present for a certain period of time, and generally applies when the person either files an application for a visa to come back to the U.S., or when the person seeks admission at a U.S. Port of Entry.

2. Those who have a prior period of unlawful presence of more than 180 days but less than 1 year and left on their own before they were put in removal proceedings will be subject to the 3-year bar. The bar is counted 3 years from the date of their departure from the U.S.

3. Those who had a prior period of unlawful presence of 1 year or more will be subject to the 10-year bar. The bar is counted 10 years from the date of departure or removal from the U.S.

4. All illegal aliens, including those who marry U.S. citizens, are subject to the bars of inadmissibility. Most spouses of U.S. citizens, however, will not be affected by the new unlawful presence grounds. This is because many spouses of U.S. citizens, except for those who entered the U.S. unlawfully, can apply for adjustment of status in the U.S., even if they have violated their status. The law has exceptions for them that do not require them to apply for their immigrant visas abroad. Since they don't have to leave, the bar won't apply in most cases,unless they had been unlawfully present in the U.S. on a prior occasion (but after 4/1/97). The law also has an exception that does not require them to apply for adjustment of status under Section 245(i).

5. Other persons besides immediate relatives (spouses, parents and children of U.S. citizens) of U.S. citizens who are eligible for immigrant visas based on an available visa number, but who arrived without inspection or who violated their status can apply for adjustment of status under Section 245(i) by paying a penalty of $1,000. When Section 245(i) sunsets on April 30, 2001 they will be found inadmissible, if they have been unlawfully present in the U.S. for more than 180 days before leaving the U.S.

2. *Are there any waivers for those found inadmissible under the unlawful presence grounds?*

A: 1. Yes,Waivers are available to those who can show that their U.S. citizen or LPR spouse or parent would suffer extreme hardship if they were denied admission to the U.S. These waivers generally apply to those persons who seek to immigrate permanently.

Waivers are also available for those who seek admission to the U.S. on a temporary basis.

The discretion is broad, so there are no specific requirements in the law as there are for those immigrating permanently.

However, the consular officer issuing the visa could, in the exercise of discretion, nevertheless deny the visa because of, for example, prior violations.

2. The law also has exceptions that don't count certain periods of time spent in the U.S. as unlawful. These exceptions cover:

a. All periods of time while the applicant was under 18;

b. All periods of time while the applicant was protected under the benefits granted by the family unity program.

c. All times while a bona fide asylum application was pending, so long as the applicant did not work without authorization; and

d. Certain battered spouses and children who can show there was a substantial connection either between their unlawful entry or their status violation and the abuse.

3. In addition to the exceptions, the law has certain tolling provisions.

Under these tolling provisions, the person's unlawful presence is "tolled" or suspended for up to 120 days. They are:

(1) Those with pending applications to extend their temporary stay; and

(2) Those with pending applications to change from one temporary visa category to another.

The law specified two specific groups in these tolling provisions. In order for the tolling to apply, however, the person must have filed the application on time (i.e. before his or her stay expired) and must not have worked without permission from INS either before the application was filed or while it was pending.

3. *How can an alien apply for a waiver of the unlawful presence grounds of inadmissibility?*

A: 1. Applicants abroad:

a. Generally speaking, when a person is applying for a visa at a U.S. consular post abroad, the waiver application is filed with the consular post considering that visa application. The consular post forwards the waiver application to the overseas INS office in the jurisdiction. INS then notifies the consular post of its decision. If INS approves the waiver application, the consular office can issue the visa if the person is not inadmissible on any other grounds (or has a waiver for those other grounds).

2. Applicants in the U.S.

Generally speaking, when the person is applying for adjustment of status in the U.S., the waiver application is filed with the INS office considering the adjustment of status application, or application is made to an Immigration Judge in immigration court proceedings.

4. *What is Section 245(i) adjustment of status?*

A: 1. Section 245(i) of the Immigration and Nationality Act allows certain persons who are eligible for an immigrant visa but who are unlawfully in the United States to remain and adjust status in the United States upon payment of a $1,000 sur charge rather than return home to apply at the U.S. Consulate.

2. This provision is currently scheduled to terminate on April 30, 2001.

3. If this statutory provision is not extended, INS will process those Section 245(i) applications which were properly filed on or before April 30, 2001.

4. After that date, these individuals must obtain their immigrant visas overseas at the appropriate U.S. Consulate Offices.

5. *Who can apply for Section 245(i) adjustment of status?*

A: 1. Normally, to apply for adjustment of status under Section 245, the person must show that he or she was lawfully admitted or paroled, maintained status while in the United States, and did not work without authorization at any time.

2. Section 245(i) allows those persons who do not meet these requirements, either because they entered unlawfully, worked without permission, or their status expired, to apply for adjustment of status by paying an additional penalty of $1,000.

3. Immediate relatives, however, (spouses, parents and children of U.S. citizens who entered the U.S. lawfully but who have not maintained their status are excepted, which means they are allowed to apply for adjustment of status and remain in the United States, without having to apply under Section 245(i) or pay the penalty of $1,000.

6. *How does INS feel about extending Section 245(i) – Has the agency made its position on this issue known to Congress?*

A: INS and the Administration would like to see the Section 245(i) provision extended and has urged Congress to do so.

7. *What happens if Section 245(i) is not extended?*

A: 1. If this statutory provision is not extended, INS will process only those Section 245(i) applications which were properly filed before April 30, 2001.

2. Any such applicants who file after that date must obtain their immigrant visas overseas at the appropriate U.S.Consulate office. When they apply for the visa at the Consular post, they will be subject to the new grounds of inadmissibility relating to unlawful presence, if they were unlawfully in the U.S. for more than 180 days or 12 months.

3. Qualified applicants must apply by April 30, 2001 in order to be considered under the current Section 245(i) provision. INS encourages eligible applicants to apply as early as possible in order to avoid long lines which may form at INS District Offices as April 30, 2001 approaches.

8. *If Section 245(i) sunsets, does INS have any discretion to continue accepting any further adjustment of status applications?*

A: No. If Section 245(i) is not extended, the law will not permit INS to accept any adjustment of status applications from applicants who entered unlawfully, worked without authorization, or who have otherwise violated their status.

2. Moreover, the law does not give INS any independent discretion to accept such adjustment of status applications if Section 245(i) sunsets.

9. *Are there alternatives to Section 245(i) for an unlawfully present alien filing for adjustment of status?*

A: The only alternative is departure from the United States and satisfaction of the required period of absence, then reentering with a immigrant visa issued by a U.S. consular officer.

10. *Should aliens who may be subject to the bars to admission marry a United States Citizen (USC) and apply for Section 245(i) adjustment of status before it expires to preserve their ability to adjust status in the United States?*

A: 1. As a spouse of a USC, except for those who entered without inspection, an alien can apply for adjustment of status in the United States at any time on the basis of a bona fide marriage.

2. However, when an alien enters into a marriage for the purpose of procuring immigration benefits, the alien has committed marriage fraud. In committing marriage fraud, the alien is perpetually barred from lawful permanent residence, as well as from obtaining a non-immigrant visa.

3. In addition, in committing marriage fraud, both the alien and USC spouse are liable to criminal prosecution under a variety of federal statutes. These offenses include:

a. Knowingly making any false statement under oath with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations (18 U.S.C 1546);

b. Perjury (18 U.S.C. 1621);

c. False statements to a federal agency (18 U.S.C. 1001); and

d. Conspiracy to commit an offense against a federal agency (18 U.S.C. 371).

11. *How many people have applied for Section 245(i) adjustment in the past? Is there an estimate as to how many people are currently eligible to apply for Section 245(i) adjustment of status before it expires to preserve their ability to adjust status in the United States?*

A: 1. Approximately 345,000 individuals applied for FY95 & FY 96.

2. There are no estimates of how many individuals are eligible to apply for adjustment of status under Section 245(i) now.

12. *Section 245(i) generated revenues for the INS. How much has been generated, and what will INS do if the provision is not extended and these revenues are lost?*

A: 1. Section 245(i) revenue for FY 1996 = $147.5 million.

2. Projected Section 245(i) revenue for FY 1997 = $214.5 million ($85.4 million for the Examinations Fee account; $129.1 million for the Detention account.). (Per Debra Rodgers, ext. 67711, Budget Office.)

13. *What will INS do without this revenue?*

A: This will affect the detention program. The law requires that most of the revenues collected under Section 245(i) be allocated to the Immigration Detention Account. It is anticipated the revenues will help fund 1,136 detention beds.

14. *Because Canadian citizens are not required to have a travel document to enter the United States, how will they be subject to the ground of inadmissibility?*

A: 1. Canadian citizens do not need travel documents to enter the United States. All they need is to establish that they are Canadian citizens. Unless admitted under a different classification, Canadian citizens are considered visitors for pleasure and allowed a six-month length of stay.

2. Any time beyond that six-month stay would be considered unauthorized stay.

3. The INS will be able to track Canadians' length of stay within the United States when INS establishes departure and arrival records for every alien entering the United States, as mandated by the new immigration law.

15. *The new ground of inadmissibility only affects those illegal residents who leave the country and try to re-enter (Section 212(a)(9). What kind of a message is sent when the law basically says if you're here illegally, you won't be affected as long as you don't leave.*

A: If a person is in the United States illegally, they are subject to removal, just as before. The law now imposes greater penalties on those who have remained illegally in the U.S., depart, and then attempt to re-enter in lawful status. This provision was apparently enacted as an inducement for those who expect to qualify for legal immigration in the future to avoid significant periods of unlawful presence, to avoid jeopardizing future benefits.

The 1986 immigration law known as IIRAIRA is a comprehensive strategy to crack down on illegal immigration at the borders and in the interior. Not only will illegal aliens be affected when they cross the border, but under the IIRAIRA law, they will have a harder time getting jobs and benefits.

16. *How will INS know if someone has been unlawfully present long enough to be inadmissible?*

A: 1. Departing aliens are required to notify INS of their departure.

2. In addition, the INS maintains various data-bases that track the departure and arrival of aliens, by checking passports.

3. These systems will assist the INS in determining whether an alien has "overstayed" previously in the United States or whether a previous entry was the result of lawful admission.

17. *If an alien has an approved Form I-130 or Form I-140, or Form I-360 Immigrant Visa Petition with an available visa number and has applied for Section 245(i) adjustment before April 30, 2001 what happens if he/she leaves the country and tries to return before the application is adjudicated?*

A: Generally, if an alien needs to make a brief trip abroad while an adjustment application is pending, the alien should request advance parole from the INS. If advance parole is granted, the applicant may return to the United States to resume the adjustment of status application.

18. *Will local INS offices be equipped to handle/accept a surge of Section 245(i) applicants between now and April 30,*

Continued on next page.

THE EXTENSION OF SECTION 245(i) RELIEF FOR ADJUSTMENT OF STATUS TO PERMANENT RESIDENCE IN U.S.

Questions and Answers

1. ***What is the new relief under Section 245(i)?***

A: The Legal Immigration and Family Equity Act of 2000 (LIFE Act) extends Section 245(i) by replacing the old eligibility cutoff date (January 14, 1998, the "grandfather" date) with the new date of April 30, 2001. This means that eligible people have until April 30, 2001 to file an Immigrant Petition or Labor Certification Application to be eligible to adjust their status in the United States.

IMPORTANT NOTE:

1. The LIFE Act added a new "physical presence" requirement which means that people need to prove that they were actually in the U. S. on the date of enactment of the new law on December 21, 2000, in order to be eligible to qualify under Section 245(i).
2. Under the changes made by the LIFE Act, Section 245(i) will be available for any beneficiary of a bona fide Immigrant Visa Petition (a Form I-130, I-140, or I-360) or Application for Labor Certification that is filed on or before April 30, 2001.
3. Beneficiaries of Immigrant Petitions or Labor Certifications that are filed after the old deadline of January 14, 1998, but before the new deadline of April 30, 2001, will be required to prove that they were physically present in the United States on December 21, 2000, the date that the new deadline became law.

All qualified applicants will be "grandfathered-in" under Section 245(i), even if they don't actually apply for adjustment of status to Permanent Resident by filing Form I-485 with INS until after the April 30, 2001 deadline, as long as a bona fide Immigrant Petition or Labor Certification application was filed before that date.

2. ***Who benefits from the new Section 245(i) law:***

A: A person who is eligible for permanent residence based on a family relationship or job offer, and who wishes to adjust status to permanent residence without leaving the U.S., could benefit from these provisions. Without Section 245(i), most persons who entered the U.S. without inspection, overstayed an admission, acted in violation of the terms of their status, worked without authorization, entered as a crewman, or were admitted in transit without a visa would not have been eligible to adjust status in the U.S.

If a person is eligible for permanent residence, but not eligible for adjustment of status, that person might still obtain permanent residence by leaving the U.S. and completing the process for an immigrant visa at a U.S. Consulate abroad. However, if that individual had been unlawfully present in the U.S. for more than 180 days, or 12 months, he or she would be barred from reentering the U.S. for at least 3 years, and perhaps as long as 10 years.

Under Section 245(i) an eligible applicant can remain in the U.S. to obtain permanent residence through adjustment of status, and thus never trigger these entry bars. (Once permanent residence is obtained, these entry bars no long apply).

Thus, it is very important that persons who would be subject to the bars should not leave the U.S. at all until the adjustment of status process is completed.

Note that an immediate relative (spouse, child, or parent of U.S. citizen) who was inspected and admitted upon entry into the U.S. can adjust status without applying under Section 245(i).

3. ***What does the new "physical presence requirement" mean — how does an applicant comply with this new law.***

A: Under the new law, beneficiaries of an Immigrant Visa Petition, (Form I-130, Form I-140 or Form I-360), or Labor Certification that is filed after the old deadline of January 14, 1998, but before the new deadline of April 30, 2001, will be required to prove that they were physically present in the United Sates on the date that the LIFE Act was signed into law on December 21, 2000.

A Joint Memorandum from Senators Kennedy (D-MA) and Abraham (R-MI) clarify some of the provisions of the new law by emphasizing that the functions of the "physical presence requirement" is to make sure that the renewed availability of Section 245(i) does not encourage anyone to illegally enter the United States in order to apply.

The Memorandum also states "It may be difficult for an individual physically present on the day of the enactment of the new law to establish his or her presence on that precise date to qualify for Section 245(i). The Immigration and Naturalization Service (INS) should therefore be flexible in the types of evidence it will accept to establish physical presence on the day of enactment. For example, the kind of evidence of physical presence INS ordinarily accepts demonstrating that the applicant has been physically present during a reasonable period preceding that date, accompanied by an affidavit or declaration that the person was present on the date itself, should ordinarily suffice.

Immigration lawyers are working with the White House and the INS to develop clear standards and guidelines that will accomplish this goal.

4. ***What is the new relief under Section 245(i)? How does a person file an application under the new Section 245(i)?***

A: Any person who will need Section 245(i) relief to adjust status to a Permanent Resident must ensure that the qualifying Forms I-130, I-140, I-360, or Labor Certification Application are filed with the applicable government agency on or before April 30, 2001.

Those who choose, and are eligible to file their Visa Petition (Form I-130 and Application for Adjustment of Status to Permanent Resident (Form-I-485)) at the same time must submit the Application for Adjustment of Status to Permanent Resident under Section 245(i) on Form I-485A, along with the Form I-130 Visa Petition and the applicable fees.

Since the law simply replaces the old January 14, 1998 deadline with a new April 30, 2001 deadline, immigration lawyers are urging INS to adopt similar policies to those announced to meet the old deadline, namely that skeletal applications should be accepted. Immigration lawyers will be working with the INS to try to achieve a fair, effective and efficient implementation.

5. ***Why is April 30, 2001 "the" important date?***

A: In order to qualify under Section 245(i) for relief, applicants must prove that a bona fide Immigrant Visa Petition or Labor Certification application was filed on their behalf on or before April 30, 2001. Therefore, any person who will need Section 245(i) relief in order to adjust status to a permanent resident must file their Forms I-130, I-140, I-360, or Labor Certification Application on or before April 30, 2001. Any person whose petitions are filed after that date will not be eligible for Section 245(i) and will be required to process an immigrant visa application at a U.S. Consulate abroad, thereby subjecting the applicant to the 3/10 year bars from admission into the U.S.

6. ***How much is the filing fee and when is it necessary to pay the fee?***

A: The Section 245(i) fee is still $1,000, and is in addition to any other filing fees levied by the INS. The $1,000 fee is paid at the time of filing the Form I-485A Application for Adjustment of Status to Permanent Resident (Supplemental Form) which is submitted along with the standard Application for Adjustment of Status on Form I-485.

There are some circumstances in which the Immigration Visa Petition (Form I-130) and the Adjustment of Status Application for Permanent Resident (Form I-485) can, at the applicant's option be filed at the same time: immediate relatives of United States citizens may file the Form I-130 Visa Petition and Form I-485 Application for Permanent Resident concurrently, and INS has indicated that it plans to soon allow Forms I-140 Visa Petitions and Forms I-485 also to be filed concurrently.

However, in most cases, the Adjustment of Status Application, (Form I-485), is not filed until after the Immigrant Visa Petition (Form I-130) has been approved, and in many employment-based cases until after both the Labor Certification and Immigrant Visa Petition (Form I-140) have each been approved. Thus, in many cases, the fee will not have to be paid before the April 30, 2001 deadline.

7. ***Does the new law under Section 245(i) provisions provide a person with employment authorization, protection from deportation, or travel permission?***

A: Section 245(i)only allows people who illegally entered the United States or are not eligible for adjustment of status under Section 245(c) to apply for adjustment of status to a permanent resident in the United States if they are otherwise eligible for adjustment. It offers no other protections or rights. However, in the past the INS has granted employment authorizations.

Continued on from previous page.

2001?

A: This issue is in the process of evaluation at this time. INS will make the appropriate accommodations and deploy resources as necessary to handle the expected increase in applications between now and April 30, 2001.

19. ***What happens if a legal permanent resident has applied long ago for citizenship but is caught in the backlog, and his/her illegal alien spouse is waiting on that to apply for adjustment of status?***

A: An application for adjustment of status can be filed only when an immigrant visa number becomes available. So in this case the spouse must wait until the Immigrant Petition has been approved and the priority date assigned to that petition has been reached before the adjustment application may be filed.

If Section 245(i) is extended again, the alien will be able to apply for adjustment of status when a visa number becomes available.

However, if Section 245(i) is no longer in effect when the visa number becomes available, the alien may be admitted to the U.S. on special new "K" Visa. For complete information see report on new "K" Visas.

20. ***Will INS immediately go after people who are illegal in the U.S. beginning April 30, 2001 to enforce the law?***

A: 1. The prior law — the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) — imposed tougher penalties on those who attempt to re-enter after having been in the country unlawfully, but it does not change INS's enforcement priorities, which have been focused on the removal of criminal aliens.

2. INS will not conduct any mass deportations.

3. However, any person who is in the United States illegally is subject to removal at any time, just as before.

LATEST NEWS

Section 245(i) Extended to April 30, 2001

WASHINGTON — The Congress has granted a reprieve to hundreds of thousands of worried illegal immigrants, approving a 4-month extension of a controversial provision that allows many immigrants to remain in the United States while they seek permanent resident status.

The provision mitigates a tough rule in the immigration law that presents large numbers of people residing here illegally with a wrenching choice: leave the country indefinitely, often abandoning jobs and families, in hopes of eventually becoming legal immigrants, or stay on and risk a furtive future as perpetual illegal residents.

With the temporary extension of Section 245(i) to April 30, 2001, eligible illegal residents can pay a fine of $1,000 and remain in the United States while seeking to become legal residents.

ADJUSTMENT OF STATUS TO PERMANENT RESIDENT FOR CERTAIN LATE LEGALIZATION CLASS MEMBERS IS NOW AUTHORIZED

Who Is Eligible for Adjustment of Status to Permanent Resident:

The new law makes some modifications to the provisions of the 1986 Amnesty Law (Section 245A) and makes it possible for only those people who were part of certain class action lawsuits against the INS for their improper handling of the 1986 Amnesty program by INS.

1. In order to qualify for Adjustment of Status to Permanent Resident, an applicant must prove that she/he filed a written claim, before October 1, 2000, for class membership in *CSS v. Meese*, *LULAC v. Reno*, or *INS v. Zambrano* (three of the various class action lawsuits filed against the INS for improperly handling the 1986 Amnesty program).
2. Entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status through May 4, 1988.
3. Was continuously physically present in the United States beginning on November 6, 1986 and ending on May 4, 1988 (brief, casual and innocent absences will not interrupt a finding of continuous physical presence).
4. Files an Application of Adjustment of Status to Permanent Resident with the INS within one year of the date on which the INS issues final regulations to implement the new law. The INS is required to issue the new regulations within 120 days after enactment of the "LIFE" Act on December 21, 2000.
5. Has not been convicted of any felony or three or more misdemeanors, has not assisted in the persecution of any person (on account of race, religion, nationality, political opinion or membership in a particular social group), and is registered or registering under the Military Selective Service Act (if required to do so under that Act).
6. Is not inadmissible to the United States as an immigrant. INS may (for humanitarian purposes, to assure family unity, or when it is in the public interest) waive any of the grounds of inadmissibility except those relating to criminals, drug offenses, security grounds, and public charge grounds. In addition, the INS may grant a waiver of the grounds of inadmissibility related to aliens seeking admission after previous removal and aliens present in the U.S. after previous immigration violations.
7. Is able to pass the naturalization exam (relating to an understanding of basic civics and the ability to speak, read and write ordinary English), or show that they are satisfactorily pursuing a course of study (recognized by the INS to achieve such an understanding of English and civics).

The New Law Shall Grant the Following Relief:

1. Eligible applicants will apply directly for permanent resident status, rather than for temporary resident status.
2. The INS is required to establish a process under which an alien who has become eligible to apply for adjustment of status to a Permanent Resident as a result of the new law and who is not physically present in the United States to apply for such adjustment from outside of the United States.
3. Applicants who submit a prima facie application under the new law are entitled to a stay of deportation, work authorization, and permission to travel while their application is pending.
4. The limitation on judicial review under IIRAIRA (Section 377) will not apply to applicants under the new law and they will be entitled to the same review allowed by the 1986 laws.
5. Newly legalized persons will not be disqualified from receiving certain public welfare assistance. (Under the original Section 245A applicants were disqualified from certain assistance for 5 years after their application was filed). However, they may still be subject to restrictions based on the 1996 Welfare Reform Law.
6. The confidentiality provisions of Section 245A (that generally prevent the information submitted on the application from being used for any purposes except criminal prosecution) will continue to apply, except that information submitted by an applicant under the new law may be used in proceedings to rescind an adjustment of status.

Protection from Deportation and Work Authorization are Authorized for Spouses and Children of Late Legalization Applicants

Consistent with laws passed in 1990 to protect the family of legalization applicants who were already in the United States, the LIFE Act prevents the deportation of the spouses and minor children of a person who is applying for late legalization under the new law. Also consistent with prior laws, these family members are eligible for work authorization.

Eligibility for Relief: To be eligible for benefits, a person must prove that he or she is:

1. The spouse or unmarried child of a person who is eligible for adjustment of status to Permanent Resident as a result of the late legalization provisions of the LIFE Act.
2. Entered the United States before December 1, 1998 and resided in the United States on that date.
3. Has not been convicted of a felony or three or more misdemeanors in the United States, has not assisted in the persecution of any person (on account of race, religion, nationality, political opinion or membership in a particular social group), or is otherwise not a danger to the community in the United States.

Relief Available Under the New Law:

Eligible applicants will be protected from deportation for violations of their status in the United States, but will continue to be deportable for other grounds of deportation, including criminal activity.

Eligible applicants will be entitled to receive employment authorization in the United States.

If the applicant for the benefits under the late legalization provisions of the LIFE Act is applying from outside of the United States, the INS is required to establish a process by which eligible spouses and children may be paroled into the United States in order to obtain the benefits under the new law.

Certain Waivers and Protections from Deportation Now Available for Applicants Under NACARA and HRIFA Laws

Grounds of Inadmissibility - Certain waivers in applications for adjustment of status for Permanent Residence under NACARA and HRIFA, provide for INS to waive certain grounds of inadmissibility relating to the re-entry after a previous order of deportation or removal (212(a)(9)(A)) and (C).

Protection from reinstatement of Prior Orders of Deportation or Removal shall not be Reinstated: In applications for Adjustment of Status for Permanent Residence, for Suspension of Deportation, or for Cancellation of Removal as provided by NACARA or HRIFA, the INS shall not reinstate previous orders of removal or deportation in order to prevent those applications from being filed (Section 241(a)(5) shall not apply).

Motions to Reopen Procedures Allowed: NACARA and HRIFA applicants who become eligible to apply for adjustment of status to Permanent Resident, Suspension of Deportation, or Cancellation of Removal arising from the changes in the LIFE Act will be able to file one Motion to Reopen any exclusion, deportation, or removal proceedings in order to apply for an adjustment of status to Permanent Resident under the new law. This right to file a Motion to Reopen exists notwithstanding any time and numerical limitations otherwise imposed under the Immigration and Nationality Act heretofore.

QUICK SUMMARY - Adjustment of Status Under Section 245(i)

1. ***What is the "re-opening" of Section 245(i) until April 30, 2001?***

A: This new law will allow beneficiaries of visa petitions filed and received by the INS before April 30, 2001 to immigrate into the U.S. through adjustment of status and therefore avoid the 3/10 year bars.

2. ***Why is Section 245(i) so important?***

A: If Maria is a U.S. citizen and her brother Jorge has been living in the U.S. since he entered unlawfully three years ago, but Maria has delayed filing a Visa Petition because of the long waiting period in this category, it is urgent that Maria file a Fourth-Preference Visa Petition for Jorge before April 30, 2001. If she files the Petition before April 30, 2001 deadline, Jorge will eventually be able to immigrate to the United States through adjustment of status and will not suffer the ten-year bar. If Maria does not file the Visa Petition before April 30, 2001, Jorge will not be able to immigrate to the U.S. while he is in the U.S. The problem is that as soon as he leaves the U.S. to go to a Consular Visa Appointment, he will be subject to the "ten-year bar," which requires Jorge to stay out of the U.S. for ten years!

Case Note:

If Carmen is a U.S. citizen and her boyfriend, Ricardo who entered the U.S. unlawfully three years ago from the Philippines, have been living with each other for sometime, then;

In order to take advantage of the Section 245(i) reopening Carmen and Ricardo will have to marry if they love each other, and then Carmen can prepare and file a Form I-130 Alien Relative Visa Petition for Ricardo with INS where they live.

Those who find out about the new law close to the deadline, or otherwise wait until the last minute, may protect themselves by filing a Form I-130 Alien Relative Visa Petition only by the petitioner spouse. This, however, will not be as beneficial for Ricardo as filing the full Form I-485 Adjustment Application by the alien spouse, which will make it possible for Ricardo to get employment authorization and legal permission to remain in the United States.

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