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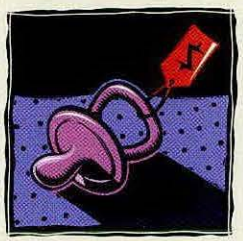

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Working together to champion justice

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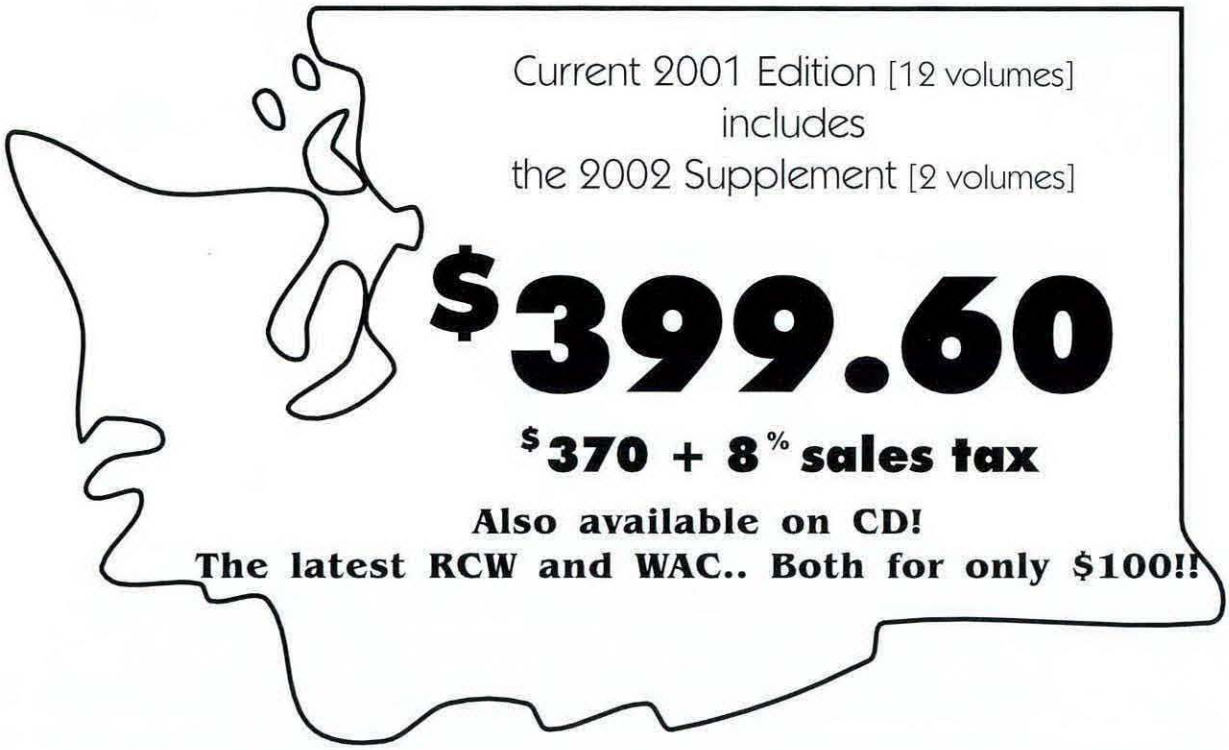

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BarNews

Published by the

WASHINGTON STATE BAR ASSOCIATION
2101 Fourth Ave., Fourth Fl.
Seattle, WA 98121-2330

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Washington State Bar News (ISSN 886-5213) is published monthly by the Washington State Bar Association, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330, and mailed periodicals postage paid in Seattle, WA. $9.83 of a regular member's dues is used for a one-year subscription. The annual subscription rate for inactive members is $15. Nonmember subscription rate is $24 a year. Washington residents add 8.8% sales tax.

Postmaster: Send changes of address to:
Washington State Bar News
2101 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330

Printed on recycled paper

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Support for Editor's Position

Editor:

I was disappointed to see the letters attacking the editor of the *Bar News* for his piece critical of George Bush's new policy regarding judicial appointments, and the American Bar Association's (ABA) involvement (May *Bar News*, p. 15). I have *never* thought of the ABA as a radical organization. I would expect the ABA would have more of a basis to evaluate candidates for positions on our Supreme Court and other federal courts than the average politician. Partisan voters with biased views of the ABA may not be interested in the ABA's opinion on a prospective judge's "integrity, judicial temperament and professional competence."

However, my experience with the average citizen is that they are very interested in knowing whether the ABA thinks a judicial candidate is competent or not. If a candidate is not competent and that becomes known before a confirmation vote, voters have an opportunity to express an opinion on the merits of confirming the appointment. There are also those in Congress who have an interest in the ABA's evaluation.

Finally, I take issue with Roger Ley's implication that the *Wall Street Journal's* editors are objective or unbiased. They are to the right of Pat Robertson. Their editorial policy seems to be guided by Strom Thurmond and Jesse Helms. I, for one, appreciated your column on judicial appointments. I suppose you don't know whether you have taken a position unless it draws fire. Thanks for being willing to bear the criticism.

Bob Dickerson
Seattle

On Communicating with a Represented Governmental Client

Editor:

I read with interest Barrie Althoff's article "Communicating with a Represented Governmental Client" (June *Bar News*, p. 42). Barrie's work is always scholarly, thoroughly researched, and a pleasure to read. I disagree with much of what he said here, however.

The application of RPC 4.2, prohibiting communication by a lawyer about the subject of the representation with a person whom the lawyer knows to be represented, should be the same when the government is a defendant in a lawsuit as when a private party is the defendant. The reason Barrie offers for allowing such communications in the context of a suit against government is the right of petition under the First Amendment and under Wash. Const. Art. I, ß 4 ("The right of petition ... shall never be abridged."). Barrie says: "To the author, elevation of an ethical rule over a constitutional right seems questionable."

But the Rules of Professional Conduct are promulgated by the Washington Supreme Court and they are not trifles: they are aspects of the Court's inherent power to supervise the Bar in furtherance of the administration of justice. The Court's inherent powers derive from common law, and therefore predate and trump any constitution, unless the constitution specifically abrogates a specific inherent power. For instance, the Washington Constitution might say "the Legislature shall supervise the practice of law in the state of Washington," but it does not. Implicitly, therefore, the people have left the supervision of the practice of law with the Supreme Court

because that was the common law understanding in 1889, when our constitution was adopted.

Some Rules of Professional Conduct other than RPC 4.2 restrict free speech, some may argue in derogation of the First Amendment. For example, RPC 3.6 states: "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." This rule obviously limits speech, but does so pursuant to the Court's authority to manage the orderly administration of justice by supervising the activities of the practicing Bar. RPC 8.4(e) says it is professional misconduct for a lawyer to "[s]tate or imply an ability to influence improperly a government agency or official." Shouldn't this otherwise not illegal and not actionable expression of speech be protected by the First Amendment? Such an expression may in fact be true in some circumstances, but is still forbidden.

In summary, the Rules of Professional Conduct can and do trump the First Amendment when the Court considers the orderly administration of justice to be at stake. I doubt there is much disagreement on this point, or on the Court's authority to promulgate and enforce such rules.

But let's get back to the purported right of the attorney to petition the government for redress of grievances. The attorney RPC 4.2 addresses is not petitioning the government; he or she is merely representing a party who is petitioning the government by means of a lawsuit. That attorney may certainly contact any government official in his or her own right as a citizen. But when that attorney is in a representative capacity, the Rules of Professional Conduct ought to apply, just as if the lawsuit were against a private party. Representing a petitioning party is not the same as petitioning yourself.

I would argue that because the people of Washington have waived sovereign immunity, and that the state "shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation" (see RCW 4.92.090), the state ought to be treated like a "private person" with respect to the Rules of Professional Conduct when it is involved in a lawsuit. There is no reason lawyers suing government should be excused from the RPCs.

What is absent from Barrie's article is any public policy reason justifying an exception to RPC 4.2. What public policy purpose supports a direct communication from a suing party's lawyer to the head of an agency, for instance? When is it ever necessary or desirable to make such a communication? Obviously, the suing party can accomplish whatever is sought by communicating directly with the agency head; the RPCs don't apply to nonlawyers. The only thing that can happen by allowing communications in violation of RPC 4.2 is a bad thing: confusion, or the driving of a wedge between government lawyer and government client. Such attempts are forbidden in private lawsuits; they should be equally forbidden in suits against government.

Bernie Friedman
Special Assistant to the Secretary for Loss Prevention and Risk Management, DSHS
Olympia

Editor:

I always appreciate Barrie Althoff's articles on Ethics and the Law, and more often than not agree with his commentary. However, I strongly disagree with his suggestion in the June 2001 article "Communicating with a Represented Governmental Client" that a constitutional right to petition the government should allow the lawyer for a party to contact a represented government client in a matter. As Mr. Althoff notes, this is a "minority" view of the anti-contact rule of RPC 4.2, and rightly so. A citizen who is a party may contact a government official directly, but to allow the citizen's lawyer to do so is not required by the constitution and undercuts many of the purposes of the rule. As noted in Alaska Bar Association Ethics Opinion 94-1 (1994):

> Direct communications by opposing counsel with a represented adverse party usually would be made only for the purpose of by-passing the party's counsel in hope of obtaining an advantage or opportunity that would not otherwise be available or to advocate a position that was not persuasive when presented through the party's counsel. The direct communication may distort the strengths or fairness of the communicating party's position and overstate the risks to the other party, thereby serving to undermine the adverse party's confidence in his or her attorney and perhaps create beliefs, fears or impressions that cannot later be corrected by that party's counsel. Those concerns clearly apply in the context of a presentation to a government agency.

As the article notes, it is sometimes difficult to draw precise parameters around the "subject of the representation" as that phrase is used in RPC 4.2. Government lawyers should interpret the rule in a way that serves the purposes of the anti-contact rule, but doesn't sweep so broadly that it inhibits other legitimate contact with government officials. Citizens' contacts with the government can be ongoing and broader than the matter at issue, and we need to recognize that fact in a reasonable application of the rule.

To conclude on a note of agreement with Mr. Althoff, the better course is for the lawyers for the various parties to discuss the matter and reach an understanding. This will advance the working relationships of both the counsel and their clients, and will avoid claims of ethical violation.

Narda Pierce
Olympia

Lawyer Sanctioning Questioned

Editor:

The admonishment against Daniel P. Kinnicutt is reported on page 53 of the April issue. I am not sure I understand why he was sanctioned; perhaps others do. The *Bar News* article says, in part, "The disciplinary action is based upon his making a discriminatory argument in court." Fine. If he made a discriminatory argument in court, discipline should follow. My problem is I do not think he did that. As reported, Kinnicutt said: "You know, in the world's eye she is not the most attractive lady. She is heavyset. In terms of the way she styles herself, you would probably walk by her in public and look, and probably not turn around, and maybe make a snide remark simply because of her status in so-

ciety. And maybe even because she is dating an individual of the opposite color." This column does not tell us what the criminal charge was, but whatever its nature, it was an alleged crime against this lady. One assumes that in final argument Mr. Kinnicutt is trying to persuade a jury that the evidence proves the defendant's crime beyond a reasonable doubt.

Why, one would ask, is he telling the jury that the victim is a homely fat lady who dates outside her race? Understandably, this short article does not tell us what the evidence was, and apparently it was not enough. The article says the defendant's crime was beyond a reasonable doubt.

I am left with the feeling that Mr. Kinnicutt was grossly misunderstood. He does not offer a disparaging personal opinion as to her looks or conduct, rather, in the introductory clause that prefaces his whole remark, he says: "You know, in the world's eye she is not the most attractive..."

Is he right? Would the world think less of her because she is obese and perhaps less yet if she keeps company outside her race? And when the "world thinks less" of an individual over a long period of time, does that person suffer a loss of self-worth and become more vulnerable to one who would take advantage of her?

People who have had the experience will tell you that obesity is subject to some of the subtle and sometimes not-so-subtle prejudices that confront others who are "minority" for one reason or another. People laugh, they stare, they make cutting remarks. Television sitcoms are not above it. Clerks are slow to wait on such people in stores, especially in the more upscale establishments. After years of this treatment, obese people, especially women, begin to think that indeed they are less worthy, less valuable. I have seen it happen.

American culture celebrates, extols, and practically worships youth and svelte good looks. In my view, the prosecutor is rightly reminding the jury that in court, all persons, tall and short, skinny and fat, handsome and ugly are entitled to equal treatment and consideration. In other words, in evaluating the victim's testimony and credibility, they were to ignore such differences. Maybe I have missed something, but if that was his argument, he was right.

Perhaps this prosecutor could have verbalized his theory of victim vulnerability with more finesse, but final arguments are extemporaneous presentations that are usually given final preparation about the time the instructions are being read to the jury. How many of us who have read transcripts of our own oral verbiage find ourselves musing with embarrassment, "My God, did I say that?"

I think Mr. Kinnicutt could have been cut some slack. Restricting latitude of final argument casts an ominous chill on advocacy.

Roger I. Lewis
Renton

President Peterson's Article on Truth

Editor:

I applaud President Peterson for his article (June *Bar News*, p. 13). He gives credit to Jaclyn Sinclair for her article in the *King County Bar Bulletin*, which is most deserved.

I wrote to Ms. Sinclair in Arizona, where she now lives, commenting on her article. In her response she inquired if there had been any comment or feedback noted in the *Bulletin*. On May 29, I wrote to regretfully advise her that I had seen none. I received my June *Bar News* yesterday containing the subject article. I am sure Ms. Sinclair is very pleased with Mr. Peterson's comments. I am sure she knows of same but I sent her a copy this morning, just in case.

Everything I mentioned to Ms. Sinclair in my letter applies equally to Mr. Peterson's article. In addition to all the other adverse effects, the loss of candor in the lawyer ranks is causing a huge increase in the complexity, length, and above all, cost of litigation. This is rendering the system incapable, economically, of handling an increasingly large percentage (now a majority, I'm afraid) of civil disputes.

We have digressed rapidly since the old Canons of Legal Ethics, circa 1908, which charged: "The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness." (See first sentence of Canon 22.) These wise and time-honored canons were abandoned in 1966 with a new code, later to be replaced by the watered-down ver-

sion we have today. The present code sure needs revision.

President Peterson tacitly suggests that reversing the trend will be difficult. Reversing such a trend in any group or class must start with the basics — the (law) schools, the authorities having some jurisdiction over group discipline (bar associations and courts, especially trial courts), and the members' motivation among themselves. It will certainly be difficult.

John F. Kovarik
Bellevue

Editor:
I was struck by the wisdom contained in President Peterson's article "The Truth, the Whole Truth, and Nothing but the Truth." One piece of evidence in support of the argument that part of the Bar no longer values or honors truth telling that was missing in this otherwise excellent article, though the perpetrator was mentioned, is the saga of former President William Clinton and his inability to tell the truth. His reliance upon his now well-known parsing of the English language to obfuscate the truth, e.g., "It depends on what the definition of 'is' is," is part and parcel of this trend. Thanks are in order to the Arkansas Supreme Court in disbarring lawyer William Jefferson Clinton.

Peter S. Lewicki
Seattle

Two Cents' Worth
Editor:
I just read your "Two Cents' Worth" May opinion column. Consider what you showed us about yourself.

You referred to the president of the United States, George W. Bush, and his administration many times in your article. What term of respect did you use? George Bush? George W. Bush? President Bush? Mr. Bush? Never.

No, you just called him "Bush." Seven times that last name appears. Repeatedly calling an ordinary person by only their last name is contempt. Repeatedly calling the president of the United States by only his last name is arrogant contempt.

You referred to "Martha W. Barnett" and "Martha Barnett" and "Ms. Barnett" so you obviously know how to use proper terms of respect. No term of respect for the president of the United States was able to escape from your clenched fist.

You condemned the president as "making new enemies at every turn, and even offending people who want to be friends." There were no facts to back up this inflammatory language. Then you referred to "the president and his minions...." Webster's cites that as a term of contempt.

We are forced to pay your salary and forced to pay for your office and forced to pay for the *Bar News* pages you can fill with your opinions. You can lead us by good example or you can draw us further into the pit of contempt for others.

John Panesko
Chehalis

Prompter Bar Exam Results Desired
Editor:
By having bar examinees wait for three months or more from the time of the exam to the time they can begin earning a living, WSBA shows a callous indifference to its prospective members who, by the way, have no one to represent their interests. The delay causes loss of revenue, anxiety, and puts people's very lives on hold for an unwarranted amount of time. Assuming these future competitors deserve our consideration, herewith a proposal.

One could grade five of the 18 substantive questions; if an examinee is averaging at least 7.5, then it should be statistically safe to assume his or her cumulative average will not fall under a passing grade of 7.0. Then grade five more questions for those remaining; if the average is 7.3 or more, assume a passing grade will result. For the rest, grade every question, so that anyone who fails will be unaffected by the above approach. I believe the above numbers could be juggled so that less than half of the exam answers will need to be graded.

This idea strikes me as eminently fair, it should save the Bar much grading time and therefore tens of thousands of dollars of expense, and it would allow each group of incoming attorneys to realize extra cumulative revenues of at least two million dollars by my reckoning, and this at a time when revenues are sorely needed. The present waiting time between the exam and the results is two-and-a-half months. Whether this idea flies in some form, or

some other method is employed, in no event should examinees have to wait more than 30 days for their test results.

Rob Born
Clinton

Objection to Diversity Seats

Editor:

I object to the proposal of the Bar Association and the Board of Governors to create two new seats on the board designated for nonwhite lawyers, presumably one black and one of another race.

This is unconstitutional. The federal Constitution prohibits discrimination by government based on race in the equal protection clause of the 14th Amendment. The Bar Association, a regulatory agency created by the Legislature to oversee the practice of law, is part of government. Setting aside a position for one race or another in a legislative body discriminates on the basis of race.

The board tries to get around this problem by pretending that the two positions are not racial. But it is obvious from the history in the pages of *Bar News* and from the language now used that the purpose is racial. Proposed Bylaw M says that the board is supposed to be "more diverse and representative than the results of the election," and directs that the board is to designate two members by considering "age, race, sex, geography, areas and types of practice, and years of membership."

Well, the government cannot enact a law valid on its face and enforce it in a systematically racially discriminatory way: *Yick Wo v. Hopkins*, 118 US 356, 1886. That old case says, "The rights of the petitioners ... are not less because they are aliens and subjects of the emperor of China.... The 14th Amendment to the Constitution is not confined to the protection of citizens. [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws ... the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied ... with a mind so unequal and oppressive as to amount to a practical denial by a state of that equal protection of the laws...." The law had said it was illegal to operate a laundry in San Francisco without a permit unless the building was stone or brick.

Section M of the Bylaws is discriminatory not only in intent but also on its face. It is interesting to note that the Bar Association does not believe in the limited form of democracy represented by the elected board. They say, apparently without shame, that democratic government is not good enough, that elected representation is not an adequate form of government, and that the government, in the form of the board, should choose for the people some of their Legislature. This is very wrong.

If the Supreme Court endorses this proposal, it amounts to an endorsement of racial discrimination in government. That disqualifies the Supreme Court from hearing other cases alleging racial or other discrimination, because the Supreme Court has already taken an official position approving this discrimination. Having taken an official position, the Supreme Court is

no longer neutral and detached, and cannot hear cases raising these issues.

This creates further problems because state government must have courts that are open to all. But the courts are not open to those who present issues of racial discrimination in government. The answer of course is that the board cannot adopt these "bylaws." The board should abandon this unconstitutional proposal.

Roger Ley
Seattle

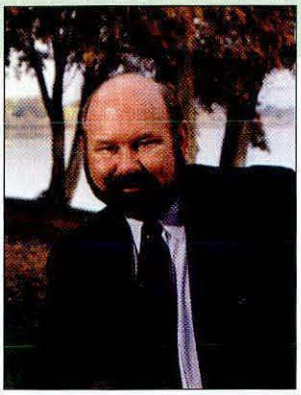
Minority Positions for "Underrepresented Groups"

I have carefully read the Board of Governors' guidelines on protecting the rights of minorities, as well as the letters to the editor from Mr. Pacher and Mr. Ley (May *Bar News*, p. 7). Following is my application for one of the "at-large governor positions": Article M in part provides that the underrepresented member shall "not be limited to age, race, sex, geography, areas and types of practice, and years of membership."

1. Age: On April 20 I will be 74 years old. This is an underrepresented group by any standard. Only a few of us were represented at the last Bar meeting, or even alive.
2. Race: I am an Irish-Norwegian-American. The Irish have been systematically discriminated against since we were driven from our homeland by the white Anglo-Anglican and forced into police work and low-level politics. Of course, the Norwegians have even been shunned in ghettos like Ballard, and forced to sea as lowly fishermen to capture for the elite the elusive halibut and salmon.
3. Sex: I have come out of the closet. I admit to being a lesbian trapped in a man's body. This sex preference is grossly underrepresented and discriminated against in the Bar.
4. Geography: My primary business interest is in Home, Washington. My other office is in the desert in Arizona. Nobody in the Bar knows where Home is. Both locations are geographically underrepresented areas in the Washington Bar.
5. Areas and types of practice: Real-estate sales, foreclosures, estate planning. Representing the most shunned, reviled and misunderstood clients such as mortgage companies, real estate salespersons, life insurance salespersons, judges.
6. Years of membership: UW class of 1953; admitted on first go-round as No. 3086, and never successfully discriminated against until now.

Ron Peters
Gilbert, AZ

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., August 10 for publication in the October issue. Letters to Bar News *will usually be published, unless the writer specifically asks us to withhold publication. The editor reserves the right to edit letters as deemed appropriate.*



A Little Summer Diversion

by Jan Eric Peterson
WSBA President

Well, it's August, and as they say in baseball, the dog days of summer are upon us. It's hot — actually only warm on the coast. Bodies of water and the pleasures they offer, from Puget Sound sailing to the backyard pool, are really inviting. School's out, and the kids or grandkids want you to come out and play. The Mariners are still in first place. There are outdoor concerts for warm summer nights at the Gorge or on the Pier. There are tall cool ones to go with Walla Walla sweet onions, ripening tomatoes, and sweet corn that's just arrived. Yup, summer is just too much fun for me to be very serious and concentrate on this article. The reality is I don't have anything much to say; I'd rather be teeing it up.

I have a friend who found the secret to legal life. He finally admitted that the places he most likes to be are the beach and the golf course.

I have a friend who found the secret to legal life. He finally admitted that the places he most likes to be are the beach and the golf course. Did he quit the law and become a beach bum or a tour caddy, forsaking family, career and a productive purposeful life? No, he made a legal career of his pleasures. He moved to Florida, which has more beaches and golf courses than anywhere on earth, and began a teaching career at Nova Southeastern University School of Law. Publish or perish, hah! He has become the world's leading legal authority on beach and golf law. M. Flynn, "Cart 54, Where Are You? The Liability of Golf Course Operators for Golf Cart Injuries," 14 *U. Miami Ent. & Sports L. Rev.* 127 (1997); "Lightning: A Double Hit for Golf Course Operators," 6 *Marq. Sports L.J.* 132 (1995); "Principles of Aquatic Law: From the Beach to the Lifeguard," *Aquatica Acad. Mag.*, Summer 1995; "The Application of Recreational Use Statutes to Beaches: Trap for the Unwary," 40 *Depaul L. Rev.* 743 (1991); "Beach Hazards: An Overview of the Legal Liability for Dangerous Beach Conditions," *J. Aquatic Safety & Educ.* (1989). He is now the respected professor, loves teaching, has a great family, and all his time and travel to beaches and courses are research or consulting! His whole *life* is summer — and deductible.

So how does one cope with a summer life? Joseph Conrad described life as birth and death separated by struggle. Humor relieves the struggle's constant pressure, so my friend handed me the humor edition of his law school's law review. No wonder he's so happy. So let's have some summer fun with legal foolishness.

Law school is not the funniest experience, but there was the great day when the legendary Larry Finegold (UW, '68) handled the embarrassment and harassment of the Socratic teaching method being applied to the unprepared by responding to being called upon with: "Well, I should think that that comes under the extended-arm doctrine," to which the imperious professor smugly inquired, "Would you care to enlighten the rest of us with further elucidation?" Finegold, packing his books for a quick exit, replied, "Well, yes. That means call on someone with their hand raised!"

Being a new associate is generally no fun at all, confined primarily to the drudgery of research and memorandum writing. I am grateful to Tim Willette for these 10 principles of such legal writing:

1. Never use one word when 10 will do.
2. Never use a small word where a big one will suffice.
3. Never use a simple statement where it appears that one of substantially greater complexity will achieve comparable goals.
4. Never use English where Latin, mutatis mutandis, will do.
5. Qualify virtually everything.
6. Do not be embarrassed about repeating yourself. Do not be embarrassed about repeating yourself.
7. Worry about the difference between "which" and "that."
8. In pleadings and briefs, that which is defensible should be stated; that which is indefensible but which you wish were true should merely be suggested.
9. Never refer to your opponent's "argument"; he only makes "assertions" and his "assertions" are always "bald."
10. If a lay person can read a document from beginning to end without falling asleep, it needs work.

Courtrooms are usually fraught with such tension and serious business that there is no room for much humor. The late Preston Niemi was an exception. In defending a negligence

case, his primary point was the plaintiff driver's own intoxication, and with a twinkle in his eye, he pounded it home to the jury: "Ladies and gentlemen, if you feel you must give the plaintiff some damages, I hope you award it to him in six-packs."

Then there was the criminal defense lawyer who argued: "Your Honor, if you believe my client's story, then you must find him not guilty." The court replied: "Counsel, there isn't a person in the county with an IQ over 50 who would believe a word your client says." Counsel rejoined: "That's true, Your Honor, but since *you* were hearing the case, we thought we'd give it a try."

And then there was the counsel who interrupted the examination: "May I interrupt for a moment? There seems to be a member of our audience who is mouthing obscenities and other things at our witness, and I would like that she be admonished." The court: "All obscenities may be directed to the court. You may proceed." "Thank you, Your Honor."

And the jury whose verdict read: "We find the defense incompetent, the prosecution arrogant, the food inedible, the accommodations insufferable, and the defendant guilty as hell."

My favorite appellate decision is *Denny vs. Radar Industries Inc.*, Court of Appeals of Michigan, 28 Mich. App. 294; 184 NW 2d. 289 (1970): "John H. Gillis, judge. The appellant has attempted to distinguish the factual situation in this case from that in *Renfro v. Higgins Rack Coating and Manufacturing Co., Inc.* (1969), 17 Mich. App. 259, 169 NW 2d. 326. He didn't. We couldn't. Affirmed. Costs to appellee."

Because it's summer, one is inclined to ponder the ramifications of Tom Boswell's title *How Life Imitates the World Series.* Baseball and law are the two professions that wear pinstripes. They are so intertwined these days that the *National Law Journal* should have a sports section. Both have highly technical and arcane rules to play by that are still curiously subject to on-the-spot interpretation. Surely he who can explain when a relief pitcher gets a save could also enlighten us as to the current relevance of the dead man's statute. Here is Patric M. Verrone's all-Supreme-Court-opinion baseball team:

1B Randy "ex parte" Milligan
2B Rod "Dred" Scott
SS Willie "read 'em their rights" Miranda
3B Bill "clear and present danger" Schenck
C Clyde "necessary and proper" McCullough
LF Gates "Board of Education" Brown
CF Joseph "Plessy" V. Ferguson
RF Claudell "International Shoe" Washington
P Preacher Rowe and Ben Wade
RP Byron "appointed counsel" Gideon
DH Curt "free agent" Flood

I was asked to write about the new disciplinary diversion rules for minor misconduct. I decided we could use a little diversion instead. Go find a wide fairway and have a good laugh this summer. Now, where is that potato salad...? ✍

Two Cents' Worth

by Mark A. Panitch
Bar News Editor

Diversity has become a watchword, a catchphrase and a shibboleth. Its purveyors and detractors use the word as a weapon in a political war that seems to have less to do with broadening the cultural and ethnic base of the Bar to reflect America, and more to do with protecting various established group rights. A variation on this drama is now playing itself out on the WSBA Board of Governors.

Opponents of expanding the BOG seem to argue that there is only so much democracy, and *that* isn't enough to go around. Supporters argue that their constituencies are not strong enough to fight in the main event, so they want BOG seats reserved for "diversity" members. In effect, both sides (or more accurately, all sides) seem to think that Bar politics is a zero sum game, as if there is a finite amount of political power, and if somebody gains, everybody else loses.

... last spring the BOG agreed to amend the WSBA Bylaws to create two additional board seats for "underrepresented" segments of the WSBA membership.

This may seem to be a reflection of our competitive American culture, but it's not an accurate reflection of the WSBA. The reality is that there is plenty of political power to go around. In fact, there is more than enough, but what is lacking are members willing to engage. This is ironic, because as lawyers we are seen by others as the most aggressive, self-aggrandizing, pushy, arrogant and ego-driven members of society.

Almost two years ago Bar President Richard Eymann challenged the Bar to put up or shut up on the issue of diversity. In principle, he urged the creation of "diversity" seats on the BOG to be reserved for members of the state's various ethnic bar associations. There were hearings around the state that resulted in cautiously favorable reports. Over the past year the BOG has devoted more hours of debate to this issue than any other. The concept overcame both political and constitutional hurdles, and last spring the BOG agreed to amend the WSBA Bylaws to create two additional board seats for "underrepresented" segments of the WSBA membership.

What constitutes "underrepresented," you may ask? The answer seems to reflect that famous Supreme Court principle: "I'll know it when I see it." But once we get past the snide cracks about survivalist lawyers from Okanogan, or farmer lawyers from Asotin, or logger lawyers from Mason County, we all know what we are talking about.

Washington, along with the rest of the country, and especially the West Coast, is becoming a much more culturally and ethnically rich place. Seattle's International District is actually becoming a Pan-Asian center. Not so long ago the average Washington State Patrol trooper was a blond, male six-footer and was seen as a reflection of the state's population. Now troopers come in virtually all shades, sizes and genders, and the WSP is still a reflection of the population. And it's not just the Seattle Public Schools that have to cope with a dozen or more native languages in any given classroom — now that is true in almost every county in Washington.

Recently, attorney diversity — actually lack of diversity — has been the subject of several major newspaper stories. There is an important unspoken message in all the talk about diversity: a legal system populated largely, if not exclusively, by people who look different from significant segments of our society will be seen as unreachable and ultimately irrelevant to them. Unlike other common-law countries, the hallmark of *American* justice is accessibility — the courthouse is supposed to be open to all.

Our open and accessible justice system has served us as an important social safety valve. Immigrants from dozens of different countries soon learned they could "go to law" to settle even minor disputes that often were the result of culture clashes and innocent misunderstanding. This is not to say that the system has been perfect — many people were excluded or suffered abuse in the courts. But for those with access to the system, the system mostly worked. Now when we talk about diversity, we are really talking about access, and access virtually equals legitimacy. For those who see themselves as outsiders in society, the law is irrelevant. It's not a very long step from irrelevance to illegitimacy.

So it's always somewhat disconcerting to look around a meeting of the Board of Governors. All the faces at the table

are white and well-established, as are almost all of the liaisons ringing the meeting room. The only time in the past year when a BOG meeting displayed some real diversity was during a meeting largely devoted to the diversity-seat issue — when several members of ethnic bar associations showed up to lobby for the seats.

Built into President Eymann's challenge, as well as the response from the various ethnic bar associations, was the assumption that "if you build it, they will come." Unfortunately, that does not seem to be the case. As of the third week of July — two weeks before nominations close — fewer than five persons have applied for a new seat.

I don't know if people are just shy or are hanging back to see what their friends do. I sincerely hope that something happens in the next few weeks to energize all those people who fought so hard to open the BOG to younger, darker and less well-established lawyers.

It would be a real shame if the opponents of diversity won by default. And the irony would be nearly unbearable if their greatest allies turned out to be the people who fought so hard for these seats and then turned their backs on the opportunity.

The WSBA Long-Range Strategic Plan: A Progress Report

by Jan Michels
WSBA Executive Director

In September 1999, as Wayne Blair's WSBA presidency culminated, the Board of Governors adopted the 1999-2003 WSBA Long-Range Strategic Plan (LRSP), "Raising the Bar." Working with committees and staff, the board spent the next year developing strategies and actions that would accomplish the goals of the plan. In July 2000, the board adopted the 2000-2001 Operational Plan with its 208 tasks organized under 11 strategic goals. In tribute to both Presidents Richard Eymann and Jan Eric Peterson, the board, committees and staff have held their focus on the plan. We are now evaluating our progress and casting the plan for 2001-2002. *(Note: Original member input and analysis, the full history of the plan's changes from year to year, and detailed review of progress is available on the WSBA Web site at www.wsba.org/long-range.)*

The LRSP has proven itself in driving the actions of the Bar in the direction members laid out for us. Fiscal year 2002 calls for an overall review of the goals and an extension of the plan for three to five more years. The LRSP represents the year-to-year and board-to-board continuity and stability of the WSBA. We take it seriously, and continue to adjust the LRSP as dictated by the market, changing conditions of the practice of law, and member desires. In 2000-2001 we accomplished many of the targeted action items, and will carry 40 of the remaining items into 2002. Following are some of our major achievements to date, and goals for next year.

Goal 1: Enhance Member Benefits

Accomplishments

- Created the Member Benefits Task Force to examine insurance plans and other direct member benefits.
- Implemented a new MCLE rule whereby the WSBA maintains records of MCLE credits for members.
- Developed and deployed the Law Office Management Assistance Program (LOMAP) Road Show and the technology manual *Technology Basics.*

Tasks for 2002

- Develop a business plan for supporting member Web sites.
- Implement group purchase and service partnerships.
- Write chapters on marketing, closing a law practice, and marketing options for the LOMAP book *Up and Running: Operating Instructions for the Small Office.*
- Open the WSBA/LOMAP computer lab.

Goal 2: Conduct Public Legal Education (PLE)

Accomplishments

- Coordinated Law Week.
- Published *The Law Book* supplement to King County newspapers.
- Conducted Law School for Legislators.
- Began working with KING-5 TV to film legal segments to be featured during news broadcasts.

Tasks for 2002

- Launch gateway Web site of public legal education for the public, teachers and others.
- Create PLE curriculum guide for K-12 teachers.
- Create and distribute legal resource guide to the media.
- Survey civil court users about their legal information needs.

Goal 3: Assure New Lawyer Professional Development

Accomplishments

- Launched annual WSBA orientation to third-year law students.
- Revived and revamped the mentorship program (now known as Lawyer-to-Lawyer).
- Developed the *WSBA Membership Guide.*

Tasks for 2002

- Implement skills training for new admittees.
- Revise the Oath of Attorney.
- Work with local bar associations to develop a more meaningful admissions ceremony.
- Develop student-loan repayment program and debt counseling services.
- Work with law schools on a formal Bridge the Gap program.

Goal 4: Promote Professionalism and Civility

Accomplishments

- The WSBA Professionalism Committee developed the Creed of Professionalism.
- Repeated ethics workshop.
- Honored local hero as part of each board meeting.
- Featured Proud to Be a Lawyer vignettes daily on the WSBA Web site (www.wsba.org).

Tasks for 2002

- Purchase and use public service ads about the good lawyers do.
- Document the level of pro bono work by members.

Goal 5: Address Future Practice of Law Issues

Accomplishments

- Defined the practice of law.
- Recommended Practice of Law Board rule to Supreme Court.
- Implemented the Future Practices Committee, who will make a multidisciplinary practice recommendation to the board this summer, and continue to study multijurisdictional practice.
- Instituted a consortium of Internet practice interests.
- Worked with Idaho and Oregon state bars on mutual reciprocity rules.

Tasks for 2002

- Implement Practice of Law Board to review nonlawyer practice.
- Launch portal on Web site to a myriad of Internet legal services.
- Establish Law on the Internet Committee.

Goal 6: Maintain Responsible, Timely and Fair Regulatory Services

Accomplishments

- Brought discipline investigations current.
- Reviewed Rules of Lawyer Discipline and developed recommendations for clarifying and improving them.
- Implemented credit-card payment of license fees.

Tasks for 2002

- Meet discipline investigations and prosecution aspirational guidelines.
- Implement recommendations of Discipline 2000.
- Monitor and evaluate ABA's changes to Model Rules of Professional Conduct.

Goal 7: Access to Justice

Accomplishments

- Board for Judicial Administration (BJA) and the Washington State Bar Association adopted resolutions declaring access to justice as a fundamental right, and supporting the need for increased resources.
- Developed and pilot-tested online interactive forms for victims of domestic violence.
- Published an Open Society Institute-funded book *A Road Map for Building an Equal Justice Community.*

Tasks for 2002

- Conduct a civil legal services needs assessment.
- Develop an Access to Justice Technology Bill of Rights to ensure that current and future technology both increases opportunities and eliminates barriers to access for justice.
- Implement Corporate Counsel Partnership for Justice Videophone Client Counseling Project statewide.
- Expand the number and kind of online forms.

Goal 8: Promote Technology

Accomplishments

- Added secure transactions and e-commerce to the WSBA Web site (www.wsba.org).
- Published *Technology Basics* for members.

Tasks for 2002

- Obtain public case law online free of charge.
- Revitalize the WSBA Web site with

interactivity, and make it more lively and interesting.

Goal 9: Promote Independence of Judiciary and Court Improvement

Accomplishments

- Worked with BJA to pass portability amendment for voter consideration.
- Supported jury improvement planning and legislation.
- Secured passage of the WSBA's five legislative initiatives.

Tasks for 2002

- Establish key issue file and resources to respond to criticism of judges.
- Work with BJA to define court-management best practices.
- Evaluate defense in capital cases.

Goal 10: Diversity

Accomplishments

- Implemented two at-large seats to increase the representativeness of the Board of Governors.
- Held listening lunches around the state to hear from members, especially those living in rural and smaller towns, and those working in government and nonstandard practice.
- Created ongoing dialog with minority bar associations.

Tasks for 2002

- Address the public perception of disparity of treatment in the justice system for persons of color.
- Support programs for gender equity.
- Establish BOG liaisons with minority bar associations.

Goal 11: Be Fiscally Responsible

Accomplishments

- Developed long-range financial forecasting.
- Established the Facilities Committee.
- Developed a Business Recovery Plan.
- Published the WSBA's financial results and budgets on our Web site.

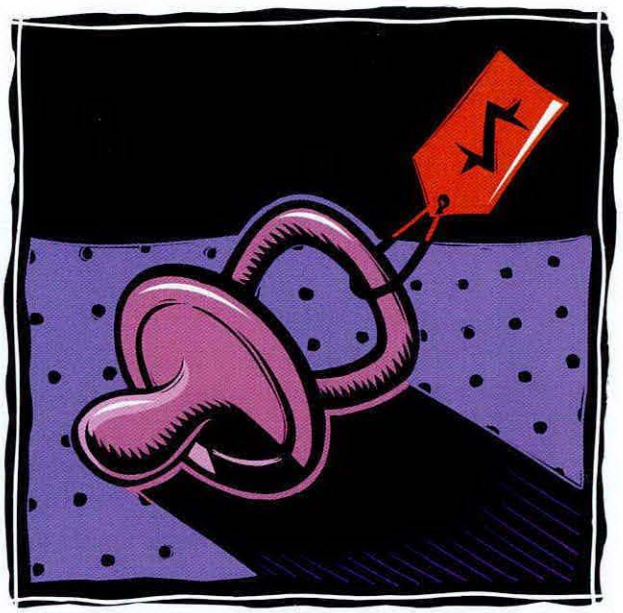
Tasks for 2002

- Develop nonlicense-fee sources of revenue to support WSBA discretionary services.
- Resolve CLE overhead and other cost increases.

Child Support and Wealthy Parents

How Much Is Too Much?

by Coreen R. Ferencz



How many ponies does a child need? Some children, by virtue of their extraordinary child-support awards, can afford an entire herd. It is not unheard of for wealthy parents to pay as much as $20,000 to $30,000 a month in child support, an amount which has increased to such a degree that high-income parents are paying 20 times more today than they did a decade ago.[1] Support awards have skyrocketed as courts have wrestled with the issue of determining, per the child-support guidelines of the state, how much support the child of a wealthy parent is entitled to.

As courts have formulated approaches to determining the support obligations of wealthy parents, they have considered the issues of what constitutes the "needs of the child"[2] and whether "good-fortune" awards, which exceed the child's needs, are appropriate where the parents are very rich.[3] Although courts have disagreed on whether good-fortune awards are appropriate,[4] they have recognized the tension in providing for the child's needs while limiting support so that it does not constitute a windfall to the child or receiving parent.

This article discusses the issue of good-fortune support as opposed to support limited to the child's needs, and concludes that support should be limited to the needs of the child, even where the parents are very rich. Because, as the Kansas Court of Appeals recognized, "no child, no matter how wealthy the parents, needs to be provided more than three ponies."[5]

The Needs of the Child and Good-Fortune Support

In Washington, as in most states, the statutes that govern child support are vague with regard to the child-support obligations of wealthy parents. In most instances, the amount of child support is proscribed by the Washington State Child Support Schedule,[6] which sets forth the presumptive amount of child support for the child or children based on the combined income of the parents (referred to as the "standard calculation").[7] A court may deviate from the standard calculation and order an amount higher or lower than that which is scheduled, but only upon written findings of fact based on one of the reasons set forth in RCW 26.19.075.[8]

The actual needs of the child consist of more than the bare necessities of life; need in this sense encompasses more than merely the support necessary for the child to survive.

The schedule stops at a combined income of $7,000 per month.[9] If parents earn in excess of $7,000 per month between the two of them, the court has discretion to set whatever amount it deems appropriate.[10]

In states such as Washington, in which the court is expected to exercise its discretion to come up with an appropriate child-support award, the tension that arises with high-income parents is the need to provide for the child in an appropriate standard of living without being excessive.[11] In circumstances in which the obligor parent earns millions of dollars per year, how does the court determine how much is enough, and how much is too much?

Washington Law

RCW 26.19 is entirely devoid of guidance as to how a court should go about determining the appropriate amount of support in situations in which the parents' combined monthly net income exceeds $7,000. Only two statutes even refer to such a contingency, and they simply provide:

> When combined monthly net income exceeds seven thousand dollars, the court may set support at an advisory amount of support set for combined monthly net incomes between five thousand and seven thousand dollars or the court may exceed the advisory amount of support set for combined monthly net incomes of seven thousand dollars upon written findings of fact.[12]

It would be erroneous to refer to support in excess of the maximum scheduled amount in these situations as a "deviation" from the child-support schedule. Because the schedule does not extend past combined monthly incomes of $7,000, there is no scheduled amount to deviate from. "Deviation" is defined by RCW 26.19.010 as "a child-support amount that differs from the standard calculation." Furthermore, the reasons listed in RCW 26.19.075 for deviation do not include income in excess of $7,000 per month. Based on these indications from statutory construction, it is reasonable to conclude that the Legislature did not consider it a "deviation" if a court was to order support above the maximum scheduled amount in cases in which the parents' combined monthly net income exceeds $7,000.

Case law is sparse as well, and there is no definitive precedent in Washington. Although the court in *Leslie v. Verhey*[13] was presented with the issue, it simply echoed the legislative policy statement found in RCW 26.09.001 and held that where the parents' income exceeded the statutory economic table, support may be awarded above the statutory maximum. The amount above and beyond the statutory maximum must be determined "commensurate with the parents' income, resources, and standard of living, 'in light of the totality of the financial circumstances.'"[14] There is no other case on point.[15] While this statement certainly gives the courts something to aspire to, it does very little in the way of practical guidance.

Precedent in Other States

Fortunately, other jurisdictions that have addressed this issue have set forth a more definitive analytical framework. As a preliminary inquiry, courts in other states usually begin by determining what the needs of the child are as the touchstone in fixing the appropriate level of support.[16] However, this analysis must necessarily begin with determining what is meant by "need."[17]

In searching for the definition of "need," courts have distinguished the "actual needs" of the child from the "bare necessities." The actual needs of the child consist of more than the bare necessities of life; need in this sense encompasses more than merely the support necessary for the child to survive. It includes support as is necessary to allow the child to enjoy the standard of living to which he or she is entitled by virtue of the obligor parent's income. The consensus is that a wealthy parent must do more than simply provide the bare necessities of life for the child; the child's actual needs must be satisfied. However, the consensus ends here.

Courts have taken two different posi-

tions as to the child's needs as the determinative factor in calculating the child-support award in situations where the obligor parent is wealthy. Some consider the child's needs as the only factor: the child is entitled to as much support as will keep him or her in the standard of living enjoyed by the obligor parent.[18] Other courts have decided, however, that the child of a wealthy parent is entitled to more than simply having his or her needs met.[19] These courts award an additional amount of support, over and above the needs of the child, as "good-fortune" support, on the theory that the child is entitled to share in the good fortune of the obligor parent.[20]

Good-Fortune Child Support

The issue of whether a court is permitted to award good-fortune child support is usually not clearly indicated by statute, leaving the courts to struggle with the issue of whether such awards are appropriate.

The Florida Court of Appeals decided in *Finley v. Scott*[21] that the trial court's award of good-fortune support, to be reserved in a trust fund for the child until she turned 18, constituted reversible error.[22] The court held that child support exceeding the child's actual needs amounted to an award of a share in the father's estate, and that the family should determine the child's standard of living, not the court.[23] Although the Florida Supreme Court had previously held that "a minor child has every right to share in the good fortune of his or her parents, even after their divorce, given the minor child's general entitlement to the bounty of his or her parents and the fact that the parent-child relationship continues notwithstanding the divorce,"[24] the *Finley* court interpreted this language to mean that the child was entitled to more than simply the basic amount of support necessary to survive, but should be provided with the amount of support appropriate to keep him or her in the same standard of living as the obligor parent.[25] The Florida Supreme Court reversed the decision of the Court of Appeals, holding that the child of a wealthy parent is entitled to more than the satisfaction of needs; the child is entitled to share in the parent's good fortune through support above and beyond that which provides for his or her needs.[26]

The Hawaii Court of Appeals took a different view in *Richardson v. Richardson*.[27] In *Richardson*, the trial court awarded child support in an amount less than that prescribed by the child-support guidelines.[28] The deviation from the guideline amount was based on the court's finding that the guideline amount exceeded the reasonable needs of the children.[29] The mother, who was the receiving parent, appealed the trial court's decision, claiming that it was an abuse of discretion to award less than the guideline amount.[30] Although the Court of Appeals remanded the case because it found that the trial court did not adequately consider the father's income, it held that "a payment in excess of the children's reasonable needs at the appropriate standard of living is, by definition, a payment for something other than child support."[31] Thus, the *Richardson* court rejected the idea of good-fortune child support, stating that such support is in fact not child support at all.

The *Finley* and *Richardson* cases illus-

trate the difficulty courts have experienced in determining whether a child is entitled only to be supported, or whether the child is entitled to share in the parent's good fortune. This difficulty was summarized in Justice McDonald's concurring opinion in *Miller v. Schou*,[32] in which the Florida Supreme Court first sanctioned the idea of "good-fortune support."[33] Although he agreed with the majority's opinion, he stated:

> I must confess considerable uneasiness with the use of the phrase "a child has a right to share in the parent's good fortune." Children have no right to the property of their parents. Their only right is to be supported. The sharing in a parent's good fortune can only relate to a higher standard of living, which includes food, shelter, clothing, education, and recreation. It does not necessarily follow that a child is entitled to trinkets, unnecessary spending money, or the like, simply because there is money available to supply them. The trial judge has great discretion in setting the level of support, but the ability to pay does not authorize a child to needlessly pick the pocket of a parent.[34]

The danger with good-fortune support in the nature of *Finley* is that it does just what Justice McDonald feared: it awards the child, as an entitlement, support above that which is necessary to keep him in the same standard of living as the parents.

Need, Not Income, Should Determine Child-Support Obligation

The determinative factor in setting child support should be the needs of the child, rather than the income of the obligor parent. To that end, courts should refuse to award good-fortune support exceeding the child's actual needs. After all, the purpose of child support is presumably to provide for the child's actual needs, not to force the obligor parent to pay as much as he or she can afford.[35] Payment above and beyond the actual needs of the child is both excessive and inappropriate.

According to one Washington case, the needs-based approach appears to be the appropriate method. In *Hartman v. Smith*,[36] the court was presented with a cause of action for support arrearages. The court held: "Child support is not meant to create an estate for the child but, rather, to assist in meeting the current expenses of child care."[37] Because the child had been well cared for, the court held that the child's interests were not at risk, and therefore the child was not entitled to receive any additional money for support.[38] Support in excess of the child's needs would amount to a windfall to the child via a distribution of the obligor parent's estate, which is not the purpose of child support.

Such was the philosophy employed by the Delaware Court of Appeals in *Ford v. Ford*,[39] when it reversed a large support award and held:

> The Delaware Child Support Statute certainly contemplates that children share in their parents' standard of living, even a somewhat luxurious standard of living.... But it does not direct or authorize the Family Court to distribute a parent's estate. The Family Court has no duty or authority to order payments which go beyond the demands of reasonable and generous support, meaning, in this context, enough to share in the respective lifestyles of the parents.

To base a child-support award on the

parent's income alone, without regard to the needs of the child, constitutes a distribution of the parent's estate, which is outside of the authority of the court under RCW 26.19.

Similarly, the Indiana Court of Appeals held in *In re Marriage of McKay*,[40] "An order of child support is not based merely upon a rudimentary review of the parties' balance sheets.... Having weighed the pertinent factors, the trial court may then order the amount of support necessary to provide adequately for the child."[41] To do otherwise would result in a windfall to the child by divesting the obligor parent of a part of his or her estate. Thus, the only appropriate method to employ is one which is centered on the needs of the child.

The needs-based approach was used by the Alabama Supreme Court in *Dyas v. Dyas*[42] to set a support obligation for a high-income obligor. The child's father was an orthopedic surgeon who had an adjusted gross income of $384,970, as well as substantial assets including real properties and a considerable retirement account.[43] The mother had a historical annual income between $27,000 and $30,000, and no significant assets, but would receive a total of $575,000 in property settlement and maintenance pursuant to the divorce.[44]

The trial court ordered $4,834 per month for the parties' two children, ages two and five,[45] but the Alabama Court of Appeals reversed, holding that "it is abundantly clear from the record that the child support awarded was based solely on the husband's perceived ability to pay and does not rationally relate to the reasonable and necessary needs of the two minor children."[46]

The appellate court found the trial court should have applied a two-pronged test to determine the appropriate amount of support, since the parties' combined income exceeds the child-support guidelines.[47] First, the court must determine whether the award rationally relates to the child's "reasonable and necessary" needs, in accordance with the child's standard of living during the marriage.[48] Then, the court must examine whether the support award reasonably relates to the obligor's ability to pay.[49] Because the trial court in *Dyas* had not fulfilled the first prong of this analysis, the appellate court reversed the award of child support, and stated that unless there was additional evidence on remand to support

Where support exceeding the needs of the child is awarded, the obligor parent is robbed of the ability to take part in determining the lifestyle of the child.

an award above the maximum amount on the child-support guidelines, "that amount appears to be the proper award at this time."[50]

If a needs-based approach such as the one used in *Dyas* is not employed by a court in setting child support, the obligor parent is deprived of many of the discretionary spending decisions that both the receiving parent and married parents are free to make for their children. An award of support that exceeds the actual needs of the child shifts to the custodial parent the sole discretion to determine the child's lifestyle.[51]

Once the child's needs are provided for, the receiving parent has the discretion to determine how much or how little of the excess to spend on the child, and the obligor parent has little voice in this decision. In fact, the court has more power than the obligor parent to determine the child's lifestyle, because it has the power to determine the amount of excess the obligor parent will have to pay. Where support exceeding the needs of the child is awarded, the obligor parent is robbed of the ability to take part in determining the lifestyle of the child.

Recognizing this effect of awarding support exceeding the child's needs, the appellate court in *Harmon v. Harmon*[52] reversed the trial court's award of $35,000 per year in support for the parties' 20-year-old on the basis that the trial court failed to consider, in setting support, the child's "actual reasonable needs."[53] The appellate court held that the trial court's blind application of the statutory formula, without any finding in regard to the child's needs, constituted "both an abdication of the judicial responsibility and a trespass upon the rights of parents to make lifestyle choices for their children."[54] It further stated that "[a]lthough entitled to support in accordance with the preseparation standard, a child is not a partner in the marital relationship, entitled to a 'piece of the action.'"[55] The child may be entitled to be supported in the parents' standard of living, but the child is not entitled to a flat percentage of the parents' income unless it is justifiably related to the child's actual needs.

Similarly, the Florida Court of Appeals in *Finely v. Scott*[56] held:

> A "good parent" has been described as one who provides for all of the needs but only some of the wants of his children. This definition recognizes that once a parent meets the needs of the child (consistent with the parent's chosen lifestyle), the good parent uses further rewards to encourage industry, good deportment and proper attitude. This extremely important parental option is lost if the court decrees that a child is entitled to *his share* of the family wealth and will get it in spite of the parent's desire.[57]

The *Finley* court recognized the importance of both the parents' role in determining the child's standard of living and the evils of creating a good-fortune "entitlement" that the child will receive by the

court's order, whether or not the parents agree.

The appellate court's holding in *Finley* was overturned by the Florida Supreme Court.[58] The Court held that while the child's actual needs should be considered, they were only one factor in determining the appropriate support amount.[59] Therefore, the trial court was permitted to award more support than was necessary to cover the expenses of the child — $3,000 more than the child actually needed.[60] The Florida Supreme Court did not respond to the statement by the appellate court that the parent should be the one to decide the child's standard of living as a "good parent" does; the court simply stated that the trial court was justified in considering the obligor's financial resources in addition to the child's needs.[61]

However, the appellate court in *Finley* did not dispute whether the trial court should consider the financial resources of the obligor parent. Indeed, the court stated that the parent must provide for the needs of the child *consistent with the parent's standard of living*[62] [emphasis added]. In order to determine the parent's standard of living, the court must necessarily consider the income of that parent. The Florida Supreme Court leaves to speculation why a child is entitled to more than having his or her needs met commensurate with the parents' standard of living, or distinguish this situation from the distribution of the parents' estate.

In situations in which the court awards more than the amount of support necessary to provide for the child's actual needs, there is no guarantee that the excess support will be spent on the child.[63] Since the receiving parent has the discretion to spend the excess as he or she pleases, the excess support may benefit the receiving parent instead of the child.[64] Although an indirect benefit to the receiving parent is expected and unavoidable, child support should not be used to equalize the incomes of the two homes, or as a method for the receiving spouse to obtain tax-free maintenance.[65] The purpose of child support is to support the child, not the receiving parent.[66] Thus, the focus should remain on the needs of the child to prevent a windfall to the receiving parent.[67]

To ensure that the focus remains on the actual needs of the child, a presumptive statutory maximum should be set for child support, which can be rebutted by evidence that the child needs more than the maximum support. The burden should be on the parent receiving support to justify why an amount greater than the statutory maximum is warranted.[68]

If the receiving parent bears the burden of proving that the maximum is insufficient, the focus will remain on the child's actual needs because the receiving parent must prove that the child's needs are not met by the maximum amount of support; the burden cannot be sustained by merely proving that the obligor parent is capable of paying a greater amount. The actual needs of the child will remain at the center of the debate; the income of the obligor parent will be a secondary concern. Fur-

thermore, the receiving parent "is in the best position, as managing conservator, to explain the needs of the child."[69] The receiving parent knows how much support the child needs, and what it is needed for, and is therefore better able to bear the burden of rebutting the presumption that the statutory amount is too low than the obligor parent is to rebut the presumption that the statutory amount is too high.

Determining child support in this way has the additional benefit of allowing the court to tailor the award to the particular circumstances of each case. Although this leads to greater unpredictability,[70] it is more flexible and more child-centered than calculating support as a strict percentage of income. And though some have argued that allowing discretionary awards is unfair because it could theoretically result in the same support for a parent earning $200,000 per year as a parent earning $1,000,000 per year,[71] the goal of the child-support system is not parity between families.[72] Rather, the goal is to provide for the actual needs of the children.

Additionally, placing the burden on the receiving parent allows the court to ensure both that the receiving parent is spending the support money on the child, and that the amount of support is not excessive. In order to justify a higher support amount, the receiving parent would have to itemize the needs not covered by the presumptive maximum. Requiring proof that the child's needs are not met by the presumptive amount forces the receiving parent to spend the money as itemized for the court. For example, if the mother claims that she needs an extra $1,000 per month so the daughter can attend an exclusive private school, the father would presumably have cause to petition the court for a modification of the child-support obligation if the mother pockets the extra $1,000.[73] Requiring the receiving parent to justify an amount higher than the presumptive maximum ensures that the additional amount is awarded to satisfy the child's needs, and prevents a windfall to the receiving parent.

Conclusion

Parents, however rich or poor, are entitled to exercise control over their finances and determine the standard of living their child should enjoy. Deciding how much money above and beyond the child's needs to provide for the child is a fundamental function of parenting. By spending money on certain items over others, or choosing not to fulfill certain material desires of the child, a parent instills values and priorities into the child that shape what he or she will become. A parent's right to take part in this formative process should not be impeded by the courts through excessive child-support awards.

Any amount of support that exceeds the actual needs of the child is not child support. Whether an excessive child-support award benefits the child or the receiving parent makes no difference; in one case, it unfairly benefits the receiving parent at the expense of the obligor, and in the other, it divests the obligor of either his or her estate, or the right to take part in discretionary spending decisions for the child. Both cases are unfair and deprive the obligor parent of either the right to participate in determining the child's standard of living, or the right to keep his or her money.

By focusing on the needs of the child, courts can avoid this problem. If the burden is on the receiving parent to prove why a high amount of child support is necessary, the court can ensure that the higher amount is justified and that it will be actually spent on the child. Furthermore, if the

receiving parent must itemize expenses to support the request, the obligor parent will have the opportunity to argue whether the itemized needs are an appropriate expense, and by doing so have the chance to voice an opinion about the appropriate standard of living for the child.

The purpose of child support is to provide for the needs of the child. Therefore, a system that requires the parent receiving child support to justify how much the child needs makes sense. By focusing on the child's needs, rather than the obligor's income, child support will return to its original purpose, and both the parents and the child will benefit.

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NOTES

1. Margaret A. Jacobs, "A Mogul and His Ex Wage an Epic Custody War," *Wall Street Journal*, February 2, 1999, B1.
2. *See, e.g.,* In re Marriage of McKay, 671 N.E.2d 194, 197 (Ind. 1996).
3. *See, e.g.,* Finley v. Scott, 687 So.2d 338, 340, *rev'd* 707 So.2d 1112 (Fla. 1998).
4. *See id.*, Harmon v. Harmon, 173 A.D.2d 98, 578 N.Y.S.2d 897 (1992); Richardson v. Richardson, 808 P.2d 1279 (Haw. 1991).
5. In re Marriage of Patterson, 920 P.2d 450, 455 (Kan. 1996).
6. RCW 26.19.020; RCW 26.19 Appendix.
7. The term "standard calculation" is prescribed by RCW 26.19.011.
8. *See* RCW 26.19.020, .035, .075. Failure to set forth written findings of fact is reversible error. *See* In re Marriage of Crosetto, 82 Wn. App. 545, 918 P.2d 954 (1996).
9. RCW 26.19.020.
10. *See* RCW 26.19.020. The court must set forth written findings of fact if it chooses to order support in excess of the maximum scheduled amount. *Id.* However, failure to set forth written findings of fact is reversible error. *See* Crosetto, *supra* note 8.
11. *See* In re Marriage of Patterson, 920 P.2d 450, 456 (Kan. 1996) (holding, "[i]n fixing the child-support obligation of a high-income parent, the trial court must balance competing concerns. On the one hand, the trial court should not limit the amount of child support to the child's 'shown needs,' because a child is not expected to live at a minimal level of comfort while the noncustodial parent is living the life of luxury. The trial court must consider the standard of living the child would have enjoyed absent parental separation and dissolution. On the other hand, child-support payments are not intended to be windfalls, but rather adequate support payments for the upbringing of children.").
12. RCW 26.19.020. The language in RCW 26.19.065 is nearly identical.
13. 90 Wn. App. 796, 954 P.2d 330 (1998).
14. *Id.*
15. An often-cited case on the issue of upward deviation is In re Marriage of Glass, 67 Wn. App. 378, 835 P.2d 1054 (1992). However, as this case pertains to upward deviations on the basis of wealth, and does not address support in excess of the statutory maximum due to the parents' combined income in excess of $7,000 per month, it is not discussed.
16. *See, e.g.,* Harmon v. Harmon, 173 A.D.2d 98, 578 N.Y.S.2d 897 (1992); Richardson v. Richardson, 808 P.2d 1279 (Haw. 1991).
17. *See* Finley v. Scott, 707 So.2d 1112, 1116 (1998), quoting Finley v. Scott, 687 So.2d 338, 340, *rev'd* 707 So.2d 1112 (Fla. 1998) (Sharp, J. dissenting) (stating that "[t]he crux of the difficulty is settling on whose standard of living determines the needs of the child.").
18. *See, e.g.,* Harmon v. Harmon, 173 A.D.2d 98, 578 N.Y.S.2d 897 (1992); Richardson v. Richardson, 808 P.2d 1279 (Haw. 1991).
19. *See, e.g.,* Finley v. Scott, 707 So.2d 1112, 1116 (1998); Miller v. Schou, 616 So.2d 436 (Fla. 1993).
20. *Id.*
21. 687 So.2d 338, 340, *rev'd* 707 So.2d 1112 (Fla. 1998).
22. *Id.* at 344.
23. *Id.* at 340.
24. Miller v. Schou, 616 So.2d 436, 437 (Fla. 1993), quoting Bedell v. Bedell, 561 So.2d 1179, 1182 (Fla. 1989).
25. 687 So.2d 338, 340, *rev'd* 707 So.2d 1112 (Fla. 1998).
26. 707 So.2d 1112, 1116 (1998).

27. 808 P.2d 1279 (Haw. 1991).
28. *Id.* at 1283.
29. *Id.*
30. *Id.* at 1281.
31. *Id.* at 1286.
32. 616 So.2d 436 (Fla. 1993).
33. *Id.* at 437.
34. *Id.* at 439 (McDonald, J., dissenting).
35. In re Marriage of McKay, 671 N.E.2d 194, 197 (Ind. 1996).
36. 100 Wn.2d 766, 674 P.2d 176 (1984).
37. *Id.*
38. *Id.*
39. 600 A.2d 25, 30 (Del. 1991).
40. *Id.*
41. *Id.* at 197.
42. 683 So.2d 971 (Ala. 1995).
43. *Id.* at 972.
44. *Id.* at 972-73.
45. *Id.* at 972.
46. *Id.* at 974.
47. *Id.* at 973-74.
48. *Id.* at 973.
49. *Id.* at 974.
50. *Id.*
51. In re Marriage of Patterson, 920 P.2d 450, 528 (Kan. 1996); Gregory M. Bartlett, J. "Setting Child Support for the Low Income and High Income Families in Kentucky," 25 *N. Ky. L. Rev.* 281, 300 (1998).
52. 173 A.D.2d 98, 578 N.Y.S.2d 897 (1992).
53. *Id.* at 110, 578 N.Y.S.2d at 904.
54. *Id.*
55. *Id.* at 111, 578 N.Y.S.2d at 904.
56. 687 So.2d 338, 340, *rev'd* 707 So.2d 1112, (Fla. 1998).
57. *Id.* (emphasis in original).
58. 707 So.2d 1112 (Fla. 1998).
59. *Id.* at 1116.
60. *Id.*
61. *Id.*
62. Finley, 687 So.2d at 341.
63. *See* Finley v. Scott, 687 So.2d 338, 341, *rev'd* 707 So.2d 1112 (Fla. 1998) (asking whether, since the trial court "is nevertheless going to impose this grandiose standard of living, should it not at least direct the mother as to how she will spend the money?").
64. Ronald F. Logar, "Wealth, A Substitute for Need: A Critical Look at Gabler-Herz," 57-APR *Inter Alia* 8, 10-11 (1992).
65. Bartlett, *supra* note 50.
66. *Id.* at 11.
67. *See id.*
68. *See* Scott v. Younts, 926 S.W.2d 415, 421 (Tex. 1996).
69. *Id.*
70. The legislative policy behind the Washington State Child Support Schedule is predictability and uniformity. *See* RCW 26.19.001.
71. Laurie Dichiara, Note and Comment, "Heeding the Call of Cassano v. Cassano: The Need to Amend the Child Support Standards Act," 17 *Pace L. Rev.* 405 (1997).
72. Sharon J. Badertscher, Note, "Ohio's Mandatory Child Support Guidelines: Child Support or Spousal Maintenance?," 42 *Case W. Res. L. Rev.* 297, 336 (1991).
73. *See* RCW 26.09.170.

Washington Rejects "Friendly Parent" Presumption in Child Custody Cases

by Margaret K. Dore and J. Mark Weiss

Is it necessary for children to have regular contact with both parents after a dissolution? In many states and in Canada, where the "friendly parent" presumption is an important factor in determining custody, the answer seems to be yes. But in Washington "the best interests of the child" remains the standard, and that means that there is no automatic right of contact between children and noncustodial parents. It also means that courts should think twice before allowing children to become pawns in disputes between parents.

In 1997, our Supreme Court held that Washington law does not presume that "frequent and continuing contact with both parents is in the best interests of the child." *Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997). In 1998 and 1999, the Legislature refused to overrule that decision and pass legislation adopting the "friendly parent" concept.

Now, three recent Court of Appeals decisions have clearly rejected the friendly parent concept: *Custody of Nunn*, 103 Wn. App. 871, 14 P.3d 175 (2000), *Lawrence v. Lawrence*, 105 Wn. App. 683, 20 P.3d 972 (2001), and *In re Parentage of Schroeder* ___Wn. App. ___, 22 P.3d 1281 (2001). Indeed, *Lawrence* expressly holds that "use of the friendly parent concept in a custody determination would be an abuse of discretion." *Lawrence*, 20 P.3d at 974. *Lawrence* is the first reported decision in the United States and Canada to both identify the concept by name, and reject it.

Friendly parents are those who do not make allegations about the other parent, do not withhold access to the child, and are cooperative.... The problem is that custody becomes a reward or punishment for behavior unrelated to a child's best interests.

The Friendly Parent Concept

Under the friendly parent concept, custody is awarded to the parent most likely to foster the child's relationship with the other parent, i.e., the "friendly parent." The concept is the underlying basis for statutes that require a court to consider which parent is more likely to allow the other parent "frequent and continuing contact" with the child as a factor for custody. Cf. *Lawrence*, 20 P.3d at 974.

In practice, courts determine which parent is the "friendly parent" by examining parental behavior. Friendly parents are those who do not make allegations about the other parent, do not withhold access to the child, and are cooperative. Conversely, unfriendly parents are those who make allegations, are "alienating," and withhold access. The friendly parent gets the child, or at least more *time* with the child.

On first look, the friendly parent paradigm is an appealing test for custody. We would all like to see friendlier parents. The problem is that custody becomes a reward or punishment for behavior unrelated to a child's best interests. The results of a friendly parent analysis can be bizarre and have nothing to do with what's best for children.

Reward for Manipulative Litigation Tactics

The friendly parent concept rewards manipulative litigation tactics. The following example comes from an unreported Washington case.

The child, who lived with the mother in the family home, had recently had open-heart surgery and was extremely ill with a high fever. The father, seeking to show that the mother was the unfriendly parent, moved for immediate visitation outside the home on an alternating, every-other-day basis. The mother, of course, objected because of the child's health. Through her objection, the father obtained his proof that the mother had restricted his access to the child; therefore she was "unfriendly."

In this same case, the father obtained a restraining order prohibiting the mother from entering his apartment — and then invited her in. The mother accepted because she hoped to reconcile. This occurred on several occasions. Subsequently the police were called and the father denied his invitations. Once again, the father obtained proof that the mother was "unfriendly." She had violated a court order; she was uncooperative and alienating. The father repeatedly utilized such tactics to paint her as the unfriendly parent.

At trial, the court was offended by the mother's violation of its order and her behavior. The father was awarded custody, the family home and child support. A few months after trial, the father returned the child to the mother's care, but he retained the family home.

It is now two years later. The mother continues to pay the father child support although she has the child. She does not go back to court because she fears losing the child, stating that she has no faith in the system. This result is not atypical for a case decided via the friendly parent concept.

"Catch 22"

The friendly parent concept can place a parent in a no-win "Catch 22." This fact is illustrated by *Custody of Nunn*. In *Nunn*, the child's aunt brought a custody petition against the mother, claiming that she was unfit due to prostitution and alcohol abuse. Although the petition was unfounded, the trial court nonetheless awarded custody to the aunt, because by fighting the petition, the mother "alienated" the aunt and other aligned persons, and failed to support the child's relationship with these persons. See *Nunn*, 103 Wn. App. at 888. If the mother had not fought the petition, she would have likely lost on the merits. But by fighting the petition, she lost as an unfriendly parent, finding herself in a no-win "Catch 22."

In *Nunn*, the Washington State Court of Appeals reversed, and although its opinion does not use friendly parent terminology, it nonetheless rejects the trial court's friendly parent reasoning. *Nunn* states:

> And so the question boils down to this: Can an otherwise fit parent be found unfit because she chooses to fight a ... custody petition, because she openly expresses her dislike of the side of the family that brought the custody petition, ... and because she doesn't foster a good relationship between her child and all of those people?

The answer is no. *Nunn*, 103 Wn. App. at 887-888.

Two months later, the Court of Appeals issued *Lawrence*, holding that use of the friendly parent concept "would be an abuse of discretion." *Lawrence*, 20 P.3d at 974. Most recently, it issued *Parentage of Schroe-*

The friendly parent concept has a warm and fuzzy name. But on close analysis, it is ultimately absurd and indeed dangerous for children.

der, where a contempt citation for withholding visitation did not justify a change in custody.

Domestic Violence

In the context of domestic violence, the "Catch 22" of the friendly parent concept can be deadly. In jurisdictions where the friendly parent concept is the law, a mother who tries to protect her child from a violent father, e.g., by limiting access to the child, risks being perceived as unfriendly. If this occurs, custody could be transferred to the violent father. While this may seem absurd, it occurs in practice.[1]

With such risk, a mother could rationally choose to keep the father's violence to herself. To avoid looking unfriendly, she would also not inform the court if the father is irresponsible, abusive or neglectful. This is the silencing effect of the friendly parent concept. The mother is rendered powerless to protect her child. Commentator Joan Zorza states:

> [Friendly parent provisions] reinforce learned helplessness in the victimized parent by encouraging her to suppress her complaints for fear that she will lose custody if she flees, denies her abuser visitation, or complains about his abusiveness in court.[2]

A similar situation would exist if the gender roles were reversed.[3] Regardless, the friendly parent concept is a dangerous test for custody. Its use is contrary to the interests of children.

Conclusion

The friendly parent concept has a warm and fuzzy name. But on close analysis, it is ultimately absurd and indeed dangerous for children. Washington has now taken important steps to reject it. Hopefully other jurisdictions will have the foresight and the courage to follow our state's lead, increasing the likelihood that children will be protected in the context of dissolution.

Margaret K. Dore practices appellate law in Seattle. She was counsel of record for the appellant in Lawrence v. Lawrence. *Her publications include other articles on the friendly parent concept.*

J. Mark Weiss is an attorney practicing family law attorney in Seattle.

NOTES

1. Joan Zorza, "Friendly Parent Provisions in Custody Determinations," *Clearinghouse Review*, Vol. 26, No. 8, December 1992, p. 924-925; Mary Ann Mason, Ph.D., JD, "The Custody Wars: Why Children Are Losing the Legal Battle and What We Can Do About It," NY, *Basic Books*, 1999, p. 152; and Margaret Hagen, Ph.D., "Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice," *Regan Books*, 1997, pp. 210-212 (describing a friendly parent analysis in the context of abuse without identifying it by name).
2. Joan Zorza, "Friendly Parent Provisions in Custody Determinations," *Clearinghouse Review*, Vol. 26, No. 8, December 1992, p. 925.
3. The friendly parent concept is most often employed against the custodial or primary parent, typically the mother. It is less often employed against fathers. Cf. Joan Zorza, "Friendly Parent Provisions in Custody Determinations," *Clearinghouse Review*, Vol. 26, No. 8, December 1992, p. 924.

Inside the The Rules of Professional Conduct Committee

by Vicki Lee Anne Parker

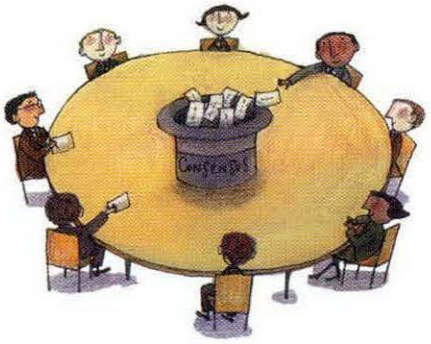
"Ethics Inquiry No. ___ has been assigned to you...." The work of the Rules of Professional Conduct Committee begins. Two members receive an assignment to research and respond to questions posed by fellow members of the Bar. One committee member assigned to the task might be an attorney from a small town whose daily work entails handling nearly every legal question that comes through the door. The other assigned member may practice in only one area of law, and live in a large city. Or, perhaps the committee member is a professor of law or a government attorney representing state, county or city government. The diversity is invaluable. An attorney on the committee may know that a question is in litigation, while another may know that disciplinary action has begun.

Submitted inquiries are confidential (See *Bar News*, December 2000, p. 38). The two attorneys assigned to the investigation write a memorandum to the committee. During the committee meeting, they present an overview and recommend a course of action. With as many as 27 attorneys grappling with an inquiry, the process is lively; however, this free exchange of views never takes on a personal tone. Candor and humor permeate every meeting.

The Committee's Work

The tasks of this committee allow its members to intellectually dissect situations in a way rarely afforded. While it is the express function of the committee to answer questions attorneys have of their own contemplated behavior, an inquiry might come from a nonattorney supervisor in a government agency. The committee must decide whether to reject the inquiry, or educate the agency about the application of the rules to attorneys in the agency, whether they are practicing law or not.

Sometimes the problem is not with what should be said, but how to say it. For example, the committee does not give legal advice. If questions involve the interpretation or applicability of a law in a situation, the committee will decline to enter the fray, but may offer general reference to certain RPCs. Often, a definite economic motive is the incentive or concern behind the inquiry. What should be done with unexpended trust funds from a lost client? Does a fee agreement have to be in writing? May an attorney charge a flat percentage of his fee for costs?



With as many as 27 attorneys grappling with an inquiry, the process is lively; however, this free exchange of views never takes on a personal tone. Candor and humor permeate every meeting.

Some of the questions submitted appear to be "no brainers," such as an attorney asking if it is appropriate for him to have direct contact with the client of opposing counsel. But a wrinkle may appear. If the opposing attorney declines to identify his representation of an individual, is the first attorney in violation of the rule upon contacting the unidentified "client"? Because the response of the committee may be used defensively in a disciplinary hearing, it is important to ask before acting in a potentially questionable manner.

The committee deals with current issues, such as recommending to the WSBA Board of Governors a proposed rule change prohibiting sex with clients. A subcommit-

tee provided an exhaustive review of insurance company audits; the resultant effect of new technologies on confidentiality are considered and reconsidered as technology changes; and ethical questions regarding the establishment of a Web site, allowable contents, and the routing to that site have been considered.

Cutting-edge issues such as multidisciplinary practice are routinely aired in committee. May an attorney sell life insurance and other products as one business, and practice estate law in another? May an attorney be a real estate broker and have a separate law practice in the same building? Whose trust account must be used? May an attorney own a contracting firm and have a law practice centered on construction issues? Each question is of vital importance in the structuring of an attorney's practice and work.

Ethics Issues

Great care is given to lead the attorney toward appropriate ethical conduct. Conflicts of interest and queries about trust accounts are routine. Attorneys accidentally find themselves violating trust-account rules by keeping nonclient funds in their trust accounts in an amount in excess of account operating expenses. We often receive questions such as "Attorney X is doing A, B and C. Is he violating the RPCs?" The committee generally refrains from responding to this type of inquiry.

While we may be asked to draft a fee agreement that meets ethical standards if the one presented to us proves unethical, the committee does not draft documents, whether fee agreements or advertisements for Web sites.

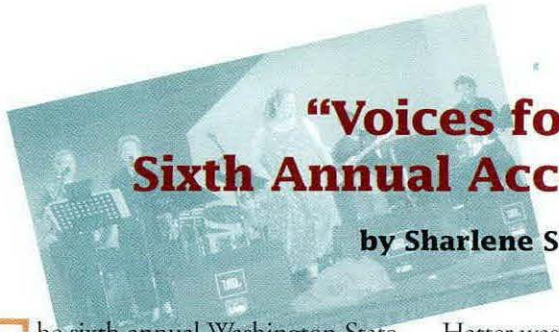
The committee, which may propose rule changes, is usually asked to review proposals to change the ethics rules. When issues recur, the committee can opt to submit a formal opinion, which may be modified, to the Board of Governors for adoption. While the informal opinion may be helpful and creates a rebuttable presumption that an action is ethical, the formal opinion creates the primary basis of analysis for future opinions of the committee. The committee also looks to the RCWs, case law, and the RCS (Rules of Common Sense) for guidance.

Currently, the committee has a work in progress — the preparation of an ethics deskbook. It is the hope of the committee that the deskbook will further help attorneys meet the ethical standards set forth in the Rules of Professional Conduct.

Before you pick up a cellular phone or use e-mail to conduct business, you may want to consider your client's confidentiality under RPC 1.6. If you are considering representing Web site clients, you may want to review the rules, particularly on conflicts and confidentiality. If your client has directed you to claim a tractor is part of a land transfer or wants help in hiding assets, you may wish to check out RPCs 1.1, 1.2(d), 3.1 and 3.4.

For further information, contact WSBA Professional Responsibility Counsel Chris Sutton, secretary of the Rules of Professional Conduct Committee, at 206-727-8219 or chriss@wsba.org.

Vicki Lee Anne Parker is an attorney in private practice in Olympia. In addition to serving on the RPC Committee, she serves on the Court Rules and Procedures Committee, and is a peer mediator in Thurston County.



"Voices for Justice" Heard at Sixth Annual Access to Justice Conference

by Sharlene Steele • *Access to Justice Liaison*

The sixth annual Washington State Access to Justice Conference was held at the WestCoast Wenatchee Center, June 8-10, 2001. In attendance were more than 250 representatives from access to justice network organizations, including courts (judges, clerks, courthouse facilitators), the private bar, legal services programs, volunteer attorney programs, law schools, alternative dispute resolution centers, domestic violence advocates, paralegal associations and social services.

The conference kicked off Friday evening with the welcoming reception. Justice **Tom Chambers** presented Judge T.W. **(Chip) Small**, outgoing ATJ board chair, with the ATJ Judicial Leadership Award, in recognition of his outstanding and tireless commitment to equal justice. **Don Kinney**, Northwest Justice Project, presented **Bob Cryder**, managing editor of the *Yakima Herald Republic*, with the 2001 Civil Equal Justice Community Award, in appreciation of a series of articles published in December 2000 titled "A Look at Race in the Yakima Valley." Special posthumous tributes were made to two people who dedicated their lives and careers to diversity and access to justice. **Santiago Rodriguez**, director of diversity for Microsoft, was a nationally recognized authority on the subject of diversity. **Rosa Hernandez** was a paralegal and dedicated farm worker advocate with Columbia Legal Services in Yakima.

Conference participants were entertained by The Moderately Talented (Yet Plucky) Repertory Theatre of Justice, which presented *Alice in Access Land* written by Judge **Michael Donohue**, Spokane County Superior Court. Alice, played by **Marla Elliott**, struggles to find her way through the justice system in spite of many barriers, such as finding herself homeless when her car is towed away by the Repo Dude (**Jan Eric Peterson**). The Honorable Mad Hatter was played by Judge **Paul Bastine**, Spokane County Superior Court. More than a dozen judges, including Washington Supreme Court Justices **Bobbe Bridge**, **Tom Chambers**, **Faith Ireland** and **Susan Owens**, marched as guerrilla soldiers.

Special posthumous tributes were made to Santiago Rodriguez and Rosa Hernandez, who dedicated their lives and careers to diversity and access to justice.

On a serious note, substantive workshops were held Saturday and Sunday. Topics included public legal education, legal services funding challenges, media training (which included a presentation by **Elizabeth Arledge**, communications director of the National Legal Aid & Defender Association), diversity training (facilitated by Dr. **Leticia Nieto**), children's issues, disabilities, domestic violence, and paralegal and other nonlawyer roles in access to justice. **William Hornsby**, staff counsel of the American Bar Association Standing Committee on the Delivery of Legal Services, facilitated "Technology Show & Tell."

The workshop provided updates on several access to justice/technology projects in the works, such as the role of judicial information systems, public legal education Web site, technology bill of rights, domestic violence online interactive forms project, proposed moderate-means integrated phone/Web site system, Legal Service Corporation technology innovation grants, and the Corporate Counsel Partnership for Justice videophone client counseling project.

The ATJ Conference and Bar Leaders Conference plenary session (planned jointly by both conference planning committees), "Strategies for Improvement of the Judicial Selection Process, or Hey That Name Sounds Familiar," was a stimulating and provocative discussion regarding qualifications of judges and how they are selected. **Denny Heck**, president of TV Washington, moderated the panel discussion, which was filmed as TV Washington's *Inside Olympia* program. Panelists were Washington Supreme Court Justices **Tom Chambers**, **Susan Owens** and **Charles Z. Smith**; the Honorable **Marlin Appelwick**, Court of Appeals; **Everett Billingslea**, General Counsel to the Governor's Office; Dr. **Ruth Walsh McIntyre**, Walsh Commission; and **Charlie Wiggins**, American Judicature Society. The conversation continued through lunch in a town-hall format to allow maximum time for audience participation.

The keynote speaker at the conference was **john powell** [sic], founder and executive director of the Institute on Race and Poverty. The institute, a strategic research center located at the University of Minnesota Law School, is directly addressing the underlying causes of problems created at the intersection of racial injustice and poverty.

The Access to Justice Conference was once again held in conjunction with the WSBA Bar Leaders Conference and Board of Governors meeting, as well as several other ATJ network organization board meetings. The conference is made possible with a grant from the Legal Foundation of Washington and donations from many generous Washington law firms.

The 2002 conference is scheduled for June 7-9 at the Yakima Convention Center. If you would like more information or would like to be placed on the conference mailing list, please contact Sharlene Steele, WSBA access to justice liaison, at 206-727-8262 or sharlene@wsba.org.

Changing Venues

Honors and Awards

The following 2001-2002 officers and trustees have been elected by the membership of the Spokane County Bar Association: **Nancy L. Isserlis**, president; **Laurie F. Connelly**, vice president; **Michael P. Price**, secretary; **William C. Maxey**, treasurer; **Jack F. Driscoll**, trustee; **Paul B. Mack**, trustee; and **Kathleen H. Paukert**, trustee.

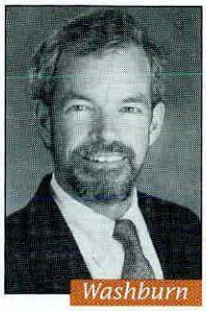
The Spokane County Volunteer Lawyers Program has recognized the following lawyers for their commitment to pro bono service in 2000: **William T. Mableson**, Senior Attorney of the Year; **Juliana C. Repp**, Special Recognition Award; **Kevin D. O'Rourke**, Young Attorney of the Year; **J. Steve Jolley**, Landlord-Tenant Attorney of the Year; **Ian Ledlin**, Bankruptcy Attorney of the Year; and **Linda D. O'Dell**, Family Law Attorney of the Year.

Mandie Barnes Lyle and **Marilyn Sherron** have been appointed to the Girl Scouts Totem Council board of directors. A former Girl Scout, Ms. Lyle is currently deputy general counsel for Sound Transit. She is a Fare Start volunteer and serves on the personnel committee of First Place. Ms. Sherron is an assistant city attorney for the city of Seattle, where she is the director of the employment section. She serves on the Washington Women Lawyers Judicial Selection Committee, and is a past chair of the WSBA Judicial Recommendation Committee. **Ruperta Alexis Caldwell** and **Linda Larson** have been appointed to the Girl Scouts Totem Council Nominating Committee. The committee is responsible for recruiting potential board members. Ms. Alexis Caldwell has served as an administrative law judge for the Social Security Administration since 1994. Ms. Larson works for the Seattle firm Sandler, Ahern & McConaughy.

Gordon L. Jaynes and **Edward N. Lange** have received the Graduate of Distinction Award from Walla Walla High School. The program honors Walla Walla High alumni who are recognized in their communities or careers. Mr. Jaynes is a lawyer, writer and editor, and has been published in professional journals around the world. He is on the editorial board of the *Washington Law Review*. Mr. Lange, now retired, practiced commercial law for 36 years. He was an Eagle Scout and now serves as a Boy Scout leader. He also serves on the Baker Boyer Bank board of directors.


Sherron


Alexis Caldwell


Washburn

The Roscoe Pound Institute of the Association of Trial Lawyers of America has bestowed the Richard S. Jacobson Award for Excellence in Teaching Trial Advocacy on **Lis Wiehl**. Ms. Wiehl is the director of the University of Washington Trial Advocacy Program.

Alfred M. Falk has been elected fellow of the American College of Trust and Estate Counsel for his service in the practice of estate planning, probate and trust law. Mr. Falk has practiced with the Tacoma firm Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP since 1984.

Julie Twyford has begun a term as president of the Washington Association of Criminal Defense Lawyers. In 1990, she opened the Twyford Law Office in Spokane, emphasizing criminal defense and personal injury litigation. Other newly elected officers are **Jeffery Robinson**, president-elect (Seattle); **Scott Engelhard**, vice president/West (Seattle); **Rick Fasy**, vice president/East (Spokane); **Margaret Smith**, secretary (Seattle); and **Barry Flegenheimer**, treasurer (Seattle). The following board members were also recently elected: **Bill Bowman** (Bellevue), **Catherine Chaney** (Seattle), **David Gehrke** (Seattle), **Cece Glenn** (Spokane), **Kevin Holt** (Kennewick), **Roger Hunko** (Port Orchard), **Robert Lewis** (Camas), **Vernon Smith** (Bellevue), **Sverre Staurset** (Tacoma), **Steve Thayer** (Vancouver) and **Karen Unger** (Port Angeles).

At their spring conference, the Washington State Association of Municipal Attorneys elected the following officers: **Robin Jenkinson**, president; **Judith Zeider**, first vice president; **Gail Gorud**, second vice president; and **Patrick Mason**, secretary-treasurer.

Movers and Shakers

Washington State Supreme Court Chief Justice **Richard P. Guy** (ret.) has joined The Markam Group in Spokane as of counsel.

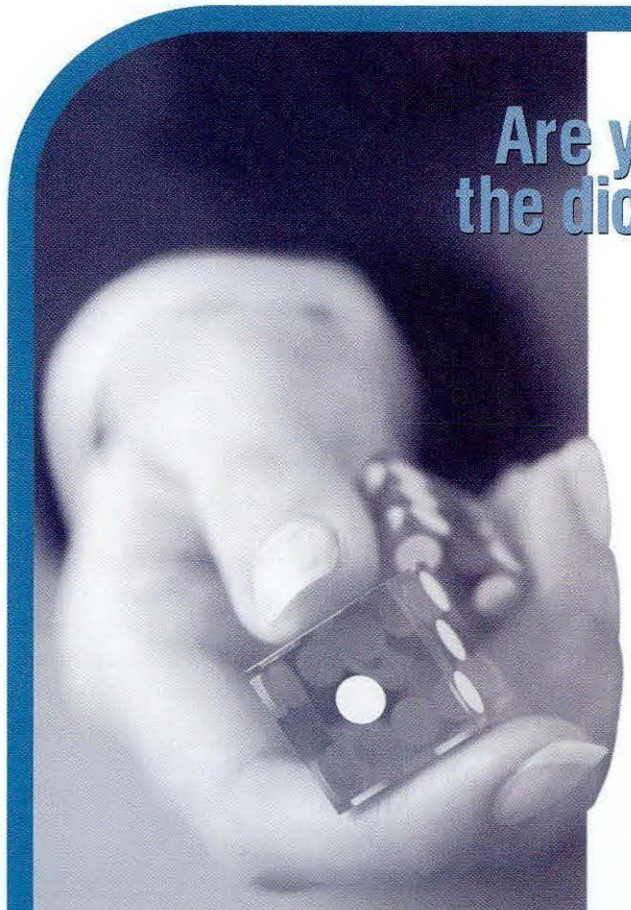
Desiree Hosannah, **Richard Roberts**, **Susan Keers Serko**, **Adam Torem** and **Selwyn Walters** have been appointed administrative law judges for the Office of Administrative Hearings (OAH). Judges Hosannah, Torem and Walters are based in the OAH Olympia office. Judge Roberts is in the Spokane office, and Judge Serko is in the Seattle office.

Four new lawyers have joined the Spokane office of Perkins Coie. **Katherine W. Fairborn** is an associate focusing on municipal finance and insurance regulation. **Brian Werst** is an associate, and his practice emphasizes general commercial, municipal and appellate litigation. **Mary J. Edwards** is of counsel in the public finance group. **James C. Sloane** serves as of counsel to the firm, concentrating on municipal corporations and public finance.

Tayloe Washburn has been elected to a four-year term as chair of the executive committee of the Seattle firm Foster, Pepper & Shefelman, succeeding **Jack Cullen**. Mr. Washburn has chaired the firm's land use and environmental group since 1995, and continues to practice in growth management, land use planning and litigation. Mr. Cullen has returned to full-time bankruptcy practice and is chair of the firm's creditors' rights and bankruptcy group. **Deborah A. Crabbe** has joined the firm as a member concentrating on creditors' rights and bankruptcy. **Meri E. Glade** (member of the California State Bar) has joined the firm as of counsel in the business practice group, focusing on intellectual property and licensing. **Pamela McClaran** is a member, and chairs the firm's estate planning practice group. **Cory B. Zion** is an associate in the litigation practice group, focusing on commercial and complex civil litigation.

Frederick Kaseburg has joined the Seattle office of Merchant & Gould as of counsel. He previously worked in the King County Prosecutor's Office and the Seattle firm Ordal & Kaseburg.

Linda Y. Chu and **Kent D. Johnson** have joined the Seattle firm Groff &



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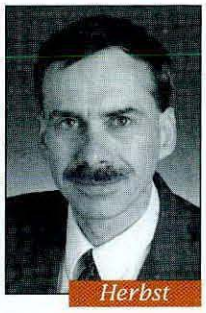
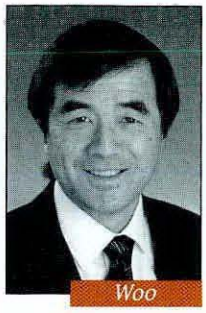
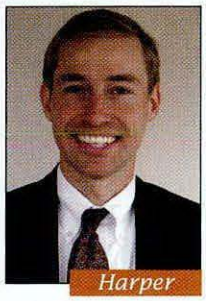

Herbst


Woo

Murphy PLLC as associates. Ms. Chu concentrates on commercial litigation, and Mr. Johnson focuses on business and real estate transactions.

Susan B. Matt has joined the Seattle firm McIntyre and Barns as an associate. Building on her nursing background, Ms. Matt focuses on medical malpractice defense.


Bailey


Harper


Hehir

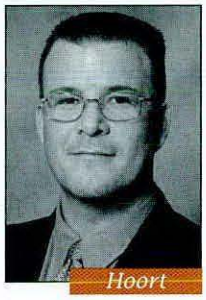
Michaelanne Ehrenberg and **Lauralyn B. Kliewer** have joined the Seattle office of Karr Tuttle Campbell as associates. **Katelyn E. Morgaine** has joined the firm as a staff attorney, and **Boaz Weintraub** has been promoted to staff attorney. Ms. Ehrenberg focuses on civil litigation and employment law. Ms. Kleiwer and Ms. Morgaine focus on commercial litigation. Mr. Weintraub joined the firm in 1998 and concentrates on probate and estate settlement, estate planning, trusts, gift and family wealth, and succession planning.

Steven Shawn Tacey has joined the Seattle office of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP as an associate. His emphasis is cross-border venture financing and other corporate finance matters.

Gary R. Duvall has joined the Seattle office of Dorsey & Whitney LLP as a partner. Mr. Duvall represents approximately 25 of the 40 franchise companies based in Washington and Oregon.

Charles E. Maduell has joined the Seattle office of Williams, Kastner & Gibbs PLLC as of counsel. He concentrates on land use and environmental law and litigation. **Robert D. Pentimonti** has joined the firm's Tacoma office as an associate, focusing on business law, taxation and estate planning. **Michael A. Herbst** and **Daniel D. Woo** have been named members in the firm's Seattle office. Mr. Herbst provides guidance in domestic and cross-border corporate and commercial transactions, including secured lending, workouts of troubled credits, mergers and acquisitions, private placements, e-commerce and business immigration. Mr. Woo advises companies on intellectual property matters and handles the related litigation.


Sharpe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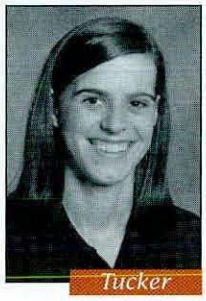
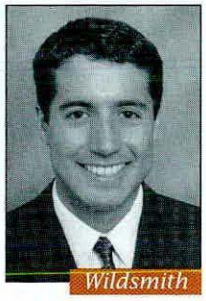
Richardson


Tucker


Wildsmith

Roger W. Bailey and **Ken W. Harper** have become partners in the Yakima firm Halverson Applegate PS. Mr. Bailey concentrates on commercial transactions and debtor/creditor issues. Mr. Harper's practice emphasizes land use and zoning. **Diane E. Hehir** has joined the firm as an associate practicing in litigation; land use; zoning; and environmental, family, and employment and labor law.

Lisa Ann Sharpe has been named principal in the Seattle firm Lasher Holzapfel Sperry & Ebberson. She joined the firm in 1991 and concentrates on employment disputes, Consumer Protection Act violations, commercial collection matters, breaches of commercial contracts, and construction defect cases. **Eric Hoort**, **Tara Richardson**, **Amy Elmendorf Tucker** and **Quentin Wildsmith** have joined the firm as associates. Mr. Hoort handles cases in numerous areas of law, including complex contractual disputes, class-action litigation, securities, UCC security interests, construction, employment, criminal defense, personal injury and immigration. Ms. Richardson focuses on family law and general litigation. Ms. Tucker concentrates on real estate, estate planning, business law and tax planning, and intellectual property. Mr. Wildsmith represents Northwest businesses in litigation, mediation and arbitration.

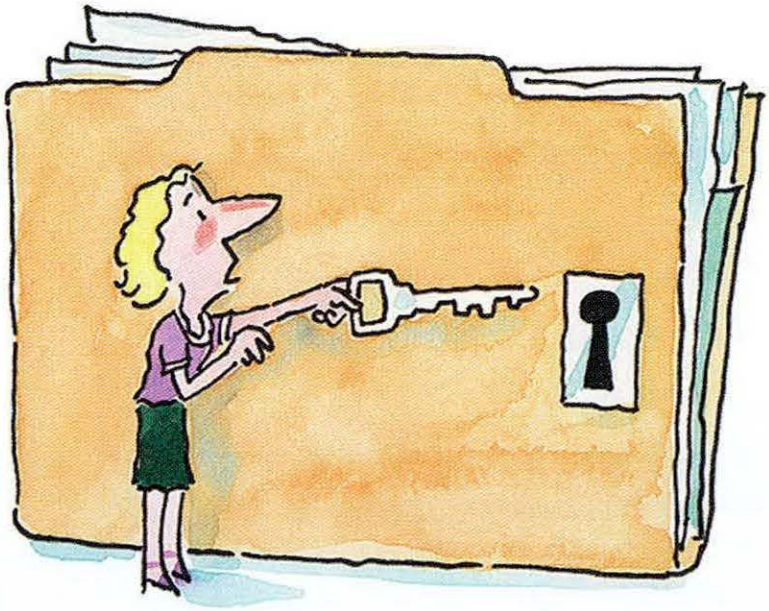
Liz Deckman, **Michaeal J. Gamsky** and **Anne B. Tiura** have joined the Seattle office of Heller Ehrman White & McAuliffe LLP as special counsel in the business department. **Oriana Halevy** and **Matthew G. Pohlman** are associates in the business department. **Tim McMichael** and **David Ward** have joined the firm as associates in the litigation department.

Annette Elinger (member of the Georgia and Florida state bars) has joined the Seattle office of Preston Gates & Ellis LLP as of counsel. She is a member of the firm's business department, as well as the emerging growth and venture capital practice group. Ms. Elinger focuses on business transactions and general corporate matters.

Confidentiality in the ADR Process

by Barrie Althoff • *WSBA Chief Disciplinary Counsel*

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



The assurance of confidentiality is essential to both a client-lawyer relationship and the success of alternative dispute resolution, particularly mediation. Without it, clients will not speak frankly and openly with their lawyers, and ADR participants will not disclose matters which may lead to resolution but which, if the ADR does not succeed, may harm them in subsequent proceedings.

A lawyer participating in ADR has a duty to maintain confidences and secrets. The source and extent of that duty depends on the role played by the lawyer. This article reviews a lawyer's duty of confidentiality (and, to a limited extent, the lawyer's duty to avoid conflicts of interest) in three roles: lawyer as client representative or advocate, lawyer as third-party neutral, and lawyer as a party in ADR proceedings. The article then briefly looks at the difficult ethical issues arising when a lawyer combines roles.

Lawyer as Client Representative or Advocate

A lawyer representing as an advocate a client participant in ADR has a duty of confidentiality as to the information the lawyer obtains in the representation. The lawyer's duty is (a) an ethical duty derived from the Washington Supreme Court's Rules of Professional Conduct (RPCs), (b) a statutory duty derived from the statutory attorney-client privilege, and (c) a statutory duty derived from applicable ADR statutes. Depending on the nature of the ADR proceedings and the agreements of the parties, the lawyer may also be subject to voluntary nongovernmental professional codes not herein addressed.[1]

Ethical Duty. RPC 1.6(a) requires a lawyer to maintain client confidences and secrets. RPCs 1.6(b) and 1.6(c) permit very limited disclosure to prevent a client from committing a crime, to allow a lawyer to defend himself or herself, and to disclose a breach of fiduciary responsibilities by a client who is a court-appointed fiduciary. RPC 1.6(a) states:

> A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

The RPCs define a "confidence" as "information protected by the attorney-client privilege under applicable law" and a "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." RPC 1.6 applies only to the confidences and secrets of the lawyer's own client, not to confidences or secrets of any opposing party which the lawyer may learn in the process of the ADR. The lawyer may also be bound to maintain such information as confidential (other than in connection with the immediate proceeding if the ADR should fail), however, under a client's preagreement to undertake ADR.

A lawyer should consult with a client about which confidences and secrets, if any, the lawyer believes it is appropriate for the lawyer to disclose in the process of ADR, and about the likely consequences of disclosing or not disclosing the information, so that the client may make an informed decision on whether to consent to the disclosure. Then, both for the client's information and the lawyer's own protection, the lawyer should document the consultation and the client's decisions regarding disclosure.[2]

In most representations, some client confidences or secrets are likely to be disclosed without explicit client consent as being "impliedly authorized" under RPC 1.6. A lawyer's reliance on implied authorization is inherently perilous to the lawyer, since it allows a client dissatisfied with the lawyer's conduct, the result of the representation, the size of the lawyer's bill, or for any other reason, to contend the disclosure was neither impliedly nor in fact authorized, and thus violated RPC 1.6. A lawyer's misplaced reliance on implied authorization in effect guarantees satisfaction to the client. If the client is not satisfied,

the client can claim breach of confidence and seek recompense from the lawyer. If the client is satisfied, the client can simply overlook the claimed breach and reap the benefits. Or, simply on the basis of an unauthorized disclosure of client confidences or secrets, the client can reap the benefits and still charge the lawyer with unethical conduct in a disciplinary grievance, even if no harm has resulted to the client. In each case, the lawyer loses.

Lawyers should not rely on implied authorization, but instead consult with the client about the proposed disclosure; explain the consequences of it; obtain from the client explicit prior authorization before making the disclosure; and thoroughly document the consultation, explanation and consent. If the client declines to consent to the proposed disclosure, the lawyer is on notice not to make the proposed disclosure. If the lawyer believes nondisclosure will lead to unsatisfactory results, the lawyer should further consult with the client and, to protect against possible disciplinary and malpractice actions against the lawyer, carefully document the consultation and client decision.

A disciplinary action arising from disclosing confidential information to a mediator illustrates the importance of obtaining explicit client consent. A lawyer was admonished for disclosing to a mediator, without the client's consent, a difference of opinion between the lawyer and the client as to settlement of a case and the client's reluctance to settle a lawsuit despite the lawyer's advice to do so. The disciplinary hearing officer found the disclosure to be negligent under RPC 1.6, since the lawyer believed he had implied permission to convey the information to the mediator and acknowledged "he had no express permission, although he could have tried to obtain it." The hearing officer observed: "The fact that such communications are not infrequently made to mediators ... does not exonerate the conduct." (See discipline notice, *Washington State Bar News*, May 1999, page 53.) Had the lawyer first consulted with the client and obtained the client's informed consent to disclosing the information to the mediator, the lawyer would have satisfied RPC 1.6 and there would have been no disciplinary action.

Attorney-Client Privilege. When a lawyer acts as legal representative or advocate to a client and not as a third-party neutral, the lawyer's client is also protected by the statutory attorney-client privilege from the possibility that the lawyer may be forced to testify against the client in subsequent litigation. The client should be advised, however, that statements made by the client or by the lawyer to the arbitrator, mediator or others would not be protected by that privilege.

Washington's attorney-client privilege rule, RCW 5.60.060(2), is an evidentiary rule, not an ethics rule. It provides that:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

As an evidentiary rule, it is directed to courts, and restricts what the lawyer or client may be compelled in court to testify about a client-lawyer communication made to obtain legal advice. It applies only to client confidences, that is, matters communicated between client and lawyer in the course of the legal representation with an expectation of confidentiality. It is narrower than the lawyer's ethical duty under RPC 1.6, which applies to both client confidences and client secrets. Under Civil Rule 26(b), privileged matters are nondiscoverable. For a discussion of the privilege in the ADR context, see Carol Needham, "When Is an Attorney Acting as an Attorney: The Scope of Attorney-Client Privilege as Applied in Corporate Negotiations," 38 *So. Texas L.R.* 681 (1997).

Statutory Duty of Confidentiality. In addition to the RPC 1.6 confidentiality provisions and the attorney-client privilege, a lawyer representing a client in ADR may be obligated by applicable statutes, referenced below, to maintain the confidentiality of the process at least where the ADR is pursuant to court order, mandatory by statute, or pursuant to a written agreement between the parties.

Lawyer as Third-Party Neutral

If the lawyer is not representing a client as lawyer, but is instead acting as a third-party neutral (for example, as a mediator or an arbitrator), the lawyer's duty of confidentiality is principally derived from applicable ADR statutes and not from the RPCs or the attorney-client privilege. The lawyer remains subject to the RPCs while acting as a neutral, and should be sensitive to their mandates, but many provisions of the RPCs, including RPC 1.6, simply will not be applicable to the lawyer acting as a neutral.[3]

A lawyer acting as a third-party neutral arbitrator or mediator does not have a lawyer-client relationship with the mediating or arbitrating parties. Thus, the attorney-client privilege does not apply (except in the rare case of the parties being the lawyer's former law clients). If the ADR process is unsuccessful and litigation results among the ADR participants, communications between the participants and the arbitrator or mediator are not protected by the attorney-client privilege. Similarly, if the lawyer unsuccessfully acts as an intermediary under RPC 2.2, with the dispute going to litigation, the privilege does not protect any communications, since either there is no privilege because the ADR parties are not law clients, or there is a privilege, but not among commonly represented clients.

Lawyers should not rely on implied authorization, but instead consult with the client about the proposed disclosure; explain the consequences of it; obtain from the client explicit prior authorization before making the disclosure; and thoroughly document the consultation, explanation and consent.

(See Comment 2 to ABA Model RPC 2.2.) Other privileges, however, some of which are discussed below, may apply to ADR communications and protect the communications similarly to the attorney-client privilege.

Arbitration. An arbitrator serves a quasi-judicial function (at least in mandatory binding arbitration) and holds testimonial immunity similar to that of a judge. See Washington Superior Court Mandatory Arbitration Rule 7.2(d). Thus, the arbitrator may not be called as a witness at the trial de novo, nor is testimony of the arbitrator admissible to determine the meaning of an arbitration award, nor should the arbitrator volunteer to produce testimony that would impeach the award. Similarly, since once an arbitration award has been made and the rights of the parties to the claims at issue are merged into the award, testimony of the parties is limited after the litigation, although arbitration testimony is admissible in a de novo hearing as long as not identified as having been given in an arbitration hearing. MAR 7.2(b)(2).[4]

Because participants generally expect arbitration awards and opinions to be confidential, although there is no general statutory or rule authority so providing, lawyers should consult with their clients about arbitration and the possible limits of confidentiality, and should explicitly address confidentiality in any agreement to arbitrate.

Although Washington's current RPCs provide little guidance for lawyers acting as third-party neutrals,[5] some assistance is provided by the American Bar Association's Commission on Evaluation of the Rules of Professional Conduct. In its May 2001 Final Report it proposes to delete Model RPC 2.2 (identical to Washington's RPC 2.2), dealing with lawyers acting as intermediaries, and to adopt a new Model RPC 2.4, captioned "Lawyer Serving as Third-Party Neutral," dealing with the role of a lawyer serving as a third-party neutral. Proposed ABA Model RPC 2.4 states:

> (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Proposed official comments to the rule explain the rule and give guidance to lawyers serving as third-party neutrals. Comments (3) through (5) are most useful:

> (3) Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.
>
> (4) A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.
>
> (5) Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

The commission's extensive proposals are scheduled to be submitted in August 2001 to the ABA House of Delegates. The House will not likely vote on them until it has debated all of the commission's proposals, unlikely to occur until sometime in 2002 or 2003. The proposals have no effect in Washington unless and until they are adopted by the Washington State Supreme Court.

Mediation. Washington has adopted considerable statutory protection for confidentiality in mediation. RCW 5.60.070 provides:

> (1) If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediator organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial proceeding or administrative proceeding except:
>
> (a) When all parties to the mediation agree, in writing, to disclosure;
>
> (b) When the written materials or tangible evidence are otherwise subject to discovery, and were not prepared specifically for use in and actually used in the mediation proceeding;
>
> (c) When a written agreement to mediate permits disclosure;
>
> (d) When disclosure is mandated by statute;
>
> (e) When the written materials consist of a written settlement agreement or other agreement signed by the par-

ties resulting from a mediation proceeding;

(f) When those communications or written materials pertain solely to administrative matters incidental to the mediation proceeding, including the agreement to mediate; or

(g) In a subsequent action between the mediator and a party to the mediation arising out of the mediation.

(2) When there is a court order, a written agreement to mediate, or when mediation is mandated under RCW 7.70.100, as described in subsection (1) of this section, the mediator or a representative of a mediation organization shall not testify in any judicial or administrative proceeding unless:

(a) All parties to the mediation and the mediator agree in writing; or

(b) In an action described in subsection (1)(g) of this section.

The protection provided by RCW 5.60.070(2) is generally comparable to that provided by the attorney-client privilege, but the information covered is even broader: "any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present."

For this statutory provision to apply, however, the mediation must be either (1) pursuant to a court order, or (2) pursuant to a written agreement to mediate, or (3) mandated under RCW 7.70.100 (relating to damage claims arising from injury occurring as a result of health care provided after July 1, 1993). Otherwise, except as provided in more specialized statutory ADR provisions, the mediator may be required to testify, and there is no protection of any confidentiality. RCW 5.60.072 also specifically provides that where mediation is under the provisions of a federal or state collective bargaining law or similar statute, the agency's rules, and not RCW 560.070, govern questions of privilege and confidentiality. However, this does not override the lawyer-as-advocate's RPC 1.6 duties. Other statutes, such as those dealing with abuse of children, developmentally disabled persons or the elderly, may also require disclosure by the third-party neutral. (See RCW 26.44.030(1), RCW 74.34.030.)

The May 4, 2001 interim draft of the proposed Uniform Mediation Act (UMA), as published by the National Conference of Commissions on Uniform State Laws, recognizes the paramount importance of confidentiality in the mediation process. A prefatory note by the drafters observes: "The primary focus of this Act is a limited one — to provide a privilege that assures confidentiality in legal proceedings."

The draft reflects throughout its provisions the central importance of confidentiality. Section 2(1) states that, in applying and construing the UMA, consideration should be given to "the need to promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests."

Section 5(a) states that a mediation communication is confidential and, if privileged, is not subject to discovery or admissible in evidence in a proceeding, while Section 5(b) defines the scope of the privilege. Section 6 covers both waiver and preclusion of the privilege, while Section 7 covers exceptions to the privilege, many of which are similar to those set out in RCW 5.60.070. Finally, Section 8 generally prohibits disclosures about the mediation by the mediator. The underlying theme of the UMA is that mediation settlement is promoted through candor, and candor is promoted through assuring participants that their frank exchanges in mediation will be confidential and will not be used to their detriment in later court proceedings or other adjudicatory processes. The draft UMA is, of course, merely a proposed uniform model act without legal effect in Washington state unless and until adopted by Washington.

Specialized ADR. Several of Washington's more specialized statutory ADR provisions also protect confidential information and make it privileged. For example, RCW 7.75 authorizes establishment of community resolution centers to resolve disputes using ADR procedures. RCW 7.75.050 generally makes confidential and privileged a wide range of communications and information related thereto:

> All memoranda, work notes or products, or case files of centers established under this chapter are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege. The foregoing privilege and limitation on evidentiary use does not apply to any communication of a threat that injury or damage may be inflicted on any person or on the property of a party to the dispute, to the extent the communication may be relevant evidence in a criminal matter.

Similarly, RCW 26.09.015(1) authorizes mediations in domestic-relations cases "to reduce acrimony which may exist between the parties and to develop an agreement assuring the child's close and continuing contact with both parents after the marriage is dissolved." Under RCW 26.09.015(2) the "mediator may be a member of the professional staff of a family court or mental health services agency, or may be any other person or agency designated by the court." RCW 26.09(3) then provides for confidentiality and testimonial privilege in predissolution decree domestic relations cases:

> Mediation proceedings shall be held in private and shall be confidential. The mediator shall not testify as to any aspect of the mediation proceedings. This subsection shall not apply to postdecree mediation required pursuant to a parenting plan.

The rights to confidentiality and privilege outside of the specific statutory ADR privilege/confidentiality provisions referenced above is more uncertain. Evidence Rule 408 generally precludes admission of evidence relating to offers or attempts to

compromise a dispute, but it is not clear that evidence rules require exclusion of mediation discussions other than those covered by specific statutes. Courts have been reluctant to admit confidential mediation information on the basis that doing so would undermine candid mediation, but on occasion have done so.[6] Although mediators generally require parties to agree to maintain mediation sessions as confidential, and not to subpoena or call the mediator to testify, agreements to suppress evidence are generally void as against public policy, and for that reason confidentiality may be inappropriate in certain cases.

A lawyer advising a client involved in a mediation should also consult with the client as to practical limitations on confidentiality and privilege, and the consequences of disclosure, especially if there is a reasonable likelihood of subsequent litigation. Even if a matter is treated as confidential or privileged, disclosure of it may still lead to other nonprivileged or nonconfidential information.

Lawyer as a Party

Although the RPCs generally assume the existence of a client-lawyer relationship, that relationship is not required for some of its provisions to apply. A lawyer may be sanctioned for conduct not involving the practice of law.[7] For example, where a lawyer is acting pro se, the lawyer is still prohibited by RPC 4.2 from communicating with the opposing represented party about the matter of the representation. Similarly, RPC 8.4 prohibits the lawyer, whether or not acting as a lawyer, from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, or conduct that is prejudicial to the administration of justice. The Washington Supreme Court recently disbarred a lawyer for fraudulent conduct despite the lawyer's contention that the conduct in question was "completely outside the practice of law." *In re Discipline of Huddleston*, 137 Wn.2d 560 (1999).

A lawyer as a party in ADR proceedings is not subject to RPC 1.6's requirement to maintain the client's confidences and secrets either because the lawyer is not acting as a lawyer and hence there is no client, or because the lawyer is acting as a lawyer but is also the client, and RPC 1.6 does not require such maintenance where the client has consented to the disclosure. The lawyer remains subject, however, to the other statutory and rule provisions, referenced above, requiring confidentiality of the ADR proceedings to the same extent as other participants in the proceedings. A lawyer failing to satisfy those requirements, even though not acting as a lawyer, may be subject to disciplinary action under RPC 8.4(d) for engaging in conduct that is prejudicial to the administration of justice.

Difficult Questions When Undertaking Dual Roles

It is not unusual for ADR parties, particularly when unrepresented by counsel, to want a third-party neutral lawyer to provide legal advice or opinions during the course of the ADR process, and to provide documentation at the conclusion of the process. Parties often select a lawyer as the neutral precisely because the neutral has legal expertise in the area of the dispute. A lawyer's assumption of dual roles, as third-party neutral and as legal representative of the parties, even when undertaken consecutively and not concurrently, raises serious ethical issues under the RPCs' conflict-of-interest provisions, as well as great practical dangers for all involved, particularly when the parties are not represented by separate lawyers.

When concluding an arbitration, an arbitrator typically memorializes the arbitration award in a written, often very conclusory, decision or opinion. A mediation's conclusion differs in that the mediator does not make an award; rather, the parties reach their own agreement facilitated, or goaded, by the mediator. Typically, in concluding a mediation a mediator will provide a written outline of the general terms of the agreement, but that outline is usually not intended to be an operative legal document implementing the mediated agreement. Parties unrepresented by counsel, however, may expect the mediator to prepare such a document. The possibility of a mediator doing so gives rise to many ethical issues.

At some stage in the ADR process, may a lawyer third-party neutral undertake joint representation of ADR parties asking for legal information or advice, or asking the neutral to draft settlement documents? Is provision of legal "information" permissible (as not constituting the practice of law), while the provision of "advice" (as constituting the practice of law) not permissible? Or is the distinction between information and advice meaningless? Does it matter if the neutral volunteers such advice or information as opposed to doing so in response to a request by one or both parties? If the parties are represented by separate counsel, may the third-party neutral lawyer draft settlement documents on the basis of being a mere amanuensis? If the neutral may not draft settlement documents during the course of the ADR process, may the neutral do so after the ADR process is complete, in effect concluding the role of neutral and then undertaking the role of joint representative of the ADR participants? Does it matter if the ADR process is wholly successful (all issues are resolved with no dispute left between the parties), or only partially successful?

At best, the RPCs provide partial answers to these questions. Clearly a third-party neutral may not simultaneously act as a "neutral" and as an advocate or adviser for only one party in the course of the ADR, since by definition the neutral would not be neutral. RPC 1.7 generally prohibits a lawyer from concurrently representing two clients if the representation of one would be directly adverse to the other, or may be materially limited by the lawyer's responsi-

A lawyer advising a client involved in a mediation should also consult with the client as to practical limitations on confidentiality and privilege, and the consequences of disclosure, especially if there is a reasonable likelihood of subsequent litigation.

bilities to another client or to a third person or by the lawyer's own interests. RPC 1.9 generally prohibits a lawyer from representing a person if the representation would be materially adverse to the interests of a former client or involve using the former client's confidences or secrets to the disadvantage of the former client. In both cases, however, with full disclosure to and consent by the clients (or former clients), the lawyer generally may undertake a dual representation, provided that under RPC 1.7 the lawyer reasonably believes the representation will not adversely affect the lawyer-client relationship with the other client. The test of reasonableness is both subjective in requiring the lawyer to actually believe no such adverse affect will take place, and objective in requiring that a reasonably competent and prudent lawyer would likewise so conclude.

Washington's RPC 1.12, captioned "Former Judge, Arbitrator, or Mediator," permits a lawyer who has served as an arbitrator or mediator to represent the parties thereto *after* the ADR process is complete, but only if *all* parties to the proceeding consent after disclosure. The language of the rule, and the use of the indefinite and uncertain term "matter," suggests that it applies only where the ADR process is concluded, and not during that process. RPC 1.12(a) states:

> Except as stated in section (d)[permitting an arbitrator selected as a partisan of a party on a multi-member arbitration panel to thereafter represent that party], a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

RPC 1.12(c) provides that if a lawyer is disqualified from a representation under RPC 1.12(a), no other lawyer in that lawyer's firm may knowingly undertake or continue a representation in the matter unless the disqualified lawyer is screened from the matter and fee, and unless written notice is given. RPC 1.12, while permitting a consented-legal representation subsequent to an adjudication or ADR process, does not override the "reasonableness" requirements of RPC 1.7. The former mediator or arbitrator lawyer must still satisfy the tests of reasonableness. The author believes that test can be satisfied only rarely.

If, at the end of the ADR, the lawyer neutral decides to undertake a limited joint representation of the parties at their request, to create, for example, the requested legal documentation, the lawyer is entering a dark world where unknown and invisible disciplinary and malpractice-breathing ethical dragons and demons lurk and lie in wait for the unwary lawyer. It is an underworld that could easily be strewn with lawyer carcasses. It is a world far better to be avoided.

If the lawyer nevertheless decides to undertake dual representation following ADR, since the RPCs provide little practical guidance, here are some suggestions on how to lessen the risks. The lawyer must first and foremost determine that he or she can in fact undertake the dual representation without violating the RPC-conflicts provisions. In most cases, including most marital dissolutions, it is unlikely the lawyer can reasonably conclude the representation will not be adversely affected, and thus unlikely the requirements of RPC 1.7 can be satisfied.

If the RPC 1.7 tests can be met, however, the lawyer should document his or her analysis of the RPCs permitting the representation, and require a limited legal engagement letter separate and distinct from the ADR engagement letter. The legal engagement should not be offered or entered into, or even considered, until the ADR process is complete. When initially undertaking to act as a neutral, the lawyer should not imply that as a matter of course the lawyer will prepare the settlement documents at the end of the mediation.

The lawyer should consult with the potential legal clients about the loss, due to the proposed joint legal representation, of confidentiality and its consequences, particularly if during the ADR the parties caucused with the neutral, thus learning confidential information of one party not known by the other party. The consultation should also cover whether all confidential information previously given to the neutral during the course of ADR is now to be disclosed to both joint clients, since in a joint representation each client is entitled to know all confidences unless otherwise agreed to, or whether prior disclosed confidential information is to remain confidential.

When initially undertaking to act as a neutral, the lawyer should not imply that as a matter of course the lawyer will prepare the settlement documents at the end of the mediation.

The consultation, and the documentation thereof, should be meticulous, both to assist the potential legal clients make informed decisions and to protect the lawyer. If there is to be a joint waiver of confidentiality for disclosure to the other, it should be written and explicit. The lawyer should advise each participant to seek independent legal advice as to whether such disclosure is in their respective best interests, although practically such advice is often unlikely to be available or affordable. In undertaking a legal role after acting as a neutral, especially with unsophisticated clients, the lawyer should beware that the difference between representing neither client and representing both clients is perilously slim.[8]

Although RPC 2.2, captioned "Intermediary," facially allows a dual representation, Comment 2 to ABA Model RPC 2.2, on which Washington's RPC 2.2 is based, indicates that the rule does not apply to a lawyer acting as a neutral among nonclients of the lawyer "even where the lawyer has been appointed with the concurrence of the parties."[9] Comments to ABA Model RPC 2.2 observe that the lawyer's conduct may instead be governed by other ethics

codes applicable to neutrals, and stress that where RPC 2.2 does apply, the lawyer must maintain the confidentiality of client information under RPC 1.6. If RPC 2.2 does not apply (as in the usual case of a lawyer acting as a third-party neutral to two or more persons, none of whom are the lawyer's clients), then RPC 1.6 does not apply so long as the ADR parties do not become the lawyer's legal clients.

In one of the more extensive discussions of a lawyer acting as a mediator, Opinion 736 (January 3, 2001) of the New York State Bar Association Committee on Professional Ethics construes New York's ethics code to generally prohibit a lawyer mediator from drafting legal documents at the conclusion of a mediation. The principal ethical issue considered is whether a lawyer may reasonably conclude that one lawyer can competently represent the interests of both clients. The opinion first observes that the committee's prior Opinion 258 (1972) had concluded that:

> It would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and informed consent of both parties because the likelihood of prejudice was so great in this type of matter as to make impossible adequate representation of both spouses, even where the separation is "friendly" and the divorce uncontested.

In Opinion 736, the committee repudiates this per se rejection of dual representation on the basis that there could in fact be occasions when a "disinterested lawyer" might reasonably believe "that the lawyer-mediator can competently represent the interests of each spouse by preparing and filing the settlement agreement and divorce papers." The concept of a "disinterested lawyer" under New York's code is the equivalent under Washington's RPCs to a lawyer acting "reasonably," which Washington's RPCs define as the "conduct of a reasonably prudent and competent lawyer." The committee cautions, however, that such a situation is a rarity:

> We remain convinced ... that in the generality of cases, even if the spouses agree on the broad outlines of a settlement at the conclusion of the mediation, a disinterested lawyer will *not* be able to conclude that he or she can competently represent the interests of each spouse. Although there is a general agreement on broad settlement terms, many particulars remain to be worked out in the course of drafting a settlement agreement. Even with respect to the terms on which there appears to be agreement, one or both spouses may benefit from a disinterested lawyer's advice as to whether the agreement meets with the spouse's legitimate objectives and what other procedural alternatives may be available to achieve more favorable terms. One or both spouses may thus benefit from a disinterested lawyer's advice as to (1) his or her legal options, (2) how the settlement terms will or will not meet the client's interests, and (3) alternative ways to fashion a settlement agreement. Likewise, one or both may benefit from the assistance of a disinterested lawyer in negotiating the terms and/or thereafter drafting the terms.

The opinion goes on to specify the very narrow circumstances under which a representation of both spouses in a marital dissolution may be acceptable:

> [T]he lawyer may not represent both spouses unless the lawyer objectively concludes that, in the particular case, the parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents. In those circumstances, the *per se* ban of N.Y. State 258 should be relaxed to permit spouses to avoid the expense incident to separate representation and permit them to consummate a truly consensual parting, provided both spouses consent to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.[10]

Finally, the opinion cautions that a lawyer, after having served as mediator between the two spouses, may only rarely thereafter act as a lawyer in preparing settlement documents:

> Because the "disinterested lawyer" test cannot easily be met, the lawyer-mediator may *not* prepare and file a settlement agreement and divorce papers after the conclusion of the mediation as a matter of regular practice on behalf of spouses who are otherwise unrepresented.[11] Nor may the lawyer-mediator, in advertising, a retainer agreement, or other communications with potential clients, state or imply that, in the ordinary course, the lawyer will routinely prepare and file the divorce papers after the mediation is completed. The likelihood that joint representation will satisfy the standard of ... [New York's ethics rule] is so uncertain prior to the start of the mediation that it would be misleading for the lawyer to indicate that preparing and filing the divorce papers for the spouses is part of the lawyer's standard practice.

While this opinion addresses the situation of a lawyer mediating as a neutral a marital dissolution and then considers whether the lawyer may provide legal services as a lawyer in preparing documents to effect the mediated result, its rationale applies equally well in the broader context of ADR. Only rarely should a lawyer, after mediating, create legal documents or otherwise undertake joint representation of the ADR participants, but if the lawyer does so, it should be done with exceptional caution.

Conclusion

A lawyer undertaking any role in ADR must first identify his or her role and the resultant duties and responsibilities. A lawyer's duty of confidentiality differs significantly by what role the lawyer undertakes. If the lawyer combines, even sequentially, the role of a third-party neutral with that of a lawyer representative, the lawyer is faced with very difficult ethical issues for which there are few good answers, especially where the parties are unrepresented by independent counsel. A lawyer seeking to combine the roles should do so only after completion of the ADR process, only after very careful analysis of the RPC-conflicts provisions, only after careful consultation with and consent by all parties, and even then only rarely. Then, the lawyer should meticulously document everything, review his malpractice insurance policy, and enter the dark world of dual roles in ADR.

NOTES

1. The two principal voluntary ethics codes in ADR are the Code of Ethics for Arbitration in Commercial Disputes (prepared by a joint committee of the American Bar Association and the American Arbitration Association) and the Model Standards of Conduct for Mediators (prepared jointly by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution).
2. A lawyer's duty to protect client confidences and secrets may conflict with the lawyer's duty of candor. In ADR, the lawyer's duty of candor as an advocate is governed by RPC 3.3 if the proceeding, such as binding arbitration, is before a tribunal; otherwise, the duty of candor to the third-party neutral and others is governed by RPC 4.1.
3. RPC 1.6 generally does not apply to the lawyer-neutral as to information arising in ADR because the lawyer when so acting does not have a lawyer-client relationship with the ADR participants. If they were clients (as when the lawyer is conducting intermediation under RPC 2.2), or former clients, RPC 1.6 and 1.9 would prohibit the lawyer-neutral from disclosing in ADR information the lawyer obtained as lawyer-advocate as to the lawyer's current or past law clients.

The RPC's conflict-of-interest provisions apply to a lawyer acting as a third-party neutral. RPC 1.7(b) prohibits a lawyer from representing a client if the representation may be materially limited by the lawyer's responsibilities to third parties. Prior to acting as a third-party neutral, a lawyer should check for conflicts. *See* District of Columbia Bar Association Opinion 276.

RPC 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. For example, a lawyer may not misrepresent his or her status as a neutral if the lawyer is not in fact neutral: if the lawyer or his or her firm previously represented an ADR party, or knew information derived from the practice of law about a party, or had some other relationship with a party, the lawyer's representation of neutrality without further disclosure would raise issues under RPC 8.4(c).

4. *See Alternate Dispute Resolution Deskbook: Arbitration and Mediation in Washington*, 2d Ed. (Washington State Bar Association, 1995, supplemented 1998) ["Deskbook"], § 12.6.
5. For an overview of ADR confidentiality in Washington, *see* Deskbook, §12.6.
6. *See* Deskbook, §12.6(2)(a).
7. *See* Althoff, "Big Brother is Watching: Discipline for 'Private' Conduct," *The Professional Lawyer*, 2000 Symposium Issue, p. 81, reprinted in *Washington State Bar News*, August 2000, p. 38 (Part I), and September 2000, p. 39 (Part II).
8. Ethics Opinion 80-23 (1981) of the Association of the Bar of the City of New York observes, in the context of matrimonial mediation: "informing the parties that the lawyer 'represents' neither party and obtaining their consent, even after a full explanation of the risks, may not be meaningful; the distinction between representing both parties and not representing either, in such circumstances, may be illusory."
9. Because of the widespread misunderstanding of the concept of intermediation under Model RPC 2.2, the ABA Ethics 2000 Commission has recommended deleting that rule and moving its commentary to ABA Model RPC 1.7 as reflecting merely a variant of other conflicts.
10. The opinion's footnote states: "Full disclosure should include advising both clients of the risk of a legal challenge, since 'the absence of independent representation is a significant factor to be taken into consideration when determining whether a separation agreement was freely and fairly entered into' when 'the same attorney represented both parties in the preparation of the agreement.'"
11. The opinion's footnote states: "If the spouses are independently represented by lawyers who are prepared, insofar as necessary, to advise about the settlement terms, negotiate unresolved terms, and review the settlement agreement and other papers, then we see no restriction on the lawyer-mediator serving as drafter and reducing to writing an oral agreement that encompasses a mutually agreeable understanding between the parties on all issues. In essence, the lawyer will then be serving as a mere amanuensis, and will not be exercising independent professional judgment on behalf of one spouse or the other with respect to the settlement terms."

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.

Correction

In the July issue of *Bar News* (p. 49-50), Rita Bender was identified as the attorney representing Donald B. Kronenberg. Mr. Kronenberg was represented by Leland Ripley. We apologize for the error.

Disbarred

Byron D. Haley (WSBA No. 19913, admitted 1990), of Seattle, has been disbarred by order of the Supreme Court effective December 12, 2000, following a default hearing. The discipline is based on his practicing while his license to practice law was suspended from 1998 through 2000.

On June 17, 1998, the Supreme Court suspended Mr. Haley's license to practice law for failure to pay his annual licensing fee to the Washington State Bar Association. On September 3, 1998, the Court suspended Mr. Haley for failure to complete his continuing legal education requirements. Mr. Haley remained suspended at the time of the June 2000 hearing.

Matter 1: On May 1, 1998, Mr. Haley agreed to represent a client in post-conviction matters. The client had been convicted of first-degree assault. On May 29, 1998, Mr. Haley appeared in court on a motion and obtained a continuance of the client's sentencing hearing. Mr. Haley took no further action on the client's case. He did not notify his client of his suspension.

Matter 2: In March 1998, Mr. Haley agreed to represent a client on a charge of driving under the influence. Mr. Haley filed a notice of appearance on March 26, 1998 and continued as counsel of record until May 1999. While his license was suspended, Mr. Haley represented the client in a jury trial and sentencing hearing. Mr. Haley also filed a notice of appeal on the client's behalf, but did not file an appellate brief. The client paid $2,000 and Mr. Haley did not refund any of this fee.

Matter 3: On November 24, 1998, Mr. Haley filed a notice of appearance and order substituting counsel in Fife Municipal Court. Mr. Haley appeared on December 15, 1998, and entered a pretrial order for the client. Following a third appearance in January 1999, court personnel informed Mr. Haley that he could not appear in court while on suspended status; however, Mr. Haley appeared again in March for the client's sentencing hearing. Again, court personnel indicated that he could not appear while his license was suspended.

Matter 4: On September 10, 1998, while his license was suspended, Mr. Haley represented a client in a criminal trial in King County Superior Court.

Mr. Haley's conduct violated RLD 1.1(l), prohibiting practicing law while on suspended status; RPCs 8.4(d), prohibiting conduct prejudicial to the administration of justice; 1.15(a) and (d), requiring lawyers to withdraw from representation if that representation results in a violation of the RPCs and to take reasonable steps to protect clients' interests at the time of withdrawal; 8.2, requiring lawyers to discontinue practicing when their licenses have been suspended; and 8.1 and 8.3, requiring lawyers to notify their clients of their inability to act, and file an affidavit of compliance with this notice requirement.

Sherry Williams represented the Bar Association. Mr. Haley did not appear. The hearing officer was Randolph I. Gordon.

Suspended

Kevin M. Moran (WSBA No. 20234, admitted 1990), of Spokane, has been suspended for one year effective September 1, 2000, by order of the Supreme Court, approving a stipulation. The discipline is based on his temporarily abandoning his practice without proper notice to his clients and failing to diligently represent several clients. *(Note: Mr. Moran is to be distinguished from Kevin Patrick Moran of Silverdale.)*

Matter 1: On December 16, 1992, Mr. Moran filed a notice of appearance on behalf of a client charged with driving under the influence. At the time, Mr. Moran was employed by the Seattle Public Defender's Office. He obtained a continuance of the client's pretrial hearing and told the client to wait to hear from him. Although standard procedure for the Public Defender's Office is to notify defendants of all mandatory court dates, the client's file contained no evidence that Mr. Moran had notified him of the hearing date. Neither Mr. Moran nor the client appeared for the hearing. Subsequently, the court issued a bench warrant for the client's arrest. The client's file does not indicate that Mr. Moran had notified the client of the bench warrant.

Mr. Moran resigned from the Public Defender's Office effective August 31, 1993. On September 3, 1993, the office administratively closed the client's file for lack of contact. The client contacted Mr. Moran at his new office several times, but Mr. Moran did not respond. In May 1996, the client was stopped for a nonworking headlight and then booked into jail on the outstanding warrant.

Matter 2: In February or March 1994, Mr. Moran opened a law office as a solo practitioner. In March 1995, a court commissioner appointed Mr. Moran to represent a client on a contempt motion for failure to pay child support. On this same day, the commissioner continued the client's hearing from March 27 until May 1, 1995. Mr. Moran spoke to his client on April 19, 1995, and then arranged for several continuances, the last to June 3, 1996. Neither Mr. Moran nor his client appeared at the contempt hearing. The deputy prosecuting attorney called Mr. Moran about the missed court date, but he did not return her call.

On June 7, the deputy prosecutor sent Mr. Moran a letter enclosing a civil bench warrant. The letter explained that the warrant would be forwarded to the sheriff if Mr. Moran did not contact her and arrange for the client to pay the past-due child support and explain his failure to attend the hearing. Mr. Moran did not respond to the letter, and the prosecutor forwarded the bench warrant to the sheriff. On September 12, 1996, the client was arrested. During a hearing on September 13 the court discharged Mr. Moran.

Matter 3: On May 2, 1995, Mr. Moran agreed to represent a client in a Department of Licensing (DOL) hearing. The

hearing officer ruled against the client. The May 3 decision included a notice that the client could appeal the decision in the county of his arrest within 14 days of the decision. The notice specified that a $40 cover fee must be submitted with the notice of appeal, to cover the cost to prepare the administrative record. On May 9, 1995, the client requested that Mr. Moran appeal the DOL hearing decision.

The client told Mr. Moran that he was going to Arizona for the summer, but he called Mr. Moran several times between May 12 and August 12, 1995. Mr. Moran did not return the client's calls. On one occasion, the client found Mr. Moran in the office, and Mr. Moran assured him that he was working on the appeal.

Mr. Moran filed the notice of appeal on June 7, 1995, with a notation that he would file the brief at a later date. Mr. Moran never filed a brief. Mr. Moran did not notify DOL of the appeal within the 14-day period, nor did he submit the $40 to cover the costs of the record.

In August 1995, the client returned to Washington and left several messages for Mr. Moran. Mr. Moran did not return his calls. The client finally reached Mr. Moran and scheduled an appointment for November 24, 1995, but Mr. Moran cancelled this meeting. On January 13, 1996, the client discharged Mr. Moran and requested a refund. Mr. Moran did not respond until December 1999, when he refunded the client's fees.

Matter 4: Mr. Moran did not respond to the Bar Association's written requests for information regarding these matters. On January 24, 1997, the lawyer representing Mr. Moran's landlord contacted the Bar Association. Mr. Moran's landlord was attempting to evict him from his office space for nonpayment of rent, and intended to place Mr. Moran's office furniture and files in storage. After several attempts to contact Mr. Moran, the Bar Association filed a motion for the appointment of a custodian for Mr. Moran's trust account, client files and client records. The Disciplinary Board chairman granted the motion, and a custodian took possession of Mr. Moran's files, records and trust account.

Mr. Moran appeared for a deposition on June 25, 1997. He agreed that he was willing and able to take responsibility for his files. On October 14, 1997, the custodian was discharged. Mr. Moran took responsibility for his files on March 11, 2000.

Mr. Moran's conduct violated RPCs 1.4, requiring lawyers to keep clients reasonably informed of the status of their matters and to promptly comply with reasonable requests for information; 1.3, requiring lawyers to diligently represent their clients; 3.4(c), prohibiting lawyers from knowingly disobeying obligations under the rules of the tribunal, except for an open refusal based on an assertion that no valid obligation exists; and RLD 2.8, requiring lawyers to promptly comply with requests for information relevant to grievances.

Henry Haas represented the Bar Association. Mr. Moran represented himself.

Suspended

Sharon Bartu (WSBA No. 17080, admitted 1987), of Vancouver, has been suspended for six months effective March 12, 2001, by order of the Supreme Court approving a stipulation. This discipline is based on her failing to adequately supervise a nonlawyer assistant, contacting a represented party directly, and failing to comply with a deposition subpoena from 1996 through 2000.

Matter 1: In November 1996, Ms. Bartu agreed to represent the husband in a marriage dissolution action. In February 1997, opposing counsel sent a proposed final decree to Ms. Bartu. The wife mistakenly believed that the divorce was final and married again. In April 1997, Ms. Bartu referred her client to her contract legal assistant regarding possible bigamy charges against his former wife. Ms. Bartu attended the conference in which the client and the legal assistant discussed the work to be performed. Ms. Bartu knew that the legal assistant intended to contact the wife directly about the bigamy allegation and the potential for criminal prosecution.

The legal assistant contacted the wife on April 14, 1997, and suggested to her that if she would give her interest in the marital home to the husband, the legal assistant would not report the bigamy. On July 2, the husband called the wife from Ms. Bartu's office to discuss terms of the settlement, and asked her to sign final documents at Ms. Bartu's office, but she refused.

Matter 2: In May 1997, Ms. Bartu agreed to represent the husband in a marriage dissolution matter. On August 19, Ms. Bartu sent opposing counsel a letter indicating that he could talk to her client directly. Opposing counsel responded, declining to contact Ms. Bartu's client. After receiving opposing counsel's letter, her client sent a letter to his wife, which Ms. Bartu edited and typed. The letter proposed a property distribution and suggested that opposing counsel did not have the wife's best interests in mind.

Matter 3: Ms. Bartu failed to respond to written requests for information from the Bar Association. After receiving a subpoena and notice for deposition, Ms. Bartu sent a letter to the Bar Association refusing to attend the deposition in Seattle, as required by the Rules for Lawyer Discipline. Ms. Bartu failed to appear for the deposition.

Ms. Bartu's conduct violated RPCs 5.3(b) and (c), requiring lawyers to supervise nonlawyer assistants and make reasonable efforts to ensure an assistant's conduct is compatible with the lawyer's professional obligations; 4.2, prohibiting communicating about the subject matter of the representation with a party the lawyer knows is represented, without opposing counsel's consent; 8.4(a), prohibiting attempting to violate the RPCs through the acts of another; and RLD 2.8, requiring lawyers to promptly comply with requests for information relevant to grievances.

Becky Neal represented the Bar Association. Ms. Bartu represented herself.

Reprimand

Alfredo Lopez (WSBA No. 17502, admitted 1987), of Seattle, has received a reprimand based on a stipulation approved by the Disciplinary Board on July 14, 2000. The discipline is based upon his failure to diligently represent a client, and willful disobedience of a court order.

In January 1993, Mr. Lopez agreed to represent a client who had been injured on a Metro bus in 1991. Mr. Lopez determined that the settlement offered by Metro was insufficient and filed a notice of claim with King County on November 17, 1994. Mr. Lopez failed to commence the action within the three-year statute of limitations. Mr. Lopez met with the client after the statute expired and explained that the claim

was lost because he had not filed the lawsuit. Mr. Lopez also advised the client that she could seek independent counsel to consider her options.

On September 7, 1995, the client filed a malpractice action against Mr. Lopez. On November 15, 1996, the parties put the terms of a $15,000 settlement on the record. The terms required Mr. Lopez to pay $5,000 initially, and then make monthly payments. Mr. Lopez also agreed to satisfy all medical liens, and the settlement was secured by a deed of trust on Mr. Lopez's real property and an interest in his 1986 Porsche. Mr. Lopez made the initial $5,000 payment, but failed to make any monthly payments or provide evidence that the medical liens were satisfied. When the client's malpractice lawyer investigated collecting the judgment, she determined that Mr. Lopez had sold the Porsche.

On June 24, 1999, the court found Mr. Lopez in contempt for failing to comply with the court order regarding payments and for selling the Porsche. The court ordered Mr. Lopez to purge the contempt by paying the client the $2,500 he made on the Porsche, in three monthly installments. Mr. Lopez failed to make these payments, and on October 22, 1999, the court issued a bench warrant for his arrest. In March 2000, Mr. Lopez satisfied the judgment in full.

Mr. Lopez's conduct violated RPCs 1.4, requiring lawyers to keep their clients reasonably informed of the status of their matters; 1.3, requiring lawyers to diligently represent clients; 1.1, requiring lawyers to provide competent representation to clients; and RLD 1.1(b), prohibiting lawyers from willfully disobeying court orders.

Andrew Becker represented the Bar Association. Kurt Bulmer represented Mr. Lopez.

Reprimand

Jeffrey B. Ranes (WSBA No. 7732, admitted 1977), of Montesano, received a reprimand based on a stipulation approved by the Disciplinary Board on November 17, 2000. The discipline is based upon his failure to diligently represent and adequately communicate with a client from 1992 through 1997.

In 1992, a hospital rehabilitation center resident fractured her shoulder. On February 26, 1993, the resident's daughter contacted Mr. Ranes regarding a personal injury claim against the hospital and treating physicians. The daughter, who had been appointed attorney-in-fact for her mother, paid Mr. Ranes $750 for the representation. In December 1993, the daughter sent a letter requesting a refund because Mr. Ranes had not worked on the case. When Mr. Ranes told the daughter he was working on the case, she withdrew the request for a refund.

On January 28, 1994, Mr. Ranes demanded that the physician turn the claim over to his malpractice carrier. The insurance adjuster wrote Mr. Ranes two letters, but he did not respond. The mother died in 1994 and her son was named executor of her estate. On October 19, 1995, Mr. Ranes filed a summons and complaint against the hospital and the treating physician, but did not complete service on the defendants until the 91st day after the filing.

On April 5, 1996, the court entered an order dismissing the claim against the doctor for failure to serve the complaint within the statutory period. However, Mr. Ranes did not have his client's authority to dismiss the claim. When the daughter called about the status of the lawsuit, Mr. Ranes failed to return her calls, and did not inform her or the son that the lawsuit had been dismissed.

In March 1997, Mr. Ranes told the son's wife that he had retained a doctor in Bellevue as an expert witness. On November 10, 1998, the daughter filed a grievance against Mr. Ranes, not knowing that the lawsuit had been dismissed. Mr. Ranes left a telephone message for the daughter indicating he would return her $750, but had not done so as of the date of the stipulation.

Mr. Ranes's conduct violated RPCs 1.3, requiring lawyers to diligently represent their clients; 1.2(a), requiring lawyers to abide by their clients' directions regarding the objectives of their representation; 1.4(a), requiring lawyers to keep clients reasonably informed of the status of their matters; and 8.4(c), prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation.

Jonathan Burke represented the Bar Association. Mr. Ranes represented himself.

Censured

Thomas F. Miller (WSBA No. 20264, admitted 1990), of Olympia, has been ordered censured pursuant to a stipulation to censure approved by the Disciplinary Board on November 17, 2001. This discipline is based on his failure to diligently represent and communicate with a client. *(Note: Mr. Miller is to be distinguished from Thomas J. Miller of Spokane.)*

On January 31, 1996, Mr. Miller agreed to represent two clients in a timber conversion case. Large cedar trees had been cut from the clients' property without their permission. Mr. Miller filed a lawsuit against the adjacent property owners (the Ms), alleging they converted his clients' timber. During discovery, Mr. Miller learned that the Ms hired a logger to cut timber along the boundary of their property. The logger allegedly converted timber from both the Ms and Mr. Miller's clients. The logger was subsequently indicted for other counts of timber theft, but not for the Ms' or the clients' timber. After deposing the Ms, Mr. Miller told his clients he did not believe their lawsuit would survive a summary judgment. The clients then instructed Mr. Miller to settle the lawsuit if the Ms would grant them an easement over their property. Mr. Miller notified opposing counsel of the settlement offer.

On September 17, 1996, the Ms agreed to the settlement proposal. After several drafts and negotiations, opposing counsel sent the final documents to Mr. Miller on April 28, 1997. Opposing counsel contacted Mr. Miller several times during May regarding the documents. On May 14, 1997, Mr. Miller's clients executed the settlement and easement documents.

During May, Mr. Miller was being treated for depression. The treatment medication interfered with his ability to function in his law practice. In June, Mr. Miller stopped taking his medication and changed doctors. Also during June, opposing counsel contacted Mr. Miller several times regarding the settlement. Mr. Miller did not return his calls.

On July 11, 1997, the Ms authorized their lawyer to draft a summary judgment motion seeking dismissal of all claims. He completed the motion on August 1 and received the executed settlement documents on August 5. The Ms decided not

to accept the settlement, and filed the summary judgment motion.

On November 13, 1997, Mr. Miller signed a stipulation to dismiss the Ms from the lawsuit. Mr. Miller did not tell his clients that the Ms had been dismissed, and continued to represent them in claims against the logger. Later, the clients learned that the logger did not have substantial assets and decided to stop pursuing him. The clients did not recover any damages from the conversion of their timber.

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

Jonathan Burke represented the Bar Association. Mr. Miller represented himself.

Censured

Ivan D. Johnson (WSBA No. 8824, admitted 1979), of Tacoma, has been censured and ordered to pay restitution following a hearing. This discipline is based on his failure to diligently represent a client in a bankruptcy matter from 1991 to 1993.

In August 1991, Mr. Johnson agreed to represent clients in a judgment lien. Mr. Johnson recommended that the clients file Chapter 7 bankruptcy, assuring them that the bankruptcy would avoid the imminent supplemental proceedings and prevent them from losing their home. Mr. Johnson filed the clients' bankruptcy petition in August. He did not explain to the clients that a bankruptcy discharge relieves the debtor of the debt, and that a motion and brief hearing are necessary to avoid a judgment lien on exempt property. On December 2, 1991, the court entered the order discharging the client's bankruptcy. Because no motion to avoid the judgment lien was filed, the lien remained against the client's home.

On May 11, 1992, the clients sold their home, with the purchaser assuming the clients' mortgage. As part of the sale, the clients agreed to pay all liens or encumbrances against the property. Several months later, when the purchaser attempted to refinance, she learned that the home was encumbered by the judgment lien.

On January 22, 1993, Mr. Johnson filed a motion to avoid the judgment, without disclosing that the home had been sold. On April 4, the court indicated it would grant the motion to avoid the lien, but that the clients would have to pay the judgment debtor's attorney's fees incurred in responding to the late motion. In June, the clients informed Mr. Johnson that they believed he should pay the $2,521.96 attorney's fee. Mr. Johnson withdrew from the clients' case and sent them a bill for $515. The order to avoid the lien was approved by the judgment debtor, but never entered by the court. In September 1993, a friend of the purchaser paid the attorney's fee to clear the judgment lien.

Mr. Johnson's conduct violated RPC 1.4, requiring lawyers to explain matters to the extent reasonably necessary to permit clients to make informed decisions regarding their representation.

Jonathan Burke represented the Bar Association. Kurt Bulmer represented Mr. Johnson. The hearing officer was Thomas J. Greenan.

Censured

Frederick H. Merrill (WSBA No. 21088, admitted 1991), of Everett, has been censured pursuant to a stipulation approved by the Disciplinary Board on November 17, 2000. This discipline is based on his placing misleading advertisements during 1997 and 1998.

Matter 1: Mr. Merrill graduated from law school in May 1990 and was sworn into practice in November 1991. Prior to being admitted to the Bar, Mr. Merrill held several positions in the criminal justice system, including juvenile and adult counselor, prison guard, parole officer and community corrections officer. In these positions, Mr. Merrill had extensive contact with courts and testified in many proceedings.

In 1997, Mr. Merrill's yellow pages advertisement stated "17 years' court experience." His 1998 advertisement claimed "over 20 years' court experience." In 1997, Mr. Merrill had been practicing law for six years. Originally, Mr. Merrill drafted his ad to include his prison and probation experience. Another lawyer told Mr. Merrill that the ad was too complicated and suggested that he only include the number of years of law practice. Mr. Merrill believed that the statements were true, combining his years as a lawyer with his prior experience, and did not intend to mislead the public. When the Bar Association contacted Mr. Merrill, he immediately asked the yellow page advertisers to delete the misleading language.

Matter 2: In October 1997, Mr. Merrill agreed to represent a client charged with child molestation. The client found Mr. Merrill through the yellow pages, and relied on the statement that he had 17 years' court experience. Following a jury trial, the court convicted the client. Mr. Merrill declined to represent the client on appeal or in a motion for a new trial, and subsequently a public defender was appointed to represent the client. This new lawyer discovered that Mr. Merrill was admitted in 1991 and discussed this with the client. The client indicated that he would not have retained Mr. Merrill if he had not believed that he had been a lawyer for 17 years. The court denied the client's motion for a new trial, and his appeal.

In October 1997, Mr. Merrill agreed to represent a second client who had also been charged with child molestation. The client's civil lawyer recommended several criminal lawyers, but none were available to take the case. The client saw Mr. Merrill's yellow pages ad and contacted him, assuming that Mr. Merrill had been practicing law for 17 years. Mr. Merrill charged the client a $12,000 nonrefundable fee.

In March 1998, based on Mr. Merrill's recommendation, the client pleaded guilty as charged and enrolled in the Sexual Offender Special Sentencing Alternative program. During this time, Mr. Merrill's clients met in jail. The second client learned from the first that Mr. Merrill was licensed to practice law in 1991. The second client stated that he would not have retained Mr. Merrill had he known Mr. Merrill had not practiced law for 17 years.

Mr Merrill's conduct violated RPCs 7.1(a), prohibiting lawyer communications about their services from containing misrepresented facts or omitted facts necessary to prevent the statements considered as a whole from being materially misleading; and 7.1(b), prohibiting lawyer communications about their services from containing statements likely to create an unjustified expectation about results the lawyer can achieve.

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

Admonished

R. Graham Cross (WSBA No. 3308, admitted 1966), of Longview, received an admonition by a review committee of the Disciplinary Board. The disciplinary action is based upon his failure to properly supervise nonlawyer assistants.

In 1996, the court appointed Mr. Cross to represent a juvenile client charged with first-degree rape. Mr. Cross's legal assistant met with the client, discussed the case, and paraphrased the client's statement on his guilty plea. The assistant did not fully explain the client's constitutional rights to him. At the end of this meeting, the client signed the guilty plea. Mr. Cross met with the client for about five minutes just prior to the hearing in which the guilty plea was accepted by the court. In April 2000, the Court of Appeals found that Mr. Cross's conduct constituted ineffective assistance of counsel, and allowed the client to withdraw his guilty plea.

Mr. Cross's conduct violated RPCs 5.3(b) and (c), requiring lawyers to make reasonable efforts to ensure that nonlawyer employees' conduct is compatible with the lawyer's ethical responsibilities.

Becky Neal represented the Bar Association. Mr. Cross represented himself.

Admonished

James E. Anderson (WSBA No. 4255, admitted 1969), of Anacortes, received two admonitions pursuant to a stipulation approved by the Disciplinary Board on July 14, 2000. The disciplinary action is based upon his failure to diligently represent and communicate with a client from 1992 to 1997. *(Note: Mr. Anderson is to be distinguished from James Arthur Anderson of West Richland.)*

In October 1992, Mr. Anderson agreed to represent clients in a real estate contract forfeiture action. The clients sold their saw-and-mower business on a real estate contract. The purchasers had missed a payment and then filed a petition for Chapter 7 bankruptcy. The purchasers stopped operating the business after filing the bankruptcy petition, and the clients were concerned that the automatic stay would prevent them from taking control of the real property.

On December 4, 1992, Mr. Anderson's client told him that the purchaser's lawyer suggested filing a motion to compel the trustee to abandon the property because her clients had no equity. Mr. Anderson obtained sample forms from the trustee, but did not file the motion or seek relief from the automatic stay. Mr. Anderson took no action on the case between December 1992 and fall 1994. In October 1994, Mr. Anderson, with the client's consent, retained a bankruptcy attorney, who filed a motion for relief from the stay. The court granted the order in October 1994.

In November 1994, the trustee filed the final report in the purchaser's bankruptcy. One of the purchasers died during this period. In May 1995, Mr. Anderson decided that rather than pursue the forfeiture action, he would ask the surviving spouse to sign a quit-claim deed in favor of his clients. Mr. Anderson did not pursue this course due to concerns that his clients would be subject to other encumbrances listed on the title report. The clients wrote to Mr. Anderson in July, September and November 1995 expressing concern and frustration that the forfeiture had not been completed.

In January 1996, the clients filed a grievance with the Bar Association regarding the delay in their case. Mr. Anderson took no action after this time, because he was unsure about how the grievance affected his continued client representation. In February 1998, at disciplinary counsel's suggestion, Mr. Anderson completed the forfeiture without further professional fees to the client.

Mr. Anderson's conduct violated RPCs 1.3, requiring lawyers to diligently represent their clients; and 1.4, requiring lawyers to promptly respond to clients' reasonable requests for information and to explain matters sufficiently for clients to make informed decisions.

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

Admonished

James P. Bailey (WSBA No. 19761, admitted 1990), of Seattle, received an admonition from a review committee of the Disciplinary Board. The disciplinary action is based upon his assisting with the unauthorized practice of law.

Mr. Bailey's law office was located in the same building as Accident and Medical Investigations (AMI). The principal of AMI was a friend of Mr. Bailey's, and Mr. Bailey knew that his friend was not a lawyer. AMI used Mr. Bailey's name on its letterhead, and Mr. Bailey used AMI's letterhead. AMI employed Mr. Bailey to assist its clients in settling their cases. In one case, Mr. Bailey wrote a letter to the insurance company directing them to contact the friend to settle the client's case. In another case, Mr. Bailey left a deposition early. His friend assisted the client and stated on the record that he was a lawyer admitted in California. Although Mr. Bailey knew this statement was not true, he did not correct the record.

Mr. Bailey's conduct violated RPCs 5.5(b), prohibiting lawyers from assisting nonlawyers in the unauthorized practice of law; and 8.4(c), prohibiting conduct involving misrepresentation.

Linda Eide represented the Bar Association. Mr. Bailey represented himself.

Admonished

Robert Wayne Bjur (WSBA No. 5962, admitted 1975), of Zillah, received an admonition from a review committee of the Disciplinary Board. The disciplinary action is based upon his disregard for the rule of law in 1998 and 1999.

On September 11, 1998, the police cited Mr. Bjur for driving while under the influence of alcohol. He received a deferred prosecution. On July 4, 1999, he was again cited for driving while under the influence of alcohol. He pleaded guilty to this second charge, which resulted in the revocation of the earlier deferred prosecution. On July 24, the police cited Mr. Bjur for the third time for driving under the influence of alcohol. He pleaded guilty to a reduced charge of negligent driving. Mr. Bjur reimbursed the city for damage he caused to a police vehicle in one of the three incidents.

Mr. Bjur's conduct violated RLD 1.1(a), prohibiting lawyers from committing acts reflecting disregard for the rule of law.

Doug Ende represented the Bar Association. Mr. Bjur represented himself.

Admonished

William I. Freeman (WSBA No. 17586, admitted 1988), of Vancouver, received an admonition from a review committee of the Disciplinary Board. The disciplinary action is based upon his failure to diligently represent and communicate with a client in 1997 and failure to cooperate with the Bar Association in 1999.

In May 1997, Mr. Freeman agreed to represent a husband and wife in a Chapter 7 bankruptcy petition. On July 10, 1997, the clients moved to separate California addresses. The clients provided their current addresses to Mr. Freeman and indicated that they wanted to file the bankruptcy petition, which could still be filed in Washington for a certain period of time.

On July 21, Mr. Freeman filed the Chapter 7 bankruptcy petition, but did not file the required schedules. The petition listed the clients' former Washington address. On July 22, the bankruptcy court sent Mr. Freeman notice that the schedules must be filed by August 5, 1997 to prevent dismissal of the petition. On July 6, Mr. Freeman requested that the court extend the time for filing the schedules until August 12, 1997. The court granted the request.

Mr. Freeman did not file the schedules by the deadline, even though he had the necessary information. The court dismissed the clients' bankruptcy petition on August 22, 1997, sending a notice of dismissal to Mr. Freeman and to the clients' creditors. The clients did not receive a copy of the dismissal because the court did not have their California addresses.

On January 16, 1998, the wife called the bankruptcy court and learned that her petition had been dismissed. She then wrote to Mr. Freeman asking that he refile her bankruptcy petition; however, the petition could not be filed in Washington because the client had lived in California too long. Mr. Freeman sent the bankruptcy schedules to the wife, so she could file them in California. He also refunded the clients' $175 bankruptcy filing fee. Ultimately, the clients did not file bankruptcy.

Mr. Freeman did not respond to the Bar Association's requests for information regarding this matter. Consequently, the Bar Association served Mr. Freeman with a subpoena and he appeared at a deposition in September 1999.

Mr. Freeman's conduct violated RPCs 1.3, requiring lawyers to diligently represent their clients; 1.4, requiring lawyers to promptly answer clients' reasonable requests for information about their cases; and RLD 2.8, requiring lawyers to cooperate with requests for information relevant to grievances.

Jonathan Burke represented the Bar Association. Mr. Freeman represented himself.

Admonished

John E. Kammeyer (WSBA No. 23067 admitted 1993), of Redmond, received an admonition following a hearing. The disciplinary action is based upon his contacting a represented party in 1995.

In fall 1995, Mr. Kammeyer agreed to represent a client in a contract dispute. On November 22, Mr. Kammeyer wrote a letter to opposing counsel. On December 28, Mr. Kammeyer wrote directly to the opposing parties without consent of opposing counsel. Opposing counsel wrote a letter to Mr. Kammeyer requesting that all contact be through him.

Mr. Kammeyer's conduct violated RPC 4.2, prohibiting lawyers from communicating about the subject matter of representation with a party the lawyer knows to be represented, without the consent of the other lawyer.

Leslie Allen represented the Bar Association. Mr. Kammeyer represented himself. The hearing officer was Lish Whitson.

Admonished

Robert J. Och (WSBA No. 19478, admitted 1990), of Bellingham, received an admonition from a review committee of the Disciplinary Board. The disciplinary action is based upon his failure to avoid conflicts of interest from 1994 to 1997.

In the summer of 1994, Mr. Och represented a client in a marriage dissolution action. While the dissolution was pending, Mr. Och had sexual relations with the client and her partner. In spring 1997, Mr. Och represented the client in a domestic violence charge filed against the client by her partner. The client disclosed personal information about the partner to Mr. Och, and also asked how to get the partner out of the house the client shared with her ex-husband. On May 31, 1997, the client's ex-husband learned of Mr. Och's sexual relationship with the client. On June 5, 1997, Mr. Och withdrew from representing his client.

Mr. Och's conduct violated RPC 1.7, prohibiting lawyers from representing a client if the representation will be materially limited by their responsibility to a third person or by their own interests.

Linda Eide represented the Bar Association. Mr. Och represented himself.

Admonished

Richard W. Swanson (WSBA No. 4777, admitted 1972), of Marysville, received an admonition from a review committee of the Disciplinary Board. The disciplinary action is based upon his failure to diligently represent and communicate with a client in 1996. *(Note: Mr. Swanson is to be distinguished from Richard S. Swanson, chairman and CEO of HomeStreet Bank in Seattle.)*

In November 1991, Mr. Swanson agreed to represent the mother in a child support and residential placement dispute. In September 1995 the father moved to Oregon, and his lawyer filed a motion to modify the existing parenting plan and to change the transportation schedule. On July 26, 1996, after a hearing, the court approved the changes to the plan. Mr. Swanson's client attempted to contact him during the 10-day period to file a motion for revision of the commissioner's order, but Mr. Swanson did not return her calls. The time period passed and the client lost the opportunity to request revision of the order.

On September 18, 1996, the client made an appointment with Mr. Swanson. Based on this meeting, Mr. Swanson filed a motion requesting clarification of and changes to the July 26, 1996 parenting plan. The hearing on this matter was held on November 26, 1996. The client told Mr. Swanson that she wanted to appeal this order. Mr. Swanson did not respond to the client's calls or faxes, and did not appeal the order or request a revision.

Mr. Swanson's conduct violated RPCs 1.3, requiring lawyers to diligently represent their clients; and 1.4, requiring lawyers to promptly respond to their clients' reasonable requests for information regarding their matters.

Jonathan Burke represented the Bar Association. Mr. Swanson represented himself.

Admonished

Paul H. Willard (WSBA No. 25727, admitted 1996), of Everett, received an admonition pursuant to a stipulation approved by the Disciplinary Board on July 14, 2000. The disciplinary action is based upon his failing to protect his client's interest upon withdrawal, and charging an unreasonable fee in 1997.

In December 1996, Mr. Willard agreed to represent a client charged with second-degree rape of a child. The fee agreement stated that the minimum fee was $8,500, payable in advance as a nonrefundable retainer. The agreement also required an additional $1,500 to cover costs. The client's wife paid Mr. Willard $10,000. In March 1997, Mr. Willard contacted another lawyer, inquiring whether his fee was excessive. Mr. Willard appeared in court at the omnibus hearing on January 27, 1997.

On February 19, the client appeared in court without Mr. Willard and informed the court that he had fired him. On February 20, Mr. Willard wrote to the client, returning the $1,500 cost deposit, but stating that $8,500 was nonrefundable. Although the client did not immediately request that the $8,500 fee be returned, he later filed a police report and grievance, which could be considered such a request. At the time of this case, Mr. Willard had been practicing law for one year. The client file did not indicate that substantial legal work had been performed. Mr. Willard paid $8,500 in restitution to the client as part of the stipulation.

Mr. Willard's conduct violated RPCs 1.15(d), requiring lawyers to refund advance fees that have not been earned by the time lawyers' services are terminated; and 1.5, requiring lawyers' fees to be reasonable.

Michael Kirk represented the Bar Association. Robert Bibb represented Mr. Willard.

New President-Elect

The Board of Governors unanimously elected unopposed candidate J. Richard Manning 2001-2002 WSBA president-elect. He will be WSBA president in 2002-2003.

Welcome to the WSBA's New Governors

New governors Robert Boggs, Carl Carlson, Bryce Dille and Jon Ostlund will take their seats at the WSBA Board of Governors (BOG) table beginning September 14, 2001. Ballots were counted at the WSBA office on June 19, 2001. Jon Ostlund was unopposed in the 2nd Congressional District. Robert Boggs was unopposed in the 4th Congressional District. Carl Carlson was unopposed in the 7th-Central Congressional District (formerly known as the 7th District).

Bryce Dille won the 9th Congressional District race with 199 votes. Stephanie Delaney received 89 votes. Twenty-seven (27) percent of the approximately 1,071 members of the 9th Congressional District returned their ballots.

Supreme Court Ethics Advisory Committee

Application deadline: August 31, 2001

The WSBA Board of Governors will nominate one member who is appointed by the Supreme Court to serve a two-year term on the Ethics Advisory Committee commencing November 1, 2001. The incumbent is eligible for re-appointment and must also submit a letter of interest.

The committee is designated as the body to give advice with respect to the application of the provisions of the Code of Judicial Conduct to officials of the judicial branch as defined in Article 4 of the Washington Constitution, and shall from time to time submit to the Supreme Court recommendations for necessary or advisable changes in the Code of Judicial Conduct (GR 10).

Please submit a letter of interest and résumé to the WSBA, Office of the Executive Director, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330, or e-mail oed@wsba.org.

Opportunities for Citizen Members on WSBA Committees and Boards

The WSBA Character and Fitness Committee, Disciplinary Board, Lawyers' Fund for Client Protection Committee, and State Board of Continuing Legal Education all include nonlawyer citizen members. The WSBA is always interested in member referrals of nonlawyers to these important committees and boards. Members may suggest individuals to their governor, or applicants may submit letters of application to the WSBA, Office of the Executive Director, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330, or e-mail oed@wsba.org. Service on these boards is voluntary. Members are reimbursed for travel and related expenses; meetings are generally held at the WSBA office in Seattle; all appointments are for three-year terms.

- *Character and Fitness Committee:* Conducts hearings on Bar applications where there is a significant question as to the applicant's moral character. Hearings typically involve review of criminal histories, record of academic discipline (cheating and plagiarism), and previous Bar discipline (for lawyer applicants). In addition, the committee considers petitions for reinstatement after disbarment. The committee generally meets two to four times a year on Saturdays.
- *Disciplinary Board:* Reviews all recommendations for suspension or disbarment and is generally responsible for lawyer discipline. The board meets six times a year for full-day meetings. In addition, board members serve on three-person review committees which meet three to four times per year for full-day meetings to review investigation reports and requests for reconsideration of grievances dismissed by the Office of Disciplinary Counsel.
- *Lawyers' Fund for Client Protection Committee:* Considers applications for reimbursement for the dishonest taking of funds or property by lawyers. The committee meets quarterly for half-day meetings.
- *State Board of Continuing Legal Education:* Responsible for the accreditation of approved continuing legal education programs, and for enforcing required compliance by WSBA members. The board meets five to seven times per year for full-day meetings.

Correction: We regret that Sarah Atwood's name was omitted from the Winter Bar Exam pass list published in the July issue of *Bar News*. We congratulate Ms. Atwood for passing the exam.

Nonlawyer citizen participation on these boards and committees enhances the WSBA's mission and credibility as a self-regulating agency. Citizen members consistently report that the experience is extremely interesting and enlightening, and enhances their understanding and appreciation of lawyers and the legal profession.

Tune Up Your Career

Would you like to recharge your approach to the practice of law? Are you considering a "second career" or a career other than the traditional practice of law? Take advantage of this unique opportunity to explore an optimum personal career path, discern your best interests, and clarify your choices.

Your Career Tune-up: What Every Lawyer Should Know to Maximize Career Satisfaction will be presented on September 13 at the Women's University Club in Seattle. The featured speakers are Carol Vecchio, executive director of the Centerpoint Institute for Life and Career Renewal; Dr. Carol G. Jung, Psy.D., consulting psychologist for The Executive Edge; and Karen J. Summerville, Legal Career Management.

To request a brochure, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Register online at www.wsba.org/cle/calendar.htm.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in July 2001 is 3.612 percent. The maximum allowable interest rate for August 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/usuryrate.html.

CASA Volunteers Needed

King County Superior Court is seeking volunteers to serve as Court-Appointed Special Advocates (CASAs). Volunteers receive extensive training to represent children involved in custody and visitation disputes in family law cases. They conduct interviews, write reports, and testify in hearings or trials. For more information, contact Ed Greenleaf at 206-296-9320.

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.

Information for Your Clients

Did you know that easy-to-understand pamphlets on a wide variety of legal topics are available from the WSBA? For a very low cost, you can provide your clients with helpful information. Pamphlets cover a wide range of topics:

Alternatives to Court
Bankruptcy
Buying and Selling Real Estate
Consulting a Lawyer
Criminal Law
Dissolution
Elder Law
Landlord/Tenant Rights
Lawyers' Fund for Client Protection
Legal Fees
Marriage
Parenting Act
Probate
Revocable Living Trusts
Signing Documents
Trusts
Wills

Each topic is sold separately. Pamphlets are $9 for 25, $15 for 50, $20 for 75, and $25 for 100. Pricing for larger quantities is available on request.

Additionally, copies of *The Law Book*, a special supplement to the King County Journal Newspapers, are available. The 12-page tabloid includes articles by WSBA members on a wide range of topics. The cost is $20 for 100 copies.

To place your order or for more information, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Sales tax is applicable to all in-state orders.

SCRAP Celebrates 25 Years

The Society of Counsel Representing Accused Persons (SCRAP) recently celebrated its 25th anniversary of providing public defense services to residents of King County. A party was held at Seattle University School of Law on June 15, and was attended by many members of the legal community, including Washington Supreme Court Justices Bobbe Bridge and Faith Ireland.

Medieval Legal "Red Mass" Tradition Revived by Seattle University School of Law, St. James Cathedral

On August 30, the Seattle University School of Law and St. James Cathedral will sponsor a Red Mass for members of the legal and legislative communities, a tradition dating back to 14th century England.

Stephen V. Sundborg, S.J., president of Seattle University, will preside over the ceremonies and deliver the homily. The Red Mass will begin at 5:30 p.m. at St. James Cathedral, located at 9th and Marion in downtown Seattle. Following the mass, a reception will be held at Sullivan Hall, home of the Seattle University School of Law. For additional information, please call Katy Huston at 206-296-6106.

People of all faiths are welcome to attend.

Discipline 2000 Task Force

The Discipline 2000 Task Force will meet Thursday, August 23 from 9:00 a.m. to noon at the WSBA office. The task force has been reviewing the Rules for Lawyer Discipline and will recommend revisions to the Board of Governors. For more information, contact Randy Beitel at 206-727-8257 or randyb@wsba.org

Goldmark Award Nominations

The Legal Foundation of Washington is now accepting nominations for the 2002 Goldmark Award. The award will be presented as part of the 16th Annual Goldmark Award Luncheon, Thursday, February 21, 2002.

The Distinguished Service Award is given annually to an exceptional individual or organization whose vision, leadership and creativity has provided meaningful access to the civil justice system in Washington.

Nomination forms may be obtained by calling the Legal Foundation of Washington at 206-624-2536, ext. 10; by e-mailing dtheories@legalfoundation.org; or by visiting http://www.legalfoundation.org. Completed nomination forms, along with letters or documents to support the nomination, must be received by Friday, September 7, 2001.

Business Skills for Lawyers

The Aljoya Conference Center in Seattle will host a WSBA symposium September 20-21 to study the use of the Association of Legal Adminstrators' business skills curriculum for lawyers. For more information, contact Peter Roberts at peter@wsba.org or 206-727-8237.

Upcoming BOG Meetings

The Board of Governors meeting schedule is as follows:

September 14-15 — WSBA office, Seattle
October 19-20 — Vancouver, WA
November 30-December 1 — Tacoma

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 Lori Lee at 206-727-8244 or oed@wsba.org.

Law Week 2001 a Resounding Success

Under the leadership of Ron Bemis, nearly 600 judges and lawyers reached almost 20,000 Washington students during Law Week. Many thanks to all who participated.

Legislative Roadmap Available

WSBA Legislative Liaison Gail Stone has developed a "Legislative Process Roadmap" which she supplied to all sections and committees. It is also available on the WSBA Web site at www.wsba.org/legislative/roadmap.htm.

Thursday
September 13, 2001

W Seattle Hotel
The Great Room
1112 Fourth Avenue
Seattle

Reception 6:00 p.m.
(no-host bar)
Dinner/Program
7:00 p.m.

_____

WSBA office use only:

Date _____

Check No. _____

Amount _____

No. AAD901

You Are Cordially Invited to Attend

The Washington State Bar Association

Annual Awards Dinner and Business Meeting

Name _____ Bar No. _____

Address _____

Phone _____ E-mail _____

Affiliation/organization _____

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

_____ ❑ beef tenderloin ❑ halibut ❑ vegan

_____ ❑ beef tenderloin ❑ halibut ❑ vegan

_____ ❑ beef tenderloin ❑ halibut ❑ vegan

Cost for the dinner is $50 per person. To make your reservation, please return this form (or a photocopy) with your credit-card information or check payable to WSBA. Space is limited, so please make your reservations early. Reservations and payment must be received no later than September 4, 2001. (Please note that refunds cannot be made after September 4.)

Credit card: ❑ MasterCard ❑ Visa No. _____ Exp. date _____

Name as it appears on card _____

Signature _____

Please send to: **Washington State Bar Association**
Annual Awards Dinner
2101 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330
Phone: 206-733-5944; Fax: 206-727-8320

TOTAL $ _____

Blair, Schaefer, Hutchison & Wolfe, LLP

is pleased to announce that attorney

Carol C. McCaulley
has become an associate of the firm.

Her practice emphasizes labor/employment law and immigration law.

Admitted to the Washington State Bar in June, Ms. McCaulley has extensive experience in personnel matters, most recently serving as employee services manager for Gunderson, Inc., a Portland-based manufacturer employing 1,300 people.

105 West Evergreen Blvd., Suite 200
Vancouver, Washington 98660
Telephone: 360-693-5883
Oregon: 503-285-4103
Fax: 360-693-1777

Floyd & Pflueger, PS

is pleased to announce that

Douglas K. Weigel*
has became a partner in the firm.

Mr. Weigel is a graduate of the University of Oregon School of Law, and is a former law clerk to the Honorable Kip W. Leonard.

His practice will continue to focus on construction defect and complex civil litigation.

300 Trianon Building
2505 Third Avenue
Seattle, Washington 98121-1445
Telephone: 206-441-4455
Fax: 206-441-8484
* also admitted in Oregon

Gordon Murray Tilden

is pleased to welcome

Sarah Jael Dion
as an associate of the firm.

Sarah joins us from the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison.

Sarah is a 1998 magna cum laude graduate of Boston University School of Law, where she was an Edward F. Hennessey Distinguished Scholar. She served as a law clerk to the Honorable Victoria Lederberg of the Rhode Island Supreme Court. She will continue her practice in a broad range of complex civil litigation.

Gordon Murray Tilden
1325 Fourth Avenue, Suite 1800
Seattle, Washington 98101
Telephone: 206-467-6477
Fax: 206-467-6292
www.gmtlaw.com

Stewart Sokol & Gray LLC

is pleased to announce that members

John Stewart, **Jan Sokol** and **Jeffrey Wilkinson** have been admitted to the District of Columbia Bar.

Jan Sokol and **Jeffrey Wilkinson** have been admitted to the Washington State Bar.

Our practice continues to emphasize surety and fidelity law, construction and design law, commercial litigation, insurance coverage and defense, bankruptcy, real estate, and business law.

Stewart Sokol & Gray LLC
1500 Benjamin Franklin Plaza
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Portland, Oregon 97258-2016
Telephone: 503-221-0699
Fax: 503-223-5706

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Attorneys at Law

Celebrating

its fifth year of

representing plaintiffs and

defendants in civil litigation

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Seattle, Washington 98101

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www.gmtlaw.com

July 1, 2001

Groff & Murphy, PLLC

is pleased to announce that

Kent T. Johnson

and

Linda Y. Chu

have joined the firm as associates.

Mr. Johnson is a graduate of
St. Olaf College, and received his
law degree from the University of
Montana School of Law.
He also holds his LL.M. in taxation
from New York University
School of Law.
His practice will focus on
business and real estate transactions.

Ms. Chu is a graduate of UCLA,
and received her law degree from
Seattle University School of Law.
Her practice will focus on
commercial litigation.

1191 Second Avenue, Suite 1900

Seattle, Washington 98101

Telephone: 206-628-9500

Fax: 206-628-9506

E-mail: kjohnson@groffmurphy.com

lchu@groffmurphy.com

Calendar

BUSINESS

Business Loan Documents
August 2 – Seattle. 7 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

How to Advise the Business in Distress
August 3 – Seattle. 7.25 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Business Law Institute
September 20-21 – Seattle. 7 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Drafting Technology Contracts
September 28 – Seattle. 3.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Intellectual Property Licensing Agreements
September 28 – Seattle. 3.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

CRIMINAL LAW

Basic Evidence: An Interactive Workshop
August 1 – Seattle. 3 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

8th Annual Criminal Justice Institute
September 20-21 – Tukwila. 14 CLE credits, including up to 2 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ELDER LAW

Elder Law Section Annual Meeting and Seminar
September 21 – Seattle. 6.25 CLE credits, including .75ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

EMPLOYMENT LAW

Fourth Annual Employment Law Conference
August 16-17 – Seattle. 13.25 CLE credits, including 1 ethics. By The Seminar Group; 800-574-4852.

Privacy in the Workplace
September 25 – Mt. Vernon. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ESTATE PLANNING

The Estate Planner's Guide to Drafting and Using Trusts
August 22 – Seattle. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

This information is submitted by providers. Please check with providers to verify approved CLE credits. To announce a seminar, please send information to:

WSBA *Bar News* Calendar
2101 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330
fax: 206-727-8319
e-mail: comm@wsba.org

Information must be received by the 1st day of the month for placement in the following month's calendar.

ETHICS

Ethics, Professionalism and Civility: The Hard Questions Continue
September 28 – Seattle. 3 CLE ethics credits. By WSBA Professionalism Committee; 800-945-WSBA or 206-443-WSBA.

GENERAL

2001 Summer Educational Conference
August 2-4 – Cleveland, OH. CLE credits TBD. By National Lawyers Association; 800-491-2994.

Persuasive Trial Advocacy Techniques ***(with Todd Winegar)***
August 10 – Portland. 7 CLE credits pending. By Oregon State Bar; 503-684-7413.

Summer Video Week
August 13-17 – Lake Oswego. CLE credits. By Oregon State Bar; 503-684-7413.

New Takes on Depositions
September 7 – Portland. 6 CLE credits pending. By Oregon State Bar; 503-684-7413.

Sixth Annual Americans with Disabilities Act Workshop
September 7 – Seattle. CLE credits TBD. By National Employment Law Institute; 303-861-5600.

Career Guidance
September 13 – Seattle. No CLE credits available. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Winning Strategies
September 14 – Seattle. 6.75 CLE credits, including 3.25 ethics. Spokane and Vancouver by video replay. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

HEALTH LAW

Health Law Primer and Refresher
September 12 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Health Law Institute
September 13 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Professionals

LITIGATION

How to Win Your Next Civil Jury Trial
August 2 – Seattle. 6 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Greatest Trials
August 8 – Spokane; August 9 – Seattle. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

REAL PROPERTY

Gifting to Minors
September 6 – Seattle; September 7 – Mt. Vernon. 3.5 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Durable Power of Attorney
September 6 – Seattle; September 7 – Mt. Vernon. 3.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

TAX LAW

New Tax Act
September 6 – Seattle. 4.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Tax Institute
September 6 – Seattle. 8.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

CALIFORNIA JUDGMENT COLLECTION & COMMERCIAL LITIGATION

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APPEALS

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Philip A. Talmadge
Former justice,
Washington Supreme Court;
fellow, American Academy of Appellate Lawyers

Cleveland Stockmeyer
Former law clerk,
Washington Supreme Court

Available for consultation or referral on state and federal briefs and arguments.

18010 Southcenter Parkway
Tukwila, WA 98188-4630
206-574-6661
Fax: 206-575-1397

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Sidney S. Royer
Kristin Houser
Corrie J. Yackulic
are available for association or referral on medical malpractice lawsuits, including failure to diagnose, surgical malpractice, medication errors and psychiatric malpractice cases.

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Seattle, WA 98104
206-622-8000
www.schroeter-goldmark.com

MEDICAL or DENTAL MALPRACTICE

John J. Greaney
is available for consultation and referral of plaintiffs' claims of medical or dental malpractice against healthcare providers and hospitals.

BELLEVUE
425-451-1202
E-mail: jgreaney@qwest.net

IMMIGRATION LAW

James Robert Deal
Joel H. Wolff
Robert M. Clegg

Members:
American Immigration Lawyers Association

JAMES ROBERT DEAL & ASSOCIATES PS
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Lynnwood, WA 98036
425-774-0233
JamesRobert@JamesRobertDeal.com

JOSHUA FOREMAN

announces his availability for consultation, association or referrals. Practice emphasizing representation of fathers in child custody fights.

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Seattle, WA 98105-4762
206-623-6750
fax: 206-633-6049
E-mail: DadsLawyer@aol.com

FEDERAL WORKERS' INJURY COMPENSATION

OWCP, Branch of Hearings and Review, ECAB

T. A. Liesenfelder
is available for consultation, referral, and association in cases involving federal injury claims.

PO Box 5641
Spokane, WA 99205
509-325-0801
E-mail: LiesenfelderT@aol.com

LEGAL MALPRACTICE and DISCIPLINARY ISSUES

Joseph J. Ganz
is available for consultation, referral and association in cases of legal malpractice (both plaintiff and defense), as well as defense of lawyer disciplinary and/or grievance issues.

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Seattle, WA 98121
206-448-2100
E-mail: jganzesq@aol.com

APPEALS

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&
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We handle or assist on all types of civil appeals in state and federal courts, from consulting with trial counsel to post-mandate proceedings.

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Classifieds

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Charles A. Kimbrough
is available for consultation, association or referral in cases of water rights or water law disputes (both plaintiff and defense). Lead water law trial attorney for successful parties in:

R.D. Merrill Co. v. Pollution Control Hearings Board and *OWL, et al. v. PCHB*, 137 Wn.2d 118 (1999); *Rettkowski v. Ecology*, 128 Wn.2d 508 (1996); *Rettkowski v. Ecology* (Sinking Creek), 122 Wn.2d 219 (1993); *McLeary v. State Dept. of Game*, 91 Wn.2d 647 (1979)

11033 NE 24th St., Suite 200
Bellevue, WA 98004-2941
425-451-1202
Fax: 425-454-4289

APPEALS

James E. Lobsenz
handles both civil and criminal appeals in state and federal courts. He has argued over 25 cases in the Washington Supreme Court, including *Washington State Physicians v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

CARNEY, BADLEY, SMITH & SPELLMAN, PS
701 Fifth Avenue, Suite 2200
Seattle, WA 98104
206-622-8020
E-mail: lobsenz@carneylaw.com

APPEALS

Margaret K. Dore

Counsel for appellant in landmark child custody case, *Lawrence v. Lawrence* (Wn. App. 2001)

Former law clerk to the Washington State Supreme Court and the Washington State Court of Appeals

Passed CPA exam in 1982

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Magnificent, custom-built executive desk. Solid oak, kidney-shaped top, 10.5-feet long, 4.5-feet wide. Also custom-built solid oak secretary desk with vinyl top and six built-in file drawers. Also other solid oak custom pieces. Law books available. Call 206-546-3798.

$69.95: 2001 Washington state child-support worksheets and financial declaration computer program. Program calculates wages, FICA, taxes (schedule A, head of household, daycare, earned-income credit, etc.), imputes income, residential-care credit, and Arvey (split custody) allocation. 2001 update, $26.95. Call Law Office of Frederick L. Hetter, 253-759-6853, or e-mail lhetter@aol.com.

SPACE AVAILABLE

Office-sharing with three CPAs available October 1st in AGC Building, overlooking Lake Union. Three spaces available. Conference room, storage, other amenities. Call Stan at 206-285-4211, ext. 24.

Renton downtown office and secretarial space in building with two attorneys; everything included; some referrals possible. 425-228-8899.

Downtown Seattle office-sharing: $200 per month. Also, full-time offices available on 32nd floor, 1001 Fourth Avenue Plaza. Close to courts. Furnished/unfurnished suites, short-term/long-term lease. Receptionist, legal word processing, telephone answering, fax, law library, legal messenger and other services. 206-624-9188.

For sublease: Partner-sized office, reception services provided; class-A building, downtown Seattle, high floor, stunning western views. Available immediately. Contact Al Bentley at 206-343-9391.

Federal Way: Two offices available; library, conference room, all necessary amenities; congenial group of seven attorneys. Partial ownership of building available, or reasonable rent. Contact Gary Slater, 253-838-0678, or Joe McGoran, 253-838-3710.

Tacoma: New professional office space. North end of downtown CBD. View suites, conference, kitchens, private secure parking. Occupancy spring 2002. See http://www.stadiumplace.net or call 253-284-2844.

For sublease: Downtown Bellevue; one to four offices with shared reception areas; additional space for support staff; telephones, Internet, photocopier; secretary services optional. Contact query@graybeal.com or 425-455-5575.

Prime North Seattle office available: Greenwood neighborhood; three offices, two bathrooms, conference room and kitchen, with off-street parking. One attorney to share 1,000 sq.-foot suite with current occupant, or two attorneys could take over entire space. Located at 8011 Greenwood Ave. N., Seattle. Call Rob at 206-783-2300.

POSITIONS AVAILABLE

Mid-sized Portland, Oregon, intellectual property law firm seeks associate attorney with at least three years' experience preparing and prosecuting mechanical and/or electrical patent applications. Candidates should have degree in ME, EE, Physics or a related degree. We offer a great work environment that lets you balance work and the rest of your life. Competitive compensation based on productivity. Send résumé in confidence to: Bruce W. DeKock; Chernoff, Vilhauer, McClung & Stenzel LLP; 601 SW 2nd Ave., Ste. 1600, Portland, OR 97204-3157.

Reply to WSBA *Bar News* Box Numbers at:
WSBA *Bar News* Box ____
Bar News Classifieds
2101 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330

Positions available are also posted by telephone at:
206-727-8261
and online at www.wsba.org

To Place a Classified Ad:

Rates: *WSBA members:* $40/first 25 words; $0.50 each additional word. *Non-members:* $50/first 25 words; $1 each additional word. Blind-box number service: $12 (responses will be forwarded). Advance payment required; we regret that we are unable to bill for classified ads. Payment may be made by check (payable to WSBA), MasterCard or Visa.

Deadline: Text and payment must be received (not postmarked) by the 1st day of each month for the issue following, e.g., September 1 for the October issue. No cancellations after deadline. **Mail to:** WSBA *Bar News* Classifieds, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330.

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

Questions? Please contact Amy O'Donnell at 206-727-8213 or amyo@wsba.org.

Litigation: 10-attorney firm in downtown Seattle (AV-rated) is seeking a full-time associate with a minimum of two years' experience. The firm's practice is high-level commercial and white-collar criminal litigation, largely in federal court. We enjoy what we do; value a respectful work environment; and want an energetic, well-rounded attorney to share our practice. For more information regarding our firm, please see our Web site at http://www.yarmuth.com. Please send résumé and cover letter to Richard Yarmuth at Yarmuth Wilsdon Calfo PLLC, 1201 3rd Ave., Ste. 3080, Seattle, WA 98101.

Escape I-5: Join a general-practice firm with a sense of community. Must have experience in practice as a Washington state lawyer. Please send résumé to: WSBA *Bar News* Box 612, 2101 4th Ave., 4th Fl., Seattle, WA 98121-2330.

Associate attorney – business and real estate litigation: Hanson Baker Ludlow Drumheller PS, among Bellevue's most established law firms, seeks mid-to-senior-level associate with the highest academic qualifications and outstanding experience in general real estate and business litigation and transactions. The new associate's talents should expand and complement HBLD's expertise in real estate development and litigation, corporate transactions, and construction and land use. HBLD is an AV-rated firm emphasizing smart, creative, effective legal advice. The firm is a place to thrive, with a mutually supportive work environment, a challenging practice, and an opportunity to grow personally and professionally. Please send résumé and cover letter to: John Ludlow, Hanson Baker Ludlow Drumheller PS, 10777 Main St., Ste. 300, Bellevue, WA 98004-5963; jludlow@hbld.com.

Mills Meyers Swartling, a 15-lawyer AV-rated law firm, seeks a civil litigation associate with a strong academic record and excellent writing and advocacy skills. At least two years' experience in a law firm and/or judicial clerkship is preferred. Salary and benefits are competitive. Please send a letter, résumé and reference list to: Daniel R. Laurence, Mills Meyers Swartling, 1000 2nd Ave., 30th Fl., Seattle, WA 98104-1064; fax 206-386-7343; e-mail dlaurence@mms-seattle.com.

Associate position available: Established business law and commercial litigation practice, including estate planning, tax, bankruptcy and related areas. Send cover letter and résumé to: David D. Cullen, 1800 Cooper Point Rd. SW, Bldg. 11, Olympia, WA 98502; 360-786-6500; fax 360-352-3118.

Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP is actively and aggressively expanding our business and real estate/land use practices in our Tacoma and Seattle offices. Tax, ERISA, securities and banking experience preferred. Send résumé to: Executive Director, 1201 Pacific Ave., Ste. 2200, Tacoma, WA 98402, or e-mail thoml@gth-law.com.

Litigation attorney: Karr Tuttle Campbell seeks an associate with at least three years' experience in litigation. Employment law experience a plus. Candidates must have superior academic credentials and excellent writing and communication skills. Current WSBA membership required. Qualified individuals should submit a cover letter, résumé outlining their qualifications, and a writing sample to: Carol Anne Nitsche, Director of Human Resources, Karr Tuttle Campbell, 1201 3rd Ave., Ste. 2900, Seattle, WA 98101. Competitive salary DOE; comprehensive benefits. All inquiries confidential.

The City of Seattle Civil Service Commission seeks an attorney to serve as a hearing examiner pro tem on an as-needed basis. The appointee will receive $50 per hour. There are generally two prehearing conferences lasting about an hour each, and a formal hearing can be expected to last two to three days. Experience in public sector employment and/or labor law is required. Submit a cover letter and résumé by 8/31/01 to Miriam Israel Moses, CSC, 700 3rd Ave., Seattle, WA 98104.

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Quality attorneys sought to fill high-end permanent and contract positions in law firms and companies throughout Washington. Contact Legal Ease, LLC by phone 425-822-1157, fax 425-889-2775, e-mail legalease@legalease.com, or visit us on the Web at http://www.legalease.com.

Associate position: Attorney sought by established general practice firm with offices in Lewis and Thurston county. Must be aggressive, self-starter and team player. Potential for growth available. Send résumé to: Don A. McConnell and Associates; 207 W. Main St., Centralia, WA 98531; http://www.lewiscountylaw.com.

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Litigation associate: Bellingham mid-sized law firm is seeking an associate with at least two years' litigation experience to work in a varied civil trial practice. Areas may include insurance defense, personal injury, and real estate and land use litigation. Strong research and writing skills required. Send résumé along with transcripts and writing sample to: HR; Visser, Zender & Thurston PS; PO Box 5226, Bellingham, WA 98227. Visit our Web site at http://www.vztlaw.com.

Columbia Legal Services: Regional director positions are open in our offices in Wenatchee, Kennewick and Olympia, Washington. The regional director is responsible for managing all activities of the office and the program in the region to address client needs (client representation, staff supervision, administration and community networking). In addition to a demonstrated commitment to work towards ensuring equal justice for low-income people, and to exploring creative solutions to problems faced by our client population, strong management, supervision and communication skills are required. Spanish language proficiency is preferred for the Kennewick and Wenatchee positions. A position is open for an attorney with at least four years' experience to engage in farmworker representation in Washington state. Spanish language proficiency required. If you are interested in one of these positions, please send résumé and a writing sample to: Gail Jackson, Human Resources Manager, Columbia Legal Services, 101 Yesler Way, Ste. 600, Seattle, WA 98104.

Grays Harbor firm seeking associate for general practice emphasizing litigation. Attorney will have primary control over area of practice, client contact and litigation. Applicant will have ethical and professional standards, commitment

to community, and experience in rural areas. Friendly small-firm environment. Benefits and salary DOQ. Send résumé, references, writing sample to: Micheau & Samuel, PO Box 343, Aberdeen, WA 98520.

Four Lynnwood attorneys seek fifth with experience in some of these areas: civil litigation, personal injury, bankruptcy, real estate, estate planning. Perfect for downtown associate who wants to move north. Prefer attorney with client following, but will consider others. Salary, medical, IRA. See http://www.jamesrobertdeal.com. Send résumé to jamesrobert@jamesrobertdeal.com.

TeamChild, an innovative civil legal advocacy program for high-risk youth, seeks full-time attorney for new Snohomish County office. Send résumé to 810 Third Ave., Ste. 800, Seattle, WA 98104.

Associate attorney: The Blankenship Law Firm, an AV-rated civil litigation firm in downtown Seattle, seeks an associate lawyer with excellent writing, research and communication skills, and preferably at least two years' civil litigation experience. We will also consider new law graduates with strong academic backgrounds and other life experience. Salary is negotiable DOE, with excellent benefits, bonuses and profit-sharing. The firm has an emphasis in employment law, but also engages in many other areas of civil litigation, including class actions, personal injury and professional malpractice. This is an opportunity to join a winning team in a growing firm. Please fax letter of interest and résumé to 206-343-2704.

Attorney: The Nature Conservancy, an international conservation organization, seeks an attorney to provide legal services for the Conservancy's northwest division. Based in Seattle, duties include legal support for real estate transactions, grants, contracts, etc. Minimum three years' experience in related field. Job description at http://www.nature.org/jobs. Send cover letter and résumé to: The Nature Conservancy, 217 Pine St., Ste. 1100, Seattle, WA 98101. EOE.

Executive director for Washington state water resources nonprofit to oversee legal, outreach, legislative and development staff, and work with board of directors on strategic decision-making and fundraising. Minimum qualifications: understanding of Western water law, legislative and media experience, leadership, oral and written communication skills, and fundraising ability. Policy research and litigation experience helpful. $40-50K DOE, plus benefits. See http://www.celp.org/ED2001.htm for details. Send cover letter and résumé to: CELP, 1165 Eastlake Ave. E., Ste. 400, Seattle, WA 98109; fax 206-223-8464; e-mail info@celp.org.

WILL SEARCH

Will sought for Ruth Hing Chinn of Seattle, King County, WA. Please contact Karen Wong at 206-264-2314. Passed away August 23, 2000.

SERVICES

California litigation/collection: California attorney ready to assist you in your California needs: domesticating judgments, jurisdictional challenges, collections, depositions, litigation. Rick Schroeder, 818-879-1943.

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Experienced appellate attorney. 20 years' state and federal experience, civil and criminal. Former deputy prosecutor. Superb writer. Robert A. Weppner. Telephone 206-728-9332; e-mail raw_law@earthlink.net.

Free estate appraisals – U.S. coins. Dealer/collector paying cash! Finders' fee for referrals. Member: ANA #R185172; PNNA 901. Call for appointment, 425-766-8194; e-mail discount.coins@gte.net.

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MISCELLANEOUS

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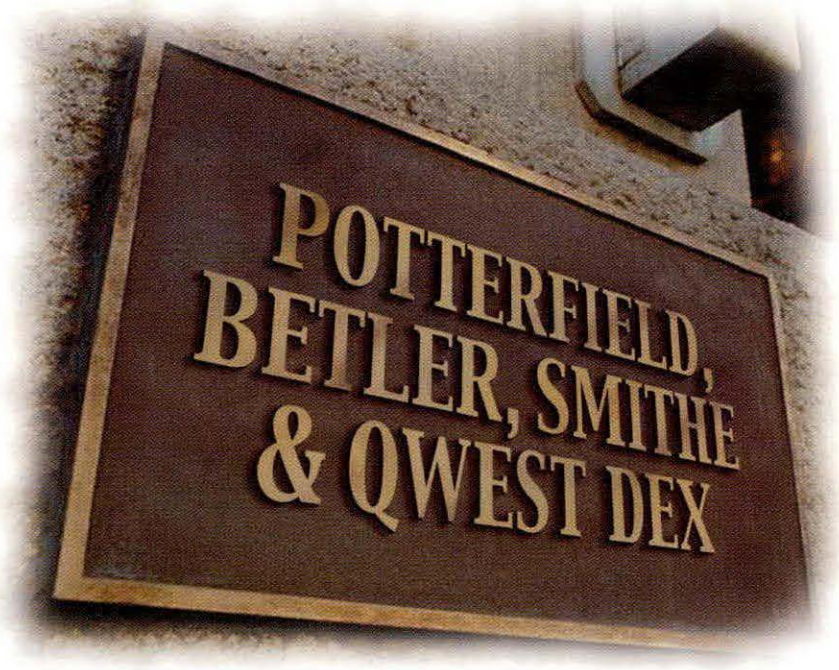

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