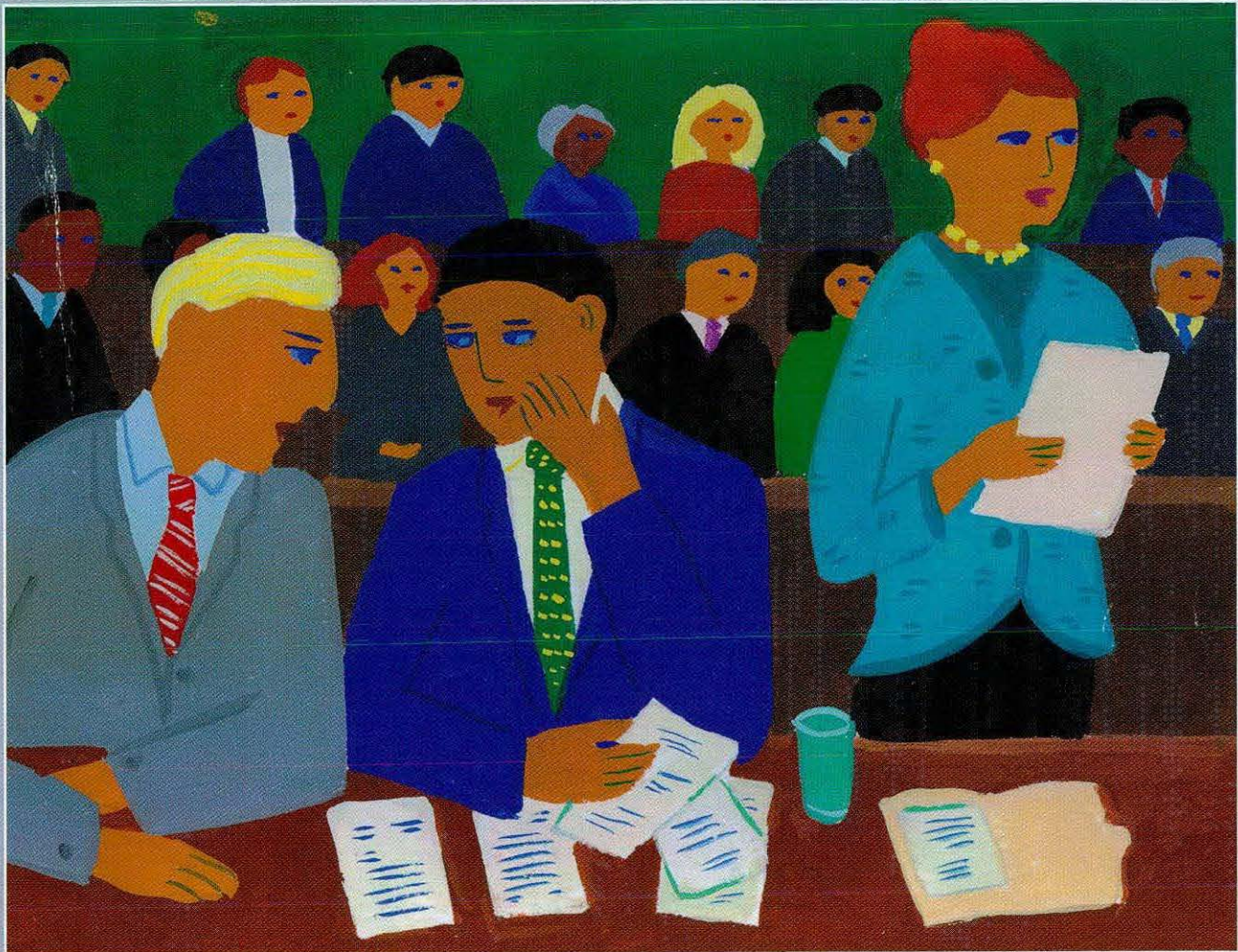


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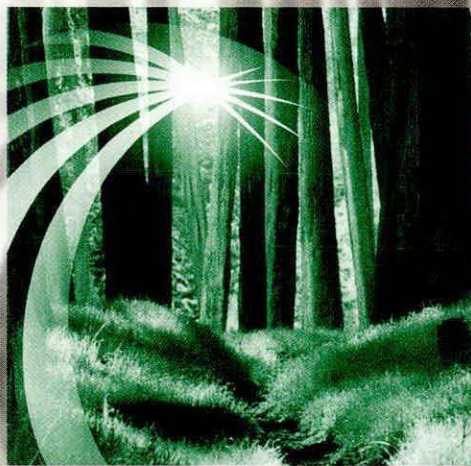
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Contents

Articles

- 17 Washington's 10 Most Significant Labor and Employment Cases in 2000-2001**
by Juliet Wehr Jones
- 26 Advising Clients: The Truth about Trademarks**
by Timothy B. McCormack
- 32 Speak Softly and Carry a Big Shtik: Litigating the Oral Contract in Washington**
by Steven A. Reisler and Dawn S. Perry

Columns

- 13 Editor's Page: Two Cents' Worth**
by Mark A. Panitch
- 15 Executive's Report: The Glass-Ceiling Survey**
by Lisa M. Stone
- 40 My Turn: Washington's Administration of Misdemeanor Justice**
by Darren Nienaber

Departments

- 7 Letters**
- 42 Practice Tips: A Mediator's Observations**
by Louis D. Peterson
- 44 Lawyer Services: Astute Attorneys Utilize Paralegals**
by Forest Collins
- 46 Observations from the Bench: The Discipline Notice: Getting a Client's Consent**
by Jeff Tolman
- 47 Changing Venues**
- 49 Disciplinary Notices**
- 52 FYI**

Listings

- 58 Announcements**
- 59 Calendar**
- 60 Professionals**
- 62 Classifieds**

Cover illustration: Carla Golembe



P. 15



P. 17



P. 26



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Readers are invited to submit correspondence and articles. They may be sent via e-mail to comm@wsba.org or provided on disk in any conventional format with accompanying hard copy and sent to *Bar News* Editor, 2101 Fourth Avenue, Fourth Floor, Seattle, WA 98121-2330. Article submissions should run approximately 1,500 to 3,500 words. Graphics and photographs are welcome. The editor reserves the right to edit articles as deemed appropriate.

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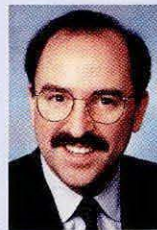
Jeffrey Veitch

Previously a criminal defense lawyer with the prestigious Pennsylvania firm of Shapira, Hutzelman; Former Prosecutor, City of Seattle; Member, Washington Association of Criminal Defense Lawyers; Extensive jury trial experience



Steve Hayne

Past President, Washington Association of Criminal Defense Lawyers; Past Chair, WSBA, WSTLA and KCBA Criminal Law Sections; Co-author, *Defending DUI's in Washington*; Founder, National College for DUI Defense; Instructor, NW College for DUI Defense; Recognized as a “Top 10” Trial Lawyer



Jon Fox

Past Chair, Washington State Bar Association Criminal Law Section; Founder, Washington Association of Criminal Defense Lawyers; Founder and Instructor, National College for DUI Defense; Co-author, *Defending DUI's in Washington*; Named “Superlawyer,” *Washington Law and Politics*



Bill Bowman

Chair, WSBA Criminal Law Section; Member, Board of Governors, Washington Association of Criminal Defense Lawyers; Former Deputy Prosecutor and Public Defender; Instructor, NW College for DUI Defense; Graduate, National College for DUI Defense; Named “Rising Star,” *Washington Law and Politics*

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WASHINGTON STATE BAR ASSOCIATION

2101 Fourth Ave., Fourth Fl.
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M. Janice Michels

Executive Director

206-727-8244; janm@wsba.org

Mark A. Panitch

Editor

206-223-1553; pan-law@qwest.net

Judith M. Berrett

Director of Communications

206-727-8212; judithb@wsba.org

Amy Hines

Managing Editor

206-727-8214; amyh@wsba.org

Jack Young

Advertising Manager

206-727-8260; jacky@wsba.org

Allison Parker

Communications Specialist

206-733-5932; allisonp@wsba.org

Randy Winn

Webmaster

206-733-5913; randyw@wsba.org

Amy O'Donnell

Classifieds and Subscriptions

Bar News Online

206-727-8213; amy@wsba.org

Clare Cox

Desktop Publishing Support

206-727-8279; clarec@wsba.org

Communications Department e-mail:

comm@wsba.org

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"Litigation Explosion" a Myth

Editor:

Andy Cooley's response to a September *Bar News* editorial by Mark Panitch was riddled with factual errors and defense-bar folklore.

Cooley suggests the plaintiff bar is responsible for the mythical eruption of junk lawsuits which in turn force insurance companies to increase premiums. He offers no evidence to support these bogus claims because, very simply, none exists. Corporations — mostly insurance companies — have bankrolled the myth of the "litigation explosion" in a calculated attempt to strip ordinary citizens of their legal right to hold wrongdoers accountable in a court of law. The fact is, insurance companies want to collect premiums without paying legitimate claims. They have driven their own policy-holders to court in an effort to make injured citizens go the distance when collecting on a service for which they have already paid.

The rate of lawsuits in America at the national level and in Washington has actually declined. The economics of the contingency-fee system encourages lawyers to reject loser cases and the "junk" lawsuit. And if a lawyer pursues a meritless case, the judge and jury are there to reject it.

Most Americans who have been injured by the carelessness of others do not file tort cases. Consider that only 1.9 percent of civil filings per 1,000 people are actually torts, compared to the 16 percent for all other civil filings. Studies have revealed that injured citizens file a minute number of lawsuits in our courts. In contrast, nearly one-third of our courts are clogged with businesses suing businesses.

A Harvard study of medical malpractice found that only two percent of people injured by negligent medical care filed suit. [Paul C. Weiler et al., *A Measure of Malpractice*, 73 (1993).] The conclusion is further substantiated in a recent study by the National Center for State Courts, a non-partisan organization that compiles court statistical data. The study found that tort filings have decreased since 1996. [Brian Ostrom & Neal Kauder, National Center for State Courts, *Examining the Work of State Courts*, 1998, 8 (1999).] In contrast, a recent citizen-action study found that businesses file 10 times as many lawsuits as

injured consumers. (Source: *Willful and Wanton Hypocrisy: Tort Reformers Flood Courts with Lawsuits*, 1995.) I wonder why we never hear the defense bar proposing tort reform to curb the filings by corporate America?

Tort reform has never done anything to improve insurance premiums for consumers and never will. Tort reform makes scandalous corporate giants lawsuit-proof and unaccountable to injured citizens. Surely, many of you remember the so-called liability insurance crisis of the 1980s, when insurance rates were skyrocketing

upward at rates of over 300 percent. Insurance companies blamed a litigation explosion, runaway juries and frivolous lawsuits as the cause. It didn't seem to matter that the insurance industry produced no data to support their claims. In fact, numerous studies and statistics showed that tort claims were stable, jury awards were steady and responsible, and no evidence of an epidemic of frivolous lawsuits existed. And of course, A.M. Best reported that insurance profits escalated by 600 percent in 1986.

Of course, after the devastation inflicted



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Ward says that while most lawyers depend on referrals, not one in 100 has a referral system. "Without a system, referrals are unpredictable. You may get new business this month, you may not," he says.

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on consumer rights, the true cause of the liability insurance crisis was documented. Numerous studies, including those conducted by Washington Insurance Commissioner Richard Marquardt, the National Association of Attorneys General, and Consumer Union, as well as industry articles and reports, determined that the "insurance crisis" was self-inflicted by the industry. Insurance underwriting practices of the high-interest era of the late 1970s and mid-1980s were the real cause of this crisis.


A recent study conducted by the New York-based Center for Justice and Democracy found states proposing severe tort-reform legislation experienced just as high an increase in insurance rates as states that enacted little or no change in their tort laws. In fact, arguably, the states in the middle tier of tort restrictions enacted, which because of the 1986 act includes Washington, incurred the highest level of insurance cost increases. In fact, Washington product liability insurance costs were the second highest in the nation. (J. Rob-

ert Hunter and Joanne Doroshow, Center for Justice and Democracy, *Premium Deceit: The Failure of Tort Reform to Cut Insurance Prices*, July 13, 1999.)

So what was the response of the insurance lobby? Nothing less than a real study in rhetorical sleight of hand. Sherman Joyce, the president of the American Tort Reform Association (ATRA), responded to this report in *Liability Week* magazine: "We wouldn't tell you or anyone that the reason to pass tort reform would be to reduce insurance rates." Victor Schwartz, ATRA's general counsel and chief lobbyist, was quoted in *Business Insurance*: "Many tort reform advocates do not contend that restricting litigation will lower insurance rates, ... and I've never said that in 30 years."

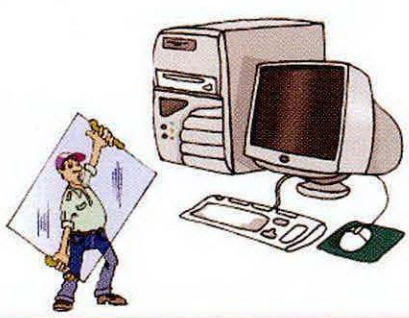
I hope I'm preaching to the choir. But just in case — it needs to be said. Thank you.

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Citing Legal Authority

Editor:

I appreciated Helen Anderson's summary of the current controversy over the proper method for citing legal authority in legal writing. I fully concur with her position that "fluidity, logic and policy are all important to legal reasoning, but courts are supposed to tether their arguments to authority." However, her "knee-jerk¹ reaction" and decision to support in-text citation as opposed to footnotes appears to assume that all readers of legal arguments or opinions are lawyers.² That is simply not the case.

As an administrative law judge (ALJ), I have learned that the majority of the litigants appearing before me, and subsequently reading my decisions, are *pro se* and without much education beyond high-school level, if that. They are primarily interested in whether or not I am ruling in their favor or upholding the agency's action which was adverse enough to them to merit their request for a hearing. If my audience's interests extend to knowing why I am ruling for or against them, at best, they are interested in citations to provisions of the Washington Administrative

Code (WAC) which govern their situation. Thus, in addition to an in-text citation, I occasionally include the full text of applicable WAC regulations in my opinions. However, most of my readers are absolutely not concerned with additional sources of legal authority such as case law or even citations to the Revised Code of Washington. Therefore, I typically banish these authorities to footnote status, allowing my readers to interrupt their reading only if they truly wish to be further informed as to the basis for my rulings. In my opinion, this style of writing serves the purpose of keeping legal writing and reasoning understandable to our most important consumers: the people.

Admittedly, my fashion of decision-writing may not be endorsed by or appropriate for all levels of courts, but I can appreciate this same approach when taken by our higher tribunals. Public access to and understanding of our judicial system must remain a paramount goal. If courts lose sight of their true audience, we risk the system itself becoming just a footnote in our citizens' lives, not a trusted and valued part of their civil rights.

*Adam E. Torem
Olympia*

1. This is Ms. Anderson's own term, not mine.
2. For instance, Ms. Anderson says "it is true that the citations clutter the text with strings of numbers and gibberish abbreviations, but lawyers quickly learn to skim over these cites and pull from them certain vital information..." She goes on to state that "the serious legal reader will never simply glide through [the text] to the end. Most lawyers will need to interrupt their reading to see what authority underpins the reasoning."

Opposition to KCBA Drug-Policy Position

Editor:

I object to the various proposals of the King County Bar Association to change drug laws to a "treatment" model.

The reason we have criminal sanctions for use of drugs such as heroin and methamphetamine, and perhaps cocaine, is that it is very bad for people to become addicted, and these drugs, as well as others, are addictive. Addicts become totally dis-

abled, pay attention to nothing other than getting drugs, abandon their families and commitments, commit crimes to pay for drugs, cause damage to society in general, and drown in a swamp of illegal activity. This is bad.

Drugs are highly inviting because they are fun, they provide a social connection, and they are profitable. There are plenty of inducements to beginning a career as a drug user.

Criminal sanctions are supposed to, and do, discourage people from becoming drug addicts. They do not work all the

time, as there is no method of enticing all the people to do any particular thing, but they probably work better at discouraging people from entry into drug and criminal activity than they do at getting people out of criminal activity. This is why there should be penalties for first users of drugs. The bar, I think, wants to abandon criminal penalties and simply ask addicts to go to treatment if they are caught in criminal activity. This terrible idea will encourage the public to become addicted, because the only penalty is the limp threat of "treatment" — the end of Washington. Most de-

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defendants know they will get more than one chance. Many, probably most, defendants do not want treatment in the first place. They want to be left alone. If they wanted treatment, they would have asked for it. Even those who do want to change, or who might be ambivalent about it, are likely unable to stay clean. It is not easy to be a recovering heroin addict, especially if you have no community or employment or family resources to help. The courts are littered with people who do not comply with "treatment." The treatment model is

a model that says, "destroy yourself, then try to rehabilitate yourself."

The King County Bar says punishment does not work. The penalties for possession and selling cause individuals to avoid detection, but they are not severe enough to frighten people away from use and sales. The penalty for a first-offense possession of heroin is zero to 90 days, which means zero to 60 days of actual confinement. The penalty for a second offense is two to six months, which means 40 days to four months actually served. The sentence

ranges are deceptive; virtually all offenders serve two-thirds of the sentence. These penalties are manageable for most defendants; they do not like them, but they are not something they cannot live with. As they commit more offenses, they become acclimatized to jail time, and the range of confinement they can live with increases.

The penalty for delivery is higher, 21 to 27 months, which usually means a bottom-range sentence of 21 months, of which 14 is served, and often there is pre-release towards the end of the sentence. If a person has six priors, the range is only 17 to 22 months, which is usually the bottom range of 17 months, of which only a little less than 12 months are served. Also, there are numerous possibilities for negotiating a better sentence: DOSA, or drug treatment, which is two-thirds of half of the midrange sentence; reduction to conspiracy, which has a range of zero to 12 months; first offender waiver; and other possibilities. Contrast this with the range for murder one, which is 240 to 320 months, with a midpoint of 23 years. Murder is not common, in spite of the millions of firearms that are present here and throughout the United States.

There is a place for treatment, and there are brave people who have recovered from addiction. But there is also a place for sanctions, and the Bar Association should leave the matter of adjusting drug policy to the Legislature. After all, they speak for the entire public.

*Roger Ley
Seattle*

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Two Cents' Worth

by Mark A. Panitch

Bar News Editor

The WSBA Board of Governors (BOG) is urging the Legislature to adopt the "medical model" for dealing with addicts and small-scale, non-violent drug dealers.

When I graduated from college in the mid-1960s, the war on drugs was already old news. It was also an old joke. College students showed the classic 1938 film *Reefer Madness* and other lurid propaganda films like *Devil's Harvest* and *Marijuana: Weed With Roots in Hell* to raise money for communal "dope runs" to Arizona. But with the official declaration of the "war on drugs" in 1982 by the Reagan administration, the stakes quickly rose. Getting busted suddenly was no laughing matter.

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4. Despite years of considerable resources being devoted to the prosecution of drug crimes, the problems of drug and alcohol abuse continue to have a significant deleterious effect on the health, safety and livelihoods of many individuals, their families and the communities of Washington State. There also has been a disparate negative impact on communities of color, despite studies that indicate equivalent drug use in non-minority populations.
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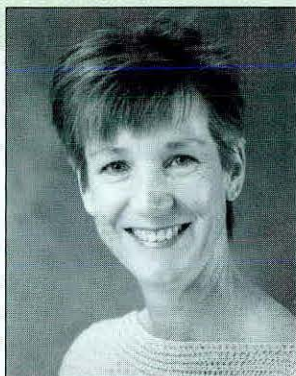
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port a drug addiction has strained state and local budgets, and has impaired the courts' ability to administer justice fairly and efficiently.

- The Washington State Bar Association agrees with the Washington State Medical Society and the King County Bar Association that it is time to expand and reorient society's approach to the problems of drug and alcohol abuse. More emphasis must be placed upon, and more resources devoted to providing drug and alcohol treatment to those who need it. Unlike the crimes discussed in paragraph 3 above, "low level" drug crimes, such as simple possession, should be approached as health problems, not criminal problems.
- Drug courts and other diversion programs have proved successful. They help individuals become better contributing members of society, and can save precious resources. Such programs should be not just preserved, but expanded
- More discretion should be permitted in the criminal justice system to allow supervised treatment as an alternative to incarceration in appropriate cases. Supervised treatment must respect and maintain the traditional physician-patient relationship.
- A working group of statewide experts should be convened to improve Washington State's comprehensive substance abuse prevention plan. Particular emphasis should be placed on preventing use of alcohol, tobacco and drugs by our young people.
- Meaningful treatment and prevention requires significant human and monetary resources. They require coordination among various sectors of the law and justice, health, and assistance communities. They require planning, training and adequate time to take hold. Society should make a long-term commitment to providing meaningful treatment and prevention programs. Studies indicate that such a long-term commitment will not only save government resources, but lives.

Adopted this 11th day of December 2001.

Dale Carlisle, President
Washington State Bar Association



The Glass-Ceiling Survey

by Lisa M. Stone
Guest Columnist

For more than 20 years, women and men have been entering law school in roughly equal numbers, and more women have risen to prominence in the legal profession, serving as judges, representing clients in high-profile cases, and being tapped as bar leaders. Yet despite these gains, many women attorneys believe a "glass ceiling" exists that prevents them from reaching the highest levels of status and compensation in the law. In 2001, a committee of female attorneys and legal professionals conducted a survey to determine whether this subjective view is warranted.

The Glass-Ceiling Survey, which was underwritten largely by the Washington Supreme Court Commission on Gender and Justice, was administered in 2001 by Northwest Research Group. Seven general areas of focus were included in the study: hiring, compensation, work life and firm culture, firm governance, discrimination and harassment policies and practices, professional growth, and promotion and retention. Respondents were asked to complete the study with reference to women and people of color in their firm and in the profession. The study was sent to all Washington law firms with five or more attorneys. Completion of the survey was voluntary; it was hoped that firms would be interested in participating in this study to learn about the status and progress of women and people of color in the legal profession in this state.

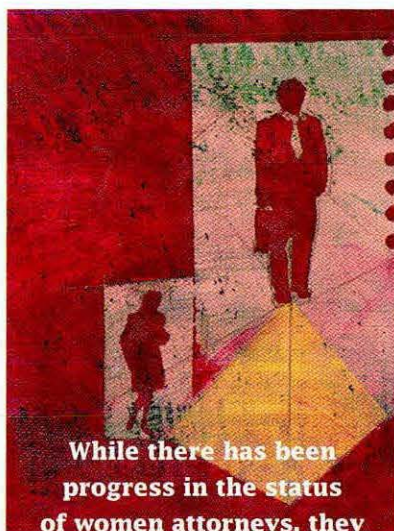
The results of the survey bear out the subjective view of its originators. While there has been progress in the status of women attorneys, they have not reached the level of compensation, participation in firm governance, and professional attainment of men. People of color similarly lag behind caucasians in the indicia of power and control within the legal profession.

The demographic makeup of the legal profession resembles a pyramid; the bottom comprises women and men in roughly equal numbers as they leave law school. Once in a firm, women

begin to play a smaller role, both numerically and functionally, until the top of the pyramid is overwhelmingly male. Between joining a firm as an entry-level associate and partnership, the number of women attorneys in law firms decreases by more than 50 percent. Women are likely to leave firms for public-sector service or solo practice, which may indicate the relative lack of a sense of comfort and acceptance they experience in private firms.

The picture for attorneys of color is equally bleak. Lawyers who identified themselves as persons of color constitute a small percentage of attorneys in private firms, with even fewer reaching the top of the pyramid. While the population of people of color in Washington as a whole is approximately 19 percent, minorities make up fewer than 10 percent of all attorneys in private practice in firms of five or more attorneys, and only three percent of equity partners.

An empirical study reveals a statistical picture of the profession, but it can also point to possible explanations for the data, or at least to potential avenues for further exploration. The trends identifiable in the results of the Glass-Ceiling Survey represent not only a reflection, but also some opportunities for the profession to expand and become more inclusive.



While there has been progress in the status of women attorneys, they have not reached the level of compensation, participation in firm governance, and professional attainment of men.

A theme emerging from the data is that women in private law firms are underrepresented in the decision-making processes of firms. In hiring authority, partnership determinations, compensation, long-term planning, firm governance and business management, women make up a very small percentage of the decision-makers, and the inclusion of people of color is even rarer in these processes. Women are fully and sometimes overrepresented in firm committees dealing with such matters as diversity, artwork, public relations, philanthropy and human resources. It appears that traditional notions of women's roles persist.

Among the patterns the data reveals is a statistically sig-

nificant difference between the representation of women and people of color at all levels in firms in eastern Washington and in western Washington. Fewer eastern firms have women or minority partners, formal antidiscrimination policies and training, or hiring committees that include women and lawyers of color. However, these tend to be attributes of larger firms, and the number of larger law firms is much smaller in eastern Washington.

Some signs of progress arise from the data: for example, private law firms appear to take seriously issues of sexual harassment, and race and sex discrimination.

Most firms have policies prohibiting such behavior, though relatively few provide regular training on how to recognize, respond to, or avert it. Firms also increasingly take into account attorneys' attitudes toward women and people of color, with most assessing gender and ethnic bias at some point in a lawyer's tenure with the firm. Additionally, a significant number of firms have parental leave policies and/or accommodate alternative schedules. The greatest number of those using such policies and schedules are women.

In many ways, it appears that private law firms have responded to the influx of

women over the last 20 years in a somewhat haphazard way. Women have been absorbed into the firms, but firms have not made deliberate, systematic efforts to integrate women into their power structures. Thus, women participate in interviewing and recruiting new hires, but not in the final hiring decisions. They provide input about compensation, but do not make ultimate financial determinations. Moreover, most firms do not have formal systems for distributing work among partners or associates.

This finding may represent a genuine opportunity for firms interested in reaching parity among women and men, and white and nonwhite lawyers. One way to systematically increase the participation of women and people of color in private firms would be to formalize work distribution to ensure that all attorneys have the chance to undertake high-level, lucrative work, rather than leaving it to chance.

Firms could also improve the climate for women and people of color by adopting and consistently communicating the criteria for promotion to partner or shareholder. The largest firms in the state are most likely to do so. Smaller firms appear to operate in a more *ad hoc* fashion, which is likely to favor those who are most like the current partners — white men.

The Glass-Ceiling Survey originated from a desire to explore in a reliable way the subjective sense of many women who practice law in Washington. The results both affirm that subjective sense and provide reason for hope. Women's increased presence in private firms, if appropriately responded to, can spur further improvement in their professional status, financial security, and sense of personal satisfaction and achievement. The profession owes no less to all its members. ☞

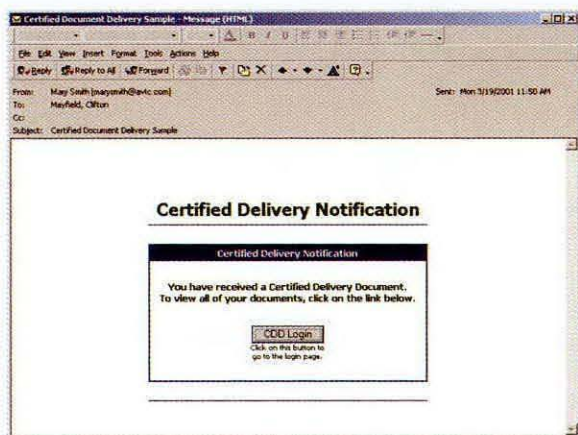
Lisa M. Stone, a member of the Glass Ceiling Task Force/Gender Equality Committee, is the executive director of the Northwest Women's Law Center, a nonprofit legal advocacy organization dedicated to advancing legal rights for women. She has worked for the federal government and been in private practice.

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Washington's 10 Most Significant Labor and Employment Cases in 2000-2001

by Juliet Wehr Jones

Labor and employment law involves complicated burden-shifting schemes, nasty personal issues, and almost as many booby traps as the famously tricky arena of trusts and estates. It's enough to make the nonemployment practitioner shy away from further familiarity with this rapidly changing field. And there have been some significant changes in 2000 and 2001.

Especially in the current recession-driven economy, everyone needs to know a little more about how these significant changes apply to their clients, employers or employees. This "top 10" list is a quick and painless overview of the last two years' most significant state and federal cases for nonemployment practitioners and those employment practitioners who need a brief review.¹ Admittedly, I cite a few more than 10 cases, and not all are strictly from Washington, but these cases apply in our jurisdiction and deserve our attention.

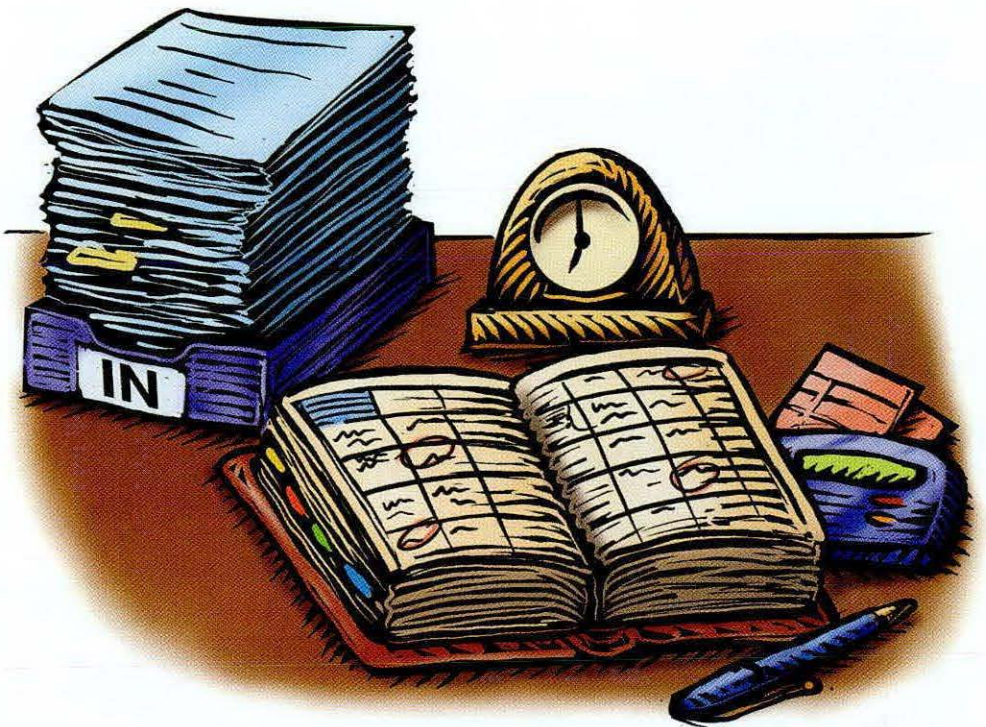
This article is not intended to substitute for legal advice, but may help practitioners "issue-spot" to know when they need more specialized assistance.

***Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L.Ed.2d 234 (2001)**

Enforcement of arbitration clauses in employment contracts under the Federal Arbitration Act

Summary: Nontransportation employment contracts are covered by the Federal Arbitration Act.

Facts: Mr. Adams applied and was accepted for a job as a salesperson at Circuit City in Santa Rosa, California. His employ-



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ment application contained an arbitration clause requiring him to arbitrate any dispute over his application, employment or termination, including Title VII (sex, race, national origin discrimination) and the ADEA (age discrimination). Two years later, Mr. Adams filed an employment discrimination lawsuit against Circuit City. *Circuit City*, 121 S.Ct. at 1306.

Procedure: Circuit City tried to enjoin Mr. Adams from pursuing action and sought to compel arbitration under the terms of the employment application. The lower court granted Circuit City's injunction re-

quest and compelled Mr. Adams to arbitrate; he then appealed. The 9th Circuit reversed, and Circuit City appealed. *Id.*

Issue presented:

- Does Mr. Adams's agreement fall under the Federal Arbitration Act's (FAA) exemption, 9 U.S.C. § 1, of "contracts of employment for...any other class of workers engaged in...commerce," therefore excusing him from mandatory arbitration? *Id.*, at 1307-08.

Holdings: No.

- The Federal Arbitration Act (FAA), 9 U.S.C. § 2, applies to individual employ-

ment contracts. *Id.*, at 1311;

- Only employment contracts of transportation workers are exempt from the FAA under 9 U.S.C. § 1. *Id.*

Related federal cases: *Circuit City* updates another well-known 9th Circuit case, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed.2d 26 (9th Cir. 1991) (requiring arbitration of an age-discrimination claim based on an agreement in a securities registration application; court declined to interpret 9 U.S.C. § 1, the exemption provision).

In addition to finishing work left undone in *Gilmer*, but in keeping with the same tradition of selective avoidance, the U.S. Supreme Court left untouched the 9th Circuit's decision-making arbitration agreements inapplicable to Title VII (federal discrimination) cases when the agreement is imposed as a condition of employment prior to the dispute. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998).

State court interpretation of *Circuit City*: Washington courts of appeal are dividing over the impact of *Circuit City* on state law. See *Young v. Ferrellgas L.P.*, 106 Wn. App. 524, 21 P.3d 334 (Div. 2 2001), and *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (Div. 1 2001). Depending on the

employee's particular claims and the appellate division, an arbitration clause may be enforced. So far, Division III has yet to weigh in on this topic.

In *Young*, the Division II Court of Appeals found *Circuit City* inapplicable to its analysis because (a) FAA issues were not raised on appeal, (b) Mr. Young would likely have been excluded as a "worker involved in transporting goods in interstate commerce," and (c) state wrongful-discharge claims in violation of public policy cannot be bargained away by agreement. *Young*, 106 Wn. App. at 528-29, *citing Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 809, 991 P.2d 1135 (2000) (public policy wrongful-discharge claim cannot be waived by agreement).

Unlike *Young*, *Tjart* incorporates *Circuit City* and followed this analysis:

1. FAA applies to arbitration agreements in employment contracts (with a few exceptions). *Tjart*, 107 Wn. App. at 827-28.
2. FAA applies to state anti-discrimination laws, as well as Title VII, requiring these claims to be arbitrated. *Id.*, at 828.
3. Ordinary state contract law determines whether the agreement subject to FAA exists. *Id.*
4. If found to exist, an agreement to arbitrate is enforceable absent unconscionability, fraud, overwhelming economic power, and other contractual defenses. *Id.*, at 830.

5. An agreement to arbitrate statutory claims such as Ms. Tjart's does not violate federal or state public policy because under the *Circuit City* analysis, arbitration agreements do not take away substantive statutory rights, but change the forum for them. *Id.*, at 831-32.
6. The court distinguished *Young* as a non-FAA case and because the employee was a whistleblower complaining of workplace health-and-safety issues.

If you are looking for guidance on the enforceability prong of Division I's analysis, take a look at the following cases: *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346, 87 L. Ed. 2d 444 (1985) (the Supreme Court gives examples of types of unenforceable agreements); *Perez v. Globe Airport Sec. Svcs, Inc.*, 253 F.3d 1280 (11th Cir. 2001) (fee-splitting makes the whole arbitration agreement unenforceable); *Ball v. SFX Broadcasting, Inc.*, F. Supp. 2d, No. 00-CV-1090, 2001 WL 1048556 (N.D.N.Y. 2001) (requiring employee to pay half of

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A painterly illustration of a man in a suit standing in a cave. The cave walls are covered in large, colorful depictions of animal heads, including a bear, a tiger, and a lion. A bright light source, possibly a waterfall or opening, illuminates the scene from above. The man is holding a briefcase and a cane, looking towards the viewer.

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port a drug addiction has strained state and local budgets, and has impaired the courts' ability to administer justice fairly and efficiently.

6. The Washington State Bar Association agrees with the Washington State Medical Society and the King County Bar Association that it is time to expand and reorient society's approach to the problems of drug and alcohol abuse. More emphasis must be placed upon, and more resources devoted to providing drug and alcohol treatment to those who need it. Unlike the crimes discussed in paragraph 3 above, "low level" drug crimes, such as simple possession, should be approached as health problems, not criminal problems.
7. Drug courts and other diversion programs have proved successful. They help individuals become better contributing members of society, and can save precious resources. Such programs should be not just preserved, but expanded
8. More discretion should be permitted in the criminal justice system to allow supervised treatment as an alternative to incarceration in appropriate cases. Supervised treatment must respect and maintain the traditional physician-patient relationship.
9. A working group of statewide experts should be convened to improve Washington State's comprehensive substance abuse prevention plan. Particular emphasis should be placed on preventing use of alcohol, tobacco and drugs by our young people.
10. Meaningful treatment and prevention requires significant human and monetary resources. They require coordination among various sectors of the law and justice, health, and assistance communities. They require planning, training and adequate time to take hold. Society should make a long-term commitment to providing meaningful treatment and prevention programs. Studies indicate that such a long-term commitment will not only save government resources, but lives.

Adopted this 11th day of December 2001.
Dale Carlisle, President
Washington State Bar Association

arbitrator's fee in an agreement signed as a condition of employment is unenforceable); *Cole v. Burns Intern. Security Svcs*, 105 F.3d 1465 (D.C. Cir. 1997) (requiring employee to pay half arbitration fees is unenforceable); and *Shankle v. B-G Maint. Mgmt. of Colo.*, 163 F.3d 1230 (10th Cir. 1999).

Hill v. BCTI Income Fund — I, 144 Wn.2d 172, 23 P.3d 440 (2001) Plaintiff claiming Washington Law Against Discrimination (WLAD) violation based on circumstantial evidence encounters "hybrid pretext" standard of proof.

Summary: Disappointing plaintiff and defense lawyers alike, the Washington Supreme Court adopted the "hybrid pretext" burden of proof, which allows a plaintiff to prove an employer's given reason for an adverse employment action is pretext or "fake" by only showing sufficient evidence to disbelieve the employer. However, sometimes proof of a "fake" reason is insufficient. In this case, the plaintiff's evidence of pretext for age discrimination was insufficient, and a jury verdict was overturned. *Id.*, at 183.

Facts: An African-American woman who was 53 years old when hired sued her employer for race, disability and age discrimination after her termination. Ms. Hill, who has an asthmatic condition, claimed she asked for a transfer as a reasonable accommodation of a disability. During this discussion, Ms. Hill talked about her level of compensation. The employer stated it fired Ms. Hill for discussing her salary and benefits with other employees, in violation of a company policy. *Id.*, at 177-78.

Procedure: The trial court directed a verdict for the employer on a disability-discrimination claim and entered a judgment upon jury verdict in favor of the employee on her age-discrimination claim. The employer appealed, and the employee cross-appealed. The court of appeals, 97 Wn. App. 657, 986 P.2d 137, affirmed denial of the employer's motion for directed verdict, but reversed jury verdict for insufficient evidence under the "pretext-plus" standard. The employee appealed. *Id.*, at 178-79.

Issue presented:

- What is a plaintiff required to prove in order to show the employer's reason for taking an adverse employment action is "pretext" for unlawful discrimination under WLAD (RCW 49.60, et seq.)?

Holdings:

- "Hybrid-pretext" rather than "pretext-plus" standard applies in determining whether employer's stated reason for the adverse action was in fact pretext; *Id.*, at 185;
- "...while a *McDonnell Douglas prima facie* case, plus evidence sufficient to disbelieve the employer's explanation, will ordinarily suffice to require determination of the true reason for the adverse employment action by a factfinder in the context of a full trial, that will not always be the case." *Id.* Central to the court's pretext analysis

was the U.S. Supreme Court's adoption of the "hybrid-pretext" evidentiary standard covering federal discrimination statutes, resolving conflicting federal circuits in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Justice Bridge gives a comprehensive historical analysis of the burden-shifting paradigm in discrimination law.

Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 20 P.3d 921 (2001) Supervisors can be personally liable for WLAD (RCW 49.60) violations. Breach-of-

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employment contract (employee handbook) claims are analyzed using the "context rule" grounded in contract law.

Summary: This case consolidated two conflicting court of appeals' cases on the issue of supervisors' personal liability under WLAD: *Brown v. Scott Paper Worldwide Co.*, 98 Wn. App. 349, 989 P.2d 1187 (1999); and *Raymond v. Pac. Chem.*, 98 Wn. App. 739, 992 P.2d 517 (1999). The Supreme Court resolved the common issue and reversed a summary judgment for plaintiff Raymond's employer on a breach-of-contract (handbook) claim.

Facts: Beverly Brown worked in an Everett

paper mill from 1979 until her termination in 1995. Shortly after her termination, she sued her employer, as well as six individual supervisors, under WLAD, alleging sexual harassment and discrimination on the basis of sex and disability. *Brown*, 143 Wn.2d at 355.

Terry Raymond was a 51-year-old sales representative for Pacific Chemical when he was terminated and replaced by a younger, less experienced employee. *Id.* at 356. Mr. Raymond sued his employer and several supervisors for age discrimination under WLAD. *Id.*

Procedure: In *Brown*, the trial court

granted the supervisors' motion for summary judgment, agreeing with their interpretation of RCW 49.60 that they were not covered "employer[s]." Brown appealed. The procedure in *Raymond* was the same.

Issues presented:

- Can supervisors be held individually liable for employment discrimination under WLAD? *Id.*, at 357;
- Did the *Raymond* appeals court err in placing too much emphasis in its contract analysis on the sales agreement, disregarding other documents and circumstances under which his employment contract was formed and modified? *Id.*, at 364.

Holdings:

- Yes, supervisors may be individually liable if they engage in employment discrimination under WLAD. *Id.*, at 361-62. Employer liability is not based upon independent fault, but upon the theory of respondent superior. *Id.*, at 350, n 3. The court based its ruling on statutory construction, legislative intent and public policy. *Id.*, at 360-62;
- Yes, the court of appeals should have looked at the context in which the contract was formed. In evaluating and interpreting employment contracts, Washington follows the "context rule" as set forth in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), instead of the plain-language rule. *Id.*, at 364. In other words, extrinsic evidence regarding contract formation, like subsequent conduct and interpretive reasonableness, may be admissible to determine the contracting parties' intent. *Id.*, citing *Id.*, at 667.

Pulcino v. Federal Express Corp., 141 Wn.2d 629, 9 P.3d 629 (2000) WAC definition of handicap does not apply to WLAD accommodation claims, and union membership alone is protected "concerted activity."

Summary: Justice Ireland clarified what constitutes a "handicap" for purposes of analyzing employee claims that their employer failed to accommodate their disability, choosing not to strictly follow WAC 162-22-020's definition of "handicap" promulgated by the state Human Rights Commission (HRC). The HRC's definition of disability is generally viewed to be broader than the federal Americans with Disabilities Act (ADA) definition.

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Facts: FedEx terminated Leanne Pulcino, a five-foot, five-inch, 120-pound flight attendant who was also a union member, after a series of transfers and orthopedic injuries following the elimination of her flight-attendant position. FedEx claimed they were unable to find a less physical courier position for Ms. Pulcino, and transferred her to a handler position that involved stacking items on pallets and pushing pallets that could weigh up to 2,000 pounds into trucks. *Id.*, at 636-37.

Ms. Pulcino accepted the handler position and sustained injuries over time, including a rib strain and a broken foot. Ms. Pulcino submitted evidence of bias against

The HRC's definition of disability is generally viewed to be broader than the federal Americans with Disabilities Act (ADA) definition.

her because of her union activity (a "smoking gun" Post-It® note), and that other physically easier positions were available. FedEx produced conflicting evidence. After breaking her foot, Ms. Pulcino was cleared to return to work, but was told the only position available was for a handler, which Ms. Pulcino did not take. She was placed on a leave of absence and assigned a manager to help her look for another internal job. The only two openings required relocation or a long commute, and the company terminated her at the end of the 90-day leave of absence for not having found another position. *Id.*

Procedure: Ms. Pulcino lost the disability discharge claim on summary judgment, and the trial judge limited her to the claim of wrongful discharge for union activity. After Ms. Pulcino presented her discharge claim at trial, the court granted a directed verdict in favor of FedEx, which Ms. Pulcino appealed, as well as the summary judgment order dismissing her disability discrimination claim. The court of appeals affirmed the summary judgment dismissal of the disability claim and reversed the limitation of Ms. Pulcino's union discrimination claim to discharge, ordering a new trial. FedEx appealed. *Id.*, at 636-38.

Issues presented:

- Whether Ms. Pulcino properly stated a claim for disability discrimination

based upon FedEx's alleged failure to reasonably accommodate her during periods of temporary disability;

- Whether union membership alone is a "concerted activity" protected by RCW 49.32.020. *Pulcino*, at 638, 648-49.

Holdings:

- WAC 162-22-020 definition of "handicap" does not apply in refusal-to-accommodate cases. Instead, plaintiff must show he has/had a sensory, mental or physical abnormality, and such abnormality has/had a substantially limiting effect upon the individual's ability to perform his job. An employee can show that he has a sensory, mental or physical abnormality by showing that he has a condition that is medically cognizable or diagnosable, or exists as a record or history. *Id.*, at 641;
- Union membership alone is "concerted activity" covered under RCW 49.52, affirming *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995). *Pulcino*, *supra* at 650-51.

Ellerman v. Center Point Prepress, Inc., et al., 143 Wn.2d 514, 22 P.3d 795 (2001)

Control over direct wage payments results in personal liability for wage withholding under state law.

Summary: *Ellerman* sets the standard for determining when personal liability applies for wage withholding, following up on *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998) (financial inability to pay wages is no defense to willful wage withholding). There is personal liability for willful wage withholding under RCW 49.52.050 for officers, financial directors or principals who directly supervise or control the payment of wages.

Facts: Mr. Ellerman worked for Center Point Prepress, which went bankrupt, leaving some of his wages unpaid. *Id.*, at 517.

Procedure: Mr. Ellerman sued Center Point, the sole stockholder and president (Widener), and the business manager (Handly). Ellerman obtained a default judgment against Center Point and settled with Widener, leaving Ms. Handly as a defendant. The trial court ruled Ms. Handly was not a covered "employer" liable for wages under RCW 49.52. *Id.*, at 518. Ellerman appealed, the court of appeals affirmed, and Ellerman appealed to the Supreme Court. *Id.* After it decided *Schilling*, the

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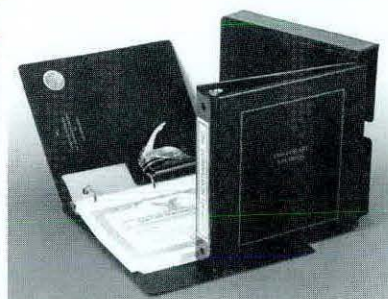
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Supreme Court remanded *Ellerman* for reconsideration and the court of appeals reaffirmed, finding Handly had no personal liability because she was not "an officer, vice principal, or agent" of his employer responsible for paying wages. *Id.* Ellerman appealed.

Issues presented:

- When does personal liability attach under RCW 49.52 for unpaid wages?;
- Who is a liable "officer, vice-principal or agent of any employer"?

Holdings:

- A vice-principal, someone who has the authority to direct and supervise the work of the employee, is personally li-

able for unpaid wages if he exercised control over the direct payment of the funds and acted pursuant to that authority. *Id.*, at 521-22;

- Personal liability attaches to an employer's agent who has some power and/or authority to make decisions regarding wages. *Id.*, at 522-23.

***Sinyard v. Commissioner of Internal Revenue*, 268 F.3d 756, No. 99-71369, 2001 WL 1117553 (9th Cir. 2001)**

Attorneys' fees are taxable income to plaintiff, even if defendant directly pays fees to plaintiff attorneys.

Summary: Attorneys' fees from a plaintiff's Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA) settlement paid directly to the attorneys is taxable gross income to the plaintiff.

Facts: Sinyard, 49 years old at the time, joined in as a plaintiff in two class-action suits against his employer (IDS) for federal age-discrimination and other claims. *Id.*, at 757. With his lawyer he entered into a standard contingent-fee agreement allocating one-third of any award or settlement as attorneys' fees. *Id.* When the suits were settled, the parties agreed that one-third of the settlement would be paid directly to the attorneys, one-third as compensation for tort injuries, and the remaining third to wages, from which IDS did IRS withholding. *Id.* The supervising district court approved the settlement order with the attorneys designated payable directly to the plaintiffs' law firm, without tax withholding. *Id.*, at 757-58.

Issue presented:

- Are attorneys' fees taxable income to the plaintiff?

Holding: Yes.

- IDS's payment of Sinyard's attorneys' fees, even as a third-party discharge of Sinyard's debt to his lawyer, is taxable income. *Id.*, at 758; Congress must deal with any remedy for unfairness. *Id.*

Crown Cork & Seal Co., Inc.

334 NLRB No. 92 (2001)

NLRB clarification on what constitutes a nonunionized employer's prohibited "labor organization"

Summary: The National Labor Relation Board (NLRB) found seven employee committees not to be employer-dominated "labor organizations" prohibited by Section 8(a)(2) of the National Labor Relations Act (NLRA) because the committees had actual decision-making authority and were therefore "management."

Facts: A 150-employee nonunion company uses an employee management system that consists of four production teams, each made up of 33 members. *Id.*, at 1. There is a "team leader" (from management) with 32 lower-level production employees. Each team makes decisions by consensus, and no employee has greater authority than another; any employee unable to join a consensus can abstain from a vote. *Id.*

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oversees the four production teams, and consists of about a dozen members, including two members from each of the four teams and some members of management. The ORB monitors plant policies and suggests modifications to plant norms including hours, layoff procedures, smoking policies, vacations, and all terms and conditions of employment. Many of the decisions made by these three committees are reviewed by the management team composed of 15 members of management. The plant manager is above the management team and has the ultimate authority to review all decisions made by the three committees. The plant manager testified he had never overruled any ORB recommendation. *Id.*, at 2-3.

Issue presented:

- Are these committees illegal employer-dominated "labor organizations" that exist for the purpose, in whole or in part, of "dealing with" employees through a bilateral mechanism concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work? *Id.*, at 3.

Holding:

- The seven committees are not labor organizations because their purpose is to perform essentially managerial functions, and thus they do not "deal with" the employer within the meaning of Section 2(5) of the Act. *Id.*, at 5. The board was convinced that these committees consisted of managerial functions delegated to the employees.

This case also stands as a reminder to nonunionized employers that they are covered by the National Labor Relations Act (NLRA). The *Epilepsy* case below is another example. In general, the NLRA provides employees protections to form, join or assist labor organizations, bargain collectively through chosen representatives, and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." State law (RCW 49.32.020) also protects employees engaging in "concerted activities."

Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095, Westlaw No. 00-1332, (D.C. Cir 2001)


Nonunion workers now have *Weingarten* rights to request co-worker/witness presence during investigatory interviews

that may result in discipline. This ruling may not apply in the 9th Circuit but is worth addressing because it applies elsewhere and may be appealed to the Supreme Court.

Summary: The U.S. Court of Appeals for the District of Columbia Circuit ruled on November 2, 2001 to uphold an NLRB decision overturning a 12-year precedent to extend to nonunion workers the rights enunciated in the U.S. Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). An older 9th Circuit case directly conflicts with the *Epilepsy* case. *E.I. Du Pont*

De Nemours & Co. v. NLRB, 707 F.2d 1065, 1078 (9th Cir. 1983). So now there is a conflict among the circuits and it is unclear whether or not *Epilepsy* will be appealed to the U.S. Supreme Court. It is a controversy worth watching.

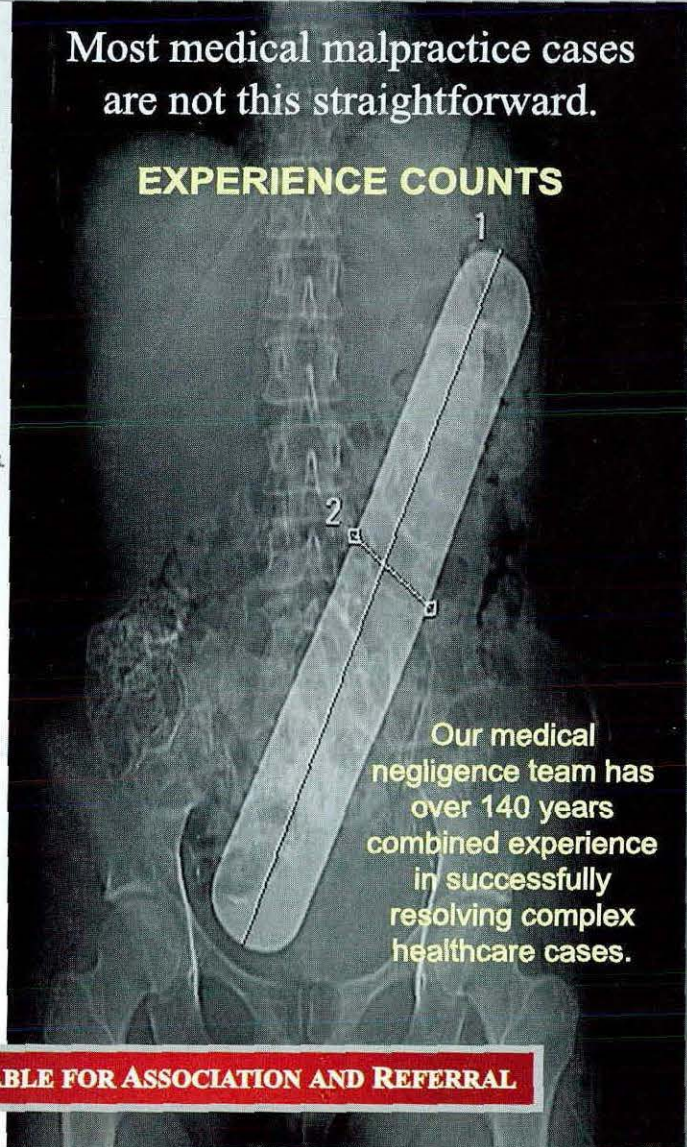
In *Weingarten*, the U.S. Supreme Court held that employees in a unionized workplace may request the presence of a union representative at an investigatory interview that the employee reasonably believes might result in disciplinary action. *Weingarten*, 95 S.Ct. at 959. This does not mean the employer has to offer a representative, but has to allow one if requested,



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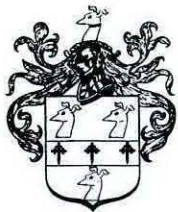
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or choose an alternative to the meeting. *Weingarten* interprets the National Labor Relations Act (NLRA), § 1 *et seq.*, as amended, 29 U.S.C.A. § 151, *et seq.*

Abbreviated facts: Two employees, Arnis Borgs and Ashraful Hasan, had disagreements with a supervisor (Berger) about how she was managing them, and sent a memo to Berger's supervisor (Loehrke). Soon thereafter, "Borgs asked for Hasan to attend a meeting at which he, Berger and Loehrke were scheduled to attend. Loehrke denied Borgs's request to have Hasan attend the meeting. When Borgs refused to meet without Hasan, Loehrke told him to go home for the day and return the next morning. Borgs returned to work the next day and was fired by Loehrke for refusing to meet with his supervisors." *Epilepsy*, 268 F.3d at 1098.

Procedure: The employer appealed to the D.C. Circuit U.S. Court of Appeals an NLRB decision that the terminations of Borgs and Hasan were unfair labor practices under the NLRA. *Id.*, at 1098.

Issue presented:

- Was the NLRB permissible in its interpretation of the NLRA to cover employees in nonunion workplaces and uphold *Weingarten* rights for nonunion employees? *Id.*, at 1098-99.

Holdings:

- Yes, the NLRB's interpretation is reasonable. Requesting a co-worker's presence at a disciplinary meeting is "concerted activity" protected by Section 7 of the National Labor Relations Act (NLRA), which protects employees' rights to engage in "concerted activities for the purpose of mutual aid and protection." *Id.*, at 1099-1100;
- The NLRB's July 2000 ruling does not apply retroactively to events prior to the decision. *Id.*, at 1102-03.

***Nichols v. Azteca*, 256 F.3d 864 (9th Cir. 2001)**

Under Title VII, men are protected from harassment due to gender stereotyping.

Summary: The *Nichols* court based its decision on the U.S. Supreme Court's primary case on illegal gender stereotyping, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). *Price Waterhouse* involved a female employee who was denied partnership and was told she could improve her chances if she would "walk more femininely, talk

more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*, at 235.

Facts: The plaintiff, a restaurant server, claimed he was verbally abused because he was effeminate and did not meet male stereotypes of behavior. His co-workers insulted him and called him names because he carried a serving tray "like a woman"; referred to him in the female gender in Spanish; and called him a female prostitute, using vulgar language. *Nichols, supra* at 874.

Procedure: Employee filed an EEOC charge alleging hostile working environment, sexual harassment and retaliation

The plaintiff ... claimed he was verbally abused because he was effeminate and did not meet male stereotypes of behavior.

under Title VII (federal law prohibiting sex discrimination) and Washington's Law Against Discrimination (WLAD) appealed from a district court decision in the employer's favor.

Issue presented:

- Were co-workers' comments about the plaintiff's effeminate behavior unlawful Title VII hostile working-environment discrimination and impermissible gender stereotyping?

Holdings:

- Plaintiff met the elements of his hostile working environment claim, one of which was proving that the verbal abuse was "because of sex." *Id.*, at 875;
- Men are equally protected by Title VII and the U.S. Supreme Court precedent prohibiting sex discrimination in the form of gender stereotyping. *Id.*, at 874;
- The 9th Circuit's prior conflicting case law in *DeSantis v. Pacific Telephone and Telegraph Co. Inc.*, 608 F.2d 327 (9th Cir. 1979) was overturned. *Id.*

***Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 27 P.2d 1172 (2001)**

Supreme Court clarifies second prong (justifiable reliance) of the Thompson v. St. Regis Paper exception to the at-will employment rule. An employee must be aware of a policy before there is justifiable reliance.

Facts: Safeway, Inc. fired Jim Bulman for initiating wage increases for his two sons

while they were working for stores in the district under his management. Bulman sued Safeway for wrongful termination, arguing that the manner of his termination violated Safeway's written personnel policies. *Id.*, at 338.

Procedure: Mr. Bulman prevailed in a jury trial. On appeal, Safeway argued that Bulman was a terminable-at-will employee who had not provided substantial evidence of reliance upon the personnel policies he claimed prevented his termination. Division I affirmed the jury verdict. Safeway appealed and the Supreme Court reversed. *Id.*

Issues presented:

- Did the Court of Appeals correctly state the standard for justifiable reliance upon an employer's promises of specific treatment in specific situations? *Id.*, at 339;
- Did Bulman prove justifiable reliance upon promises of specific treatment in specific situations that induced him to remain at Safeway and not seek other employment? *Id.*;
- Did either the employment of relatives policy or the personnel-improvement plan form the basis of an implied contract? *Id.*

Holdings: No.

- The proper standard for the 2nd prong is based on the knowledge of the policies and reliance upon them, not an "atmosphere" of job security without actual knowledge and demonstrated reliance on a particular policy. *Id.*, at 344-45;
- Mr. Bulman did not present substantial evidence for a reasonable trier of fact to conclude he had justifiably relied on any promises of specific treatment; therefore, the court overturned the jury verdict. *Id.*, at 350. ²³

Juliet Wehr Jones practices plaintiff and union-side labor and employment law in Seattle. She also conducts independent and litigation preparation investigations for employers.

NOTE

1. This survey adds to Katrin E. Frank's very thorough Title VII article in the November 2001 issue of *Bar News*, dealing with recent changes in Washington's approach to sexual-harassment laws. Also, this survey does not list all facts, issues and holdings in the cited cases, but singles out those the author believes are the most significant and new.

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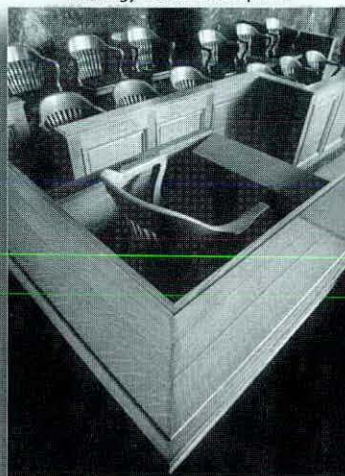


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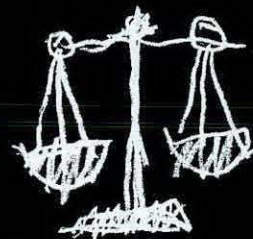
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Advising Clients: The Truth about Trademarks

by Timothy B. McCormack

Every attorney with a business client has a client with a potential trademark issue. This article is intended to help attorneys and business leaders unravel some of the myths and complexities of trademark law and practice.

Defining Trademarks, Service Marks and Other Marks

A “trademark” or “service mark” can be made up of any word, name, symbol, logo, color, sound, product shape, or any combination of these elements. Typically, a trademark is used to mark goods. Alternatively, a service mark is used when selling services. This article refers to trademarks and service marks synonymously.

A trade name, which is similar to a trademark, merely represents the name of a company. Similarly, a domain name is part of a unique address that identifies a particular Web site. Typically, trademarks trump trade names and domain names; therefore, registering one’s trade name with the state is not good enough to protect rights in the name. The same is true of domain names.

Protecting One’s Marks

Generally speaking, trademarks can be protected in four different ways:

- Trademarks can be nationally registered through the U.S. Patent and Trademark Office;
- Trademarks can be registered on a state-by-state basis;
- Trademarks can be protected within specific geographic areas under the common law of particular states;
- Trademarks can be protected internationally.

As an aside, charitable groups, nonprofit corporations, professional and fraternal groups, and educational and religious institutions receive the same protection against confusing use of trademarks and corporate names as for-profit business organizations.

Benefits of Federal Trademark Registration

The benefits of federal trademark registration are numerous. Some of the advantages are:

- One registration covers 50 states;
- The ® symbol can be used with your mark;
- Once a federal registration is filed, any common-law rights being developed by competitors are stopped dead;
- Federal trademark registrations add value to a company’s intangible asset portfolio;
- Tactical and substantive advantages in domain-name disputes are gained;
- When filing for additional trademark registrations, international priority is given in many foreign countries;



- Court-ordered damages can sometimes be tripled for federally registered trademarks;
- The federal court system can be used to stop infringement of marks;
- A federal trademark registration can be entered into evidence in court to prove your trademark is valid and that you own the mark;
- The U.S. Customs Service can be asked to stop goods marked with infringing trademarks from entering the United States; and
- The registered mark will show up prominently in other people's trademark clearance searches (including the searches conducted by the Patent and Trademark Office), making it less likely that other businesses will choose to use your mark.

Importance of Trademark Searching and Clearance

Before a company invests substantial money on advertising, business cards, store signs, customer recognition, etc., a comprehensive trademark search should be conducted and reviewed. A comprehensive trademark search typically examines marks on the federal registry, all 50 state trademark registries, common-law sources

A comprehensive search looks for marks that are exactly the same as the suggested mark, as well as "look alike" and "sound alike" marks.

including business records and newspapers, and Internet sources such as domain-name registrations. A comprehensive search looks for marks that are exactly the same as the suggested mark, as well as "look alike" and "sound alike" marks. A full trademark search also considers marks that share common elements with the suggested mark, even if the marks appear quite different; this can be important in some cases. A written opinion interpreting the search results in light of legal trends and case law is also a must.

Sometimes, the process of conducting a trademark search and reviewing the results with a knowledgeable attorney results in a business modifying their mark or identity. In these cases, an ounce of prevention is worth a pound of cure. No one wants to face expensive litigation that results in being forced to change a mark, pay

damages to the other side, and risk losing customer recognition.

In many cases, a full trademark search and written opinion results in specific strategies that help mitigate the risks described above. Often these same strategies help in actually getting your trademark registered with the U.S. Patent and Trademark Office as well.

Choosing a Strong Trademark

Choosing a strong trademark can be one of the most important decisions a business owner makes. Sometimes businesses are wed to a particular mark, and will not consider a new or modified version. In these cases, it is important to understand the strengths and weaknesses of the mark from a protection and registration standpoint, allowing for the appropriate development of registration and protection strategies that can help make a weak mark stronger. The process of understanding the relative strength of an existing trademark is the same as the first step in choosing a new mark from scratch.

Whether a mark has been predetermined or not, the first step in choosing a strong mark is to determine where the mark exists on a spectrum of protectability. Trademarks range from very weak and

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nonregisterable, to very strong and easily registered.

On the weaker end of the spectrum are marks classified as "generic." A generic mark is not protectable as a trademark. Use of such a mark is not recommended, since anyone could use the same mark in the same way without legal consequence. A generic mark is one that has become so widespread that the consuming public no longer associates it with a particular company. Ironically, owners of some of the most famous marks have had to fight to keep their once-unique marks from becoming generic. KLEENEX for tissues and JEEP for small, four-wheel-drive vehicles

are examples of marks that have come dangerously close to becoming generic.

One step up from a generic mark is a group of marks referred to as "descriptive" or "merely descriptive." These marks are exactly what their name implies — descriptive of particular goods or services. The fictional trademark CANNED GOODS for canned food products would be considered descriptive of canned goods. This mark might also be considered generic. Using the same mark to sell books, however, would be considered arbitrary (which is a good thing, as described later).

The mark TIMCO for a company selling services by someone named Tim might

also be considered descriptive. Sometimes descriptive marks can be registered and protected when it can be shown that the mark has become well-known or, in other words, has "acquired distinctiveness." A descriptive mark can often be placed on the supplemental federal registry, and after five years it can often be registered as having become "distinctive," and therefore no longer "descriptive." Marks that are merely descriptive of goods and services should be used with caution and avoided when there is a choice. It is also important to note that even a mark that has a weak placement on the trademark spectrum can be considered strong if the mark is widely recognized and has "commercial strength."

One step up from descriptive marks are marks referred to as "suggestive." Many times the argument can be made that a mark appearing to be descriptive is actually suggestive. A suggestive trademark, while not the strongest of marks, is registerable. A suggestive mark is one that requires some degree of imagination to associate the mark with the goods and services it represents. An example of a suggestive mark would be TECHNOLOGY for mechanical parts and computer hardware. The word technology describes the goods (to some extent), but the exact nature of the goods is not clear from the mark alone. As a practical matter, the further away from generic, descriptive and suggestive marks, the stronger the trademark.

The best kind of mark is described as "arbitrary or fanciful." An arbitrary mark is made of common words, like CANNED FOOD, but applied to goods and services where there is no rational connection between the goods and the mark (like CANNED FOOD for the sale of paperback books). In an etymological sense, the association between the goods and the mark is "arbitrary."

A fanciful mark is one that has no current existence in our lexicon (it is simply made up). Obviously, intellectual property rights are strongest in marks that did not exist before they were "invented." So, whether you have a mark or are thinking of a new mark, you should try to conceptualize where on the generic-descriptive-suggestive-arbitrary-fanciful spectrum the mark might fall. The further away from fanciful, the more important it is to consult a trademark attorney about trademark

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Obtaining a Federal Registration

Filing for a federal trademark registration can be an involved and lengthy process. A complicated trademark might take up to five years or more to register. With the right planning, the process can be shortened to as little as six months. Obviously, quicker turnaround time results in lowered costs and increased business certainty.

A growing number of domain-name trademark cases suggest that a trademark holder has no absolute right to use its trademark as a domain name.

Once the trademark application is filed, the Patent and Trademark Office assigns a trademark examining attorney to review the application. If the mark passes first muster, it is published for opposition in a government publication called the *Official Trademark Gazette*. Once the mark is published, anyone wishing to oppose the mark has 30 days to do so (unless they ask for an extension).

If the trademark examining attorney, on the other hand, identifies issues that need to be addressed, an "office action" is issued. Some office actions are *pro forma* and others are quite substantive. The timeline for responding to an office action is six months. Once all outstanding office actions are properly addressed, the application is published for opposition as described above. Complicated cases can take years to resolve; simple cases can be taken care of in as little as six months. In both simple and complicated cases, federal trademark rights are backdated to the application date.

Trademarks and the Internet

In the United States, trademark protection emanates from state statutes, and common-law and federal statutes. Trademark rights can be enforced for two primary reasons. First, trademark rights can be enforced to avoid consumer confusion as to the source or sponsorship of goods and

services.¹ Secondly, trademark rights can be enforced to avoid dilution of famous trademarks.² Both Washington state law and the Federal Lanham Act offer protection to unregistered famous marks.³

Trademark infringement is another common area of dispute on the Internet. Trademark infringement actions can cover everything from domain-name disputes and improper use of a company's name, mark or symbol, to infringement of the distinctive elements used to distinguish a Web site. Some trademarks are registered with the federal government; some on a state-by-state basis. Other trademarks are protected without any registration under state common law. In comparative advertising, it is usually acceptable to use another's trademark so long as the advertisement does not cause consumer confusion as to the source or sponsorship of goods.

Trademarks "Trump" Domain Names

Trademark law also applies to the Internet and domain names. Domain names are important marketing devices for corporations or businesses using the Internet, because customers and search engines use domain names to locate online businesses.

A growing number of domain-name trademark cases suggest that a trademark holder has no absolute right to use its trademark as a domain name. The test for determining whether a trademark holder is able to stop someone from using a similar domain name is the "likelihood-of-confusion" test. The likelihood-of-confusion test embodies the primary principle of traditional trademark law, namely that consumers should not be confused or deceived into buying goods or services based on false or confusing sponsorship. Other recent trademark cases suggest that a trademark holder might have an advantage in a domain-name dispute.

International Trademark Law Strategy

International trademark strategy has two primary components. The first involves acquiring and protecting trademark rights. The second is making sure that trademarks are not infringing a mark protected in a foreign jurisdiction. An international trademark strategy should reflect the concerns and conditions of a company, its target markets, and its industry. Company concerns involve considerations such as

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marketing strategy, budget, distributor relationship, and risk management.

Understanding and refining an international marketing plan is critical to developing an effective international trademark-protection strategy. The following five steps should be considered when refining an international marketing plan: (1) define the geographic area of the target market; (2) identify the target markets of immediate importance; (3) identify target markets of secondary importance; (4) develop a timetable for entering into specific target markets; and (5) if possible, create a budget to spread costs over time. When

defining target markets, don't forget to account for worldwide Internet sales, if appropriate.

Trademark Law in Other Countries

Because of the national, regional and international components of international trademark protection strategy, local and national laws as well as international agreements and treaties must be considered. Other relevant factors relate to a particular country's intellectual property trends, culture and local policy.

Trademark law can be grouped roughly into two categories. The first category is

based on what is called the "first-to-use" rule. The second is based on what is known as the "first-to-file" rule. The United States follows the first-to-use rule; while China, for example, uses the first-to-file rule.

In first-to-use countries, trademark priority is given to the first party that actually uses the mark in that particular country. In first-to-file countries, trademark use alone does not establish any rights to a mark. As a matter of practical importance, consider the risk that a junior user will register "your" mark, and prevent you or your client from using it in many first-to-file countries (this might happen even though your client was the first one to actually use the mark).

Sometimes, strategic trademark filings can be used to minimize the risk posed by "mark sharks." Additionally, some countries offer what is known as a defensive mark filing. When allowed, an applicant does not need to intend use of the defensive mark in the filed for country if use of the mark by another party in the country, even on dissimilar goods, would be likely to cause confusion. In many cases, strategic filings and defensive marks can be used to preserve rights in countries where future use and marketing is anticipated, but where there is no immediate intention or ability to enter a particular market.

Taking Advantage of International Treaties and Conventions

Different conglomerations of countries around the world have joined various collections of trademark treaties and conventions. The Paris Convention and the Madrid Protocol are among the more famous of these trademark treaties.

When two countries are members of the Paris Convention and file a second trademark treaty application within six months of a first application filing, the countries are allowed to use the earlier application's filing date on the new application.

Presently, the United States is not part of the Madrid Protocol; however, if the United States does become a member, U.S. companies will be able to take advantage of new rules and procedures for some international trademark matters. Currently, some U.S. companies incorporate a foreign subsidiary in a Madrid Protocol country when they anticipate filing large volumes

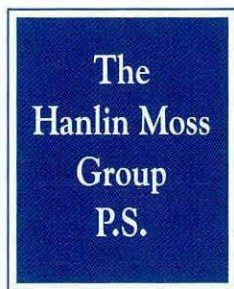
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of trademark work in the countries that are members of this protocol.

The European Union also has special rules and regulations for registering European-wide trademarks. Of course there are different costs, benefits and strategies involved with taking advantage of different international trademark treaties, conventions and agreements.

International Trademark Marking Requirements

In many countries, use of the ® is either optional or there is no provision for marking. In some countries, like the United States, specific benefits are offered for using the ® appropriately, such as eliminating certain damages defenses. In other countries, like China, Chile and Costa Rica, for example, a proper registration notice is required in order to maintain the registration and trademark rights. There is a danger, however, of using the ® too freely on international packaging. In some countries, false or misleading use of the ® can result in fines, imprisonment and other liability; Germany is one example.

International Strategy and Recommendations

If cost is not an issue, business owners doing substantial international business should consider filing trademark applications in all target countries, at the same time using the broadest possible description of goods and services allowed in each country. When cost is an issue, Paris Convention priority filings can be used to help spread costs over a six-month period. Last, business owners should consider evaluating marketing plans in light of the advantages and disadvantages of filing for trademark protection under particular trademark conventions, treaties and agreements, such as the Madrid Protocol and the trademark regulations of the European Union.

Conclusion

A trademark can be almost anything, including words, logos, colors and sounds. The benefits of properly protecting trademark rights are extremely important. In the United States, federal trademark protection is the best. It is recommended that a trademark search and written opinion interpreting the same be prepared for all businesses with important trademarks.

The first component of international trademark strategy involves acquiring and protecting trademark rights. The second component of international trademark strategy is making sure that trademarks are not infringing a mark protected in a foreign jurisdiction. An international trademark strategy should reflect the concerns and conditions of your company, such as marketing strategy, budget, distributor relationships and risk management. In addition, your international trademark strategy should reflect the conditions of your industry and target markets, including the laws, policies and cultures of your target countries. ◀

Timothy B. McCormack is an intellectual property and business attorney, practicing in trademark registration and counseling, patent litigation, technology licensing, entertainment law, and emerging and growth business. He may be reached at 206-381-8888.

NOTES

1. See generally, J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §§ 232-234 (2000).
2. *Id.*
3. Wash. Rev. Code § 19.77.160 (2000); 15 U.S.C. § 1125(a) (2000); see also, J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 214 (2000).

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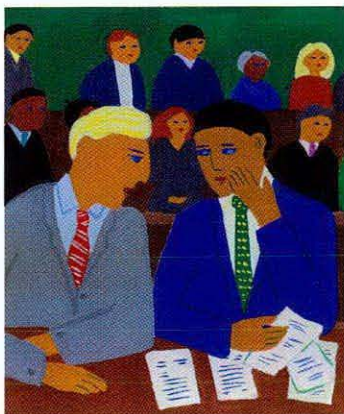
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Speak Softly and Carry a Big Shtik: Litigating the Oral Contract in Washington

by Steven A. Reisler
and Dawn S. Perry



In order to understand a contract, you must understand its context. In Washington, that often means the commercial litigator must use parole evidence to understand and ultimately explain that contractual context to the court. Under *Berg v. Hudesman*,¹ parole evidence can also be used in certain circumstances to add to or to explain the written contract evidence.²

When the dispute concerns an oral agreement, however, the lawyer's challenge is more difficult. Unlike the common written contract, an oral agreement may be constituted *completely* of parole (or otherwise extrinsic) evidence, and there may be no bright boundaries between the "context" and the "contract" itself. Moreover, the courts are loathe to summarily deal with disputes over the existence of oral contracts because so much can depend on the credibility of witnesses.³ Thus litigating how to interpret an oral contract — or more usually, *whether there even is an oral contract* — can seem like shadow-boxing with Jello, in the fog, by moonlight.

There are certain legal principles the litigator can bear in mind that will help dispel the fog — or, depending upon your objectives, tactics that will make the murk almost impenetrable.⁴

Is There a Contract?

Go back and read your class notes from Contracts 101. Whether a contract is written or oral, you do not have one unless the standard criteria are satisfied. Therefore, just like your preliminary analysis for any written contract, your analysis of an oral contract begins with the threshold question: *Is there a contract at all?* This question touches on all the basic goodies — consideration, capacity to contract, legality of the contract, mutual agreement, and so forth.

Paradoxically, it can be easier to keep a purported oral agreement alive until the time of trial than if a written agreement were at issue. Of course, any "oral contract" can be bounced out of court on a CR56 motion if its proponent can muster no more than bare assertions that the oral contract exists.⁵ In addition to bald-faced assertions that there is an oral contract, there must be some outward evidence of

the parties' mutual intent to enter into an agreement.⁶ "An agreement to *negotiate a contract in the future* is nothing more than just *negotiations*."⁷ In a nutshell, if all you have is one party's bare assertion that "we have a verbal agreement," and no other evidence of the other party's intent to make that verbal agreement, then you have nothing at all. Nevertheless, it is still substantially less difficult to conjure "evidence" of the other party's intent to enter into an *oral agreement* than it is to prove he intended to be bound by a written agreement when the signature line is blank.

If you are satisfied that there really is a valid contract, remember that oral contracts have a different statute of limitations than written contracts. Generally, an action to enforce an oral contract in Washington must be brought within three years of the alleged breach.⁸

Because consideration can be so minimal, it is usually not an issue. Capacity, legality and other issues are relatively easy to determine with reference to case law or statutes. The absence of agreement is a given, of course, or why else would there be litigation? Thus, the central issue in a dispute over an alleged oral contract can often be whether the parties actually agree on the material points of the contract. If they do, they can join battle over what it all means. If they do not, then the inquiry ends there.

A contract means a meeting of the minds. While the failure to agree on mere details will not vitiate a contract, the failure to agree on material terms will.⁹ What is "material" depends on the subject matter of the particular dispute. However, it is a matter of law whether a term is material. This is one of those mixed fact-and-law questions which, in the final analysis, a judge must decide because there is no other practical option. Thus, whether the

parties to a purported contract have or have not agreed on its material terms can be decided on a summary judgment motion or on a motion for a directed verdict.¹⁰ Otherwise, a jury of lay people could be placed in the incongruous position of either studying Corbin's hornbook on contracts as their jury instructions or writing the missing material terms of the contract *for the disputants*. The common-sense test is that if a jury gives a simple "thumbs up" to the question of whether there is a contract, would the parties be able to implement it without going back to the court to fill in the blanks? If not, the "thumbs up/thumbs down" issue should not go to the jury in the first place.

When it comes to contracts relating to real estate, the courts expect a substantial degree of precision. *Kruse v. Hemp*,¹¹ for example, citing the earlier case of *Hubbell v. Ward*,¹² describes no less than 13 material terms essential to the formation of an enforceable real estate contract. Essentially, "agreements to buy and sell real estate 'must be definite enough on material terms to allow enforcement without the court supplying those terms.'"¹³ Non-real estate contracts may require less precision, but they too may fail for lack of agreement on such material terms as the exact subject matter of the contract or its price.¹⁴

The courts are particularly loathe to force a party to specifically perform a purported contract when some of its terms are missing or ambiguous. To warrant a decree of specific performance, a contract must be definite and certain, and free from doubt, vagueness and ambiguity in its essential elements and material terms. The terms of the contract must be clear, definite, certain and precise. The terms must be so sufficiently free from obscurity or self-contradiction that neither party can reasonably misunderstand them. The terms must also be sufficiently clear so "that the court can understand them and interpret them, without supplying anything or supplanting vague and indefinite terms by clear and definite ones through forced or strained construction."¹⁵

The Statute of Frauds

Contrary to rumor, the statute of frauds is alive and well in Washington. It plays a particularly significant role in the litigation of oral agreements. The statute of frauds is not "a doctrine in equity, it is a

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positive statutory mandate which renders void and unenforceable those undertakings which offend it."¹⁶ There is a general "statute of frauds," a version codified in the Uniform Commercial Code (UCC) and various subrules, as well. Other than the UCC version of the rule that applies to the sale of goods, the rule generally nullifies oral agreements that are not capable of being performed within one year.¹⁷ There is a slightly different rule for real estate transactions. Every conveyance of or interest in real estate, and every contract creating an encumbrance on real estate, must be accomplished by a written deed, signed and acknowledged by the appropriate people.¹⁸ The purpose of the real estate statute of frauds is "the prevention of fraud arising from the uncertainty inherent in oral contractual undertakings."¹⁹

When it comes to oral real estate transactions, you need more than just misleading conduct to take the "agreement" out of the statute of frauds.²⁰ You need "part performance." *Kruse v. Hemp*²¹ describes the passel of issues that should be considered when partial performance of an oral real estate contract is an issue. The doctrine comes into play when (1) there has been delivery and assumption of actual and exclusive possession of the property; (2)

Although the one-year limitation for oral employment agreements might seem arbitrary, the concept of the rule is not.

consideration has been paid or tendered; and (3) there have been permanent, substantial and valuable improvements related to the contract.²² Thus, the doctrine applies only in very special circumstances.

The statute of frauds also applies to employment agreements.²³ Generally, an employment contract must be in writing if, by its own terms, it cannot be performed within one year.²⁴ The emphasis is on whether the oral agreement can possibly be performed within a year. Thus, your oral agreement to hire the neighbor's kid to mow your lawn for the next three months is a valid and binding contract — it can (and will) be performed within a year. The same agreement for an 18-month period, however, is not binding unless in writing. Likewise, your oral agreement to employ a new associate until the end of the year or you drop dead from overwork is a valid and binding contract because,

no matter when you made the agreement, it can be performed within a year or less. If you orally agree to give your employee stock options in your new dot.crummy company that she can have after 24 months of employment *or when the company first turns a profit*, that oral agreement also survives the statute of frauds. The reason is that as unlikely as it seems, *it is remotely possible* that your dot.crummy company could possibly turn a profit within a year, thus allowing your employee to purchase her stock options. On the other hand, an employment contract for a fixed period of more than a year must be in writing even if the employer has the option to fire the employee in less than a year's time.²⁵

Although the one-year limitation for oral employment agreements might seem arbitrary, the concept of the rule is not. The law simply requires that if a person would indenture himself to work for someone for more than a reasonable period of time, then there is every reason to require that the agreement be in writing. Like every writing, a written employment agreement requires more thought and more effort than an oral agreement — which is exactly why the law requires that something as potentially abusive as a lengthy



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period of contractual employment be reduced to writing.

Unlike real estate contracts, the doctrine of part performance emphatically does NOT apply to contracts for personal services otherwise within the statute of frauds.²⁶ Although the doctrine of part performance does not apply to verbal contracts for personal services, the doctrine of promissory estoppel may apply under certain circumstances.

In *Klinke v. Famous Recipe Fried Chicken*,²⁷ the court held that "a party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks that promise, is estopped to interpose the statute as a defense to the enforcement of the contract by another who relied on it to his detriment."²⁸ The essential fact in *Klinke*, however, was that the parties had agreed upon every essential element of the contract. The parties understood that even the form of the contract — a franchise agreement for a fried-chicken restaurant — would be just like those used by the franchiser in other locations.

Thus, in *Klinke*, the prospective franchisee had already taken significant steps in reliance on the franchiser's promises, and, when the rug was pulled out from under the franchisee's fried-chicken feet, the only thing that truly remained uncooked was the final written agreement to be signed. Significantly, it was the franchiser who was supposed to draw up the agreement for all parties' signatures, and when he did not do so, that same franchiser tried to hide behind the statute of frauds. This clearly fried our fair-minded court. It called a fowl, and clunked Famous Recipe Fried Chicken over the head with a drumstick called promissory estoppel.

Klinke is that special case, however, when all the essential terms of the contract have been agreed upon. However, if all the parties have agreed upon is that, in the future, they will negotiate a final contract, then they do not yet have a contract.²⁹ Thus, if all you have is an agreement "which requires a further meeting of the minds of the parties and without which it would not be complete," you do not have a final, enforceable agreement at all.³⁰ Likewise, "preliminary negotiations and agreements do not constitute a contract" if the determination of definite details abides the drafting of the final written contract.³¹

In sum, although there are exceptions, and exceptions to the exceptions to the statute of frauds (and far more than are described in this article), the starting point is to ask the question whether it *might* apply, then determine whether there are subrules or exceptions that need to be considered.

The Uniform Commercial Code

Washington has adopted the Uniform Commercial Code (UCC) and codified it in RCW 62A. Although a lawyer should always reread this section several times when the issue arises, RCW 62A.2-201 broadly provides that "a contract for the sale of goods for the price of five hundred

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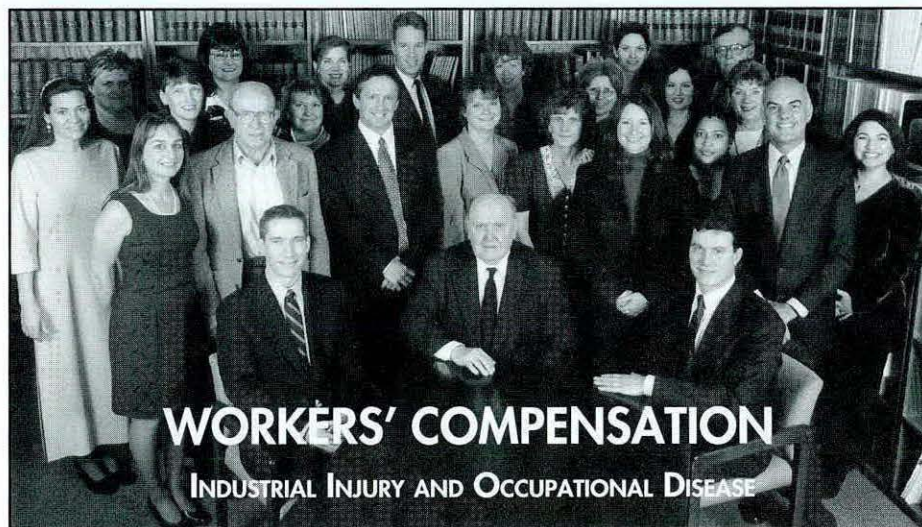
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dollars or more" must be in writing. You can always wrestle with the code and the caselaw about whether your particular contract is for the sale of "goods" or whether the "price" was or was not within the \$500 limit. However, the purpose of the code is clear. It is meant to enhance trade by minimizing the friction and confusion that could result if "large" transactions for the sale of goods are not required to be in writing. Like the real estate statute of frauds, the UCC's purpose is to prevent fraud arising from the uncertainty inherent in oral contracts. The writing itself need not be of one piece, nor is it form specific. The minimum contractual elements of who and what, on what terms, and on what conditions must be in writing.³² Beyond that, it is fun-and-games time.

RCW 62A.2-209 governs the situation when there has been an alleged oral modification of a written agreement for the sale of goods. First, if the original written agreement provides that the agreement cannot be modified or rescinded except in writing in a prescribed manner, then you cannot modify or rescind the agreement *except in writing, as prescribed*. Second, RCW 62A.2-209 provides that any modification of the original written agreement must satisfy RCW 62A.2-201 (the statute of frauds) if "the contract as modified is within its provision."

Thus, if you entered into a verbal deal for the sale of a widget worth less than \$500, and then verbally modified the agreement to either increase the price up to (or beyond) the \$500 threshold (or modified the agreement to sell multiple widgets for a cumulative price that exceeds the \$500 threshold), then your modified verbal deal is unenforceable. It must be in writing. With lawyers, however, there always has to be something "on the other hand," and here it is. *On the other hand*, if the original contract was in writing and satisfied the statute of frauds, then the modification to the written contract does not have to be in writing.³³

While many states may require that every modification of a written contract also be in writing, Washington does not.³⁴ *On the third hand*, however, the statute of frauds codified at RCW 62A.2-201(1) specifies that "[a] writing is not insufficient because it omits or incorrectly states a term agreed upon *but the contract is not enforceable* under this paragraph beyond the

quantity of goods shown in such writing."³⁵ The bottom line is that, at least in Washington, the parties *can* orally modify a written contract for the sale of goods that otherwise is within the statute of frauds, except that they *may not* orally modify the *quantity* of the goods specified in the original written sale agreement.³⁶

In Washington, the UCC restrictions on oral modifications of written contracts is

While many states may require that every modification of a written contract also be in writing, Washington does not.

only a special and limited statutory abrogation of the common law. In *Pacific N.W. Group A v. Pizza Blends, Inc.*,³⁷ the court held that even the written provision that a contract cannot be modified except in writing can itself be orally modified. "A paradox of the common law is that a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification."³⁸ The theory behind the common-law paradox is that parties should be able to quickly verbally modify their obligations in exigent circumstances. Thus, as matters now stand in Washington, contracts *that are subject to the UCC* for the sale of goods may only be modified as the UCC permits; *contracts not subject to the UCC*, on the other hand, still fall within the common-law paradox.

Signposts for the Confused and Beleaguered

Litigating oral contracts can feel like you are drowning in the Okefenokee Swamp. There is no firm ground to stand on, you grasp at vines that slip through your grasp, you struggle to grab at anything firmly connected to something while you slowly sink beneath an ooze of indefinite testimony. All around you are the law birds screeching at you about the UCC or the statute of frauds or its exceptions upon exceptions, and nothing makes any sense as the murk rises above your chin. So here are some signposts to help you avoid the swamp.

- Understand the facts of your case before you file suit. This may sound rudi-

mentary, and it is. In lay language, the rule is “look before you leap.” Nevertheless, many experienced lawyers still trip over this basic principle. They usually stumble because (a) their clients have not told them the whole story, and/or (b) their clients have waited until the last minute to see their attorneys, and/or (c) the lawyers buy into their clients’ version of the facts without the necessary detachment and rational assessment.

- **Collect your nonverbal, extrinsic evidence.** Eventually, you will have to buttress (or rebut) the claim of an oral contract with something more than the conflicting testimony of the feuding parties. As early as possible, you need to collect and categorize the extrinsic evidence that supports your case (and the other side’s, too). That includes letters, memoranda, phone logs, drafts, paper napkins and tablecloths bearing any written notes or scribblings or evidence of the parties’ intentions. It likewise includes any records that substantiate how the parties acted, or refrained from acting, on the basis of the alleged oral agreement.

- **Remember that you are still in Berg-land.** *Berg v. Hudesman*³⁹ applies to oral contracts as well as written ones. The touchstone of Berg is the parties’ intentions. And the key to any sensible interpretation of the parties’ alleged oral contract is “what makes sense.” Even when it comes to the statute of frauds, the courts will bend over backwards to do what is fair and right under the circumstances.

- **The statute of frauds is alive and well in Washington.** Read the statutes and the cases before you file. Understand what exceptions may or may not apply. If you are contemplating using the statute of frauds as a defense, remember to affirmatively plead it.⁴⁰

- **Who will testify?** Presumably, the parties themselves will be the principal witnesses in their battle to determine who said what to whom, and what it all meant, if anything. Sometimes, however, the parties’ lawyers are themselves entwined with the purported “deal.” Whenever lawyers will — or might — testify in a contract dispute, you need to consider the issues of disqualification and blown attorney-client privileges. The time to get out of that blackberry patch is before you ever step into it.

- **What will your jury instructions look**

A Special Kind of Appeal

In more than thirty years of arguing, writing and teaching about appeals, as an appellate attorney and a law professor, I’ve convinced myself that appellate cases fall into at least two categories. In the first, the challenge is primarily rhetorical. These appeals are not “easy.” They could reasonably go either way. But the legal issues were clearly understood below, and thus are clear on appeal as well and the identity of the competing legal and policy considerations is readily apparent. The challenge is largely to the lawyer’s powers of persuasion – to establish that the considerations on one side are more compelling than those on the other.

Appeals of this kind are usually stimulating, but I prefer another kind – a kind in which the issues correctly stated admit of only one reasonable answer, but the odds are against that answer prevailing. Such cases are often signaled by the trial lawyer’s nagging conviction that a case lost at trial should not have been or by anxiety that a case which was – and should have been – won below is in danger of being lost on appeal.

Frequently, in these cases, there was a bedeviling confusion inherent in the facts or the law, or both, which the trial court was unable to effectively dispel. Or, it was not confusion, but extraordinary factual or legal complexity – too many parts, too many relations – that created the danger. As a result, the wrong authority was applied, the right authority was applied mistakenly, or the framework necessary to insure appellate confirmation of a good decision was not created.

This kind of appeal poses not only rhetorical, but analytical or theoretical challenges. So, if you think an attorney who enjoys those kinds of challenges might be of help, please give me a call. I’d be delighted to talk to you about it.

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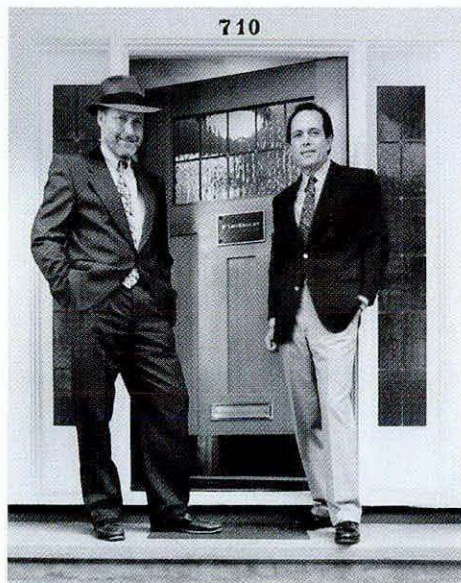
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like? Generally, your jury can decide issues of credibility and weight, as well as what the "facts" are. It is unreasonable to expect jurors to decide whether the statute of frauds or its various permutations and exceptions apply. If your jury instructions resemble the Restatement (second) of Contracts, then it is probably error to let the case go to the jury in the first place. The situation is murky when everything is a mixed issue of fact and law; but then at least the "law" part of the mixture should be decided by the judge.

- **What will be your tactics?** Depending on your objectives, your client's interests may be best served by clarity and compartmentalization of the facts. Or, your client's objectives may be better served by a fuse-blowing overload of information that, through sheer mass and volume, discourages anyone from trying to figure out what is really going on. Whichever route you choose, you need to choose early because clarity and obfuscation are two incompatible paths to trial, and it is difficult, and late in the day to jump from one pathway to the other.

- **Does your story make sense?** Whether your audience is a judge or jury, your story about your oral contract has to make sense. This is your "shtik."⁴¹ Depending on whether you are appealing to 12 Boeing engineers, a dozen blue-sky salespeople, or a black-robed judge, you have to tell a compelling, consistent and fair story. You need to understand your own story and tell it convincingly. Because so much of the litigation of oral contracts is a hybrid of fact and law, your story must appeal to your particular audience sufficiently so that it will want to find a way to rule in your favor.

Conclusion

There are many legal hurdles to enforcing (or defending against) an oral contract. If those legal hurdles are surmounted, side-stepped or merely delayed until the last possible moment, then litigating the oral contract can be a gargantuan headache for lawyers and courts. The mere allegation of the existence of an oral contract implies aerosols of facts suspended in a mist of subjectively interpreted events sprayed over difficult legal concepts.

Patience, diligent homework and perseverance are great assets. As important, however, is a coherent, plausible and fair

story line — your “shtik.” When litigating the oral contract, remember to bone up on the law; study your facts; stay calm; and keep your story simple, compelling and easy to understand. Speak softly and carry a big shtik. ♪

Steven A. Reisler practices contract law and commercial litigation in Seattle. He was Bar News editor from 1981 to 1985, served on the WSBA Board of Governors from 1985 to 1988, and was a chair of the Washington Commission on Judicial Conduct.

Dawn S. Perry practices civil/commercial litigation and employment law in Seattle. She is a past managing editor of the Washington Law Review and member of the Order of the Coif. She has lectured in Washington on the litigation of contracts to make wills.

NOTES

1. 115 Wn.2d 657, 801 P.2d 222 (1990).
2. See, Steven A. Reisler, *Dr. Stangelaw or How I Learned to Love the Berg*, *Washington State Bar News*, Sept. 1999 (page 22).
3. *Crown Plaza Corp. v. Synapse Software Sys. Inc.*, 87 Wn. App. 495, 501, 962 P.2d 824 (Div.1 1997), *Duckworth v. Langland*, 95 Wn. App. 1, 6-7, 988 P.2d 967 (Div. 1 1998).
4. This article points to certain legal issues and case law. It is not intended to be a comprehensive overview of the law governing oral contracts.
5. *Saluteen-Maschersky v. Countrywide Funding Corporation*, 105 Wn. App. 846, 855, 22 P.3d 801 (Div. 1 2001).
6. *Id.* at 855.
7. *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 608 P.2d 266 (Div. 3 1980) (emphasis added).
8. RCW 4.16.080(3).
9. *Sea-Van Investments v. Hamilton*, 125 Wn.2d 120, 128, 881 P.2d 1035 (1994).
10. *Id.* (generally).
11. 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).
12. 40 Wn.2d 779, 785, 246 P.2d 468 (1952).
13. *Sea-Van*, 125 Wn.2d at 129, (citing *Setterlund v. Firestone*, 104 Wn.2d 24, 25-26, 700 P.2d 745 (1985)). See also, *Ecolite Mfg. Co. v. R.A. Hanson Co.*, 43 Wn. App. 267, 272, 716 P.2d 937 (Div. 3 1986) (in which the court affirmed the summary dismissal of an action to enforce a “contract” where the parties had not reached a final agreement on such material terms as the property description, forfeiture and default provisions, tax liabilities and protective covenants).
14. *Shuck v. Everett Sports Cars, Inc.*, 12 Wn. App. 28, 31, 527 P.2d 1321 (Div. 1 1974) (the parties did not agree on the price for the sale of a sports car).
15. *Osterhout v. Peterson*, 198 Wash. 166, 173, 87 P.2d 987 (1939).
16. *Smith v. Twohy*, 70 Wn.2d 721, 725, 425 P.2d 12 (1967).
17. RCW 19.36.010.
18. RCW 64.04.010 – 020. The statute is explained and clarified in *Key Design, Inc. v. Mo-*

- ser*, 138 Wn.2d 875, 890-92, 983 P.2d 653 (1999) (Sanders, J., concurrence).
19. *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971).
20. *Id.*
21. 121 Wn.2d 715, 724-25, 853 P.2d 1373 (1993).
22. *Id.* at 277.
23. RCW 19.36.010.
24. *French v. Sabey Corp.*, 134 Wn.2d 547, 951 P.2d 260 (1998).
25. *Id.* at 553.
26. *Id.* at 556-57, *Trethewey v. Bancroft-Whitney Co.*, 13 Wn. App. 353, 359, 534 P.2d 1382 (Div. 1 1975).
27. 94 Wn.2d 255, 616 P.2d 644 (1980).
28. *Id.* at 259 (emphasis added).
29. *Pacific Cascade Corp. v. Nimmer*, 25 Wn.

- App. 552, 556, 608 P.2d 266 (Div. 3 1980).
30. *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957).
31. *KVI, Inc. v. Doernbecher*, 24 Wn.2d 943, 967, 167 P.2d 1002 (1946) (emphasis added).
32. A. Corbin, *Contracts* §507 (1950).
33. *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wn. App. 637, 643-645, 898 P.2d 347 (Div. 1 1995).
34. *Id.* at 644.
35. RCW 62A.2-201(1) (emphasis added).
36. *Costco Wholesale Corp.*, at 645.
37. 90 Wn. App. 273 (Div. 1 1998).
38. *Id.* at 277-278.
39. 115 Wn.2d 657, 801 P.2d 222 (1990).
40. CR 9.
41. Shtik: a Yiddish word that means a “routine,” like a “comedy routine,” or a “gimmick.”

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Washington's Administration of Misdemeanor Justice

The opinions in this article are not necessarily those of the King County Prosecutor's Office or the Mason County Prosecutor's Office.

by Darren Nienaber

About five years ago, I came downstairs to find my brother sleeping peacefully in a reclining chair, a heroin needle in his arm and a blackened spoon on the carpet beside him. His body was gaunt and sickly; when he spoke, his speech was slurred and incoherent. Some time later, an overdose stopped his heart. By the time the paramedics revived him, his face was turning blue.

While in a Bellingham jail serving a six-month sentence for a heroin-related crime, a jail officer asked my brother if he was Joe So-and-So; my brother answered yes. The officer told him bail had been posted. He asked my brother to fill out the necessary paperwork, and then released him. Later that day, the real Joe So-and-So asked the jail officer what was taking so long. A few days later, the police found my brother, with heroin in his possession, passed out in a car by the Nooksack River. For a short time, he became the poster-child for mismanaged jails.

When I visited my brother in jail, he had gained weight, his coloring was normal, and he looked healthy. The first thing he said was, "Man, am I glad to be here! This place has saved my life." By providing him with a secure environment, which was comparatively freer from drugs than the outside world, he was forced to kick the habit. He began to think clearly about what was important in his life, and how he wanted to live it. His children, the most important thing to him, provided the motivation he needed to clean up his act.

A few years later, I was prosecuting misdemeanor crimes committed primarily by poor people. For six months, I was a contract deputy prosecutor in King County District Court, and most of my time was spent at the Regional Justice Center in Kent. Although jail helped save my brother's life, and probably helped some defendants who came through the center at that time, I rarely saw a success story — only hundreds of defendants being booked on new charges.

Judging by the rate of recidivism, there is no doubt that jail is not the solution to every problem. However,

along with fines and treatment, it is currently the state's main tool for enforcing Washington law. There are numerous problems with Washington's administration of misdemeanor justice. Many of these problems lead to substantially disparate treatment of similarly situated defendants. Other problems allow defendants to avoid prosecution. My purpose is to identify many of these problems and to propose solutions.

- The fifth conviction for a driving-while-under-the-influence (DUI), assault in the fourth degree (Assault 4), or misdemeanor violation of a no-contact order (VNCO) should move that offense and any subsequent conviction of that offense to the felony category. Those working in the justice system recognize that a first-time offense may well be a fluke in an otherwise law-abiding citizen's life. They may even recognize that a second offense does not necessarily mean that the defendant is a danger to society; however, by the third offense, most would agree that the defendant has a serious problem.

Third-time (caught and convicted) DUI offenders face a minimum of 90 to 120 days in jail, depending on whether they refuse the blood-alcohol blow test. Somewhere between the fifth and 10th offense, that defendant no longer has the benefit of the doubt; he poses an extreme danger to the community. By this time, he has been warned by the court numerous times of the risks and dangers he faces, yet he has ignored these warnings. At this point, the serious repeat assaulter should be treated as if he has committed a low-grade felony and thus face a potential sentence of up to five years.

- Assault 4 and VNCO convictions should carry mandatory minimums just as DUI does. A person convicted of assault on five different occasions may spend only 20 days in jail, while a third-time DUI offender may receive a 90- to 120-day sentence. Crimes of violence threaten the security, sanctity and peace of the community. A habitually violent criminal deserves little mercy.
- Assault 4 and VNCO convictions should result in additional minimum sentences of one to five days for any subsequent criminal conviction. Consider one de-

fendant who has been convicted of malicious mischief in the third degree (MM3) but has no other criminal history. Then consider the defendant with the same MM3 charge who has five assault convictions in his criminal history. The defendant with the extensive history shows flagrant disregard for the law, and therefore is a more serious threat to the community. Critics may argue that judges already have the

served. To avoid prosecution, a defendant would only have to fail to appear at a hearing, then never commit a traffic infraction, and never be booked on another charge. Many defendants avoid prosecution for years, or altogether — an embarrassment to law enforcement.

- Prosecutors should be required to file a complaint within four months of a crime or show good cause for further investiga-

tions of probation, the court may revoke some or all of the remaining jail time, and the defendant may be required to serve all 360 days. Defendants frequently think that the judge has sentenced them to only five days in jail, and that they are free of the charge, not understanding that if they commit a subsequent offense during the probationary period, the judge may impose the remainder of the sentence.

Defendants frequently think that the judge has sentenced them to only five days in jail, and that they are free of the charge, not understanding that if they commit a subsequent offense during the probationary period, the judge may impose the remainder of the sentence.

discretion to consider criminal history in imposing sentences; however, the practical effect of increasing the penalty for an Assault 4 or VNCO conviction is that the gap in sentencing among judges may close.

- Driving while license suspended in the first degree (DWLS1) mandatory minimums are excessive at times. A person can refuse a blood-alcohol blow test and become suspended in the second degree, even if he is later found not guilty of DUI. If he drives twice, he can be suspended in the first degree. If he drives three more times, he faces 10 days for the first offense, 90 days for the second offense, and 180 days for the third offense — a total of 280 days.

In one case I recall, the defendant had been sober for three years, but had obtained his DWLS1 status by driving too many times after a DUI conviction. When arrested, the defendant accepted full responsibility for his actions even though it meant serving the full-year sentence. Since he had very little criminal history, he was sentenced to six months in jail, the mandatory minimum — and in my opinion, five months too long.

- It should be police-department policy to physically serve misdemeanor warrants more than a year old. In King County, when a defendant fails to appear (FTA) for a court appointment, a warrant is issued for his arrest. The nearly exclusive means used to serve the warrant occurs when the defendant commits a traffic infraction and the officer discovers the warrant during a routine stop. This process essentially requires that the defendant commit a traffic infraction for the warrant to be served. Many warrants aren't served for many years, and many are never

served. A shorter complaint-filing time could be of benefit to prosecutors, because witnesses' memories would be fresher.

Another problem is that of defendants who move frequently and therefore never receive the court's paperwork. Six months later when the state files charges, the defendant gets booked into jail on a warrant he never knew existed.

I have never seen a misdemeanor case that could not be filed within two months, but the "good cause" exception would protect prosecutors who have a valid reason for filing later.

- DWLS second- and third-degree offenses should be placed on an accelerated trial schedule for in-custody defendants. Many wait longer for trial than the actual sentence imposed. Typically, a DWLS3 conviction would result in a zero- to 10-day sentence, but the time to trial usually takes 30 to 50 days. The factual and legal issues are seldom complex — probable cause to stop, proper notice of the suspension, and whether or not the defendant was actually driving. Defendants who qualify for public defense should be assigned counsel within two days. A combined motion argument and trial could be held within three weeks. Alternatively, a motion argument could be scheduled within two weeks, and a trial two weeks after that, assuming officer availability.

- Defendants should be clearly warned about the meaning of a suspended sentence. For example, a judge may sentence a defendant to 365 days in jail with 360 days suspended, meaning the defendant serves five days in jail. Later, during a probation review hearing, if the court finds that the defendant has violated the condi-

- There should be limits on the amount of suspended jail time that is revocable. A first-time DUI offender might be sentenced to 365 days in jail with 363 days suspended — a total of two days in jail. After the defendant incurs a subsequent DWLS3 conviction, the reviewing court may impose 120 days in jail. Probation reviews tend to be arbitrary events; there is substantial variation in sentencing among judges, and substantial variation in sentencing by individual judges.

The WSBA should recommend to the Legislature specific guidelines on the amount of jail time that should be revoked under differing sets of probation violations, for example, for a first-time DUI offender who will not attend alcohol-information school, or a fifth-time assaulter who subsequently has three new assault convictions or violation of no-contact orders. There should be some judicial discretion, but limits on judicial whim.

Misdemeanors have not received the special consideration they deserve because felonies grab the attention of the media, the Legislature, prosecutors, judges and public defenders. This is unfortunate, because misdemeanors are by far the "more average" crime. I submit that the handling of misdemeanors needs a more scrutinizing look. ☞

Darren Nienaber is a graduate of Western Washington University and Northwestern School of Law of Lewis and Clark College. He has been a special deputy prosecutor in the King County Prosecutor's Office. He currently works for the Mason County Prosecutor's Office.

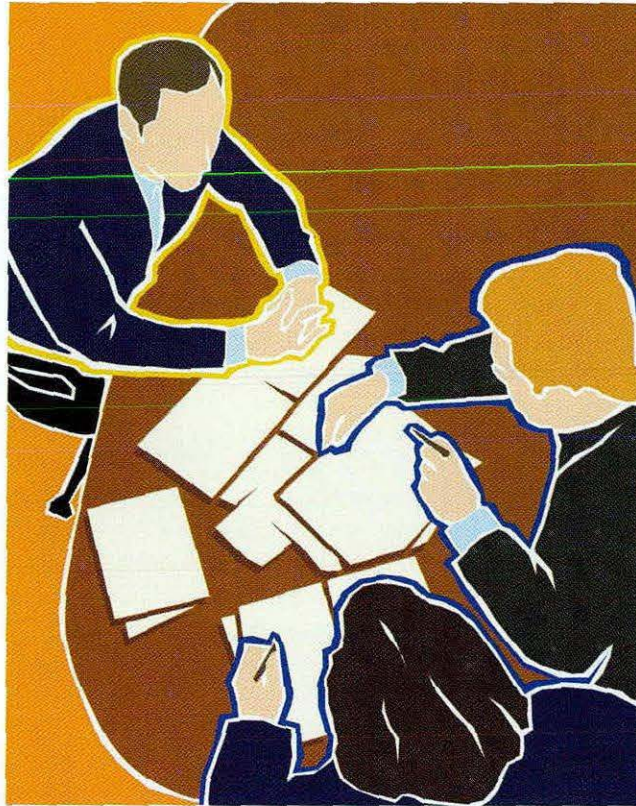
A Mediator's Observations

by Louis D. Peterson

It has now become commonplace for litigating parties and their counsel to engage in mediation. However, many of these participants do not have a realistic understanding of the mediation process and the role of the mediator. With a little advance education, they would be more likely to reach a successful result. Based upon my experiences in mediating disputes over the past decade or so, I offer these observations to assist lawyers and their clients as they embark on the mediation road.

The parties should exchange their mediation submittals. Prior to the mediation, counsel for each party will prepare a mediation submittal, in the form of a letter, memorandum or brief. This submittal should contain a thorough description of the factual background underlying the dispute, and a thoughtful analysis of the critical legal issues. In almost all cases, the parties should exchange their mediation submittals with one another because this is an important opportunity to speak directly to the other side before the day of the mediation. When each party has time to reflect upon the opposing party's perspective in advance, it is more likely that there will be meaningful settlement dialogue at the mediation. If it is necessary to provide any information for the mediator's eyes only, counsel may submit a separate short confidential memorandum.

The joint session should ordinarily not include opening statements. It is helpful for the parties and their counsel to begin the mediation day in a joint session with the mediator in order for him or her to share some preliminary thoughts at the same time with all participants. Unless there are unusual circumstances, the parties should not make opening state-



ments, which at best simply repeat what everyone already knows, and at worst polarize the parties even more, reducing the prospects for healthy negotiations. The mediator will already have an excellent grasp of the basic issues in the case from the parties' written submittals. Additional information can be provided to the mediator by each party in the separate caucus sessions that follow the joint session.

The mediator's private caucus sessions with each party should be confidential. The mediator should clarify with the parties at the outset that no information or opinion expressed during the separate caucus sessions will be shared with another party, unless the party has authorized the mediator to communicate it. The mediator should be free, however, to use all information — and inferences and arguments — that can be drawn from the written submittals exchanged between

the parties. In the event settlement is not reached, nothing that is said or done at the mediation can be used in any way by any party in connection with the lawsuit.

Each side must recognize that the other side has sincerely held and valid arguments. During the course of a lawsuit, both of the parties are so immersed in the righteousness of their cause that it is difficult for them to appreciate that there might be another side to the story. Yet it is rare for either the claims or defenses to be entirely frivolous. It is important for litigants — and their lawyers — to acknowledge that each side is advancing factual and legal positions about which they feel strongly, and that both parties are subject to the risk of an adverse result at trial.

A mediation is not a trial or an arbitration. Although a party ordinarily has ample opportunity during the mediation to describe the facts and underscore the strength of her position and the weakness of her opponent's stance, she should not lose sight of the fact that this is not a trial. The mediator is not there to decide the case, but to assist the parties in reaching a compromise. There ordinarily are no winners and losers in mediation. If the paramount goal is to achieve a victory, the parties should go to trial (where it is also possible, of course, to suffer abject defeat).

This case, like all cases, will be resolved at some point. Too often, a lawsuit takes on a life of its own, and the parties lose sight of the fact that the dispute will end some day. That day could be next month, following summary judgment motions; or next year, at the conclusion of trial; or three years from now, upon the receipt of the appellate opinion; or a year later, after the retrial. On the day of the

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mediation, the parties have an unusual opportunity to affect the timing and the terms of the resolution of their dispute. They can put an emotionally draining matter to rest and move on to more productive endeavors.

Both sides will have to compromise substantially. Before the day of the mediation, each party normally has considered his bottom-line settlement number, above or below which he will not go. And most likely he has also considered that if he must move just a bit more to reach a settlement, he would be willing to go to another line — his bottom, bottom line — beyond which there is no possibility that he will move. Due to the peculiarities of human nature, usually even the bottom, bottom line represents a victory of sorts for that party. And almost never do the bottom, bottom lines of the two parties overlap. Nevertheless, most mediations end in settlement, but only because the parties learn during the course of the day that settlements necessarily require substantial compromise by both parties, painful though it may be.

A bell-curve analysis can be a helpful tool in settlement negotiations. In any given trial, one party may obtain a decisive win, but the results would usually be different if averaged over countless trials of the same case. It is often instructive to analyze the settlement value of a case by breaking the case down into its component parts, assessing the maximum exposure on each claim, and assigning a percentage probability to an award on each theory. Even though the trial result of the case is not predictable with certainty, a seasoned, impartial observer of the case in mediation can often determine a hypothetical range within which the case would generally fall. A reasonable settlement is never just one number, but a reasonable settlement almost always falls within the middle portion of the bell curve of results forecast by this method.

The mediator is the only person involved in the mediation who is neutral and objective about the factual and legal issues in the case. Whether or not you agree with the mediator's views, you should take into account that they do represent the perspective of a neutral observer with substantial trial and mediation

experience. Although each party expects the mediator to pound some sense into the other side during the course of the day, the reality is that the mediator will actually be working hard to ensure that both sides reach a better understanding of the risks of their positions.

Only the mediator can determine that settlement is not possible at the mediation. It is not productive for a party or his counsel to announce unilaterally that the negotiations are over. The histrionics of packing up briefcases and putting on jackets are not effective negotiating tools — in fact, they are signs of immaturity and discourteous behavior. The parties and their counsel should feel free to suggest to the mediator at any time that they believe further negotiations are unlikely to be fruitful. But only the mediator is spending time in separate caucuses with each party, and he is in the unique position to know when productive negotiations are at an end. If it becomes apparent during the mediation that the case cannot be settled that day, the mediator will inform all parties of that fact.

All participants should think creatively about potential solutions to the dispute. The mediator is not the exclusive repository of wisdom in the mediation process. There may be an untraditional approach that assists the parties in reaching a resolution. Innovative ideas can emanate from anyone present. Therefore, lawyers and their clients should not be reluctant to raise their ideas in brainstorming sessions with the mediator. Furthermore, the participants should be thinking thoughtfully about any unusual terms that they will require in any settlement — late in the process, it can be difficult to add new concepts for the first time.

All participants must remain present throughout the mediation. If any

participant has a scheduling problem, for example, a telephone conference or an airplane departure, it is important that the mediator know well in advance, so this does not interfere with the course of the mediation. The mediator is usually prepared to stay as long as necessary in order to assist in the resolution of this matter, and it is important that those with authority to settle the dispute remain present. If it is necessary that any party consult during the course of the mediation with someone available only by telephone, it is crucial that that person remain available throughout the day (and night, if necessary).

The settlement terms should be put in writing and signed by the parties. Once the parties have reached a settlement, all of the principal terms of the settlement should be written on a settlement term sheet, which the parties should sign. The lawyers should not rely on the mediator to do this work for them, but instead they should anticipate the structure of the settlement in advance, and come prepared with an outline of the important settlement terms. In order to ensure that the settlement is binding, it is a good idea to provide, as one of the settlement terms, that the mediator is appointed by the parties as an arbitrator with binding authority to resolve any disputes regarding the form of the final settlement documents.

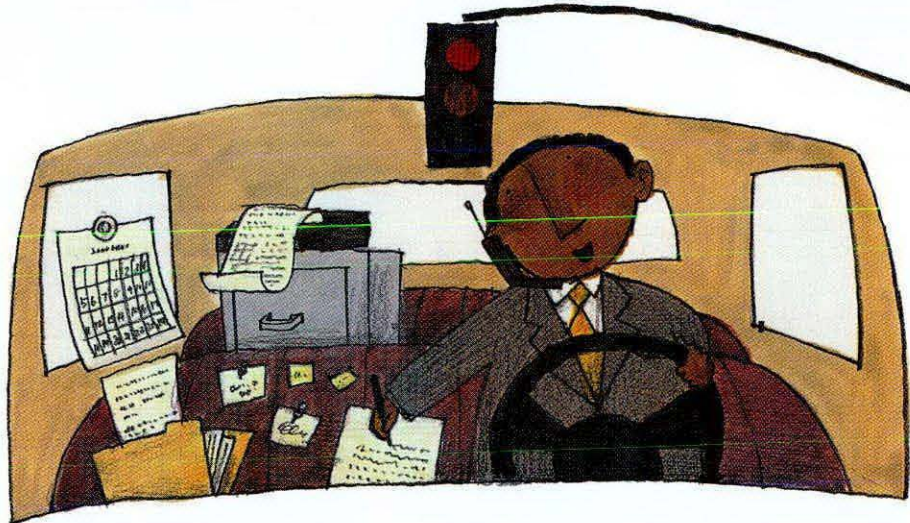
If the parties and their counsel enter into mediation with the intention of negotiating in good faith — and with a good understanding of the nature of the mediation process — the prospects for a successful resolution of the dispute are substantially enhanced. And if all efforts to settle a case fail, perhaps the judicial resolution of the dispute will add some valuable precedent to the common law, and make it more likely that future disputants in similar circumstances will compromise their dispute. ☞

Louis D. Peterson is the managing principal of Hillis Clark Martin & Peterson PS, in Seattle, focusing on business litigation. Mr. Peterson also serves frequently as a mediator and arbitrator.

Astute Attorneys Utilize Paralegals

by Forest Collins

According to the Department of Labor and Industries, "paralegals are projected to rank among the fastest-growing occupations in the economy through 2008." Why? Because it makes good sense to utilize paralegals. Unfortunately, many small offices do not realize the full potential of their support staff. Proper utilization of paralegals benefits you, the client and the paralegal.



Benefits to Attorneys

Do you perform tasks that your assistant can do or be trained to do? If so, you are wasting time and money. By effectively delegating tasks to a paralegal's maximum skill level and training a paralegal to perform new tasks, you ensure that they are working at maximum efficiency. This frees your time to focus on tasks associated strictly with the practice of law. Not only is this a more efficient use of your staff's

time, it translates to a cost-efficient way to run your office. Rather than employing a paralegal to perform clerical and secretarial tasks, those types of tasks can be turned over to a less experienced and less costly support-staff member. Running a time- and cost-efficient office, with well-qualified support staff who can take on a wide range of responsibilities, leads to the attorney's ability to take on a larger case load and greater work satisfaction.

Benefits to the Client

In 1995, the American Bar Association's Commission on Nonlawyer Practice conducted a study which found that "large numbers of low- and moderate-income people — some studies show as many as 70 percent — do not hire lawyers to meet their law-related needs." Zona Hostetler, a lawyer on the commission, told reporters in response to the study's findings, "There are huge, astronomical needs that are not being met." She stated the two main reasons that these needs are not being met are "cost, and the fear of entanglement with lawyers." These are exactly the reasons that effective utilization of a paralegal can benefit your client.

Clients appreciate cost-effective handling of their cases, and generally have a lot of faith in support staff. When they

The **Lawyers' Assistance Program (LAP)** offers confidential assistance to WSBA members with mental, emotional, drug, alcohol, family, health and other problems. Services include assessment, referral, short- or long-term counseling, group or individual therapy, treatment follow-up and training. For information, call 206-727-8268.

The **Law Office Management Assistance Program** offers a wide range of services to assist lawyers, especially those in solo or small firms, with the challenges of managing a law office. For information, call 206-727-8237.

The **Alternative Dispute Resolution Program** consists of two components: a voluntary fee arbitration program, to settle fee disputes between clients and lawyers; and mediation, to help resolve all types of disputes between lawyers and other individuals (e.g., clients, other lawyers and other professionals). For information, call 206-733-5923.

The **Professional Responsibility/Ethics Program** provides information and assistance in the following areas: ethics assistance, where a WSBA lawyer assists callers in resolving ethical dilemmas; Informal Opinions issued by the RPC Committee in response to lawyers' written ethical inquiries; Formal Opinions and Published Informal Opinions approved by the Board of Governors; and Rules of Professional Conduct promulgated by the Washington State Supreme Court. For information, call 206-727-8284.

receive an invoice that includes a paralegal's time, they see that the attorney has conscientiously saved them money. In addition to reducing client costs, paralegals can increase their comfort level. Often a strong bond is formed between a client and the paralegal working on their case, since lawyers are often busy and less accessible than their support staff. Without the ability to contact the lawyer's assistant, a client may feel frustrated or even abandoned. Frequently, a client may feel more comfortable interacting with a paralegal rather than a lawyer, whether it is because he is afraid of wasting the lawyer's time, incurring more costs, or because he may be slightly intimidated by the lawyer.

Effectively using a paralegal eases the cost burden on your clients and increases their satisfaction. Your paralegal is an extension of you — if clients are happy with your paralegal, they are happy with your services. A happy client is ultimately an effective marketing tool for your practice.

Benefits to the Paralegal

Employees generally like career challenges and want to assume more responsibility as their experience and skills increase; paralegals are no different. As they gain experience, they desire opportunities to perform a wider range of duties. In a recent survey by the National Association of Legal Assistants, such duties as drafting correspondence, assisting with clients, drafting pleadings, research, case management, and document analysis/summary ranked highly (within the top 10) as the respondents' preferred duties.

Providing a work environment that leads to greater job satisfaction for a paralegal means he is more likely to stay with your office. A highly qualified paralegal is a great asset, but a highly qualified, loyal paralegal who knows the specific workings of your practice can be invaluable.

How to Effectively Utilize Your Paralegal

- *Hire professional, qualified support staff*

If you are in a position to hire new staff,

do so wisely. Hasty decisions can result in wasted time, energy and resources. Small-business owners often forget that part of owning a business is not simply performing services, but also practicing human-resource management. Careful screening, interviewing and selection can save countless hours and dollars in the long run.

- *Train, delegate and provide feedback*

Once you have hired a paralegal, it is time to train him and begin to delegate work to him. As a paralegal, one of the most frustrating aspects of a position can be a lack

We often believe that only we can perform a particular task to perfection. Truthfully, it is more effective in the long run to spend time training an assistant to properly perform a task. Avoiding this step is a good way to “nickel and dime” your time away.

of opportunity to work on new and interesting tasks. But as a business owner or supervisor, delegation can be a frightening prospect. We often believe that only we can perform a particular task to perfection. Truthfully, it is more effective in the long run to spend time training an assistant to properly perform a task. Avoiding this step is a good way to “nickel and dime” your time away. Once you have effectively trained someone else to do a task, you can use your time more valuably.

Additional training possibilities to consider are CLEs and programs geared toward paralegals. Often the best-intentioned employers think they will eventually get around to training employees. However, in a hectic work environment, the practice of law takes precedence over training, and the potential of many employees goes untapped.

As your paralegal's knowledge and skills grow, evaluate staff responsibilities and make sure everyone is working at full skill capacity. As your paralegal learns to take on tasks that you normally would have performed, make sure his workload is not unmanageable. Transfer his clerical and secretarial tasks to an assistant or outsource service that can perform these tasks more cost effectively. Every time a paralegal spends an afternoon making

copies or addressing envelopes, he is performing tasks that could be done at a much lower cost to you.

Managing employees is a constant job. It is not enough to simply train staff to perform tasks. You must provide feedback as well, correcting incorrect work, and praising work well done.

- *Use technology to your advantage*

Technology can be one of your best allies in working toward a more efficient workplace. Databases, mergeable documents, scanners, legal-research applications, and bookkeeping/accounting software are all tools that save time in the long run. Often, offices hesitate to invest time or money in technology and lose out on the many benefits these tools provide.

In the course of effectively utilizing a paralegal, it is important to be mindful of activities that are not allowed to be performed by nonlawyers, such as setting legal fees, giving legal advice, and presenting cases in court. For more information on this subject, you may want to refer to the American Bar Association's Model Guidelines for the Utilization of Legal Assistant Services (see <http://www.abanet.org/legalassts/modguide.html>).

Ultimately, your practice is a business; your expenses should be investments that provide the greatest return. With a little faith and guidance, your support staff can provide exponential returns. ☛

Forest Collins is a paralegal and owner of Legal Support Solutions, a business providing support services to law offices in the greater Seattle area. He can be reached at forest@galaxy-7.net.

The Law Office Management Assistance Program (LOMAP) offers help in the administration of your office. Contact us for materials, books and information. We also have law office software available for demonstration. See www.lomap.org, call 206-727-8237, or e-mail peter@wsba.org.

The Discipline Notice: Getting a Client's Consent

by Jeff Tolman

Some months ago, I opened the just-arrived *Bar News*. I initially turned to the disciplinary notices, and then the obituaries, to see if any of my friends' or former opponents' names were there. I agreed with the sanctions imposed in most of the disciplinary notices I read. Lawyers had done things they should not have, or not done things they should have. One notice really caught my eye, though.

Without getting the client's prior consent, a lawyer had received an admonishment for forwarding a letter to a mediator disclosing that he and his client disagreed on the value of a claim. The hearing officer found that there was no *actual* harm, but there was *potential* harm. And that "the fact that these types of communications are frequently made to mediators does not exonerate the conduct."

The issue recently reared its head again in an article about the issues of ethics in ADR in general, mentioning this admonition specifically. While in a scholarly way the issue may be clear (all I have to do is get my client's prior approval to reveal anything he says to me), in the trenches the issue gets more complicated.

As an officer of the court, I have the obligation to tell the truth to a fact-finder or dispute-resolver. Bar counsel notes that this is governed by RPC 3.3 if the proceeding is before a tribunal. Otherwise, the duty of candor is governed by RPC 4.1:

In the course of representing a client, a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless the disclosure is prohibited by rule 1.6.

How is telling the mediator the truth ("my client's expectations are unrealistic but he won't believe me") a violation of RPC 4.1?

As someone who feeds his kids based on his reputation, I want opposing counsel and the mediator to know that I understand the reasonable value of the case — even if my client wishes it was higher. As someone who has mediated many cases, I want to know who I need to bring to reality so that the case can settle — the client, the lawyer or both. And now I need my client's prior consent? Think of the letter:

Dear Client:

As you know, we have a mediation coming up. The case needs to be mediated because you believe your soft-tissue case is worth more than Bill Gates's Microsoft portfolio. I do not. We have hired a mediator to try and resolve the claim. I trust and respect her, and hope to work with her in the future. The demand we have made in our mediation packet is, to say the least, optimistic. In fact, I thought I heard the entire Safeco building erupt with laughter as if the adjuster had read our demand aloud. To be honest, if I got that settlement, the adjuster and defense attorney would be immediately fired, and I would start a new career speaking to lawyers on how to get off-the-chart settlements. You are being unrealistic and unreasonable. I would like your permission to tell the mediator my feelings; to let her know that it is you who needs some reality therapy, not me.

If you consent to this, please sign and return the enclosed copy. If not, please give me a call. Don't read more into this than there is. Anyone who has been married or has children knows that reasonable minds can disagree. I am still here as your advocate.

*Yours truly,
Jeff Tolman*

What about at the mediation, when the mediator pulls me aside and says: "Jeff, have you gone crazy? This is not a jillion-dollar case! What's going on?" How can I respond? Do I say I need my client's permission before I can answer, because if I don't have it I will be admonished?

Perhaps in other people's professional worlds, they and their clients have a common vision and march ahead, always hand-in-hand. In mine, my clients and I sometimes disagree. I sometimes have to tell them that the \$50,000 they want for missing their annual bowling weekend is outside what I think the real value is.

As someone who has mediated many cases, I want to know who I need to bring to reality so that the case can settle — the client, the lawyer or both.

The group most frightened by this discipline should be domestic-relations lawyers. They often deal with the most highly charged, emotional cases, with the most moving parts. They often negotiate, argue and finesse to bring ultimate justice to a case. Many times the client just needs someone to hear them before they can settle the case. Divorce lawyers often say, "My client is still devastated that her husband was having an affair with her best friend. She needs to vent. Just hear her out, be kind, and then tell my client what you believe is a fair split." Or they let the other attorney know that their cli-

Changing Venues

ent's request for lifetime maintenance for the 20-minute marriage was negotiable.

Is that unethical? Is pointing out a client's mental astigmatism "revealing a client's secrets or confidences" as was the letter to the mediator?

Lawyers often transmit information to mediators and fact-finders through code words. For example: "My client believes that his claim is worth \$200,000" tells the judge that I know it is worth less. When I say: "This is a case we would like to settle based on potential difficulty in proving damages," a moxie judge will know that I have proof problems. Maybe our key witness hasn't been sober since 1963, or has been convicted of multiple felonies. Maybe my client's doctor told me, off the record, that my client is a malingerer.

There are always subtleties lawyers convey to fact-finders. It is an important part of our job. Do I have to reveal those to my client; get his prior permission to use them so that a mediator or judge can bring my client into the real range of settlement? Does my motive matter; my hope that a neutral person telling my client the same thing I do will get him to re-evaluate the line he has drawn in the sand?

Any time I represent a client I wear several hats. I am an advocate for the client; I am a counselor; I am an officer of the court; I am a pragmatist, trying to get a good result for my client. Sometimes I am a magician, trying to get everyone to look at my case's strong points without seeing the warts that exist.

I am more than an agent to parrot my client's positions, as if all of them make sense. The push, at least in this case of discipline, is to ignore every hat but the advocate's. This is not wise, and not real. There are some things that need be said to get a fair result, whether the client likes it or not, whether the client consents or not. ✎

Jeff Tolman is a lawyer and part-time municipal court judge in Poulsbo. He has served on the WSBA Board of Governors, and is a frequent speaker and writer on law-related topics.

Honors and Awards

Michael L. Olver has been elected 2002 president of the Washington Chapter of the National Academy of Elder Law Attorneys. Mr. Olver is a partner in the Seattle firm Merrick & Olver PS. He succeeds **Barry M. Meyers** of Bellingham.

The ACLU of Washington board of directors has awarded the William O. Douglas Award to Seattle lawyer **John Fox**. It is the organization's highest honor. Mr. Fox was honored for 25 years of working to advance the rights of tenants, the homeless and street youth.

The ACLU Civil Libertarian Award was presented to **Paul J. Dayton**, **Christopher R. Osborn** and **Roger J. Peven** in recognition of their efforts in defending complex, multistate death-penalty cases.

Daniel M. Caine has been re-appointed by Governor Locke to the Governor's Small Business Improvement Council. The council makes recommendations to the governor and Legislature regarding policies and regulations affecting small businesses. Mr. Caine practices in the Seattle office of Heller Ehrman White & McAuliffe LLP.

The Federal Bar Association of the Western District of Washington has named the following officers and trustees for 2002: **James A. Smith Jr.**, president; **Kevin D. Swan**, vice president; **Scott E. Collins**, treasurer; **Steve Y. Koh**, secretary; **John S. Congalton**, trustee; **J. Richard Creatura**, trustee; **Dan R. Dubitzky**, trustee; **Karen F. Jones**, trustee; and **Allison S. Wallin**, trustee.

Seattle lawyer **Jerry A. Creim** has been appointed to a three-year term as board member of the Seattle chapter of the Building Owners and Managers Association. Mr. Creim is a member of Williams, Kastner & Gibbs PLLC, focusing on complex business transactions.

Movers and Shakers

Jeffrey O. Burkhardt and **Michelle C. Mentzer** have been appointed administrative law judges for the Office of Administrative Hearings. Both are based in the



Olver



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agency's Seattle office and primarily conduct hearings on unemployment benefits.

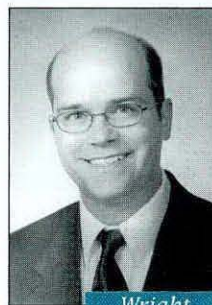
Aaron L. Adee has joined the Seattle firm Burkett, Burdette & Van Kampen as an associate. He practices with the litigation and securities arbitration groups.

Jeffrey B. Van Duzer has been hired as dean of the Seattle Pacific University School of Business and Economics. He previously served as an adjunct professor of business law and business ethics while practicing law with Davis Wright Tremaine.

Stephen J. Day and **Mary B. Foster** have joined the Seattle firm Real Property Law Group. Mr. Day, a partner, is an architect and attorney focusing on zoning, land use, historic properties redevelopment, and urban mixed-used development. Ms. Foster is of counsel to the firm, and concentrates on federal income taxation and tax-deferred exchanges.



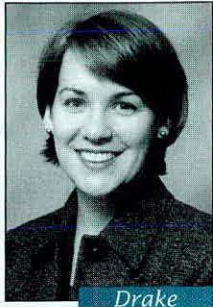
Peterson



Wright

Arissa M. Peterson and **William F. Wright** have joined Williams, Kastner & Gibbs PLLC as associates. Ms. Peterson practices civil litigation in the firm's Seattle office. Mr. Wright focuses on land use issues and litigation in the firm's Tacoma office.

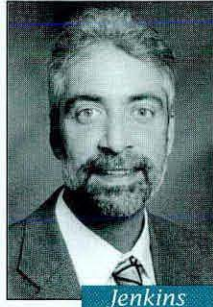
Marcia S. Kelbon has joined Omeros Medical Systems, Inc. as vice president and general counsel. She is responsible for corporate legal business activities as well as supervising all aspects of intellectual property functions.



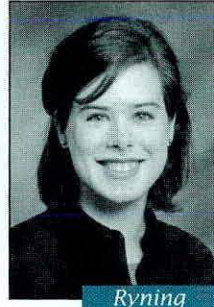
Drake



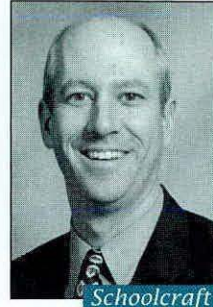
Hawkinson



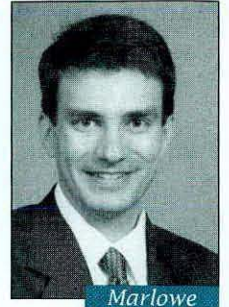
Jenkins



Ryning



Schoolcraft



Marlowe

Rachel J. Drake, Jeffrey M. Hawkinson, Nicholas L. Jenkins, Devon W. Ryning and David G. Schoolcraft have joined the Seattle office of Miller Nash LLP as associates. Ms. Drake focuses on labor and employment law, litigation and government relations. Mr. Hawkinson concentrates on business, corporate and securities law. Mr. Jenkins focuses on insolvency and reorganization, corporate and securities law, and litigation. Ms. Ryning's practice emphasizes intellectual property and emerging business, technology and e-commerce. Mr. Schoolcraft concentrates on corporate representation, technology, health care and data privacy. Steven W. Marlowe has joined the firm's Vancouver, Washington, office as an associate focusing on corporate

governance, real estate, business, corporate and securities law.

William M. Krause has joined the Seattle office of Lane Powell Spears Lubersky LLP as an associate concentrating on corporate finance and securities, business transactions, corporate law and Internet law.

Former King County Superior Court Judge Larry A. Jordan has joined Judicial Dispute Resolution LLC as a panelist. He previously served on the King County Superior Court bench for 10 years, and served as a commissioner of Division I of the Washington State Court of Appeals.

Cynthia L. Hoppner has joined the law department of AT&T Wireless Services as corporate counsel. She previously served as wish director for Make-A-Wish Founda-

tion, and currently serves as part-time director of philanthropy for drugstore.com.

Stephen R. Fallquist and Paul H. Williams have joined the Yakima firm Halverson Applegate PS as associates. Mr. Fallquist previously clerked for the Office of Counsel of the U.S. Army Corps of Engineers and worked extensively on the "Kennewick Man" case. Mr. Williams served as a law clerk for the Marion County (Oregon) district attorney before joining the firm.

Eric B. Schmidt has been appointed commissioner of Division II of the Washington State Court of Appeals. He also serves as an adjunct professor at Seattle University, teaching medical liability and bioethics.



Krause



Jordan



Hoppner



Fallquist



Williams



Greenough

In Memoriam

W. Kenneth Jones died December 8 at age 85. He was a founding partner in the Spokane firm McGillvray, Jones, Clarke and Schiffner. Memorials may be made to Inland Northwest Alzheimer's Association (601 W. Maxwell, Ste. 4, Spokane, WA 99201) or Shriners Hospital for Children (911 W. Fifth Ave., Spokane, WA 99204-2901).

Thomas O'Malley died December 13 at age 72. He graduated from the University of Washington School of Law in 1953, and practiced law until his death.

Grandview Municipal Court Judge Philip M. Noon died January 1 at age 81, one day after his retirement. He is believed to have been the longest-sitting judge in Washington, serving for 48 years. Prior to his judicial service, Judge Noon worked in private practice in Grandview.

Raymond C. Swanson died November 4 at age 75. For his entire career, Mr. Swanson was a member of the firm now known as Ryan, Swanson & Cleveland. He served as the firm's managing partner from 1982 to 1989.

Bruce A. Cohen has joined the Seattle firm Short Cressman & Burgess PLLC as of counsel in the firm's construction practice section. Mr. Cohen represents construction-industry clients including contractors, owners, municipalities, design professionals and sureties in all facets of the construction process.

John W. Robertson has been promoted to director, and John C. Morrow has been promoted to senior attorney at the Kirkland firm Venture Law Group.

Marc R. Greenough has joined the Seattle office of Orrick, Herrington & Sutcliffe LLP as an associate in the public finance department. ☞

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.

Reprimand

Gary H. Branfeld (WSBA No. 6537, admitted 1976), of University Place, received a reprimand based on a stipulation approved by the Disciplinary Board on May 18, 2001. The discipline is based upon his failure to diligently represent a client and making misrepresentations to the same client between 1997 and 1999.

In 1997, Mr. Branfeld agreed to represent a real estate development group in a dispute with a property-management company and an insurance company, involving possible fraud and embezzlement. Between February and July 1997, Mr. Branfeld worked on the client's case. Later in 1997, Mr. Branfeld met with the client a second time and stated that he had drafted a couple of complaints. In late 1997, Mr. Branfeld stopped communicating with his client.

On October 9, 1998, Mr. Branfeld wrote a letter to the client implying that he had filed two lawsuits on the client's behalf; however, he had not done so. The client asked Mr. Branfeld to return his files, which he did not do. In 1998, the client retained another lawyer to help obtain his files. Mr. Branfeld told this lawyer that he had filed two lawsuits on the client's behalf. Mr. Branfeld did not return the client's files even though the new lawyer and disciplinary counsel requested that he do so. Mr. Branfeld also failed to cooperate with the disciplinary investigation.

Mr. Branfeld's conduct violated RPCs 1.2, requiring lawyers to competently represent their clients; 1.3, requiring lawyers to diligently represent their clients; 1.4, requiring lawyers to keep clients reasonably informed about the status of their matters; and 8.4(c), prohibiting lawyers from making misrepresentations.

Jean K. McElroy represented the Bar As-

sociation. Mr. Branfeld represented himself.

Reprimand

Richard Llewelyn Jones (WSBA No. 12904, admitted 1982), of Bellevue, received a reprimand based on a stipulation approved by the Disciplinary Board on March 29, 2001. The discipline is based upon his filing a frivolous claim and failing to promptly comply with lawful discovery requests in 1996. (*Note: Richard L. Jones is to be distinguished from Richard A. Jones of Seattle; Richard B. Jones of Port Orchard; and Richard F. Jones of Olympia.*)

In 1996, Mr. Jones represented a client in a civil lawsuit. The suit alleged that the client had stolen an exotic sports car from the plaintiff. The court set trial for April 29, 1996. At the client's request, Mr. Jones asked that his client's deposition be postponed until April 1. After business hours on March 29, the client notified Mr. Jones that he had been injured and could not appear for the deposition. Mr. Jones did not notify opposing counsel until counsel appeared for the deposition, and did not bring any of the subpoenaed documents.

On April 10, 1996, opposing counsel obtained a court order compelling the client to make himself available for deposition immediately. Opposing counsel then rescheduled the deposition for April 15. The client appeared for the deposition and testified that a lawyer in Oregon had additional documents. Opposing counsel did not receive these additional documents until April 25. During the deposition, Mr. Jones instructed his client not to answer several questions and left the room to confer with his client while a question was pending, in violation of Civil Rules 30(h)(3) and 30(h)(5).

On April 15, 1996, at the client's request, Mr. Jones filed an answer, counterclaim and third-party complaint naming opposing counsel and his wife. The third-party complaint alleged abuse of process and Consumer Protection Act violations. The court dismissed the complaint and sanctioned Mr. Jones and the client for filing frivolous claims and failing to comply with discovery rules. Mr. Jones appealed the sanctions. The court of appeals affirmed the sanctions and further sanctioned him for filing a frivolous appeal.

Mr. Jones' conduct violated RPCs 3.1,

prohibiting lawyers from asserting frivolous claims; 3.4(a), prohibiting obstructing another party's access to evidence; 3.4(d), requiring lawyers to make reasonably diligent efforts to comply with legally proper discovery requests; and 4.4, prohibiting using means with no substantial purpose other than to embarrass or burden a third party.

Linda Eide represented the Bar Association. Kurt M. Bulmer represented Mr. Jones.

Reprimand

Richard C. Kimberly (WSBA No. 10666, admitted 1980), of Bellingham, received a reprimand based on a stipulation approved by the Disciplinary Board on March 29, 2001. The discipline is based upon his failure to comply with his criminal defendant client's request to testify at a jury trial in 1995.

In 1995, Mr. Kimberly defended a client against charges of rape in the second degree and unlawful imprisonment. Prior to trial, Mr. Kimberly suggested, and the client agreed, that the client would not testify in his own defense. During the trial, the court twice sanctioned and fined Mr. Kimberly for disrespect outside the presence of the jury.

Initially, Mr. Kimberly decided to send an associate to present closing argument in the client's case, but he appeared personally after the court ordered him to complete the case. When Mr. Kimberly returned to the courthouse, his client indicated that the client wanted to testify. The defense had rested, but closing argument had not yet been presented. Mr. Kimberly still believed that it would not be in his client's best interest to testify, so did not move to re-open the evidence to allow the testimony. Mr. Kimberly then proceeded with closing argument.

The jury found the client guilty as charged. The client obtained new counsel, who filed a motion for a new trial based on ineffective assistance of counsel. Mr. Kimberly signed a supporting declaration admitting that the client had asked to testify, and that Mr. Kimberly had not presented the testimony; the court denied the motion. The court of appeals indicated that Mr. Kimberly's conduct had fallen below the standard of care, but denied the client's

motion. In August 1999, the Washington Supreme Court granted the client an evidentiary hearing on the sufficiency of his defense at trial. After the hearing, the motion was denied.

Mr. Kimberly's conduct violated RPC 1.2(a), requiring lawyers to abide by a client's decision whether to testify in a criminal case.

Leslie Allen represented the Bar Association. Richard Kimberly represented himself.

Reprimand

Mark D. Mestel (WSBA No. 8350, admitted 1978), of Everett, received a reprimand based on a stipulation approved by the Disciplinary Board on July 25, 2001. The discipline is based upon his failure to avoid conflicts of interest between several criminal defendants in one matter from 1993 through 1997.

In 1993, four people jointly purchased land for a marijuana grow operation. Only one name was placed on the title, to limit risk to the others. The group established a small grow operation in the house, and began construction of a barn to house a larger grow operation.

In February 1994, one of the original four dismantled the operation and moved off the property. Later, a new person was recruited to move into the house and tend the in-house operation. The new operation was set up in the barn. In May 1994, when fire broke out at the property, law enforcement learned of the grow operations.

One of the original four, (client A), whose business truck was on the property at the time of the fire, contacted Mr. Mestel to represent him in any criminal investigation into the grow operation. Mr. Mestel met with all five people involved in the operation as a group, not knowing that the property had been jointly purchased. He believed that the last person living in the house was singularly responsible for the grow operation, and that the others were concerned about forfeiture of the property.

After the first meeting, Mr. Mestel referred the property title-holder (client B) to another lawyer to handle state forfeiture and civil matters related to the property. Mr. Mestel indicated that his reputation as a criminal defense attorney who handled drug cases would send an unde-

sirable signal to law enforcement.

In October 1994, the federal government filed a civil forfeiture action regarding the property. At client A's request, Mr. Mestel agreed to represent client B in this matter. Mr. Mestel did not discuss conflicts of interest with clients A and B, or obtain written conflict waivers. Client A was present for most of client B's meetings with Mr. Mestel and paid some of client B's attorney's fees.

In 1995, the federal government noted the depositions of both clients A and B in the civil forfeiture action. Client B discussed with Mr. Mestel whether to assert his Fifth Amendment right at the deposition. Mr. Mestel advised that if client B did this, the government would likely succeed in its forfeiture action. At the deposition in July 1995, Mr. Mestel represented Client B, who testified falsely at his deposition. At the time of the deposition, Mr. Mestel did not know that the testimony was false.

When the government noted client A's deposition, Mr. Mestel referred him to other counsel, but continued to provide some legal advice and representation until January 1996. Following the depositions, Mr. Mestel negotiated a settlement of the forfeiture action with the government. During settlement negotiations, Mr. Mestel had discussions with client A. In July 1997, the federal government filed indictments against clients A and B, and others involved in the grow operation. Client B pleaded guilty in October 1997, and client A in March 2001.

Mr. Mestel's conduct violated RPC 1.7(b), prohibiting lawyers from representing a client if the representation may be materially limited by the lawyer's responsibilities to another client, unless the lawyer reasonably believes that the representation will not be adversely affected, and the client consents in writing after consultation.

Joanne Abelson represented the Bar Association. David Allen represented Mr. Mestel.

Reprimand

Jeffrey M. Werthan (WSBA No. 20099, admitted 1990), of Issaquah, received a reprimand, following a hearing July 17, 2001. The discipline is based upon his fail-

ure to represent a client competently and diligently in 1998.

In May 1998, Mr. Werthan agreed to represent the personal representative of the estate of DH. The personal representative was one of DH's two brothers. At this same time, Mr. Werthan received a copy of the last will and testament, with handwritten changes. On June 11, 1998, Mr. Werthan filed a petition for appointment of the personal representative, stating that no will had been found. RCW 11.20.010 requires anyone having possession of a will to deliver the will to the court or the executor within a specified time. Mr. Werthan did not comply with this statute.

If there had been no will, DH's father would have been the sole heir. Mr. Werthan's petition listed DH's two brothers as the sole heirs, with no mention of the father. Mr. Werthan did not obtain the personal representative's verification of the petition, as required by RCW 11.28.110. Mr. Werthan obtained a waiver of notice of nonintervention powers from one heir, but not all heirs, as required by RCW 11.68.041. Mr. Werthan also failed to provide the required notice of the appointment of the personal representative or publish required notices to creditors.

A company that locates missing heirs contacted DH's father and told him he stood to inherit from an unnamed deceased relative. After the father contacted Mr. Werthan's client, Mr. Werthan wrote to his client that the handwritten changes invalidated the will, and there was no alternative but to proceed to open a probate without a will. DH's father refused to accept his share of the estate so that the brothers could inherit the estate; DH's estate paid \$2,000 to the father's attorney. The court removed the personal representative and Mr. Werthan as the personal representative's attorney, and admitted the will to probate. The court made a specific finding that Mr. Werthan's negligent and reckless actions in the handling of the estate were a substantial factor in the suspicions and mistrust among family members.

Mr. Werthan's conduct violated RPCs 1.1, requiring lawyers to provide competent representation; 1.3, requiring lawyers to diligently represent their clients; 1.4, requiring lawyers to keep clients reasonably informed of the status of their matters;

and 8.4(c), prohibiting lawyers from engaging in misrepresentation.

Patricia H. Char represented the Bar Association. Kurt M. Bulmer represented Mr. Werthan. The hearing officer was Bert W. Markovich.

Censure

Lori S. Haskell (WSBA No. 15779, admitted 1986), of Seattle, received a censure pursuant to a stipulation approved by the Disciplinary Board on May 18, 2001. This discipline is based on her failure to comply with lawyer trust account requirements between 1996 and 2000.

In May 2000, when disciplinary counsel discovered that Ms. Haskell had withdrawn more funds from her trust account than she had deposited on behalf of her clients, the WSBA conducted an audit of Ms. Haskell's trust account. The audit found that Ms. Haskell did not keep client ledgers or track individual client balances. She did maintain settlement sheets for each client, but they did not always accurately reflect the transactions. This lack of recordkeeping prevented Ms. Haskell from performing meaningful reconciliation of her trust account.

The audit manager discovered that Ms. Haskell had distributed more to one client than the client had deposited, creating a shortage in the trust account. Ms. Haskell used other client funds when she made this mistakenly large distribution, creating several negative client balances in her trust account. Ms. Haskell commingled her own funds in the trust account and failed to properly pay her clients; several had a positive balance that should have been returned to them. Ms. Haskell also failed to withdraw her fees from the trust account.

In December 2000, the audit manager returned to Ms. Haskell's office. Although not all suggestions had been implemented, Ms. Haskell had deposited funds to cover the shortage, and was waiting for advice of counsel to fully comply with other recommendations.

Ms. Haskell's conduct violated RPC 1.14, requiring lawyers to maintain adequate records of receipt, deposit and disbursement of client funds; promptly pay client funds that are owed; and promptly remove the lawyer's funds from the trust

account.

Becky Neal represented the Bar Association. Kurt M. Bulmer represented Ms. Haskell.

Censure

Antonio Salazar (WSBA No. 6273, admitted 1975), of Seattle, received a censure on September 26, 2001 following a hearing. This discipline is based on his failure to represent a client competently and diligently in 1997 and 1998.

In 1997, the Salazar firm agreed to represent Mr. S in deportation proceedings. On November 4, 1997, following a hearing, the immigration judge denied Mr. S's application for asylum and granted a voluntary departure. Mr. S. asked the firm to appeal the decision to the Board of Immigration Appeals (BIA). Mr. S paid the firm \$110 for the filing fee and \$1,155.80 toward attorney's fees. Ms. Salazar filed the notice of appeal and paid the filing fee. The BIA issued a briefing schedule, informing Mr. Salazar that his client's brief was due on June 11, 1998. The notice indicated that briefs must be received by the due date and that requests for extension must be received prior to the due date.

On June 10, 1998, Mr. Salazar sent by FedEx a motion for an extension to the BIA in Falls Church, VA. The hearing officer found that because FedEx service takes one day between Seattle and Falls Church, Mr. Salazar could not reasonably have expected his motion to be resolved prior to the June 11 due date. The BIA granted the motion and extended the due date to July 2, Mr. Salazar did not file the client's brief on or before the due date.

On October 19, 1998, the BIA summarily dismissed the client's appeal for failure to file a brief. As a result of the summary dismissal, the client received a letter from the INS indicating that he had lost the right to work lawfully in the United States and that the deportation order would be enforced. In 1999, the client retained another lawyer to re-open the appeal based on ineffective assistance of counsel. In July 2001, Mr. Salazar agreed to return \$1,155.80 to the client.

Mr. Salazar's conduct violated RPCs 1.1, requiring lawyers to competently represent their clients; and 1.3, requiring lawyers to diligently represent their clients.

Joanne Abelson represented the Bar Association. Mr. Salazar represented himself. The hearing officer was Philip J. Vanderhoef.

Censure

Joveliano C. Trinidad (WSBA No. 27144, admitted 1997), of Seattle, received a censure on May 9, 2001, following a stipulation approved by the Disciplinary Board on April 13, 2001. This discipline is based on his failing to diligently represent two clients between 1998 and 2000.

Matter 1: In September 1999, Mr. Trinidad agreed to represent a client regarding an outstanding bench warrant. Although the client paid Mr. Trinidad \$900, he did not start a file for the client. The client called Mr. Trinidad from October 1999 through January 2000, but never heard from him. On January 28, 2000, the client sent a certified letter to Mr. Trinidad requesting that his fee be refunded so he could retain another lawyer. Mr. Trinidad did not return the fee.

Matter 2: On February 12, 1998, Mr. Trinidad agreed to represent a client in a Department of Labor and Industries (L&I) claim. On February 24, Mr. Trinidad sent a letter to L&I asking that they re-open the client's claim; however, he took no further action on the claim. Between September 1998 and March 1999, the client tried unsuccessfully to contact Mr. Trinidad.

On March 11, 1999, Mr. Trinidad met with the client, assuring her he would work on her case. Mr. Trinidad also told the client that he had received some papers from L&I that required a timely response. On January 6, 2000, the client called L&I and learned that her case had been closed because Mr. Trinidad had not turned in the necessary paperwork. In March 2000, the client picked up her file from Mr. Trinidad's office.

Mr. Trinidad's conduct violated RPCs 1.3, requiring lawyers to diligently represent their clients; 1.4, requiring lawyers to keep clients reasonably informed about the status of their matters; 1.5(a), requiring lawyers' fees to be reasonable; and 1.15, requiring lawyers to take reasonable steps to protect clients' interests upon withdrawal.

Linda Eide represented the Bar Association. Mr. Trinidad represented himself. ☐

Opportunities for Service

WSBA Presidential Search

Application deadline: May 15, 2002

The Board of Governors of the Washington State Bar Association (WSBA) is seeking applicants to serve as WSBA president for the 2003-2004 term. Pursuant to Article IV(A)(2) of the WSBA bylaws, the primary place of business for the president must be the area east of the Cascade mountain range generally known as eastern Washington. The WSBA member selected to be president will have an opportunity to provide a significant contribution to the legal profession.

Applications will be accepted through May 15, 2002, and should be limited to a current résumé, a concise application letter stating interest and qualifications, and no less than five or more than 10 selected references. The Presidential Search Committee and the Board of Governors will consider endorsement letters received by May 31, 2002. Applications and endorsement letters should be sent to the WSBA, Office of the Executive Director, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330.

Confidential interviews with the Presidential Search Committee will be conducted May 16-31, 2002 at the WSBA office. Direct contact with the governors is also encouraged. All candidates will have an interview with the full Board of Governors in open session at the June meeting. Following the interviews, the board will select the president.

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

The commitment begins in June 2002, following selection. A one-year term as president-elect will begin at the annual business meeting in September 2002. The president-elect is expected to attend the two-day board meetings held approximately every five to six weeks, as well as numerous subcommittee, section, regional, national and local meetings. In September 2003, at the WSBA annual business meeting, the president-elect will assume the presidency of the WSBA. During his or her service, the president-elect and president will also be required to meet with members of the bar, courts, media and public and legal-interest groups, as well as be involved in the bar's legislative activities. Appropriate time will need to be devoted to communication by letter, electronic mail and telephone in connection with these responsibilities.

The duties and responsibilities of the president are set forth in the WSBA bylaws.

Presidential Search Committee: Victoria L. Vreeland, chair; Robert M. Boggs; Dale L. Carlisle; William D. Hyslop; Lucy Isaki; J. Richard Manning

2002 Notice of Board of Governors Election

Nomination deadline: March 1, 2002

Four positions on the WSBA Board of Governors will be up for election this year: the governors representing the 3rd, 6th, 7th-East* and 8th congressional districts. These positions are currently held by Stephen J. Henderson (3rd District), S. Brooke Taylor (6th District), Jenny A. Durkan (7th-East District) and Victoria L. Vreeland (8th District). (Note: The state's redistricting, which should be finalized in February, may alter WSBA governor districts for 2002 elections.)

The WSBA bylaws provide that any member in good standing except a member previously elected to the Board of Governors may be nominated for the office of governor from the congressional district in which such member is entitled to vote. Nominations are made by filing a petition signed by at least 20 active members of the WSBA entitled to vote in that district, along with a biographical statement of 100 words or less. Generally, a member is entitled to vote in the congressional district in which he or she resides. All out-of-state active WSBA members are eligible to vote in the district of the address of their agent within Washington for the purpose of receiving service of process as required by APR 5(e), or, if specifically designated to the executive director, within the district of their primary Washington practice.

Nominating petitions are available from the WSBA, Office of the Executive Director, 2101 Fourth Ave., Fourth Fl., Seattle, WA 98121-2330; the WSBA Web site (www.wsba.org/bog/petition); or by calling 206-727-8244. The WSBA executive director must receive petitions with accompanying biographical statements of 100 words or less by 5:00 p.m., March 1, 2002. The Board of Governors determines the official dates of the election. Ballots are usually mailed around the first of June and counted approximately the first of July.

Note: The May issue of *Bar News* will include biographical statements from nominated candidates.

*The 7th congressional district is divided into three subdistricts: east, central and west. These subdistricts are distinguished by ZIP codes, and each has one elected governor. The east subdistrict (ZIP codes 98105, 98115, 98118, 98122, 98125, 98144, 98155 and 98178) will elect a new governor in 2002.

ABA House of Delegates

Application deadline: March 15, 2002

The Board of Governors of the WSBA is accepting letters of interest from members interested in serving on the ABA House of Delegates representing Washington. There are two positions available and one new position "pending ABA approval." A written expression of interest is also required for any incumbents seeking reappointment.

The control and administration of the ABA is vested in the House of Delegates, its policymaking body. The house, which has approximately 500 delegates, elects the ABA officers and board, and meets out of state twice a year. Delegate attendance is required. The WSBA's allowance is \$500 per year per delegate. Members appointed to the House of Del-

egates serve a two-year term, which begins at the close of the annual meeting (August 2002).

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

Experts Needed for Legal Resource Guide

Nomination deadline: March 1, 2002

The Council on Public Legal Education is preparing a legal resource guide for Washington media. The guide will provide general information about the law and justice system, and will also include a directory of experts on specific legal topics who are willing to talk to the media. The council is seeking nominations of experts to be listed in the guide. Ideally, the experts will be well-established practitioners or scholars with expertise in one or more substantive legal areas, with a history of public service. The council will offer training in working with the media.

Nominations, which may be made by self or peers, should include a brief résumé (including public-service activities and organizational affiliations), and a list of legal topics on which the expert feels qualified to speak. (The complete list of topics is available for review at www.plecouncil.org/drafts/media; suggestions of additional topics are welcome.)

The deadline for the print edition of the guide is March 1. Ongoing nominations will be accepted for the online edition. Nominations should be submitted to the WSBA, Council on Public Legal Education, 2101 Fourth Ave., Fourth FL., Seattle, WA 98121-2330, or e-mailed to plecouncil@wsba.org.

For further information, see www.plecouncil.org or contact Pam Inglesby, WSBA public legal education manager, at pami@wsba.org or 206-727-8226.

CASA Volunteers Needed

King County Superior Court is seeking volunteers to serve as Court-Appointed Special Advocates (CASAs). Volunteers re-

ceive 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.

WSBA Bar Leaders and Access to Justice Conferences

The 2002 WSBA Bar Leaders Conference and Access to Justice (ATJ) Conference will be held at the Yakima Convention Center, June 7-9. Conference registration brochures will be mailed in April. For bar leaders' registration information, please contact Toni Doane at tonid@wsba.org or 206-727-8293; for ATJ information, please contact Sharlene Steele at sharlene@wsba.org or 206-727-8262.

Upcoming BOG Meetings

April 5-6 – Walla Walla

May 10-11 – Stevenson

June 7 – Yakima

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 loril@wsba.org. The complete BOG meeting schedule for fiscal year 2001-2002 is available on the WSBA Web site at www.wsba.org/2001/bog-schedule.htm.

WSBA Committee, Board and Panel Preference Forms (2002-2003)

Preference forms will be mailed to all active WSBA members in mid-February 2002. The Board of Governors makes appointments based on these forms. Since appointments for most committees are reviewed and renewed annually, current members of committees, boards and panels who are interested in reappointment must submit a preference form each year. Please visit www.wsba.org/c/preference.htm to

Use Resources to Your Advantage

Would you like your name and/or firm listed under your area of practice in the yellow pages of the 2002-2003 edition of the WSBA's *Resources* annual directory?

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

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

To reserve your yellow-page listing in the 2002-2003 *Resources* directory, complete this form, enclose a \$35 check payable to the WSBA, and mail by February 28 to:

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

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

Firm/Individual Name _____

 Address _____
 City/State/ZIP _____
 Phone _____
 Fax _____
 E-mail _____
 Web site _____
 Category _____

complete and submit the form online. Please contact Jerri Ninesling at oed@wsba.org or 206-727-8239 if you have questions.

TeamChild Opens New Office

TeamChild, a nonprofit legal services agency providing civil legal advocacy to youth, has opened an office in Snohomish County. The office is staffed by attorney Karen Pillar and social worker Jessica Shriner. TeamChild is housed in the Snohomish County office of Columbia Legal Services. For more information, call 425-258-3132.

License Fee Reminder to WSBA Members

Licensing Packets

Licensing packets, which include license fee, trust account and MCLE reporting (C-2 Compliance Affidavit) forms, were mailed in early December. If you have not received your licensing packet, please call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or e-mail questions@wsba.org to request a duplicate. Please note that it is your responsibility to pay your annual license fee, regardless of whether you receive the licensing packet.

Fees

In addition to your license fee, per APR 15, the Supreme Court has ordered all active members to pay a \$13 assessment to the Lawyers' Fund for Client Protection (LFCP). We encourage you to pay your license fee (and active members the LFCP fee) promptly to avoid penalties. A 20 percent late-payment penalty is imposed if the annual license fee is not paid by March 1, 2002. After April 1, 2002, a 50 percent late-payment penalty is imposed. If your license fee, penalty assessment or LFCP fee remain unpaid after May 1, 2002, the delinquency will be certified to the Supreme Court, which will enter an order of suspension from the practice of law. In order to be reinstated to your former status after suspension for non-payment, you must pay *double* the amount of the combined fee and penalty (*triple* the original fee). For active members, nonpayment of the LFCP fee is also cause for suspension.

More Information

For more information, please see the WSBA Web site at www.wsba.org/licensing, or contact the WSBA Service Center at 800-945-WSBA, 206-443-WSBA or questions@wsba.org.

MCLE Reporting Time

Group 1

Active WSBA members who are in Reporting Group 1 (active members admitted through 1975; or in 1991, 1994, 1997 or 2000*) will report CLE credits for activities undertaken in 1999, 2000 and 2001.

*Newly Admitted Members

Newly admitted members are exempt from reporting CLE credits during their year of admission and the following calendar year. If you were admitted in 2000 you will not report this reporting period even though you are in Group 1. You will first report at the end of 2004. (New admittees may earn CLE credits starting from their admission date, and those credits may be applied toward their first reporting period.)

CLE Compliance

If you are in Reporting Group 1, please do the following to meet your CLE requirements:

- 1) Complete approved CLE credits totaling at least 39 general and six ethics for the three-year period (1999 through 2001);
- 2) Submit these credits and attendance to the WSBA either through the sponsor or directly to the WSBA;
- 3) Sign the C-2 Compliance Affidavit certifying attendance of the listed courses; and
- 4) Send the C-2 Compliance Affidavit to the WSBA by February 1, 2002.

Reporting Forms

Your C-2 Compliance Affidavit contains all courses and credits to your record for 2001 CLE activities submitted by sponsors. Please review it carefully and make any necessary changes or additions. If you have CLE credits for activities in 2001 that were not earned through live courses, you must enter this information. You must also enter course/credit information for activities undertaken in 1999 and 2000. You must then sign, under penalty of perjury, that the credit information you submit is true and correct.

New Online MCLE Credit-Tracking System

The new online MCLE Credit-Tracking System (<http://pro.wsba.org>) is now ready for you to use. Here's what you can do using the new system:

- View your CLE courses and credits on your online attendance roster.
- Make changes to your online attendance roster.
- Search for approved courses.
- Apply for course approval.

To enter the MCLE Credit-Tracking System, go to <http://pro.wsba.org>, select Member Login, and follow the onscreen instructions. If you have questions, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Law Week 2002

Law Week 2002 is an exciting opportunity for lawyers and judges to bring legal education into the classroom. Each year, Law Week provides an enriching experience to youth through positive interactions with lawyers and judges. Law Week 2002 will take place the week of May 1. To learn more about the program or to participate, visit www.lawweek.org, or contact Lisa KauzLoric at 206-733-5944 or lisak@wsba.org.

CLE Credits for Pro Bono Work? Limited License to Practice with No MCLE Requirements?

Yes, it's possible! Regulation 103(g) of the Washington State Board of Continuing Legal Education allows WSBA members to earn up to six hours of credit annually for providing pro bono direct representation under the auspices of a qualified legal-services provider. APR 8(e) creates a limited license status of emeritus for attorneys otherwise retired from the practice of law, to practice pro bono legal services through a qualified legal-services organization.

For more information, contact Access to Justice Liaison Sharlene Steele at 206-727-8262 or sharlene@wsba.org.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in December 2001 is 1.791 percent. The maximum allowable interest rate for January is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates for 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.

NJP Board to Meet Quarterly

The Northwest Justice Project board of directors will hold the rest of its 2002 meetings on April 13, July 13 and October 19. Public meetings begin at 9:30 a.m. For site information, contact Lisa Giuffr  at 888-201-1012 or 206-464-1519.

Law-Office Software

The WSBA Law Office Management Assistance Program (LOMAP) offers members the chance to "kick the tires" of a host of software programs used in law offices. Come in and try out programs such as TimeSlips, Amicus Attorney and TrialWorks. For more information, contact Peter Roberts at 206-727-8237 or peter@wsba.org.

ABA Tech Show 2002

The WSBA is a sponsor of the ABA Tech Show 2002 in Chicago, March 14-16. This means WSBA members are eligible for a \$100 registration discount. For more information, contact Peter Roberts at 206-727-8237 or peter@wsba.org, or visit the Tech Show Web site at www.techshow.com.

Web Site Links From Lawyer Directory

The lawyer directory on the WSBA Web site has been enhanced! A link to your Web site can be added to your directory listing, so current and potential clients can find out more about you and your practice at the click of a button.

The fee is \$75 annually (\$50 if you sign up July 1 or later). If your firm has seven or more lawyers, you'll save through our special pricing structure. Special pricing is also available for those who work for nonprofit or government agencies. For more information and sign-up instructions, see www.wsba.org/directory/addlink.

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 Trust

Signing Document

Trusts

Wills



Chief Justice Gerry L. Alexander (right) congratulates Charles B. Roe Jr. at a luncheon held in his honor at the WSBA Water Law CLE in December. Mr. Roe was honored for being the "founder" of the wa-

ter law seminar and for his contributions to continuing legal education.

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.

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.

Operation Enduring LAMP

American Bar Association President Robert E. Hirshon has called on America's lawyers to help U.S. military reservists get their legal affairs in order in the event of a large-scale mobilization. Volunteer lawyers are needed to participate in Operation Enduring LAMP (legal assistance to military personnel). For more information, visit the ABA Web site at <http://www.abanet.org/legalservices/helpreservists>.

Multilingual Legal Assistance Now Available

Eastside Legal Assistance Program (ELAP) has expanded its offering of free legal clinics. Multilingual services will operate twice monthly for people who speak Spanish, Russian or Ukrainian. For schedule information and appointments, call 425-747-1663.

The WSBA Store Is Open

The WSBA store is now open online (www.wsba.org/store). You can purchase Cutter & Buck polo shirts, twill baseball caps, ballpoint pens, and brass luggage tags emblazoned with the WSBA logo. The store features secure online credit-card ordering. You can also purchase logo merchandise by calling the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Polo shirt (pewter or white, size L or XL) – \$56

Baseball cap (stone) – \$24

Ballpoint pen – \$12

Luggage tag – \$7

Prices include shipping and handling. Sales tax (8.8%) will be added to orders shipped within Washington.

Pro Bono Publico Awards Nominations Sought

The ABA standing committee on pro bono and public service is seeking nominations for the Pro Bono Publico Awards. The awards recognize lawyers and law firms for extraordinary contributions to extending legal services to low-income persons. Nominations must be received by March 11. For more information, contact Dorothy Jackson at 312-988-5766 or jacksond@staff.abanet.org.

Creed of Professionalism

The WSBA now has an aspirational Creed of Professionalism. Developed by the Professionalism Committee with input from many members around the state, and approved by the Board of Governors, the creed's purpose is to "inspire and guide lawyers in the practice of law." The full text of the creed can be found on the WSBA Web site at www.wsba.org/creed.



Printed copies of the creed are available for purchase (we have made every effort to keep the cost as low as possible). Printing is in black and gold on heavy cream-colored paper. The creed is available unframed, or mounted on a mahogany-finish wooden plaque. It is our hope that Washington lawyers will display the creed proudly in their offices.

Creed suitable for framing:

_____ @ \$4 each (includes shipping) \$ _____

Creed mounted on a wooden plaque:

_____ @ \$20 each (includes shipping) \$ _____

If in Washington, add state sales tax @ 8.8% \$ _____

Total \$ _____

check enclosed (payable to WSBA)

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MasterCard and Visa orders may also be placed over the phone by calling the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

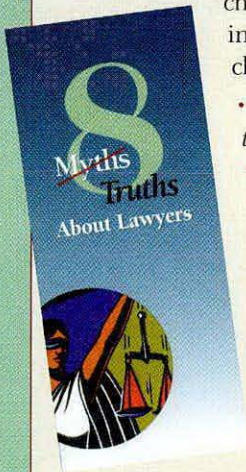
Name _____
Address _____
City _____ State _____ ZIP _____
WSBA office use only: 1-40072-210
date _____ check no. _____ amount _____

Organization Formed to Help 9/11 Victims

Trial Lawyers Care, a nonprofit organization, has been created to provide free legal services to September 11 attack victims and their families who participate in the federal government's Victim Compensation Fund. More volunteer lawyers are needed. Volunteers must be in good standing; have been licensed to practice for at least five years; and have tried or settled any combination of at least 15 personal injury, death or other significant cases. For more information, contact the organization at 888-780-8637 or volunteers@911lawhelp.org, or visit <http://www.911lawhelp.org>.

8 Myths Truths About Lawyers

Help us stamp out some of those myths about lawyers! The new *8 Myths Truths About Lawyers* brochure, developed by the President's Initiative Task Force, is now available for purchase. Think about displaying the brochures in your reception area, or enclosing them with your invoices. The brochure tackles the following myths:



- *The United States has more lawyers than any other country.*
- *Lawyers are selfish and greedy.*
- *Lawyers stir up litigation for their own personal profit.*
- *Huge punitive damage awards are frequent and on the rise.*
- *The McDonald's verdict shows how foolish juries are.*
- *Lawyers who defend criminals are just promoting crime.*
- *When there's an accident, lawyers are among the first on the scene, soliciting business.*
- *The jury system is not worth keeping.*

The cost is \$35 per 100 (price includes shipping and handling).

Yes! I would like to order _____ packets @ \$35 per packet (100) \$ _____

If in Washington, please add WA state sales tax @8.8% \$ _____
Total \$ _____

check enclosed (payable to WSBA)

MasterCard Visa

No. _____ Exp. date _____

Name as it appears on card _____

Signature _____

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Name _____
Address _____
City _____ State _____ ZIP _____
WSBA office use only: 1-59202-210
date _____ check no. _____ amount _____

Antitrust Law Conference

The ABA Section of Antitrust Law is hosting a conference focusing on practical solutions to antitrust issues faced by in-house and outside counsel. The conference will be held at The Chateaux at Silver Lake in Park City, Utah, February 27-March 1. For more information, contact the ABA at 312-988-5609 or visit <http://www.abanet.org/antitrust>.

Resources on Sale for Half Price

The 2001-2002 *Resources* membership directory is now on sale for half-price:

- \$8.50 – WSBA members (\$9.25 in WA)
- \$17.50 – non-WSBA members (\$19.04 in WA)

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

Goldmark Award Luncheon

The Legal Foundation of Washington will host the 16th Annual Goldmark Award Luncheon on Thursday, February 21, 2002 at the Washington State Convention & Trade Center from noon to 1:30 pm. The Legal Foundation is a not-for-profit organization that has distributed over \$51,000,000 for legal services to the poor since 1985.

The Honorable William L. Dwyer, senior U.S. district court judge for the Western District of Washington, will receive the Goldmark Award for Distinguished Service in recognition of a lifetime of exceptional leadership, both as an attorney and as a judge. Justice Rosalie Abella of the Court of Appeals for Ontario, Canada, will give the keynote address.

The Goldmark Award honors the memory of Charles A. Goldmark, a Seattle attorney, community leader, and ardent supporter of access to justice. To make a reservation, please return the form below with your check payable to the Legal Foundation of Washington.

- Yes, I would like to honor the work of legal services by attending the luncheon. I will bring _____ additional guests. (\$35/person enclosed).
- My firm would like to be an Equal Justice Sponsor (\$1,000 enclosed). Eight members of our firm will attend. (A charitable contribution of \$720 will help cover luncheon expenses.)
- My firm would like to be an Equal Justice Supporter (\$500 enclosed). Four members of our firm will attend. (A charitable contribution of \$360 will help cover luncheon expenses.)
- I would like to be a Goldmark Donor (\$100 enclosed). Two lunches will be provided and a charitable contribution of \$30 will help cover luncheon expenses.
- No, I cannot attend the luncheon, but I would like to support the luncheon with a donation of \$ _____.

Name(s): _____

- Please check if a vegetarian meal is preferred.

Legal Foundation of Washington, 500 Union Street, Suite 545, Seattle, WA 98101; phone 206-624-2536, ext. 10; fax 206-382-3396. The Legal Foundation of Washington is a 501(c) (3) status institution.

Photo Bar Cards Now Available

The WSBA is pleased to offer photo bar cards to members. This is an option for those who are interested in having their photo on their card; original and replacement cards without photos are provided at no cost. Here's how it works:

- You can either e-mail an electronic photo in .bmp format or mail a hard-copy photo that we will scan. Photos can be any size.
- You may submit a black-and-white or color photo, however all photos will be printed in black and white.
- The cost is \$10 for cards created from electronic photos, and \$15 for cards created from hard-copy photos. Checks, MasterCard and Visa are accepted for payment.
- If you're mailing a hard-copy photo, please mail the photo with the completed order form and payment.
- If you're e-mailing an electronic photo, mail the completed order form with your payment. If paying by credit card, you may fax the order form.

If you have questions, please contact the WSBA Service Center at 800-945-WSBA, 206-443-WSBA, or questions@wsba.org.

YES! I would like to order a photo bar card.

Select one of the following:

- Photo submitted electronically \$ 10.00
(If in Washington, add WA state sales tax @ 8.8%.) .88
Total \$ _____
- Hard-copy photo enclosed \$ 15.00
(If in Washington, add WA state sales tax @ 8.8%.) \$ 1.32
Total \$ _____

If submitting an electronic photo, please e-mail to allisonp@wsba.org. We recommend that you e-mail the photo the same day you send this form. If paying by credit card, you may fax this form to 206-727-8319. If submitting a hard-copy photo, be sure to write your name on the back and enclose it with this form. Your photo will be returned to you.

- check enclosed (payable to WSBA) MasterCard Visa
- No. _____
Exp. date _____
Name as it appears on card _____
Signature _____

Please send to:
Communications Department
Washington State Bar Association
 2101 Fourth Ave., Fourth Fl.
 Seattle, WA 98121-2330
 Fax: 206-727-8319

Name _____
 Address _____
 City/State/ZIP _____

<p>For office use only: 1-40199-180</p> <p>Date _____</p> <p>Check no. _____</p>

CHEMNICK, MOEN & GREENSTREET

is pleased to announce that

Roger J. Leslie, Ph.D., J.D.

has become of counsel to the firm.

Roger Leslie received his J.D. from Seattle University School of Law in 1997. Before attending law school, he received his B.S. degree from the University of Colorado and his Ph.D. in biology from the University of Oregon. He received a post-doctoral fellowship from the National Institutes of Health to study the mechanism of cellular reproduction, and was an assistant professor in the section of Molecular and Cellular Biology at the University of California, Davis.

In addition to numerous original research publications, Roger was a contributing author of a college textbook in biology. Roger's law practice will emphasize medical negligence, drug liability, and other complex claims involving medical and scientific issues.

Chemnick, Moen & Greenstreet continues its practice with emphasis on medical negligence and drug liability claims.

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EDWARDS, SIEH, SMITH & GOODFRIEND PS

is pleased to announce that

Evy McElmeel,

former judicial clerk to the
Honorable Anne Ellington,
Washington State Court of Appeals,
has joined the firm as an associate.

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Washington's Appellate Counsel

FLOYD & PFLUEGER PS

is pleased to announce that

Thomas B. Nedderman*

has become a partner in the firm.

Mr. Nedderman will
continue to focus on the defense of
complex civil litigation.

FLOYD & PFLUEGER PS

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* also admitted in Illinois

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McCORMICK, DUNN & BLACK, P.S.

is pleased to announce that

Richard D. Campbell

has been elected a principal in the firm,
effective January 1, 2002.

Rich's practice will continue to emphasize construction claim litigation and defense on behalf of prime contractors, subcontractors and suppliers, as well as providing general legal advice to those entities. Rich earned his B.S. degree from the University of Idaho (1987) and his J.D. degree, cum laude, from Gonzaga University School of Law (1994), where he was a Thomas More Scholar. He is licensed to practice in the state and federal courts of Washington, Idaho and Montana. Prior to becoming a lawyer, Rich was an infantry officer in the United States Marine Corps.

200 Fernwell Building
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Spokane, Washington, 99201
Telephone: 509-455-8711
Fax: 509-455-8734
Email: md&b@mdblaw.com
www.mdblaw.com

McKINLEY & IRVIN, PLLC

is pleased to announce that

Jennifer J. Payseno

has become a member of our firm,
and continues to focus her practice on
complex divorce and family law litigation.

We are also pleased to announce the
January 2, 2002 opening of our Seattle and
Bellevue office locations.

The firm continues to focus
its practice on complex divorce and
family law litigation.

Seattle
City Center Building
5th & Pike

Bellevue
City Center Building
108th & NE 8th

Calendar

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.

ADMINISTRATIVE LAW

Administrative Law Section CLE

March 22 - Location TBA. CLE credits TBA. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ANTITRUST LAW

Antitrust in Deer Valley: New Challenges/Cutting-Edge Solutions

February 27-March 1 - Park City, UT. CLE credits TBA. By American Bar Association Antitrust Section; 312-988-5609.

CRIMINAL LAW

Criminal Law Update

February 1 - Spokane. CLE credits TBA. By Spokane County Bar Association; 509-777-0078.

EMPLOYMENT LAW

Employment Law Briefing

March 3-6 - Vail, CO; March 24-27 - Santa Barbara, CA. 20 CLE credits pending. By National Employment Law Institute; 303-861-5600.

9th Annual Employment Law Institute

March 8 - Seattle. 6.75 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ESTATE PLANNING

Retirement Plan Administrator Liability

February 8 - Seattle. 7.75 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Estate Planning for Small to Medium-Sized Estates

March 8 - Seattle; March 21 - Mt. Vernon. 7.75 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Planning Considerations for Retirement Plans and IRAs

February 15 - Seattle. 5.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ENVIRONMENTAL LAW

Rights of Indian Tribes That Affect Development and Use of Natural Resources, Land, and Water

February 8 - Seattle. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Environmental and Land Use Quarterly Meeting and CLE

March 21 - Seattle. 1 CLE credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Professionals

GENERAL

District Court Update

February 15 – Spokane. CLE credits TBA. By Spokane County Bar Association; 509-777-0078.

Handling Difficult People

March 7 – Tacoma; March 8 – Seattle. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Superior Court Update

March 13 – Spokane. CLE credits TBA. By Spokane County Bar Association; 509-777-0078.

David Gross: How to Win Next Jury Trial

March 14 – Seattle. 6.5 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Appellate Court Update

March 29 – Spokane. CLE credits TBA. By Spokane County Bar Association; 509-777-0078.

INTELLECTUAL PROPERTY

Intellectual Property Institute

March 27 – Seattle. 6.25 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

LAW OFFICE MANAGEMENT

Law Office Management Institute

March 8 – Seattle. 5.7 CLE credits, including 4.5 ethics pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Law Office EXPO – Exhibit Hall Tour

March 8 – Seattle. Free; no CLE credits available. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

LITIGATION

WYLD Pretrial Preparation

February 2 – Seattle; February 21 – Vancouver. 7 CLE credits, including 1.5 ethics. By WSBA-CLE and WYLD; 800-945-WSBA or 206-443-WSBA.

REAL ESTATE

Drafting and Enforcing Real Estate Documents

February 15 – Mt. Vernon; February 21 – Seattle. 5.5 CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

SENIOR LAW

Senior Law Section Annual Meeting and CLE

February 15 – Tacoma. CLE credits TBA. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

REAL ESTATE and TITLE INSURANCE

Betty J. Schall

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E-mail: DadsLawyer@aol.com

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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.

2101 Fourth Avenue, Suite 2100
Seattle, WA 98121

206-448-2100

E-mail: jganzesq@aol.com

ETHICS & LAWYER DISCIPLINE

Leland G. Ripley, former WSBA chief

disciplinary counsel (1987-94), is available for consultation or representation regarding all aspects of professional responsibility or discipline defense.

206-781-8737

SOCIAL SECURITY DISABILITY APPEALS

Steve Hood,

formerly of the Social Security Administration, is available to write appellant briefs at the federal court level in claims for disability benefits.

Also available for consultations and referrals.

206-352-3759

E-mail: s.w.hood@worldnet.att.net

MEDICAL OR DENTAL MALPRACTICE

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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

LABOR AND EMPLOYMENT LAW

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Michael T. Schein

and

Douglas W. Ahrens

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DISCIPLINARY INVESTIGATION AND PROCEEDINGS

Patrick C. Sheldon,

former member of the Washington State Bar Association Disciplinary Board, is now accepting referrals for attorney disciplinary investigations and proceedings.

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E-mail: patrick@fsav.com

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Cleveland Stockmeyer

Former law clerk, Washington Supreme Court

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co-author of the chapters on estate planning and probate in Butterworth's *Washington Civil Practice Deskbook*, is available for referrals of matters, both contested and noncontested.

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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).

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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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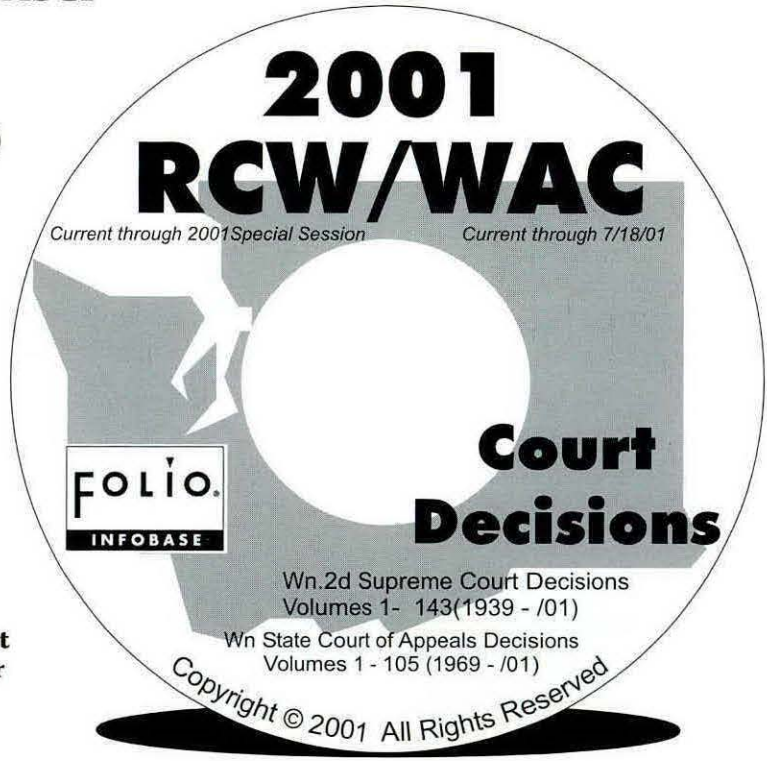
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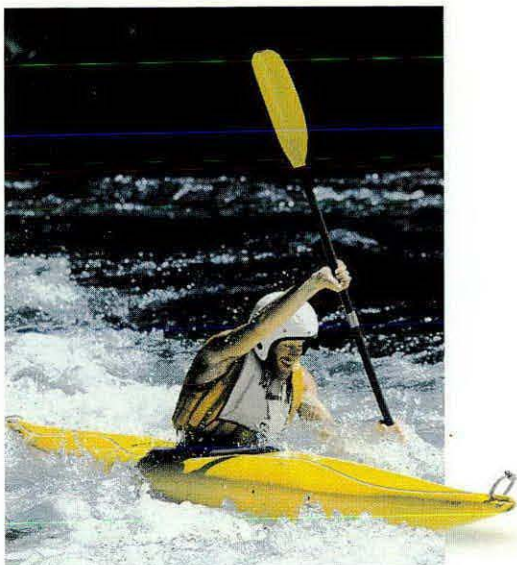
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