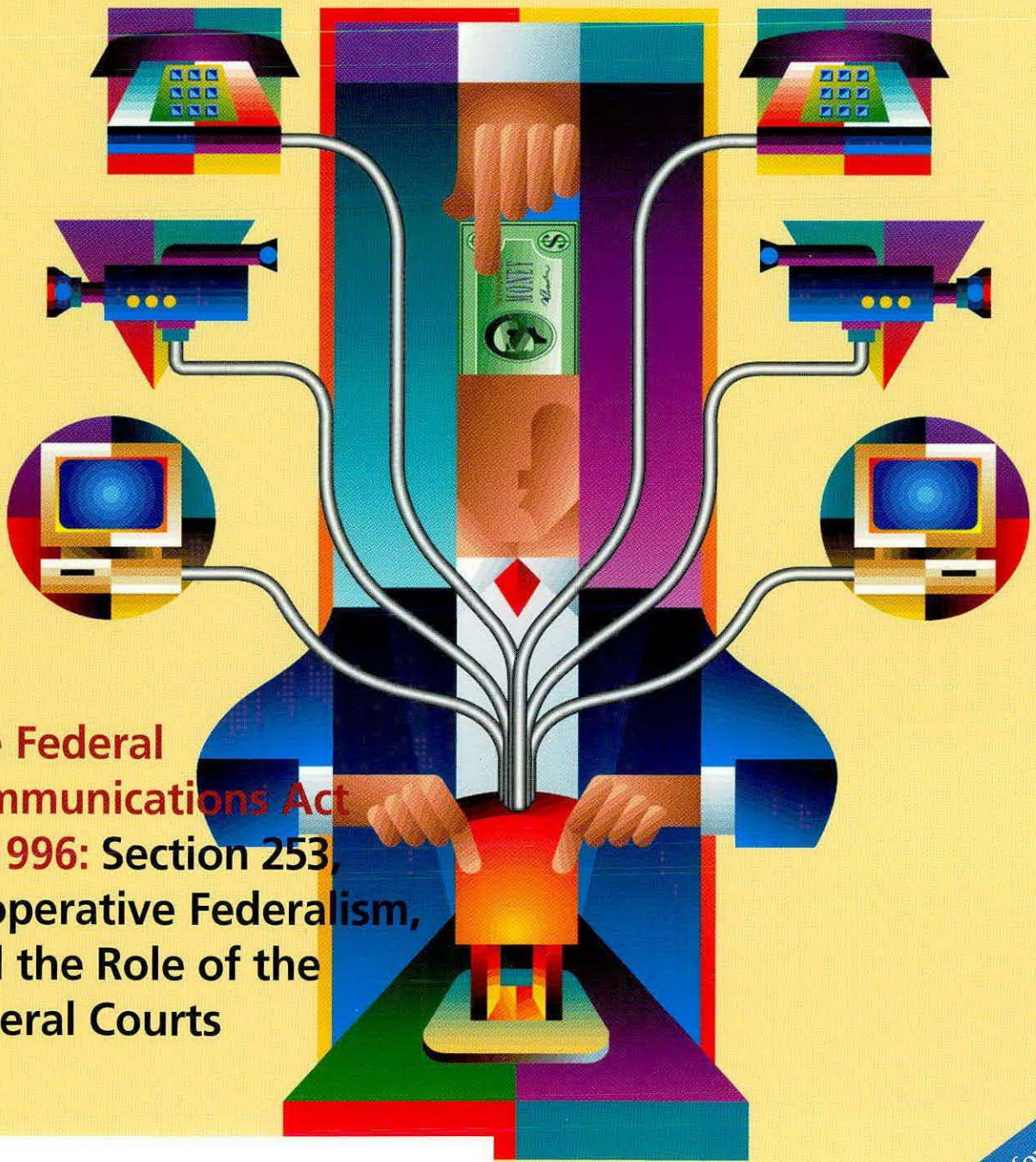
Vol. 56 No. 5

Washington State
BarNews
The Official Publication of the Washington State Bar ▪ MAY 2002



The Federal Communications Act of 1996: Section 253, Cooperative Federalism, and the Role of the Federal Courts

New Online Resource for Court Decisions
www.LegalWA.org
p. 56

Hon. Patricia Aitken
King County
Superior Court (Ret.)

Hon. James I. Maddock
Kitsap County
Superior Court (Ret.)

Gregory L. Bertram

Shawn Otorowski, Esq.

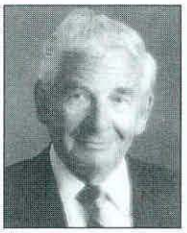
Fred R. Butterworth, Esq.

Hon. Robert H. Peterson
Pierce County
Superior Court (Ret.)

Hon. Robert J. Doran
Thurston County
Superior Court (Ret.)

Hon. Norman W. Quinn
King County
Superior Court (Ret.)

Hon. Richard P. Guy
Chief Justice,
WA Supreme Court (Ret.)



Hon. Gerard M. Shellan
King County
Superior Court (Ret.)

JAMS IS THE LEADING PRIVATE DISPUTE RESOLUTION PROVIDER

JAMS' success starts with our neutrals – dedicated professionals with the wisdom to see clearly through difficult disputes. Their experience and proven adjudication and settlement skills make JAMS the premier choice for resolving your conflict.

A pioneer in the design of ADR programs, JAMS has been helping attorneys and their clients manage conflict for more than 20 years. JAMS offers a complete range of ADR services and superior customer support nationwide.

Please call **877-jamsadr (526-7237)** or visit **www.jamsadr.com** for further information.

JAMS

THE RESOLUTION EXPERTS

600 UNIVERSITY ST. • SUITE 1910 • SEATTLE, WA 98101
950 PACIFIC AVENUE • SUITE 500 • TACOMA, WA 98402

Contents

Articles

Columns

Departments

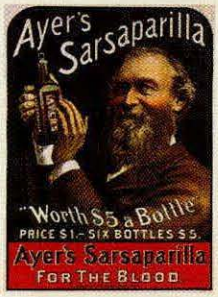
Listings

Cover illustration by August Stein

NOTICE: In the April 2002 isue of *Bar News*, the book *On Trial: A Treasure Trove for Trial Lawyers* by Henry G. Miller Esq. was reviewed by attorney Thomas J. Greenan (p. 38). The book may be purchased through its publisher at www.lawcatalog.com (or 800-537-2138, ext. 9300), or from select bookstores and online booksellers.

P. 19

P. 22



P. 32

Working together to champion justice

Submission Guidelines

Readers are invited to submit correspondence and articles. They may be sent via e-mail to comm@wsba.org or provided on disk in any conventional format with accompanying hard copy and sent to *Bar News* Editor, 2101 Fourth Avenue, Suite 400, 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.

Hayne Fox Bowman & Duarte:
***proven** leadership in*

DUI *defense*

In 2001, Hayne Fox Bowman & Duarte:

- Successfully led the defense bar in challenging the admissibility of breath test evidence in dozens of courts across the State,
- Used in-house state-of-the-art technology to file the first **e-briefs** at the trial court level,
- Sponsored the largest CLE for criminal defense lawyers with 350 attendees,
- Received national recognition for its innovative DUI defense work in *Lawyers' Weekly USA*, and
- Successfully appealed dozens of Department of Licensing rulings, emphasizing the need for greater Constitutional rights and protections in administrative proceedings.

Steve Hayne

Jon Fox

Bill Bowman

Francisco Duarte

HAYNE FOX BOWMAN & DUARTE

425-451-1995
www.DUI *defense*.com

BarNews

Published by the

WASHINGTON STATE BAR ASSOCIATION
2101 Fourth Ave., Ste. 400
Seattle, WA 98121-2330

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 L. 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; amyo@wsba.org

Clare Cox
Desktop Publishing Support
206-727-8279; clarec@wsba.org

Communications Department e-mail:
comm@wsba.org

Washington State Bar News (ISSN 886-5213) is published monthly by the Washington State Bar Association, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330, and mailed periodicals postage paid in Seattle, WA. $9.13 of a regular member's dues is used for a one-year subscription. The annual subscription rate for inactive members is $15. Nonmember subscription rate is $24 a year. Washington residents add 8.8% sales tax.

Postmaster: Send changes of address to:
Washington State Bar News
2101 Fourth Avenue, Suite 400
Seattle, WA 98121-2330

Printed on recycled paper

Advertising

Display: Contact Jack Young at 206-727-8260 or jacky@wsba.org.

Announcements: For WSBA members only. Contact Jack Young at 206-727-8260 or jacky@wsba.org.

Classifieds: Advance payment required (payment may be made by credit card). Please see classified pages for rates and submission guidelines or contact Amy O'Donnell at 206-727-8213 or amyo@wsba.org.

Professionals: The boxed ads preceding classifieds; for WSBA members only. Cost: $50/inch; advance payment required (payment may be made by credit card). Contact Jack Young at 206-727-8260 or jacky@wsba.org.

Deadline: Copy must be received (not postmarked) by the first of each month for the issue following. No cancellations will be accepted after the deadline. Please submit typed copy with check (payable to WSBA) or credit-card information to:

Bar News, 2101 Fourth Avenue, Suite 400, Seattle, WA 98121-2330.
No phone orders, please.

WSBA Board of Governors

Dale L. Carlisle, *President*
J. Richard Manning, *President-elect*
Kenneth H. Davidson, *First District*
Jon E. Ostlund, *Second District*
Stephen J. Henderson, *Third District*
Robert M. Boggs, *Fourth District*
William D. Hyslop, *Fifth District*
S. Brooke Taylor, *Sixth District*
Carl J. Carlson, *Seventh-Central District*
Lucy Isaki, *Seventh-West District*
Jenny A. Durkan, *Seventh-East District*
Victoria L. Vreeland, *Eighth District*
Bryce H. Dille, *Ninth District*
Zulema Hinojos-Fall, *At-large*
David W. Savage, *At-large*
Paul R. Lehto, *At-large representing WYLD*

Editorial Advisory Board

Paula C. Littlewood, *Chair*
Hari Alipuria, *Ninth District*
Theodore W. Armbruster, *Second District*
Hugh K. Birgenheier, *Sixth District*
Danshera Cords, *Ninth District*
Bradford A. DaPont, *Second District*
Kelly Ann Delaat-Maher, *Eighth District*
Judith A. Endejan, *Seventh-Central District*
William J. Flynn, *Fourth District*
Kirsten W. Foster, *First District*
Michelle Gonzalez, *Seventh-Central District*
Don M. Gulliford, *Eighth District*
Stephen L. Henley, *Seventh-East District*
James H. Hopkins, *First District*
Karena K. Kirkendoll, *Sixth District*
Joan H. Lukasik, *First District*
Richard A. Paroutaud, *Third District*
David H. Rorden, *Third District*
Margaret M. Smith, *Seventh-East District*
Jeffrey A. Smyth, *Eighth District*
William R. Sullivan, *Second District*
Melissa O'Loughlin White, *Seventh-Central District*

WSBA Contacts

WSBA SERVICE CENTER
800-945-WSBA / 206-443-WSBA / e-mail: questions@wsba.org
- General inquiries
- Address changes
- Current WSBA CLE seminars and CLE products (information or seminar registration)
- MCLE credits and course accreditation
- Licensing
- Office of Disciplinary Counsel (complaints about lawyers)
- Order placement for all WSBA products (inquiries about pending orders 206-733-5918)

WSBA fax 206-727-8320

Web site & *Bar News* online www.wsba.org

Admissions 206-727-8209

Ethics line (for lawyers only) 206-727-8284

Jobline (recording) 206-727-8261

Lawyer Services (for lawyers only) 206-727-8268
- Voluntary fee arbitration
- Mediation
- Lawyers' Assistance Program
- Law Office Management Assistance Program

The mission of the Washington State Bar Association is to promote justice and serve its members and the public.

Chemnick, Moen & Greenstreet

We work as a team on complex medical negligence and drug liability claims.

- *Pat Greenstreet is an attorney who is also a pediatric nurse.*
- *Paul Chemnick and Gene Moen have more than 50 years' combined experience in representing plaintiffs in medical negligence and other complex injury and death claims.*

We presently limit our caseload to medical negligence and drug liability claims. Many of our clients come to us through referrals and association with attorneys throughout the state.

Examples of cases we have handled recently include:

- Anesthesia negligence during back surgery, resulting in brain damage
- Obstetrical negligence, resulting in brain damage to children
- Delay in diagnosis and treatment of cancer, including breast, ovarian, lymphoma, Hodgkin's, colon, lung, and cervical cancers
- Misdiagnosis in emergency room of cardiac ischemia, resulting in death
- Delay in diagnosing deep vein thrombosis, resulting in permanent disability
- Various drug liability product claims involving damage to liver and heart, pulmonary hypertension, and psychoses
- Delay in diagnosing cardiac condition, resulting in heart attack and disability
- Negligence in epidural anesthesia, resulting in nerve damage and chronic pain
- Delay in treating eye injury, resulting in loss of vision
- Negligent handling of intubation during surgery, resulting in anoxia and death
- Negligence in intensive care monitoring of cardiac surgery patient, resulting in complications and death
- Telephone triage negligence, resulting in patient death
- Negligent emergency room handling of pneumonia, resulting in death
- Negligent positioning during surgery, resulting in nerve damage and chronic pain
- Failure to diagnose pulmonary emboli, resulting in death

CM&G

450 Market Place Two
2001 Western Ave
Seattle, WA 98121
(206) 443-8600
Fax: (206) 443-6904
email: cmg@cmglaw.com

Responses to Glass-Ceiling Issue

Editor:

In the April edition of *Bar News* (Letters, p. 7) Arthur D. McGarry challenged some of the assumptions made in Lisa M. Stone's article titled "The Glass-Ceiling Survey." I am writing to challenge what I see as Ms. Stone's most problematic assumption.

Ms. Stone stated that "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." She also stated that women's increased presence in private firms could "spur further improvement in their professional status, financial security, and sense of personal satisfaction and achievement."

The assumption made is that high-level, lucrative work, professional status, and financial security lead to personal satisfaction. I suggest that neither the pursuit nor the achievement of status and money will lead to personal satisfaction. I am suggesting a different hypothesis: personal satisfaction cannot be obtained until the pursuit of it is abandoned. Begin by totally abandoning the desire for status and money.

Bruce Finlay
Shelton

Editor:

With horrified fascination I read Mr. Arthur McGarry's recent letter to the editor. Several thoughts came to mind but were quickly censored as rude and unprofessional. However, Mr. McGarry raised some interesting issues related to balancing work and family life as well as the drive for success and meaningful work versus full-blown workaholism.

Assuming Mr. McGarry believes it is valuable for the human race to continue, who should bear the children? My impression is that Mr. McGarry believes women attorneys should either choose to not have children, or else face the glass ceiling. It doesn't seem to bother him that men are not forced into such a position.

In fact, Mr. McGarry notes that highly successful male attorneys often have as many as four wives. May I conjecture that the duly noted wives were taking care of the home and the children so that these men were free to work incredibly long hours? It reminds me of a comment innocently made to me by a male friend in law school. Frustrated by the heavy demands of school as well as daily household tasks, he said, "I need a wife." Cynically, I replied, "So do I." Unfortunately for most women, this is not an option.

An excellent recent article in *Bar News* concerned workaholism. As a former mental health professional I learned that workaholism is the most highly socially sanctioned of the addictions, if not the only one. Yet it takes a terrible toll on physical and mental health and family life. In addition to losing spouses (the successful workers in Mr. McGarry's letter had a series of wives), there is research indicating that workaholism more adversely affects children than any other addiction manifested by their parents.

Mr. McGarry's final paragraph stating that women who are discriminated against can file lawsuits on a case-by-case basis struck me as the last blow. I could laugh, or scream, or perhaps both. From my experience, gender discrimination is ram-

pant and often insidious. After all, have you ever heard complaints about an "old girls' network"? I don't think so. From a legal and historical perspective, when the founding fathers of the Constitution wrote that all men are created equal, they meant only white landowning men. It really hasn't been that long since women and minorities gained the right to vote.

To say the least, Mr. McGarry's letter was thought-provoking.

Bambi Lin Litchman
Tacoma

Editor Inspires Controversy

Editor:

What a diversity of views!

On page 24 of the April issue, authors Miller and Bernbaum start off with "September 11 was a major failure of American efforts to protect the country from foreign terrorists." On page 15, you (Editor Panitch) castigate President Bush, who, when addressing some troops and referring to the war on terrorism as a "crucible," said, "If you're not with us, you're against us."

I cannot agree with you, as I don't think being anti-terrorist is being anti-American.

James A. VanderStoep
Chehalis

Editor:

I thought *Bar News* was a more or less professional magazine for the legal profession in Washington. But find of late, under the leadership of Mr. Panitch, that it's the political mouthpiece for the alliance of certain trial-lawyer groups with the National Democratic Party. Since we are now reduced to political hyperbole, one diatribe deserves another.

In good trial-lawyer fashion, without much regard for historical accuracy, Mr. Panitch sets up one straw man after another to make his case that the Bush administration is fostering policies that are "legal vampires waiting for troubled times" to "[mess] with our principles of due process, such as warrant-based arrest, lawyer-client confidentiality, [and] humane treatment of prisoners." How better to demonize your political opponents than setting them up as vampires and inhumane tormentors of prisoners? Does Mr. Panitch have some evidence that these nefarious crimes are being committed by the Bush administration, or are these serious charges simply made up?

Panitch Myth #1: The Florida election. This is transparently the most egregious of his falsehoods. Candidate Gore lost by "deferring to legal process" (Panitch's emphasis) while the Bush camp "never deferred, never conceded and...never compromised on anything." A "strategy...obviously successful...[to create] an administration that seeks to create a new paradigm...to transfer [these tactics] to the world at large." Absolute rubbish! Both sides had plenty of lawyers jockeying for advantage. If you will remember, it was Gore who at first conceded the race, and then withdrew the concession on the advice of William Daly, his campaign manager who devised a plan of Chicago-style politics of legally attacking the election results in only selected precincts where their strategists thought they would have the best chance of overturning the election. We can debate this one forever, but only an extreme partisan would propose that the Gore side deferred to legal pro-

cess while the Bush side pursued uncompromising hardball that somehow has become a "new paradigm" for foreign policy.

Panitch Myth #2: Military tribunals. The Bush administration "announced... secret military tribunals...to try foreign nationals accused of being terrorists," but was frustrated by young government attorneys who "actually know — and care — about what [the Constitution] says."[1] Is this simply a total fabrication, or does Panitch actually have some source, no matter how weak, to support such a silly assertion? It was Secretary of Defense Donald Rumsfeld who made public on March 22 the 16-page rule book that implemented President Bush's November 13 order authorizing the tribunals for noncitizens accused of war crimes and related offenses. These rules were drafted by an authoritative body comprised of Secretary Rumsfeld's staff and an *ad hoc* committee of well-known lawyers, including former Federal Communications Commission Chairman Newton Minow. Their measure for coming up with these rules: what would be fair if our guys were the prisoners? Senator Patrick Leahy (D-Vt.) has said that he is pleased with the product. President Bush employed a deliberative process to come up with these rules, and Panitch creates the fantasy that only idealistic young lawyers have somehow saved our civilization.

We might go on, but I've made my point. Mr. Panitch in the past has made much of the low esteem in which lawyers (particularly plaintiff lawyers) are held, even to the point of criticizing defense lawyers for not vigorously voicing their opposition to private jokes about plaintiff lawyers. If Mr. Panitch's writings and reasoning are the new paradigm (to use his phrase) of lawyer mentality, he deserves to be a joke.

Mr. Panitch might dismiss this letter of complaint as part of the vast right-wing conspiracy. However, I voted for Bill Clinton (twice), and simply propose to *Bar News* that extreme political partisanship is not appropriate in your publication.

Finally, since President Bush's approval ratings continue to exceed 80 percent, while trial lawyers struggle to maintain any margin over used-car salesmen, Mr. Panitch might want to look at the example of Mr. Bush as something to be emulated rather than attacked. One characteristic of Mr. Bush is that he is plainspoken, direct, and easy to understand. This reputation for forthrightness that Mr. Bush enjoys was once enjoyed by lawyers, but no more. An example of his directness that the American people appreciate is this quote from March 21, 2002:

> The evil ones didn't know who they were attacking. They thought we would ...roll over. They thought we were so materialistic and self-absorbed that we wouldn't respond. They probably thought we were going to sue them.

I don't care about the politics of Mr. Panitch, but I have been a member of the Washington State Bar Association for 33 years and am frankly dismayed with the political partisanship of *Bar News*. It reflects badly on the profession, and particularly on all the individual lawyers and law firms mentioned in your pages. Please, if this is to be your policy, next time put in a right-wing nut as editor so I can write more

letters and restore my reputation as a good liberal.

John Bundy
Seattle

1. It's not clear that Mr. Panitch knows what the Constitution says. He states, for example, that "Article 6 of (the Constitution) creates a system of courts and judges."

Editor:

Bar News Editor Mark Panitch "doth protest too much" in his April 2002 column. He states that he "would never suggest that one administration's political policies are superior or inferior. That would be straying too far from the mandate of this magazine to cover legal matters." In fact, his statement is only half right. He is expressing his opinion on his political preferences, something he does with some frequency. Indeed, by my count this is the third "Two Cents' Worth" written by Mr. Panitch that attacks Bush administration policies for one reason or another. Mr. Panitch correctly acknowledges that it is wrong for him to do so in this magazine, but it doesn't stop him from doing it anyway.

First, he mischaracterizes President Bush's comments during his recent visit to Alaska. When the president said, "If you are not with us, you're against us," he was not talking about domestic or legal issues. Instead, he was referring to our relations with other nations. Neither the president nor his administration has ever suggested that people inside the United States cannot dissent from the government's policies on terrorism, or any other issue. Instead, he is simply restating a policy supported by the overwhelming majority of Americans — that foreign governments that sponsor or shield terrorists will be treated just like the terrorists themselves.

Second, he repeats as received truth Jeffrey Toobin's conclusions about the Florida recount and *Bush v. Gore*, without acknowledging that there are alternative views. In the interests of full disclosure, I was a small part of the Bush Florida recount team, so perhaps I'm biased. However, that also means I was present for some of the events recounted in Toobin's book and repeated in Mr. Panitch's piece. From my perspective, Mr. Panitch's description (and Toobin's book) is factually inaccurate. Vice-president Gore was anything but deferential to the legal process. Instead, the Gore campaign engaged in every possible tactic to win, at virtually any cost. Toobin is an entertaining writer, but if you want to get an unbiased and scholarly view of what happened, I submit that Judge Posner's book *Breaking the Deadlock* is a better read. And by the way, virtually every post-election recount by various news organizations found that President Bush did in fact win Florida. See, "Florida Recounts Would Have Favored Bush," *Washington Post*.

Finally, Mr. Panitch attacks the administration, implying that it is looking to curtail civil liberties in the name of the war on terrorism, with the proposal for military tribunals as the main example. Of course, events have shown Mr. Panitch to be dead wrong on this issue as well. The draft rules for military tribunals make it clear that defendants will have virtually all of the due-process guarantees that we see in civilian courts. These include a right to counsel, a right to remain silent without any adverse presumption being drawn as a result, a presumption of innocence, and that guilt must be proved beyond a reasonable doubt.

I have no objection to Mr. Panitch, or anyone else, setting themselves up in opposition to the president or his policies, war or no war. He is entitled to his opinion. However, I do object to his expressing his political opinions in articles on the Editor's Page in a publication paid for with my mandatory Bar dues, particularly when so much of the article is based on mistakes of fact or sheer conjecture.

Vincent T. Lombardi
Seattle

Editor:

In the past 46 years I have often thought about writing to *Bar News*, relative to the content that is published on behalf of the Washington State Bar Association.

Looking at the March 2002 issue I am really interested to know why the editor thinks an article on "Federal Protection for Vessel Hull Designs" is worthy of statewide dissemination as something of general interest to the Bar Association and lawyers comprising the Washington State Bar. Washington State *Bar News* is an excellent medium by which to inform lawyers throughout the state of new laws, issues,

and matters that are substantively and procedurally important to the Bar. I cannot help but think that there must be numerous other subjects worthy of note that could have been included.

Unfortunately, when articles like this appear in a statewide journal of general applicability to all lawyers in the state, I must confess that *Bar News* joins the ranks of other unread periodicals that cross my desk. I can appreciate the fact that articles may be hard to come by, but please — give us a break.

Again, I am not attacking the author, but I am challenging the judgment of the editor in selecting this type of article for the statewide Bar journal.

Evan E. Inslee
Bellevue

Three Cheers for *Bar News*

Editor:

I just finished reading the April *Bar News* and wanted to send in three cheers:

1. I am really sorry I missed the Goldmark Award Luncheon on February 21 and hearing Judge Dwyer's daughter read his (posthumous) acceptance speech for the Legal Foundation's Award. (I was tied up in a settlement conference and could not get away — *pro bono* as it was!) His remarks were right on; I get immeasurable rewards for my *pro bono* work just from the gratitude of the clients served.

2. Mark Panitch, you are also right on with your warnings about the current administration's direction(s). Some may castigate you because they believe those remarks are beyond the scope of "our" publication (that would not be new, would it?), but we are lawyers, after all, and you write on issues that *do* or at least *should* concern us more than the average citizen. Keep up the good work!

3. And Jeff Tolman ("Modest Dreams," p. 48), you write (and have written) the way I frequently think. I read your articles with my head constantly nodding agreement! Yes, I often think about the fact that I am not a "captain of industry," that I am not a renowned and respected Supreme Court justice, that I have not gotten a "jillion dollar verdict" and been inducted into the (what is it? sanctum sanctorum Circle of Advocates, or something like that). But you know what? I've got a plethora of happy, pleased clients who would go miles for me because they know I did for them, and that's worth one heckuva lot more than those other material items! Thanks again for the reminder!

Ron Mattson
Renton

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

NOW SHIPPING!

Revised Code of Washington

2001 Supplement

$40.00 plus 8% sales tax

Don't have the 2000 edition of the RCW?
Order it now for $210.00
Includes both the 2001 Supplement and a complimentary RCW CD!*

Call us today toll-free: 1-866-650-6369
[In Olympia, call 352-5769]

We'll gladly take your credit card order over the phone...or fax this form to: 360-357-7219

If you prefer to pay by check, send your order to: Office of the Code Reviser, Order Dept, PO Box 40552, Olympia WA 98504

☐ Check for total amount enclosed.
Make checks payable to the Office of the Code Reviser

☐ Visa
☐ Master Card
Card number

Month Year
Expiration Date

Ship ____RCW Supplements to:

*** CD will ship as soon as it becomes available**

Name of Card Holder [required for all charge orders]

First Name Last

Company Fl/Suite/Department

Address Bldg/Apt

City St Zip

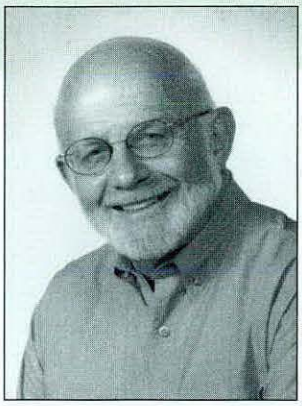
[ ] -
Daytime Phone email address

Tax & shipping Information:

Sales tax is 8% of total amount

You are not required to pay sales tax if:
1. Your order is being sent out of state
2. You are a federal agency.

No shipping or handling charges



Professionalism

by Dale L. Carlisle
WSBA President

Last July, the Board of Governors adopted an aspirational Creed of Professionalism for Washington lawyers. During the development of the creed, led by 2000-2001 Professionalism Committee Chair Harry McCarthy, the committee obtained input from hundreds of lawyers and judges around the state. Under the leadership of this year's chair, former Board of Governors member Marijean Moschetto, the Professionalism Committee is focusing on disseminating the creed as broadly as possible. Our goal is to have a copy of the creed in each courtroom in the state, and many county bar associations are participating by holding ceremonies in which plaques are presented to local judges.

The meaning of professionalism is best defined by reviewing the creed (set forth below), which summarizes the many elements of a law practice that demonstrate the traits we should all strive to fulfill. Whether we are trial lawyers or office lawyers, "elevator" lawyers or suburban individual practitioners, or lawyers serving one client or many, these principles apply to each of us every day.

Client-oriented results should drive our training and be the goal of new lawyers as well as experienced ones.

One of my partners recently noted that he believes lawyers are not achieving these goals. We discussed this issue and why it is elusive. We both believe that the competitive/adversarial "win at all costs" approach in many business and litigation settings is counterproductive to reaching the objectives of professionalism.

I believe the lawyers of Washington and elsewhere can best represent their clients and remain collegial and professional by constantly addressing what is best for clients, and not worrying about their own need to appear adversarial and contentious. Client-oriented results should drive our train-

Washington State Bar Association Creed of Professionalism

As a proud member of the legal profession practicing in the state of Washington, I endorse the following principles of civil professional conduct, intended to inspire and guide lawyers in the practice of law:

- In my dealings with lawyers, parties, witnesses, members of the bench, and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness.
- My word is my bond in my dealings with the court, with fellow counsel and with others.
- I will endeavor to resolve differences through cooperation and negotiation, giving due consideration to alternative dispute resolution.
- I will honor appointments, commitments and case schedules, and be timely in all my communications.
- I will design the timing, manner of service, and scheduling of hearings only for proper purposes, and never for the objective of oppressing or inconveniencing my opponent.
- I will conduct myself professionally during depositions, negotiations, and any other interaction with opposing counsel as if I were in the presence of a judge.
- I will be forthright and honest in my dealings with the court, opposing counsel and others.
- I will be respectful of the court, the legal profession and the litigation process in my attire and in my demeanor.
- As an officer of the court, as an advocate and as a lawyer, I will uphold the honor and dignity of the court and of the profession of law. I will strive always to instill and encourage a respectful attitude toward the courts, the litigation process and the legal profession.

This creed is a statement of professional aspiration adopted by the Washington State Bar Association Board of Governors on July 27, 2001, and does not supplant or modify the Washington Rules of Professional Conduct.

ing and be the goal of new lawyers as well as experienced ones. I see too many of our representations turning into ego contests between lawyers. This often conflicts with quietly pursuing a client's objectives and maintaining good relationships with opposing counsel and all participants in the matter. An effort to turn a conflict into a "good guy/bad guy" dispute frequently means a prolonged and expensive experience for a client, which in some cases is unnecessary. Beginning each matter with an effort to honor the principles set forth in the creed is a good starting point.

The adversarial approach is still the heart of our legal system. However, the use of it does not require that we pursue every representation as a war. An effort to use a results-oriented approach and act civilly usually shows the best aspect of our profession, and often produces the best results for both lawyers and clients. Applying the principles of the creed on a daily basis will implement a professionalism program of benefit to lawyers and clients statewide.

To order the Creed of Professionalism, either unframed or mounted on a mahogany-finish wooden plaque, please refer to the order form on page 42 of this issue.

Speak Out!

Wanted: Lawyers to volunteer to speak to schools and community groups on a variety of topics.
For information, call Amy O'Donnell at the WSBA Speakers Bureau:
206-727-8213

From "Crime and Punishment" to a Continuum of Professional Conduct Services

by Jan Michels
WSBA Executive Director

In 1992, the WSBA's response to grievances against lawyers was to wait for allegations of misconduct, then investigate and sanction the conduct: *crime and punishment.* That response was often sluggish, leaving respondent lawyers, victims of misconduct, and insurance carriers hanging for years without resolution.

Now the WSBA has a continuum of professional conduct services. Early this month the 1994 Joint Task Force on Lawyer Discipline and those instrumental in implementing the continuum of services the task force recommended will gather to celebrate the achievement of their vision. In 2002, the WSBA's response to grievances is to educate, train, prevent, resolve, restore, offer alternatives, heal, divert and, where appropriate and public protection is at stake, sanction. And, it's done in a timely and responsive manner.

In 2002, the WSBA's response to grievances is to educate, train, prevent, resolve, restore, offer alternatives, heal, divert and, where appropriate and public protection is at stake, sanction.

To Educate

The WSBA has created a new professionalism counsel position. The responsibility of this position is to oversee member education concerning ethical conduct and professionalism. Barrie Althoff, former WSBA chief disciplinary counsel, has moved into this position to continue lectures, CLE seminars and writings on professionalism and ethics.

To Train

The WSBA Law Office Management Assistance Program (LOMAP) is aimed at training members to manage the business side of the profession. Labs, demonstrations, CLE seminars and consultations often avert potential misconduct regarding performance diligence, conflicts, trust-account withdrawals, file management and fee agreements. Many other CLE programs teach members about technology, business practices, ethics and client relations.

To Prevent

The WSBA has an ethics call-in line (206-727-8284 or 800-945-WSBA, ext. 8284) available to lawyers interested in discussing the ethical implications of prospective behavior. This service was implemented to help lawyers think through ethical dilemmas and prevent possible misconduct.

To Resolve

The WSBA offers an ombudsman-type service. When clients call the WSBA concerning the conduct of their lawyers in matters of diligence, communication or file disputes, the WSBA's goal is to resolve a potential conflict without a grievance by advising both clients and lawyers of alternative actions, and offering assistance with follow-through.

To Restore

All active members contribute to the Lawyers' Fund for Client Protection, which restores client financial losses and assures persons financially harmed by lawyer misconduct that the WSBA and other lawyers care about them. This program restores the public's confidence in the profession.

To Offer Alternatives

The WSBA offers both mediation and arbitration programs for disputes regarding lawyer fees or other aspects of lawyer-client or interprofessional services agreements. Results from participating in these programs may actually be more satisfying for the client, while allowing the lawyer to avoid disciplinary proceedings.

To Heal

The WSBA understands that there may be times in members' lives when personal, emotional, addictive or financial problems may interfere with their responsible practice of law. The Lawyers' Assistance Program (LAP) provides confidential assistance to lawyers to help them address their problems. This service may also be helpful to lawyers apart from the practice of law.

To Divert

For less serious misconduct that may be attributed to the need for further education, service or intervention, diversion

may be offered. The diversion alternative seeks remediation rather than discipline.

To Sanction

After opportunities for education, training and diversion have been offered, if a lawyer violates the ethics rules and the matter cannot be otherwise resolved, or if public protection is at risk, misconduct is prosecuted and sanctions are sought. Another improvement based on the 1994 task force report is to separate, organizationally, adjudication of grievances (Disciplinary Board) from prosecution (disciplinary counsel) to ensure the independence and objectivity of the judiciary.

Implementing this continuum of services took successive boards' leadership, increased resources supported by members, and a strong commitment by disciplinary counsel. The payoff for these efforts is a starship array of professional conduct services. No one wants bad lawyers practicing law, and lawyers should receive help and support when they need it.

Completing the continuum of professional conduct services was capped by the Discipline 2000 Task Force rewrite of the Rules of Lawyer Discipline as the new proposed Rules for the Enforcement of Lawyer Conduct (ELC). These procedural rules implement the enforcement of the Rules of Professional Conduct. The rewrite makes them easy to read and follow. (Note: the ELCs are published for member review and comment. See the WSBA Web site at www.wsba.org/2001/d2k/report.htm and click on ELC Recommendations.) We want our professional conduct system to be supportive and member-friendly, where possible, realizing that at times the greatest friend the WSBA can be is to remove the few individuals who engage in egregious misconduct in the practice of law.

Thank you to the many who participated in implementing this vision.

Thanks go to...

Disciplinary counsel, past and present, who balance the public's interest with fierce loyalty to the best of their profession;

Lee Ripley, who originally recognized the shortcomings of the WSBA's disciplinary system;

Justice James Anderson and WSBA Past-president **Paul Stritmatter**, co-chairs of the 1994 Joint Task Force on Lawyer Discipline that mapped out service improvements, and the task force members for their vision: **Wayne Blair**, **Steven Burgess**, **J. Donald Curran**, **Judge Anne Ellington**, **Paul Fitzpatrick**, **Martha Gross**, **Justice Richard Guy**, **Anita Kernie**, **Judge Dean Lum**, **Christina Meserve**, **Christopher Pence**, **Jan Eric Peterson**, **Judge John Skimas**, **Justice Charles Smith** and **Lois Webb**;

WSBA past-presidents **Judge Ronald Gould**, **Judge Edward Shea**, **Justice Tom Chambers**, **Mary Fairhurst**, **Wayne Blair**, **Richard Eymann** and **Jan Eric Peterson** for their steadfast focus on a continuum of professional conduct services and their willingness to fund them;

Barrie Althoff, who upgraded the WSBA's lawyer conduct services and implemented the educational components;

Barbara Harper, who saw the confidential LAP, LOMAP and ADR programs as part of the circle of lawyer conduct services, and worked to make them relevant and effective; and

Joy McLean, who oversaw the elimination of the investigation backlog and now tackles the record high number of public proceedings that resulted.

Further information about the WSBA Office of Disciplinary Counsel may be found at www.wsba.org/discipline.htm.

Proud to Be a Lawyer

The power and risk of a legal education is that it sharpens you, and in the rigor and sacrifice it calls for, it results in an estrangement between you and yourself.

by Randolph I. Gordon

Seattle University School of Law Commencement Address
December 22, 2001

"Lawyers' idea of listening is waiting for their turn to speak." I claim no exception for myself. The class of 2001 will forever be linked to these challenging days and times. I have not struggled to find words to share, but to find a pathway through those words which have jostled with one another to find expression. As the expected duration of my comments is about six semesters, I have arranged to have law degrees conferred on everyone in the room. There is first, however, the small matter of tuition.

I hope I may be forgiven if, given these times, I speak to you earnestly, from the heart, without levity, under this precedent: that the one bottle of champagne that is never consumed is that smashed upon the bow of the ship as it is being launched. Things were so clear when your singular purpose was to complete that which you started, but now it is foggy. Part of the problem is not of your own making: shipbuilding is different than navigation. While law school has trained you for command, it has not done such a good job of giving you a mission or a moral compass. These *you* must provide. It has given you the tools of a carpenter, but not told you what to build.

Where does a sense of justice begin? In your heart; in the values imparted to you by your friends, families and community; and in your conscience. It is, after all, the touchstone of individual conscience that is at the heart of the Rules of Professional Conduct that guide our profession. Lawyers provide the justice. The power and risk of a legal education is that it sharpens you, and in the rigor and sacrifice it calls for, it results in an estrangement between you and yourself. Just as the foxholes of World War I can still be seen as scars on the fields of France, graduation from law school becomes a demarcation in your lives: In the Year of our Law School One.

Some of you have gone through law school at great personal and financial sacrifice — placing personal lives, relationships and plans on hold. The time has come for respiration, for inspiration.

I speak to you of three guiding principles, or buoys, which mark out the trackless, fogbound seas. There are three astonishing mysteries of human existence which can serve as markers that guide you to the deep channels of lives well lived that are a credit to our profession, our community and our humanity.

The first of these is the principle of *simultaneity*, the knowledge that as we celebrate today, there are others who are suffering. For us this is a day of celebration — for others a day of mourning. Today is for us a day of peace — for others a day of war. In the Taoist symbol of Yin and Yang, we see in the bright heart of celebration the shadow of despair; we eat while others starve. According to United Nations Secretary General Kofi Annan, the average American consumes 260 pounds of meat annually compared to 6.5 pounds for the average Bangladeshi. Do you feel you are 40 times more worthy? What makes us worthy to receive this gift and opportunity? Nothing.

This is the simple logic of saying grace. People try to isolate themselves from this knowledge — not to notice that by 2050, eight billion of the 9.5 billion people on this planet will be in the developing world. But let's consider our world today. In the developing world, three-fifths of its people lack safe sewers, one-third safe water; 20 percent lack access to any modern medical services at all. They aspire to the abuse we receive from HMOs.

This is a message of knowledge. This burden must be with you as long as there is injustice and hunger in the world. I cannot spare you this knowledge. The question is not how can you live knowing this, it is how can you live *not* knowing this?

The second guiding principle or buoy in your life's voyage is that of our essential *connectedness* to our fellow man. This is the basis of our duty. This is the explanation of the laudable ritual of the Passover seder, where for each of the plagues visited upon Pharaoh, a drop of wine is removed from the glass. Our pleasures must be diminished by our essential connectedness to the despairs of humankind. So it is that one of the Five Pillars of Islam is Zakat, the giving to the needy; in Jewish tradition it is Tzedakim. It is what John Donne understood when he wrote: "No man is an island entire to itself....Any man's death diminishes me, because I am involved in

mankind, and therefore never send to know for whom the bell tolls; it tolls for thee."[1]

If you wear shoes, sleep under a roof, have eaten in the last eight hours and have the prospect of a meal in the next eight hours, you are one of the wealthiest people on the planet. As one of the one percent who are lawyers — educated and trained in the switches and levers of power, you are among the most powerful people on earth. Who shall do the work? If not you, who? Shall we call upon migrant laborers, illegal immigrants, refugees? Shall we leave it to the Taliban, the al-Qaida, the farmers of the lowlands in Bangladesh periodically threatened by flood? The foundation of all ethics is that one's moral duty is commensurate with one's power. So, what then shall I expect of you, the most powerful people in the world — little or much?

The third principle is that of *choice and renewal*, the fact that with every moment of life we are blessed with a rebirth of our choice as to how to live that moment and this moment. Life is many moments; this is one of them — one of the best, pregnant with hope and possibility. Pierre Teilhard de Chardin, the Jesuit philosopher and scientist, said: "We are not human beings having a spiritual experience, we are spiritual beings having a human experience." This is a message of hope. If you heed these principles, these buoys, you will head out to the deep seas and do the work of humanity.

> There is a tide in the affairs of men
> Which taken at the flood leads on to fortune;
> Omitted, all the voyage of their life
> Is bound in shallows and in miseries.
> On such a full sea are we now afloat,
> And we must take the current when it serves,
> Or lose our ventures.[2]

There is also a siren leading you to the shallows: compound interest. *Radix malorum est cupitas*; the root of all evil is avarice. Do not let your interest in interest blind you. Our creature comforts and pursuit of things of this world blind us to the true experience that flows from our knowledge of the suffering of others, our duty as human beings arising from our essential connectedness, our power and our choice.

Some have dedicated their lives to the accumulation of wealth. Ask the greater community, your friends and family whether they would prefer you to line your own pockets and walk around chortling about how you are self-made men and women, or to contribute to the community? For people who choose the former, let these words appear on their tombstones: "They accumulated wealth; they died with more than they could use; they ate to excess while those around them starved." What would we think of a human being who said, "My life's purpose is the maximization of profit"? It is despicable. Yet we tolerate this from some of our corporate citizens. What does this lead to? Layoffs on Christmas Eve to boost profits to shareholders. It is written in Mark 8: 35-36: "For whosoever will save his life shall lose it; but whosoever shall lose his life...shall save it. For what shall it profit a man, if he shall gain the whole world, and lose his own soul."

Law is not only hard work, it is "heart" work. The Koyukon peoples of North America tell us of Raven, the trickster who changed rivers from flowing in different directions on opposite banks to flowing one direction because it was not right that people should be able to go where they wanted to go without paddling.

Do you not know where your work is? It is estimated that the additional cost of

achieving and maintaining universal access to basic education and health care, reproductive health care, adequate food, clean water and safe sewers is less than four percent of the combined wealth of the 225 richest people in the world. The richest three people in the world have more wealth than the 48 poorest nations.

I tell you this: cynicism is a dead end. It neither inspires nor commands respect, nor does it call upon our inner resources to do better.

Last year I spoke of moments of reflection, of taking account of ourselves. But the world is changed. We do not have time for reflection; we need action. The sense of the Hebrew *tikun olam*, healing the world, speaks to this. We live in a world where there is work to be done. We need you to do some of it.

Randy Gordon is a member of the adjunct faculty at Seattle University, teaching products liability and remedies. He received WSTLA's Public Justice Award in 1998, Professionalism Award in 2001; and WSBA's President's Award in 2001. He presently serves on the WSTLA board.

NOTES

1. John Donne, *Devotions upon Emergent Occasions*, Meditation 17.
2. William Shakespeare, *Julius Caesar*, Act IV, Sc. iii.

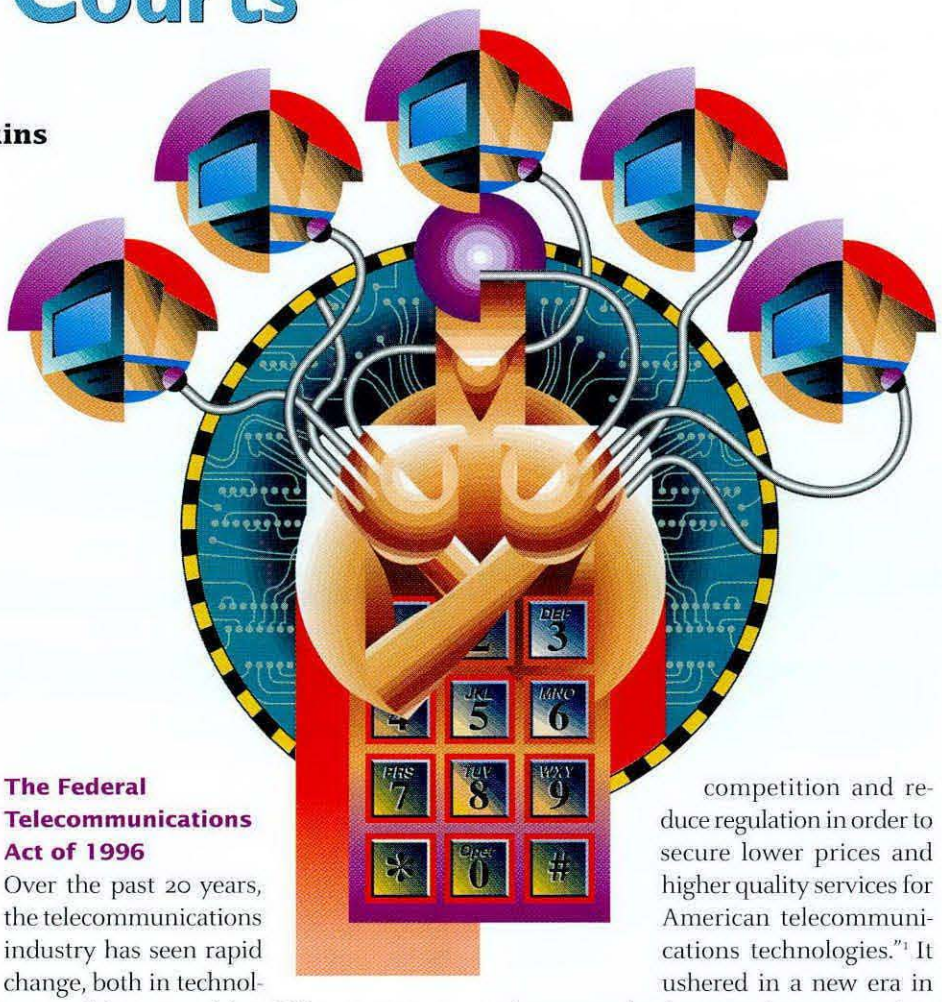
The Federal Telecommunications Act of 1996:

Section 253, Cooperative Federalism, and the Role of the Federal Courts

by David Goodnight and Roy Adkins

Federal courts have been instrumental in advancing the cooperative federalism envisioned by Congress in the passage of the Federal Telecommunications Act of 1996. However, many municipal governments have clung to comprehensive regulatory roles of a prior era, roles no longer permitted by the act. In particular, they have attempted to condition carriers' access to the rights-of-way on carriers' agreements to submit to various pre-act conditions, including gross-receipts fees and broad municipal regulation. The federal courts have served a vital role in enforcing the purposes of the act and restraining the sometimes provincial efforts of local governments.

In this article, we will briefly discuss the act, its central purpose, and the constraints it places on local government. We will then discuss a number of new developments in federal court decisions and, in particular, the landmark 9th Circuit decision *City of Auburn v. Qwest*, 260 F.3rd 1160 (9th Cir. 2001) (petition for *certiorari* pending). Finally, we will highlight the important role the 9th Circuit and other federal courts have played in advancing the purposes of the act.



The Federal Telecommunications Act of 1996

Over the past 20 years, the telecommunications industry has seen rapid change, both in technology and in competition. Where customers previously were restricted to a single monopoly provider, they may now choose among any of several companies and any number of technologies, including wireless, fiber-optics, cable Internet, and telephone and Internet through existing telephone lines. In the act, Congress quite deliberately reshaped the industry's landscape by removing barriers to entry and ending local monopolies. In doing so, Congress carved out a very limited, circumscribed role for local municipal government.

The act is titled "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications technologies."[1] It ushered in a new era in telecommunications service — one that relies on a competitive market model, rather than traditional line-of-business restrictions, to encourage "rapid deployment of new telecommunications technologies" and enhance consumer access to the best possible telecommunications network.[2]

Section 253 of the act is titled "Removal of barriers to entry." Sections 253(a) and (c) provide:

> (a) In general: No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of

any entity to provide any interstate or intrastate telecommunications service. (c) State and local government authority: Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

In many instances, local governments continue to operate under form franchise or license agreements originally crafted decades before the act. Some of these agreements provide for comprehensive local regulation over telecommunications services, or include onerous fee provisions taken from cable franchise agreements or pre-act agreements. Many are holdover agreements from another era, completely out of phase with the purposes of the act.[3]

Telecommunications companies are frequently given two options: either sign the agreements as presented or remove their facilities from municipal rights-of-way. In some instances, a telecommunications company's ability to access rights-of-way (to obtain permits, to serve existing customers) is put in jeopardy. It is against this sort of backdrop that federal courts are asked, typically in declaratory judgment actions, to determine the respective rights of the parties.

Municipal Authority Under Section 253

In the past few years, two distinct lines of authority have arisen. The majority line holds that by charging fees exceeding the cities' actual costs, the cities obstruct competition and, therefore, violate the act. See *City of Auburn v. Qwest Corp.*, 247 F.3d 966, 980 (9th Cir. 2001); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp.2d 1081 (N.D. Cal. 2001); *Bell-Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp. 2d 805 (D. Md. 1999), vacated on other grounds, 212 F.3d 863 (4th Cir. 2000); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 49 F. Supp. 2d 582, 593 (N.D. Tex. 1998); *New Jersey Payphone Assoc., Inc. v. Town of West New York*, 2001 WL 242154 (D. N.J. 2001).

A second line of cases has upheld municipal fees that exceed costs in various contexts. See *TCG Detroit v. City of Dearborn*, 16 F. Supp.2d 785 (E.D. Mich. 1998); *Omnipoint Communications, Inc. v. Port Authority*, No. 99 Civ. 0060 (BJS), 1999 WL 494120 (S.D.N.Y. July 13, 1999); *BellSouth Telecomm., Inc. v. City of Orangeburg*, 522 S.E.2d 804 (S.C. 1999).

First, in the 9th Circuit this issue has now been resolved as a result of the circuit's recent *Auburn* decision. Second, based on both the act and its legislative history, fees that exceed actual costs or fail to allocate costs properly among the various competitors necessarily fail to meet either the facial requirements that municipal rights-of-way compensation be "fair and reasonable" or that it be "neutral and non-discriminatory." Third, gross-receipts fees necessarily impede and distort fair competition, and therefore fail to meet either the act's overall purpose or its specific requirements.

City of Auburn v. Qwest Corps

The most recent significant opinion regarding sections 253 (a) and (c) is the 9th Circuit's opinion in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001). There, the United States Court of Appeals for the 9th Circuit invalidated ordinances that imposed non-cost-based rights-of-way fees and other burdensome regulations on Qwest as pre-empted by section 253 of the Federal Telecommunications Act of 1996.[4] The federal district court declined to reach the section 253 claims, reasoning that they were not yet ripe. The Court of Appeals reversed, deciding these issues as a matter of law on the appellate record. See *Auburn* at 1175.

In *Auburn*, the 9th Circuit held that section 253(a):

> bars all state and local regulations that prohibit or have the 'effect of prohibiting' any company's ability to provide telecommunications service, unless the regulations fall within the statute's safe harbor provisions....

The preemption is virtually absolute and its purpose is clear — certain aspects of telecommunications regulation are uniquely the province of the federal government, and Congress has narrowly circumscribed the role of state and local gov-

ernments in this arena. *Auburn* at 1175 (emphasis added).

The 9th Circuit held that section 253(a) pre-empts "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also *that 'may...have the effect of prohibiting' the provision* of such services." *Id.* at 1175 (emphasis added) (quoting *Bell Atlantic-Maryland, Inc.*, 49 F. Supp. 2d at 814). The ordinances before the *Auburn* court included requirements that Qwest provide detailed forms and maps, disclosure of corporate records and policies, broad municipal discretion to require additional information, regulations regarding transferability of ownership, non-cost-based fees, and civil and criminal penalties. These provisions constituted a municipal attempt at broad regulation. The Court found that these terms had the effect of prohibiting the provision of telecommunications services:

(a) Non-Cost-Based Fees. The Court held that "non-tax fees charged under the franchise *agreements are not based on the costs of maintaining the right of way, as required under the Telecom Act.*" *Id.* at 1175 (emphasis added). The Court specifically invalidated ordinances imposing "non-cost-based fees," including percentage-of-revenue fees. *Id.* at 1180 & n.19 (invalidating ordinances containing percentage of revenue and non-cost application fees). Importantly, the Court's ruling extends to Qwest and other telecommunications providers. This very significant aspect of the Court's holding makes it clear that the ordinances are facially invalid, and not invalid as applied uniquely to Qwest.

(b) Unfettered discretion. The Court found that each city had improperly reserved the discretion to "grant, deny, or revoke the franchises" in violation of section 253(a). *Id.* at 1176.

(c) Written reports. The Court condemned lengthy and detailed application forms, including specified items and information requested by the city. *Id.* at 1175, 1177.

(d) Restrictions on transfer of ownership. The Court held that the ordinances improperly sought to "regulate transferability of ownership, even requiring franchisee to report to stock sales." *Id.* at 1176.

(e) Penalties. The Court found that "civil and criminal penalties," including the right to remove facilities, were unlawful. *Id.* at 1170, 1173.

(f) Mapping. The Court specifically indicated that cities may not require maps as a condition for entering a franchise agreement. *Id.* at 1176.[5]

(g) Most-favored community status. The Court invalidated provisions granting a city the best available rates and terms, or requiring free or excess capacity for the use of the city or other users. *Id.* at 1178.

The Court concluded that these features, and others not mentioned here, created a "substantial and unlawful barrier to entry" and, further, that none of these impermissible features were saved by section 253(c). *Id.* at 1176. The Court specifically noted numerous other objectionable provisions, making it clear that the aforementioned list was not intended to be comprehensive, but rather, illustrative. *Id.* at 1179. The Court rejected the city's argument that these features were somehow justified because they were related to use of rights-of-way: "This argument has the flavor of the old children's ditty, 'Oh, your ankle bone connected to your thigh bone, your thigh bone connected to your hip bone...'" *Id.* at 1179 (quoting *Dry Bones*, American spiritual derived from Ezekiel 37: 1-14).

Citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713

(1985), the Court concluded that these ordinances were pre-empted as "contrary to section 253 of the Telecom Act...." *Auburn* at 1180. The Court then reasoned that the various objectionable portions of the ordinances could not be excised without rendering the end product a "Swiss cheese regulation...." *Id.* at 1181. The Court thus invalidated all of the ordinances in their entirety and, in its ordering paragraph, remanded to the district court with instructions to grant judgment to Qwest consistent with its opinion. *Id.*

In reaching these conclusions, the Court noted that the city's argument had no limiting principle. Refusing to remand for fact finding, the Court drew a bright line, strictly limiting the role of municipal government. The Court reached these conclusions as a matter of law, focusing on the language of the ordinances and not on their impact on Qwest.

The Federal Communications Commission has also issued several opinions consistent with *Auburn*'s conclusion that non-cost-based fees are prohibited.

Other Federal Decisions

Congress enacted section 253 to eliminate local regulations that interfere with the act's stated competitive goals. Like *Auburn*, lower federal courts consistently have struck down, as pre-empted under section 253(a), local laws imposing burdensome regulations or unreasonable charges on telecommunications companies because such requirements have a prohibitory effect on the provision of telecommunications services.

For example, relying on *Auburn*, the Northern District of California granted a motion preliminarily enjoining the City of Berkeley from imposing burdensome regulations and revenue-based fees. *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp.2d 1081 (N.D. Cal. May 23, 2001). Following the 9th Circuit in *Auburn*, Judge Illston concluded that Berkeley's ordinance imposed an impermissible application and permit process; significant, non-cost-based application fees; an impermissible public-hearing requirement; and unlawful detailed informational requirements. The Court also held that the city's unfettered discretion to consider numerous open-ended criteria in granting or denying the application "impose[d] an onerous burden" and, therefore, constituted a barrier to entry under section 253(a) that was not saved under section 253(c). *Berkeley*, 146 F. Supp.2d 1081 (N.D. Cal. 2001) at *12-13.[6]

The Federal Communications Commission (FCC) has also issued several opinions consistent with *Auburn*'s conclusion that non-cost-based fees are prohibited. See Mem. Opin. & Order, *In re New England Public Communications Council Petition for Preemption*, 11 F.C.C.R. 19, 713, 19, 721-22, ¶ 20 (1996), (holding that section 253 precludes any local requirement that "substantially raises the costs and other burdens of providing services, thus deterring the entry of potential competitors"), recons. denied, 12 F.C.C.R. 5, 215 (1997); *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, ¶ 102 (1997); ("Congress intended primarily for competitive markets to determine which

entrants shall provide telecommunications services demanded by consumers, and by preempting [local regulation] under section 253 sought to ensure that State and local governments implement the 1996 act in a manner consistent with these goals.").[7]

Effect of Gross-Receipts Fees on Competition

As stated, the act repeatedly expresses Congress's intent to encourage free competition between, and rapid distribution of, the various products and technologies now evolving in the telecommunications industry.[8] This is apparent from sources as general as the name of the act: "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications technologies," and from sources as specific as sections 253(a) (forbidding local actions that may "have the effect of prohibiting" the provision of telecommunications services) and 253(c) (exempting only those fee requirements that are both "fair and reasonable" and "neutral and non-discriminatory"). Because gross-receipts fees are inherently incompatible with the recovery of a city's actual costs, they conflict with and are barred by the act.

(a) Non-Cost-Based Fees Are Pre-empted by Section 253(a)

In *Auburn*, and the related cases cited above, various courts have held that section 253(a) limits municipalities to recovery of actual costs. See, e.g., *Auburn* at 1180 & n.19 (invalidating code provisions imposing "non-cost-based fees"). For example, the *Auburn* court specifically held that "non-tax fees charged under the franchise agreements *are not based on the costs of maintaining the right of way, as required under the Telecom Act.*" *Id.* at 1176 (emphasis added).[9] The non-cost-based fees in *Auburn* included application fees of $2,500 and $5,000, and a percentage-of-revenue fee. See *id.* at 1165, 1173 & n.19 (and cited code provisions in n.19).[10] Non-cost-based fees often include percentage-of-revenue fees, which are even less directly tied to the use of the right-of-way than application fees and are pre-empted by section 253(a). By requiring wireline carriers to pay a surcharge in order to place lines in municipal rights-of-way, the cities necessarily "have the effect of prohibiting" new services.

(b) Revenue-Based Fees Necessarily Impede Competition

As stated, the act was enacted in order to institute free competition. See, e.g., *Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) (253(a) is intended to protect "Congress' new free market vision"). However, as trustees of rights-of-way, cities enjoy an effective monopoly over access to customers because carriers require a city's permission to access rights-of-way in order to install cables to customers' buildings. If cities could lawfully erect a virtual toll booth for their own financial benefit, members of the telecommunications industry would be held hostage to the demands of one city or another, and then excluded from public rights-of-way absent acquiescence to revenue-raising provisions. Consumers, of course, ultimately bear the burden of such revenue-raising provisions in the form of increased rates — an increase that is in direct conflict with the purpose of the act.

Gross-receipts charges are particularly pernicious. If a city may charge a carrier based on a company's revenues, rather than the costs related to use of the right-of-way, the city receives fees that have no relationship to the use of the right-of-way.

For instance, if a carrier provided a new service based on existing facilities, any additional revenue would have no relationship to the right-of-way. In that event, the carrier and its customers are penalized financially by innovation.

(c) The 1996 Amendments to the Cable Act Demonstrate the Prohibition of Revenue-Based Fees Under the Act

In the 1984 Cable Act, Congress explicitly empowered cities to impose on cable providers revenue-based fees up to a five percent cap. See 47 U.S.C. § 542(b). In sharp contrast, the act does not contain any language granting authority to charge revenue-based fees to telecommunications carriers. Had Congress wished to authorize revenue-based fees under the act, it certainly could have; in fact, it did exactly the opposite. In 1996, Congress amended the Cable Act to clarify that local authority to charge revenue-based fees under the Cable Act does *not* reach telecommunications services provided by cable operators. See *id.* § 541(b)(3)(A)(ii) ("the provisions of this title shall not apply to...cable operator[s] [in their] provision of telecommunications services"). Congress specifically added this amendment "to make clear that the franchise-fee provision [in the Cable Act] is *not intended to reach revenues* that a cable operator derives from providing new telecommunications services over its system." S. Rep. No. 104-23, at 36 (1996) (emphasis added).[11] This deliberate distinction reveals that revenue-based fees are impermissible under the act.

(d) Revenue-Based Fees Are Not Saved by Section 253(c)

By definition, revenue-based fees do not reflect actual management costs. Revenue-based fees are, therefore, not "fair and reasonable compensation" related to use of rights-of-way, as permitted by section 253(c), and are pre-empted. See *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 817-18 (D. Md. 1999) (appropriate benchmark of franchise fee is the county's cost of maintaining and improving the public rights-of-way the provider actually uses, not the value of the provider's privilege of using the county's public rights-of-way), vacated on other grounds, 212 F.3d 863 (4th Cir. 2000); *AT&T Communications of the Southwest, Inc. v. City of Dallas* (*City of Dallas I*), 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) (requirement that provider pay four percent of its total gross revenues pre-empted); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D. N.J. 2001) (a revenue-based franchise fee can never be sufficiently connected to compensation for use of the rights-of-way; commissions-based fee has "no logical link at all to costs" and constitutes an economic barrier to entry; any fee that does more than make a municipality whole is not compensatory); *PECO Energy Co. v. Township of Haverford*, No. Civ. A. 99-4766, 1999 WL 1240941, at *8 (E.D. Pa. Dec. 20, 1999). ("Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way.")[12]

...the act repeatedly expresses Congress's intent to encourage free competition between, and rapid distribution of, the various products and technologies now evolving in the telecommunications industry.

Federal courts have made it clear that in passing section 253, Congress reserved for municipalities only the narrow authority to manage the manner in which telecommunications companies install their facilities in city streets — the physical process of installing and maintaining telecommunications facilities in the public rights-of-way — and to recovering actual costs related to this narrow management role. Section 253(c), titled "[s]tate and local government authority," permits cities to manage public rights-of-way, and to require fair and reasonable compensation from telecommunications service providers on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way. 47 U.S.C. § 253(c).

This narrow savings clause gives cities the limited authority to manage rights-of-way by, for example, charging costs for inspection and permits. *Auburn* at 1177

("right-of-way management means [for example]...coordination of construction schedules, determination of insurance bonding and indemnity requirements, establishment and enforcement of building codes") (quoting *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, ¶ 103 (1997)). By contrast, cost-based fees are fair and reasonable. Each carrier pays for actual costs related to its use of the right-of-way. Thus, if a carrier's use is extensive, its costs rise. If its use is nominal, its costs are nominal. This charging mechanism is consistent with Congress's goals and avoids problems of discrimination and non-mutual charges.

(e) Revenue-Based Fees Are by Definition Competitively Non-neutral and Discriminatory

Revenue-based fees by definition are not based on or related to use of rights-of-way. Rather, they are based on the existence of revenue which, in turn, may be derived by numerous factors that have nothing whatsoever to do with carriers' use of rights-of-way (such as changing corporate policy, the quality of advertising, management changes and even accounting). Instead of charging carriers a formula based on the actual costs they impose on the city, such as the actual costs of processing permit applications and ensuring safety on roadwork, revenue-based fees will inevitably overcharge some carriers relative to others in a manner that bears no relationship to the impact on rights-of-way. Accordingly, revenue-based fees are competitively non-neutral and, therefore, not saved by section 253(c). See *City of Dallas I*, 8 F. Supp. 2d at 593 (explaining that whether other providers have agreed to regulations is irrelevant for purposes of the "competitively neutral and nondiscriminatory" requirement; the operative question is whether the fees are tied to the amounts of rights-of-way used by the respective telecommunications providers). Cf. *In re Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8,776 ¶¶ 48-50 (1997) (in context of section 254, to allow the market to function properly, "competitive neutrality" required both neutrality between different competitors and different technologies).[13]

Gross-receipts fees also are necessarily non-neutral and discriminatory as to landline, as opposed to wireless carriers. For landline carriers, the cities have a *de facto* monopoly position, because carriers are typically able to reach customers only by crossing city rights-of-way. Because gross-receipts fees are conditioned on the use of rights-of-way, they necessarily discriminate in favor of wireless products, which are not required to use city rights-of-way, and against landline services, which are.

By conditioning payment on something unrelated to costs, such as gross revenue, cities actually punish investment in efficient use of city resources.

In addition to this "technological non-neutrality," gross-receipts fees also discriminate in favor of inefficient carriers and against efficient carriers. For example, if two carriers each dig identical length trenches through a city, but one carrier invests in placing extra fibers in the trench or invests in modern technology that allows it to use its fibers more efficiently, the efficient carrier is likely to have more gross revenue than the inefficient carrier,

despite their equal costs to the city. By conditioning payment on something unrelated to costs, such as gross revenue, cities actually punish investment in efficient use of city resources.

Congress expressly rejected a "parity" provision that would have required a single fee to be imposed on all carriers in a given area, because a parity requirement ignores the different amounts of city rights-of-way that each carrier uses to provide its services. *AT&T Communications of the Southwest, Inc. v. City of Dallas*, (*City of Dallas I*) 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998). Representative Stupak, who proposed the amendment that ultimately became section 253(c), explained:

> Local governments must be able to distinguish between different telecommunications providers. The way the [parity] amendment is right now, they cannot make that distinction. For example, if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings. The [parity] amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.

141 *Cong. Rec.* H8460-01, H8460 (daily ed. Aug. 4, 1995) (quoted in *City of Dallas I*, 8 F. Supp. 2d at 594). *Accord Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 817 n.26 (D. Md. 1999), vacated on other grounds by 212 F.3d 863 (4th Cir. 2000).

(f) Courts Narrowly Circumscribe Municipal Authority under Section 253(c)

Once a violation of section 253(a) has been demonstrated, the city bears the burden of showing that its conduct and the challenged laws fall within the safe harbor of section 253(c). *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 89 n.5 (S.D.N.Y. 2000) (appeal pending). As succinctly summarized by the 9th Circuit in *Auburn*, section 253(c) preserves only cities' authority to manage their rights-of-way: "Right-of-way management means control over the public right-of-way itself, not control over companies with facilities in the right-of-way." *Auburn* at 1177. Like *Auburn*, courts routinely have held that local laws like those at issue here fail to fit within section 253(c)'s "safe harbor" when they stray beyond "traditional rights-of-way matters," and impose a "third tier" of regulation[14] on telecommunications providers.[15]

Section 253(c)'s safe harbor for "management" allows cities to impose reasonable safety restrictions on a telecommunications carrier's excavations in the rights-of-way (e.g., time periods for excavation, use of traffic control measures, restoration of excavated pavement, etc.). During the floor debate regarding section 253(c), Senator Dianne Feinstein stated that it is within the scope of "management" to:

> regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts; require a company to place its facilities under ground, rather than overhead, consistent with the requirements imposed on other utility companies; require a company to pay fees to recover an appro-

priate share of the increased street repair and paving costs that result from repeated excavation; enforce local zoning regulations; and require a company to indemnify the City against any claims of injury arising from the company's excavation.

Auburn at 1177 (quoting *In re Classic Telephone, Inc.*, 11 F.C.C.R. 13,082, ¶ 39 (1996), in turn, quoting 141 *Cong. Rec.* S8172 (daily ed. June 12, 1995)).[16] See *Auburn* at 1175-1177.

Conclusion

The changes envisioned by the act are dramatic and, in a general sense, require a diminishing role for state and local government. As the 9th Circuit recently held, that role is properly focused on managing rights-of-way, not the companies that use them. Revenue-raising is inconsistent with that role and, as the vast majority of courts have concluded, is prohibited by the act. The line-drawing being done by federal courts is a necessary part of the change Congress sought to implement.

David Goodnight serves as national trial counsel for Qwest Corporation in all matters relating to section 253 of the Telecommunications Act of 1996. He is a partner and co-chair of Dorsey & Whitney LLP's Seattle Trial Group, and is a graduate of Valparaiso University and Yale Law School.

Roy Adkins is corporate counsel for Qwest Corporation, with nationwide responsibility for rights-of-way litigation. He is a graduate of Denver University School of Law, where he obtained both a J.D. and an LLM. in taxation.

NOTES

1. The Act, Pub. L. No. 104-104, 110 Stat. at 56 (codified as amended in scattered sections of 47 U.S.C.).
2. *Id.; see* Reno v. ACLU, 521 U.S. 844, 855-60 (1997); Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, at 113 (1996) (The act designed to "rapidly" foster competition in local telecommunications markets); H.R. Rep. No. 104-204, at 89 (1995) (goal of the act is "to shift monopoly markets to competition as quickly as possible").
3. Several decades ago, many cities regulated both the rates and the terms and conditions of service of telecommunications providers.
4. *See* Communications Act of 1934, Ch. 652, 48 Stat. 1064, *amended by* Federal Telecom-

munications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

5. Not all mapping requirements are invalid. However, mapping requirements that impose burdensome or technologically infeasible requirements or telecommunications providers are invalid.

6. *See also* AT&T Communications of the Southwest, Inc. v. City of Dallas (City of Dallas II) 52 F. Supp. 2d 763, 769 (N.D. Tex. 1999) (form franchise ordinance requiring four percent of gross receipts from all operations within the city; dedicated fiber for city's use; city access to a duct or sub-duct of each conduit at no charge; and access to financial and other records for detailed audits found inconsistent with the act), vacated as moot by 243 F.3d 928 (5th Cir. 2001); AT&T Communications of the Southwest, Inc. v. City of Austin, 975 F. Supp. 928, 934-35, 942 (W.D. Tex. 1997) (by passing an ordinance requiring among many restrictions that providers obtain municipal consent before operating services within the city, pay a nonrefundable application fee, pay quarterly franchise fees, disclose detailed financial information, as well as any information regarding any legal proceedings, the city "overstepped its bounds").

7. Because the FCC is the administrative agency charged with administering the act, the courts must grant deference to determinations made within its authority. *See* AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 397 (1999) (deferring to FCC to interpret ambiguities in the act); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

8. Congress meant to encourage facilities-based competition.

9. In its original opinion containing this same sentence, the text included a reference, two sentences earlier, to application fees in the amount of $2,500 and $5,000. City of Auburn v. Qwest Corp., 247 F.3d 966, 981 (9th Cir. 2001). This reference was dropped in the amended opinion, broadening the prohibition against non-cost-based fees. Auburn at 1176.

10. Auburn note 19 refers to various municipal code provisions invalidated by the 9th Circuit, including Auburn Municipal Code § 20.04.020. Auburn Mun. Code § 20.040.020 (J) states an application shall also include all deposits or "charges" required pursuant to that title. Section 20.06.180, Compensation for use of Public Ways, states that: "A....grantees and franchisees shall pay the city as a general compensation for the use of the public way during each year of the term of a franchise a franchise fee as determined by city council, not to exceed six percent of gross revenue for each quarter of each calendar year...."

11. The Cable Act also provides: "A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof." *Id.* § 541(b)(3)(B). *Cf.* In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21,396 ¶ 64 (1997) (explaining cross-ownership restrictions of Cable Act).

12. *But see*, TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000) and TCG New York, Inc. v. City of White Plains, 125 F. Supp. 2d 81 (S.D.N.Y. 2000) (appeal pending). However, these cases are not authoritative in the 9th Circuit. Moreover, in both TCG Detroit and TCG New York, the carriers had begun negotiations with the cities before the enactment of the act and had been willing to pay a revenue-based fee. The courts looked to the course of dealings based on facts unique to these long histories of negotiations when they upheld the fee structure. As other courts have noted, the court in Dearborn did not address the various reasons intrinsic to the act that limit franchise fees to actual costs. Bell Atlantic-Maryland, 49 F. Supp. 2d at 819.

13. The FCC recently filed an amicus brief supporting this conclusion: "A percentage of gross revenues-based fee, even if uniformly applied, might well have no relationship to either the extent of each carrier's use of the rights-of-way or the costs it would impose on the municipality. It therefore could be inconsistent with the competitive neutrality requirement of 253(c)." *See Brief of the Federal Communications Commission and the United States as Amici Curiae*, TCG New York, Inc. v. City of White Plains, (2nd Cir. appeal filed March 8, 2001) (Nos. 01-7255 (XAP), 01-7213 (L)), *appealed from* 125 F. Supp. 2d 81 (S.D.N.Y. 2000) (included in Qwest's notebook of authorities).

14. *See* TCI Cablevision, 12 F.C.C.R. at 21,441-42, ¶¶ 8, 102, 105 (expressing concerns about local "third tier" regulation).

15. *See, e.g.*, Bell Atlantic-Maryland, 49 F. Supp. 2d at 817; Board of County Comm'rs for Grant County, New Mexico v. U.S. West Communications, No. Civ. 98-1354 JC/LCS, slip op. at 11 (D.N.M. June 26, 2000); PECO Energy Co. v. Township of Haverford, No. Civ.A. 99-4766, 1999 WL 1240941, at *6 (E.D. Pa. Dec. 20, 1999); City of Dallas I, 8 F. Supp. 2d at 592; AT&T Communications of the Southwest, Inc. v. City of Dallas (City of Dallas II), 52 F. Supp. 2d 763, 769 (N.D. Tex. 1999), *vacated as moot*, 243 F.3d 928 (5th Cir. 2001); BellSouth Telecommunications, Inc. v. City of Coral Springs, 42 F. Supp. 2d 1304, 1309-10 (S.D. Fla. 1999), *aff'd in part, rev'd in part on other grounds sub nom.* BellSouth Telecommunications, Inc. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001).

16. In light of this legislative history, the FCC has likewise interpreted the proper scope of "management" under Section 253(c) to prohibit the type of regulations at issue here:

> [S]ection 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways; to control the orderly flow of vehicles and pedestrians; to manage gas, water, cable (both electric and cable television) and telephone facilities that crisscross the streets and public rights-of-way....[T]he types of activities that fall within the sphere of appropriate rights-of-way management... include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them. TCI Cablevision, 12 F.C.C.R. 21,396 ¶ 103.

Unfairness in Consumer Protection Cases

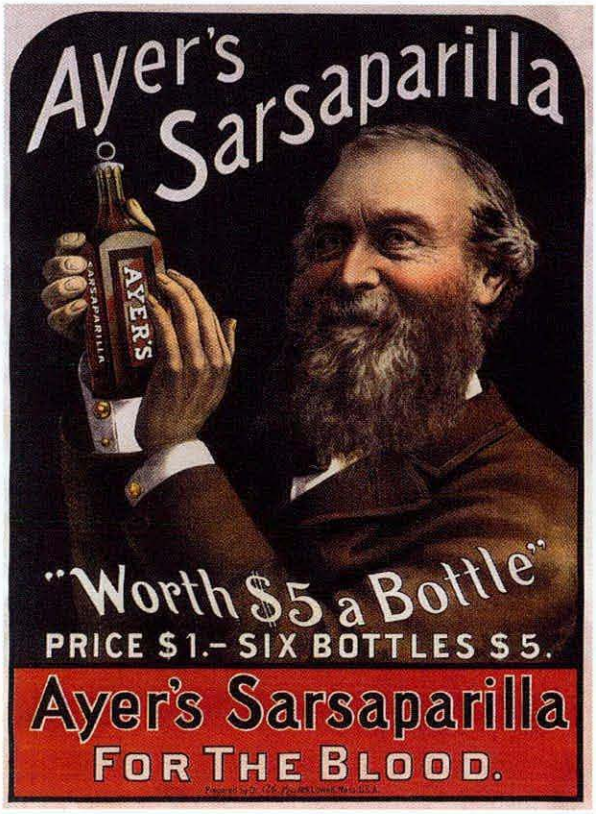
by Bob Lipson

State and federal statutes prohibit unfair and deceptive business acts and practices.[1] Washington's Consumer Protection Act, R.C.W. 19.86 *et seq.*, passed in 1961, can be enforced either by the attorney general acting on behalf of all state consumers, or by private counsel acting on behalf of individual or class clients.[2] The Federal Trade Commission Act, 15 U.S.C.§ 41-58, passed in 1914, is enforced exclusively by the Federal Trade Commission (FTC).[3]

While unfair behavior and deceptive behavior are both prohibited, historically most consumer protection actions have focused on deception.[4] Few unfairness cases are brought. Although most complaints allege both unfair and deceptive business practices, despite this form of pleading, most cases are usually litigated as deception cases.

What deception means is firmly rooted in case law. Judges, juries and lawyers have little trouble understanding and applying it. In contrast, the meaning of unfairness is less certain, although it is not so uncertain as to be unconstitutional.[5]

The purpose of this article is to explore what unfairness means in the context of consumer protection cases. The article will look at historical development of the concept at the FTC, examine types of unfairness cases brought by the FTC over the years, review significant state and federal cases, and reflect on how related concepts might inform our understanding.



The FTC's First 50 Years: 1914-1964

Congress passed the Federal Trade Commission Act in 1914. The act's original language outlawed "unfair methods of competition." Passed primarily due to Congress's dissatisfaction with judicial interpretation of the anti-trust provisions in the Sherman Act, which Congress thought the courts were interpreting too restrictively, Congress wanted to afford more complete relief against what it thought were unfair practices.[6] Thus, while the primary purpose of the FTC was to enforce anti-trust laws, consumer protection lurked in the background as an intended purpose, too.[7]

The act's legislative history and Congress's debate over the meaning of unfairness indicate that a broad meaning was intended.[8] Congress explicitly considered, and rejected, the idea that it might clarify what was meant by the phrase "unfair methods of competition" by tying it to a common law or statutory standard, or by trying to enumerate particular prohibited practices.[9] "Unfair" was said to include that "for which a remedy lies either at law or equity,"[10] as well as that which "shocks the universal conscience of mankind."[11] The House Con-

ference Report stated, with regard to the meaning of unfairness, that:

> It is impossible to frame definitions to embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.[12]

Early judicial opinions also shed light on the meaning of unfairness. As the U. S. Supreme Court stated: "The careless and unscrupulous must rise to the level of the scrupulous and diligent. The Commission was not organized to drag the standards down."[13] The statute was said to be aimed at "the kind of unfairness" which business should be "under a powerful moral compulsion not to adopt, even though it is not criminal."[14] If something "exploits consumers, children, who are unable to protect themselves," then it was unfair.[15] "The Commission has a wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and to make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[16]

In 1931, however, the U.S. Supreme Court interpreted the meaning of "unfair methods of competition" in the FTC Act to apply only to those situations where business competition was injured.[17] A practice was thus not a violation of the act if it only harmed consumers; to be unlawful, the practice must injure competition. Three years later, the Court began to modify its view when it permitted an unfairness suit, even though only consumers and not competition were arguably injured.[18] Four years after that, in 1938, Congress legislatively intervened and resolved all lingering questions by passing the Wheeler-Lea Amendment, which authorized the act to apply to "unfair or deceptive acts or practices" as well as "unfair methods of competition."[19] After 1938, there was no question that the FTC's unfairness jurisdiction applied to consumer harm.

Over a quarter of a century later, in 1964, the FTC made its first systematic attempt to define what "unfairness" meant in the context of consumer protection. The occasion was the FTC's publication of its Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking (1964 Cigarette Advertising Statement).[20]

In the 1964 Cigarette Advertising Statement, the FTC reviewed past business practices that it had banned as unfair, and attempted to extract those principles underpinning a judgment of unfairness. It concluded:

> The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitative or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others.[21]

Three factors thus emerged from the 1964 Cigarette Advertising Statement as criteria by which to judge unfairness. Those three factors were public policy, morality and ethics, and substantial consumer injury. Finally, the FTC had a working definition of unfairness.

Modern Times at the FTC: 1964-1994

The 1964 Cigarette Advertising Statement acquired elevated status when the U.S. Supreme Court cited its three factors with approval in a footnote in a 1972 case, *FTC v. Sperry and Hutchinson*. There the court noted in what became a widely used test:

> The Commission has described the factors it considers in determining whether a practice which is neither in violation of the antitrust laws nor deceptive is nonetheless unfair: whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; whether it is immoral, unethical, oppressive, or unscrupulous; whether it causes substantial injury to consumer (or competition or other businessmen).[22]

Adoption of this three-part test was a watershed in unfairness jurisprudence. Shortly thereafter, the FTC successfully litigated several other unfairness cases. After that, and apparently heady with its victories, it persuaded Congress to authorize formally its unfairness rule-making ability.[23]

The FTC then entered the arena of unfairness rule-making with vigor, especially with regard to advertising for children.

The FTC then entered the arena of unfairness rule-making with vigor, especially with regard to advertising for children. Congress and the public reacted negatively to some of this and felt that the FTC had overreached its public purpose. It was accused of being the "National Nanny."[24] In early 1980 Congress responded to this public perception by preventing the FTC from engaging in further unfairness-based advertising rulemaking.[25] The FTC responded to Congress in December 1980.

The FTC's response was the Commission Statement of Policy on the Scope of the Commission's Unfairness Jurisdiction (1980 Policy Statement).[26] The 1980 Policy Statement substantially changed the FTC's unfairness criteria.[27] It modified its position compared to the 1964 Cigarette Advertising Statement, and diverted from that which the Supreme Court had already approved of in *Sperry and Hutchinson*.

In articulating its new test, the FTC remarked that since the 1964 Cigarette Advertising Statement and *Sperry and Hutchinson*:

> The Commission has continued to refine the standard of unfairness in its cases and rules, and it has now reached a more detailed sense of both the definition and the limits of these criteria.[28]

The new test for unfairness as embodied in the 1980 Policy Statement stated that:

> To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[29]

The 1980 Policy Statement changed how unfairness was to be determined. Consumer injury was now primary. Pub-

lic policy was no longer directly referred to in the test. Elsewhere, the FTC stated that public policy would only be relied upon as a basis for agency action where it was a widely shared public view, and where it was declared or embodied in a formal source.[30] Morality and ethics were also removed as touchstones. Thus, since 1980 the three-part FTC test for unfairness has been substantial consumer injury, which is not outweighed by countervailing benefits, and is not something the consumer could reasonably have avoided.

In 1982, the FTC asked Congress to codify its 1980 Policy Statement as law.[31] In 1994, it was finally codified as an amendment to the FTC Act at 15 U.S.C. §45(n).[32] The 1994 amendment provides:

> The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

This is still the current FTC test and applicable federal law.

Types of Unfairness Cases

Review of cases litigated by the FTC under an unfairness theory helps reveal what unfairness means and how it has been applied. Sometimes these cases show that unfairness is the only theory that will work, while other fact patterns allow unfairness and deception to be used concurrently.

In the 1960s and 1970s, FTC unfairness cases were usually one of four types: coercive and high-pressure sales, withholding of material information, unsubstantiated claims, and interference with post-purchase rights and remedies.[33]

Examples of coercive and high-pressure sales cases litigated under unfairness theories include advertising vitamins to children,[34] a dance studio using cajolery and other high-pressure tactics to entice older women into buying dance lessons costing thousands of dollars,[35] and a heating contractor dismantling home furnaces for cleaning and inspection, and then refusing to reassemble them until customers agreed to buy additional parts and services.[36]

Unfairness cases based on withholding of material information include where a lender failed to disclose its anticipated use of individuals' tax information obtained from loan applications,[37] and where a manufacturer packed new razor blades as free samples in newspapers which were delivered to homes.[38]

Unsubstantiated advertising claims have also formed the basis for unfairness cases. One such case involved advertisements for an over-the-counter sunburn ointment where the ads implied scientific proof of usefulness without there being such proof.[39]

Likewise, interfering with consumer post-purchase rights and remedies can also be unfair. Thus, there was unfairness where a business routinely assigned notes of indebtedness to third parties against whom claims and defenses would not be available without disclosing that to con-

sumers,[40] and where a national mail-order house sued delinquent customers in an inconvenient forum, even though it was entirely proper to do that under its home state's jurisdictional long-arm statute.[41]

In the 1980s and 1990s, more recent FTC unfairness cases have tended to be slightly different. Most can be characterized as falling into one of five categories: theft and its facilitation; breaking or causing the breaking of other laws; insufficient care; interference with the exercise of consumer rights; and advertising that promotes unsafe practices.[42]

Examples of unfairness cases involving theft and its facilitation are: unauthorized billing of credit cards;[43] unauthorized debiting of bank accounts;[44] forcing consumers to send credit payments in a roundabout route which resulted in an increased percent of payments being received late;[45] sale of cable decoders for unauthorized viewing of cable signals;[46] Internet "page-jacking and mouse-trapping" where Web surfers are not permitted to exit a Web site when they hit their close-icon button, but are instead rerouted to the same or related Web sites;[47] sale of customer lists with credit-card information to companies that then make unauthorized charges;[48] sale of computerized templates for the creation of fake IDs;[49] "cramming" of unauthorized services;[50] billing telephone subscribers for services purchased over an 800 number where the individual owning the line did not specifically authorize the charge;[51] charging a telephone line subscriber for Internet connections to a porn site where the line subscriber did not specifically authorize the connection;[52] and an information broker impersonating bank customers and tricking banks and other financial institutions into disclosing the customer's personal information.[53]

Breaking or causing the breaking of other laws has also been the basis for unfairness cases. Examples of these are: collecting consumer debts discharged in bankruptcy;[54] magazine sellers approving debt-collection letters that were unlawful in violation of the Fair Debt Collection Practices Act;[55] and lenders making subprime loans without regard to debtors' ability to pay, in violation of the Home Owner and Equity Protection Act.[56]

Insufficient care has also been the basis for unfairness cases. Examples include: inaccurate credit information being re-

ported by a retailer to credit agencies as a result of system errors;[57] a car rental agency not disclosing to customers that it did not inspect its cars that were subject to manufacturers' recalls;[58] failure of a manufacturer to disclose that its exercise device could break and injure users;[59] an auto manufacturer failing to make successful warranty repairs in a reasonably prompt manner because of ineptitude;[60] poor application of car paint resulting in paint blisters;[61] and failure to effect a successful merger of financial information during a corporate takeover resulting in nonpayment of mortgagees' insurance by the mortgage company.[62]

Interference with the exercise of consumer rights is also unfair. Examples are: where a lender required purchase of credit insurance and then required the purchaser to sign a statement indicating that the purchase was voluntary;[63] failure to honor a lifetime warranty;[64] and failure to honor the stated price of an annual renewal of a lifetime guarantee.[65]

Finally, the promotion of unsafe behavior in ads can also be unfair. A good example is when a beer company went overboard by running TV advertisements that showed young adults on a boat drinking beer and not wearing life vests.[66]

Important Reported Unfairness Cases Since 1964

Evolution of the modern unfairness rule began in 1964. The following cases track judicial interpretation of the term and how courts have gone about measuring it since 1964.

FTC v. Sperry and Hutchinson, 405 U.S. 233, 92 S.Ct. 898, 31 L. Ed. 2d 170 (1972), is the first and only U.S. Supreme Court case addressing unfairness in the consumer-protection context. Until the FTC changed its unfairness test in 1980 and Congress codified that change in 1994, this was the most important unfairness case. This case is still quoted today, and its test may still be used in some states including Washington. The importance of this case in the evolution of unfairness consumer law derives from footnote 5, in which the court approved the language used by the FTC in its 1964 Cigarette Advertising Statement. Thereafter, the 1964 Cigarette Advertising Statement's three-part test was widely adopted and referred to as the *Sperry and Hutchinson* test. The three parts were whether the act or practice offends public policy as embodied in statutes, common law or otherwise, including any established concept of unfairness; whether the act or practice is immoral, unethical, oppressive or unscrupulous; and whether it causes substantial injury to consumers or to competition.

PMP Associates v. Globe Newspaper, 366 Mass 593, 321 N.E. 2d 915 (1975), decided two years later, is one of the few state cases to address the meaning of unfairness. There, an escort service wanted to place an ad in a newspaper and the newspaper refused. The escort service claimed that the refusal was unfair. After adopting the *Sperry and Hutchinson* three-part test, the court used it to find no unfairness.

Spiegel v. FTC, 540 F. 2d 287 (7th Cir. 1976), followed next. There, the 7th Circuit applied the *Sperry and Hutchinson* three-part test to uphold the FTC's power to enjoin a company from suing its customers in its home state and not where the customer lived, even though long-arm jurisdiction in the company's home state was proper under state law. The case rejected the argument that the FTC cannot characterize something as unfair and thus illegal if the act is otherwise within the

technical bounds of the law. According to *Speigel*, even if a practice is not criminal or a violation of common law, if it is contrary to public policy, it can be prohibited as unfair.

Johnson v. Phoenix Mutual Life Insurance Company, 300 N. C. 247, 266 S.E. 610 (1980), which involved the behavior of a mortgage broker and a lender, is one of the few other state cases that deals with what unfairness means. It adopts the *Sperry and Hutchinson* three-part test, and notes that the concept of unfairness is broader than, and includes, deception. It also concludes that a party is guilty of unfairness "when it engages in conduct that amounts to an inequitable assertion of its power or position."

Magney v. Lincoln Mutual Savings Bank, 34 Wn. App. 45, 659 P.2d 537 (1983), is the first of two Washington reported cases to discuss unfairness in the context of the Consumer Protection Act. It uses the 1972 three-part test from *Sperry and Hutchinson*, and does not mention the 1980 Policy Statement's criteria for unfairness. The question before the court was whether a due-on-sale clause in a mortgage was enforceable, or whether it was an illegal restraint on alienation of property or a violation of the Consumer Protection Act. The court noted a split among the states on the issue of whether it was an improper restraint on alienation of property, but concluded the better rule was to disallow such provisions unless the lender could prove the provision was necessary to protect the lender's security. On the unfairness question the court held that since some states permitted these practices, it therefore could not be oppressive or unfair.[67]

Blake v. Federal Way Cycle Center, 40 Wn. App. 302, 698 P. 2d 578 (1985), is the second and last reported Washington case to address unfairness in the Consumer Protection Act. In this case, an unhappy motorcyclist sued over his two-wheel lemon, claiming that the dealer's post-sale dealings were unfair. The court stated whether behavior is unfair is a question of law. It then noted that since the Consumer Protection Act does not define unfair, FTC and federal law should be used for guidance. The court then cited the three-part test from *Sperry and Hutchinson*, as well as the different three-part test contained in the FTC's 1980 Policy Statement. The case did not distinguish between the tests or indicate which it preferred, and thus seemingly approved of both.

Unconscionability, good faith and fair dealing, and unfair acts and practices are closely related concepts.

There have been no reported Washington cases since *Blake* that address unfairness. However, a 1996 unpublished Court of Appeals decision, *Martin v. McEvoy*, 1996 WL 335997 (Div. 1. 1996), uses the *Sperry and Hutchinson* test for unfairness, without mentioning the 1980 Policy Statement or the 1994 amendment. More recently, a 1999 unpublished Court of Appeals decision, *Opportunity Management Co. v. Frost*, 1999 WL 96001 (Div. 3 1999), again uses the *Sperry and Hutchinson* test for unfairness, without mentioning either the 1980 Policy Statement or the 1994 amendment. Whether these omissions were briefing, drafting errors, or judicial design is unknown. Nevertheless, since Washington courts are directed to look to FTC law in construing the Consumer Protection Act, logic dictates that the FTC's 1980 Policy Statement, now codified as 15 U.S.C. §45(n), should be the main Washington test.

American Financial Services v. FTC, 767 F. 2d 957 (D.C. Cir. 1985), is also worth noting. This case challenged the FTC's credit-practices rules adopted pursuant to the 1980 Policy Statement criteria. The court, in a detailed and articulate opinion, reviewed the evolution of the unfairness standard from the 1964 Cigarette Advertising Statement, to the adoption of that standard in *Sperry and Hutchinson* and *Spiegel*, to the 1980 Policy Statement. It called the 1980 Policy Statement standard "the most precise definition of unfairness articulated by either the Commission or Congress," and upheld the 1980 Policy Statement standard as not being arbitrary and capricious.

The case also describes the difference between deception and unfairness in an interesting way. Deception occurs when the consumer is forced to bear a larger risk than expected because the consumer is misled. Unfairness occurs "when the consumer is forced to bear a larger risk than an efficient market would require.... This theory in effect posits a market imperfection which for some reason prevents the market from arriving at the most efficient distribution.... Faced with such an imperfection, the Commission steps in to correct the market's results...." What is meant by market imperfection, how to recognize it, and how to judge when the market is not operating at its most efficient distribution is, unfortunately, unexplained.

Orkin Exterminating Company v. FTC, 849 F. 2d 1354 (8th Cir. 1988), three years later, again upheld the three-prong criteria of the 1980 Policy Statement as a valid standard for determining unfairness. Orkin had offered lifetime guarantees for a fixed annual fee, but then changed the amount of the annual fee, contrary to what they had promised their customers. The FTC issued a cease-and-desist order on grounds that what Orkin did was unfair, and Orkin challenged the order. The court upheld the test and that what Orkin did was unfair.

FTC v. Verity International, 124 F. Supp. 193 (S.D. N.Y 2000), is one of the most recent federal unfairness cases, and one of the few cases that takes into account the 1994 amendment. The case addresses whether Internet porn charges billed to telephone numbers without explicit authorization from the owner of the phone is unfair. The court noted that the FTC does not have to prove intent or bad faith in an unfairness case, and then acknowledged and used the three-part 1980 Policy Statement codified at 15 U.S.C. §45(n) to analyze and uphold the FTC's determination of unfairness.

Related Concepts

Unconscionability, good faith and fair dealing, and unfair acts and practices are closely related concepts. Each seeks to prohibit unspecified conduct in trade or commerce on the ground that the community's sense of decency has been offended. At heart, they are all equitable concepts.

Unconscionability has been described as a deal that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[68] It is most often associated with the Uniform Commercial Code (UCC), although its origins clearly predate the UCC. Comment 1 to UCC 2-302 describes unconscionable clauses in contracts as "being so one-sided...under the circumstances existing at the time of the making of the contract." Further, the comment continues, "The principle is one of the prevention of oppression and unfair surprise...and not of disturbance of allocation of risks because of superior bargaining power."[69] Thus, ef-

fective use of "superior bargaining power" is acceptable, but "oppression or unfair surprise" is not, and is unconscionable.

At least one scholar has noted that it is not possible to define unconscionability, and that it is not a concept. Rather, it is a determination based on a variety of factors which cannot be unified into a formula.[70]

Unconscionability is of two varieties: procedural and substantive.[71] Procedural unconscionability is "bargaining naughtiness."[72] It relates to "impropriety during the process of forming a contract."[73] Like deception, it involves lack of meaningful choice in the making of the bargain. It "is usually founded upon a recipe consisting of one or more parts of assumed consumer ignorance and several parts of seller's guile."[74]

Substantive unconscionability, on the other hand, applies to "overly harsh terms."[75] Like unfairness, substantive unconscionability "involves those one-sided terms of a contract from which a party seeks relief."[76] Substantive unconscionability cases are historically often excessive price cases or cases where a creditor has unduly restricted a debtor's remedies or unduly expanded the creditor's remedial rights.[77] One court has said that for a price to be excessive and unconscionable, the price must be "shocking."[78] Other courts have focused on whether there was any true ability to bargain or negotiate, although these are not conclusive factors.[79]

Washington courts have used these terms to describe unconscionability: one-sided or overly harsh;[80] shocking to the conscience;[81] monstrously harsh;[82] exceedingly callous;[83] lack of meaningful choice;[84] whether each party had a reasonable opportunity to understand the terms;[85] and gross excessiveness of price.[86]

Unconscionability and unfairness are similar but distinct. Unconscionability seems to require more egregious conduct than unfairness. Consequently, an act or practice may be unfair but not unconscionable. Similarly, because different tests are used, all unconscionable acts are not necessarily unfair.

Good faith and fair dealing is also a concept closely related to unfairness. Washington common law imposes an implied covenant of good faith and fair dealing on all contracts.[87] So does the UCC[88] and the Restatement (Second) of Contracts.[89]

The UCC defines good faith as "honesty in fact" and the "observance of reasonable commercial standards of fair dealing in the trade."[90] The restatement notes that good faith means different things in different contexts, but the term "emphasizes faithfulness to an agreed-upon common purpose and consistency to the justified expectations of the other party."[91] Under Washington common law, good faith requires "cooperation so that each may obtain the full benefit of performance," although it does not require accepting material changes to a contract term, nor does it impose a duty outside the specific contract obligation.[92]

At the very least, good faith and fair dealing requires that the parties work cooperatively to fulfill expectations that are justified by the terms of the agreement.

At the very least, good faith and fair dealing requires that the parties work cooperatively to fulfill expectations that are justified by the terms of the agreement. If something reasonable and justified ought to be understood as flowing from the agreement, then good faith and fair dealing seems to require that the other party supply positive efforts to that end and not try to undermine it.

Good faith and fair dealing relates to unfairness in a straightforward way. If good faith and fair dealing is lacking, unfairness usually exists. Good faith and fair dealing involves a determination of what one ought to do; unfairness involves a determination of what ought not to be done.

Conclusion

From 1914 to 1980, the FTC evolved its definition of unfair business acts and practices. Not until 1980 did the FTC settle on its criteria. In 1994, that criteria was codified at 15 U.S.C. §45(n). For a business act or practice to be unfair, it must result in substantial consumer harm, not be outweighed by countervailing benefits to consumers or competition, and not be something the consumer reasonably could avoid. While the theory of most consumer protection cases has been and will continue to be deception, unfairness can and should be used, too. There are simply times when it is needed to remedy that which is unacceptable, but not necessarily deceptive. Increased use of unfairness in consumer protection cases would serve society well, and help define its parameters for the marketplace.

Bob Lipson is an assistant attorney general with the Washington State Attorney General's Office, where he is currently a trial lawyer in the Consumer Protection Division. His background includes personal injury, maritime, and constitutional tort work for the state. This article was written in honor of the 40th anniversary of Washington's Consumer Protection Act.

NOTES

1. *See* RCW 19.86.020 and 15 U.S.C. §45 (a)(1).
2. *See* RCW 19.86.080; RCW 19.86.090; *see also* Pickett v. Westours Inc., 101 Wn. App. 901, 6 P.3d 63 (2000) rev. granted 143 Wn.2d 1001, 20 P.3d 944 (2001).
3. Baum v. Great Western Cities, 703 F.2d 1197 (10th Cir. 1983); Dreisbach v. Murphy, 658 F.2d 720 (9th Cir. 1981).
4. Pridgen, *Consumer Protection and the Law*, p. 8-3 and 9-2 (1986).
5. State of Washington v. Ralph Williams North West Chrysler Plymouth, 82 Wn.2d 265, 510 P.2d 233 (1973) (state CPA not unconstitutionally vague); Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919)(rejecting vagueness challenge to unfair methods of competition in FTC Act).
6. Erxleben, *The FTC's Kaleidoscope Unfairness Statute: Section 5*, 10 Gonzaga Law Rev. 333 at 334-335 (1975).
7. Le, *Protecting Consumer Rights*, p. 4 (1987).
8. Calkins, *FTC Unfairness: an Essay*, 46 Wayne L. Rev. 1935 at 1944 (2000).
9. FTC v. Sperry and Hutchinson, 405 U.S. 233 at 239-240; 92 S. Ct. 898, 31 L. Ed. 170 (1972).
10. Calkins, *supra* at 1945 (quoting Senate consideration of H.R. 15613, S. 4160, reprinted in Kintner, *The Legislative History of Federal Antitrust Laws and Related Statutes* (1982)).
11. *Id.* at 1945.
12. FTC v. Sperry and Hutchinson, *supra* at 240 (quoting from House Conference Report No. 1142, 63 Cong., 2d Sess., 19 (1914)).
13. FTC v. Algoma Lumber Co., 291 U.S. 67 at 78-79, 54 S.Ct. 315, 78 L.Ed. 655 (1934).
14. R.F. Keppel & Bro., Inc v. FTC, 291 U.S. 304 at 313, 545 S.Ct. 423, 78 L.Ed. 814 (1934).
15. *Id.* at 313.
16. FTC v. Standard Education Society, 86 F.2d 692, 696 (2nd Cir. 1936) rev'd on other grounds 302 U.S. 112 (1937).
17. *FTC v. Raladam Co.*, 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931).
18. R.F. Keppel & Bro., Inc., *supra.*

19. Erxleben, *supra* at 336-337; Calkins, *supra* at 1948-1950.
20. Calkins, *supra* at 1950-1952.
21. Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964) (quoted in Sperry and Hutchinson, *supra* at 244, n.5).
22. Sperry and Hutchinson, *supra* at 244, n.5.
23. Calkins, *supra* at 1952-1954.
24. *Id.* at 1954.
25. *Id.* at 1954. *See also,* American Financial Services Assoc. v. FTC, 767 F.2d 957, 969 (D.C. Cir. 1985).
26. *Id.* at 1954.
27. *Id.* at 1954-1955.
28. Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction (1980 Policy Statement), attached to commission letter to Senators Danforth and Ford (Dec. 17, 1980), reprinted in H. Rep. No 98-156 at 33 (1983). *See also,* American Financial Services Assoc., *supra* at 971.
29. 1980 Policy Statement, *supra. See also,* American Financial Service Assoc., *supra* at 971; Calkins, *supra* at 1955.
30. 1980 Policy Statement, *supra*; Calkins, *supra* at 1954-1955.
31. Calkins, *supra* at 1955.
32. Calkins, *supra* at 1955-1961.
33. Calkins, *supra* at 1961.
34. In re Hudson Pharmaceuticals, 89 F.T.C. 82 (1977)(consent order).
35. Arthur Murray Studio, Inc. v. FTC, 458 F.2d. 622 (5th Cir. 1972).
36. Holland Furnace Co. v. FTC, 458 F.2d. 302 (7th Cir 1961).
37. Beneficial Corp. v. FTC, 542 F.2d 611 (3rd Cir. 1976).
38. In re Philip Morris Inc., 82 F.T.C. 16 (1973) (consent order).
39. In re Pfizer Inc., 81 F.T.C. 23 (1972).
40. In re All-State Industries, Inc., 75 F.T.C. 465 (1989), aff'd 423 F.2d 423 (4th Cir. 1970).
41. Spiegel Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976).
42. Calkins, *supra* at 1962.
43. *See* FTC v. Credit Card Travel Services, No. 87 C 9443 (N.D. Ill. April 14,1999)(consent order); FTC v. Crescent Publishing Group, 129 F. Supp 2d 311 (S.D. N.Y. 2001); Calkins, *supra* at 1963.
44. *See* FTC v. J.K. Publications, Inc., 99 F.Supp 2d 1176 (C.D. Cal. 2000); Calkins, *supra* at 1964.
45. *See* FTC v. Credi-Care, Inc., Civ. No. 920 8000 N.D. Ill. (1992)(consent judgment); Calkins, *supra* at 1963.
46. *See* FTC v. C&D Electronics, 109 F.T.C. 72 (1987); Calkins, *supra* at 1963.
47. *See* FTC v. Pereira (E.D. VA)(filed September 13, 1999)(complaint only — case not resolved); Calkins, *supra* at 1964-1965.
48. *See* FTC v. Capital Club of North America, Civ., No. 94-6335 (D.N.J. 1994); Calkins, *supra* at 1965.
49. *See* FTC v. Martinez, Civ. No. 00-12701 CAS (C.D. Calif. 2000)(TRO granted); Calkins, *supra* at 1965.

50. *See* FTC v. American Telnet, Inc., (S.D. Fl. 1999)(stipulated judgment); FTC v. Hold Billing Services, Civ. No. 5A-98-CA-0629-FB (W.D. Tex 1999)(stipulated judgment); Calkins, *supra* at 1965-1966.
51. *See* FTC v. Interactive Audiotext Services, Inc., No. CV 98-3049 CBM (C.D. Calif. 1998) (stipulated judgment); Calkins, *supra* at 1966.
52. *See* FTC v. Verity International, Ltd., 124 F.Supp 2d 193 (S.D. N.Y. 2000)(preliminary injunction granted).
53. *See* FTC v. Touch Tone, Civ. No. 99-WM-783 (D. Colo 2000)(consent decree); FTC v. Reverse Auction, Civ. No 000032 (D.D.C. 2000)(consent decree); Calkins, *supra* at 1967.
54. *See* Sears Roebuck & Co., 125 F.T.C. 395 (1998)(consent order); May Dept. Stores Co., 1999 FTC Lexis 15 (1999)(consent order); Calkins, *supra* at 1970.
55. *See* American Family Publishers, 116 F.T.C. 66 (1993)(consent order); Calkins, *supra* at 1970.
56. Calkins, *supra* at 1970.
57. *See* May Dept. Stores, 122 F.T.C. 1 (1996) (consent order); Calkins, *supra* at 1971-1972.
58. *See* Budget Rent-A-Car, 113 F.T.C. 1109 (1990)(consent order); Calkins, *supra* at 1972.
59. *See* Consumer Direct, Inc., 113 F.T.C. 923 (1990)(consent order); Calkins, *supra* at 1972.
60. *See* Jeep Eagle Corp., 113 F.T.C. 792 (1990) (consent order); Calkins, *supra* at 1972-1973.
61. *See* SAAB-Scania of America, Inc., 107 F.T.C. 410 (1986)(consent order); Calkins *supra* 1959.
62. *See* Lomas & Nettleton Financial Corp., 102 F.T.C. 1356 (1983)(consent order); Calkins, *supra* at 1959.
63. *See* The Money Tree, 123 F.T.C. 1187 (1997) (consent order); Tower Loan of Mississippi, 115 F.T.C. 140 (1992)(consent order); Calkins, *supra* at 1973-1974.
64. *See* Sun Refining and Marketing Co., 104 F.T.C. 578 (1984)(consent order); Calkins, *supra* at 1959.
65. Orkin Exterminating Company v. FTC, 849 F.2d 1354 (11th Cir. 1988).
66. *See* Beck's North America, 1999 F.T.C. Lexis 40 (consent order); Calkins, *supra* at 1974-1975. A number of earlier FTC cases dealing with promotion of unsafe practices are listed in Calkins, *supra* at footnotes 175 and 182.
67. This logic contrasts with that of Spiegel, where the opposite conclusion was reached with regard to a practice permitted under state law.
68. Earl of Chesterfield v. Janssen, 2 Ves. SR 125 28 Eng. Rep 82, 100 (Ch. 1750)(quoted in White and Summers, Uniform Commercial Code, p. 149 (2nd ed. 1979)).
69. Comment 1 to Section 2-302 of the UCC; *see also,* White and Summers, *supra* at 151.
70. White and Summers, *supra* at 151.
71. Nelson v. McGoldrick, 127 Wn.2d 124, 895 P.2d 1258 (1995); *see also,* White and Summers, *supra* at 150-166.
72. Leff, *Unconscionability and the Code — The Emperor's New Clause,* 115 U. Pa. L. Rev. 485, 487 (1967)(quoted in White and Summer, *supra* at 151).
73. Christiansen Brothers v. State, 90 Wn.2d 872, 878, 586 P.2d 840 (1978).
74. White and Summers, *supra* at 153.
75. *See* Nelson, *supra* at 1262; Christiansen Brothers, *supra* at 878.
76. White and Summers, *supra* at 151.
77. *Id.* at 149.
78. *Id.* at 155.
79. *See* Christiansen Brothers, *supra* at 878 (citing Schroeder v. Fageol Motors Inc., 86 Wn.2d 256, 544 P.2d 20 (1975)).
80. *See* Nelson, *supra* at 1262.
81. *Id.* at 1262.
82. *Id.* at 1262.
83. *Id.* at 1262.
84. *Id.* at 1262.
85. *Id.* at 1262.
86. *Id.* at 1262.
87. Miller v. Othello Packers, 67 Wn.2d 842, 410 P.2d 33 (1966).
88. RCW 62A. 1-203 and RCW 62A 2-103(b).
89. Restatement (Second) of Contracts, §205 (1981).
90. RCW 62A. 1-201(19) and RCW 62A 2-103(b).
91. Restatement (Second) of Contracts, §205, comment a (1981); *see* Confederated Tribes and Bands of Yakima Indian Nation v. Baldridge, 898 F.Supp 1477 (W.D. Wa. 1995).
92. Badgett v. Security Bank, 116 Wn.2d 563, 807 P.2d 356 (1991); Johnson v. Yousoofiam, 84 Wn. App. 755, 930 P.2d 921 (1996).

The Board's Work

by Allison L. Parker
WSBA Communications Specialist

Walla Walla (April 5-6)

2001 Lawyer Discipline Report

WSBA Professionalism Counsel **Barrie Althoff** and Director of Lawyer Discipline **Joy McLean** presented the annual lawyer discipline report. Mr. Althoff explained recent changes in disciplinary procedures and the way files are handled within the Office of Disciplinary Counsel (ODC). The new system is more consumer and lawyer friendly, and offers better quality control, consistency and timeliness. A consumer-affairs team was created in the ODC to promptly resolve lawyer-client communication problems and file disputes. The discipline prevention program helps lawyers understand legal ethics. Mr. Althoff noted that even with a more streamlined system in place, prosecuting grievances is increasingly complex. The ODC must respond in a way that fully protects the public, yet does not financially overburden lawyers, who alone fund the entire system on behalf of the public. To retain public and lawyer trust and credibility, the discipline system needs to ensure openness to and involvement of the public, and sensitivity to the complexity of ethical rules and the practicalities of practice. It must be independent, adequately resourced, and must vigorously prosecute misconduct.

There was a 21 percent reduction in the number of complaints filed last year, in part because of these changes. The ODC received 2,717 new matters, consisting of 1,923 grievances, 378 requests to resolve lawyer-client file disputes, and 416 requests to resolve lawyer-client noncommunication situations. Of the 2,753 matters closed last year, 1,959 were grievance files, 378 were informally mediated file disputes, and 416 were informally mediated noncommunication matters. Completed prosecutions resulted in 72 public disciplinary sanctions/actions being imposed on 71 lawyers. For more information on the annual lawyer discipline report, please see page 47 of this issue.

Practice of Law Board Nominations

Last year, the Washington Supreme Court approved a rule that establishes the Practice of Law Board (POLB). The Board of Governors (BOG) developed a list of 13 names for nomination to the Supreme Court for appointment to the first POLB. The nominees are: Hon. **Paul A. Bastine**, **Rita L. Bender**, **Stephanie A. Delaney**, **Stephen R. Crossland**, **Douglas A. Cruikshank**, **Brian J. Dano**, **Jeanne J. Dawes** (nonlawyer), **Howard H. Marshack**, **C. Robert Ford** (nonlawyer), **Ricardo R. Garcia** (nonlawyer), **Nancy C. Ivarinen**, **Pamela B. Loginsky** and **Jane M. Smith** (nonlawyer).

New Animal Law Section

Following a presentation by **Adam Karp**, the BOG approved the creation of an Animal Law Section, and approved their recommended bylaws that include associate membership. Watch for organizing information on the WSBA Web site (www.wsba.org/animallaw). An animal law CLE is in the works, and Seattle University has expressed interest in adding an animal law class to the curriculum. Governor **William Hyslop** was concerned that the section might be vulnerable to animal-rights and other activist groups. Mr. Karp reminded the BOG that the section is not an animal-rights group. It is an animal law section for members who have cases that involve animals.

Sponsored Liability Insurance

Marsh Affinity Group Services (formerly known as Seabury & Smith) will be changing the insurance carrier that provides malpractice insurance to WSBA members. **Pam Blake** told the BOG the change is the result of premium increases, policy coverage concerns, and claims-handling issues with the current provider. Marsh is reviewing proposals from other carriers and expects no interruption in service. They will make a recommendation at the May BOG meeting, and intend to begin coverage with a new carrier in July.

Board Approves Group Medical Insurance Plan for Members

The BOG adopted the recommendation of the Member Benefit Task Force (MBTF) that the WSBA sponsor a group medical plan for members. Enrollment will begin in May 2002 with a year's open enrollment and annual enrollment after that. Marsh Affinity Group, the broker for the plan, will begin marketing the plan to WSBA members immediately. The group medical plan will primarily benefit small firms and sole practitioners. Firms with at least three employees will also be eligible for a dental plan.

Board Rejects Affinity Card for Members

The MBTF's recommendation for an MBNA credit card was rejected. Several governors expressed concern about the Bar promoting MBNA and allowing the company to mass-market to members. There were also questions about competing with the WSBA Credit Union's credit card.

Legislative Report

WSBA Legislative Director **Gail Stone** assured the BOG that this legislative session went well. Despite early predictions of a special session necessitated by a $1.6 billion budget shortfall, the 2002 Legislature concluded its business with the close of the 60-regular session in March. Overall, the WSBA had a successful, if challenging, session. Early in the session, the Bar faced cuts in Governor Locke's proposed budget of just under $500,000. Three weeks later, the amount allocated for legal services was reduced by $2.4 million. The equal justice community launched its largest grassroots effort ever to restore funding. Lawyers, judges and legislators responded, and the $2.4 million was restored. The governor vetoed a *proviso* in the budget, however, and the final budget restores $1.5 million of the cut.

Nearly all the bills that the BOG voted to sponsor or support this year made it to the governor's desk. Of particular note: HB 2301, electronic notice under the WBCA; SB 6266, updating personal property exemptions; SB 6267, revising the Principal and Income Act; HB 2299, defining "person" under the WBCA, ULP and LLC Acts; SB 5373, offers of compromise in mandatory arbitration; HB2338, drug sentencing revisions; and SB 6429, apology bill.

Awards

Ronald E. Thompson received the WSBA Local Hero Award at the Tacoma-Pierce County Bar Association's 94th Annual Lincoln Day Banquet in February. Mr. Thomp-

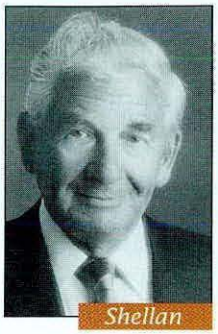
son is a sole practitioner in Gig Harbor. He is a life member of the Optimist Club of West Tacoma, and served as president of the Optimist International Foundation. During his term as international president of Optimist International, Mr. Thompson formed the NOW program to assist clubs in building memberships. He also initiated the Adopt-a-Neighborhood program which encouraged clubs to focus their programs on specific neighborhoods. For that, he received a Citation for Community Service from the U.S. Department of Housing and Urban Development. As chair of the Downtown Tacoma Association, he was instrumental in attracting a University of Washington branch campus. Mr. Thompson has been a member of the Tacoma-Pierce County Economic Development Board for 23 years, and has been a board member of the Tacoma Rescue Mission since 1988.

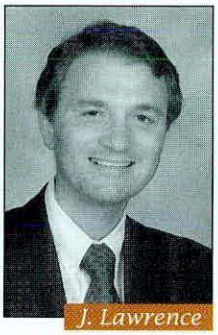
Walla Walla lawyer **Herman "Dutch" Hayner** and former state legislator **Jeannette Hayner** each received an award of appreciation for their legislative work on behalf of the WSBA. The awards were presented by President Dale Carlisle during a lunch with the Walla Walla County Bar Association at the April BOG meeting.

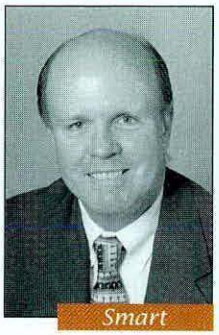
Mr. Hayner's service to the Bar goes back a half century. He was president of the Walla Walla County Bar Association in 1954. He was first appointed to the WSBA Legislative Committee in 1979, and has been instrumental in shaping the WSBA's legislative agenda ever since.

Mrs. Hayner has long been recognized for her leadership in securing state funding for legal services. She represented the 16th District in both the state House and Senate from 1977 until her retirement in 1992. As Senate majority leader in 1992, she helped create a mechanism to provide state funding for civil legal services.

Changing Venues


Shellan


J. Lawrence


Smart


Paisner

Honors and Awards

Bellevue lawyer **Phil Shucklin** has been elected to a second term as president of the Eastside Legal Assistance Program board of directors. **Diane Tebelius**, of Seattle, has been elected to the board.

William H. Lynch has been appointed by Governor Locke to the Pollution Control/Shorelines Hearings Board.

Mabry Chambliss DeBuys has been elected president of the Washington chapter of the American Academy of Matrimonial Lawyers (AAML). She has also been inducted as a fellow of the American College of Trial Lawyers. Ms. DeBuys practices family law with Preston Gates & Ellis in Seattle.

Seattle lawyer **James S. Rogers** has been inducted as a fellow of the American College of Trial Lawyers.

Former King County Superior Court Judge **Gerard M. Shellan** has received the Excellence in Dispute Resolution Award in recognition of his 25 years of service as a jurist and ADR pioneer. The award was presented by Judicial Arbitration and Mediation Services (JAMS).

The U.S. District Court for the Western District of Washington has selected the following lawyer representatives to the 9th Circuit Judicial Conference: **Todd D. True**, **Sheryl J. Willert** and **John W. Wolfe**. They will serve three-year terms.

Bellevue lawyer **Joseph L. Lawrence** has been nominated to serve a two-year term as director of the Washington Society of CPAs.

Kathleen Field has been appointed to a five-year term on the Edmonds Community College board of trustees.

Snohomish County Superior Court Judge **Ellen Fair** and **Howard L. Phillips** have been appointed to the Sentencing Guidelines Commission. Their terms end in 2003.

Nancy Isserlis and **Stuart Stiles** have been reappointed to two-year terms on the Spokane Intercollegiate Research and Technology Institute board of directors.

Seattle lawyer **Jeff Frank** has been selected for The Giraffe Project board of directors. The project is a nonprofit organization that encourages children to "stick their necks out" for the common good.

Douglas J. Smart has been appointed Washington chair of the American College of Mortgage Attorneys. Mr. Smart is a shareholder in the Seattle firm Graham & Dunn.

Movers and Shakers

Joseph Montes has been appointed administrative law judge in Olympia. He conducts hearings on unemployment benefits.

Marie Palachuk, a former assistant attorney general, has been appointed administrative law judge in Spokane.

Gary Sparling has joined Soha & Lang in Seattle.

Joel Paisner has returned to the Seattle office of Ater Wynne after serving as vice-president and general manager for Western Integrated Networks.

David Clarke has rejoined the Seattle office of Perkins Coie as a partner in the corporate finance group. He advises high-growth companies, private equity firms, and financial institutions. **Chun M. Ng** has

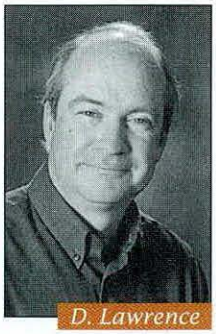
BOG Meetings

May 10-11 – Stevenson; June 7 – Yakima; July 26-27 – Ocean Shores

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.


Ostrovsky


Noonan


D. Lawrence


Wahrenberger

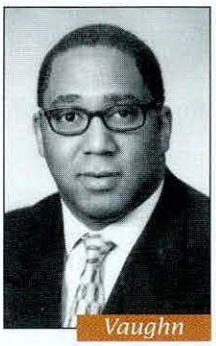
joined the firm as a partner in the Seattle patent group. He concentrates on patent procurement and prosecution, patent litigation, and other intellectual property matters.

Jan Ostrovsky has joined Crocker Kuno, concentrating on bankruptcy and non-bankruptcy debtor-creditor rights.

Kelly Twiss Noonan has been elected managing partner of Stokes Lawrence in Seattle. **Douglas C. Lawrence** and **Gail N. Wahrenberger** have been elected to the firm's executive committee.

Daniel F. Vaughn has joined the Seattle office of Lane Powell Spears Lubersky as an associate focusing on corporate finance and securities.

J.C. Ditzler has been promoted to senior member in the Seattle office of Cozen O'Connor.


Vaughn

Rachael H. Nilson has joined the Lynnwood firm Bergstedt, Clegg & Wolff as an associate focusing on immigration, consumer protection and bankruptcy.

Vincent T. Lombardi has joined the Seattle firm Short Cressman & Burgess as of counsel. He focuses on labor and employment law and litigation, real estate, and commercial and business litigation. **Susan Thorbrogger** has been named chair of the firm's business and tax practice section, and **Bradley P. Thoreson** has been named chair of the real estate section.

Nancy A. Robertson has become a partner in the Seattle firm Groff & Murphy. She joined the firm in 1995 and concentrates on government contracts and construction litigation.

Robert J. Caldwell has joined Witherspoon, Kelley, Davenport & Toole in Spokane. He focuses on health care and corporate law.

Marcia K. Fujimoto and **Stephen M. Klein** have been re-elected to the board of directors of Graham & Dunn in Seattle.


Fujimoto


Klein

Ms. Fujimoto concentrates on wealth management and transfer, and succession planning. Mr. Klein counsels financial institutions on federal and state banking matters.

John H. Chun has become a partner in the Seattle firm Mundt MacGregor.

In Memoriam

Horton Herman died February 21. He was a partner in the Spokane firm formerly known as Paine, Lowe, Coffin, Herman and O'Kelly. Mr. Herman served as chairman of a federal judgeship panel for the Eastern District of Washington in 1979. Memorials may be made to the Shriners Hospital for Children (911 W. Fifth Ave., Spokane, WA 99204-2901).

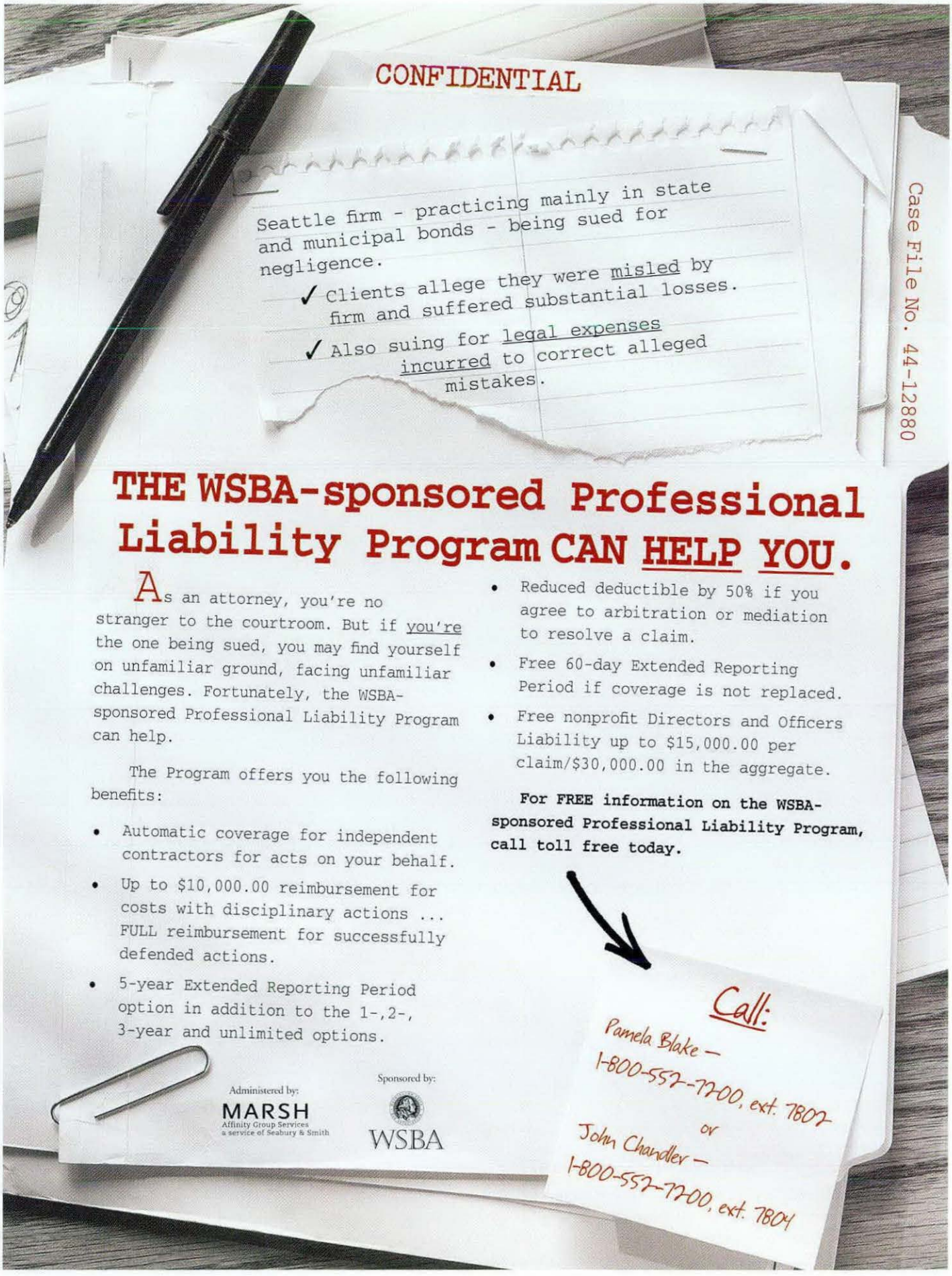
Nancy Ann Holman, Washington's first female superior court judge, died April 7 at age 66. In 1970, Judge Holman became the first female member of Washington Defense Lawyers, and that same year Governor Dan Evans appointed her to King County Superior Court. She was also the first woman to hold office in the Washington State Superior Court Judges' Association, and the first woman elected to the King County Law Library Board. In 1981, Judge Holman helped found the King County Superior Court Family Law Department.

Thomas Patrick Keefe died March 29 after a battle with Parkinson's disease. He was 82. Mr. Keefe was an active member of the WSBA, the King County Bar Association, and the American Bar Association for more than 50 years. He was founding member of the Washington State Trial Lawyers Association, and was a fellow of the International Academy of Trial Lawyers. Mr. Keefe was appointed to the Washington State Gambling Commission by Governor John Spellman, and was reappointed by Governor Booth Gardner to serve as chairman. Memorials may be made to the scholarship fund at O'Dea High School (802 Terry Ave., Seattle, WA 98104) or the Father Kilian Scholarship Fund at Saint Martin's College (5300 Pacific Ave. SE, Lacey, WA 98503).

James E. McKenna died March 16 at age 73, following a brief illness. Mr. McKenna was the fourth of five generations of lawyers. He spent most of his career with Shell Oil Company. Memorials may be made to the American Diabetes Association (557 Roy St., Lower Level, Seattle, WA 98109).

Hosted Reception and Networking

The WSBA Interprofessional Committee invites members to a forum discussion with members of the financial industry. The focus will be on fostering better relations, teamwork, and interprofessional dialogue. The event will be held May 16 from 3:30 to 7:00 p.m. at the Women's University Club in Seattle. For more information, please contact Toni Doane at tonid@wsba.org or 206-727-8293.



THE WSBA-sponsored Professional Liability Program CAN HELP YOU.

As an attorney, you're no stranger to the courtroom. But if you're the one being sued, you may find yourself on unfamiliar ground, facing unfamiliar challenges. Fortunately, the WSBA-sponsored Professional Liability Program can help.

The Program offers you the following benefits:

- Automatic coverage for independent contractors for acts on your behalf.
- Up to $10,000.00 reimbursement for costs with disciplinary actions ... FULL reimbursement for successfully defended actions.
- 5-year Extended Reporting Period option in addition to the 1-, 2-, 3-year and unlimited options.
- Reduced deductible by 50% if you agree to arbitration or mediation to resolve a claim.
- Free 60-day Extended Reporting Period if coverage is not replaced.
- Free nonprofit Directors and Officers Liability up to $15,000.00 per claim/$30,000.00 in the aggregate.

For FREE information on the WSBA-sponsored Professional Liability Program, call toll free today.

Call:
Pamela Blake – 1-800-552-7700, ext. 7802
or
John Chandler – 1-800-552-7700, ext. 7804

Administered by:
MARSH
Affinity Group Services
a service of Seabury & Smith

Sponsored by:
WSBA

Lawyer Discipline & Ethics: 2001 Summary Report

by Barrie Althoff • *WSBA Professionalism Counsel*

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

This article summarizes what happened in Washington lawyer discipline and ethics during calendar year 2001.

Grievants file allegations of unethical conduct by Washington lawyers with the WSBA Office of Disciplinary Counsel (ODC). The ODC investigates, and either dismisses or prosecutes grievances. Prosecutions must first be authorized by order of a three-person review committee (two lawyers and one nonlawyer). Volunteer lawyers act as trial-court hearing officers. The WSBA Disciplinary Board, composed of the members of the review committees and a chair and vice-chair, serves as the disciplinary appellate court. The Washington Supreme Court is the disciplinary court of last resort.

Number of Lawyers Disciplined

In 2001, 56 formal disciplinary sanctions (permanent public records) were imposed on Washington lawyers, consisting of 20 disbarments, 15 disciplinary suspensions, 13 reprimands and 8 censures. In addition, 16 lawyers were formally admonished (generally a nonpermanent public record) for misconduct. Another five lawyers were suspended from practice on an interim basis (not a disciplinary sanction) pending disciplinary proceedings. The 72 sanctions and admonitions were imposed on 70 lawyers (one lawyer received three reprimands). By comparison, in 2000 there were 107 disciplinary sanctions/actions, but in 1999 only 49.

As of midyear 2001, Washington had 19,217 active in-state lawyers, an increase of about 500 over the prior year. In 2001, about one in every 356 Washington lawyers (compared to one in every 237 in 2000) was formally sanctioned (disbarred, suspended for discipline, reprimanded or censured), and one in every 1,201 (compared to one in every 668 in 2000) was formally admonished. Or, collectively, in 2001, one in every 275 (183 in 2000) Washington lawyers (less than four-tenths of one percent) was either sanctioned or admonished. Alternatively, 274 of 275 Washington lawyers (about 99.6 percent) were not subject to any disciplinary sanction or action last year. Washington lawyers continue overwhelmingly to represent their clients ethically.

...in 2001, one in every 275 Washington lawyers (less than four-tenths of one percent) was either sanctioned or admonished.

Nature and Number of Grievances

During 2001 the ODC changed file opening/closing practices, generally resulting in fewer file openings, with the result that 2001 figures are not wholly comparable to those in prior years. However, during 2001 the ODC opened files on 2,717 new matters (compared to 3,427 in 2000). Included were 1,923 (2,244 in 2000) written grievances (allegations of unethical conduct), 378 (536 in 2000) lawyer-client file disputes, and 416 (647 in 2000) lawyer-client noncommunication matters. While some lawyers were subject to multiple grievances, written grievances averaged about one for every 10 lawyers. However, this bare statistic does not accurately reflect client satisfaction. If each of Washington's 19,217 active in-state lawyers represented only 20 clients in 2001 (an unrealistically low assumption), less than one half of one percent of those 384,340 lawyer-client representations resulted in a grievance, or, nearly 99.5 percent did not result in a grievance. This suggests that Washington lawyers continue to do a very good job in satisfying their clients.

Cases in Inventory

At the end of 2001, the ODC had in inventory about 110 files in the intake phase and about 278 under investigation. Under the aspirational timelines used by the ODC, files should not remain in intake more than 60 days before being dismissed or sent to investigation, and 90 percent of investigation files should be out of investigation within 120 days and the rest within 180 days. Files assigned to outside special district counsel are exempt from the timelines. At the close of the year, about 73 percent of investigations were less than 120 days old, 16 percent were between 120 and 180 days old, and nine percent were older than 180 days (of which 42 percent were files assigned to outside special district counsel).

In addition to open investigations, the ODC ended the year with a record total of 150 formal prosecutions pending, ranging from matters just ordered to hearing to cases awaiting Supreme Court decisions. Without the generous support of many lawyers who volunteered to act as special district counsel and prosecute cases on behalf of the ODC, the closing inventory would have been even higher. The increase in pending disciplinary proceedings reflects both the completion of many investigations and the fact that disciplinary prosecutions are becoming increasingly complex, contentious and time-consuming.

In addition to the ODC's handling of formal grievance investigations and pros-

ecutions, in 2001 its consumer-affairs team received 6,140 telephone calls from the public about lawyers' performance or disciplinary histories, mailed 2,534 grievance brochures and forms and 953 other law-related information brochures, handled 4,619 additional calls from the public on pending matters, and took part in 138 in-person meetings with members of the public.

Nature of Grievants

About 53 percent of all grievances were filed by clients (21 percent) or ex-clients (32 percent), while 19 percent were filed by opposing clients (17 percent) or opposing counsel (two percent). The WSBA itself filed 11 percent of grievances, mostly for trust-account problems. The rest of the grievances were filed by other lawyers (three percent), court reporters and expert witnesses (two percent), judges (less than one percent) and others (12 percent). These percentages are consistent with past years' grievances.

Practice Areas Involved in Grievances

In prior years most grievances generally were filed against lawyers practicing family law. In 2001, however, most grievances were filed against lawyers practicing criminal law (29 percent), then family law (22 percent), personal injury law (11 percent), estates/probate law (seven percent), real property law (four percent), and commercial law (four percent). Grievances were filed in lesser amounts against lawyers practicing in the areas of labor/employment matters, bankruptcy, collections, contracts/consumer law, landlord/tenant law, immigration and corporate/business matters.

Other than the increase in criminal law and decrease in family law formal grievances, there were no significant changes from last year in the areas in which written grievances were filed. The areas in which most grievances are filed generally are the most common areas of practice with the most clients, and thus are most likely to receive grievances. In addition, clients in these areas often have not previously dealt with lawyers, and often have unrealistic expectations of what their lawyer will or can do for them, or what the lawyer's services will cost.

Grievance Allegations

About 45 percent of formal grievances allege that the lawyer either did not perform promised legal services at all, unduly delayed performance beyond what the client expected, failed to adequately communicate with the client, or otherwise failed to perform required duties for the client. Another 16 percent of formal grievances allege interference with justice by the lawyer, by, for example, communicating with represented adversaries, making misrepresentations to a court, disobeying court orders, or filing harassing lawsuits. Another 11 percent relate to the lawyer's personal conduct, including criminal convictions of the lawyer, misrepresentations by the lawyer to nonclients, failure to pay debts, practicing while suspended, use of offensive language, and so on. Another eight percent allege the lawyer charged excessive fees, failed to return unearned fees, or made unauthorized withdrawal of disputed fees.

About nine percent allege failure by the lawyer to satisfy duties to the client, including making misrepresentations to the client, disregarding conflicts of interest, improperly withdrawing from representation, failing to turn over files to the client, or settling cases without authority. Another seven percent allege trust-account violations. There were no significant changes in 2001 compared to 2000 as to the nature of the grievances.

Reasons for File Closures

The ODC examines each submission it receives to determine if it alleges an ethical violation. About 23 percent of 2001 submissions failed to do so and were dismissed. If a submission alleges an ethical violation, the ODC considers its materiality and investigates as appropriate. The ODC dismissed 29 percent of 2001 submissions after either a formal (15 percent) or informal (14 percent) investigation showed that, although a violation was alleged, there was either no evidence or insufficient evidence to establish a violation had occurred. Another 13 percent were dismissed further into the disciplinary process by a review committee or the Disciplinary Board. File disputes (14 percent) and noncommunication matters (15 percent) were generally closed and resolved informally outside of the grievance-discipline process. About four percent of closures were viewed as essentially fee disputes not appropriate for lawyer discipline and were dismissed and referred to voluntary fee arbitration, while another two percent were referred to informal mediation.

Supreme Court Opinions

During 2001, the Supreme Court issued two published opinions in lawyer disciplinary cases. One considered whether requiring a Washington licensed lawyer as probation supervisor was appropriate for a respondent lawyer whose practice was exclusively in federal courts and whose office was outside the state of Washington. The other case looked at whether a deputy prosecuting attorney may ethically attempt to induce a witness to not testify for a person charged with a crime, even if the offer has no affect on the witness's decision not to testify.

In the first case, *In re Discipline of Juarez*, 143 Wn.2d 840 (2001), the Court upheld the Disciplinary Board's recommendation to suspend a lawyer from the practice of law for 18 months, to be followed by a 12-month probation period during which the lawyer's work was to be supervised by another Washington-licensed lawyer.

The lawyer was charged with various acts of misconduct. The interesting issue in the case, however, is not the misconduct but the nature of the sanction. The lawyer asserted his criminal law practice was exclusively in federal courts and that he had moved out of Washington to New Mexico. He contested whether, upon the expiration of his suspension, his probation supervisor had to be a Washington-licensed lawyer as recommended by the Disciplinary Board. The Court rejected the lawyer's argument and agreed with the observing board that the lawyer was only licensed to practice law in Washington, and his right to practice law in federal courts was dependent on his maintaining his Washington license.

The Court's second lawyer-discipline opinion was *In re Discipline of Bonet*, 144 Wn.2d 502 (2001). Disciplinary counsel charged the lawyer, a deputy prosecutor, with misconduct as to a potential witness

for a criminal defendant. The hearing officer found that the lawyer had offered to dismiss a charge against the witness if the witness would invoke his constitutional privilege not to testify for the criminal defendant, a privilege the hearing officer found the witness did not otherwise intend to invoke. The hearing officer found that two other charges against the lawyer were not proved. Both the lawyer and disciplinary counsel appealed the hearing officer's decision to the Disciplinary Board, which found none of the charges proved, and recommended dismissing the case. Disciplinary counsel then sought, and the Supreme Court granted, discretionary review of the board's decision as one involving an issue of substantial public interest.

The Court decided that the misconduct found by the hearing officer was proved, and that the conduct violated the Rules of Professional Conduct. It then remanded the case to the Disciplinary Board to determine the appropriate sanction.

The issue of substantial public interest which formed the basis for the Court's discretionary review of the Disciplinary Board's decision, was, in the Court's words:

> May a prosecuting attorney offer an inducement to a defense witness to not testify at a criminal proceeding? More specifically, is it misconduct for a deputy prosecuting attorney to attempt to induce a witness to not testify for a person charged with a crime, even if the offer has no affect on the witness's decision to not testify? [144 Wn.2d 502, 513].

The Court concluded such conduct violated RPC 3.4 (a lawyer may not falsify evidence or assist a witness to testify falsely or offer an inducement prohibited by law) and RPCs 8.4 (b) and (d) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, or to engage in conduct prejudicial to the administration of justice).

Suggested Court Rule Revisions and Related Matters

New Diversion Program. During calendar year 2001 the Supreme Court adopted the recommendation of the Bar's Board of Governors to amend the Rules for Lawyer Discipline to create a new diversion program as an alternative to formal discipline.

Under the diversion program, disciplinary counsel may agree with a lawyer to divert the lawyer's disciplinary case out of the formal disciplinary process, but only if the lawyer's alleged misconduct is "less serious misconduct." That term means conduct which does not involve misappropriation of client money, dishonesty, fraud, deceit or misrepresentation; conduct which does not involve serious injury to clients; and conduct which is not of the same type for which the lawyer has been previously disciplined. Disciplinary counsel may, but is not required to, divert such a case out of the formal discipline system into various alternative programs including, for example, lawyer assistance programs, law office management programs, continuing legal education programs, and so on.

...the Supreme Court adopted the recommendation of the Bar's Board of Governors to amend the Rules for Lawyer Discipline to create a new diversion program as an alternative to formal discipline.

For diversion to happen, the lawyer must admit to the misconduct and sign a contract to do certain things outside the formal discipline system to address the misconduct. For example, the agreement may require the lawyer to implement better office procedures, arbitrate or mediate fee or other disputes, obtain counseling or treatment, take educational courses, or make restitution for injuries the lawyer has caused. If the lawyer satisfies the diversion contract, the disciplinary grievance is dismissed; if the lawyer does not satisfy the contract, the grievance is reinstated and processed through lawyer disciplinary procedures.

Definition of Practice of Law and Creation of the Practice of Law Board. In October 2000, the WSBA's Board of Governors approved and submitted to the Supreme Court proposed new rules defining the practice of law and establishing a board to deal with issues of unauthorized practice of law. The court approved new General Rules 24 and 25 effective September 1, 2001.

General Rule 24 clarifies what is and what is not the practice of law. This is relevant not only for nonlawyers providing client services, but also for out-of-state lawyers not admitted in Washington who may provide client services within Washington, and for Washington lawyers who may assist them, since providing legal services in a jurisdiction where a lawyer is not authorized to do so, and assisting another lawyer to do so, are both ethical violations subjecting a lawyer to disciplinary action. It also lays the groundwork for enforcement of existing statutes prohibiting the unauthorized practice of law which are largely unenforced due, at least in part, to uncertainty over what constitutes the practice of law.

General Rule 25 establishes a Practice of Law Board to address issues of unauthorized practice of law and issues related to authorized practice of law by nonlawyers. The rule includes criteria to be used in considering a recommendation to the Supreme Court that it consider establishing limited practice for nonlawyers similar to the current rule for Limited Practice for Closing Officers (APR 12).

Proposed Replacement of Disciplinary Procedural Rules. The Board of Governors approved late in 2001, and submitted to the Supreme Court early in 2002, extensive recommendations for procedural changes in Washington's lawyer discipline system. The recommendations, including a new set of disciplinary procedural rules, are now pending before the Supreme Court.

The proposed new rules substantially complete a discipline-system review begun in 1992, when the Court, the governors and the Disciplinary Board invited the ABA's Standing Committee on Professional Discipline to evaluate Washington's lawyer discipline system against the national model for such systems set out in the 1992 final report of the ABA McKay Commission. The Court and governors

appointed a joint task force to consider the evaluation team's September 1993 final report on Washington's system. In December 1994, the joint task force issued its own final report largely supporting the evaluation team's recommendations and making additional recommendations. Most recommendations were subsequently approved by the governors, submitted to the Court, and adopted as rule amendments effective September 1997.

In late 1999, the governors proposed forming a new task force (Discipline 2000 Task Force) to review the Rules for Lawyer Discipline, first adopted effective in 1983, and address numerous procedural problems that had become apparent under the rules. The Court agreed to the proposal. The 1992 evaluation and subsequent joint task force consideration had looked at Washington's discipline system from the outside, comparing it to a proposed national model. The new task force was to look at the system from the inside, and thus was to be made up principally of "insiders" (respondents' counsel, disciplinary counsel and adjudicators) intimately familiar with Washington's discipline system and its strengths and weaknesses. Their mandate was to improve the effectiveness, fairness and efficiency of the existing discipline system rather than to seek alternative structures for that system.

In July 2001, the new task force submitted its report (available at www.wsba.org/2001/d2k) to the governors, who, in September 2001, approved most of its recommendations and, in January 2002, submitted suggested now-pending rules changes to the Court. If the Court adopts the suggested rules, they will likely become effective September 1, 2002.

Among the recommended changes and actions are the following:

- appoint a chief hearing officer to administer the hearing officer system;
- authorize hearing officers to approve stipulations not involving suspension or disbarment rather than requiring those stipulations to be submitted to the Disciplinary Board;
- subject hearing officers to conduct standards modeled after state judicial standards;
- permit certain dispositive motions and require scheduling orders to keep cases moving timely;
- do more to recover discipline costs, including updating the amounts of costs assessed against lawyers receiving discipline and having final unpaid cost orders result in entry of a judgment; recently, the court also inquired whether lawyers who prevail in disciplinary actions should be able to recover their costs;
- modify sanctions to be consistent with the ABA Standards for Imposing Lawyer Sanctions by eliminating the sanction of "censure" and increasing the maximum suspension period from two to three years;
- permit, under very narrow circumstances, a lawyer facing discipline to permanently resign (the lawyer must admit the misconduct, arrange for restitution and costs, and will be considered disbarred);
- clarify the rules for disability proceedings and provide for limited guardianships in superior court;
- modify hearing and appellate procedures to conform more closely with civil, administrative and appellate practice;
- clarify the lawyer's duty to cooperate in disciplinary investigations as to the waivers required and the effect of attorney-client privilege;
- provide respondents more efficient means of seeking review of their matters in the system; and
- rewrite, reorganize, clarify and rename the existing Rules for Lawyer Discipline (with a suggested new name of "Rules for Enforcement of Lawyer Conduct").

In late 1999, the governors proposed forming a new task force (Discipline 2000 Task Force) to review the Rules for Lawyer Discipline...The Court agreed to the proposal.

The governors did not adopt a task-force recommendation to reduce the number of disciplinary hearing officers to no more than 10, and pay them a stipend. The recommendation's goal was to create a small cadre of hearing officers who, by frequently handling disciplinary proceedings, would develop extensive knowledge and experience in, and familiarity with, disciplinary issues and procedures. The governors adopted the enabling language to pay hearing officers, but did not fund it for 2002 due to budgetary concerns and uncertainty that payment of a stipend would, in fact, attract the caliber of lawyers sought as hearing officers.

Proposed Rules on Unbundled/Discrete-Task Representation. In December 2001, the governors approved submitting to the Supreme Court suggested rule changes to facilitate discrete-task representation (unbundled legal services) and limited court appearances. The suggested rules were also approved by the Washington Access to Justice Board, the Superior Court Judges' Association, and the District and Municipal Court Judges' Association. If the court adopts the suggested changes, they will likely become effective September 1, 2002.

Several Rules of Professional Conduct are proposed for revision including RPCs 1.2 (scope of representation), 4.2 (communicating with represented person), 4.3 (communicating with an unrepresented person), and a new RPC 6.5 (nonprofit and court-annexed limited legal service programs). Revisions and new rules were also suggested to the superior court civil rules and the civil rules for courts of limited jurisdiction, including specific provision for limited appearances and clarifying that a lawyer generally will not be obligated to continue a representation beyond the agreed scope of representation. The suggested rules are in part based on newly adopted changes to the ABA's Model Rules of Professional Conduct.

Creed of Professionalism. In July 2001, the governors adopted a Creed of Professionalism as a statement of professional aspiration for Washington lawyers. While not supplanting or modifying the Rules of Professional Conduct, it sets out some fundamental principles of professionalism and civility in the belief that these prin-

ciples and full representation of clients are not incompatible. For the text of the creed, see page 15 of this issue.

Ethics Presentations

By making ethics presentations and writings available to lawyers throughout the state, the ODC has sought to help Washington lawyers understand their ethical obligations and avoid misconduct leading to discipline. Last year, lawyers in ODC made about 80 ethics presentations and wrote various legal ethics articles.

Further Information

The ODC publishes the Washington Lawyer Discipline Manual annually. The most recent version reprints relevant disciplinary rules, guidelines and year 2001 discipline notices, and contains the 2001 annual discipline report. It is available for $15 from the ODC.

Conclusion

Having moved in March 2002 from the position of WSBA chief disciplinary counsel and director of lawyer discipline to the new part-time position of WSBA professionalism counsel, this is my last summary discipline report. I will continue serving the Bar in my new position through presentations and writings on ethics, discipline and legal professionalism.

Seven years ago, when I started as chief disciplinary counsel, I was proud to be a Washington lawyer. After seven years at the helm of Washington's lawyer discipline system, during which the discipline system handled over 18,000 grievance investigations and prosecuted over 400 Washington lawyers for ethical misconduct, I am even prouder to be a Washington lawyer. I remain convinced that nearly all Washington lawyers are highly ethical, and serve their clients and the public well. Because of their conduct, law remains a noble profession in Washington.

WSBA Service Center
800-945-WSBA
206-443-WSBA
E-mail: questions@wsba.org

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.

Disbarred

John Hess (WSBA No. 22308, admitted 1992), of Renton, was disbarred by order of the Supreme Court effective August 8, 2001, following a default hearing. The discipline is based on his failure to diligently represent several clients and failure to properly deal with client funds.

Matter 1: In October 1995, Mr. Hess agreed to represent the wife in a marriage dissolution action. The parties agreed to an independent accounting, with each party paying $750. Mr. Hess was responsible for contacting the accountant and processing the payments through his office. The husband provided his records to the accountant and sent a $750 check to Mr. Hess. The accountant reviewed the records and billed the husband, who referred the charges to Mr. Hess. The accountant asked for a $500 retainer. Mr. Hess failed to pay the retainer, so the accountant returned the documents and declined to do further work on the matter. The husband asked Mr. Hess to forward $100 to the accountant and return the remaining $650 to him. After the husband filed a grievance, Mr. Hess issued a $146.90 check to the accountant. About six months later, Mr. Hess wrote the husband a check for $750. Mr. Hess did not comply with disciplinary counsel's requests for information regarding this grievance.

Matter 2: In December 1995, Mr. Hess agreed to represent a client in a personal injury matter. The client had been injured in a rear-end automobile accident. In January 1996, both the client and Mr. Hess signed a document instructing Mr. Hess to pay the client's chiropractor out of settlement proceeds.

In July 1998, Mr. Hess received $46,000 in settlement proceeds in the client's case. He paid all of the client's medical bills except the chiropractor's. Mr. Hess told the client that he was holding the money for the chiropractor's bill in his trust account, and that he believed the bill should be reduced.

In October 1998, Mr. Hess's paralegal wrote to the chiropractor that no payments would be made until all service fees were removed and the balance reduced by one third. The chiropractor reduced his bill by $1,000. A few weeks later, Mr. Hess paid the chiropractor $1,000, leaving $3,437 outstanding. Although the client repeatedly instructed Mr. Hess to pay the bill, he made no further payments. The chiropractor sent bills to the client, with mounting interest. Mr. Hess did not maintain the disputed funds in his trust account, nor did he comply with disciplinary counsel's requests for information regarding this grievance.

Matter 3: In October 1997, Mr. Hess agreed to represent Mr. A, who, with his stepfather, was a joint tenant on a checking and savings account containing approximately $10,000. After Mr. A's mother died, his stepfather became involved with Mr. A's former wife. Mr. A became concerned about his stepfather's welfare and withdrew $10,000 from the joint account. Although Mr. A offered to return the funds, the stepfather filed a lawsuit against Mr. A. Mr. Hess advised Mr. A to give him the $10,000 for deposit in his trust account to pay any settlement or judgment. In the answer Mr. Hess drafted for the client, he stated the funds had been placed in a sealed bank account.

In April or May 1998, Mr. Hess informed the client that he had withdrawn $1,200 from the $10,000 for attorney's fees. Mr. Hess refused the client's requests to return the money to the trust account. The client discharged Mr. Hess and asked for a refund of the remaining funds. Mr. Hess wrote the client a check for $8,500, noting that he was holding $300 for potential costs. After the client left the office, Mr. Hess stopped payment on the check.

In May 1998, Mr. Hess wrote the client a replacement check for $6,305.05. He also gave the client a document called "costs and fees," indicating he spent 27.37 hours on the client's case for $3,694.95 in

attorney's fees. Mr. Hess had not billed the client for these amounts and did not keep contemporaneous records of the time he spent on the client's case. Mr. Hess and the client arbitrated their fee dispute. The arbitrator awarded Mr. Hess $650 and required him to refund $3,244.95 to the client.

At the time of the hearing, Mr. Hess had not paid the arbitration award, nor did he maintain the disputed funds in his trust account. Mr. Hess did not comply with disciplinary counsel's requests for information regarding this grievance.

Matter 4: In November 1997, Mr. Hess agreed to represent a client in a personal injury matter. The client had been injured in a May 1995 automobile accident. Prior to contacting Mr. Hess, the client received a $15,000 settlement offer. Upon Mr. Hess's advice, the client declined the offer. Mr. Hess and the client agreed that the client would send Mr. Hess reminders of the statute of limitations in her case. The client sent a reminder on March 26, 1998; Mr. Hess filed a complaint on May 15, 1998. Mr. Hess's paralegal signed the summons and complaint.

In September 1998, the court dismissed the client's lawsuit with prejudice, based on the defendant's claim that the suit was not properly commenced prior to the expiration of the statute of limitations. Mr. Hess did not submit a response to the motion or attend the hearing. The court also imposed statutory attorney's fees against Mr. Hess's client. Mr. Hess took no action on the client's request that he attempt to reopen her lawsuit.

In March 1999, the client retained new counsel. New counsel asked Mr. Hess to provide a declaration to support the client's request to reopen the case. Mr. Hess agreed to provide a declaration, but did not do so. Based on Mr. Hess's refusal to provide the declaration, the client's new counsel determined that it was unlikely the court would set aside the dismissal. Mr. Hess did not comply with disciplinary counsel's requests for information regarding this grievance.

Matter 5: In April 1998, Mr. Hess agreed to represent a client in a trial *de novo* of an arbitration award. The client had sustained back injuries and hearing loss in an automobile accident. The arbitrator awarded the client $6,714.54 plus costs. The client, who paid Mr. Hess $3,000 in advanced costs, was not able to contact Mr. Hess during summer and fall 1998.

The client appeared for the March 16, 1999 trial. While the client waited in the hall, Mr. Hess told the judge and defense counsel that he could not continue with the trial because of an anxiety disorder. The judge continued the trial and stated he would award costs to the defendants if counsel filed a motion. Mr. Hess told the client that the trial was continued because of his heart problems; however, Mr. Hess never rescheduled the client's trial.

In May 1999, the court dismissed the client's case for failure to prosecute. Mr. Hess did not inform the client that the court had dismissed his case. Mr. Hess also failed to provide the client with a refund or an accounting of the costs and fees in his case. Mr. Hess did not comply with disciplinary counsel's requests for information regarding this grievance.

Matter 6: In May 1998, Mr. Hess agreed to represent a client in a lease and purchase of a Domino's Pizza franchise. The client paid Mr. Hess $2,500 in advance fees. Mr. Hess agreed to draft the agreement so that the client could retain the profits and accept liability for operating the store prior to closing the sale. The client was selling a Domino's Pizza in Maryland while purchasing one in Washington. Mr. Hess did not prepare the necessary lease and purchase agreements, and failed to attend a meeting with his client and the planned sale closing. The client attended the closing without counsel and was required to pay an additional $3,000 as pre-sale profits because Mr. Hess had not drafted the agreement.

After the closing, the client retained a second lawyer to contact Mr. Hess about a refund of his $3,000. Mr. Hess told the new lawyer that he would return a portion of the fees; however, he did not return any fees to the client until after the client filed a grievance, when Mr. Hess paid the client $1,000 and gave him a promissory note for $1,500. Mr. Hess made no payments under the promissory note, nor did he comply with disciplinary counsel's requests for information regarding this grievance.

Matter 7: In December 1998, Mr. Hess agreed to represent a client who was attempting to purchase a home. During the home purchase, an $8,000 child-support arrearage appeared on the client's credit report. Just before the home purchase was to close, Mr. Hess told the client that he could do nothing further to reduce the child-support arrearage. On January 8, the client paid the arrearage in full.

In April 1999, the mother served the client with a petition to modify child support. Mr. Hess agreed to file an answer for the client in this matter. After several weeks of unsuccessfully trying to contact Mr. Hess, the client discharged him and asked for a refund of his fees. Mr. Hess did not refund the client's fees, nor did he comply with disciplinary counsel's requests for information regarding this grievance.

Matter 8: In April 1999, Mr. Hess agreed to represent the father in a motion seeking primary residential placement of his children and a release from the mother stating that he was current on his child-support payments. The client paid $2,000 in advance fees and agreed to pay an additional $1,000. The client told Mr. Hess that the children were in danger and that the case must go forward immediately.

The client called several times during April, and then asked for his money back. Three days later, Mr. Hess called the client and promised to take care of the case immediately, promising a refund if the client was still unhappy. Mr. Hess's legal assistant made an appointment for the client to meet with Mr. Hess on Sunday, April 25. The client appeared and waited two hours, but Mr. Hess failed to appear. Mr. Hess did meet with the client two days later and drafted a declaration. The client made significant corrections to the declaration and completed a financial declaration; however, Mr. Hess did not contact the client after their meeting.

On May 11, 1999, the client sent Mr. Hess a $25 check to cover the costs of mailing his file. Mr. Hess cashed the check and failed to send the client's file or refund his retainer. Subsequently, the client filed a small-claims action in King County District Court. In June, the client received portions of his file; Mr. Hess mailed the remainder of the file to the client in Au-

gust 1999. The court awarded the client a $2060.90 judgment that was later satisfied by Mr. Hess's appeal bond. Mr. Hess did not comply with disciplinary counsel's requests for information regarding this grievance.

Mr. Hess's conduct violated RPCs 1.14 (a)(2), requiring lawyers to maintain disputed funds in their trust accounts; 1.14 (b)(4), requiring lawyers to promptly deliver client funds to clients upon request; 1.15(d), requiring lawyers to protect clients' interests upon termination of the representation; 8.4(c), prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; 1.4, requiring lawyers to keep clients reasonably informed about the status of their matters; 1.1, requiring lawyers to provide competent representation; and 1.3, requiring lawyers to diligently represent their clients.

Marsha Matsumoto represented the Bar Association. Mr. Hess represented himself. The hearing officer was William P. Bergsten.

Disbarred

John O. McLendon (WSBA No. 1187, admitted 1969), of Spokane, has been disbarred by order of the Supreme Court effective March 7, 2002, following a stipulation. The discipline is based on his failure to diligently represent two clients, failure to abide by two clients' decisions to accept settlement offers, and entering into a business transaction with a client in 1998 and 1999 without giving the client a reasonable opportunity to seek independent advice.

Matter 1: In March 1995, Mr. McLendon agreed to represent a client in a personal injury matter. Mr. McLendon negotiated with the insurance company, but did not convey the company's settlement offers to the client. In August 1997, Mr. McLendon finalized a settlement with the insurance company, without the client's consent.

Matter 2: In May 1995, Mr. McLendon agreed to represent a client in a personal injury matter. The client had been injured in an April 1995 auto accident. Mr. McLendon negotiated with the insurance carrier, but did not negotiate a settlement prior to the statute of limitations running on the client's claim in April 1998. Mr. McLendon did not file or serve a lawsuit on the client's claim prior to the statute of limitations running.

In June 1998, when Mr. McLendon realized the statute had run, he tried to negotiate a $7,500 settlement. When the insurance company refused to negotiate, Mr. McLendon faxed a letter attempting to accept a June 3, 1997 $6,500 settlement offer. Mr. McLendon did not discuss these settlement offers with his client.

In June 1999, Mr. McLendon proposed a settlement of the client's malpractice claim against him, without advising the client to seek independent representation. (This same client had been involved in a second automobile accident in October 1996.) Mr. McLendon settled the client's case without her knowledge or permission.

Mr. McLendon's conduct violated RPCs 1.3, requiring lawyers to diligently represent clients; 1.2, requiring lawyers to obtain clients' authority prior to accepting settlement offers; 1.4, requiring lawyers to keep clients informed about the status of their matters; 1.8(h), prohibiting lawyers from settling malpractice claims with unrepresented former clients without advising the former client in writing that independent representation is appropriate.

Timothy J. Parker and Randy Beitel represented the Bar Association. F. Lawrence Taylor Jr. represented Mr. McLendon. The hearing officer was Robert Redman.

Disbarred

Clark T. Ransom (WSBA No. 10925, admitted 1980), of Rainier, was disbarred by order of the Supreme Court effective March 4, 2002, following a default hearing. The discipline is based on lack of diligence, unfair business transactions with a client, and failure to protect two clients' interests when closing his practice in 1999.

Matter 1: In early 1999, Mr. Ransom began representing Mr. O on several matters, including an ongoing bankruptcy. The client consulted Mr. Ransom for advice on how to realize his investment in a parcel of real property to obtain funds to pay off his creditors. The client needed financing to build a road though the property to provide access to 13 subdivided lots. Mr. Ransom suggested that his brother might be interested in investing in the client's subdivision project.

In March 1999, the client met with Mr. Ransom and his brother regarding a possible investment. The client learned that an undeveloped parcel of land in Poulso was available for sale. The client hired Mr. Ransom to work with him in this purchase along with Mr. H, who was to provide the financing. The client would log the land and sell the lumber, and together they would subdivide and sell the individual lots. In exchange for doing the necessary legal work on this project, Mr. Ransom agreed to accept 20 percent of the profits, and told the client he would create a corporation to handle the transaction. Mr. Ransom did not form a corporation, but did print letterhead with a corporate name, listing himself as president.

In May 1999, Mr. Ransom wrote the client a letter on corporate letterhead offering to finance the $35,000 cost of road construction in exchange for being repaid out of the first available proceeds, and a fee of $2,000 for each of the 13 lots to be sold. The client accepted the offer, and another lawyer filed a motion asking the bankruptcy court to approve the plan.

In June 1999, Mr. Ransom attempted to register the corporate name with the Washington secretary of state. Upon discovering that a corporation already existed under that name, he registered under a different name, listing himself as the sole director and registered agent. The bankruptcy court approved the loan from the first unregistered corporation.

In August, Mr. Ransom obtained a $25,000 loan for the corporation from his brother. The corporation promised to pay the brother $30,000 before January 1, 2000. Mr. Ransom deposited the money into a bank account in the corporation's name. Over the first few weeks in September 1999, Mr. Ransom made several withdrawals from this account, including checks made out to himself, his video business and his son. Mr. Ransom did not pay the contractors who were logging the Poulsbo property and did not complete the services contract for the road.

In mid-October 1999, Mr. Ransom told his brother that he was closing his law

practice and moving to Arizona. Mr. Ransom was representing Mr. O when he left Washington, and failed to notify his client of this decision, and to answer disciplinary counsel's questions about this matter.

Matter 2: In April 1999, Mr. Ransom represented Mr. and Mrs. R in an appeal from a Department of Licensing (DOL) administrative law judge's decision imposing a $19,710 tax and fee assessment against their trucking business. Mr. Ransom mailed the clients' petition for reconsideration one day after the 10-day deadline.

On May 7, 1999, the DOL director denied the clients' petition because it was not timely filed. The director's decision also explained the procedures for judicial review. Mr. Ransom filed the clients' petition for judicial review more than 30 days after the deadline, and failed to serve the DOL and the attorney general for another three weeks. The clients were unable to contact Mr. Ransom, so they called the assistant attorney general working on the case. The clients learned that their petition was filed late and that the attorney general had filed a motion to dismiss their petition. The clients then learned that Mr. Ransom had left the state and that they could pick up their file from his 17-year-old son. The clients retained new counsel and negotiated a settlement with DOL. Mr. Ransom failed to respond to disciplinary counsel's requests for information regarding this matter.

Mr. Ransom'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; 1.15(d), requiring lawyers to take steps to protect clients' interests after terminating representation; 8.4(c), prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation; and RLD 2.8(a), requiring lawyers to promptly respond to disciplinary counsels' requests for information regarding disciplinary investigations.

Kevin Bank represented the Bar Association. Mr. Ransom represented himself. The hearing officer was William Nielsen.

Opportunities for Service

WSBA Presidential Search

Application deadline: May 15, 2002

The WSBA Board of Governors 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, 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 Executive Director, WSBA, 2101 Fourth Ave., Ste. 400, 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 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 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

Washington Pattern Jury Instructions Committee

Application deadline: May 20, 2002

The WSBA Board of Governors is accepting letters of interest from members interested in serving a four-year term on the Washington Pattern Jury Instructions Committee. There is one position available. The term will commence July 16, 2002. A written expression of interest is also required for the incumbent seeking reappointment.

Committee members review, discuss, and vote upon instructions in the civil or criminal area as drafted by subcommittees or staff. The committee meets monthly in Seattle on Saturday for three to four hours (except July and August), and requires a considerable time commitment. It is a large committee with more than 30 members, both judges and lawyers, including two WSBA representatives.

Please submit a letter of interest and résumé to Executive Director, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330, or e-mail oed@wsba.org.

WYLD President-elect Nominations

Application deadline: June 17, 2002

Young lawyers interested in serving as president-elect of the WYLD are invited to submit a statement of eligibility and qualifications for this position. The president-elect automatically succeeds to the position of WYLD president upon completion of a one-year term commencing October 1, 2002.

To be eligible for the position of president-elect, candidates must have a principal place of business in Washington and must be members of the WYLD at the time of taking office for the president-elect position. Additionally, the bylaws require that the president and president-elect have principal places of business in different counties; therefore, this year's candidates may not have a principal place of business in Pierce County.

Any active member of the Washington State Bar Association is also a member of the Washington Young Lawyers Division until December 31 of the year in which he or she turns 36, or until December 31 of the fifth year in which he or she has been admitted to practice, whichever is later.

Individuals intending to stand for election must send their statement of eligibility

and qualifications to Lisa KauzLoric, WYLD Liaison, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; phone 206-733-5944; fax 206-727-8319; e-mail lisak@wsba.org.

WYLD Trustee District Positions

Application deadline: June 17, 2002

Young lawyers interested in serving on the WYLD board of trustees are invited to submit a statement of eligibility and qualifications for the following trustee district positions:

- **Northwest District** – representing Island, San Juan, Skagit and Whatcom counties
- **North Central District** – representing Chelan, Douglas, Ferry, Grant, Kittitas and Okanogan counties
- **Snohomish District** – representing Snohomish County
- **Greater Spokane District** – representing Lincoln, Pend Oreille, Spokane and Stevens counties
- **Greater Olympia District** – representing Lewis and Thurston counties
- **King County District** – representing King County
- **Southeast District** – representing Adams, Asotin, Benton, Columbia, Franklin, Garfield, Klickitat, Walla Walla, Whitman and Yakima counties

To be eligible for one of these positions, a candidate must reside or have his or her principal place of business in the district he or she wishes to represent, and must be a member of the WYLD for the entire term of the position. Elected trustees serve three-year terms commencing October 1, 2002.

Any active member of the Washington State Bar Association is also a member of the Washington Young Lawyers Division until December 31 of the year in which he or she turns 36, or until December 31 of the fifth year in which he or she has been admitted to practice, whichever is later.

Individuals intending to stand for election must send their statement of eligibility and qualifications to Lisa KauzLoric, WYLD Liaison, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; phone 206-733-5944; fax 206-727-8319; e-mail lisak @wsba.org.

Welcome New Governors-elect Joni Kerr, Howard Graham and Ronald Ward

Board of Governors nominating petitions for the 3rd, 6th and 8th Congressional Districts have been received from Joni R. Kerr (3rd District), Howard L. Graham (6th District) and Ronald R. Ward (8th District), all unopposed. Biographical statements have been provided by the governors-elect.

Joni R. Kerr is a solo practitioner in Vancouver, WA. Her practice is limited to representing public school districts in Washington. She graduated from the Ohio State University College of Law in 1979 and clerked for the Ohio Court of Appeals from 1979 to 1981. Ms. Kerr was admitted in Nebraska in 1981, and in Washington in 1990. Before moving to Vancouver, she was a shareholder with Vandeberg, Johnson & Gandara in Tacoma. She served as president of the state board of Washington Women Lawyers in 1998-1999, and as its liaison to the WSBA Board of Governors in 1999-2000.

Howard L. Graham is a sole practitioner in Tacoma. He is a graduate of University of Louisville, 1965, and Wayne State University, J.D., 1973. He served as executive director of Puget Sound Legal Assistance Foundation, 1980-1986 (now Tacoma's Columbia Legal Services). He helped start TPCBA's Volunteer Lawyer Program in 1980. Practice focus: disability issues, Social Security, federal employees' compensation appeals, fair-housing litigation. He was co-chair of the Systems Impediment Committee of the Washington State Access to Justice Board, 2001-2002; past-chair, WSBA Administrative Law section; member, BJA Best Practice Committee, 2001-2002. He is the author of *Federal Employees' Compensation Act Practice Guide*, 1994. Additionally, Mr. Graham served as a Peace Corps volunteer, 1965-1967, and in the U.S. Army, 1968-1970.

Ronald R. Ward, a resident of Mercer Island, is a partner and shareholder in the Seattle law firm Levinson Friedman PS. Mr. Ward earned his J.D. in 1976 from the University of California Hastings College of Law. He is licensed to practice law in California and Washington. Before commencing private practice, he was a Washington state assistant attorney general. Mr. Ward has served as WSTLA vice-president west (1994-1996), a seven-term member of the WSTLA board (1989-1996), and co-chair of the Seattle Downtown Roundtable (1994-1996). He is a member of the Association of Trial Lawyers of America, the National Bar Association, King County Bar Association, and Loren Miller Bar Association. In 1994, Ron was the recipient of an Outstanding Achievement Award presented by Anheuser-Busch Companies at the national convention of the National Bar Association. In 1995, he was the recipient of a WSTLA Special President's Recognition Award. He was appointed to the 1996-1997 Court Composition Committee convened to study the Washington Supreme Court, and is a past member of the WSBA Judicial Recommendation Committee. He was recently nominated an associate member of the Washington Chapter of the American Board of Trial Advocates. Ron is a member of the board of trustees of the Northwest Chamber Orchestra. For some years, he volunteered as a reading tutor for first- and second-graders at a South Seattle elementary school.

Notice of Deadline for Filing WSBA Resolutions

Pursuant to WSBA Bylaw Article VII, Section F – Resolutions, any 10 active members of the Washington State Bar Association may present a written resolution to the Board of Governors for consideration at the WSBA annual business meeting. This year's meeting will be held September 12 at 6:00 p.m. at W Seattle Hotel, 1112 Fourth Ave., Seattle.

Resolutions must be filed with the WSBA executive director at least 90 days before the annual meeting (by 5:00 p.m. on June 17, 2002), and must be accompanied by a written report explaining the resolution. The resolution and explanatory report together shall not exceed a total of 1,000 words. Send resolutions to Executive Director, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330.

The Board of Governors will refer any resolutions addressing issues within the purposes of the WSBA to the WSBA Resolutions Committee. Those purposes are set forth in Article I of the WSBA bylaws and General Rule 12 of the Washington Court Rules. Not more than 11 nor less than seven days before the annual meeting, the Resolutions Committee will hold a public hearing at the WSBA office. Proponents and opponents of resolutions may attend the hearing in person or present their views in written form for consideration by the committee. Proposed resolutions will be published in the August 2002 issue of *Bar News*, along with the date of the Resolutions Committee meeting and a list of committee members.

For further information, please contact WSBA General Counsel Robert D. Welden at bobw@wsba.org or 206-727-8232.

WYLD Practice Conditions Forum

The Washington Young Lawyers Division Practice Conditions Forum will take place May 31 at the Museum of Flight in Seattle. The forum will address such topics as stress management, bal-

ancing your work and personal life, résumé building, and exploring alternative careers in the law. Three CLE credits pending approval. More information will be available soon at www.wsba.org/wyld.

WYLD Seeks Award Nominations

The WYLD is accepting nominations for the Thomas Neville *Pro Bono* Award, Outstanding Young Lawyer of the Year, and the Professionalism Award. All three awards recognize lawyers who epitomize the best in the legal profession. Nominations are also being accepted for Outstanding YLD Affiliate or Organization for recognition of public service and/or member-service programs. Awards will be presented at the WYLD Bridging the Gap Conference in Seattle on September 21. Letters of nomination should include the nominator's name, address and daytime phone number, as well as a copy of the nominee's résumé or list of accomplishments. Nominations must be received by July 31, 2002, and should be mailed to Lisa KauzLoric, WYLD Liaison; WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330.

LOMAP Traveling CLE Presentations

The WSBA's Law Office Management Assistance Program (LOMAP) continues a series of presentations around the state for CLE credit. Presentations will be made in Colville, May 7, and Spokane, May 8. The cost is $65. For more information, contact the WSBA Service Center at 800-945-WSBA, 206-443-WSBA or questions@wsba.org, and cite event number LOM-0502.

New Online Resource for Court Decisions and Other Related Information

There's a new Web site you'll want to bookmark: www.legalWA.org. This new site contains Washington State Supreme Court opinions from 1939 to the present, and published Court of Appeals opinions from 1969 to the present. It also includes links to the full text of the RCW, WAC, and 70 Washington city and county municipal codes.

LegalWA.org was created cooperatively by the Washington State Bar Association, Municipal Research & Services Center, and the Washington State Office of the Code Reviser to provide free public access to case law.

The site has been designed for ease of use. The full text of court decisions is searchable by keyword, and navigation around the site is simple and straightforward. The site also contains useful links to other legal resources. It will be updated weekly.

New Animal Law Section

At its April meeting, the Board of Governors approved the formation of an Animal Law Section. If you'd like to join the section, please contact the WSBA Service Center at 800-945-WSBA, 206-443-WSBA, or questions@wsba.org, and you will be sent an application and dues information. If you have questions about the section, please see the WSBA Web site at www.wsba.org/animallaw, or contact Toni Doane at 206-727-8293 or tonid@wsba.org.

Washington Civil Procedure Deskbook Available Soon

The second edition of the *Washington Civil Procedure Deskbook* will be available June 21. It provides exhaustive coverage of the Washington Rules of Civil Procedure, plus commentary, analysis of significant authorities, practice tips, and in-depth discussion of strategic and practical considerations under the rules. The complete three-volume set with forms on diskette will sell for $375. As with all WSBA deskbooks, purchasers who sign up for the Automatic Update Service will receive a 10 percent discount on their purchase. To order the deskbook, please call 206-733-5918 or see www.wsba.org/cle/catalog/form.htm.

7th-East Governor Position — Letters of Interest Being Sought

Application deadline: May 31, 2002

The 7th-East is one of four positions on the WSBA Board of Governors (BOG) up for election this year. This is the position that will be vacated by Jenny Durkan.

The WSBA did not receive any petitions for the 7-East governor position. According to WSBA bylaws, the BOG elects governors for vacant positions. Therefore, the BOG is calling for letters of interest from members who reside in 7th-East (zip codes 98105, 98115, 98118, 98122, 98125, 98144, 98155 and 98178). Letters of interest must be received by May 31. Please submit letters to: Executive Director, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121. The election will be held at the June 7 BOG meeting.

Governors serve for three-year terms. For more information, see the BOG page on the WSBA Web site at http://www.wsba.org/bog and the WSBA bylaws at http://www.wsba.org/bylaws.

Informal Ethics Opinions Now Online

We are pleased to announce that informal ethics opinions are now available on the WSBA Web site at http://pro.wsba.org/io/search.asp. You can search by subject, key word(s), opinion number, year issued or authority.

Informal ethics opinions are issued by the WSBA RPC Committee, which researches and prepares responses to written ethical inquiries submitted by WSBA members. Informal opinions have not been approved by the Board of Governors, nor do they reflect the official position of the WSBA.

To discuss ethical questions about your own prospective conduct, phone the WSBA ethics line at 206-727-8284 (or 800-945-WSBA, ext. 8284). Your inquiry is considered confidential. If you have a question about the ethical conduct of another lawyer, please call 206-727-8235.

WSBA Bar Leaders and Access to Justice Conferences

The 2002 WSBA Bar Leaders Conference and Access to Justice (ATJ) Conference will be held June 7-9 at the Yakima Convention Center. Conference registration brochures will be mailed this month. For bar leader 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.

World Peace Through Law Section Hosts International Criminal Court Presentation

The WSBA World Peace Through Law Section, in coordination with the Seattle Chapter of the United Nations Association, invites WSBA members to a presentation by Professor Robert Araujo of Gonzaga University School of Law. He will speak about the international criminal court. The event will be held on June 13 from 6:30 p.m. to 8:30 p.m. at the WSBA office in Seattle. On-site registration fee is $10; two CLE credits pending. Pre-registration is not required. For more information, please contact Paul Schlossman at 253-473-0537.

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, Suite 400
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.

ADR

Advanced Mediation
June 17-18 – Seattle. CLE credits TBD. By UW-CLE; 206-543-0059.

EMPLOYMENT LAW

35th Annual Pacific Coast Labor and Employment Law Conference
May 2-3 – Seattle. 13.75 CLE credits, including 1.5 ethics pending. By Pacific Coast Labor Conference; 206-243-0927.

Human Resources Institute
May 2-3 – Chicago; May 9-10 – San Francisco; May 16-17 – Washington, D.C. Up to 15 CLE credits pending. By National Employment Law Institute; 303-861-5600.

Employment Law Litigation
June 13-14 – San Francisco; June 20-21 – Washington, D.C. 12 CLE credits, including 1 ethics pending. By National Employment Law Institute; 303-861-5600.

ESTATE PLANNING

The Professional Estate-Planning Seminar, with Roy M. Adams
May 17-18 – San Francisco. 13.75 CLE credits, including .5 ethics pending. By Northwestern University; 201-391-6859.

Nuts and Bolts: Estate Planning and Probate
June 26 – Seattle. 3 CLE credits estimated, ethics credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ENVIRONMENTAL & LAND USE

ELUL Midyear
May 16-19 – Vancouver, BC. 13 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Construction Law Midyear
June 14 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

FAMILY LAW

Elder Law Seminar
June 14 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Nuts and Bolts: Family Law
June 19 – Seattle. 3 CLE credits estimated, ethics credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Family Law Section Midyear
June 28-30 – Wenatchee. 13.5 CLE credits, including 2 ethics. By WSBA-CLE and Family Law Section; 800-945-WSBA or 206-443-WSBA.

GENERAL PRACTICE

Persuasive Writing
May 7 – Vancouver and Tacoma. 3.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Legal Document Drafting
May 7 – Vancouver and Tacoma. 3.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Title 11 Guardianship: Guardian *ad Litem* Registry Training
May 9-10 – Seattle. 11 CLE credits, including 2.25 ethics. By KCBA; 206-340-2578.

Handling the Traumatic Brain-Injury Case
May 17 – Seattle. 8 CLE credits, including 5 ethics. By the Brain Injury Association of Washington; 425-895-0047.

PLS: Legal Issues Facing Non-Profits
May 23 – Seattle. 7.25 CLE credits. By WSTLA; 206-464-1011.

2002 Washington State Professional Guardian Certification Training Program
May 23-24 – Seattle. CLE credits TBD. By KCBA; 206-340-2578.

Business Law Section Midyear
May 31-June 2 – Yakima. 10.25 CLE credits, including 2 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Themis Assembly; Personal and Professional Development for Women Lawyers
May 31-June 2 – Vancouver, BC. CLE credits pending. By Renaissance Lawyer and Lawyer Coaches Directory; 800-663-1144.

Nuts and Bolts: Business Law (a.m.); Civil Litigation (p.m.)
June 5 – Seattle. 3 CLE credits estimated, ethics credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Representing Nonprofits
June 7 – Seattle; June 27 – Lacey, Mt. Vernon, San Juan County, Spokane (video replay with live credits). 6.75 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Nuts and Bolts: Criminal Law (a.m.); Bankruptcy (p.m.)
June 12 – Seattle. 3 CLE credits estimated, ethics credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

INDIAN LAW

Indian Resources & Authorities in 2002
May 17 – Seattle. CLE credits TBD. By UW-CLE; 206-543-0059.

INTELLECTUAL PROPERTY

4th Annual Intellectual Property for Nonspecialists
May 3 – Seattle. 6 CLE credits. By KCBA; 206-340-2578.

LAW PRACTICE MANAGEMENT

LOMAP Traveling CLE Workshop
May 7 – Colville; May 8 – Spokane. 4 credits, including 1 ethics. By LOMAP; 800-945-WSBA or 206-443-WSBA.

Pacific Rim Computer and Internet Law Institute
June 7 – Seattle. 6.75 CLE credits, including .25 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Nuts and Bolts: Practice Management
June 26 – Location to be announced. 3 CLE credits estimated, ethics credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

LITIGATION

Courtroom Survival Kit for the New Practitioner
May 2 – Tacoma; May 3 – Seattle. 7 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Voir Dire
May 10 – Seattle. 7 CLE credits. By WSTLA; 206-464-1011.

Plaintiffs Motion Practice: Facts & Forms
May 30 – Spokane. 4.5 CLE credits. By WSTLA; 206-464-1011.

Litigation Section Midyear
June 21 – Seattle. 6.25 CLE credits, including .5 ethics. By WSBA-CLE and Litigation Section; 800-945-WSBA or 206-443-WSBA.

Building Trial Skills
June 22-30 – Berkeley, CA. CLE credits TBD. By the National Institute for Trial Advocacy; 800-225-6482.

REAL ESTATE

Nuts and Bolts: Residential Real Estate
June 19 – Seattle. 3 CLE credits estimated, ethics credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

REAL PROPERTY

Real Property, Probate and Trust Section Midyear Meeting and Seminar
May 31-June 2 – Stevenson. 11.5 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

FLOYD & PFLUEGER, PS

is pleased to announce that

Steven E. Knapp
and
Amber L. Pearce
have become associates of the firm.

The firm's litigation practice emphasizes complex civil litigation, including the defense of construction defect claims and claims of professional negligence.

2505 Third Avenue, Suite 300
Seattle, Washington 98121-1445
Telephone: 206-441-4455
Fax: 206-441-8484

GROFF & MURPHY, PLLC

is pleased to announce that

Nancy A. Robertson
has become a partner in the firm,
effective January 1, 2002.

Ms. Robertson's practice will continue to focus on commercial law, government contracts and construction litigation.

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

LYONS LAW OFFICES

is pleased to announce that

Derek W. Jensen
has become a shareholder in the firm

and

Jerry E. Walker
has joined the firm as an associate.

Available for Referral
Estate Planning • Business Planning • Tax Planning

---

900 Fourth Avenue, Suite 4050
Seattle, Washington 98164
Telephone: 206-623-6440
www.lyonslawoffices.com

THE SCARFF LAW FIRM PLLC

is pleased to welcome

Todd W. Wilson
as an associate of the firm.

Todd joins us from the Minneapolis firm of Hinshaw & Culbertson.

Todd will continue his practice in real estate, business succession, corporate law, and estate planning.

3035 Island Crest Way
Mercer Island, Washington 98040
Telephone: 206-236-1500

Professionals

APPEALS

TALMADGE & STOCKMEYER PLLC

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

Cleveland Stockmeyer
Former law clerk,
Washington Supreme Court

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

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

MEDICAL MALPRACTICE

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

SCHROETER GOLDMARK & BENDER
810 Third Ave., Ste. 500
Seattle, WA 98104
206-622-8000
www.schroeter-goldmark.com

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 v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001).

CARNEY BADLEY SPELLMAN, PS
700 Fifth Avenue, Suite 5800
Seattle, WA 98104
206-622-8020
E-mail: lobsenz@carneylaw.com

APPEALS OF THE SECOND KIND

Bill Bishin
Some appeals are
too hard and too important.

Assisting in the analysis
and articulation of difficult legal
issues for appeals,
and every other level and
form of litigation.

LAW OFFICES OF WILLIAM R. BISHIN PS
1111 Third Avenue, Ste. 1865
Seattle, WA 98101
206-682-1584
E-mail: bbishin@SpecialAppeals.com
www.SpecialAppeals.com

IN SNOHOMISH COUNTY FOR ARBITRATION, MEDIATION, SETTLEMENTS AND SOLUTIONS

Resolve your dispute
expeditiously, fairly and
economically with the assistance of
qualified and experienced dispute
resolution facilitators from the law
firm of **Marsh Mundorf Pratt Sullivan & McKenzie**.
All resolution facilitators have 20
or more years of experience in their
areas of focus. The following
attorneys are available to assist you
and/or your client to settle or
resolve a legal matter or dispute:

Douglas B. Marsh
Civil and family law matters
William R. Sullivan
Civil and family law matters
Jeffrey E. Pratt
Business, commercial, real estate and estate matters

For scheduling, contact
Helga Watson at 425-742-4545
or helgaw@millcreeklaw.com.

MARSH MUNDORF PRATT SULLIVAN & MCKENZIE
16504 Ninth Ave. SE, Ste. 203
Mill Creek, WA 98012
425-742-4545
Fax: 425-745-6060

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.

FAIN SHELDON ANDERSON & VANDERHOEF, PLLC
Wells Fargo Center
999 Third Ave., Ste. 3610
Seattle, WA 98104
206-749-2371
E-mail: patrick@fsav.com

MEXICAN MATTERS

Spanish-speaking attorneys
in Seattle and Mexico work
together to address real estate,
business, litigation, and
immigration matters.

MATTHEW N. METZ
206-282-2405
(in Seattle)
matthew@metzlaw.net
www.metzlaw.net

CALDERON ROSEN SMART & ASSOCIATES
011-52-55-52-54-68-77
(in Mexico)
info@calderonrosen.com
www.calderonrosen.com

APPEALS

Charles K. Wiggins
Kenneth W. Masters
and
Marilyn L. Taylor

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

WIGGINS LAW OFFICES, PLLC
241 Madison Ave. N.
Bainbridge Island, WA 98110
206-780-5033
www.appeal-law.com

LABOR AND EMPLOYMENT LAW

William B. Knowles
is available for consultation, referral and association in cases involving employment discrimination, wrongful termination, wage claims, unemployment compensation and federal employee EEOC or Merit System Protection Board appeals.

206-441-7816

REAL ESTATE and TITLE INSURANCE

Betty J. Schall
is available for consultation, association, or contract work in complex real property transactions, closings, and title insurance issues.

E-mail: bettyjschall@qwest.net

APPEALS

Michael T. Schein
and
Douglas W. Ahrens
are available for referral, consultation or association on all issues relating to appeals and the appellate process.

REED, LONGYEAR, MALNATI, AHRENS & STRICKLAND, PS
801 Second Ave., Ste. 1415
Seattle, WA 98104
206-624-6271

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

206-624-9400
206-907-9066
www.margaretdore.com

MEDICAL OR DENTAL MALPRACTICE

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

BELLEVUE
425-451-1202
E-mail: john@greaneylaw.com

JOSHUA FOREMAN

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

4500 Ninth Ave. NE, Ste. 300
Seattle, WA 98105-4762
206-623-6750
Fax: 206-633-6049
E-mail: DadsLawyer@aol.com

LEGAL MALPRACTICE and DISCIPLINARY ISSUES

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

2101 Fourth Ave., Ste. 2100
Seattle, WA 98121
206-448-2100
E-mail: jganzesq@aol.com

ETHICS & LAWYER DISCIPLINE

25 Years Experience

Leland G. Ripley,
former WSBA chief disciplinary counsel (1987-94), represents and advises lawyers in all aspects of legal ethics and lawyer discipline.

206-781-8737
E-mail: lawethics@attbi.com

Classifieds

Reply to WSBA *Bar News* Box Numbers at:
WSBA *Bar News* Box ____
Bar News Classifieds
2101 Fourth Avenue, Suite 400
Seattle, WA 98121-2330

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

FOR SALE

Save 50 percent on law books. Call National Law Resource, America's largest law book dealer. We buy and sell. Visa/AX; excellent condition. Your satisfaction guaranteed. 800-886-1800; http://www.nationallaw.com.

Complete set Wn.2d volumes 1-145 and Wn. App. volumes 57-109. All volumes in excellent condition. Call 509-328-0122 or 509-536-9437.

SEEKING

Lease is up. I am looking for space in a professional or law-firm setting to maintain my part-time mediation practice. Needs are an office and space for one staff person, use of a small conference room (4-6) two days per week, and access to a larger conference room (8-12) one week every two months for training purposes. Please call Alan Alhadeff or Joan at Alhadeff Mediation Services, 206-281-9950.

SPACE AVAILABLE

For sublease: Two spacious offices in small suite on the 22nd floor at 1111 3rd Ave., one with full western exposure, one with northern exposure (ideal for paralegal or support staff). Reception and other amenities provided. Available July 1, 2002. Contact Allen Bentley at 206-343-9391 or by e-mail at abentley@concentric.net.

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

Wells Fargo Center, 32nd fl.: View attorneys' offices. Completely equipped law office, including receptionist, conference room, electronic law library, high-speed DSL access and

kitchen. Secretarial station available. Call Harris, Mericle & Wakayama at 206-621-1818.

Shoreline: Office space available for attorney practicing primarily in the area of family law. Reception; secretarial space available. Convenient Northend location. Call Paul Reni at 206-542-1840.

Sweeping, unobstructed view of Mt. Rainier (Wells Fargo Building, 41st fl.): Elegant law office near courthouse. Reasonable rates include receptionist, basic messenger service, mail delivery, fax, two conference rooms, law library, fully equipped kitchen. For more information, please call Paula at 206-624-9400.

Mercer Island view office: Class-A building; excellent easy-access location. Share amenities including clerical space, copier and fax with one other attorney and CPA. Call Jim at 206-275-0770.

Large, bright partner-sized office located in Logan Building, 500 Union, Ste. 645; heart of Seattle; kitchen, reception, mail, fax, copier. $900/month. Contact David Roth at 206-447-8665.

Historic Pioneer Square on carefree Occidental Mall: Four window (operable) offices in law firm's elegant, custom-designed penthouse suite include wraparound deck with views. Lease as a group or individually. Secretarial stations, library, conference rooms, kitchen/breakroom, reception, phone/fax/copy/postage, word processing, DSL, computer network, Internet access. Walk to courthouse, ferry, transit center, stadiums, great restaurants. Sole practitioners welcome. Up to 3,200 sq. ft. additional space available on lower floor. Call Joe Cornett at 206-357-2021 or e-mail hjc@space-solutions.com.

Congenial and professional attorneys in downtown high-rise suite seek subtenants for two to four offices. We provide receptionist and other amenities. Rent and length of lease negotiable. 206-382-2600.

Downtown Kirkland on Lake Washington: Office for an attorney and legal assistant available. Share attractive office space with seven experienced attorneys. Includes receptionist services, telephone system, copy and fax, library, and all the latest technology. Contact Pat Trudell at 425-822-2200 for information.

POSITIONS AVAILABLE

Litigation associate: Scheer & Sotirhos LLP seeks an associate attorney with litigation experience. Insurance coverage, construction-defect defense, appellate and/or personal injury experience is preferred. The successful candidate must be interested in complex and challenging litigation and able to work independently. Scheer & Sotirhos LLP is a small, dynamic downtown Seattle firm with a broad and rapidly growing litigation and appellate practice, offering competitive salary, benefits, and an enjoyable work environment. Contact Hiring Partner Maria Sotirhos, 206-262-1200; e-mail msotirhos@scheerlaw.com.

North Seattle law firm seeks associate: Prefer attorney with at least two years' legal experience. Attorney to practice in areas of foreclosure, guardianship, probate, real estate, and *ex-parte* court appearances. Compensation is hourly. Flexible hours. No benefits. Transportation required. Send résumé and hourly pay requirement to Office Administrator, PO Box 70567, Seattle, WA 98107.

Join the world's largest law firm, the Army JAG Corps! The Army Reserve needs a "few good lawyers" to serve as judge advocate officers in Seattle, Spokane, Tacoma and Vancouver. Become part of a 225-year tradition of providing legal counsel to commanders and soldiers. One weekend a month and two weeks a year provide supplemental income, low-cost life insurance and dental benefits, commissary and exchange privileges, a defined-benefit retirement plan, travel opportunities, continuing legal education, and personal and professional development. Prior military service is preferred but not required. Idaho and Oregon attorneys and law students are welcome to apply. Visit our Web site at http://www.jagcnet.army.mil. Send cover letter and résumé to Commander, 70th Regional Support Command, Attn: AFRC-CWA-JA (Staff Judge Advocate), 4570 Texas Way W., Fort Lawton, WA 98199-5000.

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

Minzel and Associates, Inc. is a temporary and permanent placement agency for lawyers and paralegals. We are looking for quality lawyers and paralegals who are willing to work on a contract and/or permanent basis for law firms, corporations, solo practitioners and government agencies. If you are interested, please call 206-328-5100 or e-mail mail@minzel.com for an interview.

U.S. magistrate judge – Tacoma, WA. The U.S. District Court, Western District of Washington announces the creation of a new full-time U.S. magistrate judge position in Tacoma, WA. Applications are now being accepted. The effective date of the position will be upon the passage of a federal budget for 2002-2003, expected to occur approximately October 1, 2002 or soon thereafter. The duties of the position are demanding and wide-ranging and will include: (1) the trial and disposition of civil cases upon consent of the litigants; (2) conduct of preliminary proceedings in felony cases; (3) trial and disposition at the federal courthouse in Tacoma of petty and misdemeanor cases arising from outlying government facilities such as Fort Lewis, Bangor Naval Submarine Base, Mt. Rainier National Park, Olympic National Park and Bremerton Naval Shipyard; (4) trial and disposition of other federal misdemeanor cases; (5) assisting district judges in disposition of prisoner petitions and Social Security appeals; (6) conducting various pretrial matters and evidentiary proceedings on reference from the judges of the district court; (7) conducting settlement conferences. The basis of jurisdiction of the U.S. magistrate judge is specified in 28 U.S.C. § 636. To be qualified for appointment an applicant must: (1) be, and have been for at least five years, a mem-

To Place a Classified Ad:

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

Deadline: Text and payment must be received (not postmarked) by the first day of each month for the issue following, e.g., June 1 for the July issue. No cancellations after deadline. **Mail to:** WSBA *Bar News* Classifieds, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330.

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

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

ber in good standing of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States, and have been engaged in the active practice of law for a period of at least five years (with some substitutes authorized); (2) be competent to perform all the duties of the office; be of good moral character; be emotionally stable and mature; be committed to equal justice under the law; be in good health; be patient and courteous; and be capable of deliberation and decisiveness; (3) be less than 70 years old; and (4) not be related to an active judge of the district court. A Merit Selection Panel composed of attorneys and other members of the community will review all applicants and recommend to the judges of the district court in confidence the five persons whom it considers best qualified. The court will make the appointment, following an FBI full-field investigation and an IRS tax check of the appointee. An affirmative effort will be made to give due consideration to all qualified candidates, including women and members of minority groups. The salary of the position is $138,000 per annum. The term of office is eight years. Application forms and further information on the magistrate judge position may be obtained from the Clerk of the District Court Bruce Rifkin, 1010 5th Ave., Seattle, WA 98104; or via the court's Web site at http://www.wawd.uscourts.gov. Applications must be submitted only by potential nominees personally and must be received no later than June 30, 2002. All applications will be kept confidential unless the applicant consents to disclosure, and all applications will be examined only by members of the Merit Selection Panel and the judges of the district court. The panel's deliberations will remain confidential.

Associate attorney: Vancouver firm looking for associate attorney to practice in a variety of areas of law, including family law. Three years' practical experience preferred; computer experience necessary. Must be a member of the WSBA. Send cover letter and résumé to WSBA *Bar News* Box 618, 2101 4th Ave., Ste. 400, Seattle, WA 98121-2330.

Transactions attorney: Large A-V rated Spokane business law firm invites applications from established attorneys who are interested in joining our business transactions practice group. Applicants should have at least three years' experience in complex real estate, corporate finance, business acquisitions and/or other commercial transactions. The successful candidate will be highly motivated; have a demonstrated commitment to developing a successful business practice; and possess excellent legal, technical and interpersonal skills. We are a 70-lawyer firm with a sophisticated business practice and an emphasis on interdisciplinary cooperation and exceptional client service. Please send résumé with references to Philip S. Brooke III, Hiring Partner; Paine, Hamblen, Coffin, Brooke & Miller LLP; 717 W. Sprague Ave., Ste. 1200, Spokane, WA 99201.

Mid-sized Tacoma area law firm is seeking a full-time attorney, preferably with a background in traffic issues. Must have excellent organizational skills. Minimum two years' experience. Please fax your résumé to Human Resources Manager at 253-922-2802.

Land use attorney: Snohomish County Prosecuting Attorney, Civil Division. The civil division of the Snohomish County Prosecuting Attorney's Office seeks a land use attorney with at least five years' experience in advising clients in areas relating to land use and environmental regulation including zoning, state Environmental Policy Act compliance, Growth Management Act compliance and Endangered Species Act compliance. Experience with the Land Use Petition Act, land use damages claims, and administrative hearings board is desired, as well as excellent writing and oral communication skills. Experience in computer-aided research and word processing is extremely desirable. Salary dependent upon qualifications. Generous fringe benefits and leave package. To apply, please submit a letter of interest, résumé, writing sample and references to Barbara Dykes, Snohomish County Prosecuting Attorney's Office, 2918 Colby Ave., Ste. 203, Everett, WA 98201. Position open until filled. Snohomish County is an equal opportunity employer.

Central Washington University is seeking an adjunct professor of accounting to teach a five-quarter hourly course, Legal and Tax Strategies for Business, at its Lynnwood site fall quarter. Actual class time: two nights per week for two hours, 10 minutes; possible distance education. Salary for the position is $3,593. The applicant should have a law degree and have taken law school courses in personal income taxation and one of the following: corporation tax, partnership tax or entity tax. Prior government or legal practice in the areas of taxation or business planning is desirable. Previous teaching experience is also a plus. Applicants should send a résumé with three references to Professor Jay Forsyth, Chair; Dept. of Accounting, CWU; 400 E. 8th Ave., Ellensburg, WA 98926-7484. AA/EOE/Title IX institution.

Williams, Kastner & Gibbs PLLC is seeking an associate with a minimum of three years' litigation experience for its Tacoma office. Applicants need to be very familiar with discovery and other aspects of the litigation process. Experience in personal-injury litigation is preferred. All applicants should be motivated, hard-working individuals with a strong academic background. All applicants should have excellent communication and organizational skills. Applicants need to reside in the South Puget Sound area. Please send résumé, short writing sample, and copy of law school transcripts to Patti Christiansen, Recruiting Administrator, Williams Kastner & Gibbs PLLC, PO Box 21926, Seattle, WA 98111-3926; pchristiansen@wkg.com.

Attorney: Established Seattle mid-sized law firm seeks commercial litigation attorney to join its Seattle office. Position entails immediate work in a variety of complex commercial litigation matters. Candidates must have high academic credentials as well as communication, writing and client-relations skills. Firm offers opportunity for professional growth. Send résumé to John R. Tomlinson Jr., Barokas Martin Ahlers & Tomlinson, 1422 Bellevue Ave., Seattle, WA 98122.

Washington Tax Services, a Seattle tax resolution firm, seeks an attorney for a 20-30 hr. per week position. Attorney will assist in representing clients with IRS collection issues and general business advising. The applicant should have a law degree and be a member in good standing of any state bar. Preferably, applicants will have completed courses in taxation and business entities, and be familiar with reading and analyzing financial statements. Collections experience a plus. Casual office environment. Salary 45K-plus, depending on hours/experience. Phone 206-219-6370; fax 206-284-5938; mwoare@watax.com.

Wheeler & Associates is offering a full-time paralegal/legal secretary position to start May 28, 2002. Minimum two years in legal field with experience in litigation preparation; amicus case management software preferred. Position will support real estate and business attorneys. Superior office surroundings. Competitive salary; benefits include 401(k) and professional training. Office emphasizes teamwork and professionalism. Provide a résumé and cover letter to Office Administrator, 1212 Jefferson St. SE, Ste. 201, Olympia, WA 98501.

NCW firm seeks associate with at least two years' litigation/trial experience to join busy sole practitioner in general practice. Need self-starter. Emphasis on family/criminal defense. Wenatchee is a recreation-based community, great for raising families. Send résumé to DeForest Neil Fuller, PO Box 3364, Wenatchee, WA 98807-3364; neil@nfullerlaw.com.

The Portland, OR, office of a premier Northwest law firm seeks a bankruptcy attorney with a minimum of five years' experience in bankruptcy matters including creditor and debtor rights, loan restructures and workouts, reorganizations and related fields. Excellent academic credentials and writing skills required. Send cover letter and résumé to WSBA *Bar News* Box 619, 2101 4th Ave., Ste. 400, Seattle, WA 98121-2330.

Associate attorney: Seattle-based law firm with a national practice representing Indian tribal governments and Alaska native entities seeks an associate attorney for its Seattle office. Join a team whose success in litigating tribal rights, environmental law and economic development is recognized throughout Indian country and our nation's capital. Candidates should possess litigation experience in federal and state courts, and knowledge of Indian law. Ability to expand the firm's practice through contacts in Indian country is desired. At least two years of law practice, top academic credentials, and excellent writing skills are expected. Native Americans are encouraged to apply. For more information, see our Web site, http://www.msaj.com. We offer a competitive salary, partnership track, paid vacation and holidays, medical/dental and life insurance, and retirement plan. Send résumé, writing samples and references to Morisset, Schlosser Jozwiak & McGaw; Jerry E. Rugh, Legal Administrator; 801 2nd Ave., Ste. 1115, Seattle, WA 98104; j.rugh@msaj.com.

City of Olympia, city attorney: Salary range: $72,420-88,008. Set on the shores of South Puget Sound, with the rugged Olympic Mountains rising in the distance across the water and the dome of Washington's Capitol soaring above the town, Olympia ranks as one of America's loveliest cities. While residents enjoy all the pomp and pageantry that come with being a state capitol – the marble halls, the monuments, the stately dome and the gorgeous capitol grounds – Olympia is still a small town at heart, and one of the most livable cities in the state. Under the general direction of the city manager and city council, the city attorney plans, organizes and directs the provision of comprehensive legal services to the city. The City of Olympia legal department has a staff of seven talented, autonomous and motivated employees, and a $580,000 budget. The competitive candidate will possess a comprehensive knowledge of Washington municipal law including criminal, administrative, contract, insurance, land-use torts and labor-relations. The city attorney's position requires graduation from a law school accredited by the American Bar Association and five years' experience in the practice of municipal law. Experience in legal office management preferred. The successful candidate must be licensed to practice law in Washington at the time of appointment. The City of Olympia is an equal opportunity employer, and all qualified candidates are encouraged to apply as soon as possible. Please send cover letter and résumé to Waldron & Company, 101 Stewart, Ste. 1200, Seattle, WA 98101; 206-441-4144; fax 206-441-5213; info @waldronhr.com.

Chmelik Sitkin & Davis PS is a well-established six-attorney business, municipal, real estate and land-use firm in Bellingham. We represent a wide variety of business clients, port districts, fire districts and other municipal governments throughout northwest Washington. We are seeking an associate attorney with a minimum of three years' experience in business and transactional law. The ideal candidate will have demonstrated success in law school, solid experience, and the desire to work in a collegial environment in an expanding law practice. The firm provides a competitive salary and excellent benefits in an ideal location, with an opportunity to develop a successful practice. Please send résumé, references and cover letter to Chmelik Sitkin & Davis PS, Attn: Linda Sahlin, 1500 Railroad Ave., Bellingham, WA 98225.

Tacoma area law firm is seeking a full-time attorney with a background in basic business and real estate. Must have a minimum of two years' experience. Salary negotiable. Please fax résumé to Human Resources Manager, 253-922-2802 .

City of Puyallup city attorney: Salary $74,544-96,912 annually (DOQ). The city of Puyallup is situated in the beautiful Puget Sound region, 10 miles east of Tacoma and approximately 35 miles southwest of Seattle. The residents of Puyallup share a unique pride in their community, which retains a strong sense of history, including a picturesque downtown. The city's mission is to earn the public's trust and deliver quality services for the over 30,000 citizens who work and live in the community. Puyallup's school district has an excellent reputation for providing quality education for grades K-12. Puyallup is also home to a two-year community college. Reporting to the city manager, the city attorney advises council members and staff regarding issues of policy and proposed city actions, and develops linkages and relationships with other departments. The successful candidate will be team-oriented with a participatory style of management. He/she will take a proactive approach to problem-solving and be well-versed in Washington codes, land use and zoning law, personnel law, contract law, and ideally, municipal court operations. Candidates must have a JD degree and five years' experience in the field of municipal law. It is also required for candidates to have membership in the WSBA and a license to practice law within the state. The City of Puyallup is an equal opportunity employer. All qualified candidates are encouraged to apply. Please send your résumé and cover letter by May 10, 2002 to Waldron & Company; 101 Stewart, Ste. 1200; Seattle, WA 98101; 206-441-4144; fax 206-441-5213; info @waldronhr.com.

Well-established Social Security disability law firm in Everett seeks fourth attorney to represent claimants at federal administrative hearings. Candidates should be experienced in Social Security disability or related areas of law, and interact well with clients. Excellent salary, benefits, and long-term opportunity for motivated individual. Send cover letter and résumé to Hiring Partner, 3410 Broadway, Everett WA 98201; e-mail rafnmi@aol.com.

Trial attorney: We are a small trial-practice firm seeking an associate. We require a willingness to learn, ability to respect others, and a sense of humor. A position with this firm requires that you appear in court for hearings and trials in a variety of criminal and civil matters. You will also be required to take part in matters that involve preparing a case for successful resolution at trial. Send résumé, cover letter and references to Holly Owens, 175 NE Gilman Blvd., Issaquah, WA 98027.

Coeur d'Alene, ID, firm is seeking an associate attorney with a minimum of two years' experience for our North Idaho/Eastern Washington practice. Insurance defense; business, commercial and real estate litigation experience preferred. Strong research and writing skills required. Competitive salary, profit-sharing and benefits. Reply to Hiring Partner, Ramsden & Lyons, PO Box 1336, Coeur d'Alene, ID 83816-1336.

Growing South Sound PI law firm seeks experienced attorney. Ideal candidate has a minimum of three years' experience with plaintiffs PI. Position is located in Tacoma. All résumés should be sent to our general administrative office: Attn: DAD/GLP, 500 John St., Seattle, 98109; e-mail dianedaniel@uswest.net; fax to DAD/GLP, 206-448-4640.

U.S. magistrate judge – Seattle, WA. The U.S. District Court, Western District of Washington announces the retirement of the Honorable John L. Weinberg from his position as full-time U.S. magistrate judge in Seattle, effective April 24, 2003. Applications are now being accepted for the position being vacated. The duties of the position are demanding and wide-ranging and will include: (1) the trial and disposition of civil cases upon consent of the litigants; (2) conduct of preliminary proceedings in felony cases; (3) trial and disposition at the federal courthouse in Tacoma of petty and misdemeanor cases arising from outlying government facilities such as Fort Lewis, Bangor Naval Submarine Base, Mt. Rainier National Park, Olympic National Park and Bremerton Naval Shipyard; (4) trial and disposition of other federal misdemeanor cases; (5) assisting district judges in disposition of prisoner petitions and Social Security appeals; (6) conducting various pretrial matters and evidentiary proceedings on reference from the judges of the district court; (7) conducting settlement conferences. The basis of jurisdiction of the U.S. magistrate judge is specified in 28 U.S.C. § 636. To be qualified for appointment an applicant must: (1) be, and have been for at least five years, a member in good standing of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands of the United States, and have been engaged in the active practice of law for a period of at least five years (with some substitutes authorized); (2) be competent to perform all the duties of the office; be of good moral character; be emotionally stable and mature; be committed to equal justice under the law; be in good health; be patient and courteous; and be capable of deliberation and decisiveness; (3) be less than 70 years old; and (4) not be related to an active judge of the district court. A Merit Selection Panel composed of attorneys and other members of the community will review all applicants and recommend to the judges of the district court in confidence the five persons whom it considers best qualified. The court will make the appointment, following an FBI full-field investigation and IRS tax check of the appointee. An affirmative effort will be made to give due consideration to all qualified candidates, including women and members of minority groups. The salary of the position is $138,000 per annum. The term of office is eight years. Application forms and further information on the magistrate judge position may be obtained from the Clerk of the District Court Bruce Rifkin, 1010 5th Ave., Seattle, WA 98104; or via the court's Web site at http://www.wawd.uscourts.gov. Applications must be submitted only by potential nominees personally and must be received no later than June 30, 2002. All applications will be kept confidential unless the applicant consents to disclosure, and all applications will be examined only by members of the Merit Selection Panel and the judges of the district court. The panel's deliberations will remain confidential.

Barker Martin & Merchant PS seeks a litigation associate with a minimum of two years' experience. Our practice is limited to representing condominium associations regarding construction and insurance matters. Applicants should have trial and motions experience, good academic credentials, superb writing skills, strong references, and the ability to work independently as well as in a team environment. Compensation DOE and negotiable. Send letter, résumé and writing sample to davidmerchant@barkermartin.com or fax 206-381-9807.

Marten Law Group seeks highly qualified and motivated candidates who share our passion for environmental law and interest in professional growth. We offer superior compensation and benefits, including profit-sharing. There are immediate openings for a junior and a senior litigator. Please forward credentials to Tisha Pagalilauan, 1191 Second Ave., Ste. 2200, Seattle, WA 98101.

SERVICES

Fast cash for seller carry-back real estate or business notes (other types also considered). Free amortizations. Call Larry or Lorelei Stevens, Wall Street Brokers, Inc., at 800-423-2114 or 206-448-1160; http://www.wallstreetbrokers.com. Our 30th year. We appraise notes.

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

Forensic document examiner: Trained by Secret Service/U.S. Postal Crime Lab examiners. Court-qualified. Currently the examiner for the Eugene Police Dept. Only civil cases accepted. Jim Green, 541-485-0832.

Lump-sums cash paid for remaining payments on seller-financed real estate notes and contracts, business notes, structured settlements, annuities, inheritances in probate, lottery winnings. Since 1992. Cascade Funding, 800-476-9644, http://www.cascadefunding.com.

Oregon accident? Unable to settle the case? Associate an experienced Oregon trial attorney to litigate the case and share the fee (proportionate to services). OTLA member; references available; see Martindale, AV-rated. Zach Zabinsky, 503-223-8517.

Have CD Brief, LLC put your appellate brief on CD-ROM. Submit your appellate briefs on CD-ROM with hyperlinks to the cases and the record, as suggested by the Washington Supreme Court. Contact us for more information or a free demo. 206-909-1762; http://www.cdbrief.com.

Contract attorney: Experienced, accomplished trial and appellate attorney available, 20-plus years' experience. Litigation and writing emphasized. References; reasonable rates. M. Scott Dutton, 206-324-2306; fax 206-324-0435.

Contracts paralegal: 10 years' experience. Specializing in drafting, proofreading and editing documents. Outstanding writer. Billable to clients. Scrivener Legal Support; e-mail scrivenerlegal@attbi.com; phone 206-380-4468.

Minzel and Associates, Inc. is a temporary and permanent placement agency for lawyers and paralegals. We provide highly qualified attorneys and paralegals on a contract and/or permanent basis to law firms, corporations, solo practitioners and government agencies. For more information, please call us at 206-328-5100 or e-mail mail@minzel.com.

Attorneys available for contract work and referrals: Two-attorney firm available for contract work and referrals in the areas of bankruptcy, employment law, immigration law, and other areas of civil and criminal law. Visit our Web site at http://www.arcala-law.com for a comprehensive list of our areas of practice. We are experienced in each of the practice areas mentioned. Hourly rates for contract work and fees for referrals are negotiable. Please contact us at 206-524-4900.

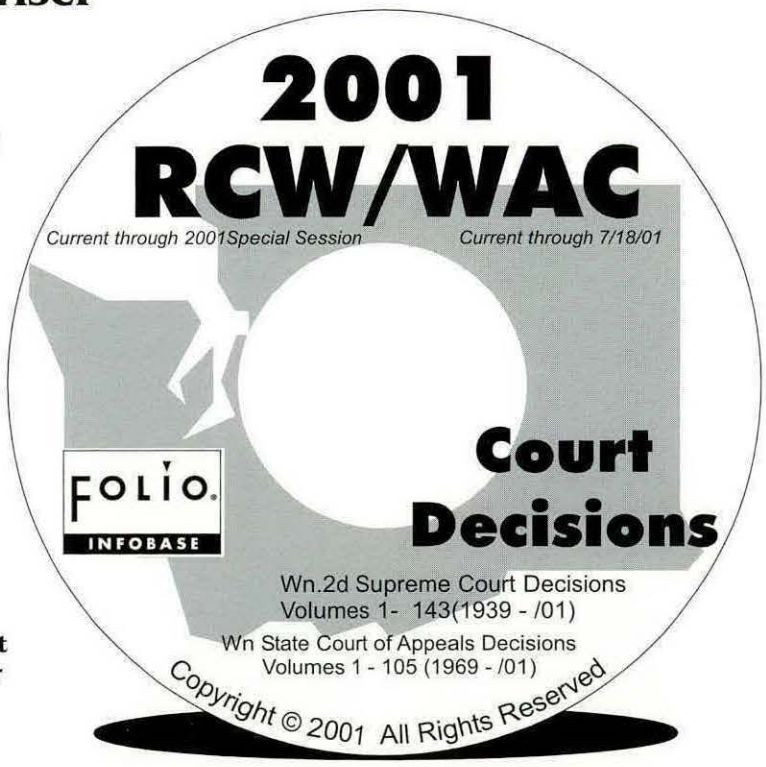
Contract attorney at your service! Legal research and writing for Washington lawyers. I draft briefs, memoranda, CLE materials; near UW law library. Many satisfied clients. Elizabeth Dash Bottman, 206-526-5777; e-mail bjelizabeth@qwest.net.

RCW & WAC on CD for 2001

As published by the Statute Law Committee, Office of the Code Reviser

Office of the Code Reviser
Order Dept
Call toll free:
1-866-650-6369
in Olympia 352-5769

Fax your order to
360.357.7219



Each CD is licensed for 10 concurrent users. Licenses may be purchased for additional users.

All versions contain pattern forms by the Administrator for the Courts

Four versions to choose from

$50 ☐ **RCW**

$100 ☐ **RCW/WAC**

$100 ☐ **RCW with Court Decisions**

$150 ☐ **RCW/WAC with Court Decisions**

Method of Payment:

☐ **Check for total amount enclosed.**
Make checks payable to the Office of the Code Reviser

☐ **Visa**
Card number ☐ **Master Card**

Month Year
Expiration Date

Name on Card
[required for all charge orders]

First Name **Last**

Company **Fl/Suite/Department**

Address/ PO Box **Bldg/Apt**

City **St** **Zip**

[ ] -

Daytime Phone **email address**

Tax & shipping Information:

Mail to Office of the Code Reviser
PO Box 40552
Olympia, WA 98504

Sales tax is 8% of total amount
You are not required to pay sales tax if:
1. Your order is being sent out of state
2. You are a federal agency.

TIN: 91-600-1909

No shipping or handling charges