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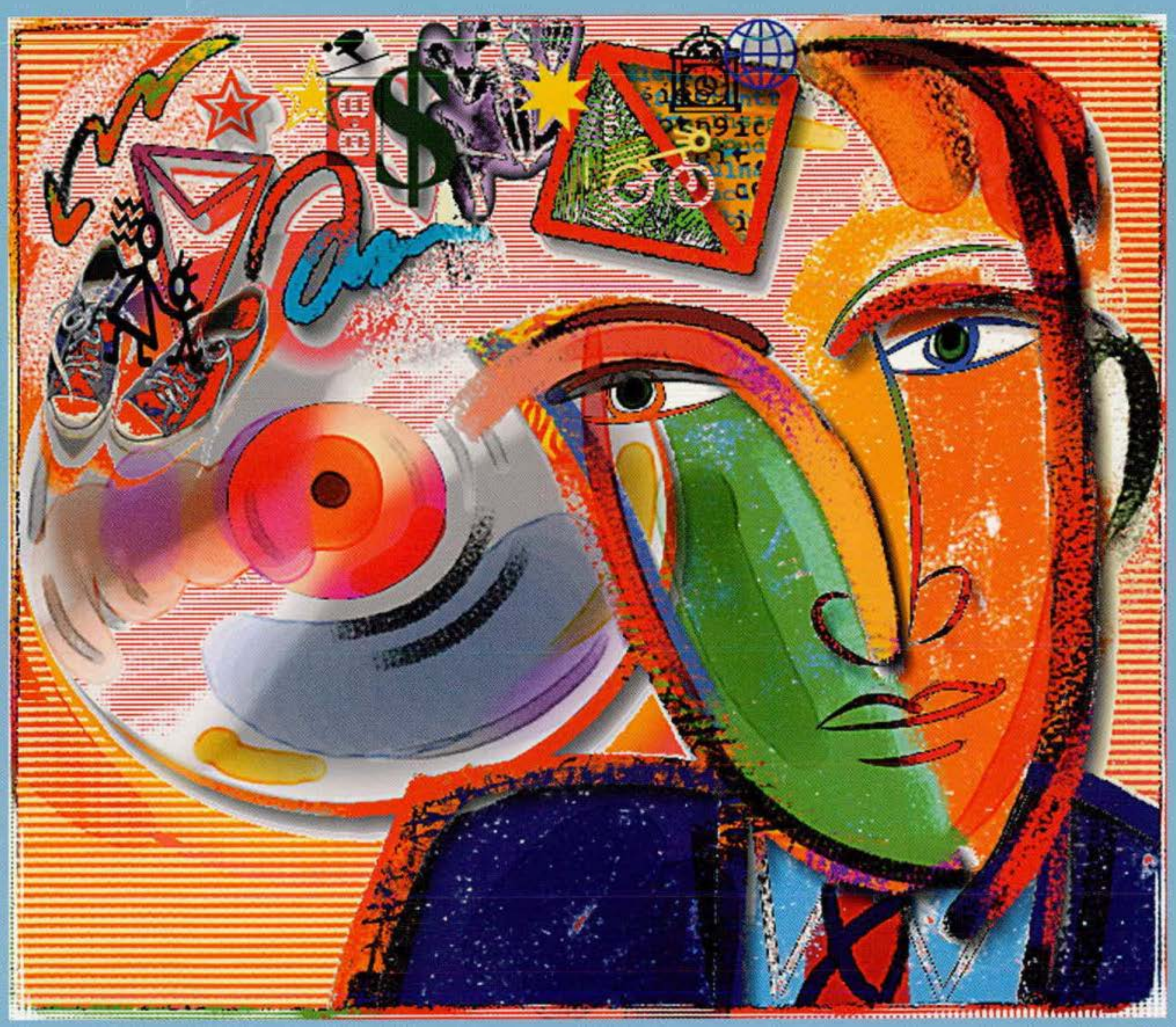

Has the Duration of Copyright Turned Wrong?

Our Friend "That"
by Robert C. Cumbow
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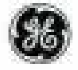

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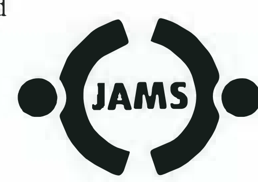

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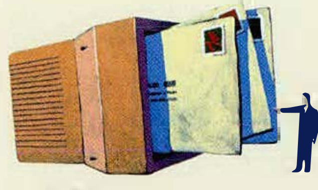

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Readers are invited to submit correspondence and articles. They may be sent via e-mail to comm@wsba.org or provided on disk in any conventional format with accompanying hard copy and sent to *Bar News* Editor, 2101 Fourth Avenue, Suite 400, Seattle,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

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Wit and Twaddle-Exposing, All in One Issue

Lindsay Thompson was in rare form in the April issue of *Bar News* and I, for one, wish to express my appreciation of his wit and spunk. We are passing through a dreary time where nonconformist opinion is denounced as unpatriotic and expressions of unpopular views are often hedged by all sorts of defensive disclaimers. So it was indeed refreshing to see Mr. Thompson's willingness to call pious twaddle by its proper name without apology or qualification.

My admiration is directed not simply to Mr. Thompson's exposure of the hypocrisy underlying the opposition of right-wing curmudgeons to legal service programs. Even his coverage of such unpromising material as the meetings of the Association's board was literate and incisive. In short, Mr. Thompson's editorial talents have transformed an otherwise tedious professional journal into a lively and provocative public forum. Not a small feat!

Keep up the good work.

Stafford L. Smith
Seattle

What's a Gormless Prat?

I enjoyed your April Editor's Page. As you used the phrase "gormless prat" three times, I looked it up. It has a great ring, but alas, I fear it is redundant. Are not all prats gormless?

Pronunciation: gôrm´lis
Function: adjective
Etymology: alteration of English dialect *gaumless*, from *gaum*, attention, understanding (from Middle English gome, from Old Norse *gaum*, *gaumr*) + -less
Date: 1883
Chiefly British: lacking intelligence: STUPID (www.m-w.com)

"Prat" did not appear in more conventional sources, but did in a slang Web site: "prat n. To call somebody a prat is rather similar to calling them an idiot. It's often meant to mean someone's general attitude than concerning one particular incident — 'I met my sister's boyfriend the other day and he seems like a complete prat.' Derived, I believe, from a time when the word was slang for your posterior, in a similar way to the more contemporaneous arse." (english2american.com/dictionary/p.html #prat).

Dustin R. Klinger
Portland

Things Change

Speaking as a member of a gender once considered both "chattels" and "possessions" (just like animals) not so very long ago, I'd like to point out that things change. Our laws are meant to reflect the sensibilities of our society, and to change as those sensibilities change. Otherwise I would still be unable to vote or own property.

And as far as the absurdity of animal lawsuits goes, would the anti-Karp letter writers also remove the right of civil suit from severely mentally challenged humans, since he or she would be unable either to manage any monies stemming from a successful suit, or to understand a suit brought in his or her name? Perhaps just as we protect those humans who need protection, we also need more effective ways to protect the animals under our

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Aaron J. Wolff

B.A., Emory University, Atlanta, Georgia; J.D. (cum laude), Seattle University School of Law; Former DUI prosecutor for the cities of Kirkland and Tukwila; Graduate, National College for DUI Defense; NHTSA Qualified Standardized Field Sobriety Test Administrator; Member, Washington Association of Criminal Defense Lawyers.

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care, whatever shape such protection would take.

I believe Mr. Karp's intention is to create a dialogue around an issue that has not been fully explored, and I applaud him for it. Though this thorny dialogue seems problematic to our justice system, and to our accepted definitions, that is not reason enough to refuse to engage in it.

Gayle Chronister
Seattle

It was disheartening — though I suppose not all that surprising — to see the negative responses to Adam Karp's article on animal law ("Lex Feles et Canis — Beyond Ferae Naturae," February *Bar News*, p. 16), and the foundation of WSBA's Animal Law Section. I am writing to counter some common misconceptions about animal law, and stress its importance to our society — and thus to its lawyers.

First, do not underestimate the importance of animals to a large percentage of the general population — your potential and perhaps current clients. Billions of dollars are spent in the United States every year by pet and livestock owners, and others involved in animal-related industries.

Second, and perhaps more importantly, it must be emphasized: animal law is not animal rights. It is "standard" law applied in a particular setting. There is nothing inherently more unusual about animal law than there is about other fields that look at how "standard" law applies to a specific subset in other contexts — such as Internet law, elder law, juvenile criminal law, venture capital . . . you name it, there are numerous and varied examples to choose from in our increasingly specialized practices. The authors of the letters focused in large part on Mr. Karp's discussion about an animal's standing to sue — but that is just one perspective on only one issue in the animal law field.

The Animal Law Section of our Bar is made up of diverse members: defense and plaintiffs' counsel, prosecutors and defense attorneys, corporate attorneys, trust attorneys, government attorneys. The list goes on to include just about every walk of legal life. Discounting the entire section and designating animal law as "bull" because one disagrees with the opinions on a few discrete topics as expressed by one member, is quite bluntly a narrow and shortsighted view. It would be like saying that insurance law is "bull" because you don't like the view of a particular lawyer on an insurance law topic. I respect the views of my fellow Animal Law Section members — even while I don't always agree. Indeed, our section meetings have contained lively discussions with a wide variety of views being expressed. Focusing on the views of an individual lawyer to judge the worth of a general area of law is missing the forest for the trees.

Why is an animal law section important, and how is it relevant to our times and to lawyers at large? Animal law is a changing landscape, largely due to the changing perceptions and importance that we as a society place on our companion, service, working and other animals. One letter points out that animal cruelty laws reach back to the last century — yet even that area of the law is changing dramatically. Evidence the increasing criminal penalties placed on animal cruelty violations, recognizing the correlation between violence to animals and later violence to fellow humans.

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That brings me to another important distinction often missed in assumptions about "animal law." Animal law is not always about the animals — but is quite frequently about their owners and the general public. Mr. Karp raised the controversial, but very real and growing debate about the appropriateness of permitting owners to recoup emotional distress damages when their companion animal is hurt out of negligence or, worse, intentional acts. The letter writers' disagreement with one view on this current hot-button topic does not negate the significant potential legal impact of the issue itself. The diverse Animal Law Section simply provides a forum for intelligent analysis and debate about such issues. In addition, there are several, perhaps more mundane areas that are of very real concern to the members of our society, and thus to their lawyers. For example, in our recent CLE we had a wonderful presentation by Barry Sheridan about Layla's Law, the stringent protection enacted to protect people with disabilities and their service animals. Katrina Glogowski discussed aspects of the Disabilities Act that pertain to rights to have service animals in various public places. Those laws aren't about protecting the animals so much as they are about protecting the rights of the people who rely on them.

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Also note the tremendous increase in attention to dangerous dog laws, and liabilities for ownership of a dog that hurts another person or animal. This is an issue affecting everyone in our society who lives near animals or encounters animals in their daily lives — in other words, it affects everyone, irrespective of whether that person owns or even likes animals. From the animal owner or animal business perspective, especially with respect to dogs, there are municipal and state restrictions on dog ownership in response to increasing media attention to dog attacks, and insurance and airline breed-specific bans. Lest anyone forget, the refusal of insurance companies to provide insurance to owners of certain breeds — regardless of the individual dog's actual history or propensities — affects everyone in society, not just the dogs' owners. Insurance is often the only meaningful source of monetary compensation for physical injuries inflicted in a serious dog attack.

Without writing a treatise on the topic, I invite our fellow WSBA members to keep an open mind, and actually look at what the Animal Law Section is doing. Join the e-mail list, attend a meeting, or join the section, and listen to the discussions. Dare to brush away any initial misconceptions. I don't mean that all members must get involved, but simply take the time to see the section for what it is. I ask our fellow Bar members to respect animal law practice and its practitioners, and the need for people who are knowledgeable in that area.

"Animal law" impacts our legal system and our society — and eventually, ultimately, your client. At our last CLE, we drew in a full house. We had discussions on pet trusts (you can laugh, until you're asked to create or serve as trustee for a pet trust of several hundred thousand dollars — it's more common than you might think), service animals, animal-related criminal law, animal issues in family law (you don't think that pet owners fight quite

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adamantly about their respective new roles? Yes, even visitation rights are commonplace), exotic-animal ownership, contracts relating to animals (that's my particular bailiwick), veterinary malpractice issues from both a plaintiff's and defense point of view, a recent class action case relating to vegetarianism, and, as Mr. Karp discussed in his article, animal valuation. There were many other things that could have been addressed, but there was simply not enough time. For example, animal-related legislation is a topic that will warrant its own CLE at a later point.

Don't scoff at the practice or interest in animal law and the very practical issues that arise when applying "regular" law in an animal context — because you just might find that you need to consult with a member of our section when your client is affected by one of the myriad avenues of animal law.

We may be a section of varying views, but I think there is one sentiment, expressed by Gandhi, we do agree on: "The greatness of a nation and its moral progress can be judged by the way its animals are treated."

Carmen R. Rowe, Tacoma
(land use and animal contract law)

Joined by the following Animal Law Section members, practices included to provide a flavor of the diversity represented:

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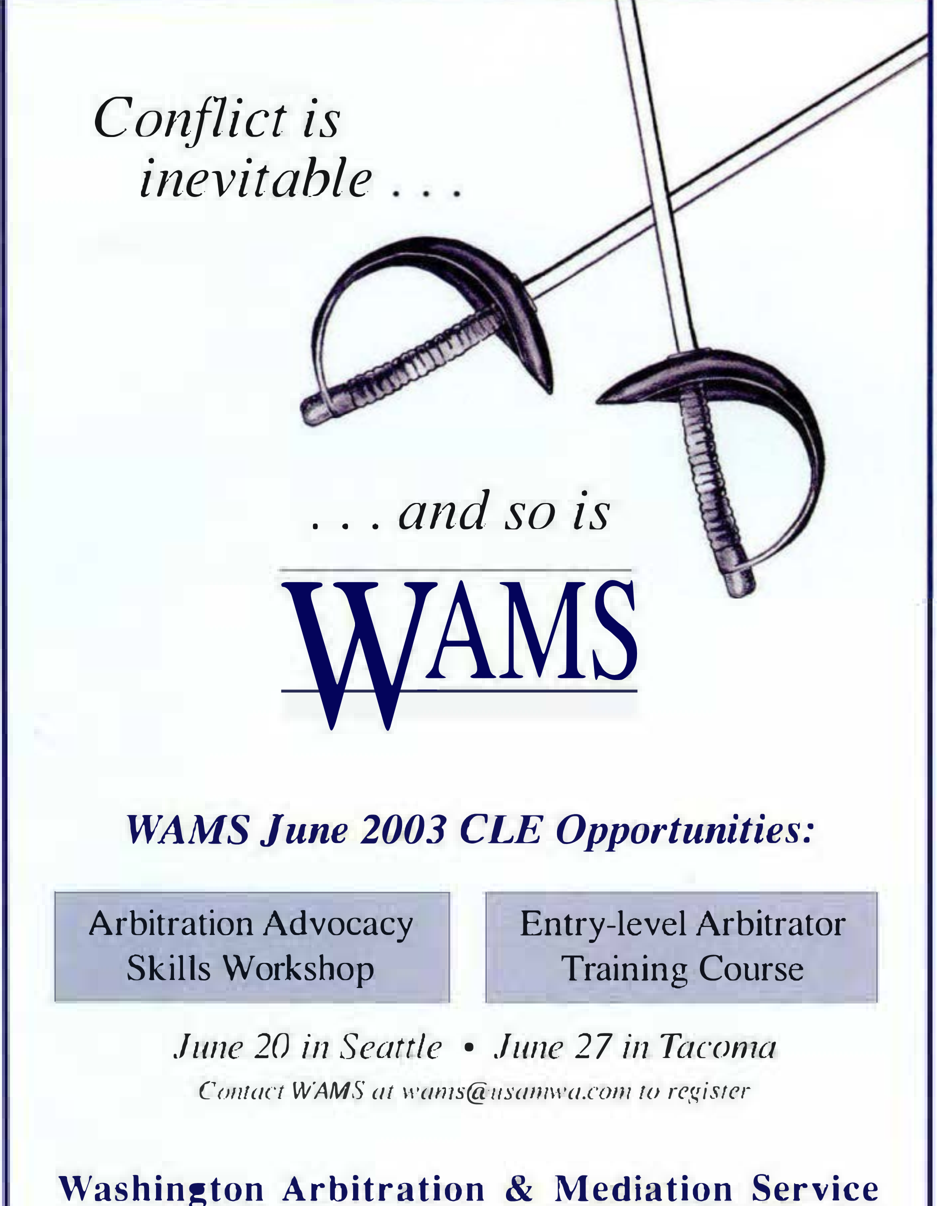


A Legal Services Critic Responds

You want to know what the critics of IOLTA and Columbia Legal Services suggest (Thompson, "If You're So Smart, Why Aren't You Running Legal Services? A Challenge to Its Critics," April *Bar News*, p. 25).

1. The simple answer: get rid of Columbia and its siblings. The world would then be as it was before Columbia existed, in perhaps 1967, and it will not collapse.

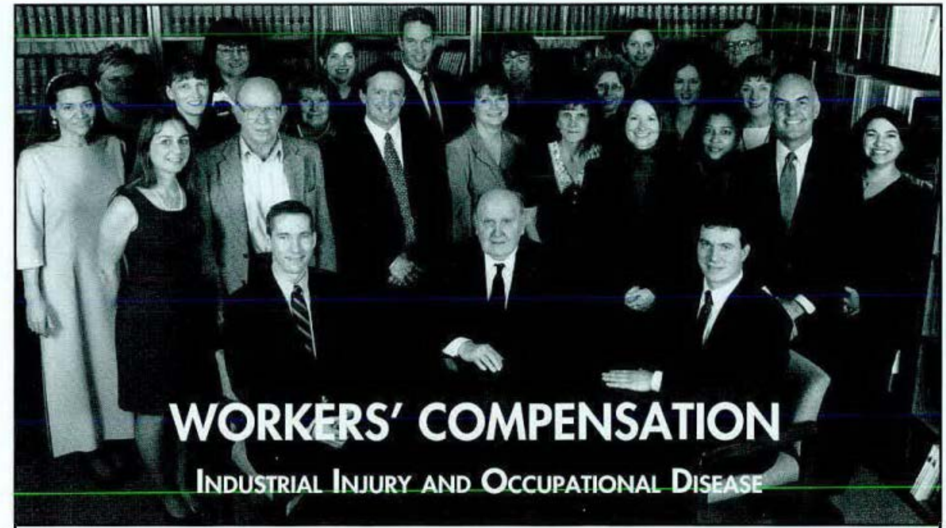
2. If some remnant of Columbia remains, finance it by the people through the Legislature, not by hidden taxes such as IOLTA. The Supreme Court cannot finance because the Court cannot be a Legislature and a court at the same time. And, a court cannot favor a law firm or policy (i.e., Columbia) by an indirect subsidy.

3. Enhance self-help or *pro se* assistance. The legal community should foster the practice of advising people who are *pro se*. For example, a lawyer could charge to be available by cell phone as the *pro se* client shepherds a routine order through the courthouse. The legal community should provide better information about areas of knowledge of lawyers: different courts, procedures, legal problems and subject matter, such as military pensions, child support for special-needs children, WA divorce with Idaho implications. And public library branches could have current copies of the RCW and dedicated access to West or some other online source. People live near branch libraries, so that is where the books should be.

But why abolish Columbia? There are institutional reasons why Columbia is not a helpful use of taxpayer money. First, Columbia discourages self-reliance.

To simplify and stereotype a bit, the Democrats believe many people are helpless, and need welfare, and taxes don't matter. The Republicans believe no one is helpless, no one should get welfare, and taxes are the only things that matter. I tend to believe that people are resilient and that the survival instinct is very powerful.

The concept of responsibility is related. Society should encourage people to be responsible for their own welfare, for many reasons, one of which is that they are happier. But the more welfare, the less responsibility. Lawyers are often polished experts at avoiding responsibility for their clients.



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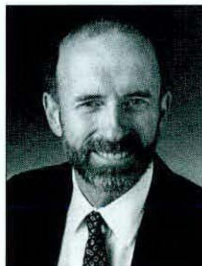

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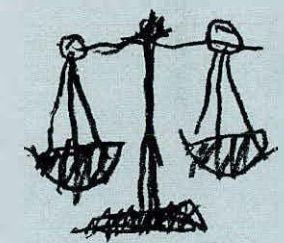

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Children's Willingness to Deceive Fluctuates with Age

Columbia does not foster the values of self-reliance and responsibility because Columbia provides a form of welfare, and I doubt (I don't know, I just doubt) that they try to inculcate in their clients a sense of responsibility, a sense that living off the largesse of the U.S. might be bad for one's health. Certainly providing free legal services is a statement that it is ●K to let someone else pay your way. And Columbia encourages the model of helplessness by implying that calamitous and unjust consequences will befall their clients if they don't have legal assistance from Columbia.

Second, Columbia and courts are poor institutions for deciding entitlement claims. All they do is substitute the judgment of a legal services lawyer and a judge for the judgment of someone in the executive branch. There is no reason to assume that judgment is better (a pun here) and there is plenty of reason to discredit it, because, as I have so often said, the executive and legislative branches consider — perhaps imperfectly — all the public interests involved, whereas courts and lawyers consider only the interest of the person who wants the money. They don't think about where it comes from. They don't think about who loses a job when someone else gets an entitlement. (This is sort of an allegory.) I think a large portion of Columbia's budget is entitlement work.

Third, Columbia files general application litigation: they sued the post office! They sued the post office because they wanted to change services provided to indigents. We don't need this, because we have a democratic government which considers — albeit imperfectly — the competing public interests in spending our money. Neither Columbia nor the courts are set up to do that. Such litigation is not a reason for keeping I●LTA, nor is litigation designed to change the status of farm workers or immigrants or anyone else. Columbia lawyers may want to change the USA to a form more to their liking, which is fine, but they are no more qualified than any other citizen to do this, and they are not entitled to advocate for change at public expense, no matter how much they dislike the policies of an elected government.

Fourth, Columbia lawyers are bound by their ideology and the need to please their benefactors, such as the "Equal Justice Coalition." They are not subject to the curative effects of the market. They do not have to please their clients, and, if they bring general application litigation, their connection to their supposed clients is even more tenuous.

You ask about ignoring the oath of an attorney, which says one must not reject from any consideration personal to oneself the cause of the defenseless or oppressed. This is meaningless to me. If it means anything, it says that every lawyer must take every case of a defenseless and oppressed person regardless of the cost. This is not practical.

The bar can't force lawyers to work for free, no matter what the cause, because the taking clause protects us from forced labor. That is part of the constitution, and the oath says we have to support the constitution.

You also argue that objections to I●LTA and other things are a cover for the real issue. Not so. The issues are constitutional and have to do with democratic government. I●LTA raises issues of taking, free-

dom of speech, use of public money for private parties, taxation, and the authority of courts. You disagree with, but do not respond to the issues I have raised from time to time but might believe that the Supreme Court has inherent power to regulate lawyers. It doesn't because all government power is derived from the people and the constitution, and not from anyone's handy claim of "inherent power." Also, a court cannot properly review whether its own legislation asserting power over a lawyer is constitutional.

Many people think the structure of IOLTA and the Supreme Court is not important, because the Columbia cause is good. The structure of government is important; that is why we have a constitution. Why do I have to argue this? We have a constitution so that our elected representatives will remain faithful to the voters and so that they will not assume power they ought not have. So we will continue to have democracy.

Roger Ley
Seattle

Was Justice Done?

I learned of a recent lawyer disciplinary matter, in which the attorney stipulated to having had sex with a client, stipulated that he had violated the Rules of Professional Conduct, and stipulated to a censure. Upon submission to the Disciplinary Board, the latter rejected the stipulation and concluded "... this conduct does not appear to warrant discipline."

The Disciplinary Board then dismissed the complaint against the attorney. No further explanation was provided, even when requested by the complaining party. The complaining party understandably believes someone was "bought." I was shocked when I learned of this, as were my partners. Has anyone heard of any similar action by the Disciplinary Board?

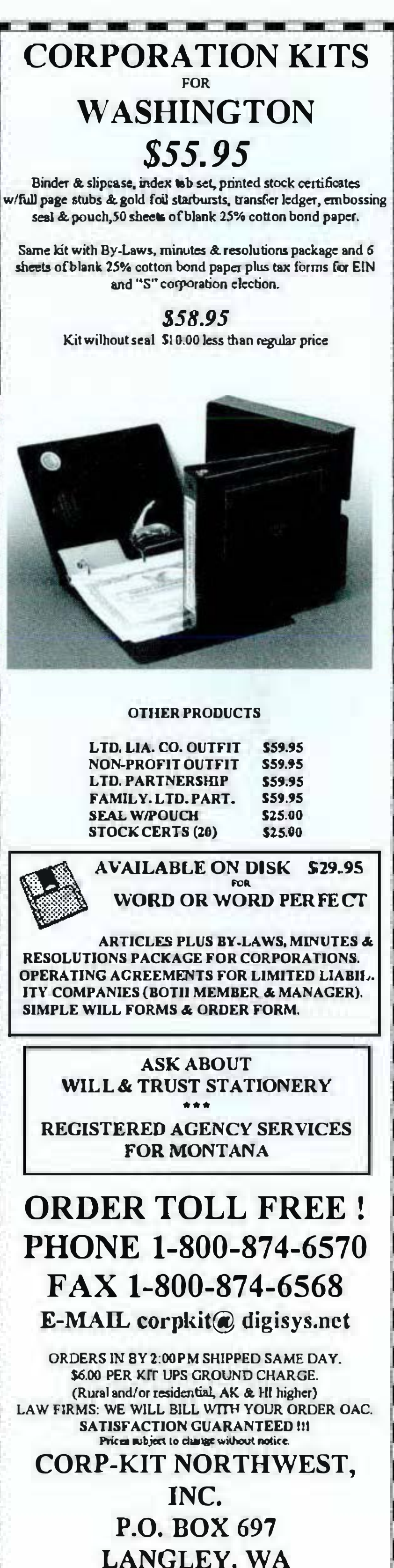
Christopher E. Young
Seattle

Editor's response: In November 2002, a WSBA member entered into a stipulation to dismissal of a disciplinary complaint. The stipulation's text describes it as "a compromise agreement intended to resolve this matter in accordance with the purposes of lawyer discipline while avoiding further proceedings and the expenditure of additional resources."

The facts of the case are that in October 2000 the lawyer was hired by a married couple to assist them in a dispute with the contractor who was building their home. Between mid-October and November 29, 2000, he assisted the couple in reaching a settlement of the dispute. The parties signed an amended construction agreement December 5 and 6, 2000. On December 8, the wife made an appointment to see the lawyer at his office. They discussed the house dispute, but conversation turned to personal matters. Later that day they entered into an intimate relationship, at which time she told the lawyer her marriage was deteriorating and she had left her husband. On December 19, 2000, the lawyer wrote the couple advising he had closed his file as of the signing of the amended agreement on December 6. He performed no legal services for them after December 6, 2000. The husband filed for divorce in Skagit County December 21, 2000. The relationship between the lawyer and the wife ended in mid-February 2001, and the wife died in an auto accident April 3, 2001.

Under RPC 1.8 a lawyer is subject to discipline for entering into a sexual relationship with a client unless a consensual sexual relationship existed between them at the time the lawyer/client relationship commenced. On September 27, 2002, the Disciplinary Board reviewed the facts and found in an October 2, 2002, order that "based on the facts as presented in the stipulation this conduct does not appear to warrant discipline." The stipulation found the lawyer "negligently believed that the representation of the clients had ended on December 6, but should have affirmatively informed them that the representation had terminated before commencing a sexual relationship with [the wife]." The Disciplinary Board approved the stipulation to dismissal on February 14, 2003.

Readers are invited to submit letters of reasonable length to the editor via e-mail (comm@wsba.org), fax (206-727-8319) or mail. Due date is the 10th of the month for the second issue following — e.g., June 10 for publication in the August issue.



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Does *Bar News* Have "Boof"?

by Jan Michels
WSBA Executive Director

As part of our periodic, wide-ranging conversations, my friend and trusted confidant WSBA member Paul Sherfey asked me about *Bar News*. "Whose is it?" "Whose ideas/views does it express?""Whose "brand" drives it?"

What *is Bar News*? I tried a number of responses, but realized that when answering a question takes a long spew of words, various stuttering starts and iterations, and contrary-to-my-nature thinking out loud while searching for a satisfying response, the question is one that should be talked about more.

Whose Is It?

Bar News is the members' publication — it's yours! It should reflect what you want it to be. That said, how do we know what you want in your association magazine? President-elect Dave Savage has formed a *Bar News* Review Committee to examine these questions. On his committee sit *Bar News* Editor Lindsay Thompson and Managing Editor Amy Hines; Member and Community Relations Director Judy Berrett; Governors Robert Boggs, Joni Kerr and Fawn Sharp; Editorial Advisory Board (EAB) Chair James H. Hopkins; former EAB Chair Paula Littlewood; WYLD Trustee Paul Richmond; and I. This committee is reviewing various other state bar magazines and newspapers, and will conduct a membership survey in the fall to help answer these questions.

Whose Ideas/Views Does It Express?

The WSBA uses an independent editor who is in charge of editorial content, article solicitations and selection, and setting themes for different issues. This content and "flavor" constitute about 50 percent of the magazine. Many members have commented most favorably on how Lindsay Thompson's return, after a stint as a governor and the pursuit of other life interests, has revitalized *Bar News* and made reading it much more compelling — actually fun.

But the president and executive director have their bully pulpits. Their columns are not subject to editing, except the most welcome advice on how to improve readability. Lindsay is fond of telling us that we don't have to have a column every month. I think another of his quotes, "Most people run out of things to say in about 12 months," emphasizes this point without direct affront. The president and I feel you should know who we are and what we're thinking. The content we submit amounts to only about five percent of *Bar News*. Although any of our plans, or bents, is subject to the wisdom of all 14 members of the Board of Governors, we hope to be the antennae (and the voices) of what we see on the horizon in our areas of concern.

The third expression in *Bar News*, probably a 20 percent factor in this stew of a periodical, is "stuff" we think members want to know about and publicly examine. This category includes *Disciplinary Notices*, *The Board's Work*, *FYI* (including Opportunities for Service), *Around the State* and *Announcements*. Since disciplinary notices are now posted on our Web site, we're weighing whether taking up three to five pages per month on them is the best use of precious *Bar News* "real estate" (we have a 16-page "signature" block, which means we can grow or shrink only in 16-page segments).

You will have a chance to offer your opinions in the survey later this year.

Whose Brand Drives It? (Name the Stew)

So does this stew have "boof" — a perfume term borrowed from Tom Robbins as he used it in his book *Jitterbug Perfume*, meaning underlying, unmistakable and identifying tone? Well, Paul, sorry to disappoint, but probably right now *Bar News* lacks boof, though it's clearly building some. Set side-by-side with publications from Arizona, Oregon, Michigan and Wisconsin (our usual comparison states in size, focus and function), *Washington State Bar News* has the same professional objectivity and legal-information-sharing function, with a middle-line approach. I fancy that the president, with his provocations; I, as executive director with occasional inspirations; and the editor, with his insight and literary command, may sometimes add a new spice or interesting ingredient on our personal pages, but *Bar News* as a whole is an amalgam that addresses multiple purposes and interests.

That's not saying it can't be more or different. The review committee has created an inventory of the methods of communication the WSBA uses to contact its members, with the intent of better matching the message to the medium and the audience. We want to take advantage of the "information age" without leaving anyone behind. We want a *Bar News* that members are interested in and proud of — a *Bar News* with boof.

Has the Duration of Copyright Turned Wrong?

by J. Michael Keyes

Introduction

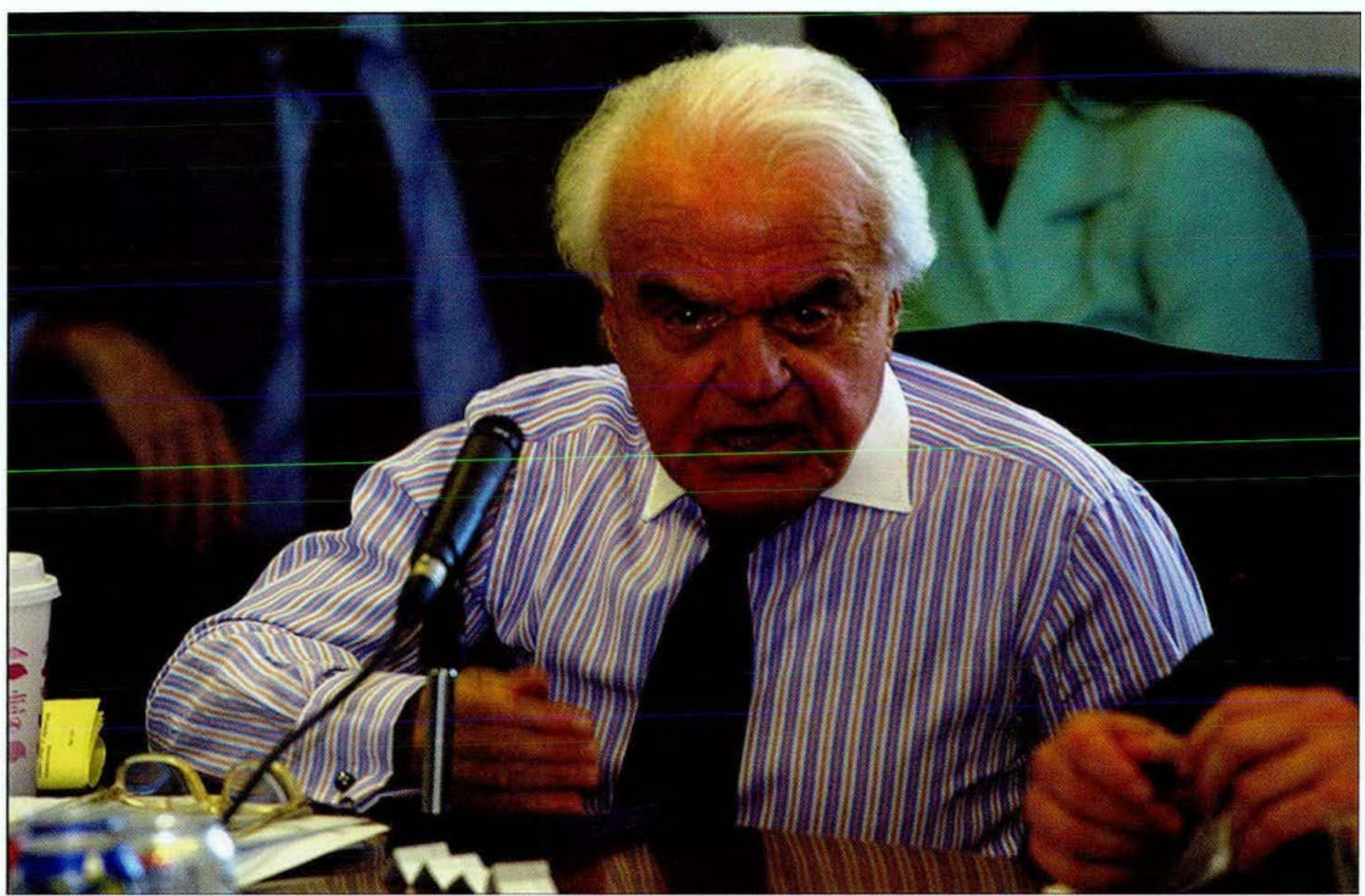
Buried deep within our Constitution is a 27-word phrase that — certainly unbeknownst to the likes of James Madison — was destined to transform the world of arts and entertainment. That unobtrusive provision vests Congress with the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] On this phrase our federal copyright laws are founded.

In this country's fledgling years, copyright protection was limited in scope and duration. As time wore on and as technological hurdles were surmounted, copyright law expanded. In the early 1900s, purveyors of new technology and *avante garde* modes of expression vigorously lobbied Congress to pass legislation favorable to these new industries. The lobbyist in chief was the Motion Picture Association, seeking to benefit from copyright legislation that would protect motion pictures from unauthorized duplication. Success was the association's in those early days of the 20th century, and it — along with similarly situated entertainment compatriots — has racked up an impressive array of lobbying victories ever since.

The latest in the win column for the Motion Picture Association and its brethren is the Sonny Bono Copyright Term Extension Act of 1998 (hereinafter "Bono"). This appendage to the copyright law granted, among other things, an additional 20 years of protection to copyrighted works that were poised to tumble into the public domain. Numerous songs, novels and movies received this grant, thereby increasing the income streams to the entertainment industries and insiders owning those copyrights. In *Eldred v. Ashcroft*,[2] a case billed as "the most important copyright decision in more than 100 years,"[3] the U.S. Supreme Court recently upheld Bono, holding that the extension did not violate the "limited times" directive contained in the Constitution.

I do not take aim at the *Eldred* decision. Justice Ginsburg's majority opinion is weighty, well reasoned, historically illuminating and correct. Instead,

The lobbyist-in-chief was the Motion Picture Association, seeking to benefit from copyright legislation that would protect motion pictures from unauthorized duplication.



Jack Valenti, president and CEO of the Motion Picture Association of America, at a Commerce Department roundtable on digital-rights management. Valenti is an outspoken proponent of the Sonny Bono Copyright Term Extension Act.

I want to explain why copyright-term extension represents unsound public policy that may very well be bad for society.

Copyright's Pedigree and Purpose

Copyright law is several centuries old. Like many other legal constructs of our country, copyright owes its genesis to England. In 1710, Parliament passed the first copyright statute, the Statute of Anne, giving authors the exclusive right to copy their works for a period of 14 years.[4] A renewal period of 14 years was also available to the author at the expiration of the original term.[5] Once the renewal period lapsed, the work became part of the public domain for all to copy *ad libitum*. Our country's first federal copyright law was enacted in 1790, incorporating many of Anne's provisions, including the 14-year initial period of protection.[6] Over two succeeding centuries, Congress has repeatedly lengthened copyright protection on numerous occasions and has broadened the ambit of what type of works receive copyright protection.[7] Before Bono, copyright protection lasted for 50 years after the author had departed this world.

Despite copyright's personal property–like appearance, authors are not the intended beneficiary of this law. As the U.S. Supreme Court noted in days of yore, "the *sole* interest of the United States and the primary objective in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."[8] Indeed, the copyright monopoly is a "special reward"[9] and a "secondary consideration"[10] to the ultimate aim of enriching the public domain. The ultimate goal of copyright protection is to benefit the rank-and-file members of society, with authors receiving an incidental benefit of "limited" exclusivity to exploit their works.

The Entertainment Industry Hits the Bono Bonanza

Congress apparently believed that Bono would benefit the public domain. Congress's copyright-extension legislation assumes that a 20-year extended copyright will "strengthen" incentives to "create new and derivative works" and "create" incentives to "preserve existing works."[11] These assumptions are questionable, because there is no indication that authors need more incentive or that existing works would not have been preserved without the benefit of copyrightterm extension. Thus, Congress's ultimate conclusion that the public domain will be greatly enriched by copyright extension is doubtful.

A. Incentives Were Not Wanting

Congress engaged in bold speculation when it determined that incentives needed to be strengthened. In order for additional copyright duration to make any sense on the basis of strengthening the incentive for authors to create new and derivative works, there must have been some aspect of the life-plus-50-years incentive that was wanting, lacking or deficient in some respect. "Incentive" is synonymous with "motive," which is defined as "something

(as a need or desire) that causes a person to act."[12] Thus, if authors have no need or desire for longer copyright protection, then copyright duration extension, while perhaps a windfall or a bonus, is not properly characterized as an incentive.

Interestingly, no artists or authors testified to Congress that they would have greater incentive to create new and derivative works if Congress expanded copyright protection.[13] Rather, the sole concern of the artists (or their heirs) who testified appeared to be that financial streams would run dry if copyright protection were not extended for works already in existence.[14] Given the complete lack of indicia as to the authors' or artists' needs or desires for protracted copyright protection, it is highly arguable whether such an extension is necessary or will have any effect on strengthening incentives.

In fact, it seems unlikely that such a necessity to strengthen incentives could really exist. On a purely commonsense level, could it truly be possible that an author or artist would find any more incentive to create simply because the posthumous copyright protection was going to exist for nearly three-quarters of a century, as opposed to merely half a century?[15] The motivations that inspire works of a creative nature are innumerable. Fame, notoriety, wealth, love, hate, loneliness, joy and sorrow are but a few.[16] It seems quite likely that nowhere in that vast sea is the motive to create based on postmortem protection of an additional 20 years beyond the already extant 50-years-after-death protection.[17] The congressional assertion to the contrary is dubious.

Congress also speculated that longer copyright protection for existing works will strengthen the incentive to create new works, because of the added income or subsidy that copyright owners will receive on original works.[18] This subsidy is important, because the motion-picture studios and publishers supposedly rely on it to "finance the production of marginal works and those involving greater risks (i.e., works by young or emerging authors)."[19] Copyright extension may provide added income to the motion-picture and publishing industries,[20] but this income will not necessarily induce the creation of new works. There is nothing in Bono itself that actually requires, compels or even encourages this added income to be invested in such works of authorship.[21] Thus, it is at least possible that any additional income received from copyright extension could be applied to industry-related expenses, perks or junkets that have nothing to do with the creation of new works of authorship.

Interestingly, no artists or authors testified to Congress that they would have greater incentive to create new and derivative works if Congress expanded copyright protection.

Additionally, there is no indication from the legislative history that these entertainment industries would refuse or be financially unable to produce marginal or risky works without the income derived from copyright-term extension.[22] This is not to say that the motion-picture and publishing industries are greed-laden and ambivalent about whether the public domain is ever enriched by the creation of new works. Rather, the point is that, in reality,

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the income received from those copyright extensions may have little or no impact on which marginal works are ultimately churned out by those industries. On one hand, such infusions of cash might lead to the creation of new works. On the other hand, the coffer enhancements from these infusions may be put to use far outside the realm of copyright subjectmatter.

B. Preservation Is by No Means Assured

Finally, Congress assumed that without extending copyright protection, there would be no incentive for the motion-picture and publishing industries to preserve existing works.[23] Thus, to incentivize the film and publishing industries to transfer these "cultural treasures" into an "easily reproducible and indelible format" — that is, a digital format — Bono provides a blanket 20-year copyright extension.[24] There are two problems with the assumption that Bono is the best vehicle to ensure the preservation of these existing works of authorship.

The first problem is that Congress simply assumed that without extended copyright protection there would be no carrot to encourage digitizing works of authorship. This assumption is certainly questionable, because the actual lack of copyright protection may very well lead to a burgeoning array of creativity. This is especially true in today's technologically steeped world. Professor Lawrence Lessig recently struck upon this exact issue in his latest opus, *The Future of Ideas*.[25] Professor Lessig argues that just because a work tumbles into the public domain does not mean there is a *de facto* lack of incentive to use that work in an innovative and creative manner. In fact, given the current technological tools at our disposal, the reality is quite to the contrary.

Professor Lessig recites poignant examples of how the lack of copyright protection actually induces individuals into creative and innovative action. Eric Eldred is one such consummate exemplar.[26] The trappings of the Internet and the innovative practices that could take place there entranced Mr. Eldred, a former naval computer programmer.[27] Almost by happenstance, he began publishing public domain novels in HTML format on the World Wide Web.[28] This hobby transformed itself into a passion and resulted in the founding of Eldritch Press, a free Web site devoted to publishing public-domain works online. Mr. Eldred's creativity and innovative ways were sparked because of the lack of copyright protection.[29]

It appears likely that there are other Mr. Eldreds out there who, because of existing technology, would be willing to invest time, effort and even financial resources to ensure that public-domain works are transferred into an indelible format.[30] For instance, suppose that a Walt Disney film called "Mickey Mouse" was set to expire before Bono was enacted. Had that film's copyright term expired, there still would have been sufficient reasons for one to invest the time, effort and money to ensure that the work — which would have been a treasure in the public-domain chest — made its way into an indelible format. With the advent of digital video disks (DVDs), a Mr. Eldred clone could have taken the Disney film, invested the necessary time and money, and produced a DVD version. This DVD version could couple the reproduced and digitized film with such elements as a history of Disney, or Walt

The trappings of the Internet and the innovative practices that could take place there entranced Mr. Eldred, a former naval computer programmer.

Disney biography, or any other multimedia enhancement that makes DVDs much more inherently valuable and attractive than their analog predecessors. Moreover, this DVD, embodying a compilation under copyright law, would be subject to copyright protection and receive the full federal armament under one of the other new appendages to the Copyright Act, the Digital Millennium Copyright Act (DMCA).[31]

These examples illustrate that technological advents can have a tremendously positive effect on innovation. When works of authorship are emancipated from the shackles of our copyright laws, that emancipation may lead to a renaissance of creativity and innovation — creativity and innovation that would not otherwise have transpired if the works were still subject to copyright protection.

The second problem is that it is nothing less than a major assumption on the part of Congress to think that the carrot of extended copyright protection for existing works will actually result in works being transferred into digital format. Congress simply assumes that extending copyright protection will automatically motivate movie studios and publishing houses to convert older works into digital format.[32] Again, much like the lack of a requirement that these industries use funds received from extended copyright protection to fund new works, there is nothing in Bono that requires or compels copyright holders to ensure works get placed into a reproducible and indelible format.[33] It may very well be that vast amounts of works that were given a 20-year extension may end up sitting on some warehouse shelf in the middle of nowhere without ever being saved to an indelible format.[34] While this fate probably will not befall all of the works that receive extended copyright protection, there is no provision in Bono that would ensure or encourage another result.[35]

In stark contrast to the above-mentioned congressional speculations stands this unquestioned reality: Bono's protection for existing works will prohibit others from using works that would otherwise have been used *but for* the passage of Bono. It is incontrovertible that works in the public domain provide a fountain of opportunities and material for the creation of works that would otherwise be classified as "derivative works" under the Copyright Act.[36] For example, upon falling into the public domain, *The Secret Garden,* written by American novelist Frances Hodgson Burnett, experienced an "explosion of new book, film, and stage versions."[37] Other recent and quite successful films owe their rebirth to artists who relied on the resources available in the public domain. Jane Austen's *Sense and Sensibility* and William Shakespeare's *Hamlet* and *Romeo and Juliet* are three such examples. Similarly, there are numerous examples of individuals and organizations that were poised to catch copyrighted works slated to fall into the public domain but were stymied by Bono.[38] Eric Eldred is one such example, but there are many more.[39] For instance, the Internet Archive is an organization dedicated to "offering permanent access for researchers, historians, and scholars to historical collections in digital format."[40]

Distilled to its essence, Bono is the product of unsupported congressional speculation. There is no indication that there was a social need to strengthen incentives to create new and derivative works by extending copyright protection. In fact, given the rather generous amount of posthumous protection under the Copyright Act of 1976, it seems unlikely that such a need could truly exist. Additionally, there is

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nothing in Bono that would compel or encourage the income received from copyright extensions to be used to fund new and derivative works. Likewise, Bono contains no provisions to ensure that works embodied in older technologies will be transferred into indelible formats. Against this backdrop shines this reality: Bono will have a significant impact in quelling others from engaging in artistic endeavors.

Why Copyright Extension Is Wrong

Given that Bono is premised upon questionable congressional assumptions and the reality that Bono will stymie would-be creators from plying their trade, the following question must be posed: Does Bono embody sound copyright policy? The answer can be "yes" only if the upshot of the 20-year displacement of society's rights can be said to ultimately create a more vibrant and enriched public domain.[41] Unfortunately, there is no answer to this question; for this reason, Congress should have declined to extend copyright protection.

Whether the public domain will ultimately be better off because of Bono cannot be prospectively determined by congressional prognostication or by the theories of luminaries and lobbyists in the realms of copyright law and the arts.[42] The legislative branch has no idea as to whether doling out a 20 year extension for existing copyrights will ultimately enrich the public domain. Perhaps there will be no increased flow of creative juices or any industry movement to ensure older media are protected in indelible formats. Similarly, the anti-extensionists cannot assert with all certitude that Bono will strike a detrimental or harmful blow to the public domain.[43] It is possible that Bono will make the entertainment industries flush with cash, which will spur them into preserving extant works of authorship and bankrolling new and derivative works that would not have otherwise been preserved or created. Whether Bono actually enriches the public domain will turn on innumerable variables.

Congress should not have enacted Bono because it cannot be stated that it will have a positive effect on the public domain.

Congress should have erred on the side of caution and not enacted Bono, because copyright extension of 20 years could lead to one of two possible outcomes. When we as a society are uncertain as to how a particular resource is going to be used, "we have more reason to keep that resource in the commons."[44] Conversely, when we have a sharper understanding of how a resource will be consumed, "we have more reason to shift that resource to a system of control."[45] The justification for such a position is indeed straightforward: "Where a resource has a clear use, then, from a social perspective, our objective is simply to assure that that resource is available for this highest and best use."[46] This is why Bono represents bad copyright policy, at least to the extent that Bono extended copyright protection for those works that had already been created. Because Congress could not possibly know in advance what fate awaits the works of authorship given extended copyright protection, Congress should not have shielded those resources from entering the commons of the public domain.[47] Had Congress not enacted Bono, the full weight of human innovation could have been brought to bear on works of authorship that would have otherwise tumbled into

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Ingels' primary area of practice is in business transactions, corporate law, entity creation, mergers and acquisitions, and commercial transactions. Ray's focus is in state and federal civil litigation with a focus on civil rights, wrongful death, governmental liability, discrimination, and federal and state appellate practices. Weiss' practice is focused on providing creative solutions to contentious and complex disputes in the natural resources and environmental arena.

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the public domain.[48] Instead, these works protected by extended copyright may simply languish for another 20 years on warehouse shelves, thereby not enriching anything and certainly not contributing to the wealth and vitality of the public domain.

Congress should not have enacted Bono because it cannot be stated that it will have a positive effect on the public domain. The most that can be stated for Bono is that it *might* provide a benefit to the public domain. This is an insufficient basis for implementing a law with the depth and breadth of Bono.

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NOTES

1. The text of the constitutional provision provides that "[t]he Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *See* U.S. CONST. art I, § 8, cl. 8.
2. Eldred v. Ashcroft, ___U.S.___ , 123 S. Ct. 769, 778 (2003).
3. Henry Weinstein, Ann O'Neill and Meg James, "Studios May Have the Most to Lose," *L.A. Times*, Feb. 21, 2002, at C1, *available at* www.latimes.com/business.
4. *See* Statute of Anne, 1710, 8 Ann., c. 93 (Eng.). The statute is named after Queen Anne, who reigned from 1702 to 1714. *See* Brian Forté, *The Statute of Queen Anne*, www.betweenborders.com/queenanne/index.html. Queen Anne did not, however, have much involvement with the act, as her reign was plagued with both domestic problems and strife abroad. *See* encyclopedia.com/html/section/annequeen_reign.asp.
5. *See id.* The statute indicated that after the first set of 14 years has passed, "the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years." *Id.*
6. *See* Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 125 (1790).
7. *See* Pub. L. No. 93-573, title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 87-668, 76 Stat. 555 (1962).
8. United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).
9. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).
10. *See* Paramount Pictures, 334 U.S. at 158.
11. *Id.* at 12.
12. *Merriam-Webster Collegiate Online Dictionary*, *at* www.m-w.com.
13. *See* Michael H. Davis, *Extending Copyright and the Constitution: Have I Stayed Too Long?*, 52 Fla. L. Rev. 989, 996 (2000).
14. *See id.*
15. Stephen R. Barnett and Dennis S. Karjala, "Copyrighted from Now until Practically Forever," *Wash. Post*, July 14, 1995, op-ed page ("What author is going to decide not to write another book because copyright royalties will flow only for 50 years, not for 70 years, after her death?"); *see also* Peter Jaszi, *Goodbye to All That — A Reluctant (and Perhaps Premature) Adieu to a Constitutionally Grounded Discourse of Public Interest in Copyright Law*, 29 Vand. J. Transnat'l L. 595, 597 (1996) (arguing that "[e]xtending the term of protection for works made after the effective date of the legislation might produce some theoretical, highly attenuated effect on the creative practices of individuals. I say might, because I cannot imagine the instance in which a writer, for example, would be swayed to undertake a project by the mere possibility of 20 [more] years of *posthumous* royalties available only in the highly

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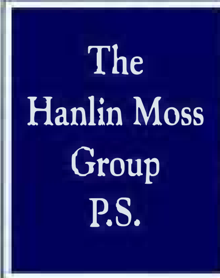

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unlikely event that the work retains popularity among generations of readers yet unborn") (emphasis added).

16. *See* Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. Cal. L. Rev. 617, 626 (2001) (noting that creativity owes its genesis to an author's quest for "[f]ame, recognition of peers, and a desire to disseminate divergent views").

17. Moreover, even if there was a "need or desire" for additional copyright duration, it is indeed questionable whether the 20-year extension would fulfill those longings. To the extent there is an economic incentive to create additional works provided by the 20-year extension, that incentive is negligible. As explained by Dr. Hal Varian, "extending current copyright terms by twenty years for new works has a tiny effect on the present value of cash flows from creative works and will therefore have an insignificant effect on the incentives to produce such works." Affidavit of Hal R. Varian at ¶ 3, Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999), *available at* cyber.law.harvard.edu/eldredvreno/cyber/varian.pdf. In short, it is not at all clear that an author would be any more incentivized to create a work simply because that work was going to receive greater *posthumous* copyright protection.

18. *See* S. Rep. No. 104-315, at 12.

19. *Id.* at 12-13.

20. But even this congressional conclusion is debatable. *See* John McDonough, *Motion Picture Films and Copyright*, *at* www.law.asu.edu/HomePages/Karjala/Opposing Copyright Extension/commentary/McDonough.html (arguing that "it can be easily shown that there are very few commercial motion pictures made before 1930 which are still bringing in the windfall of huge revenues which make these industries so profitable").

21. *See* S. Rep. No. 104-315, at 12–13.

22. *See id.* at 12–13.

23. *See S. id.* at 13.

24. *Id.*

25. *See* Lawrence Lessig, *The Future of Ideas* 122 (2001).

26. *See id.*

27. *Id.*

28. *Id.*

29. *Id.* at 123.

30. Indeed, "projects to digitize and give away millions of out-of-copyright books, movies, and music are now under way, funded by foundations, the government, and indeed corporations." Brief of Amici Curiae of the Internet Archive on Behalf of Petitioners, No. 01-618, *available at* www.arl.org/info/frn/copy/ia_brief.html; *see also* Litman, *supra* note 78, at 173 (observing that history has shown that a "variety of new media flourished and became remunerative when people invested in producing and distributing them first, and sorted out how they were going to protect their intellectual property rights only after they had found their markets").

31. The Copyright Act defines a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. A compilation is protected by copyright. *See* Feist Publ'ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 358 (1991) (noting that copyright in compilation is limited to the compiler's original "selection, coordination, and arrangement"). Thus, this compilation would be subject to copyright protection. Moreover, the DMCA would prohibit third parties from "accessing" this DVD without the permission of the copyright holder of the compilation. *See* 17 U.S.C. § 1201(a) (providing that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title."); *see also* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 444 (2d Cir. 2001) (holding that those individuals who "decrypt" an encrypted DVD with the authority of a copyright owner are exempted from liability under the DMCA; however, authority to "view" a DVD does not create a right to decrypt a DVD).

32. *See* S. Rep. No. 104-315, at 13.

33. *Id.*

34. *See* John McDonough, *Motion Picture Films and Copyright Extension*, *at* www.law.asu.edu/HomePages/Karjala/OpposingCopyright Extension/commentary/McDonough.html (opining that copyright extension will not result in greater distribution of older films, "because in most cases their copyright owners are not exploiting them today and have not exploited them for decades").

35. *See supra*, note 2.

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36. A derivative work means a work that is "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (1998).

37. Dennis S. Karjala, *Copyright Extension Would Enrich Heirs, Impoverish Culture, at* www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/commentary/AzRep9-01-98.html.

38. There is also a financial benefit that often results as works fall into the public domain. For example, when a popular novel makes its way into the public domain, new publishers often take that work and reproduce it with "a wide range of versions of differing production qualities and prices, giving the public more choice at a lower price." *Id.* Moreover, when musical theater works go into the public domain, "schools, churches and community theaters can stage them without worrying about what is often a prohibitively high royalty payment." *Id.*

39. *See* Lawrence Lessig, *The Future of Ideas* 122 (2001).

40. Brief of Amici Curiae of the Internet Archive on Behalf of Petitioners, No. 01 618, *available at* www.arl.org/info/frn/copy/ia_brief.html.

41. After all, the goal of any copyright policy is to ensure that the policy is crafted in such a manner as to ultimately benefit the public welfare. *See* United States v. Paramount, 334 U.S. 131, 158 (1948) (citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

42. Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 Cardozo Arts & Ent. L. J. 655, 657 (1996) ("The fact is that we do not really know what difference twenty extra years would make.").

43. *See, e.g.*, Brief of Amici Curiae of Association of Law Libraries, American Library Association, Association of Research Libraries, Digital Future Coalition, Medical Library Association, and Society of American Archivist in Support of Petition for Writ of Certiorari, Eldred v. Ashcroft, No. 01-618 (concluding that "[u]nless the decision of the D.C. Circuit is reversed, Bono and subsequent extensions of copyright terms will continue to impede the growth of the public domain."), *available at* www.arl.org/info/frn/copy/Ashcroft.html.

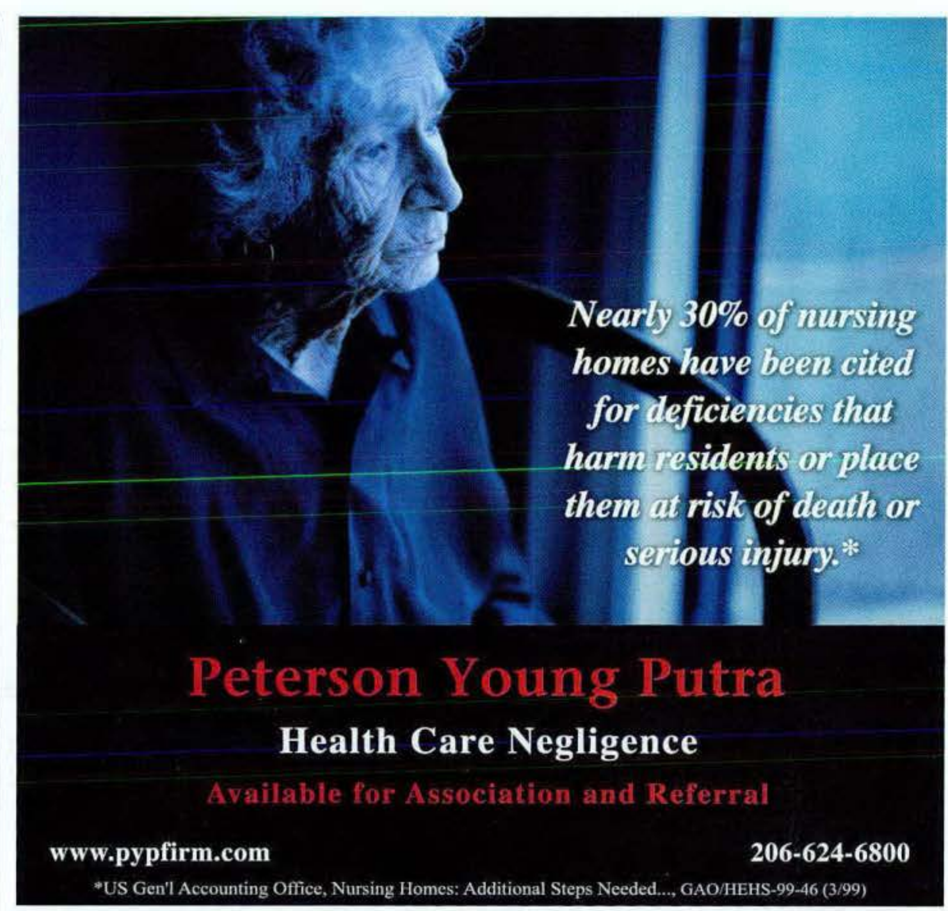
44. Lessig, at 88-89, note xlii.

45. *Id.*

46. *Id.*

47. *See id.*

48. *See id.* Ironically, Senator Orrin Hatch, one of the leading figures in promoting Bono, noted that "copyright protection should be expanded unless the extent of such protection would *hamper creativity* or the wide dissemination of works." *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 735 (1998) (emphasis added).



Subject to certain exceptions, a judgment obtained from a Washington court will be recognized and enforced in Canada, without relitigating the merits.

Enforcing Your Washington State Judgment in Canada

The U.S. Constitution guarantees that a judgment of a Washington court will be given "full faith and credit" in all other American courts.[1] This ensures that a judgment obtained in Washington can be enforced in the other 49 states, without having to relitigate the matter.

But what if you need to enforce your Washington judgment in Canada? The "full faith and credit" clause is of no assistance to you once you cross the 49th parallel, as the U.S. Constitution does not apply in Canada.[2] Will Canadian courts recognize and enforce U.S. judgments, or will you have to relitigate the matter in a Canadian court, and prove your case once again, in order to seize Canadian assets?

The answer is of vital importance to Washington attorneys. The proximity and relative wealth of both nations have made the U.S.-Canada relationship the largest, most successful trading relationship the world has ever seen. With over a billion dollars' worth of trade between Canada and the United States every day, Canada is America's largest trading partner by far. In fact, in 2001 Canada bought more U.S. exports ($163.7 billion) than the entire 15 nations of the European Union combined ($159.2 billion).[3] And, of course, intertwined economies mean cross-border disputes.

By and large, the answer is this: Subject to certain exceptions, a judgment obtained from a Washington court will be recognized and enforced in Canada, without relitigating the merits.[4] Throughout Canada, the courts will enforce U.S. judgments under the "Morguard Principle,"[5] which effectively provides that a foreign judgment will be recognized by Canadian courts, provided that the foreign court properly had jurisdiction over the matter, and provided that certain narrow defenses (such as fraud on the foreign court) do not apply. The result is that in the absence of special circumstances, the defendant will be precluded from relitigating the matter in Canada.

by Kimberly Jakeman and John Sullivan

If you wish to enforce a Washington judgment in British Columbia, you have a second option. Subject to certain exceptions, you will be able to rely upon the expedited statutory scheme for enforcement of foreign judgments contained in B.C.'s Court Order Enforcement Act. Again, in the absence of special circumstances, the defendant will be precluded from relitigating the matter.

Enforcing Judgments in Canada by Means of the Common Law "Morguard Principle"

For most of Canada's history, U.S. judgments were *prima facie* unenforceable in Canada.

Traditionally, the Canadian approach to U.S. judgments was that found in the 1908 decision of *Emanual v. Symon*.[6] The rule from *Emanual v. Symon* effectively provided that a foreign judgment would be recognized only if the defendant was a resident of the foreign state when the action began, voluntarily appeared in the action, or contracted to submit to the jurisdiction of the foreign state. Although *Emanual v. Symon* was an English decision, it was adopted by the Canadian provincial superior courts, not only with respect to foreign decisions, but also with respect to decisions from other Canadian provinces.

Thus, under the traditional *Emanual v. Symon* approach, a Washington judgment against a B.C. resident or company would not be effective in B.C. unless the B.C. defendant had either voluntarily appeared in the proceeding or agreed by way of contract to submit to the jurisdiction of the Washington court. Judgments from other Canadian provinces were treated the same. However, a lot has changed since 1908. For example, Canada, the United States and Mexico have joined together as trading partners through the North American Free Trade Agreement. And, as noted, the cross-border trade between Canada and the United States has grown to phenomenal levels over the years.

One of the strengths of the common law is that it can change with the times. And the Canadian common law has changed 180 degrees on the question of recognition of U.S. judgments.

This change occurred in the 1990s, by means of Canadian decisions that rejected the restrictive *Emanual v. Symon* approach, first in the Canadian domestic context, and subsequently in the Canada-U.S. context.

Canada's decisive break with the *Emanual v. Symon* tradition occurred with the 1990 decision of the Supreme Court of Canada in *Morguard Investments v. De Savoye*.[7] *Morguard* involved a foreclosure in the Alberta Court of Queen's Bench with respect to property located in Alberta. The defendant was a British Columbian; he did not appear in the Alberta proceedings. The plaintiff ultimately obtained a money judgment for the amount of the mortgage deficiency.

Morguard subsequently sued in B.C. Supreme Court to enforce its deficiency money judgment. However, the defendant argued that the Alberta judgment was not enforceable in B.C., because he had not appeared in the Alberta proceeding, relying upon *Emanual v. Symon*. However, the Supreme Court of Canada rejected this argument and held that the Alberta deficiency judgment was enforceable in B.C., despite the defendant's nonappearance. In so deciding, the Supreme Court of Canada gave us the "Morguard Principle," which is as follows: "the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province . . . so long as that court

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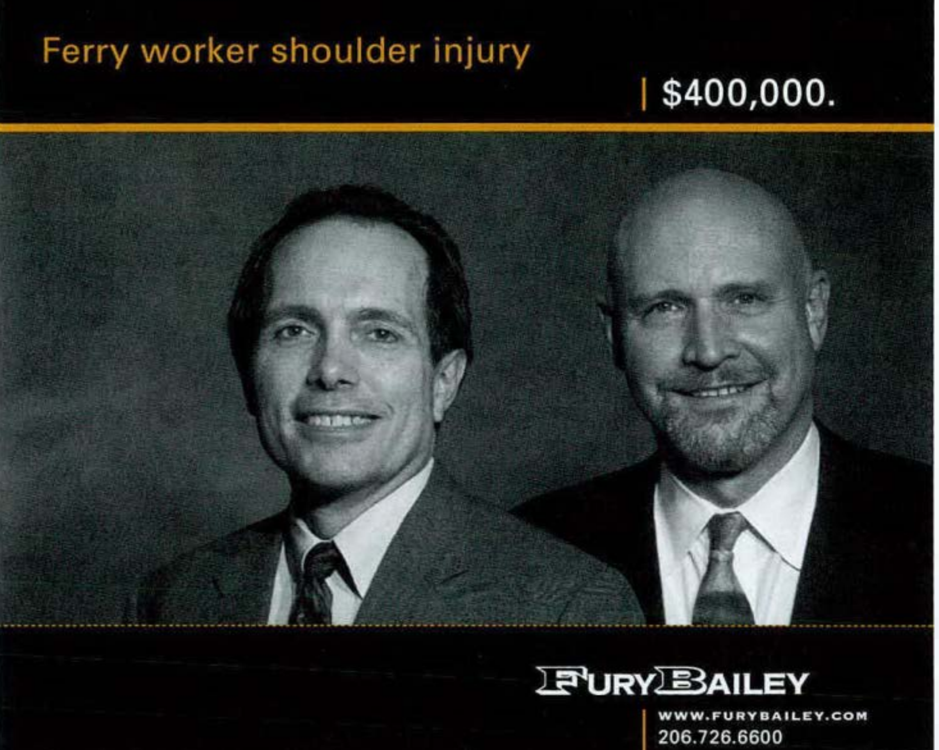

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has properly, or appropriately, exercised jurisdiction in the action."[8]

Thus, through the *Morguard* decision, the Canadian common law advanced to the stage of having an implicit "full faith and credit" clause with respect to decisions of other Canadian courts, effectively by borrowing language from the U.S. Constitution.[9] But because Alberta and B.C. are both Canadian provinces, *Morguard* was a purely domestic Canadian decision. Would the Morguard Principle apply to American judgments?

This question was answered in the affirmative three years later in *Moses v. Shore Boat Builders*,[10] where the B.C. Court of Appeal applied the Morguard Principle to an Alaskan judgment. The plaintiff, Moses, was an Alaskan resident who purchased a fishing boat from the defendant, Shore Boat Builders, a B.C. company. Moses claimed the boat was defective and thus sued Shore Boat in 1987 in the Superior Court of Alaska. Shore Boat ignored the Alaskan proceeding, believing that Moses would have to sue in B.C. in order to execute in B.C., and that Shore Boat would have the opportunity to defend on the merits in that B.C. proceeding. Big mistake! Moses obtained a default judgment in Alaska, then sued in B.C. in the early 1990s for recognition and enforcement of the Alaskan judgment. Moses argued that *Morguard* (December 1990) had changed the law, such that his default judgment was entitled to recognition in B.C., despite the fact that Shore Boat had not appeared in the Alaskan proceeding.

Moses was right. The B.C. Court of Appeal applied the Morguard Principle and recognized the Alaskan default judgment, stating that "modern rules of international law must accommodate the flow of wealth, skills and people across state lines and promote international commerce."[11]

Other Canadian courts have reached the same conclusion, such that it is now uncontroversial that courts throughout Canada will apply the Morguard Principle to U.S. judgments.[12]

Limitations on the Morguard Principle *(i.e., circumstances where your Washington judgment will not be enforced in Canada)*

Notwithstanding *Morguard* and *Moses*, not every U.S. judgment will be enforced in Canada. Generally speaking, a Canadian

court will refuse to enforce in two circumstances: (1) the American court did not properly have jurisdiction; or (2) specific defenses (such as fraud on the U.S. court) apply. We will consider both potential problems in turn.

Jurisdictional Problems

The Morguard Principle contains the condition that the original court must have "properly exercised jurisdiction in the action." Thus, if the American court did not properly have jurisdiction — according to Canadian conflict-of-laws rules — then its judgment will not be enforceable in Canada.

This is precisely what happened in *Braintech Inc. v. Kostiuk*,[13] where the B.C. Court of Appeal refused to enforce a Texas judgment. In *Braintech*, the plaintiff was a Nevada-incorporated company which had its corporate head office in Vancouver, B.C. The defendant, Kostiuk, resided in West Vancouver. During a period of time in which the Kostiuk family and Braintech were embroiled in multiple lawsuits in the

The Morguard Principle contains the condition that the original court must have "properly exercised jurisdiction in the action."

B.C. courts, Kostiuk made some allegedly defamatory comments about Braintech on an Internet bulletin board called "Silicon Investor." Notwithstanding the clear connections to B.C., Braintech sued Kostiuk for defamation — in Texas. Kostiuk had no links of any kind with Texas. For its part, Braintech maintained a research office in Austin, had a director in Austin, and approximately 10 percent of its shareholders resided in Texas.

However, Canadian conflict-of-laws rules are clear that a state's connections to the *plaintiff* are not sufficient to provide jurisdiction to the courts of that state. Instead, jurisdiction exists only if there is a "real and substantial connection" between that state and either the *defendant* or the cause of action.[14] This is referred to in Canada as the "real and substantial connection" test.

Braintech tried to avoid the application of this rule by arguing that the tort had occurred in Texas by means of publication on the Internet. Because the comment was on the Internet, and because the Internet was accessible in Texas, the argument went, Braintech had been defamed in Texas. However, Braintech provided no evidence that anyone in Texas had actually read Kostiuk's statement.

The problem with Braintech's argument, of course, is that the Internet is accessible just about anywhere. Thus, if publication of a comment on the Internet were sufficient to provide jurisdiction to any court where the Internet is accessible, it would mean that Internet defamation could be litigated virtually anywhere in the world, and pursuant to *Morguard* and *Moses*, the resulting foreign judgment would be enforceable in Canada (subject only to the very limited defenses listed below). Not surprisingly, the B.C. Court of Appeal rejected such an approach, holding that it would have "a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries."[15]

Given that the defendant had no links to Texas, and given the rejection of the Internet argument, the B.C. Court of Appeal thus refused to recognize the Texas judgment for lack of jurisdiction.

One problem with the "real and substantial connection" test is that it is not a completely objective, clear test. How can you know if there is a "real and substantial connection" between a cause of action and the state of Washington such that a Canadian court will enforce a Washington default judgment? One relatively recent B.C. Court of Appeal decision said that the "real and substantial connection" test remains "undefined." However, the court did give some guidance, noting that "clear examples of connecting factors include the residency of the defendant in the jurisdiction or the fact that the tortious act was committed or damages [were] suffered" in the jurisdiction.[16] Furthermore, one learned Canadian author has suggested that the Canadian test is in effect very similar to the American "minimum contacts" test for personal jurisdiction.[17]

Specific Defenses

Along with lack of jurisdiction, there are also specific defenses that can apply to stop a U.S. judgment from being enforced in Canada: fraud on the U.S. court, public policy, breach of natural justice, manifest error on the face of the judgment, and certain statutory defenses.

The general trend in Canadian law has been in favor of recognizing U.S. judgments. Thus, all of these defenses are narrowly construed. The courts clearly do not want to force parties to relitigate matters in Canada.

For example, the fraud defense is narrowly circumscribed to "fraud on the court," such that an allegation of "fraud on the merits" cannot be raised to stop enforcement of a U.S. judgment. In other words, for the fraud defense to succeed, the fraud in question must be an "extrinsic" fraud — not a fraud committed in the underlying dealings between the parties, but a fraud committed in the course of the foreign proceeding — which had the effect of denying to the defendant a fair and adequate opportunity to present its case to the foreign court. An example would be where a plaintiff submitted a fraudulent proof of service to the foreign court in circumstances where the defendant was in fact unaware of the action.

The B.C. Supreme Court restated the law in this area in December 2002, expressly rejecting the view that an allegation of fraud on the merits could provide a defense to an action on a U.S. judgment. In that case, the plaintiff was a New Yorker who sued a British Columbian on a promissory note, in the District Court for the Southern District of New York. The B.C. defendant did not appear in New York, and default judgment was granted. The New York plaintiff subsequently sued in B.C. for enforcement of the New York judgment, and moved for summary judgment. The defendant opposed, arguing that he had entered into the promissory note on the basis of "fraudulent misrepresentations," which he particularized in his statement of defense. The defendant urged the B.C. court to not grant judgment until after the plaintiff had been subjected to full documentary and oral discovery. However, the B.C. court rejected this argument, and granted judgment for the New York plaintiff. The court noted that the wider the scope of the fraud defense, the more likely it is that the Canadian court will be drawn into a re-examination of the merits of the claim. The court held that the B.C. defendant "cannot defend the judgment on the basis of fraud going to the merits," and must lose because "there is no evidence before me of fraud on the part of the plaintiff which deprived the defendant of an adequate opportunity to present his case in [the New York] court."[18]

The general trend in Canadian law has been in favor of recognizing U.S. judgments.

Equally, although a foreign judgment will not be applied if it stands for a proposition that is contrary to the public policy of Canada, this does not mean that U.S. judgments will be denied simply because they are based upon substantive law that differs from Canadian law. For the public-policy defense to apply, the foreign judgment must be contrary to Canadian "essential morality" such that it is fundamentally inconsistent with the Canadian system of justice.[19]

The other defenses are similarly narrowly construed. A successful defense for breach of natural justice requires a "fundamental flaw" in the foreign proceedings, as "mere irregularities" will not suffice.[20] It is unclear whether the "manifest error" defense continues to exist at all in the post-*Morguard* era.[21] The statutory defenses address very specific matters such as claims relating to asbestos mined in B.C., or claims under the "Helms-Burton Act," and will have no impact on the enforceability of the vast majority of American judgments.[22]

Defendants can also delay matters by requiring that the American judgment be "final" (in the sense that the American court that rendered it no longer has the power to rescind or vary it in any way), and by obtaining a stay of proceedings or execution pending appeals in the United States.[23]

Enforcing Judgments in B.C. by Means of Reciprocal Enforcement of Judgments Legislation

As outlined above, you can *prima facie* enforce a Washington judgment in any province of Canada, including B.C., by means of bringing an action for enforcement relying upon *Morguard* and *Moses*. In such an action, the defendant will have an opportunity to file a statement of defense, relying upon those defenses outlined above. The plaintiff can then move forward to judgment by way of either summary trial or full trial. Documentary and oral discovery may be required, depending on how the summary trial application goes.

If you are considering enforcement in B.C., you have another option. You can, in some instances, utilize the reciprocal enforcement of judgments provisions that exist between Washington and B.C., which are found in Part 2 of B.C.'s Court Order Enforcement Act (COEA).[24] Where applicable, these provide an expedited process for enforcement of a Washington judgment.

The COEA provisions allow a Washington judgment creditor to apply to the B.C. Supreme Court for registration of its Washington money judgment. Once registered, the judgment will be of the same force and effect as if it were a judgment of the B.C. Supreme Court given on the date of registration. Thus, from that date forward, execution proceedings may be taken

upon it in B.C. without any impairment by virtue of its foreign nature.

However, there are a number of limitations and defenses. Specifically, the B.C. Supreme Court will not register a Washington judgment if it is more than six years old;[25] the Washington court acted either without jurisdiction under B.C.'s conflict-of-laws rules, or under Washington state law;[26] the defendant, being a person who was neither carrying on business nor ordinarily resident in Washington, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;[27] the defendant was not duly served with the process of the Washington court and did not appear, even though he or she was ordinarily resident or was carrying on business in Washington or had agreed to submit to the jurisdiction of the Washington court;[28] the judgment was obtained by fraud;[29] an appeal is pending or the time in which an appeal may be taken has not expired;[30] the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the B.C. court;[31] or the defendant would have a good defense if an action were brought on the judgment (i.e., if an action were brought under the common-law Morguard Principle).[32]

As can be seen, a defendant does have more defenses available under these provisions than under the common law. For example, a defendant who did not carry on business in Washington, was not a Washington resident, and did not voluntarily submit to the Washington proceedings could successfully oppose registration, even though Washington had a "real and substantial connection" to the dispute. Importantly, however, the COEA provides that these provisions do not deprive a judgment creditor from bringing an action on the judgment under the common law.[33] It is thus simply an option that can be utilized in appropriate cases, to obtain enforcement through an expedited process.

Other limitations of the COEA provisions include the fact that they may be used only for money judgments (such that if the Washington judgment orders the payment of money and also other relief, the judgment may be registered for the purposes of the money portion only) and that they are not available for periodic payments of money as alimony or maintenance.[34]

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Conclusion

Canadian law with respect to enforcing U.S. judgments has developed considerably in the past 15 years. In keeping with our era of liberalized international trade, the Canadian courts have reformed the common law from a position where U.S. judgments were *prima facie* unenforceable in Canada, to one where they are *prima facie* enforceable.

Furthermore, although some defenses remain that can potentially stop the enforcement of a U.S. judgment in Canada, those are relatively few and are narrowly construed. In most instances, the key question will be whether the U.S. court properly had jurisdiction over the matter, in the eyes of the Canadian court.

In the case of enforcing a Washington judgment in B.C., you are in a particularly good position, given that, in most instances, you can choose from either the common-law action for enforcement, or an expedited application under the COEA for registration of the Washington judgment. ✍

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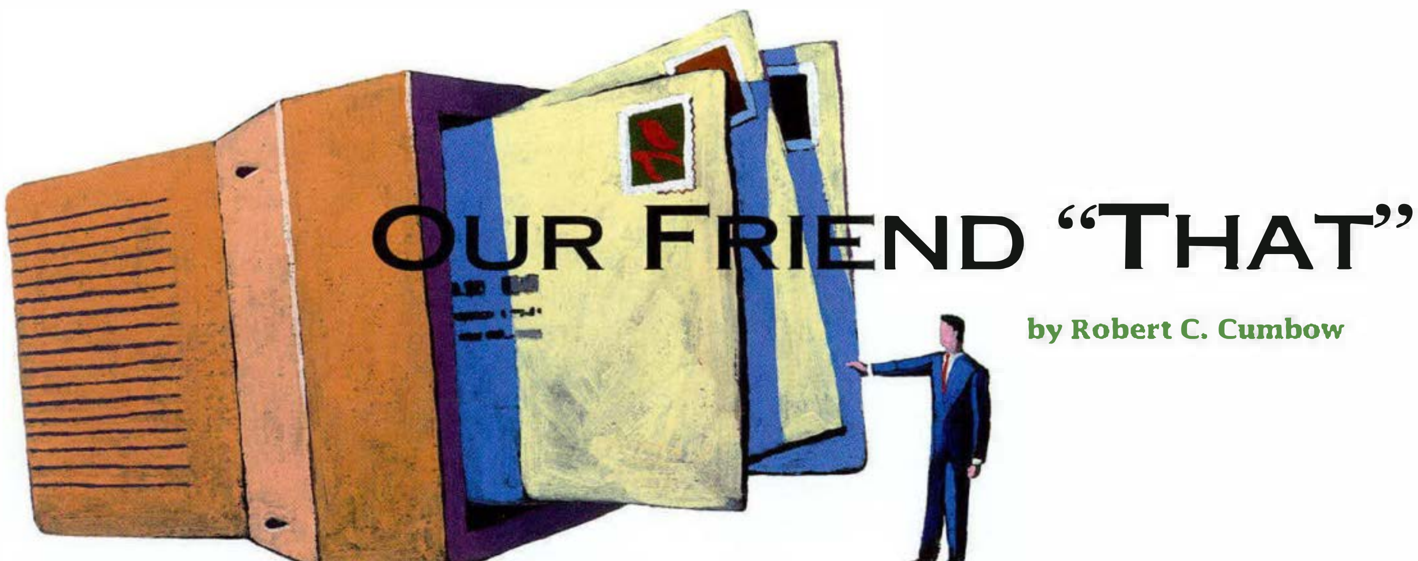
NOTES

1. U.S. CONST. Art IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."
2. Canada has its own constitution, consisting primarily of the Constitution Act, 1982, and the earlier Constitution Act, 1867 (usually referred to as the "British North America Act").
3. For these and other basic facts relating to the enormous trading relationship between Canada and the United States, see, *inter alia*, *The Economist*, "The Americas," March 15-21 (2003 ed.), 33, as well as the U.S. Department of Commerce's "National Trade Estimate 2002, Canada," and "National Trade Estimate 2002, European Union," found at www.export.gov, which records that in 2001 the U.S. imported $217 billion worth of goods from Canada, and exported $163.7 billion worth of goods to Canada. By comparison, U.S. exports to all 15 member states of the European Union in 2001 amounted to only $159.2 billion, or $4.5 billion *less* than U.S. exports to Canada. A substantial amount of that U.S.-Canada cross-border trade flows between Washington and B.C. For example, in 2000, British Columbians imported over $13 billion in U.S. products.
4. Regardless of whether it is a state court or federal court.
5. This principle takes its name from the decision of the Supreme Court of Canada in *Morguard Investments v. De Savoye* [1990] 3 S.C.R. 1077.
6. Emanual v. Symon [1908] 1 K.B. 302 (English Court of Appeal).
7. Morguard Investments v. De Savoye [1990] 3 S.C.R. 1077.
8. Morguard, *supra*, 1102. Plaintiffs can still invoke *Emanual v. Symon* if they wish. In other words, if the defendant appeared and participated in the foreign proceeding, it is not necessary to consider the "Morguard Principle" when seeking to enforce the judgment in B.C. *Emanual v. Symon* would be sufficient.
9. The Supreme Court of Canada addressed the constitutional nature of the Morguard Principle three years after *Morguard*, referring to the principle as a "constitutional imperative" in *Hunt v. T&N plc* [1993] 4 S.C.R. 289.
10. Moses v. Shore Boat Builders [1993] 83 B.C.L.R.2d 177 (C.A.).
11. Moses, *supra*, at 190. Shore Boat Builders sought to have this decision overturned, but the Supreme Court denied leave. *See* Moses v. Shore Boat Builders [1993] S.C.C.A. No. 496 (QuickLaw).
12. *See, inter alia*, Arrowmaster Incorporated v. Unique Forming Limited [1993] 17 O.R.3d 407 (O.S.C.J.); Beals v. Saldanha [2001] 54 O.R.3d 641 (Ontario Court of Appeal).
13. Braintech Inc. v. Kostiuk [1999] 63 B.C.L.R. 3d 156 (C.A.).
14. Jordan v. Schatz [2000] 77 B.C.L.R.3d 134 (B.C. Court of Appeal); Cook v. Parcel, Mauro [1997] 31 B.C.L.R.3d 24 (B.C. Court of Appeal).
15. Braintech, *supra*, at 171. It should be noted that the B.C. Court of Appeal's rejection of the notion that Internet accessibility in Texas is sufficient to provide the Texas courts with jurisdiction over a matter is consistent with American law on Internet jurisdiction. *See, inter alia*, Zippo Manufacturing v. Zippo Dot Com Inc., 952 F. Supp. 1119 (W.D. Penn. 1997); Rannach Inc. v. Rannoch Corp., 52 F. Supp. 2d 681 (E.D. Virginia); and Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002). Indeed, the B.C. Court of Appeal quoted at length from the *Zippo* decision in reaching its conclusion that the Texas court did not properly have jurisdiction.
16. Jordan v. Schatz, *supra*.
17. *See* Hogg, *Constitutional Law of Canada* (Looseleaf ed.), vol. 1, ch. 13 5(b), "Jurisdiction." The American "minimum contacts" test for personal jurisdiction is derived from the "due process" provision contained in the 14th Amendment to the U.S. Constitution. *See, inter alia*, International Shoe Co. v. Washington, 326 U.S. 310; Calder v. Jones, 465 U.S. 783 (1984); and Zippo, *supra*.
18. Zaidenberg v. Hamouth [2002] B.C.J. No. 2834 (Can.) (QuickLaw). The Court in *Zaidenberg* relied heavily upon the earlier decision of the Ontario Court of Appeal in *Beals v. Saldanha* [2001] 54 O.R.3d 641. It should be noted that an application for leave to the Supreme Court of Canada has been accepted in *Beals*, and thus it is possible that the Supreme Court of Canada will be restating the ambit of the fraud defense in the near future. For an additional authority, see *Stanton v. Gudbranson* [1999] B.C.J. No. 896 (Can.).
19. *See, inter alia*, U.S.A. v. Ivey [1995] 130 D.L.R.4th 674 (O.S.C.J.), *aff'd*, [1996] 30 O.R.3d 370 (O.C.A.); Old North State Brewing Co. v. Newlands [1998] 58 B.C.L.R.3d 144 (C.A.); Beals v. Saldanha, *supra*. Some authorities indicate that part of the "public policy" defense is that Canadian courts will not recognize a foreign judgment where so doing would involve the Canadian court in the enforcement of the "penal," "revenue" or "other public laws" of another nation. *See, inter alia*, Lane & Baltser v. Estonian State Cargo & Steamship Line [1949] S.C.R. 530, where the Supreme Court of Canada refused to enforce an order from the Estonian Soviet Socialist Republic; and U.S.A. v. Ivey, *supra*.
20. *See, inter alia*, National American Insurance Co. v. Leong [1996] 49 C.P.C.3d 246 (B.C.S.C.) and U.S.A. v. Ivey, *supra*.
21. *See, inter alia*, Moses, *supra*, and Silver Star Properties v. Veinotte [1998] B.C.J. No. 2385 (QuickLaw), at para. 57.
22. For example, foreign judgments relating to "injury that arises out of exposure to or the use of asbestos that has been mined in B.C." are unenforceable pursuant to section 40(2) of B.C.'s Court Order Enforcement Act. Furthermore, any judgment given under the Cuban Liberty and Democratic Solidarity Act, 1996 (better known as the "Helms-Burton Act") are unenforceable pursuant to section 7.1 of Canada's Foreign Extraterritorial Measures Act.
23. *See* Four Embarcadero Centre v. Kalen [1988] 65 O.R.2d 551 (O.S.C.J.), at 563; A.T.U. v. I.C.T.U. [1998] 63 B.C.L.R.3d 335; and Rule 54(9) of the B.C. Supreme Court Rules.
24. Court Order Enforcement Act, R.S.B.C. 1996, ch. 78 (COEA). Along with British Columbia, the Provinces of Prince Edward Island and New Brunswick also have statutory schemes for the enforcement of Washington judgments.
25. *Id.* § 29(1).
26. *Id.* § 29(6)(a).
27. *Id.* § 29(6)(b).
28. *Id.* § 29(6)(c).
29. *Id.* § 29(6)(d).
30. *Id.* § 29(6)(e).
31. *Id.* § 29(6)(f).
32. *Id.* § 29(6)(g).
33. *Id.* § 38.
34. *Id.* §§ 28 and 29(8). It should be noted that there is specific legislation relating to the reciprocal enforcement of family support orders. *See* International Support Orders Act, S.B.C. 2002, ch. 29. However, that is beyond the scope of this article.



Our Friend "That"

by Robert C. Cumbow

Who would have imagined that my humble ruminations on writing errors ("Top 10 Writing Errors for Law Students (*and Lawyers*) to Improve Upon in 2003," March *Bar News*) would have drawn so much response? Within a week of the article's appearance, I was up to my ears in e-mail from people wanting more, and suggesting their favorite bugaboos or pet peeves as topics for a second article. Once the kind folks at *Bar News* gave me the opportunity to do a sequel, I faced the tough task of choosing a topic from among the many suggestions I had received.

I finally decided to write about "that." One of my reasons for doing so was that a lot of people who wrote or talked to me about my earlier article hoped that I could clear up the difference between "which" and "that." But, handily enough, the word "that" raises some other issues as well. So I figured that by taking "that" as my topic I could cover a lot of ground without resorting to the tired old "top 10" structure I fell back on last time.

1. Who or That?

Let's warm up with a little light exercise. Is it okay to say, for example, "the woman that was driving the car"? It's heard often enough, but something about this construction jars us. It isn't exactly incorrect. Indeed, there are distinguished literary precedents, such as Edgar Allen Poe's "The Man That Was Used Up," Mark Twain's "The Man That Corrupted Hadleyburg," Thomas Carew's poem "To a Lady that desired I would love her," and the grand old song "The Man That Broke the Bank at Monte Carlo," so memorably sung by Peter O'Toole to the crags flanking a wadi early in *Lawrence of Arabia*. On the other hand, we have G.K. Chesterton's *The Man Who Was Thursday*, Alfred Hitchcock's *The Man Who Knew Too Much*, Mother Goose's "The Old Woman Who Lived in a Shoe," and "The Man Who Wasn't There" (who began life in a piece of doggerel verse by Hughes Mearns[1] and was more recently personified in a Coen brothers film). Since "man," "woman" and "lady" are personal nouns, "who" just sounds a whole lot better.

If you want a rule, though, the closest you'll get is this: "Who" is used for people, "which" is used for things, and "that" may be used for either. This, at least, is the policy set forth by Theodore M. Bernstein, the late, great usage guru of *The New York Times*. The Associated Press, by contrast, adheres to a stricter rule in its *Stylebook*: Use "which" to introduce a *nonessential* clause referring to an inanimate object or an animal without a name, "that" to introduce an *essential* clause referring to an inanimate object or an animal without a name, and "who" or "whom" to introduce an essential *or* a nonessential clause referring to a human being or an animal *with* a name.

What's this essential and nonessential business? You may well ask; but to answer, we have to turn to our second topic.

2. Which or That?

What the *Associated Press Stylebook* calls essential and nonessential clauses are traditionally and more familiarly referred to as restrictive and nonrestrictive clauses. A restrictive clause is a clause that *identifies* the noun it is attached to and cannot be removed without changing the meaning of the sentence. A nonrestrictive clause provides incidental information, which can be removed without changing the meaning of the sentence. The preceding two sentences not only state, but also illustrate, the proper use of "that" and "which."

What do we mean when we say a restrictive clause *identifies* the noun it is attached to? We mean that without the restrictive clause the sentence would be unclear; the reader or listener would be confused. If a witness described an auto accident by saying "the car hit the other car," the information would be singularly unhelpful. On the other hand, the following statement might be useful: "The car that was turning hit the car that was going straight." Because the clauses "that was turning" and "that was going straight" *identify* the respective cars, they are restrictive, or essential, clauses. Without them we would not know which car was which. And, because these are restrictive clauses, they are properly introduced by the word "that" (and, by the way, please note, *not* separated from the nouns by commas).

A nonrestrictive clause provides information that is nonessential, information

that can be left out. "The White House, which was first[2] built in the 1790s,[3] is the official residence of the President of the United States." This sentence still makes sense, and doesn't lose its main meaning, if we exclude the information about the date of the building of the White House. It is a nonrestrictive clause, and is thus introduced by "which" (and set off by commas from the noun it refers to).

Strunk and White, in *The Elements of Style*, provide an excellent illustration of the difference between a restrictive clause, introduced by "that," and a nonrestrictive clause, introduced by "which." The sentence "The lawn mower that is broken is in the garage" tells us the location of the broken lawn mower. Its fullest meaning is, "We have more than one lawn mower, one of our lawn mowers is broken, and that one is in the garage." Contrast this with the sentence "The lawn mower, which is broken, is in the garage." This sentence's fullest meaning is, "We have only one lawn mower, it's in the garage, and (by the way) it's broken."

In trying to decide whether to use "which" or "that," simply ask yourself whether the clause to be introduced by the disputed word is essential to what you have to say, or is an incidental bit of information that could just as easily be left out without harming your message. Or, if you prefer, ask yourself whether you could insert the phrase "by the way" into the clause and not lose your meaning.

A good test is to say the sentence to yourself both ways, using "which" and then using "that," and choose the way that *sounds* right. This isn't sure-fire, but it works most of the time. That's because most of the time people use "that" correctly when speaking. It's only when *writing* that many of us get overcome with attacks of stuffiness and convince ourselves that "which" is the better word because it somehow sounds more important, more formal, more — dare I say it? — *legal*. At times like those, stop a moment and remember *The Little Engine That Could*. Would you have wanted that book read to you as a child if it had been *The Little Engine* Which *Could*?

Why does any of this matter? Partly because we want our writing to sound as right as our speaking. And partly because it can really make a difference sometimes. The sentence "The room had a window that overlooked the park" means that the room may have had several windows, but one of them overlooked the park. The sentence "The room had a window, which overlooked the park" means that the room had only one window, and, by the way, it overlooked the park. The sentence "The room had a window which overlooked the park," without a comma before "which," could have either meaning; it's unclear. You don't have to be a mystery writer to imagine a legal situation in which the distinction could be important.

In trying to decide whether to use "which" or "that," simply ask yourself whether the clause to be introduced by the disputed word is essential to what you have to say . . . .

3. To That or Not to That

One other problematic issue involving the word "that" is whether to use it at all when it introduces an independent clause. Should I say, "Tom told me the Mariners had won the game," or "Tom told me that the Mariners had won the game"? Both are correct, and neither sounds awkward or confusing. But, depending on the meaning and the construction, sometimes "that" is definitely needed, if only to keep your reader from saying "what?" and having to go back and reread.

Consider, for example, this sentence from a recent appellate court opinion (from another state, where the judges don't write as well as they do here in Washington): "The plaintiff next argues the district court erred in finding the statements were not susceptible to a defamatory meaning." Be honest, now: Admit that you had to scan that sentence more than once. It gives us three clauses — "the plaintiff argues," "the district court erred," and "the statements were not susceptible" — strung together without any relational signposts to help us on our way. Hard to hack our way through that jungle, isn't it? Adding a couple of *that*'s may not turn the sentence into a model of compelling prose, but it makes it easier to understand the first time through: "The plaintiff next argues that the district court erred in finding that the statements were not susceptible to a defamatory meaning." By the way, the court that wrote that sentence actually did know the right way to do it: In their very next sentence the judges wrote, "We disagree, and find *that* the district court properly found *that* the article was not susceptible to defamatory meanings." (Emphasis added.) What, one wonders, made them lose their heads so badly in the preceding sentence?

Sometimes want of a properly placed "that" can make a sentence not only difficult to navigate but downright ambiguous: "The Governor said after he learned of the resignation he called the Attorney General." Does the phrase "after he learned of the resignation" tell us when the Governor "said," or when the Governor "called the Attorney General"?

There's no rule here. In fact, we're no longer talking about grammar or usage, but simply about clarity. The test is, does it *sound* right? Does it read clearly on the first try? Does it mean what you want it to mean?

"That" is your friend. Treat it nicely.

I hope that helps.

Robert C. Cumbow is a shareholder with Graham & Dunn, Seattle, where he counsels clients in beverage, food, communications, entertainment and other businesses, on trademark, copyright, advertising and media law. He teaches at Seattle University School of Law and has written extensively on law, film, food and language. He published parts of this article in a different form in "The Subverting of the Goeduck: Sex and Gender, Which and That, and Other Adventures in the Language of the Law," in the University of Puget Sound Law Review *(now* Seattle University Law Review*) 14:3, Spring 1991.*

NOTES

1. As I was walking up the stair
I met a man who wasn't there
He wasn't there again today
I wish, I *wish* he'd stay away!
— *Hughes Mearns* (1875-1965)
2. The word "first" may seem superfluous until one recalls that the White House was built more than once.
3. *The New York Times* would have me say "the 1790's," but I expressed my views on that in my previous article.

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The Board's Work

by Lindsay Thompson and Robert "Ace" Welden, **Bar News** *Cub Reporter*
Bellevue, April 11-12, 2003

[**Lindsay Thompson**]
Friday, April 11: After a meeting in January and two in February, it was nice to go a month and a half without gathering with the Board of Governors, nice to have the meeting close to home (to be able to sleep in my own bed), and nicest of all to be able to blow off Day 2 for a long-planned holiday in Palm Springs.

Meetings begin with reports. The president makes one and then the president-elect makes one. With tort reform mutating daily in the Legislature, both **Dick Manning** and **Dave Savage** had a lot to report. Manning estimated he'd put in 150 hours on WSBA business since the BOG last rose.

Then the president called for board members who'd attended the Western States Bar Conference to report that they enjoyed the experience. *(Well, he didn't actually say* that, *but I'm the only governor I ever heard who thought most of the event was pointless and boring, so you can pretty much predict the governors' reports will be that they enjoyed it. Each year the president, president-elect, executive director and one class of govs attend the event. It is held in places like Arizona and Hawaii.*

In a nutshell, the conference is like a national gathering of fraternity chapters. Bar prezzes and governors meet other prezzes and governors, and marvel over how alike or different the problems they deal with are. There are panels made up of prezzes and govs and ex-prezzes and ABA leaders, some academics, and reps of groups, like Martindale-Hubbell, that sponsor the event. There is an interminable roll call of states, during which prezzes go on, some more succinctly than others, about what their associations are working on.

The conference elects leaders as well, mainly execs from various states, and they, too, bloviate on topics of interest. There are actually bits that are capable of interest, and the agenda ends early enough that plenty of golf and tennis and shopping can be had. I attended the conference in my last year on the BOG in 2001. We were trapped in a resort hotel on the Big Island — $25 dollars for the cab from anywhere — surrounded by miles of lava beds, across which thousands of high-school kids have arranged white coral to read for eternity "Egbert and Hilda" against the black lava rock. There are all the usual, dreadful tourist events inflicted by Hawaiian resort hotels. But the weather was nice, some of the seminars were reasonably useful, and I got to have dinner twice at Merriman's in Kamuela, one of the best restaurants in the known universe. "Good beat, easy-to-understand lyrics . . . I give it a 72, Denny.")

After the annual appraisal of the western states, Executive Director **Jan Michels** updated the board on the work of replacing the software that runs the WSBA computers and keeps up with more than 27,000 members' dues, CLEs, discipline and everything else. It's complicated, but seems to be going well.

The board approved the members, and charter of a blue-ribbon committee to study and report back on fixing problems in the state system of indigent criminal defense. Co-chairs are attorney **Marc Bowman** and Supreme Court Justice **Robert Utter** (ret.).

The board lunched with members of the East King County Bar Association.

The biggest chunks of the day went to deciding what to do about vexing issues of judicial recommendations, hearing the annual report of the Young Lawyers Division, and electing a new governor to represent the YLD for the next three years.

The judicial recommendations problem is that sometimes with the best of intention the committee that rates people for judicial appointments to superior and appellate courts gets the ratings, well, wrong. So who to oversee their work?

A board committee chaired by **Ron Ward** produced a report, and **Carl Carlson** produced a minority report. Basically the question was this: If there is a review panel set up to which lawyers unhappy with their ratings can appeal, should that panel be able to upgrade the offending rating? Carlson didn't think the review body should be able to change ratings; the ratings should be remanded back to the committee that did the legwork in the first place.

The board approved motions by Carlson to delete the upgrade provision, and one by Jon **Ostlund** to improve the record the committee makes of its decisions and the basis for them, then approved the overall package from Ward's committee.

Young Lawyers President **Lance Hester** and a cadre of YLD leaders gave the board the division's yearly report on their work. YLD has irons in all kinds of public-service fires. Even your obed't srvt, who has sat through such reports back to the youth of **John McKay**, found it most impressive. Now if some more of them will just run for seats on the board of governors . . . .

But I digress. **Paul Lehto**, whose election as the first YLD governor did not, after all, herald The End of Life as We Knew It in 2001, comes to the end of an interesting and effective tenure in September. YLD sent three names to the board from which to make a choice. Each was interesting — **Eric Martin**, **Noah Davis** and **Kathleen O'Sullivan** — each in his and her own way. After interviews and deliberations, the board gave the nod to O'Sullivan, who practices with Perkins Coie in Seattle ("big firms deserve representation, too," one member quipped).

At day's end the WSBA disciplinary department leadership and defense lawyer **Kurt Bulmer** updated the board on the long-ongoing effort to eliminate the backlog in lawyer-discipline complaints so they are handled promptly and effectively in the future. The process was likened to a pig mid-python, as drawing down the backlog of complaints has led to a consequent backlog of cases to go to hearing. The prediction is that pretty soon the python will be all caught up and so will the discipline docket. Well done, said everyone to the department staff and lawyers, for a hard job well carried forward.

The board rose at 6 p.m. I turned over the pen to **Bob Welden**, who has donned his cub reporter hat on other occasions in the past when I had to be elsewhere. In this instance I left on vacation for a lounge chair and drinks with little umbrellas next to a pool in Palm Springs, and returned rested and sunburned.

[**Bob ("Ace") Weldon**]
Saturday, April 12: The Saturday board meeting began with a presentation from the board members to **Barrie Althoff**, former WSBA chief disciplinary counsel and professionalism counsel. The board thanked Barrie for his eight years of service to the WSBA, and congratulated him

on his new position as executive director of the Commission on Judicial Conduct. Barrie thanked the board, and spoke of the importance of member outreach and education on legal ethics.

Gail Stone, WSBA lobbyist, reported on legislation of interest to the WSBA with three weeks remaining in the regular session, including corporate act and trademark revisions sponsored by the WSBA and passed by the Legislature. A proposed bill to abolish the Growth Management Hearings Board and transfer jurisdiction to superior court prompted the board to unanimously pass a resolution expressing board concern about the impact on court budgets unless funding is provided by the Legislature to cover this shift in jurisdiction. Other issues, including the filing-fee bill, and tort-law changes, were still fluid, and, by the time this report is printed, should have been resolved.

The board then returned to the proposals regarding the Judicial Recommendations Committee. A revised version of the recommendations from Friday was discussed, and after numerous motions, seconds, friendly amendments and withdrawn motions, the question was called on the main motion and the board unanimously approved revised guidelines for the JRC.

In other business, the board asked Governor **Ken Davidson** to draft a resolution for board consideration calling on the Washington congressional delegation to support legislation to create an exception to the Controlled Substances Act for doctors and patients prescribing and using marijuana in accordance with state laws. The board also voted unanimously to co-sponsor a recommendation to the ABA House of Delegates from the Task Force on the Model Definition of the Practice of Law recommending that every jurisdiction adopt a definition of the practice of law and setting out principles and recommendations for doing so. ✍

"The Board's Work" is an unofficial report on meetings and actions of WSBA's elected governing body. Official minutes, containing matters not covered here, are kept by the WSBA executive director. WSBA members are welcomed to attend and speak at all board meetings.

Photo Bar Cards Available

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

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

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

YES! I would like to order a photo bar card (I am an active member).

Select one of the following:

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

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

❑ Check enclosed (payable to WSBA)
❑ MasterCard ❑ Visa

No. ____________________

Exp. date ____________________

Name as it appears on card ____________________

Signature ____________________

Please send to:
Member and Community Relations
Communications Division, WSBA
2101 Fourth Ave., Ste. 400
Seattle, WA 98121-2330

Name ____________________

Address ____________________

City ____________ State ____ ZIP ____________

WSBA office use only: 45060/LICMR

date ________ check no. ________ amount ________

Cowlitz County Report

by Our Local Correspondent

Welcome to the newest honorary member of the Cowlitz-Wahkiakum County Bar Association: **Amaya Cassie Busby Frey**, born April 10 at 8 lbs. 3 oz. to **Tierra Busby** and **Mick Frey** (son of **Don Frey**).

In addition, Cowlitz County Prosecuting Attorney **Sue Baur** would like to welcome intern **Dustin Richardson**. Dustin is a recent graduate of the University of Oregon. The PA also welcomes her newest deputy, **Mike Nguyen**, formerly of Liebowitz & Associates in Portland. DPA **Megan Ellavsky** is working closely with the U.S. Attorney's Office in a coordinated effort to prosecute firearms crimes in Cowlitz County. Finally, congratulations to Chief Criminal DPA **Toby Krauel** for his successful prosecution of a three-strikes case this March.

The defense bar reports that **Lisa Tabbut** has joined **Kevin Blondin** and **Thad Scudder** to form the adult felony indigent defense group Cascade Defense, formerly Bennett Scudder & Blondin. **Matthew Butler** has moved to the 1401 Broadway Building and, along with **Graham Cross**, has the juvenile defense contract. **Bob Huffhines** has been representing indigent defendants in Kelso for 20 years now . . . there must be song lyrics in there somewhere. Congratulations and thank you to **Sam Wardle** for a successful "Lawyer in Every Classroom" day.

Apparently, there is absolutely nothing going on with the civil attorneys in town.

(Information for the August issue must be received by June 14 at CWBAnews@hotmail.com.)

International Report

Former Seattle attorney **Daniel A. Nye** returned to Saudi Arabia recently to take a new position as of counsel to Kadasah Law Firm/Bryan Cave LLP, the Riyadh affiliate of the international law firm Bryan Cave LLP. Bryan Cave, who has one of the largest practices in the Middle East, has represented the government of Kuwait before the United Nations in preparing and prosecuting Kuwait's claims against Iraq for damages that occurred in the 1991 Gulf War. Bryan Cave also represents Saudi Arabia in its claims for environmental damages against Iraq. Nye, who has practiced in the Middle East for five years, will commute between Riyadh, Kuwait City, Abu Dhabi and Dubai in his capacity as resident senior international commercial-transactions lawyer with Bryan Cave's Middle East practice group. Nye can be reached at danye@bryancave.com, and welcomes inquiries and greetings from friends in the Pacific Northwest.

(News about international members may be sent to the editor at tradelaw@thompsonlaw.com.)

Judiciary Report

by Lindsay Thompson

Seattle attorney **Mary Alice Theiler** has been appointed magistrate judge for the U.S. District Court, Western District of Washington. She succeeds Judge **John L. Weinberg**, who held the position for 30 years. Judge Theiler is a past member of the WSBA Board of Governors and past president of the King County Bar Association, and was a member of the firm Theiler Douglas Drachler & McKee LLP until her appointment.

Theiler

Governor **Gary Locke** appointed Seattle attorney **Mary Roberts** to King County Superior Court to replace retiring judge **Dale Ramerman**. "Mary has more than 17 years of experience in the legal system and has an extensive and diverse legal background in both civil and criminal law," Locke said. "It is with great pleasure that I appoint her to the King County Superior Court." Roberts began her career working at the Public Defender Association before joining the civil division of the King County Prosecutor's Office. She moved to private practice in 1992 and is a partner at Frank Freed Roberts Subit & Thomas LLP, a six-attorney firm emphasizing employment law litigation. Roberts attended the University of Puget Sound for her undergraduate degree and the University of Washington Law School for her legal education. She was admitted to the Washington Bar in 1985. Judge Ramerman has served on the bench since 1989. "We thank Judge Ramerman for his service to the King County Superior Court," Locke said. "I hope he will enjoy spending time with his seven grandchildren and working in his family garden." Judge Roberts is Governor Locke's 45th appointment to the state's superior court benches since 1996.

(Judicial news may be sent to the editor at tradelaw@thompson-law.com.)

King County Report

by Jim Varnell

Introduction

As our esteemed editor, **Lindsay Thompson**, pointed out in the April *Bar News*, the *County Reports* were discontinued in 1995. In the case of the *King County Report* previously submitted by this correspondent, some would suggest, "with good reason." Nevertheless, the *County Reports* are back, and the topic this month reflects the top 10 reasons that many attorneys, including those who are newly admitted and those who are inexperienced, might find this column informative.

10. You will learn here that if you serve on a King County Bar Association committee, be wary of well-meaning people like **Gary Strauss**, **Andy Symons** and/or **Alice Paine**, who may/will ask you to serve on yet another committee.

9. If you are plaintiffs' counsel and have an arbitration case before **John Cooper**, you might suggest to him that you would accept an award that is about as high as his golf score.

8. Simply because 15 years ago a well-respected judge like **Stanley Soderland** might accept a defense to a summary judgment argument such as "with a file that large on counsel's table, there has to be a genuine issue of material fact in there somewhere" does not necessarily mean that it will be persuasive in 2003.

7. You should not be dismayed if you are not named one of the 25 smartest people in Washington by a local magazine dealing with law and politics. Take heart in knowing that attorneys like **Jim "Pretty Boy" Hermsen** and **David Koopmans** were not among those 25 either.

6. Although not necessarily pertinent to our readers, this column does provide an opportunity for a correspondent to

demonstrate to his former law school professors, including (without limitation) Professors **Hjorth**, **Junker** and **Coughenour**, that one's writing can improve somewhat since receiving those barely passing grades 30 years ago.

5. If you like to read about attorneys who combine triple-digit golf scores with single-digit jury verdicts, as is the case with **Tom McElmeel**, **Mike Welch**, **Susan Gasch** and **Jane Rhodes**, then this is the column for you.

4. At a Bar Association gathering that includes Justices **Faith Ireland** and **Richard Sanders**, you might be well advised to refrain from disparaging Highline High School, which, as unlikely as it may seem, they are both graduates of.

3. When one of the more knowledgeable members of your law firm mentions that Justice **Sandra Day O'Connor** is a "swinger," the reference is to her Supreme Court opinions, where, as **Marc Slonim** might advise you, she is often the deciding vote. See *Minnesota v. Mille Lacs*, 119 S. Ct. 1187 (1999).

2. In spite of the high demand for salacious reporting, this correspondent will not follow the lead of some, such as **Jean Godden** of *The Seattle Times*, and report on the cumulative and ever-increasing number of marriages of a prominent Seattle criminal defense attorney. However, when his total number of betrothals exceeds that of Larry **King** and/or **Elizabeth Taylor**, which could occur soon, note will be made of it here.

1. From time to time you will receive the inside scoop on sports news involving lawyers, including the exploits of *Pro Se*, a Seattle softball team, headed by Magistrate Judge **John Weinberg** and **Clem Barnes**, now in its 30th consecutive year of competition; the above-the-rim basketball play of **Joe McIntosh**, **Jan Peterson** and **Eric Nelson**, among others; the negotiating secrets of **Bart Waldman**, representing the Seattle Mariners; and the ongoing travails of **Mike Hunsinger** and his no-lack-of-business criminal defense work with UW football players.

Office Moves

Carl T. Edwards has rejoined Edwards, Sieh, Smith & Goodfriend as of counsel. **Amanda H. DuBois** has opened her office in the Bank of America 5th Avenue Plaza, as has **Molly Kenny**. **Joseph A. Sakay** has become a principal in Hillis Clark Martin & Peterson. **Dennis J. McGlothin** has become a member of Barokas Martin & Tomlinson. **Jeff James** is pleased to learn that the new firm name is now Sebris Busto James. Mills Meyers Swartling has announced that **Caryn Geraghty Jorgensen** and **Gretchen Graham Salazar** have become principals in the firm and that **Kasey D. Huebner** has joined the firm as an associate.

Moving outside the jurisdiction of King County, former basketball teammate **Dan Hannula** and Rush, Hannula, Harkins & Kyler have relocated to new offices in Tacoma. **Dana M. Reid** has become a member of Montgomery Purdue Blankinship & Austin. **Mark de Regt** has joined Simburg, Ketter, Sheppard & Purdy as of counsel.

(Readers are invited to send King County Report *items to jlvarnell@aol.com.)*

Kitsap County Report

Betsy Hollingsworth of Port Orchard has been named a member of the board of the Girl Scouts Totem Council. Hollingsworth has been a faculty member at Seattle University School of Law since 1986.

Oregon Report

Mark John Holady, who practices in Washington and Oregon, announces the move of his civil practice from south Beaverton, Oregon, to downtown Beaverton. As of June 1, 2003, Holady is sharing space with fellow attorneys **Kelly Ford** and **Herbert Gray**. Holady warns fellow practitioners that the portability fee charged on their telephone bills does not mean their current telephone number will be portable anytime in the near future. Therefore, all of Holady's numbers have changed. The new contact information is 4800 SW Griffith Drive, Suite 320, Beaverton, OR 97005; telephone 503-6465454; fax 503-641-8757.

Pierce County Report

Casey R. Ingels, **Lanny D. Ray** and **Josh Weiss** have recently joined the home office of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim in Tacoma. Ingels's primary area of practice is in business transactions, corporate law, entity creation, mergers and acquisitions, and commercial transactions. Ray's focus is in state and federal civil litigation, with a focus on civil rights, wrongful death, governmental liability, discrimination, and federal and state appellate practices. Weiss's practice is in natural resources and environmental law.

Right firm, wrong office: The January *Bar News* accurately reported that **S. Shawn Tacey** has been made a Gordon Thomas partner, but misplaced him in the firm's Seattle office. Tacey practices in the firm's Bothell office. We regret the error.

Snohomish County Report

David J. Sprinkle has taken the position of vice president, corporate counsel with Barclays North Inc., a land-development and construction firm based in Snohomish County. Mr. Sprinkle was a principal at Lasher Holzapfel Sperry & Ebberson, PLLC before his current position. He reports that he misses his friends and colleagues at Lasher, but the siren call of being in-house counsel for a growing real estate company was simply too powerful.

Spokane County Report

Christian Cox has joined Dunn & Black, PS to do construction law and commercial litigation. He's a graduate of the University of Louisville and Gonzaga University School of Law.

Gina Costello has left Maryann Moreno & Associates to share office space with **Jeffrey Finer** in Spokane.

Thurston County Report

Shawn M. Bunce, a CPA and 2002 graduate of Seattle University School of Law, has joined Jay A. Goldstein Law Office in Olympia, focusing on estate planning, bankruptcy, tax and business law.

Attorney General **Christine Gregoire** has named **Sharon L. Nelson** chief of the Consumer Protection Division. Nelson was director of the Shidler Center for Law, Commerce and Technology at the University of Washington School of Law.

Whatcom County Report

by Mick Moynihan

Our esteemed and most honorable What-

com County Bar president, **Chase Van Gorder**, came up with the bright idea to gather as many members of the bar as possible to reminisce about times past. So about 110 members who were able to scrape up the $39 dinner cost attended the gala on May 1.

The first to muse about times past (1950s) was **John Slater**, who bemoaned the demise of the minimum-fee schedule. John even went so far as to quote from the Supreme Court decision. His son **Tim Slater** chimed in and said that until the day he retired, John still used the minimum-fee schedule. When it was **Frank Atwood's** turn, he told stories about judges and courts of 40 years ago.

For the era of the '60s, **Jack Ludwigson** talked about the significant changes in the numbers and members between then and now. Jack is always humorous and entertaining.

Craig Hayes, who arrived in Whatcom County in the early '70s and **Andy Peach**, from the latter part of the decade, talked about some of their more memorable cases and clients.

Hugh Lewis and **Jon Komorowski** shared memories of their arrivals in the '80s. Komo did the best impression of Judge **Byron Swedberg** (ret.) since Byron retired, and it was Byron who was laughing the hardest.

Breean Beggs and **Simon Brownlie** wrapped up the last 10 years with amusing anecdotes about their contacts with other lawyers and judges.

John Erickson closed out one of the most fun-filled and entertaining evenings we have had in years by thanking **Nancy Berg** and **Karlene Wieland**, who had arranged and done all the great work to put on the extravaganza. Same time next year?

In Memoriam

Remembering our colleagues and friends

Eugene T. Golden

Whitman County attorney

Eugene Golden was born in Walla Walla and lived there until his final illness. After graduating from Whitman College, he ventured north to Spokane for law school, graduating from Gonzaga University in 1955. He practiced in Spokane for a year, and then returned to Walla Walla. From 1956 to 1962 he was deputy prosecuting attorney. Returning to private practice, he was a member of Gose Williams Luce & Golden for three years, then joined law partner Jack Williams to form Williams & Golden, where he practiced the rest of his life.

Active in community affairs, Golden was a member of Ascension Church and a former president of the Walla Walla County Bar Association. He served on the WSBA Continuing Legal Education Committee in the mid-1970s and the Disciplinary Committee in the 1980s. In addition to his practice in state and federal courts, Golden served as a judge *pro tem.*

Survivors include his wife, a sister, three brothers, eight stepchildren, five grandchildren, 14 stepgrandchildren and two great-grandchildren.

Eugene Thomas Golden was born in Walla Walla August 26, 1928, and died in Portland, Oregon, March 5, 2003, aged 74.

Richard T. Howsley

Quiet doer influenced Clark County growth management for a quarter century

Dick Howsley had a passion for land-use planning and managing growth to preserve communities' senses of place. His friend attorney **Steve Horenstein** said Howsley was more interested in getting things done than in getting credit for them; a business colleague told *The Columbian*, "Howsley's fingerprints are pretty easy to find" all over Clark County. Howsley enjoyed a reputation as southwest Washington's leading land-use, real estate, environmental and natural resources attorney.

Howsley received his bachelor of arts degree from Willamette University, his master's in urban affairs degree from Virginia Polytechnic Institute and State University, and his law degree from Lewis & Clark Northwestern School of Law in Portland. He was admitted to practice in Oregon and Washington, and before the U.S. District Court of Western Washington.

He served as executive director of Oregon's Rogue Valley Council of Governments from 1974 to 1978, serving Jackson and Josephine counties, where he prepared land-use plans under state mandated planning laws, and administered water quality, transportation, law enforcement, aging, employment and housing programs. From 1978 to 1984, Howsley served as director of Clark County's regional government, where he administered a broad range of local, state and federal planning programs for the county, cities, school, ports and special-purpose districts, and also helped write many of the county's land-use policies while obtaining his law degree from Lewis & Clark. After graduation he joined, and became a partner and president of, Landerholm, Memovich, Lansverk & Whitesides in Vancouver. From 1992 to 2002 he had his own Vancouver firm. Howsley was a charter member of the American Planning Association and a member of the American Institute of Certified Planners, and received a 10-year recognition award from the International City Management Association. He was involved in planning for communities in eight states.

Howsley died of a stroke in his sleep. Survivors include two brothers and two children.

Richard T. Howsley was born January 31, 1948, in Medford, Oregon, and died in Vancouver, Washington, March 27, 2003, aged 55.

Brian D. Hutton

Illinois lawyer was avid outdoorsman

Brian Hutton graduated from Waukegan High School in 1975, the University of Wisconsin in 1979, and, *cum laude*, from Gonzaga University School of Law. He was an attorney, amateur astronomer and avid outdoorsman. A friend said of Hutton, "He loved his family and the North Woods and was known for his kindness, intelligence and wonderful sense of humor."

His parents, four siblings and one daughter survive him.

Brian David Hutton was born in Waukegan, Illinois, June 23, 1957, and died in Waukegan January 17, 2003, aged 45.

Hon. Robert A. Wacker

King County jurist served 30 years

Robert Wacker enjoyed an unusually long judicial career. After serving as a *pro tem* judge, he was appointed to the King County District Court in 1972, and elected in 1974. He was presiding judge of the

district court in 1976-77. He was last re-elected to his bench in Shoreline District Court in 2002.

Before ascending the bench, Wacker served as a King County deputy prosecutor under **Charles O. Carroll**, and was in private practice working with the late **Barbara Durham**, who also became a district court judge in the 1970s and retired as chief justice of Washington. Judge Wacker served and chaired many committees in the district court throughout his tenure on the bench.

Having served with Wacker as a district court judge, Presiding Judge **J. Wesley Saint Clair** expressed condolences to Judge Wacker's family on behalf of the court. "I admired him immensely and believe he was an exemplary model of a district court judge; he will be sorely missed," recalled Saint Clair. Judge Wacker was noted for his dry sense of humor and his willingness to take the time, even in crowded dockets, to explain the law and the basis for his decisions to those appearing before him.

Judge Wacker completed his undergraduate work at Columbia University and the University of Washington in 1959. He graduated from the University of Washington School of Law in 1964.

Judge Wacker is survived by his wife, LaNita, four children and three grandchildren, and a sister and brother.

Robert Arthur Wacker was born in Boston in 1934 and died in Seattle April 1, 2003, aged 69.

Obituaries and remembrances of WSBA members are welcomed. Please forward to the editor at the WSBA office or by e-mail to tradelaw@thompson-law.com.

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The LAP/LaSD 6th Annual Statewide Conference:

"The Whole Lawyer"

by Erika Wilson
Lawyer Services Coordinator

2003 marked the sixth year of the Lawyers' Assistance Program/Lawyer Services Department (LAP/LaSD) Statewide Conference. During the weekend of April 4-6, lawyers and their guests gathered at Campbell's Resort in Chelan for a series of programs organized around the theme "The Whole Lawyer." The conference included CLE presentations, an afternoon exercise session, and a Sunday morning brunch cruise on Lake Chelan.

Presentations at the conference, orchestrated by the Lawyer Services Department, were aimed at addressing mental and physical health, and law practice issues. The conference is a cooperative effort of the various Lawyer Services programs, including Law Office Management Assistance (LOMAP), Professional Responsibility and Alternative Dispute Resolution. Following a Friday-afternoon law practice and ethics presentation by LOMAP . . . On the Road™, the conference began with a dessert reception that evening, lasted a full day Saturday, and ended with the Sunday-morning boat cruise.

At the request of the LAP Standing Committee, Director of Lawyer Services Barbara Harper arranged for a presentation by members of the Cardiac Rehabilitation and Prevention staff at Swedish Hospital in Seattle: Lori Downey, Stefanie Hatcher, Lisa Morishige, Kathleen Putnam and Tara Workman. This group started the Saturday sessions with a talk titled "Life in the Balance: Protect Yourself, Protect Your Practice," which focused on the ways in which our physical health affects our ability to be successful and productive at work. A healthy diet and regular exercise are two of the many important components of living a balanced life, particularly for those who work under stressful conditions. Although this message is not new, it bears repeating, and the presentation was a reminder that many things we do every day in the hopes of increasing productivity and effectiveness actually hinder those goals in the long run. Substituting coffee for breakfast, eating a fast-food lunch and dinner, and staying up late may provide more time to push through a big project, but mental alertness, accuracy and focus tend to plummet while stress levels skyrocket. On the other hand, even relatively small changes in

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How can lawyers, especially new lawyers, learn to make good choices about the many issues they face every day?

diet and exercise routines can increase mental stamina and help fight tension.

Dr. Adrian Hill, executive director of Canada's Legal Profession Assistance Committee and a perennially popular speaker at the conference, weighed in with a more personal lawyerly perspective on the topic "Laughter and Living: Preventing Burnout for Lawyers and Judges." As longtime conference attendees know, Adrian is the kind of presenter who always manages to have his audience laughing and nodding in agreement with him. With over 35 years of experience under his belt, Adrian knows his subject, and he knows how to communicate it to his fellow lawyers. His dynamic presentation this year included everything from how to handle difficult clients to the salutary effects of bran breakfast cereal, and participants responded enthusiastically to the theme of preventing burnout.

Lending his perspective from LOMAP, Pete Roberts covered the topic "How to Feel Like You're Managing Your Practice, Not the Other Way Around." A former law firm administrator and currently the LOMAP advisor, Pete has established himself as an expert on solo and small-firm practice issues. In this presentation, he reminded participants that everyday aspects of practice are choices that deserve careful thought and consideration. For top effectiveness and practice satisfaction, everything from the type and scope of representation to billing practices and file management must be well thought out and compatible with a particular lawyer's interests and skills.

That said, law-practice management is fraught with difficult decisions and pitfalls that can lead to mistakes and even ethics violations. How can lawyers, especially new lawyers, learn to make good choices about the many issues they face every day? One way is through the WSBA Lawyer-to-Lawyer Program, which is administered by LOMAP and matches new admittees with more experienced attorneys. Jennifer Miller and Donald Logerwell of Seattle are one such pairing, and their match has been a resounding success. Jennifer, who works in the King County Prosecutor's Office, and Don, an experienced arbitrator and dispute resolution attorney, took turns speaking about their match, which was made possible by the Lawyer-to-Lawyer Program. Conference attendees were inspired by the descriptions of the mutual benefits of mentoring. Volunteer mentors like Don are urgently needed right now to be matched with new lawyers, and this presentation showed how enjoyable the experience can be.

Continuing the theme of good practices, WSBA Professional Responsibility Counsel Chris Sutton spoke on the topic of ethical issues in representing multiple parties. Chris currently staffs the Ethics Line (206-727-8284), which WSBA members can call with questions, and he is an extremely important source of knowledge and information for lawyers. He spends the better part of every day providing guidance to help prevent mistakes before they happen. In this presentation about multiple parties, Chris stressed the fundamental principles underlying the RPCs concerning the lawyer/client relationship: loyalty, confidentiality and competence. These basic principles can help steer lawyers away from conflicts of interest and ethics violations.

Wrapping up the afternoon, LAP staff psychologists Rebecca Nerison and Ellen Begley led a session on active-listening and peer-counseling skills for attorneys. Many of the lawyers who attend the annual LAP/LaSD conference are peer counselors with the LAP, which means that they volunteer to help their colleagues through difficult times. Peer counselors do not act as legal counsel; instead, they provide a listening ear or positive motivation for other lawyers to seek help with a problem or get started in a 12-step program. Regular training is important for these counselors. Ellen and Rebecca led small-group role-plays in which participants practiced handling difficult or sensitive situations, such as sexual abuse, alcoholism and suicidal thoughts. While not asked to be therapists, these volunteers need to know how listen to a person in distress and respond supportively and constructively. Peer counselors are a vital part of the LAP, because they understand the day-to-day difficulties of combining a successful law career with a full and balanced life.

On Saturday evening, the LAP honored a dedicated WSBA peer counselor, Judge John Carroll of Richland, who has served as a counselor, mentor and friend to many lawyers in the Tri-Cities over the past 16 years. Although John could not be present at the conference, an award was presented to him in absentia. John is an avid rose gardener, and the LAP had a vase engraved with an expression of thanks for his many years of service to the WSBA and to the lawyers of Washington state. John's kind and thoughtful presence was missed at the conference, but his many friends are sure he will grow some beautiful prize blooms to fill the vase this summer.

Bringing the conference to an inspiring close, a western Washington attorney shared her story of recovery. An eastern Washington attorney, speaking on Saturday evening, had shared insights about rebuilding his life even after personal catastrophe. During a catered brunch cruise on Lake Chelan Sunday morning, the first attorney gave a funny and wonderfully dynamic talk.

Even though the weather on the boat was gray and foggy, we hope that those who attended the 6th Annual Statewide Conference came out of the weekend with a greater sense of clarity.

For more information about the WSBA Lawyer Services Department, please visit our home page at www.wsba.org/lasd, or call us at one of the numbers below. We look forward to assisting you!

Lawyers' Assistance Program (LAP): 206-727-8268
Law Office Management Assistance Program (LOMAP): 206-727-8237
Lawyer-to-Lawyer Program: 206-733-5914
Professional Responsibility/Ethics Program: 206-727-8284
Alternative Dispute Resolution Program (ADR): 206-733-5923

The Art of Negotiation

by Michael Lantz

The psychology of the play *is the most important issue.*
You must understand the psychology *of the negotiating process.*

Diplomacy is the art of letting someone have your way.
— Daniele Vare

The art of negotiation is nothing more than the method of accomplishing or establishing the "diplomacy" of letting someone have your way. Here are some ideas lawyers may find useful.

The Golden Rule

Never bid against yourself. Make the other side start the bidding.

1. Learn to read the room. You need to understand the psychology of the persons in the room and their individual motivations. Negotiations are like a complex poker game. In some cases, the facts may not be the most important issues. Above all, listen, and the players in the room will tell you how to make the deal work.

2. Understand that in any negotiation there are only two important things: (1) money and (2) brains. *Money* can buy the *brains*, and the *brains* are trying to get the *money*. The *brains*, in many cases, may have no *money*, but can still be in a position to negotiate because of their strength and their ability to make the *money* show all of its cards first. Then the *brains* will play the *money*'s cards as if they were the *brains*' cards, and make the *money* feel good about it.

3. Never talk religion in a business meeting. Whenever someone mentions that they are a good — *something* — no matter what the religion, everyone else at the table will reach for their wallet to make sure it has not been, and will not be, picked. If you mention religion, from that point forward you will not be trusted.

4. Never have more than two people on your side of the table and then have only one person do the talking. The attorney should direct traffic and control the flow of the meeting. The client needs to be well briefed as to the expected scenario. When there are more than two people on one side of the table, they will all want to talk, which will cost that side of the table dearly. If the opposition has more than two people, then attempt to direct the conversation among the persons on the other side. This technique will keep them off balance, and they will overstate their case and show their weaknesses.

5. The job of the attorney is to be a salesman of the client's position. Make a sale — motivate the buyer to buy.

6. Don't argue law, and above all, don't argue your case. It weakens your position and gives away too many cards to the other side as to your strengths and weaknesses. Most attorneys are unable to handle the negotiator who refuses to argue law and discounts its value, especially in a commercial/real estate situation. Such a technique disarms the opposition and is frustrating to them.

7. Don't structure a deal to fit the law. Structure the deal not only to fit with what the client wants, but also to make good business sense; then modify it to ensure it complies with existing laws and what might be anticipated in the future. If it is not a good business decision, the law is irrelevant.

8. Know when to get up and walk away. Don't want the deal so badly that you are not willing to walk away. If you can't walk away, the opposition will sense it and use it to their advantage.

9. Learn to listen very carefully to all persons in the meeting, including your own client. They will slowly, in their own way, give you clues to how the matter can be successfully negotiated. Listen for what the true objections or issues are from all sides, including your own client. In most cases you won't find out until everything has been covered several times.

10. Learn how to use the opposing counsel as an ally, either by making him the good guy and you the bad guy, or by making his perceived abilities called into question. Imply such things. Don't make them blatant, as you will lose points if you do and opposing counsel will become the enemy. Also, learn how to allow opposing counsel to address your client directly, perhaps to get certain points across when your client doesn't want to listen to you.

11. Argue a minor point, using it as a weapon against the opposition to wear them down. This can be effective against bureaucrats who are just doing a job and don't enjoy the confrontation or the adversary environment. This can be used as a tool to make negotiating the major issues much easier.

12. Never attack opposing counsel. Remember, both of you are just doing a job. Once you attack opposing counsel or are attacked yourself, it tells you that someone realizes they have lost control and are losing their position and argument. If opposing counsel ever attacks you personally, be very careful, but don't let them get away with it. If you allow them to get away with it, they will perceive you as weak and will continue to attack, which does not address the issues and is not to your client's benefit. Generally, show sympathy for their obvious weak position, which has caused them to attack you, or cut opposing counsel to shreds. With opposing clients present, the use of the right technique can be extremely effective in undercutting their confidence in their attorney and their position, thus getting them to agree to a solution that is favorable to your client.

13. Don't try to *win*. If you are attempting to win, you will probably lose and/or end up costing your client a lot of money. Being successful may be minimizing the damage to your client in a negative situation.

14. Be careful not to overnegotiate your position, making it too strong, because you might strangle the other side and make the deal ultimately fail. This situation might require you to renegotiate the deal in the future to make it more functional and practical to keep it from ultimate failure.

15. Know when to take the deal away from the other side and not let them have it. Make them want it and make them commit to it.

16. Don't think that just because a negotiation breaks down that the deal is dead. Consider it as nothing more than a pause in the negotiations.

17. Know when to destroy the negotiation by blowing it out of the water; then put it back together so everyone saves face and feels as if they have kept or gotten something. If you destroy it without giving something back, you will lose. With it you will generally gain considerable respect.

With opposing clients present, the use of the right technique can be extremely effective in undercutting their confidence in their attorney and their position, thus getting them to agree to a solution that is favorable to your client.

18. Know when not to negotiate. If either side is too ready to negotiate, it makes for a bad environment, as they may not be able to listen and hear the method of solution or be too fixed in their position. Be patient and it will come to you.

19. Depending on the client and his ability, always consider, with the right coaching and preparation, turning the client loose with the opposing clients and negotiating the matter without attorneys present. Sometimes the best deals are consummated this way. But always spend time with the client in advance and prepare him for as many issues and contingencies, including personality issues, as possible.

20. Don't let egos enter into the negotiations. Once that happens everyone will lose. If an ego is obviously at work and has to be dealt with in order to complete the deal, understand it going in and deal with it in a manner whereby it is not a primary issue. Always make egos a secondary issue, but don't lose sight of how to use the opposition's ego to your advantage.

21. Be a counselor and an arbitrator to your own client. Be able to be objective and effective when you have more than one client. The conflict issue may be present, but in small business, separate attorneys are many times not affordable. In large business, you may represent the corporation, but will have to deal with the personalities of various officers and directors. Learn how to handle such clients and keep them happy. In some cases, you may have to act as a mediator among the executives of the corporation to develop a consensus on the issues and resolution.

22. Learn how to debate/negotiate using the position of the opposition to your advantage and their disadvantage. When the facts and situation are right, agree with the opposition's position, and then give it a twist to your advantage. Once you are able to use their position as a foundation, build your house on top; this makes it difficult for them to wiggle out.

23. Make payment using *cash*. Start counting $100 bills and everyone will stop talking. They will all now want to count the cash. The client will love it, but opposing counsel might get upset because with the cash they lose control over the money, which could include the payment of their fees. Get a receipt, of course. Have all the agreements ready for signing at that time.

24. Don't ever threaten criminal prosecution. If there is a possible criminal issue, figure out where the emotional guilt lies and then determine how to use it as an implied threat that will work against the emotional guilt and fear.

25. Learn how to negotiate with a judge and/or jury during open court argument.

26. Don't argue to death a minor point that can destroy your credibility with a judge or jury.

Remember: The psychology of the play is the most important issue.

Michael Lantz is retired from the law firm Maas and Lantz, and a retired lieutenant colonel in the U.S. Air Force Reserves. He serves as president of Capstone Mfg. LLC, a company specializing in new-technology insulation products for the construction, transportation, marine, oil and gas, industrial and aviation industries. He published the "Tax Guide for Reservists" from 1979 through 1986 in the Air Reservist *magazine and* The Officer *magazine.*

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Things to Learn from a Lawyer with Files in Piles

by Jeff Tolman

We three middle-aged lawyers met for lunch and, as often happens, our conversation turned to the lawyers who had preceded us in practice. How things were different, and the same; what we had learned from their experiences.

As we chatted we were reminded of one of the happiest and most successful lawyers in the history of Kitsap County. By all accounts a nice person and a good lawyer, he always had three separate piles of files on his desk. The pile farthest away from him was the "C" pile — cases of the clients who were behind in their payments or who weren't responding to his calls. The middle pile, the "B" pile, was the largest pile. It contained his average clients, who usually paid and were okay, but not great, to work with. In the pile closest to him, the "A" pile, were his best clients — those who paid promptly, who referred clients to his office, and with whom he had had a long relationship. Those who, month to month, fed his family.

Every day when the lawyer began his work he started with the A pile. When he had completed the needed work on those cases, he worked on the B pile. After that work was done, he spent any remaining time dealing with C-pile issues.

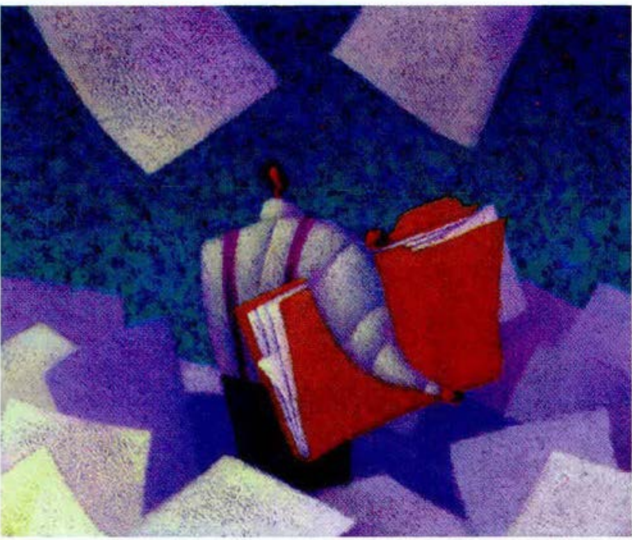
The lawyer was up front with new clients. After explaining the configuration of piles on his desk, he would tell them, "Your file will begin in the A pile. Whether it stays there or not is up to you."

When he stopped practicing, there were lots of A files. He had good clients. His bills were always paid, his family always well fed.

While the new Rules of Professional Conduct don't allow a lawyer a C pile that gets worked on only when time allows, modern rules do allow a lawyer to withdraw from cases. And under the "old lawyer's" organizational method, choosing the files to withdraw from was easy.

Several lessons can be learned from the old lawyer.

First, like any good businessperson, he deciphered and prioritized clients. He knew who paid their bills and who took up his time for intermittent or occasional payments. He knew who brought new business into his office. He knew who had earned getting his first, and best, effort. So did his clients.



Today, I know of no lawyer so organized, though we all should be. For years I had lists of 1) my 10 biggest cases going at any time, and 2) the 10 best referral sources among my clients. They got first priority. They got TLC.

Over time my lists have disappeared. Instead, I have fallen into the lawyer's dilemma of becoming a firefighter without every other day off. Too often, I come into the office and put out the biggest fire on my desk, then the second biggest, then handle the emergency phone call. My good clients, the ones who pay my bills, remain on my desk, often getting less attention than my "squeakier" nonpaying clients.

Every lawyer should keep the following lists, frequently updated:

1. The 10 clients who refer the most business to the office;
2. The 10 cases in the office anticipated to generate the biggest fees;
3. The clients who pay their bills in full within 30 days of receipt;
4. The 10 clients you enjoy working with the most.

These clients are your A pile, the clients who make practice bearable and enjoyable. The clients who give positive reinforcement for work well done. The clients who pay the bills.

Probably there should be a fifth list, too — the 10 clients who give a lawyer and office staff the most trouble. My bet (and certainly my personal experience) is that this group would take an inordinate amount of time and attention without the corresponding positive feedback or payment. Why I keep working for these demanding, nonpaying, unsatisfiable clients only a good psychiatrist (or another lawyer) could determine. Any reasonably good business-person would figure out immediately that my energies are misdirected, my priorities juxtaposed.

Every well-run business monitors its clientele. Lawyers (who are not generally in this category) should, too.

No wonder the old Kitsap County lawyer was happy and successful. He knew who his best clients were and gave his best work to them.

Jeff Tolman is a lawyer and parttime municipal court judge in Poulsbo, and has served on the WSBA Board of Governors.

These notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 3.5(d) of the Washington State Supreme Court Rules for Enforcement of Lawyer Conduct, 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 name and address.

Disbarred

Robert C. Lyons (WSBA No. 22275, admitted 1992), of Spanaway, was disbarred, following two separate hearings, by order of the Supreme Court, effective November 19, 2002. This discipline is based on conflicts of interest, dishonesty and criminal conduct from 1994 through 2000.

Matter 1: In 1995, Mr. Lyons agreed to represent a client in a marital dissolution. During the first meeting, Mr. Lyons suggested that the client work for an escort service to earn extra money. Mr. Lyons called the client repeatedly for three months, asking if she would have an affair with him. The client began cooperating with the Tacoma Police Department by allowing a phone tap, and wearing a microphone and transmitter. During these conversations, Mr. Lyons asked the client to perform oral sex, and suggested that he "try her out" and then provide a reference to his friend at the escort service. Mr. Lyons fondled the client when she tried to leave his office. The conversation ended with Mr. Lyons paying the client for her agreement to have sex with him. When the media coverage of this matter aired, several other women reported similar conduct to the Tacoma Police Department.

Matter 2: In March 2000, Mr. Lyons agreed to represent Mr. and Ms. C in a personal-injury action based on a 1999 automobile accident. In December, Mr. Lyons told Mr. C that the insurance company was willing to pay only $1,100. The client agreed to this settlement amount, so long as he received the money before Christmas. On December 18, the insurance company issued a $2,250 settlement check to Mr. C and Mr. Lyons. Mr. Lyons deposited the check into his trust account without the client's signature. In March 2001, Mr. Lyons closed his office without disbursing any of the settlement funds to Mr. C. Mr. Lyons took no action on Ms. C's case. The driver's insurance company paid Mr. C his portion of the settlement, even though the company had paid this amount earlier to Mr. Lyons.

Matter 3: In January 2000, Mr. Lyons agreed to provide pro bono representation to clients of a women's shelter. In early December 2000, Mr. Lyons began representing a shelter client whose parental rights were apparently being terminated. Mr. Lyons told the client the representation would cost $100 per month. On December 27, during a meeting at the client's home, Mr. Lyons discussed his personal problems, pretended to be emotional, and asked the client to give him a hug. Mr. Lyons then convinced the client to move to her bedroom, undressed her, and had sexual intercourse with her, despite her objections. The client was intimidated by Mr. Lyons's large stature and manipulated by his promise to get her children back.

On December 31, Mr. Lyons arrived at the client's house just before midnight. Mr. Lyons demanded to have sex with the client, she refused, and he left. Mr. Lyons called the client several times, asking her to say sexual things over the telephone. On February 5, 2001, the shelter asked Mr. Lyons to cease all contact with its clients. Mr. Lyons falsely told the shelter director that the client had been the aggressor. Mr. Lyons's conduct caused the client to relapse in her treatment, leading the court to place her children with a relative.

Matter 4: In summer 1999, Mr. Lyons agreed to represent the mother in a child-custody matter. Mr. Lyons suggested that the client provide sexual favors as payment for his legal services. The client initially said no, but agreed as she became more desperate for legal assistance. This arrangement continued for months. When the client refused to provide sexual favors, Mr. Lyons offered to pay her money for sex. In July 2000, Mr. Lyons told the client that he loved her and was going to leave his wife and family. The client did not want to develop a relationship with Mr. Lyons and was eventually able to terminate the sexual relationship. In November 2000, while trying to remove a ring from the client's finger, Mr. Lyons picked her up and threw her on the ground. Mr. Lyons was charged with fourth-degree assault. Despite a no-contact order, Mr. Lyons entered the client's house while she was sleeping, attempted to have anal sex with her, and, in the process, choked her unconscious and pinned her down. The client was eventually able to contact the police.

Matter 5: In 1999, a client retained Mr. Lyons to collect a judgment she was awarded in a defamation case and to represent her in a lawsuit filed against her. When the plaintiff did not show up for trial, Mr. Lyons prepared one form dismissing the lawsuit. In October 2000, the client paid Mr. Lyons $2,000 to represent her in another lawsuit filed by a lawyer to collect his fees. Mr. Lyons told the client that the arbitration was continued, so she did not attend. The arbitration was not continued, and the arbitrator entered a $35,000 default judgment against the client. Mr. Lyons told the client he would deposit the client's $35,000 in his trust account to prevent the lawyer from collecting, convert it to his own use, and the client could recover the money from the Lawyers' Fund for Client Protection. Mr. Lyons also borrowed money from the client and used her credit card for over $3,000 more than their agreement.

Matter 6: In early 2000, Mr. Lyons agreed to represent the husband in a marriage dissolution action. In April 2000, the parties reached an agreement including a $3,000 payment from the wife to the husband. In February 2001, the wife's lawyer sent the $3,000 to Mr. Lyons. Mr. Lyons deposited the check, but did not notify his client. In April 2001, the client filed his own motion for a contempt judgment against the wife for failure to pay the $3,000. Prior to the hearing, the client stopped by Mr. Lyons's office and learned that Mr. Lyons was no longer there. The client learned in court, for the first time, that the wife had made the payment. The back of the check contains two signatures, but neither is the client's. The client never received his funds.

Mr. Lyons's conduct violated RPCs 8.4(a), prohibiting attempting to violate the RPCs through the acts of another; 8.4(b), prohibiting committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a

lawyer in other respects; 8.4(c), prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation; 8.4(d), prohibiting conduct prejudicial to the administration of justice; 1.7(b), prohibiting representation of a client if the representation may be materially limited by the lawyer's own interests; 1.8(k), prohibiting sexual relations with a current client, unless a consensual relationship existed at the time the representation began; 1.14, requiring lawyers to promptly notify a client of the receipt of funds and pay the funds to the client when requested; 2.1, requiring lawyers to exercise independent judgment; 1.8, prohibiting lawyers from entering business transactions with clients, unless the terms are fair and reasonable, the client consents, and the client has a reasonable opportunity to seek independent legal advice; 1.4, requiring lawyers to keep clients reasonably informed of the status of their matters; and 1.3, requiring lawyers to act with reasonable diligence and promptness.

James Trujillo represented the Bar Association in the first hearing and Sachia Stonefeld Powell in the second. Kurt Bulmer represented Mr. Lyons in a portion of the first matter and Mr. Lyons represented himself in the second. The hearing officer in the first hearing was Carolyn Lake and, in the second, Thomas Jerome Greenan.

Suspended

John C. Caldwell (WSBA No. 28831, admitted 1999), of Mill Creek, was suspended for 90 days, following a stipulation, by order of the Supreme Court, effective May 30, 2002. This discipline is based on his failure to properly handle client funds in 2000.

Matter 1: In April 2000, Mr. Caldwell agreed to represent a client in a criminal appeal. The client's sister paid Mr. Caldwell $10,000, which Mr. Caldwell deposited into his personal account. Mr. Caldwell did not prepare a written fee agreement. Mr. Caldwell filed a notice of appeal and paid the $250 filing fee. Mr. Caldwell met with the client twice at the correctional facility. In August, the client's new lawyer sent Mr. Caldwell a notice of substitution. The client's sister requested that Mr. Caldwell refund her fees. Mr. Caldwell stipulated that he had earned $1,000, but did not have the money to return the sister's $9,000.

Matter 2: In late 1999 or early 2000, Mr. Caldwell advised a client about a business purchase. During this meeting the client gave Mr. Caldwell original documents, including the original purchase and sale agreement. In June 2000, Mr. Caldwell left his law firm, took the client's file with him, and stored it in a drawer in his residence. On July 15, the client asked Mr. Caldwell to return his file. Mr. Caldwell was not able to locate the file and has not returned the client's original documents. Mr. Caldwell's conduct violated RPCs 1.14(b)(4), requiring lawyers to promptly deliver client funds upon request; 1.14(a), requiring lawyers to deposit client funds into a trust account; and 1.15(d), requiring lawyers to take reasonable steps to protect clients' interests upon withdrawal from representation.

Kevin Bank represented the Bar Association. Mr. Caldwell represented himself.

Suspended

Philip S. Morgan IV (WSBA No. 21607, admitted 1992), of Seattle, was suspended for two years, following a hearing, by order of the Supreme Court, effective February 5, 2003. This discipline is based on his failure to diligently represent and adequately communicate with five clients during 1999.

Matter 1: In February 1999, Mr. Morgan agreed to represent a client in a Labor and Industries (L&I) proceeding. In April 1999, Mr. Morgan filed two appeals for the client. In September 1999, Mr. Morgan missed the required scheduling conference and then failed to appear for the hearing. He called from a roadside phone the day of the hearing and requested a continuance. The Board of Labor Appeals denied his continuance and dismissed the client's appeals.

Matter 2: In February 1999, Mr. Morgan agreed to represent a client in a L&I appeal. In July 1999, the employer's lawyer sent Mr. Morgan a proposed stipulation. Mr. Morgan did not respond to opposing counsel. Mr. Morgan also failed to appear at the stipulation conference, even though subpoenaed by the administrative law judge.

Matter 3: In March 1999, Mr. Morgan assumed responsibility for a client's third-party L&I claim. Mr. Morgan filed the client's lawsuit the day before the statute of limitations expired, but did not perfect service within the required 90 days. The defendant filed a motion for summary judgment based on expiration of the statute of limitations. Mr. Morgan failed to appear at the hearing. The court dismissed the client's claim.

Matter 4: In May 1999, Mr. Morgan agreed to represent a client in a third-party L&I claim. Although he told the client that everything was under control, Mr. Morgan failed to file a complaint prior to expiration of the statute of limitations. Mr. Morgan did not respond to the client's phone calls.

Matter 5: In February 1999, Mr. Morgan agreed to represent a client in an L&I appeal. Mr. Morgan failed to act on the client's appeal, and the department closed the file in April 1999. Mr. Morgan did not send the order to the client or file an appeal within the required 60 days. When the client learned of the dismissal, he filed an appeal, but it was dismissed as untimely.

Mr. Morgan's conduct violated RPCs 1.3, requiring lawyers to diligently represent their clients; 1.4, requiring lawyers to keep clients reasonably informed of the status of their matters; and 3.4(c), prohibiting lawyers from knowingly disobeying an obligation under the rules of a tribunal.

William R. Squires III and Anthony Butler represented the Bar Association. Mr. Morgan represented himself. The hearing officer was Waldo F. Stone.

Suspended

Santiago Juarez (WSBA No. 5686, admitted 1974), of Espanola, NM, was suspended for 18 months, following a stipulation, by order of the Supreme Court, effective May 31, 2002. This discipline is based on his failure to comply with trust-account rules, promptly deliver client funds, and cooperate with the discipline investigation in 2000 and 2001.

In 1999, Mr. Juarez assisted another lawyer in representing a client charged with distribution of a controlled substance. The client paid Mr. Juarez a $6,000 fee. There was no written fee agreement. Mr.

Juarez stated that the fee was nonrefundable, which the client denied. Mr. Juarez failed to place the funds in a trust account. Mr. Juarez did not maintain complete records of the client's funds. Mr. Juarez told lead counsel he would travel to Spokane to meet counsel and the client, but he failed to attend the meeting. Mr. Juarez did not file any pleadings, go to court, send correspondence, or speak with witnesses. He did review police reports and had telephone conversations with lead counsel and the client.

In late 2000, the client terminated Mr. Juarez's services, requesting a refund of $5,000 and return of her file. In February 2001, Mr. Juarez promised to send the client $4,000. Mr. Juarez did not send the client the refund until after disciplinary counsel had served him with a subpoena *duces tecum* for failure to cooperate with the disciplinary investigation.

Mr. Juarez's conduct violated RPCs 1.14(a) and (b), requiring lawyers to place client funds in a trust account and to keep complete records of these transactions; 1.14(b)(4), requiring lawyers to promptly deliver client funds upon request; 1.15(d), requiring lawyers to take reasonable steps to protect a client's interests upon withdrawal; 1.4, requiring lawyers to keep clients informed about the status of their matters; and RLD 2.8, requiring lawyers to promptly comply with requests for information during disciplinary investigations.

Anne Seidel represented the Bar Association. Mr. Juarez represented himself.

Suspended

Paul H. King (WSBA No. 7370, admitted 1977), of Seattle, was suspended for six months, following a hearing, by order of the Supreme Court, effective April 25, 2002. This discipline is based on his lack of diligence in one matter and misrepresentation in another in 1995.

Matter 1: Mr. King, or his office, accepted responsibility for filing a client's small-claims court notice of appeal. The client's notice was not timely filed and he lost the right to appeal.

Matter 2: In November 1995, Mr. King contacted the escrow company holding lien funds that had been assigned to his wife, Rita King. The funds were disputed fees from Mr. G, a prior client's dissolution action. Mr. King asked the escrow agent to release the funds to him, even though the escrow instructions indicated the funds had been assigned to Rita King. When the escrow agent refused, Mr. King filed a motion in Mr. G's divorce action, asking the court to disburse the escrow funds to Mr. King to hold "in trust" for Rita King. Mr. King stated in the motion that he continued to represent Mr. G.

Mr. King's representation of Mr. G had ended in 1993, and the client disputed Mr. King's right to the lien funds. Mr. King did not give notice of his motion to the parties involved in the earlier dissolution. Mr. King also did not disclose to the court that his divorce from Rita King was then pending in Snohomish County Superior Court. Mr. King presented this motion to conceal the existence of these funds from Rita King and the court presiding over his dissolution.

Mr. King's conduct violated RPCs 1.3, requiring lawyers to diligently represent their clients; 3.3, prohibiting lawyers from making false statements of fact to the tribunal; 1.15, requiring lawyers to take steps to protect a client's interests, upon withdrawal; 3.5(b), prohibiting ex parte communication with the tribunal, except as permitted by law; and 8.4(c), prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation.

Leslie Allen represented the Bar Association. Peter Cogan represented Mr. King. The hearing officer was Charles T. Conrad.

Suspended

Steven J. Thomas (WSBA No. 20076, admitted 1990), of Enumclaw, was suspended for 90 days, following a hearing, by order of the Supreme Court, effective February 10, 2003. This discipline is based on his continuing to practice law during an administrative license suspension during 1999.

In May 1998, the WSBA notified Mr. Thomas that it had not received his required mandatory continuing legal education (MCLE) report for 1995 through 1997, which was due December 31, 1997. On January 6, 1999, after granting two extensions, the WSBA notified Mr. Thomas that it had not received his MCLE report or the $450 late filing fee. The letter also indicated that if Mr. Thomas did not comply by January 18, 1999, he would be considered for suspension. The Supreme Court suspended Mr. Thomas's license on February 11, 1999. On March 25, Mr. Thomas spoke with a WSBA employee, telling her he knew about his suspension, but he was not going to stop practicing. The Supreme Court reinstated Mr. Thomas's license on May 5, 1999.

During his suspension, Mr. Thomas continued to practice law, representing clients in Washington state courts.

Mr. Thomas's conduct violated RPCs 5.5(a), prohibiting lawyers from practicing in jurisdictions in which doing so violates the regulations of the legal profession; 1.15, requiring lawyers to withdraw from representation when to continue would violate the RPCs; 8.4(d), prohibiting lawyers from engaging in conduct prejudicial to the administration of justice; and RLD 8.2, prohibiting suspended lawyers from continuing to practice law.

Timothy Whitters and Joanne Abelson represented the Bar Association. David Butler represented Mr. Thomas through a portion of the proceedings. Mr. Thomas represented himself through a portion of the proceedings. The hearing officer was J.C. Becker.

Suspended

Thomas Westbrook (WSBA No. 4986, admitted 1973), of Littlerock, was suspended for two years by order of the Supreme Court approving a stipulation, effective November 5, 2001. This discipline is based on his false statement to a bank in 1991. Mr. Westbrook will be eligible for reinstatement on November 5, 2003.

In late January 1991, Mr. Westbrook submitted a false statement of fact to a bank to support a request for a line of credit for his company. Mr. Westbrook submitted a borrowing certificate stating that his company had receivables of $846.00 and $624.51, and an inventory of $979,764.92, knowing that these figures were substantially inflated. In 1998, Mr. Westbrook pled guilty to one count of false statement in connection with a federally insured loan, a felony.

Mr. Westbrook's conduct violated RPCs 8.4(b), prohibiting committing a criminal act that reflects adversely on a lawyer's

honesty, trustworthiness or fitness as a lawyer in other respects; 8.4(c), prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation; and RLD 1.1(c), requiring lawyers to abide by the laws of the United States as required by the oath of duties as a lawyer.

John Wolfe and Becky Neal represented the Bar Association. Mr. Westbrook represented himself.

Reprimand

Thomas P. Robinson (WSBA No. 11269, admitted 1980), of Spokane, received a reprimand on May 4, 2001, based on a stipulation approved by the Disciplinary Board. This discipline is based on his failure to avoid a conflict of interest in 1995. *(Mr. Robinson is to be distinguished from Thomas S. Robinson of Seattle.)*

In 1995, Mr. Robinson represented Ms. S in a guardianship petition for her father's estate. Ms. S was appointed guardian and then, in October 1995, her father died. Ms. S was appointed personal representative of her father's estate, and retained Mr. Robinson to represent the estate and complete the probate. The estate's main asset was a bank account with a $194,000 balance. Ms. S told Mr. Robinson that she and her father, prior to his death, had signed documents converting the bank account to a joint account with right of survivorship. The other heirs believed the bank account to be an estate asset. Mr. Robinson also learned that the bank refused to recognize the signature card purporting to create the joint account. Mr. Robinson agreed to advocate Ms. S's position without advising Ms. S or the other heirs about the conflict, or obtaining their written consent to continue the representations. Mr. Robinson withdrew from the representation in 1996. In 1997, the court found that the account was an estate asset.

Mr. Robinson's conduct violated RPC 1.7(a), prohibiting representing a client if the representation will be directly adverse to another client, unless the lawyer believes the representation will not adversely affect the relationship with the other client and both clients consent in writing after full disclosure and consultation.

Leslie Allen represented the Bar Association. J. Donald Curran represented Mr. Robinson.

Lawyers' Fund for Client Protection

The Lawyers' Fund for Client Protection Committee meets quarterly to review applications for gifts from the fund. The committee is authorized to make gifts of up to $10,000 to eligible applicants. On applications for more than $10,000 the committee makes recommendations to the Board of Governors, who are the fund's trustees. The committee met on February 21, 2003, and took the following action, with approval by the trustees as necessary at their meeting on April 11, 2003:

Terry L. Deglow (WSBA No. 13357, Spokane; disbarred): Deglow was hired to probate an estate in 1994. The applicant (the executor and heir) surrendered a $5,000 life-insurance policy to Deglow to pay the estate costs and debts. Deglow did no work on the estate between April 1995 and 2000. The applicant paid delinquent real estate taxes on his brother's property and paid the burial expenses. Deglow reimbursed him approximately $1,600 from the estate funds, and paid $940.26 to the Department of Social and Health Services to pay the deceased's back-due child-support debt.

On July 10, 2000, the Supreme Court suspended Deglow, pending disciplinary proceedings in another matter. Deglow did not advise the applicant that he had been suspended, or provide him any accounting for the funds paid. The Supreme Court ordered that Deglow pay restitution of $2,454, and the committee approved payment of that amount to the applicant.

Mickie Jarvill (WSBA No. 14049, Snohomish County; disbarred): Jarvill and her husband each pleaded guilty to conspiracy to commit wire and mail fraud, and were sentenced to five years in prison. They admitted to defrauding about 30 people through their law office and investment businesses. The committee previously approved two applications concerning Jarvill.

The applicant was Jarvill's client beginning in 1989, when Jarvill handled sale of real estate that netted the applicant approximately $216,000. Jarvill advised the applicant to invest $200,000 in the Jarvills' investment project. Jarvill subsequently assisted the applicant with another real estate transaction that netted the applicant approximately $150,000. On Jarvill's recommendation, the applicant also gave those funds to Jarvill to invest.

The applicant received regular payments of about $3,400 from Jarvill until January 1999, when the full investment was due to be paid and payments stopped. Jarvill gave the applicant one check for $17,000 that was returned for insufficient funds. After criminal charges had been filed against the Jarvills, the applicant learned that the development Jarvill had advised her to invest in, in 1989 and 1994, had been in bankruptcy since 1993.

The purpose of the Lawyers' Fund for Client Protection is to assist persons who have been the victims of dishonest lawyers.

The committee recommended payment of $50,000 to the applicant, which was approved by the trustees.

Robert H. Lewis (WSBA No. 23635, Tacoma; disbarred): Lewis had worked as a contract attorney for another lawyer who had moved to Brazil and sold his practice to Lewis. Shortly thereafter, Lewis abandoned his practice. The committee previously approved four applications concerning Lewis.

Lewis represented the applicant on a medical claim. An insurance check was issued payable to the applicant and Lewis in the amount of $4,152. Lewis obtained the applicant's endorsement. He told her he would deposit the check into his trust account, and pay her the funds less his fees (25 percent). Lewis gave the applicant $100 and agreed to pay two bills she owed.

When the applicant confronted Lewis about the balance of her funds, Lewis gave her a promissory note agreeing to pay her one half of her funds by June 13, 2001. He did not do so, and a WSBA audit of his trust account showed that by June 30, Lewis did not have sufficient funds in his trust account to pay the applicant. Lewis never paid the applicant the balance of her funds, nor did he pay the bills as promised. The committee approved payment of $2,814 to the applicant.

Robert C. Lyons (WSBA No. 22275, Spanaway; disbarred): Lyons was disbarred

based on allegations of sexual misconduct, as well as conversion of client funds and failure to return unearned fees. The committee previously approved two applications concerning Lyons.

The applicant was sued for $35,000 for legal fees allegedly owed to another lawyer. She paid Lyons $2,000 to represent her. A week prior to a mandatory arbitration hearing, Lyons falsely told her that he had filed a notice of appearance and had the hearing continued. As a result, a default judgment for $35,000 was entered against the applicant. The committee concluded that Lyons had lied to the applicant about the services he had performed, and that his failure to return his unearned fee was a dishonest act. They approved payment of $2,000 to the applicant.

Douglas M. O'Coyne Sr. (WSBA No. 15689, Spokane; deceased): O'Coyne became ill and abandoned his practice. A custodian was appointed to protect his clients' interests, and in several instances the custodian referred O'Coyne's former clients to the fund.

- The applicant paid O'Coyne $1,500 for representation regarding unpaid income taxes in Oregon. O'Coyne wrote to the Oregon Department of Revenue that he was representing the applicant. The department said they could not disclose any information to O'Coyne, because he was not admitted to practice in Oregon. Other than the one letter, O'Coyne performed no services for the applicant. The committee approved payment of $1,500 to the applicant.
- The applicant paid O'Coyne $500 to represent him before the IRS. The applicant did not hear again from O'Coyne until he was contacted by O'Coyne's custodian and advised that O'Coyne had abandoned his practice. The committee approved payment of $500 to the applicant.
- The applicant and her husband hired O'Coyne for representation before the IRS, paying him $1,500. They never received any billings or accountings from O'Coyne, and he became ill shortly after they had hired him. Apparently he did nothing on their case. The committee approved payment of $1,500 to the applicant.
- The applicants paid O'Coyne $700 to represent them in a foreclosure of their home. O'Coyne agreed to file a petition for bankruptcy, which would have stayed the foreclosure, but did not do so, and the house was foreclosed upon. The committee approved payment of $700 to the applicants.

Jeffrey B. Ranes (WSBA No. 7732, Montesano; disbarred): The committee previously approved five applications concerning Ranes. The applicant hired Ranes for representation in a marriage dissolution. The issue in the dissolution was division of real property. An order was entered against the applicant, who paid Ranes $1,430 to file an appeal. The applicant says that throughout this period he had difficulty reaching Ranes, and when he did speak to him, Ranes told him that the judge had not yet signed the final order on the property distribution, and therefore the 30-day period in which to file a notice of appeal had not yet begun.

After several delays, the applicant contacted the WSBA and learned that Ranes had been suspended from practice on July 23, 2001. He then learned that the judge had signed the property order on October 30, 2000, and the period to file an appeal had expired. The committee approved payment of $1,430 to the applicant.

Lois M. Wood (WSBA No. 17878, Pasco; suspended): The applicant paid Wood $750 on behalf of her husband, who was in prison, to file a motion for discretionary review in the State Supreme Court regarding denial of a personal restraint petition. Wood did not file the motion for discretionary review, and falsely told the applicant she had filed the motion and that the Supreme Court had lost it. She said she would refile it with a motion for extension of time. The applicant paid Wood an additional $250 to refile the motion; however, Wood did not file it.

When the applicant learned from the court that the motion had never been filed, she contacted Wood. Wood told the applicant that she was trying to find out why the court had not received the motion and that she would call her back. The applicant heard nothing further from Wood. The applicant then contacted another lawyer, who contacted Wood, and Wood gave the new lawyer a copy of a motion she had prepared. After the new lawyer had reviewed and edited the motion, he filed it with the court with a $250 filing fee and a motion for extension of time. The filing fee was returned with the advice that no filing fee was required. The motion for extension of time was denied. The committee approved payment of $500 to the applicant.

Other Business: The committee reviewed nine additional applications denied for lack of evidence of dishonest conduct, or as fee disputes or claims for malpractice. One application was continued to the next meeting. One was dismissed because restitution had been made by a bank that had honored a forged endorsement.

Restitution: The fund seeks restitution from the lawyers who cause payments from the fund. Because in most cases those lawyers have no assets, the chief avenue of restitution is through court-ordered restitution in criminal cases. Prosecuting attorneys cooperate with the fund in getting the fund listed in restitution orders. As of February 2003, six lawyers were making regular restitution payments to the fund, and one lawyer had settled his restitution debt to the fund by payment of $22,203.

Thank-Yous: The purpose of the Lawyers' Fund for Client Protection is to assist persons who have been the victims of dishonest lawyers. Although the fund cannot fully compensate a person for the harm done by a dishonest lawyer, the fund receives notes of appreciation to the lawyers of Washington state:

- "I would like to thank you and the Bar Association members for the approval of the award from the Lawyers' Fund. My sincere thanks are extended to each one who has made an effort to make this possible. It will truly make a difference in my life."
- "Thank you for the refund. I sincerely appreciate any amount approved by the committee. I had lost all hope in collecting anything from [the lawyer]."

The Lawyers' Fund for Client Protection Committee chair is Pullman attorney Scott J. Bergstedt. WSBA General Counsel Robert Welden is staff liaison to the committee.

2003 Board of Governors Election Results

WSBA member volunteers Howard Graham, Steven Russell and Bob Welden have certified the election results as follows:

Fifth District:

Michael Pontarolo is certified the governor-elect in the 5th District.

(1,938 eligible voters, 876 ballots cast — return rate of 45.2 percent)

Peter Karademos — 175 votes (20 percent)
Mark Kim — 140 votes (16 percent)
Michael Pontarolo — 561 votes (64 percent)

Seventh-West District:

Since no candidate received a majority vote, there will be a run-off election in the 7th-West District between Ellen Conedera Dial and Mark A. Johnson. Ballots were mailed May 30 with a June 16 return.

(2,387 eligible voters, 511 votes cast — return rate of 21.4 percent)

Kevin Baumgardner — 144 votes (28 percent)
Ellen Conedera Dial — 162 votes (32 percent)
Mark A. Johnson — 205 votes (40 percent)

Ethics 2003 Committee Meetings

The WSBA Committee for the Evaluation of the Rules of Professional Conduct (Ethics 2003 Committee) was convened to review the revised ABA Model Rules of Professional Conduct; undertake a comprehensive study and evaluation of the ABA "Ethics 2000" revisions; consider the suitability of adopting the ABA revisions and commentary in Washington; and consider other appropriate changes to Washington's Rules of Professional Conduct. Ethics 2003 Committee meetings are open to the public, and interested WSBA members are encouraged to attend and/or provide input about the committee's work. Information about the Ethics 2003 Committee is on the WSBA Web site at www.wsba.org/lawyers/groups/ethics2003. Please direct questions or comments to Committee Reporter Douglas Ende at 206-733-5917 or Ethics2003Committee@wsba.org. Meetings are generally held the second Wednesday of the month.

Upcoming meetings:

June 11 — Law Offices of Perkins Coie, 1201 3rd Ave., Ste. 4800, Seattle
July 9 — WSBA office
August 13 — WSBA office

"Random Acts of Professionalism" Program

The WSBA Professionalism Committee has created a new way for lawyers and judges to recognize their colleagues who have conducted themselves in a professional manner consistent with the Creed of Professionalism. Through the "Random Acts of Professionalism" program, lawyers and judges may nominate their colleagues to receive the award. Nominating a lawyer or judge for the award is very easy — simply send his or her name, along with a brief description of why you are nominating the person, to Judy Berrett, staff liaison to the Professionalism Committee, at judithb@wsba.org, or fax to 206-727-8319. That's all there is to it! The nominated person will receive a letter, a certificate and a copy of the WSBA Creed of Professionalism.

WSBA-CLE Creates "Litigator's Library" of Deskbooks

Attorneys litigating in Washington will want the two authoritative books on civil litigation and ethics from WSBA-CLE — the *Washington Civil Procedure Deskbook* (2d ed. 2002) and the *Washington Legal Ethics Deskbook* (due July 2003). Right now you can save nearly 15 percent by purchasing both of them. To order, go to the WSBA online store at http://store.yahoo.com/wsbastore/lili.html, or call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

King County Bar Association Annual Awards Dinner

This year's event will be held Thursday, June 26, at the Grand Hyatt Seattle, 721 Pine St. The reception will begin at 5:30 p.m., with dinner and program starting at 6:30 p.m. Jeffery P. Robinson, this year's winner of the Outstanding Lawyer Award, will be the guest speaker, and the program will include — in addition to recognitions of award recipients — a celebration of the recent IOLTA decision. Tickets are $75; to ensure particular seating assignments, reservations are required and must be paid for by June 23. For more information or to make a reservation, call 206-340-2574.

ABA's LAMP Standing Committee Assisting Military Reservists

As the fighting phase of the war in Iraq comes to an end and military reservists are being called back home, in addition to warm hugs and grateful tears, many will also find complex legal issues awaiting them. To assist the military's legal assistance network in meeting the needs of mobilized reservists, the American Bar Association is renewing its call for lawyers across the country to help provide free legal assistance to the men and women called to serve their country through Legal Assistance for Military Personnel (LAMP). "The lawyers of America are ready, willing and able to assist our men and women in uniform and their families during this challenging time," said ABA President Alfred P. Carlton Jr. For information on LAMP in your community, visit www.abanet.org/legalservices/lamp/home.html or call Robin Rone at 312-988-5106.

Lawyer-to-Lawyer Program Round Table

For program participants awaiting their one-on-one matches, there will be a Round Table Discussion on Monday, July 14, 2003, from 3:00 p.m.-5:00 p.m. at the WSBA office. The discussion offers an informal question-and-answer session and provides opportunity to network with senior members and peers. For more information, contact Allison Durazzi at allisond@wsba.org or 206-733-5914.

LOMAP . . . On the Road™ — Smart Strategies for Improving Efficiency

WSBA's Law Office Management Assistance Program (LOMAP) continues its annual traveling seminar series. Top-

FYInformation

ics include case-management software, client management, unbundled legal services, and a segment about transitions in lawyers' careers. The course offers 4.0 credits, including 2.0 ethics credits. Cost is $69. For more information, please see www.lomap.org, or contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Reference event code LOM0603.

LOMAP . . . On the Road™ will visit the following cities:

Silverdale — June 9 (Red Lion)
Oak Harbor — June 10 (Best Western Harbor Plaza)
Bellingham — June 11 (Hampton Inn)
Colville — June 16 (Comfort Inn)
Spokane — June 17 (Davenport Hotel)

Litigation Section Midyear at Lake Chelan, June 20-21

Join the WSBA Litigation Section at Campbell's Resort on Lake Chelan for "Honing Your Skills: Lessons from the Trials of the Century," featuring Todd Winegar. The program will include an ethics session and an evening reception. See actual trial film footage and re-creations; and hear transcripts of trials such as the Scopes "Monkey Trial," Leopold and Loeb, the Clinton impeachment, and OJ Simpson. Additional topics include lessons in cross-examination and argument, dealing with difficult witnesses, and borderline ethics. 7.5 CLE credits (includes 2.5 ethics credits). The cost is $250. To register, call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or visit www.wsba.org/cle/seminars. To reserve a room, call 800-553-8225 or 509-682-2561 and use group code WABR3.

Fulbright Scholar Grants Available for 2004-05

The Fulbright Scholar Program is offering a number of lecturing, research and lecturing/research awards in law for the 2004-05 academic year. Awards range from two months to an academic year. While many awards specify project and host institution, there are a 153 open "All Disciplines" awards that allow candidates to propose their own project and determine their host-institution affiliation. Foreign-language skills are needed in some countries, but most lecturing assignments are in English. The application deadline is August 1. For information, see www.cies.org, or contact the Council for International Exchange of Scholars, 3007 Tilden St. NW, Ste. 5L, Washington, DC 20008; 202-686-7877; e-mail apprequest@cies.iie.org.

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's annual business meeting (September 11, 6:00 p.m.; Bell Harbor International Conference Center, 2211 Alaskan Way, Pier 66, Seattle).

Resolutions must be filed with the WSBA executive director at least 90 days before the annual meeting (by 5:00 p.m. June 13, 2003), and must be accompanied by a written report explaining the resolution. The resolution and explanatory report together must not exceed a total of 1,000 words. Send resolutions to WSBA Executive Director, 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 (2101 Fourth Ave., Ste. 400, Seattle) to consider the views of proponents and opponents of resolutions. Proponents and opponents 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 2003 issue of *Bar News*, along with the date of the Resolutions Committee meeting and a list of committee members.

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

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. For detailed information, please see www.wsba.org/lawyers/groups/wyld. Letters of nomination should include the nominator's complete contact information, as well as a copy of the nominee's résumé or list of accomplishments. Nominations must be received by July 31, 2003, and should be sent to Lisa Harper, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; or lisak@wsba.org.

Filing-Fee Notice for CLE Sponsors

Effective July 1, 2003, all CLE sponsors will be required to pay a $50 filing fee. At the November 22, 2002, Mandatory Continuing Legal Education (MCLE) Board meeting, a motion was passed to increase a sponsor's filing fee for a Form 1 application for approval of MCLE credit to $50.

In addition, a motion was passed to increase the fee for the WSBA's processing of manually submitted CLE attendance to $3 per name, with advance notice to providers that fees will be raised effective July 1, 2003. The fee for electronically submitted attendance will remain at $1 per name.

This increase in fees will be subject to review to ensure that the generated income is sufficient to cover costs.

Web Site Links from Lawyer Directory

A link to your Web site can be added to your directory listing, so that current and potential clients can find out more about you and your practice at the click of a button.

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

Upcoming Board of Governors Meetings

June 6 — Wenatchee
July 25-26 — Bellingham
September 11-12 — Seattle

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 Donna Sato at 206-727-8244 or donnas@wsba.org. The complete BOG schedule is available on the WSBA Web site at www.wsba.org/info/bog/schedule.htm.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in June 2003 is 1.155 percent. The maximum allowable interest rate for June is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates for June 1988-June 1999 appear on page 53 of the June 1999 *Bar News*. Information from January 1987 to date is on the WSBA Web site at www.wsba.org/media/publications/barnews/usury.htm.

Online MCLE Credit-Tracking System

Using the online MCLE Credit-Tracking System, you can do the following:

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

To enter the MCLE Credit-Tracking System, go to the WSBA Web site at www.wsba.org and click "MCLE" in the left navigation bar. Alternatively, go to http://pro.wsba.org and click on the Member tab. Select "Member Login," and follow the onscreen instructions. If you have questions, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Keep in Touch

The WSBA uses e-mail to communicate with members quickly, efficiently and inexpensively, and increasingly it is becoming the preferred method of communication among committees and sections. Please consider providing us your e-mail address. Contact the WSBA Service Center at 800-945-WSBA, 206-443-WSBA or questions@wsba.org. Representatives are available Monday through Friday, 8:00 a.m. to 5:00 p.m.

Learn More about Case-Management Software

The WSBA Law Office Management Assistance Program (LOMAP) office maintains a computer for members to review software tools designed to maximize office efficiency. LOMAP staff are available to provide materials, answer questions and recommend options. To make an appointment, contact Pete Roberts at 206-727-8237 or peter@wsba.org.

Creed of Professionalism

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

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

Creed suitable for framing:
@ $4 each (includes shipping) $________

Creed mounted on a wooden plaque:
@ $20 each (includes shipping) $________

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

Total $________

❑ Check enclosed (payable to WSBA)

❑ MasterCard Visa

No. ________________

Exp. date ________________

Name as it appears on card:

____

Signature ________________

Please send to:

Member and Community Relations
Washington State Bar Association
2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330

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

Name ________________

Address ________________

City/State/ZIP ________________

WSBA office use only: 44200-COMM

date ________ check no. ________ amount ________

FYInformation

Blank & Associates PS

is pleased to announce that

C. Dean Little

has joined the firm as a principal.

Mr. Little will continue his practice in intellectual property and securities compliance litigation, and will enhance the firm's electronic discovery and technology law practice with over 34 years of experience in complex commercial litigation.

We are also pleased to announce that

Brent J. Hyer

has joined our firm as an associate.

Mr. Hyer is a recent graduate of the University of Washington School of Law.

Blank & Associates PS

Business Legal Counsel & Risk Management

Commercial & Intellectual Property Litigation

Electronic Discovery Services

Software Transactions & Piracy Enforcement

Technology Management

2001 Western Avenue, Suite 250
Seattle, Washington 98121
Telephone: 206-256-9699
Fax: 206-256-9899
www.digital-legal.com

Jim Johnson

announces his availability to serve as appellate counsel.

Over 100 Appellate Cases
U.S. Supreme Court; Washington State Supreme Court; the 8th, 9th and D.C. U.S. Courts of Appeals.

Appeals and Petitions for Certiorari or Review
Jim Johnson understands appeals and can increase your chances to be granted review and prevail on the merits.

Experience
20 years' assistant attorney general, chief of the Special Litigation Unit. In private practice Jim has focused on major litigation, appeals and constitutional issues.

James M. Johnson
Telephone: 360-357-3104
1110 S. Capitol Way, Ste. 225
Olympia, Washington 98501

The Johnson Law Group

is pleased to announce that

David A. Strickland

has become a member of the firm.

Mr. Strickland's practice emphasizes complex family law, civil litigation and business law.

The Johnson Law Group
430 Galland Building
1221 Second Avenue
Seattle, Washington 98101-2942
Telephone: 206-344-3085
Fax: 206-344-3087

O'Brien and Associates, Inc. PS

is pleased to announce that

Gerald Tuttle

has joined the firm as an associate.

After 35 years of practice, and closing the doors of the Tuttle and Gorham law firm, Jerry thought he would retire. That thought lasted about two months. Mr. Tuttle has joined our Issaquah firm. His practice will continue to emphasize estate-tax planning, wills, living trusts and probate issues.

John L. O'Brien, Lisa K. Barton, S. Russell Joe, Stuart W. Carson, David J. Wieck, Fred Hopkins, Nancy S. Whitten, Gerald G. Tuttle, Mary E. O'Brien*

O'Brien Professional Building
175 NE Gilman Blvd.
Issaquah, Washington 98027
Telephone: 425-391-7427
www.obrienlawfirm.net

*Also admitted to the Alaska Bar

The law firm of

Reed, Longyear, Malnati & Ahrens, PS

is pleased to announce that

Christina L. Corwin

has joined the firm.

Ms. Corwin will continue her practice in family law and related matters.

Attorneys
Douglas W. Ahrens
Christina L. Corwin
James A. Jackson
Michael J. Longyear
Michael C. Malnati
Fredric D. Reed
Cresey Stewart
Barbara A. West

Of Counsel
William L. Maltman
Michael T. Schein

Lawrence R. Hennings
(1899-1993)

1415 Norton Building, 801 Second Avenue
Seattle, Washington 98104
Telephone: 206-624-6271
www.rlmalaw.com

Reed McClure

welcome:

Nancy C. Elliott,

formerly of counsel for Keefe King & Bowman PS. She will continue defending health-care providers.

Keith M. Kubik,

former national director of litigation management for Fireman's Fund Insurance Company. He will focus his defense practice on complex personal-injury and construction-defect matters.

Catherine E. Kvistad,

who will focus her practice on appellate issues and general litigation.

Katina C. Thornock,

who will be working on the defense of first- and third-party claims.

Ms. Elliott and Mr. Kubik are principals.
Ms. Kvistad and Ms. Thornock are associates.

Two Union Square
601 Union Street, Suite 4901
Seattle, Washington 98101-3920

Scheer & Zehnder LLP

is pleased to announce the addition of their new associates

Benjamin C. Waggoner, Latife H. Neu and Nathan Furman.

Scheer & Zehnder LLP is a litigation firm focusing on construction, construction defect, property insurance, bad faith, subrogation, mold claims, professional and products liability, employment law and personal injury.

Scheer & Zehnder LLP
720 Olive Way, Suite 1605
Seattle, Washington 98101
Telephone: 206-262-1200
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Soha & Lang, PS

is pleased to announce that

Christine E. Dinsdale

has become a shareholder in the firm.

The firm is also pleased to announce that

Misty A. Edmundson

has joined the firm as an associate.

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Gavin M. Parr

has joined the firm as an Associate.

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Mr. Parr graduated from the University of Washington School of Law, with high honors, where he was elected to the *Order of the Coif* and was Notes & Comments Editor of the Washington Law Review. He served as judicial law clerk to Chief Justice Alexander of the Washington Supreme Court in 2000-2001. His undergraduate degree is from the University of Puget Sound, *cum laude* and *Phi Beta Kappa.*

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Yarmuth Wilsdon Calfo PLLC

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and

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and that

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BANKRUPTCY

The Lawyer's Toolbox: Nuts and Bolts for New Practitioners – Consumer Bankruptcy
June 4 – Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

BUSINESS LAW

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June 25 – Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

CONSTRUCTION LAW

Construction Law Midyear
June 20– Seattle. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

CRIMINAL LAW

The Lawyer's Toolbox: Nuts and Bolts for New Practitioners – Criminal Law
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ESTATE PLANNING

The Lawyer's Toolbox: Nuts and Bolts for New Practitioners – Estate Planning and Probate Practice
June 11 – Seattle. 2.5 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

FAMILY LAW

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Family Law Midyear
June 27-29 – Ocean Shores. 13.75 CLE credits, including 1.5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

GENERAL

Secured Transactions in Washington: Introducing the *Washington UCC Article 9 Deskbook*
June 13 – Seattle. 6.5 credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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June 18 – Seattle. 3.5 CLE credits, including 1.5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Computer Camp I and II
July 10 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Computer Camp III and IV
July 17 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Foreclosures
July 24 – Seattle; July 31 – Vancouver. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

WDTL Annual Meeting & Convention
July 24-27 – Coeur d'Alene. 6 CLE credits, including 1 ethics. By WDTL; 206-749-0319.

LAW OFFICE MANAGEMENT

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June 9, Silverdale; June 10, Oak Harbor; June 11, Bellingham; June 16, Colville; June 17, Spokane. 4 CLE credits, including 2 ethics. By WSBA Law Office Management Assistance Program; 800-945-WSBA or 206-443-WSBA.

Making the Ascent: Annual Solo and Small-Firm Success Training
June 20 – Seattle. 4.5 CLE credits, including 1.75 ethics. By KCBA; 206-382-1270.

LITIGATION

The Lawyer's Toolbox: Nuts and Bolts for New Practitioners – Civil Litigation
June 11 – Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Nuts and Bolts of the PI Practice
June 12 – Seattle. 5.25 CLE credits, including .5 ethics. By WSTLA; 206-464-1011.

Litigation Midyear Seminar
June 20-21 – Seattle. 7.5 CLE credits, including 2.5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

How to Master the Fundamentals of Effective Trial Practice
July 10 – SeaTac. 6.5 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

WSTLA 2003 Annual Convention
July 24-27 – Sun River, OR. 10.5 CLE credits, including 2 ethics. By WSTLA; 206-464-1011.

REAL ESTATE

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June 4 – Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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RPPT Section Midyear
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Counsel for appellant in *Marriage of Lawrence*, 105 Wn. App. 683, 20 P.3d 972 (2001)

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

Passed CPA exam in 1982

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Lake Chelan home for rent: Bring your boat, the kids, and get ready for unbeatable family fun in the sun! Beautifully furnished home sleeps 10 with three bedrooms including loft/family room; two large, full baths; full kitchen; deck. Lake access via Chelan Shores boat ramp, Beach Club (adjacent to Chelan Shores) and the Willows (one mile north). Not available for July 4th week. Weekly rates. 253-945-7238.

Maui: Deluxe one-bedroom beachfront condo in West Maui. Sleeps four. Pool, tennis, workout room, daily maid service. $130-150/night. Call 206-728-7799, ext. 105, or e-mail sfriedmanlaw@aol.com.

"— but enough about me. What do *you* think of me?"

by Lindsay Thompson
Bar News Editor

The essayist is a self-liberated man, sustained by the childish belief that everything he thinks about, everything that happens to him, is of general interest. He is a fellow who thoroughly enjoys his work, just as people who take bird walks enjoy theirs. Each excursion of the essayist, each new "attempt," differs from the last and takes him into new country. This delights him. Only a person who is congenitally self-centered has the effronteryand the stamina to write essays.

There are as many kinds of essays as there are human attitudes or poses, as many essay flavors as there are Howard Johnson ice creams. The essayist arises in the morning and, if he has work to do, selects his garb from an unusually extensive wardrobe: he can pull on any sort of shirt, be any sort of person — philosopher, scold, jester, raconteur, confidant, pundit, devil's advocate, enthusiast.

— E.B. White, *The Essays of E.B. White* (1978)

Actor Charles Grodin tells of filming a movie in an English country house. Between takes he found himself in an adjoining room that was not part of the shot. The owner, passing, focused a steely gaze on Grodin and, with exquisite politeness, said, "It would be so nice if you weren't here."

A WSBA member, reading my April column, thought enough of it to tear it out and send it to me with the same suggestion. Well, actually, his comment was a little less polite: "What a lot of crap."

I wrote back to explain why I write these back-page digressions, citing E.B. White. He graciously replied that on rethinking, it wasn't all crap but maybe, as I'd written of opera, I'd passed several good places to stop.

So why an editor's page?

Simply put, it comes with the job. There's been an editor's page since 1947 (lawyers love tradition). Alert readers of A Certain Age will rightly point out that I can undercut that argument (it's always been that way) by my own conduct. I was entitled to a column in my last turn as editor and splashily announced, in my first issue, I wasn't going to write one every month. I think I wrote five or six in eight years. But as one of our members — Congressman George Nethercutt — once noted, things change. I decided this time around I'd give it a try.

An editor's page is a busman's holiday, a chance to actually write something after a month's worth of consulting with authors about the placement of semicolons, following the Board of Governors around the state and taking down their every word to spin into a digestible narrative explaining what they do and why, and juggling all the other balls that have to fall into place just so to produce an issue.

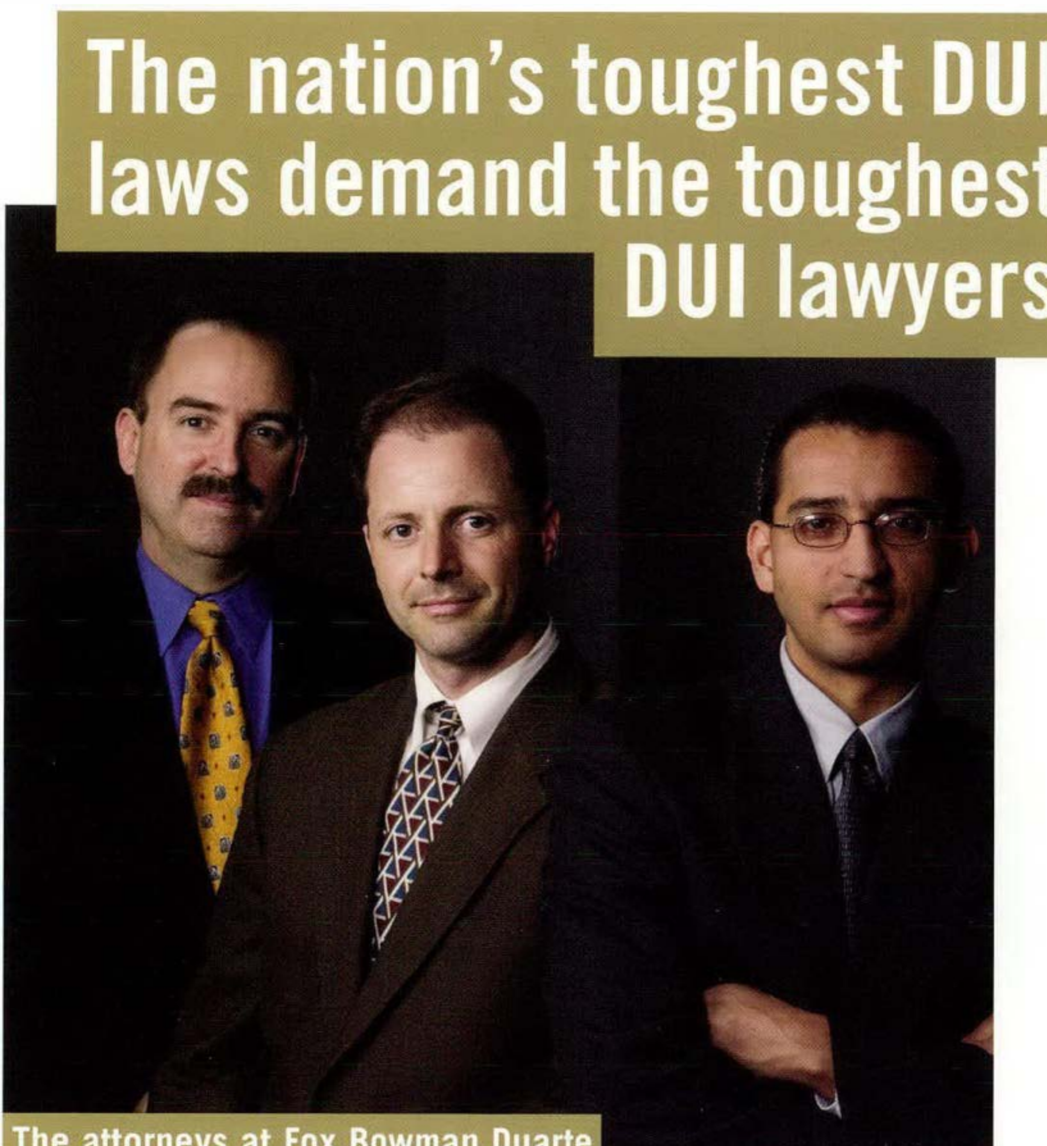
I moved the editor's page from the front of the book — where Official Pronouncements get made by Bar leadership — to the last page, where I can write about less official things. I've had my little turn as a Bar leader. It's more fun being the poacher than the gamekeeper.

Too many lawyers define themselves *as* lawyers, a state of existence different from being people. They remind me of Sam the Eagle on *The Muppet Show*, fussing about all the show's comedy skits being boring, inappropriate or incomprehensible (I guess that makes me Kermit the Harried Producer; readers, you get to be Statler and Waldorf).

It's too easy to get ground down by work, by the perfection it demands and the constant criticism (self-generated and other-generated) — not to mention the morbid urge to find fault with others — it evokes. Another reader, so vexed by an article she decided the entire magazine, editor and management were so incompetent as to warrant never reading the magazine again, received my usual "here's why we did whatever it was we did, we meant well, really" response, and then gave me the entire lecture again, slightly condensed.

More lawyers need to relax, to retrieve — or start building — some shoot-the-breeze time with colleagues into their routines. One of my Cowlitz County colleagues in the early 90s used to call my office after we had finished trials together. When I came back from court at day's end, there'd always be a slip in my box that he'd called to discuss *State v. Miller*. I'd walk from the Cowlitz County Courthouse to the Bridgebender Tavern next door, where I'd find him sitting at a table with a pitcher of Miller and two glasses, ready to talk about the case we'd just tried.

Sometimes this column will nudge ideas like that, and other suggestions on the pursuit of happiness, forward. If these essays seem too much to fit Dr. Johnson's definition of the term ("a loose sally of the mind; an irregular undigested piece"), it's deliberate. We ought to have a little fun in this magazine. Think of this column as a chat among friends at the end of the day.



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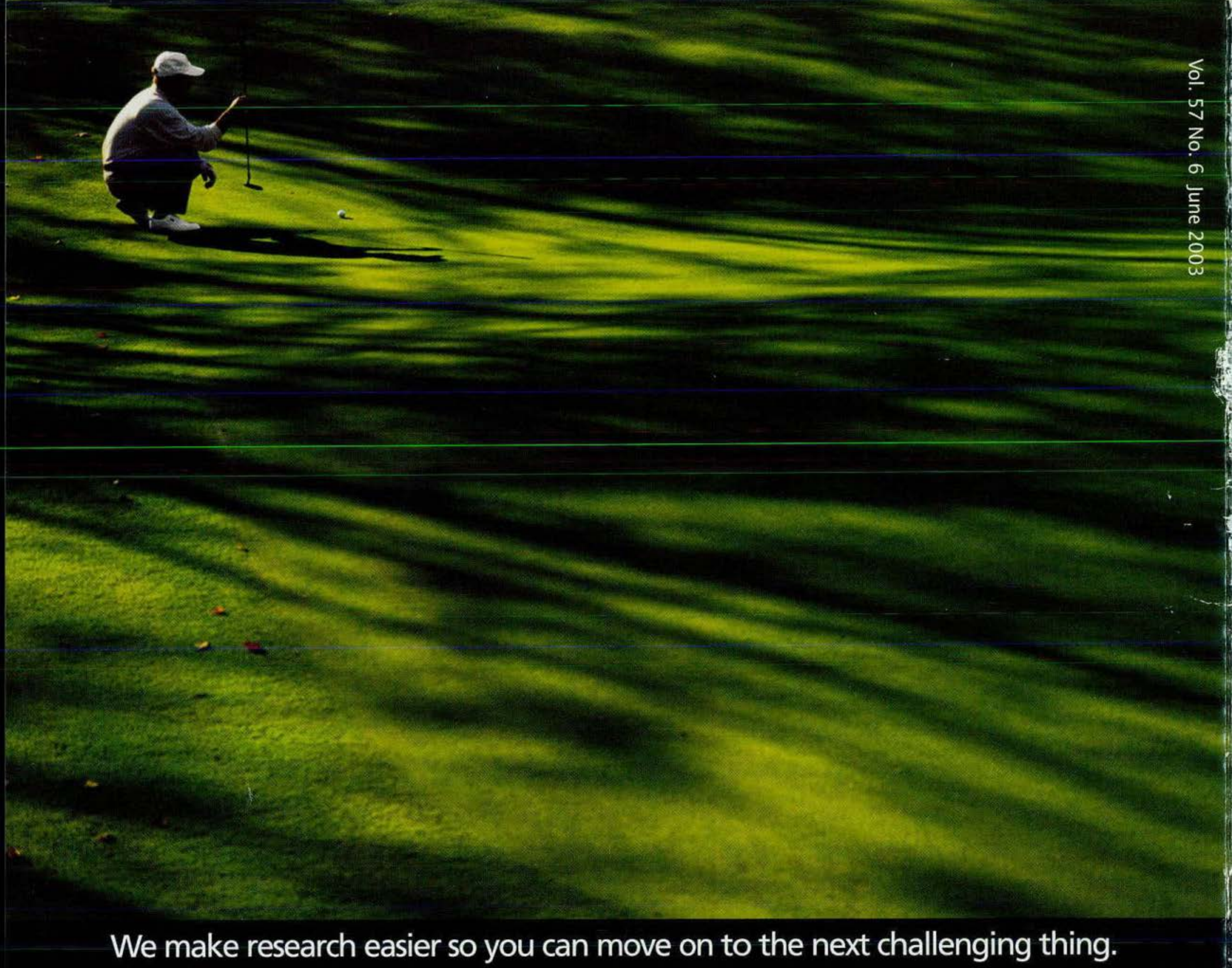

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