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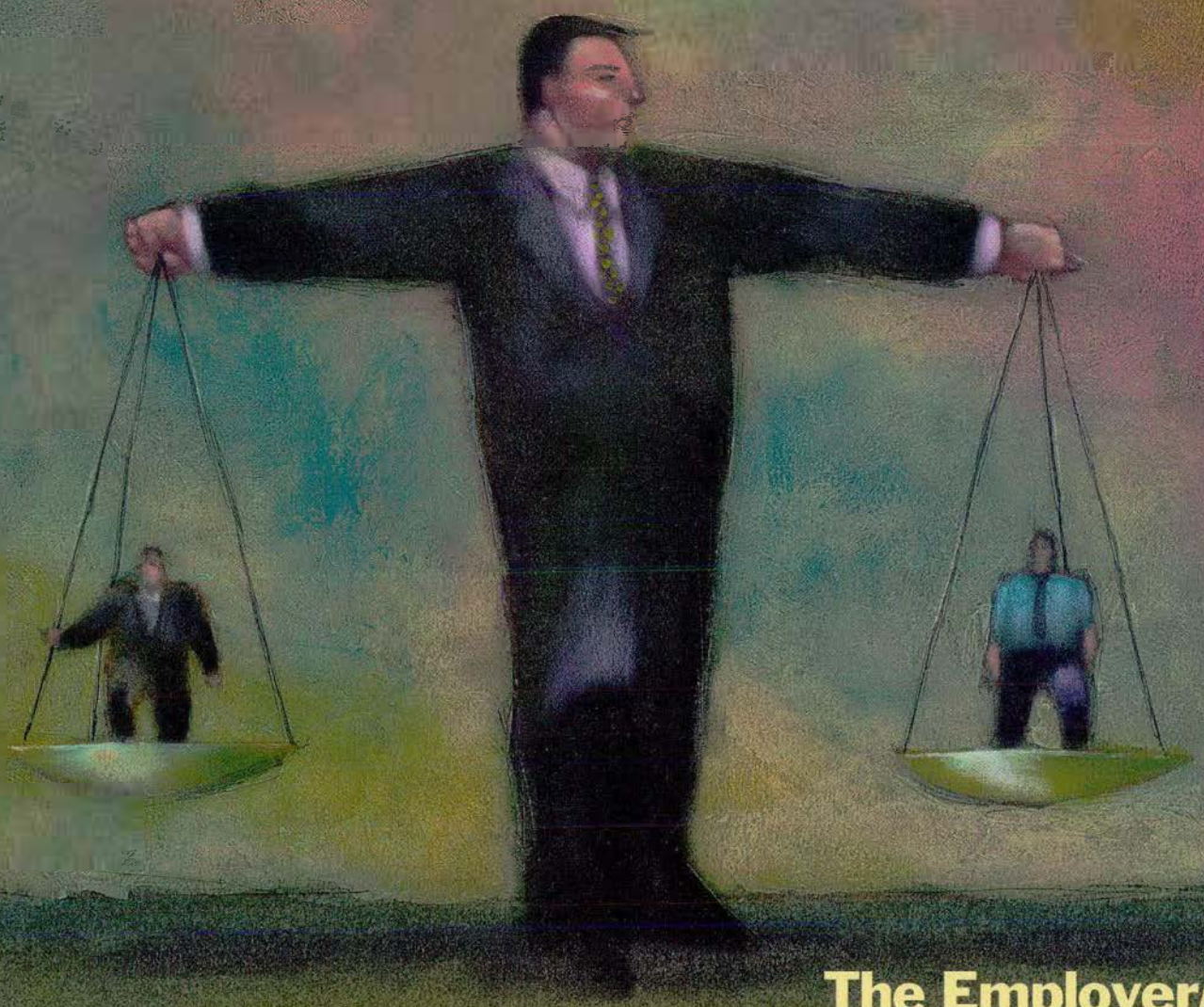

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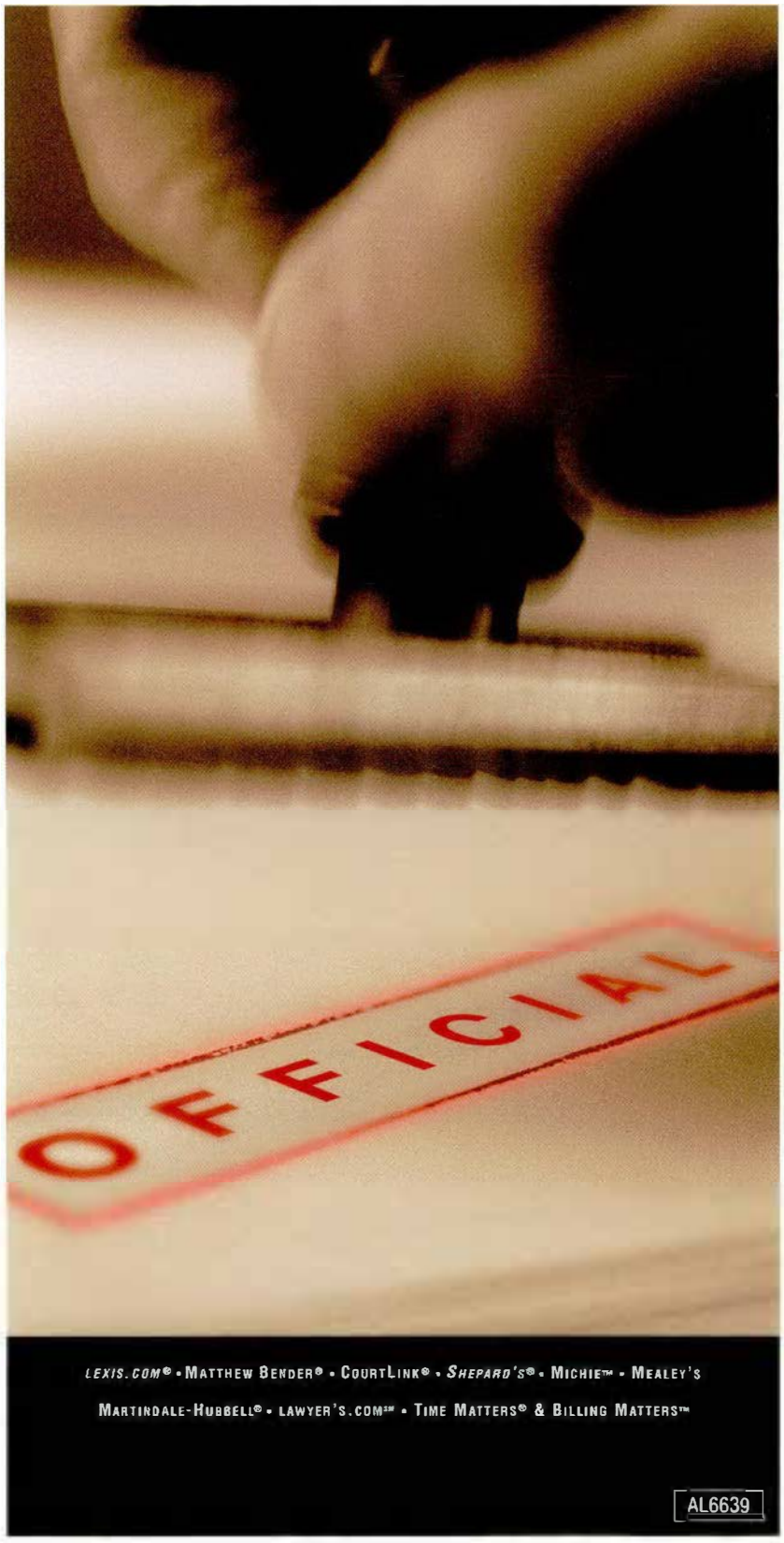

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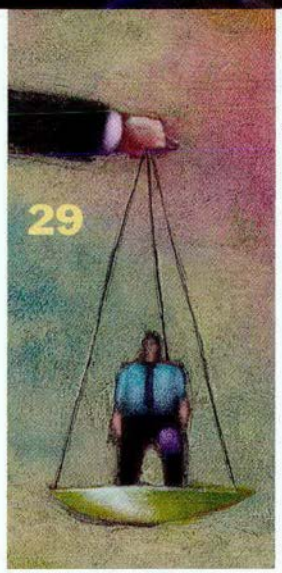
November 2004



FEATURES

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JoAnne L. Tompkins, former Washington Court of Appeals Commissioner;

Larry A. Jordan, former King County Superior Court Judge;

R. Joseph Wesley, former King County Superior Court Judge.

(not pictured)

Correcting the record

Thank you for clarifying that the late Judge Bill Lewis was not a founding member nor associated with the firm of Lee, Smart, etc. (Letters, September 2004). For those of us who practiced before Judge Lewis, we remember him as a kind, fair and no-nonsense judge who "usually always" came to the right conclusions. This gives me a chance to say publicly how much he is missed. It was an honor to be in his courtroom.

Douglas J. Smith
Judge, King County District Court
Shoreline

Wave goodbye to attorney-client privilege?

I appreciate the thoughtful presentation of divergent views on governmental attorney-client privilege in the September issue's discussion of the *Hangartner* case (*Bar News*, August 2004). My own position is similar to the one that Bernie Friedman eloquently argued in his article.

It should be pointed out that both governments and the news media have internal conflicting interests. Obviously both open government and a free press is key to our type of democracy. But the media are businesses, and they have self-interest in full access to titillating material for entertaining stories. And, while government serves the people, governments have institutional interests against full disclosure in all circumstances.

The unanswered questions Mr. Friedman raises at the end of his piece are the most interesting: who owns the public's attorney-client privilege? How long does that privilege last? How do we ensure that the privilege is not used to reduce accountability? My view is that ultimately the legislative authority has the right to waive attorney-client privilege. The legislative authority can be the Legislature or the People through the initiative.

But waiving a government's attorney-client privilege across the board would be remarkably stupid. It would be like telling the Armed Forces that they must publish battle plans at least 48 hours ahead of any action, in the interest of public disclosure and media access.

We should not destroy the ability of elected and appointed officials to consult confidentially with their attorneys. That would cost the taxpayers a great deal of money because it would give a huge competitive advantage to the private sector in transactions and to opposing counsel in litigation. Although Washingtonians are very committed to open government, we establish governments as institutions — as governmental corporations; in order to work most effectively they must be allowed to function as legal persons (including maintaining the ability to consult with legal counsel).

Hugh Spitzer
Seattle

From the Department of Redundancy Department

I enjoyed Robert Cumbow's article

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"Commonest Errors in Contract Drafting" (*Bar News*, August 2004), but I must disagree with his thoughts on using "including without limitation" or similar language.

Under the doctrine of *ejusdem generis*, a list of particulars after the word "including" confines the general language to things similar to the list of particulars. *See, e.g., West v. Umialik Ins. Co.*, 8 P.3d 1135, 1141 (Alaska 2000); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 419 n.24 (Alaska 1982); *Lombardo v. Pierson*, 121 Wn.2d 577, 583 n.4, 852 P.2d 308, 312 n.4 and accompanying text (1993), (citing *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244, 74 A.L.R. 3d 378 (1972)).

By using "including without limitation," "including but not limited to," "the following are merely illustrative but not limiting," or similar language, drafters are instructing the courts not to apply the doctrine but to look at the general term — not merely items similar to those found in the list — if the particular item at issue is not listed. Thus, the use of this language is not redundant, but a useful direction to those who interpret the contract.

Marc Bond
Anchorage, AK

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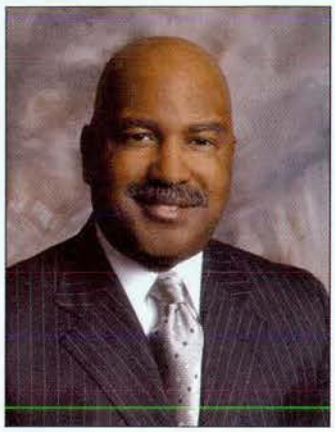

Democracy by the Dozen

Better Juries Mean Better Justice: Our Duty to Protect the American Jury System

by Ron Ward, WSBA President

One of the most unfortunate contemporary phenomena in the administration of the law has been the *apparent* growing aversion by citizens to jury service. Courts around the country report serious problems with low response rates to jury summonses. This is an ominous development for our justice system, and it constitutes something of an irony. A new public opinion poll (www.abanews.org/releases/juryreport.pdf) recently released by the American Bar Association (ABA) reveals that Americans have a profound belief and trust in the jury system, and dispels the popular notion that the citizenry consider jury duty to be a burden to be avoided.

Three-quarters (75 percent) of those polled rejected the assertion that jury duty is a burden to be avoided. Instead, the poll revealed that Americans strongly believe that jury service is important even if it seems inconvenient — a belief held even more strongly by those who have previously been called to jury duty. And even beyond "important," 58 percent consider jury duty a privilege and a responsibility they look forward to fulfilling. Moreover, a large majority of Americans — 75 percent — would want a jury, rather than a judge, to decide their case if they were ever a participant in a trial.

Robert Grey, the current president of the ABA, has made the American jury system the central thrust of his tenure. It is a theme we would do well to adopt here in Washington state.

The American jury is a cornerstone of democracy. It is a fundamental part of our system and our government. It is the best adjudicative system in the world. Juries evolved as impartial arbiters of our disputes and as our alternative to dueling. The system is one of the most tested, tried, and true mechanisms we have in democracy — for every issue from determining the appropriate measure of damages in a civil action, to matters of life and death in a criminal case. Actions of juries have resulted in safer products, reductions in pollution, and better medical management. We properly and appropriately entrust juries with responsibilities of this gravity, and the jury system has stood this country in splendid stead since its inception. Serving on a jury is the closest active relationship to government that most people experience. Jury service is one of the highest callings of a citizen — yet the sheer inconvenience and incredible lack of amenities involved with serving cause people to want to get out of their service. **We must change that.**

The Legal Profession as the Jury's Advocate

The legal profession must be the jury's advocate and lead on this issue. We are in an era of jury demonizing flowing from many quarters. A multitude of special interests, both national and local, has coalesced in a systematic program to criticize and tear the jury system down. We entrust a group of 12 lay persons with responsibility for making the ultimate determination of life and death in a criminal matter, and yet it is asserted that these same 12 people are incapable of arriving at a sound decision with regard to what is the appropriate measure of damages in a civil injury or negligence cause of action. That's not exactly logical to a profession that prides itself on its logic. We need to meet this unwarranted criticism by taking overt steps to celebrate the institution and to build it up. The central message we must send is that better juries mean better justice. Serving on a jury is an honor and every citizen's responsibility. However, the needs of jurors must be met, and their work deserves the same respect as that of judges and lawyers.

Creating the Proper Environment

In meeting the needs of persons who serve as jurors, we must create the proper environment. Robert Grey has stated: "If we are to sustain Americans' respect for the jury system, the legal profession must take steps to move the jury experience into the 21st century." We need to educate employers on the importance of making jury service possible. We must provide parking spaces, business centers, childcare centers, and, most importantly, appropriate jury fee compensation. Jury fees have not essentially changed since Eisenhower was president in the 1950s. For jury service — one of the highest callings in our system — virtually all counties pay a juror fee of only $10 per day. In com-

parison, poll watchers in many counties are paid the hourly minimum wage. This can work out to $60-75 per day. Jury fees are a pittance in comparison — equivalent to financial cruel and unusual punishment. For many people, jury service is something they simply cannot afford to do without real and substantial hardship. Jury fees must be increased.

Providing the Proper Tools for Effective Jury Service

Jurors must have the same opportunity, tools, and participation in the process that advocates do. Jurors do their best work when they are able to ask questions, take notes, examine documents, and review evidence and testimony before making decisions. Many Washington courtrooms have adopted these tools, and the justice system has been the positive beneficiary. These measures need to be standardized and formalized in the Washington court system. Washington Courts has an informative and inspiring website about jury duty at www.courts.wa.gov/newsinfo/resources that would benefit any citizen who has been summoned for jury service.

Recent Legislative Activity in Washington State

In the most recent session of the Washington Legislature, two bills were introduced in the 2004 regular session. The bills sought to reduce the burdens of jury service and increase participation in the jury system. Both amended RCW 2.36.010 to address length and terms of jury service; postponement of participation and excuses from service; and creation of a lengthy-trial fund with a $20 civil filing fee surcharge to pay for it — with exemptions for *pro se* litigants, government lawyers, certain government benefits cases, and child-custody and support cases. The bills provided that in trials of more than 10 days' duration, jurors might apply for reimbursement of lost wages of up to $300 per day. Employers were prohibited from requiring employees to use sick or vacation leave for time spent in jury service. The bills were controversial, particularly with regard to the funding considerations, and they died. The current official interim (between sessions) legislative work plan doesn't list the jury bill. There do not, at this time, appear to be any plans to commence committee work or reintroduce the bills in the next session. Arizona enacted a similar version of this bill in 2002 with the support of the judiciary.

What We Can Do

The legal profession in Washington might explore some of the following possible initiatives: 1) undertake a public advocacy campaign for the jury system; 2) make Law Day 2005 "A Celebration of the Jury System"; 3) make best practices, research data, surveys, etc., on the jury system more easily available; 4) create a forum for judges from across the state to easily share experiences and attitudes on jury issues; 5) speak to judges and court administration groups around the state on the issues; 6) support lobbying and advocacy for legislation needed to enhance the jury system; 7) participate in the development of a turn-key education curriculum on the jury system, mock trials for students to learn about the jury system, and programs to bring students into the courtroom; and 8) participate in programs to educate employers and business leaders about the importance of the jury system and their support for jury service.

Thomas Jefferson said: "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[1] Juries are the foundation that buttresses and sustains the importance of the rule of law in a democratic society. We must do everything we can to preserve and enhance the institution for our generations to come.

The question is not whether we can; it is whether we will. We can and we will, because, working together, there is nothing we cannot change for the better.

Ron Ward may be reached at rrw@admiralty.com or 206-624-8844.

NOTES

[1] Thomas Jefferson to Thomas Paine, 1789. ME 7:408, Papers 15:269.

Bar Year 2004-2005: A Preview

by Jan Michels, WSBA Executive Director

The WSBA's fiscal and governance Bar Year (BY) begins October 1, 2004, and runs through September 30, 2005. During the year, the Board of Governors will meet nine times as countless committees, task forces, work groups, and sections develop recommendations for Board consideration. Each new year is governed by a combination of factors — some ongoing, others predictable startup factors, some new and some leftover-from-last-year pressing issues, and finally the new goals of the president and governors. This preview is meant to give you a glimpse of what the WSBA targets for this new year.

Ongoing core activities

The WSBA's core activities are defined by General Rule 12 and include the day-to-day work of the regulation of the practice of law, which includes admissions; licensing; discipline; mandatory legal education compliance; the provision of lawyer services to members such as the Lawyers' Assistance Program (LAP), the Law Office Management Assistance Program (LOMAP), and the Ethics call line; continuing legal education; media relations; publications; and the administration of the Bar's 120 staff and $15.8 million budget. These core functions consume the majority of the WSBA's resources and cannot be compromised or curtailed.

Predictable startup

Predictable is not to say mundane or taken for granted. Each BY starts with a new year's enthusiasm and energy. Committees begin their work, and new task forces and work groups have their inaugural meetings. Staff revise the Bar-leader contact lists, lay out schedules for the year, and update the website and other reference materials. Section renewal notices are sent out in October, and new section leadership kicks in (though not all section-leadership change follows the WSBA BY). The new president and I start our "dance" together and with the Board. I use the word "dance" here with the meaning of "to move together in rhythm," since the cooperative, rhythmic working of the Bar leaders together is what creates a successful and productive year for the WSBA.

2004-2005 issues

Often a new BY is driven by issues and influences beyond the Board's direct control. The times, political climate, members' concerns, or interest groups can all surface issues to the WSBA. The following list highlights some of the significant issues for BY 2004-2005.

1. Promoting diversity.
   - Implement the WSBA Leadership Institute.
   - Initiate the work of the new diversity advocate.
   - Support the Initiative for Diversity commitments project.

2. Protecting "Justice in Jeopardy."
   - Co-sponsor with the Board for Judicial Administration (BJA) measures to secure adequate funding for the courts.
   - Co-sponsor with the BJA and State Office of Public Defense improvement of defense services and adequate funding of indigent defense.
   - Support measures toward funding civil equal justice services.

3. Setting license fees for 2007 and beyond.

4. Planning the 2007 WSBA office move.

5. Sponsoring the WSBA Committee on Public Defense to implement the recommendations of the 2003-2004 WSBA Blue Ribbon Panel on Criminal Defense.

6. Implementing the recommendations of the Professional Development Implementation Committee for four hours of pre-admission skills training, and other new-lawyer skills training and client-relationship mentoring requirements.

7. Lobbying the WSBA's and sections' legislative proposals, and responding to other legislative issues.

8. Reviewing the Appellate/RALJ rules, based on the recommendations of the Court Rules and Procedures Committee.

9. Reviewing and revising the WSBA's committee-appointment process.

10. Strengthening the Limited Practice Board and the accountability of limited practice officers for real estate closings.

11. Implementing electronic legal research as a member benefit.

New Board and president direction

The Board's Long-range Planning Committee develops an operational plan for the coming year, which is linked to the Budget and Audit

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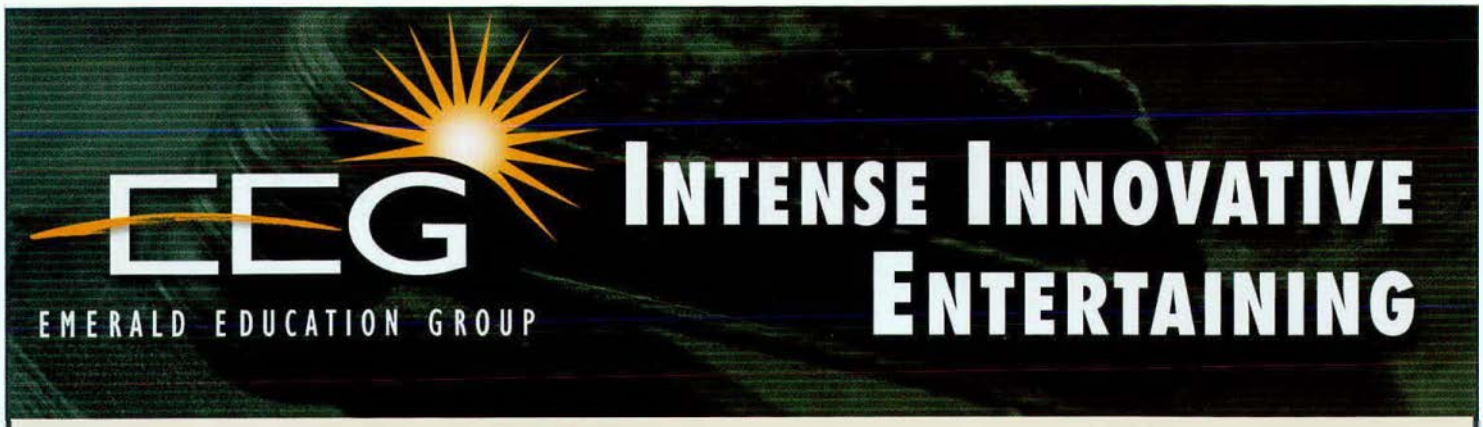
Total Free Distribution	95	100
Total Distribution	26,948	27,277
Copies Not Distributed	90	75
Total	27,038	27,352
Percent Paid and/or Requested Circulation	100	100

Committee's projected budget. The combination of these two efforts sets the direction and ensures the resources for the year's work. President Ron Ward detailed his focus and hopes for the year in his October *Bar News* column. This year, we will focus on the work lawyers do to protect rights and our democracy, taking full advantage of the richness of the diversity that surrounds us, and the professional obligations of lawyers. These noble goals are built into the Board's fiscal and operational plans.

Conclusion — We can and will do it!

Some see the WSBA as a huge ship whose direction is not easily redirected or whose course is not easily changed. Working with the many wonderful volunteer leaders who captain this ship, we are setting off for this year's focused work on diversity, leadership development, and new-lawyer skills training. We have the resources to fit the core work, ongoing and new issues, and new vision together into one manageable whole — **and we look forward to it.**

2004-2005 promises to be a great year!



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- **Dec. 10th: Communication in the Courtroom featuring comedian Carl Grant**
- **Dec. 15th: Yellow Flags & Red Herrings For The Generalist (Part II):** Just Enough Consumer Bankruptcy, UCC, Intellectual Property & Real Estate Law To Help You Spot Key Issues and Avoid Malpractice
- **Dec. 16th: A Day With Judge Coughenour:** A Pre-Trial Litigation Skills & Strategy Institute (including 2.0 Ethics hours: "Pit Bull Ethics")
- **Dec. 17th: American College of Trial Lawyers' Greatest Hits**
- **Dec. 20th: Tegland's Evidence & Procedure Update 2004** (morning)
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The Top 10 Reasons for Adopting the New Uniform Mediation Act in Washington

BY ALAN KIRTLEY

The Genesis of the Uniform Mediation Act

Over the last 30 years the use of mediation has become prevalent in Washington and elsewhere. In many contexts, mediation has proven to be a faster, less expensive, less adversarial, and more confidential means of resolving disputes than the courts. Confidentiality is integral to successful mediation. It allows parties to engage in candid negotiations without fear that their words will be repeated later in court.

Jurisdictions around the country have enacted mediation-privilege statutes to legally ensure confidentiality, thus promoting and supporting mediation. Washington's first mediation privilege was adopted for mediations conducted by community dispute resolution centers (DRCs)[1] in 1984. Then, in 1989, confidentiality for divorce mediations was added.[2] Finally, an all-purpose statute ("general statute") was drafted by the WSBA's ADR Section and became law in 1991.[3] In Washington and elsewhere, these efforts produced an array of statutes, some with provisions that were inadequate, ambiguous, or conflicting.[4]

By adopting the UMA, Washington contributes to the national effort to create a uniform mediation privilege for all the states.

The need for a uniform, state-of-the-art mediation privilege became increasingly apparent as the field of mediation matured. In 1997, a blue-ribbon committee was formed to draft such a provision. Members were drawn from the National Conference of Commissioners for Uniform State Laws (NCCUSL) (which gave us the UCC and many other uniform acts) and from the American Bar Association's Dispute Resolution Section. The committee invited representatives from a broad base of mediation organizations, bar associations, government offices, and the academy of legal scholars who are expert in mediation-privilege issues to attend drafting meetings and comment on drafts. In 2001, after four years of work, the Uniform Mediation Act (UMA)[5]

emerged from the committee, and was endorsed that same year by NCCUSL (later amended in 2003) and by the ABA in 2002.

Nebraska and Illinois have adopted the UMA, and the model statute has been introduced in seven other state legislatures.[6] In Washington, a committee formed by the WSBA's ADR Section has studied the UMA, gathered comments from diverse constituencies, and in August 2004 issued a report recommending that the UMA, with appropriate changes, be made law in Washington.[7]

It is likely the UMA will be considered by our Legislature as soon as the 2005 session. Here are what I see as the top 10 reasons for adopting the new Uniform Mediation Act in Washington:

1. Establishes inter- and intra-state uniformity.

The obvious first benefit of the UMA is its promise for the creation of a uniform, predictable mediation privilege for Washington and throughout the country. For those involved in disputes crossing state lines, the variation in the scope, content, and operation of state mediation-privilege statutes generates confusion and uncertainty. Under some circumstances it is virtually impossible to reliably assess, at the time of the mediation, which state privilege will apply if the case fails to settle; for example, a dispute arising from an Idaho construction project involving entities from Washington, California, New York, and Florida that is mediated in Chicago, or via conference call. Similar problems of prediction exist for parties entering contracts to mediate future disputes, and disputes mediated on the Internet. In each of these cases, a mediation party expecting confidentiality may find that the eventual forum state has no privilege statute, requires specific action (not done) or written language (not included) to trigger the privilege statute, or offers vastly more limited protection than elsewhere. By adopting the UMA, Washington contributes to the national effort to create a uniform mediation privilege for all the states.

More importantly, the UMA will bring uniformity within Washington itself. Uncertainty of application remains a concern within Washington, due to the existence of multiple confidentiality provisions. For example, which statute will apply following an unsuccessful divorce mediation referred by a DRC to a lawyer/mediator whose form agreement to mediate references the general privilege statute — the divorce, DRC, or general-privilege statute? The answer is significant, as each of these statutes contains its own triggering mechanisms, scope, and holder status.

A uniform privilege will add certainty and simplicity, and will end needless confusion in Washington law. Regardless of the type of case, all mediation participants and providers in Washington will look to a standard privilege. As the field expands, new statutes providing for mediation will need only to incorporate the uniform privilege by reference.

In addition to the significant benefits of uniformity, the UMA will strengthen the substance of many facets of this state's mediation privilege. Reasons 2-10 below highlight the improvements the UMA will bring about.

2. Broadens the scope of the mediation privilege.

Ideally, a privilege statute covers media-

tions in which confidentiality is intended by the participants, the mediation is conducted by a qualified mediator, and the privilege is justified as a matter of public policy. It is extremely difficult to craft a mediation privilege with the appropriate scope, since the process is used in such a wide variety of disputes: international conflict; commercial, personal injury, workplace, and family disputes; peace-making efforts in neighborhoods and at accident scenes; and even playground conflicts. The challenge for drafters is devising a privilege that is not over- or under-inclusive.

The UMA strikes the correct balance by extending the privilege:

- When parties are required to mediate by statute, court, administrative agency, or arbitrator;
- When parties and the mediator agree to mediate in a writing demonstrating an expectation of confidentiality; or
- When the parties use a person or an organization that provides mediation services.[8]

The scope of the current Washington statute is far narrower, extending only to mediations:

- When there is a court order to mediate;
- When the parties agree to mediate in writing; or
- Where the dispute involves a healthcare malpractice claim.[9]

Mandatory mediation is becoming more prevalent. The UMA will improve Washington law by protecting parties required to mediate not only by courts, but also by statute, administrative agencies, and arbitrators. These changes take into account the broader context in which mediation is now used.

3. Eliminates triggering pitfalls of the current statute.

The more inclusive scope of the UMA will also eliminate a pitfall for those mediating in Washington who fail or choose not to sign an agreement to mediate. Washington's general-privilege statute is invoked by the parties signing an agreement to mediate in the vast majority of cases. However, if ill-informed parties fail to sign an agreement to mediate, their legitimate mediation communications will not be privileged. The UMA will protect communications, even if there is no written agreement, so long as the parties mediate with a recognized mediator.[10]

Related problems arise under current law with regard to pre-session communication. During this preliminary phase, the party and the mediator or her staff routinely converse, correspond, and record information that relates to the substance of the dispute to be mediated. Candor and confidentiality are as important for these communications as those occurring in a mediation session. However, the agreement to mediate is generally not signed until the first session. If a party decides against mediation before signing the agreement to mediate, there are serious questions in Washington as to whether pre-session communications are privileged. The broader scope of the UMA resolves this issue as well if the parties are using a recognized mediation provider.[11]

4. Clarifies the time frame for privileged activities.

There often remains a question as to

which portions of the mediation are protected even when parties successfully invoke the general privilege. The current Washington statute covers the "mediation proceeding."[12] While the use of "mediation proceeding" may have been intended to protect communication during any phase of the mediation process, a court may interpret "proceeding" as narrowly as referring only to those communications occurring when the parties were actually in session.

At issue are communications that occur while convening the mediation (inquiries regarding services, staff-intake interviews and pre-session individual caucuses with the mediator), between sessions, and after the last session when a mediator may be attempting to bring about, resurrect, or finalize a settlement. The UMA eliminates the present uncertainty by encompassing all communication "that occurs during a mediation or is made for the purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."[13]

5. Extends to more subsequent proceedings.

To promote candor, the mediation privilege, once invoked, must be operative in all types of subsequent adjudicatory proceedings. The Washington state general statute bars disclosure "in any judicial or administrative proceeding."[14] In creating an inclusive privilege for all civil, criminal, and administrative proceedings, the Washington statute was forward thinking for the time. The UMA goes one step further with the addition of "arbitral" and "legislative hearing[s] or similar process[es]."[15] Arbitrators are decision-makers and, as with judges, should not be permitted to consider previous mediation settlement discussions. The UMA also leaves no doubt that the mediation privilege extends to the subsequent proceeding's "related pre-hearing and post-hearing motions, conferences, and discovery."[16]

Subsequent proceedings in criminal cases were particularly controversial for the UMA drafting committee. Committee members were of two views. There were those who wanted the UMA's privilege to be an absolute bar in all criminal cases, as with current Washington law. Others believed that the interests of justice, particularly in felony cases, are too great to exclude mediation communications. The resulting compromise is a qualified privilege for criminal cases.

Under the UMA, mediation communications may be admitted in a subsequent criminal case only if the following conditions are met: The proponent of the evidence, in an in-camera hearing, must convince the court that the evidence is not otherwise available, and that the need for the evidence "substantially outweighs the interest in protecting confidentiality."[17]

Our Legislature should reject optional language offered in the UMA to also admit mediation communications in misdemeanors. With the lower stakes in misdemeanor offenses, the public interest weighs on the side of promoting settlements through mediation over the need to access mediation communications. Moreover, in misdemeanor (and felony) cases, the courts under the UMA will already have access to threats or statements evidencing abuse made in mediation.[18]

6. Establishes a privilege for non-party participants.

Whom should the mediation privilege protect? A variety of people may attend a mediation besides the individuals in dispute and the mediators: attorneys, consultants and experts, family members and other "support persons," interpreters, and mediation trainees and observers. Mediation sessions routinely open with the mediator urging all present to be candid, and assuring the confidentiality of their communications. In fact, Washington's and most other mediation privilege statutes protect only the disputing parties and the mediator. For others, participating in mediation can be risky business.

Particularly at risk are professional non-party participants, such as architects, attorneys, real estate agents, financial advisors, and accountants attending as consultants. For example, in a mediation between a builder and property owner, what protection will be given to the owner's architect who casually states that "maybe we could have called for a little more steel there"? Under existing Washington law, the architect would have no power to block her admission in the subsequent litigation, because she was neither a mediation party nor the mediator.

The UMA drafting committee was urged to rectify this problem to ensure the availability of professional assistance to parties in mediation. The committee did so by granting a limited privilege to non-party participants.[19] The non-party participant may only block testimony regarding his or her mediation communications in any later litigation.[20] By adopting the UMA, the standard mediator assurance of confidentiality for all participants present will actually be supported by the law.

7. Creates an exception for fraud and duress.

Mediation communications should be readily available to prove or disprove allegations that a mediation agreement was reached by fraud or duress. Yet the Washington statute and those in most states contain no such exception. Two factors may explain the absence. First is the fear that parties experiencing "settler's remorse" may use a fraud exception coupled with the threat of litigation as a "loophole" to upset valid settlements. The second is the belief that courts will somehow manage to sort out valid claims and find a way in which to override the privilege.

The UMA addresses fraud in the same manner as privilege in criminal cases. A qualified privilege is created for proceedings to rescind, reform, or avoid a mediation agreement. To use mediation communications to challenge or defend a settlement, the proponent has the same burden as for offering evidence in a felony. He must show that the evidence is otherwise not available and that the need for the evidence "substantially outweighs the interest in protecting confidentiality."[21] This approach improves Washington law by creating an explicit exception for fraud and duress while maintaining sufficient restrictions.

8. Permits evidence of professional misconduct and malpractice.

It is also possible that the mediator, or a lawyer, CPA, or other professional, may commit misconduct or malpractice during a mediation. Without an exception

to the privilege, reporting, proving, or disproving misconduct or malpractice is problematic, if not impossible.

The Washington statute addresses these concerns in part with an exception for offering evidence in a "subsequent action between the mediator and a party ... arising out of the mediation."[22] This exception allows for malpractice actions against a mediator, but does not include other professionals. Current law, however, does not explicitly permit the reporting of misconduct by a mediator or other professional to regulating authorities.

In contrast, the UMA will free up mediation communications "to prove or disprove a claim or complaint of professional misconduct or malpractice."[23] This exception properly opens up the mediation process for the scrutiny of the courts, disciplinary bodies, and the public when such charges are made. The provision will also serve to encourage all professionals who participate in mediation to do so with skill and integrity.

9. Limits mediator reporting to the court.

Both the Washington general statute and the UMA are designed to protect the mediator from the role of tie-breaking witness in subsequent proceedings. When a mediator is forced to testify, inevitably one or both parties assumes loss of neutrality. Should this become the norm, future/potential parties will be reluctant to be candid or dismiss mediation entirely as a viable option.

Similar concerns arise when a court questions a mediator (often *ex parte*) about a mediation in progress, or when the court requires a mediator to provide a post-mediation report. Mediators can be asked to assess the level of the parties' "good faith" participation, evaluate the merits of the case, and/or make recommendations to the court. Such inquiries place the mediator in the difficult position of deciding whether to honor the mediation privilege or submit to the court's directive.

Courts, however, do have a legitimate need for basic information from the mediator, in order to monitor party compliance with court-ordered mediation. Without the risk of sanctions, litigants and their lawyers may be tempted to treat court-mandated mediation cavalierly.

The UMA strikes a correct balance by allowing mediators to report to courts only whether the mediation occurred, who attended, whether the parties reached settlement, and any non-privileged communications.[24] With the addition of this provision, the courts are then able to enforce their orders to mediate while the privilege for all other mediation communications remains intact.

10. Tackles public disclosure issues.

The growth of mediation has not been limited to private disputes. Public entities have also experienced the expediency of mediation. They, too, benefit from a positive, cost-effective alternative for resolving their disputes. Governmental bodies, like many businesses, are creating in-house mediation programs to resolve disputes arising in the workplace.

When a public entity participates in or sponsors a mediation program, the policies supporting a mediation privilege clash with those favoring open public meetings and records. The Washington statute and those of nearly all states ig-

more this difficult issue entirely. This response is no longer workable with the rise of government participation in mediation. The UMA properly provides no privilege protection when a mediation session is open, or required to be open, to the public.[25]

The UMA, however, mistakenly subjects mediation communications to open-records laws. Under the present Washington law, government-based mediation programs and DRCs face uncertainty and concern as to whether their case files may be subject to disclosure requests. Without the protection of confidentiality, public employees may no longer participate in mediation, causing innovative public programs to die on the vine. Our Legislature must depart from the UMA and instead follow the lead of the federal Alternative Dispute Resolution Act exempting mediation communications from Freedom of Information Act requests.[26]

Conclusion

These top 10 reasons provide ample support for adopting the UMA in Washington. The UMA will consolidate this state's several differing confidentiality provisions into a single, uniform mediation privilege and, in addition, markedly improve the substance of the Washington mediation privilege. Passage will also contribute to the national effort to create a uniform mediation privilege for all the states.

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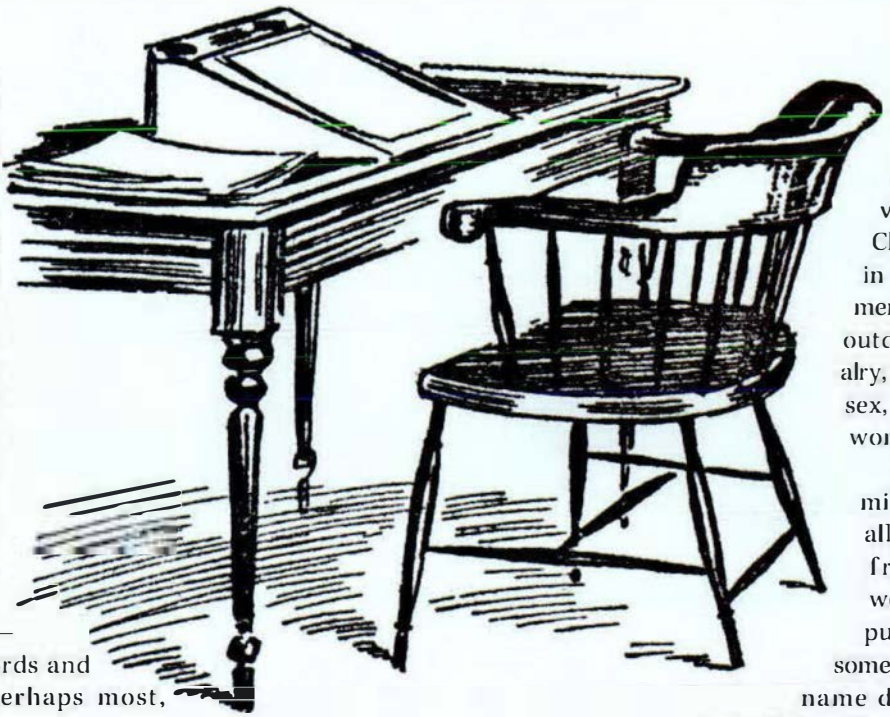
NOTES

[1] Laws of 1984, ch. 258; RCW 7.75.050.
[2] Laws of 1986, ch. 95; RCW 26.09.015(3).
[3] Laws of 1991, ch. 321; RCW 5.60.070.
[4] Kirtley, "The Mediation Privilege's Transition from Theory to Implementation," 1995 J. Disp. Resol. 1.
[5] The final version of the UMA, with the Prefatory Note and Comments, can be found online at www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm. Further references to the UMA will be to this website. Also, a summary of the UMA is available at www.nccusl.org/Update/uniformact_summaries/uniformacts-s-uma2001.asp.
[6] *See* www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp.
[7] The Committee's Final Report of August 5, 2004, is on file with the author.
[8] UMA § 3(a).
[9] RCW 5.60.070(1).
[10] UMA § 3(a)(3).
[11] *Id.*
[12] RCW 5.60.070(1).
[13] UMA § 2(2).
[14] RCW 5.60.070(1).
[15] UMA § 2(7).
[16] *Id.*
[17] UMA § 6(b)(1).
[18] UMA §§ 6(a)(3), (7).
[19] UMA § 4(b)(3).
[20] *Id.*
[21] UMA § 6(b)(2).
[22] RCW 5.60.070(1)(g), (2)(b).
[23] UMA § 6(a)(6).
[24] UMA § 7.
[25] UMA § 6(a)(2).
[26] USC § 574(j).

Using That Word

BY ROBERT C. CUMBOW

Vizzini: Inconceivable!
Montoya: You keep using that word. I don't think it means what you think it means.
— *The Princess Bride*



The word "inconceivable" may or may not have meant what the ill-fated Sicilian thought it meant. But we all know lots of Vizzinis — and, if truth be told, most of us have a lot of Vizzini in us. We often use words and phrases because they seem to sound clever, when in fact, we have no idea what they mean. This time — submitted for your approval, as Rod Serling used to say — I offer a grab bag of words and phrases that many, perhaps most, people use incorrectly.

Let's start with **anxious** — a word that means worried, vexed, or concerned. Most of our lives we've heard it misused as a synonym for "eager." If you are particularly excited about a new movie, you are eager, not anxious, to see it. You may be eager to read the judge's opinion or anxious about it, and possibly both; but the two words do not mean the same thing.

Now before you run to your reference library, and fire off a "gotcha!" letter telling me "It's in the dictionary," permit me this brief interlude: dictionaries do not prescribe correctness (and for the most part don't pretend to). They codify usage. The fact that a word has been misunderstood so often by so many that it now appears in some dictionary as "accepted" does not mean that it is correct. It merely means that another of the subtle distinctions that once made our language so rich has been lost. Indeed, they are disappearing more rapidly than the rain forest — and, it seems, with fewer people to weep over their passing. More about that in a future column.

To return to our grab-bag: **buxom** is an example of a word that is frequently misunderstood and misused because of its similarity to another word. "Buxom" means "healthy," usually in an earthy, ample, red-cheeked, farm-girl sort of way. It does not mean "large-breasted," though its similarity to the word "bosom" is probably what causes many people to make that inappropriate association.

Chauvinistic doesn't mean the same thing as "sexist." A chauvinist — a word derived from the name of Nicholas Chauvin, a fanatical supporter of Napoleon Bonaparte — is someone who is enthusiastically devoted to some particular place, person, or cause. You might correctly say, "He's very chauvinistic about Spokane," or "He's a Husky chauvinist." You should not call someone a chauvinist because he tends to stereotype women. Such a person might be a sexist, or a male chauvinist, but not simply a chauvinist. The term "Male Chauvinism" was coined in the Sixties to refer to men who persisted in the outdated notions of chivalry, women as the weaker sex, men as protectors of women.

In the heyday of Rome's military power, occasionally an enemy (or even a friendly) military unit would come in for group punishment, because of some perceived wrong. The name decimation (from the Latin for "ten") was given to the process of executing every tenth man. While today the term need not be used in its strictest sense, it is nevertheless incorrect to use **decimate** to mean "obliterate" or "wipe out." The correct sense of the term is to suggest a substantial loss or reduction. "The company's workforce was decimated by layoffs" might legitimately mean that a significant percentage of workers were laid off, say maybe somewhere from five to 20 percent. But if seven or eight out of every 10 workers were laid off, you'd need a stronger word than "decimate." Perhaps "devastate" would be better — indeed, the fact that "decimate" sounds a lot like "devastate" may be the reason it is so often inappropriately used.

The word **fortuitous** doesn't mean "fortunate." It refers to a turn of fortune that may be bad or good or even indifferent. Its proper sense is of randomness or caprice, not of good luck. "I might have been rich but for a fortuitous stock market decline."

This next one may seem a bit esoteric, but you'd be surprised how often it's used by people, and how often they have it completely wrong: The term **Immaculate Conception** does not refer to the fact that Mary conceived and gave birth to Jesus Christ while remaining a virgin. That phenomenon is known as the Virgin Birth. In Christian — specifically Catholic — doctrine, Mary had the additional distinction of being the only person born free from Original Sin. Original Sin refers to the sin of pride, doubt, and self-sufficiency originally committed by Adam and Eve, meriting them expulsion from the Garden of Eden. Every human being since Adam and Eve is conceived tainted with Original Sin (a metaphor, as some would have it, for an inherently flawed human nature), with one exception. Because she was to be the vessel by which God's son became flesh, Mary was conceived without the "stain" of Original Sin. That is what is meant by the Immaculate Conception: Mary's own conception by her parents, not her conception of Jesus.

Another frequently misused term is the word **literally**, which means, well, "literally" — exactly what it says. For reasons unknown, many people seem to think the word "literally" is simply an intensifier, used only to add emphasis. "They were literally rolling in the aisles" means that the audience actually had left their seats, and their rows, and were rolling around in the aisles — not an impossible occurrence but an unlikely one. You shouldn't use "literally" unless that is exactly what you mean.

People who speak of problems in getting from one place to another, or organizing an event, as **logistical** have it wrong. The term "logistics" is a military word referring to supply. If your issue is how to get the people properly provided with sufficient food, clothing, and equipment, it's a logistical problem. If it's a concern with how to get them from one place to another, how to handle the timing of a series of events, or how to surmount perceived obstacles, that's a tactical issue, not a logistical one.

A favorite among lawyers is the word **meretricious**, which family lawyers know does not mean "meritorious." This is another case of a word's sound leading people to misinterpret its meaning. A meretricious relationship is a sexual relationship with a social stigma attached to it — usually living together outside of marriage, or a married man's relationship with a mistress.

One of the most misused words in our language is **nauseous**. Many — I daresay most — people use it as if it meant "nauseated." It doesn't. It means "nauseating." A correct use of the term would be, "The curtains were a nauseous shade of green." The comment, "I feel nauseous," by contrast, runs the risk of being greeted with the response, "Yes, and you look nauseous, too" — whose actual meaning would probably be lost on the original speaker.

During the height of controversy over the turbulent relationship between Princess Diana and Britain's Royal Family, it was common to see references to the **Queen Mother** whose speakers clearly meant the Queen herself. "Queen Mother" is not a synonym for "the Queen"; it's an honorific accorded specifically to the widow of King George VI. Under British succession, when a man becomes King, his wife is entitled to be called "Queen" — but of course she is not a monarch, she is simply a monarch's wife. If the King dies,

his widow does not become the monarch. That honor passes to the King's heir — usually his firstborn son, if still living, otherwise, other sons, or daughters. But the King's widow is still entitled to call herself "Queen." When George VI died, his eldest daughter, Elizabeth, became Queen Elizabeth II. His wife, who was also named Elizabeth, became what had been traditionally known as "the Dowager Queen." But this circumstance meant that two members of the Royal Family were entitled to be called "Queen Elizabeth." This intolerable turn of events was avoided by creating the term "Queen Mother" for George VI's widow. The popular "Queen Mum" died not long ago, at the age of 101, and it remains to be seen whether anyone else will ever bear the title Queen Mother.

Heard but not seen

A special sub-set of this grab-bag is devoted to words that are misused because of a confusion not as to their meaning but as to their spelling. This most commonly arises with words and phrases that are more often spoken than written. People hear them a lot, but when they come to write them down, they write them incorrectly because they have misinterpreted what they heard.

For example, it is common to criticize as ignorant or illiterate people who say "would of," as in, "I would of gone to the movies if I'd had enough money." The truth of the matter, however, is that what is being said is "**would've**," a perfectly legitimate contraction of "would have." Because "would've" sounds just like "would of," the listener hears "would of," and writes it that way in reporting the conversation. The error is the writer's, not the speaker's.

Other such "mis-hearings" include:

• **free reign** — a frequently seen misspelling of **free rein**, for relinquishing control. Both "rein" and "reign" suggest some sort of control; but the term "free rein" comes from the world of team animals, guided by reins, in which to give a horse "free rein" means to allow the horse to move as it pleases, and not to exercise control over it by working its reins.

• **pouring over** — a misspelling of **poring over**, meaning studying long and laboriously. No telling what the writer of "pouring over" thinks this phrase means.

• **tow the line** — a misspelling of **toe the line**, a phrase signifying obedience or acquiescence to control by keeping one's toes on or behind the line, as opposed to "crossing the line," "going over the line," "getting out of line," or simply "going too far." It's easy to see how the fact that towing is done by using a line (even called a towline in some contexts) could have led to a misunderstanding — and misspelling — of this expression.

The revenge of Mr. Science

Another interesting sub-set of words that don't mean what we think they mean

might be termed pseudo-science. Because scientific terms sound erudite, they can make their users sound (and feel) clever. But all too often, those who co-opt scientific terminology into their conversation or writing don't bother to check whether the word they've pressed into service is really the right one for the job.

For example, it's perfectly all right to refer to the **parameters** of a situation if you are referring to a set of interdependent variables, such that a change in one effects a change in all. But if what you mean is simply "boundaries," "borders," or "limitations," any of those three words would be a more accurate and effective term to use than "parameters." (That common mistake might have arisen because of the similarity between "parameter" and "perimeter.") And never use "parameters" to refer simply to the general characteristics of a case or situation.

Similarly, a **differential** (as any mechanic can tell you) is not the same thing as a difference. The word "differential" refers to something that differentiates, not to something that is simply different.

It's popular these days, especially for news reporters, to refer to the focal point of an event as the **epicenter**. The "epicenter" is the point on the earth's surface directly above the point of origin of an earthquake. Thus an "epicenter" is not a true center or focal point of anything. This doesn't mean we should never use the term "epicenter" except when talking about earthquakes. One of the glories of our language is its richness in metaphoric uses. But we do that glory a disservice if we use a term without considering whether it is an appropriate metaphor. It would be appropriate to say that Tiananmen Square was an epicenter of student rebellion, since it makes metaphoric sense to compare the impact of student revolt to an earthquake. On the other hand, to refer to New York as the "epicenter" of the theatre world would be merely pretentious.

It's all right to use the word **paradigm** if you're referring to an example of declension or conjugation giving all of the inflections of a particular word. It's probably metaphorically correct to use the term for an overriding example or model that contains within itself all possibilities. But to use "paradigm" when all you mean is an "example" or a "model" is inappropriate and windy.

Some years ago, health food cultists co-opted the term **organic** as a way of distinguishing between "natural" and "artificial" foods and food preparation processes. In truth, all food is organic; if it weren't, it wouldn't (and couldn't) be food. The phrase "organically grown" is fair enough. But, FDA rules notwithstanding, to use the term "organic" to separate some kinds of food from others displays nothing more than ignorance of both science and language.

That'll do for now. Next time: "Those Troublesome Twins" — a column dedicated to all those who are never sure whether to use "principal" or "principle," or whether it's "affect" or "effect." See you then.

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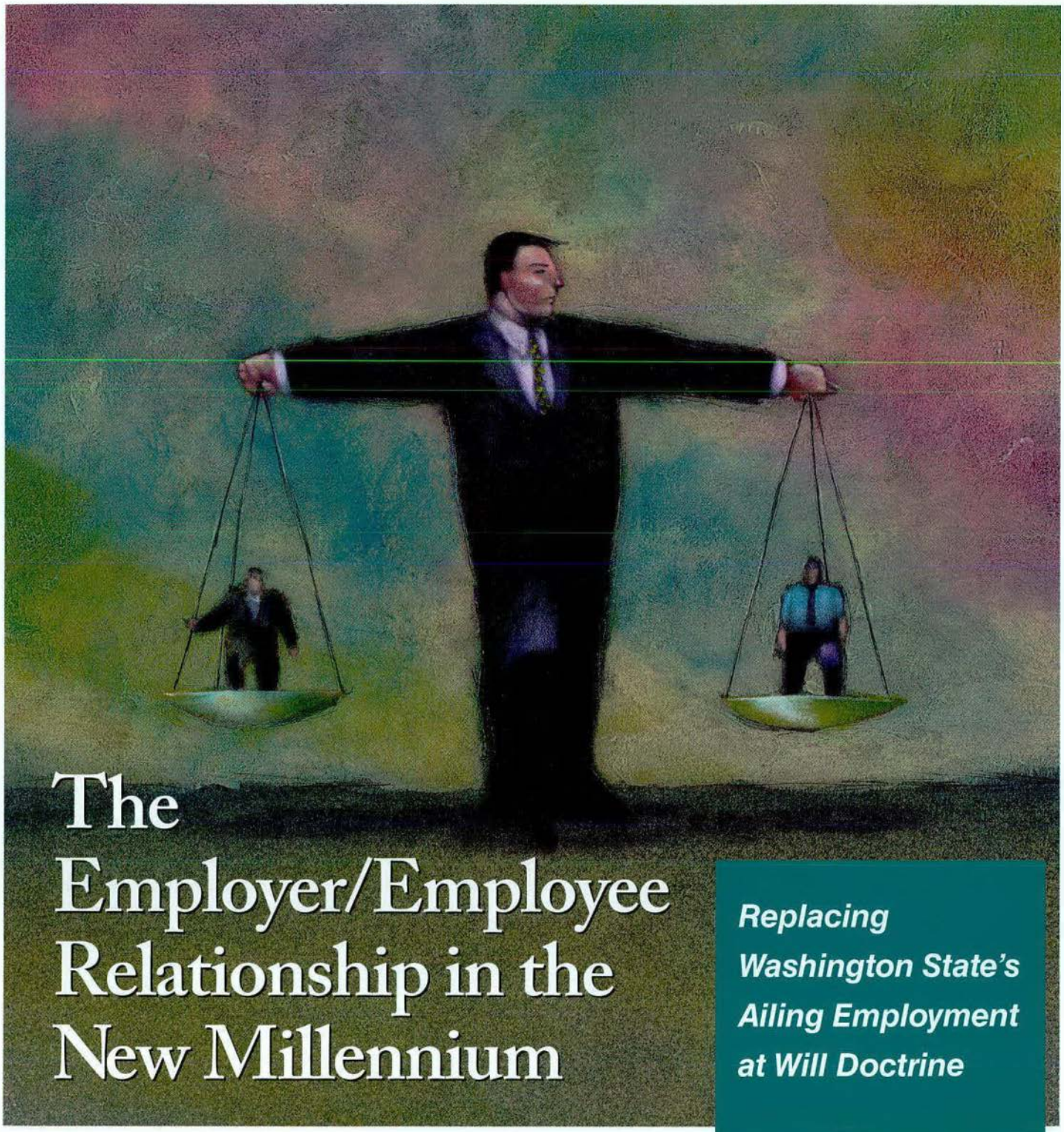

The Employer/Employee Relationship in the New Millennium

Replacing Washington State's Ailing Employment at Will Doctrine

BY JAMES H. HOPKINS, J.D., SPHR

In 1928, the Washington State Supreme Court established the Employment at Will Doctrine in an effort to set forth a standard to which employers and employees could relate the employment relationship.[1] In its simplest form, the doctrine provides that when no definite time period was contracted for, the employer or employee could terminate the employment relationship at any time, for any reason or for no reason.[2]

Since it was first pronounced, the doctrine has undergone a radical metamorphosis. Through the gradual removal of its underpinnings by the Legislature, Congress, and the courts, the doctrine today is no longer recognizable as set forth in 1928.

More than 20 years ago, the Washington State Supreme Court recognized the erosion of the Employment at Will Doctrine when it stated: "While the future of this doctrine is a compelling issue it

is one that must be left for another day and different facts."[3]

Furthermore, progressive business leaders are not utilizing the doctrine. Instead, they are developing "provisions for employment security, . . . and practices reflecting the organization's concern for the general well-being of the employee and his/her family."[4]

Replacing the stripped-down doctrine with a new standard that incorporates the changes made by the legislative and judicial branches of government, as well as private employers, seems timely.

A Historical Perspective of the Employment at Will Doctrine

The employment at will concept, as first enunciated in Washington state, stated: "The law of the cases seems to be well settled, that a contract such as this constitutes an employment for an indefinite period and that such a contract may be abandoned by either party at will without incurring any liability therefor."[5]

In deciding that the law was "well settled," the court relied on H.G. Wood's commentary that: "A mere promise to work for another, no time or terms being fixed, is not a contract for service, for a breach of which an action will lie."[6]

Mr. Wood relied on British law when making his statement, specifically, "[t]hat one must be bound to employ, and the other to serve, for a certain definite time, . . . and there is no contract of hiring and service obligatory beyond the will of either party."[7]

The statements expressed by Mr. Wood and the cases he relied on conflict with other English cases of that time period, which held that any hiring that was not for a definite period of time was for one year. Mr. Blackstone stated: "If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year . . . ."[8] These conflicting statements raise the question of how "well settled"[9] the law was in 1928 when the Washington State Supreme Court established the Employment at Will Doctrine.

The initial burden of proof rests with the charging party, who must show that he/she fit into a protected class, was qualified, was doing satisfactory work, was terminated, and was ultimately replaced.

The employment at will theory was addressed in other commentaries: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whom so ever, whether the refusal rests on reason or is a result of whim, capriciousness, prejudice or malice."[10]

The sentiment expressed by Mr. Cooley above fits the judicial philosophy of "laissez-faire constitutionalism" of that time, and was characterized by the U.S. Supreme Court's attitude between the 1860s and the 1930s.[11] It was during this period that Supreme Court struck down a statute that made it unlawful to discriminate against employees based on union membership. The Court held, "so the right of employee to quit the service of the employer for whatever reason is the same as the right of the employer, for whatever reason, to dispense with

the services of such employee."[12] The Court continued:

> In all such particulars (*referring to either the employer or employee terminating the employment relationship*) the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no Government can legally justify in a free land.[13]

Justice Holmes dissented, stating: "The section simply prohibits the more powerful party to extract certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds on those already employed."[14] He went on to state: "Where there is, or generally is believed to be, an important ground of public policy for restraint, the constitution does not forbid it."[15]

Exceptions to the Employment at Will Doctrine

Since the beginning of the Employment at Will Doctrine, an employee could not be terminated when an employment contract for a specified period of time existed without complying with the terms of the contract.[16] Such a contract was to be in writing when it could not be completed within one year to satisfy the statute of frauds.[17] Another exception to the Employment at Will Doctrine is a contract implied from the attendant circumstances.[18]

The public-policy argument Justice Holmes raised in his dissent[19] has also become an exception to the Employment at Will Doctrine — that being, an employer cannot terminate an employee in violation of public policy.[20]

Many laws have been enacted by Congress and the state Legislature which govern the employer/employee relationship, each of which alters the Employment at Will Doctrine in some fashion, and none of which, as Justice Holmes believed, is forbidden by the Constitution.[21] These statutes cover many issues — discrimination,[22] union activity,[23] employee benefits,[24] hours worked,[25] age discrimination,[26] worker safety,[27] civil rights,[28] disability,[29] and veterans' rights.[30]

The Employment at Will Doctrine, which purports to afford employers the right to terminate an employee for any reason or no reason at all,[31] does not relieve the employer from the burden of establishing that it did not terminate the employee for one of the prohibited reasons described above.[32] The initial burden of proof rests with the charging party, who must show that he/she fit into a protected class, was qualified, was doing satisfactory work, was terminated, and was ultimately replaced. This has been further defined:

(1) that plaintiff engaged in an ac-

tivity protected by Title VII; (2) that the exercise of his [her] civil rights was known by defendant; (3) that, thereafter, the defendant took an employment action adverse to plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.[33]

Once this has been established, the burden shifts to the employer to show that the reason for the termination was not part of any prohibited activity.[34] The employee must then persuade the court that the reason is pretextual to prevail,[35] and that the alleged unlawful reason was a substantial factor in the adverse employment action.[36] This must be proven with a preponderance of the evidence.[37] Employers have been meeting this burden for years in the labor arbitration arena[38] by establishing mechanisms to show the employee was terminated for poor performance, lack of work, or some other business reason.

Under current law, employers are told that employees can be terminated "for no cause, good cause or even cause morally wrong without fear of liability." This is simply not accurate.

Just-Cause Standard

The time has come for the Washington State Supreme Court to take its lead from the Court in *Atlantic Richfield, supra,* which stated: "While the future of that doctrine is a complying issue . . . ."[39] Well, the future is now. The Court should establish a doctrine other than Employment at Will for the employer/employee relationship in Washington.

The only equitable standard for terminating an employee would be termination for cause. This is not the first time such a standard has been proposed for Washington state.[40] Instituting a termination-for-cause standard would also establish a consistent model for employers in all termination cases.

Under current law, employers are told that employees can be terminated "for no

cause, good cause or even cause morally wrong without fear of liability."[41] This is simply not accurate. An employer's ability to terminate an employee has many restrictions, as discussed previously. Under a just-cause standard, an employer would clearly understand its duty.

The burden of proof would be no more problematic than is currently required for any other wrongful discharge case. The Washington State Supreme Court has established the burden of proof: "Once the employee has demonstrated that his discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to provide that the dismissal was for reasons other than those alleged by the employee."[42]

An employee would have the burden to establish that he/she was employed by this specific employer and that the employer involuntarily terminated him/her. Then the burden would shift to the employer to establish that the basis for the involuntary termination was for cause. This concept is not new — employers covered by a collective-bargaining agreement currently have the burden of establishing just cause in termination cases.[43]

The Washington State Supreme Court has defined "just cause" in the employee-discharge context as "a fair and honest cause or reason regulated by good faith on the part of the party exercising the power. We further hold a discharge for 'just cause' is one that is not for any arbitrary, capricious, or illegal reason and which is based on facts [1] supported by substantial evidence, and [2] reasonably believed by the employer to be true."[44]

In employee-discipline situations, traditional labor arbitrators have taken the position: "Offenses are of two general classes: (1) those extremely serious offenses, such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less-serious infractions of plant rules or of proper conduct, such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction."[45]

A growing number of employers have established employee policies that outline the relationship between the employer and the employee. These employee policies are currently an exception to the Employment at Will Doctrine, in that an employer must follow the rules created by such policies when the employee is aware of their existence and they create an expectancy of treatment in accordance thereof.[46]

The Association for Human Resource Professionals[47] recommends that its members "[A]lways use progressive discipline."[48] Furthermore: "Workplace disciplinary systems are grounded on the theory of rehabilitation, not punishment."[49] This reveals the position of the professionals in the field of employer/employee relationships.

The courts should establish a strong, yet rebuttable, presumption that when an employer follows a progressive or corrective discipline program that leads to the termination of an employee, the termination is for cause. This presumption should only be rebutted with clear, co-

gent, and convincing evidence, which must establish it is highly probable[50] that the progressive or corrective discipline was pretextual.

Progressive discipline or corrective discipline is when the employer uses successive steps in the corrective process, from verbal warnings to termination, for those "less serious infractions" — generally this will be a verbal warning followed by a written warning, then something more substantial, such as suspension or termination.[51]

Following this recommendation would not preclude an employer from terminating without progressive or corrective discipline in the case of extreme employee behavior,[52] or layoffs for lack of work or other changing economic conditions. This standard would simply mean the employer, if challenged, would have to establish that the action met the definition of "cause," *supra*, and was not pretextual; and the employee would be afforded the substantial factor and preponderance of the evidence standard, *supra*.

Conclusion

To the extent there is an Employment at Will Doctrine today, when its many exceptions are taken into consideration, it is clear it would not be recognized by Messieurs Cooley, Blackstone, or Wood; or the majority of the 1907 U.S. Supreme Court, which decided *Adair*, *supra*; or even the 1928 Washington State Supreme Court, which decided *Davidson*, *supra*.

The doctrine is but a shell of its former self and has no place in the modern employer/employee relationship. The very statutory scheme — i.e., union membership — that the U.S. Supreme Court found unconstitutional in *Adair*, *supra*, and on which it based its decision has since been held constitutional.[53]

It seems clear that a sound economy and human dignity are grounded in a stable work force. A human being potentially having his or her livelihood severed by "whim, capriciousness, prejudice or malice"[54] should not be the standard on which the employer/employee relationship rests as we move into the 21st century.

The time has come for the courts to recognize for all employees what the more progressive employers have implemented — that being a just-cause standard of termination with a rebuttable presumption favoring progressive or corrective discipline.

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NOTES

[1] *Davidson v. Machall-Paine Veneer Co.*, 149 Wash. 685, 688 (1928).

[2] *Id.*

[3] *Robert V. Atlantic Richfield Co.*, 88 Wn.2d 887, 898 (1977).

[4]Paul R. Lawrence & Davis Dyer, *Renewing American Industry* (1983), at 11.
[5]*Davidson*, 149 Wash. at 688 (emphasis added).
[6]H.G. Wood, *A Treatise on the Law of Master and Servant* (1877), at 157-158 ("*Master and Servant*").
[7]*Williamson v. Taylor*, 5 Q.B. 175, *cited in Master and Servant* at 157.
[8]T.M. Cooley, ed., *Blackstone's Commentaries on the Laws of England* (1879), Book 1, at 424 ("*Laws of England*").
[9]For one court's questioning of Wood's formulation in *Master and Servant*, see *Toussand v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579 (1980).
[10]T.M. Cooley, *A Treatise of the Law of Torts* (1880), at 278 ("*Law of Torts*").
[11]Kermitt L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (1992) ("*Oxford Companion*").
[12]*Adair v. United States*, 208 U.S. 161, 175 (1907).
[13]*Id.* at 175 (emphasis added).
[14]*Id.* at 191.
[15]*Id.*
[16]*Law of Torts*, at 157.
[17]RCW 19.36.010; *Lasser v. Grunbaum Bros. Furniture Co.*, 46 Wn.2d 402 (1955).
[18]*DePhilips v. Zolt Const. Co.*, 136 Wn.2d 26 (1998).
[19]*Oxford Companion.*
[20]*Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984).
[21]*Oxford Companion.*
[22]42 U.S.C. §2000E *et seq.*; ch. 49.60 RCW *et seq.*
[23]29 U.S.C. §141 *et seq.*; *Krystad v. Lau*, 65 Wn.2d 827 (1965).
[24]29 U.S.C. §1161 *et seq.*; ch. 43.72 RCW *et seq.*
[25]29 U.S.C. §201 *et seq.*; RCW 49.28.010 *et seq.*
[26]29 U.S.C. §621 *et seq.*; RCW 49.44.090.
[27]29 U.S.C. §651 *et seq.*; ch. 49.17 RCW *et seq.*
[28]42 U.S.C. §§1981, 1983.
[29]49 U.S.C. §§12101, 12213; RCW 49.60.181(1).
[30]46 U.S.C. §4301 *et seq.*; RCW 73.16.033.
[31]*Gaglidari v. Denny's Restaurants, Inc.*, 117 W.2d 426 (1991).
[32]*Green v. McDonnell Douglas Corp.*, 411 U.S. 792 (1973).
[33]*Hollins v. Atlantis Co.*, 188 F.3d 652 (6th Cir. 1999).
[34]*Green v. McDonnell Douglas Corp.*
[35]*Id.*
[36]*MacKay v. Acorn Custom Cabinetry*, 127 Wn.2d 302 (1995).
[37]*Carle v. McChord Credit Union*, 65 Wn.2d 93 (1992).
[38]*See, generally, Huntington Chair Corp.*, 24 L.A. 490 (1955).

[39] *Robert v. Atlantic Richfield Co.*, 88 Wn.2d at 898.

[40] Cornelius J. Peck, "Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge," 66 Wa. L. Rev. 719.

[41] *Thompson v. St. Regis Paper Co.*, 102 Wn.2d at 226.

[42] *Id.* at 232.

[43] Elkouri and Elkouri, *How Arbitration Works* (3d ed. 1979).

[44] *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 139 (1989).

[45] *Huntington Chair Corp.*, 24 L.A. 490, 491 (1955).

[46] *DePhillips v. Zolt Const. Co.*

[47] The Society for Human Resource Management.

[48] Frances T. Coleman, *Cardinal Rules of Termination* (1998).

[49] *Id.*

[50] *Colonial Imports V. Carlton Northwest*, 121 W2nd 726 (1993).

[51] *Guardian Industries Corp. v. Grew*, 319 N.L.R.B. 74 (1995).

[52] *Thompson v. St. Regis Paper Co.*

[53] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[54] *Laws of England.*

The Law of Lawyering

The One Area of Law with Which We Must All Be Intimately Familiar

BY MARK A. JOHNSON

There is no profession more highly regulated than the practice of law, a fact not surprising when one considers that our profession has, in essence, a monopoly on justice in a democracy. Since equal access to justice is a necessary and fundamental right in "an empire of laws, not men," those of us whose trade it is to ply justice should rightfully expect a high degree of regulation for the privilege of acting in a representational, fiduciary capacity on behalf of the citizenry of our republic.

The law of lawyering — defined as all regulatory authority (statutes, court rules, and decisional authority) that impacts our profession — is the one area of law that each of us needs to know and know thoroughly.

Although Article IV, Section 1, of the Washington State Constitution vests our State Supreme Court with nearly unlimited power to regulate the practice of law, including the "exclusive, inherent power to admit, enroll, discipline, and disbar attorneys," *Short v. Demopolis*, 103 Wn.2d 52.62 (1984) (citing *Graham v. Washington State Bar Ass'n*, 86 Wn.2d 624 (1976)), the Court has acquiesced in the Legislature's regulation of our profession with respect to the "entrepreneurial aspects" of the practice of law, defined as "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients." *Short v. Demopolis*, 103 Wn.2d at 62.

We are required to be members of the Washington State Bar Association[1] and pay dues to the organization; there is no "right to work law" — we are not a non-union shop. In fact, in order to be admitted to the union of justice, each of us must pass a comprehensive examination and provide evidence of our good moral character and fitness.

Once admitted, the regulation includes adherence to the Rules of Professional Conduct (RPCs), a comprehensive code of requirements and prohibitions governing every aspect of our professional and, in some circumstances, extra-professional behavior; approximately $3.3 million of the WSBA's annual $16 million budget is spent disciplining lawyers and auditing our trust accounts.

The RPCs dictate, *inter alia*:

- *for whom we can work* — RPCs 1.7, 1.8 & 1.9 (Conflicts)
- *how much we may charge for our work* — RPC 1.5 (Fees)
- *to whom we can speak about our work* — RPCs 1.6, 3.6 (Confidentiality; Trial Publicity)
- *what we must do with and how we must account for the money we receive* — RPC 1.14 (Preserving Identity of Funds and Property of a Client)
- *how quickly we must perform our work* — RPCs 1.3, 3.2 (Diligence; Expediting Litigation)
- *the "quality" of the work we take* — RPC 3.1 (Meritorious Claims and Contentions)
- *how we advertise and promote ourselves and our businesses* — Title 7 (Communications Concerning a Lawyer's Services: Advertising; Contact with Prospective Clients; Fields of Practice; Firm Names)

The law of lawyering is interwoven and, to an extent, inconsistent. Negligence may result in sanctions by a trial court, discipline by the WSBA, and a lawsuit by our client. Although we practice in an adversary system of justice that imposes on us the duties of undivided loyalty and zealous representation, we also owe responsibilities to our opponents, the justice system, and, in certain circumstances, nonclients; and, therefore, we may be disciplined, sanctioned, and sued if we do not meet obligations to the courts, our opponents, or third parties to whom we may owe a duty of care. (*See* RPCs 3.3, 3.4, and Title 4; CR 11; and *Trask v. Butler*, 123 Wn.2d 835 (1994).)

The law of lawyering is also kinetic. The Special Committee for the Evaluation of the Rules of Professional Conduct (Ethics 2003 Committee) has recently finished its work, and the WSBA Board of Governors has considered and voted on the committee's product. The proposed revisions to the RPCs are substantial, and the changes will cause significant alterations in practice. In addition, the increased complexity in the subject matters of our representation, expanding client expectations, and extension of our duty of care to nonclients are giving rise to exposure to civil liability that did not exist even a decade ago.

Given the comprehensive, complex, and changing nature of attorney regulation, it is not surprising that the WSBA perceived a need for an annual conference encompassing all the regulations that impact our profession. The Second Annual Conference on the "Law of Lawyering" will be held at the Washington State Convention Center December 16 and 17, 2004. The topics will include malpractice and insurance issues, CR 11, a comprehensive update on the proposed changes to the RPCs, malpractice and discipline case law update, and panel discussions with hypotheticals on malpractice and conflicts of interest.

Mark Johnson practices in Seattle and is a member of the WSBA Board of Governors.

NOTES

[1] The WSBA was created by an act of the Legislature, the State Bar Act (RCW 2.48.010 *et. seq.*), a law that our Supreme Court has steadfastly declined to hold, in its entirety, to be constitutional. In addition, many of the functions of the bar specified in the State Bar Act have been duplicated (superseded) by the enactment, in 1987, of GR 12.

The WSBA Honors Its 2004 50-Year Members

BY KATHY HENNING

At a celebratory luncheon held September 29 at the Sheraton Seattle Hotel and Towers in Seattle, the WSBA honored its 67 members who this year celebrate 50 years of membership. In appreciation of their service to the WSBA and the public, President-elect Brooke Taylor and members of the WSBA Board of Governors presented 50-year certificates and lapel pins to the members — who had joined the WSBA the year the U.S. Supreme Court issued its decision in *Brown v. Board of Education*, which banned racial segregation in public schools. The honorees and their families enjoyed good food and fellowship.

50-year members who attended the celebratory luncheon gather for a memorable photo.

The program began with a welcome and introduction of guests by President-elect Taylor and a greeting from Supreme Court Chief Justice Gerry L. Alexander. Then President-elect Taylor began a speech titled "1954: A Moment in Time."

"Eisenhower was president, and Nixon was vice-president," he told the 130-plus honorees and guests who were present. "The average income was $3,960, a new home cost an average of $22,000, and a new car set you back about $1,950. A stamp cost 3 cents, a gallon of gas was 21 cents, and a loaf of bread was 17 cents. Minimum wage was 75 cents an hour."

And much more happened in 1954 that was newsworthy, he told his captive audience, than the desegregation of public schools. Just a few of the headline events: nationwide testing of Jonas Salk's Polio vaccine began; President Eisenhower signed the order adding the words "under God" to the Pledge of Allegiance; Play Doh, originally a nontoxic substance used for cleaning wallpaper, was introduced; and Disneyland had its official groundbreaking.

"Meanwhile, in Washington," President-elect Taylor told them, "the first Dick's Drive-in opened in Seattle's Wallingford district on January 28. In July, the 'Jet Age' began in Seattle with the maiden flight from Boeing Field of the Dash-80, the prototype for the Boeing 707. In September, President Eisenhower dedicated McNary Dam on the Columbia River near Plymouth, Washington. And in December, public television station KCTS Channel 9 began broadcasting."

After lunch, members posed for photos, reminisced, and remarked about how the world had changed in 50 years.

Robert Edward Anderson, *Spokane*
David Statler Back, *Seattle*
John Rodgers Blackburn, *Bothell*
Homer Orrin Blair, *San Angelo, TX*
Robert F. Brachtenbach, *Cottage Grove, OR*
Stanley Keith Bruhn, *Mount Vernon*
Leonard M. Cockrill, *Seattle*
James Richard Cook, *Shoreline*
Martin James Durkan, *Renton*
Eleanor Hunn Edwards, *Clyde Hill*
George J. Fair, *Bellevue*
Carol Anita Fuller, *Tumwater*
Herbert Henry Fuller, *Tumwater*
Richard L. Gemson, *Seattle*
Warren John Gilbert, *Mount Vernon*
William Joseph Grant, *Spokane*
Eugene A. Greenway, *Edmonds*
Harold T. Hartinger, *Tacoma*
George Michael Hartung, *Seattle*
Raymond Lester Horn, *Scottsdale, AZ*
Douglas Andrew Jacobsen, *Blaine*
Gordon Leslie Jaynes, *Surrey, England*
Jon Marvin Jonsson, *Seattle*
J. Porter Kelley, *Bellevue*
Eugene Harbord Knapp, *Bellingham*
Gustav George Kostakos, *Seattle*
Edward Marshall Lane, *Tacoma*
Roger Irwin Lewis, *Renton*
Scott Bruce Lukins, *Spokane*
James Cooper Lynch, *Wenatchee*
Philip P. Malone, *Poulsbo*
Joseph Raymond Matsen, *Bellevue*
Keith Donald McGoffin, *Tacoma*
Hugh Richard McGough, *Seattle*
Robert John McKanna, *Veradale*
John H. McRae, *Spokane*
James Francis McAteer, *Seattle*
Michael Mines, *Seattle*
Robert Stanley Mucklestone, *Seattle*
Charles Steele Mullen, *Kent*
Gregory Nelson, *Montesano*
John Byron Norton, *Tumwater*
Wesley A. Nuxoll, *Colfax*
John Leland O'Connor, *Spokane*
Paul Martin Poliak, *Seattle*
Loren Dunn Prescott, *Friday Harbor*
Dale Riveland, *Shoreline*
Wayne Roethler, *Longview*
D. Scott Sandelin, *Camano Island*
Richard Alan Satterberg, *Burien*
Leonard William Schroeter, *Seattle*
Raymond Huber Siderius, *Seattle*
Thomas Allen Swayze, *Tacoma*
Edward W. Taylor, *Kirkland*
Don Peter William Taylor, *Olympia*
Donald Leroy Thoreson, *Seattle*
Phillip Stanley Tracy, *Tacoma*
Philip Andrew Trautman, *Seattle*
John Bertram Troup, *Tacoma*
Charles Edward Tulin, *Anchorage, AK*
Robert F. Utter, *Olympia*
Elvin J. Vandeberg, *Tacoma*
William Emmett Wall, *Seattle*
John Homer Ward, *Sedro Woolley*
Herbert Edward Wieland, *Raymond*
Robert W. Winsor, *Seattle*
Stanley Wilbur Worswick, *Gig Harbor*

Congratulations to the 2004 WSBA Annual Award Recipients

Congratulations to this year's Annual Awards recipients! The awards, with the exception of the *Pro Bono* Award, the Outstanding Judge Award, and the President's Award, were presented at the Annual Awards Dinner in Seattle on September 16. For additional information about each recipient, see the news releases on the WSBA website at www.wsba.org/media/releases.


Ellen Dial


Robert Boruchowitz


Jeffrey Jahns

Award of Merit

First given in 1957, this is the WSBA's highest honor. The Award of Merit is most often given for long-term service to the Bar and/or the public, although it has also been presented in recognition of a single, extraordinary contribution or project. This year's recipients are **David Boerner** (photo not available) and **Ellen Dial**.

Professionalism Award

This honor is awarded to a member of the WSBA who exemplifies the spirit of professionalism in the practice of law. "Professionalism" is defined as the pursuit of a learned profession in the spirit of service to the public and in the sharing of values with other members of the profession. This year's recipients are **Robert Boruchowitz** and **Jeffrey Jahns**.

Angelo Petruss Award for Lawyers in Public Service

Named in honor of the late Angelo R. Petruss, a senior assistant attorney general who passed away during his term of service on the WSBA Board of Governors, this award is given to a lawyer in government service who has made a significant contribution to the legal profession, the justice system, and the public. This year's recipients are **Sally Bagshaw** and **Rhonda Brown**.


Sally Bagshaw


Rhonda Brown


Richard Jones


Matthew Kenney


Ada Shen-Jaffe


Wayne Blair

Outstanding Judge Award

This award is presented for outstanding service to the bench and for special contribution to the legal profession at any level of the court. This year's recipient is the Honorable **Richard Jones**.

Pro Bono Award

This award is presented to a lawyer, nonlawyer, law firm, or local bar association for outstanding efforts in providing *pro bono* services. This award is based on cumulative efforts, as opposed to a lawyer's or group's *pro bono* hours or financial contribution. This year's recipient is **Matthew Kenney**.

Courageous Award

This award is presented to a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. This year's recipient is **Ada Shen-Jaffe**.

Lifetime Service Award

This is a special award given for a lifetime of service to the WSBA and the public. It is given only when there is someone especially deserving of this recognition. This year's recipient is **Wayne Blair**.


David Swartling


Sandra Madrid


Ken Armstrong


Florangela Davila


Justin Mayo

President's Award

This award is presented annually in recognition of special accomplishment or outstanding service to the WSBA during the term of the current president. This year's recipient is **David Swartling**.

Excellence in Diversity Award

This award is made to a lawyer, law firm, or law-related group that has made a significant contribution to diversity in the legal profession's employment of ethnic minorities, women, and disabled persons. This year's recipient is Dean **Sandra Madrid**.

Excellence in Legal Journalism Award

This award recognizes that describing the context, facts, and players involved in the legal system with fairness and sensitivity requires intelligence, knowledge, dedication, and skill. The award is given to the journalist and his or her organization that has set the standard for relevance, clarity, accuracy, and understanding in reporting. This year's recipients are *Seattle Times* reporters **Ken Armstrong**, **Florangela Davila**, and **Justin Mayo**.

Alternative Dispute Resolution

The committee is charged with overseeing the WSBA's alternative dispute resolution programs that provide arbitration of fee disputes between lawyers and clients, and mediation of any disputes that arise between lawyers and other individuals. These low-cost and voluntary programs are for the benefit of consumers and lawyers. No appointments were made to the ADR Committee for 2004-2005. Instead, a special review committee has been formed to evaluate the programs.

Amicus Curiae Committee

Much of the activity in 2003-2004 involved matters considered by the WSBA Real Property, Probate and Trust Section. One of the cases that came to the committee was deemed appropriate for further consideration and WSBA participation. See *In re Estate of Jones* (Supreme Court Cause No. 73951-0). In 2004-2005, the committee expects to present to the Board of Governors a minor modification to the committee policy requiring the committee to give notice to the opposing party (or position) of the *amicus* request, and providing an opportunity to comment to the committee regarding the potential WSBA participation.

Character and Fitness Committee

The committee met five times, hearing a total of 12 matters — 10 were applications to sit for the bar examinations and two were applications for reinstatement by a disbarred attorney. The committee appreciates the ongoing work of the task force assigned to draft a comprehensive set of rules and procedures to assist both the applicants and the committee members in their work. The committee continues to be mindful of the high percentage of applicants who struggle with the effects of drug and alcohol abuse on their lives and the lives of their families and co-workers.

Civil Rights Committee

The committee's major activities included a resolution in support of including sexual orientation in the state civil rights laws; development of a civil rights pamphlet; creation of a diversity subcommittee; review of the Civil Rights Tax Relief Bill (SB6270); review of the Kanoon South Asian Bar Association pamphlets; plans for a Patriot Act forum; and a decision not to pursue section status at this time. The committee renewed its ongoing recommendation that the Board of Governors authorize it to recommend removal of members with more than three consecutive absences; and that the Board of Governors appoint members with a background and interest in civil rights issues.

CLE Board

This was the second year of the redevelopment of the committee to serve more as an advisory body to the CLE Department. With the goal of establishing the committee as a policy-guidance body for the CLE Department, four standing subcommittees — Quality Control, Technology, Section and External Relations, and Programs — were es-

tablished to address both current issues as they arise and to assist the CLE Department in the development of long-term policy within the subject area of the subcommittee. A proposal approved by the committee was adopted allowing all law libraries to order twice-yearly a maximum of 25 coursebooks at the discounted price of $25 per book. In addition, the committee began to explore the issues relating to the development of a speaker master file, which will provide a resource to the CLE Department, sections, and program chairs in recruiting qualified speakers for legal education programs being developed.

Committee for Diversity

In October 2003, the committee hosted a joint reception with Seattle University and the University of Washington for minority law students. In February 2004, the committee and the Board of Governors presented a half-day "Celebrating Diversity" listening session and reception for members of the judiciary, law school deans, and minority bar leaders. The committee sponsored its second annual reception for law students enrolled in Seattle University's Academic Resource Center program in mid-July. In August, three committee representatives and Lawyer Services Director Barbara Harper, staff liaison to the committee, traveled to Gonzaga University Law School to speak to the incoming class.

Editorial Advisory Board

The EAB's chief goals this year were to provide guidance and assistance to the editor and staff of *Bar News* in improving its quality. In fall 2003, the EAB recommended a salary increase for Editor Lindsay Thompson, which the Board of Governors approved. The EAB reviewed the 2003 membership survey, which showed an overall favorable opinion of *Bar News*. In 2003 the EAB recommended that the editor be collaboratively evaluated, and a subcommittee was formed.

Judicial Recommendation Committee

The 2002-2003 revisions to the committee guidelines and procedures were instituted; they are available at www.wsba.org/lawyers/groups/judicial recommendation. Before the committee conducted any interviews last year, it had the first mandatory committee orientation to provide guidance and training for all members. The committee interviewed 11 candidates and identified a chair for next year, who has since been involved in planning for the year ahead. The committee is having another pre-interview training session, which is

mandatory for all new committee participants and suggested for all other committee members. The committee will continue to fine-tune questions asked both in pre-interview telephone inquiries and during interviews.

Lawyers' Assistance Program Committee

Marketing efforts by the committee came to fruition with the debut of an hour-long ethics CLE presentation, "Listening at the Movies," at the LAP/LaSD statewide conference, which drew 70 attendees. 2003-2004 LAP peer counselors also trained with LAP clinicians Ellen Begley and Jennifer Favell. LAP continued to successfully reach its lawyer-based constituency through the implementation of two programs — one for judges and another for lawyers diverting from discipline. Committee members will continue scheduling additional CLE "listening" presentations throughout the state in 2004-2005, with the goal of increasing awareness of LAP services and recruiting additional LAP peer counselors.

Lawyers' Fund for Client Protection Committee

This year the committee reviewed 164 applications concerning 40 lawyers, and approved 84, for a total of $313,721.29. For the full report, see pages 44-45.

Legal Services to the Armed Forces Committee

This was the committee's last year; however, the work will be continued as a section. The Board of Governors approved section status effective October 1. This past year, the committee planned and produced the 8(g) CLE. The Legal Services to the Armed Forces Section will continue the committee's work. The comittee liaisoned with ABA LAMP and the branch JAG offices in Washington state.

MCLE Board

During the last year, the MCLE Board's goals have been to provide high-quality legal education at a reasonable cost to all members, including those who live and practice in remote areas; and to improve on the review and treatment of requests for approvals of course programs, extensions, and waivers which come from CLE providers and members. To that end, the board met six times during this period, and considered the following general topics: in-house CLEs; *pro bono* CLEs; review process; internal process; notices to members; course auditing; military service exemptions; and moot court.

Professionalism Committee

Among its many activities this year, the

committee continued promotion of the Random Acts of Professionalism Program; increased recognition of the importance of mentoring newer lawyers to encourage professionalism; fostered a partnership with LOMAP to promote both mentoring and professionalism; increased collaboration between lawyers and judges to promote professionalism in litigation; and secured a panel on professionalism issues as an agenda item at the next judicial conference. The September CLE seminar was a success; panelists included two Superior Court judges, two WSBA governors, and a prominent litigation attorney. The committee continued its work toward adaptation of the Creed of Professionalism for transactional attorneys.

Pro Bono and Legal Aid Committee

The committee publicized and promoted amendments to RPC 6.1 and proposed revisions to the official comments recommended to the Board of Governors by its Ethics 2003 Committee; completed a draft *in forma pauperis* rule intended to help minimize the time and effort currently required for *pro bono* lawyers to obtain a fee waiver on behalf of their *pro bono* clients and to develop uniformity throughout the state in the application of the fee-waiver process; drafted rules that facilitate *pro bono* participation; supported amendment of MCLE Reg. 103(g); continued to promote and develop corporate counsel and government attorney involvement in *pro bono* efforts statewide; increased visibility of Washington state's *pro bono* efforts; and explored PBLAC's role in encouraging the development of access to justice initiatives by every WSBA section and committee.

Public Information and Media Relations Committee

The committee voted to sponsor a Law Week Town Meeting with other WSBA co-sponsors; published in *Bar News* a letter from the chair urging attorneys to volunteer for Law Week; and surveyed *pro bono* organizations throughout Washington to obtain information on the scope of WSBA members' volunteer activities.

Recent Committee Actions and 2004 Annual Report

August 2004 Committee Meeting

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 trustees. The Committee met on August 20, 2004, and reviewed 106 applications concerning nine lawyers (97 of the applications concerned one lawyer), and approved the following:

Gregory E. Grahn (WSBA #20312; Lakewood; disbarred). Grahn represented the applicant for 10 or 11 years in various child-custody and -support matters. After a several-day trial in 2001 in which custody was awarded to the child's father, Grahn recommended that the applicant file an appeal. The applicant documented payment of fees specifically paid to Grahn for purpose of this appeal in the amount of $1,118.75. During this period, Grahn's law office burned down. After that, when the applicant talked to him, he told her that he was trying to straighten things out after the fire, but he would take care of the appeal. Grahn told her he needed $1,500 to pay for transcripts for the appeal. She paid him $400 toward that cost (the Committee previously approved payment of this amount to the applicant).

When the applicant contacted Grahn's office in the spring of 2003, she learned he had been disbarred. She later talked with another lawyer and learned that an appeal had to have been filed within 90 days. No appeal was filed. The Committee approved additional payment to the applicant of $1,118.75.

Michael J. Harris (WSBA #18240; Tacoma; suspended). *(Mr. Harris is to be distinguished from Michael E. Harris and Michael P. Harris of Seattle.)* The applicant paid Harris $7,500 as fees to represent her son to appeal a marriage-dissolution decision. Harris filed a Notice of Appeal on September 3, 1996, without proof of service, which was not filed until after the court had moved to dismiss the case. Over the next year, Harris repeatedly failed to meet filing requirements in a timely manner, and sanctions were assessed against him. After granting Harris extensions of time to file the Appellant's Brief, the court dismissed the appeal for failure to file the brief on October 2, 1997. Harris did not advise his client or the applicant of the sanctions or the dismissal.

Over the next year, the applicant and her son repeatedly inquired about the status of the appeal, and Harris told them he was waiting for the opposing party to file his brief. In September 1998 the applicant reviewed the court file and discovered the appeal had been dismissed a year earlier. Harris told the applicant that he knew nothing about the appeal being dismissed, and that the court had made a mistake that he would correct. Thereafter, the applicant called Harris several times and he always told her he had straightened out the appeal. In November 1998, Harris told the applicant that he needed an additional $2,000 to pay for the trial transcripts, which the applicant paid. The Supreme Court ordered restitution to the applicant of $9,500. The Committee approved payment of that amount.

Michael T. Johnson-Ortiz (WSBA #23580; Seattle; disbarred). Michael Johnson-Ortiz maintained a high-volume practice chiefly in the area of immigration. He had one associate who was admitted to the Bar in November 2003. In December 2003, Johnson-Ortiz announced that he was going on vacation to Chile, where his wife's parents live. He said he would be gone January 3 to February 6, 2004. Johnson-Ortiz's staff became increasingly alarmed by the prospect that he would not be returning. The bookkeeper discovered that the firm operating account was overdrawn by about $5,000. There was no provision to pay staff salaries in his absence. On January 9, his staff learned that Johnson-Ortiz had shipped all of his belongings, including his car, to Chile. It was subsequently learned that on December 18, 2003, he had informed his landlord that he would be vacating his offices within 30 days.

Members of Johnson-Ortiz's staff contacted the WSBA. On January 22, 2004, the chair of the Disciplinary Board entered an appointment of counsel to protect Johnson-Ortiz's clients' interests, pursuant to ELC 7.7. The WSBA examined his trust account, which had no funds.

Because of the large number of applications, and the fact that many of the applicants were Spanish-speaking, the WSBA employed a temporary investigator who is a law graduate from the Universidad Nacional de Córdoba, Argentina, who previously worked as a legal assistant with a Seattle law firm in the area of immigration. Based on his investigations, the Committee reviewed 97 applications to the Fund, and approved 60 for payment.

Nearly all of the approved applications concerned failure to return unearned fees when Johnson-Ortiz abandoned his practice. The total amount authorized for payment by the Committee concerning Johnson-Ortiz is $89,440.31. Details regarding individual applications are published in the 2004 Annual Report (see "2004 Annual Report," below).

Richard Kyaw (WSBA #21312; Tacoma; disbarred). (The Committee previously approved eight applications concerning Kyaw totaling $25,527.14.) The applicant's husband died August 14, 1999. He left his wife, a teenage son, and four adult children from a prior marriage. The will named the applicant as personal representative. The applicant is deaf and foreign-born, with limited English-language skills. She hired Kyaw in December 1999 to represent her and the estate. She paid a fee of $2,500. Her contact with Kyaw was "almost at nil." When she was able to talk with Kyaw, he assured her that the matter was being taken care of. However, he did not seek appointment as personal representative until October 26, 2000.

When the applicant was unable to contact Kyaw, she contacted the WSBA and learned that Kyaw had been disbarred. With assistance, the applicant was able to locate records showing that on October 27, 2000, Kyaw received $14,620.86 from the deceased's credit-union account, and that on November 27, 2000, he received $12,500 from the sale of the deceased's Alaska commercial-fishing permit. Kyaw never accounted for these funds. A review of the court docket shows that after Kyaw was appointed personal representative on October 26, 2000, there was no further action in the proceeding. The Committee and trustees approved payment of $2,500 to the applicant and $27,120.86 to the estate.

S. Don Phelps (WSBA #21247; Olympia; disbarred). (The Committee previously approved two applications concerning Phelps totaling $750.) The applicant paid Phelps $250 on September 1, 1999, to write a will and prepare a quitclaim deed. She heard nothing further from him, and calls to his office were not returned. In December 2002, the applicant discovered the receipt for her payment to Phelps. She says, "I had forgotten about the retainer and the services to be provided by Mr. Phelps." She wrote requesting a refund and received no response. By that time, Phelps had been convicted of third-degree child molestation and suspended from the practice of law. The Committee approved payment of $250 to the applicant.

Other Business

The Committee reviewed 42 additional applications that were denied as fee disputes or claims for malpractice, or for lack of evidence of dishonest conduct. The Committee also considered a number of issues referred by the Board of Governors in their capacity as Fund trustees. Based on those recommendations, at their meeting on September 17, 2004, the Board of Governors took the following actions:

- Approved the Committee recommendation to increase the per-claim limit from $50,000 to $75,000.
- Accepted the Committee recommendation to make no change in the current restriction on payment of consequential damages.
- Approved the Committee recommendations to recommend to the Supreme Court amendment of the Procedural Rules to (a) give the Committee discretion to approve gifts up to $25,000 without review by the Board of Governors; (b) modify the rule on exhaustion of remedies; and (c) give the Committee as well as the trustees the discretion to waive the three-year time limitation on filing applications.
- Accepted the Committee recommendation that the Fund not be used to pay the costs of custodianships, pursuant to Rule 7.7 of the Rules for Enforcement of Lawyer Conduct. The issue of payment for these custodianships was referred to the WSBA Budget and Audit Committee.

2004 Annual Report

The Lawyers' Fund for Client Protection Committee met four times this fiscal year — November 21, 2003; and February 20, May 14, and August 20, 2004 — to consider 164 applications to the Fund involving 40 lawyers. Eighty-four were approved for payment, totaling $313,721.29. Of the denials, most were deemed to be fee disputes or malpractice claims, or it was determined that there was no evidence of a dishonest taking of funds. During fiscal year 2003, $25,482 in restitution was received by the Fund. The full report is available on the WSBA website at www.wsba.org/lawyers/groups/lawyersfund, or may be obtained by contacting the WSBA office.

The Lawyers' Fund for Client Protection Committee 2003-2004 chair was Seattle attorney Wilda Heard; the 2004-2005 chair is Olympia attorney Jim Connolly. WSBA General Counsel Robert Welden is staff liaison to the Committee.

by Lindsay Thompson

Seattle, September 16-17, 2004
September marks the changing of WSBA's leadership. President **David Savage** returns to Pullman, full of honors; President **Ron Ward** takes the helm. Governors **Rob Boggs, Carl Carlson, Bryce Dille, Zulema Hinojos-Fall**, and **Jon Ostlund** departed with a full record of achievement; Governors **Marcine Anderson, Jim Baker, Stan Bastian, Eron Berg**, and **Lonnie Davis** take their places at the Big Table.

This month's briefing book was only 441 pages, but it was vitamin-enriched, and with new additives. The Board took to it with a will, and, after 12 hours over two days, put most of it to rest. By any measure, President Savage moved a remarkable amount of legislation, initiatives, and studies through the BOG in his year. Not easily impressed, your obedient servant has to confess he was impressed.

Professional Development Implementation Committee: former presidents **Dick Manning** and **Steve DeForest**, and outgoing Seattle University law dean **Rudy Hasl** presented the committee's recommendations arising from their July report to the BOG. The committee's charge was to develop means of improving the lawyers' professional skills: the practical stuff law schools tend not to teach very well.

The committee recommended these actions: (1) that all lawyers admitted to the WSBA do four hours of orientation and skills training prior to admission; (2) that all new lawyers complete 15 hours of approved skills-training courses in their first year of admission, five to be required courses, and all to be offered at a low cost ($75 or less); (3) that all new lawyers complete, by the end of year two, 15 more hours of skills-training courses; (4) that all new lawyers, in the third, fourth, and fifth years after admission, complete 45 more CLE hours, including 15 in approved skills training; and (5) that a task force be created to work on creating more opportunities for new lawyers to get mentored (supervised) client-representation experience.

A long debate followed. People had various concerns, from the projected price tag for the enterprise to what specific course content would be. Proponents said the details would follow, with implementation no sooner than late 2006 or early 2007. In the end, all the recommendations were adopted unanimously, though not without some comments that the WSBA seemed to be taking on things law schools ought to be doing.

Oral Reprimands Get a Preliminary Stake Through the Heart: For years a debate has gone on within the BOG about what to do about reprimands. As the WSBA disciplinary system has evolved over time, the reprimand is the only sanction administered orally, and in person, by the Board of Governors. Lesser ones and greater are all done in writing.

Any number of committees and groups have studied the question, and all came back with the same recommendation: keep things the way they are. My observation was always that those committees were predisposed to that point of view, so it was not surprising when that was the point of view they took. The arguments tended to be anecdotal: it has a deterrent effect, however unquantifiable; we have always done it that way, and should not change things lightly; and so on. The countervailing argument tended to be that the WSBA made attorneys drive long distances to stand before the Board of Governors, have a two-minute reprimand read them, and then go home. By contrast, notices of disbarment come by mail.

This year President Savage appointed Governor **Mike Pontarolo** to chair another committee to look at the issue. To their credit, they looked at all sides fairly and concluded that reprimands should be given in writing, "as there seems to be no showing that oral reprimands deter future misconduct at any greater rate than a written reprimand might."

Governors felt warmly about the issue on both sides, and discussed it at great length. When the vote was called, they voted 8-5 to ask the Supreme Court to change the rules on the use of oral reprimands.

Expanding the Admission Pool, Slightly: Governor **Zulema Hinojos-Fall** persuaded the BOG to recommend changes to APR 3 to allow lawyers who have completed law studies in another country, and who have completed an LLM., SJD, or Ph.D. program in a U.S. law school, to sit for the Washington State Bar exam. The proposal was adopted.

Consent calendar actions
Amendments: addition of "disability" to WSBA Bylaw Section M, approved; technical corrections to Bylaw Article II (c) (2 and 3), approved.

Reports: Board Chair **David Leen** and Executive Director **Barbara Clark** gave the Board of Governors the 2003 Annual Report of the Legal Foundation of Washington. Chair **Wilda Heard** gave the 2003 Annual Report of the Lawyers' Fund for Client Protection. ABA delegates **Llewellyn Pritchard** and **Bill Neukom** gave a report on the 2004 Annual Meeting of the American Bar Association. The Long-Range Planning Committee, chaired by Governor **Carl Carlson**, presented its 2004-2005 Operating Plan for the WSBA, which the Board approved. The Ad Hoc Committee on Election of WSBA Presidents and Governors gave an interim report. Committee Chair **Jim Macpherson** outlined the committee's work to date. The Court Rules and Procedures Committee's recommended changes to CR 26 and 35 will be carried over to next year.

The Committee to Study General Rule 12 gave a report that concluded the rule is subject to varying interpretations. The Young Lawyers Division Greater Access and Assistance Project (GAAP) won an endorsement from the BOG to continue filling the legal-services needs on an expanded basis. The Student Loan Crisis Committee and Washington State Bar Foundation reported on their plan to choose Sallie Mae as a student-loan consolidator, and on the beginning of a plan to forgive student loans for lawyers who go into public service. Federal Judge **Ed Shea** urged the BOG to plan ahead for the WSBA's 125th anniversary in 2014 by starting to capture the recollections of elders of the bar while they are still alive.

The Panel on Criminal Defense recommended goals for improving funding operation of public defense programs. The Washington State Bar Foundation reported on its work over the last year.

That's it. I'm outta here.

OPPORTUNITIES FOR SERVICE

Statute Law Committee — Two Positions

Application deadline: February 18, 2005

The WSBA Board of Governors is accepting letters of interest and résumés from members interested in serving a six-year term on the Statute Law Committee (which oversees the operation of the Office of the Code Reviser), commencing April 1, 2005. A written expression of interest and résumé are also required for incumbents seeking reappointment.

This 12-member committee of lawyers seeks to foster accurate publication of laws and agency rules services in a professional and strictly nonpartisan and cost-effective manner. The primary responsibilities are to periodically codify, index, and publish the Revised Code of Washington; and to revise, correct, and harmonize the statutes of administrative or suggested legislative action as may be appropriate. The committee meets at least twice a year.

Please submit a letter of interest and résumé to the Bar Leaders Division, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; or e-mail barleaders@wsba.org.

Northwest Justice Project Board of Directors — Two Positions

Application deadline: November 19, 2004

The WSBA Board of Governors is accepting letters of interest and résumés from members interested in serving a three-year term on the Northwest Justice Project Board of Directors. The three-year terms will commence January 1, 2005. A written expression of interest and résumé are also required for incumbents seeking reappointment.

The Northwest Justice Project is a not-for-profit organization that receives primary funding from the state and through the federal Legal Services Corporation to provide civil legal services to low-income people. Board members, who play an active role in setting program policy and ensuring adequate oversight of program operations, must have a demonstrated interest in, and knowledge of, the delivery of high-quality civil legal services to the poor. Further information about board-member responsibilities is available on request by e-mail to mac@nwjustice.org.

Please submit letters of interest and résumés to Bar Leaders Division, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; or e-mail barleaders@wsba.org.

Bench-Bar-Press Committee of Washington — Two Positions

Application deadline: December 17, 2004

The WSBA Board of Governors is accepting letters of interest and résumés from members interested in serving a three-year term on the Bench-Bar-Press Committee of Washington. A written expression of interest and a résumé are also required for incumbents seeking reappointment. The three-year terms will commence in February 2005.

The Bench-Bar-Press Committee was formed in 1963 to foster better understanding and working relationships among judges, lawyers, and journalists. Its mission is to seek to accommodate, as much as possible, the tension between the constitutional values of free press and fair trial through educational events and relationship building. The committee is chaired by the Chief Justice of the Washington State Supreme Court and includes representatives from the legal profession, judiciary, law enforcement, and news media. The committee meets as a whole once or twice each year. Subcommittees of volunteers are organized on an *ad hoc* basis to plan and execute events. Further information regarding the committee can be found online at www.courts.wa.gov/programs_orgs/pos_bbp.

Please submit letters of interest and résumés to Bar Leaders Division, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; or e-mail barleaders@wsba.org.

Limited Practice Officer Board — Two Positions

Application deadline: November 12, 2004

The WSBA Board of Governors will be nominating two members who are appointed by the Supreme Court to serve four-year terms on the Limited Practice Officer Board. Terms will commence January 1, 2005. Incumbents are eligible for reappointment (up to two consecutive terms) and must also submit a letter of interest and résumé. The board oversees administration of and compliance with the Limited Practice Officer Rule (APR 12), and meets every other month.

Please submit letters of interest and résumés to Bar Leaders Division, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; or e-mail barleaders@wsba.org.

Free Online Legal-Research Tool Coming to WSBA Members

The WSBA will soon provide a free online legal-research tool to all members, through the Casemaker Consortium of Bar Associations. Casemaker is an online legal-research system providing access to state and federal materials.

Launched by the Ohio State Bar Association in 1999, the system is marketed only to bar associations. There are currently 20 member state bar associations, including our neighbors Oregon and Idaho. Other members are Alabama, Colorado, Connecticut, Georgia, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Texas, Utah, and Vermont. Michigan case law is also available to

all lawyers who are members of Casemaker Consortium states. Each member bar shares its library with all the other member bars.

The WSBA will provide this benefit to WSBA members at no charge; the WSBA will absorb the cost of Casemaker.

We anticipate that Casemaker will be available to all WSBA members by June 2005. Time is needed for Casemaker to create the Washington database, and for the WSBA to develop an online application that will enable members to access Casemaker quickly and easily through the WSBA website. Casemaker will be in a password-protected "members only" section of the website.

Stay tuned for more information!

Creditor-Debtor Section Publication: *Bankruptcy Case Law Digest for Washington State* (3d ed.)

Update your resources with this two-volume set of printed materials plus searchable CD. The third edition of the *Digest* contains the bankruptcy cases dating from 1996 through 2002, with a linked topical index, case list, code, and rules. Bankruptcy cases included are from the U.S. Supreme Court, 9th Circuit Court of Appeals, 9th Circuit BAP, 9th Circuit District Courts, and the Washington Bankruptcy Courts. Cost for the set of both volumes and companion searchable CD is $90, with a discounted cost of $75 for members of the WSBA Creditor-Debtor Section and the Idaho Commercial Law and Bankruptcy Section. To order, visit the Creditor-Debtor Section webpage at www.wsba.org/lawyers/groups/creditordebtor/bankruptcy_digest.htm.

CLE Bookstore Open for WSBA Members in December

For members who must complete their MCLE credits before December 31, 2004, the WSBA CLE Seattle bookstore will be open at the WSBA office, 2101 Fourth Ave., Ste. 400, from December 16 through December 30, with the exception of Friday, December 24, when the bookstore will be closed. Hours of operation will be from 9:00 a.m. to 4:30 p.m. Available MCLE A/V credit-approved material will include a limited supply of selected taped seminars with coursebooks. Payment may be made by cash, check, MasterCard, or Visa, and there are no shipping and handling charges for members who take their purchases with them. (You may claim up to 15 total A/V credits for the current reporting period. All ethics credits can be acquired using approved A/V self-study.)

Thinking of Changing Your WSBA Membership Status? Consider Emeritus.

As the 2005 WSBA licensing period approaches, you may be thinking of changing your membership status to more accurately reflect your current career or lifestyle. If you no longer need your active WSBA license, here's why you should consider Emeritus status.

APR 8(e) creates a limited license status of Emeritus for attorneys otherwise retired from the practice of law, to practice *pro bono* legal services through a qualified legal services organization. A qualified legal services organization is defined as "an organization that exists primarily for the purpose of providing legal services to low-income clients." There are no MCLE requirements (although you may attend optional CLE seminars at no cost so that you stay apprised of changes in the law). The 2005 license fee for Emeritus is $117. This is a significant savings in time and money if you are paying for an active license that you no longer need. Under most circumstances, Emeritus attorneys can remain in Emeritus status indefinitely without having to re-take the bar exam if/when returning to active status. Volunteering for a "qualified legal services organization" allows you to control your own schedule. Most importantly, the Emeritus program provides an opportunity for attorneys to give something back to their communities by helping those who are less fortunate.

One or more qualified legal service organizations are present in most Washington state counties. They include Columbia Legal Services, a statewide legal services program; Northwest Justice Project, a central statewide point of access for clients; specialized legal services programs (such as Northwest Women's Law Center, Unemployment Law Project, and others); and county volunteer-attorney programs. These organizations offer a wide variety of volunteer opportunities, such as direct representation, mentoring, advice clinics, self-help clinics, board service, telephone advice, and document preparation. Emeritus also allows for *pro bono* services for criminal cases through some public defender offices. Emeritus attorneys and judges are currently volunteering in many capacities, including the Northwest Justice Project's CLEAR intake line (one remotely, from home); the Northwest Women's Law Center Board of Directors; a Columbia Legal Services administrative law case; King County Bar Association Neighborhood Legal Clinics; defense services for the Associated Counsel for the Accused in the Seattle Municipal Court's Mental Health Court; and writing wills for low-income seniors in Skagit County. We will do our best to find a niche to fit your legal expertise and time schedule.

An Emeritus training session has been scheduled for Tuesday, January 25, 2005, at the WSBA office in Seattle. This training is a requirement for changing to Emeritus status and will provide an opportunity for you to meet the providers. Travel expenses will be reimbursed. For more information about the Emeritus program, the training session, and the logistics of changing your WSBA status to Emeritus, please contact Sharlene Steele, WSBA access to justice liaison, at 206-727-8262 or sharlene@wsba.org.

Washington Attorneys Assisting Community Organizations (WAACO)

WAACO is a statewide organization that matches volunteer attorneys with charitable and community-based nonprofit organizations in need of business-related *pro bono* legal services. Volunteer lawyers are needed; those interested in volunteering are encouraged to attend a training seminar on December 7 in Seattle; e-mail contact@waaco.org or call 866-288-9695 for details.

Address Update Reminder

The 2005 license fee renewal packets are scheduled to be mailed in early December. The deadline for updating your address to be included in the license fee renewal packet mailing was October 15, so please call the WSBA to request a duplicate packet if you have not received yours by December 31. You can check your listing by going to the online lawyer directory at http://pro.wsba.org. If any of your contact information (name, address, phone, fax, or e-mail address) has changed, please update the information by e-mailing questions@wsba.org; faxing the change to 206-727-8319; or calling the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Senior Attorneys Discussion Group

We meet one Thursday a month to talk about issues important to senior attorneys who continue to be involved, creative, healthy, and active. November 11, author Bonnie Genevay will discuss loss, resilience, grief, and aging. December 16, we will share our volunteer activities. Please join us from 4 to 5:40 p.m. at no cost in the WSBA 4th-floor conference room. For more information, call Jennifer Favell, Ph.D., at 206-727-8267.

Therapy Group for Attorneys Struggling with Depression

Research reports indicate that at least 20 percent of lawyers suffer from clinically significant levels of depression. If you or a colleague is among this group, you might consider the services of the Lawyers' Assistance Program. We will offer a small, confidential therapy group for active members of the WSBA, meeting on Wednesdays, 4-5:30 p.m., beginning as soon as the group has formed. Cost will be on a sliding-scale basis. If you have questions or would like further information, please call Jennifer Favell, Ph.D., at 206-727-8267.

Coming Soon: 2005 Annual Publications Catalog

The 2005 edition of the Publications Catalog from WSBA-CLE Publications will be in the mail soon. Look for your convenient guide to outstanding products and services, from the leader in innovative legal education, this month. Save your catalog for the coming year to order our premier deskbooks, audiotapes, coursebooks, and more — whether online, or by phone, fax, or mail.

CLE Calendar Through December 2004 Now Online

To help you plan your schedule, WSBA-CLE is listing upcoming seminars through the end of the year at www.wsba.org/cle/seminars. If the seminar is open for registration, you can register online. For later seminars, you can ask to be notified when registration opens.

MCLE Certification for Group 1 (2002-2004) — Complete Credits by December 31, 2004

Active WSBA members in MCLE Reporting Group 1 will be required to report compliance with MCLE credit requirements for 2002-2004 at the end of this year. Members in Group 1 include active members who were admitted to the WSBA in all years through 1975, or in 1991, 1994, 1997, or 2000. Members admitted in 2003 are also in Group 1 but are not due to report until the end of 2007. Their first reporting period will be 2005-2007, but any credits earned on or after the day of admittance to the WSBA may be counted for compliance.

If you are a Group 1 member, you will receive a Continuing Legal Education Certification (C2/C3) form in the license packet that will be mailed to you at the beginning of December. This form is an affidavit that lists all the WSBA-approved courses that are in your MCLE online profile for the 2002-2004 reporting period. The C2/C3 form, not your online profile, is the official record of MCLE compliance.

- If you have taken courses since the course information on the C2/C3 form was printed, ensure that these courses have been added to your online profile, then print and attach the profile to the C2/C3 form. Indicate on your C2/C3 form that the attached profile is the true and correct record of the courses taken for the reporting period.
- Alternatively, you may simply add by hand to the back of the C2/C3 form the additional WSBA-approved courses you took. Ensure that you include the activity ID number and all other required information for each course.
- The deadline for completing the C2/C3 form and returning it to the WSBA is February 1, 2005. All active members in Group 1 must send in a completed C2/C3 form.

If you are not able to meet the credit requirement by December 31, 2004, an automatic extension will be granted until May 1, 2005; however, a late fee will be imposed. If this is the first period in which you have not met MCLE compliance requirements, the late fee is $150. The late fee increases by $300 for each consecutive reporting period that you are late in meeting MCLE requirements.

See the "MCLE Certification for Active Members — General Information" section that follows for further information about MCLE reporting-period compliance.

MCLE Certification for Active Members — General Information

Due Date for MCLE Reporting. All WSBA members are divided into three MCLE reporting groups based on year of admission:

Group 1: Admitted through 1975, 1991, 1994, 1997, 2000, or 2003.*

Group 2: Admitted in 1976 through 1983, 1992, 1995, 1998, 2001, or 2004.*

Group 3: Admitted in 1984 through 1990, 1993, 1996, 1999, or 2002.*

**New admittees (exempt): see "Newly Admitted Members," below.*

Group 1 will be required to report for the 2002-2004 reporting period by March 1, 2005.
Group 2 will be required to report for the 2003-2005 reporting period by March 1, 2006.
Group 3 will be required to report for the 2004-2005 reporting period by March 1, 2007.

Credit Requirements. The following credit requirements must be met by December 31 of the last year of an active member's reporting period: Earn at least 45 total credits of WSBA-approved CLE activities, which must include a minimum of 30 live credits and a minimum of six ethics credits. A/V courses can be no more than five years old, except skills courses. No more than four *pro bono* credits can be earned per year.

Carryover CLE Credits. Carryover credits from the previous reporting period must be used to meet the requirements of the current reporting period. If your current reporting period total credits exceed 45, you may carry over a maximum combined total of 15 general and ethics credits. Only two ethics credits and five A/V credits may be carried over.

MCLE Late Fees. All active members who have not completed their credits by December 31 of the last year of their reporting period, or who submit their C2 reporting forms after March 1 of the following year, must pay a late fee of $150. The late fee increases by $300 for each consecutive three-year reporting period of noncompliance.

Newly Admitted Members. If you are a newly admitted member, you are exempt from reporting CLE credits for the year of your admission and the following calendar year. If you were admitted in 2003, you will not report this reporting period (2002-2004) even though you are in Group 1. You will first report at the end of 2007 for the 2005-2007 reporting period. When you report at the end of your first reporting period, you may claim all CLE credits earned on or after your date of admission to the WSBA.

MCLE Comity. If you are an active member of the WSBA and your primary practice is in Oregon, Idaho, or Utah, you may meet your mandatory CLE requirements by providing proof of current compliance. Only a Certificate of Compliance from your state bar will satisfy your MCLE requirements in Washington.

MCLE System — Course Listing and Member Profiles. You can use the online MCLE system at http://pro.wsba.org to review courses taken and credits earned, apply for course approval, apply for writing credit or for prep-time credit, and search for approved courses being presented in the future.

To use the MCLE system, go to http://pro.wsba.org, click on the Member tab, then select Member Login. The online instructions will lead you through the process of creating a confidential password and beginning to use the system. Online help is available.

If you have any questions about using the MCLE system or about the MCLE compliance requirements, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or questions@wsba.org.

Lawyers' Assistance Program Peer Counselor Statewide Network

We are attorneys who volunteer support to others who need someone to listen when times are tough. We are not professional mental-health counselors, but do receive training at our statewide conference in April and regional trainings throughout the year. We seek to expand the diversity we represent and offer to WSBA members. Would you have time and interest in listening, recognizing when a peer needs referral for additional support, attending a training, educating the legal community about the healthy practice of law, or otherwise giving of yourself as your time allows? Please call Jennifer Favell, Ph.D., at 206-727-8267.

WSBA Mileage-Reimbursement Rate

It is the WSBA's policy to adjust the mileage-reimbursement rate every October to the optional standard business rate set by the IRS. Effective October 1, 2004, the WSBA mileage reimbursement rate for meetings and travel on behalf of the WSBA is $0.375 per mile. For a summary of the WSBA Expense Policy, download the WSBA expense report form at www.wsba.org/info/operations/finance/expensereport.htm.

Lawyer-to-Lawyer Program: Mentors Needed for Newer Admittees

The WSBA's Lawyer-to-Lawyer Program matches newer admittees with experienced lawyers. The program is not a structured mentoring program and does not supplant any similar programs of local or specialty bars. We connect lawyers with similar practices in the same geographic area for mutual information-sharing and goodwill. We need experienced attorneys to serve as informal mentors, especially in King County. Help new lawyers get a head start on learning those lawyering skills not found in any textbook. Interested members may contact Pete Roberts (206-727-8237; peter@wsba.org) in the Law Office Management Assistance Program. Program guidelines and sign-up forms are available at www.wsba.org/lawyers/services/lawyertolawyer.htm.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in October 2004 was 2.038 percent. The maximum allowable interest rate for November 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 to June 1999 appear on page 53 of the June 1999 *Bar News*. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.

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 for committees and sections. If you haven't already, please consider providing us with your e-mail address. Contact the

WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or questions@wsba.org. Representatives are available Monday through Friday, 8 a.m. to 5 p.m.

Upcoming Board of Governors Meetings

December 10-11 — Everett
January 20-21, 2005 — Olympia
February 18-19, 2005 — Seattle

With the exception of a one-hour executive session the morning of the first day, Board of Governors 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 Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/info/bog/schedule.htm.

Visit the WSBA Online Store

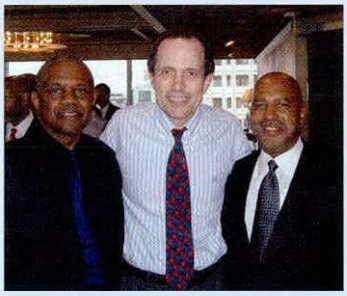
Go to www.wsba.org and click "WSBA Store" in the left navigation bar to purchase Cutter & Buck polo shirts, twill baseball caps, ballpoint pens, and brass luggage tags, all sporting the WSBA logo. The store offers secure online credit-card ordering. You can also purchase logo merchandise by calling the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

- Polo shirt (pewter or white, size L or XL) — $56
- Baseball cap (stone) — $24
- Ballpoint pen — $12
- Luggage tag — $7

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

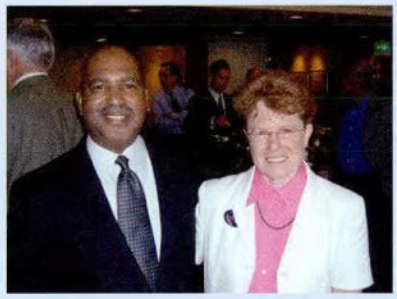
Learn More about Case-Management Software

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.



WSBA President Ron Ward with William Garling Jr. (l.) and William Bailey (ctr.).

Outgoing Governor Zulema Hinojos-Fall (r.) joins (l. to r.) Karen Murray, Anika Patel, Faye Brooks, and Bonnie Glenn in welcoming the new president.



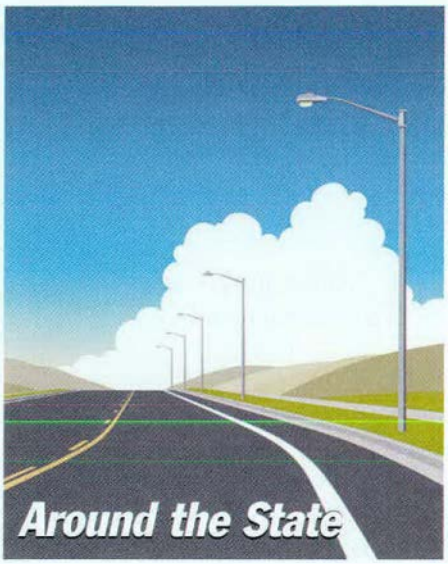
President Ron Ward with WSBA Executive Director Jan Michels.

Loren Miller Bar Association and Levinson Friedman Host Reception for Ron Ward, New WSBA President

On September 14, 2004, the Loren Miller Bar Association and the Law Firm of Levinson Friedman, P.S. hosted a special reception honoring new WSBA President Ward at the Harbor Club in Seattle. The Loren Miller Bar Association — the 2004 recipient of the Washington Young Lawyers Association Outstanding Affiliate Award — is the Washington affiliate of the National Bar Association, which is the oldest minority bar and the largest organization of African-American attorneys in the United States. Levinson Friedman, where President Ward is a shareholder, is a 75-year-old Seattle law firm of 11 lawyers that represents injured persons. Approximately 150 friends, family members, and colleagues of President Ward attended the reception.

Ron Ward Sworn in by Washington State Supreme Court Chief Justice Gerry Alexander

On September 16, 2004, in a history-making ceremony at the 2004 Annual Awards Dinner and Business Meeting in Seattle, Washington State Supreme Court Chief Justice Gerry Alexander swore in Ron Ward as 114th president of the WSBA, with members of the Loren Miller Bar Association and other minority bar associations standing by. Ron Ward is the first WSBA president of color.



Around the State *reports are welcome from county and specialty bar associations. There are no rules for writing them, except to mention lots of your members. We leave it up to each organization to decide who does it, and to the correspondent to decide how often. Many counties are still available. Contact the editor at tradelaw@thompson-law.com for more information.*

Island County Report

by Tom Pacher

Greetings from the shores of Oak Harbor.

Dean Adams, primarily known around here for his work in the public defense in City of Oak Harbor cases, recently set out on his own after the firm he was associated with decided to part company and close its Oak Harbor operation. Dean swears it will be business as usual. I tend to think he's serious, despite repeatedly claiming the city hasn't given him discovery on yet another case yet. Normally, I'd probably say something nice about him here, but I have to face him across a courtroom several times a week . . . .

In judicial news, Superior Court Judges **Alan Hancock** and **Vickie Churchill** will likely both be starting new terms after drawing no opposition for their jobs in the most recent election. Despite a previous practice of claiming there is something just inherently wrong in unopposed races for elected office, the local paper actually endorsed both judges for re-election, saying they each deserved another term. We're just not sure whether this marks an editorial shift for the paper, or if someone at the paper has figured out it may not be wise to pick a fight with a judge for no reason. Either way, congratulations to both judges . . . again.

In sadder news, Oak Harbor District Court Commissioner **Tom Coughlin** recently passed away. According to news reports, Commissioner Coughlin was on his way home one Monday evening when he stopped to help someone at an accident scene. While at the scene, he had a heart attack and died. Commissioner Coughlin was liked and respected by many around here, and his death came as quite a surprise to those of us who had recently appeared before him on some fairly lengthy calendars, which he was tackling with his usual vigor and energy. He will be missed.

The Judiciary

by Lindsay Thompson

In Snohomish County, friends of **Eric Z. Lucas** are celebrating his historic primary win in a race for the Superior Court. Lucas was elected to position 8. It was the first time in 50 years an incumbent judge was unseated in that county, and the first time an African-American has ever been elected to the bench. Lucas started his trailblazing path in 1999 when he was the first African-American to serve as a *pro tem* judge. Prior to his election Lucas worked as an administrative appeals judge for the Department of Environmental Hearings.

Longtime Washington Courts Administrator **Mary Campbell McQueen** won the American Judicature Society's Herbert Harley Award in September. The award honors a person whose outstanding efforts and contributions have resulted in substantial long-term improvement to the justice system at the state level. McQueen worked with Washington's courts for over 20 years before becoming president of the National Center for State Courts in August of this year.

In Yakima, the late U.S. Supreme Court Justice **William O. Douglas** was honored in September with the unveiling of a $60,000 statue at Davis High School. Douglas, a Yakima native, graduated from the school — then Yakima High School — in 1916 and taught there from 1920 to 1922. He went on to become a distinguished law professor, chair of the Securities and Exchange Commission, and the longest-serving member of the Supreme Court in history. Appointed in 1939, Douglas retired in 1975 and died in 1980.

President Bush has nominated Pierce County Superior Court Judge **Jack Nevin** for promotion to brigadier general in the Army Reserve. In addition to his civilian judgeship, Nevin serves as chief judge for the U.S. Army Legal Services Agency in Falls Church, VA. A graduate of WSU and Gonzaga Law School, Nevin is a former Army lawyer. He joined the Pierce County Prosecuting Attorney's Office in 1984 and was appointed to the bench in 1997.

In Memoriam

Richard Bostrom

Friends and family called Dick Bostrom a renaissance man. He loved opera, travel, theater, and art. In 30 years he never missed a Husky football game.

A West Seattle native, Bostrom was a champion swimmer and triathlete who graduated from WSU and the University of Idaho School of Law. He was a captain in the Army Reserve, and spent 21 years as a business, bankruptcy, and estate-planning lawyer in Seattle.

Survivors include two sisters. Richard John Bostrom was born in Seattle July 2, 1948, and died in Seattle July 30, 2004, aged 56.

Paul M. Goode

Yakima native Paul Goode graduated from UW, where he rowed crew, and the UW School of Law. He was Phi Beta Kappa and Order of the Coif at UW. After joining the Bar in 1935, he practiced law for half a century, first in Seattle, then in Yakima after World War II ended. In 1983 he moved to McMinnville, OR.

Goode served as a probate judge in Yakima, chaired the school board and Yakima Covenant Church board, and was

a director of the Lions Club and Washington Mutual Bank.

Survivors include his wife of 62 years, Ruby; two daughters; four grandchildren; two great-grandchildren; and two sisters.

Paul Matthew Goode was born in Yakima February 7, 1912, and died in McMinnville January 29, 1999, aged 86.

John L. Neff

John Neff had a lifelong interest in mining. He graduated from the Colorado School of Mines in 1953 with an Engineer of Mines degree, worked at the Climax Mine in Colorado, then spent two years in the Army Counterintelligence Corps.

When Neff enrolled at UW School of Law, he taught engineering part time in the University. After graduation in 1958, he joined the Witherspoon, Kelley, Davenport & Toole firm in Spokane, and practiced there until his retirement in 2000.

Neff was a longtime member and officer of the Northwest Mining Association and was active in Manito United Methodist Church.

Survivors include his wife, four daughters, five grandchildren, two step-grandchildren, and two siblings.

John Lewis Neff was born in Tulsa, OK, July 7, 1929, and died in Spokane May 19, 2003, aged 73.

Frank A. Peters

Native Washingtonian Frank Peters was a UW law student when the Pearl Harbor attack occurred, and immediately left school to join the Navy. He left the service four years later as a lieutenant, senior grade, and picked up his law studies.

After graduation in 1946, Peters clerked for Judge Homer Bone on the 9th Circuit Court of Appeals. Returning from San Francisco, he set up private practice in Puyallup with his friend Edmund F. Jacobs. In 1965 he moved to Spokane and practiced there for the rest of his career with H. Frank Stubbs. Peters became known as a successful trial lawyer and was active in the Elks, Rotary, and VFW.

Survivors include his second wife, Bonnie. His first wife, Gertrude, died in 1985.

Born in Seattle August 12, 1919, Frank August Peters died in Lake Forest Park January 25, 2003, aged 83.

Richard A. Staeheli

A lifetime resident of Spokane, Richard Staeheli had a varied practice, working for six years in the First Service as a young man, then serving 13 years as an IRS lawyer after he graduated from Gonzaga School of Law. Staeheli went into private practice for 20 years and ended his career serving as of counsel to the Paine Hamblen firm.

Active in his community, Staeheli was a member of Sacred Heart Catholic Church, Rotary International, and the Spokane County Bar Association. He was a life member of the NRA and a director of the Camp Fire program.

Survivors include his wife, three children, five grandchildren, and two siblings.

Richard Alan Staeheli was born in Spokane February 15, 1943, and died in Spokane July 9, 2004, aged 61.

Robert M. Sweeney

Lifelong Spokane resident Robert Sweeney served two years in the Army before entering Gonzaga Law School. He joined the Bar in 1961, and died in Spokane March 20, 2004, aged 73.

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.

Suspended

Helen M. Johansen (WSBA No. 5211, admitted 1973), of Seattle, was suspended for three years, effective July 9, 2004, by order of the Washington State Supreme Court following a stipulation. This discipline was based on her conduct in 2000 involving drafting a will naming her as beneficiary.

Ms. Johansen developed a friendship with two clients. Over several years, she took the clients to dinner; arranged for residential care; and assisted them with daily tasks such as banking, food shopping, obtaining prescription medications, and meeting healthcare providers. In 1997, the clients began asking Ms. Johansen to draft a new will for them naming herself as an alternate beneficiary. Ms. Johansen refused and the clients became upset. The clients eventually wrote up their own wills on blank will forms, naming Ms. Johansen as the alternate beneficiary. At the clients' insistence, Ms. Johansen gave their wills to her secretary to type. She also drafted a codicil leaving the alternate beneficiary blank, which the clients did not use. In late January 2000, Ms. Johansen finalized the clients' wills, inserting her name as alternate beneficiary. She advised the clients against naming her as a beneficiary, but did not explain that this might invalidate the wills. In March and April 2000, the clients executed the wills.

One client died in January 2001 and the other in November 2001. In December 2001, Ms. Johansen was appointed personal representative with nonintervention powers. She transferred all of the estate funds into her name, but maintained the estate intact. The probate remained open at the time of the stipu-

lation. Pursuant to the stipulation, Ms. Johansen renounced any interest in the estate.

Ms. Johansen's conduct violated RPC 1.8(c), prohibiting a lawyer from preparing an instrument giving the lawyer a substantial gift, including a testamentary gift.

Elizabeth Turner Smith represented the Bar Association. Spencer Hall represented Ms. Johansen.

Suspended

James D. Hughes (WSBA No. 15165, admitted 1985), of Portland, OR, was suspended from the practice of law for six months, by order of the Washington State Supreme Court, effective July 20, 2004, imposing reciprocal discipline based on an order from the state of Oregon. This discipline was based on his lack of diligence in a bankruptcy litigation matter.

In March 1996, Mr. Hughes agreed to represent clients in a proceeding to determine the dischargability in bankruptcy of a judgment they obtained. The clients lived out of state and also had local counsel. Mr. Hughes failed to notify the clients that the court had set their case for trial. Local counsel advised Mr. Hughes that the case would no longer be pursued. Mr. Hughes agreed to notify the clients, but failed to do so. Later, the court dismissed the clients' case for failure to prosecute. The clients terminated Mr. Hughes's employment and asked that he return their file. He returned a portion of the file after the clients contacted the Oregon State Bar.

At the time of this conduct, Mr. Hughes was meeting with a probation monitor following a prior suspension. Mr. Hughes did not tell the probation monitor of his failures in the Hughes matter.

Mr. Hughes's conduct violated Oregon Code of Professional Responsibility 1-102(A)(4), prohibiting conduct prejudicial to the administration of justice; 6-101(B), prohibiting neglecting a legal matter entrusted to a lawyer; 7-101(A)(1), prohibiting intentionally failing to seek clients' lawful objectives through reasonably available permissible means; and failing to promptly pay or deliver client property upon request.

Felice Congalton represented the Bar Association. Mr. Hughes represented himself.

Reprimanded

James M. Roe (WSBA No. 8553 admitted 1978), of Seattle, received a reprimand effective July 20, 2004, following a default hearing. This discipline is based on his conduct in 2002 involving conduct prejudicial to the administration of justice in a juvenile criminal matter.

In September 2002, Mr. Roe represented a client in a juvenile court matter. When the co-defendant received a deferred prosecution with community service, Mr. Roe asked his client to step into the hallway for a discussion. Mr. Roe pressured his client about the client's ability to complete community-service hours. The client "bet" that he could complete the hours, and Mr. Roe "bet" that the client could not. Using profanity, Mr. Roe pointed out that the client risked a felony conviction if he failed to complete the required hours. Mr. Roe grabbed the client's shoulder and pushed him into a corner.

Mr. Roe's conduct violated RPCs 8.4(d), prohibiting conduct prejudicial to the administration of justice; 8.4(b), prohibiting committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; and 8.4(i), prohibiting committing an unjustified act of assault.

Linda Eide represented the Bar Association. Mr. Roe represented himself. Andrea Darvas was the hearing officer.

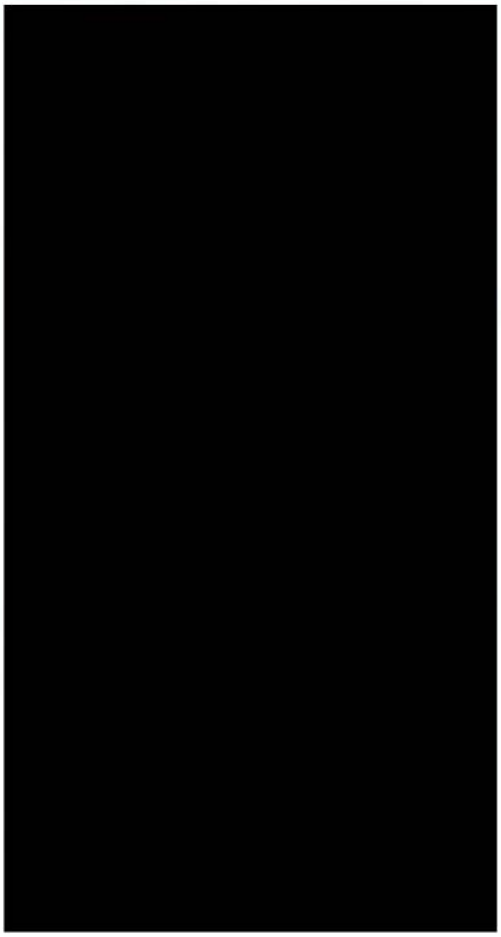
Reprimanded

John K. McIlhenny Jr. (WSBA No. 32195, admitted 2002), of Olympia, was ordered to receive a reprimand, by order of the Washington State Supreme Court, effective July 13, 2004, imposing reciprocal discipline based on an order from the state of Oregon. This discipline was based on his actions in 2002, involving an error determining the character of funds received.

Mr. McIlhenny represented a client in a marriage-dissolution matter. The court awarded the client a judgment lien on real property. In April 2002, Mr. McIlhenny filed an attorney lien against the real property judgment lien. The client disputed the amount of fees owed to Mr. McIlhenny. Mr. McIlhenny agreed, at the client's request, to maintain the disputed funds until the dispute was resolved. In May 2002, the judgment lien was paid in two separate checks — one made out to Mr. McIlhenny and the other to the client. Mr. McIlhenny wrote the client a letter asking how she wished to disburse the funds. The client communicated with the lawyer, but not on the fee issue. In June 2002, Mr. McIlhenny sent the client the check made out to her order and also told her that he had applied the second check to her account. Mr. McIlhenny mistakenly believed that the check written to him was not "funds of a client paid to the lawyer" and, therefore, did not have to be placed in the trust account.

Mr. McIlhenny's conduct violated Oregon Code of Professional Responsibility DR 9-101(A), requiring lawyers to deposit and maintain client funds in a trust account.

Felice Congalton represented the Bar Association. Mr. McIlhenny represented himself.



KINGMAN PEABODY PIERSON & FITZHARRIS, P.S.

is pleased to announce that

Kathleen F. Cochran, Colleen M. Gutierrez, Lisa M. Hammel, and **Matthew F. Pierce**

have joined the firm as Associates.

The attorneys of Kingman Peabody Pierson & Fitzharris, P.S. are available for referral, consultation, and association in litigation involving commercial disputes; insurance coverage; professional liability and discipline; products liability; intellectual property; construction defect; serious personal injury and wrongful death; eminent domain/ condemnation; and real property disputes.

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206-622-1264 • www.kingmanpeabody.com
We invite you to call, write, and/or visit our website.

GOIN' RIDIN' INTO THE SUNSET

Gretchen McCallum of **McCallum Law Firm,** P.S. announces her retirement effective December 31, 2004. The call to be on the trail with the husband and the Appaloosas has become too strong to ignore.

Her appreciation is extended to all those colleagues who have made the past 17-year journey a challenging, sometimes humbling, but always enlightening experience.

Jennifer Walker has relocated her office from Tacoma, WA, and will assume Gretchen's practice with the able assistance of Gretchen's longtime paralegal, Debi Beyerlin. Jennifer is a 1988 graduate of the University of Puget Sound School of Law and a 1988 member of the Alaska and Washington Bars. She will continue to focus her practice on family law issues and welcomes referrals on relevant matters for both Pierce County and King County.

Jennifer and Debi will remain at the same location with the same phone number and fax number, and will be known as:

WALKER LAW OFFICES, P.S.
1102 Bronson Way North
Renton, WA 98055
Phone: 425-687-1413 • Fax: 425-687-1418

Jenifer C. Merkel

has joined the firm of

REED, LONGYEAR, MALNATI & AHRENS PLLC

as an associate practicing estate planning, probate, guardianships, and general civil litigation.

Ms. Merkel earned her Bachelor of Arts Degree in Journalism from Washington State University in 2000. She earned her Juris Doctor from the University of Washington School of Law in 2003. Ms. Merkel is licensed to practice in Washington.

REED, LONGYEAR, MALNATI & AHRENS PLLC
1415 Norton Building
801 Second Avenue
Seattle, WA 98104
Phone: 206-624-6271 • Fax: 206-624-6672

YARMUTH WILSDON CALFO PLLC

is pleased to announce the addition of attorney

C. Seth Wilkinson

Seth joins us from the law firm of Heller Ehrman White & McAuliffe. He is a former law clerk to Chief U.S. District Judge John Coughenour and is a graduate of University of Michigan Law School and Haverford College.

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925 Fourth Avenue, Suite 2500
Seattle, WA 98104
206-516-3800
www.yarmuth.com

LYBECK ❖ MURPHY LLP

is pleased to announce that

Beth Cooper

has become a partner of the firm.

Ms. Cooper began her private practice in 1995 focusing on maritime insurance matters. She has practiced with Lory Lybeck and James Murphy since 1996 in the areas of medical negligence, products liability, guardianship, and other civil litigation matters. Ms. Cooper is admitted to practice in Washington and Alaska.

and that

Brian C. Armstrong
Brian T. Hodges
Katherine L. Felton

have joined the firm as associates.

Mr. Armstrong joined the firm after two years as a judicial clerk for the Honorable Mary Kay Becker at the Washington Court of Appeals, Division I. Mr. Armstrong's practice includes appellate litigation, professional and products liability, employment law, and general civil litigation.

Mr. Hodges also joined the firm following two years as a judicial clerk for the Honorable Mary Kay Becker. Following his clerkship, Mr. Hodges' practice includes appellate litigation, administrative proceedings and appeals, products liability, employment, and general civil litigation.

Ms. Felton joins the firm after practicing in Seattle for four years, where she focused her practice in the area of CERCLA clean-up and natural resource damages matters and civil litigation. She will continue her practice in the areas of environmental law and civil litigation. A native of Alaska, Ms. Felton is a graduate of Princeton University and was Editor-In-Chief of the *Journal of Environmental Law & Litigation* at the University of Oregon School of Law.

Lory R. Lybeck, PS
James P. Murphy, PS
Janet H. Somers, PLLC
Sue Stepp Tamblyn, PLLC
Elizabeth A. Cooper

Brian C. Armstrong
Katherine L. Felton
C. Chip Goss
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The Law Office of Mary Anne Vance, P.S. proudly announces that **SHEILA C. RIDGWAY** is now a shareholder in the firm. The firm name is now

The Law Office of Mary Anne Vance
and
Sheila C. Ridgway, P.S.

The firm will continue its practice in trust, estate, probate and guardianship matters.

Ms. Ridgway's practice focuses on the litigation of complex trust, probate and guardianship matters.

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- Consultation, Representation

206-623-5890
E-mail: mcaryl@mbwf.com

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Helmut Wallenfels, having 38 years of experience as an in-house lawyer for Weyerhaeuser Co., is available for consultations and referrals in citations and appeals under the Washington Industrial Safety and Health Act (WISHA).

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E-mail: comm@wsba.org

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

Antitrust

Trends in Antitrust Policy: Washington, the United States and the World
November 5 — Seattle. 6 CLE credits, including 1 ethics credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Business Law

Insurance Today: How to Navigate Placement, Claims and Other Rough Waters — and Stay Dry
December 14 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Environmental Law

Annual Water Law Conference
November 19 — Tukwila. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Estate Planning

49th Annual Estate Planning Seminar
November 15-16 — Seattle. 14.5 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Charitable Giving
December 8 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics

Ethical Dilemmas for the Practicing Lawyer
November 3 — Mount Vernon; November 10 — Vancouver; November 12 — Seattle. 4 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics for General Practitioners
November 5 — Telephone CLE. 6 CLE credits, including 1.5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Learning to Listen
November 19 — Olympia. 2 ethics credits. By WSBA Lawyers' Assistance Program; 206-727-8268.

Modern Technology and Ethical Dilemmas
November 23 — Telephone CLE. 1.5 ethics credit. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics for Estate Planners
November 30 — Telephone CLE. 1.5 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Negotiation Ethics: Winning Without Selling Your Soul, featuring Martin E. Latz
December 1 — Telephone CLE. 1.5 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Impeach Justice Douglas! Handling Controversies Ethically: An engaging theatrical performance combined with panel discussion
December 2 — Seattle; December 7 — Lacey. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

The Art of Law — A Workshop on Professionalism for Lawyers
December 2 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

12th Annual Professional Responsibility Institute
December 11 — Seattle. 6.5 ethics credits pending. By UW-CLE; 800-CLE-UNIV.

Ethics for Employment Lawyers
December 14 — Telephone CLE. 1.5 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics for Business Lawyers
December 15 — Telephone CLE. 1.5 ethics credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

The Ethics of Excellence with Judge Coughenour and Dr. Himma
December 21 — Seattle. 8 ethics credits. By Emerald Education Group; 206-985-4351.

Family Law

Adoption Practice and Procedure: Keeping Current
December 3 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206443-WSBA.

How to Handle Your First (or Next) Dissolution Trial with Confidence
December 9 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

General

Violence Against Women Act and Special Immigrant Juvenile Status
November 16 — Seattle. 4.5 CLE credits, including 1.75 ethics. By UW-CLE; 800-CLE-UNIV.

Law, Literature and Film
December 3 — Seattle. 4 CLE credits, including 1 ethics pending. By UW-CLE; 800-CLE-UNIV.

A Year to Remember: 2004 Transforms the State Felony Landscape
December 3 — Seattle. 6.25 CLE credits, including 1 ethics. By WACDL; 206-623-1302, info@wacdl.org.

Nuts and Bolts of Representing Nonprofit Organizations
December 7 — Seattle. CLE credits pending. By Washington Attorneys Assisting Community Organizations (WAACO); 866-288-9695.

Yellow Flags and Red Herrings for the Generalist, Part I
December 9 — Seattle. 7 CLE credits. By Emerald Education Group; 206-985-4351.

Best of CLE — Encore of Excellence
December 10 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Yellow Flags and Red Herrings for the Generalist, Part II
December 15 — Seattle. 8 CLE credits. By Emerald Education Group; 206-985-4351.

The History, Theory and Practice of Free Expression
December 17 — Seattle. 4 CLE credits pending. By UW-CLE; 800-CLE-UNIV.

Theories of Constitutional Interpretation
December 17 — Seattle. 3.5 CLE credits pending. By UW-CLE; 800-CLE-UNIV.

Tegland's Evidence and Procedure Update2004
December 20 (a.m.) — Seattle. 4 CLE credits. By Emerald Education Group; 206-985-4351.

Trial Themes and Exhibits Workshop
December 20 (p.m.) — Seattle. 4 CLE credits. By Emerald Education Group; 206-985-4351.

Last Chance Video Round Up
December 20-21 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

CLE Jubilee (Procrastinator's Paradise)
December 30 — Seattle. 16 CLE credits, including 8 ethics. By Emerald Education Group; 206-985-4351.

Land Use

Advances in Land Use: The Latest Hot Topics
December 15 — Seattle. 6.5 CLE credits, including 1 ethics pending. By UW-CLE; 800-CLE-UNIV.

Law Office Management

Time Mastery for Lawyers, featuring Frank Sanitate
November 4 — Seattle. 6 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Law of Lawyering Conference
December 16-17 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Attorneys' Fees, Retainer Agreements and Client Communications
December 7 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Litigation

Winning Your Case in Discovery: Effective Use of Discovery and Depositions
November 5 — Seattle. 5.75 CLE credits, including .5 ethics. By WSTLA; 206-464-1011.

Movie Magic: How the Masters Try Cases
November 19 — Seattle. 6 CLE credits, including 2 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Tort Law Update
November 17 — Seattle. 5.75 CLE credits, including 1 ethics. By WSTLA; 206-464-1011.

Trial Stars
December 10 — Seattle. CLE credits pending. By WSTLA; 206-464-1011.

Communication in the Courtroom
December 10 — Seattle. 7.5 CLE credits, including 1 ethics. By CLE Services; 206-985-4351.

A Day with Judge Coughenour and Colleagues: A Litigation Skills and Strategy Institute
December 16 — Seattle. 8.5 CLE credits, including 2 ethics. By Emerald Education Group; 206-985-4351.

American College of Trial Lawyers' Greatest Hits
December 17 — Seattle. 7 CLE credits. By Emerald Education Group; 206-985-4351.

Real Estate

11th Annual Fall Real Estate Conference
November 12 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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My death and why I still have to work too hard

by Evan L. Loeffler, Guest Columnist

I received a telephone call from a client recently and learned, much to my surprise, that I was dead.

"I'm so pleased to hear your voice!" my client said.

This statement was surprising enough by itself. Very few people like to speak to their lawyer. I asked her why she was so relieved.

"Well," she explained. "I looked up your phone number on the Washington State Bar Association website, and your profile says you are 'deceased.'"

I checked the website and determined that my client was correct: somehow, in the Bar Association's website directory, my "active" status had changed to "deceased." I immediately called the WSBA and reported the error.

"Hello, my name is Evan Loeffler, and I'm a lawyer in Washington. Your records say that I'm dead."

"So, what's the problem?" the records department person asked.

"I'll tell you what the problem is," I said. "I'm not dead."

"Are you sure of this?" she asked.

"I'm speaking to you," I pointed out.

"Why would you have changed your status to 'deceased' if you were not dead?" she asked.

"I'm fairly certain that if I were dead — which I am not — I would not be the one reporting the fact to the Bar Association. I would like you to change my status."

"Very well," she relented. "What status would you like?"

"Undead," I said.

"I don't think that's an option," she answered after a moment.

"Why not?" I asked. "You guys killed me and I'm not dead. Lots of people refer to lawyers as vampires and bloodsuckers. I think my status should reflect that."

She insisted that she could not list me as "undead," and similarly refused to list me as "revived," and "not dead yet." Finally, we agreed on "still active."

It turned out the WSBA was moving computer files to a new system and in the process I became dead. Within a day the error was fixed. In the meantime, news of my death filtered through my firm. Reactions were pretty much what I would have expected if I had planned to become dead. My assistant immediately took the rest of the day off. Two attorneys walked into my office and spoke reverently about the departed:

"I never liked him anyway," said one attorney.

"Me neither," said the other. "But look at him. Doesn't he look lifelike?"

"He really does," agreed the first attorney. "He looks just like I remember him."

"I must say that hand gesture he's giving us is just like him."

"He should be more careful. If *rigor mortis* ever sets in (and it can't happen quickly enough for me) he'll freeze that way."

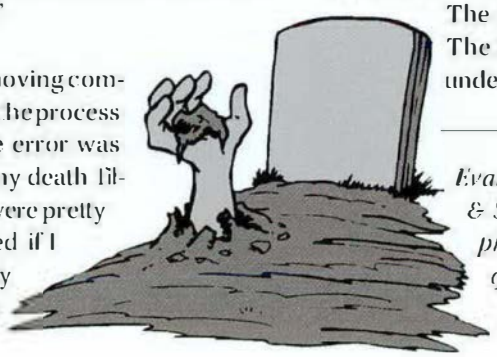
I called my parents for sympathy — demonstrating that I've learned nothing, even in death. I explained what was going on and suggested that since I had been dead and was alive again that I was technically entitled to two birthday presents. My parents took the position that since I was dead the need to recognize my birthday was unnecessary, as was keeping a provision for me in their will.

It was turning out to be an unfruitful day, when I discovered a way to make my death work to my advantage. I changed my e-mail autoreply to generate the following response:

> You have reached the ghost of Evan Loeffler. I'm sorry I cannot answer your e-mail right now, as I am dead. Please be patient until I am reborn, reanimated, resurrected, or reincarnated into someone who gives a damn. I will answer your e-mail at that time.

This had the desired effect: clients and opposing counsel stopped harassing for me for the rest of the afternoon, which allowed me to get more or less caught up on work.

The respite proved to be short-lived, however. The Bar may not recognize the concept of the undead attorney, but my clients certainly do.



Evan L. Loeffler is of counsel to Harrison, Benis & Spence in Seattle, where his practices emphasizes landlord-tenant relations. He requests bottles of Scotch instead of a card or flowers in his memory.

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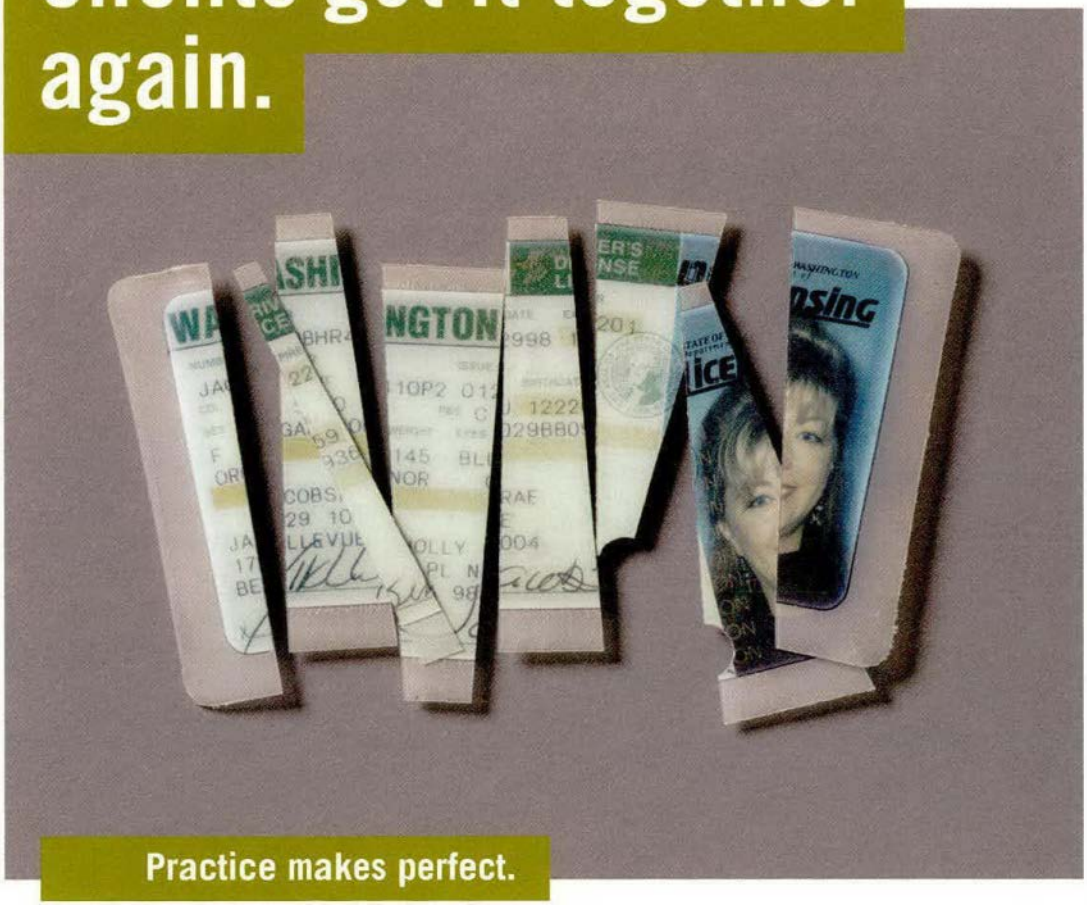

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