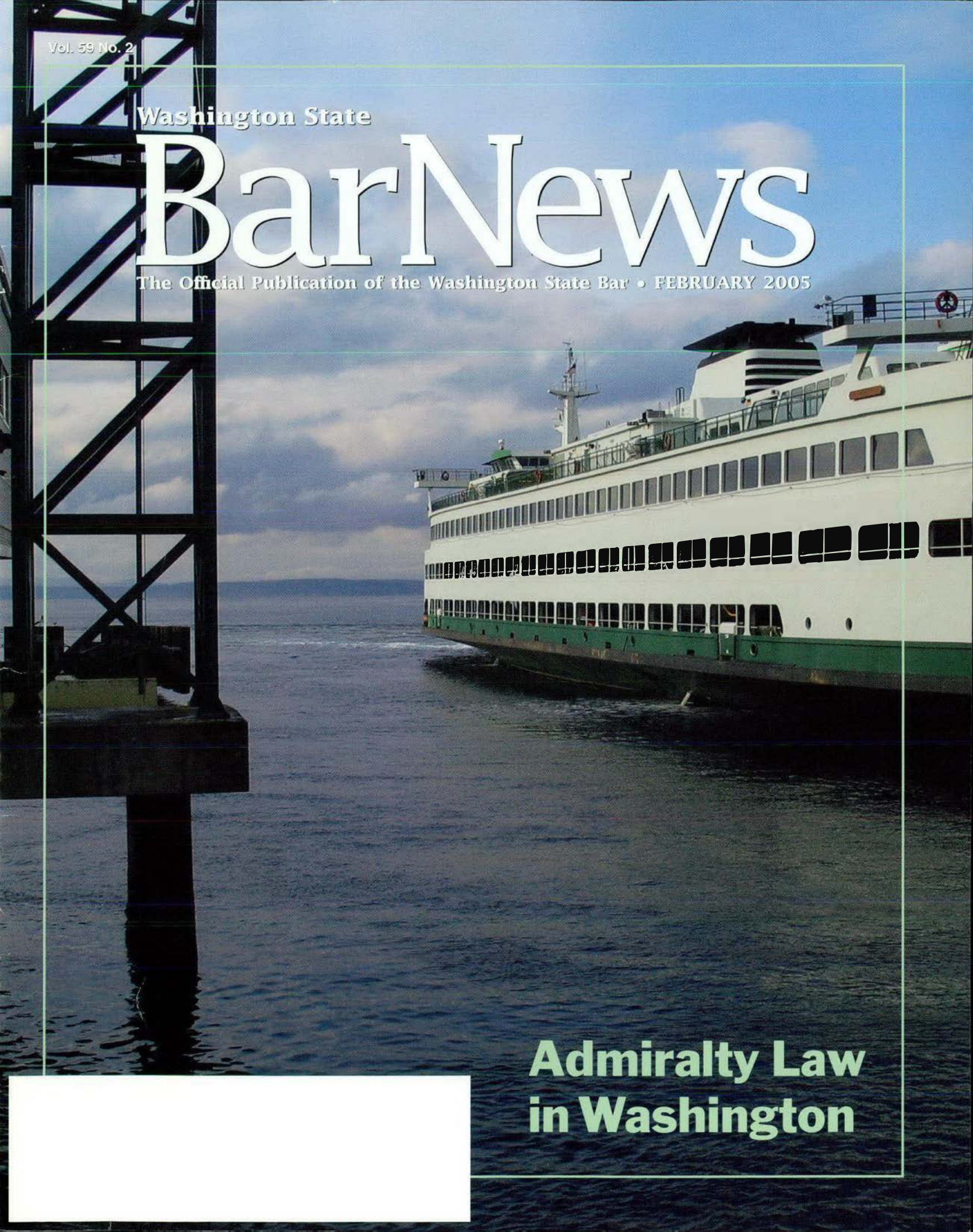


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Washington State

BarNews

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FEBRUARY 2005



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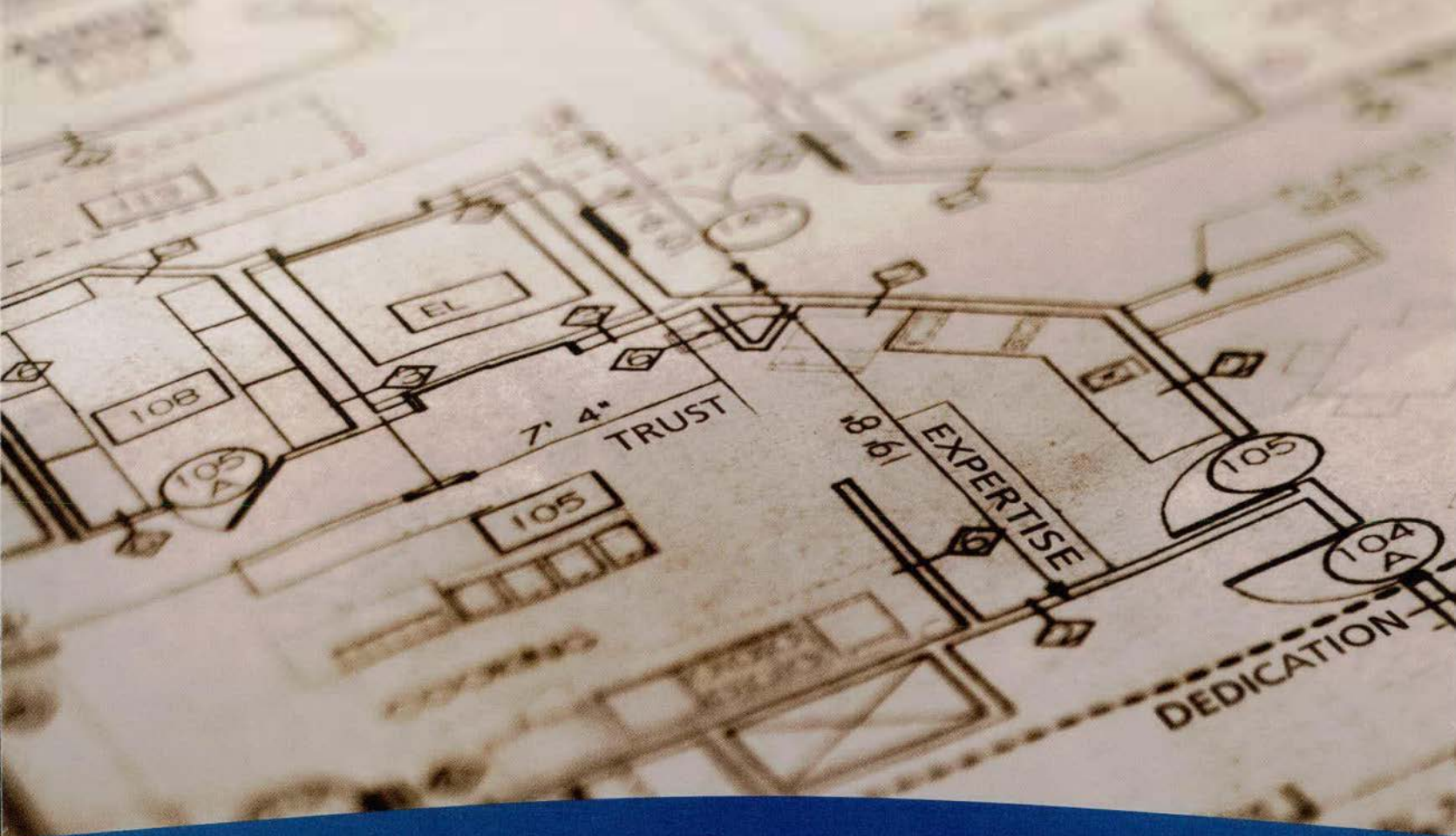
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The WSBA Professionalism Committee encourages WSBA members to promote professionalism by participating in this program; see page 50 for details.

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Letters to the Editor

Calling Eliot Spitzer

I am a personal injury plaintiffs' attorney.

At a recent insurance law CLE, a knowledgeable speaker on "Directors and Officers" insurance products revealed that the number and size of claims far exceed the premium rates charged for the D & O policies. This may be due in part to the recent explosion of such claims in the wake of Enron, *et al.* Nevertheless, what came to my mind immediately was the obvious anomaly this scenario presents to the medical malpractice insurance

arena. All credible sources indicate that the number of malpractice claims are definitely not rising and perhaps declining as are the size of awards. However, it has been widely proclaimed that malpractice insurance premiums are soaring and out of control: doctors and conservative politicians blaming lawyers.

Wouldn't it be nice if someone could once and for all investigate this industry and expose the truth — the whole truth?

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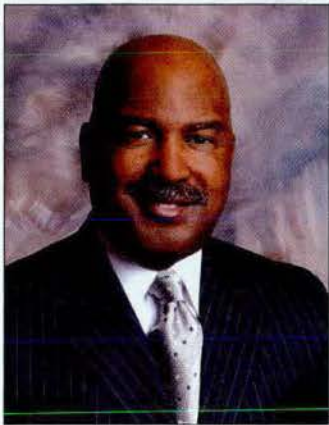
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Pit Bulls, Pikes, and Pitchforks

Rendering the Service of Practicing Professionalism

by Ron Ward, WSBA President

The pit-bull litigators and law firms — those who think that to be obnoxious, or abusive, or intimidating is to be effective — are an anachronism in our profession. They lack professionalism, and that is all too often accompanied by a complete absence of ethics. The overwhelming majority of us — those who love the law, who love the profession, who love justice, our reputations, and our image — are committed to either changing the ways of these outlaws, or removing them. One sign is the increasing tightening of the Rules of Professional Conduct and discipline sanctions, and the manner in which the courts and judges are beginning to deal with this type of conduct.

Pit Bulls and Junkyard Dogs Belong in a Kennel, NOT in the Justice System

The pit-bull lawyer or law firm's lack of professionalism is counterproductive to any concept of justice, it is a poor example to the citizens we serve, and it besmirches each and every one of us. It is also a dangerous phenomenon that contains the seeds of the destruction of our profession. Anyone who believes that this is hyperbole or overstatement on my part has obviously not been following recent news accounts. Recent media reports range from a client shooting of a lawyer; to lawyer fisticuffs in the courtroom; to an armed, near-fatal assault by one lawyer on another. The conduct

of some lawyers in depositions is reprehensible. These incidents are becoming too frequent to be blithely categorized as aberrational. Rather, they are the present manifestation of a culture in the practice of law that none of us can afford to continue to tolerate.

The overwhelming majority of us — those who love the law, who love the profession, who love justice, our reputations, and our image — are committed to either changing the ways of these outlaws, or removing them.

Most of us came into the law envisioning it as what it is: a noble profession that improves people's lives. Law is designed to resolve disputes peaceably, hopefully to improve the quality of life, and definitely to heal the community. It is thus with dismay that we watch the evolution of a legal system that a small minority of lawyers and law firms threatens to turn into something which brutalizes everyone it touches: clients, judges, and other lawyers. Our societal role as problem-solvers, advocates, guardians, teachers, counselors, and leaders requires us to seek justice and find reasonable solutions to conflict. The practice of law was never

meant to be about lawyers focusing on destroying their opponents by any means necessary — including outright dishonesty and fraud, nasty fights, vicious and unfounded accusations, and twisting of the truth.

In our society, no one is really winning in the "win-at-any cost" or "win-lose" model. Divorce litigation that drives families further apart and runs up astronomical legal bills only further destroys our societal foundation. Civil litigation that becomes so nasty and prohibitively expensive that grievously injured (or dead) victims of negligence cannot afford redress, or cannot endure the ordeal of obtaining it, only undermines respect for the orderly adjudication and resolution of disputes. Transactional practice that values might over right ultimately breeds only contempt for our legal system.

Lawyer Misconduct, Lack of Professionalism, and the "Quality of Life" Cost to Lawyers

Lawyer misconduct and lack of professionalism include most notably:

1. Lying (including material omissions verbally and in pleadings directed to the court and to opposing counsel).
2. Engaging in intimidation tactics and abuse of the discovery process (including badgering and attempted intimidation of witnesses and opposing parties and other "Rambo"

techniques; name-calling; threatening CR 11 sanctions; brow-beating *pro se* litigants; failing to timely file responsive pleadings; failing to submit responsive pleadings; concealing and destroying evidence; and engaging in cost-prohibitive litigation intended not to resolve the dispute, but to force opponents from the fray because of their inability to afford justice).

3. Abandoning clients.
4. Abusing court staff.
5. Appearing in court drunk, or under

the influence.

There is a great deal of palaver about why all of this has come about. Some blame the so-called litigation machine and a "scorched earth" *modus operandi* that continues to dominate the legal world. Some point the finger at the dominant pedagogy in legal education, known as legal formalism, in which law students are trained to ignore messy concepts of justice and morality, in favor of strict rules and doctrines. Even though lawyers

deal with people in serious distress, they get no training or support for integrating emotional intelligence or human values into their practice. Clients begin to look like walking legal problems instead of complex human beings.

Lack of professionalism involves a high personal cost for lawyers. Lawyers have the highest rate of depression among 105 professions, according to a 1991 Johns Hopkins University study. Too many hours spent at work, increased competition for clients, and shrinking revenues don't really explain the phenomenon of what has become an epidemic of professional dissatisfaction. Some of the most satisfied practitioners — public-interest lawyers, for example — work the hardest, but earn the least.

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How should we go about dealing with the harm to our image caused by public alienation resulting from a lack of professionalism?

Lack of professionalism results in a personal cost to clients, sullies the public image of the legal system, and disrupts its orderly operation.¹ I believe that increasing alienation in the legal system, a lack of consciousness with regard to our image in society, and not enough emphasis on a "service to others" ethic are responsible for professional dissatisfaction. How should we go about dealing with the harm to our image caused by public alienation resulting from a lack of professionalism?

What Other States Are Doing

We resist efforts to make adherence to standards of professionalism mandatory, but without doing so, there is no means to enforce compliance. Professional incivility and discovery abuse are focal points for lack of professionalism that other states are moving to address. In Arizona, applicants to become lawyers must pass a one-day professionalism course before they may obtain a license to practice. A

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Justice of the Arizona Supreme Court teaches the course. Professionalism is a mandatory part of continuing legal education. Every bar gathering has a professionalism offering. The thrust of this is to tell the truth, keep your word, and don't tolerate those who do not. Arizona has mandatory "lay down" discovery within the first 40 days of filing of the complaint and the answer. Clark County, Utah, considers the need for professionalism so serious that it has established a "discovery commissioner," whose decisions are published on the Internet. These decisions become guidelines for

other practitioners. The Utah State Bar is now studying this idea with an eye toward implementing special discovery masters for litigation throughout the state. These special discovery masters will have the authority to administer fines and sanctions. A side benefit of this approach should be lightening of the motion dockets of trial court judges. In Connecticut and North Carolina, trial judges have significant influence on the ability to disbar.

What We Can Do

Judges — A more assertive role by judges

is the single most important factor in fostering professionalism. Judges are the referees in the justice process. There is no way to abrogate that responsibility. It is clear that in many cases the litigants are not just going to work it out among themselves. Breaches of professionalism and flouting of the rules are akin to corporate policy in some firms. Unfortunately, it is their culture.

Judges need to confront unprofessional lawyers privately and in open court. Admonishments, where warranted and necessary, should be made via written opinion. Imposition of personal monetary sanctions against firms and lawyers should be utilized with greater frequency, where it is clear other methods of communication are not being heeded. Judges should report breaches of professionalism to the Bar's Office of Disciplinary Counsel. The judge need not be listed as the complainant. In response to the usually spurious charge of selective enforcement, or the fear of election-year retaliation, judges should adopt a jurisdiction-wide collective zero-tolerance policy with regard to "junkyard dog" lawyers and firms, incivility, and abusive practices. Healthy sanctions assessed at the outset of the implementation of such a policy will go a long way toward quickly eradicating unprofessional practices and the apprehension of "retaliation."

Lawyers — For those who engage in the unprofessional practice that is the focus of this article: knock it off or suffer the consequences. Stop hiding behind the obligation to engage in "zealous advocacy" and twisting it to fit your purposes. Stop engaging in lies and deception that you justify to yourselves as a part of the practice of law, with rationalizations about billing, postponements, settlement discussions, the client, *ad infinitum*, *ad nauseam*. It is said that some lawyers know all of the written rules, but they're totally oblivious to the unwritten rules. DON'T BE ONE OF THOSE. Stop engaging in rudeness, mean spiritedness, lack of professional courtesy, and incivility to other lawyers, judges, and the public. Stop destroying our image as a profession.

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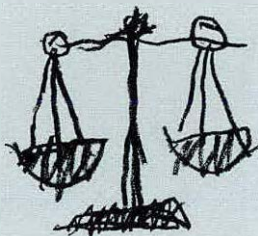
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When lawyers place partisanship ahead of service and virtue, our society's ideals and the people within it wither. If you decide that your only role is to do what

your clients tell you to do, you will be part of the destruction of a great nation, which is dying already from our stubborn refusal to look at life as more than an opportunity to get what we want.

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regular ethics: theft is theft.

The Perception of the Profession

The practice of law is changing. Because of the antics of a small minority, it may be changing for the worse. We are a profession in denial. We need to "get a grip" before it is too late. The public could well start to abandon us. The lawyer's mental model of self is very different from the public's perception. Lawyers think in terms of precedent, *stare decisis*, getting a corner on legal information and winning — above all winning. Some segments of the public see lawyers as manipulative, scheming, sneaky, and (in some cases) abusive. Zealous advocacy is seen as a euphemism for dishonesty, coercion, and abuse. Lawyers are seen

Lawyers are leaders in this society and will continue to be, to the degree we focus on our role as problem-solvers, on serving our clients and society, and on the core values of the profession. Those core values are truth, integrity, and honesty.

as money-oriented. The public wants a product; not process, but results. They don't want a lot of hours and high bills, but results. The profession needs to replace an image as manipulators and schemers with the notion that we understand your situation and genuinely want to help you get to a solution. The public is searching for alternatives to us because we are in danger of losing our way and our image as society's problem-solvers. That explains the tremendous movement toward collaborative law, mediation, and other alternatives for resolving disputes. I don't know whether it has occurred to the profession, but lawyers are not absolutely necessary to bring disputes to successful conclusion in these mediums. This is particularly true if we prove to be more obstacle than instrument.

All of this goes back to basics. Lawyers are leaders in this society and will continue to be, to the degree we focus on our

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role as problem-solvers, on serving our clients and society, and on the core values of the profession. Those core values are truth, integrity, and honesty. We have an obligation to our clients and to the justice system to search for justice. We must use professionalism and truth to find it. In short, we can get rid of the pit bulls and the entire syndrome they represent, or the public is going to be out in front of our house with pikes and pitchforks. If and when they arrive, they'll be there to make us obsolete. It's past time for a change. Let's get to it. ✍

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 206-624-8844 or rrw@admiralty.com.

NOTE

¹ "From Ballistic to Holistic," Elaine McArdle, *The Boston Globe*, 1/11/2004.

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Vernon Smith is a Trial Attorney with experience defending over 3,000 DUI and Criminal cases. Board Certified in DUI Defense, National College for DUI Defense*; Graduate, National Institute for Trial Advocacy; Guest Lecturer, numerous DUI Defense seminars; Certified, NHTSA Standardized Field Sobriety Testing; Staff Attorney, Seattle-King County Public Defenders Association 1987-1989; Founding Member, National College for DUI Defense; Member, Washington Foundation for Criminal Justice, Washington Association of Criminal Defense Lawyers (Board of Governors 2001-2002), National Association of Criminal Defense Lawyers, Washington State Bar Association

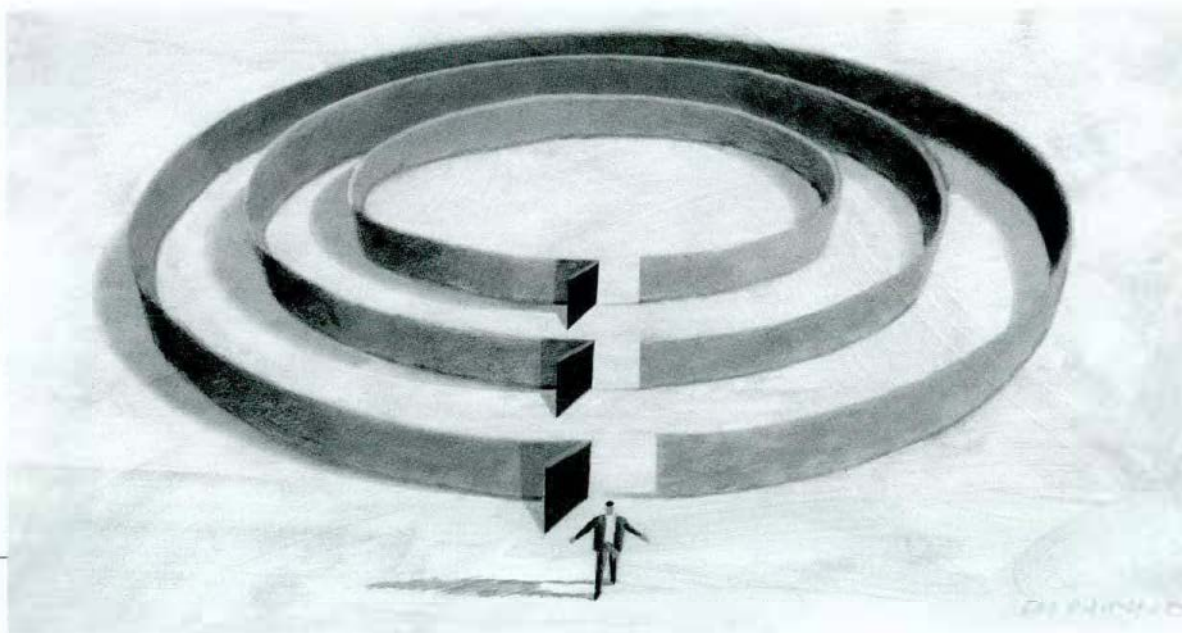
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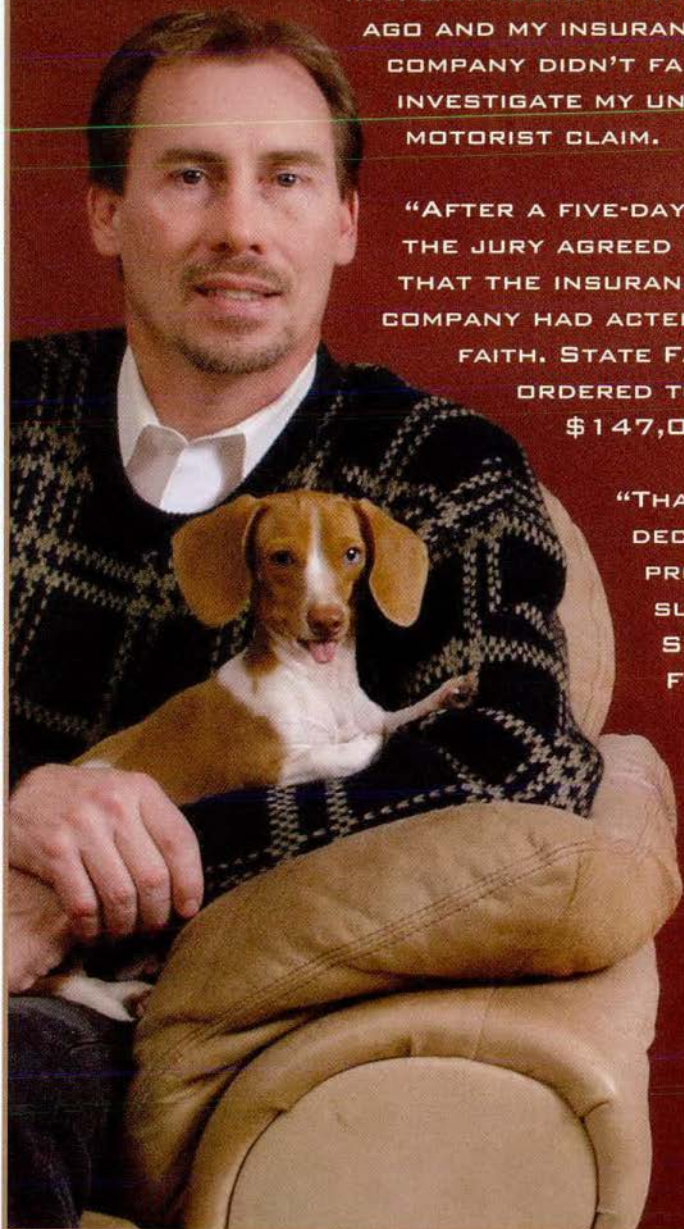
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Admiralty Law in Washington: Not Just for the Specialist*



BY CRAIG H. ALLEN

By any measure, Washington is among the most “marine” states in the nation. The northwest corner of the state is dominated by a vast inland sea formed by the Strait of Juan de Fuca, Puget Sound, and the straits surrounding the San Juan Islands. The boundaries of the Olympic Coast National Marine Sanctuary encircle the lush and pristine marine ecosystem off the entrance to the Strait of Juan de Fuca, and Gray’s Harbor and Willapa Bay punctuate Washington’s Pacific shoreline. The Columbia River divides Washington from Oregon to the south and, together with the Snake River, serves as a tug and barge highway for the wheat fields of the “inland empire.”

*Lawyers in any field may only hold themselves out as “specialists” in accordance with RPC 7.4.

Fish and shellfish were a dietary staple for tribes in the Northwest long before Captain Vancouver arrived, and the salmon remains a virtual icon for many in the region. As the modern successor to the privately owned "Mosquito Fleet" of the 19th and early 20th centuries, the Washington Department of Transportation operates the nation's largest ferry fleet (29 vessels), which carries more than 26 million passengers and 11 million vehicles throughout the Puget Sound basin each year. Washington also hosts the largest fishing fleet (by tonnage) in the nation and has witnessed tremendous growth in recreational boating. Shipyards and container terminals line Elliott Bay in Seattle and Commencement Bay in Tacoma. Much of the crude oil from Alaska's North Slope is carried by tankers into refineries near Anacortes. Washington has long served as the staging point for vessels serving Alaska via the scenic waters of the Inside Passage. Navy bases in Washington host everything from nuclear submarines to aircraft carriers. Coast Guard cutters and rescue stations in Washington stand ready to answer distress calls and to provide security for the homeland. It should therefore come

as no surprise that admiralty — that branch of the law that deals with vessels and their crews and cargoes — finds its way into the practice of many Washington attorneys.

How is admiralty law unique?

In teaching a course in admiralty and maritime law each year, I begin by highlighting what it is that makes admiralty law unique and why it matters to a group of students who will soon embark on a legal career in the Pacific Northwest. Admiralty's ancient origins, its emphasis on resolving disputes with dispatch,

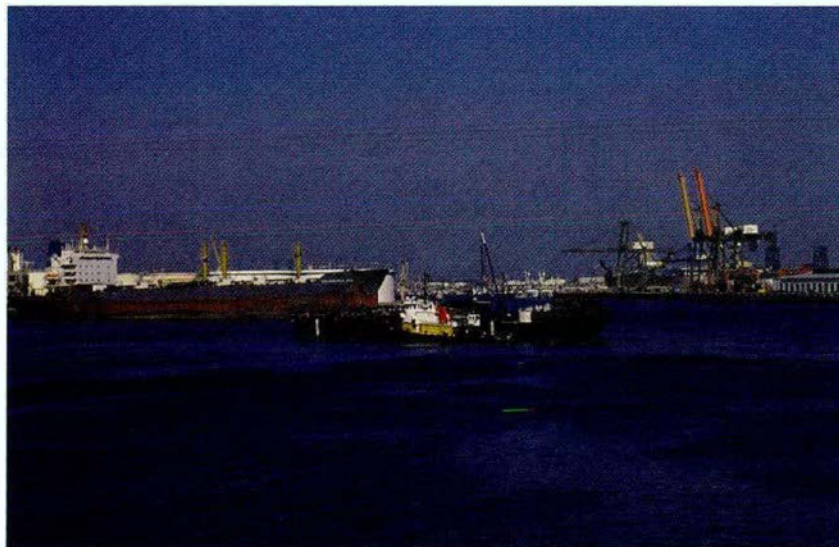
and its quest for a set of uniform substantive rules distinguish it from most other areas of the law. The students soon learn to be alert to admiralty's capacity to displace conflicting rules of state law for claims falling within admiralty and maritime jurisdiction.

Admiralty's origins are ancient indeed. Elements of maritime law can be found in the Code of King Hammurabi of Babylon¹ (circa 1780 B.C.). Mediterranean maritime codes developed roughly a millennium later. Blackstone's 18th century *Commentaries on the Laws of England* describes the admiralty court of England, held before the lord high

voice of some sovereign or quasi sovereign that can be identified" was made in a leading maritime personal injury case.⁴ Over the years admiralty has attracted the attention of prominent (and witty) scholars such as Grant Gilmore and Charles Black, otherwise known for their contributions to contracts and constitutional law, respectively.⁵

The Constitution extends the judicial power of the federal courts to all cases of "admiralty and maritime jurisdiction." In *Federalist No. 80*, Alexander Hamilton famously reported that even:

The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations that are relative to the public peace.



It should therefore come as no surprise that admiralty — that branch of the law that deals with vessels and their crews and cargoes — finds its way into the practice of many Washington attorneys.

admiralty, as well as the vice-admiralty courts in the American colonies.² Justice Joseph Story, one of American admiralty's most eloquent expositors, was an ardent proponent expanding admiralty jurisdiction beyond the English court precedents, to facilitate development of a uniform body of law for maritime commerce in the new republic. Nearly a quarter of Chancellor Kent's 1824 treatise on American Law was devoted to admiralty-related subjects.³ Justice Holmes's memorable remark that "the common law is not a brooding omnipresence in the sky but the articulate

Justice Frankfurter observed that the admiralty and maritime jurisdiction clause in Article III impliedly includes three grants: (1) it empowers Congress to confer admiralty and maritime jurisdiction on the lower federal courts; (2) it confers on admiralty courts the power to draw upon the general maritime law and continue to develop that judge-made body of law; and (3) it empowers Congress to revise and supplement the general maritime law by legislation.⁶ Congress in turn assigned original admiralty jurisdiction to the federal district courts, but chose not to make federal jurisdiction exclusive. By virtue of the "saving to suitors" clause in 28 U.S.C. § 1333, most *in personam* admiralty claims may also be heard in state court or under the federal court's diversity jurisdiction.

The principal reason for placing admiralty jurisdiction in the federal courts was to promote uniformity. The need for uniformity in maritime law is no less compelling today than in 1789. In a November 2004 admiralty decision by the U.S. Supreme Court involving a claim arising out of damage to cargo while being transported by rail under a through bill of lading from Australia to Huntsville, Alabama, the Court pointed out that the plaintiff cargo interests:

law. The Court expressly noted that its decision was intended to protect "uniformity of federal admiralty law."⁶

At one time it was common to distinguish a federal court's "law side" from its "admiralty side" (and "equity side"). Tradition has it that when the court was exercising admiralty jurisdiction, the bailiff would signal the court's status by preceding the judge into the courtroom waving a silver oar above the judge's head. The oar was then placed in

chief judge, Robert Lasnik.

Since the Federal Rules of Civil Procedure (FRCP) were unified in 1966, the distinction between the civil and admiralty "sides" is no longer accurate. Even after unification, however, FRCP 9(h) preserved many of the unique remedies available only in admiralty cases. These include the *in rem* action against vessels and cargoes and a powerful maritime attachment rule that is available when the defendant cannot

be found within the district. One of admiralty's best-known features is the bench trial. When a case is brought under the federal court's admiralty jurisdiction, there is no right to a jury. The Seventh Amendment's preservation of the right to a jury trial only in "suits at common law" confirms this. Increasingly, however, maritime disputes are resolved through arbitration, mostly in New York or London. As the number of maritime contracts and ocean bills of lading with mandatory arbitration clauses grows, fewer admiralty cases find their way into court.

The admiralty bench and bar

The admiralty bench bar has long taken pride in its distinctive practice. A century ago Judge Alfred Coxe Sr. of the Court of Appeals for the Second

Circuit advised:

If a student intends to be a specialist — and in large cities all branches of the law are becoming specialized — there are many reasons that should attract him to the law of the sea. The high character of the admiralty bar, the special training of the judges, the wide range of interesting subjects with which the law deals, the certainty of the judgment being paid which results from the proceedings, in a

One of admiralty's best-known features is the bench trial. When a case is brought under the federal court's admiralty jurisdiction, there is no right to a jury. The Seventh Amendment's preservation of the right to a jury trial only in "suits at common law" confirms this.



emphasize that, at bottom, this is a diversity case involving tort and contract claims arising out of a rail accident somewhere between Savannah and Huntsville. We think, however, borrowing from Justice Harlan, that 'the situation presented here has a more genuinely salty flavor than that.'⁷

Writing for a unanimous Court, Justice O'Connor rejected the plaintiff's argument and upheld admiralty jurisdiction and the application of maritime

a cradle below the judge's bench, where it remained while the court was in session. Long after the courts abandoned the ceremony, judges who display what Justice Harlan might have called a "genuinely salty flavor" are still honored by the admiralty bar for their contributions to field. In 1973, for example, the admiralty bar for the Western District of Washington presented the court's nationally renowned admiralty judge, William Beeks, with a replica of the silver oar. The oar now rests in a place of honor in the chambers of the court's

vast majority of instances, being *in rem*, and the freedom from the delays, disagreements, compromises and miscarriages incident to jury trials, all combining to make this a peculiarly alluring field of endeavor.⁹

Even when the attorney professional responsibility codes severely limited advertising by lawyers, attorneys who qualified as "proctors" in admiralty were permitted to advertise their qualifications to potential clients. At the national level, the Marine Law Association of the United States (MLA) brings together judges and practitioners with an interest in admiralty. The MLA directory lists more than 50 Washington law firms (many of them admiralty boutique firms), as well as many of the federal trial and appellate judges in Washington.

Maritime practitioners recognize the value of a uniform body of admiralty law applicable to vessels that move in global commerce. The MLA seeks to promote uniformity within the maritime law. Its Committee on Uniformity of U.S. Maritime Law selectively files *amicus curiae* briefs urging appellate courts to promote uniformity in maritime law where appropriate. The MLA prides itself on its code of professionalism, and attorneys who practice admiralty often comment that the admiralty bar is among the most civil and professional. Each year, the MLA co-sponsors a National Admiralty Moot Court competition for students named after famed admiralty (and civil rights) judge John R. Brown.

The influence of admiralty outside the specialty

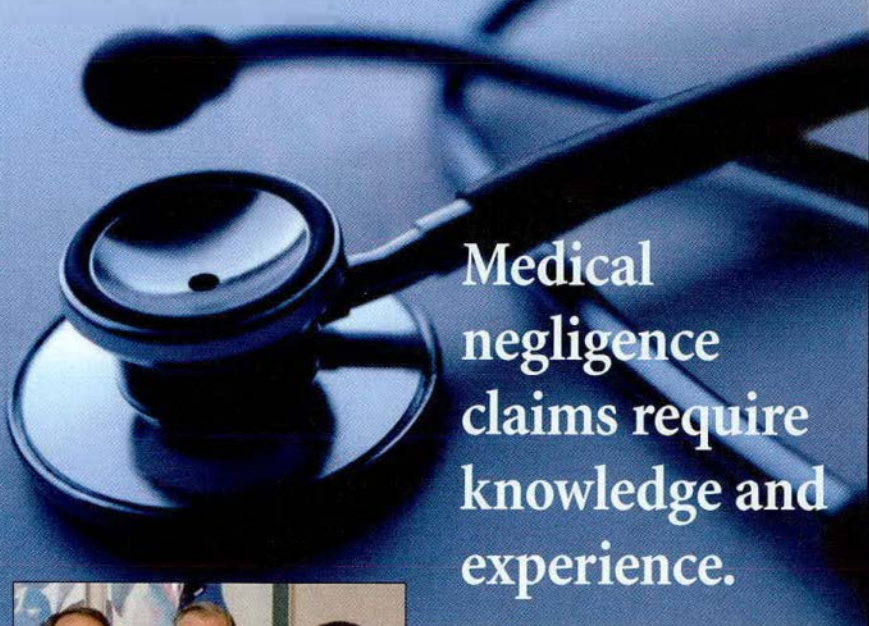
The substantive law of admiralty governs a variety of maritime issues, including salvage, general average, ocean bills of lading, towage, collision, marine pollution, maritime liens and ship mortgages, charter parties, marine insurance, and shipowner limitation of liability. Although international treaties and federal statutes constitute a significant part of the substantive maritime law, much of that law is judge-made.

The influence of admiralty decisions on development of the common

law is often overlooked. Many law students are surprised to learn how much "admiralty" they already know from first-year courses. In contracts, students discovered there could be no "meeting of the minds" on the delivery of a cotton shipment if the parties each had in mind a different ship named the *Peerless*.¹⁰ In torts they learned Judge Learned Hand's celebrated algebraic formula for determining negligence, which he set out in an admiralty case involving a moored barge.¹¹ And many studied the case involving the storm-tossed tug *T.J. Hooper*,¹² in which Judge

Hand explained why custom does not conclusively establish the standard of care for an industry. Some of the leading cases on proximate causation are admiralty cases, including the *Wagon Mound I and II* cases¹³ found in most torts casebooks, and the case of George Steinbrenner's breakaway barge that triggered a massive flood on the Buffalo River at issue in *Kinsman Transit Co.*¹⁴ In Civil Procedure, students study the enforceability of forum selection clauses in *The Bremen v. Zapata Off-Shore Co.*¹⁵ and *Carnival Cruise Lines, Inc. v. Shute*¹⁶ (a case originally filed in Seattle). One

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of the leading transnational choice of law decisions, *Lauritzen v. Larson*,¹⁷ arose out of a personal-injury action by a foreign seaman. Admiralty courts were among the first to abandon the rule of pure contributory negligence in favor of comparative fault principles and the arcane distinctions between the duties owed by property owners to invitees, licensees, and trespassers.

Admiralty in Washington: Choice of law matters

Most attorneys are familiar with the *Erie* choice-of-law doctrine applicable

in cases brought in federal courts under diversity-of-citizenship jurisdiction. Admiralty cases frequently employ the less well-known "reverse-*Erie*" choice-of-law doctrine. In a 1959 case falling within the admiralty and maritime jurisdiction, Justice Stewart, writing for the Supreme Court, explained the consequences of admiralty jurisdiction on choice of law, whether the claim is brought in state court or in federal court under diversity jurisdiction:

If this action had been brought in a state court, reference to admiralty

law would have been necessary to determine the rights and liability of the parties Where the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum, the result is no different, even though he exercises the further right to a jury trial.¹⁸

The consequences of the reverse-*Erie* doctrine for Washington attorneys can best be demonstrated by three cases. The first is *Stanton v. Bayliner Marine Corp.*, decided by the Washington State Supreme Court in 1994.¹⁹ The case concerned claims against the manufacturer of two 45-foot yachts that sank after being run aground in separate incidents by their owners. The owners asserted product-liability claims against the manufacturer and distributor, arguing that the yachts were defective in design and construction. The issue on appeal was whether the owners could recover under strict product-liability theories for damage to the product itself (the yachts). Under the Washington Product Liability Act, as construed by the Washington State Supreme Court, the answer was yes. However, under a general maritime law rule established by the U.S. Supreme Court, such recovery is not allowed. Citing the "reverse-*Erie*" doctrine, and acknowledging the "long-standing desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction," the Washington Supreme Court determined that the federal maritime law rule controlled the claims, thus barring recovery for damage to the yachts.

The second case involved an injured worker on the *Lady of the Lake II*, which operates on Lake Chelan.²⁰ As a worker injured in the course of her employment, the plaintiff would normally be limited to workers' compensation benefits under state law. In this case, however, the plaintiff argued that she was a "seaman" employed on a vessel in navigation and was therefore entitled to invoke the trinity of remedies available to such maritime workers. Injured seamen may be entitled to maintenance and cure (essentially, the cost of medical treatment, wages to the end of the voyage, and a modest living allowance while recovering), damages for injuries



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Carla Tachau Lawrence, J.D.
Douglas Weinmaster, J.D.

Medical Director

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caused by an unseaworthy condition on the vessel, and a negligence action against her employer under the federal Jones Act. Why has admiralty been so solicitous of seamen? As Justice Story described the seaman, in a decision he wrote while riding circuit nearly two centuries ago:

Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached... courts of maritime law have been in the constant habit of extending toward them a peculiar, protecting favor and guardianship.²¹

Unfortunately for Ms. Thompkins, the federal district court hearing her case determined that Lake Chelan did not fall within the navigable waters of the United States. Accordingly, she did not qualify as a seaman. Had she worked on one of the many ferries or tour boats that ply the waters of Puget Sound, Lake Washington, or the Columbia River, Ms. Thompkins's claims would likely have been warmly received in federal court, where, to this day, seamen are ritually described and treated as "wards" of the court.

It is well known that in most cases punitive damages are not available under Washington state law. This is not the case, however, in admiralty cases arising in Washington waters. In 1983, when the merchant ship *Protector Alpha* caught fire at a Kalama, Washington, grain-loading wharf, the dock foreman, fearing the fire might spread to the terminal, set the vessel adrift into the Columbia River. The fire hoses being used by Coast Guard and local firefighters on board the burning vessel snapped one by one as the ship drifted away from the wharf. One of the Coast Guard responders was killed in an explosion on board after the ship was set adrift. The shipowners sued the operators of the pier in federal court in Portland, and legendary admiralty judge Gus Solomon awarded the shipowner substantial punitive damages, after finding the dock foreman's actions

constituted gross negligence. In upholding the award, the 9th Circuit began by noting: "As an initial matter, federal law, rather than state law, controls the damages issue when the cause of action arises under maritime law."²²

The future of admiralty in Washington

Washington is the most trade-dependent state in the nation. Ocean carriers transport nearly \$600 billion worth of commodities in foreign and interstate commerce to and from U.S. ports. International trade is expected

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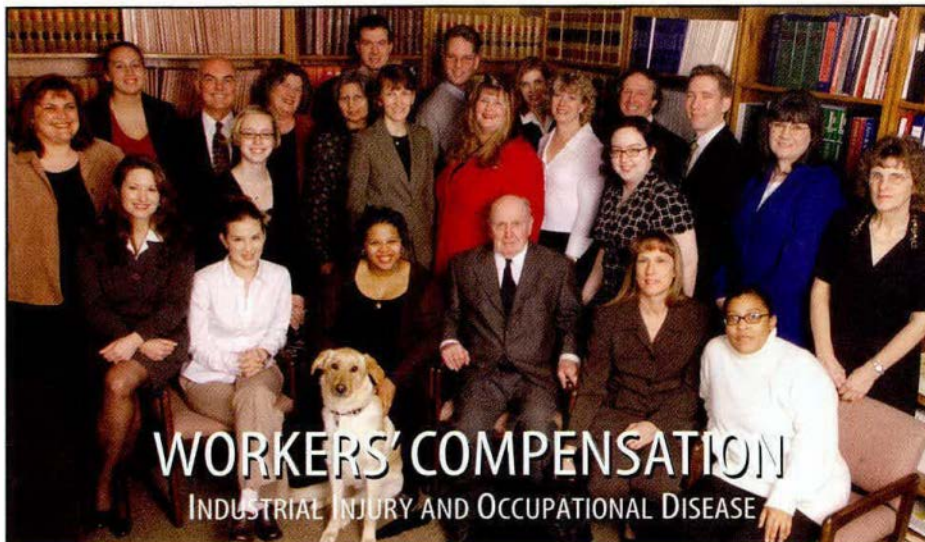
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from Washington state law, Washington attorneys must be alert to the reach of admiralty jurisdiction. ✍

Professor Allen teaches maritime and international law at the University of Washington.

NOTES

- ¹ Hammurabi's Code of Laws, laws nos. 234-40 & 275-77, reprinted in Chilperic Edwards, *The Hammurabi Code* (3d ed. 1921).
- ² William Blackstone, *Commentaries on the Laws of England*, vol. 1 at 247 & vol. 3 at 68 (1765-1768) (Cavendish Publ. reprint, Wayne Morrison, ed., 2001).
- ³ James Kent, *Commentaries on American Law* (1826).
- ⁴ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917).
- ⁵ Grant Gilmore & Charles L. Black Jr., *The Law of Admiralty* (2d ed. 1975).
- ⁶ *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).
- ⁷ *Id.* (quoting *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961)).
- ⁸ *Norfolk Southern Railway Co. v. James N. Kirby, Pty.*, ___ U.S. ___, 2004 U.S. Lexis 7510 (2004).
- ⁹ Alfred C. Coxe, *Admiralty Law*, 8 Colum. L. Rev. 172, 173-74 (1908).
- ¹⁰ *Raffles v. Wichelhaus*, 2 H.&C. 906, 159 Eng. Rep. 375 (Ex. 1864).
- ¹¹ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).
- ¹² 60 F.2d 727 (2d Cir.), cert. denied, 287 U.S. 662 (1932).
- ¹³ *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound)* [1961] App. Cas. 338 (P.C. 1961).
- ¹⁴ 388 F.2d 821 (2d Cir. 1968).
- ¹⁵ 407 U.S. 1 (1972).
- ¹⁶ 499 U.S. 585 (1991).
- ¹⁷ 345 U.S. 571 (1953).
- ¹⁸ *Kermarec v. Campagnie Generale Transatlantique*, 358 U.S. 625 (1959).
- ¹⁹ 123 Wn.2d 64; 866 P.2d 15 (1994).
- ²⁰ *Thompkins v. Lake Chelan Recreation, Inc.*, 1995 AMC 2311 (E.D. Wash. 1995).
- ²¹ *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6047).
- ²² *Protectus Alpha Navigation, Ltd. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985).



Indian Law: A Bit More Mainstream in Washington

In
October, a two-
and-a-half-year cam-
paign to include federal
Indian law on our state's
bar exam culminated in a
vigorous two-and-a-half-
hour debate before our
Board of Governors,
and ultimately a
unanimous ...

... Board decision to test new Washington lawyers' understanding of four fundamental tribal jurisdictional principles, beginning in the summer of 2007.



by Gabe Galanda

During the days that followed the governors' decision, the media conveyed the magnitude of the new policy to citizens throughout the state, region, and country.¹ Every story detailed the who, what, when, where, and why of our Bar Association's decision. *Spokesman-Review* columnist Rob McDonald began an editorial he authored with those same details. But, recognizing that State Bar governance is not typically the stuff news headlines are made of, he proceeded to put a slightly different, more poignant spin on the issue. He wrote:

In case your eyes dulled over, let me say it another way.

The state that hanged Indian leaders, strong-armed treaties, burned villages, beat up Indian fishermen and launched a notorious Indian opponent, Slade Gorton, has affirmed the need for attorneys to know Indian law.

This is huge.²

Mr. McDonald is correct. The govern-

nors' decision is huge, for every member of the WSBA and for every citizen of our state.

The boom of Indian gaming in Washington (a \$648 million industry in 2002) and resultant increase in non-Indian citizens who are flocking to reservations for business, employment, or recreation, has interjected federal Indian legal concepts into every area of practice in our state. In fact, the governors were persuaded that Indian law pervades every legal topic traditionally tested on the Washington bar exam — e.g., civil and criminal procedure, contracts, corporations, administrative law, family law — even commercial paper.

The primary purpose of the bar exam is to ensure lawyers have knowledge reasonably necessary to protect the public³ — including families whose travel onto the Muckleshoot Reservation for a Jimmy Buffet concert at the White River Amphitheater, or the Tulalip Reservation for shopping at Wal-Mart or Home Depot, may subject them to a "foreign" legal regime. To ensure that all the legal rights of all Washington citizens are protected, our Bar wisely adopted policy that will increase awareness that an everyday dispute may not be governed by state law or heard in superior court, and may require the involvement of a tribal sovereign, if the matter arises in Indian Country.

While law students and out-of-state lawyers who aspire to practice in Washington have until 2007 to bone up on tribal jurisdiction, the time is now for WSBA members to understand fundamental federal Indian legal principles, so that we can competently represent and protect our tribal and non-tribal

clientele. See RPC 1.1.⁴ To that end, I offer this overview of the four federal Indian jurisdictional principles that are already part and parcel of the Washington common law and will soon be included on our bar exam: (1) tribal self-governance; (2) tribal civil and criminal jurisdiction; (3) tribal sovereign immunity; and (4) the Indian Child Welfare Act.

Principle #1 — Tribal Self-governance. Under nearly 200 years of federal common law, Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government.⁵ While no longer "possessed of the full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations."⁶ Essentially, Indians possess "the right . . . to make their own laws and be ruled by them."⁷ In an opinion issued last summer, Division I of the Washington Court of Appeals, in

... the time is now for WSBA members to understand fundamental federal Indian legal principles, so that we can competently represent and protect our tribal and non-tribal clientele.





**We are part of the earth and the
earth is part of us.**

— Chief Sealth (1786-1866)

Rodriguez v. Wong, affirmed that Washington's 29 federally recognized Indian tribes "retain the authority necessary 'to protect tribal self-government or to control internal relations.'"⁸ Much like the federal and state governments, tribal governments are elaborate entities, consisting of executive, legislative, and judicial branches. The office of the tribal chairperson or president (like that of the U.S. president or Washington state governor) and the tribal council (a legislature) operate the tribe under a tribal constitution and/or code of laws, and tribal courts adjudicate most matters arising on or out of the reservation.

Many Washington tribes are organized pursuant to the Indian Reorganization Act of 1934 (IRA).⁹ Under Section 16 of the IRA, a tribe will have adopted a constitution and bylaws that set forth the tribe's governmental framework and the authority that each facet of its government possesses. A tribe may also be incorporated under Section 17 of the IRA,¹⁰ by which the Secretary of the Interior issues the tribe a federal

charter. Through Section 17 incorporation, the tribe may have created a separate legal entity to divide its governmental and business activities. The Section 17 corporation has articles of incorporation and bylaws that identify its purpose, much like a state-chartered corporation. Alternatively, an Indian corporation may have been organized under tribal or Washington law. Under federal common law, the tribal corporation likely enjoys immunity from suit, as discussed below. Particularly when negotiating a tribal business transaction in Washington, counsel should first review the tribe's organic

documents and code of laws, which taken together identify the entity with which you are engaging and your client's legal rights and potential remedies.

Principle #2(a) — Tribal Civil Jurisdiction. Tribal subject-matter jurisdiction over matters that involve or should involve Washington tribes or tribal members depends predominantly upon (1) whether the defendant is Indian or non-Indian;¹¹ and (2) whether the events at issue arose in Indian Country.¹² These highly complex issues should be the first area of inquiry for any dispute arising in Washington Indian Country.¹³ A third threshold determination should be whether "Public Law 280," codified in Washington at RCW 37.12.010, grants the state civil authority to adjudicate

the dispute.¹⁴ Under Section 37.12.010, the state has assumed jurisdiction over eight types of civil adjudications arising in Indian Country, including adoption proceedings and disputes related to the operation of motor vehicles on reservation roads.¹⁵

Generally speaking, Washington tribal courts have jurisdiction over a suit by any party — Indian or non-Indian — against a tribal defendant for a claim arising in Indian Country.¹⁶ Following the "pathmarking" U.S. Supreme Court case of *Montana v. U.S.*,¹⁷ a tribal court's jurisdiction over non-Indian parties is essentially limited to those "who enter consensual relationships with the tribe . . . through commercial dealing, contract, leases, or other arrangements." The U.S. Supreme Court has made clear that a private contract qualifies as a consensual relationship, thus affirming that tribal courts have jurisdiction over non-Indian parties to contracts with tribes or tribal members.¹⁸ In *Wong*, Division I ruled that tribal "employment constitutes a 'consensual relationship' over which the tribe is presumed to retain authority."¹⁹ While parties to tribal business or employment agreements might not be required to litigate in tribal court if the contract expressly permits adjudication in a non-tribal forum, it is doubtful that a federal court could assert federal question or diversity jurisdiction over a dispute arising out of such consensual relationships.²⁰



Logos of the WSBA Indian Law Section (left) and the Northwest Indian Bar Association

State courts have jurisdiction over disputes arising from an auto accident occurring on a state right-of-way through the reservation,²¹ and in

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particular suits between non-Indians under U.S. Supreme Court precedent holding that such roads and highways are not Indian Country.²² Yet, jurisdiction over tort or contract lawsuits between non-Indians arising on or out of the reservation may lie in tribal court. *Wong* was a reservation-based employment tort suit between two non-Indian tribal employees (in which the tribal employer was not a defendant but was allowed to participate as *amicus curiae*). In affirming the King County Superior Court's dismissal of the lawsuit for want of subject-matter jurisdiction, the *Wong* court explained:

In *Williams v. Lee* the United States Supreme Court considered whether a non-Indian merchant operating within the Navajo reservation could bring an action in state court to collect for goods sold on credit to members of the tribe. The court stated, 'the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.' The court noted that the tribe had strengthened and broadened its exercise of civil jurisdiction, which extended to suits by nonmembers. Under the circumstances, the court concluded, '[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.'²³

Division I concluded that the state's imposition of jurisdiction into a tribal employment matter "would undermine the right of the tribe to govern reservation affairs."²⁴

Under the Washington common law, when "a dispute does not clearly arise either on or off a reservation, the essential question is whether state assumption of jurisdiction would interfere with reservation self-government."²⁵ In such a dispute, the Washington State Supreme Court has indicated that Washington's policy interests can be protected only "up to the point where

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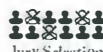
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tribal self-government would be affected.²⁶ In short, do not hastily file the common slip-and-fall or breach-of-contract lawsuit in superior court, if doing so will impinge upon the tribe's right to adjudicate such controversies and/or call into question an act attributable to the tribe as a governmental body,²⁷ or your client might be granted an early exit from court by way of a rule 12(b)(1) motion to dismiss.

... although a criminal defendant's heritage and territorial issues are not typically germane to non-tribal criminal proceedings, such considerations could present the first line of defense to a crime committed in Indian Country.

Principle #2(b) — Tribal Criminal Jurisdiction. While federal and state common law make clear that tribal courts do not have general criminal jurisdiction over non-Indian crimes occurring on tribal land,²⁸ Indian courts do retain the power to exclude any unwanted person from the reservations over which they preside.²⁹ Criminal offenses occurring in Indian Country³⁰ by non-Indians are subject to prosecution by the state and federal governments, depending on the offense.³¹ Crimes committed on tribal land by non-Indians against non-Indians may be subject to state jurisdiction.³² Under the General Crimes Act, federal courts may assert jurisdiction over non-Indian crimes against Indians or tribal property on tribal land, and tribes may prosecute Indians for such crimes.³³ While the federal government can prosecute enumerated "major crimes" committed by Indians in Indian Country,³⁴ a tribe may be able to concurrently prosecute Indians for offenses under the Major Crimes Act.³⁵

Under Public Law 280, state and tribal courts share jurisdiction over non-major crimes committed by Indians in Washington Indian Country.³⁶ The determination of whether the state and/or tribe can prosecute an Indian accused depends in large part upon the character of the tribal land on which the crime occurred, specifically whether the land is within or beyond the exterior boundaries of the reservation and is fee, trust, or allotted land.³⁷ Although in 1963 the state assumed general criminal jurisdiction over

Indians on tribal land in Washington, the state Legislature passed law in 1986 to facilitate the retrocession of such jurisdiction to certain tribes.³⁸ Washington tribes, including the Colville and Tulalip, have retroceded from state jurisdiction and thereby restored tribal power to prosecute Indian crimes committed on their reservations.³⁹ In sum, although a criminal defendant's heritage and territorial issues are not typically germane to non-tribal criminal proceedings, such considerations could present the first line of defense to

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a crime committed in Indian Country.

Principle #3 — Tribal Sovereign Immunity. Washington tribes are generally immune from civil suit, whether in tribal, state, or federal court.⁴⁰ Tribes are afforded immunity regardless of whether the alleged tribal act or omission took place on or off the reservation.⁴¹ Tribal sovereign immunity extends to agencies, entities, and enterprises, including gaming operations.⁴² Officials and employees of a tribe are afforded immunity protection when acting in their official capacity and within the scope of their employment.⁴³ Tribal immunity shields

tribes from suit for damages and requests for injunctive relief, including third-party subpoenas for the production of corporate witnesses or tribal documents.⁴⁴ In 2002, the 9th Circuit Court of Appeals, in *Bishop Paiute Tribe v. County of Inyo*, reaffirmed that tribes are immune from subpoena enforcement in barring the execution of a search warrant to obtain confidential payroll records for tribal employees.⁴⁵

Tribal sovereign immunity is a matter of subject-matter jurisdiction.⁴⁶ For any tribunal to have jurisdiction to adjudicate a claim to be brought

against a Washington tribe, the tribal sovereign or U.S. Congress must have clearly and unequivocally waived the tribe's immunity.⁴⁷ There is a strong presumption against waiver of tribal sovereign immunity.⁴⁸ "Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending upon the equities of a given situation."⁴⁹ Therefore, *before* suing a Washington tribe, its business, and/or employees, counsel must first closely evaluate issues of sovereign immunity and waiver. Otherwise, your client's suit could be promptly dismissed for want of subject-matter jurisdiction. Incidentally, in *Wong*, Division I did not reach the tribal *amicus curiae's* sovereign immunity argument, because it concluded the superior court lacked jurisdiction to entertain the dispute.⁵⁰

Principle #4 — Indian Child Welfare Act (ICWA). Jurisdiction over the adoption and custody of Indian children is governed by ICWA.⁵¹ The Washington Supreme Court has explained: "ICWA was enacted to counteract the large scale separations of Indian children from their families, tribes, and culture through adoption or foster-care placement, generally in non-Indian homes."⁵² As King County Superior Court Commissioner Kimberly Prochnau observed when declaring her support for the inclusion of Indian law on our bar exam:

Failure to apply the Indian Children Welfare Act correctly can disrupt placement and lead to reversible error. Although there has been more education on the topic in the last few years, I still find many lawyers do not understand this act.

Under Public Law 280, state courts possess jurisdiction over the adoption and custody of Indian children in Washington. Notwithstanding, ICWA makes clear that "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding."⁵³

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an Indian child to notify the child's parent or Indian custodian, and the child's tribe, of the pending proceedings and of their right of intervention.⁵¹ No such proceeding shall be held until at least 10 days after the child's tribe receives notice.⁵² If actual notice of the proceeding and right to intervene is not properly provided to the child's tribe, the state superior court's adoption or custody decree could be reversed by a state appellate court and remanded for compliance with ICWA.⁵⁶ ICWA contains several other procedural and substantive requirements that have been subject to a significant amount of state and federal judicial interpretation, all of which counsel must analyze relative to any Indian adoption or custody proceeding in Washington.

Our governors should be applauded for banding together to enact policy — in the face of some skepticism — that recognizes the pervasiveness of tribal sovereignty and jurisdiction in Washington, and will help ensure the legal protection of everyone in our state. *25*

Gabriel S. Galanda is an associate with the Seattle office of Williams, Kastner & Gibbs, PLLC. He is a descendant of the Namlaki and Concow Tribes, and an enrolled member of the Round Valley Indian Confederation in Northern California. He is past president of the Northwest Indian Bar Association and immediate past chair of the WSBA Indian Law Section. The views expressed in this article are his own.

NOTES

¹ See "Across the USA," *USA Today*, 8A, October 26, 2004; "Washington to address Indian law in bar exam," *The Oregonian*, October 24, 2004; "Indian law will be added to bar exam," Sara Jean Green, *Seattle Times*, B3, October 23, 2004; "Bar adds Indian law to exam," *Seattle Post-Intelligencer*, October 23, 2004.

² "Move invalidates long-ignored legal principles," *Spokesman-Review*, B1, October 29, 2004.

³ See "Comprehensive Bar Admission Requirements 2004," National Conference of Bar Examiners and the ABA Section of Legal Education and Admission to the Bar, at p. ix (www.ncbex.org/pub.htm).

⁴ See Tim Woolsey, "Should Indian Law Be Tested on the Washington Bar Exam?" *De Novo*, June 2004.

⁵ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁶ *U.S. v. Kagama*, 118 U.S. 375 (1886).

⁷ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

⁸ 119 Wn. App. 636, 645 (2004) (citing *Montana v. U.S.*, 450 U.S. 544, 564 (1981)).

⁹ 25 U.S.C. § 461.

¹⁰ 25 U.S.C. § 477.

¹¹ To be precise, tribal jurisdiction hinges upon whether the defendant is a tribal "member" or "nonmember" — the latter being a non-Indian who is not enrolled as a member of the tribe that seeks to assert

jurisdiction. See *U.S. v. Lara*, Docket No. 03-107 (U.S. 2004). For sake of clarity, the terms "Indian" and "non-Indian" are used herein.

¹² Although 18 U.S.C. § 1151's definition of "Indian Country" (*infra*) by its terms relates only to federal criminal jurisdiction, the U.S. Supreme Court has recognized that the definition also generally applies to questions of civil jurisdiction. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 & n.1 (1998). "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe

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inhabiting it, and not with the States.” *Id.* In particular, land held in trust for the benefit and use of an Indian tribe is Indian Country under section 1151. *Oklahoma Tax Comm’n v. Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *State v. Cooper*, 130 Wn.2d 770, 772 n.3 (1996).

¹³ William C. Canby, Jr., *American Indian Law*, P. 112 (3d Ed. 1998); Felix S. Cohen, *Handbook of Federal Indian Law* § 6 (Rennard Strickland, et al., ed., 1982 ed.). (“Jurisdiction over Indian matters is a function both of territory and of subject matter. A court’s jurisdiction

may depend not only on the location of events but also on the race of the parties or the subject matter of the case.”)

¹⁴ 28 U.S.C. § 1360(a).

¹⁵ See generally *Cordova v. Holwegner*, 93 Wn. App. 955 (1999).

¹⁶ See *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Sanders v. Robinson*, 1988 U.S. App. LEXIS 17047, *4-5 (9th Cir. 1988); *In re Adoption of Buehl*, 89 Wn.2d 649, 654 (1976).

¹⁷ 450 U.S. 544 (1981); *Thomsen v. King County*, 39 Wn. App. 505 (1985).

¹⁸ See *Strate v. A-I Contractors*, 520 U.S. 438, 457 (1997) (a business contract qualifies

as a “consensual relationship”).

¹⁹ 119 Wn. App. at 640.

²⁰ See *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945 (9th Cir. 2004) (dismissed complaint against the Navajo Nation seeking enforcement of an arbitration agreement for lack of federal question jurisdiction); Canby, *supra*, at 207 (“An Indian tribe that is not incorporated is not a citizen of any state and cannot be sued in federal court on the basis of diversity.”). Even if a tribe could be sued in diversity (see *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993)), a federal court might defer jurisdiction to a tribal court when the dispute at issue is a “reservation affair” or arose on or out of the reservation. See *Crawford v. Genuine Parts, Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991); *Stock West Corp. v. Taylor*, 942 F.2d 655, 661 (9th Cir. 1991), rehearing granted, 856 F.2d 207, on rehearing, 964 F.2d 912, *aff’d in part, vacated in part* (9th Cir. 1992).

²¹ See *McCrea v. Denison*, 76 Wn. App. 395 (1994).

²² See *Strate*, *supra*.

²³ 119 Wn. App. at 643 (citations omitted).

²⁴ *Id.* at 644.

²⁵ *Maxa v. Yakima Petroleum*, 83 Wn. App. 763, 769 (1996) (citing *Williams v. Lee*, *supra*).

²⁶ *Powell v. Farris*, 94 Wn.2d 782, 786 (1980).

²⁷ *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 983 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985).

²⁸ *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *State v. Schmuck*, 121 Wn.2d 373 (1993).

²⁹ *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985).

³⁰ The term “Indian country” is currently defined at 18 U.S.C. § 1151, which in pertinent part provides:

“Indian country” . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including

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- ³¹ *Schmuck, supra*.
- ³² *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946); *Solem v. Bartlett*, 465 U.S. 463 (1984).
- ³³ 18 U.S.C. § 1152; *Williams v. U.S.*, 327 U.S. 711 (1946).
- ³⁴ 18 U.S.C. § 1153; *Department of Labor and Industries v. Sargeant*, 27 Wn. App. 1 (1980).
- ³⁵ See Canby, *supra*, at 160-61.
- ³⁶ RCW 37.12.010.
- ³⁷ Cooper, *supra*.
- ³⁸ RCW 37.12.021, .100.
- ³⁹ See Jennifer Sullivan, "Moving up in the ranks," *Seattle Times*, March 4, 2004.
- ⁴⁰ *Santa Clara v. Martinez*, 436 U.S. 49, 58 (1978); *U.S. v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 92 Wn.2d 236 (1978); *Colville Tribal Enterprise v. Orr*, 5 CCAR 1 (Colville Confederated 1998).
- ⁴¹ *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).
- ⁴² See *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160, 164 n.3 (1980).
- ⁴³ *U.S. v. Oregon*, 657 F.2d at 1013 n.8.
- ⁴⁴ *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 86-88 (S.D.N.Y. 2002).
- ⁴⁵ 275 F.3d 893, 902-904 (9th Cir. 2002), *vacated and remanded on other grounds*, 538 U.S. 701 (2003); see also *U.S. v. James*, 980 F.2d 1314, 1319-20 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993).
- ⁴⁶ See *McClendon v. U.S.*, 885 F.2d 627, 629 (9th Cir. 1989).
- ⁴⁷ *Santa Clara v. Martinez, supra*; *Colville Tribal Enterprise v. Orr, supra*.
- ⁴⁸ *DeMontiney v. U.S. ex rel. Dept. of Interior*, 255 F.3d 801, 811 (9th Cir. 2001).
- ⁴⁹ *Chemehevui Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 n.6 (9th Cir. 1985).
- ⁵⁰ 119 Wn. App. at 644 n.27.
- ⁵¹ 25 U.S.C. § 1901, *et seq.*
- ⁵² *Matter of Adoption of Crews*, 118 Wn.2d 561, 567 (1992); 25 U.S.C. § 1902.
- ⁵³ 25 U.S.C. § 1911(c).
- ⁵⁴ 25 U.S.C. § 1912(a); *Matter of Welfare of M.S.C.*, 86 Wn. App. 127, 133-34 (1997).
- ⁵⁵ 25 U.S.C. § 1912(a); *In re Dependency of Colnar*, 52 Wn. App. 37, 39 (1988).
- ⁵⁶ *Matter of Welfare of M.S.C.*, 86 Wn. App. at 134-35.

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Wills, Wills Everywhere, and All of Them to Keep?

A New Way to Fulfill Your Ethical Duty of Safekeeping Original Wills

BY RICHARD CUNNINGHAM AND CHRISTOPHER SUTTON

Many of us have prepared wills during the course of our practice of law. Often we retain the original will for our clients' safekeeping. There are many good reasons to retain original wills: (1) we can maintain a connection with our clients; (2) clients will not lose the will, inadvertently destroy it, or write on it; (3) we have our contact information on the copy of the wills we give our clients; and (4) perhaps (although we sometimes do not want to admit it) we can eventually assist the personal representative with the future probate. However, as our collection of original wills grows, so do our ethical duties to preserve them.

Problem: *Over the course of a long career, a lawyer accumulates a large number of client wills. As the lawyer is preparing to retire, he realizes he should return the wills to the clients but, after a diligent search, he is unable to locate some of them. What does he do?*

Problem: *Lawyer purchases the practice of another lawyer and discovers two filing cabinets full of original client wills; one will is yellow and dated August 7, 1920. What should the lawyer do with these wills?*

Problem: *Lawyer passes away and a large number of original client wills are in his office. How should his personal representative handle these wills?*

Rule of Professional Conduct 1.14 requires us to protect our clients' property when it is in our possession. To satisfy that duty, some of us place the original wills in a bank safe deposit box, others keep them in fireproof safes on site, while

others have them stored by storage professionals. However, some of us do not realize that our duty under RPC 1.14 requires us to hold the wills indefinitely, which can potentially lead to problems as we continue our practice and the number of wills we hold grows.

After his first three years of private practice, Chris Sutton, now serving as the WSBA professional responsibility counsel, realized the weight of the responsibility and duties required for the storage of

is to answer the WSBA Ethics Line and assist fellow lawyers in solving the day-to-day ethical dilemmas we all face in our profession. A significant number of those calls identified problems that arose from lawyers retaining their clients' original wills. In some cases it was a retiring lawyer asking what to do with the original wills. At other times a deceased lawyer's spouse, child, or partner would call asking what to do with the original wills in the lawyer's office.

The advice was not what they wanted to hear. Even if clients ultimately cannot be located, RPC 1.14 requires that their wills be maintained indefinitely. Since the lawyer assumed the ethical duty of safeguarding client property, that duty continues after retirement and perhaps even after death. In the case of death, a deceased lawyer's personal representative likely would "step into the shoes" of the decedent and assume the duty of safekeeping original wills.

Although there is no Washington case law directly on point, it is the authors' opinion that a court would likely find that the personal representative of the estate assumes the deceased lawyer's duty to safeguard client documents and would require the use of estate assets to locate the lawyer's clients and return the original wills using reasonable efforts, including the hiring of staff, the payment of mail, notice by publication, or other possible methods to reach this result.

Members of the Bar became more and more concerned with the problems associated with the duty of safekeeping original wills. The WSBA Board of Governors (BOG) formed a task force to develop a solution that was practical



his clients' original wills. At that time he was renting three large safe deposit boxes to keep original wills. He realized that he was going to need even more space as his practice developed. It made little sense to continue holding original wills for an indefinite period, and he decided that he would no longer hold original wills for clients. He contacted his current clients, returned their original wills, and never kept another one. In retrospect, Chris believes that during his 25 years of private practice that decision was one of the best decisions he ever made.

After six years of serving as the WSBA professional responsibility counsel, Chris recognizes just how wise that decision was. One of Chris's duties at the WSBA

and not too expensive. The task force, led by Barbara Sherland of Stoel Rives LLP, consisted of WSBA staff lawyers, lawyers from the Real Property, Probate & Trust Section, representatives from the Administrative Office of the Courts, representatives from the Washington Secretary of State, other interested lawyers, and a citizen member. The task force met for over a year to address these issues and draft proposed legislation. They sent the legislation to the BOG, recommending that the WSBA support the adoption of the legislation by the state Legislature. The result of this effort was the passage of RCW 11.12.265, entitled "Filing of original will with court before death of testator."

As of June 2004, RCW 11.12.265 went into effect, allowing any person who has custody or control over an original will to deposit the will under seal with the clerk of any court having jurisdiction. The purpose of the statute is to provide a safe place to hold a testator's will, addressing the certain problems associated with attorneys having original wills in their possession. The statute does not require all original wills to be deposited with the superior court clerk. You may continue to retain your clients' original wills for safekeeping.

RCW 11.12.265 provides:

Any person who has custody or control of any original will and who has not received knowledge of the death of the testator may deliver the will for filing under seal to any court having jurisdiction. The testator may withdraw the original will so filed upon proper identification. Any other person, including an attorney in fact or guardian of the testator, may withdraw the original will so filed only upon court order after showing of good cause. Upon request and presentation of a certified copy of the testator's death certificate, the clerk shall unseal the file. This section does not preclude filing a will not under seal and does not alter any duty of a person having knowledge of the testator's death to file the will.

Under current Washington law, the superior court of every county has original subject matter jurisdiction over the

probate of wills and the administration of estates. RCW 11.96A.040(1). Therefore, a Washington resident's will may be deposited with the clerk of any Washington superior court. A deposited will is treated as a sealed document by the court clerk and without a court order can be released only to the testator. Any other person, including an attorney in fact or guardian of the testator, may seek a court order to withdraw the original will upon a showing of good cause. Upon request and presentation of a certified copy of the testator's death certificate, the will may become a matter of public record.

A will that is deposited with the court clerk can still be challenged upon the death of a testator. The fact that the court clerk holds a will in its repository is not a determination of validity. A will must still meet the statutory execution formalities, and the testator must still have testamentary capacity.

The procedure for depositing a will with a superior court clerk may vary with each county. The following is the King County procedure:

In King County, a party wishing to deposit an original will of a living person must complete a *Will Repository Cover Sheet* (WRCS), which is available in the Clerk's Office or on the Clerk's Web site at www.metrokc.gov/kcsccl/forms.htm. A filing fee of \$20 is required to deposit a will in the Clerk's Will Repository. An index will be maintained in the Superior Court Management Information System (SCOMIS) under the name and date of birth of the testator. Any other filing, such as of a codicil, also requires payment of the \$20 filing fee. If a will is withdrawn from the Repository, it may be deposited again with payment of the \$20 filing fee.

The testator may withdraw the will upon verification of identity. Removal of the deposited will by someone other than the testator requires a court order. A sample Motion and Order is available on the Clerk's Web site. All pleadings filed relating to the repository must be captioned "IN RE THE DEPOSITED WILL OF (testator)" and should include the date of birth

of the testator.

After the death of the testator, and upon request and presentation of a certified copy of the death certificate, the will will be unsealed.

The Clerk will retain deposited wills or the record of their withdrawal for 100 years.

See King County Superior Court Clerks' Alert, June 9, 2004.

RCW 11.12.265 gives us a new tool to serve our clients' needs and to manage our practice more efficiently. Remember, the statute does not require you to deposit your client's original wills with the court. You may continue to hold them for your clients, or you may continue to have your clients hold their original wills. However, if you decide to continue to keep your clients' original wills, remember that your ethical duty to safeguard them continues indefinitely. Let your clients know of the new opportunity to deposit their original will with the court in a private, safe, and secure manner. You will be maintaining your ethical duty to your clients without having the headaches of maintaining all those wills. ✍

Richard Cunningham received his J.D. and LL.M. in Taxation from the University of Washington School of Law in 2000 and 2001. He is a member of the WSBA Probate and Trust Section, serving on the editorial board for the section newsletter. He also is a member of the Estate and Gift Tax Committee of the WSBA Taxation Section, where he currently serves as the chair of the Washington Uniform Transfers to Minors Act subcommittee. He has authored articles for various bar publications.

Christopher Sutton is a graduate of the College of William & Mary and the Marshall-Wythe School of Law. He has been practicing law for over 30 years in many areas, including domestic relations, trusts and wills, and business transactions. He worked at the WSBA as disciplinary counsel for two years. Presently he is the professional responsibility counsel for the Bar Association and professional responsibility program manager. He also operates the Ethics Line and supervises the WSBA ADR Program.

Anti-icers: Is It Time for Courts to Recognize Municipalities' Use of Anti-icers for Roadway Ice Control?

BY KEITH L. KESSLER

Anti-icers, principally liquid calcium, magnesium, and sodium chlorides, have, since the early 1990s, been routinely sprayed on roadway surfaces prior to a freeze to prevent ice from forming and bonding with the asphalt or concrete surface.¹

The State of the Art

According to the Federal Highway Administration, anti-icers have been found to be effective in roadway ice control:

Anti-icing is a very relevant tool used to fight ice formation due to frost, freezing rain, snow, and ice storm conditions. This tool has been used by maintenance workers in 15 States for the last 4 years [since 1992]. Most of them have found anti-icing methods to be very successful.

Anti-icing is the snow and ice control practice of preventing the formation and development of snow and ice by timely application of a freezing point depressant. It provides a maintenance manager with two major capabilities: the capability for maintaining roads in the best conditions possible during a winter storm, and the capability to do so in an efficient manner. As a consequence, anti-icing has the potential to provide the benefit of increased traffic safety at a lower cost.

Federal Highway Administration, *Manual of Practice for an Effective Anti-Icing Program* (June 1996) (emphasis in original).

In fact, the Washington State Department of Transportation directs its winter maintenance personnel to "have accurate weather information," and apply anti-icers "before a . . . freezing event occurs." *WSDOT Snow and Ice Control - Operators Handbook*. According to WSDOT, monitoring forecasts and actual weather conditions enables its road maintenance personnel to "estimate the onset of road surface ice. With this information

is virtually always ice on the road surface. An icy road surface is universally considered dangerous for drivers.

As can occur, the law hasn't kept up with science or actual practice in the area of winter roadway maintenance. Decades of case law, condensed into WPI 140.01, broadly require that the state of Washington and its municipalities keep our roads in a reasonably safe condition for ordinary travel.³ The problem

is that a number of courts feel bound to blindly treat as binding precedent a handful of old ice and snow cases that pre-date the now common use of anti-icers. Contrary to our current *proactive* approach to controlling ice and snow on road surfaces, this handful of old cases is used to excuse inaction under the now outmoded *reactive* methodology, where no one paid a lot of attention to weather forecasts, roads became icy, cars crashed,

and only then did roadway maintenance crews begin to show up to start sanding the ice.

Those outdated cases, some from 50 years ago, provided essentially that a municipality had to have notice of ice on the roadway surface before it had to address the hazard. The cases further granted governmental entities a "reasonable amount of time" following notice of the icy roadway condition to apply sand.⁴

As discussed below, the application of sand is and has been disfavored both because sand is blown off the roadway surface by vehicle tires and quickly becomes ineffective, and because it costs municipalities time and money for numerous repeat applications and clean-up. By contrast, liquid anti-icers are ultimately diluted and removed by



maintenance crews can apply anti-icing treatments just before a storm or ice condition hits." *WSDOT Maintenance Manual* (M51-01) (March 2002).

WSDOT in fact touts the effectiveness of its anti-icer program:

Washington State, just as the majority of other States experiencing winter driving conditions, has applied chemicals to its highways to prevent or reduce slickness due to ice and snow . . . with favorable results.²

Anti-icing plays an integral role in proactive winter roadway maintenance, beginning with the monitoring of weather forecasts for freezing conditions combined with precipitation. The result of this combination of weather conditions

precipitation, or the water evaporates out, leaving a residue of de-icer chemical in the texture of the roadway surface for the next freezing event.

As with advances in medicine over the past 50 years in preventing disease and illness, roadway maintenance has achieved remarkable success in preventing the formation of ice on our roads. There is no longer any reason to use a reactive standard for liability now that roadway agencies actively subscribe to the proactive means of preventing ice. There were no MRIs or CT scans 50 years ago, but that is obviously the state of the art in medicine today. There were no liquid anti-icers being sprayed on our roads 50 years ago, but that is the state of the art today, and actually has been for several years.

A History and Science of the Use of Anti-Icers in Winter Roadway Maintenance

Anti-icing processes have been in use since well before the 1990s. From the time that chemicals were first used for ice and snow control, maintenance crews recognized that early application of salt-based chemicals made the removal of ice and snow easier, and in some cases, prevented the formation of bonded ice altogether. A roadway surface with an anti-icer application is no different from a roadway surface in the rain, with a reasonably safe coefficient of friction in the .5-.7 range.

The 1930s. The use of straight granular sodium chloride was pioneered by the New Hampshire State Highway Department on an experimental basis in 1938. LeRoy F. Johnson, New Hampshire's maintenance engineer from 1933 to 1961, devised the direct windrow application method using granular sodium chloride on the New Hampshire state highway system. It became the standard operating procedure in New Hampshire in the winter of 1940-1941. This was a form of anti-icing, as the windrow was typically placed on the centerline of the roadway surface. As the salt took on moisture and formed a brine, the brine would run from the crown of the road to the edges on both sides of the centerline.

Except in those cases where the rate of snowfall surpassed the melting rate of the sodium chloride, the roadway was kept bare and wet.

The 1940s. In November of 1948, the Highway Research Board (now the Transportation Research Board) published a second revision to the original War-time Road Problems Bulletin No. 9 in its Current Road Problems series, entitled "Recommended Practice for Snow Removal and Treatment of Icy Pavements." The government report recognized the "Application of Chloride without Abrasives" as a "method of prevention now being used" where dry chloride was applied directly to the road surface, "prevent[ing] the formation of ice."

The 1950s. The third revision (No. 9-3R) of January 1954 reported that "[a] method of prevention now being used



in many states is the application of sodium chloride or calcium chloride, or a mixture of these chlorides, directly to the pavement surface Highways or streets carrying large volumes of traffic should be treated as soon as possible if it appears that snow will compact and adhere to the pavement The use of sodium chloride of the coarse commercial size at the beginning of a storm prevents the snow from compacting and adhering to the pavement."

The 1960s. The fourth revision (No. 9-4R) of August 1962 re-affirmed that "[an] established winter maintenance goal in most primary routes and an increasing number of secondary and local roads is often referred to as bare pavement maintenance The usual procedure

is to apply chemicals as soon as there is a definite indication of snow sticking to the pavement or of the formation of ice. In some cases, it is practical to make this application slightly ahead of the actual storm to prevent the development of a slippery condition."

The 1970s. In 1970, Iowa Maintenance Engineer Foster Smiley reported to the American Association of State Highway Officials (AASHTO) on the effective use of *pre-wetting* granular sodium chloride with liquid sodium chloride, to create a *liquid anti-icer/de-icer*.

The 1980s. The 1980s saw further development in new anti-icing materials and application equipment. In 1988 the Strategic Highway Research Program (SHRP) focused on seven technology areas, including Anti-Icing.

The 1990s. In the 1990s, the SHRP research focused on anti-icing programs.⁵ As part of the SHRP research, nine state highway agencies conducted anti-icing activities during the 1991-1992 and 1992-1993 winters. The nine states were California, Colorado, Maryland, Minnesota, Missouri, Nevada, New York, Ohio, and Washington. The SHRP results demonstrated the effectiveness of anti-icer usage. The Federal Highway Administration (FHWA) published the "Manual of Practice for an Effective Anti-Icing Program." The FHWA determined that the anti-icing process was so promising that it developed a nationwide Ice Warriors program. This program provided crew chiefs and others in the front line of highway maintenance with hands-on training and technical support on anti-icing strategies. The team was created in 1995, at the close of the FHWA program on testing and evaluating anti-icing techniques. In 1996, the American Association of State and Highway Transportation Officials (AASHTO) established the Lead States Team for anti-icing. This team consisted of seven states that were considered to be ahead of the pack in implementing anti-icing techniques. The state of Washington was a member of that Lead States Team.

The State of the Law

Our case law reflects none of these de-

acades of anti-icer usage, nor even our actual practice in the state of Washington over the past 15 years. As a result, our case law is out of touch.

Until recently, even our Washington Pattern Jury Instructions erroneously said that one had to be fault-free to hold a governmental entity liable for a

hazardous roadway. This was corrected by the Court of Appeals in *Keller v. City of Spokane*, 104 Wn. App. 545, 17 P.3d 661 (2001), *affirmed*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). In *Keller*, the court held that the language in WPI 140.01 requiring that plaintiffs be fault-free not only improperly allowed the jury

to determine the *duty* of a government entity based on the plaintiff's conduct, but ignored the already well-established duty to keep roads reasonably safe for ordinary travel:

[T]he City stretches the reasoning of *Hansen* to support its contention that the purpose of WPI 140.01 is to limit the City's duty of ordinary care to persons "exercising due care." This is wrong.

The City cites numerous decisions from Washington and other jurisdictions that facially exonerate municipalities from any duty to negligent plaintiffs in street maintenance actions. But these holdings are generally explicitly or implicitly predicated on one of two premises. In most cases the street was in fact safe for ordinary travel by reasonably prudent persons. [Citations omitted.] Where an unsafe condition was found, the municipality's negligence was not a proximate cause of the injury. [Citations omitted.]

Conversely, in those cases in which the municipality failed to take ordinary measures to provide reasonable safety, the plaintiff prevailed, regardless of his or her own fault. [Citations omitted.]

Here, the first paragraph of Instruction No. 13 (WPI 140.01) erroneously left it to the jury to decide the legal question of the City's primary duty owed to the plaintiff.

Keller at 554-56. The Court of Appeals held that the language of WPI 140.01 erroneously conveyed to the jury that if there were any contributory fault on the part of the plaintiff, then the City did not owe the plaintiff any duty. *Keller* at 557-58.

In affirming the Court of Appeals, the Washington State Supreme Court acknowledged that the provisions of Chapter 4.22 RCW clearly provide that a plaintiff can be partially at fault, and the municipality responsible for an unsafe road will still be liable for its share of fault arising out of a bad roadway design or bad maintenance:

[I]nterpreting our cases as a whole, the language used in *Berglund* and

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other decisions by this court does not limit the scope of a municipality's duty to only those using the roads and highways in a nonnegligent manner....

We therefore hold that a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.

Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

But our appellate courts still lag in enforcing that fundamental rule where people are injured or killed because of an icy road surface. For example, *LeRoy v. State*, ____ Wn. App. ___, 98 P.3d 819 (2004), very recently reiterated outdated case law. The opinion certainly did not warrant publication as it was merely an anachronistic re-hashing of the purely reactive approach to winter road maintenance no longer followed by municipal road maintenance shops. Current practice and industry standards render *LeRoy* irrelevant.

And, of course, the Washington State Supreme Court's overriding holding in *Keller* — that our roads must be maintained in a reasonably safe condition — trumps any deviation by lower courts, including the *LeRoy* court, to the extent that it purports to elevate excuses for operating an unsafe road above the Supreme Court's requirement that roads be maintained in a reasonably safe condition.

Consistent with this fundamental duty requiring reasonably safe roads, trial courts are now rejecting the blind approach of the old, reactive cases that ignore actual proactive winter roadway maintenance practices that are and have been in place for some time. For example, the trial courts in *Morehouse v. Washington State Department of Transportation* (Spokane County Superior Court)⁶ and *Cooper v. City of Richland* (Benton County Superior Court)⁷ both recently ruled that the duty to keep our roads in a reasonably safe condition during winter months includes addressing a foreseeably dangerous condition⁸ such as the formation of ice on the roadway where precipitation (including fog) and freezing conditions are forecast:

In *LeRoy*, however, there was no reference to fog in the weather report. The evidence in *Morehouse* establishes that the weather report not only advised the State Maintenance Localities of the temperature range, but that that fog would be forming late in the evening prior to the accident, and deposition testimony confirmed that those conditions create black ice especially on bridges. The State's program of deicing and anti-icing are in place and are used.

Taking the *LeRoy* decision to its

extreme would mean that the State never has an obligation to use its anti-icing process because by its nature it is done before the actual ice forms — it's a preventive measure. If the State only had to act after they have actual notice the ice is there, they never would have a duty to use the anti-icing process. The *LeRoy* court references *Niebarger v. Seattle*, 53 Wn.2d 228, and that court acknowledged that constructive notice may be inferred from the time the dangerous condition was permitted to continue to a point where the

CASE #131

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dangerous condition should have been known. The question is, I guess, is a known likelihood of a dangerous condition sufficient notice to require state response? *In my mind the important distinction is that with snow you cannot do anything about it until it is there to either shovel, plow or sand. Ice, however, can be prevented in some circumstances.*

A dangerous condition can be one where it is known that black ice will more likely than not be forming at a certain place and at

a reasonably certain time.

Morehouse (Judge Jerome J. Leveque, 11/3/04) (italics by the court).

Similarly, in the *Cooper* case, the City of Richland in effect asked the trial court to ignore the Public Works Department's practice of using anti-icers. It also wanted the court to ignore its failure to apply any anti-icer prior to the morning of a fatal collision on an icy bridge because no one in Public Works was on duty during the Christmas holidays. The City asserted that,

notwithstanding the forecast of fog and freezing conditions, because its off-duty Street Division employees were unaware of the ice on the bridge until after the collision, it lacked notice and a reasonable opportunity to correct the hazardous condition. On this basis, it argued that it did not breach its duty to keep the roads and bridges reasonably safe. The trial court disagreed:

Now that, if there was any doubt remaining in *Wright versus City of Kennewick*, seems to me to have been even more clearly manifest in the third case, *Bird versus Walton*. The City it seems to me in its brief mischaracterizes the holding in *Bird versus Walton*. The court in the *Walton* case cites the City's general duty to maintain roads in a reasonably safe condition, and that's clearly the law, and that is a responsibility that the City tends to not speak of.

Cooper (Judge Dennis D. Yule, 8/25/04).

The trial court ruled that the real issues were the adequacy of the notice to the city that was provided by the weather forecast, in terms of the foreseeability of the ice, and whether the city should therefore have applied its anti-icer on the bridge surface prior to the freeze.

The fact is that the Washington State Department of Transportation has a meteorologist as part of its proactive winter maintenance program. Regional WSDOT maintenance shops have the ability to monitor weather forecasts that predict precipitation and freezing temperatures. Over the course of the past several years, municipal public works agencies across the state have acknowledged that same duty to pay attention to weather forecasts as part of their proactive programs. Not only do virtually all public works agencies have access to local weather forecasts by means of the Internet, television, and newspapers, but anyone can purchase a hand-held weather forecast radio for \$25. There's no excuse for failing to heed weather warnings, nor any excuse for failing to get the maintenance trucks out spraying anti-icer on the roadway surface before the arrival of the expected precipitation at freezing temperatures.

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The Consequences of Inaction

Car and truck tires traveling on an icy road surface often lose traction. With a loss of traction comes a loss of control of the vehicle. Out-of-control cars on icy roads frequently end up crossing the centerline and colliding head-on with oncoming vehicles. Head-on collisions virtually always result in severe injuries and sometimes death.

Municipalities of course know these consequences, and must be held to a standard of care that takes into account the warnings from weather forecasters, and the duty to use their anti-icers when they are warned of incoming precipitation and freezing temperatures. Their charge is to keep the roadways in a reasonably safe condition. A roadway surface with an anti-icer application is no different from a roadway surface in the rain. That is a reasonably safe roadway surface, and meets the duty set by law.

There is no longer an excuse for allowing municipalities to hide behind an outdated reactive approach to roadway safety. The *LeRoy* opinion has perhaps inadvertently encouraged negligent municipalities to put their heads in the sand. Unfortunately, it rewarded bad behavior. Drivers and their families deserve better. *✍*

Keith L. Kessler is a partner with the law firm of Stritmatter Kessler Whelan Withey Coluccio, with offices in Hoquiam and Seattle.

NOTES

¹ Anti-icer brands commonly used by municipalities across the United States include FreezGard, FreezeGard Zero, Icestop Cl, Liquidow, RoadGuard, and Calcium Magnesium Acetate.

² Declaration of Jennene Ring, P. E. at 3-4, *Janssen v. Corbett*, Chelan County Superior Court Cause No. 03-2-00716-6. Ms. Ring is the Regional Traffic/Maintenance Engineer for the North Central Region of WSDOT. Department of Transportation spokesperson Jeff Adamson confirms that the WSDOT anti-icer program "has reduced accidents." *The Wenatchee World*, November 30, 2004. For a current report on the effectiveness of WSDOT's anti-icer program, visit its website at www.wsdot.wa.gov/winter/anti.htm.

³ WPI 140.01 provides:

The [county] [city] [town] [state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a reasonably safe condition for ordinary travel.

⁴ See, e.g., *Wright v. Kennewick*, 62 Wn.2d 163, 381 P.2d 620 (1963).

⁵ An integral part of the program was the introduction of the Road Weather Information Systems involving a range of weather technologies, from meteorological sensors to gather

weather information, to roadway sensors to collect pavement condition information, to thermographic road analyses to develop temperature profiles of road networks.

⁶ Spokane County Superior Court Cause No. 200302-00043-9.

⁷ Benton County Superior Court Cause No. 03-2-02089-1.

⁸ As long ago as 1940, the Washington State Supreme Court made clear the duty on the part of the municipality responsible for a road to keep it in a reasonably safe condition, taking into account foreseeable dangerous conditions. *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940).

Legal Foundation of Washington 19th Annual Goldmark Awards Luncheon

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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.

WSBA District 2 Governor **Eron Berg** was kind enough to spend a lunch meeting with the Island County Bar Association November 30. Eron filled us in at length on the Board of Governors' work, and I have to say — being a solo practitioner — I don't know how he finds the time to fit his BOG work in with the rest of his practice. Despite having been licensed to practice for enough years now that the Young Lawyers Division stopped sending me stuff years ago, I had no idea just how much work the BOG does. Eron is to be commended for supplying his time not only to the BOG, but to our little group to fill us in. Next time he comes back to town, we'll have to let him stop long enough to actually eat his lunch.

The Volunteer Lawyer Program of Island County had their Open House

a few weeks back. Local dignitaries and various important folks attended the event, which started off with local Superior Court Judge **Alan Hancock** playing his bagpipes. Keynote speaker for the event was Federal Judge **John C. Coughenour**, who spoke on the subject of unmet civil legal needs, the theme for the event. Also addressing the audience on the subject was Superior Court Judge **Vickie Churchill**. The Open House succeeded in getting the attention of local lawmakers and the local press, the latter of which ran a nice story on the VLP and the lawyers who support it. Thank you to all of the judges and attorneys that help make the program run, and especially thanks to the program's fearless leader, **Rita Worley**.

I missed Judge Hancock's bagpipe segment because of a court appearance, by the way, but I'm told the performance was stirring. I love listening to the pipes as a general rule, but in nearly five years in Island County, I have yet to catch one of His Honor's performances. I'm hoping he's going to put out a CD soon. Maybe we can find an entertainment lawyer to get him a record deal.

In other recent Island County news (hey, we've been saving up), Island County Bar Association members elected **Hans Juhl** president for 2005 and **Nathan Manni** (who, by the way, is getting way too much ink for a guy with a bar number of about, like, a gazillion or so) was elected secretary/treasurer. Thankfully, the votes were unanimous, avoiding any need for any post-election distress.

The Judiciary

by Lindsay Thompson

Governor Gary Locke ended his term with three more Superior Court appointments last fall.

In September, Locke appointed Whatcom County District Court Judge **Ira Uhrig** to the Superior Court seat vacated by retiring Judge **Michael Moynihan**. As the only candidate for the seat in the November election, Uhrig was appointed to fill the time between Moynihan's August 31, 2004, retirement and the beginning of Uhrig's elected term in January.

In October the governor appointed Camas attorney **Robert A. Lewis** to a new, ninth Superior Court judgeship in Clark County. Lewis previously served as a Clark and Skamania County court commissioner in addition to acting as assistant city attorney and municipal prosecutor in Camas.

On December 21, 2004, Locke appointed **Sally Olsen** to a new Superior Court position in Kitsap County. Olsen was a King County deputy prosecuting attorney before going into practice in Kitsap 11 years ago.

The governor noted Olsen was his 61st and last appointment to the Superior Court in eight years as governor. He also appointed five members of the Court of Appeals and two members of the Supreme Court.

Thurston County Report

by Fred D. Gentry

TCBA's annual Christmas lunch again, in cooperation with the Salvation Army, produced a generous response for the less-advantaged families in our community. Six families with children (as many as six in some cases) were "adopted." Members of the Association, led by **Frank Groundwater** and **Charles Szurszewski**, purchased Christmas gifts and foodstuffs.

The Christmas lunch also provided a venue for a tribute to retiring Judge **Dan Berschauer**. The highlight was **Rob Hill's** song honoring Judge Berschauer, to the tune of "My Way":

Yes, there were times, I'm sure
you knew
I let the tail/wag the doggy-do
But through it all, I stayed on
track
Covered my ass/with findings
of fact
From which I feel/there's no
appeal
You're stuck with my way.

I've laughed/until I cried
When asked to quash/some
punk's confession
I've read the Bill of Rights
But in the end, it's my discretion

To think, for 30 years, you people
had to do what I say
It's true, the joke's on you
You did it my way.

For what is a judge, what has
he got
Under the robe, I just wore
socks
I took the bench/with zest and
zeal
From which there can/be no
appeal
My record's clear, now fetch
some beer
And pour one my way.

(Copyright 2004, Rob Hill.)

Chris Wickham, who defeated **Jim Powers** in an election featuring two highly qualified candidates, will replace Judge Berschauer on the bench.

In Memoriam

Wayne Bjur

Longtime Zillah City Attorney Wayne Bjur was a lifelong Yakima Valley resident who took two cases to the U.S. Supreme Court as an attorney for the Yakima Nation. He joined the bar in 1975 and was in private practice at the time of his death.

Survivors include his mother, seven sisters and brothers, three children, and one grandchild.

Robert Wayne Bjur was 54 when he died October 12, 2004.

Laurie A. Daviess-White

Law was a second career for Laurie Daviess-White, and part of a busy and varied life. After graduating from the University of Washington, she worked as a counsel for sight- and hearing-impaired people for the Department of Labor and Industries. Later she entered Seattle University School of Law and earned her law degree. She joined the bar in 1993.

After a time practicing in the Tri Cities, Daviess-White moved to Wenatchee and worked in private and government practice before opening her own family

law firm in 1998. She was a competitive horsewoman for most of her life and was a member of the Central Washington Dressage Association, the International Arabian Horse Association, and a variety of other organizations. She served as an adjunct investigative counsel panel member for WSBA.

Survivors include her sister, her husband, and eight stepchildren.

Laurie A. Daviess-White was born in Santa Monica, CA, February 2, 1950, and died in Olympia September 30, 2004, aged 54.

Gabe Ibarra

WSBA member Robert Perez provided this remembrance of his friend.

Juan Gabriel ("Gabe") Ibarra, of Seattle, died November 18, 2004, in a car accident four miles east of Cle Elum, Washington. He was born in Eagle Pass, Texas, on August 10, 1971, to Gumecindo and Juanita Ibarra Ramos. Raised in Eagle Pass, Texas, and Piedras Negras, Mexico, Gabe graduated from the University of Texas in May 1993 with a B.A. in American Studies, after which he taught seventh-grade history at Eagle Pass High School. After teaching for a year, Gabe moved to Pullman, Washington, to attend graduate school at Washington State University. Upon receiving his M.A. in Latin American Studies, Gabe taught history at North Seattle Community College. In August of 1996, Gabe began studies at the University of Washington School of Law and graduated with his J.D. in June 1999. Following graduation, Gabe began a one-year state court clerkship for Judge Marlin J. Appelwick, Washington Court of Appeals, Division I. After his clerkship, Gabe joined the law firm of Velikanje, Moore & Shore in Yakima. In February 2003, Gabe started his own law firm in Seattle and practiced there and in eastern Washington. In October 2004, Gabe bought his first home, in West Seattle. An avid traveler and golfer, Gabe was an everpresent friend, companion, and colleague. Gabe was 33 years old and will be dearly missed by his friends, including Stacy George, and his family, including his father, Gumecindo Sr.; his sisters, Dulce, Raquel, Rosa, Susana, and Yolanda; and his brother, Gumecindo Jr.



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He is preceded by his beloved mother, Juanita, who passed away on July 5, 1998. Donations may be made to the UW School of Law Alumni Scholarship Fund, with an indication that the gift is in memory of J. Gabriel Ibarra; Law Development, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, WA 98195.

Kenneth Reiserer

Kenneth Reiserer grew up in Los Angeles and earned a degree from Oregon State University before joining the Navy and serving in Vietnam. He was awarded the Commendation Medal with the Combat V as well as the Bronze Star. Resuming his education, Reiserer received his law degree from the University of Santa Clara in 1973 and later obtained a tax law degree from Boston University. He practiced in Los Gatos, CA, for many years before moving to Washington. He joined the bar here in 1997.

Survivors include Reiserer's parents, two sisters, his wife, two daughters, and a stepson.

Kenneth Harris Reiserer was born in Rochester, NY, August 12, 1944, and died in Sammamish July 12, 2004, aged 59.

Fred Schlick

Fred Schlick practiced on Vashon Island for 43 years before enjoying a happy retirement. He died on a road trip with his wife, and at his death was laying plans with friends for a big celebration of his 85th birthday.

Friends and family cited his passion for gardening, poetry, and political commentary. He joined the WSBA in 1950.

Survivors include two sisters, his wife, two sons, and one granddaughter.

Fred Schlick died September 27, 2004, aged 84.

Charles W. Shepherd

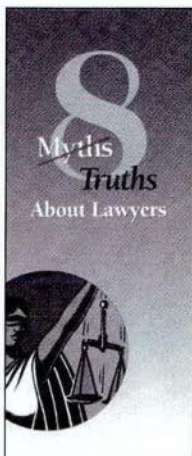
Chuck Shepherd served in World War II as a combat photographer, then won his undergraduate and law degrees at the University of Washington. He joined the bar in 1954 and spent his career practicing in Edmonds.

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- The McDonald's verdict shows how foolish juries are.
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Shepherd was active in the Snohomish County Bar Association, served as a municipal judge, and was a governor of the Washington State Trial Lawyers Association. A trustee of the Stevens Hospital Research Foundation, Shepherd was involved in the establishment of Stevens Memorial Hospital in Edmonds.

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

Charles Wilbert Shepherd was born in Gunnison, CO, October 8, 1919 and died in Edmonds September 29, 2004, aged 84.

John F. "Jack" Raymond

Jack Raymond attended Wenatchee High School and the University of Washington, where he received his law degree in 1952. From 1943 to 1945 he served in General Patton's Third Army, 1st Platoon, 30th Field Hospital, receiving the Jubilee of Liberty medal for his service during the Normandy Invasion. Jack met his wife, Fern Simmons, at the UW; they married in 1950.

From 1952 to 1992, Jack had a private law practice in Wallingford. He served as a municipal judge in Island County and as a district court commissioner. In 2002, Jack was one of only 100 WSBA members to commemorate 50 years of membership.

Jack was active in the Seattle community, with nearly 50 years of service to Kiwanis International, including serving as a club president and camp director for Camp Casey, a camp for children with physical disabilities. Jack coached his son's elementary school basketball team, receiving the "Man of the Year" Award for his service. He will be remembered with love by family, friends, and colleagues for his intelligence, sense of humor, wonderful stories, and beautiful rose garden.

Jack is survived by his wife, Fern; four children; and nine grandchildren. John F. "Jack" Raymond was born March 29, 1923, in Anacortes, and died October 14, 2004, in Seattle, aged 81.

David E. Williams

David Williams attended Whitman College and earned his J.D. from the

University of Montana in 1949 and J.L.M. in Labor Law from New York University in 1950.

He served in the U.S. Army during World War II and was awarded a Purple Heart and Bronze Star.

He was a founding partner and consultant for Critchlow, Williams and Schuster from 1953-2004. He was a founding member of the Washington State Trial Lawyers Association. During his 54-year legal career he was known as a zealous champion of the "little guy."

David was guided by strong moral principles; had a sharp wit; was an avid reader of historical nonfiction; valued education and hard work; loved children; and was a sports enthusiast, especially enjoying Huskie football games and his children's and grandchildren's sporting events. Above all, David valued family.

He is survived by his wife, Kay; three children; and five grandchildren.

David Williams was born March 2, 1922, in Walla Walla and died December 24, 2004, in Richland, aged 82.

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2005 Notice of Board of Governors Election

Nomination deadline: March 1, 2005

Four positions on the WSBA Board of Governors will be up for election this year. These are the governors representing the 3rd, 6th, 7th-East*, and 8th Congressional Districts. These positions are currently held by Joni R. Kerr (3rd District), Howard L. Graham (6th District), Andrea Brenneke (7th-East District), and Randolph I. Gordon (8th District).

The WSBA Bylaws provide that any member in good standing, except a member previously elected to the Board of Governors, may be nominated for the office of governor from the Congressional District (or geographical region within the 7th District*) in which such member *is entitled to vote*. Nominations are made by filing a statement of interest and a biographical statement of no more than 100 words.

Generally, members are entitled to vote in the congressional district in which they reside. All out-of-state active WSBA members are eligible to vote in the district of the address of their agent within Washington for the purpose of receiving service of process as required by APR 5(e), or, if specifically designated to the executive director, within the district of their primary Washington practice.

Nomination forms are available from the Office of the Executive Director, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; 206-727-8244; and on the WSBA website at www.wsba.org/info/bog/2005bogelections.htm. The WSBA executive director must receive nomination forms by 5:00 p.m. Tuesday, March 1, 2005. The Board of Governors determines the official dates of the election. Ballots are mailed April 15 and counted approximately May 15.

Note: The biographical statements of nominated candidates will be published in the May issue of *Bar News*.

*The 7th Congressional District is divided into three sub-districts — East, Central, and West. These sub-districts are distinguished by zip codes and each has one elected governor. For the coming year, the east sub-district (zip codes are 98028, 98055, 98105, 98115, 98118, 98122, 98125, 98129, 98144, 98145, 98155, 98178, and 98185) will elect a new governor.

Call for Applications for One of Two Board of Governors At-large Seats

Application deadline: March 1, 2005

To increase member representation on the Board of Governors, the WSBA Bylaws provide for two at-large

seats. The full text of the Bylaws can be reviewed at www.wsba.org/bylaws. One of those seats is up for election to a three-year term commencing at the close of the annual meeting in September 2005.

Persons interested in filling an at-large position should submit a letter of application. The deadline for receipt of applications at the WSBA office is March 1, 2005. The Board of Governors will elect the at-large governor at its meeting on June 3, 2005. The application should include a statement addressing how the applicant feels he or she meets the intent specified in Article III, Section M. There is no intent that these seats are dedicated or rotationally filled by any one element of diversity or group of members.

(Excerpt from the WSBA Amended Bylaws, Article III, Section M)

M. ELECTION OF AT-LARGE GOVERNORS. *Any active member of the Bar, except a member previously elected to the Board of Governors, may apply for the office of At-Large Governor, except as provided in this Section. Filing of applications shall be in accordance with Section C of this Article.*

At the regularly scheduled June meeting of the Board of Governors following the regular election of Governors from Congressional Districts, or at a special meeting called for that purpose, the Board of Governors shall elect additional Governors from the active membership at-large. Election may be by a secret written ballot. There shall be two at-large Governor positions to be filled with persons who, in the Board's sole discretion, have the experience and knowledge of the needs of those lawyers whose membership is or may be historically under-represented in governance, or who represent some of the diverse elements of the public of the State of Washington, to the end that the Board of Governors will be a more diverse and representative body than the results of the election of Governors based solely on Congressional districts may allow. Under-representation and diversity may be based upon the discretionary determination of the Board of Governors at the time of the election of any at-large Governor to include, but not be limited to, age, race, gender, sexual orientation, geography, areas and types of practice, and years of membership, provided that no single factor shall be determinative.

Members interested in an at-large position on the Board of Governors should submit a letter of application and résumé to the Office of the Executive Director, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; oed@wsba.org.

The Board for Judicial Administration Best Practices Committee — One Position

Application deadline: March 28, 2005

The WSBA Board of Governors will be nominating one member who is appointed by the Supreme Court to serve a two-year term on the Board for Judicial Administration Best Practices Committee, the term will commence on June 1, 2005. Incumbents are eligible for reappointment and must also submit a letter of interest and résumé. The committee actively and extensively participates in the selection, endorsement, dissemination, and implementation of best practices in court operations and administration, and is committed to a process of continuously assessing and updating the practices. The committee is currently working on establishing court performance measures to implement court performance audits as provided by GR 32.

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

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 Bar Leaders Division, WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330; barleaders@wsba.org.

YMCA Mock Trial Program Seeks Volunteers

The YMCA Youth & Government Mock Trial program allows high school students to participate in a "true-to-life" courtroom drama. Each team of attorneys and witnesses prepares the case for trial before a real judge in an actual courtroom. A "jury" of attorneys rates teams on their presentations while the presiding judge rules on the motions, objections, and ultimately the merits. Participants develop critical-thinking and analytical skills, learn the art of oral advocacy, and gain a respect for the rule of law and the judiciary.

The state championship competitions will be held Friday, March 18, through Sunday, March 20, 2005, at the Thurston County Courthouse in Olympia. Attorney volunteers are needed! To volunteer, please contact Janelle Nesbit at 360-357-3475 or youthandgovexec@qwest.net. Please visit www.youthandgovernment.org for additional details.

2005 License Fee Packets

Licensing packets were mailed in December. The packet includes your license-fee invoice, trust-account declaration form and, if applicable, the MCLE certification form. If you have not yet received your licensing packet, please call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or e-mail questions@wsba.org to request a duplicate. Please note that it is your responsibility to pay your annual license fee, regardless of whether you receive the licensing packet.

If you are mailing your forms and payment. The return envelopes for your forms and payments have instructions on the reverse side for improvement in process-

ing and ease of use. Please review them carefully before mailing your forms and payment.

If you are paying your fees online. To pay your fees online, go to <http://pro.wsba.org>, click on the "Member" tab, and sign in with your WSBA Bar # and password. Prompts will lead you through the process to pay your 2005 license fees by MasterCard or Visa. The system allows payments only for the full amount billed, e.g., no Keller deductions or status changes. Note that you do not need to return the A2 form if you pay online. Active members have other forms in their packets that must be completed and returned by the due date. There may be other voluntary forms in the packet that you may want to complete and return to the WSBA.

Reminder Notice. A reminder notice will be sent in mid-February to those members who have not paid their 2005 license fees.

Payment deadline. 2005 license fees are due no later than February 1, 2005. Please note that if your payment is postmarked or delivered in person to the WSBA office later than March 1, 2005, WSBA Bylaws require a 20 percent penalty to be assessed. In mid-March a pre-suspension notice will be mailed to those members who have not paid their 2005 license fees. If your payment is postmarked after April 1, 2005, a 50 percent penalty will be assessed.

Important note about paying your fees. If either your license fee or, for active members, the Lawyers' Fund for Client Protection assessment remains unpaid two months after the mailing of the pre-suspension notice, the delinquency will be certified to the Supreme Court, which will enter an Order of Suspension from the practice of law.

Software Conversion. In late summer 2004, the WSBA

underwent a software conversion of the membership database. It is possible that not all information converted correctly. If you feel the amount showing on your licensing form (A2) is not correct, please call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or e-mail questions@wsba.org.

Judicial Recommendation Interviews

Application deadline: February 11, 2005

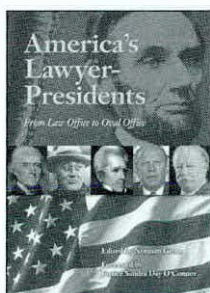
The WSBA Judicial Recommendation Committee is currently accepting applications from attorneys and judges seeking consideration for appointment to fill potential appellate and Supreme Court vacancies. Interested candidates will be interviewed by the committee in March 2005. The deadline for receipt of questionnaires by the WSBA office is 5 p.m. February 11, 2005.

The committee's recommendations are reviewed by the WSBA Board of Governors and then referred to the Governor for review when appointments are made to fill vacancies on the Washington Court of Appeals and Supreme Court.

If you are interested in scheduling an interview, please contact the WSBA at 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330, 206-727-8239; or barleaders@wsba.org, to obtain a questionnaire. Please specify whether you need the questionnaire designed for a judge or an attorney.

List Yourself in the Online ADR Provider Directory Now!

Sponsored by the WSBA Dispute Resolution Section, the ADR Provider Directory is an online attorney and citizen resource for locating appropriate alternative dispute resolution service providers. If you are a provider, don't miss the opportunity to be listed for the current year. The directory subscription year is January 1 to December 31 and fees are not prorated. The annual listing fee is \$50 for members of the WSBA Dispute Resolution Section and \$75 for non-members. To register online, go to www.adrwa.com/directoryRegister.



From Law Office to Oval Office . . .

Now available through CLE Publications, *America's Lawyer-Presidents: From Law Office to Oval Office* engages the imagination and intellect, providing a rare look at the 25 men who were lawyers before they became U.S. presidents. Written by historians and presidential scholars and featuring

an image-rich presentation, *America's Lawyer-Presidents* provides new insights into our national leaders and their lives and times, from colonial days to the present. "[I]ntriguing biographical perspectives on the professional lives of a number of our most influential citizens . . . demonstrates yet again the profound relationship between the development of American law and our democracy," writes Scott Turow. Published August 2004 by Northwestern

University Press (384 pages, WSBA member price \$29.95). For more information or to place an order, visit the WSBA Online Store at <http://store.yahoo.com/wsbastore>, or call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

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, and giving of yourself as time allows? Please call Jennifer Favell, Ph.D., 206-727-8267.

Senior Attorneys Discussion Group: A Matter of Connection

The discussion group will meet on a quarterly basis in 2005. April 2005 will offer two wonderful opportunities: the Senior Lawyers Section annual CLE event, and the LaSD peer counselor annual statewide conference at Lake Chelan. Contact Anna Schmidt, LAP program assistant, 206-727-8268, for details about the conference. Your ideas are welcome for the summer and fall meetings.



Legal Foundation of Washington Elects New Board of Trustees Members

At its November 20, 2004 meeting, the Legal Foundation of Washington Board of Trustees unanimously elected Robert T. Anderson, Native American Law Center director and assistant professor of law, University of Washington School of Law,

as the Foundation's president for 2005.

Judge Michael E. Schwab, Superior Court of Yakima County, was elected vice president; Carol J. Haire, limited practice officer for the University of Washington Real Estate Office, was elected secretary; and Erika L. Lim, career services director, Seattle University, was elected treasurer.

The WSBA Board of Governors elected Seattle attorney Nicholas P. Gellert to his first two-year term, which began January 1, 2005. Wallace Webster II, vice president, Bank of America, was appointed by the Governor to his first term, and Spokane attorney Nancy L. Isserlis was elected by the Supreme Court. Seattle attorney Nancy Pacharzina and Spokane attorney Lynn Watts will return as trustees.

The Foundation was established in 1985 at the direction of the Washington State Supreme Court to support legal aid and law-related education through the Interest on Lawyers'/Limited Practice Officers' Trust Account (IOLTA) program.

Committee of Law Examiners Annual Report

Note: This report was not included in the committee reports in the November 2004 Bar News because it was received after the issue had gone to press.

The lawyers on this committee competently and efficiently executed their primary mission: the preparation and grading of one of the best essay bar examinations in the country. There were no significant problems with either exam.

The Executive Committee (Joe Nappi Jr., Gene Anderson, Craig Beles, Steve Hughes, and James Horne) provided assistance to various members of the Board of Governors in selecting and retaining the bar examiners most likely to make a positive contribution to the work of the committee. The committee continued to keep travel and meeting expenses to a minimum. The committee continued its high-level training seminar as mandated by the Board of Governors and, as part of the training, assigned new examiners to write questions for a summer question bank. The committee nears its goal of having a full exam in reserve; although it now has nearly enough questions "in the bank" to provide an examination in the event of some compromise or other catastrophe, the committee believes the bank continues to serve a good training function, allowing new examiners to prepare quality questions without an impending deadline. It furthers their training and provides a reserve.

The Executive Committee edited, revised, and produced an updated version of the *Handbook of Procedures* for the preparation and grading of bar examination questions. The handbook is distributed to all committee members and is used extensively during the Board-mandated training session for all new examiners. Bar exam questions must be prepared and graded in accordance with the handbook requirements.

The committee maintained a solid core of experienced and capable examiners by advising the Board of those members who should be reappointed to the committee because of their ability, experience, and desire to continue working on the committee. In keeping with ongoing goals, the committee was able to recruit women and minority lawyers to become new members.

Members of the committee and WSBA General Counsel Bob Welden visited the three in-state law schools during the spring to speak with students about the application and examination process. More than 100 students attended those presentations. The Executive Committee met with representatives of the effort to include the subject of Indian Law on the bar exam.

Two members of the Executive Committee were appointed to the Professional Development Implementation Committee and assisted that committee in understanding the role and functioning of the bar exam. The PDIC originally had as one of its agenda items the elimination of the bar exam. Executive Committee members reported to PDIC that bar exams are favored by the ABA, which recommends written bar exams with hypothetical questions. The PDIC chose not to further consider eliminating the bar exam.



peter@wsba.org.

Contract Attorney Discussion Group

Join the Contract Attorney Discussion Group each first Tuesday of the month from 12:00 noon to 1:30 p.m. Bring a lunch and meet colleagues as your contract-attorney issues of concern are addressed. Contact Pete Roberts at 206-727-8237 or

New Dean to Lead Seattle University School of Law

Kellye Y. Testy has been chosen to lead Seattle University's School of Law, following an extensive national search process. Testy currently serves as the law school's associate dean for academic administration and faculty director of the Center on Corporations, Law and Society. She succeeds Rudolph C. Hasl, who has served as dean for the past five years.

Testy joined the School of Law faculty in 1992 after a clerkship on the United States Court of Appeals for the Seventh Circuit. She was instrumental in founding several key programs at the Law School, including the Access to Justice Institute; the Seattle Journal for Social Justice; and the Center on Corporations, Law and Society. From 2001-03, she served as a Patricia Wismer Professor at Seattle University, a professorship in recognition of academic leadership on issues of justice and diversity.

WSBA Members on Active Military Duty

At its January 2004 meeting, the Board of Governors approved a Bylaw amendment that allows all active WSBA members who are on active duty in the military to waive WSBA license fees and remain active members for up to five years. (WSBA members on active duty whose WSBA membership status is inactive or emeritus must still pay the annual WSBA license fees.) If you are currently an active member on active military duty, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or questions@wsba.org.

Washington Association of Prosecuting Attorneys (WAPA) New Officers for 2005

Kitsap County Prosecuting Attorney Russell D. Hauge has been elected president of the Washington Association of Prosecuting Attorneys. Other newly elected officers are: Lincoln County Prosecuting Attorney Ronald B. Shepherd, vice president; San Juan County Prosecuting Attorney Randall K. Gaylord, secretary; and Garfield County Prosecuting Attorney John R. Henry, treasurer. Their terms began on January 1, 2005.

Address Update Reminder

The 2005 licensing packets were mailed in early December. The deadline for updating your address to be included in the licensing packet mailing was October 15, so please call the WSBA Service Center at 800-945-WSBA or 206-

443-WSBA to request a duplicate packet if you have not yet received your packet. 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.



Books for Belarus

WSBA member Elizabeth Vasiliades is currently teaching law on a fellowship program at the Belarus State Economic University in Minsk, Belarus. She is coaching two teams of law students for moot court competitions. Access to Western legal resources is minimal to non-existent, making student preparation for classes and moot court

extremely difficult.

WSBA members may be able to help these students by donating used legal books. If you have legal texts on international law, criminal law, property, commercial law, or other topics that are outdated, duplicates, or simply sitting in a dusty bin somewhere, these books would be put to good use by Ms. Vasiliades and her students. If you have texts you would like to donate, please send them to the WSBA; we will then send them on to Ms. Vasiliades in Belarus. Please send your donated books to: Member and Community Relations Dept., WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121.

Recently Released: 2005 Annual WSBA CLE Publications Catalog

The 2005 edition of the Publications Catalog from WSBA CLE Publications is now available! It's your convenient guide to outstanding products and services from the WSBA CLE, the leader in innovative legal education. Save your catalog for the coming year to order our premier deskbooks, audiotapes, coursebooks, and more — whether online, or by phone, fax, or mail. Need another one? Call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

Mileage Reimbursement Rate Increased January 1, 2005

The Board of Governors recently adopted a policy to make the WSBA mileage reimbursement rate adjustment effective January 1 rather than October 1. This change is being made so that our rate adjustments will correspond with the IRS's schedule of implementing new rate changes effective January 1.

The new rate, which was effective January 1, 2005, is 40.5 cents per mile. The revised Expense Report Form is on the WSBA website (www.wsba.org), and hard copies are available by request from the WSBA office (call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA).

Please note that for travel that occurred between October 1, 2004, and December 31, 2004, the rate of 37.5 cents per mile applies.



Random Acts of Professionalism Program

The WSBA Professionalism Committee has created a way for lawyers and judges to recognize their colleagues who have conducted themselves in a professional manner consistent with the Creed of Professionalism. Through the Random Acts of Professionalism

Program, lawyers and judges may nominate their colleagues to receive the award. Nominating a lawyer or judge for the award is very easy — simply send his or her name, along with a brief description of why you are nominating the person, to Judy Berrett, staff liaison to the Professionalism Committee, at judithb@wsba.org, or fax to 206-727-8319. That's all there is to it! The nominated person will receive a letter, a certificate, and a copy of the WSBA Creed of Professionalism.

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, 8:00 a.m. to 5:00 p.m.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in January 2004 was 2.630 percent. The maximum allowable interest rate for February 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.

Upcoming Board of Governors Meetings

February 18-19 — Seattle

March 11-12 — Seattle

April 22-23 — Spokane

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. Items available include: 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.



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/lawyrs/services/lawyertolawyer.htm.

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/lawyrs/services/lawyertolawyer.htm.



Consumer-Information Pamphlets Available

Provide a valuable service to your clients by offering them consumer-information pamphlets! Published by the WSBA as a public service, these pamphlets educate consumers about their legal rights and responsibilities, answer frequently asked questions, and explain basic aspects of Washington law. The information is general,

and not intended as legal advice or as a substitute for a lawyer's services.

For a complete list of pamphlets and pricing information, contact the WSBA Service Center at 800-945-WSBA or

206-443-WSBA, or go to www.wsba.org/public/consumer. Note: A special discounted rate is available for qualified nonprofit organizations — contact the WSBA Service Center for details.

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 ques-

tions, and recommend options. To make an appointment, contact Pete Roberts at 206-727-8237 or peter@wsba.org.

19th Annual Goldmark Award Luncheon

The Legal Foundation of Washington will present the 2005 Charles A. Goldmark Distinguished Service Award to Ada Shen-Jaffe at the 19th Annual Goldmark Award Luncheon. The luncheon will be held Friday, February 18, 2005, at the Emerald Ballroom of the Red Lion Hotel on Fifth Avenue between noon and 1:30 p.m.

Ms. Shen-Jaffe receives the award in recognition of her leadership in the equal justice community both in Washington and nationally. Ms. Shen-Jaffe has played a key role in the architecture and strategy of civil legal justice since 1981, when she became Deputy Director of Evergreen Legal Services, which later became Columbia Legal Services, which she directed for the last 18 years.

Joaquin Avila, Visiting Professor at Seattle University School of Law, MacArthur Fellow, and noted authority on minority voting rights issues, will give the keynote address.

The Goldmark Award honors the memory of Charles A. Goldmark, Seattle attorney, community leader, and ardent supporter of access to justice. Mr. Goldmark served as the Legal Foundation's president at the time of the tragic assault that led to his death in 1986. The public is invited to attend the luncheon, which pays tribute to all the volunteer lawyers and legal-aid providers in Washington state.

The Legal Foundation is a not-for-profit organization that has distributed over \$70 million for legal aid to the poor since 1985. Visit www.legalfoundation.org or contact Barbara C. Clark at 206-624-2536 for more information about the Goldmark Award and the IOITA program. See page 41 for a registration form for the Awards Luncheon.



Question, Comment, Request?

The WSBA Service Center is open
Monday through Friday 8:00 a.m. to 5:00 p.m.

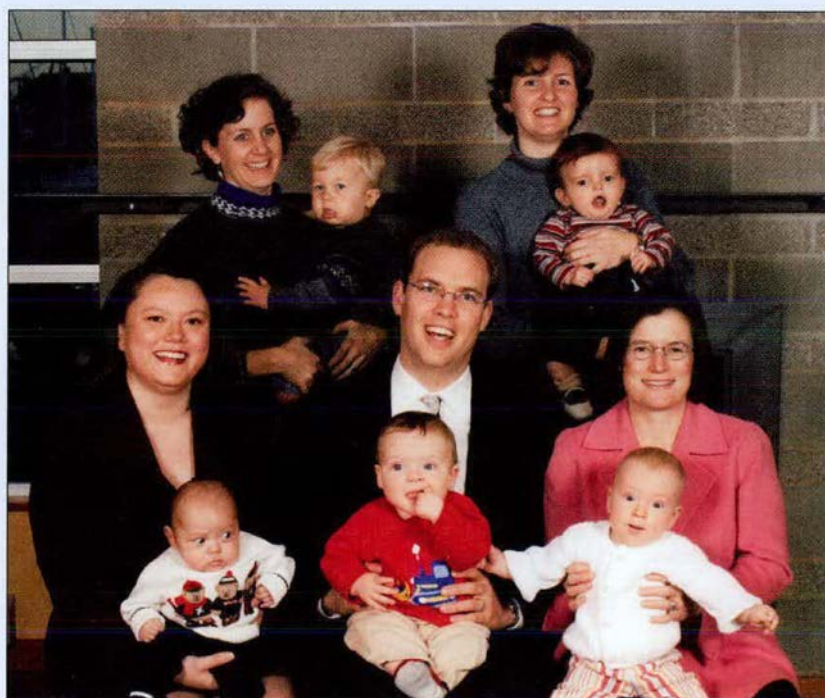
800-945-WSBA • 206-443-WSBA
questions@wsba.org



National Center for State Courts Event Draws More than 300 Renowned Attendees

Each year the National Center for State Courts (NCSC) recognizes an outstanding judicial leader by conferring its annual Rehnquist Award. Usually presented by Chief Justice Rehnquist himself, this year, due to Justice Rehnquist's health, Justice Kennedy presented the award. The event is held in the Great Hall of the Supreme Court. Attendees this year included more than 300 of the most renowned trial court judges, state justices and chief justices, and invited dignitaries. Mary Campbell McQueen, recently Washington's court administrator and currently president of the NCSC, invited Washington's Trial Court Funding Task Force leaders to the event and a panel presentation the following day. This photo was taken at the luncheon preceding the panel presentation.

Front row, left to right: Mary McQueen, WSBA President Ron Ward, WSBA Executive Director Jan Michels; back row, left to right: ABA presidential candidate Bill Neukom, U.S. Supreme Court Justice Anthony Kennedy, Washington State Supreme Court Chief Justice Gerry Alexander, Court Funding Task Force Chair Wayne Blair.



Bar Babies Joined the Board in Everett!

Service to the Bar just seems to start earlier and earlier! At the December 2004 Board meeting, this handsome group of infants and toddlers brought along their parents, who work and volunteer for the Bar in various capacities.

Seated left to right: Governor Fawn Sharp with son, Daniel; Governor Eron Berg with son, Sterling; and Governor Katie O'Sullivan with son, Kieran.

Standing left to right: WSBA Deputy Director Paula Littlewood with son, Parker; and Washington Women Lawyers President Jennifer Meyer with son, Henry.

The Law
Firm of **Stephen
W. Hayne**

The DUI Firm

Refer with Confidence:



Stephen W. Hayne

2003 recipient of the Washington Association of Criminal Defense Lawyers' **William O. Douglas Award**; named one of "**Seattle's Best Lawyers**" by *Seattle Magazine*; one of "**Washington's Ten Best Trial Lawyers**" by the *Washington Law Journal*; a "**Super Lawyer**" multiple times by *Washington Law & Politics*; past **President** of the Washington Association of Criminal Defense Lawyers; past **Chair** of the Criminal Law Sections of WSBA, WSTLA and KCBA; Trial Practice **Instructor** at the National Institute of Trial Advocacy, the Trial Masters Program, and the University of Washington and Seattle University Schools of Law; **Published** in the *Bar News*, *Trial News*, *Defense* and *Overruled* magazines; featured speaker at over 80 CLE programs; **Founder**, National College of DUI Defense; **Lead Counsel/of Counsel**: State v. Straka, State v. Brayman, State v. Scott, State v. Ford, State v. Franco, Seattle v. Box, Seattle v. Allison.



Aaron J. Wolff

B.A., Emory University, Atlanta, Georgia; J.D., Seattle University School of Law (with honors); former **DUI Prosecutor** for the cities of Kirkland and Tukwila; **Graduate**, National College for DUI Defense; DRE Drug Evaluation and Classification Program Overview Course; **NHTSA-Qualified Administrator** of the Standardized Field Sobriety Tests; member, Washington Association of Criminal Defense Lawyers and Washington State Trial Lawyers Association.

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DUNN & BLACK, P.S.

is pleased to announce that

Michael S. Bissell

has become a principal of the firm.

Michael graduated *summa cum laude* from the University of Idaho, and received his law degree from the University of Washington. He is admitted in Washington, Idaho, and Alaska. His practice will continue to emphasize construction claim litigation and defense on behalf of prime contractors, subcontractors, and suppliers, as well as providing general construction advice to those entities.

DUNN & BLACK, P.S.

10 North Post Street
200 Peyton Building
Spokane, WA 99201

Phone: 509-455-8711 • Facsimile: 509-455-8734
www.dunnandblack.com

Jacob H. Menashe

gratefully thanks his former employers, Barbara A. Isenhour and Sean R. Bleck of Isenhour Bleck, P.L.L.C.; and

William S. Hickman and Jacob H. Menashe

joyfully announce the formation of their association together as

HICKMAN MENASHE, P.S.

with both their practices continuing to focus on estate planning, elder law, guardianship, and probate.

Main office

4211 Alderwood Mall Blvd., Ste. 202, Lynnwood, WA 98036
Phone: 425-744-5658 • Fax: 425-744-6078
www.hickmanmenashe.com

Additional offices, in Seattle at

601 Union St., 42nd Floor, Seattle, WA 98101
Phone: 206-652-3322 • Fax: 425-744-6078

And in Bellevue at

500 108th Ave. NE, 8th Floor, Bellevue, WA 98004
Phone: 425-990-6456 • Fax: 425-744-6078

BENNETT BIGELOW & LEEDOM, P.S.

is pleased to announce that

Bruce W. Megard Jr.

has become a Shareholder of the firm effective January 1, 2005.

Bruce is a 1997 *magna cum laude* graduate of Gonzaga University School of Law, where he was an Associate Editor of the *Gonzaga Law Review*. His practice consists primarily of the representation of health care institutions, medical professionals, and pharmaceutical and medical device manufacturers in medical malpractice and medical products liability cases at the trial court level and appellate level. Bruce has been with Bennett Bigelow & Leedom, P.S. since 1999.

BENNETT BIGELOW & LEEDOM, P.S.

1700 Seventh Avenue, Suite 1900 • Seattle, WA 98101
Tel: 206-622-5511 • Fax: 206-622-8986
www.bbllaw.com

Sara M. Earls

has joined the firm of

DAVIDSON, CZEISLER & KILPATRIC, P.S.

as an associate practicing family law.

Ms. Earls earned her Bachelor of Arts Degree in Sociology from the University of Washington in 1996. She earned her Juris Doctor from Seattle University in 2000, graduating *summa cum laude*. Ms. Earls is a member of the Washington State Bar Association and King County Bar Association.

DAVIDSON, CZEISLER & KILPATRIC, P.S.

520 Kirkland Way, Suite 400
P.O. Box 817
Kirkland, WA 98083-0817
Phone: 425-822-2228 • Fax: 425-827-8725
www.kirklandlaw.com

**KINGMAN, PEABODY,
PIERSON &
FITZHARRIS, P.S.**

is pleased to announce that

Robert H. Fulton II

has joined the firm as an Associate.

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.

505 Madison Street, Suite 300, Seattle, WA 98104
206-622-1264

www.kingmanpeabody.com

We invite you to call, write, and/or visit our website.

PRESTON BUNNELL & STONE, LLP

is pleased to announce some changes.

Meagan A. Flynn

has become a partner in the firm.

The firm name is now

**PRESTON BUNNELL &
FLYNN, LLP.**

John S. Stone

has become Of Counsel to the firm.

And we've moved our offices to:

1500 SW First Avenue, Suite 770, Portland, Oregon 97201

Phone: 503-227-5445 • Fax: 503-227-1398

Toll free: 888-300-9916

The firm will continue to represent individuals in Oregon and Washington litigation involving major personal injury, wrongful death, construction injury, product liability, maritime injury, asbestos disease, and longshore injury.

**GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON &
DAHEIM LLP**

takes great pleasure in announcing
the future leaders of our firm.

J. Bradley Buckhalter

Jemima J. McCullum

Michelle A. Menely

Thomas B. Vertetis

have become partners of the firm,
and

James Beck

Lara B. Fowler

Yvonne M. Mattson

Durham C. McCormick

have joined the firm as associates.

1201 Pacific Avenue, Suite 2100, Tacoma, WA 98402
253-620-6500

600 University Street, Suite 2100, Seattle, WA 98101
206.676.7500

www.gth-law.com

COHEN & IARIA

announces the relocation of its office to

National Building, Suite 302

1008 Western Avenue

Seattle, Washington 98104

Phone: 206-624-9694 • Fax: 206-624-9691

Jeffrey Cohen

Michael Iaria

Jeffrey Kradel

Liza Burke

Neil Fox, Of Counsel

The firm emphasizes criminal defense.

PUBLIC INTEREST LAW GROUP, PLLC

announces it has moved to the Hoge Building
705 2ND AVE., STE. 501, SEATTLE, WA 98104.

It is also pleased to announce that

Hank L. Balson

formerly with the Institutions Project of Columbia Legal Services, has joined the firm. Mr. Balson will focus his practice on individual and class-action litigation in the areas of civil rights, predatory lending, wage and hour, and public disclosure.

PILG serves individuals, nonprofit organizations, and legal advocacy groups in the areas of civil rights, international human rights, employment and labor, consumer protection, disability, education, elder and health law, and criminal defense. PILG also provides a full range of legal services to nonprofit organizations.

Gwynne L. Skinner

Daniel S. Gross

Nancy S. Chupp

Hank L. Balson

Karen L. Mitterer, Special Counsel

Melissa A. Huelsman, Special Counsel

206-447-0103 • www.pilg.org

Your referrals are welcome and appreciated.



THE WASHINGTON STATE BAR ASSOCIATION

is pleased to offer advertising services in the
Announcements section of *Bar News*.

For more information, contact
Advertising Manager Jack Young at
206-727-8260, or e-mail jacky@wsba.org.

2101 Fourth Ave., Ste. 400, Seattle, WA 98121

Disciplinary Notices

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

Richard A. Alcorn (WSBA No. 7973, admitted 1977), of Phoenix, AZ, was reciprocally suspended for three months, based on a March 18, 2004, order of the Supreme Court of Arizona suspending Mr. Alcorn retroactive to May 4, 2003. The Washington State Supreme Court's order of reciprocal discipline, entered September 30, 2004, imposed the suspension in Washington retroactive to May 4, 2003, in accordance with the dates in the Arizona order. This discipline was based on Mr. Alcorn's borrowing money from clients in 1995 without making necessary disclosures or obtaining the clients' consent to the transaction in writing.

In 1993, Mr. Alcorn commenced representing two clients in a dispute arising out of formation of an L.L.C. In 1995, during the representation, the clients loaned Mr. Alcorn \$3,000 at Mr. Alcorn's request. The terms of the loan transaction were not transmitted to the clients in writing and the clients did not consent to the loan terms in writing.

Mr. Alcorn's conduct violated ER 1.8(a) of the Arizona Rules of Professional Conduct, prohibiting a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction is fair and reasonable, and the terms are fully disclosed and transmitted in writing to the client; the client is given a reasonable opportunity to seek the advice of independent legal counsel; and the client consents in writing.

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

Suspended

Mark J. Dynan (WSBA No. 12161, admitted 1981), of Tacoma, was suspended for six months, effective October 10, 2004, by order of the Washington State Supreme Court following a hearing. This discipline was based on his conduct between 1997 and 1999 involving alteration of bills and submission of false declarations in connection with motions for attorney fees. For additional information please see *In re Discipline of Dynan*, 152 Wn.2d 601, 98 P.3d 444 (2004).

Mr. Dynan was hired by an insurance company in three matters to represent people insured by the company. By motion, Mr. Dynan requested attorney fees in each matter as authorized by statute and the Mandatory Arbitration Rules. The motions were supported by declarations of Mr. Dynan with attached billings. The declarations stated that the attached billings were "true and correct billings for my time and services expended on this matter." However, the attached bills were not the actual bills sent to the

insurance company. Believing that he was entitled by statute to claim a reasonable fee rather than his actual fee, Mr. Dynan had directed his office staff to white out the actual hourly rate of \$100-\$120 and replace it with a rate of \$150 before submitting the papers to the court. Mr. Dynan did not notify the court or opposing counsel of these alterations.

Mr. Dynan's conduct violated RPCs 3.3(a)(1), prohibiting a lawyer from making a false statement of material fact or law to a tribunal; 3.3(a)(4), prohibiting a lawyer from offering evidence the lawyer knows to be false; 3.4(b), prohibiting a lawyer from falsifying evidence, counseling or assisting a witness to testify falsely, or offering an inducement to a witness that is prohibited by law; 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Douglas M. Fryer represented the Bar Association. Edward S. Winskill represented Mr. Dynan. Gayle T. McElroy was the hearing officer.

Reprimanded

Anthony Z. Szabo (WSBA No. 23210, admitted 1993), of Kent, was ordered to receive a reprimand, effective October 15, 2004, following a stipulation. This discipline was based on his conduct in 2002, involving the failure to deposit client funds in a trust account and failure to keep complete records of client funds.

In 2002, a client consulted with Mr. Szabo about a potential medical malpractice claim. Mr. Szabo agreed to evaluate the case. After receiving the medical reports, Mr. Szabo advised the client that before he would agree to handle the case, he would need her to advance \$450 in costs for the hiring of a medical expert to review the reports. In August 2002, Mr. Szabo charged the sum to the client's credit card and directed the funds to his general banking account. Believing that the funds would be immediately paid to the medical expert, Mr. Szabo did not transfer the funds into a trust account. It eventuated that there were delays in obtaining the expert's services, but Mr.

Szabo did not transfer the client's funds to his trust account.

A physician reviewed the medical reports in September 2002 and reported that he was not inclined to express an opinion in the matter. The physician did not charge for the consultation. In October 2002, Mr. Szabo advised the client that he was declining to handle her case, and refunded \$450 to the client's credit-card account. During the period between August and October 2002, during which the client's funds were in Mr. Szabo's general account, Mr. Szabo did not maintain at least a \$450 balance in the account in order to preserve the integrity of the client's funds.

Mr. Szabo's conduct violated RPCs 1.14(a), requiring a lawyer to deposit all funds of a client into an interest-bearing trust account; and 1.14(b)(3), requiring a lawyer to maintain complete records of all funds or other properties of a client coming into the possession of the lawyer.

Randy Beitel represented the Bar Association. Mr. Szabo represented himself. Scott M. Ellerby was the hearing officer.

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Nondisciplinary Notices

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Bernie W. Potter (WSBA No. 23076, admitted 1993), of Seattle, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.2(a)(3), effective November 18, 2004, by an order of the Washington State Supreme Court. This is not a disciplinary action.

Suspended Pending Outcome of Disciplinary Proceedings

Ann Whitlow-Clark (WSBA No. 14579, admitted 1984), of Dallas, TX, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.1, effective November 5, 2004, by an order of the Washington State Supreme Court. This is not a disciplinary action.

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

Business Law

Business at the Speed of Light — Counseling Your Electronic Commerce Clients

February 4 — Seattle. 5.5 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Consumer Protection

Is Consumer Protection an Anachronism in the Information Economy?

March 4 — Seattle. 6 CLE credits. By Shidler Center for Law, Commerce & Technology, University of Washington School of Law; 206-685-2636.

Criminal Law

Wrongful Conviction: Causes and Remedies

February 24 — Seattle. 1 CLE credit. By UW-CLE; 800-CLE-UNIV.

Employment Law

12th Annual Employment Law Institute

March 16 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Estate Planning

Estate Planning for Large Estates: Family Limited Partnerships and Beyond

February 17 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Trusts and Estates Litigation

March 18 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Family Law

Formidable Factors: The Financial Aspects of Divorce

February 16 — Seattle. 6.75 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

General

Financial Statements: Reading Between the Numbers

February 8 — Seattle. 5 CLE credits. By The Seminar Group; 800-574-4852.

Global Health and Justice: Paradigms for Multidisciplinary Collaboration

February 25-26 — Seattle. CLE credits pending. By UW-CLE; 800-CLE-UNIV.

Intellectual Property

10th Annual Intellectual Property Institute

March 11 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Litigation

The Master Class on Appeals in Washington

February 10 — Seattle. 6.25 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Defense Medical Exams

February 16 — Seattle. 5.5 CLE credits, including .25 ethics. By WSTLA; 206-464-1011.

Torts and Contract Damages

March 10 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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How to get inaugurated

by LINDSAY THOMPSON, *Bar News* Editor

It's the inaugural season. Having read, last month, how easy it can be to get elected to WSBA's Board of Governors, you're probably wondering, "How do I get to be president?"

That's easy. Any WSBA member can be president. So we start out with 28,000 potential candidates, give or take.

But there are footnotes.

First, subtract all the members who can't afford to take a chunk of a year to be president-elect, and most of the next year as top dog.

Next, you have to be in the part of the state The Rotation selects candidates from. To try to balance geographical and numerical issues in the bar (the East/West, North/South, and King County/Everywhere Else Things), the presidency rotates between eastern Washington, King County, western Washington outside King County, King County again, and then back to eastern Washington, and thence onward in the fullness of time.

Given the travel issues, if you're an out-of-state member, you're probably a non-starter, although a year or two ago, an out-of-state member applied for appointment to a BOG at-large seat, and more ought to try, just to crack the idea it won't work.¹

To make it easier for someone who hasn't served on the BOG — or who has but has been off the BOG for a while — to be president, the Board created a president-elect position some years ago.² For a long time, the tradition was that governors served their three years, then went back to the day job, and returned as candidates for president when it fit their career plans. Sometimes this was up to a decade later. A get-up-to-speed year seemed a practical solution.

So far, however, it hasn't worked. The only time WSBA has had a president who wasn't a BOG member first was in 1975. This cuts the pool fairly dramati-

cally, to former members of the Board in the area where The Rotation lands each year.

Since the 1990s the Board's work has increased and changed. Previously the Bar year revolved around whatever theme the incoming president wanted to stress, and the annual state bar convention. The BOG ended the bar convention³ after years of losses and declining attendance, and moved to a long-range planning model that means most of the Bar's work is multi-year in nature. The perception that presidents need to hit the ground running seems to have shortened the time between when governors left the Board and ran for president. That reduced the pool of realistic candidates to former governors who served within the memory of the sitting BOG.

In 1998, the Board stumbled into what I call The Fast Track Model. They elected a first-year governor as president-elect. He spent what would have been his second year on the BOG as president-elect, and his third as president.

A light bulb went off in many heads. Why spend five, six, or more years getting to the top when you can do it in three? Sitting governors started declaring for president their first year on the Board. Since 1999, one president-elect served a full term on the Board before moving up, and that one had no opposition. Twice, two sitting governors ran against each other. Two candidates in recent years who'd been out of BOG circles for some years were effectively DOA. They'd been away too long.

Opinions go both ways about the merits of The Fast Track, but there's no doubt it makes the Board of Governors less democratic. Each time an elected governor resigns to move up, an appointed governor takes the seat.⁴ It's a fair comment to say we have a system that says it works one way but in practice works another way, and

that reduces the pool of presidential candidates to a handful of members every year.

The Fast Track is good for the people who benefit from it, but does it serve WSBA members well?

That's a question a committee chaired by lawyer Jim Macpherson is considering. They are looking at how governors and presidents are selected. What do you think? Send in your ideas and we'll not only pass them along, but also publish them. *✍*

Lindsay Thompson thought about running for WSBA president in 2001 but lay down until the feeling passed. E-mail your election reform ideas to him at tradelaw@thompson-law.com.

NOTES

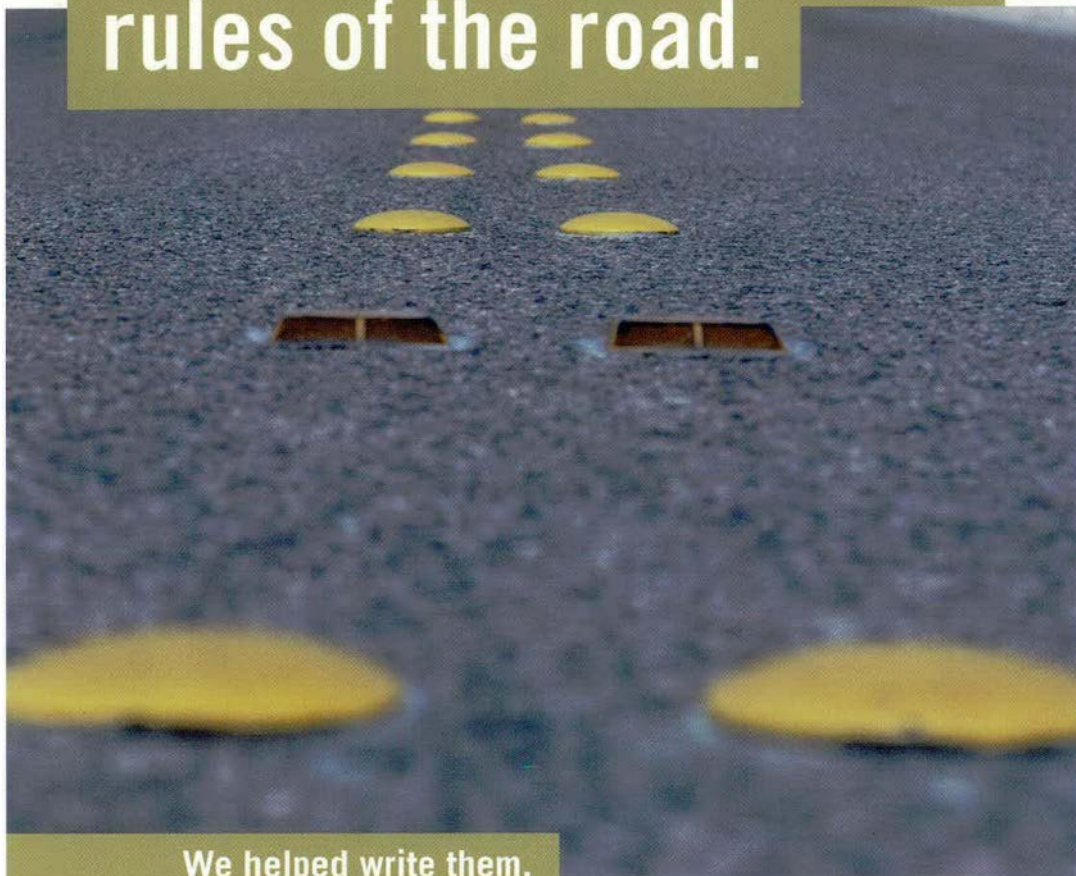
¹ Into the late 1980s, for example, the Received Wisdom was you couldn't edit *Bar News* effectively if you didn't live in Seattle.

² The president-elect gets chosen every June to succeed the president-elect, who will become president in September, succeeding the sitting president. I call this the "heir and a spare" solution.

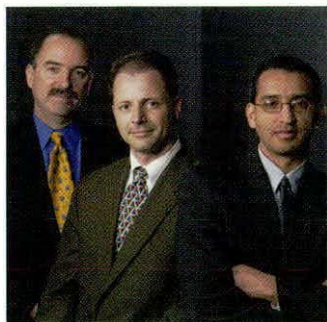
³ ...But not the annual meeting, which isn't the same thing, although it was part of the bar convention program except when the convention was out of state. The bar convention was a tradeshow-CLE-section-meeting-theme party and famous speakers fest that ran several days. One year, the planners crammed Bernard Kalb, then of CBS, and Sarah Weddington, who argued *Roe v. Wade*, onto the same luncheon billing, with infelicitous results. Poulsbo lawyer Jeff Tolman famously remarked, "Mrs. Kalb had two sons, and we hired the wrong one."

⁴ One may well argue that since the BOG now has two appointed at-large seats and one appointed Young Lawyers Division seat, it has segued into a mixed board of elected and appointed members, making the argument above moot.

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