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Washington State

# BarNews

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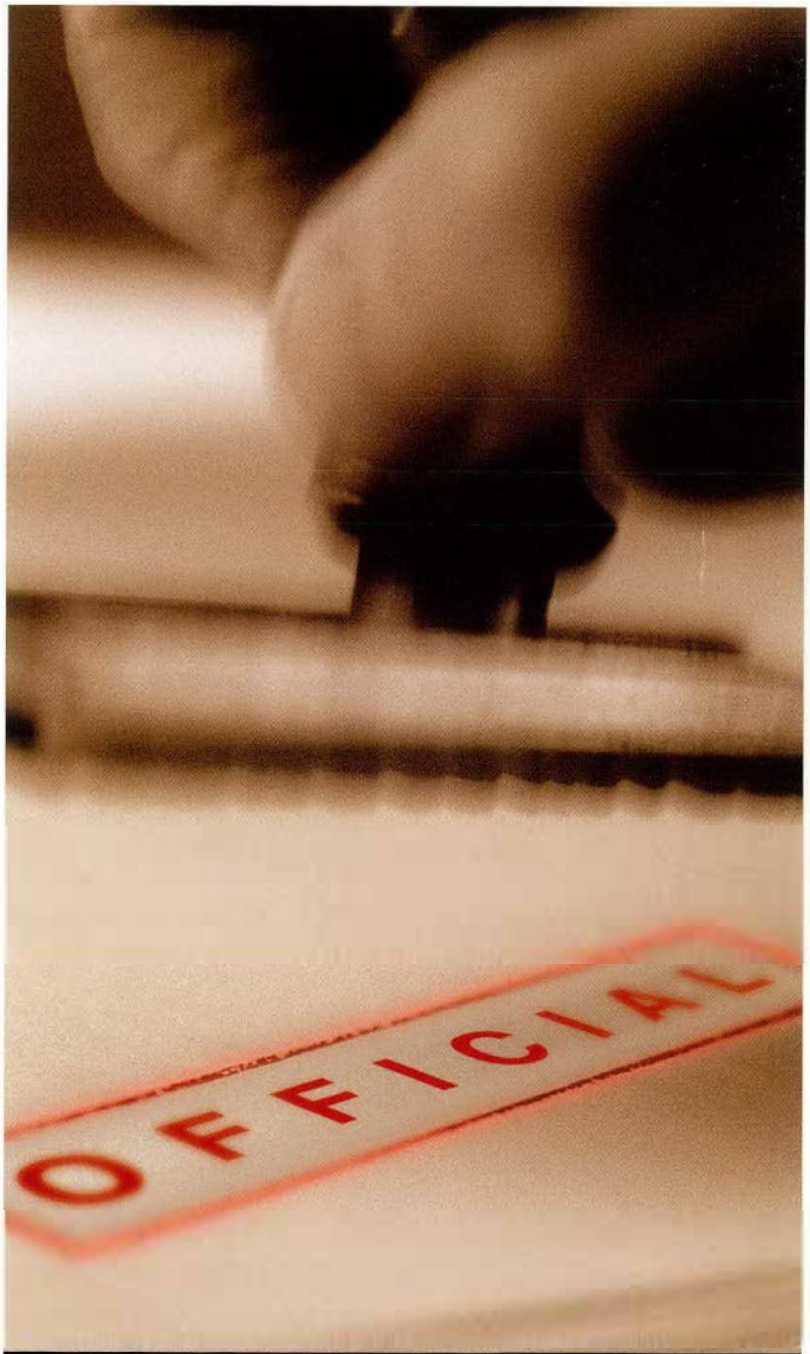


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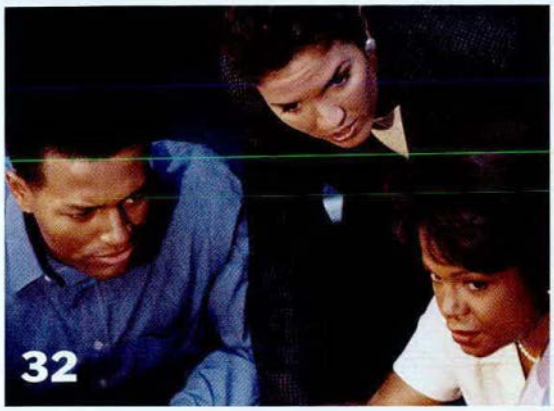



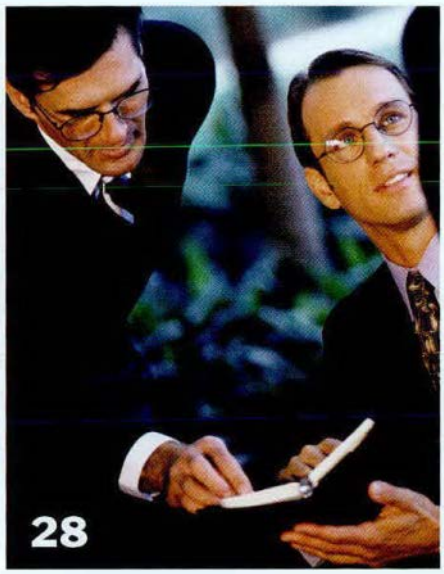


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## COLUMNS



## DEPARTMENTS



## LISTINGS



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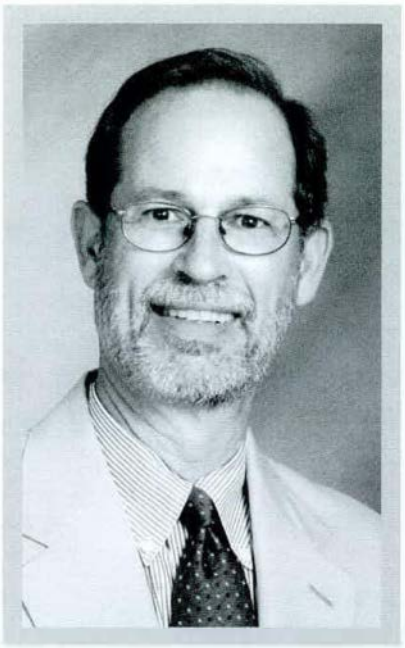

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### The Letter-Writing Habits of Highly Judgmental People

In the March 2005 *Bar News*, David L. Evans wrote an eloquent letter, objecting to President Ron Ward's column on the duty to provide legal services to the poor. In Mr. Evans' view poverty results from poor choices, and "governmental safety nets" are "pernicious folly."

Unlike Mr. Evans, I believe that dumb luck and socio-economic status have a lot to do with whether a person ends up rich or poor. But perhaps Mr. Evans is correct about the cause of poverty. The point is, it does not matter. The reason for helping people who cannot afford legal representation (or medical care, or shelter, or other necessities) is that they need it. One does not ask a drowning man whether he was negligent is falling overboard before deciding whether to throw the life preserver.

*G. Michael Zeno Jr., Kirkland*

How utterly discouraging to read Mr. Evans' unaccountably angry and misanthropic reaction to President Ward's thoughtful urgings in support of equal access to justice. Contrary to this bitter rant, all of the state's citizens are well served and quite significantly benefited by the work of our staffed legal aid programs and the many effective volunteer lawyer programs throughout Washington. Working together, their involvement regularly makes the difference between frail elderly persons being able to remain in their own homes or being forced into nursing homes. In many cases it enables frightened refugees and other families to be safe from physical harm. And, in yet others, it allows disabled persons the security of being housed instead of being homeless. I fail to see how giving a mere modicum of meaning to the words carved on our nation's highest court is to "[s]upport a man in his delusions. . ." to strive for "equal outcome" (as opposed to equal opportunity), or to "ensnare more than to protect." But most of all, I strongly resent and adamantly disagree with the contention that striving to assure that the poor get a fair shake in our legal system is, as Mr. Evans' mean-spirited diatribe absurdly asserts, "to enable the voluntarily incompetent, indolent, irresponsible and/or foolhardy to enjoy the fruits of someone else's labor."

While he obviously takes relish in cataloging the many mistakes that others can make, Mr. Evans makes a serious mistake of his own when he forgets (or perhaps simply rejects) John Donne's wise and well-worn admonition to the effect that none of us really ever stand alone.

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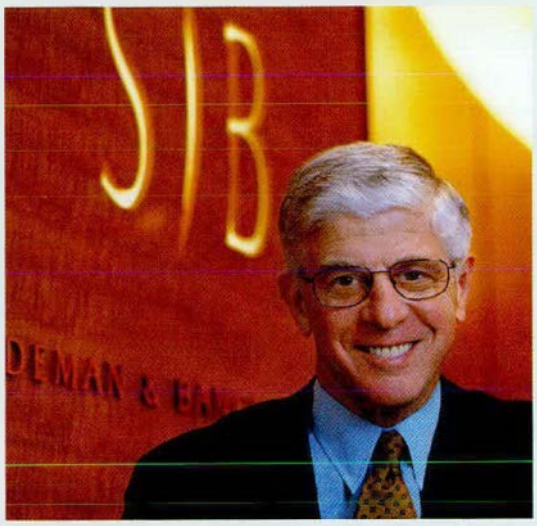

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— far from feeling ill served — I am very glad indeed that this Association is led by someone like Ron Ward, a principled and visionary lawyer with the courage to walk the profession's talk of justice for all. As far as I'm concerned, Mr. Evans has it completely backward — it is President Ward who clearly deserves better!

*Patrick McIntyre, Executive Director*
*Northwest Justice Project, Seattle*

The March Issue of *Bar News* contains a letter to the editor entitled "The Nine Rules of Highly Ineffective People" which engages in that popular pastime of bashing the poor for their supposed lack of motivation and poor thought habits which causes them to "choose poverty." The mind over matter solution to complex social problems might be tolerable if it were not so rooted in a comfortable mythology of American individualism that was never true and is certainly not true in today's complex economy.

Mr. Evans' letter begins with a critique of President Ron Ward's column. Mr. Evans claims that the column relies on an argument that there is a supposed Constitutional right to legal representation in civil matters for the poor. President Ward makes no such argument. What the column asserts is that civil matters touch on fundamental human rights in a democracy, and as such legal aid for the poor is a laudable endeavor. Though there is no civil Gideon, there is at least a conscientious bar association which must always be aware of the mission of the profession to address legal needs. The law is not the prerogative of the wealthy and when access to justice is too expensive it is effectively denied.

The burden of Mr. Evans' letter in response is that people choose poverty. It then goes on to critique the poor, bash the folly of governmental safety nets, and take a whack at the ever popular target of consumer protection legislation and the treble damage awards that are a civil substitute to police corporate wrongs. Mr. Evans' heady combination of Karl Rove, Horatio Alger, Norman Vincent Peale, and Ebenezer Scrooge deserves an answer so I propose my own list of nine rules, this time for the comfortable and complacent:

1. To imply that mere belief and choice create reality is a luxury of motivational speakers and those seeking a rationale for lack of compassion. People do not simply choose poverty.
2. Few working spouses can afford to home-school their children and recent budget cuts and state deficits have been disastrous for public education. The Bush administration has pursued enormous cuts in Pell Grants and Perkins Loans, which had helped in a modest way to open colleges to the poor. People don't choose to have bad jobs for lack of education.
3. College degrees today are themselves no guarantee of secure employment in a saturated job market and global competition. Ask the many people downsized in middle age who cannot find jobs employing their former skills.
4. Alcoholism and substance abuse are complex addictive diseases and as such by definition not amenable to simple choice. They reflect a society of desperation and pain.
5. Having children out of wedlock is a symptom of poor education and of youth's drives and immaturity, a problem beyond the "just say no" mentality that would claim to fix it.
6. Many people live in abusive relationships due to poor employment skills and fear of spousal abuse. Is this a matter of choice?
7. Perhaps a little regulation of the credit card industry that panders its wares to human desire and lack of foresight would do more than bankruptcy legislation to address excessive spending which is less a cause of poverty than a result.
8. Today most Americans live in debt, have little savings, and no large assets beyond their home, which can be wiped out by a medical emergency. It's hard to own the means of production under such conditions. The so-called ownership society really means a subsidy for Wall Street brokers and mutual funds.
9. Ultimate responsibility for any situation is not due to choice alone but to the environment and opportunities and competition that surround any choice. Advertising and culture do much to beckon towards an American Dream that grows daily further beyond reach. That way of life was the product of strong unions and G.I. Bill education benefits in a growing and people-oriented economy. Those days are gone. To pretend otherwise is to deny the obvious.

That the 19th century nonsense of Mr. Evans' letter can be seriously entertained in the complex society and economy that we face today is a tribute to shortsightedness and lack of inquiry into the complex causes of poorly distributed income which includes huge tax cuts for the wealthy and unfair subsidies to industry and huge factory farms. (Will any dare to call it welfare

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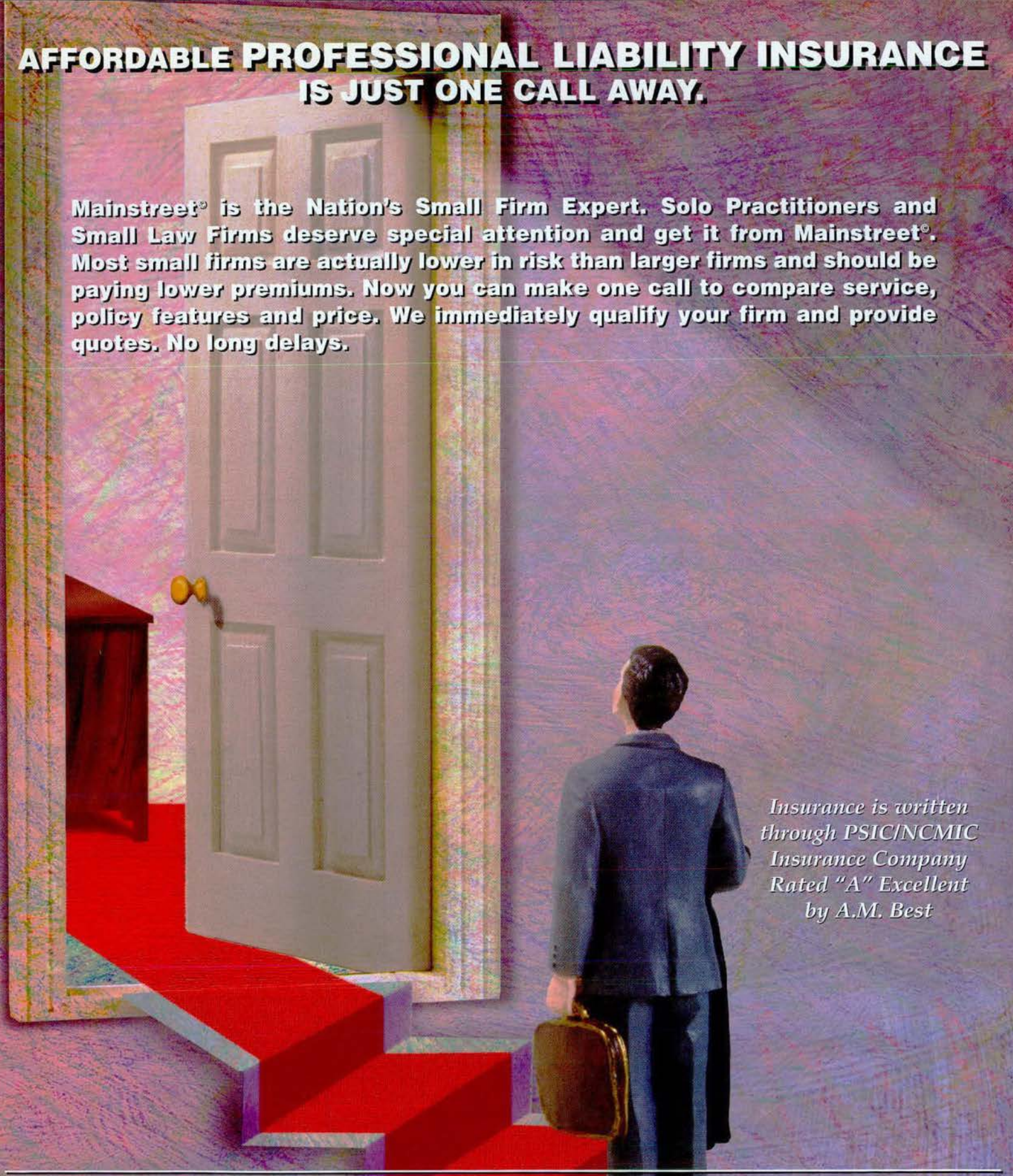

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Opinions such as those that Mr. Evans expresses may have drawn a willing assent from John Jacob Astor or any of the robber barons whose successors are well on their way to undermining the very American dream Mr. Evans claims to celebrate but it is inappropriate for anyone living in the 21st century. I suggest four books that may be of some help to bring Mr. Evans up to date: *The Working Poor: Invisible in America* by David K. Shipler; *Nickel and Dimed On (Not) Getting by in America* by Barbara Ehrenreich; *Shafted: Free Trade and America's Working Poor* by Christine Ahn; *The Betrayal of Work: How Low Wage Jobs Fail 30 Million Americans and Their Families* by Beth Shulman.

Perhaps this will help if Mr. Evans cares to read them. That is a matter of choice.

*Thomas Mengert, Keyport*

## Edit, Proofread, Fact-Check, Then Call the Courts

It was disappointing to see the February 2005 *Bar News* present an article advocating a position on an issue that presently is in litigation: "Anti-icers: Is It Time for Courts to Recognize Municipalities' Use of Anti-icers for Roadway Ice Control?," by Keith Kessler. In arguing that the courts should impose a duty on municipalities to use such agents, Mr. Kessler refers to *Morehouse* as a trial court ruling that supports his position. A motion for discretionary review is pending in that matter. As counsel for one of the parties in the *Morehouse v. State* case, I find use of the *Bar News* to advocate with respect to an issue in pending litigation inappropriate and disturbing.

Neither the article nor the information about Mr. Kessler notes his direct involvement in the litigation to which he refers, *LeRoy v. State*. He devotes a significant portion of his article to criticizing the court of appeals decision in *LeRoy v. State* because it rejects his position. Although the article does not mention it, Mr. Kessler was counsel for *LeRoy*. As counsel for one of the parties in *LeRoy*, I would hope that the *Bar News* is not going to become a vehicle for advocating litigation positions, as I believe such a use disserves the interests of the Bar. But, if the *Bar News* is going to publish articles of this nature — advocacy pieces on only one side of a legal issue — then at the very least, *Bar News* readers are entitled to be advised of the author's participation in litigating the issue.

*Linda J. Dunn, Senior Assistant Attorney General, Chief, Torts Division, Seattle*



## The Eternal Sunshine of the Spotless Rules Conflict

Help! I try to comply with the new rules as they come out — I really do. But I cannot understand, and do not know how to comply with the new General Rule 31. It snuck up on me, and I only found out about in *The Hotsheet*, the WSBA Family Law Section publication, in November. It was said to be "highly controversial," but I would suggest it is also non-understandable, and is apparently causing a great deal of conflict between the federal government and local government. I started trying to comply, and used only initials instead of full names for children in my family law order. Then, in *The Hotsheet* in January, I discovered that DCS took the position that the full name of minor children is required or "federal moneys" can be lost.

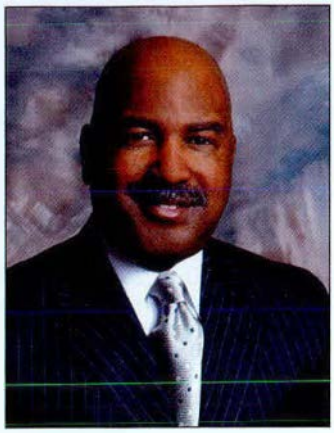
The rule apparently says you cannot use anything but the last four digits of account numbers. The most frequently used account number, of which, of course, is Social Security numbers. Did anyone bother to consider that banks and other financial institutions almost always, by default, assign the last four digits of Social Security numbers by default as "PIN" numbers by which anyone can assess information? If you have a copy of someone's bank statement, and you know the last four digits of their Social Security number, you can access by telephone *all* information relating to that account, including the bank balance, deposits made and checks and withdrawals taken — without once ever speaking to a live person or identifying yourself! Why on earth would you then disclose only the last four digits of someone's Social Security number in court records? How well thought out was that?

Secondly, it is totally confusing as to when you use the full names of minor children. It appears on first glance to prohibit the use of full names of minors, then gives exceptions that seem to cover everything in family law — child support orders, parenting plan, protection orders, etc. See above about what DCS expects — the full name.

And finally, in today's *Snohomish County Bar News*, I find another new local rule that totally befuddles me. Effective 3/14/05, "'The complete name of minor children is necessary for the orderly administration of justice and shall be used in all cases except where prohibited by statute or court order . . . .' Aren't court rules adopted by Supreme Court orders? Does that now mean if I comply with the local rule, I am in violation of the Supreme Court's order?

Can someone please issue a bar opinion or write an article explaining when and where I am *not* supposed to be putting in a child's full name? I confess, I no longer know how to comply with the law on this issue. Who was responsible for sneaking in this rule and how are we as attorneys supposed to comply?

*Paula McManus, Everett*



# The Practice of Law and Involvement by Nonlawyers — *Whither Goest the Future?*

by Ron Ward, WSBA President

In March 2005, the WSBA Practice of Law Board, headed by its estimable Chair Steve Crossland and Vice Chair Paul Bastine, appeared before the Board of Governors. The Practice of Law Board, formed by the Washington State Supreme Court and administered by the WSBA, addresses concerns about unauthorized practice of law by developing a regulatory framework for nonlawyers, and more practical ways to define the unauthorized practice of law so that it can be prosecuted. This presentation concerned a draft rule that would create, license, and regulate "legal technicians" in various fields of law. They would be allowed to work in form-driven fields where there's a demonstrable need. Public hearings are planned in the near future in Spokane and Seattle in April and May, as well as sessions with WSBA sections, local bar associations, and the Bar Leaders Conference in June. This presentation acted as a catalyst to some thought on my part about lawyers, the public we serve, contemporary circumstances, and economics.

## A Brief Hearkening Back

In my February 2005 column, "Pitbulls, Pikes, and Pitchforks," I speculated that it might be that:

> 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.[1]

One aspect that I did not comprehensively explore in my article in addition to our profession's image is the role that economics and consumerism may play in the evolution of the legal profession in Washington and in America in the future; a future that may be nearer than we think.

## A British Foray — A Proposal for the Radical Overhaul of the Legal Profession in Britain

Dale Carlisle, past president of the Washington State Bar Association, sent the following article to me.[2] It constitutes real food for thought, to the degree that I wanted to share it with you.

Envision executing a will just down the aisle from frozen foods at the supermarket or negotiating a divorce agreement in an alcove near the automotive department of the superstore at the mall.

Those may be farfetched scenarios in the U.S., but for lawyers in much of the United Kingdom, they depict what the legal marketplace could be like if the government goes forward with a radical overhaul of the legal profession. And that appears to be the plan.

Last week, a leading justice official in the government announced a package of measures to make the regulatory and discipline process for lawyers more open and accountable to the public, and to make it possible for lawyers to partner with commercial enterprises in offering legal services to the public.

"Reform of legal services is overdue," said Lord Charles Falconer, the secretary of state for constitutional affairs and lord chancellor, in a speech March 21 at a legal reform conference in London. "Where the system is not working as well as it needs to, we must put it right."

Consumers, Lord Falconer said, "are at the heart of the package of reforms. The consumer needs and deserves value for money together with accessible, consistent, responsive legal services." Moreover, he said, consumers want "services which are designed to suit them, not the convenience or the interest of the supplier."

Indeed, some Britons have referred to the proposed legal restructuring as "Tesco law," after the giant U.K. supermarket chain that is hoping to sell legal and insurance services to customers who drop in to shop for their milk, canned goods and produce. Other potential investors in legal services, including banks, insurance companies and document preparation services, also are exploring how they might take advantage of business opportunities if the legal restructuring is eventually implemented by Parliament.

While any impact on the U.S. legal system is expected to be minimal, some American lawyers are following developments across the pond with interest,

if only because the two justice systems share the same common-law roots.

"It definitely will be an interesting experiment," says Richard Granat, who co-chairs the eLawyering Task Force of the ABA Section of Law Practice Management. "I for one don't know the outcome."

In his speech, Lord Falconer outlined three key proposals to change the current regulatory structure for lawyers in England and Wales. (Scotland and Northern Ireland have separate legal systems.) First, the government would create a Legal Services Board, which would have a nonlawyer majority, to oversee what Lord Falconer described as "the legal services sector" in England and Wales. The LSB would be empowered to assign regulatory functions to other entities. Presumably, those other entities would include the Law Society and the Bar Council, the mandatory membership organizations that currently regulate the bar in England and Wales. Solicitors, who work primarily outside the courts, are members of the Law Society, while barristers, who argue cases in court, belong to the Bar Council.

Second, an Office for Legal Complaints would be established to handle consumer complaints against regulated legal service providers that are not resolved at lower levels.

Third, the government would for the first time permit nonlawyers to be partners, owners, investors or managers in businesses that provide legal services. Lord Falconer said this step would include "robust safeguards" for consumers and a licensing scheme to determine a business's fitness to represent legal clients.

The measures outlined by Lord Falconer closely track recommendations made in December by Sir David Clementi, a nonlawyer with a background in banking and finance who headed a commission appointed in July 2003 by Prime Minister Tony Blair to review the legal profession's regulatory structure. While Lord Falconer's speech is expected to give momentum to the government's plan to overhaul the structure for regulating legal services in England and Wales, the proposals aren't a done deal—at least not yet. Lord Falconer pledged to formalize the proposals in a white paper later this year, then to propose legislation to implement them. Observers say it is unlikely Parliament would consider the measures until at least 2006.

Some say Lord Falconer's speech was as significant for what was left out as for what was said. "The suggestions that have been made lack almost any detail at all that would help you express informed judgment about them," says Milwaukee lawyer Delos N. Lutton, who is president-elect of Union Internationale des Avocats, an international association of lawyers, bar associations and law societies. Stating his personal view, Lutton expresses concern that Lord Falconer did not emphasize the importance of an independent legal profession. Lord Falconer "never even mentioned what consumers would need most," Lutton says. The requirements include "a lawyer independent of government influence, who avoids conflicts of interest, knows how to keep things confidential and has a recognition of the attorney-client privilege, which has been a hallmark of the legal systems of developed countries for centuries." If the proposals fail to address concerns about independence, Lutton says, they will "amount to a government

executive branch takeover of the legal profession and a critical loss of independence by the legal profession."

Edward Nally, the president of the Law Society, also raised concerns about independence in a speech delivered after Lord Falconer's remarks. While the Law Society does not oppose the government proposals, Nally said professional independence for lawyers is "non-negotiable." Nally said the principle of independence "means ensuring that lawyers can operate fearlessly and unfettered from government control when they have to stand up for citizens against the state." Nevertheless, Nally urged the government to move quickly to draft legislation to implement Lord Falconer's proposals. "Delay would frustrate consumers and thwart many of the imaginative changes that the legal profession itself wants to implement," he said.

Indeed, the Law Society and the Bar Council already are changing their structures in line with Clementi's recommendations. Both have announced plans to create regulatory and discipline systems that are separate from their efforts as advocates for lawyers.

Meanwhile, both lawyers and nonlegal entities are anxious to take advantage of new business opportunities that would be made possible by what Clementi termed legal disciplinary practice. LDP would essentially be a freewheeling version of multidisciplinary practice that would allow companies, from banks to grocery stores, to offer legal services directly to the public.

To Richard Cohen, a London solicitor who heads Epoq Group, an online legal information services company, LDP is a logical step in the evolution of legal services delivery. (Granat of West Palm Beach, Fla., is president of Epoq US.) If the Clementi recommendations are implemented, Cohen says, the manner in which legal work is parceled out would quickly change. He foresees large operations outsourcing document work through core centers, while lawyers are retained in-house to provide direct counsel to consumers.

Cohen also envisions further segmentation of legal services delivery in England, where accountants have taken over most tax work once performed by lawyers and specialty companies

handle debt collection. Cohen says real estate could follow the same pattern, with small-firm lawyers known as "High Street solicitors" losing work to other types of providers.

Insurance companies in particular will find the legal services market hard to resist, Cohen says.

And, he says, "Providing it's done ethically, I don't see anything wrong with it."

Cohen says the proposed changes actually could improve career opportunities for many lawyers. A lawyer working for a company might be on a career path with more flexibility and opportunities for advancement than he or she would have flying solo or working in the ranks of a law firm, he says. "I don't think lawyers are going to come out of the loop," Cohen says. "I don't see institutions trying to deliver services without lawyers. I just think there will be less lawyers in private practice."

I hope you found the foregoing as provocative as I. If you did, please give *Bar News* and me your thoughts via your letters to the editor. I think it is a subject eminently worthy of thoughtful discourse.

***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 206-624-884 or rrw@admiralty.com. If you would like to write a letter to the editor on this topic, please e-mail comm@wsba.org or tradelaw@hotmail.com, or mail it to WSBA* Bar News, *Attn: Letters to the Editor, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330.*

NOTES

[1] Washington State *Bar News, Pit Bulls, Pikes, and Pitchforks*, p. 14, Ronald R. Ward, February 2005.

[2] Reprinted by permission. ABA Journal eReport, Vol. 4, Issue 13, *Reform Proposals Pick Up Steam In Britain — Justice Official Lays out Plan That Would Allow Nonlawyers to Compete for Legal Business*, Molly McDonough, April 1, 2005.

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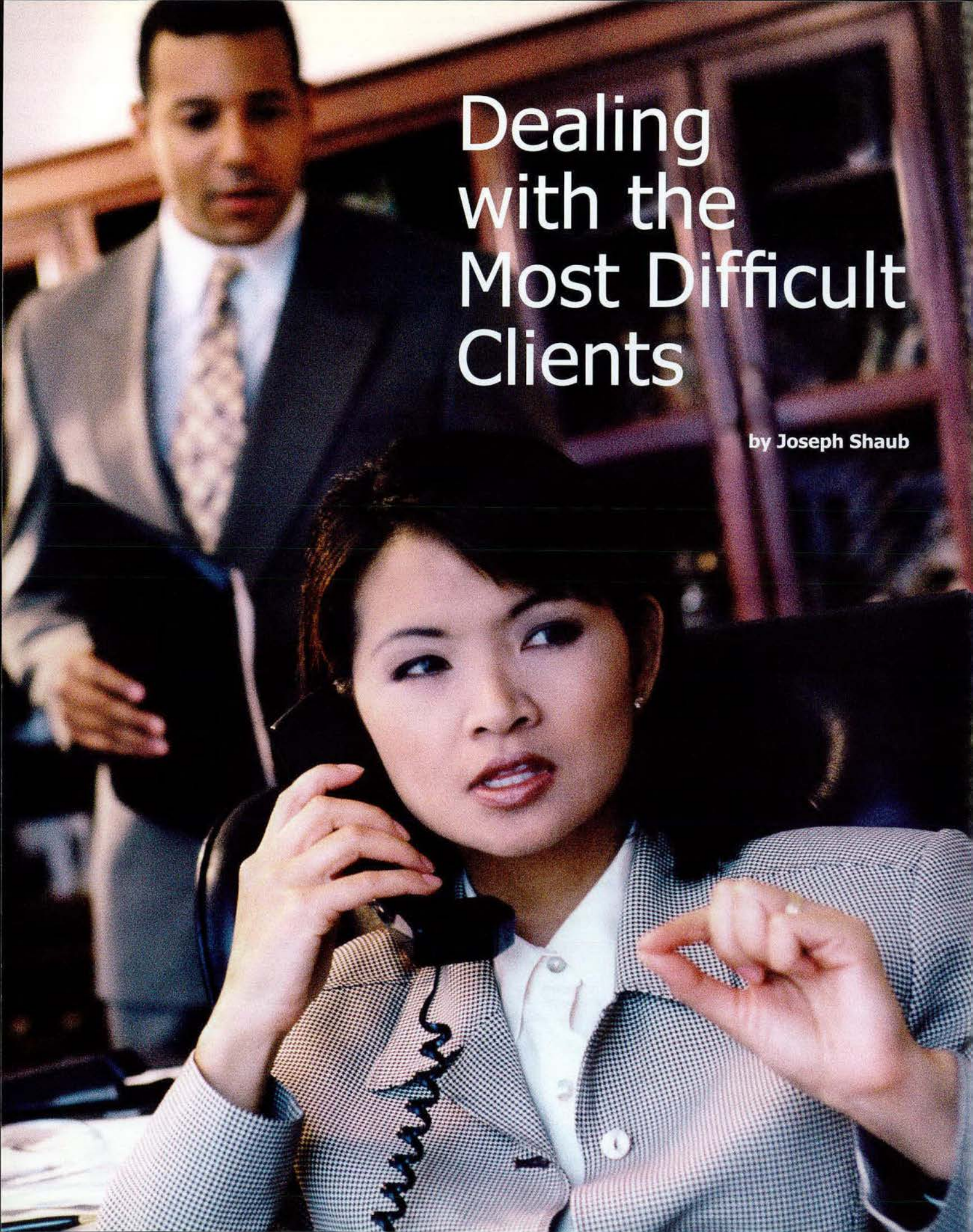

# Dealing with the Most Difficult Clients

by Joseph Shaub

You should have heard those faint alarms going off after the first half hour of Susan's initial consultation. You were her second lawyer (and you're aware of the "Don't Be the Third Lawyer" rule), and she was extremely critical of the handling of the case by her prior attorney. You'd never dealt with him so you didn't have a frame of reference. Yet, as Susan continued to tell her story, she seemed to vilify everyone who had been involved in the case. The father of her three children was "abusive" and she was afraid of him; she had been in therapy for a while, but that ended in dissatisfaction with the counselor's lack of empathy; Susan was concerned that the parenting evaluator was biased. She came across as an intelligent, charming woman. Every concern she had was entirely plausible. It wasn't until you had invested thousands of dollars of energy and time into the case, and at times felt compelled to tell Susan things she didn't want to hear, that she suddenly turned on you with all of the venom that she had previously held for her husband. As it happened, you became the second of four attorneys and you are left with a receivable which you aren't eager to pursue, given Susan's penchant for accusation and conflict.

Or perhaps you have had clients like John, a successful businessman who is inclined to dismiss your advice whenever offered. He came to you because he had heard that you were an excellent attorney (even the best in a particular field) and he is enraged when the temporary orders fail to grant him 100 percent of the relief he has sought. He is estranged from his wife (of course) and his teen-age children. He is invariably rude to your staff and very demanding of your time. He insists on being treated like a "special client."

Leon is another kind of client that some have endured. He is extremely attractive and charming. Your first impression is quite positive and you actually feel some sympathy for his statements that his wife is trying to cheat him. He can't pay the full advance fee deposit you seek because he has a deal that is closing in three weeks and he desperately needs some work done on his case immediately. You take him on as a client because, frankly, you like him and he seems very forthcoming. As you get more deeply into the case, however, your misgivings bloom. He continues to put you off on the fee, with imminently reasonable excuses; he dodges discovery requests for financial documents; he blatantly ignores the pick-up and drop-off times in the temporary parenting plan. After two months and a $7,000 receivable, you are forced to cut your losses and withdraw.

Finally, there is Mary, a strikingly attractive woman, who dresses such that your receptionist and staff turn her into the topic of the day whenever she comes by to drop things off (which is more frequently than any of your other clients). She is extremely emotional, and you took her on (with a tiny tug of doubt in your gut) because she triggered the protector in you. She was truly needy. However, that tiny tug became a full-on shove when she began calling the office almost every day — sometimes three or four times a day. Your staff wasn't able to "understand or help" her. Again, the fees were running up disproportionately. When she would come in for appointments, she would carry on for about 90 percent of the meeting about her feelings, her concerns, her husband, her co-workers, her plans — almost everything but the business at hand, which might be reviewing and signing off on a declaration.

***How we respond to these clients in the volatile environment of a family law case will not only bear on whether we get paid, but it will also affect our freedom from bar complaints and suits. It is widely acknowledged that family law is the leading magnet for bar complaints.***

How we respond to these clients in the volatile environment of a family law case will not only bear on whether we get paid, but it will also affect our freedom from bar complaints and suits. It is widely acknowledged that family law is the leading magnet for bar complaints. A recent report of the Arizona State Bar, for example, noted that 28 percent of their complaints arose out of family law matters. Failing to adequately communicate with clients is the number-one cause of bar complaints. Difficult clients almost compel us to avoid them in order to manage our calendars, our energy, and our sense of well-being. The way that we manage our "normally distraught" clients is certainly important. However, the greater share of complaints and potential malpractice suits will arise from our pool of clients who suffer from a condition that is described by the DSM-IV (the "Bible" of mental health diagnostics) as "personality disorders."

Mental health practitioners have long been aware of a particular difficulty that was termed a "personality disorder" in the DSM-IV. Rhoda Feinberg and James Tom Greene describe a personality disorder in their article *The Intractable Client — Guidelines for Working with Personality Disorders in Family Law* (35 Fam. & Conc. Crt. Rev. 351 (1997)) as follows:

> A personality disorder is a clinical term used to describe people who are "locked in" for many years with certain exaggerated personality traits that interfere with all aspects of their functioning in life.

Both the DSM-IV and William Eddy[1] aptly describe these personality disorders as reflecting "enduring traits."

While there are nine personality disorders described in the Feinberg and Greene article, Eddy, in his excellent *High Conflict Personalities*, focuses on the four which he identifies as particularly challenging for the family law practitioner. These are Borderline, Antisocial, Narcissistic, and Histrionic.

In the shortest of shorthands:[2]

**Antisocials** (Leon) are characterized by a collection of traits which may include the failure to conform to societal norms with respect to lawful behaviors; deceitfulness; impulsiveness; aggressiveness; consistent irresponsibility; and lack of remorse over the injuries they cause, often, but not always, accompanied by a very beguiling personality.

**Narcissists** (John) are characterized by a grandiose sense of self-importance; a preoccupation with fantasies of unlimited success, power, or beauty; a belief that he/she is special; a sense of entitlement; a lack of empathy; and a tendency to be

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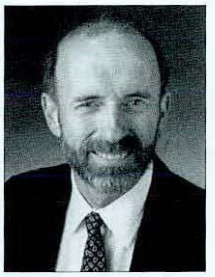

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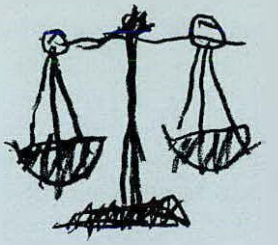

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interpersonally exploitive.

**Histrionics** (Mary) are uncomfortable when not the center of attention; display rapidly shifting and shallow expressions of emotion; consistently use physical appearance to draw attention to themselves; tend toward theatricality in expression; and consider relationships to be more intimate than they actually are.

**Borderlines** (Susan) tend to have a pattern of unstable and intense interpersonal relationships; be impulsive in their intimate relationships; experience chronic feelings of emptiness; exhibit inappropriately intense anger; and possess a markedly unstable self-image. Borderlines are noted for putting the other person on a pedestal ("You are a brilliant lawyer. I cannot believe my luck in finding you."), followed by intense denigration and anger (Bar grievances, lawsuits, abrupt dismissals, etc.).

Family lawyers who have engaged in custody disputes may be familiar with the name Millon, as Theodore Millon is the principle author of the psychological instrument, together with the MMPI-2 (Minnesota Mulitphasic Personality Inventory-2 — a widely used and widely researched test of adult psychopathology), which is conventionally administered to parties in a parenting evaluation. In his excellent text *Personality Disorders in Modern Life* (2000), Dr. Millon notes that each personality disorder may be seen as residing along a continuum of behaviors or traits. Most of the characteristics of a particular personality disorder may be found, albeit in different intensity and presentation, among the "normal" or even "highly successful" population. Along the Antisocial continuum, for example (but not into the "red zone" of difficult, alienating, or destructive behavior), is the daring risk-taker who takes care of the business many of us wouldn't touch. Not so far along the Narcissist continuum is the supremely confident, and successful, businessperson. Moderate Histrionic qualities impart a sense of drama and entertainment to life, while the drama which is so acute in the Borderline adds spice to an otherwise dull life when carefully measured.

When pushed to the level of pathology, the four "high-conflict personalities" are found by Eddy to be driven by the following fundamental fears: Borderline — fear of abandonment; Narcissist — fear of inferiority; Antisocials — fear of being dominated; Histrionics — fear of being ignored.

Additionally, what really differentiates these people, in Eddy's view, is that they perceive (and persuade others to share in this perception) that the cause of their distress is external. Eddy notes:

> Because they think their internal problems are external problems, the difficulties of those with personality disorders continue and become quite distressing.[3]

High-conflict personalities have enduring patterns of behavior characterized by:

1. Chronic feelings of *internal distress*;
2. Think the cause is *external*;
3. *Behave inappropriately* to relieve distress;
4. *Distress continues* unrelieved;
5. Receive negative feedback about behavior which escalates *internal distress* but thinks the cause is *external* so *behaves inappropriately* . . . and on and on.[4]

Not everyone with a personality disorder becomes a high-conflict personality. Only those who are also "Persuasive Blamers"

seem to become high-conflict personalities. Persuasive Blamers persuade others that their internal problems are external, and caused by something else or someone else. Once others are persuaded to get the problem backwards, the dispute escalates into a long-term, High-conflict dispute — which few people other than Persuasive Blamers can tolerate.[5]

The thing to remember about these people is that they labor under a real psychological burden. Their personalities tend to be rigid, and they have little tolerance for self-reflection that might challenge their (often) fragile egos. While conflict is stressful for most of our clients, the circumstances that bring these folks into our offices are fertile ground for the maladaptive behavior which make them so tough to handle. So how can we best protect ourselves, and the professional relationship, from the encroachments of the *strivings* of these clients? Consider these seven closing tips:

1. Set clear boundaries. The rules of the attorney-client relationship must be assiduously adhered to. Telephone calls must be billed, or they will mushroom. Deadlines must be clearly communicated and enforced. Bills must be paid in a timely fashion. Be particularly careful to dress and act professionally with these clients. They should *never* be permitted to verbally abuse you or your staff.

2. No special treatment. Do not stray from your customary practice to allow these clients to feel special. Avoid unique financial arrangements. Don't give the client your home phone number. Don't meet at odd hours.

3. Do not avoid the client. Failure to return phone calls, while relieving you of stress and aggravation, will cause the client's anxiety to escalate. If necessary, tell the client that you will not be readily available to him. Instruct your staff on specific procedures when dealing with multiple and insistent telephone calls.

4. Communicate clearly. While e-mail has a down-side with these clients, as you are likely to be deluged with messages, at the same time, you are able to clearly communicate expectations and possible outcomes in writing so you have a clear paper trail that you can refer to. Don't believe that just because you *told* the client something, it had impact on him and he retained it. If you have certain rules or boundaries to set, communicate them very clearly and, if necessary, repeatedly.

5. Don't get seduced by adoration. This is particularly true with the Borderline personality, who is gifted at the art of seduction ("I don't know how I was ever so lucky as to find you for a lawyer.") followed by vertiginous denigration (accusations of betrayal, malpractice, or unethical conduct). Keep your relationship with this client level.

6. Be consistent. These clients will repeatedly try to push the boundaries you set. They will test you and your staff. Counter-intuitively, they will be more anxious if you allow there to be even minor variations in your process and relationship style. You will be more likely to calm this anxiety with consistency.

7. Stay at arm's length. Almost every one of these personalities has an attractive quality about them. You may be drawn to the Antisocial's charm, the Borderline's need for protection, the Narcissist's powerful personality, and your desire to impress or the sheer entertainment value of the Histrionic. In fact, if you find yourself thinking of a client in an emotional or personal way because of these qualities, be *very* careful. You will have the greatest success manag-

ing the client, their case, and the post-litigation fallout if you strictly adhere to a professional, friendly, arm's-length attitude toward the client.

Ask among your colleagues, and you will hear the "war stories" of client relations gone sour due to mistakes made with these four "high-conflict personalities." The solution can't be to avoid them, because we often won't know we have this problem until after we have been retained. Additionally, these people sorely need our guidance, professional advice, and representation. The work does not have to end with grumbling and distress — and can even result in a deep sense of professional satisfaction — if we keep our eyes and ears open and follow some basic rules once the red flags begin to pop up.

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*Joseph Shaub is a family law attorney and mediator whose practice is in Seattle. He can be reached at joe@shaublaw.com.*

NOTES

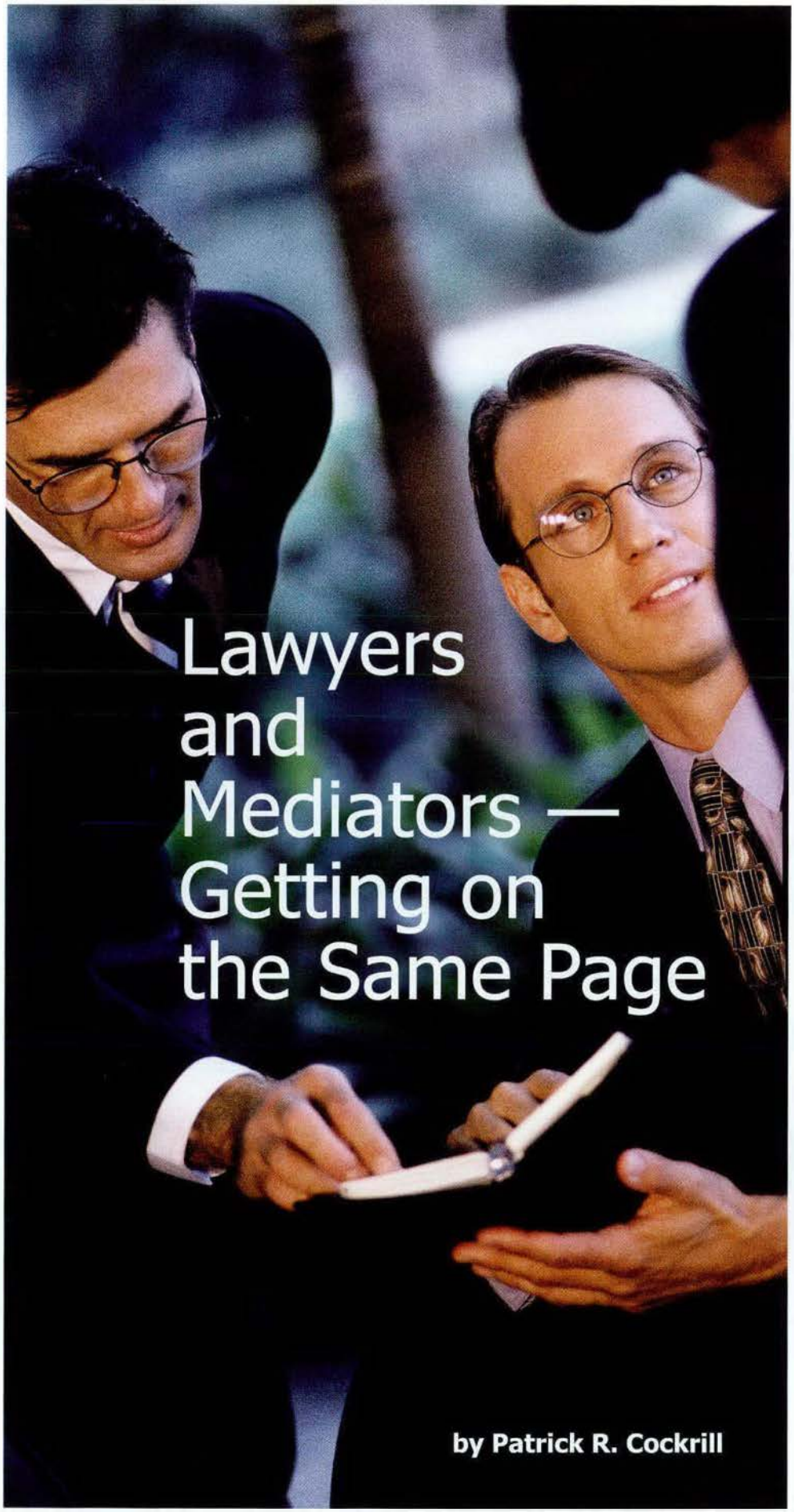
[1] A significant portion of this section is derived from the work of William Eddy. Bill Eddy is an attorney/mediator who practices in San Diego, California. Having practiced for many years as a clinical social worker, he became an attorney and devoted his practice almost exclusively to divorce mediation. Through both his practice as a therapist and then later as an attorney and mediator, Bill observed that a certain kind of personality was highly disproportionately represented in the volume of unresolved conflicts that required trial. These people were also far more inclined to bring ethical complaints against their attorneys. This article, however, is only a sliver of the wealth of information that may be garnered from his excellent edition, *High Conflict Personalities — Understanding and Resolving Their Costly Disputes*. This volume may be obtained through Bill's website www.eddylaw.com. I also recommend a visit to this website for the number of brief and valuable articles that Bill has posted, covering a wide array of subjects of interest to family lawyers and mediators.

[2] Readers are strongly encouraged to review the criteria for these personality disorders found in the DSM-IV and also a very lucid discussion found in Theodore Millon, et al.'s, *Personality Disorders in Modern Life*, Wiley & Son, 2004.

[3] Eddy, W., *High Conflict Personalities*, p. 15.

[4] Id., p. 17.

[5] Id., p. 18.



# Lawyers and Mediators — Getting on the Same Page

by Patrick R. Cockrill

The problem: In my experience, family law attorneys are still resistant to the nonlawyer mediator. Conversely, many mediators find their clients are reluctant to seek advice from a lawyer. (Before we go further let me clarify a few terms.)

***Evaluative mediator***: a mediator who will weigh the positive and negative aspects of each party's case and urge a common ground settlement based on what the judge would probably rule. This person is usually a family law attorney or a retired judge. The process is akin to a good settlement conference.

***Facilitative mediator***: a facilitative mediator trusts that the parties have the ability to solve their own problems, and is not concerned with whether the party's solution fits a likely judicial scenario. This mediator's responsibility is to facilitate the communication between the parties, and to be satisfied that each party has enough information to make a fully informed decision, and enough personal ability to represent his or her own best interest vis-à-vis the other party.

Most attorneys are looking for an evaluative mediator who will help get the case settled. Most mediators who are not also attorneys do not provide evaluative mediation services, because of a recognized lack of dissolution-evaluation training and because of a preference for a facilitative approach. Most attorneys believe that if you lack dissolution-evaluation training, you should not be mediating dissolutions. Most facilitative mediators believe that it is not their job to "evaluate" the fairness of the agreement, only to ensure that the parties are fully informed and believe the agreement is fair *for them*.

What the mediator and the attorney both tend to miss are the differences in what each seeks to accomplish in light of their common ultimate goal of assisting the parties to be free to go their separate ways if that is the client's choice.

To illustrate: Perhaps it would be easier to get a picture of the differences in approach if we look at a simple question of spousal maintenance. Jack and Jill have a 25-year marriage. Jack finds a younger female companion. His annual salary is $90,000. Jill is now a teacher's aid after staying home until the youngest of their three children left to join the Marines. On the horizon — their son's graduation from boot camp, their daughter's wedding in six months, and their second grandchild's baptism next spring. There are also birthdays and Christmas celebrations to look forward to for many years. Jill's attorney has drafted a motion to establish temporary monthly maintenance at $3,000 fully expecting this to continue for at least eight to 10 years. Jack has offered $800 a month for six months. After a meeting with a facilitative mediator, Jill hands her lawyer the mediation agreement that sets maintenance at $1,000 per month for three years.

At this point most family law attorneys want to grab Jill and shake her until her teeth rattle. The lawyer's analysis sees the husband's gross of $7,500 a month, a client making less than $1,500 a month with little chance of any substantial increase in the client's marketability, and her leaving thousands of dollars on the table. What is wrong with the mediator?!

The mediator sees a woman who has anticipated the divorce for several years. She has a strong support system and will come into a substantial inheritance in a few years. Her primary goal is to keep the house, which she has. She had an affair four years ago that is over now, but the sense of guilt and the sense that she was at least partly responsible for "driving" Jack into the arms of another woman lingers on. Money is not important to her as long as she can get by and has the support of her family. Money is a major focus of Jack's life. Jill is concerned with placating Jack so that they will be able to attend their son's graduation, their daughter's wedding, and future family events with their children and grandchildren without undue tensions being generated. Jill knows what her attorney thinks and that her guilt, her expected inheritance, and the nature of any future encounters between Jack and her at family events are totally irrelevant to the court's determination of the level of maintenance to which she is "entitled." But they are relevant to her!

The lawyer is now composing his CYA letter, fearing the seller's remorse that Jill will likely experience a few years down the road. The mediator is less concerned, believing that Jill was fully aware of her options and as a mature adult woman, made her choices based upon what she saw as being in her overall best interest. The mediator's primary concern, if any, is that Jill's attorney will talk her out of the settlement and the parties will be fighting for the next year awaiting a bitter, contested trial.

***Most attorneys are looking for an evaluative mediator who will help get the case settled. Most mediators who are not also attorneys do not provide evaluative mediation services, because of a recognized lack of dissolution-evaluation training and because of a preference for a facilitative approach. Most attorneys believe that if you lack dissolution-evaluation training, you should not be mediating dissolutions. Most facilitative mediators believe that it is not their job to "evaluate" the fairness of the agreement . . . .***

## The Lawyer's Approach

We have laws that apply to the dissolution of a marital relationship. In some jurisdictions grounds must be established; in others no grounds are required. Joint assets and debts must be divided equally or equitably depending on the jurisdiction. Separate property interests have their own rules. What is "fair" is what the judge determines or the attorneys negotiate. The rearing and support of children is to be determined according to the rules and assumptions established by statute, by judicial precedent, and by "guidelines."

As an overly simplistic synopsis, one might say that the lawyer's job is to determine the "facts" and the available "evidence" to establish the "facts" from the client and through discovery techniques; to present the "facts" in the light most favorable to the client and most unfavorable to the other party; and to convince the judge to find the facts favorable to the client and apply the law to the provable facts.

The lawyer's mind set, indeed the attorney's oath, is to advocate for the client to achieve the best result the law and the facts permit. It is the lawyer and the client with a problem to be solved versus the other party.

## The Facilitative Mediator's Approach

The applicable "law" is relevant only to the extent that the draft of the parties' solution has to meet substantive and procedural legal requirements. That accommodation is in the lawyer's realm, not the mediators.

The division of assets and debts is a problem that is shared by the parties who will work together to maximize their joint and individual benefit. What is fair is what the couple jointly agree is fair, or fair enough to let them get on with their lives. The rearing and support of children is to be determined by the father and mother looking at their own family situation and determining together how they will carry out their respective roles as dad and mom while living in different houses, regardless of legal precedent or guidelines. Their concern is to decide what will be most conducive to meeting the individual needs of their individual children, and how the costs of doing so will be shared.

The mediator's job is to listen to the "facts" as each side views them; to accept the differing perceptions of the husband and wife as to what the "facts" really are; to be otherwise unconcerned about what "evidence" might or might not be available to "prove" the "facts" (except perhaps in a reality-testing situation); to be assured that each party is fully informed about the information needed to make a determination in their own best interests; and to encourage the inter-communication of the parties to the end of reaching a mutually acceptable and workable solution regardless of their individual perceptions of the historical "facts."

### Different Approaches Can Make Each Profession Suspicious of the Other

What comes out of these two very different approaches, given the identical fact pattern, may look very similar, or may look very different. The attorney has to be concerned about what is admissible in court. The mediator is free to let the parties, during their deliberations, weigh many factors that would not be admissible were they in trial. That difference alone may result in substantially different end results.

Many clients are reluctant to seek legal advice because they believe that the lawyer will try to scuttle their agreement, or will convince the other party that the agreement is not fair. From the attorney's perspective, the agreement may well not be fair, as in the case of Jack and Jill. The attorney is evaluating the settlement from the context of what would happen in court. That the ultimate agreement for a particular couple is not based on economic equality, but is driven by a need to retain a working relationship with the other party — to ensure that the children do not lose a parent, to be able to attend a child's graduation or future wedding without creating a hostile environment by the mere presence of divorced parents — are all considerations that do not impact judicial decisions and hence are not relevant to the attorney's professional evaluation of the fairness of the agreement.

When a party gives up an interest in a business enterprise without having the business appraised, it is very discomforting to the adversarial attorney. When a spouse accepts the value of a pension based on the annual statement of the plan administrator without an actuarial analysis of future benefits, the attorney has to ask if the client was really aware of what is going on, let alone "fully informed" as the mediator asserts.

"Fully informed" seems to be the key to the lawyers concerned with the mediated settlement. Couple that with what the attorney evaluates as the client's "need" for an advocate, and we have a justifiable basis for questioning whether mediators should be allowed into this field at all.

On the other hand, a system where parties are moved apart, frequently told not to talk to each other and often restrained by court order from doing so; counseled on how to avoid marital property treatment of some assets and how to keep the other side from successfully acquiring negative facts about the client; encouraged to fight to maximize the client's powers with reference to the child and to minimize those of the other parent; and made to feel inadequate and powerless in the face of rules of evidence and considerations of "relevance" that have little or no meaning in the client's daily life, seems to the mediator to raise a question as to whether lawyers should be allowed into this field at all.

### Different Approaches Can Come Together

Mediators need to know enough family law to be able to determine whether their clients are, in fact, "fully informed." Mediators who do not know that there is a difference between defined contribution and defined benefit retirement plans and that each is valued differently, or that a spouse will still be contingently liable for the mortgage on the house awarded to the other party, should not be mediating property-division issues. Attorneys who lack sensitivity to the impact of a

divorce contest on minor children, and to the fact that the emotional divorce may not be over for many years after the decree is entered, should not be practicing family law.

But while there are in fact poor mediators and poor family attorneys, the mainstream contains very professional and well-qualified practioners in both disciplines. What is needed is for each to understand the professional orientation of the other, and to recognize that they have different goals and different tools. They are looking at the same problem, but through a different window. What is important to one may be irrelevant to the other, but they each need to understand that, and to understand why it is deemed irrelevant.

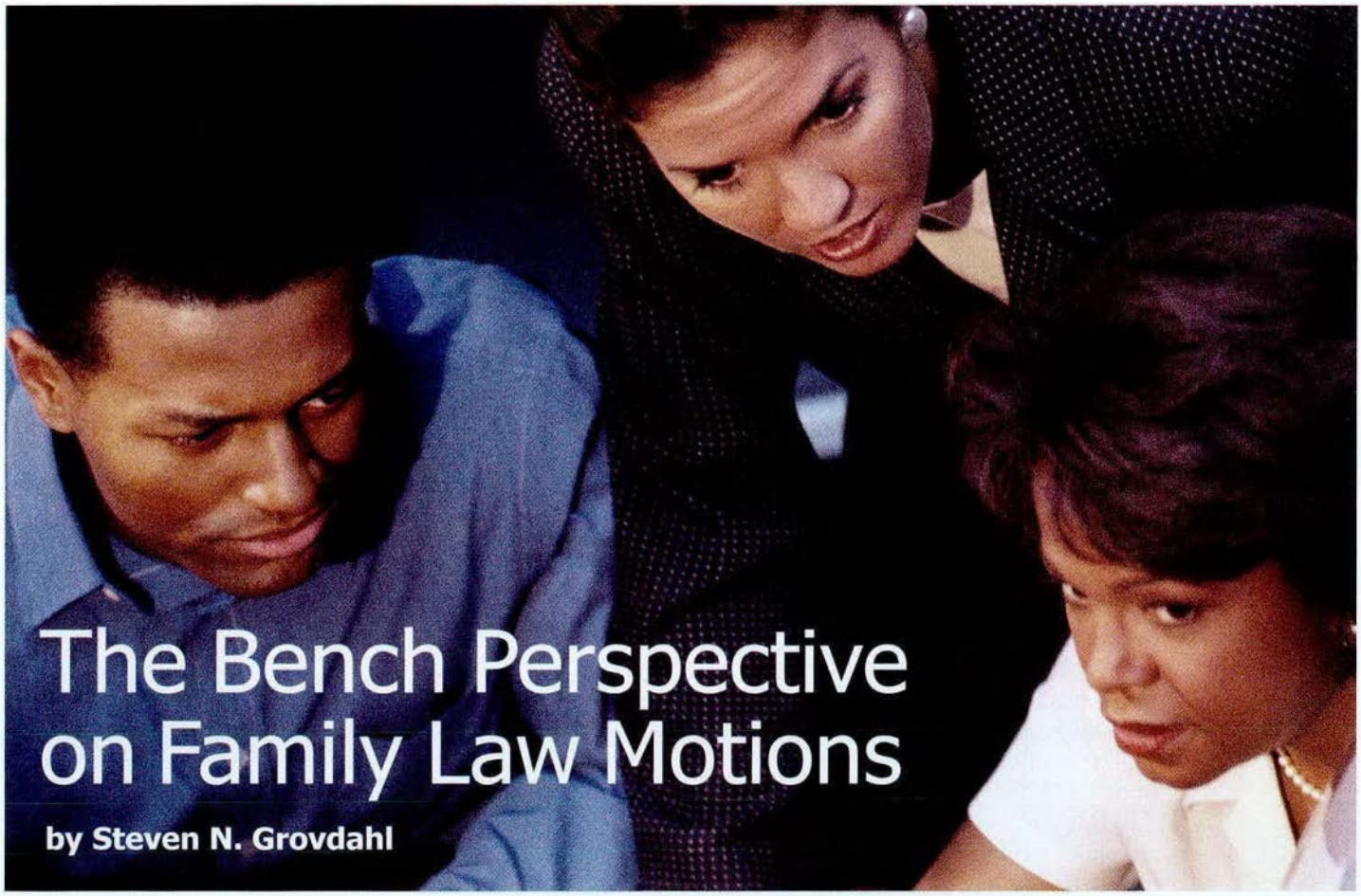
## Conclusion

Finally, for the systems to serve the greater society, both mediators and attorneys need to get beyond their professional "orientation" and listen to the individual client. Both professions need to be client driven. Each should be frequently referring to the other to ensure that clients have available to them the best tools for addressing the problems they face given their individually unique history, current situation, and future prospects. Though many attorneys might disagree, it seems to me that not every client needs a lawyer. Look at the large number of *pro se* actions. While a few end up in post-decree litigation, most apparently do not. Conversely, not every couple can benefit from mediation. The last statistics I saw indicated that about 25 percent of cases couldn't be mediated successfully. Still, I submit that most couples will benefit from the expertise of each profession as we learn better and better ways to communicate and work together. Understanding where the other is coming from is the first step.

Family-mediator education emphasizes the importance of recognizing the areas in which clients need to consult an attorney. The clients need to know what a judge is likely to do in order to know if consulting an attorney would be worth pursuing in light of the many other considerations they are weighing.

Family law attorneys should be educated to the need to analyze their marriage dissolution cases from a broader aspect than the rules of evidence and winning the maximum economic outcome for the client. Most of us with clients struggling with serious emotional stress refer our clients to mental health counselors. We need to be aware also that for clients with young children, and clients who do not want to "fight" or cannot afford expensive discovery or expert witnesses, and who have a grasp on the real world and how to deal with his or her spouse, can usually benefit from the facilitative mediation approach to their "legal," rather than "current life," problems. We need to be more sensitive to the reality that even after the decree is entered, most dissolution clients will continue to have emotional ties to their former spouse. Couples with children particularly need to be able to communicate civilly with one another. Facilitative mediation can be an invaluable resource for these clients. It can greatly simplify the attorney's problems in handling many family law issues.

*Patrick R. Cockrill has been a WSBA member since 1965 and is a mediator in Yakima.*



# The Bench Perspective on Family Law Motions

by Steven N. Grovdahl

*Be brief, be pointed, let your matter stand*
*Lucid in order, solid and at hand;*
*Spend not your words on trifles but condense;*
*Strike with a mass of thought, not drops of sense;*
*Press to the close with vigor, once begun,*
*And leave — how hard the task! — leave off when done.*
— Joseph Storey, *Advice to a Young Lawyer* (1835)

Judicial officers frequently begin looking like Hannibal Lecter after serving time in a family law rotation. Their patience is tested every day by shenanigans and imperfections of process that don't often occur in other arenas. It is made no easier by their own recognition of the importance of the decisions they must make. In family law matters, the most important decisions to your clients are not those which are made after long preparation and lengthy trials, but those made on short notice and with scant information — parenting issues, complex financial issues, use of the property of the parties are some of the issues that often must be addressed by motions shortly after an action is filed. We also know that these decisions, once made, have considerable inertia and often guide the ultimate outcome of a case.

While it is true that it is the task of judicial officers to judge facts rather than the performance of attorneys who appear before them, it is also true that judges and commissioners do make judgments about the level of trust that they might have in each lawyer who appears before them. I am attempting in this article to provide to family law practitioners suggestions that will enhance their effectiveness and professional standing before the court.

## Preparation

*Prepare your proof before you argue.*
— Jewish folk saying

The professional is prepared for the hearing. He or she has prepared and carefully edited the declarations of clients and other declarants, taking care to present only the relevant issues and avoiding the presentation of inadmissible evidence in the declarations.

*The minute you read something you can't understand, you can almost be sure it was drawn up by a lawyer.*
— Will Rogers

The professional will make every effort to present the evidence in a clear, concise, and ordered fashion that can be easily followed by the judicial officer and will avoid the use of overly technical legal language.

*In the strange heat litigation brings to bear on things, the very process of litigation fosters the most profound misunderstandings in the world.*
— Renata Adler

The professional is also careful to avoid unnecessary, inflammatory rhetoric and also eschews bombastic and overly critical comments in the declarations submitted to the court. Most family law judicial officers recognize the toxic effect of conflict

on the children of parties to a dissolution. Judges often view the litigants who fuel such conflict with some disdain.

*The place of justice is a hallowed place.*
— Francis Bacon

If the clients and others are brought by the attorney to the hearing, the attorney should take the time to explain to these parties what the protocol for the hearing is and what is expected of them during the hearing. For example, he or she makes sure clients and their supporters have their hats off, turn off cell phones, and are not chewing gum. It is explained to them that it is inappropriate to exhibit overly expressive body language or to speak out without being asked during the hearing. With these issues addressed prior to the hearing, there is a greater likelihood that the hearing will progress smoothly and without interruption.

*After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented.*
— Obviously chagrined Federal District Court Judge in *Bradshaw v. Unity Marine Corporation*, 20012 WL 739951 (S.D. Tex.)

Although it is somewhat unusual for complex legal issues to be presented in family law matters, it does occur occasionally. It has been my experience that even in those cases where there is a fairly unique legal issue presented, it is a rare occurrence that counsel take the time to research the issues. While it might be assumed that the judge or commissioner has encountered the precise issue before and is familiar with the law, that assumption is not always warranted. The other danger in asserting a legal position that you have not adequately researched is that the judicial officer may in fact know the law, and the law may be contrary to the position you have taken. When that happens, your client may be upset by your lack of awareness of the prevailing law on an issue important to their case.

As another element of preparation, it is important to have also taken the time to discuss the case with opposing counsel. Even if the entire case is not resolved, it is extremely helpful if the attorneys have managed to limit the issues the court must decide by reaching an agreement on some of the issues.

The other benefit of whittling down the issues is that more time can be devoted in argument to those crucial issues that have not been resolved.

## Conduct During the Hearing

*Let your accusations be few in number, even if they be just.*
— Pope Xystus I

The professional in family law first of all concentrates on the client's case. He or she does not get distracted or create distractions by turning the hearing into a grudge match in which he or she complains about treatment by opposing counsel. He or she will conscientiously avoid paying disrespect to another person because of that person's gender, sexual orientation, race, disability, age, religion, or marital status. When the case is argued, the professional will point out credibility concerns without demeaning the other party by calling them liars or perjurers.

*If the court please, I am about to illustrate it by a diagram, and I hope to make it so plain that the audience, and perhaps the court, will understand.*
— James T. Brown, lawyer addressing a circuit court judge in Indiana (1899)

It is helpful if the attorney begins his or her argument by summarizing what the issues are and giving a brief statement of the background of the case. It is also helpful if the presentation is concluded by clarifying precisely what the client is asking for, so that the client's position is clear in the judge's mind. In particularly complex or confusing cases, it may be of assistance to the court if you present illustrative exhibits or written summaries of the evidence.

## Conduct After Argument

*Do not attempt to confute a lion after he's dead.*
— Talmud, Gittin

After attorneys have presented their case, the court should be allowed to fully articulate its decision without interruption. Interruptions often lead to confusion, and that in turn can lead to issues being overlooked by the court and the parties. Once the court is through with its oral ruling, if the attorneys have any questions or need clarifications, they should respectfully ask the court for clarification. If they believe from the comments of the court that it is mistaken in the factual basis for its decision or have made an error of law they might again respectfully ask the court for reconsideration.

*[Appeal:] In law to put the dice into the box for another throw.*
— Ambrose Bierce, *The Devil's Dictionary* (1906)

If the court does not change its decision, however, the revision or appeal process should be relied on to resolve your client's concerns. The role of argument in a family law hearing should be limited to arguing with opposing counsel, not the judicial officer.

## Conduct After the Hearing

*Decisions are not like fine wine — they don't get better with age.*
— Judge Kathleen O'Connor, Spokane County Superior Court

Following a hearing, the professional will do his or her best to have orders promptly prepared and submitted to the judicial officer so as to avoid a future presentment. The longer attorneys take to prepare their orders following a hearing, the more they will disagree and the more likely a presentment hearing will be necessary. It is unfair for clients to have to pay their attorneys to argue a case at presentment that could have been better presented shortly after the hearing when the matter is fresh in everyone's mind. Also, it is almost impossible for the judicial officer to recall the precise details of the holding months after the hearing.

*If respect for the courts and for their judicial process is gone or steadily weakened, no law can save us as a society. Lawyers, whatever their views on controversial decisions, must inspire respect for the judiciary.*

— William T. Gossett, President ABA (1969)

The real test for the professional is what happens after the hearing, outside of the purview of the court. Judicial officers are not naïve — they can expect that any party who has not fared well before the court will be quick to criticize their own counsel, opposing counsel, and the court. This will provide an attractive opportunity for counsel to divert criticism by claiming that the opposing attorney is unprincipled or corrupt, or criticizing the court as being unfair or ignorant of the law or facts. As we all know, the legal system is already regarded with cynicism by the public, and any expedient, face-saving comments that attack lawyers or judges merely affirm that public perception to the client. Clients who hold the belief that they are victims of corruption or incompetence are also less likely to be compliant with court orders.

*Every calling is great when greatly pursued.*
— Oliver Wendell Holmes Jr.

Family law practitioners should be mindful that their work can be a high calling, often profoundly affecting families and children. The manner in which they present their case can also be destructive and counter-productive if that perspective of family law is ignored. The professional handling of family law motions can not only enhance an attorney's professional good will and standing with the court, but also set a higher standard to which other members of the family law bar can aspire.

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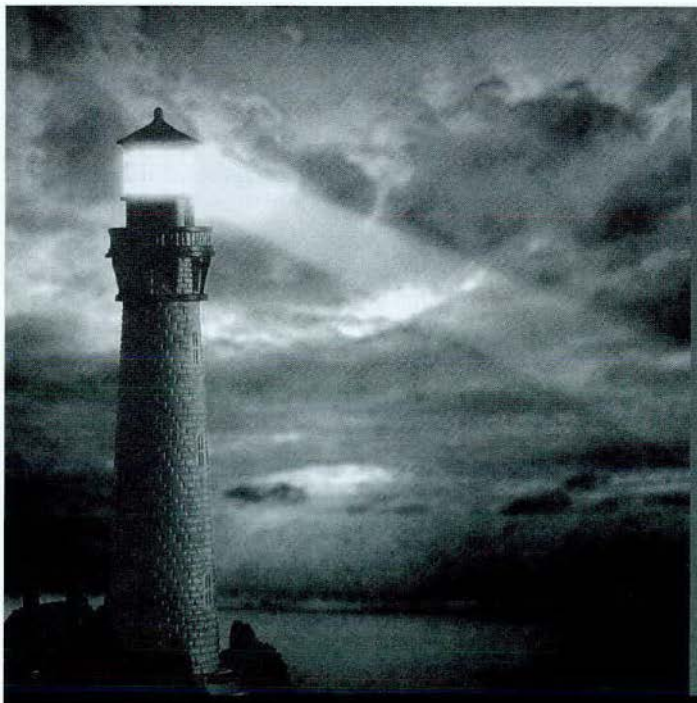

# Fear and Loathing in the Courthouse

BY LESLIE SAVINA

Out of respect for Hunter S. Thompson I just want to call it like it is, lay it all out right here, right up front. Then you can skip this and go on to read something really interesting. Because this is about a four-letter word. And I don't mean *pro bono publico*. I mean the "F" word: Free. As in "free legal services."

Whether Hunter S. Thompson wrote fact or fiction, I'm never quite sure — just as I'm never quite sure if free legal services are just a pipe dream. We all talk about providing civil legal services to the poor and vulnerable like it's important, like it's something we value. Heck, even those gonzo guys and gals we elect to represent us on the WSBA BOG think it's important. At least I think they think it is important because they passed RPC 6.1 which encourages every attorney to give 30 hours of *pro bono publico* service each year specifically to assist persons of limited means. Being on the board of the ballet is all good and fine but you know, and I know, and Hunter S. Thompson knows, that is not what this rule is all about. It's really about 30 hours of free legal services to those who cannot afford a lawyer.

And they are legion. What percentage of family law cases has at least one party appearing *pro se*? A lot. How do they do it? How do they navigate the intricacies of the mandatory forms, the personalities of the courthouse, the idiosyncracies of the local rules on their own? With fear and trepidation or, perhaps, not at all.

I don't know about you, but I never think it is a particularly good day when I have to go to the courthouse. Sure, I sometimes run into friends, perhaps help a client, and I can always get a good cuppa coffee at that nice little espresso stand at the RJC but, in my heart of hearts, I know fear and loathing. I am nervous, anxious. Did I confirm my motion on time? Did I copy the attachments to my client's declaration? Did I bring proposed orders? Did I leave a three-inch margin at the top? Was I or wasn't I supposed to underline the important parts of the FCS report for the judge? Am I over the page limits? Do I have proof of service in my file? What if opposing counsel is smarter-cuter-more facile than I am? Oh jeez. I'm on stress overload.

Lucky for me, there are lots of worries I can cross right off my list. I don't have to worry whether the forms will be printed in Hindi, Thai, or Senegalese. I don't have to worry whether the bus comes near the courthouse or if I will have to push my wheelchair uphill from the bus stop. I don't have to worry if the sheriff at the door will ask my immigration status. I don't have to worry about losing my job at the nursing home because I took time off to come to court. I don't have to worry whether my child will cry in the courtroom because I have no safe place to leave her. I don't have to worry whether my husband will wait for me outside the courthouse with a gun.

If you're still with me here, then I'm singing to the choir and that's pretty scary because I really can't sing. If I could, I'd sing the blues, because as family law lawyers we are asked, repeatedly, to provide free representation. It's logical, because family law cases are the areas of greatest need. How often do you see your friends, the corporate tax attorneys, the land use attorneys, or the patent attorneys, representing one of their clients for free? Not gonna happen. Now, how often do family law attorneys represent clients for free? A lot.

(Let me note here that poor business practices do not constitute *pro bono* representation. If you agree to represent a client for free, good on you. But if you agree to represent a client and the client doesn't pay you, then the client got lucky and you got took. Next time you find it in your heart to give away some of your time, and I hope you do early and often, I'd recommend that you do it through a referral from a legal services organization to ensure that the client has been screened for need and all other resources have been explored.)

I'm one of the lucky ones because I am able to represent the neediest and most desperate of family law clients for free and still get paid, not much, but paid. (To my longer suffering husband, honey, this is a "real" job.) Folks tell me all the time how great it is that I do this work, how important it is for these clients to have representation. And I couldn't agree more or I wouldn't do this job. But tell me, why do I feel so lonely? If folks think this work is so important, and they seem to, why aren't more people representing needy, low-income clients? I don't need one more "atta girl" for my work: I need help.

Perhaps Hunter S. Thompson would know the answer to the puzzle but he's no longer available. I think he would say what my civ. pro. professor (who bore a slight resemblance) taught us: Go with what you've got. What we've got is a fine and talented bar and a tremendous need. What we've got is a rule recommending 30 hours of free legal services a year from every attorney — family law, labor law, land use, tax, torts, trials. And, okay, if you can't give 30 hours of free services, work your hours, pay the taxes, and donate the rest to LAW Fund. It's a wild idea, but I think we can make a difference.

If you are with me and if you want to do something wild and crazy, crank-up your laptop and go to the website for the Advocate Resource Center — www.advocateresourcecenter.org. On the left side of the home page, click on "volunteer." You can then tailor your search for volunteer opportunities to your county, area of interest, or by a text search. What could be easier? Or go to the Washington Legal Foundation website at www.legalfoundation.org/2005/directory.htm. This takes you to the Legal Foundation of Washington 2005 Grantee Directory. There is a grantee near you. Call them. I promise, they will be thrilled to hear from you and you will feel honored to work with them.

Rock on.

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*In 1995 Leslie Savina became the first staff attorney for the Domestic Violence Legal Fund, a program begun by Eastside Legal Assistance Program to provide direct representation in family law matters to low-income domestic violence survivors in King County. Similar programs have now been started in other jurisdictions in Washington. When not loving the law, Ms. Savina is a baseball mom. She can be reached at leslie@elap.org.*

# Deciphering *Booker*:[1] The Saga of the Federal Sentencing Guidelines

BY ALLEN R. BENTLEY

Setting: A rustic cabin. It is night. A cheery fire burns in the fireplace. An older man, Rip, sits in a rocking chair. A precocious child, Dorothy, sits beside him. Dorothy is reading a newspaper. She speaks first.

**Dorothy:**
Grandpa, it says here that the Supreme Court made an important decision yesterday, that affects the sentencing of thousands of people who have committed federal crimes. You defend people in federal court. I know that some of them are guilty, and they will be sentenced. What's this new decision all about?

**Rip:**
It's about the transformation of the Federal Sentencing Guidelines.

**Dorothy:**
What are the Federal Sentencing Guidelines?

**Rip** [sighing]:
It is a long and complicated tale. To answer your question, my dear, I need to go back a long way — way back to my early years as a lawyer. Are you *that* interested in this?

**Dorothy:**
Please tell me, Grandpa. *Please* tell me the story of the Sentencing Guidelines!

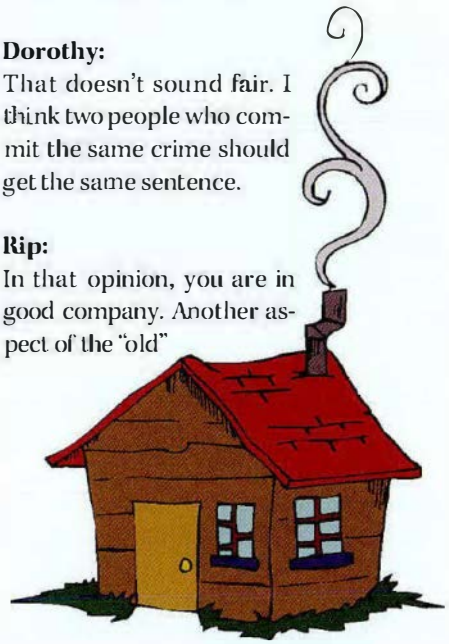
**Rip** [breathing deeply]:
OK. I'll try to make it short and understandable. Once upon a time, federal judges could sentence those convicted in their courts to just about anything. This was known as discretionary sentencing.

**Dorothy:**
You mean, if a letter carrier stole a letter from the mail, he or she could be sentenced to life imprisonment?

**Rip:**
Oh, no. No, no, no. There *were* limits. Stealing a letter, for instance, had a five-year maximum sentence. On the other hand, there was no "floor" that prevented a judge from giving "straight probation" in any case. As a result, some mail thieves got nothing but probation. Other mail thieves got several years in jail. It depended on who the judge was, or in what part of the country the theft was committed.

**Dorothy:**
That doesn't sound fair. I think two people who commit the same crime should get the same sentence.

**Rip:**
In that opinion, you are in good company. Another aspect of the "old" system was that the sentence the judge imposed couldn't be overturned on appeal, if it was within the statutory maximum and it wasn't influenced by something impermissible, like racial discrimination.



**Dorothy:**
Wow. If there was no real appeal, then a single judge must have had a lot of power.

**Rip:**
Yep. Many of the judges themselves weren't comfortable with it. And many observers felt that it wasn't fair. Eventually, in 1984 Congress authorized the creation of a standardized sentencing code, the Federal Sentencing Guidelines.

**Dorothy:**
That sounds like a good idea. How did they work?

**Rip:**
Well, the "guidelines" system was designed to reduce differences in sentences by creating a "grid" with presumptive sentences. The presumptive sentence was somewhere in a range (not all discretion was removed), which was found by locating the intersection of the "offense severity level" with the defendant's "criminal history category."

Do you remember that chart we have in the car, which shows the distance between any two cities by locating one city on the horizontal axis and another city on the vertical axis? Then you see where the two axes meet, and that is the distance between the cities? That's how this worked, too.

The goal was to end disparities by channeling judges' discretion so that most defendants having been convicted of comparable crimes, and having comparable criminal histories, would receive approximately the same sentence, no matter who the judge was, and no matter where the case was prosecuted.

To encourage the courts to achieve this goal, the law was changed to allow sentencing appeals. If a judge, in sentencing a criminal, did not follow the grid — did not sentence "within the guidelines" — then anybody who was dissatisfied with the sentence could appeal it to a higher court. And if the judge "departed" from the guidelines in a way that wasn't authorized, that could be appealed, also.

**Dorothy:**
Was there something wrong with the guidelines system, Grandpa?

**Rip:**
Yes. It was this. In calculating the severity of an offense, many judgments had to be made. How much was the loss in a fraud case? What was the weight of the drugs involved in a drug case? Was the defendant a leader or organizer of criminal activity? Did the defendant "accept responsibility" for

the crime? Had the defendant "obstructed justice"? All these considerations were built into the system, making for a very calibrated scheme. And the sentencing judge made decisions on these factors using a preponderance of the evidence standard — that is, by deciding if it was "more likely than not" that a certain enhancement factor applied.

**Dorothy:**
Whoa! You always told me that no one could be punished unless they had been found guilty "beyond a reasonable doubt."

**Rip:**
You're absolutely right. At its worst, the guidelines system allowed a judge to add punishment to a defendant's sentence on the basis of conduct, even though the defendant had been *acquitted* by the jury on that same conduct! The theory was that even though the jury wasn't able to find guilt on a certain matter beyond a reasonable doubt, the judge could find that the matter was proven on the basis of the lesser, preponderance standard.

For example, a person could be charged with possession of a gram of cocaine in Count 1 and possession of a kilogram of cocaine in Count 2. If this person were acquitted of the kilogram (Count 2) but convicted of the gram (Count 1), the judge could still base the sentence on the basis of the kilogram — and believe me, that extra weight would make a big difference.

**Dorothy:**
That sounds unfair, too. How did they fix the problem?

**Rip:**
Well, in June 2004, the Supreme Court said that any factor that increases a defendant's sentence must be found beyond a reasonable doubt by a jury (or else, must be agreed to by the defendant in pleading guilty). This was the decision in *Blakely v. Washington*,[2] a case that started right here in Washington.

In the *Blakely* case, the defendant was convicted of kidnapping and faced a "standard" sentence of about six years. But the judge used his authority to increase the sentence to nine years because he found that the kidnapping was committed with "deliberate cruelty." When the Supreme Court looked at the case, they said, "Hold on, you can't do that, unless *the jury* decides it was deliberate cruelty."

After *Blakely* came down, everyone knew that it was only a matter of time before the Supreme Court considered the constitutionality of the Federal Sentencing Guidelines. And that's the decision that you asked me about. It's called *United States v. Booker*.

**Dorothy:**
What does the decision mean?

**Rip:**
It's interesting, my young legal scholar. Given their decision in *Blakely* — which was decided, by the way, on a 5-4 vote — the Supreme Court just *had* to conclude that the Federal Sentencing Guidelines were unconstitutional. The reason is that the Federal Sentencing Guidelines, just like the Washington State Guidelines, required a judge to increase a defendant's sentence on the basis of facts that had not been found by a jury.

I'm actually surprised that the Court could not agree on that point unanimously,

but once again, we had a 5-4 split. The majority — the *first* group of justices — said that *Blakely* applied and that the Federal Guidelines would have to meet *Blakely's* requirements.

Having made that decision, the Court had three choices. First, they could declare the guidelines completely and utterly unconstitutional — they could throw 'em out. Second, they could attach *Blakely*-type protections to the current guidelines scheme. And third, they could take the teeth out of the guidelines.

**Dorothy:**
Which approach did they take, Grandfather?

**Rip:**
They took the teeth out of the guidelines and made them advisory only.

**Dorothy:**
How could they do that? That sounds like legislating.

**Rip:**
Don't ask me — they're the Supreme Court!



Seriously, what they said they were doing was trying to figure out hypothetically what Congress would have wanted them to do, had Congress known that by making the guidelines mandatory, they had deprived defendants of their due process rights.

**Dorothy:**
Which Congress? The Congress that adopted the guidelines, or the Congress that's there today, or some in-between Congress?

**Rip:**
The Court didn't say, but I think they felt that they knew the 1984 Congress, which enacted the guidelines, better. Justice Breyer — who wrote the opinion for the majority that decided to "fix" the guidelines — was a Senate staff member and worked on the guidelines proposal at that time. He's been a staunch supporter of the concept of guidelines sentencing ever since.

**Dorothy:**
Did all of the justices agree that the guidelines were advisory only?

**Rip:**
No, only a bare majority — five of them.

**Dorothy:**
What did the other four want to do?

**Rip:**
They said that, rather than *take something away* from the guidelines (their mandatory nature), you should *add something to* them — namely, the right to a jury trial on factors that would increase the sentencing range.

**Dorothy:**
Did any of the justices say that they should throw out the guidelines entirely and let Congress take another try?

**Rip:**
No. You know, personally, I'm disappointed that they didn't. If they had declared the guidelines entirely unconstitutional, it would have taken the system back to the way it was in the late 1970s when I was a prosecutor. Certainly, declaring the guidelines completely unconstitutional wouldn't have been the last word. It's likely that Congress would have stepped in and dealt

with the issue in some way. But that might have been more democratic.

**Dorothy** [yawning]:
Let me see — have I got this right? *Five* justices said that *Blakely* meant that the Federal Sentencing Guidelines were unconstitutional? And then the four justices who dissented on that issue then joined with *one* other justice — whom they disagreed with on the first part — to conclude in a second opinion that the guidelines could be fixed by making them advisory? It sounds to me like there was only *one* justice who fully agrees with the way that the Court decided this case.

**Rip:**
No wonder you do so well in math.

**Dorothy:**
Who was that one justice?

**Rip:**
Ruth Bader Ginsburg.

**Dorothy:**
What do you think she was thinking?

**Rip:**
I'm certain she did what she thought was right. Maybe she was also influenced by a desire not to totally wreck a system that has been functioning for decades. You know, other justices may have argued that they should save the system, even if they had to re-write the statute, and she may have agreed with them. Maybe she thought that her solution would meet the constitutional objection while, from a political point of view, satisfying those in Congress who would have enacted mandatory minimum sentences for *everything*, if the guidelines were completely invalidated.

**Dorothy:**
Do you think Congress is going to do anything, despite the fact that there are still guidelines, and judges are still encouraged to follow them?

**Rip:**
Look, our fire is almost out. The wind is whistling, and it's way past your bedtime.

**Dorothy:**
Grandpa! No fair. How does the story end?

**Rip:**
A bedtime story can't end without a happy ending. You know, "They all lived happily ever after."

**Rip:**
Some criminal defense lawyers thrive on uncertainty and enjoy the intellectual challenges presented by an unsettled legal situation. I must admit I'm one of them. *We're* the ones living happily at this point. But will our happiness last for "ever after"?

Only time will tell, my dear. Only time will tell.

*Allen Bentley is a Seattle lawyer whose practice emphasizes federal criminal defense. A question from one of his adult children prompted him to write this fanciful dialogue on the subject of* United States v. Booker. *He does not have any grandchildren.*

NOTES

1 *United States v. Booker*, __ U.S. __, 2005 WL 50108 (January 12, 2005).

2 *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (June 24, 2004).

# Inadvertent Production: Gold Nugget or Rotten Egg?

BY MARK J. FUCILE

Imagine this scenario: You just received five boxes of documents from opposing counsel in response to a production request. You and your paralegal dig into the boxes and you run across some e-mail printouts. You notice that one of the e-mails contains damaging admissions by your opponent and you are envisioning it as a billboard-size trial exhibit. You then realize that this gold nugget is from in-house counsel to the president of the opposing party and, therefore, was privileged at the time it was written. You received a privilege log with the production, but this e-mail wasn't included. Given its content though, you conclude that opposing counsel likely produced it inadvertently.

What do you do? Do you need to tell opposing counsel? Has the privilege been waived? And, if you simply use the document without telling the other side, are there risks to you that might turn your gold nugget into a rotten egg?

In an age when privileged communications increasingly travel in electronic instead of paper form under distinctive law firm or general counsel letterhead, it is also becoming more common for at least some privileged documents to slip through even the most diligent review. When that happens, there are typically three sets of issues: (1) ethics issues on notification; (2) privilege issues on waiver; and (3) practical issues in handling the documents to minimize the recipient's risk of unpleasant consequences.

***Notification.*** Over the past 12 years, the pendulum has swung from "finders keepers, losers weepers" to a proposed rule requiring notification and related procedures for determining whether privilege has been waived.

In 1993, the WSBA Rules of Professional Conduct Committee issued an informal ethics opinion — 1544 — finding that a lawyer who comes into possession of an opponent's inadvertently produced privileged material could simply use that material.

Since the early 1990s, four important developments occurred — two nationally and two in Washington — that moved the pendulum away from "finders keepers, losers weepers."

First, in 1992 and 1994, the ABA addressed inadvertent production and the related circumstance of unsolicited receipt of an opponent's privileged material in Formal Ethics Opinions 92-368 and 94-382, respectively. Both opinions counseled that a lawyer who receives such materials should: (a) stop reading once it becomes apparent that they are privileged; (b) notify the lawyer on the other side; and (c) follow the other lawyer's instructions on what to do with

the documents. In 1997, the RPC Committee cited ABA Formal Opinion 94-382 as guidance in responding to an "unsolicited receipt" question in WSBA Informal Ethics Opinion 1779.

Second, in 1996, the Washington State Supreme Court in *In re Firestorm 1991*, 129 Wn.2d 130, 138-39, 916 P.2d 411 (1996), held that lawyers who are confronted with issues about whether privilege applies to information received from the other side should seek the court's guidance rather than making those decisions unilaterally. *Firestorm 1991* was not an inadvertent production case. It dealt with information received through an *ex parte* contact with an opposing party's expert. Nonetheless, *Firestorm 1991* suggests the mechanism for a recipient to test whether privilege has been waived through inadvertent production: Ask the court.

Third, in 2001, the U.S. District Court in Seattle in *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001), disqualified a law firm for using an opponent's privileged information. *Richards* was not an inadvertent production case either. The lawyers in *Richards* received the documents at issue from their client, the plaintiff, who had taken them with him when he left his job with the defendant. But *Richards* looked to ABA Formal Opinion 94-382 in outlining a lawyer's duties: "An attorney who receives privileged documents has an ethical duty upon notice of the privileged nature of the documents to cease review of the documents, notify the privilege holder, and return the documents." 168 F. Supp. 2d at 1200-01.

Fourth, in 2002, the ABA revised Model Rule 4.4 to include an explicit requirement to notify the other side of the receipt of what reasonably appears to be inadvertently produced privileged material: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The comment to ABA Model Rule 4.4(b) leaves open what additional steps should be taken. The WSBA has proposed revising RPC 4.4 in the same fashion and including a similar comment. Those proposed changes are currently before the Washington State

Supreme Court for review.

In sum, Washington may soon have a rule requiring notification. As we'll discuss further, *Richards* counsels that there is an important tactical reason for also returning the privileged documents and, as *Firestorm 1991* suggests, litigating privilege waiver before using the documents involved.

***Waiver.*** The comment to ABA Model Rule 4.4(b) and the proposed comment here in Washington both note that the issue of whether privilege has been waived through inadvertent production is governed by substantive law, not the RPCs. In general, whether privilege has been waived through inadvertent production turns on case-specific factors, including: "'(1) the reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; (2) the volume of discovery versus the extent of the specific disclosure at issue; (3) the length of time taken by the producing party to rectify the disclosure; and (4) the overarching issue of fairness.'" *Harris v. Drake*, 152 Wn.2d 480, 495-96, 99 P.3d 872 (2004) (Alexander, C.J., dissent-

ing) (citation omitted).

***Minimizing Recipient Risk.*** Are there risks if you conclude on your own that privilege has been waived and use the documents without first litigating privilege waiver? The short answer is yes — and that's where the "rotten egg" potential comes in. *Richards* illustrates that potential. As noted earlier, *Richards* was not a true inadvertent production case, because the plaintiff's law firm received the privileged documents directly from its client when he left the defendant employer. Rather than notify its opponent, return the documents, and then litigate the privilege issue up front, the law firm simply used the documents in formulating its case strategy. When the defense found out, it moved to disqualify the plaintiff's law firm. The court agreed — holding that privilege had not been waived, and because there was no other way to "unring the bell" to erase the law firm's knowledge of the confidential information, disqualification was an appropriate sanction.

The Washington State Supreme Court in *Firestorm 1991* held that no privileged information was involved in the unauthorized contact at issue and, therefore, disqualification was not warranted on its facts. The Court cautioned, however, that "[o]ne situation requiring the drastic remedy of disqualification arises when counsel has access to privileged information of an opposing party." 129 Wn.2d at 140. Knitting *Richards* together with *Firestorm 1991* suggests that, if you decide for yourself that privilege has been waived and guess wrong, you may have your own "inadvertence" problem: You may have inadvertently disqualified yourself. In short, your gold nugget might turn into a rotten egg if you don't handle it with care.

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*Mark J. Fucile is a partner with Stoel Rives LLP, where he handles legal ethics, regulatory, and attorney-client privilege matters for lawyers, law firms, and legal departments throughout the Northwest. He is past chair of the WSBA Rules of Professional Conduct Committee and co-editor of the* WSBA Legal Ethics Deskbook, *and contributes this column quarterly to* Bar News.

OPPORTUNITIES FOR SERVICE

## WSBA Presidential Search

***Application deadline: May 15, 2005***

The WSBA Board of Governors is seeking applicants for the position of WSBA president for 2006-2007. Pursuant to Article IV (A)(2) of the WSBA Bylaws, the primary place of business of candidates for president for 2006-2007 must be King County. The WSBA member selected to be president will have an opportunity to provide a significant contribution to the legal profession.

Applications for 2006-2007 WSBA president will be accepted through May 15, 2005, and should be limited to a current résumé, a concise application letter stating interest and qualifications, and no fewer than five or more than 10 references. The Presidential Search Committee and the Board of Governors will consider endorsement letters received by May 31, 2005. Applications and endorsement letters should be sent to the WSBA Executive Director, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330.

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

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

The commitment begins in June 2005 following selection. A one-year term as president-elect will begin at the Annual Business Meeting in September 2005. The president-elect is expected to attend the two-day board meetings held approximately every five to six weeks, as well as numerous subcommittee, section, regional, national, and local meetings. In September 2006, at the WSBA Annual Business Meeting, the president-elect will assume the position as president. During his or her service, the president-elect and president will also be required to meet with members of the Bar, the courts, the media, and public and legal interest groups, as well as be involved in the Bar's legislative activities. Appropriate time will need to be devoted to communication by letter, e-mail, and telephone in connection with these responsibilities.

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

The Presidential Search Committee comprises Fawn Sharp, chair; Ronald R. Ward, president; S. Brooke Taylor, president-elect; Andrea Brenneke; Lonnie Davis; Randolph Gordon; and Katie O'Sullivan.

## ABA House of Delegates

***Application Deadline: May 13, 2005***

The WSBA Board of Governors is accepting letters of interest and résumés from members interested in serving on the ABA House of Delegates representing Washington state. There are three positions available (in August 2005). A written expression of interest and a résumé is required for any incumbents seeking reappointment.

The control and administration of the ABA is vested in the House of Delegates, the policymaking body of the ABA. The House, which has approximately 500 delegates, elects the ABA officers and board, and meets out of state twice a year. Delegate attendance is required. The WSBA's allowance is $800 per year per delegate. Members appointed to the House of Delegates serve a two-year term, which begins at the close of the annual meeting (August 2005).

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

## 2005 Board of Governors Election, and Candidates' Biographical Statements

On April 15, ballots were mailed to all active WSBA members eligible to vote for the 7th-East or 8th District governor. Returned ballots must be postmarked by May 16 in order to be counted. Board of Governors nomination forms for the 3rd, 6th, 7th-East, and 8th Congressional Districts have been received from Kristal Wiitala Knutson (3rd District) (unopposed); Salvador A. Mungia (6th District) (unopposed); Liza E. Burke, Terri Winters Malolepsy, Jonathan Newcomb, David A. Trieweiler, and Jeffrey M. Wolf (7th-East District); Robert J. Chicoine, E. Duane Golphenee, Douglas C. Lawrence, and Jeff Smyth (8th District). The governors-elect and candidates have provided the following biographical statements:

### 3rd District

**Kristal Wiitala Knutson**, governor-elect/3rd District, states: I am currently the DSHS public disclosure manager and previously a DSHS review judge. I have worked for other state agencies and in private practice, and am a graduate of WSU and UW Law School. I am currently the BOG liaison for the Government Lawyers Bar Association (GLBA) and have periodically observed BOG thrills and excitement over the past 25 years. I held a variety of positions, including president, in WWL, GLBA, and the National Association of Hearing Officials. Formerly a member of the WSBA Disciplinary Board and other WSBA committees, I now serve on the GLBA and Administrative Law Section Boards.

### 6th District

**Salvador A. Mungia**, governor-elect/6th District, states: I appreciate the opportunity to serve as a governor on the WSBA Board of Governors. Since becoming an attorney in 1984, I have been actively

involved with the Bar Association by, among other activities, serving as president of the TPCBA in 1999 and president of LAW Fund in 2002-2004. I have served on numerous bar association committees, including the TPCBA Editorial Board Committee for the past six years and I chaired the WSBA Bar Leadership Conference in 1999. I will use my energies to improve the legal profession to benefit lawyers and nonlawyers throughout the state.

### 7th–East District

**Liza E. Burke**, candidate/7th-East District, states: I am a Seattle native. After graduating from Roosevelt High School, I attended the University of Arizona on a swimming scholarship. I received my law degree from the University of Washington in 1993. At the UW, I was a founding member of the Filipino Law Students Association. Following my admission to the Bar in 1993, I became a public defender and served as a staff attorney in the juvenile, misdemeanor, and felony units. Currently, as a partner at Cohen & Ilaria, a private criminal defense firm in Seattle, I appear in municipal, district, and superior courts throughout Western Washington.

**Terri Winters Malolepsy**, candidate/7th-East District, states: I am an AAG in the Seattle SHS Division doing juvenile law litigation involving termination trials. In the 20 years I have worked for the AG's Office, I also practiced in the areas of adult protection, licensing, administrative law, mental health, and support enforcement. In my first career, I was a college teacher of costume and make-up design, theatre, and film. I have served on the WSBA's CLE Committee for three years and on the Mandatory CLE Board for six years. I have two grown children, three grandchildren, and am passionate about gardening in Seattle.

**Jonathan Newcomb**, candidate/7th-East District, states: I am a graduate of UW Law School, and have practiced criminal law for 16 years. The Board of Governors needs strong representation from the criminal section of the Bar and at present has none. I am especially concerned for new, criminal law, solo, and small firm practitioners. Bar bureaucracy, and consequently dues, have grown, hurting these practitioners hardest. This growth needs to be examined and curbed through greater efficiencies and cost consciousness while maintaining the needed quality services most used by the membership. Working with fellow governors, I will improve the practice of law for the benefit of all Bar members.

**David A. Trieweiler**, candidate/7th-East District, states: I graduated in 1984 from the University of Puget Sound Law School, *cum laude*. I was an associate editor of the UPS Law Review and a deputy prosecutor with the Pierce County Prosecutor's Office from 1983 to 1988. Currently, my practice is primarily criminal defense and personal injury. As a member of the Washington Association of Criminal Defense Attorneys I serve as co-chair of its Rules Committee. I have spent the past two years working with the Board of Governors and the WSBA Rules and Procedures Committee for the adoption of several Criminal Court Rules. I have enjoyed this process and would enjoy serving on the Board of Governors.

**Jeffrey M. Wolf**, candidate/7th-East District, states: I am a member at Williams, Kastner & Gibbs, PLLC. My experience includes several years both as an associate in a small firm and as a deputy prosecutor for Kitsap County. My involvement with the WSBA began in 1991, administering WYLD's Trial Advocacy Program. Since then, I have served on the Court Rules and Procedures Committee and Rules of Professional Conduct Committee. During the past two years, I have been actively involved in chairing WSBA education seminars. I look forward to the prospect of increasing my commitment to the Bar by serving the collective needs of its diverse membership and the public.

### 8th District

**Robert J. Chicoine**, candidate/8th District, states: I am a founder of Chicoine & Hallett, P.S., which focuses its practice on tax and business controversy. I was previously employed with the Office of Chief Counsel, U.S. Treasury Department. I am an adjunct faculty member at the School of Taxation, University of Washington School of Law; president of the Tax Section for the Washington State Bar Association; and have appeared successfully before the U.S. Supreme Court. I have served as a chairman, participant, or moderator of numerous ABA, WSBA, and UW seminars. I graduated from the University of California, Hastings College of Law.

**E. Duane Golphenee**, candidate/8th District, states: I received my BA in ac-

counting from Columbia College in 1981. I spent two years in public accounting and 12 more as a corporate controller and CFO before graduating law school, *cum laude*. I have served as a corporate officer and board member of several companies. My law practice is focused on providing start-up, succession, and estate planning services to entrepreneurs. I am also active in litigation within my practice area, and had the honor of representing the prevailing parties in what has become the leading case in Washington interpreting our state's Securities Act.

**Douglas C. Lawrence**, candidate/8th District, states: I am a shareholder with Stokes Lawrence, P.S. I am past chair of the WSBA and KCBA Real Property, Probate & Trust Sections. I have been actively involved with legislative matters, and am vice chair of the WSBA Legislative Committee. I received the WSBA Award of Merit for my work on TEDRA. I taught as an adjunct at Seattle University and the UW School of Law. I currently serve on the MS Society Board of Trustees (Greater Washington Chapter), and previously served on the Board of AtWork, an agency providing assistance to people with disabilities. I hope to serve as your representative on the Board of Governors.

**Jeff Smyth**, candidate/8th District, states: I have been engaged in the private practice of law since 1975. I have represented a broad variety of business clients in trials and arbitrations in several state and federal courts. I am a member of the American Board of Trial Advocates and a four-time Washington SuperLawyer. I served as a fee disputes arbitrator, as a member of the Editorial Advisory Board, and as a member of the Judicial Recommendation Committee for the Bar Association. I remember a far more collegial Bar Association and will prioritize a return to that state of affairs. I will do all I can to accomplish this.

## 2005 WSBA Award Nominations Sought

***Nomination deadline: May 6, 2005***

Each year, WSBA members are asked to identify those members of our profession and the public who deserve the legal profession's recognition and thanks. Nominations are sought for the following awards (the *Pro Bono* Award is not included in the list for this issue, because the deadline for nominations for this award was April 1):

- **Award of Merit.** First given in 1957, this is the WSBA's highest honor. The Award of Merit is most often given for long-term service to the Bar and/or the public, although it has also been presented in recognition of a single, extraordinary contribution or project. It is awarded to individuals only— both lawyers and nonlawyers.
- **Professionalism Award.** This honor is awarded to a WSBA member who exemplifies the spirit of professionalism in the practice of law. "Professionalism" is defined as the pursuit of a learned profession in the spirit of service to the public and in the sharing of values with other members of the profession.
- **Angelo Petruss Award for Lawyers in Public Service.** Named in honor of the late Angelo R. Petruss, a senior assistant attorney general who passed away during his term of service on the WSBA Board of Governors, this award is given to a lawyer in government service who has made a significant contribution to the legal profession, the justice system, and the public.
- **Outstanding Judge Award.** This award is presented for outstanding service to the bench and for special contribution to the legal profession at any level of the court.
- **Courageous Award.** This award is presented to a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession.
- **Excellence in Diversity Award.** This award is made to a lawyer, law firm, or law-related group that has made a significant contribution to diversity in the legal profession's employment of ethnic minorities, women, and disabled persons.
- **Outstanding Elected Official Award.** This award is presented to an elected official for outstanding service, with special contributions to the legal profession. It is awarded to an individual who has demonstrated a commitment to justice beyond the usual call of duty.
- **Excellence in Legal Journalism Award.** This award recognizes that describing the context, facts, and players involved in the legal system with fairness and sensitivity requires intelligence, knowledge, dedication, and skill. This award is given to the journalist and his/her organization that has set the standard for relevance, clarity, accuracy, and understanding in reporting.
- **Lifetime Service Award.** This is a special award given for a lifetime of service

to the WSBA and the public. It is given only when there is someone especially deserving of this recognition.

**Award Presentation:** It is important to note that presentation of any WSBA awards is made only when there are truly deserving recipients. Some years, no award is given in some categories. Awards are limited to one recipient per category, except when a group of individuals earned the award together.

**Nomination Submissions:** If you know an individual who fits the criteria set forth above, please visit www.wsba.org/barleadershomepage.htm, and complete and submit the nomination form. Self-nominations will not be accepted. Please note that the completed nomination form must accompany each nomination in order to be considered. Please send nominations to: WSBA, Attn: Annual Awards, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330, fax: 206-727-8319, e-mail: amyo@wsba.org.

The awards will be presented at the WSBA Annual Awards Dinner in Seattle on September 15, with the following exceptions: the *Pro Bono* Award will be presented at the Access to Justice Conference in Bellevue on June 4, and the Excellence in Legal Journalism Award will be presented at the Annual Bench-Bar-Press Conference in Fall 2005.

## MCLE Certification for Group 1 (2002-2004) Past Due

MCLE Reporting Group 1 members should have completed all required credits for the 2002-2004 reporting period by December 31, 2004. Members in Group 1 who were due to report include active members who were admitted to the WSBA in all years through 1975 or in 1991, 1994, 1997, or 2000.

The credit requirements for members who were active for all three years of the 2002-2004 reporting period are at least 45 total credits of WSBA-approved CLE activities, which must include a minimum of 30 live credits and a minimum of six ethics credits

If you were unable to complete the credit requirements by December 31, 2004 and were unable to take advantage of the automatic extension until May 1, 2005 granted by APR 11 to complete your credits (and pay the late fee), please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA, or questions@wsba.org to discuss options for becoming compliant with MCLE requirements.

## Senior Attorneys Discussion Group — A Matter of Connection

The group will be meeting on a quarterly basis in 2005. If you're interested in an early-September meeting, please contact Jenny Favell, Ph.D., LAP, 206-727-8267.

## Just released — The 2003-2004 Case Law Update: Bankruptcy Case Law Digest for Washington State (3d ed.)

WSBA-CLE Publications and the WSBA Creditor-Debtor Section proudly present the long-awaited 2003-2004 case law update to this valuable resource. This two-volume set with searchable CD contains summaries of bankruptcy cases (U.S. Supreme Court, 9th Circuit Court

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of Appeals, 9th Circuit BAP, 9th Circuit District Courts, and the Washington Bankruptcy Courts) from 1996 through 2004, with a linked topical index, case list, code, and rules. The Digest is published by the Creditor-Debtor Law Section and the Washington State Bar Association. To order, go to www.wsba.org/lawyers/groups/creditordebtor/bankruptcy_digest.htm or call the WSBA Service Center at 800-945-WSBA or 206-443-WSBA.

## 2005 Bar Leaders and Access to Justice Conference

The tenth annual Access to Justice Conference will be held in conjunction with the WSBA Bar Leaders Conference June 3-5, at the DoubleTree Hotel in Bellevue. Registration brochures were mailed in April. For more information or to receive a brochure, contact Sharlene Steele, 206-727-8262, sharlene@wsba.org (Access to Justice Conference); or Desiree Ogden, 206-733-5931, desireeo@wsba.org (Bar Leaders Conference). The brochures are also on the WSBA website at www.wsba.org.

## Job Seekers Discussion Group

Looking for a job or making a transition? Join the Job Seekers Discussion Group the second Wednesday of each month from noon to 1:30 p.m. The group discusses where to look for jobs, how to use your network of contacts, strategies for résumés and cover letters, and how to keep yourself organized and motivated. Exchange information and ideas with other lawyers looking to make a change. For more information, contact Rebecca Nerison, PhD., at 206-727-8269 or rebeccan@wsba.org.

## Upcoming Board of Governors Meetings

June 3 — Bellevue
July 29-30 — Bellingham
September 15-16 — Seattle

With the exception of a one-hour executive session the morning of the first day, Board of Governors meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Please contact Donna Sato at 206-727-8244 or donnas@wsba.org. The complete Board of Governors meeting schedule is available on the WSBA website at www.wsba.org/info/bog/schedule.htm.

## List Yourself in the Online ADR Provider Directory

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.adr-wa.com/directoryRegister-drPro.cfm.

## Computer Clinic

The WSBA offers a hands-on Computer Clinic for members wishing to learn more

about what Microsoft Office programs such as Outlook, PowerPoint, Excel, and Word, as well as Adobe Acrobat 6.0, can do for a lawyer. Are you a total beginner? No problem. Don't hesitate to try a clinic for help that you can use immediately in your practice. Computers are provided for your use, and seating is limited to 20 members. There is no charge, and no CLE credits are offered. The time is 10 a.m. to noon on Monday, May 9, at the WSBA. For more information, contact Pete Roberts at 206-727-8237 or peter@wsba.org.

## Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in April 2005 was 3.125 percent. The maximum allowable interest rate for May 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.

## Random Acts of Professionalism Program

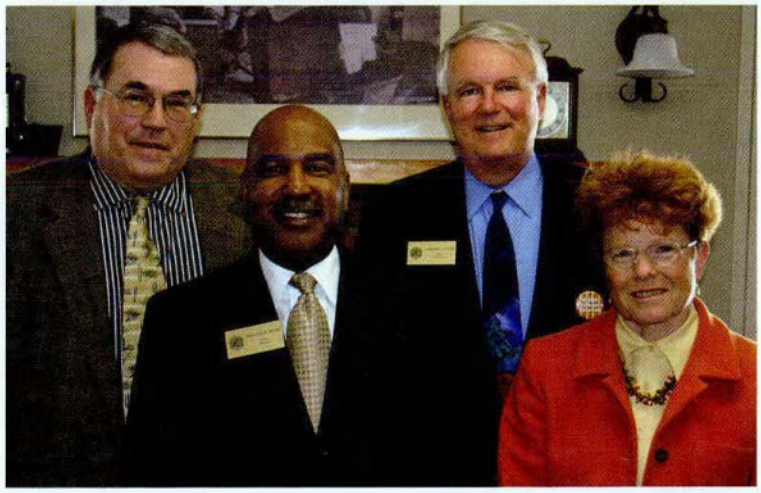
The WSBA Professionalism Committee has created a way for lawyers and judges to recognize their colleagues who have conducted themselves in a professional manner consistent with the Creed of Professionalism. Through the Random Acts of Professionalism Program, lawyers and judges may nominate their colleagues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

## Learn More about Case-Management Software

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

## WSBA Officers Visit Pend Oreille and Stevens Counties

WSBA President Ron Ward, President-elect S. Brooke Taylor, and Executive Director Jan Michels visited Pend Oreille and Stevens Counties on March 30. In Newport, they met with the County Extension and heard about their model program "Children Coping with Divorce." In Stevens County, they toured the courthouse, and met the tri-county judicial district judges, Rebecca Baker and Larry Kristianson, and county clerk Patty Chester. The tri-counties have developed a Rural Resource Service umbrella which houses the NE Washington Legal Aid Program. Dinner was shared with Pend Oreille Bar President Doug Lambarth, Ferry County Bar President Alex Wirt, Stevens County Bar President Bruce Pruitt-Hamm, all the superior and district court judges in the three counties, and many members from the area. The three county bars passed a joint resolution in support of federal funding of Community Development Block Grants, which represents over half of the funding for the NE Legal Aid Program. WSBA President Ron Ward committed to carrying that message to Washington's congressional delegation when he meets with them in May.



From left to right: Pend Oreille Bar President Doug Lambarth, WSBA President Ron Ward, President-elect S. Brooke Taylor, and Executive Director Jan Michels.

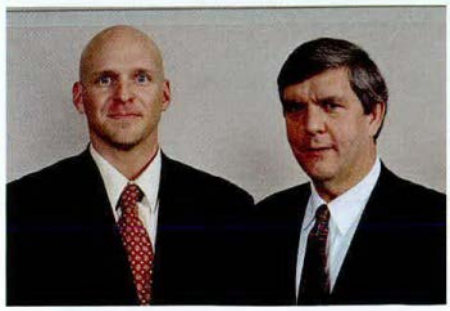
## S. Brooke Taylor and Noah Davis Attend ABA's Bar Leadership Institute

Joining some 300 other emerging leaders of lawyer organizations from across the country at the American Bar Association's Bar Leadership Institute (BLI), March 10-12 were S. Brooke Taylor, WSBA president-elect, and Noah C. Davis, president-elect of the WSBA Young Lawyers Division.

The BLI is held annually in Chicago for incoming officials of local and state bars, special focus lawyer associations, and bar foundations. The seminar provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff, and other experts on the operation of such organizations.

Taylor and Davis joined ABA President Robert J. Grey Jr. and ABA President-elect Michael S. Greco in sessions on bar governance, finance, communications, and planning.

WSBA President-elect S. Brooke Taylor (right) with ABA President Robert J. Grey Jr.



WYLD President-elect Noah C. Davis (left) with ABA President-elect Michael S. Greco.

**Peter E. Hapke**
announces the opening of the

## HAPKE LAW OFFICE PLLC

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Seattle, WA 98154
Telephone: 206-224-6245
Fax: 206-260-7035
E-mail: peter@hapkelaw.com

Peter focuses his practice on environmental, natural resources, and health and safety law through counseling, permitting, and litigation. He is available for referral, consultation, and association.

## WILSON SMITH COCHRAN DICKERSON

is pleased to announce that

**Shilpa Bhatia**

has become a Director of the firm

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1700 Financial Center
1215 4th Avenue
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206-623-4100

The lawyers and staff of

## LARSON HART & SHEPHERD, PLLC

are pleased to welcome the firm's newest partner,

**Christopher L. Thayer**

Chris has been with Larson Hart & Shepherd since 1998, and will continue to practice in the following areas of law:

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- Real Estate — Transactions and Litigation
- Personal Injury/Medical Malpractice/ Product Liability
- Estate Planning

"I have enjoyed working with a great group of lawyers at Larson Hart & Shepherd for the past several years, and I am excited about officially joining the firm as a member. As an attorney, I see my role as a problem solver, and look forward to the continuing opportunity to provide assistance to my clients."
— Chris Thayer —

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Kenneth W. Hart
Mark B. Shepherd
Susan M. Johnson
Christopher L. Thayer
E. Ross Farr
Robert A. Zielke, of counsel

To congratulate Chris, you may e-mail him at:
cthayer@L-H-S.com

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**Lisa Abram-Kolodenko,**
**Darrin Bailey,**
**Karen Cobb,** and
**Stephanie Grassia**

to the firm.

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## Ben Shafton

on his induction as a
Fellow of the American College of Trial Lawyers.

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900 Washington, Suite 1000
Vancouver, WA 98660
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## SEATTLE DIVORCE SERVICES

proudly announces that

**Jennie Laird**

has joined

**Michael Fancher** and **Christine Mayoue**

at Seattle Divorce Services as an associate.

Ms. Laird joins Seattle Divorce Services as a Family Law attorney. Ms. Laird has most recently been a Staff Attorney with Columbia Legal Services' King County Office, focusing on contested custody cases involving allegations of domestic violence and child abuse.

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## WECHSLER BECKER, LLP

is pleased to announce the addition of two family law associates to its office,

**Elizabeth Leary**
and
**Brook Goddard.**

Ms. Leary received her J.D. from Georgia State University in 2004, and her B.A. from the University of Washington in 2000. Mr. Goddard previously worked in the civil division of the Snohomish County Prosecuting Attorney's Office, and served, from 2001 to 2003, as a law clerk for the Honorable Faye C. Kennedy of the Washington State Cout of Appeals, Division I. He earned his J.D. from Tulane University in 2001, and his B.A. from the University of Washington in 1996.

**WECHSLER BECKER, LLP**
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## MONTGOMERY PURDUE BLANKINSHIP & AUSTIN PLLC

takes pleasure in announcing that

**Sandy K. Lee**

**Ryan L. Montgomery**

and

**Benjamin I. VandenBerghe**

have joined the firm as associates.

**MONTGOMERY PURDUE BLANKINSHIP & AUSTIN PLLC**
55th Floor, Bank of America Tower
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Seattle, WA 98104-7096
206-682-7090

## OLES MORRISON RINKER & BAKER LLP

is pleased to announce that

**Elizabeth A.C. Thompson**

has joined the firm as an Associate.

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*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.*

***Note:** Nearly 29,000 persons are eligible to practice law in Washington state. Some of them share the same or similar names.* Bar News *strives to include a clarification whenever an attorney listed in the Disciplinary Notices has the same name as one or more other WSBA members; however, all discipline reports should be read carefully for names, cities, and bar numbers.*

## Suspended

**Theodore P. Hunter** (WSBA No. 8453, admitted 1978), of Seattle, was suspended for six months, effective December 22, 2004, by order of the Washington State Supreme Court following a hearing. This discipline was based on his conduct between 1996 and 1999 involving conflicts of interest.

In 1982, Mr. Hunter incorporated PEI, a nonprofit corporation and tax-exempt organization. PEI's purpose is to promote use of renewable resources and encourage the efficient use of limited resources. During time periods pertinent to the disciplinary proceeding, Mr. Hunter served as a member of the PEI Board, its president, its registered agent, and as a lawyer for the organization, providing his legal services at a reduced rate in exchange for office space. Starting in 1995, Mr. Hunter served in the combined offices of president, treasurer, and "Executive Committee." The PEI Board, which typically met once a year, consisted of Mr. Hunter's friends and business acquaintances. For these reasons, a great deal of PEI's corporate power was concentrated in Mr. Hunter himself.

***Matter 1:*** Between 1996 and 1998, Mr. Hunter leased two or three computers to PEI. The lease payments were invoiced to PEI on Mr. Hunter's bills for professional services. When the leases terminated, PEI purchased the computers for $1. Mr. Hunter did not provide the leases or his invoices to the PEI Board, did not fully disclose and transmit in writing the terms of the leases to the PEI Board, did not provide PEI with the opportunity to seek the advice of independent counsel in connection with the transactions, and did not obtain the PEI Board's prior written consent to the leases. Although PEI was not actually harmed by its lease of computers from Mr. Hunter, there was potential injury in that the unreviewed lease terms could have enriched Mr. Hunter at PEI's expense.

***Matter 2:*** In 1997, Mr. Hunter was looking for a waterfront residence as a second home. In February 1997, Mr. Hunter entered into an agreement for the purchase of a waterfront home on Lake Leland in Jefferson County (Parcel 1). Subsequently, the sellers of Parcel 1 imposed an easement providing pedestrian access to the lake in favor of two nearby parcels (Parcels 2 and 3) owned by other members of the sellers' family. When Mr. Hunter discovered this, he amended his agreement to purchase Parcel 1 so that it was contingent on the availability of Parcels 2 and 3 "at a reasonable price." Subsequently, on behalf of PEI, Mr. Hunter signed agreements to purchase Parcels 2 and 3 for $15,000 per parcel. For each agreement PEI issued a $300 check as earnest money. Mr. Hunter thereafter learned that Parcel 2 contained the well that provided water to the house he was purchasing on Parcel 1.

The transactions simultaneously closed in June 1997, with PEI taking title to Parcels 2 and 3. Immediately thereafter Mr. Hunter signed a quit-claim deed for PEI transferring Parcel 2 to himself. Mr. Hunter paid $14,892.06 to close the purchase of Parcel 2, but he did not reimburse PEI for the $300 PEI had paid as earnest money.

Although, prior to the closing of the purchases, a PEI employee had voiced concerns about the PEI purchases, Mr. Hunter did not, prior to closing, consult with the PEI Board about the acquisitions, provide the Board with full disclosure regarding the material facts of the purchases, or obtain the prior written consent of the PEI Board.

***Matter 3:*** In 1998, an individual inquired into Mr. Hunter's interest in purchasing a 15-acre parcel of property near Parcels 2 and 3. The prospective seller subsequently subdivided the 15-acre parcel into two 7.5-acre lots. Meanwhile, a PEI employee learned that Mr. Hunter intended to add to PEI's land holding at Lake Leland and requested that Mr. Hunter schedule a board meeting to address the proposed purchase. Mr. Hunter declined to do so. The owner of the two lots offered to sell both for $85,000. Mr. Hunter had PEI purchase one of the lots for $50,000, while Mr. Hunter purchased the other for $35,000. A limited pre-sale appraisal that had been obtained by the seller indicated that both parcels had the same value, and a subsequent tax assessment valued the parcels identically. In purchasing the property and allocating the $50,000 purchase price to PEI, Mr. Hunter did not, prior to the closing of the purchase, fully disclose the material facts to the PEI Board, consult with the PEI Board, or obtain the PEI Board's prior written consent.

Mr. Hunter's conduct violated RPC 1.7(b), prohibiting a lawyer from representing a client if the representation may be materially limited by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after a full disclosure; and RPC 1.8(a), 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 and its terms are fair and reasonable and fully disclosed and transmitted in writing to the client, the client is given opportunity to seek the advice of independent counsel, and the client consents.

Linda B. Eide and Nancy Bickford Miller represented the Bar Association. Leland G. Ripley represented Mr. Hunter at the hearing, and Michael

R. Caryl represented Mr. Hunter on appeal. Randolph I. Gordon was the hearing officer.

## Suspended

**Oleg Ordinartsev** (WSBA No. 27574, admitted 1997), of Bothell, was suspended for two years, effective November 29, 2004, by order of the Washington State Supreme Court following a stipulation approved by the Disciplinary Board. This discipline was based on his conduct between 2001 and 2003 involving a number of conflicts of interest, the improper disbursement of client funds, improperly attempting to settle a claim for malpractice liability with an unrepresented client, and the inclusion of a false statement in a promissory note.

Prior to 2001, Mr. Ordinartsev represented Client A in a number of matters. In October 2001, Mr. Ordinartsev began representing Client B in connection with a caviar production and distribution business known as the "caviar project," which involved several corporate entities. Shortly thereafter, Mr. Ordinartsev stopped taking new clients and commenced work as legal counsel for the caviar project, though he retained some of his existing clients, including Client A.

Meanwhile, Mr. Ordinartsev began to discuss the possibility of Client A investing in the caviar project. Mr. Ordinartsev failed to fully advise Client A of all the conflicts inhering in his advice to invest in the business of another client (including the fact that the business employed Mr. Ordinartsev). Mr. Ordinartsev did not obtain written waivers of the conflict from either client.

In March 2002, Client A gave Mr. Ordinartsev $65,000 to invest in the caviar project, expecting to receive stock in one of the caviar project's corporations. Mr. Ordinartsev deposited the funds into his trust account. Mr. Ordinartsev subsequently disbursed $20,000 to Client B, $20,000 to himself for legal services related to the caviar project, and $25,000 to one of the project's corporate entities. At the time, Mr. Ordinartsev knew that this use of the funds was inconsistent with the expectations of Client A. Mr. Ordinartsev failed to provide adequate documentation or obtain any security in connection with his use of the funds.

A number of corporate permutations ensued in connection with the caviar project, during which Mr. Ordinartsev acquired an ownership interest in one of the entities. During this period, Mr. Ordinartsev showcased for Client A the project's production plant in an attempt to assuage Client A's concerns about the investment. He also unsuccessfully endeavored to obtain from Client B a corporate resolution from the then operational corporate entity acknowledging that Client A had made a $55,000 capital contribution.

Subsequently, pursuant to Client A's demand, Mr. Ordinartsev prepared a promissory note for the repayment of the money. In the note, Mr. Ordinartsev also agreed to pursue legal action against Client B to recover the money. The note also falsely stated that Mr. Ordinartsev did not personally benefit from his disbursal of Clients A's funds.

Client A later rejected Mr. Ordinartsev's promissory note and instead sought Mr. Ordinartsev's ownership interest in the caviar project. Mr. Ordinartsev agreed to transfer his interest to Client A, and he drafted a settlement agreement to this effect. The agreement included a provision in which Client A abandoned any and all claims against Mr. Ordinartsev. Mr. Ordinartsev failed to advise Client A to consult with independent counsel about the agreement.

Mr. Ordinartsev's conduct violated RPC 1.1, requiring a lawyer to provide competent representation to a client; RPC 1.2, requiring a lawyer to abide by a client's decisions concerning the objective of representation; RPC 1.3, requiring a lawyer to act with reasonable diligence in representing a client; RPC 1.7(a) and (b), prohibiting a lawyer from representing a client if the representation of that client will be directly adverse to another client, or if the representation may be materially limited by the lawyer's responsibilities to another client or the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after a full disclosure; RPC 1.8(h), which prohibits a lawyer from settling a claim for malpractice with an unrepresented client without first advising that person in writing that independent representation is appropriate; RPC 8.4(a), prohibiting attempts to violate the RPCs (here, by means of violating RPC 1.9, prohibiting undertaking a representation in conflict with the interests for a former client); and RPC 8.4(c), prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation.

Jean K. McElroy represented the Bar Association. Mr. Ordinartsev represented himself.

## Suspended

**Mark A. Panitch** (WSBA No. 12393, admitted 1982), of Seattle, was suspended for 135 days, effective December 21, 2004, by order of the Washington State Supreme Court following a stipulation approved by the Disciplinary Board. This discipline was based on his conduct in 2001 and 2002 involving lack of diligence, lack of communication with clients, failure to expedite litigation, failure to return client paperwork and to refund unearned fees at the conclusion of a representation, and failure to deposit client funds into a trust account.

***Matter 1:*** In 2002, a client hired Mr. Panitch to represent him in a pending federal action. The client paid Mr. Panitch $2,500 as an advance fee deposit for hourly work to be performed during the representation. Mr. Panitch deposited the check into his business checking account. In April 2002, the client flew to Seattle from Arizona for a scheduled meeting with Mr. Panitch. Mr. Panitch did not keep the appointment.

In June 2002, the court entered an order granting the client's motion to vacate an earlier default. Accordingly, the client was obliged to file an answer. In June 2002, the plaintiff notified Mr. Panitch by letter that, owing to the absence of an answer, it intended to move for a default order. Mr. Panitch did not respond to the letter. On July 9, 2002,

the plaintiff moved for a default order. Shortly thereafter, by e-mail, the client's former lawyer advised Mr. Panitch to file an answer. The client's lawyer also sent the message to Mr. Panitch via fax, in which he advised Mr. Panitch to contact the client. Mr. Panitch did not respond.

On July 12, 2002, the client hired another lawyer, who filed the answer. Commencing on July 13, 2002, the client and his new lawyer made repeated efforts to contact Mr. Panitch to obtain the client's file. Mr. Panitch did not respond to these overtures. In late August 2002, the client's new lawyer warned Mr. Panitch that if the file was not delivered, he would file a grievance with the Bar Association. On August 28, 2002, Mr. Panitch replied that the file was available for retrieval. The new lawyer picked up the file on September 9, 2002. Although Mr. Panitch had performed only $1,000 worth of services, he never refunded any part of the $2,500 advance fee.

***Matter 2:*** In March 2001, Mr. Panitch entered an appearance on behalf of a client in a pending personal-injury lawsuit. After filing a notice of appearance in March 2001 and a confirmation of joinder in April 2001, Mr. Panitch filed no other documents in the case. The client informed her former lawyer that Mr. Panitch was not involved in the case, and asked him to fire Mr. Panitch. In November 2001, the former lawyer met with Mr. Panitch, informed him that the client was dissatisfied, and notified him that the client wanted Mr. Panitch to return the file. Mr. Panitch told the former lawyer that he would discuss the situation with the client and address her concerns. He did not, however, communicate with her promptly.

In January 2002, opposing counsel noted the client's deposition for January 22, the date of the discovery cutoff. By letter, Mr. Panitch notified opposing counsel that he voluntarily waived the discovery cutoff, thereby allowing opposing counsel to reset the deposition for January 24. Mr. Panitch did not communicate with the client about this course of action; he waived the discovery cutoff because of a personal scheduling conflict. On January 22, 2002, Mr. Panitch telephoned the client and asked her to appear for the January 24 deposition. During the conversation, the client informed Mr. Panitch that he was fired. Although the client had not authorized Mr. Panitch to communicate further with opposing counsel, Mr. Panitch assured opposing counsel by letter that there was an agreement waiving the discovery cutoff, and that if the client's new lawyer attempted to resist a deposition and assert the discovery cutoff, Mr. Panitch would support the opposing lawyer's right to take the deposition.

Mr. Panitch's conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence in representing a client; RPC 1.4, requiring a lawyer to keep the client reasonably informed about the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions; RPC 1.5(a), requiring that a lawyer's fee be reasonable; RPC 1.14(a), requiring all funds of clients paid to a lawyer to be deposited in an interest-bearing trust account; RPC 1.15(d), requiring that a lawyer take reasonably practicable steps to protect a client's interests upon termination of representation (including refunding any advance payment of fee that has not been earned and surrendering papers and property to which the client is entitled); and RPC 3.2, requiring a lawyer to make reasonable efforts to expedite litigation consistent with the interest of the client.

Anthony L. Butler represented the Bar Association. Leland G. Ripley represented Mr. Panitch. Robert C. Bibb was the hearing officer.

## Suspended

**John D. Schumacher** (WSBA No. 5348, admitted 1973), of Montesano, was suspended for 60 days, effective December 6, 2004, by order of the Washington State Supreme Court following a stipulation approved by the Disciplinary Board. This discipline was based on his conduct in 2001 and 2002 involving acquisition of a security interest adverse to a client without full disclosure, withdrawal from a matter without adequate notice, and service of a motion for default on parties who had not been served with the summons and complaint. *(Mr. Schumacher is to be distinguished from John W. Schumacher of Shelton.)*

***Matter 1:*** While representing a client in a dissolution matter in 2001, in order to secure his fee, Mr. Schumacher obtained from the client and recorded a $20,000 mortgage on the family residence. Other than the loan instruments themselves, Mr. Schumacher did not provide any written disclosure to the client about the transaction. Shortly before a hearing in the dissolution matter, following a meeting at the courthouse, Mr. Schumacher advised the client that he would stop representing her; he then left the courthouse before the hearing began. Mr. Schumacher provided no further legal services to the client. The client later signed a quitclaim deed to Mr. Schumacher for the residence subject to the $20,000 mortgage, shortly before a lender foreclosure was scheduled to occur.

***Matter 2:*** Mr. Schumacher represented plaintiffs in a matter involving approximately 98 defendants. He filed a motion and declaration for default directed to a number of the defendants. The declaration averred that the defendants had been served with copies of the summons and complaint but had not filed or served answers within the time provided by law. It further averred that the defendants were not in the armed forces of the United States of America. When Mr. Schumacher signed the declaration, 11 of the defendants had not been served with the summons and complaint, and one of the defendants was on active duty in the armed forces. Although Mr. Schumacher's assistant ordinarily kept track of matters relating to service and had prepared the declaration, Mr. Schumacher noticed that mistakes had been made, but he signed the declaration anyway.

Mr. Schumacher's conduct violated RPC 1.8(a), 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 and its terms are fair and reasonable and fully disclosed and transmitted in writing to the client, the client is given opportunity to seek the advice of independent counsel, and the client consents; RPC 1.15(b), permitting a lawyer to withdraw from representing a client only in defined circumstances or if the withdrawal can be accomplished without material adverse effect on the interests of the client; RPC 1.15(d), requiring, upon termination of representation, that a lawyer take steps to the extent reasonably practicable to protect a client's interests; RPC 3.4(c), prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; and RPC 8.4(d), prohibiting a lawyer from engaging in conduct prejudicial to the administration of justice.

Linda B. Eide and Nancy Bickford Miller represented the Bar Association. Kurt M. Bulmer and Curtis M. Janhunen represented Mr. Schumacher. David K. Hiscock was the hearing officer.

### Reprimanded

**W. Russell Van Camp** (WSBA No. 5385, admitted 1973), of Spokane, was ordered to receive a reprimand, effective September 9, 2004, following a hearing. This discipline was based on his conduct in 1996 involving failure to sufficiently explain the terms of a fee agreement to a client and removal of funds from his trust account as fees before they were earned.

In June 1996, a client hired Mr. Van Camp to handle a medical malpractice case against a Spokane physician. The client signed a contingent fee agreement and paid Mr. Van Camp $1,000. This sum, characterized in the fee agreement as an "earned retainer fee," was an advance payment for attorney fees and costs to be incurred in conducting an initial investigation into the viability of the claim. Mr. Van Camp did not adequately explain the nature of the "earned retainer fee" to the client, who did not fully understand the purpose of the payment.

Promptly after the $1,000 was deposited into Mr. Van Camp's trust account, Mr. Van Camp disbursed $35 to pay for medical records and $900 to himself as a fee. At that point, the fee had not yet been earned. Over the course of the next several months, the client advanced additional sums to pay for the costs of obtaining medical records and review of the case by a medical expert. The expert, a local medical practitioner, opined that he could find no evidence of medical malpractice. For this reason, Mr. Van Camp advised the client not to invest further in the case without seeking the opinion of an out-of-state medical expert.

In March 1997, at the client's behest, Mr. Van Camp filed a complaint against the Spokane physician; because the statute of limitations would shortly run, this was a precautionary filing to permit the client to decide whether to proceed. Ultimately, the client elected not to proceed and asked Mr. Van Camp to drop the lawsuit. Mr. Van Camp refunded the balance remaining in his trust account and instructed an associate to obtain a dismissal. In August 1997, an agreed order of dismissal was entered.

Mr. Van Camp's conduct violated RPC 1.4(b), requiring a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; and RPC 1.14(a), requiring all funds of clients paid to a lawyer to be deposited in an interest-bearing trust account.

Jean K. McElroy represented the Bar Association. F. Lawrence Taylor Jr. represented Mr. Van Camp. Diehl R. Rettig was the hearing officer.

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### Nondisciplinary Notices

**Suspended Pending Outcome of Disciplinary Proceedings**

**Donna J. Light** (WSBA No. 22465, admitted 1993), of Renton, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.2, effective March 17, 2005, by an order of the Washington State Supreme Court. This is not a disciplinary action.

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# Calendar

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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

**The 2005 Business Law Section Midyear**
May 20 — Seattle. 6 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

**Drafting Key Business Documents**
June 8 — Vancouver. June 15 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

## Construction Law

**Construction Law Midyear: Big Projects, Big Problems**
June 17 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

## Employment Law

**Investigating and Litigating an Employment Discrimination/ Harassment Case**
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**Workers' Compensation**
June 10 — Seattle. CLE credits pending. By WSTLA; 206-464-1011.

## Environmental and Land Use Law

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## Estate Planning

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**The 2005 Real Property, Probate and Trust Section Midyear**
June 10-12 — Spokane. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

## Ethics

**Global Ethics and Corporate Compliance Strategies: How to Implement Systems that Work — A Structured Dialogue (with short case study)**
May 12 — Seattle. 2 CLE ethics credits. By Baker & McKenzie; 800-543-4446, ext. 2530.

## Family Law

**The Lawyers' Toolbox: Family Law**
June 7 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

**2005 Family Law Section Midyear**
June 24-26 — Ocean Shores. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

## General

**March-in Rights and Other Issues in Federally Funded Research**
May 10 — Seattle. 1 CLE credit. By University of Washington School of Law's Shidler Center for Law, Commerce and Technology; 206-543-0059.

## Law Office Management

**Practical Business Management for Attorneys and Legal Administrators**
May 19 — Seattle. 6 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

**LOMAP . . . On the Road, The 2005 Traveling Seminar**
May 5 — Spokane
May 18 — Seattle
May 24 — Tacoma
June 21 — Sequim
June 22 — Silverdale
June 23 — Port Orchard
4 CLE credits, including 2 ethics. By WSBA Law Office Management Assistance Program; 800-945-WSBA or 206-443-WSBA.

## Litigation

**Suing and Defending Professionals**
May 4 — Seattle. 5.25 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

**Attorney Fees — It Ain't All About the Money**
May 12 — Seattle. 6.5 CLE credits, including 1.5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

**Damages Essentials**
May 19 — Seattle. CLE credits pending. By WSTLA; 206-464-1011.

**Defending Medical Claims and Allegations of Malpractice**
May 20 — Seattle. CLE credits pending. By Washington Defense Trial Lawyers; 206-749-0319.

**Torts and Contract Damages**
May 25 — Seattle. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

**Bankruptcy and Its Effect on the Defense of Your Case**
June 1—Portland. CLE credits pending. By Washington Defense Trial Lawyers; 206-749-0319.

**Litigation Section Midyear**
June 24-25 — Chelan. 6.75 CLE credits, including 1 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

## Real Property

**Advising Condominium and Homeowner Associations**
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**The Lawyers' Toolbox: Residential Real Estate**
June 21 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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**Seeking information** regarding a Last Will and Testament for Ted Thomas Taylor, Seattle, Washington, deceased. Please contact Ruth Ann at Amicus Law Group 206-624-9410.

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# The lighter side of the law

BY GUEST EDITOR JANET SKREEN

Somber. Dignified. August. Solemn. Those are the adjectives normally used to describe a courtroom. But each day in courtrooms across the state, laughter is heard amidst the weighty legal arguments. And the laughter isn't only from the lawyer jokes we've all heard.

We've all been in stressful situations that have been eased by humor. Sometimes the humor is intentional; sometimes, though not intentional, a remark is all the more funny because of the circumstances. This collection of amusing courtroom anecdotes came from across the state. We're grateful to those whose utterances eased the tension, and allowed us all to be humans when we sometimes found ourselves in places we'd rather not be.

The law is serious business, and our profession prides itself in addressing the serious problems of our clients. But, thankfully, occasionally we can smile at our own foibles, and enjoy the lighter moments of our calling.

Consider these anecdotes as evidence of the lighter side of family law:

A father, testifying in a temporary parenting plan hearing, verified that his wife historically did most of the parenting: "She did about 85 percent of the parenting. I did the other 30 percent."

In a child dependency case the mother, who had inconsistent success following the case plan, testified: "I've had to jump through loopholes."

A husband complained about the request that he pay his wife's "exuberant" attorney fees.

The woman presented her proposed final dissolution documents. It had been a short marriage, with no real property, no kids. Default. Very simple. In the paragraph regarding name changes, she had marked the boxes and filled in the blanks as follows:

[X] Wife's name shall be changed to Smith

[X] Husband's name shall be changed to S--t Head.

Husband's name change denied: she hadn't asked for his name change in the petition so the judge couldn't grant her request.

Different woman, same situation. The requested name change this time: "The Luckiest Man in the World." Denied for the same reason.

From a declaration in support of a request for spousal maintenance: "I can no longer work because I have carpal tunnel vision."

Levity is also found in criminal and civil proceedings:

In a marijuana case, the subject plant was seen well inside the living room of a house that was surrounded by a large, wide porch and a fence enclosure around the yard. The police report included this statement: "While on routine patrol on the Defendant's front porch, I observed . . . ."

The judge told the 18-year-old drug court participant she didn't appreciate his cavalier attitude. He looked confused, so the judge asked, "Do you know what cavalier means?" He said, "Yeah, it's a car. A Chevy."

Judge: "Why do you need an order of protection?"

Petitioner: "Because Mr. Smith attacked me."

Judge: "Why did he attack you?"

Petitioner: "Because I took part of his dog."

How about the defendant who complained about his lawyer, the "public pretender," or the one who took the "fifth commandment" on the witness stand?

Counsel: "Well Mr. Smith, when did you and Mr. Jones consummate the deal?" Mr. Smith: "Well, I liked the guy, but not that much!"

The judge instructs the jury: "Your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion . . . ." The judge goes on to discuss the role of the presiding juror, the qualities jurors should look for in making a wise selection, and alternate ways for making the selection. The jury begins to deliberate and immediately has this question for the bailiff: "Can you tell us when we're supposed to pick a foreman of the jury? The judge forgot to tell us."

And then there are the classic one-liners:

"I was mostly born in Spokane."

"My girlfriend is almost pregnant."

"It certainly raised some eyeballs."

"I was pretty incarcerated."

"She's more or less my fiancée."

"He was a little bit small for his size."

"As far as men go, he's a good father."

"You have to commit suicide to get in."

"My client is incredibly believable, Your Honor."

"This year, Christmas falls on December 25th."

"I left my briefcase in Idaho."

"Your Honor, I will be glad to urinate for you any time."

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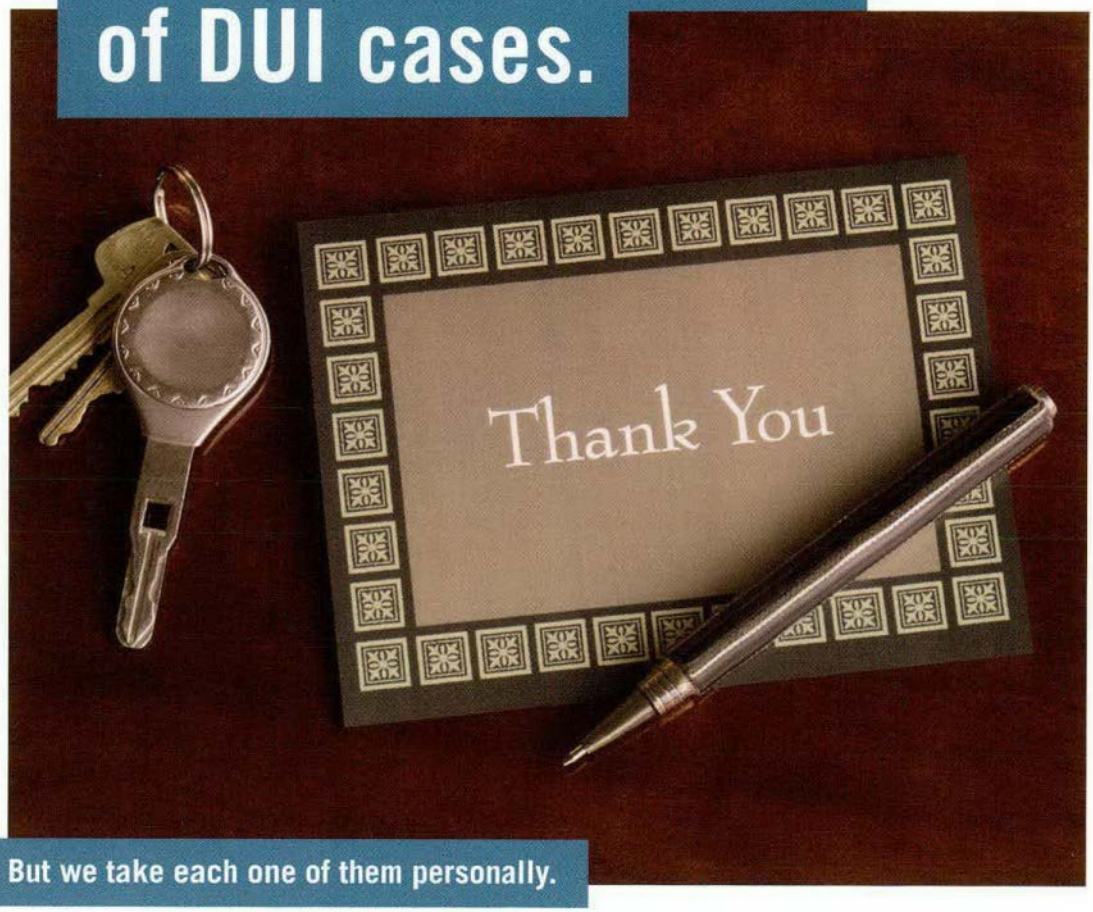
*WSBA member Janet Skreen is a former Kitsap County Becca court commissioner and courthouse facilitator. She is currently senior court program analyst in the Administrative Office of the Courts.*

# We've successfully defended hundreds of DUI cases.




**But we take each one of them personally.**

At Fox Bowman Duarte, our whole firm is dedicated to DUI defense. That's what we do; it's the only thing we do; and we're good at it. Altogether, our six lawyers have over 75 years of DUI litigation experience. We've also published extensively about the complex nature of DUI law. If you'd like to know more, call us. We'll help keep your clients on the road to success.

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