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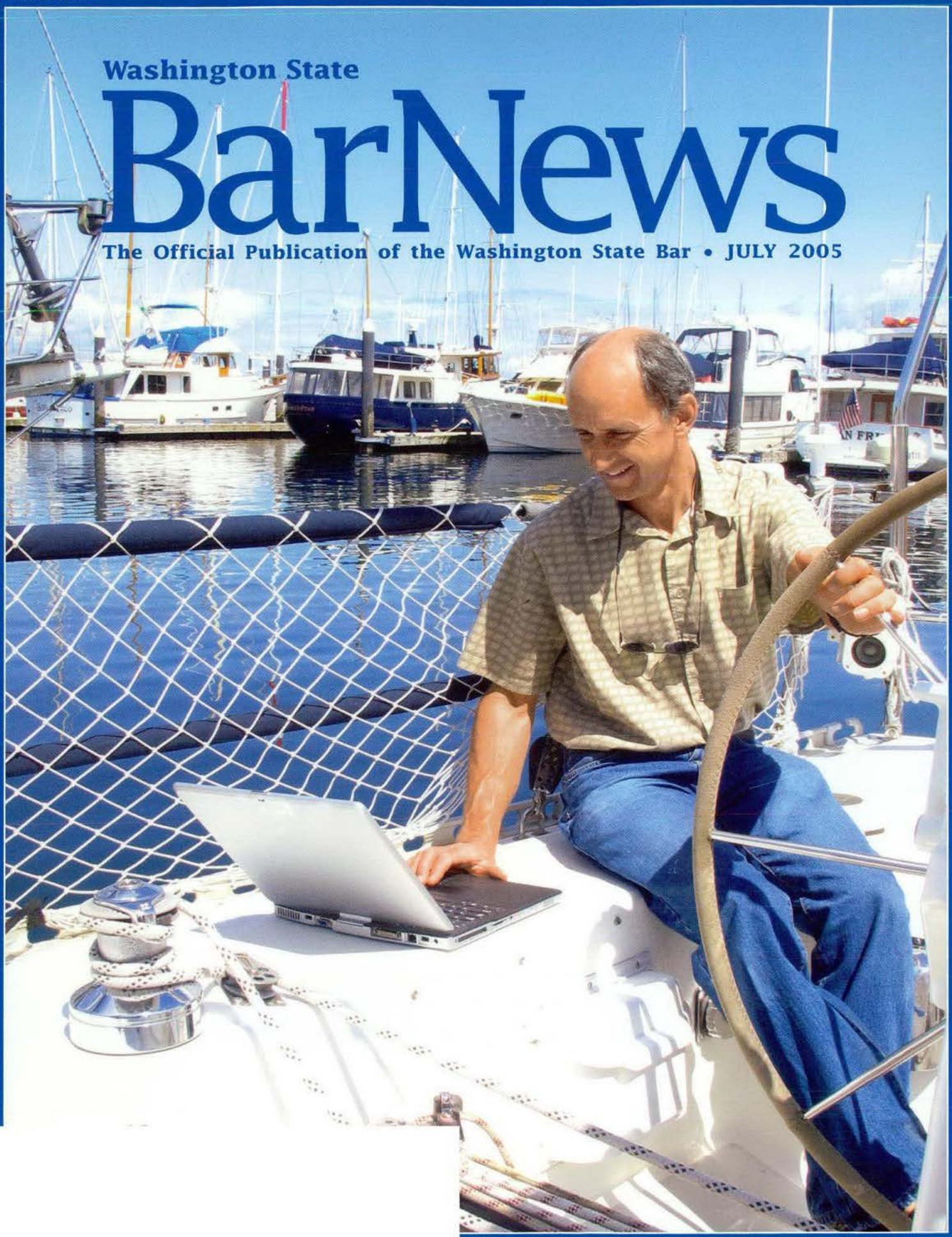

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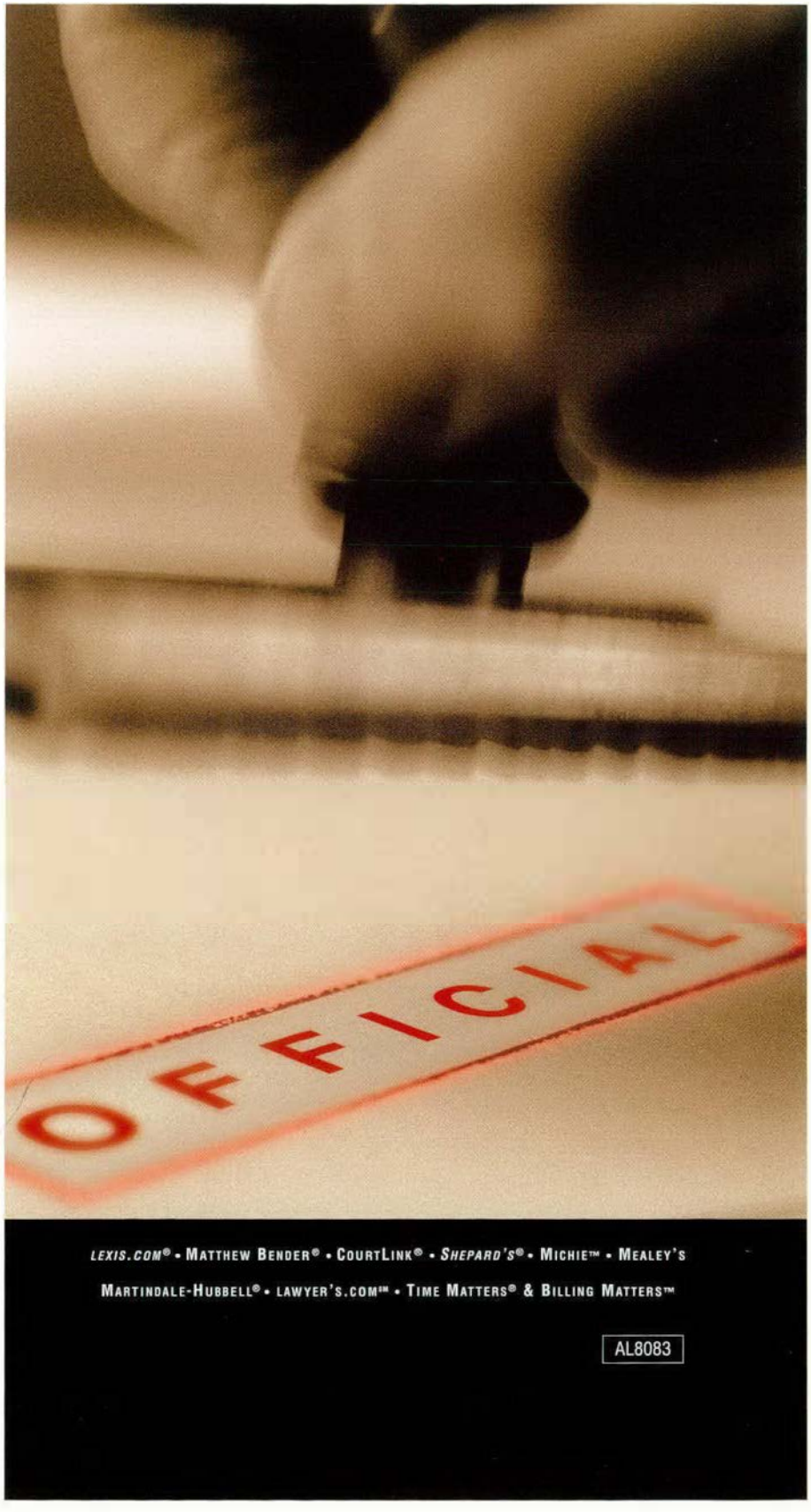

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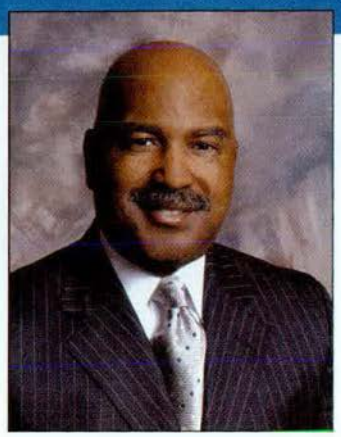

Attacks on the Judiciary — Living in Bizarro World

A Call to Action to Render the Service of Maintaining the Judiciary as a Separate, Independent, Coequal Third Branch of Government

by Ron Ward, WSBA President

The Demogogic Din, Hue, and Cry

Federal judges are a more serious threat to America than Al Qaeda and the Sept. 11 terrorists, the Rev. Pat Robertson claimed yesterday.

"Over 100 years, I think the gradual erosion of the consensus that's held our country together is probably more serious than a few bearded terrorists who fly into buildings," Robertson said on ABC's "This Week with George Stephanopoulos."

"I think we have controlled Al Qaeda," the 700 Club host said, but warned of "erosion at home" and said judges were creating a "tyranny of oligarchy."

Confronted by Stephanopoulos on his claims that an out-of-control liberal judiciary is the worst threat America has faced in 400 years — worse than Nazi Germany, Japan and the Civil War — Robertson didn't back down.

"Yes, I really believe that," he said. "I think they are destroying the fabric that holds our nation together."[1]

Senator John Cornyn argued that recent courthouse violence might be explained by distress about judges who "are making political decisions yet are unaccountable to the public." The frustration "builds up and builds up to the point where some people engage in violence," said Mr. Cornyn, a former member of the Texas Supreme Court who is on the Senate Judicary Committeee, which supposedly protects the Constitution and the guarantee of an independent judiciary.[2]

Senator Cornyn's comments were made in the aftermath of displeasure over the courts' refusal to restore a feeding tube to Terri Schiavo, the brain-damaged Floridian who died March 31, and just days after the House Majority Leader, Tom DeLay, declared that:

"We will look at an arrogant, out of control, unaccountable judiciary that thumbed their nose at the Congress and president when given jurisdiction to hear this case anew and look at all the facts . . . The time will come for the men responsible for this to answer for their behavior, but not today."[3]

The Washington Post *reported that plans are afoot to use budgetary, oversight, and disciplinary authority to assert greater control over the federal courts before next year's elections. The planned legislative review was ordered by House Majority Leader Tom DeLay, R-Texas. House Judiciary Committee Chairman James Sensenbrenner, R-Wis., opened the drive by suggesting that Congress should create an inspector general for the courts to field complaints and conduct investigations. He also indicated that he would be very active in seeking to curb the judiciary, starting with passage of a tougher disciplinary mechanism for judges.*[4]

It was reported that strategies are being laid out to rein in judges, such as stripping funding from their courts in an effort to hinder their work. Tony Perkins, president of the conservative Family Research Council, stated:

"There's more than one way to skin a cat, and there's more than one way to take a black robe off the bench." . . . Congress could use the appropriations authority to "just take away the bench, all of his staff, and he's just sitting out there with nothing to do."[5]

Bizarro World

When I was a kid, I read D.C. comics, which featured *Superman*. Superman was a way-cool, all-powerful superhero who was a force for good on planet Earth. His only weakness was to a green mineral element called kryptonite from his own original home world of Krypton. Kryptonite was derived from his own origins, and it alone could kill him.

One of Superman's foremost enemies, and his nemesis, was Bizarro, product of the parallel dimension and diametrically opposite-to-Earth Bizarro World, analogous to a scientific experiment gone horribly bad. Bizarro and everything in his world was upside down, relied on complete and total control of the inhabitants, was antithetical to ordered principles, and ultimately was destructive to any semblance of balance or order, as was existent on Earth. After nearly killing Superman and destroying Earth, Bizarro and Bizarro World could no longer sustain their own contradictions. Bizarro World imploded and succumbed (at least in one version I read).

With the current demonization and out-of-control attacks on the judiciary and the justice system, when you as a

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lawyer, or judge, or legal academician read stuff such as is set forth above, do you feel these days (as I often do) that we're somehow living in Bizarro World? Do you fear (as I do) that excesses in the very system of democracy derived from our own origins will prove to be the instrument of our demise?

When we talk about maintaining the independence of the judiciary, this is not about Republicans and Democrats. It is about retaining the unique system of checks and balances of the American republic and the preservation of democracy. That cannot continue if the judiciary becomes merely an ideological rubber stamp for the executive and legislative branches of government, as some seem to so avidly desire.

"Dangerous" does not begin to describe the remarks set forth above, nor the gravity of the phenomenon they represent. They're just wrong. They involve thumbing of political noses at the separation of powers, and the suggestion that the Supreme Court be an enforcer of political decisions made by elected representatives of the people, no matter how intrusive to privacy or other basic freedoms. Avoiding that nightmare is precisely why the founders made federal judgeships lifetime jobs and created a nomination process that requires presidents to seek bipartisan support. These kinds of irresponsible and dangerous falsehoods have no place in mature political discourse. This is not a matter of an attack on federal judges, but on all judges at every level of our system, and on the separation of powers that undergirds democracy itself.

The need to shield judges from outside threats is a priceless principle of our democracy. It is sickening that any public or elected official would give succor to sociopaths and psychopaths such as those involved in the recent murder of court personnel and an Atlanta judge in his courtroom, by a career criminal seeking to shoot his way out of a trial, and the execution of a Chicago judge's mother and husband by a deranged man furious that she had dismissed his lawsuit.

The existence of those who are attempting to capitalize on tragedy and further increase the cultural divide in our country is a repulsive fact of contemporary life. Attacks on the judiciary and movements to radically modify the operation of the rule of law and our time-tested system of justice will ultimately benefit no one and will likely cause serious harm. We are a country of laws and must be so to survive. Our Constitution and the rule of law, including the doctrine of separation of powers, have served us well over the past two and a half centuries and are the primary reasons our country is so great.

What Is Judicial Independence?

Judicial independence means that judges can decide cases before them without fear or favor, based on the law and the facts of each particular case. It's a way to provide for fair and impartial courts. Judicial independence does not mean that judges are free to decide cases according to their own whims or prejudices. It means that judges have the authority to exercise their constitutional obligation to make hard decisions, unpopular decisions, without concern for personal or professional retribution.

Independent Courts and Democracy

Our democracy depends on independent courts where decisions are based on the facts and the rule of law. John Marshall's address to the Virginia Convention of 1830

includes a stern warning about the failure to ensure an independent judiciary:

> I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary.[6]

An impartial judiciary is a cornerstone of our democracy, one of the guiding principles that sets us apart from other nations of the world. Indeed, when visitors from developing democracies come to the United States, they come to learn about and draw on our judicial system, not our executive or legislative branch models.

How Is Judicial Independence Threatened?

Interest groups and political parties are pouring millions of dollars into targeted judicial campaigns, using highly negative advertising to influence voters and outspending the judicial candidates themselves.

The problems go beyond judicial elections:

State legislatures cut budgets for the courts while caseloads continue to increase, threatening the institutional independence of courts by placing more pressure on judges to decide more cases with fewer resources.

In many jurisdictions, compensation is an issue. There is a growing disparity between private practice and the judiciary. Some beginning lawyers make more than experienced judges do, while judicial salaries fail even to keep pace with inflation. Successful lawyers are reluctant to give up lucrative law practices to serve on the bench.

In most states, women and people of color remain underrepresented on the bench. Minority lawyers continue to experience barriers to being elected or appointed to judicial positions. The lack of diversity fuels mistrust of the courts, as they fail to reflect the communities they serve.

Benefits of Judicial Independence

Judicial independence assures all Americans that cases will be decided on their merits. All litigants know that their case will be decided according to the law and the facts, not the vagaries of shifting political currents or the clamor of partisan politicians. Decisions are based on what is right and just, not what is popular at the moment.

Throughout American history, the independence of the judiciary has protected individual liberties and prevented a tyranny of the majority. Examples include extending voting rights, ending segregation, and protecting average citizens from unwarranted government intrusion.

Emerging democracies look to our system of an independent judiciary as a model. They are all too familiar with "telephone justice," in which a judge adjourns court to wait for the call that tells him or her how to decide the case.

Maintenance of the Independence of the Judiciary Is an Imperative

An independent judiciary free of political pressure is essential to the separation of powers that makes our democracy work. Judicial independence ensures that our system of checks and balances prevents one branch of government from dominating the others and protects the rights of each of us. Americans have a right and a duty to express disagreement with judicial decisions, but not to threaten retaliation against judges. Recent political rhetoric has crossed the line from healthy debate to attempted intimidation of judges.[7]

WSBA Public Relations and Media Relations Committee

Quite candidly, I have been puzzled by the relatively deafening silence on the Washington legal scene with regard to many of the issues set forth above. An exception is the recent (May 4, 2005) Seattle public forum titled: "What Was the Judge Thinking? The Duty to Decide," that discussed how judges decide controversial issues. The forum was sponsored by the WSBA Public Information and Media Relations Committee, with participation by KOMO TV and an outstanding panel of judges and attorneys, including King County Superior Court Judge William Downing, Seattle University Law Professor Julie Shapiro, Washington State Supreme Court Justice Barbara Madsen, and former King County Superior Court Judge Robert Alsdorf.

The WSBA Public Information and Media Relations Committee is chaired by Elaine Taylor Rose and functions with the efforts of Board of Governors liaison Governor Fawn Sharp and WSBA liaison Judith Berrett (who is also WSBA director of member and community relations). The committee is charged with broadening public knowledge about, and respect for, the law; the rule of law; and the roles, responsibilities, and contributions of lawyers and judges, including their ethical commitments.

The committee was established in

September 2002. During its first year, the committee developed a plan to respond to the unjust criticism of judges. When circumstances have warranted, this plan has functioned in an outstanding manner. To ensure that the public confidence is preserved in the judiciary and the courts, the WSBA maintains a policy and program to provide appropriate and timely responses to unjust criticism of judges and courts. This program applies and is implemented when there has been an unwarranted or unjust attack, or series of attacks, on a judge or court which may cause significant harm to a judge or adversely affect the administration of justice. Judges may be precluded from responding to individual attacks or criticism upon them. Therefore, when appropriate, the WSBA responds to such criticism of judges and the courts. This response includes, but is not limited to, correcting erroneous, inaccurate, or misleading public communication involving retaliation against or criticism of judges, courts, and/or the administration of justice, as further provided in the Committee's plan as approved by the Board of Governors; and in generally seeking a better understanding within the community of the legal system and the role of lawyers and judges.

What We Can Do

Despite some disturbing nuances that appeared in certain races in the recent election cycle, we in Washington have been blessed to date with a *relative* paucity of extremes in the debates with regard to judges and officers of the justice system. Notwithstanding, there are some disturbing harbingers for the future, and our state is not going to be insulated from the storm. There are some things we can do:

1) Continue to explore rational, pragmatic judicial campaign contribution reform.
2) Engage in vociferous healthy debate with regard to the viability of election v. merit selection of judges.
3) Develop methodologies that really work in increasing representation of people of color, women, people with disabilities, and gays and lesbians on the bench.
4) Ensure that judicial salaries and

A thank you to our peers for
the honor of your votes.

William S. Bailey

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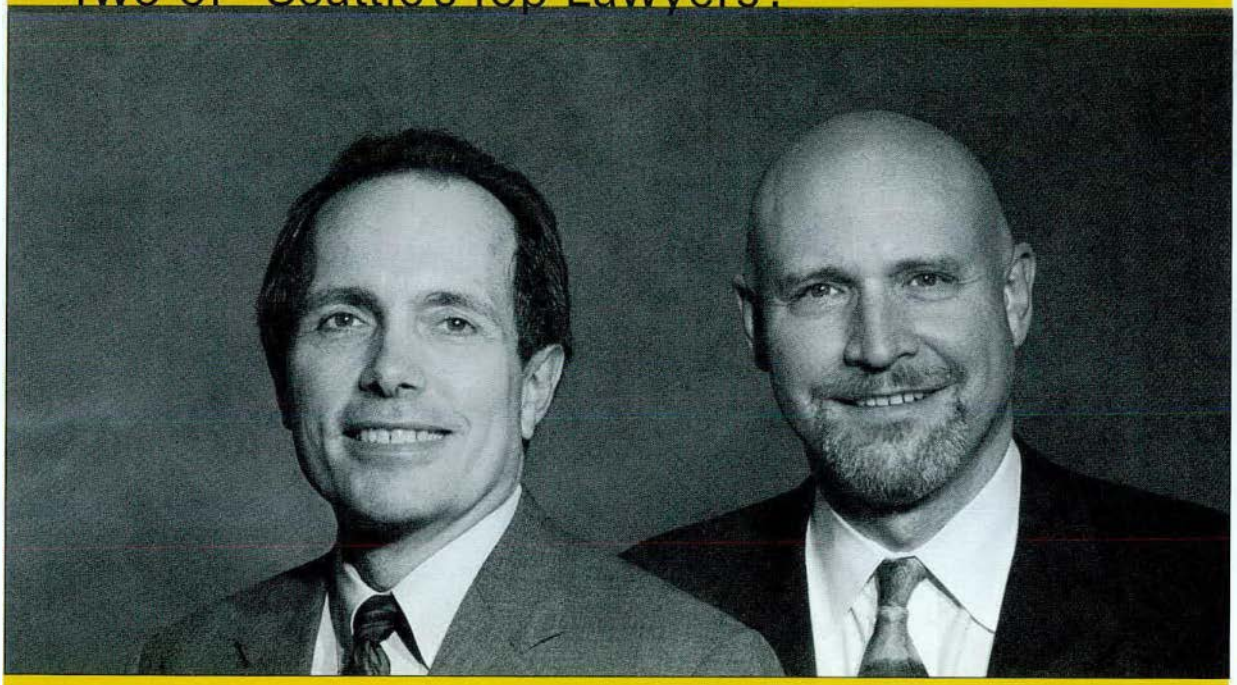

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compensation not only keep pace with inflation, but that they much more adequately reflect the prestige and stature that ought to be accorded to the position, when one scrutinizes the magnitude and the gravity of the decisions judges must make on a day-to-day basis involving property, liberty, and even life and death.

5) Acquaint ourselves and get involved personally with the legislators who represent our communities, for the purpose of educating them about the justice system, and about the importance and appropriate priority adequate court funding should have in the legislative process.
6) For goodness sakes, get civics back into Washington schools as a curriculum requirement in order to graduate.
7) Speak out, oppose, and discredit the demagogic critics of our justice system, whenever and wherever they present themselves.

Lawyers need to get involved as professionals and as human beings. We need to keep our heads up, stand up, and speak up on behalf of judges and the justice system. It is clear that attacks on judges and maintenance of the independence of the judiciary require constant vigilance on the part of lawyers, coupled with a substantial amount of character, integrity, professionalism, and responsibility. If we are to safeguard this special legacy with which we and this country has been gifted, nothing less will do. The storm is not going away anytime soon.

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 it to letterstotheeditor@wsba.org or mail it to WSBA Bar News, Attn: Letters to the Editor, 2101 Fourth Ave., Ste. 400, Seattle, WA. 98121-2330.

NOTES

[1] Derek Rose, *Robertson: Judges Worse than Al Qaeda*, New York Daily News, World & National Report, May 2, 2005; Pat Robertson, The Christian Coalition. *This Week with George Stephanopolous* (ABC television broadcast, May 1, 2005).

[2] *The Judges Made Them Do It*, New York Times, April 6, 2005; Senator Joseph Cornyn (R-Texas), U.S. Senate, April 4, 2005.

[3] Tim Harper, *Republican Leader Warns Judges: You Will Answer for This*, Toronto Star, April 1, 2005; Congressman Tom DeLay (R-Texas), U.S. House of Representatives, April 1, 2005.

[4] Mike Allen, *House GOP Plans Strategy on Federal Courts*, The Washington Post, May 12, 2005; Congressman Tom DeLay (R-Texas), Congressman James Sensenbrenner (R-Wis.), U.S. House of Representatives, May 12, 2005.

[5] Peter Wallsten, *Evangelical Groups Seek "Defunding" of Judges*, Los Angeles Times, April 23, 2005; Tony Perkins, president, Family Research Council, March 17, 2005.

[6] John Marshall, address to the Virginia State Convention, Proceedings and Debates of the Virginia State Convention of 1829-30 at 616 (1830).

[7] *Supporting America's Judiciary*, (visited May 4, 2005) <http://www.abanet.org/barserv/attacksonthejudiciary.html>.

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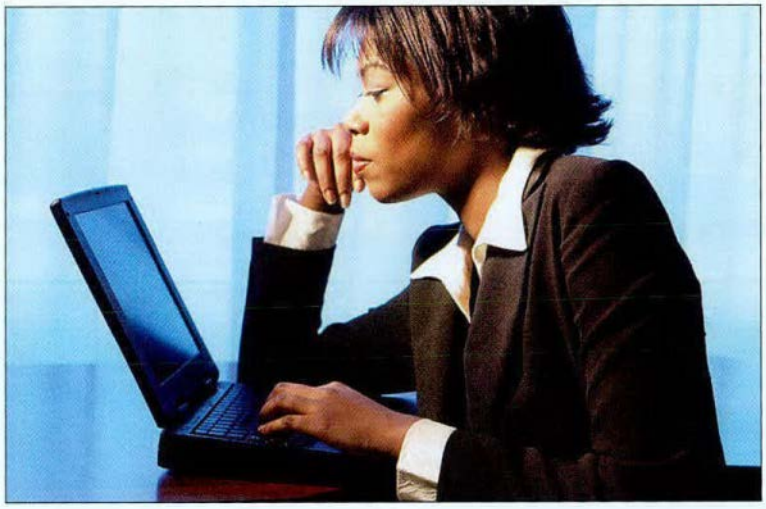
Electronic Evidence Update:

How to Help Clients Meet Their Duty to Preserve Evidence in the Computer Age

BY MARK D. WALTERS AND WRIGHT NOEL

When it comes to electronic discovery in litigation, the reality is that many lawyers and companies fail to address the issue thoroughly. Many attorneys now ask for e-mails, word-processing documents, and spreadsheets in discovery, knowing quite well their opponent will not fully comply with the request. Further, many attorneys do not have an understanding as to how their clients and opponents should meet their legal obligations for evidence preservation and electronic discovery. Hence, they cannot communicate effectively on the issue, and they gloss over it as best they can, which is often not very well. In fact, the unspoken truth of electronic evidence preservation and discovery today is the widespread use of "don't make me and I won't make you."



This approach is risky for a number of reasons. First, most documents today are created on computers, and many of these documents are never printed on paper. According to a 1999 study conducted by researchers at the University of California, Berkeley, 93 percent of all information created in 1999 was generated in digital form, meaning on a computer. The numbers are probably higher now because computers are used for even more purposes than in 1999 (e.g., e-mail, instant messaging, digital photographs, computerized voice mail and faxes, Blackberries, etc.). Further, 70 percent of all documents are never printed on paper.[1] In other words, 70 percent of documents created today *never* make it to the file cabinet. To complicate matters further, computers automatically overwrite and destroy deleted documents and files, which are discoverable.[2] Indeed, by continuing to use their computers, your opponent and your client may be deleting relevant and discoverable information. Attorneys cannot ensure that their clients are meeting their duty to preserve evidence unless they are familiar with the electronic evidence issues, and they review those issues with their clients. This needs to occur early in the case.

A string of decisions in an employment case from the Southern District of New York, *Zubulake v. UBS Warburg, Inc.*, appears to have set new benchmark standards for modern discovery and evidence preservation issues. The five *Zubulake* cases[3] first gained notoriety when the court announced a new seven-factor test in *Zubulake I* for how courts should analyze cost-shifting arguments for electronic discovery.[4] More recently, in *Zubulake IV* and *Zubulake V*, the court addressed two important issues regarding electronic discovery that all attorneys should pay attention to: (1) what electronic records must potential litigants preserve, and (2) what must attorneys do to help their clients meet their duty to preserve?

What Evidence Must Potential Litigants Preserve?

In *Zubulake IV*, the court answered the question: What documents must companies preserve when they are on notice of potential litigation? *Zubulake IV* instructs attorneys and potential litigants to identify the key players and take appropriate steps to preserve and "retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches and any relevant documents created thereafter."[5] The court stated that, at the time the duty to preserve arises, litigants can preserve relevant backup tapes, make mirror images of selected hard drives, and implement other steps to ensure that discoverable and relevant documents are preserved.[6]

Under current discovery rules, companies are required to preserve a broad range of documents: ones "likely to have discoverable information that the disclosing party may use to support its claims or defenses." While potential litigants are not required to save every backup tape, they are required to preserve all documents, including all electronic documents, known to contain information relevant to the dispute. Each company and attorney must make their own decisions, but it is perhaps safest to follow *Zubulake IV*'s guidance and retain all relevant backup tapes and make mirror images — or clones — of the key employees' hard disk drives. Taking these steps will preserve the universe of documents that exists at the time the duty to preserve arises.

How to Help Clients Meet Their Duty to Preserve Evidence

Representing companies that use computers in their day-to-day operations — all companies today — requires lawyers and in-house counsel to become familiar with technology related to document creation and preservation, because lawyers must consult with their clients, and their clients' information-technology departments, on the need to preserve electronic documents.

In *Zubulake V*, the court set forth three ongoing steps lawyers should follow to help their clients preserve documents: (1) issue a litigation hold; (2) talk to the key players regarding document preservation; and (3) obtain the electronic documents:

> *First*, counsel must issue a "litigation hold" at the outset of litigation or

whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

Second, counsel should communicate directly with the "key players" in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these "key players" are the "employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.

Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.[7]

To fulfill these obligations, the *Zubulake V* court stated that attorneys "must become fully familiar with their client's document retention policies, as well as the client's data retention architecture."[8] This may require attorneys to learn new skills and subject matter so they can truly communicate with the key players and information-technology personnel, and so they effectively and competently monitor the litigation hold on an ongoing basis:

> In short, it is not sufficient to notify all employees of a litigation hold and expect that all relevant information will then be retained and produced. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.[9]

The three steps *Zubulake V* announced appear to be emerging as the benchmark standards for helping clients meet their evidence preservation duty. Hence, litigators and in-house attorneys should consider adopting these steps into their practice when advising clients on evidence preservation issues when litigation appears likely.

What Could Happen If Your Client Fails to Preserve?

Lawyers who know electronic-evidence issues can often gain an advantage through discovery. In many cases, they can show through depositions that the other side failed to meet its evidence-preservation obligations. In *Zubulake V*, the court found that the employer failed to preserve and produce all discoverable electronic documents. As a result, the court ordered the employer to produce the improperly withheld documents; pay to retake certain depositions; pay the attorneys' fees and costs the employee incurred in the discovery fight; and, substantially swinging the case in the employee's favor, the court ruled that it would give the following adverse-inference jury instruction:

> You have heard that [the employer] failed to produce some of the e-mails sent or received by [the employer] personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants' control and would have

proven facts material to the matter in controversy.

If you find that [the employer] could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to [the employer].

In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that [the employer's] failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.

There are very few things that juries like less than someone who fails to play by the rules. According to the trial judge in the *Zubulake* case, an adverse inference instruction ends the case by forcing settlement:

Nothing, no sanction is worse than an adverse inference before a jury. If you give an adverse inference, that's the end of the case. It's as bad [as a] judgment, if not worse, because then you get punitive damages, you don't just get judgment. You risk punitives, and we all know that once a judge says there is going to be [an] adverse inference, that's the road to settlement. There is no way that a case can be tried with such an inference . . . .[10]

Indeed, it is extremely difficult to explain away why your client hid or destroyed evidence, even inadvertently. Defending a client against whom an adverse jury instruction is given is like taking the client on the Titanic's maiden voyage. Better to avoid sailing on that ship if you can, but it is even better to have never bought a ticket for the voyage in the first place.

The emerging trend is clear: lawyers and judges now know that there is a treasure trove of discovery in electronic documents, yet many lawyers fail to inform and instruct their clients about the duty to preserve electronic documents.

Using the "don't make me and I won't make you" approach without an express written agreement from opposing counsel is extremely risky. Opposing counsel probably knows about the *Zubulake* cases and the growing body of cases involving spoliation sanctions against a party that failed to preserve and produce electronic records. Failing to help your client meet his duty to preserve electronic documents may give your opponent an opportunity to ask difficult questions in discovery. It may also result in trying to defeat at least one motion to compel and could lead to harsh sanctions up to and including dismissal or an adverse-inference jury instruction. The most economical way to deal with electronic evidence is to follow *Zubulake IV* and *V* and integrate the following into your litigation practice:

- Inform your client about his duty to preserve evidence, including electronic evidence such as e-mail, spreadsheets, word-processing documents, instant messages, etc. Also inform your client of the risks for failing to meet the duty to preserve.
- Discuss with your client whether or not he has a plan in place to preserve and produce electronic documents when responding to regulators or discovery requests. If your client does not have a plan — and many will not — help him develop such a plan.
- When litigation appears likely, send a written "litigation hold" to your client — including members of your client's IT department — informing your client that he is required by law to preserve documents and electronic storage media known to contain relevant and discoverable information. Tell your client to immediately stop destroying and rotating backup tapes from shortly before and after the relevant time period.
- At the same time you issue the litigation, interview a sufficient number of people to determine who the key players are in the dispute. Interview enough people, including members of your client's IT department, to gain a working understanding as to how documents are created, preserved, and deleted within your client's computer network.
- Make evidence-quality mirror images — or clones — of the key players' hard disk drives and other storage media used by the key players such as CD-ROMs, diskettes, flash memory, Blackberries, PDAs, etc.
- Regularly reissue the litigation hold to the key players.

Following these steps will save money and headaches for all involved. These steps will help you avoid having to search every backup tape and every hard disk drive for discoverable documents. Following these steps will help your client meet his duty to preserve electronic evidence; you can decide later what steps will be necessary to respond to discovery requests. In addition, by following these steps you will help your client avoid possible discovery battles over

spoliation of evidence, which will also help manage litigation costs.

The age of electronic discovery is upon us. The odds are great that virtually every document your clients create is on a computer and stored on electronic media. To ignore this fact is risky. In addition, it is also risky to assume that opposing counsel is going to follow the "don't make me and I won't make you" approach. However, follow this approach without an express written agreement and, sooner or later, opposing counsel is going take you and your client for a ride on the spoliation voyage, leading to risky collisions with icebergs of discovery disputes, dismissal, or an adverse-inference jury instruction for spoliation of evidence.

Mark D. Walters and Wright Noel are with Blank Law & Technology P.S., a Seattle-based law firm (formerly Blank & Associates P.S.) that focuses on electronic discovery, computer investigations for law firms and businesses, and ethics and security training for information technology professionals. *Messrs. Walters and Noel thank Jonathan Yeh and Cathy Castell for their valuable assistance in writing this article.*

NOTES

1 *Coping When Everything Is Digital? Digital Documents and Issues in Document Retention White Paper*, Baker & McKenzie Cyberspace Law & Policy Center (2004).

2 "E-mails and other electronic documents are discoverable, as are deleted documents still located in a computer's hard drive." *Kucala Enterprises, LTD v. Auto Wax Co.*, 2003 WL 21230605 (N. D. Ill.), at *4 n5, 56 Fed. R. Serv. 3d 487 (citing *Byers v. Illinois State Police*, No. 99 C8105, 2002 WL 1264044, at *10-11 (N. D. Ill. June 3, 2002)).

3 *Zubulake v. UBS Warburg LLC*, 217 F. R. D. 309 (*Zubulake I*) (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); *Zubulake v. UBS* Warburg LLC, 2003 U. S. Dist. Lexis 7940, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) (*Zubulake II*) (addressing Zubulake's reporting obligations and suggesting that cost shifting is only appropriate when the data to be searched is inaccessible); *Zubulake v. UBS Warburg LLC*, 216 F. R. D. 280 (S.D.N.Y. 2003) (*Zubulake III*) (allocating backup-tape restoration costs between Zubulake and UBS); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*) (ordering sanctions against UBS for violating its duty to preserve evidence); *Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243 (SAS), 2004, U. S. Dist. LEXIS 13574, 2004 WL 1620866 (S.D.N.Y.) (*Zubulake V*) (court issued harsh discovery sanctions against employer for spoliation of electronic evidence).

4 The *Zubulake I* seven factors are: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issue at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.

5 *Zubulake IV*, 220 F. R. D. at 218.

6 *Ibid.* at 217-218.

7 *Zubulake V*, 2004 WL 1620866 (S.D.N.Y.) at *9 *10.

8 *Ibid* at *8.

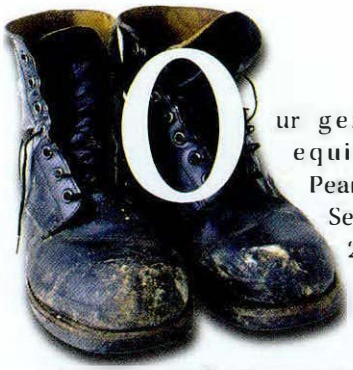
9 *Ibid.*

10 Hon. Shira Ann Scheindlin, trial judge for the *Zubulake v. U. S. B. Warburg LLC* case. Speaking at the E-Evidence Thought Leadership Luncheon, New York City, Sept. 23, 2003.

When Johnny Comes Marching Home:

USERRA's Protections and Obligations

BY THOMAS P. QUINLAN



Our generation's equivalent of Pearl Harbor is September 11, 2001. Since that horrific day, our nation's communities have transitioned from time of peace to that of war. More than 430,000 National Guard and Reserve personnel from all military branches have been called to active duty for Operation Enduring Freedom (OEF), Operation Iraqi Freedom (OIF), and other military and homeland security operations. Washington residents have suffered that impact.

Over 3,800 Washington National Guard personnel and reservists will soon be returning home from their respective theaters of operation with the expectation of returning to their civilian jobs and lives. Most have been deployed to active duty for over a year. The jobs of the reservists have either been vacant or performed by others for many months, and entire annual billing cycles. Transition back into the civilian work environment that has either grown or changed in the service member's absence is not easy. Legal issues abound for both the reservists and their civilian employers.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, protects the job rights of Reservists and National Guard personnel. USERRA is a comprehensive revision of the federal law of veterans' employment rights. It applies to virtually all employers and protects the rights of those who serve with the regular components, reserve components, and National Guard when in the federal service. State law adopted specific provisions of USERRA for Washington residents serving in the reserve components in USERRA and can be found at RCW 73.16.

USERRA applies to all private employers, states, and governments, and all branches of the federal government. There is no exception for small employers. USERRA also applies to union hiring halls and similar entities to which employers have delegated employment-related responsibilities. If an employer can prove that re-employment is impossible, is unreasonable, or would impose an undue hardship on the employer, the employer need not re-employ the soldier, but the employer has the burden of proof.

To obtain USERRA's protections, a soldier must pass each element of a five-part test, which includes:

1. **Job**. The soldier must have had a civilian job before the period of active duty in question. All jobs are covered, except jobs for a brief, non-recurrent period.
2. **Advance Notice**. The soldier must give advance notice to the employer before leaving for active duty. Notice can be oral or in writing, but obviously, written notice is easier to prove. The soldier's commander or another appropriate officer may also give notice for the soldier. This "notice" is not a "request"; the employer cannot refuse permission for an absence.
3. **Service Duration**. All service members are entitled to five years of protected absence. Absences with anyone employer are cumulative. The soldier can exclude certain absences from the five-year limit: most periodic and special Reserve and National Guard training, most service connected with war or national emergency, and certain other absences.
4. **Character of Service**. Soldiers who have been discharged from the service under less than honorable conditions are not protected. Service members with less-favorable discharges or who were dropped from the rolls because of AWOL or desertion are not protected by USERRA.
5. **Timely Reapplication for Work**. The soldier has a limited window to seek re-employment. The service member must return to work within a reasonable period of time after completion of service. The definition of "reasonable" depends on how long the soldier was gone. USERRA does not require that employment reapplications be in writing, but it is a good idea. Service members should make clear that they are not applicants for new employment, but rather had previous positions and left work to perform military service. For absences of 181 days or longer, the soldier must apply for work not later than 90 days after completing service. Service members returning from absences of 181 days or longer should make a written application, and make clear that they left a previous position for military service.

Service members are entitled to protections both while they are gone and when they return. These include:

Prompt Job Reinstatement. USERRA does not define "prompt," but the clear intent of the law is re-employment within days, not weeks or months.

Job Seniority. Service members away from their civilian employment for 90 days or less are entitled to the exact job they left. If service was 91 days or more, the employer has the option of giving the returning soldier a position of like seniority, status, and pay. For all absences, USERRA incorporates the "escalator principle." Returning employees are entitled to the same seniority they would have had if they had never left the employer for military service. If their pre-service

peers were promoted or received raises in their absence, the returning soldier is entitled to the same raise or promotion. Conversely, if their pre-service peers took pay cuts, or if their jobs were eliminated, the returning soldier gets the same adverse treatment.

Status. Returning service members are entitled to the same status they would have attained if continuously employed. This includes job title, location, the opportunity to work during the day versus at night, and the opportunity to work in departments where there are better opportunities to earn commissions.

Training and Other Accommodations. An employer must make "reasonable efforts" to train a soldier on new equipment or techniques, refresh skills not used during service, and accommodate a service-connected disability, or to offer the soldier alternate employment.

Today, thousands of veterans are returning with serious service-connected disabilities. In this situation, the pre-service civilian employer is required to make "reasonable accommodations" to allow the disabled veteran to do the job despite the new disability. If the disability cannot be reasonably accommodated in the pre-service position, the pre-service employer must re-employ the returning disabled veteran in another position that provides like seniority, status, and pay, or the closest approximation thereof consistent with the returning disabled veteran's circumstances. Under the Americans with Disabilities Act (ADA), employers are required to make reasonable accommodations for disabled persons generally, including but not limited to disabled veterans. There is overlap between USERRA and the ADA. However, the ADA exempts employers with fewer than 15 employees. USERRA contains no such exception.

Special Protection Against Discharge Other Than for Cause. If a returning soldier is fired within a protected period, the employer has the burden of proving that the discharge was for cause, and not in retaliation for USERRA-protected service.

The protected period is one year for service members gone for 181 days or more, and 180 days for service members gone for 31 to 180 days. Service members gone for 30 days or less are protected only by the general anti-discrimination clause of USERRA, with no defined, protected period.

Immediate Reinstatement of Health Benefits. The employer or employer's health insurer can impose no waiting period and no exclusion of pre-existing conditions, other than for VA-determined service-connected conditions.

Pension Benefits. For purposes of pension benefits, employers must count any period of service protected under USERRA as if it were service with the employer. This applies both to benefit eligibility (vesting) and to benefit computations. If the pension plan does not require employee contributions, the soldier gets credit as if she or he had never left work. If the plan uses employee contributions or deferrals, the returning soldier gets up to three times the period of absence (up to a maximum of five years) to make up any missed contributions.

Anti-Discrimination Provision. USERRA prohibits discrimination based on military service or obligations. If military service was a factor in an employer's adverse action, the employer must prove

that the adverse action would have been taken in the absence of the employee's military service or status. USERRA also prohibits retaliatory action against witnesses and those who take action to enforce USERRA protections.

Other Benefits. As discussed above, USERRA requires an employer to treat an employee who serves in the armed forces like any other employee of similar seniority and status who is on furlough or leave of absence. Any other benefits available to other employees returning from a similar period of absence are due to returning service members.

Other Protections. USERRA imposes minimum protections and benefits as a safety net: it supersedes any state law, local law, or ordinance contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates any rights under USERRA or establishes additional prerequisites to the exercise of such rights. However, USERRA allows state laws, collective bargaining agreements, private contracts, etc., to provide extra protections and benefits. Returning service members are still entitled to any other benefits they enjoy from sources other than USERRA.

We are encountering situations where there has been a claimed waiver of rights. An employer may ask a departing soldier to sign a statement saying the soldier does not intend to return to the civilian job, or a more limited waiver of the soldier's right to seniority and/or non-seniority benefits. Despite such a waiver, a soldier never gives up his or her rights to re-employment, nor the right to be treated as continuously employed for seniority purposes upon return to the job. A statement of non-return, however, does waive non-seniority benefits. To be effective, a waiver must be made with full knowledge of the rights the soldier is giving up, and the employer bears the burden of proof on this issue. Signing such a waiver will almost never be in a soldier's best interest.

If a soldier thinks his USERRA rights have been violated, the soldier should start by contacting the National Committee for Employer Support of the Guard and Reserve (ESGR), 800-336-4590. Check the ESGR online at www.esgr.org. If an ESGR ombudsman cannot resolve the matter, the soldier may decide to seek legal remedies.

Remedies. District courts have broad remedial powers against a civilian employer: injunctive relief, money damages, attorney costs, expert witness fees, and other litigation expenses. If the court finds the employer's failure to comply with USERRA was willful, the court may award liquidated damages for willful misconduct (in an amount equal to the actual damages) in addition to actual damages. For the purpose of remedies, states are treated as private employers. When the federal government is the employer, the Merit Systems Protection Board (MSPB) may award lost wages and benefits, attorney costs, expert witness fees, and other litigation expenses, but not liquidated damages for willful misconduct, and may order federal agencies to comply with USERRA.

Thomas P. Quinlan practices in Pierce County with the law firm of Miller, Quinlan & Auter, P.S. He is also a USAR JAG who routinely works on USERRA issues and is responsible for training deploying and returning service members on their rights under USERRA.

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Financial Highlights for Fiscal 2004

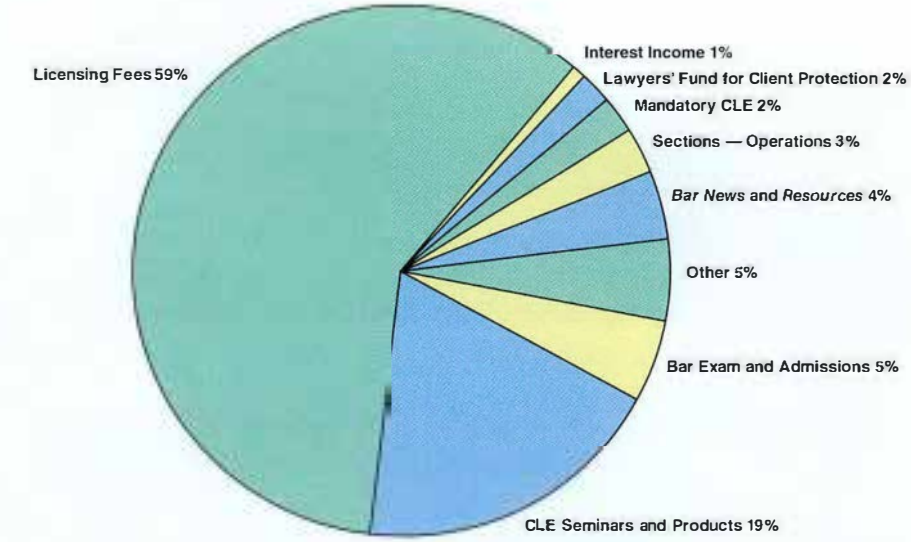
Strategic Financial Goal

The WSBA's strategic financial goal is to be fiscally responsible — to operate a well-managed and financially sound association, to be accountable to our members and the public, and to use our resources wisely in ways that accomplish our mission. We account for our revenues and expenses in four categories:

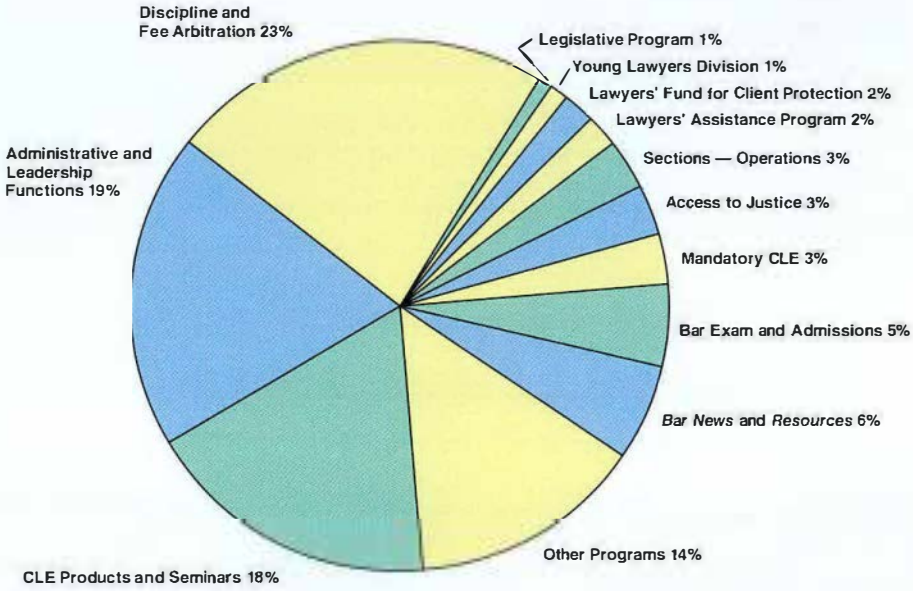
- The general fund consists of our regulatory functions and most services to members and the public. It is funded by member license fees and revenues from services.
- CLE programs and products are entirely self-funded by seminar registration fees and sales of deskbooks and other publications.
- The WSBA's 24 sections are a voluntary activity for WSBA members and are fully self-supporting through section dues and fees for section products and services. No member license fees are used for section activities, and all net income from sections is carried forward in each section's net assets for use by that section in future years.
- The Lawyers' Fund for Client Protection (LFCP) may be used for relieving a loss sustained by a person due to the dishonesty of, or failure to account for money entrusted to, a member of the WSBA in connection with the member's practice of law. It is funded by an annual assessment on all active WSBA members.

The accumulation over time of revenues in excess of expenses is called net assets, commonly referred to as reserves. Each category of activities has accumulated net assets for use in future years.

Percentage of 2004 Revenues Collected from Various Sources



Percentage of 2004 Expenses Used by Activity



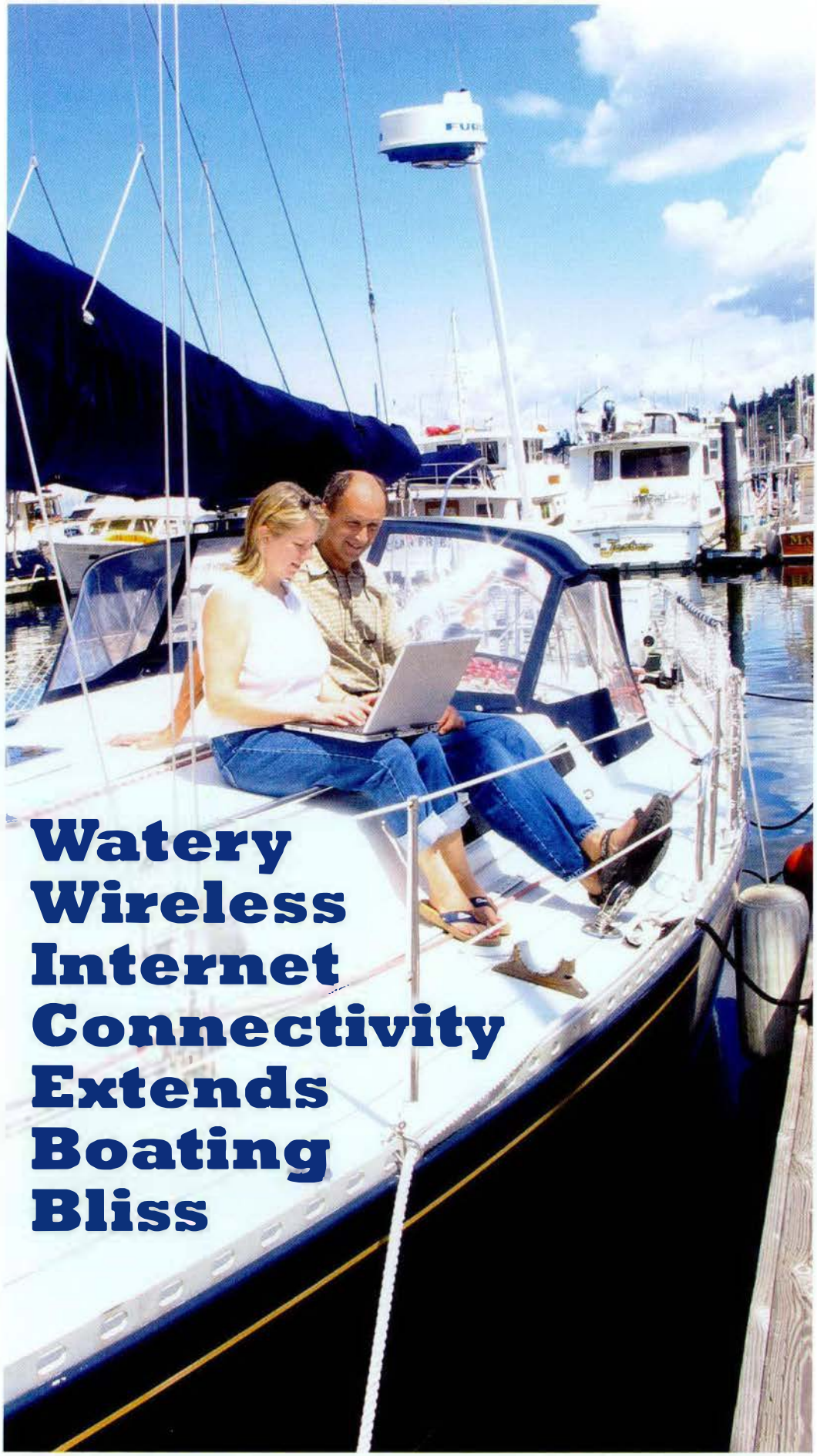
Financial Results for Fiscal 2004

All four categories had revenues in excess of expenses, thereby contributing to their individual net assets.

- The general fund budgeted for revenues over expenses of $242,542, and actual results were $991,874. As of September 30, 2004, the general fund balance was $2,724,324, of which $881,270 is designated as an operating reserve and $881,270 is designated as a reserve for the WSBA's planned move to Puget Sound Plaza at the end of calendar year 2006.
- The CLE fund budgeted for revenues over expenses of $356,564, and actual results were $408,341, bringing CLE's fund balance as of September 30, 2004, to $1,436,141.
- The sections budgeted for $93,078 expenses over revenues (in order to use past accumulated reserves to benefit their members), and actual results were revenues over expenses of $48,558. The sections' fund balance on September 30, 2004, was $832,805.
- The LFCP budgeted for revenues over expenses of $108,953, and actual results were $9,115. The LFCP's fund balance as of September 30, 2004, was $632,477.

Statements of Activities

	Year ended September 30, 2004			Year ended September 30, 2003		
	2004 Actual Revenue	2004 Actual Dir. Exp.	2004 Actual Net	2003 Actual Revenue	2003 Actual Dir. Exp.	2003 Actual Net
Access to Justice (includes TBOR income)	79,343	418,697	-339,354	78,978	457,671	-378,693
Administration	114,107	785,416	-671,309	92,122	843,096	-750,974
Alternate Dispute Resolution	6,725	93,611	-86,886	5,325	67,366	-62,041
Attorney Licensing Fees	9,229,118	0	9,229,118	8,633,151	0	8,633,151
Audits	500	129,144	-128,644	2,498	96,404	-93,906
Bar Examination and Admissions	865,653	754,753	110,900	929,687	725,097	204,590
Bar Leaders Support	21,291	263,639	-242,348	16,671	247,199	-230,528
Bar News	543,619	798,533	-254,914	518,329	741,871	-223,542
Board of Governors and Office of the Executive Director	0	587,422	-587,422	415	435,315	-434,900
Communications	44,420	404,400	-359,980	29,689	278,705	-249,016
Discipline	133,215	3,082,718	-2,949,503	184,163	2,999,764	-2,815,601
Human Resources	0	160,437	-160,437	0	172,383	-172,383
Information Technology	20,700	704,160	-683,460	14,925	886,866	-871,941
Law Office Management Assistance Program	62,625	222,778	-160,153	48,327	200,855	-152,528
Lawyers' Assistance Program	43,311	323,278	-279,967	39,491	300,581	-261,090
Legislative	0	199,477	-199,477	0	214,285	-214,285
Limited Practice Officers	160,772	89,888	70,884	159,319	69,984	89,335
Mandatory Continuing Legal Education	392,407	385,370	7,037	392,380	301,017	91,363
Membership Records and Licensing	81,348	469,239	-387,891	70,379	431,870	-361,491
Office of General Counsel	857	338,284	-337,427	15,787	352,520	-336,733
Practice of Law Board	0	78,651	-78,651	0	37,778	-37,778
Professional Responsibility Program	0	219,455	-219,455	0	129,629	-129,629
Public Legal Education	7,549	106,058	-98,509	26,961	116,936	-89,975
Resources Directory	113,068	47,505	65,563	120,616	54,563	66,053
Sections Administration	89,112	131,642	-42,530	103,755	104,889	-1,134
Technology Bill of Rights	0	54,343	-54,343	60,035	60,124	-89
Young Lawyers Division	34,029	169,010	-134,981	19,308	142,814	-123,506
Other	0	33,988	-33,988	0	11,276	-11,276
Total Unrestricted — General	12,043,769	11,051,896	991,873	11,562,311	10,480,858	1,081,453
Unrestricted — Continuing Legal Education						
CLE Products	762,940	525,635	237,305	754,705	584,772	169,933
CLE Seminars	2,265,267	2,094,231	171,036	2,090,760	1,869,469	221,291
Total Unrestricted — CLE	3,028,207	2,619,866	408,341	2,845,465	2,454,241	391,224
Unrestricted — Sections Operations	484,704	436,147	48,557	526,902	366,284	160,618
Restricted — Lawyers' Fund for Client Protection	350,297	341,180	9,117	357,274	149,997	207,277
Total	15,906,977	14,449,089	1,457,888	15,291,952	13,451,380	1,840,572



Watery Wireless Internet Connectivity Extends Boating Bliss

BY JOHN HARRINGTON

You are at the office. Your boat is at the dock. The sky is blue. The wind is up. Port Townsend, the San Juans, the Gulf Islands, and beyond beckon. You're wondering, "Can I run my practice off a Blackberry and a cellphone from the cockpit of my 'sanity preserver' in Desolation Sound?"

If you want to replicate a real office setting, the answer is "absolutely not." You are not revising pleadings and reviewing hundreds of pages of documents on any case over a Blackberry, while dictating to an assistant over a dodgy cell connection behind an island across from Campbell River.

You need full-blown Internet access on a laptop with a nice big screen that is set up with a remote desktop and a virtual private network connection back to your office — the office you want to leave so badly to get out on that boat.

You have work to do — editing, writing, research, big attachments to send and receive — all of it billable, by the way. There is but one fundamental problem: no fast Internet pipe on the boat. Thus, you are stuck at the office.

Not necessarily.

"It's not a problem anymore in a bunch more places than you'd think," said Peter Giannacopoulos, a Boston-area networking integrator who has been setting up attorneys' boats with wireless network hubs and often sophisticated computing equipment and peripherals so they can take advantage of a proliferation of marine Wi-Fi coverage that's expanding up and down the East Coast (www.myrmidon.net). From

Boston Harbor, past Cape Ann, around Cape Cod and up into Maine, "you can get online from onboard."

"We have thousands of lawyers in this market, and a lot of them want to be on their boats. We started getting calls about it a couple of years ago and it has become a crazy sideline — busy. We do not do the actual wireless base stations, but all the marinas around here are heavily deployed. Now, we have attorney clients who office almost permanently from their boats in Boston Harbor. They have given up their regular offices, at least unofficially. Granted, they have nice boats, but the fact they are on them and their clients enjoy having conferences down at the docks instead of in some office tower is the whole point." Giannacopoulos said "it's now a must" for any high-end marina in New England to offer reliable wireless Internet service to permanently moored and visiting boats to remain competitive.

In Seattle, one of the national pioneers of the "networked boat" and the marine Wi-Fi stations that link boats to the Internet on a high-speed connection is Kevin Keating, CEO of Broadband Xpress (www.bbxpress.net). His company has installed wireless access points in marinas that can also cover areas of open water with long-range onboard Wi-Fi antennas that connect to base stations using the highest amount of Wi-Fi signal power allowed by the FCC. Keating's installations run from Gig Harbor all the way up to Desolation Sound. Along with Keating's 70-plus locations, he has roaming agreements in place that provide Internet access at some 350 places, including Tully's Coffee shops — so a Northwest boater can get online on and off the boat.

"Our typical customers love their boats; some even live on their boats. The service is particularly great for professional people who want to be out, but need to be able to do serious (read paying) work so they can be out," Keating said. His company's extended-range antennas and other networking configurations can allow one of Broadband Xpress's Wi-Fi signals to be picked up across much greater distances than is usually associated with a typical local "hot spot."

"I can get online from as far away as a half mile out," Ron Meng, the owner of Islands Marine Center on Lopez Island, said. "His [Keating's company's extended range] antenna is great."

Keating said the key to boating is "being on the boat." It's a simple concept, but one that has been a constant thorn in the sides of generations of Northwest boaters who have been hidebound to their careers and physical offices while they pursue the means to own a boat in the first place.

"It's a real Catch-22," said Sharon Donovan, a member of the Washington State and Utah State bar associations. Her family owns a sailboat permanently moored in the San Juans. She was able to extend her annual summer cruise to the Gulf Islands and inside passage from 10 days to four weeks last year, because her boat subscribed to the Broadband Xpress network. "I could sit on deck in the morning having coffee in the Sydney Harbor Marina (one of Broadband Xpress's locations) and work with my office over my virtual desktop. Clients did not know I was not back at my desk. It was great. Being able to do it took so much of the stress out of being away. It really is the first time in years I can say I fully relaxed while we were cruising."

"Our typical customers love their boats; some even live on their boats. The service is particularly great for professional people who want to be out, but need to be able to do serious (read paying) work so they can be out . . ."

Giannacopoulos said getting online from onboard might be as easy as having a laptop equipped with a Wi-Fi card — but that it often requires more. "It totally depends where your boat is in relation to the base station. If you're docked close enough to the access point, less than 150 feet, a Wi-Fi-ready computer, or a computer with a Wi-Fi card inserted on the side will usually do you. But we never leave it to that. It gets trickier when you are on the move, anchored out, or blocked by other boats at the dock. An after-market, long-range antenna is a must, in my opinion. You really ought to go to the Wi-Fi service provider you use to make sure the reception equipment you install is matched up with the Wi-Fi provider's signal," he said. "The service providers we work with have been great at recommending the right stuff to our clients."

In Washington, Keating's company not only offers wireless hubs and antennas for the on-board portion of the "networked boat," they are also the service provider and they have staff that will go to a customer's boat to install the gear. "We have assembled our own system," he said, noting that standard Wi-Fi hardware has a limited range of maybe 200 feet and is designed for residential or small-office environment areas.

"Regular Wi-Fi cards and Centrino-powered laptops are not designed to operate over marina distances," he said. "You need higher-powered equipment." Keating recommends that anyone wanting to get a boat Wi-Fi-ready consult with their intended primary service provider first. Broadband Xpress's website lists the equipment it sells to its customers.

With the national and Canadian proliferation of marina Wi-Fi, it's now possible to cruise up and down the U.S and Canadian west coast, across the Gulf Coast, around Florida, and all the way to Nova Scotia, and find a solid Internet connection. "All the providers are banding together," Keating said. "We all may be going it alone as different companies, but there are roaming agreements in place and they are growing."

One such cooperative (through Marine Wi-Fi.org) has joined Broadband Xpress and iDockUSA (www.idockusa.com) to offer a 150-access-point network up and down the West Coast.

So, what's holding you back? This summer, bill your hours from the boat!

John Harrington is a technology writer and frequent speaker on the Internet and networking trends for lawyers. He can be reached at jharrington@saltzone.net.

Zeitgeist Postcard

***Barbara Standal** is a graduate of Gonzaga Law School and a member of the WSBA. Two years ago, Barbara retired from her successful practice in employment/civil rights. For the five years prior to retirement, she was a senior supervisor in the Equal Employment Opportunity Commission's litigation unit. She came to Kyrgyzstan in November 2004 to live for a year as a Rule of Law Liaison representing the American Bar Association Central European and Eurasion Law Initiative (CEELI). Barbara writes: "The election observer job is only one of many fascinating experiences I have had while in Kyrgyzstan. This is a complicated, poor, struggling part of the world — a former Soviet Republic with all that that implies. I work in an office in Bishkek with two Kyrgyz attorneys, both of whom have lived and studied in the U.S. They are as skilled, knowledgeable, and dedicated as any attorneys I have ever worked with. I would recommend this experience to any attorney who has a taste for adventure, a desire to make some small contribution, and the time to do it."*

Kyrgyzstan is a Central Asian country of incredible natural beauty and proud nomadic traditions. Kyrgyzstan was annexed by Russia in 1864; it achieved independence from the Soviet Union in 1991. Officially the Kyrgyz Republic, and sometimes known as Kirghizia, it is landlocked and mountainous, bordering China, Kazakhstan, Tajikistan, and Uzbekistan. The capital is Bishkek.

The following is Barbara's account of recent events. Her partner, Tom Lucas, is also a member of the WSBA.

On Sunday, March 13, I participated in a historic event here in Kyrgyzstan. I was one of 50 official election observers for the national parliamentary elections for OSCE, an organization that plays prominently in worldwide elections. (OSCE is usually the organization quoted in American newspapers on whether an election was conducted fairly.) I had been trying to get selected from the time I arrived in the country, and I was very disappointed not to have

been selected for the first round of parliamentary elections, which occurred on February 27. As it turned out, the runoff elections in which I participated were more exciting.

As you may know, President Akaev, initially the most democratic of all the despots of Central Asia, has gradually assumed more and more power. Most Kyrgyz expect that he will engineer running for an unconstitutional third term in October. He had seven family members running for parliament seats in this recent campaign, including his famous daughter.

I had given up hope of being an observer and had begun to plan a quiet weekend before Tom arrived when I received a call from David Greer, the deputy director of a USAID agency, on Friday afternoon. David is a big, good-natured, friendly man, an American lawyer from Chicago, who has worked here and in the Balkans for the past seven or eight years (another refugee from American big-firm law practice). He told me I had been selected as an observer, and that he and I would be partners. He said he would furnish the car, driver, and translator and that we were assigned the district in Bishkek in which Akaev's daughter would be running. I could hardly believe my beginner's luck! David told me to be ready at 6:45 on Sunday morning so we could open the first polling station at 7:00. He warned me that I may not get home until 2:00 the next morning (I groaned, since I had a lecture scheduled at American University at 8:00 on Monday morning).

On Saturday, OSCE had an orientation for observers about a mile from where I lived. I had a glorious walk on Saturday morning to begin this strange, surreal weekend. We met in the conference room of a typical cheap new building here in Bishkek, located on a busy highway. The OSCE ambassador from Vienna was there to discuss the political

WSBA member Barbara Standal in Kyrgyzstan

situation. On my right sat a young Brit, next to him sat a Turk from Istanbul, across the table two congenial Japanese men who barely spoke English. My supervisors were old hands — Giulana and Andrea, from Sweden and Germany, respectively. For a couple of hours, they advised about the job and what we were expected to do. It was far more complicated than I had realized. I had to fill out checklists for every polling station we were assigned to, following every single procedure, then ranking the procedures and the polling station. I was to record the number of precinct members, their sex, the chair, and his/her sex. We were

to observe ballots, ballot boxes, voting, inking, checking for prior inking, opening, closing of stations, other observers, police and military presence and activity, protesters, and then also write a narrative on any unusual activity.

The next morning at 6:45, David; Ainura, the translator; Mahmoud, our driver; and I set off to open our first polling station. The morning was dark and overcast. OSCE had assigned us eight polling stations within one district, including one of the universities where we expected to see some action. We arrived at a large, imposing public building, walked up wide marble steps, and stepped into a grand marble foyer. Incongruously, three cheap, flimsy plywood ballot booths, painted gray, stood at the top of more wide steps, underneath a huge oil painting (as wide and high as the ballot booths) of a smiling President Akaev. A long table with ballots and inking material sat along one wall with large letters in Cyrillic spaced out the length of the table behind where the polling workers sat. Voter registration booklets sat neatly on the tables.

As we entered, off to our left were about 15 chairs. Several people were seated. They were observers from various NGOs and political parties. OSCE had told us that observers had the right to walk around as long as we did not disturb the voting process. However, a very stern-looking, brisk woman met us and immediately told us to sit down. She was the chair of the polling station. At first I was intimidated and sat down. Later, we ignored her and walked around. Soon voters began to arrive and check in. Many old people came. I was particularly touched by the old Russian women and men. So many were themselves refugees from Soviet terror who fled to Kazakhstan or Kyrgyzstan from the 1930s through the 1950s. Some were seeing a ballot with more than one candidate for the first time in their lives. They looked proud, confused, and earnest.

We watched the sealing of the transparent ballot boxes, one fixed, one mobile, to take to disabled voters, with real sealing wax and a plastic tie, then a paper stamped with an official stamp over

that, all done with great fanfare. I could not help thinking about my own polling station where the old women could never get their act together on time, the ballot boxes were cardboard boxes, and we voted by punching cards.

Right on the dot at 8:00, the station opened for voting and people began filing through. People came in one by one, checked at the door with an ultraviolet light to make sure they did not have invisible ink on their hands. They moved to the voter registration table where they were duly checked off in the registration book, and their passports or picture IDs examined. Then they put out their left thumbs where the polling worker squirted invisible ink right at the base of the thumbnail. The voter then went to the ballot booth, made his or her mark, walked to the transparent ballot box, folded the ballot, and dropped it into the box.

We stayed for about an hour and watched people vote. More observers arrived. At times, there were more observers than voters. I kept thinking of Florida during the presidential race of 2000 and wondered if any voting place in the United States could withstand such scrutiny. David said the saying in Chicago was: "Vote early, vote often."

We moved on to polling station after polling station to much the same scene. Of all the polling stations we visited, seven of the eight, all but one of the polling chairpersons were women and almost all polling workers were women. They are a universal type: busy, active, well organized, and attentive to details. The chairpersons were generally very businesslike, professional, some defensive, all also very organized. On two occasions, the chairpersons were the teachers of the school where the polling station was located. They, too, were a universal type of grade-school teacher with that kindly body language, smile, soft way of speaking, and in English she would have spoken in short sentences, using simple, third-grade vocabulary. Her Russian-speaking counterpart I have no doubt had a similar style. Ironically, only three of the 75 parliamentary seats were won by women.

During the course of the day, it appeared to me this was an incredibly well-organized, clean voting process with few irregularities. But then we came to Kyrgyz National University. The voters were almost all students, and things seemed to look and feel different. The students arrived in waves of about 15 minutes each. All carried what our translator told us were the "invitations" sent out to each voter to participate in the election, which contained their names, addresses, and precincts. Each student carefully unfolded the invitation from his or her passport — the invitations were carefully collected and put into an envelope — then the inking, balloting, and voting. However, we noticed each ballot had writing on the back of it unlike any other ballots we had seen. We were also ordered to sit in a specific place. David speaks fluent Russian but could not get any student to talk to him. Ainura told us as we were leaving that her sister attended that university and had been told that after she voted, she

was to go see her dean and tell him she had voted.

We had heard rumors for months, particularly in my office where we have so many students, that students were being bribed to vote for certain candidates. Students also bribe their professors for grades, or the professors will ask for a bribe in order to give the student a decent grade. University professors are paid the equivalent of about US$25 to $50 a month. They are notoriously corrupt, as are prosecutors, lawyers, and judges, who are also poorly paid. (We pay our office manager $350 a month.)

Finally, about 6:00 p.m., we arrived at what turned out to be our last polling station, in a school gym. A very bossy chairwoman met us with some suspicion. At least 25 other observers were also there. We milled around for awhile, and then heard that a hearing would take place on a complaint of one of the observers. About a half hour later, a woman judge arrived in her long black robe and went into a small office. We crowded in along with the complaining observer, other witnesses, the beleaguered chairwoman, and an attorney representing the observer. The complaint was that the chair had ordered the observer to sit down and not bother the voters. It felt a great deal like a lot of other administrative hearings. The judge looked stern and professional as she sat at a big desk with her laptop in front of her. I couldn't quite forget I was not in Central Asia, however, with wires from printers, computers, and other electrical devices strung across the floor, the desk, under chairs, on top of the desk, the backs of chairs, and up the walls. Frankly, it is a miracle there aren't more fires. The fuel and water pipes outside buildings have the same random spreading everywhere like a nest of snakes.

Speaking of facilities, I had avoided using any during the day, despite having the bladder of a mouse. Central Asian bathrooms are some of the worst in the world, according to Robert D. Kaplan, who should know since he has been almost everywhere. All older buildings have the footplate with the hole in the floor. Most bathrooms are located in the basement, and you can smell them a good 100 feet before you get to the outer door. In the school, the bathroom was in the main hall, but the women's bathroom had no light. So the outer door stayed open, even though the stalls had no doors. I could peek out from my stall and watch people walk up and down the corridor; it was little comfort they could not see me, because I was in the dark.

Later that evening, David and I rushed back in to hear the judge read her decision in the fastest Russian I had ever heard. We were joined by the observer, the attorney, the chairwoman, looking as indomitable as ever, and a witness. Oddly, no other observers ever figured out what was going on. Incongruously, the judge's cell phone went off at least twice, playing the overture to some classical piece, which she simply ignored and went on reading. Then the piercing ring of the phone on her desk went off; she never missed a beat but simply reached over, picked up the receiver, and put it down again. She ruled against the observer.

At 8:00 p.m., the polling station closed. Our assignment was to observe the counting of the ballots, all of the signoff procedures, then accompany the polling people to where the ballots are dropped off, then on to the tallying center. Since this was one of the stations with the fewest voters, many observers had decided to stay there and observe in the hopes that they would be done early.

There is no way to describe what happened after 8:00. There was a great deal of moving of furniture and setting up and organizing. Final counting of ballots did not begin until at least 9:30 p.m. Each of the 10 counters was given a pile of ballots. By the end of that interminable evening, they must have counted their pile and their neighbor's pile 20 times. I remember sitting through a water district meeting one time that had that same slow-motion quality to it.

Finally, the chairwoman announced the ballots she had disallowed due to the voter having voted for both candidates. Fair enough. She then announced the "preliminary" count. For Miripov — 403. Akaev's daughter had a slim margin — 430. By that time it was about 11:00 p.m. The chair was on her cell phone often. David muttered ominously. I thought he was being unnecessarily suspicious, since the chair seemed so earnest and was trying to please the observers too. Two hours later, after more and more and more counting, unaccountably Miripov's final count was down to 363 and Akaev's had miraculously risen by about the same number. They wrapped up. David and I were the final observers. We accompanied their car to the tally station. David was muttering more about fixes and suspicious behavior. I naively asked how was it possible with 30 observers there. He just kept talking about their having worn everyone down. The streets were deserted as Mahmoud, our faithful driver, drove me through the streets of Bishkek at 1:45 a.m. with a semicomatose Ainura alongside me in the back seat and a silent David in the front.

I wearily climbed the dingy cement steps and stepped into the heat of my lovely apartment. My clock in the kitchen read 2:00 straight up. In another six hours, I had to be standing in front of a group of students trying to sound entertaining about the American Trial Experience.

And that is another story. I got to sleep around 3:00 a.m. and was up at 5:30.

My assessment four days after the elections is that the fix was generally outside the polling stations. The chair at our final station found herself in a situation where she had to give Akaev 10 percent of Miripov's votes and managed to do that. The university turned out students in the hundreds. It was enough to make a difference. Akaev's daughter won.

It makes me sad for Kyrgyzstan and the people here. The presidential election in October should be equally interesting and perhaps generate more Western press interest. In the meantime, ABA/CEELI works with law students, some of whom have assured me they are a new generation and things will be different.

Congratulations to the following WSBA members who reported 50 or more hours of *pro bono publico* service in 2004. We regret that these names were inadvertently omitted from the list published on pages 42-45 of the June 2005 issue of *Bar News*.

Gary Michael Abolofia
Sharonda Thompson Amamilo
Kathleen Phair Barnard
P. Craig Beetham
Carol Dianne Betts
Gloria J. Bolino
Janis L. Carrington
C. Scott East
Shannan L. Frisbie
Bradford Edward Furlong
Laura R. Gerber
S.C. Gilyeart
Dirk Jay Giseburt
Marvin Lee Gray
Andrew Alexander Guy
Henry Haugen
John Kent Hoerster
Michael P. Jacobs
John Graham Kamb
Margo T. Keller
Lise Kenworthy
Dustin Randal Klinger
Vincent R. Larson
Douglas Alan Luetjen
Andrew M. Mar
Kenneth Wendell Masters
Gary Nathanson
Timothy Scott Note
Adolfo Ojeda-Casimiro
Ronald R. Ritoch II
Daniel C. Russ
Gail Raymond Smith
John R. Spencer
Philip Anthony Thompson
Gretchen L. Valentine
Anthony D. Vivenzio
Jane J. Voget
Ruth Ann Elizabeth Westbrook
Robin J. Williams

Who's Fair Game? Who You Can and Can't Talk to on the Other Side

BY MARK J. FUCILE

Washington RPC 4.2 governs communications with represented parties. The "no contact" rule is designed to protect clients by channeling most communications through counsel for each side. Although RPC 4.2 is simple on its face, it can be difficult in application. At the same time, it involves situations that lawyers encounter frequently, and where they risk sanctions for "guessing wrong."

In this column, we'll look at who you can — and can't — talk to on the other side. Although the focus is on the litigation context where this arises most frequently, the concepts discussed apply with equal measure outside litigation. We'll first survey the elements of the "no contact" rule, then turn to its exceptions and conclude with how the rule applies in the corporate context.

Before doing so, though, we should note three amendments that are before the Supreme Court as part of the WSBA's "Ethics 2003" proposals. The first broadens the scope of the rule slightly by substituting represented *person* for *party*. The second deletes RPC 4.2(b), which deals with communications in limited-scope representations under RPC 1.2, and moves it to a comment instead. The third expands the "authorized by law" exception by including court orders. More information on these changes is available on the WSBA website at www.wsba.org/lawyers/groups/ethics2003.

The Elements

The "no contact" rule has four primary elements: (1) a lawyer, (2) a communication, (3) the subject of the representation, and (4) a party the lawyer knows to be represented.

A Lawyer. The "lawyer" part is easy. But what about people who work for the lawyer — such as paralegals, secretaries, and investigators? And what about our own clients? Although RPC 4.2 doesn't specifically mention communications channeled through others, the WSBA RPC Committee concluded in an Informal Ethics Opinion in 1996 — No. 1669 — that a lawyer cannot use others as a conduit to circumvent the rule. In doing so, the Committee relied on RPC 8.4(a), which prohibits a lawyer from violating the rules "through the acts of another." The comments to the pending amendments make that same point. Clients are not prohibited from contacts with each other during a lawsuit and, in fact, often continue to deal with each other on many fronts while disputes are underway. The comments to the pending amendments recognize this. Nonetheless, a lawyer should not "coach" a client for a prohibited "end run" around the other side's lawyer.

Communication. "Communicate" is not defined specifically in the rule. The safest course, though, is to read this term broadly to include communications that are either oral (both in person and telephone) or written (both paper and electronic).

Subject Matter of the Representation. RPC 4.2 does not prohibit *all* communications with the other side. Rather, it prohibits communications "about the subject of the representation" where the party is represented in "the matter."[1] In a litigation setting, the "subject of the representation" will typically mirror the issues in the lawsuit as reflected in the pleadings or positions that the parties have otherwise staked out. For example, asking an opposing party in an automobile-accident case during a break in a deposition whether the light was red or green will likely run afoul of the rule. By contrast, exchanging common social pleasantries with an opposing party during a break in a deposition should not.

Party the Lawyer Knows to Be Represented. RPC 4.2 is framed in terms of actual knowledge that a party is represented. Actual knowledge, however, can be implied from the circumstances.[2] The Supreme Court noted in *Carmick*: "Where there is a reasonable basis for an attorney to believe a party may be represented, the attorney's duty is to determine whether the party is in fact represented."[3]

The Exceptions

There are two principal exceptions to the "no contact" rule: permission by opposing counsel and communications that are "authorized by law."

Permission. Because the rule is designed to protect clients from overreaching by adverse counsel, permission for direct contact must come from the party's lawyer rather than from the party. The rule does not require permission to be in writing. A quick note or e-mail back to the lawyer who has granted permission, however, will protect the contacting lawyer if there are any misunderstandings or disputes later.

Authorized by Law. Contacts that are expressly permitted by law (or under the pending amendments, court order) do not violate the rule. Service of a summons or obtaining documents under public-records inspection statutes, for example, fall within the exception.[4] At the same time, the phrase "authorized by law" is more ambiguous in its application than in its recitation.[5] The safest course is to read this exception narrowly and to rely on permission from opposing counsel instead if direct contact is necessary.

The Corporate Context

A key question in applying the "no contact" rule in the corporate context is: Who is the represented party? Or stated alternatively, if the corporation is represented, does that representation extend to its current and former officers and employees?

The leading case in Washington on this point is *Wright by Wright v. Group Health Hosp.*[6] *Wright* was decided under Washington's former DR 7-104(A)(1). Nonetheless, the comments to the pending amendments note that "[w]hether and how lawyers may communicate with employees of an adverse party is governed by *Wright*."

In *Wright*, the Washington State Su-

preme Court drew a relatively narrow circle of employees who fall within the scope of corporate counsel's representation — particularly as it relates to a line employee whose conduct is at issue:

> We hold the best interpretation of 'party' in litigation involving corporations is only those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, *i.e.*, those employees who have 'speaking authority' for the corporation. This interpretation is consistent with the declared purpose of the rule to protect represented parties from the dangers of dealing with adverse counsel .... We find no reason to distinguish between employees who in fact witnessed an event and those whose act or omission caused the event leading to the action ....
>
> We hold *current* Group Health employees should be considered 'parties' for the purposes of the disciplinary rule if, under applicable Washington law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation. Since former employees cannot possibly speak for the corporation, we hold that CPR DR 7-104(A)(1) does not apply to them.[7]

Wright's explicit reliance on substantive evidence law produces an interesting dichotomy depending on whether the underlying case is pending in state or federal court. Professor Robert Aronson of the University of Washington notes this difference in his treatise, *Law of Evidence in Washington*:

> ER 801(d)(2)(iv) provides that the statement of a party's agent or servant is imputed to the party only if the agent or servant is 'acting within the scope of the authority to make a statement for the party.' This is a more stringent requirement than FRE 801(d)(2)(D), which exempts from hearsay treatment admissions by a party's agent 'concerning a matter within the scope of his agency or employment, made during the existence of the relationship.'
>
> ER 801(d)(2)(iv) requires that the declarant be a '*speaking agent*.' *See* Comment 801(d); *Kadiak Fish Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 422 P.2d 946 (1967). Thus, the statement of a truck driver after an accident, 'Sorry, I was speeding,' would be admissible against the truck company in federal court (because it is within the scope of his authority to act), but not in Washington courts (because the truck company did not authorize him to *speak* on its behalf).[8]

In other words, senior officers and directors are "off limits," and line-level employees whose conduct is at issue may or may not be "off limits" depending on their status as "speaking agents" under applicable evidence law. By contrast, line-level employees who are simply occurrence witnesses (to borrow from Professor Aronson's example: another company truck driver who simply observed the accident) and former employees of all stripes are "fair game." In communicating with a former employee, however, the comments to the pending amendments suggest that the contact cannot be used to invade the former employer's attorney-client privilege.

Summing Up

Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained, and bar discipline. Given those possible sanctions, coupled with the natural reaction of opposing counsel upon learning of a perceived "end run" to get to his or her client, this is definitely an area where discretion is the better part of valor.

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, coeditor of the WSBA Legal Ethics Deskbook, *and contributes this column quarterly to* Bar News.

NOTES

1 *See* WSBA Informal Ethics Opinion 2010 (2003).

2 *See In re Carnick*, 146 Wn.2d 582, 598, 48 P.3d 311 (2002); WSBA Informal Ethics Opinion 2044 (2003).

3 146 Wn.2d at 598.

4 *See* WSBA Informal Ethics Opinion 1668 (1996) (public records).

5 *See generally* ABA Formal Ethics Opinion 95-396, § X (1995) (discussing this phrase at length under the analogous ABA Model Rule); WSBA Formal Ethics Opinion 96 (1961) (wrestling with this issue under the former Canons).

6 103 Wn.2d 192, 691 P.2d 564 (1984).

7 103 Wn.2d at 200-01 (emphasis in original).

8 R. Aronson, The Law of Evidence in Washington, 801-27 through 28 (4th ed. 2004) (emphasis in original).

Insurance-Disclosure Court Rule Information and Request for Comments

BY WSBA GENERAL COUNSEL BOB WELDEN

At its July 2005 meeting, the Board of Governors may consider recommending a Supreme Court Rule on Insurance Disclosure that would make available to the public the basic information of whether or not a lawyer in the private practice of law is insured against professional liability. The rule is based on the ABA Model Court Rule on Insurance Disclosure (the WSBA was a cosponsor of the Model Rule proposal). The Board of Governors invites your comments on this proposed rule. The text of the proposed rule is on page 39.

What would the rule require? The Insurance Disclosure Rule requires only that a lawyer certify in the annual license-registration renewal process whether the lawyer is engaged in the private practice of law, and whether he or she is currently covered by professional liability insurance and intends to maintain insurance while in private practice. It also requires lawyers to report to the WSBA within 30 days if the policy providing coverage lapses or is terminated. The process would be similar to the annual Trust Account Certification procedure.

What would this rule not do? It is important to note what this rule does not do. It does not require that a lawyer have insurance. It does not require that a lawyer make any affirmative disclosure to a client or prospective client that she has or does not have insurance. It does not require disclosure of coverage limits or other individualized information. Failure to disclose would not result in a disciplinary sanction, but rather would result in suspension of a lawyer's authority to practice, and the suspension would be terminated simply by making the required disclosure.

Why consider this rule? Members of the public have the expectation that lawyers are insured for professional liability. In Washington, the public knows that you need insurance to be licensed to drive a car, to put on a roof, or to paint a house. The public expects that lawyers need to have insurance to be licensed to practice law. The profession bears the responsibility to recognize this expectation and to be answerable to it. Insurance is intended to protect the insured, but often clients who have been injured by professional negligence can receive meaningful recovery only if the lawyer is insured. In considering whether to pursue a malpractice claim on behalf of a client, the threshold question for most lawyers is whether there is insurance that makes a difficult claim worth pursuing. It is information that an informed client should have. In this case, we have the opportunity to do good for others at the same time we are doing good for ourselves. All lawyers should recognize the importance of insuring themselves to prevent their life's work from ruining their life savings.

How would this information be made available to the public? The WSBA would post the information as disclosed on the WSBA website in the member directory, and it would also be available by telephoning the WSBA. To avoid potential public misunderstanding of the issues, there would also be a link to a webpage where anyone could learn more about professional liability insurance. For example, it would explain that malpractice insurance coverage is "claims-made," i.e., even if the attorney was covered when the legal work was done, no insurance recovery is available unless the attorney is insured when the claim is filed. It would also note factors such as the fact that a lawyer maintains insurance does not mean that coverage is adequate because of policy limits and the effect of aggregate coverage in the event of multiple claims; that failure of a lawyer to comply with the terms of the policy might negate coverage; and that there are reasons why a responsible lawyer might choose not to carry malpractice insurance.

Has such a court rule been adopted elsewhere? Eleven state supreme courts have adopted rules requiring insurance disclosure, and four states are actively considering adoption of disclosure rules:

- Seven states (Delaware, Illinois, Kansas, Nebraska, North Carolina, Michigan, and Virginia) require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance, similar to the ABA Model Rule. Virginia adopted their rule in 1990, and maintains a consumer-oriented website where this information is available.
- Four states (Alaska, New Hampshire, Ohio, and South Dakota) took a different approach and amended their Rules of Professional Conduct to require lawyers to disclose directly to their clients whether they maintain professional liability insurance.
- In addition, the Arizona and Kentucky supreme courts and the Minnesota and New Mexico state bars are considering adoption of an insurance disclosure rule based on the ABA Model Rule.

If someone wants to know if a lawyer is insured, why not just ask? Both clients and lawyers should be encouraged to discuss all aspects of their professional relationship, but the reality is that persons seeking legal services are often not sophisticated individuals who are comfortable discussing anything with a lawyer, and, in fact, many lawyers are not comfortable discussing fees and other business issues with clients. Lawyers, as fiduciaries, should make this information available to the client. We should not expect that clients need to initiate discussions about liability insurance. The Insurance Disclosure Rule makes this information easily available to the public at no burden to the lawyer.

Your comments? Please share with the Board of Governors any comments you may have regarding this proposed rule. At their meeting on July 29–30, 2005, they may consider whether to recommend it for adoption by the Supreme Court. Please send comments to the attention of WSBA General Counsel Robert D. Welden at bobw@wsba.org or to 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330.

More information: Additional information on the ABA Model Court Rule on Insurance Disclosure and on the adoption of rules in other states is available at the ABA website at www.abanet.org/cpr/client.html#insurance.

Admission to Practice Rules (APR)
APR XX Insurance Disclosure *(Draft May 2005)*

(a) Each active member of the Bar Association shall certify annually in a form approved by the Board of Governors by the date specified by the form (1) whether the lawyer is engaged in the private practice of law; (2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance; (3) whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law; and (4) whether the lawyer is exempt from the provisions of this rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity. Each lawyer admitted to the active practice of law who reports being covered by professional liability insurance shall notify the Bar Association in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.

(b) The information submitted pursuant to this rule will be made available to the public by such means as may be designated by the Board of Governors which may include publication on the website maintained by the Bar Association.

(c) Any lawyer admitted to the active practice of law who fails to comply with this rule by the date specified in section (a) may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies. Supplying false information in response to this rule shall subject the lawyer to appropriate disciplinary action.

You are cordially invited to attend

The Washington State Bar Association's 50-Year Member Tribute Luncheon

Please join us as we celebrate the accomplishments of the 2005 WSBA 50-year members. All members of the legal community are invited to attend.

Thursday, September 29, 2005

•

Sheraton Seattle Hotel and Towers
1400 Sixth Avenue
Seattle

•

Registration and Reception
11:00 a.m.
(no-host bar)

•

Luncheon/program
12:00 noon

Name _____ WSBA No. _____

Address _____

Phone _____ E-mail _____

Affiliation/organization _____

Registration is $45 per person (table of 10 = $450). To make your reservation, please return this form (or a photocopy) with your credit-card information or check payable to WSBA. Space is limited, so please make your reservations early. Reservations and payment must be received by September 22, 2005. (Refunds cannot be made after September 22.)

☐ MasterCard ☐ Visa No. _____ Exp. date _____

Name as it appears on card _____

Signature _____

_____ (no. of persons) X $ _____ (price per person) = $ _____ TOTAL

Please list the names of all attendees and indicate meal choices. Be sure to include yourself.

_____ ☐ chicken ☐ salmon ☐ vegetarian

_____ ☐ chicken ☐ salmon ☐ vegetarian

_____ ☐ chicken ☐ salmon ☐ vegetarian

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_____ ☐ chicken ☐ salmon ☐ vegetarian

Send to: Washington State Bar Association
50-Year Member Tribute Luncheon
2101 Fourth Avenue, Suite 400
Seattle, WA 98121-2330
Phone: 800-945-WSBA or 206-443-WSBA • Fax: 206-727-8320

☐ If you need special accommodations, please check here and explain below.

_____

_____

WSBA office use only:
Date _____
Check No. _____
Amount _____
No. MTL50929

Lawyers' Fund for Client Protection

The Lawyers' Fund for Client Protection Committee meets quarterly to review applications for gifts from the fund. The Committee is authorized to make gifts of up to $25,000 to eligible applicants. On applications for more than $25,000, the Committee makes recommendations to the Board of Governors, who are the fund's trustees. At their meeting on May 20, 2005, the Committee took the following action:

David A. Ambrose (WSBA No. 21764; Edgewood; suspended): Ambrose stipulated to a two-year suspension. The conditions for reinstatement to practice include restitution to various parties. *(Mr. Ambrose is to be distinguished from David R. Ambrose of Portland.)*

Applicant A: Applicant hired Mr. Ambrose to represent him in seeking a parenting plan regarding his eight-year-old daughter. Applicant's mother paid Mr. Ambrose $1,800 on behalf of her son. Mr. Ambrose prepared a draft parenting plan, but when Applicant reviewed it, he found that it was full of inaccuracies and spelling errors, and was incomplete. After a few weeks, Mr. Ambrose would not return Applicant's phone calls and did not open his door when Applicant went to his office. Applicant wrote Ambrose to demand that he either finish the work or refund the $1,800. He received no response. Finally, Mr. Ambrose left a message that Applicant could pick up his file. Applicant went to Mr. Ambrose's office and received an envelope with his file and a handwritten note from Mr. Ambrose stating that Applicant had failed to decide on a "single, integrated strategy" and that "THE MOTHER NEEDS AT LEAST A STERN TALKING TO BY SOMEONE" [*sic*]. He received no refund or accounting. In his stipulation, Mr. Ambrose agreed to pay $1,800 to Applicant's mother. The Committee approved payment of that amount.

Applicant B: Applicants hired Mr. Ambrose for representation in a family real estate dispute. They paid him $2,900 in fees and costs. Mr. Ambrose filed a lawsuit on behalf of Applicants, but after that, he did little work. He did not respond to discovery requests until the defendants moved for sanctions. He cancelled scheduled depositions. On the scheduled date for trial, he filed an untimely motion for a new judge. Even though it was untimely, the judge chose not to proceed. Mr. Ambrose agreed to arbitrate the claim but took no steps to do so. Mr. Ambrose stipulated that although he did not work on Applicants' case after December 2003, between December 12, 2003, and September 17, 2004, he collected an additional $2,200 in fees from them. He stipulated to $2,200 restitution, and the Committee approved payment in that amount.

Applicant C: Applicants hired Mr. Ambrose to represent them regarding a dispute with neighbors regarding a road easement over Applicants' property. They made fee payments totaling $9,645 plus $112 to pay cost of service. Before Mr. Ambrose filed suit, the neighbors filed against Applicants. They filed a motion for order of default, which was granted. Mr. Ambrose then filed a notice of appearance. According to the lawyer for the neighbors, he had only one telephone conversation with Mr. Ambrose who told him that he did not have an office at his mailing address, and gave no other contact information. Mr. Ambrose appeared in court one time when the order of default was set aside by agreement of the parties. He never filed an answer to the complaint, and the trial judge entered a default judgment against Applicants. Mr. Ambrose then told Applicants that he would sue the neighbors. Applicants paid him an additional $2,000. Ambrose did nothing further on their case. The Committee approved payment of $10,757.

Applicant D: Applicants hired Mr. Ambrose to file suit against the builder of their home over defective siding. They paid him $1,500 and filing and service fees. Mr. Ambrose drafted a complaint which was reviewed and agreed to by the Applicants, but Mr. Ambrose says that on the day that he was prepared to file and serve the complaint, he checked with the Office of the Secretary of State and discovered that the defendant had voluntarily dissolved. As a result, he did not file the complaint. After that, there were communications between Applicants and Mr. Ambrose. In the disciplinary investigation, Ambrose asserted that he fully earned the $1,500 fee. He did not, however, account for or refund the filing and service fees totaling $145. The Committee approved payment of $145 and denied the balance of Applicants' application, because it is a fee dispute that the Fund Committee cannot resolve.

John M. Cooper (WSBA No. 22977; College Place; suspended): Mr. Cooper asserted during disciplinary proceedings that he was mentally incapacitated and unable to defend himself. Supplemental disability proceedings were ordered, and Mr. Cooper was ordered to sign waivers to allow disclosure of his medical records. He did not do so. The hearing officer found that a lawyer asserting incapacity has the burden of proving incapacity, and that Mr. Cooper failed to do so. Therefore, the disability proceeding was dismissed and the disciplinary proceeding was resumed. Mr. Cooper also never filed an answer to the disciplinary complaint, and an order of default has been entered. *(Mr. Cooper is to be distinguished from John G. Cooper of Seattle and John M. Cooper of Bainbridge Island.)*

Applicant hired Mr. Cooper to probate her mother's estate. She paid him $250 at that time. The estate was valued at approximately $50,000, consisting mainly of the house Applicant's mother owned and in which Applicant lived. There were also numerous creditors' claims. Mr. Cooper recommended that she take out a mortgage to raise $5,000 to pay the creditors. Applicant gave Mr. Cooper a cashier's check for $5,750. $750 was an advance fee payment to Mr. Cooper, and $5,000 was to be used to pay creditors, with any remaining balance to be refunded to Applicant. Applicant contacted Mr. Cooper periodically, and he assured her everything was fine. However, soon he stopped returning phone calls, and creditors began contacting Applicant because their claims had not been paid.

Applicant and her husband confronted Mr. Cooper at his home. During that meeting, Cooper gave Applicant a trust account check for $3,010, and a promissory note for the balance of fees and costs plus interest, plus $2,000 "to make matters right." He has made no payments on the note.

The disciplinary examination of Mr. Cooper's trust account showed that after he deposited Applicant's check into his trust account, he used her funds to pay the expenses of other clients and to make cash withdrawals. His payment of $3,010 to Applicant from the trust account depleted the account. The Committee approved payment to Applicant of $2,990, representing the $6,000 paid in fees and costs, less the $3,010 repayment.

Robert C. Lyons (WSBA No. 22275; Spanaway; disbarred): The Committee previously paid two applications regarding Mr. Lyons. Applicant hired Mr. Lyons to seek custody of his 14-year-old son. Applicant paid Lyons $2,500. Mr. Lyons never filed any petition or took other action on his behalf. After Mr. Lyons closed his office and disappeared, Applicant says that he was able to reach Mr. Lyons's former secretary who said, "good luck finding him." The Committee approved payment of $2,500.

Oleg Ordinartsev (WSBA No. 27574; Bothell; suspended): Mr. Ordinartsev had represented Applicants for approximately three years in connection with construction companies they owned. According to Mr. Ordinartsev, he was aware that they had financial difficulties with their businesses. Mr. Ordinartsev had another client who was involved in caviar production and distribution. Mr. Ordinartsev agreed to stop taking new clients in order to wind down his private practice and work full-time for this client and his caviar businesses. During a meeting at his office, Applicants were introduced to Mr. Ordinartsev's caviar-business clients. As events ensued, Applicants decided to invest in the caviar business. Mr. Ordinartsev did not advise Applicants to seek independent counsel, and he did not advise Applicants of the conflicts of interest he had in being involved in a transaction where one client would invest in another client's business. He also did not advise the Applicants that his other client was involved in litigation where it was alleged that he had misused corporate funds for private purposes. He obtained no written waiver of conflicts from any of the parties involved.

Applicants gave Mr. Ordinartsev $65,000 to hold in his IOLTA trust account until all details of the "caviar project" were worked out. Applicants were to receive 65,000 shares of stock in the caviar business. Mr. Ordinartsev gave Applicants no documentation for their investment other than two receipts for the funds. Applicants never received any shares of stock. Mr. Ordinartsev disbursed the $65,000 as follows: he paid $20,000 to his other client, which Mr. Ordinartsev wrote was "for purchasing processing equipment, personal expenses, etc."; $25,000 to a subsidiary company "for purchasing processing equipment and operation expenses"; and $20,000 to himself "for legal services associated with 'caviar project.'" Mr. Ordinartsev stipulated that when he made these distributions, he knew that was not what the Applicants intended be done with their money. Applicants never authorized any of their funds to be paid to Mr. Ordinartsev.

Among other misconduct, the Stipulation to Discipline provides that "by disbursing [Applicants'] investment funds in a manner inconsistent with what [Applicants] had been led to believe would be done with, and what they wanted done with, those funds, [Mr. Ordinartsev] violated . . . RPC 8.4(c) ["Engage in conduct involving dishonesty, fraud, deceit or misrepresentation"]." Mr. Ordinartsev stipulated to payment of restitution to Applicants of $20,000. The Committee approved payment of that amount, and denied the balance as an investment transaction not compensable from the fund.

R. Stuart Phillips (WSBA No. 29701; Indianola; disbarred): Applicant hired Mr. Phillips to seek payment on a disability insurance policy she had purchased through her credit union when she took out a car loan. She says that she became disabled and unable to work, so asked the credit union for an insurance claim form. She says the insurance claim manager refused to allow her to submit a claim on the grounds that her claim was disqualified because of a pre-existing condition. Her insurance policy was cancelled. Phillips wrote letters to the credit union and to the insurance company. As a result of those letters, the insurance policy was reinstated and the insurance paid the loan payments as of the date of Mr. Phillips's letter. However, after that, she could not contact Mr. Phillips; his phone was disconnected, and she discovered that his office was closed. Applicant received one billing from Mr. Phillips. It shows payment of $500 by Applicant, fees for meeting with client and for the letters totaling $201.60, and a credit balance of $298.40. Mr. Phillips never refunded the balance or accounted to Applicant for her funds. The Committee approved payment of that amount.

Randall L. St. Mary (WSBA No. 4331; Everett; disbarred): Mr. St. Mary represented Applicant in a personal-injury lawsuit against the city of Everett. After he filed a complaint, Defendant moved for summary judgment, which was granted with prejudice when Mr. St. Mary failed to appear in court. Mr. St. Mary told Applicant they could reopen her claim after they had obtained an expert witness. At Mr. St. Mary's request, Applicant paid him $1,225 to pay the expert witness's fees. Mr. St. Mary had not told her the case had been dismissed with prejudice. When she learned that the case had been dismissed, she requested return of her $1,225. Mr. St. Mary did not respond and has not returned Applicant's $1,225. The Committee approved payment in that amount.

Chul Shirts (WSBA No. 24993; Vancouver; disbarred): The Committee previously paid two applications regarding Mr. Shirts. Applicant paid Mr. Shirts $430 to seek a modification of child support. According to the hearing officer's findings, she called Mr. Shirts nearly weekly for several months, and also went to his office, but she could never reach him. She heard through family members that her ex-husband had been served with papers, but she checked the court file and nothing had been filed. Mr. Shirts never filed the petition and proof of service. He never accounted for the $430 and never returned her funds. He was ordered to pay $430 restitution, and the Committee approved payment of that amount.

Gregory S. Wilson (WSBA No. 12012; Tacoma; resigned in lieu of disbarment): The Committee previously paid two applications regarding Mr. Wilson. Applicant paid Mr. Wilson $1,000 to apply for permanent residency. One of Mr. Wilson's staff members told Applicant to purchase a cashier's check for $470 payable to the INS. He says that after he gave Mr. Wilson the cashier's check, he heard nothing further. The next time he heard from Mr. Wilson was when he received a letter dated April 20, 2004 stating that, due to health problems (Mr. Wilson was suspended on May 13, 2004), Mr. Wilson would be unable to represent him and that he had referred Applicant's case to another attorney. Applicant called Mr. Wilson's office and was told that they would send his file, his $1,000 fee payment, and the cashier's check to the new attorney. *(Mr. Wilson is to be distinguished from Gregory M. Wilson of Greenacres.)*

Applicant contacted the new attorney and asked for his files, the $1,000, and the cashier's check. The attorney said he never got them from Mr. Wilson. A WSBA staff member contacted Mr. Wilson who said that he could not find Applicant's file. He also said that he had received a $470 cashier's check, but he did not know what happened to it except he had never cashed it. Applicant was advised to contact the bank where he purchased the check to seek a refund of the money. The Committee approved payment of $1,000 to Applicant.

Other business: The Committee reviewed 20 additional applications that were denied for lack of evidence of dishonest conduct, or as fee disputes or claims for malpractice. Four of them were dismissed as full restitution had been made, and one was continued for further investigation.

Restitution: Before payment is made to an Applicant, the Applicant must sign a subrogation agreement with the fund, and the fund seeks restitution from the lawyers. Because in most cases those lawyers have no assets, the chief avenue of restitution is through court-ordered restitution in criminal cases. Prosecuting attorneys cooperate with the fund in getting the fund listed in restitution orders. As of April 30, 2005, seven lawyers were making regular restitution payments to the fund, totaling $2,560 in this fiscal year.

The Committee chair is Olympia attorney James A. Connolly. WSBA General Counsel Robert Welden is staff liaison to the Committee.

Congratulations to the Individuals Who Passed the Winter 2005 Bar Exam!

Abedi, Hassan Ali, Bainbridge Island
Adams, Robyn L., Bellevue
Ahrens, Chad E., Fife
Aiax, Shelley Ann, Kennewick,
Akeju, Samuel Olutola, Chicago, IL
Akiona, Ululani Gayle, Honolulu, HI
Alvarez, Marina Lamps, Seattle
Ambrose, Michael James, Seattle
Anaya, Jennifer R., Tacoma
Anderson, Mary Ruth, Seattle
Anderson, Patricia M., Longview
Anderson ,Shane T., Seattle
Arjun, Patricia, Portland, OR
Armstrong, Ashley Hope, Seattle
Barnes, Gretchen Seeley, Beaverton, OR
Baumann, Laura, Redmond
Bawel, Paul, Woodinville
Beckwith, Rogina D., Kingston
Bell, Daniel H., Portland, OR
Bell, Richard L., Issaquah
Berens, Kristen Deanne Randall, Pullman
Berens, Michael J., Colorado Springs, CO
Berg, Mark R., Seattle
Bertoson, Todd Russell, Arlington, VA
Bifone, Christopher P., Seattle
Black, Bruce E., Seattle
Bodey, Jessica Lee, Spokane Valley
Bond, Alison, Lacey
Boswell, Mason, Redmond
Botes, Holly Kay, Seattle
Bottoms, Brent William, Tacoma
Braunstein, Jeremy, Indianapolis, IN
Bray, Petrea Shantel, Seattle
Brennan, Carey M., Kirkland
Breysse, Margaret A., Seattle
Briggs, Joelle Marie, Seattle
Brokaw-Zorrozua, Camerina I., Spokane
Brost, Tiffany Joy, Seattle
Brown, Lynnda, Las Vegas, NV
Brownlee, John P. Jr., Bonners Ferry, ID
Bryant, Andrew Robert, San Diego, CA
Buchsbaum, Lori Leigh, Burien
Bugay, Daniel Pitpitan, Lawndale, CA
Bull, Karina, Portland, OR
Busha, Cathy Ann, Ellensburg
Bushman, Brian Russell, Seattle
Campbell, Bryan R., Chicago, IL
Campbell, Sarah Ann, Colorado City, TX
Campbell, Teresa T., Chicago, IL
Careaga, Richard, Kirkland
Carlson, Sharon E., Tukwila
Carroll, Mendi R., Bellevue
Carter, Melissa D., Brier
Cazares, Christopher D., El Paso TX
Chang, Henry, Arcadia, CA
Chase, Mila Melissa, Portland, OR
Chawes, David E., Seattle
Cheng, Hubert H., Issaquah
Chesebro, Nova Monika Ciel, Seattle
Chou, Pedro S., Bellevue
Chou, Sophath, Bellevue
Choy, Alison L., Seattle
Christen, Daniel R., Snoqualmie
Christensen, Aaron, Kirkland
Christeson, Eric Blaine, Roscoe, IL
Chung, Lawrence, Bothell
Clark, Leslie C., Renton
Cleaveland, Ruben David, Vancouver
Combs, Jennifer, New Orleans, LA
Connolly, Daniel R., Seattle,
Conrad, Matthew Wentworth, Seattle
Conyac, Luke, Seattle
Cousins, Robert F., Bainbridge Island
Craig, Kara M., Quincy, IL
Crowley, Barbara Kay, Spokane
Dani, Steven J., Seattle
Daniels, Shamaine A., Kennewick
Danielson, James E., Seattle
Davis, Bruce Scott, Seattle
DaPra, Eileen, Lynnwood
Dean, John R., Anchorage, AK
de Bakker, Derek Peter, Seattle
Delgado, Timothy H., Folsom, CA
Derricott, Mark Roland, Seattle
Derrig, Elizabeth Colette, Mukilteo
DeWitt, Steve, Seattle
Diggs, Matthew, Seattle
Dixon, Roman S. Jr., Kent
Dodge, Mark S., Topanga, CA
Doolittle, Alexandria K., Seattle
Downey, Jennifer Marie, Seattle
Druyan, Kira E., Seattle
Dunkerley, Michele A., Mercer Island
Dunnagan, Danny Keith Byron, Ellensburg
Duong, Diem, Renton
D'Arcangelo, Brandon, Vancouver
Eccles, Leah M., Salt Lake City, UT
Eklund, Amanda Katherine, Fairbanks, AK
Elias, Jennifer, Jackson Heights, NY
Elliott, Svitlana V., McKinleyville, CA
Esterle, Marriya Christine, Spokane
Eversole, Sarah, Seattle
Fedorak, Marc F., North Vancouver, BC
Feldman, Brandon Matthew, Shoreline
Ferguson, Alison Amy, Seattle
Finley, Marilyn, Newcastle
Fitzgerald, Sean P., Lynnwood
Fleischmann, Zachary Ian, Seattle
Franklin, Steve C., Bainbridge Island
Freeman, Nathaniel Ketil, Seattle
Fruehling-Watson, Rosalee, Seattle
Fujimoto, Beth Keiko, Redmond
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Ghidotti, Michelle Rene, Santa Ana, CA
Gilligan, Francis Richard, Evanston, IL
Gordon, Deborah Lynn, DuPont
Gorman, Kimberly Ann, Bainbridge Island
Grabowski, Marcin, Renton
Grace, Ryan T., Seattle
Grady, Douglas Anderson, Seattle
Gravendyk, Katherine A., Carnation
Gray, David Stuart, Richmond, BC
Greb, Leylan, Vancouver
Green, Adam Howard, Coeur d'Alene, ID
Green, Penelope Olga, Vancouver, BC
Green, Robert Hajime, Spokane
Green, Shannon Marie, Kirkland
Grey, Francis, Santa Maria, CA
Griffith, Philip Arthur, Longview
Grimm, Mayrie, Longview
Grover, Megan Elaine, Maple Valley
Guadagno, Alberto, Seattle
Gusick, Spencer M., Sammamish
Guzman, Alvin Lee Jr., Sunnyside
Habernigg, Ann, Kirkland
Hackett, Lisa Marie, Kirkland
Hall, Timothy James, Yakima
Hamje, Paula, Lacey
Hamlin, Spencer Danz, Washington, DC
Hammer, Isaac L., Seattle
Han, Jae Hee, Anaheim Hills, CA
Harris, Andrea S., Seattle
Harris, Anthony V., Graham
Harrison, Kathleen A., San Diego, CA
Harrow, Eva G., Tacoma
Hart, Amy S., Boise, ID
Hawkins, Matthew T., Olympia
Hays, Gene E., Grand Terrace, CA
Helenese, Sherman George, Seattle
Henderson, Clarence M. Jr., Talladega, AL
Hess, Adana C., Seattle
Hiatt, Pamela Beth, Bellevue
Hicks, James D., Seattle
Hidley, Ondrea Dae, Sammamish
Hoegen, Thomas A., Laramie, WY
Holifield, Jeffrey G., San Jose, CA
Holmes, Kim M., Seattle
Humphries, Sara Evangeline, Groton, CT
Hutchison, SaraEllen McCay, Seattle
Hvidberg, Jepera, Mercer Island
Impert, Walter Quentin Pratt, Seattle
Isaac, Annette Louise, St. Peter Port, Channel Islands
Jacob, Christopher C., Seattle
Jacobson, Paul Stephen, Renton

Jarbi, Isabella, Lake Havasu City, AZ
Jason, Casey Jr., Washington, DC
Jeffrey, Adrienne Olson, La Jolla, CA
Jennison, Judith Bond, Kirkland
Jessee, William Lloyd, Auburn
Jiwa, Farouk, Vancouver, BC
Johnson, Jeffrey S., Spokane
Julian, Darrell R., Seattle
Just, Leah Sage, Seattle
Kandra, Lindsay Ruth, Portland, OR
Kerl, Christopher A., Seattle
Kerr, Kara E., Shoreline
Keyes, John Brian, Newcastle
Keyes, Ruth A., Newcastle
Khaira, Serene S., Alameda, CA
Kierkergaard, Eric Nicholas, Redmond
Kilby, Pamela Anne, Redmond
Kim, Christie, Los Angeles, CA
Kim, Loree J., Kenmore
Kleps, Michael T., Estacada, OR
Knauf, Erica Nicolle, Seattle
Koonce, Heidi Katrina, Hailey, ID
Kubecka, Michael J., Edmonds
Kvistad, C. Michael, Seattle
Lambert, Benjamin, Seattle
Lancaster, Brandon, Lake Havasu City, AZ
Lang, Andre L., Kent
Langley, Mark Lonsdale, Tucson, AZ
Lapitan, Tricia S., Kirkland
Larson, Brent Patrick, Whitefish, MT
Laurent de Cannon, Franz, Salem, OR
LaMotte, Matthew F., Seattle
LaSarte-Meeks, David, Seattle
Leary, John V. Jr., Seattle
Lee, Deborah Brown, Seattle
Lee, Derek Angus, Vancouver
Lenaburg, Rebecca Ann, Seattle
Lester, Isa, Bend, OR
Lewis, Jonathan J., Seattle
LeCuyer, Stephen T., LaConner
LeRay, Lancer J., Spokane
LeRoy, Tracy N., Spokane
Lindell, Joan Louise, Sammamish
Lindemuth, Jahna M., Anchorage, AK
Lindsey, Gus III, Lake Stevens
Ling, Emily, Spokane
Llewellyn, John Grant, Seattle
Lorella, Theresa Rose, Bellevue
Low, Angela M., Seattle
Lowen, Amy, New York, NY
Madison, Zachary Andrew, Coeur d'Alene, ID
Malcolm, Sean Bennet, Portland, OR
Malloch, Steven P., Seattle
Malloy, Curtis David, Bellevue
Marino-Blair, Bonnie, Portland, OR
Marlow, Anthony Scott, Sammamish
Mason, Edgar Chen, Olympia
Masshoor, Awesta, Seattle
Masters, Richard Gibson, Portland, OR
Mathewson, Gwen Christina, Seattle
McCabe, Peter T., Surrey, BC
McCullough, Amy, Vancouver
McGirk, Thomas W., Spokane
McGowan, Donald Joseph, Bellevue
McMurtry-Chubb, Teri A., Bellingham,
McNeely, Andrea H., Tacoma
Meade, Aram Adam Theo, Seattle
Mendez, Damian Salomon, Walla Walla
Messenger, John R., San Francisco, CA
Michaud, Mark Jason, Incline Village, NV
Milgrom, Benjamin B., Seattle
Moore, Garette N., Shoreline
Morelli, Billie Renee, Seattle
Morgan, Patricia S., Bellevue
Morris, Joseph P., North Bend
Mower, Amy L., Maple Falls
Mundorf, Gretchen, Seattle
Mustafayeva, Sabina, Redmond
Neff, William Joseph, Pasco
Ngo, Anh Kiet, Kirkland
Ngo, Hieu, Mill Creek
Nguyen, Lan Thi, Seattle
Njoku, Noble Chikezie, Seattle
Noel, Lacey Alynn, Jacksonville, FL
Noel, William Scott, Jacksonville, FL
North, Erinlea Elizabeth, Newcastle
Northrop, John Blair, Bensenville, IL
Noviks-Tucker, Danielle Malia, Seattle
Novotny, Stephen J., Graham
Odom, Jeffrey Michael, Federal Way
Orr, Timothy S., Spokane
Ortiz, Kathy Jean, Astoria, OR
Osbun, Craig S., Redmond
Ouren, Kimberly Ann, Kennewick
O'Connell, Joan M., Corrales, NM
Pangborn, Russell C., Redmond
Payant, Sharon, East Wenatchee
Payne, Kris A., Richland
Payne, R. I., Spokane
Pellegrini, Matthew A., Lynnwood
Penhallegon, Ryan, San Jose, CA
Penry, Julie Suezanne Eling, Lake Oswego, OR
Perez, Robert, Sammamish
Peterdy, Noland, Veradale
Pitner, Noel J., Spokane
Plichta, Grzegorz S., Mercer Island
Poliquin, Sunshine Marie, Spokane
Porto, Jennifer Rose, Kirkland
Prestia, Frank, Seattle
Proctor, Chadwick Scott, Hallandale Beach, FL
Purganan, Florian Damaso, Lynnwood
Rahman, Ashek, Kenmore
Ransom, Alexander Floyd, Bellingham
Raymond, Thomas Emmons, Sammamish
Reitz, Michael J., Olympia
Rettinghouse, Heidi D., Marysville
Richmond, Woody, Bellevue
Rios, David, Redmond
Robinson, Deborah, Bellevue
Roe, Juliana, Tacoma
Rogers, Jeremy H., Tacoma
Rolfs, Rachel, Seattle
Ronis, Carolyn S., Bothell
Rosenberg, Shoshana Eleanor, Washington, DC
Ross, Gyasi, Silver Spring, MD
Rowand, Geoffrey Halvor, Seattle
Russell, Maya Elizabeth, Flagstaff, AZ
Sage, David W., Lakewood, CO
Sastry, Stanley S., Mill Creek
Satterberg, William Robert, Fairbanks, AK
Sayre, Steven Michael, Olympia
Schack, Karen Christina, Seattle
Scheetz, Breier William, Edmonds
Scheinman, Tenaya, Seattle
Schoenecker, Amy Suzanne, Seattle
Scholz, Kristi Linn, Orting
Schwartz, Marne, Seattle
Seawell, David, Seattle
Seldon, Janet Beth, Tacoma
Settle, Scott William, Kailua, HI
Sharma, Anu, Auburn
Sheldon, Kelsey M., Browns Point
Shin, Hacryung A., Furry Creek, BC
Simon, Marcus Scott, Seattle
Sivinski, Greg A., Woodinville
Skuda, Phillip Jason, Dallas, TX
Smith, Andrea Yaeko, Seattle
Smith, Stuart W., Lake Oswego, OR
Snowden, Kevin, Seattle
Solidum, Michael I., Seattle
Speir, Reed Manley Benjamin, Fircrest
Spencer, Quanah M., Zillah
Starrett, Jung-Ock Shin, Bellevue
Stegena, Roy T. J., Downingtown PA
Stelting, Neal Ray, Portland, OR
Stone, Rachel Dobrow, Mercer Island
Stoner, Bianca, Tacoma
Stum, Melanie Ann, Spokane Valley
Summer, James B. Jr., LaGrange, GA
Sutton, Leslie J., Portland, OR
Sykes, Tuella O., Seattle
Talley, Leigh N., Spokane
Tatum, Jennifer Sue, Olathe, KS
Tavel, Phillip Alden, Seattle
Theodorakis, D. John, Sammamish
Thompson, Kenneth A., Seattle
Thomsen, David Arthur, Newport Beach, CA
Treptow, John A., Anchorage, AK
Truini, Trina Marie, Flagstaff, AZ
Tshionyi, Makambo, Seattle
Valdez, Natividad, Olympia
Vaughan, David A., Seattle
Vining, Elisa Joy, Prosser
Vrbanac, Michael D., Seattle
Waldo, John Frazier, Bainbridge Island
Wall, John Michael, Seattle
Walling, Kevin C., Everett
Wan, Kenneth C., Bellevue
Watson, Wayne Earl, Anchorage, AK
Weber, Antone Alfred, Seattle
Weber, Peter Ross, Provo, UT
Wehling, Martha Frost, Tumwater
Wells-Sanchez, Randi, Bellevue
Westphalen, Mimi M., Lyons, CO
Wheeler, Julian Saucedo, Seattle
White, Josephine Afiya, Seattle
Whiteley, Jason R., Spokane
Williams, John Meade, Lynnwood
Wilson, Terrance R., Seattle
Wittner, Kelly Moreen, Tacoma
Womac, Daniel Allen, New York, NY
Woods, Judith A., Kirkland
Wright, April Eileen, Vancouver
Wright, Chad R., Tacoma
Wyckoff, Timothy R., Seattle
Yamada, Masaki J., Seattle
Younesi, Peyman, Bellevue
Young, Jeff G., Bellevue
Yu, Jeng Daw, San Jose, CA
Zere, Tamar Isaac, Kent
Zimmerman, Jon Michael, Seattle

The Board's Work

BY LINDSAY THOMPSON

Bellevue, June 2-3, 2005

This time at bat the governors combined their meeting with the Access to Justice/Bar Leaders annual conferences. Thursday, June 2, was an afternoon session devoted to a consideration of Initiative 330. That's the ballot measure to reform the legal system floated by the Washington State Medical Association. A gaggle of guests presented their views. The Board of Governors took up whether to do anything about the initiative.

The guests were of the Usual Suspects in tort reform, so I'm only going to summarize what they all said. Mostly it was recitations of talking points everyone has heard before and will certainly hear again as summer wanes, for we were promised big-budget ad campaigns in the media by all sides.

Thomas J. Curry, CEO of the medical association, started off. He said there is a man serving in the legislature whose name is "The Trial Lawyers' Legislator of the Year." This character apparently chairs a committee, and is a bit of a scamp. TTLLY was mean to the doctors and wouldn't let any of their bills get out of his committee. WSTLA, not content to leave the fun to TTLLY, wasted boatloads of time in meetings with the doctors, and got all stroppy with their non-negotiable demands.

So, Mr. Curry concluded, the doctors had to go the initiative route, and when they said they were going to do it, the president of WSTLA threatened the president of the doctors with a WSTLA initiative. When the doctor manfully stood his ground, the trial lawyer showed a womanly display of retribution and filed WSTLA's initiative out of pure spite.

The rest of Mr. Curry's presentation cited studies supporting his position and slagging WSTLA's initiative ("the three strikes provision in I-336 is an attempt to extort bigger settlements"). Mr. Curry thinks WSBA doesn't have a dog in this fight and urged the BOG to remain neutral.

John Connelly is president-elect of WSTLA, and he spoke next. He predicted "a tremendous risk of the public being duped by a coming barrage of ads talking about greedy trial lawyers." The doctors' initiative brings in draconian restrictions; contains provisions that are unconstitutional on their faces; and gangs up on women, the elderly, and children, Connelly declared. He went through the WSBA's legislative guidelines, which were adopted to help the BOG decide what measures to support, and concluded that supporting I-330 would violate those guidelines. He was particularly concerned that every time anyone in Washington seeks medical treatment, they'd have to sign a paper waiving their right to jury trial and admitting that the waiver isn't a contract of adhesion. He exhorted the governors to "oppose 330 in the strongest terms."

"Do you have any picture books that could help a child understand tort reform?"

Mike Kreidler, the state insurance commissioner, came next, but said he wasn't there as insurance commissioner. He explained how in his business and political career he has weathered three up-and-down cycles in the costs and availability of insurance in Washington. The insurance market is improving today and will continue to do so. For most doctors, insurance is more available and affordable; the company that insures about three-quarters of Washington doctors has offered a rate reduction and is making record profits. New carriers are entering the market. The last 10 years, according to a study Kreidler's office did, shows no unusual spikes in insurance premiums over the last decade, just a steady increase tracking the rate of medical inflation.

Kreidler told the Board I-330 will punish malpractice victims, shield hospitals, result in arbitrarily reduced damage awards, and tilt the litigation playing field by limiting attorney fees on one side but not the other.

"If my position on I-330 sounds harsh," Kreidler concluded, "It is not because I support 336 either." He called for real reform through the legislative process.

Jeff Frank is the president of the Washington Defense Trial Lawyers. He and their liaison to the BOG, **Jim Macpherson**, urged the Board not to get involved. "Opposing 330 will put the Bar Association on the spear point of all the attacks partisans on both sides will surely launch," Macpherson said. "You should sit this one out and let others do their advocacy." Mr. Frank said he wasn't there to argue the merits of either initiative, or to tell the Board what to do. "It's not about whether you *can* do something," he argued, "but whether you *should*." The WSBA will get beaten up by members for taking sides; by the public for trying to feather the profession's nest; and the results will be generally nasty, brutish, and long-lasting.

Barbara Flye is the former executive director of the consumer group Washington Citizen Action and newly named head of a "No on 330" campaign. She said 330 is anti-consumer and thought the WSBA should take no position on 330 or 336.

That ended the set-piece part of the debate. After a break, President **Ron Ward** (looking chipper and well after a nasty bout with gallbladder surgery) called for a Q&A session. Despite the fact the presenters all ranged back and forth over 330

and 336, the president ruled a motion by Governor **Joni Kerr** — to support neither — out of order on grounds 336 hadn't been vetted, and commenters invited, as was occurring this time on 330.

It developed in the discussion that people were thinking in terms of several potential courses of action: taking a position for the initiative; taking a position against it; and a more Dadaist option of taking a position not to take a position, which was explained as being different from being for or against.

There were questions to the speakers about whether the initiative would shield insurance companies from liability (well, at least HMOs and health care contractors); or pharmaceutical companies (no, but yes, they are giving money to the initiative campaign); whether defense attorney fees would be regulated (no, "defense attorney fees are driven by plaintiffs' attorney fees").

Governor **Mark Johnson** cross-examined Mr. Curry at some length over issues like how you can make sure plaintiffs get more money by capping damage awards ("it's a matter of balance," Curry replied, a bit teeth-clenchedly).

Governor Kerr complained the program was being turned into a forum for WSTLA to tout its position and urged opposition to both. If we oppose 330 we'll be seen as impliedly supporting 336, she said.

Governor **Eron Berg** asked, somewhat rhetorically, how the two sides could have let things get to such a sorry,, zero-sum state. The Medical Association and WSTLA each blamed the other for being intransigent. Both claimed they had gone the extra mile, which made it look like they had passed each other somewhere along the way and ended up two miles apart.

A consensus emerged that however much the two initiatives may resemble steaming piles of verbiage, the WSBA's core values — defense of the jury system and the courts, and separation of powers, for example — are at bazard under 330, so some kind of position was called for to educate the public. Others pointed out the initiative would reduce statutes of limitations and awards on meritorious cases as well as bad ones. After some rear-guard action by Governor Kerr to get a vote on both measures, the BOG voted unanimously to take a position on 330. After some further discussion, they voted 12-0-1 to oppose 330, Governor Kerr abstaining

Governor Berg produced a memo he and Governor **Lonnie Davis** did on 336, finding that for the most part the things it wants to do are outside the ambit of General Rule 12, the court rule that defines the sorts of things the Association can and can't take positions on. **Doug Ende**, sitting in for WSBA General Counsel Bob Welden, told the Board the two measures are substantially different in a GR 12 analysis. The Board decided to put off action on 336 until they have an opinion from general counsel, probably at their July meeting.

So in the end the Board voted 9-4 to oppose Initiative 330. With a little time left on the clock, they approved appointments to WSBA's Legislative Committee for the coming year, and recessed at 4.30 p.m.

Friday the Board reconvened at 9 a.m. and took up election of a new president for the year 2006-07 and a governor to fill one of the at-large seats. WSBA's presidency rotates around the state — eastern Washington, western Washington outside King County, and King County. 'Ought Six is a King County year, so from thence came two candidates: **Ken Davidson**, of Kirkland, and **Ellen Conedera Dial**, of Seattle.

The election presented more than usual interest to political junkies. On the one hand, Davidson is a bar leader's bar leader: active for years in the East King County Bar Association, holding its presidency and starting a successful indigent legal defense program; active in the WSBA as a governor, treasurer, and member or chair of important committees; and a leader in efforts to rationalize drug sentencing laws. He was seeking to end the anomaly that in King County years, nobody has ever been elected from outside Seattle.

Ellen Dial was seeking to end the anomalies that only one WSBA president has been elected who didn't serve on the BOG first, and that only two women have ever been president. Her c.v. offered two decades' service in the WSBA's committees and sections, service as chair of its Legislative Committee, and the successful landing of the massive rewrite of the Rules of Professional Conduct.

Each made a presentation to the Board and answered questions, then got packed outside. The Board then took an initial lap around the decision but ran into time problems: there were four candidates for the at-large seat who'd been promised their interviews would be done by lunch. The Board decided to pick up the presidential vote after lunch and hear the at-large candidates, but it makes more sense to deal with each in turn here.

Davidson's supporters used the Bob Dole Argument: he's worked hard, he knows everything, and it's his turn. Oh, and Dial hasn't been on the Board, where The Mysteries of Governance lie, to be revealed only to duly elected votives. Dial supporters argued there is no one true path to being president, and talked up her long and successful record of service.

Some argued WSBA needs to get to where electing women presidents is a norm, not an abnormality, but others countered that argument was just a gussied-up version of the Bob Dole Argument.

The afternoon, and the debate, dragged on. People got tired, and a bit testy. Discussion turned to things like speaking styles and who'd fare better advocating for the WSBA at *The Seattle Times* editorial board. It began to remind me of a high school student council debate over picking homecoming royalty.

As the discussion went on, and on, it segued into a sort of panel confession on *Oprah*. Governors, explaining their analyses of the candidates' merits, started taking up sides. People who'd arrived planning to vote one way announced they'd changed their minds. Among those keeping tallies around the sidelines, brows furrowed. The vote was getting very close. Three governors, apparently deciding a secret ballot meant not telling how they'd vote, didn't. Ballots were marked; no one appeared to be a felon, or dead; and **Ellen Dial** was declared the winner. She'll start as president-elect in October.

In the middle of the hustings, lunch. The Board dined with the Access to Justice Board and heard its annual report. ATJ Vice Chair **Dwight Williams** urged the two boards to institutionalize regular meetings, because the relationship has gotten like a couple who've been married a long time and they don't go on dates any

more. You had to be there. (Note to BOG: it would be lovely if, sometime, lunch could just be lunch.)

Double-timed back to their meeting room, the Board took up deliberation on that at-large seat. The interviews were delightful: four candidates applied. All were bright, engaging, and brought remarkably various experience and backgrounds to the discussion.

The choice was among **Sarah L. Lee**, who's an Allstate Insurance lawyer in Tacoma; **Eric de los Santos**, who's general counsel to Labor Ready, a Tacoma-based firm; **Hortensia Castillo**, who was a lawyer in Mexico before going through WSBA's law clerk program, passing the bar, and opening a practice in Arlington with her husband ("He didn't want me to apply for this," she told the Board. "I told him it was my decision."), and **Veronica Alicea-Galvan**, a Seattle administrative law judge for the state.

As governors began the *Oprah* round, de los Santos seemed to take a bit of a lead but then the bid faltered as one governor conveyed intelligence from some minority bar groups that though he is Filipino, he really hadn't done his time in the trenches and apparently, too, being a member of a sketch comedy group will lead to claims one lacks gravitas.

"Oh, give it a rest," came at least one rejoinder from the sidelines. After some more discussion the Board elected de los Santos.

Appointments, more appointments... one to the Statute Law Committee; three to the ABA House of Delegates. Then the Board took up a batch of proposed amendments to the Rules of Appellate Procedure — mostly proposed by appellate judges to make things flow better — and voted to send them on to the Supreme Court for consideration.

Jim Macpherson brought up a report from his President and Governor Selection Task Force. It's charged to come up with ways to rationalize WSBA's election system.

In Board of Governors elections, members are chosen from federal congressional districts, except in Seattle, where the district was divided into three parts in 1998 to more equally distribute members among seats. In the Fifth and Sixth districts, the presence of a big population center (Spokane and Tacoma) has led to members from those burgs holding a permanent lock on BOG seats. The Second, Third, and Fourth districts have rotation agreements of varying degrees of formality.

The task force recommends institutionalizing rotations in WSBA's Bylaws, including a provision that every nine years only a non-Spokane resident could run in the Fifth. They continue to talk about ways to encourage more people to run, one of which is to make sitting governors chair a committee to recruit at least two candidates to run for each BOG seat, which would, if nothing else, ensure that the BOG would be the first nonprofit board in America to adopt cloning.

The task force wants the BOG to act on the ideas in September. In the meantime, they will be put up on the website and made available to members in other ways to invite more comment.

After that, the co-chairs of the WSBA Diversity Committee, **Leona Colegrove** and **Joaquin Hernandez**, gave a report to the Board on WSBA diversity programs and mainly complained that the WSBA diversity advocate, **Joslyn Donlin**, doesn't have the sort of staff support and budget similar programs in other state bars, created more than a year ago, have. A snark-bomb comment lobbed at one WSBA leader was so inappropriate even I won't report it.

By now I was looking for a calendar rather than a clock, and things took a turn for the surreal as a rock band took up rehearsing in the two-thirds of the ballroom the BOG wasn't using. First you'd think it was the Muzak being turned up; then the music would swell and eventually drown out gubernatorial discussion. At one point Governor **Randy Gordon** stood and started singing the remainder of his remarks to the pending tune. It turned out the band for the Access to Justice Conference skit had to rehearse and the Board was supposed to have been long since adjourned. The last number was Queen's "We Are the Champions." Lacking a lighter or a penlight, I settled for holding my hands in the air and swaying back and forth in time to the tune, hoping to jump-start my circulation. But happily, the Young Lawyers Division trustees arrived to give their annual report. With characteristic good humor and efficiency they presented reports, both concise and informative, in a quarter hour. Sometime they really should get more time.

The president gaveled the meeting to an end and before I could say, "I'm outta here," hotel personnel, behind schedule finishing the ballroom for the ATJ skit, were disassembling the table at which I was writing, and strapping me and my chair to a dolly to be hauled away. Collecting myself on a loading dock, I found my car and went home. Next gig's in July.

Thursday
September 15
2005

•

The Fairmont Olympic Hotel
411 University Street
Seattle

•

Reception
5:30 p.m.
(no-host bar)

•

Dinner/Program
6:30 p.m.

You are cordially invited to attend

The Washington State Bar Association's Annual Awards Dinner *and* Business Meeting

Please join us for an evening of inspiration as we celebrate the accomplishments of the 2005 WSBA award recipients. All members of the legal community are invited to attend.

Name _____ WSBA No. _____

Address _____

Phone _____ E-mail _____

Affiliation/organization _____

Registration is $75 per person (table of ten = $750). To make your reservation, please return this form (or a photocopy) with your credit-card information or check payable to WSBA. Space is limited, so please make your reservations early. Reservations and payment must be received no later than September 8, 2005 (refunds cannot be made after September 8).

☐ MasterCard ☐ Visa No. _____ Exp. date _____

Name as it appears on card _____

Signature _____

_____ (no. of persons) X $ _____ (price per person) = $ _____ TOTAL

Please list the names of all attendees and indicate meal choices. Be sure to include yourself.

_____ ☐ beef ☐ salmon ☐ vegetarian
_____ ☐ beef ☐ salmon ☐ vegetarian
_____ ☐ beef ☐ salmon ☐ vegetarian
_____ ☐ beef ☐ salmon ☐ vegetarian
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_____ ☐ beef ☐ salmon ☐ vegetarian
_____ ☐ beef ☐ salmon ☐ vegetarian

All those listed on the same registration form (up to 10) will be seated at the same table.

Send to: Washington State Bar Association
Annual Awards Dinner
2101 Fourth Avenue, Suite 400
Seattle, WA 98121-2330
Phone: 800-945-WSBA • 206-443-WSBA • Fax: 206-727-8320

☐ If you need special accommodations, please check here and explain.

_____

_____

WSBA office use only:
Date _____
Check No. _____
Amount _____
No. AAD904

WSBA Board of Governors 2005 Election Results

At its June 3 meeting, the WSBA Board of Governors elected Seattle attorney **Ellen Conedera Dial** as the WSBA's president-elect for the 2005-2006 board year. Ms. Dial, a partner at Perkins Coie, will take office as president-elect for a one-year term at the close of the September 15, 2005, annual business meeting, when President **Ronald R. Ward** will pass the gavel to current president-elect **S. Brooke Taylor**. **Kristal Wiitala Knutson**, who ran unopposed, was elected governor for the 3rd District; **Salvador "Sal" A. Mungia**, who also ran unopposed, was elected governor for the 6th District; **Liza E. Burke** was elected governor for the 7th-East District; **Douglas C. Lawrence** was elected governor for the 8th District; and **Eric C. de los Santos** was elected governor at-large. The newly elected governors will take office at the close of the annual meeting of the WSBA on September 15, 2005, and will serve three-year terms.

WSBA Wins ABA Partnership Award

The WSBA Leadership Institute has been selected for an American Bar Association Partnership Award. This prestigious award, which recognizes efforts by bar associations to increase diversity in the legal profession, will be presented at the ABA Annual Meeting in August. The fact that this is the WSBA Leadership Institute's inaugural year makes the award especially noteworthy.

WSBA President **Ron Ward** is the guiding light of the WSBA Leadership Institute and the one with the original vision. The mission of the WSBA Leadership Institute is to recruit, train, and retain Washington attorneys who have been admitted to practice for 10 years or less for leadership positions in the legal community and in the WSBA. Significant features of the program include its core curriculum, which combines professional development leadership techniques; seminar modules and experiential-based learning not typically found in law school classrooms; and the *Leadership Institute Handbook*. Program participants (fellows) are selected with an emphasis on diversity, although no applicants meeting the selection criteria are excluded from consideration.

Seattle attorney **James Williams** serves as chair of the Institute's Advisory Board, whose members are **Marcine Anderson, Dale Carlisle, Noah Davis, Anthony Gipe**, Judge **Richard Jones, Elizabeth Li, Sandra Madrid**, Judge **Ricardo Martinez, Marijean Moschetto**, Justice **Susan Owens, Fred Rivera, Sharon Sakamoto, Dave Savage**, and **Ron Ward**. The WSBA Leadership Institute is supported by WSBA Diversity Advocate **Joslyn Donlin** and Public Legal Education Manager **Pam Inglesby**. This year's fellows are **Melissa W. Bartholomew, Beth Barrett Bloom, Carrie M. Coppinger Carter, Angelique Davis, Lisa M. DeCora, Kevin Diaz, Lisa J. Dickinson, Tracy S. Flood, Michael R. Heath, Gloria Ochoa Lawrence, Daniel C. Russ**, and **Kim M. Tran**.

Congratulations to all who have made the WSBA Leadership Institute a success. Their dedication and talents are greatly appreciated.

Young Lawyers Division Elects New President-Elect

The WSBA's Young Lawyers Division (WYLD) elected Wenatchee lawyer **John M. Brangwin** to serve as its 2005-2006 president-elect. His term as president-elect will begin October 1, 2005, and end September 30, 2006. Mr. Brangwin will begin his one-year term as president on October 1, 2006. As president-elect and president, Mr. Brangwin envisions leading the WYLD to re-establish a statewide younglawyer conference, focusing on member service by assisting young lawyers with professional marketing techniques, and continuing its current membership and public-service activities and programs. Mr. Brangwin also hopes to address student-loan debt, which he sees as the primary challenge facing young lawyers today.

CLE Publications Announces 2005 Member Appreciation Online Summer Sale

Shop the WSBA-CLE online store July 18 through July 29 for great discounts on audio seminars, coursebooks, and deskbooks. Stock up on A/V credits and expand your practice library. Visit the online store at www.store.yahoo.com/wsbastore and choose from dozens of titles on sale in a variety of practice areas at substantial discounts!

Seeking Applications from Judicial Candidates

Application deadline: September 16, 2005

The WSBA Judicial Recommendation Committee is accepting applications from attorneys and judges seeking consideration for appointment to fill potential Washington Appellate and Supreme Court vacancies. Interested candidates will be interviewed by the committee in October 2005. The committee's recommendations are reviewed by the WSBA Board of Governors and then referred to the governor for review. If you are interested in scheduling an interview, please contact the WSBA at 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330 or call 206-727-8239. To obtain a questionnaire, e-mail barleaders@wsba.org. Please specify whether you need the questionnaire designed for a judge or an attorney. Completed questionnaires must be received by the WSBA office by 5 p.m., Friday, September 16, 2005.

Washington State Association of Municipal Attorneys Elects New Officers

The Washington State Association of Municipal Attorneys (WSAMA) has elected new officers for the 2005-2006 term. The elections were held at the 49th Annual WSAMA Spring Conference in Victoria, B.C., on April 27–29, 2005. **Cynthia McMullen** was elected president; **James Pidduck** was elected first vice president; and **Michael Weight** was elected second vice president. **Charles Zimmerman** is immediate past president. Board members **Londi Lindell** and **Heidi Wachter** were re-elected to two-year terms, and **Milt Rowland** and **Joseph Svoboda** were elected as new board members. The WSAMA also gave out its annual awards. **Daniel B. Heid** and **Richard Andrews** received the Ernest Campbell Award for Excellence in the Practice of Municipal Law, and **Gail Gorud** received the Outstanding Service Award.

Does Your Résumé Make the Grade?

Available through August 1, 2005, the WSBA and the American Bar Association's Career Resource Center invite you to submit your résumé for critique. A legal-career counselor will confidentially assess your résumé for presentation, accuracy, organization, and persuasiveness. You'll receive suggestions for upgrading your résumé's effectiveness. Résumés e-mailed in ".doc" or ".rtf" format will be revised and returned via e-mail with a comment sheet. WSBA members receive a special $95 rate. To order online, visit www.abanet.org/careercounsel (click the "Résumé Review" button and enter code ABAWSB05). Submit résumés via e-mail to careers@abanet.org. You can fax the online order form to 312-988-5368. Mail your check to: Jill Eckert McCall, ABA Career Resource Center, 321 N. Clark St., Ste. 1900, Chicago, IL 60610. For more information, call 312-988-6215.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in June 2005 was 3.151 percent. The maximum allowable interest rate for July 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 issue of *Bar News*. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.

Third-Party Liability Information

If your client is involved in a personal injury case and has received or is receiving medical assistance (Medicaid) payments for their medical care, you are required to contact the Department of Social and Health Services (DSHS). RCW 43.20B.060 places a lien against any settlement or judgment your client receives from a third party, which means also their own insurance coverage, that is responsible for your client's injuries in order to reimburse the medical bills that have been paid by Medicaid. Before settling your client's claim with the third party and/or their insurance company, please contact the COB Casualty Unit of DSHS at 1-800-562-6136 or COB Casualty Unit, PO Box 45561, Olympia, WA 98504-5561 to supply the information that DSHS requires; or view our website at http://fortress.wa.gov/dshs/maa/ltpr. Failure to pay any lien imposed by the department on any settlement or judgment obtained by your client can subject you to personal liability for any funds improperly distributed. (RCW 43.20B.070)

Learn More about Case-Management Software

The WSBA's 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.

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. The clinic teaches helpful tips you can use immediately in your practice. Computers are provided and seating is limited to 20 members. There is no charge, and no CLE credits are offered. The clinic runs from 10 a.m. to noon on Monday, July 11, at the WSBA. Contact Pete Roberts at 206-727-8237 or peter@wsba.org.

More LOMAP Events

LOMAP hosts a meeting of contract lawyers the first Tuesday of each month. The next meeting will take place July 7 from noon to 1:30 p.m. at the WSBA office. The upcoming dates for "LOMAP...on the Road" are July 26 in Moses Lake, July 27 in Wenatchee, August 16 in Vancouver, August 17 in Montesano, and August 18 in Olympia. Registration is $79 and each seminar has been approved for four CLE credits, including two ethics credits. For more information, contact Pete Roberts at 206-727-8237 or peter@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 drafting résumés and cover letters, and how to keep yourself organized and motivated. For more information, contact Rebecca Nerison at 206-727-8269 or rebeccan@wsba.org.

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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 another WSBA member; however, all discipline reports should be read carefully for names, cities, and bar numbers.*

Suspended

Margaret D. Christopher (WSBA No. 24884, admitted 1995), of Seattle, was suspended for 18 months, effective February 14, 2005, by order of the Washington State Supreme Court following a hearing. This discipline was based on her conduct in 1999 involving falsification of documents and forgery of a signature in connection with the filing of an offer of judgment. For additional information, see *In re Discipline of Christopher*, 153 Wn.2d 669, 105 P.3d 976 (2005).

In 1999, Ms. Christopher worked as an associate at a Seattle law firm. In the first case Ms. Christopher was assigned to handle on her own, she represented the defendants in a civil action that was subject to mandatory arbitration. The arbitrator ruled in favor of the plaintiff. After receiving the arbitrator's ruling, Ms. Christopher became concerned, erroneously, that she had made a mistake by not submitting an offer of judgment to the plaintiff prior to the arbitration in order to preserve her clients' right to an award of attorney fees in the event of a successful appeal to the superior court.

On August 25, 1999, Ms. Christopher created an offer of judgment pleading, which she signed and backdated to July 27, 1999. She attached a stamped declaration of mailing on which she forged her secretary's signature. Ms. Christopher filed the offer of judgment pleading and mailed a copy to opposing counsel. She also created a declaration in support of attorney fees, which stated that the offer of judgment was a true and correct copy of the defendants' offer to settle and that it had been served on the plaintiff on July 27, 1999. Ms. Christopher created an entry in her billing records to falsely reflect that she had prepared and finalized the offer of judgment on July 27, 1999.

Ms. Christopher's secretary subsequently concluded that Ms. Christopher had forged the signature, and she reported the matter to the law firm's management. Ms. Christopher was fired and informed that if she did not self-report the matter to the WSBA, the law firm would report it. On October 13, 1999, Ms. Christopher reported the matter to the WSBA.

Ms. Christopher's conduct violated RPC 3.3(a)(1), prohibiting a lawyer from making a false statement of material fact or law to a tribunal; RPC 3.3(a)(4), prohibiting a lawyer from offering evidence the lawyer knows to be false; RPC 8.4(b), prohibiting a lawyer from committing a criminal act (here forgery) that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

Stevan D. Phillips represented the Bar Association at the hearing and Kevin M. Bank represented the Bar Association on appeal. Kurt M. Bulmer represented Ms. Christopher. Jack J. Cullen was the hearing officer.

Suspended

Sandra L. Davis (WSBA No. 12618, admitted 1982), of Lynnwood, was suspended for 18 months, effective February 23, 2005, by order of the Washington State Supreme Court following a stipulation approved by the Disciplinary Board. This discipline was based on her conduct involving preparation of a will giving a substantial gift to her mother, delay in distribution of assets of an estate, and misrepresentation of estate assets.

In July 2002, an individual with whom Ms. Davis's mother had lived for eight years was hospitalized. During his hospitalization, Ms. Davis prepared a will for him. The will provided that Ms. Davis's mother would receive a testamentary gift of $10,000, in addition to a car and other personal property. The will further provided that the residue of the estate would be distributed among the testator's children. Ms. Davis did not advise him to consult with another lawyer about the will.

Shortly after the testator's death in August 2002, Ms. Davis wrote to his children to inform them that he had left a will, that she was the executor, and that she would provide them with a copy of the will and contact them about settling the estate. But she did not promptly do so; instead, Ms. Davis decided to deliberately delay the distribution of estate assets. Between December 2002 and June 2003, Ms. Davis misrepresented her intentions regarding settlement of the estate and failed to provide the beneficiaries with an inventory of estate assets. In July 2003, after the children-beneficiaries filed a grievance against Ms. Davis with the Bar Association, Ms. Davis prepared and provided the beneficiaries with an inventory.

At the time of his death, the testator had money in two bank accounts; with respect to each account, his daughter was a joint tenant with a right of survivorship. Hence, as of the date of his death, each account was the property of the daughter and not an asset of the estate. In a July 2003 letter sent to the beneficiaries, and in the inventory of estate assets that accompanied it, Ms. Davis stated that the two bank accounts were estate assets subject to distribution under the will. Included with the letter were affidavits prepared by Ms. Davis to effect the distribution of the bank accounts. The affidavit prepared for Ms. Davis's mother stated that her mother was claiming $10,000 from one of the bank accounts. The affidavits represented that the two bank accounts were subject to probate. At the time she mailed the affidavits, Ms. Davis knew that the two bank accounts were not estate assets and were not subject to probate. Ms. Davis never informed the daughter that the accounts were the daughter's property and not subject to distribution under the will.

Ms. Davis's conduct violated RPC 1.3,

requiring a lawyer to act with reasonable diligence and promptness in representing a client; RPC 1.8(c), prohibiting a lawyer from preparing an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift; RPC 4.1, prohibiting a lawyer, in the course of representing a client, from knowingly making a false statement of material fact or law to a third person; and RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Scott G. Busby represented the Bar Association. Patrick C. Sheldon represented Ms. Davis.

Suspended

Michael R. Hutton (WSBA No. 5673, admitted 1974), of Seattle, was suspended for three years, effective January 31, 2005, by order of the Washington State Supreme Court following a default hearing. This discipline was based on his conduct in 2002 and 2003 involving lack of diligence, failure to communicate with clients, failure to deposit client funds into a trust account, retention of unreasonable fees, sexual relations with a client, and failure to cooperate with disciplinary investigations.

Matter 1: In 2002, Client A hired Mr. Hutton to reinstate the client's right to own a firearm. The client paid a $500 advance fee deposit by check. Mr. Hutton did not deposit the sum into a trust account. Between July 2002 and October 2003, the client telephoned Mr. Hutton approximately 20 times for information, but he was able to speak with Mr. Hutton on only four occasions. The client had no contact with Mr. Hutton after March 2003. Mr. Hutton did not perform any work on the client's matter. Mr. Hutton did not respond to disciplinary counsel's requests for information about the client's grievance.

Matter 2: In 2002, Client B hired Mr. Hutton to represent her in a pending dissolution of marriage proceeding. The client gave Mr. Hutton a rifle as an advance fee payment, because she had no money to pay a fee. Mr. Hutton assisted the client with responding to the dissolution petition but performed no other work on the matter. In 2003, the client paid Mr. Hutton with money received from a tax refund. Mr. Hutton did not deposit the payment into a trust account. The client gave Mr. Hutton dissolution documents to review. After that meeting, the client repeatedly telephoned Mr. Hutton, but he did not return the calls or contact the lawyer for the opposing party as the client had requested. Mr. Hutton did not provide a prompt, full, and complete response to disciplinary counsel's requests for information about the client's grievance.

Matter 3: In 2002, Client C hired Mr. Hutton to set aside the client's plea of guilty to a felony conviction. The client paid Mr. Hutton in cash, but Mr. Hutton did not deposit the sum into a trust account. Mr. Hutton failed to file any documents prior to the deadline for moving to withdraw the plea, failed to take any other steps to collaterally attack the conviction, and did not discuss the matter with the client. Subsequently, Mr. Hutton persuaded the client to have sexual relations with him. In January 2003, after the client refused to continue the sexual relationship, Mr. Hutton did no further work on the matter. Mr. Hutton did not provide a prompt, full, and complete response to disciplinary counsel's requests for information about the client's grievance.

Mr. Hutton's conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness 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 1.7(b), prohibiting a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's own interests; RPC 1.8(k), prohibiting a lawyer from having sexual relations with a current client; RPC 1.14(a), requiring a lawyer to deposit client funds into a trust account; and RPC 8.4(l), prohibiting a lawyer from violating a duty imposed by or under the Rules for Enforcement of Lawyer Conduct (here, ELC 5.3(e), requiring a lawyer to promptly respond to any inquiry or request for information relevant to grievances).

Nancy Bickford Miller represented the Bar Association. Mr. Hutton represented himself. Erik S. Bakke Sr. was the hearing officer.

Suspended

Antonio Salazar (WSBA No. 6273, admitted 1975), of Seattle, was suspended for 30 days, effective February 15, 2005, by order of the Washington State Supreme Court following a hearing. This discipline was based on his conduct in 2000 and 2001 involving lack of diligence, failure to communicate the basis of his fee to a client, retention of an unreasonable fee, and failure to cooperate with disciplinary investigations.

Matter 1: On February 3, 2000, Client A, a citizen of Japan, hired Mr. Salazar to assist her in obtaining an H-1B visa. Although Mr. Salazar believed that the client met the professional criteria for the visa, he advised her that her job description was insufficient to meet the criteria for a specialty occupation. Mr. Salazar told her that they needed to work with the client's employer to improve the job description. He emphasized the need to move quickly, since there was a cap on the number of H-1B visas issued in a fiscal year and most of the H-1B visas for 2000 were gone.

After obtaining necessary paperwork from the client and her employer, Mr. Salazar submitted an H-1B visa application to the INS on April 27, 2000, indicating the client's intended dates of employment were from April 30, 2000, to April 30, 2003. In May 2000, the application was returned to Mr. Salazar with an explanation that on March 21, 2000, the INS had given notice that the statutory cap for H-1B visas had been reached for employment scheduled to begin prior to October 1, 2000. Accordingly, the application was rejected.

The client's visa expired on April 30, 2000, and she returned to Japan in June 2000. In August 2000, Mr. Salazar resubmitted the client's application to the INS with an employment start date of October 1, 2000.

The client returned to the United States on a tourist visa on November 18, 2000, and notified Mr. Salazar of her whereabouts. On November 27, Mr. Salazar received an INS Request for Evidence letter indicating that the visa application was insufficient and describing the additional documentation needed for

favorable consideration. The letter stated that the additional information must be received by February 13, 2001. Mr. Salazar did not notify the client that he had received the letter.

After repeated unsuccessful attempts to contact Mr. Salazar, the client met with him on January 10, 2001. Mr. Salazar asked the client to provide him with a new job description, but he failed to notify her that he had received the Request for Evidence letter. The client provided Mr. Salazar with the requested job description within a week. On February 6, 2001, Mr. Salazar informed the client that the revised job description was not sufficient. At that time, he mentioned that he had received the Request for Evidence letter and provided a copy to the client. The client provided Mr. Salazar with another revised job description, and Mr. Salazar submitted a response to the Request for Evidence letter on February 12, 2001.

On May 21, 2001, the INS denied the visa application, ruling that although the position was a specialty occupation, the evidence did not establish that the client had recognition of expertise in the specialty as required. The decision noted that various materials that had been specifically requested in the Request for Evidence letter had not been provided with the application.

Matter 2: In January 2000, Client B hired Mr. Salazar to handle multiple matters. The client made an initial $3,750 payment. Both the client and Mr. Salazar speak Spanish, and Mr. Salazar communicated with the client exclusively in Spanish. Mr. Salazar documented the initial fee agreement in a memorandum that specified how portions of the initial $3,750 would be applied to the different matters. The memorandum was written in English. In the memorandum, part of the payment was characterized as a "down payment" and other parts were characterized as "retainers." Although Mr. Salazar explained the meaning of the term "down payment" to the client, he did not explain the meaning of "retainer" nor did he explain the difference between a "down payment" and a "retainer." The client was never told the basis of the fees nor the factors used to determine the fees. He was simply told the amounts for initial fees and that additional money would be needed in the future. In June and November 2000, the client made two additional payments totaling $2,100. Mr. Salazar did not tell the client the matters for which these funds were needed.

In May 2001, in connection with one of the matters, Mr. Salazar filed a complaint against the Social Security Administration on behalf of the client in federal district court. The client was unaware that Mr. Salazar had filed this case on his behalf. Mr. Salazar also filed a complaint against an individual relating to a property dispute. Although the client denied having hired Mr. Salazar for that purpose, Mr. Salazar spent more time on that matter than on any of the client's other matters. When Mr. Salazar subsequently withdrew from these cases, the client was confused about which matters Mr. Salazar was actually withdrawing from.

In June 2001, the client informed Mr. Salazar that he had hired another lawyer and he asked to have his money refunded. Mr. Salazar declined to refund any money and advised the client that he owed additional fees for work that had been done. In February 2003, the client's new lawyer filed a claim against Mr. Salazar to recover the fees the client had paid. Mr. Salazar filed a counterclaim for additional fees that he claimed he was owed. Mr. Salazar settled with the client and refunded $4,000, but he did not admit any wrongdoing as part of the settlement.

Matter 3: In 2001, the Bar Association investigated five grievances that had been filed against Mr. Salazar. In each of the matters, Mr. Salazar failed to promptly comply with requests made by the Association for information relevant to the grievances.

Mr. Salazar's conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence and promptness in representing a client; RPC 1.5(a), requiring that a lawyer's fee be reasonable; RPC 1.5(b), requiring a lawyer who has not regularly represented a client to communicate to the client the basis or rate of the fee or factors involved in determining the charges for legal services and the lawyer's billing practices; and former Rule for Lawyer Discipline 2.8(a), requiring a lawyer to promptly respond to any inquiry or request for information relevant to grievances.

Loren G. Armstrong represented the Bar Association. Mr. Salazar represented himself. Robert M. Scales was the hearing officer.

Suspended

E. Armstrong Williams (WSBA No. 30361, admitted 2000), of Spokane, was suspended for 60 days, effective March 3, 2005, by order of the Washington State Supreme Court following a hearing. This discipline was based on his conduct in 2001 involving sexual relations with a client.

Commencing in 2000, Mr. Williams represented a client concerning a sexual harassment claim against the client's former employer and job supervisor. In January and February 2001, Mr. Williams and the client had extensive telephone contact in the evenings and on weekends and socialized with one another at night clubs. On two separate occasions in January and February 2001, at Mr. Williams's residence, Mr. Williams had sexual relations with the client. After disclosing the facts regarding the sexual relations to her therapist and her spouse, the client terminated the representation and hired another lawyer.

Mr. Williams's conduct violated RPC 1.8(k), prohibiting a lawyer from having sexual relations with a current client unless a consensual sexual relationship existed between them at the time the lawyer/client relationship commenced.

Leslie Ching Allen and Marsha A. Matsumoto represented the Bar Association. Lewis M. Wilson represented Mr. Williams. David A. Thorner was the hearing officer.

Reprimanded

Steven J. O'Neill (WSBA No. 21108, admitted 1991), of Monson, MA, was ordered to receive a reprimand on February 15, 2005, following a stipulation approved by a hearing officer. This discipline was based on his conduct in 1999 and 2000 involving the failure to provide clients with adequate notice of withdrawal. *(Mr. O'Neill is to be distinguished from Stephen F.X. O'Neill of Blaine.)*

Commencing in August 1999, Mr. O'Neill represented clients in a lawsuit

arising from defective construction of a rock wall in the clients' backyard. The clients paid Mr. O'Neill $2,500 as an advance fee deposit.

In September 1999, Mr. O'Neill filed a lawsuit against the contractor and its bonding company. At a June 2000 status conference, the matter was continued to October 2000 unless a confirmation of joinder, a statement of arbitrability, or a dismissal was filed before September 28, 2000.

Mr. O'Neill met with the clients in July 2000. As a result of that meeting, Mr. O'Neill believed that he had been terminated as counsel because the clients left with their file materials. The clients, however, did not intend to fire Mr. O'Neill and believed that he was still their lawyer.

Mr. O'Neill never filed a notice of withdrawal and never provided the clients with written notice that he was no longer their lawyer. In September 2000, the clients paid Mr. O'Neill additional legal fees of $355.69.

On October 5, 2000, the court dismissed the lawsuit without prejudice, because Mr. O'Neill did not appear at the status conference. Mr. O'Neill received a copy of the dismissal notice from the court. The clients did not receive a copy of the notice from him. The clients learned the case was dismissed in September 2001 after examining the court file.

Mr. O'Neill's conduct violated RPC 1.4, requiring a lawyer to keep a 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, and RPC 1.15(d), requiring that a lawyer take reasonably practicable steps to protect a client's interests upon termination of representation.

Joanne S. Abelson represented the Bar Association. Kenneth S. Kagan represented Mr. O'Neill. Margarita V. Latsinova was the hearing officer.

Nondisciplinary Notices

Transferred to Disability Inactive Status

Kevin Y. Jung (WSBA No. 18540, admitted 1989), of Bellevue, was by stipulation transferred to disability inactive status, effective April 5, 2005. This is not a disciplinary action.

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

Bankruptcy

The Lawyer's Toolbox: Bankruptcy Issues (p.m.)
August 10 — Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Business Law

Mergers and Acquisitions: Survival Tactics for Deal Lawyers
July 27 — Seattle; July 28 — Spokane. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

The Lawyer's Toolbox: Business Law (a.m.)
August 10 — Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Civil Procedure

The Essentials of Washington Civil Procedure and Ethics: Video Replay with Live Moderators
August 3 — Portland; August 12 — Couer d'Alene. 6.5 CLE credits, including 2 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Criminal Law

The Lawyer's Toolbox: Criminal Law Issues (a.m.)
July 19 — Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Civil Litigation

The Lawyer's Toolbox: Civil Litigation (a.m.)
July 29 — Seattle. 3 CLE credits, including .5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Estate Planning

Advanced Probate — Special Issues in Administration
July 21 — Seattle. 6.25 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics

The Essentials of Washington Civil Procedure and Ethics: Video Replay with Live Moderators
August 3 — Portland; August 12 — Couer d'Alene. 6.5 CLE credits, including 2 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

General

WDTL Annual Convention and Meeting (annual CLE)
July 28-30 — Winthrop. By WA Defense Trial Lawyers; 206-749-0319.

WSTLA Annual Convention with Keynote Speaker David Ball
July 28-30 — Harrison Hot Springs, BC, Canada. 10 CLE credits, including 2 ethics. By WSTLA; 206-464-1011.

Law Practice Management

The Lawyer's Toolbox: Setting Up Your Practice and Handling Your Trust Account (a.m.)
August 19 — Seattle. 3.5 CLE credits, including 1.5 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Law Office Management

LOMAP . . . On the Road: The 2005 Traveling Seminar!
July 26 — Moses Lake
July 27 — Wenatchee
August 16 — Vancouver
August 17 — Montesano
August 18 — Olympia
4 CLE credits, including 2 ethics. By WSBA Law Office Management Assistance Program; 800-945-WSBA or 206-443-WSBA.

Patent Litigation

Pre- and Early-Stage Patent Litigation
July 22 — Seattle. 7 CLE credits. By Law Seminars International; 800-854-8009.

Real Estate

Advanced Commercial Leases
July 12-13 — Spokane. 8.75 general CLE credits and 1 ethics credit. By The Seminar Group; 800-574-4852.

Technology

2005 CASRIP High Technology Protection Summit
July 22-23 — Seattle. CLE credits pending. By UW-CLE; 800-CLE-UNIV.

Gamer Technology Law
July 11-12 — Seattle. 11.5 CLE credits, including 1 ethics. By Law Seminars International; 800-854-8009.

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Seeking the will of Robert Allen Wells of Kent, WA. Please contact Kristina C. Udall at 206-625-0739.

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Diversity — have it your way

BY *BAR NEWS* EDITOR LINDSAY THOMPSON

June 3, most of which the Board of Governors devoted to whom we choose as leaders, and how we choose them, was a fascinating glimpse of the disconnect between the changing makeup of WSBA membership and institutional responses to it.

On the ground, diversity just happens. We have more and more members of various mixes of race. The Census started giving people more — and more realistic — choices in 2000. Washington has the third-largest population of same-sex couples in America, another fact we know because the Census got around to asking about it in 2000.

Women are now commonly the majority of entering classes at Washington's three law schools. We've had a majority of women on the Supreme Court, masses of legislators, and both our U.S. senators. Minority communities continue to grow. The number of specialty bar groups evolving out of the broad heading of "Asian/Pacific Islander" in recent years is remarkable. Openly gay people serve as judges and legislators in Washington. The Board of Governors' creation of two at-large and one young-lawyer seat four years ago has opened a remarkable new avenue for members to reach the long table — people who'd likely never have thought to try before. Dozens of such people have met with the Board these four years, and are also being seeded into the Bar's committees and task forces. Diversity works.

At the institutional level, however, diversity is something to be owned, and access to it controlled. In legislatures and the federal congress, it's something to restrain, if not repeal outright. In the courts, it's either something to recognize as a reality and adapt to, or something whose existence can be denied because constitutional framers didn't talk about it one or two centuries ago.

At WSBA, diversity — which was kind of an eyes-rolled, OK, put it in thing when the association's long range plan was developed in the '90s — is in vogue. There's a new diversity advocate at the Bar office, Joslyn Donlin, who, in her first year on the job, is struggling to juggle the pent-up demand rising up from real-life changes in the diversity of the profession. Bar leaders talk about it a lot. Conferences about it are held. But it's a narrowly defined, non-controversial definition WSBA uses. Basically, it's women and ethnic minorities, with disability, championed by Governor Lonnie Davis since he joined the Board last year, making a strong advance. In short, if there's a body of law in place to protect one from discrimination, institutional diversity efforts seek to make real the promise of those laws. The Bar asks members to voluntarily describe themselves by age, gender, race, disability, and the like, consistent with this definition. They use that data to try and maintain diversity in appointments.

If you're not within the definition — the diversity status quo — you're pretty much on your own. And even if you think you are, you might not be, depending on whom you ask, or who tells you. It has been interesting to see some in minority and specialty bar groups arguing that people who haven't moved up through the ranks of those groups in the prescribed manner, and who don't hold the consensus view of leadership, really shouldn't be seriously considered. It makes sense, if you think about it. If the at-large BOG seats are filled in part on diversity considerations, diversity becomes a tool for getting on and getting one's program advanced. And political influence has long been considered a commodity. What one doesn't control, someone else will. If you can draw the diversity status quo less broadly, even better.

You can see the same tensions in WSBA governance debates. Anyone can run for president, but the actual selection process favors insiders who've moved up the prescribed way, and hold the consensus views. We need more women and minorities in high office, but now never seems to be the right time. Sometimes the WSBA includes sexual orientation in diversity, but doesn't develop the voluntary data it seeks of others, thus rendering the practical application of inclusion ineffective. As a former law partner of mine used to say: "Not measured, not managed."

WSBA's task force on the election of governors has proposed a model to somehow improve access, and thus diversity, by making the way districts elect governors more rigid. Some minority and specialty groups have argued diversity will be advanced by their prescreening of applicants for Board seats, in effect giving the Board of Governors less choice, not more. Yet one of the most often-expressed delights of the at-large selection process, year in and out, has been the appearance of members who live completely outside the ambit of insiders and bar lifers. It's fascinating to see some group leader semaphoring the Board that, of two lawyers of the same race, one should get more consideration than the other.

Short term institutional efforts to control diversity are illogical and frustrating, underscoring the old bar work maxim: "Nothing should ever be done for the first time." But in the long term, real-life diversity will just continue on, and institutions will probably always struggle to keep up, like the French revolutionary leaping up from lunch as the mob streamed by, shouting: "I must follow! I am their leader!"

Lindsay Thompson indulges Jacobinist musings on Salmon Bay in Seattle. For personal correspondence, contact him at tradelaw@hotmail.com. E-mail letters to the editor to letterstotheeditor@wsba.org or mail to WSBA, Attn: Letters to the Editor, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121.

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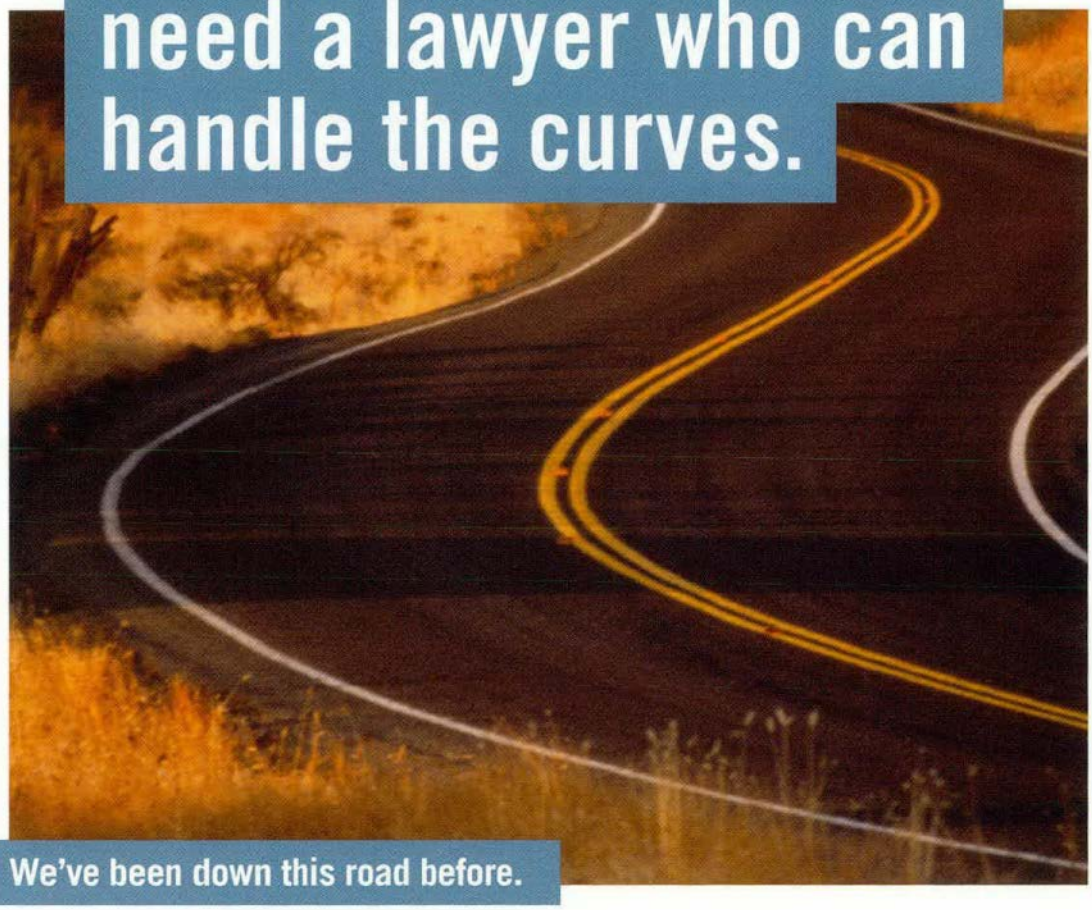

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