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got grammar? p.32

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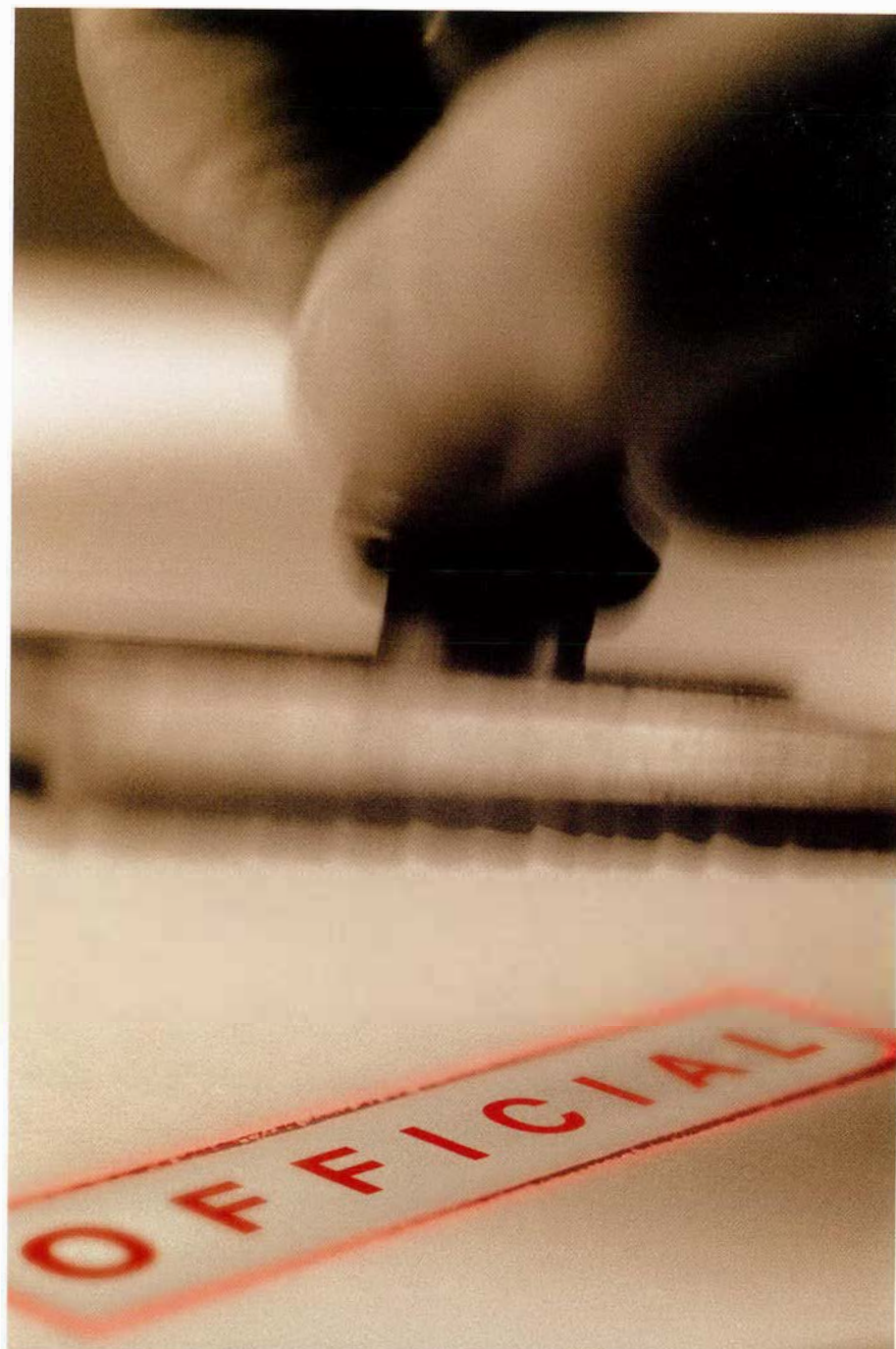
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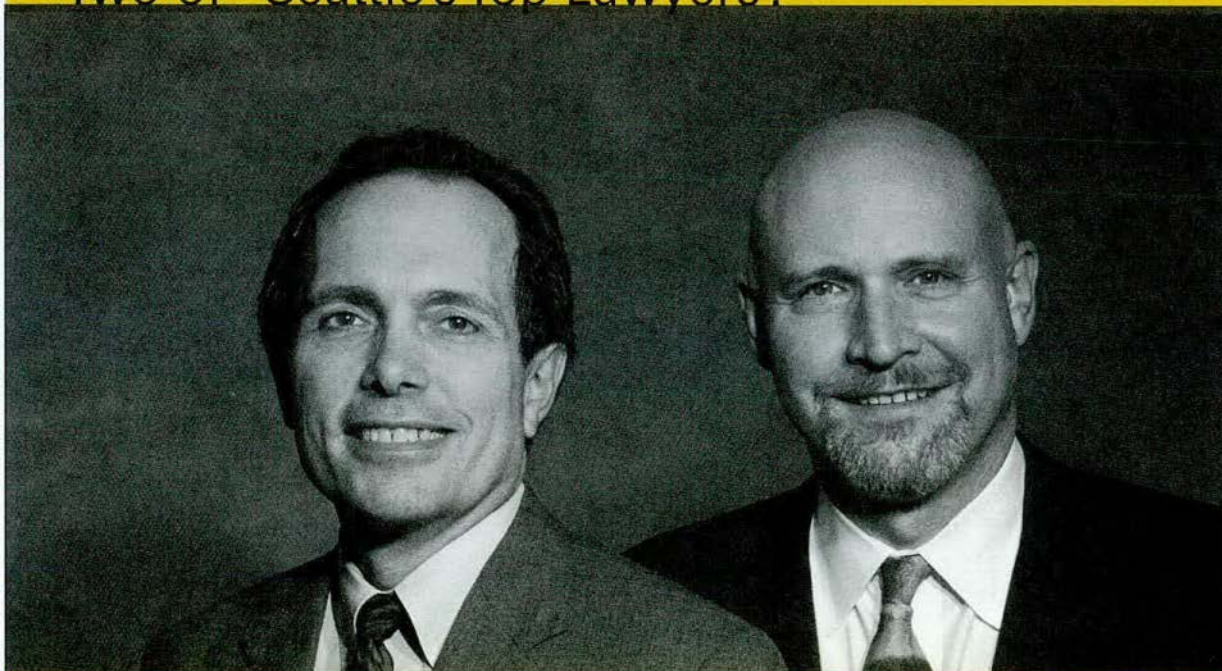
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On the shooting of messengers

Editor:

Several months ago, in March, I believe, Bar News published David Evans' lengthy letter taking issue with President Ward's support and encouragement for legal service to the less financially fortunate. I found his article thought-provoking. I understood Mr. Evans' thesis to be that, in general, individual success or lack thereof in life's challenges depends on choices one makes. This doesn't seem to be a particularly new nor controversial concept. I have re-reviewed Mr. Evans' article and did not find his words to be judgmental, denigrating, nor mean spirited.

I am surprised and disappointed by the way he has been castigated by other WSBA members. Most of the letters disagreeing with Mr. Evans' thesis were themselves judgmental, denigrating and even guttural. How ironic that the invective toward a fellow member of the bar comes from those who espouse compassion for the less fortunate of our citizens.

Lest I too be painted as small-minded and mean-spirited, let me say that I spend hours monthly doing *pro bono* and modest-means representation. I believe we should afford legal assistance to all persons we can, whether their plight arises from poor choices or from circumstances beyond their control. Nevertheless, I willingly accept that others may have a different view. When those views have a rational basis, such as Mr. Evans', they are worth a listen and discussion. As Voltaire said, "I may not

agree with what you say, but I will defend to the death your right to say it."

Kenneth V. Hoffman, Vancouver

Licensing nonlawyers is not a bad idea

Editor:

We would like to correct some misconceptions made by a letter in the June 2005 Bar News (*Licensing Nonlawyers Is a Bad Idea*). It appears that the author of that letter may not clearly understand the

role a Legal Technician would play, as described in the Practice of Law Board's (POLB) proposed Admission to Practice Rule (APR) for non-lawyer practice.

Rather than harming the public with unqualified or inexperienced legal service providers as the writer postulates, the proposed APR would instead set out strict criteria that will for the first time authorize certain qualified individuals to become certified as Legal Technicians, while clamping down on those unlawful business practices that the writer is most concerned about.



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The Washington Supreme Court's Civil Legal Needs Study found that 87 percent of low-income households in Washington experience a civil legal problem each year. Many households experience multiple urgent legal problems, often involving safety or subsistence. Further, low-income people face 88 percent of their legal problems without help from an attorney. The study found that fully 70 percent of family related problems such as divorce or child support are addressed *without any attorney assistance*. Many low-income people don't even realize there are laws to protect them and they often endure misery that higher income people would never suffer.

The letter writer raises a red herring of incompetent legal counsel improperly advising their clients with deleterious results. He suggests that the state bar should instead, "focus on improving attorney skills in serving their clients more efficiently and competently." It is clear though that no amount of skill improvement by attorneys can ever hope to fill our state's huge deficit in delivery of quality legal services, when people can't afford to pay for those same services.

As envisioned, the APR calls for minimum educational standards, along with CLE and *pro bono* requirements, as well as a competency exam, prior to obtaining certification as a Legal Technician.

Further, the proposed APR will require the non-lawyers to be held *to the same standard of care as an attorney*, pursuant to the Rules of Professional Conduct. Of special note, Legal Technicians *may not provide any services to a client who requires assistance exceeding the scope of practice authorized by the rule, and must inform the client that the client requires the services of a lawyer*. Legal Technicians will be required to follow existing Washington laws regarding fiduciary relationships between his/her clients and in handling conflicts of interest.

Not every legal need requires an attorney. Rather than fearing the arrival of Legal Technicians, attorneys should recognize them to be one more weapon in their arsenal. An educated public will make better decisions. Those situations that can be better addressed by Legal Technicians will serve the public good

far better than offering no such service provider choice as is the case today.

Indeed, the introduction and utilization of Legal Technicians may lead to *increased usage of attorneys* as people gain a better understanding of their rights and those situations calling for engagement of a lawyer rather than a Legal Technician.

By their proposal, the POLB has set high standards for non-lawyer practice in our State that can serve as a model for other states to follow. The proposal seeks to reverse a decades' long problem and will make Washington State a leader in addressing this important issue. Attorneys should whole-heartedly endorse the proposal and pass words of support to the members of the Board for their fine work.

Kelli Wilcox, Vice President of Professional Development, Washington State Paralegal Association, Seattle

Brian Haberly, Chair, Positions and Issues Committee, Washington State Paralegal Association, Seattle

We should deal with CR 11 motions more fairly

Editor:

I suggest that the WSBA form a committee, approved by the Washington

Supreme Court, for the purpose of protecting attorneys from receiving sanctions under CR 11 before any filing occurs. We need some sort of a certificate from the Bar stating that "based upon the facts presented to the committee, CR 11 sanctions are not warranted in this case."

In his letter in the June 2005 *Bar News*, Lewis H. Zieske Jr., from Chehalis, in responding to David L. Evans' letter in the March 2005 *Bar News*, states that "notions of justice and equal access to justice are such overriding principles that whether they derive from the Constitution or not they remain imbued within our legal system." Mr. Zieske cites the general foundation of our jurisprudence in that "Everyone is entitled to his/her day in court if our society is to claim that justice is the base of our legal system. That value judgment was made centuries ago and is inherent in our state's legal system."

I agree. However, current Washington law now reads that "Everyone, except Attorneys, are entitled to their day in court": A non-party attorney who receives a CR 11 sanction in Washington is now added to the judgment in the case as a "judgment debtor," which subjects the attorney to a loss of his or her personal property through statutory supplemental proceedings (See *Splash Design, Inc. v. Lee*, 104 Wash.App. 38, 14

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P.3d 879 (Wash.App.Div.1 12/26/2000): "In the absence of statutory language to the contrary, it would be unfair to deny a party to whom an award is due under CR 11 the benefits and protections of supplemental proceedings just because the sanctioned attorney is a non-party."). A person receives more due process protections in defending a \$60 traffic ticket than a non-party attorney receives to defend the accusation that his or her case is frivolous and thus he or she is subject to a fine of thousands of dollars, which could be solely a monetary sanction or a sanction that includes the opposing party's attorney fees. In King County, the motion requesting CR 11 sanctions in the form of substantial attorneys' fees can be done by a six day motion without permitting oral argument.

Despite the words of Justice Brandeis in *Chase National Bank v. Norwalk*, 291 U.S. 431 (1934), that "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights" (Id. at 441), an attorney in Washington who receives a CR 11 sanction and thus is added to the judgment as a judgment debtor subject to supplemental proceedings cannot be "rest assured" that the judgment against him or her will not affect his legal rights, even though the attorney is not a litigant to the action; the attorney does not receive a summons or a complaint; the attorney is afforded neither a jury trial nor the opportunity to select counsel to represent him or her for the purpose of challenging the facts that accuse the attorney of filing a frivolous action, thus, the attorney is denied access to the court.

Furthermore, the attorney may find that his malpractice legal protection does not cover CR 11 sanctions at all.

A WSBA committee issuing a CR 11 "no violation" certificate before filing the case would allow clients access to the courts because attorneys would not refuse a client's case out of fear of a CR 11 sanction. Such certificate would reduce real frivolous cases because of the WSBA committee's input to the attorney; and finally, such a certificate will allow the attorney to get his or her client's case

before the jury without a pre-trial motion for CR 11 sanctions that makes the non-party attorney a "judgment debtor."

Glen Prior, Fife

Courts impede the people's right to discriminate

Editor:

Former Chief Justice Richard Guy wrote an editorial on the back page of the June 2005 *Bar News* praising the judiciary as the branch of government that assures the people that the government is responsible. He says that an independent judiciary is the cornerstone of any democracy "and will preserve and enhance it."

I disagree.

The cornerstone of democracy is the ability of the people to elect and remove government officials as they please, and fail to please, the voters. To the extent that the judiciary interferes with this process, as in the California election of Gov. Schwarzenegger, the courts are an anti-democratic force.

Judges are human like everyone else, and they are subject to the same external and internal economic and political influences as everyone else, and they have the same desire for power that everyone else has. Therefore judges cannot be trusted any more than anyone else to provide a forum for review of "governmental policies or legislation." And our government is set up to prevent this from happening. In order to have legitimate republican government, there must be a review and control of the action of each branch of the government. This does not exist if the courts believe they can act as a sort of ombudsman in reviewing the "justice" of some action of the government. And if there is no review or accountability for action of a branch of government, it is unconstitutional, a concept expressed in the limitation of federal court power to cases and controversies. It is true that judges are elected in this state, and therefore accountable to a degree, but it is difficult for the public to hold a judge accountable for her or his decisions, as opposed to a legislator.

It may be that Chief Justice Guy

believes the court is suited for righting wrongs to individuals, either by government or by industry. Again this is not the case. Courts always see the injuries of an individual, ably presented by a lawyer, but they do not see the competing public interests that play a role in setting public policy. They do not see this because tort cases do not have lobbyists to present the public interests, as the legislature does. All they have is an injured and sympathetic party and a lawyer for some economic entity who is not qualified or even authorized to present the public interests involved in a panoply of health, safety and economic issues. A good example would be the issue of salting roads, where a legislature can make decisions based on lobbying by motorists, cities, road safety equipment manufacturers, land owners and everyone else. Courts do not receive this information and should not decide these policy issues.

Chief Justice Guy also praises the courts as without political agendas and without partiality. The Washington Supreme Court has a political agenda. The court has made it an ethical "offense" to "discriminate" on the basis of sexual or marital status. Some object to the sexual or marital status of others, but the Supreme Court threatens to disbar lawyers who dare to express or act on beliefs contrary to the court's orthodoxy. As another example, the court has done its best to assist in funding Columbia Legal Services, claiming to act in the name of justice. In fact the court assists a highly partisan law firm whose positions almost always echo those of the Democratic Party.

Courts have a role in society: they should focus on ending disputes and deciding cases which involve real constitutional rights, such as the legality of searches and seizures. Beyond that, the people should rule.

Roger Ley, Seattle

Interpreting how the people should rule

Editor:

Our editor Lindsay Thompson had interesting comments on how governing

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body retreats are run in the April 2005 *Bar News* (One or two steps forward, then, maybe, another). The process has indeed led to significant value, yet it does have its shortcomings. Taking his column as true and as a cue to focus not on strengths but shortcomings, I note that it's hard for those who work full time salaried positions in an area like bar leadership to trust those who are only part-time, because the part-timers are so often wrong and uninformed, but nevertheless pepper that naiveté with brilliance and innovation that can be valuable if harnessed.

But as far as insuring the short life

and quick death of process inputs goes, I perhaps delusionally hoped he would allude to the long tradition of mystifying the intent of voters at elections and then discarding the inputs of the electorate, a subject that recently has become near and dear to my heart (as well as my attorney Randy Gordon's heart). See lawsuit, study, etc. at www.votersunite.org (April 7 lawsuit).

If the people indeed rule this country and, as Article I, Section 1 of the Washington State Constitution says "all political power originates in the people," and we also have elections set up for the transfer or withdrawal of that original

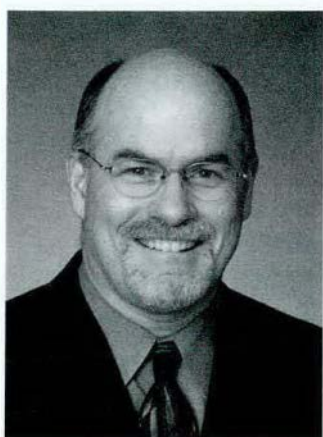
power, why is the intent of the people something to be interpreted, at best, by soothsaying pollsters after gazing into the equivalent crystal balls? Has the science of measuring voters' intent progressed so little?

To respect input implies a challenging process of separating wheat from chaff while still being aware that chaff may not be chaff, necessarily. Thus, a core element of leadership should be defined as 'the reconciliation of the followers, the dissenters and the apathetic, with due regard for the inputs of each, in order to best serve the mission at hand.' But when it comes to elections, though the government is obliged to serve the public and measure their intent at elections, mostly what we have is attacks upon voters and the negligence of officials, rather than an honest discussion about how one measures intent and then publishes that intent so that the government may be thus formed (through representation) and more importantly, informed.

Thompson, while typically hailing from the right (wrong) side of the political tracks, has hit upon a primary problem with governance as presently practiced: It has become a series of questions of the day, many of them largely for spectacle, upon which people may have only an attitude read or heard on the subject, but rarely is there a true attempt to assess the intent of those who are nominally 'served' and certainly not to consider at length any opinion which is highly developed and considered. And even for those who try to do a 'needs assessment,' it once again suffers from the shapings, limitations and biases of the assessor, only to collect dust on a shelf. Still, even with the value of the needs assessment and other tools before us, no real attempt is made to assemble the various pieces into a brilliant collage, for to do so is to risk being deemed inconsistent or worse by those who hold their own attitudes sacred, which is to say, all of us.

Meanwhile, somewhere along the way, brilliance, innovation and progress were all told they had exceeded their time limits. Meeting adjourned.

Paul Lehto, Everett



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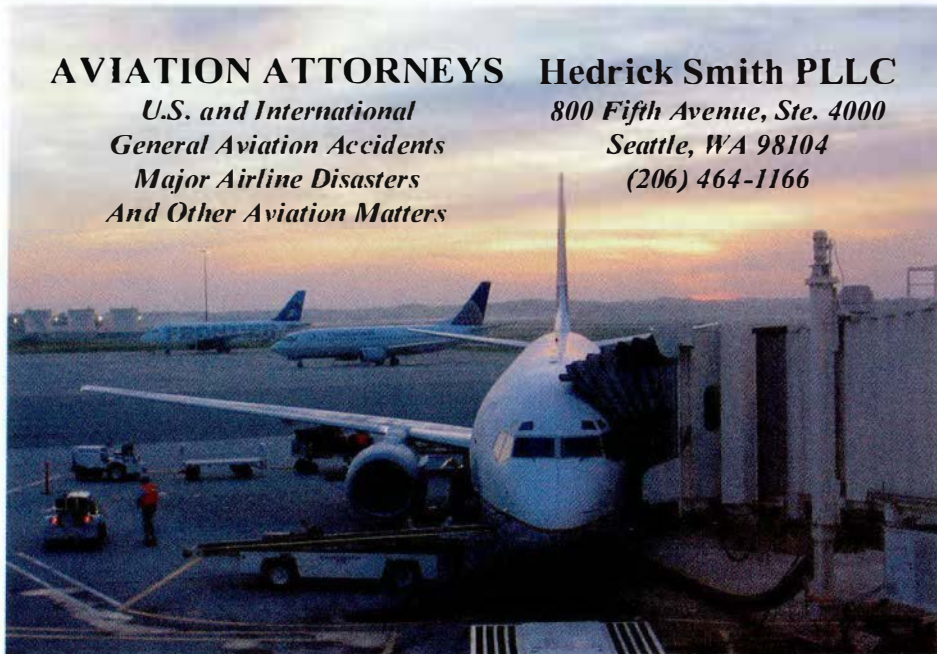
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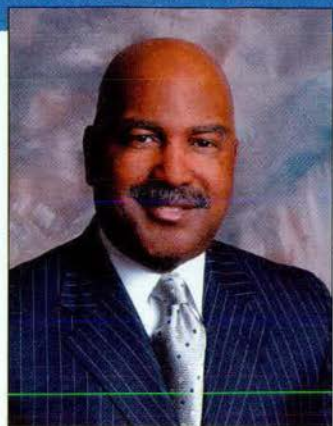
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Initiative 330 — The Medical Malpractice Initiative

Rendering the Service of Preserving the Right to Trial by Jury, Due Process, and Equal Protection of the Law

by Ron Ward, WSBA President

Initiative 330 is a measure on the November general-election ballot sponsored by the Washington State Medical Association (WSMA), which characterizes it as an act relating to healthcare liability reform.

On June 3, 2005, presentations on this initiative were made before the Washington State Bar Association Board of Governors by Thomas J. Curry, CEO of the WSMA; John Connelly, president-elect of the Washington State Trial Lawyers Association (WSTLA); Mike Kreidler, insurance commissioner of the state of Washington; Jeff Frank, president of the Washington Defense Trial Lawyers (WDTL); and Barbara Flye, former executive director of Washington Citizen Action. Following discussions of the merits, the Board of Governors concluded that the elements encompassed in Initiative 330 are within GR 12,¹ i.e., they relate to, or affect, the practice of law or the administration of justice, and that the WSBA could take a position on the initiative. After extensive debate, the Board voted 12-0-1 to oppose Initiative 330.

Effect on the Practice of Law, the Administration of Justice, and the Public Interest — a Synopsis of Selected Provisions from I-330

Even cursory scrutiny of the provisions of I-330² conclusively establishes that it is well within the purview of GR 12, in that it will have a dramatic impact on the practice of law, the administration of justice, and most importantly on the public

interest related thereto. This is particularly true with regard to the interests and rights of injury and medical-negligence victims and their families, and also of the civil justice system as a whole.

The WSMA initiative is as far reaching a tort-reform measure as I have ever read. It imposes caps on non-economic damages in all personal-injury actions. A cap is imposed in all healthcare liability cases involving medical-negligence victims and on derivative claims, such as injury to the parent-child relationship and on spousal consortium, all of which are subsumed under a single damage-limit cap of \$350,000. Plaintiff attorney contingent fees are capped, but not those of defendant attorneys. It shortens the statute of limitations for adults and minors, and contains what is, in effect, a three-year statute of repose and provides that "the tolling provisions of RCW 4.16.190" do not apply to "this section." Therefore, the statute of limitations is not tolled by a personal disability such as minority, incompetence, disability, or imprisonment. Agreement by a prospective patient to binding arbitration in any subsequent medical-negligence action arising out of treatment is made a condition of receipt of medical care. Other changes mandate periodic payment of judgments over \$50,000; repeal the ostensible agency doctrine; make dramatic modifications to hospital and healthcare provider vicarious liability and "vulnerable adult" nursing-home claims; and eliminate or modify joint and several liability in

medical-negligence cases in a manner demonstrably different and more adverse to patient rights than is existent in current law. If enacted, I-330 would conflict with no fewer than five prior Washington State Supreme Court decisions. Even a summary of the measure would run several pages, so by way of example, I have chosen some illustrative excerpts, found on page 20 at the end of this article.

Point/Counterpoint — with Regard to Initiative 330

Contentions of the Medical Profession and the Insurance Industry

The medical profession contends that "runaway" medical malpractice lawsuits and "out-of-control" jury verdict awards are responsible for astronomical malpractice insurance rates that some doctors say are driving them out of business and causing large numbers of physicians to leave practice in Washington. The "holy grail" they cite as a panacea for this phenomenon is to impose caps on both the "non-economic" monetary damages awarded to injury/negligence victims (i.e., compensation for the pain and suffering that accompany any loss of normal functions, e.g., blindness, paralysis, sexual dysfunction, lost bowel and bladder control, loss of a limb or eyesight, inability to engage in daily activities or to pursue hobbies, disfigurement, loss of fertility); and caps on the attorney fees of the lawyers who provide representation to

these patients. They allege that caps have worked in reducing premiums in other states where they have been imposed. The Washington State Medical Association claims that Washington state will face "unlimited healthcare costs" and a "crisis in healthcare access" if laws are not changed to limit the legal rights of injured patients to seek compensation.

Contentions of Citizen Consumer Organizations, Injury/Negligence Victim Groups, and Lawyers

Citizen consumer organizations, injury/negligence victim groups, and lawyers

have long contended that increases in malpractice insurance premiums for some healthcare providers is not a long-term problem, nor has it been caused by the legal system. They claim it is a short-term problem triggered by a brief spike in medical malpractice insurance rates for some physicians. This periodic spike in rates is a result of the cyclical economics of the insurance industry and investment losses caused by the country's economic slowdown. Further, it is contended that insurance-industry management and underwriting practices are the chief culprit for what has been a decades-long

ongoing cyclical swing in rates charged to doctors and healthcare providers. Other arguments made are that caps not only do not work in premium reduction — premiums have increased in many states after caps have been imposed. Caps are punitive in their impact on an already vulnerable segment of the citizenry and will radically reduce access to justice for injury and negligence victims. There is no "crisis in healthcare access" attributable to the legal system. Taking away people's legal rights, as is proposed under I-330, would only decrease deterrence and reduce the quality of care.



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Is There a Medical Malpractice Insurance Crisis in Washington? Not According to the Washington State Insurance Commissioner

The most credible, objective, and authoritative source on this subject in Washington is a report released in March 2005 by the Washington State Office of the Insurance Commissioner.³ This is an exhaustive and comprehensive 10-year study of claims closed from July 1, 1994 through June 30, 2004, authored by the office that regulates insurance in this state. The report concluded that purported "runaway" lawsuits and "out-of-control" jury verdict awards are *not* responsible for rising malpractice insurance rates. One news media report⁴ set out the findings and conclusions of the insurance commissioner's report as follows:

Increases in medical malpractice claims over 10 years. While claims have increased over the past 10 years, they have done so gradually, about five percent a year. Likewise, the amount insurance companies paid to injured patients increased about four percent a year during that period. The amount insurance companies spent to defend doctors rose about six percent annually. [Note: One advocacy group quoted in the report noted that when population growth and inflation are factored in, there has been no significant increase during the 10-year period in claims, payments to injured patients, or costs to defend doctors.]

The above numbers are averages.

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During some years, costs actually declined. And the number of closed insurance cases has dropped from its peak in fiscal year 2002, according to the report.

Fifty jury verdict awards over 10 years. Meanwhile, 73 percent of 10,073 malpractice claims filed over the decade went nowhere; patients and their lawyers got nothing. Only 50 cases (five per year) resulted in a jury verdict award over the 10-year period.

Amount of jury verdict awards over 10 years. When injured people did get something from insurance companies, 65 percent of the time the payout was \$100,000 or less. The number has held steady over the past decade.

Frequently, cap advocates paint a picture of a system run amok, where greedy lawyers and their sleazy clients strike it rich from frivolous lawsuits, destroying medical careers and bankrupting the healthcare industry. In fact, only 1.6 percent of insurance-company payouts to patients in Washington over the past five years were for \$1 million or more, a number down from 1.7 percent for the first five years of the analysis.

The findings mean that there is no medical malpractice crisis in the state, Insurance Commissioner Mike Kreidler said. Kreidler, who also happens to be a doctor of optometry and a former state legislator, stated: "Changes happen on a gradual basis."

The data above comes directly from the state's five biggest medical malpractice insurance companies and represents about 90 percent of the market. It is limited in that it does not include the remaining 10 percent, largely physicians who self-insure. Kreidler said he is certain the findings are accurate for the companies covered.

The report will likely have a significant impact on the state and perhaps even the national medical malpractice debate, because it undermines a key argument used by physicians and insurance companies trying to cap pain-and-suffering damages to patients: their assertion that the malpractice system is in crisis.

Other Pertinent Information Bearing Directly on the Issues Herein

In 2003, the Medical Liability Monitor, an insurance-industry publication, reported that every state in the country experienced medical malpractice insurance rate increases that year — whether or not damages were capped. For example, three states that have implemented caps, Hawaii, Texas, and Florida, saw rate increases of more than 20 percent. New Mexico has caps — rates went up there more than 30 percent. Virginia has caps — rates went up more than 40 percent. In Washington state, without caps, rates

increased only 8.35 percent.

The state's largest insurer of doctors has posted record profits and is cutting 2005 rates — in some cases to levels resembling those paid in 1985. The lower premiums, combined with the dwindling number of doctors now asking for help finding malpractice insurance, signal a turnaround in the market, says State Insurance Commissioner Mike Kreidler.

Physicians Insurance, which covers about 70 percent of Washington's doctors — who own the mutual company, has asked for a



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We are available for consultation, association or referral in cases involving medical or hospital negligence and catastrophic injury. Medical malpractice cases are difficult, expensive and risky. Cases must be carefully investigated, analyzed and screened. Each prospective case is reviewed carefully by our legal and medical staff before acceptance. If a case is accepted, we will do whatever is needed to win and to maximize the monetary recovery.

Lawyers

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Douglas Weinmaster, J.D.

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7.7 percent reduction of malpractice premium rates for 2005. In addition, Kreidler said, it reported record profits, called net income for this type of company.⁵

In a March 6, 2005, news article titled "Gouging, numbers belie medical malpractice 'crisis' claims," it was reported that State Insurance Commissioner Mike Kreidler announced . . . that he had ordered the state's largest medical malpractice insurer, Physicians Insurance and its affiliate, Western Professional Insurance Company, to refund more than \$1.3 million plus interest in excess

premiums charged in 2003. . . . The \$1.3 million refund order came just one day after Kreidler's office released a report analyzing a decade's worth of medical malpractice claims. The report appears to give lie to allegations of a "crisis" in medical malpractice.⁶

Doctors across Washington have argued that the high cost of malpractice insurance is crippling their financial viability and driving them from the state, although neutral-party counts of physicians in Washington don't support the claim that physician numbers are plummeting.⁷

The Washington State Medical Association has advertised anecdotes regarding physicians who, it claims, may abandon their practices or leave the state if medical malpractice insurance premiums continue to increase.⁸ Statistics reveal that — far from an exodus of doctors — Washington continues to experience a steady and significant increase in the number of doctors.⁹

The number of in-state practicing doctors in Washington has jumped 3,270 over the last decade, from 15,533 in 1993 to 19,253 in 2003. This is an overall increase in doctors of 23.9 percent, or 2.4 percent per year. In comparison, Washington's overall population experienced an annual average increase of 1.7 percent, from 1993 to 2002.¹⁰ This means the number of doctors increased at a rate of 37.3 percent faster than the rate of population increase during this period.

Musings in Conclusion

Jurors. Why is it that we can entrust 12 lay people as jurors to decide what's fair for businesses suing businesses, or to make the ultimate decision as to whether someone lives or dies in a criminal matter, yet we are expected to buy the patently spurious allegation that they're too dense to decide what's fair for injury or negligence victims?

Accountability. Everyone should be responsible and accountable for their actions. This includes people, government, lawyers, and doctors. There should be no special class of beneficiaries of less or no accountability.

Doctors and lost opportunities. I have enormous empathy toward doctors. I love my own. There is absolutely no doubt that doctors are being squeezed from every direction, including grossly inadequate federal Medicare and state Medicaid treatment reimbursement rates; the increasingly prohibitive cost of complying in one's medical practice with insurance-industry bureaucracy and its accompanying documentation focused on procedural and fiscal scrutiny of a doctor's every action; and yes, the rising cost of liability insurance premiums.

But it's also fair to note that in the last two Washington legislative sessions, bills were introduced that would have gone far toward addressing many of the problems

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faced by doctors. These included increases in government medical program reimbursement rates; establishment of an excess liability fund which would have placed a ceiling on the monetary exposure a doctor could sustain in a medical negligence action; and a voluntary medical malpractice arbitration program for all claims under \$1 million (the overwhelming majority of claims made fall into this category), which was drafted by both plaintiff and defendant attorneys working together to find more effective solutions for reduction of litigation costs and smoother, more expeditious resolution of these unfortunate cases. The total value of the legislative proposal in the session immediately pre-dating the 2005 Legislature approximated \$33 to \$35 million — a significant amount in a state as budget-deficit strapped as Washington was during that period. Unfortunately, the Washington medical profession decided to reject these proposals in the interest of continuing the quest for caps on damages and caps on attorney fees. I would respectfully submit that patients, patients' rights, and the public (the real ultimate stakeholders with regard to

these issues) did not benefit from that decision.

Politics, partisanship, division, and "collegiality" v. standing up. I have personally been advised that an issue such as I-330 is "too political," "too partisan," and "too ideologically divisive" for the Washington State Bar Association to take a position. My response is the following: First, the position the Association is taking now on the principles and concepts underlying I-330 is exactly the same as has been taken on similar legislative proposals dating back a number of years. Bad public policy is bad public policy in whatever form it takes. Second, I hope that I never see the day in this profession when the placement on any measure of the label "political" or "partisan," or interest in the protection of some nebulous concept of "collegiality" within the ranks, prevents principled lawyers on both sides of counsel's table from speaking out on issues which affect fundamental rights, the practice of law, the administration of justice, and most importantly — the public interest related thereto. I'm not articulate enough to state how proud I

am of this particular Board of Governors with whom I have been privileged to serve over these last three years.

In my very first October 2004 *Bar News* effort — *First, Let's Bless All the Lawyers* — I said something with regard to the legal profession that I think fits the issue addressed in this article and that would be appropriate to end the time I have been privileged to spend with you in this column:

Contemporarily, "reform" is the rubric being used in an attempt to establish a double standard in the American legal system, i.e., a discriminatory one that applies to injury/negligence victims who seek redress in the courts, and another for everyone else. One of the most hallowed traditions in democracy and the American legal system is equal protection of the law. It is a legal standard. It is not based on partisan political cant, or dogma of various and sundry types. It applies to ALL elements of society. Any time fundamental principles such as trial by jury, due process, the right to freely contract, and equal protection of the law are threatened or contravened, by whatever the artifice used, lawyers and bar associations must speak up — politics, or ideology, or economics notwithstanding. If we don't, who will? We cannot risk relevancy suicide by stating "we don't have a dog in this fight": not when the ultimate victims are fundamental rights and the justice system.

A president's last column at the end of his or her term in September is ordinarily devoted to looking back over events (and hopefully accomplishments) of the year in office. Mine next month will follow that tradition. It has been my privilege to render service as an officer of your Washington State Bar Association. ✍

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.

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Ron Ward may be reached at rrw@joneswardlaw.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 General Rule 12(c), adopted by the Board of Governors Oct. 22, 2004. GR 12(c) provides in relevant part:

(c) Activities Not Authorized. The Washington State Bar Association will not:

(2) Take positions on political or social issues which do not relate to or affect the practice of law or the administration of justice; . . .

² Initiative 330 — An Act relating to health-care liability reform; amending RCW 4.56.250, 7.70.020, 7.70070, 7.70.100, 4.16.350, 7.70.080, 74.34.200, 4.22.070, and 4.22.015; adding a new section to chapter 4.56 RCW; adding a new section to chapter 7.04 RCW; adding new sections to chapter 7.70 RCW; and creating new sections.

³ State of Washington Office of Insurance Commissioner, Rates and Forms Division, *A Report to the Insurance Commissioner: Medical Malpractice Closed Claim Study*, Feb. 2005.

⁴ M. Alexander Otto, *No malpractice crisis, report says*, The News Tribune, Mar. 2, 2005.

⁵ Carol M. Ostrom, *Key doctors insurer cuts '05 rates*, The Seattle Times, Jan. 10, 2005.

⁶ Thomas Shapley, *Gouging, numbers belie medical malpractice 'crisis' claims*, Seattle Post-Intelligencer, Mar. 6, 2005.

⁷ Carol M. Ostrom, *Key doctors insurer cuts '05 rates*, The Seattle Times, Jan. 10, 2005.

⁸ Washington State Medical-Education and Research Foundation, *The Impact of Medical Malpractice Insurance and Tort Law on Washington's Health Care Delivery System*, Sep. 2002; Carol M. Ostrom, *Malpractice Ad Enlists Doctor With Rocky Past*, Seattle Times, March 14, 2003.

⁹ Medical Quality Assurance Commission, Department of Health, Washington state, data obtained via e-mail April 18, 2003.

¹⁰ U.S. Census Bureau, *State Population Estimates: April 1, 2000 to July 1, 2002*, and *State Population Estimates Annual Time Series, July 1, 1990 to July 1, 1999*, <www.eire.census.gov/popest/data/states.php>.



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Selected Provisions from Initiative 330

Section 1: Non-Economic Damage Cap for All Personal Injury Actions

Section 1 contains the first of two non-economic damage caps contained in the initiative. Although I-330 is primarily a healthcare-liability initiative, Section 1 contains a damage cap that applies to all personal-injury actions. The cap on damages is identical to that which was held unconstitutional in *Sofie v. Fibreboard Corp., et al.*, 112 Wn.2d 636, 771 P.2d 711 (1989), on the ground that such a cap violates the right to a trial by jury guaranteed by the Washington State Constitution. All derivative claims such as injury to the parent-child relationship and spousal consortium claims are subsumed under the single damage cap of \$350,000.

Section 2: Non-Economic Damage Cap for Medical Negligence Actions

Section 2 contains a \$350,000 non-economic damage cap applicable solely to healthcare actions. As in the Section 1 damage cap, all derivative claims are also subsumed under a \$350,000 single cap. The cap on how much insurance companies would pay applies to all cases, regardless of how bad the negligence, or how serious the injury. There are no exceptions.

Section 4: Cap on Contingent Fees

Section 4 contains a cap on attorneys' fees for plaintiffs' attorneys in medical negligence cases. The cap is 40 percent of the first \$50,000; 33 1/3 percent of the next \$50,000; 25 percent of the next \$500,000; and 15 percent of any amount that exceeds \$600,000. The fees are calculated on the net sum after payment of costs that have usually been advanced by the attorney. There is no cap on attorney fees for defendants' attorneys. This provision contravenes the right to freely contract without interference.

Section 6: Statute of Limitations Modifications

Section 6 shortens the statute of limitations (the time in which one must file suit, or lose all rights) for medical malpractice cases (RCW 4.16.350) to three years from the date of the malpractice or one year from the date of discovery, whichever occurs first. The current statute provides three years/one year, whichever occurs later.

Section 6 also contains what is, in effect, a three-year statute of repose, in that no action (other than those involving minors) may be brought more than three years from the date of the act or omission (absent, again, fraud, concealment, and foreign-body exception). Section 6 also provides that "the tolling provisions of

RCW 4.16.190" do not apply to "this section." Therefore, the statute of limitations is not tolled by a personal disability such as minority, incompetence, disability, or imprisonment. In *Gilbert v. Sacred Heart Medical Center*, the Washington State Supreme Court held that an attempt to shorten the time period in which a minor has to bring a medical negligence claim was ineffective, as it did not repeal the general minor tolling provision contained in RCW 4.16.190. Yet another of the Court's decisions, *DeYoung v. Providence Medical Center*, held that an attempt to enact an eight-year statute of repose for medical negligence claims was unconstitutional as violating the privileges and immunities clause of the Washington State Constitution.

With respect to cases involving minors under the "fullage" of six years, the action must be commenced within three years or prior to the minor's eighth birthday, whichever is longer. If there is proof that the "minor's custodial parent or guardian and the defendant or the defendant's insurer have committed fraud or collusion in the failure to bring an action on behalf of the minor," the statute of limitations is one year from the date the patient or the patient's representative received actual knowledge of the fraud or collusion, or one year from the date of the minor's 18th birthday, whichever is longer.

Section 8: Binding Arbitration

Section 8 provides that a contract for healthcare or related services may be made subject to mandatory binding arbitration, assuming that the contract contains certain language advising the claimant that by signing the contract both parties "are giving up their constitutional rights to have a dispute decided in a court of law before a jury. . . ." If the contract is signed by a minor's parent or legal guardian, it may not be disaffirmed. This provision would permit HMOs, insurance companies, and hospitals to make prospective patients sign a contract before they can obtain any medical care or a prescription. This also applies to residents in nursing and veterans' homes.

Section 10: Periodic Payments of Judgments

Section 10 permits periodic payments of judgments in excess of \$50,000. This provision allows the insurance industry to pay a monetary judgment they owe to a victim out over 20 or 30 years, or even longer.

Section 11: Repeal of Ostensible Agency Doctrine

Section 11 repeals the doctrine of "osten-

sible agency" as established in the case of *Adamski v. Tacoma General Hospital* (20 Wn. App. 98, 579 P.2d 970 (1978)). That doctrine holds that a hospital is liable for the negligence of a physician, who although not an employee of the institution and who is not selected by the patient, is provided by the hospital to the patient.

Section 12: Modification to Hospital Vicarious Liability

Section 12 provides that a hospital is not liable for the negligence of a healthcare provider granted privileges, unless the provider is the actual agent or employee of the hospital and was acting within the scope and course of the employment/agency at the time of the care in question. This provision essentially overrules decisional authority of *Pedroza v. Bryant* (101 Wn.2d 226, 677 P.2d 166 (1984)), which established the doctrine of corporate negligence in Washington state and which created an action against hospitals for negligence in the credentialing process.

Section 13: Modification to Other Healthcare Provider Vicarious Liability

Section 13 overrules both *Adamski* and *Pedroza*, and provides that no other healthcare provider shall be liable for the act or omission of any other healthcare provider, unless the negligent provider was the actual agent and employee, or acting under the "person's" direct supervision and control at the time of the act or omission.

Section 14: Vulnerable Adult Nursing Home Claims

Section 14 makes changes to RCW 74.34.200, which creates an action for damages against nursing homes on behalf of "vulnerable" adults who are abandoned, abused, financially exploited, or neglected. Section 14 eliminates the attorney's fee and expert witness fee recovery provisions from the statute.

Section 16: Changes to the Law of Joint and Several Liabilities

Section 16 makes changes to RCW 4.22.070 in that it eliminates joint and several liability in medical negligence cases, unless parties were acting in concert or were the actual agent or servant of the party, or were acting under the party's direct supervision or control. It requires a jury, in its apportionment of liability, to include "empty chairs," i.e., entities which are immune, released (except in workers compensation situations), or have entered into covenants not to sue or execute.

The Student Loan Repayment Assistance Program Is Coming!

Guest Column from the Washington State Bar Foundation LRAP Advisory Committee

With great enthusiasm and excitement, we announce the arrival of the Washington State Bar Foundation's Loan Repayment Assistance Program (LRAP). Thanks to generous donations from three WSBA sections (Administrative Law, Family Law, and Labor and Employment Law) and an affiliation relationship with Sallie Mae, which will offer loan consolidation services to WSBA members, the LRAP will begin accepting applications as early as this fall.

Nearly six years in the making, the Foundation LRAP comes after the culmination of many years of hard work by countless people across the state, first trying to establish a program through the Washington State Legislature for four years, and then through the tireless work of the WSBA's Loan Crisis Task Force for over two years. The resulting program from all these efforts can be viewed at www.wsba.org/lrap.htm.

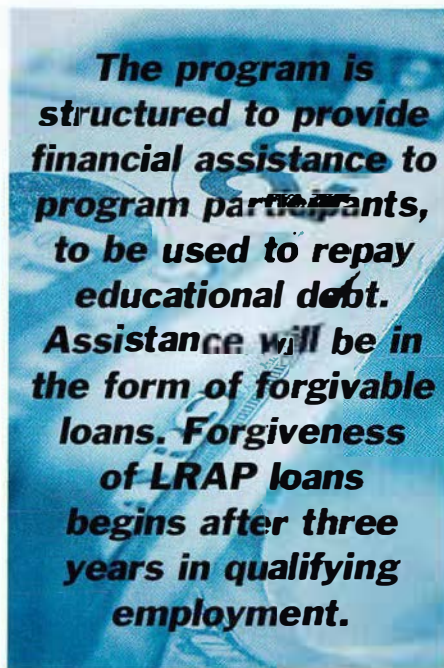
In the first year, the LRAP will be able to accept five participants funded at \$5,000 each per year for five years. The hope is to add five additional participants each year after that.

The program is structured to provide financial assistance to program participants, to be used to repay educational debt. Assistance will be in the form of forgivable loans. Forgiveness of LRAP loans begins after three years in qualifying employment. Loans are not forgiven in full until completion of five years of qualifying employment. Recipients who do not complete the full five years of required public service must pay back their LRAP loans consistent with the program guidelines.

Program participants must be ac-

tive WSBA members employed at least 32 hours per week in qualifying public-service employment. Qualifying public-service employment includes:

- Legal services offices
- Public defenders
- County prosecutors
- State and local government employers
- Tribes
- Private nonprofit organizations providing direct legal representation of individuals



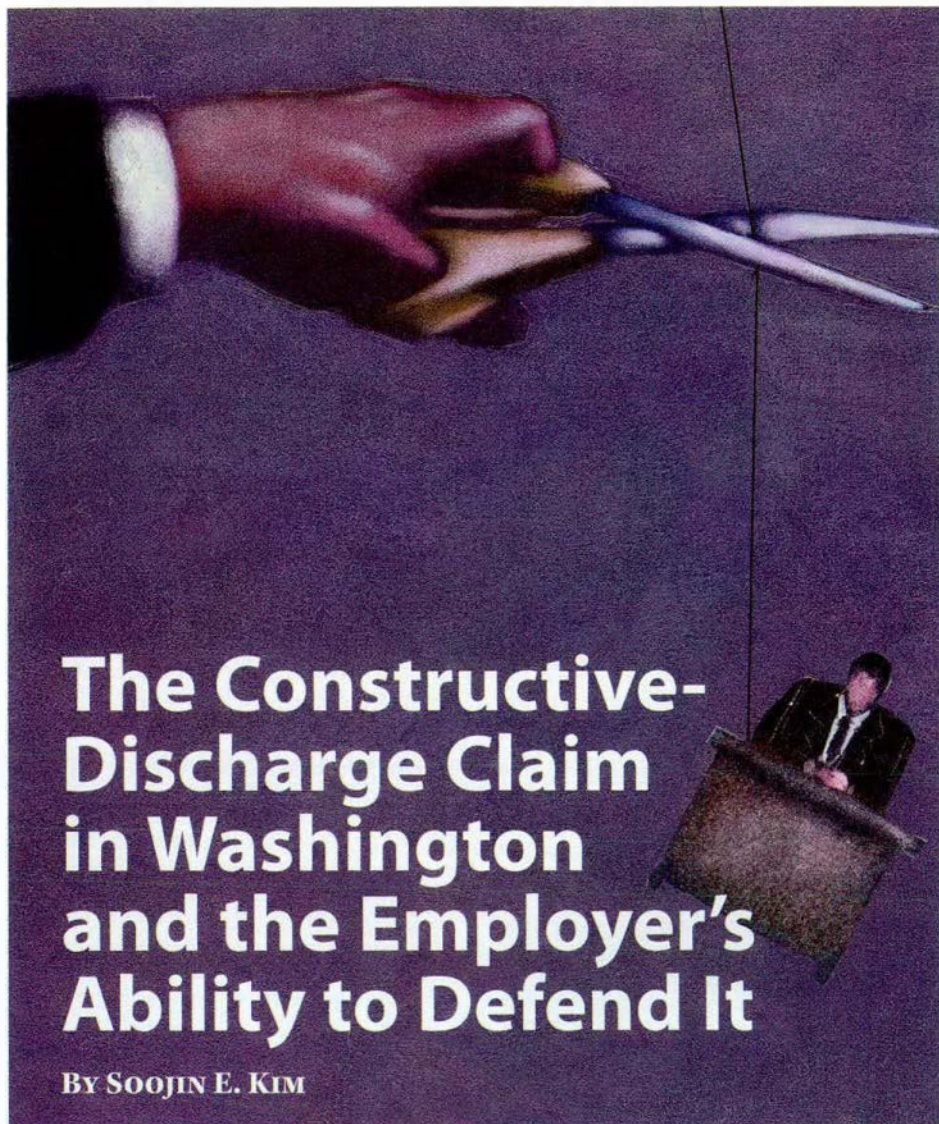
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The Constructive-Discharge Claim in Washington and the Employer's Ability to Defend It

By SOOJIN E. KIM

The Impact of the U.S. Supreme Court's Decision in *Pennsylvania State Police v. Suders*

Since it is often the case that a harassment plaintiff will resign and later claim that the harassment forced her to quit, employers and employees across the country have had a big stake in how the U.S. Supreme Court would answer the question of whether a constructive discharge brought about by supervisor sexual harassment constitutes a "tangible employment action" and, therefore, precludes the employer's ability to assert an affirmative defense. This article examines how the Court's 2004 decision in *Pennsylvania State Police v. Suders* affects Washington employees' ability to bring a constructive discharge claim and Washington employers' ability to defend it. As part of this examination, this article will discuss the requirements in Washington state law for proving constructive discharge and compare them with the standard set forth in *Suders*.

Introduction

Recently, the U.S. Supreme Court delivered a timely reminder to employees of the importance of escalating their complaints of sexual harassment to an appropriate official level. In *Pennsylvania State Police v. Suders*,¹ the Supreme Court granted *cert* to resolve disagreement among the circuit courts over whether a constructive discharge brought about by supervisor harassment constitutes a "tangible employment action" and therefore precludes assertion of the defense articulated in *Faragher v. City of Boca Raton*.²

The *Suders* decision also serves as a reminder to employers of the importance of establishing an effective mechanism for reporting and resolving employee complaints. Following the path marked by its 1998 decisions, the Supreme Court in *Suders* noted that unless the employee's resignation was precipitated by an official act, an employer may defend against a constructive-discharge claim "by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus."³ The Court held that a constructive discharge is not in and of itself a tangible employment action.

The 2004 *Suders* decision went against the view of the 3rd, 7th, 8th, and 11th Circuits that a constructive discharge constitutes a tangible employment action.⁴ Although the 9th Circuit had not adopted a general rule as to whether a constructive discharge is in and of itself a "tangible employment action," two district courts sitting within the 9th Circuit had held that it was a tangible employment action that would bar the *Faragher/Ellerth* affirmative defense.⁵

Facts and procedural history of *Suders*

Nancy Drew Suders worked as a police communications operator for the McConnellsburg barracks of the Pennsylvania State Police (PSP) beginning in March 1998.⁶ While working at PSP, her three supervisors constantly sexually harassed her.⁷ Supervisor Easton "would bring up [the subject of] people having sex with animals" each time Suders entered his office.⁸ Easton also would sit down near Suders, wearing

spandex shorts, and spread his legs apart.⁹ Supervisor Baker made obscene gestures in Suders's presence by grabbing his genitals and shouting out a vulgar comment inviting oral sex — as many as five to 10 times per night throughout Suders' employment at the barracks.¹⁰ Suders once told Baker she d[id]n't think [he] should be doing this; Baker responded by jumping on a chair and again performing the gesture, with the accompanying vulgarity.¹¹ Further, Baker would "rub his rear end in front of her and remark 'I have a nice ass, don't I?'"¹² In June 1998, Suders told PSP's Equal Employment Opportunity Officer, Virginia Smith-Elliott, that she "might need some help," but "neither woman followed up on the conversation."¹³ Suders again contacted Smith-Elliott two months later, and informed her that she was being harassed and was afraid.¹⁴ Smith-Elliott told Suders to file a complaint but did not indicate where she could acquire the forms to do so.¹⁵

Two days later, Suders's supervisors arrested her for theft of her own computer-skills exam papers.¹⁶ Contemporaneous with her arrest, Suders resigned from the force, then sued the PSP in September 2000, alleging, *inter alia*, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII of the Civil Rights Act of 1964.¹⁷

Although the district court found that Suders presented sufficient evidence to permit a trier of fact to conclude that the supervisors had created a hostile work environment, the district court held that PSP was not vicariously liable for the supervisors' conduct, and thus, granted PSP's motion for summary judgment. Relying on principles articulated in *Faragher* and *Ellerth*, the district court concluded that Suders did not avail herself of PSP's internal procedures for reporting harassment, as she resigned just two days after first reporting the harassment.¹⁸ The 3rd Circuit reversed, concluding that a constructive discharge should always be treated as a "tangible employment action," thereby rendering the *Ellerth/Faragher* defenses inapplicable.¹⁹

Why does it matter whether a constructive discharge can be classified as in and of itself a "tangible employment action"?

The effect of the 1998 *Ellerth/Faragher* decisions has been to encourage employers

to establish effective internal procedures or mechanisms for reporting and resolving employee complaints of harassment. This would mean the employer disseminating some formal policy against harassment along with a reasonable complaint procedure, including a provision for bypassing the offending supervisor in instances where the supervisor himself is the alleged harasser.²⁰ The other effect of the 1998 decisions has been to discourage employers from taking tangible employment actions against employees who complain about harassment. A tangible employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."²¹

The Suders decision also serves as a reminder to employers of the importance of establishing an effective mechanism for reporting and resolving employee complaints.

When a "supervisor's harassment culminates in a tangible employment action," the "employer is subject to vicarious liability" for the hostile environment created by a supervisor and will not have recourse to the affirmative defense.²²

If the Supreme Court had held that constructive discharge is in and of itself a tangible employment action, the harassed employee could resign without having to mitigate her damages by using the employer's internal grievance procedures or other mechanisms put in place by the employer to report and resolve complaints. Such a holding may have created an unintended incentive for harassed employees to quit and claim constructive discharge instead of staying in the workplace to fight the discrimination.

What constitutes an "official act" by an employer?

In 2004, the Supreme Court concluded that in the absence of an employer's official act, the employer may rely on the affirmative defense that the employee

failed to take advantage of the employer-provided mechanisms for reporting and resolving complaints of harassment in the workplace.

In *Suders*, the Supreme Court relied on its decisions in *Ellerth* and *Faragher* to define "official act." Examples of official acts are actions "reflected in company records—a demotion or a reduction in compensation."²³ Such acts show "beyond question" that the supervisor has used his managerial or controlling position to the employee's disadvantage.²⁴ Absent such acts, the Court found that the extent to which the supervisor's misconduct has been aided by the agency relationship with the employer is less certain.²⁵ In the face of such uncertainty, the Court followed precedent in holding that a constructive discharge in and of itself is not an "official act" and not a "tangible employment action" that bars the affirmative defense. In other words, the fact of the resignation is not itself equivalent to an employer's action in firing the employee, or demoting or reassigning her to a position with less pay or benefits.

The Supreme Court's concern with protecting employers who have established effective mechanisms for reporting and resolving employee complaints of harassment

The Court was concerned with holding strictly liable, under Title VII of the Civil Rights Act of 1964, only those employers whose supervisors engaged in sexual harassment via an official act. The Court said that when an official act does not underlie the constructive discharge, the "employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the workplace."²⁶ In other words, the Court will not presume that the employer had notice of the co-worker or supervisor misconduct unless the harassed employee escalated her complaint to an appropriate official level before she resigned.

Impact of *Suders* on law regarding constructive discharge

The foregoing discussion of the *Suders* decision, however, should not discourage the victimized employee from bringing a constructive discharge claim. Following is a discussion of how *Suders* has clarified

federal law on "constructive discharge" and what it means for employees and employers in Washington.

Suders clarifies federal law on "constructive discharge"

To establish "constructive discharge," a plaintiff must make a further showing than what she is required to show to establish a hostile work environment.²⁷ To establish a hostile work environment, plaintiffs must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment."²⁸ But a hostile-environment constructive-discharge claim entails something more: "A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign."²⁹

In *Suders*, the Court found constructive discharge and noted that the facts showed "harassment ratcheted up to the breaking point."³⁰ The Court clarified that "harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts."³¹ In other words, showing an official act of

the company is not necessary to prove constructive discharge.³²

Washington state law on "constructive discharge"

In Washington, however, the plaintiff employee's analysis does not stop with *Suders*. At least one Washington State Supreme Court case holds that "Washington law does not recognize a cause of action for constructive discharge; rather the law recognizes an action for wrongful discharge which may be either express or constructive."³³ In analyzing the plaintiff's constructive-discharge claim as a type of wrongful discharge, the Court applied the test articulated in *Thompson v. St. Regis Paper Co.* In *Snyder v. Medical Service Corp. of Eastern Washington*, the Court said: "We recognize an exception to the terminable-at-will doctrine by permitting a cause of action for wrongful discharge only where the discharge contravenes a 'clear mandate of public policy.'"³⁴

However, Washington courts, both before and after the 2001 *Snyder* decision, have recognized a constructive discharge as a cause of action. The courts have analyzed Washington cases involving claims of

discriminatory treatment and harassment pursuant to the Washington Law Against Discrimination (WLAD), RCW 49.60, several of which are discussed below, using the objective employee standard relied upon by the federal courts and recently affirmed in *Suders*. Washington has also allowed constructive discharge as a cause of action where it arose pursuant to the Family Leave Act, RCW 49.78.070. The U.S. Supreme Court's decision in *Suders* generally strengthens the ability of plaintiffs to plead a constructive-discharge claim as an independent cause of action, and is likely to bolster reliance on the objective employee standard as well as the "aggravated circumstances" and "deliberate act" tests that have been used in Washington.

"Aggravating circumstances" or "continuous pattern" test

In *Sneed v. Barna*,³⁵ the Washington Court of Appeals adopted the "aggravating circumstances" or "continuous pattern" standard set forth in the 9th Circuit's decision in *Sanchez v. City of Santa Ana*.³⁶ The *Sneed* court found as a matter of law that the plaintiff's allegations failed to show aggravating circumstances or a "continuous pattern of discriminatory treatment" required to support a constructive-discharge claim.³⁷ In *Sneed*, the plaintiff was removed from the position of school principal to position as "administrator for at-risk students" at the same pay.³⁸ She also worked in the new position for a relatively short time, roughly two months, before quitting.³⁹

In *Washington v. Boeing*, the plaintiff claimed she was constructively discharged due to her sex and race in violation of RCW 49.60.⁴⁰ She complained that co-workers and a manager of a flight-line crew at Boeing addressed her as "dear" and "sweet pea"; that a male co-worker refused to assist her; that a calendar display was offensive; and that a co-worker called her "brillo head."⁴¹ The Court of Appeals found that these facts were insufficient to constitute the "aggravating circumstances" or "continuous pattern of discriminatory treatment" required to support plaintiff's claim of constructive discharge.⁴² The Court noted that her co-workers' refusal to help plaintiff did not affect her work performance and that, plaintiff was upgraded from a grade 4 to a grade 7 three months after she was transferred to the flight line.⁴³ The Court

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also noted Boeing's responsiveness to complaints: When plaintiff's manager was made aware that she did not want to be addressed as "dear," he apologized and never called her that again.⁴⁴ Boeing also counseled employees regarding the use of inappropriate terms to address co-workers, had the offensive calendar taken down, and counseled a co-worker about assisting plaintiff.⁴⁵

The "aggravating circumstances" test is consistent with long-standing federal caselaw cited by the U.S. Supreme Court in *Suders* that say a hostile-environment constructive-discharge claim entails something more than a hostile work environment claim.

"Deliberate act" requirement and the objective employee standard

Washington courts have adopted the objective employee standard of the federal circuit courts of appeal and continue to also require deliberate action on the part of the employer in bringing about the intolerable condition. "[C]onstructive discharge occurs where an employer deliberately makes an employee's working conditions [so] intolerable that a reasonable person would be compelled to leave."⁴⁶

In *Blomster v. Nordstrom*, the Court of Appeals held that the trial court erred in dismissing plaintiff's constructive-discharge claim pursuant to the Family Leave Act, RCW 49.78, that the employer failed to honor its own policy, consistent with the FLA, and that an employee will be returned to the same or equivalent position after taking family leave.⁴⁷ The Court found that plaintiff had presented sufficient evidence to go to the jury on whether Nordstrom deliberately made working conditions so intolerable that a reasonable person in plaintiff's position would be forced to quit.⁴⁸ In that case, when plaintiff returned from family leave, her salary was cut in half; she was relieved of all management responsibilities; she lost her management perks; she lost her corporate travel expense account; she was being supervised by people she had trained and supervised before she left on leave; and she was given menial tasks considerably different from the duties she possessed before she left.⁴⁹

The "deliberate act" requirement, as defined by Washington state courts,

is not inconsistent with *Suders*. Under Washington state common law, the word "deliberately" merely requires "a deliberate act of the employer creating an intolerable condition, without regard to the employer's mental state as to the resulting consequence."⁵⁰ Washington courts have clarified that the "deliberate act" requirement refers to the supervisor's intention to engage in discriminatory treatment or harassing behavior rather than an employer's intention to force the employee to quit. For example, in *Colville v. Cobar Services, Inc.*, plaintiff happened upon her supervisor masturbating in a small locked room of the federal courthouse where she worked in janitorial services.⁵¹ The *Colville* court found there was no reasonable inference that the supervisor deliberately acted to create a condition under which the plaintiff would discover him masturbating.⁵²

In *Suders*, the U.S. Supreme Court clarified that a constructive discharge claim does not require a showing by the employee that supervisors took official action to negatively change the employee's employment status. This clarification resolves the split in the circuits regarding

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whether an employee claiming constructive discharge must prove that the employer deliberately intended to induce her resignation. The *Suders* decision affirms the 3rd, 5th, 7th, 9th, and 10th Circuits that have held that no such intent is required.⁵³ In doing so, the *Suders* decision gives further direction to courts, federal and state, in Washington.

"Contravenes public policy" test

Washington courts have sometimes analyzed a constructive discharge as a type of wrongful discharge.⁵⁴ In a 1993 decision, the Court of Appeals stated that one of the requirements for proving constructive discharge was to show that the employer made working conditions intolerable for plaintiff because she was a woman.⁵⁵

In a 2004 decision, the Court of Appeals not only analyzed the constructive-discharge claim under the objective employee and aggravating circumstances standard, but also analyzed the claim to determine whether the plaintiff "met all of the elements of the tort of wrongful discharge in violation of public policy."⁵⁶ To establish liability for wrongful discharge, a plaintiff must prove (1) the existence of

a clear public policy; (2) that discouraging the employee's conduct would jeopardize the public policy; and (3) that this conduct caused the discharge.⁵⁷

In *Korslund v. Dynacorp Tri-Cities Services, Inc.*, plaintiff Korslund was removed as lead engineer after reporting various safety concerns about radioactive materials.⁵⁸ After his reports provoked an investigation of the employer's alleged abuses, the plaintiff himself became the target of the investigation and was threatened with termination.⁵⁹ A psychologist eventually put plaintiff on disability for job-related stress, from which he did not return to work.⁶⁰ The Court of Appeals found that Korslund presented sufficient facts that would permit a jury to find that the employer's retaliation for reporting safety concerns caused plaintiff's constructive discharge.⁶¹

The analysis in the *Korslund* decision tends to show that, despite the *Snyder* decision, Washington courts still use the objective-employee standard and do recognize the constructive-discharge claim as an independent cause of action. The "contravenes public policy" requirement for proving constructive discharge has little practical effect. Why? Discrimina-

tory treatment or harassing conduct contravenes public policy. (See RCW 49.60.) If an underlying discrimination claim fails, the constructive-discharge claim necessarily fails.

Conclusion

The *Suders* decision gives employers the security of knowing that, as long as they have an effective mechanism for reporting and resolving complaints of harassment, they will be able to raise as a defense a plaintiff's unreasonable failure to take advantage of it. At the same time, *Suders* leaves intact the ability of Washington employees to bring constructive-discharge claims as an independent cause of action. It remains to be seen whether Washington courts will apply *Suders* broadly to cases involving other types of discrimination besides sexual harassment. ☞

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NOTES

¹ 542 U.S. 129, 124 S. Ct. 2342 (2004).

² 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

³ 124 S. Ct. at 2347.

⁴ See *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3rd Cir. 1999); *EEOC v. University of Chicago Hospitals*, 276 F.3d 326, 331 (7th Cir. 2002); *Jaros v. Lodgenet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002); and *Poole v. The Country Club of Columbus, Inc.*, 129 F.3d 551, 554 (11th Cir. 1997).

⁵ See *Haworth v. Romani Imported Motors, Inc.*, 2001 U.S. Dist. LEXIS 21508, at *8 (D. Or. Dec. 27, 2001). See also *Vasquez v. Atrium Door & Window Co.*, 218 F. Supp. 2d 1139, 1142-43 (D. Ariz. 2002) (noting that the Supreme Court's list of tangible employment actions in *Ellerth* [citing 524 U.S. at 765] was likely not intended to be either exhaustive or exclusive of a constructive discharge).

⁶ 124 S. Ct. at 2342.

⁷ *Id.* at 2347.

⁸ *Id.*
⁹ *Id.*
¹⁰ *Id.*
¹¹ *Id.* at 2348.
¹² *Id.*
¹³ *Id.* at 208.
¹⁴ *Id.*
¹⁵ *Id.*
¹⁶ *Id.* at 2348.
¹⁷ *Id.*
¹⁸ *Id.* at 2349.
¹⁹ *Id.*
²⁰ Faragher, 524 U.S. at 807-08.
²¹ Ellerth, 524 U.S. at 761.
²² Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
²³ 124 S. Ct. at 2355.
²⁴ *Id.* citing Ellerth, 524 U.S. at 760.
²⁵ *Id.*
²⁶ 124 S.Ct. at 2355.
²⁷ Suders, 124 S. Ct. at 2347.
²⁸ *Id.* (citations omitted).
²⁹ *Id.* at 2354 (citations omitted).
³⁰ *Id.* at 2355.
³¹ *Id.*
³² *Id.*
³³ *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wash. 2d 233, 238 (2001).
³⁴ *Id.* at 238-39 quoting Thompson, 102 Wash.2d 219, 232 (1984).
³⁵ Sneed, 80 Wash. App. 843, 850 (1996).
³⁶ 915 F.2d 424, 431 (1990) cert denied 502 U.S. 815, 112 S. Ct. 66 (1991).
³⁷ Sneed, at 850.
³⁸ *Id.*
³⁹ *Id.*
⁴⁰ 105 Wash. App. 1, 16 (2001).
⁴¹ *Id.* at 11 and 13.
⁴² *Id.* at 16.
⁴³ *Id.* at 11.
⁴⁴ *Id.* at 12.
⁴⁵ *Id.*
⁴⁶ *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 121 Wash. App. 295, 318 (2004) citing *Bulaich v. A.T. & T. Info. Sys.*, 113 Wash. 2d 254, 258-59 (1989) and *Martini v. Boeing Co.*, 137 Wash.2d 357, 366 n.3 (1999).
⁴⁷ 103 Wash. App. 252, 254 (2000).
⁴⁸ *Id.* at 258.
⁴⁹ *Id.* at 258-59.
⁵⁰ *Bulaich*, 113 Wash.2d at 261.
⁵¹ 73 Wash. App. 433, 435-36 (1991).
⁵² *Id.* at 441.
⁵³ See *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984).
⁵⁴ See, *supra*, the Washington Supreme Court's 2001 holding in *Snyder*, 145 Wash. 2d at 238. See also *Reninger v. State Department of*

Corrections, 134 Wash. 2d 437, 446 (1998) (holding plaintiffs failed to state a claim for wrongful constructive discharge because they did not allege or prove they were discharged "for a reason that contravenes public policy").
⁵⁵ *Hill v. GTE Directories Sales Corp.*, 71 Wash. App. 132, 143 (1993).

⁵⁶ *Korslund v. Dyncorp Tri-Cities*, 121 Wash. App. at 317-18.
⁵⁷ *Id.* at 318 citing *Hubbard v. Spokane County*, 146 Wash.2d 699, 707 (2002).
⁵⁸ *Id.* at 318.
⁵⁹ *Id.*
⁶⁰ *Id.* at 309.
⁶¹ *Id.* at 321-22.

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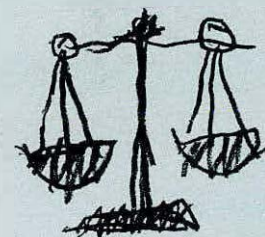
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The Theory of the Case:

Why a Strange Story Is Better Than None at All

BY STONE GRISSOM

One of the basic and all too often axioms of trial advocacy is that in order to be effective at trial, you need to develop a clear, simple theme and theory. Consider two fact patterns. Fact pattern one: A local police officer (let's call him Jonathan Doe IV) arrests a male college student after being dispatched to a residence, because of a noise complaint. The next day, the officer returns to begin a sexual relationship with the arrestee. Two months later, the young man is found in the front yard of his apartment with his throat cut. Four days after the crime, an anonymous crime-stoppers' tip reveals that the victim was involved with a married cop. Immediately, the gay community begins a proactive campaign to find the killer, and information begins pouring

into the police department. Eight days after the crime, Jon Doe's name is linked with the victim. It turns out, Officer Doe was even one of the responding officers to the crime scene. Suddenly, a bright and uncomfortable spotlight is turned toward the police.

Jonathan Doe IV is quickly arrested and charged with the murder. The problem is that there's no confession, no murder weapon, and the case is entirely circumstantial at best. The state's theory is that the cop murdered the college student to keep his own sexual orientation a secret from his cop buddies and to conceal his betrayal from his wife and four-month-old baby. At trial, the only evidence against the accused is the illicit affair and skin-cell DNA evidence under the victim's right fingernails matching the accused and only confirming the al-

ready admitted relationship. In fact, the state's own timeline almost precludes the opportunity for Mr. Doe to commit the murder and still make it home to give his newborn his early-morning bottle. Despite the overwhelming reasonable doubt that abounds in this case, a Missouri jury, after only six hours of deliberation, convicted Jonathan Doe IV of first-degree murder and sentenced him to life in prison without the possibility of parole.

Now consider fact pattern two: A young soldier recently stationed to Ft. Lewis (let's call him Christopher Doe, because Baber is too on the nose) gets mixed up with a group of self-proclaimed para-military vigilantes calling themselves "The Federation" and spouting off libationously induced ideas of violently stamping out the undesirables in our society. (They also have plans on invading Cuba, but that's for another article.) The leader of The Federation (let's call him Jeremy Doc, because Miers is also too much on the nose), however, has his sights set on eliminating something or someone a little closer to home. Jeremy somehow convinces the naive Chris that the Florida sect of The Federation has a "hit" out on Jeremy's wife, and that it is necessary to fake her death in order to throw them off the track.

After a failed attempt involving an off-duty correctional officer and some dirty dancing in an empty warehouse, the three of them (yes, the wife is even involved) decide that a mock robbery/strangulation is the best way to proceed. They drive to a secluded spot near the Tacoma waterfront and begin staging the scene. Jeremy's wife helps place a bungee cord around her own neck for effect; while Jeremy produces a "magic potion" for her to drink that will simulate death. However, as in many ill-conceived plans, things don't quite work out as expected, and, instead of simulating her death, someone got the bright idea to actually pull the cord until the wife turned blue and eventually died.

It gets better. Within a couple of weeks, Chris is arrested and confesses to the crime — not once, but twice, on tape and after Miranda warnings were properly given. Then, against stringent advice from his attorneys (let's call them Stone Grissom and Ann Stenberg), he

writes 48 letters to his girlfriend from jail detailing his thoughts about the crime and how remorseful he is for being involved. All of this evidence is neatly gathered, Bates-stamped, and presented to the defense by the state in discovery. Oh yes, and if the prosecutors didn't already have enough evidence to support the large smirks on their faces, they have the full cooperation of the U.S. Army's special investigations unit.

Unlike fact pattern one, any reasonable doubt seems to be well hidden by the overwhelming evidence pointing toward the guilt of Christopher Baber (I mean Doe). However, after an almost seven-week trial, the jury needed only one extra hour than their Missouri counterparts in order to find Chris not guilty of murder and not guilty of conspiracy to commit murder.

A theory for the defense

Why the two seemingly conflicting results? As eloquently stated by the brilliant, albeit fictional, character Sherlock Holmes, the answer is elementary. Christopher's attorneys had what John Doe's attorneys did not — a developed theme and theory of the case.

It's not enough to just say to the jurors that the prosecution can't meet its burden or argue that because there is certain evidence presented, it doesn't mean guilt. You must also have an actual "theory" of the case. If you don't, you will lose. It's that simple.

For Chris, it all came down to a 2001 movie called *Spy Games*. I don't know if you've seen it, but it's a pretty good flick — Brad Pitt, Robert Redford, a classic Porsche 911, and a bunch of high-speed chases and special effects. However, the blockbuster film's opening scene also answered one basic question that had been gnawing at us since the beginning: Why would a seemingly intelligent young man, who had scored rather high on his military entry tests, believe in some magic potion that can be found only in such children's tales as Snow White and Rip Van Winkle? (Yes, *Romeo and Juliet* has the same reference, but we weren't going there in this trial.)

The movie begins with Brad Pitt's character (a cool and hip CIA operative with an impressive military background as a war-time sniper) sneaking into a

Chinese prison in order to rescue his love interest, a peace activist with a checkered past involving a bombing of a Chinese Embassy. How does our hero pull off his entry into the heavily guarded fortress? You guessed it. He uses special military technology in the form of a pill that, when used in conjunction with a heavy electrical shock, simulates death by temporarily stopping the heart.

It sounds crazy, but imagine you're a naive 18-year-old follower who has never been away from home and you find yourself in an overwhelming situation as a U.S. military recruit in basic training. Now, imagine during your

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training meeting several well-traveled and self-confident associates of a secret organization charged with the duty to stamp out all that is evil in the world and who are willing to bring you onboard as a full-fledged member. Additionally, imagine a self-proclaimed leader of this organization taking you under his wing to ensure your acceptance and safety. It's not hard to make the leap from there. We learned that Jeremy and Chris had spent hours watching the opening scene to *Spy Games* — a fact indirectly confirmed by the victim's own family, who found the VHS tape in Jeremy's apartment after the murder. A theory was born.

With every direct and cross-examination, our story stayed simple

and consistent. By closing arguments, the prosecution was no longer arguing their own theory — they were arguing against ours. We won the trial because we controlled the story being told to the jury. We could have gone into the courtroom and simply argued that the multiple confessions from our client were coerced or "didn't mean guilt." However, if we had, we'd currently be in the process of turning his files over to his appellate attorneys for review. Instead, as weird as it was, we decided to embrace the client's story and, in turn, we embraced our client. Our theory of the case was certainly out there, but it was also honest, it was real, and it offered a clear, independent story as an alternative to the state's case.

What happens when you don't have a theory

In contrast, police officer Jonathan Doe's attorney, in a brilliant display of mediocrity, stood up and simply stated that just because the accused's DNA was under the victim's fingernails, it evidenced only an affair and not murder. Then she sat down. Wow! In one sentence, she not only validated the state's theory — her idle counter-argument wholeheartedly embraced it. There was no discussion of the fact that the reason the accused was sitting in court was because of a rush to judgment. The police department had been hammered in the press and had a tremendous amount of pressure on them to make an arrest. (I see a theme and theory developing here.) There was no discussion of the several leads about mysterious cars parked in front of the victim's apartment the week before the murder that were never followed up on, or the fact that the victim had made many enemies in the community because he was so politically active. None of that. All she said was that DNA doesn't prove guilt. Setting aside the obvious O.J. comment, that doesn't even pass the giggle test, and it's not a theory of the case.

Whether it is a criminal or civil case, a good theme and theory help create a clear, simple story of "what really happened" from your side's point of view. It's not only important, it's critical. It allows you, as the advocate, to tell the jury *your* story through every direct and

every cross in the trial, and should be developed as early as the beginning of the discovery process. Without a theory of the case, you're just . . . arguing. For example, during poor Mr. Jon Doe's trial, I sat through an hour-long cross of the medical examiner regarding whether a couple of drops of blood found on a Coke can near the body was a result of blood spatter or flies. It was effective. By the end, I was even confused as to how the blood got on the soft drink receptacle. However, it was also a distinction without a difference, and it did nothing to aid the client's fate before the triers

of fact. Jonathan Doe's attorneys were not arguing a theory. Instead, they were simply arguing any point that could be argued. It was as if they had conceded the loss before the trial began, and were only going through the motions in order to do their jobs and save themselves from a reversal for ineffective assistance. That type of burned-out attitude screams for a career change.

The science behind a workable theory at trial

If you can't answer the basic question, "I win because . . ." then you're not ready

to pick the 12 people who are probably already preconditioned to find your client guilty of whatever charges are brought by the prosecution. Why spend so much time during *voir dire* on keeping an open mind only to contradict your efforts with a non-theory at trial?

All too often, even seasoned trial attorneys walk into courtrooms arguing nothing more than "just because the cops found A + B, it doesn't necessarily mean that C is involved." Come on! Of course C is involved. What you need to do is educate the jury on why C is either not liable or being falsely accused, not the statistical improbabilities of three being the sum of one plus two. It can be as simple as flipping through *Aesop's Fables* to find an analogy that mirrors your argument. It is the small amount of extra effort that distinguishes between attorneys who lose 90 percent of their trials, and those who win 90 percent.

Juries don't want to hear the attorneys split hairs about proof and evidence. They want to hear a story of intrigue and suspense that captivates their attention and allows them to rationalize their verdict. It's not enough to say the other side is wrong — you must also say why your side is correct. For the past 50 years, behavioral science studies have shown that most jurors employ affective reasoning (right brain) in the courtroom. In other words, they see trials more like human dramas than legal disputes, and are more prone to be persuaded by a dramatic and emotional portrayal than by a dissociated review of the evidence. Lawyers, on the other hand, are taught from day one in law school to use cognitive legal reasoning when approaching a case. Strict interpretations of the law and technical applications of precedent usually take up the bulk of pre-trial motions. As important as such maneuvers are to litigation, we must also remember to always view the case in the light most favorable for being presented to a jury. Every decision should be weighed against the ultimate trial presentation. Before writing any request for admission and any motion *in limine*, we should be asking ourselves: How will this play in front of the jury?

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for only about 20 to 25 minutes before levels begin dropping at varying rates. Any advertising executive will tell you, he'd rather place his ad on a half-hour program, because viewers tend to change the channel before the hour is up. That means attorneys are wasting precious time fighting over the minutiae. Your jurors are more apt to remember the big picture over the details. That's why litigators who adhere to the trial technique of primacy, recency, and repetition using a good theme and theory seem to almost mystically command the courtroom. It's not magic — it's a time-tested preparation and a keen awareness of how we as human beings process information.

It is certainly true that DNA under the victim's nails doesn't necessarily mean the accused is a killer, but without a coherent theory, there's no story to tell. If there's no story to tell, there's no reason to listen to your side. A trial is more than two sides airing a dispute before a citizen jury. It is an artistic presentation and the ultimate play, each act outlining two opposing scripts of true-life human conflict and experience. The effective trial advocate sheds his lawyer's skin in order to stand against opposing counsel and become a competing director of the action as it unfolds. Working with the judge as producer, our job is to creatively present this living drama because, at the end, it is the jury who gets to write the conclusion.

If life is truly nothing more than "a

tale told by an idiot, full of sound and fury, signifying nothing," then the last thing needed at trial is a stiff, over-educated lawyer arguing minute details that have very little to do with the ultimate question. Instead, jurors need a simple storyteller who can speak not only with the clarity of a child, but also with the flair of a Shakespearian actor. Those are the stories remembered and retold throughout the ages, and those are the stories that will invoke the type of responses that resonate throughout the deliberation room. You don't need to actually represent a Lady Macbeth to win at trial. However, you do need to do some pre-trial preparation to bring your client's story alive with the same unique and personal visual concepts that were represented by her festering and prophetic wound. That's what will be remembered above everything else, and the extra time exerted before you step into the courtroom will assuredly pay off when it is time for you and your client to leave. *✍*

Stone Grissom is a civil rights attorney and former co-chair of the Trial Advocacy Committee of the Washington State Bar Association. Additionally, he is a national legal commentator and author of numerous legal publications.

NOTES

¹ William Shakespeare, *Macbeth*, Act 5 Sc. 5.

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BY ROBERT C. CUMBOW

got grammar?

Thanks to the International Dairy Foods Association (and their ad agency), everyone now seems to think that it's wonderfully clever to use two-word slogans and titles in which the first word is "got." It's getting old, and has just about run its course. But it raises (not "begs") the question whether "got milk?" and the like are proper constructions at all.

"Got milk?" is, of course, just a shortened form of "Have you got milk?" But where did that "got" come from? Isn't it more correct to ask, "Do you have milk?"

We hear the "got" construction in spoken English quite a lot. "Got any change?" "Have you got the time?" Or the phrases that inspired this discussion, "I've got a question for you" and "You've got mail."

The prevailing wisdom has long been that this kind of construction is peculiar to colloquial speech, and should be avoided in writing and formal speaking.

Clearly, in each of the examples cited above, the "got" is superfluous. "I have" and "You have" do the job, without showing the word "got" in there. Granted, "Have you the time?" and "Have you any change?" sound a bit stuffy and artificial (though many generations have grown up uncorrupted by "Have you any wool?"). But "Do you have the time?" and "Do you have any change?" work just as well as "Got any change?" and "Have you got the time?" It's a mystery why people will ask "Have you got any peanut butter?" when "Do you have any peanut butter?" is perfectly clear and correct, and doesn't sound like a pistol fired off next to your ear.

We might analyze this as follows: "Have" means simply "is in possession of," while "got" is the past tense of "get" and means "received," "acquired," or "obtained." Now if there's a jar of peanut butter in your pantry, you'd say "I have

peanut butter"; but if you've just returned from the store, where you purchased some, you might say "I've got peanut butter" (though in that case, it would be more appropriate to drop the "have" and say "I got peanut butter"). Anyway, the distinction between "I have" (for "I am



in possession of") and "I have got" (for "I have acquired") seems to have blurred over the years, and "got" has come to be used interchangeably with — or even redundantly to — "have," creating the "I've got" formative.

An interesting sidelight on this is that "gotten" is considered an acceptable participial form of "get" in American English, while in Britain it is severely frowned upon. In the United States, you wouldn't bat an eye at a construction

such as "He's gone and gotten himself arrested," while in the U.K. one would use "got" or risk castigation. Strunk and White, in their venerable first edition of *The Elements of Style*, preserve the British preference. By the mid-Seventies, though, Theodore Bernstein of *The New York Times* was drawing the distinction between the American and the British usage. Still, Bernstein and other usage guides continued to emphasize that neither "I've got" nor "I've gotten" is acceptable in written English; "I have" is always preferred.

Which brings us to "You've got mail." Why is it that "You have mail" doesn't quite have the ring that "You've got mail" has? It's because, as noted earlier, "have" denotes simple possession, while "got" carries the additional sense of acquisition. If I log on and learn "You have mail," it may well be the same mail I had all along; while if I log on and am greeted with "You've got mail," I know at once that this is *new* mail that I've recently received. Thus "You've got mail" is a defensible construction, since the message is "You have received mail"; whereas "I've got a question for you" should actually be "I have a question . . ."

Not So Clever Segue

The word "segue" comes from music, and refers to an uninterrupted transition from one musical theme to another. It's pronounced "seg-way," in case anyone is unsure about that. And now I've ruined my clever segue from "You've got mail" to the following additional email-related item (unless you're willing to forget that this paragraph ever happened).

Is the plural of email "email" or "emails"? A reader asked this some months ago, after noting that "email" is a new but increasingly essential word in the legal lexicon, and observing that some people

in his office used the term "emails."

As a threshold issue, let's acknowledge that the word "email," barely 30 years old,¹ is still in a transitional stage, and its spelling has not yet become standardized. I follow the *Wired* magazine usage guide, which recommends "email" (and "Web site" rather than "web site" or "website"). The hyphenated form "e-mail" runs a close second in usage, according to the online Wikipedia, though the hyphen is hardly necessary, and some regard the term "e-mail" as downright un-American. The alternate forms "E-mail" and "Email" have all but disappeared.

Now, back to that great question about the plural of "email." The word "email" is a derivative of the word "mail," and the plural of "mail" is "mail." So it would seem that the proper plural of "email" would have to be "email." However, many of us often say "emails," including yours truly. I've thought about this, and I think I have figured out the reason for it.

You could say "I get lots of mail" and "I get lots of email," and there would be no inconsistency. But if you're talking about a specific number of items, you wouldn't say "I got three mails"; you'd say "I got three letters." But units of "email" aren't called letters, and there is no equivalent of "letter" in the world of email. I suppose you could say "messages," but that would eliminate clarity: they could have been email, voicemail, instant, or paper messages. They could even have been telegrams, if anyone uses those any longer.

So when we want to refer to more than one piece of email, we say "I got three emails."² We also say "send me an email" or "I got an email from her" — usages that are not analogous to the way we use the word "mail." Of course we could be more precise and always say "email message" rather than simply "email." But I don't think that's likely to catch on. So my best guess — and it is only a guess — is that we're free to use "email" as both a collective noun (like "mail") and as a concrete singular or plural noun ("an email," "several emails").

New Saws

The emergence of "email," and the burning usage questions it inspires, is a good example of how our language is constantly changing (and, one hopes,

growing). Another way in which our language changes (really bad segue) is that some words and phrases that have well established meanings seem — gradually or even suddenly — to take on very different meanings in popular parlance. I'm not talking about the calculated adoption and assignment of completely new meanings for existing words, as occurred with such words as "gender" and "gay." I'm talking about a dramatic change in the actual public understanding of an expression.

Let's take an example: The phrase "it's all downhill from here" used to mean that the hard part of a task was completed, and all that remained was the easy part — comparable to coasting down the other side of a hill once the summit had been passed. Today, however, the phrase "it's all downhill from here" is generally understood to mean that things have stopped improving, and from now on they can only get worse. William Safire noted this new understanding in one of his *New York Times Magazine* columns not long ago, and he didn't have any better an explanation for it than I have. This is no small change in meaning; it's a 180-degree turnabout, from "things are getting better" to "things are getting worse."

How did a phrase that meant one thing come to mean its exact opposite? My best guess is that some influential person, probably in the government, misunderstood the term and misused it in a very public context, others picked it up, and the previously wrong, now new, meaning was propagated by viral marketing and mass imitation. This happens a lot in bureaucracies.

Here are some other examples of words and phrases whose meanings have changed in our own lifetimes — some of them in just the last few years.

Carrot and stick: In the old *Our Gang Comedies*, which somewhat younger readers of this column will recall as *The Little Rascals*, and which most readers of this column have probably never heard of, the kid had a particularly memorable means of transportation. A little cart, not much more than a wagon, really, was hitched to a goat. In the wagon sat a kid with a stick. Attached to the stick was a length of string, to which was tied

a carrot. The kid would dangle the carrot in front of the goat, just out of reach. The goat would step forward to get the carrot, pulling the wagon forward. As the wagon moved, so did the kid and the stick, keeping the carrot tantalizingly³ out of reach of the goat. The goat kept moving to reach the carrot, and thus the cart kept rolling and the kid got a cheap ride.

Now I always thought that was what was meant by "carrot and stick." But a few years ago the phrase took on a completely different meaning. It now suggests a reward/punishment system of getting things done. When the donkey does what you want, you give him a carrot; when he doesn't, you hit him with a stick. This is an altogether different, more fundamental, and less creative approach to task management as well as to language usage, and it has the additional disadvantage of having origins not nearly as colorful as those of the "carrot on a stick" example I gave above.

Closer is a word whose meaning hasn't really been changed, just enhanced — and in a pretty colorful way. There was a time when baseball teams didn't have "closers," only relief pitchers. But today, after many decades of evolving baseball practice and strategy, every team has its "closer" — the relief pitcher who comes in during the last inning when the team is ahead, with the task of "closing down" the other side and making sure his team keeps the lead. In addition, thanks in no small part to David Mamet, "closer" also refers to someone who closes deals, especially in the real estate business. "ABC — Always Be Closing!" And don't bother to take a break, because coffee is for closers. The two uses in this case are about the same: one who gets the job finished.

Out of pocket: Not so very long ago, the term "out of pocket" referred to expenses incurred by an employee without the benefit of an advance payment or a company credit card. These "out of pocket" expenses were paid by the employee herself, out of her own pocket, in the expectation of being reimbursed later. "I put dinner on the company card, but I'm out of pocket a hundred bucks for the baseball tickets." Now, however — oddly — "out of pocket" refers not to what I've paid but to where I am. You hear "I'll be

out of pocket for the rest of the week," and you understand it to mean "out of the office," "out of town," or generally "unavailable." Why anyone ever assumed it meant that is beyond me, but today it is the far commoner usage of the term.

Slam dunk: This expression, from basketball, used to mean an easy achievement, something that involved only height and power, not strategy or skill. Today it's unclear whether a "slam dunk" is an easy shot or a decisive shot or a spectacular shot. From a recent news article: "Kevin Neely, a spokesman for Oregon Attorney General Hardy Myers, called Wednesday's decision 'a slam dunk for [Oregon] and certainly a tremendous victory for policymakers in every state.'" The phrase "slam dunk" has come to be used so ambiguously that no one is sure what it means any more.

Short fuse: Traditionally, a person who was quick to anger was said to have a "short fuse." The metaphor came from explosives. A firecracker with a long fuse will give you plenty of time from the time you light it until the time you'd better be rid of it. One with a short fuse will explode almost as soon as it's lighted—hence the reference to a short-tempered person, who "blows up" on slight provocation, as having a "short fuse." Well, you can forget all that. Today, the term "short fuse" is most commonly used in workplaces to refer to projects that have a fast-approach-

ing deadline and need quick turnaround. "We have a short fuse on this one, so get an associate to come in on Sunday." The meaning is still a logical one, but the explosive metaphor has been lost, and with it, a lot of color.

Splitting the baby: The recent evolution of this expression is particularly alarming. In the First Book of Kings, Solomon, son of David, a young judge of no experience, is presented with a problem: two women both claim to be the mother of a particular baby. Neither will relent, so it is up to Solomon to decide which woman gets the baby. His famous solution was to call over a soldier and order him to cut the baby in half and give half to each woman. One woman agrees this is just, while the other woman begs that the baby be spared, even if it means giving the child to the first woman. Solomon stays the soldier's hand, and gives the baby to the second woman, announcing that she must be the child's real mother.

Now this kind of evidence would never stand up in a contemporary court of law. The best that can be said of Solomon's judgment is that it suggests which of the two women might be better at caring for the child; but it does nothing to identify the actual mother. For that, we'd need DNA testing, a benefit Solomon didn't have.

The point of all this, though, is that "splitting the baby" used to mean suggesting a radical measure as a bluff in order to elicit the true feelings of the

persons involved. Today, "splitting the baby" is used as a common synonym for a compromise, or a middle ground that a mediator or arbitrator might find between two parties' positions. People who use the expression in this way may be unfamiliar with the story; or perhaps they recall it only dimly and believe that Solomon solved the problem by actually cutting the baby in half.¹ So an expression that once referred to an outrageous, unthinkable act is now accepted as meaning a reasonable way of being fair to both parties—and no one seems to be troubled by this! Babies don't have it as good as they used to, evidently. ✍

Robert C. Cumbow is a shareholder with Graham & Dunn, Seattle, where he counsels clients in beverage, food, communications, entertainment, and other businesses on trademark, copyright, advertising, media, and alcoholic beverage law. He teaches at Seattle University Law School and has written extensively on law, film, and language. He acknowledges the contributions of Gary Myles and Stuart Bates to this installment of his quarterly Bar News column on language and usage.

NOTES

¹ The first email was sent in October 1971, but none of my usual sources can offer any clear guidance on when the word "email" was first used (though a word spelled the same way but with a very different meaning appears in the Oxford English Dictionary and dates back to 1480).

² Actually, you would never say "I got three emails." You would say "I got a hundred and three emails."

³ See the Greek myth of Tantalus, who offended the gods in a way that would also offend you if I were to mention it here, and who, for his punishment, was condemned to a special place in Hades where, thirsty and hungry, he could see but never quite reach a pool of water and a tree laden with fruit.

⁴ It's worth noting here, if only for the sake of completeness, that in Joseph Heller's *God Knows*, an anachronistic King David, reflecting back on his life and family with the benefit of both foresight and hindsight, reveals that Solomon was not the vaunted wise judge of legend, but an impetuous halfwit who really thought cutting the baby in half would be a good solution to the problem.



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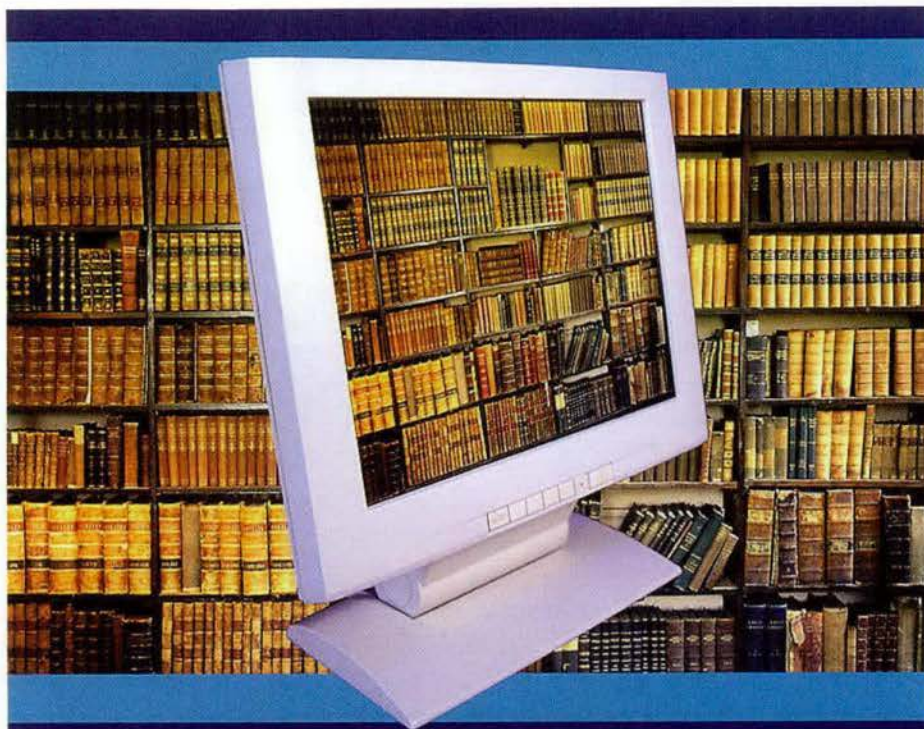
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Merkel Cell Carcinoma — A Rare Bug

BY JOHN P. PAYSENO

In my 63 years I never was sick. To be clear, let's define "sick" to mean something more serious than a cold or the flu. Really sick. I had the normal childhood diseases and a couple of broken bones, but nothing life threatening.

Last year, I noticed an angry-looking growth on my left forearm. I thought it was a cyst or boil. It was persistent and did not go away. Around Thanksgiving, my wife, an RN, sent me to the dermatologist who excised the object and sent it to the lab. I thought nothing more about it.

About a week later, I received a phone call from my dermatologist — it was evening, about 6:30. She told me that the lab sample was cancerous; that in fact it was a rare and aggressive cancer called Merkel cell carcinoma; that I needed to see an oncologist as soon as possible; that the treatment required complete excision of the tumor, likely followed by aggressive radiation therapy and chemotherapy.

I don't really remember much else in the conversation. I was in a daze and still did not fully appreciate that she had just told me that my health and life were in immediate danger. Luckily, my wife had just arrived home as the dermatologist call came in. She listened and interpreted for me.

Cancer is a word that still sends fear through to the core of one's being. A stigma attaches to the word cancer. Most of us know of someone who has died of some form of this dreadful disease.

My wife made a list of the oncologists she knew of and who we thought would be the best to treat me. We chose Saul Rivkin at the Swedish Cancer Institute. His office made room in his schedule for us the next evening for a 7:00 appointment. Saul Rivkin is nearly 70 years old, with the energy level of a 30-year old. He often makes rounds to see his hospitalized patients in the middle of the night. He likes to be called Saul. He has a quick mind and is well-trained and experienced. He exudes the spark of life and

knowledge in his manner, eye contact, and appearance. He instills confidence and patient trust. He is also honest. He has treated and lost many patients to cancer. He has also cured many. He has seen Merkel cell only two or three times.

He told me my odds were three out of four that, once removed, the Merkel cell disease would not return. In cancer terms, those are pretty good odds. Of course, the kernel of doubt is always in the back of my mind. Once in a while it comes forward, and I have found I need to "think" it to the back of my mind again and proceed with life. Living with a diagnosis of cancer is never easy.

He told me Merkel cell tumors are rare, occurring in only 300 to 400 cases per year in the United States. He told me it was a "troublesome and aggressive" disease. There are no "protocols" to treat it, like there would be for something more common, such as prostate cancer. Surgery and other treatments would be required for sure. He was not yet certain what the "other treatments" would be.

He told me we would have to schedule surgery. He then proceeded to do so, right then and there, juggling his cell phone and dictation phone in both hands. He called the surgeon, Jim Hanson, who returned Saul's call within minutes. I was set up to see the surgeon almost immediately, and arrangements were made for me to have further procedures to determine whether the tumor had spread.

The most common cancer-spreading route is via the lymph system. A left-forearm tumor would likely spread via the lymph nodes in the left elbow, axilla (armpit), and chest. The surgeon removed the tumor from my left forearm, cutting away tissue until the pathologist determined that he had clean margins all around the tumor site (no remaining evidence of cancerous tissue). He also removed four axillary lymph nodes and found that two of them had cancer evidence.

This discovery required another surgery, performed about three weeks later, to remove another 25 lymph nodes from

the left armpit. All 25 of these nodes were clean, to my great relief. God is good.

It was amazing how the diagnosis of cancer immediately took over my life. I realized that I was not immortal; that my health was the most valuable thing I had; that it was now in jeopardy. How would my wife and family react? What did the future hold? Would the tumor return in some other part of my body? Is this the disease that will end my life?

One of the most important factors to retain is a positive attitude and outlook. I tried always to listen carefully to explanations of proposed procedures and treatments. I visualized them as being tolerable and helpful. I prayed for myself, my family, my friends.

Many of us speak of our health as being important. Yet we continue in our ways, probably not fully appreciating what we mean by "our health." Indeed, without good or decent health, not much else in life has quality. The life of the ill is not a pleasant one. My many visits to the "cancer wards" made me realize that there is another subculture that the mainstream of life really does not know exists. It is the cancer treatment centers.

Swedish Cancer Institute is a wonderful place to go if you have cancer. The nurses and technicians are very warm and caring. They know the anxieties and discomforts and real pain their patients are enduring. They smile; they are responsive; they touch gently and reassuringly.

My medical oncologist, the quarterback on my care team, told me the research on Merkel cell disease is limited, because it is rare. Merkel cell is also aggressive and troublesome. He advised me that we would have to undergo "big time" chemotherapy and radiation therapy, all in an effort to ensure that the disease would not return. I really had no idea what this "big time" treatment would entail. All I knew was that chemo patients were often severely nauseated. I was scared, to say the least, but I was also determined and knew I had no alternatives.

I learned I would need another surgery to implant a portable catheter into my right chest. Through this catheter I would be able to receive the chemotherapy infusions directly into my heart and bloodstream without having to use veins in my arms, which might fail or become damaged with overuse. The catheter is also a means to draw blood for the many and frequent diagnostic tests I would need. It is a great invention and saves a lot of discomfort.

The catheter implant surgery went well and, a few days later, I began the chemotherapy and radiation therapy. The two therapies were administered over a 10-week cycle. Chemotherapy treatments were on Wednesday, Thursday, and Friday of weeks one, four, seven, and 10. Radiation involved my left arm, shoulder, and chest areas. Each procedure took 20 to 30 minutes over 28 consecutive days (five days a week). The treatments were pain-free and not uncomfortable, other than the anxiety of the unknown. The radiation effects were cumulative. As each daily visit went by, my skin began to show evidence of burns, some fairly severe, especially in the sensitive armpit area. A variety of lotions, gel packs, and, later, pain pills, kept the burn pain bearable, but no fun.

The chemotherapy treatments involved simply sitting back in a nice leather reclining armchair and having the very skillful nurses attach the IV tubing to my portable chest catheter and, bingo, the process started. No pain or discomfort. It took about three to four hours for the fluids to be administered. I was able to read, sleep, watch TV, or chat with my wife, who always was by my side for chemo. I had 12 chemo treatments spread over 10 weeks.

My wife formed a number of my friends and my son into a carpool to shuttle me each day to my radiation treatments and back home after each treatment. What a wonderful gift this was. One of them picked me up every day. Having a friend close by eased the anxiety of the treatments. The radiation treatments brought a lot of tiredness and exhaustion. Again, this was cumulative. The chemotherapy made me feel sick, like the flu, and somewhat nauseated. This

lasted for five to seven days after each treatment. The nausea was well-controlled with medications. I learned more about Emend, Zofran, and Lorazepam than I really wanted. Most importantly, they kept me from vomiting. Thank God for these drugs.

Finally, all the treatments were completed and the 10-week cycle was over. The whole process took six months from diagnosis to treatment completion. My attorney friends helped me with many of my cases, since some of the drugs affect short-term memory. It would not do to chat with a client and forget what was said. Some days I needed help when I was just too sick to really work effectively.

I continue to see my medical oncologist for monitoring. He checks my blood diagnostics by use of my portable catheter. He tells me I am cancer free. I can hardly believe it, but I am immensely grateful and relieved. I know my odds, and I know the disease can return. In the meantime, I plan to live life to its fullest. I will now appreciate my health as I never have before.

None of us is going to live forever. We all live life in a bubble, in a sense. The bubble can burst. But it probably will not. In the meantime, do things for the right reasons. Don't put off meaningful activities, cultivate essential relationships, accomplish worthwhile projects. Value and protect your health. You will

never regret doing so. *✍*

John Payseno practices in Seattle and reports he is feeling fine.

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A Plea for Trampus Borders

BY ROYCE ROBERTS

COMES NOW Defendant Trampus Borders, by and through his counsel, Manny Scusez, and presents this Pre-Sentence Report to this honorable Court.

The facts

On March 13, 2004, Trampus Borders was driving home in his pickup truck after his nightly visit to the Big Dog Tavern. Although Trampus had consumed only two beers, he was tired and decided to get a cup of coffee at Dunkin' Donuts.

Unbeknownst to Trampus, State Trooper Conrad Jones was inside Dunkin' Donuts, eating his second cream puff. After Trampus purchased his coffee at the drive-thru, he accelerated slightly around the corner and accidentally hit Trooper Jones's patrol car. Trooper Jones heard the crash, threw down his cream puff, and ran outside.

He arrested Trampus, handcuffed him, and put him in the back seat of his patrol car. Unfortunately, Trampus threw up in the back seat. At this point, Trooper Jones lost all professional objectivity. He dragged Trampus out of the car, hog-tied him, and tossed him back inside. They drove on to the police station with all the windows rolled down.

Trooper Jones cited Trampus for DUI, fallaciously reasoning that only a drunk would hit a parked patrol car, vomit in the back seat, and scream obscenities all the way to the police station. Trooper Jones completely discounted the possibility that Trampus was suffering from stomach flu or food poisoning.

Trampus is a proud man, and decided to right this wrong by going to trial. He insisted on testifying and mixed up a few details, which the prosecutor unfairly characterized as lying. The jury was out for all of 20 minutes, and found Trampus guilty.

The state's recommendation

For these innocuous facts, the state demands that Trampus be incarcerated for a year, receive alcohol treatment, and pay restitution for the costs of cleaning and fumigating Trooper Jones's patrol car. Such

is the opinion of narrow and vindictive minds. We reply, as would the great poet Alexander Pope, that "all looks yellow to the jaundiced eye."

The defense recommendation

To sentence Trampus Borders justly, this court must examine his intentions, his character, and his place in the world. Trampus did not intend to break the law the night of March 13. Except for Trooper Jones's negligent parking job, Trampus would have enjoyed a cup of coffee and driven safely home. That he was involved in an accident is the result of bad luck, not bad intentions.

Indeed, Trampus is a man of impeccable intentions. He intends to work, but employment eludes him. He intends to pay child support, but can't raise the money. He tries to remain sober, but evil companions lead him astray. Trampus is plagued by misfortune — his plane tickets are lost, his rent money is stolen, and his truck breaks down just before job interviews. Old warrants follow him wherever he goes. Shrewish and vindictive ex-wives and girlfriends pursue him for alimony and child support. Troopers spring out of donut shops with malicious glee. But this is not Trampus's fault.

We should not, writes Marcus Aurelius in his *Meditations*, ask men for virtues they do not possess and ignore those they do. Consider Trampus's virtues: he is a boon companion in a tavern, he never refuses a drink, and he always lends a sympathetic ear to troubled souls. He fixes friends' and neighbors' cars for free, and adores his many children even though he cannot support them. Trampus is a lover of women if only they are shapely and not overly fastidious. But these virtues are ignored by the prosecutor, who views Trampus with a jaundiced eye.

In another time, Trampus would be living happily in a French village, crushing grapes with his feet and attending the feast days of saints. After a few glasses of *vino* to celebrate Saint Bacchus, Trampus would stagger over to his donkey cart and fall inside. Awakened by his master's belly flop, the donkey would perform as designated

driver, and clip-clop home. Poor Trampus lives in modern America, his donkey cart is made of metal, and the law frowns on the consumption of *vino* prior to driving.

Trampus is not an unusual man. Properly understood, his story is the story of most of mankind. He is the president's brother, the moviestar's homely sister, and the executive's son who lives in a trailer down by the river. His uncle couldn't keep a wife, his cousin couldn't hold a job, and his aunt required a medicinal shot of whiskey to start her day.

Trampus is Billy Beer and pork rinds, the cold cup of coffee, and the empty roll of toilet paper. He is soggy lasagna on a weak paper plate. He is too sweet or too sour; he is overdone and undercooked; he is never just right. But Trampus is hardly evil. He has never murdered or robbed, or run an oil tanker aground in pristine Alaskan waters.

His criminal record is a mere menu of peccadilloes, a diary of harmless idiosyncrasies. Heedless when attention is necessary, vague when specificity is required, insolvent when money is useful, tardy when timeliness is essential — these are Trampus's crimes, nothing more. And if he should continue on with his life's journey, bumping into this tree, or that squad car, what real harm has he done?

Conclusion

We are satisfied that Your Honor, possessed of a spacious mind and an understanding heart, will agree that a minimum sentence would display maximum sympathy. We recommend credit for time served (one day) and 10 hours of community service. In the spirit of bygones, Trampus is willing to pay for the fumigation of Trooper Jones's squad car.

Respectfully Submitted,

Manny Scusez
Counsel for Trampus Borders ✍

Royce Roberts is an attorney with the Society of Counsel Representing Accused Persons in Seattle, and a past contributor of stories to Bar News.

Alone With the Judge: The Heightened Duty of Candor in *Ex Parte* Proceedings

BY KEVIN BANK

It always feels strange being alone with the judge. Sometimes, it happens when you are riding up in the same elevator with her at the lunch break in a hard-fought trial, or perhaps you find yourself at the same table with her at a charity dinner. We all know that in those situations, there is not a whole lot you can talk about — the weather, the design of the new courthouse are possibilities; the cases you have pending before her are not. However, there are other times when you are alone with the judge and you are expressly permitted to talk about the case at hand. In those situations, it may be tempting for a lawyer to overreach. This article addresses the lawyer's ethical responsibilities in such *ex parte* proceedings. It also marks the return of a regular ethics column, to appear four times per year, giving the perspective of the Office of Disciplinary Counsel on ethical issues.

Washington Rule of Professional Conduct (RPC) 3.3(f) addresses the lack of "checks and balances" in *ex parte* proceedings by imposing unusually broad duties of disclosure on the lawyer. RPC 3.3(f) states that in an *ex parte* proceeding, a lawyer "shall inform the tribunal of *all relevant facts* known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, *whether or not the facts are adverse*." (Emphasis added.)¹ Washington's rule differs from the 1983 ABA Model Rule on which it is based in using the term "all relevant facts" rather than "all material facts." The WSBA Ethics 2003 Committee has recommended that RPC 3.3(f) be modified to eliminate this distinction.² RPC 3.3(f) may not exclude from the duty of disclosure attorney-client confidences and secrets generally protected by RPC 1.6 (prohibiting disclosure of confidences and secrets of a client).³

1. Affirmative Misrepresentations Violate the Rule

There are few litigated Washington cases

addressing RPC 3.3(f). Only one case discusses the rule in detail. In *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002), the court sanctioned a lawyer under the rule for affirmatively misrepresenting facts in arguing in support of an *ex parte* order to disburse funds that had been placed in the court registry. Carmick represented a client in negotiating and satisfying a past-due judgment for child support. The client's ex-wife was represented by Lewis County prosecutors. Although Carmick's client disputed the judgment amount, he agreed to deposit \$11,000 in the court registry to release the child-support judgment lien. Carmick did not inform opposing counsel or the ex-wife of the \$11,000 deposit his client had placed in the court registry. He eventually persuaded the ex-wife to settle her claim for \$5,000.⁴

When the settlement agreement was signed and notarized, Carmick presented an *ex parte* order to the court authorizing disbursement of the funds in the registry — \$5,000 to the ex-wife and \$6,000 to his client. Carmick told the judge at the *ex parte* hearing that both the prosecutor and the ex-wife were aware of the proposed *ex parte* order and that they had approved it. Carmick knew that the prosecutor and the ex-wife had not seen or approved the proposed order. The court granted the order.

In imposing a 60-day suspension, the Washington State Supreme Court stated that a lawyer's duty of candor "is at its highest" when opposing counsel is not present. Such a high level of candor is necessary to "prevent judges from making decisions that differ from those they would reach in an adversarial proceeding."⁵

2. Misrepresentations by Omission Can Violate the Rule

Although Carmick's were affirmative misrepresentations, the rule also applies where the lawyer *omits* informing the court of relevant facts. In a Maryland case, the court held that an attorney rep-

resenting adoptive parents had violated the rule when he presented a final decree of adoption to the court in an *ex parte* hearing without informing the court that the birth mother's counsel had told him the day before that the mother "was hysterical" and "wanted to know where the baby was." The Maryland court held that the conversation with counsel for the birth mother was "patently material" and that the test should be whether the judge would have entered the same order had he known of the omitted facts.⁶ Similarly, in stipulating to a reprimand, Washington lawyer Gimi Page admitted to violating RPC 3.3(f) by submitting a dissolution settlement to the court *ex parte* as "agreed" without informing the court that she had made changes to the documents after opposing counsel had signed them.⁷ Lawyers have also been disciplined for failing to adequately inform the court in an *ex parte* proceeding of a related proceeding or judgment involving the same parties.⁸

3. "Staying Silent" When Another Lawyer Misrepresents

A recent Connecticut case went even further. The court disciplined an associate attorney for "staying silent" at counsel's table while a partner in the firm mischaracterized a conversation between the associate attorney and the client's counsel in another state. The court held that the nature of the proceeding — an *ex parte* hearing for emergency relief — was a unique circumstance that created an enhanced duty of candor. Even though the associate was not actually arguing before the judge, the court stated that he had knowledge that the partner was affirmatively misleading the court and omitting relevant facts, and thus was subject to discipline under the rule.⁹

4. Client Advocate or Officer of the Court?

Perhaps more than any other rule, RPC 3.3(f) requires the lawyer to play two

roles that are not always easy to reconcile — both client advocate and officer of the court. The plain language of the rule and the cases interpreting it impose a broad duty of disclosure on an attorney in an *ex parte* proceeding. Lawyers should be aware that in such situations, their advocacy role may need to be tempered to assure that the court gets a more balanced view of the issues, even if that results in disclosure of facts adverse to the lawyer's client. The Office of Disciplinary Counsel encounters allegations of violations of RPC 3.3(f) quite frequently, indicating

that lawyers may be uncertain or unaware of their enhanced obligations in *ex parte* proceedings. If you have questions regarding this or other rules and how they relate to your practice, call the WSBA's ethics line at 206-727-8284 or 800-945-WSBA, ext. 8284. ✍

Kevin Bank has been a disciplinary counsel at the WSBA since 1999. He graduated from New York University Law School in 1987 and practiced in a small private firm and with the federal government.

NOTES

¹ RPC 3.3(f) does not define what constitutes an "ex parte proceeding." This article will be limited to a discussion of those instances where court rules or procedures permit the moving party to present a motion, order, or argument without the other party being notified or present, such as temporary restraining orders and motions to release funds from a court registry. The rule may apply in other contexts. For instance, courts have sometimes applied the rule to motions or hearings on default judgments where the moving party's conduct in affirmatively misstating facts or withholding information is particularly egregious. See, e.g., *Louisiana State Bar Ass'n v. White*, 539 So. 2d 1216, 1220 (1989). The North Carolina State Bar invoked the Rule in an ethics opinion concerning an attorney representing a Social Security disability claimant in a non-adversarial hearing for benefits. The opinion states that an attorney has a duty to disclose to the administrative law judge information obtained from the claimant's treating physician opining that the client is not disabled. N.C. Eth. Op. 1 (1998).

² The Committee's proposed revisions to the RPCs have been recommended by the WSBA Board of Governors and are currently being reviewed by the Washington State Supreme Court.

³ Although Washington courts have not addressed the issue, one commentator believes that the drafter's use of the mandatory "shall," along with the absence of any language exempting client confidences and secrets from disclosure, indicates that the lawyer has an affirmative duty to disclose confidences or secrets if they are material. See Jill M. Dennis, "The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)," 8 *Gen. J. Legal Ethics*, 157, 174 (1994).

⁴ Carmick was also disciplined for violating RPC 4.2 (contact with person the lawyer knows to be represented by counsel without permission of counsel).

⁵ *Carmick*, 146 Wn.2d at 595.

⁶ *In re Adoption No. 85365027*, 71 Md. App. 362, 525 A.2d 1081 (1987).

⁷ *In re Gimi Page* (July 22, 1996).

⁸ See, e.g., *Fitzhugh v. Committee on Professional Conduct*, 308 Ark. 313, 823 S.W. 2d 896 (1992).

⁹ *Daniels v. Alander*, 268 Conn. 320, 844 A.2d 182 (2004). The associate received a public reprimand.

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One Attorney's Story: The Long Journey from Substance Abuse to Recovery

BY ELLEN A. BEGLEY, PH.D.

This article is the second in a series of two on attorneys making the transition from active substance abuse to abstinence and recovery.

Attorneys in the United States struggle with substance abuse more than the general population.¹ For attorneys, substance abuse is suspected, along with mental health issues, to be involved in approximately 50 percent of the disciplinary problems brought before state bar associations.² Formal statistical findings are difficult to ascertain, because attorneys do not always reveal the role of substances in their misbehavior. However, the Illinois Bar Association offered some objective data when it found 36.7 percent of the attorneys who underwent formal disciplinary proceedings between July 1, 1988, and June 30, 1993, either admitted to, or were found to have, substance abuse problems.³

In this article, I will offer one illustration of an attorney's transition from active substance abuse to recovery. I will tell the story of one attorney whose particular experiences related to alcohol demonstrate two factors common to the recovery of many people who have struggled with alcohol problems: the role of relapsing back to active alcohol use, and the grass-roots organization Alcoholics Anonymous (AA).

The *American Heritage* dictionary's definition of *relapse* is: 1. To fall back or revert to a former state. 2. To regress after partial recovery from illness. 3. To slip back into bad ways; backslide. For individuals who have decided to cease their use of mind-altering substances, relapse back into active substance abuse is a common problem. Prevalence rates for relapse vary considerably, depending on one's definition; nevertheless, they are generally high. For example, as discussed by Connors, Donovan, and Diclemente (2001), when relapse rates are defined as a return to pre-treatment levels of substance use, 50 percent of individuals were found to have relapsed during the 12 months after treat-

ment.⁴ Alternatively, when a single drink of an alcoholic beverage post-treatment was used as criteria, 90 percent were found to have relapsed.⁵ Whether one accepts the more conservative or liberal estimate, relapse is a startlingly common occurrence among individuals who have gone to considerable effort to deal with their addiction by going through substance-abuse treatment. While relapse is a challenging and potentially deadly event, it can also be an



indispensable opportunity to better understand what skills or resources are needed to live life more completely without drugs or alcohol. If individual attorneys are going to face this problem and make the decision to change their substance-using behavior, a significant number of them are also going to struggle with relapse. Therefore, it is important for attorneys to know that they can survive the difficult learning experience and get back on track to meaningful and productive lives.

About nine percent of the adults in the United States have participated in an AA meeting at some point in their lives, and about one-third of those admit that it was for their own problem with substance use. Additionally, 12-step groups appear to be the most frequently attended form of support group for the adult American

population.⁶ A survey of individuals with a history of alcohol problems who achieved approximately five or more years of sobriety indicated that 44 percent did so with the help of AA, revealing AA to be the single most commonly relied-upon method of achieving and maintaining abstinence from alcohol.⁷ For attorneys considering ceasing problematic substance use in our cultural climate, AA and related 12-step groups are options almost impossible not to consider. Often individuals have preconceptions about this diverse organization that do not always hold true in the light of real experience.

It is important for attorneys to get accurate information about AA before making the decision about whether it could be helpful.

For the sake of this article, I will call the attorney I interviewed Doug. Doug has practiced law for about 27 years. He lives and works in a small town. He is in his mid-50s and began his recovery approximately 20 years ago. Of his initial consideration that there might be a problem, Doug stated: "I thought I might have a problem in law school. Other people stopped [drinking] and I would continue." He did not attempt to do anything about this disparity. Later, as a prosecutor, he and his colleagues went to the local watering hole. He would often think, "I'll just get a couple of beers." Sometimes he did have only a few and other times he would have a lot more, coming home at 2 a.m. extremely drunk. "I couldn't predict when these episodes would happen." One incident stands out as particularly alarming. He described it as a clear wake-up call for him. He passed out on his living-room floor after an intense bout of drinking. He woke up after missing a flight out of town and knew he would be late for an important bar association meeting. He got a later flight that morning, during which he had a bloody mary in order to feel better. Upon arrival, the alcohol on his breath was undetected by the other attorneys, because a cocktail social hour was in progress. To him, it was a miracle

that he wasn't discovered, and he thought to himself, "I definitely have a problem."

Soon after that, Doug had a deposition with a psychiatrist who has expertise in addiction treatment. He pulled the physician aside and expressed his concern about his own alcohol use. They agreed to meet at a later date, and the doctor advised him not to drink until that appointment, one month away. He was able to abstain for only one week. Along with a diagnostic interview, the physician gave him the Michigan Alcohol Screening Test (MAST) and concluded: "You're an alcoholic." Initially, Doug was resistant to the idea of abstaining from alcohol altogether and believed he could not control his alcohol use. So the physician set up a test: "You can drink all you want for a period of 90 days but you can never get drunk." Doug succeeded in this for about 60 days and then got drunk. Upon returning to the psychiatrist, Doug said: "Maybe I am an alcoholic." The doctor recommended that he make the commitment to stop drinking altogether. Doug agreed with one condition — only if his abstinence could start after football season. The doctor insisted that he should stop on that day. Reluctantly, Doug agreed.

Doug's abstinence began that day. However, he did not want to go to AA because he felt it was humiliating and was afraid of being seen by others he knew in this small town. He anticipated that AA would be "dour" and "full of derelicts." He was also concerned about clients on either side of the cases he handled seeing him at meetings. "People would look down on me. It would be seen as a weakness." Nevertheless, the doctor recommended a meeting in which he knew there were a few other attorneys in attendance. Doug agreed to give it a try.

He was "petrified" walking into the local meeting. However, when another member began to speak his story, he suddenly felt at home. He met other attorneys at the meeting, and this also eased his discomfort. He and the other two attorneys founded another sober-support group for professionals in his town. He continued to attend both meetings, and his fears dissipated. Initially, he had no knowledge of its structure or philosophy but found upon experiencing it that he "loved it." The tradition and ritual made him feel at home, as it reminded him

of the religious practices with which he was raised. He valued the spiritual aspects and focus on developing a relationship with a power greater than himself.

However, he stopped going to meetings after 10 years. His initial goal for entering AA was to simply stop drinking. After 10 years, he had achieved that goal and no longer felt the desire for alcohol. So, gradually "AA just disappeared" from his life. Over time, however, cravings for alcohol and the feeling of fighting those cravings returned, especially in response to external cues. As Doug described it when he heard someone open a can of soda, "my stomach went nuts," because it viscerally reminded him of opening a beer. Nevertheless, Doug remained abstinent from alcohol for the next five years.

After more than 15 years of sobriety, there was a death in Doug's immediate family. Afterwards, he drank quietly for a brief period. In his pain and loss he turned to alcohol. He remembers thinking, "It will be OK for me to drink today. I can stop tomorrow." Even though these fleeting thoughts and justifications flew in the face of his past experience of not being able to drink moderately for any sustained period of time, they served the immediate purpose of giving him the excuse to drink again. After resuming drinking, he could immediately see that his life would "go downhill quickly" if he continued. Specifically, he could imagine missing work, his law practice suffering, and being in danger of getting a DUI. Additionally, he "instantly experienced the progressive aspects of alcoholism in a physical sense," including intensified cravings and needing to drink more and more alcohol to get the effect he wanted. He went to an AA meeting and talked about his relapse. He discontinued his alcohol use for the next three years, while irregularly attending AA. His level of participation was sporadic because he felt "inferior" as a "relapsed alcoholic."

About two years ago, while experiencing a family crisis, Doug experienced a brief relapse that resulted in legal involvement. For the first time, his alcohol-related behavior created problems that were obvious to him and everyone around him. His behavior was more out-of-control than before. He returned to the physician who had treated him previously and asked if inpatient

treatment was advisable. His psychiatrist recommended he increase his involvement in AA instead. This was effective, as Doug has not had a drink since.

Doug learned from these relapses that the support of AA and a strong relationship with God are important to his recovery and life. The particular stressors that led up to his relapses do not really matter. Before each relapse, he did not have the tools to deal with life and wasn't "spiritually grounded." Doug says that he was "not connected to God and my place in the order of the universe." When he discloses to others in AA about these relapses occurring after such a long period of abstinence, he sees fear in their eyes, that he reads as meaning: "You just took away my hope." However, to Doug the relapses were "a good thing." They forced him to examine how "miserable" and "spiritually disconnected" he was. That state of mind combined with virtually any significant stressor would have resulted in a crisis and likely relapse.

Doug's insight that his feelings spiritually disconnected led him to relapse is consistent with research that shows a modest but consistent relationship between religiousness/spiritual activities and decreased substance abuse and dependence. Carl Jung, who corresponded with the founders of AA, stated of alcoholism and spirituality: "One drives out the other." For some individuals.

Most of Doug's negative expectations regarding how others would view his sobriety, participation in AA, and later struggle with relapse were dramatically invalidated. Of AA, he stated: "AA wasn't what I thought it was." He was surprised by the broad cross-section of people participating. In contrast to his idea of AA as serious and unpleasant, he found it to be "full of laughter" and "uplifting." In the important relationships he formed in AA, he found that he grew as a person. He was surprised by the strength he found in people with dramatically different backgrounds and experiences from his own. For instance, his first AA sponsor was an ex-convict recovering from heroin addiction. He respected, and learned a lot from, this man. He found it "freeing" to admire people "not for what they did for a living, but for their sobriety."

Generally, Doug has "not had a problem" with clients or other counsel viewing

him negatively because of his sobriety or involvement in AA. In one instance, an opposing party made a snide remark about his participation in AA. He found that this did not bother him. In contrast, there have been many times people have gone out of their way to express respect for him. When he has seen individuals involved in his legal cases at AA meetings, such as when someone comes up to him to shake his hand, he has simply set boundaries by saying that they can't talk about the case. They have always understood and seemed to perceive the fact of his participating in AA as a strength. Other attorneys have had "nothing but positive" reactions to his recovery.

Following his more recent relapse and legal trouble, Doug thought his career might be over. So he was startled when lawyers, judges, and clients went out of their way to

express support for him. This was even true of attorneys who often oppose him in court. Additionally, to his great surprise, business went up after he clearly got back on his feet again. "People want a human lawyer" is his interpretation of this unexpected boom in business. In the end, rather than ruin his career, this experience has reaffirmed his commitment to his career and helped him realize how much he loves law. Having thought that his career was over and then to receive so much support has led him to look more deeply at his work.

Currently Doug goes to two meetings a week, sometimes more. He believes working to help others helps him stay sober. When he travels, he attends other AA meetings and learns a lot, because it gives him further experiences with the wide range of recovering individuals. Doug

wants other attorneys to know that "AA and being an attorney go together well," because working as an attorney is very stressful and "AA is a great antidote to stress." Additionally, he stated: "The law attracts people who are helper personalities, but with both strong egos as well as insecurities. Practicing the steps of AA helps produce a balance in that regard, which yields both inner peace and professional creativity." Doug also speaks of how substance-abusing attorneys share "an inability to comfort ourselves," and AA helps provide tools to do this. The fellowship and the safety of AA allow a "lack of masks." This is especially helpful to individuals who work in an adversarial mode most of the time. If anyone is wondering if they have a problem, he hopes they won't fear talking about it. Talk to another attorney in recovery, and the conversation will be both "confidential and nonjudgmental." ✍

Support Resources for Attorneys in Washington State

The WSBA Lawyers' Assistance Program (LAP) offers individual therapy and referral services for addiction problems and other mental health issues. LAP office: 206-727-8268. Addiction specialist Ellen A. Begley, Ph.D.: 206-733-5988.

Abstinence-Based Sober-Support Resources

The following are some abstinence-based, nonprofit organizations that offer support to those struggling with addictions. They each offer a unique philosophy for achieving a sober, healthy life. This list is intended to give a sampling of the range of options available to individuals.

Alcoholics Anonymous (AA): 509-758-2821, www.alcoholics-anonymous.org. AA is the most established, accessible, and prevalent sober-support organization in the world, and originated the 12-step method more than 60 years ago. In addition to the many meetings officially listed, there are many unofficial meetings for particular sub-groups such as attorneys, doctors, professionals, gay/lesbian/transgendered individuals, specific race/cultural groups, and others.

Narcotics Anonymous (NA): www.na.org. NA applies a 12-step program and AA structure to help those attempting to stop the use of drugs of any kind. Derivatives of NA include Cocaine Anonymous, Marijuana Anonymous, and others.

Women For Sobriety (WFS): www.womenforsobriety.org. WFS is the first national self-help program for women alcoholics. Started in 1976, it is well-established and has a spiritual component.

Non-Religious Sober-Support Resources

LifeRing Secular Recovery: 510-763-0779, service@lifering.org. Started in 1985 (formerly known as Secular Organization for Sobriety), LifeRing encourages the use of reason and the scientific method to understand alcoholism. It focuses on prioritizing sobriety above everything else.

SMART Recovery: 440-951-5357, www.smartrecovery.org. Facilitated support groups that offer cognitive behavioral tools to abstain from alcohol and other drugs.

Religious/Spiritual Sober-Support Resources

Alcoholics for Christ: 800-441-7877, www.alcoholicsforchrist.com.

Jewish Alcoholics, Chemically Dependant Persons and Significant Others (JACS): 212-397-4197, www.jacsweb.org.

White Bison/Wellbriety Movement: 719-548-1000, www.whitebison.org (Native American spiritual focus).

Buddhist 12 Steps: www.buddhist12steps.com.

Ellen A. Begley, Ph.D., is a clinical psychologist currently working as the addictions specialist for the WSBA Lawyers' Assistance Program.

NOTES

¹ Frances, Alexopoulos, & Yondow, *Lawyers' Alcoholism: Alcohol and Drug Abuse in the Affluent*, Barry Stimmel, M.D. ed. 59-66 (1984); Benjamin, Darling, & Sales, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 *International Journal of Law and Psychiatry* 233-246 (1990); Drogin, E, *Alcoholism in the Legal Profession: Psychological and Legal Perspectives and Interventions* 15 *Law & Psychology Review* 117, 127, (1991).

² D. F. Rolewick, *Attorney Substance Abuse Impairment and Discipline in Illinois*, DCBA Brief, *Journal of the DuPage County Bar Association*, March 1998.

³ *Ibid.*

⁴ Connors, Donovan, & Diclemente, *Substance Abuse Treatment and the Stages of Change* (Guildford Press 2001) (citing Armor, Polich, & Stambul, 1978).

⁵ *Ibid.* (citing Orford & Edwards, 1978).

⁶ Robin Room and Thomas Greenfield, *Alcoholics Anonymous, Other 12 Step Movements and Psychotherapy in the U.S. Population, 1990*, 88 *Addiction* 555-562 (1993).

⁷ Anne Fletcher, *Sober for Good* (2001).

William Ward "Bill" Kates

Kates grew up in Seneca Falls, NY; Pittsfield, MA; Spokane, WA; and Baltimore, MD. He graduated from Amherst College in 1965 and attended Columbia Law School before moving to Seattle to begin his 34-year law career. He retired from the Solicitor's Office of the U.S. Department of Labor in 2002. He married Margie Harvey Kates in 1974 in Seattle, and together they raised two daughters. He was devoted to his family, his friends, and the Episcopal Church. Kates was known for his love of family, keen intellect, and wonderful sense of humor.

He is survived by his wife, Margie, two daughters, his mother, his sister, his brother, and three nephews and nieces. Memorials may be made to the Epiphany Parish of Seattle, 1805 38th Ave., Seattle, WA 98122.

Bill Kates was born on June 24, 1943, in Geneva, NY, and passed away peacefully on April 2, 2005, in Seattle, aged 61.

Eleanor Rose Fine

In 1941, Fine moved to Seattle to attend the University of Washington School of Nursing. Following her graduation in 1948, she worked as a nurse in hospitals, with the Seattle-King County Department of Health, and at Fircrest School for the Developmentally Disabled.

In 1966, she started working for the Washington State Bureau of Nursing Home Affairs monitoring the care provided to Medicaid patients. She became involved in frequent litigation matters with facilities that were providing substandard care. Fine decided that she needed some legal training to help her perform her work. She enrolled in night classes at the University of Puget Sound School of Law in 1975. She continued her legal education and graduated in 1978. During her third year of law school, her son Seth enrolled there as a first-year law student. Seth is now a lawyer practicing in Everett.

Following her graduation and admission to the Bar, Eleanor engaged in a general civil practice in Tacoma. She represented many impoverished clients and engaged in considerable *pro bono* work, including representation of bat-

tered women. She also worked for the Department of Assigned Counsel, representing mental patients in involuntary commitment proceedings.

Eleanor Rose Fine was born in New York City on December 13, 1927, and died in New Smyrna Beach, FL on June 24, 2005, aged 77.

Neil J. Hoff

The Hoff family came to Tacoma from Redwing, MN, in 1938. Neil Hoff graduated from Stadium High School, then attended Pacific Lutheran College until enlisting in the Army during World War II. After the war, he attended the University of Washington, earning a bachelor's and then a law degree from the UW Law School in 1949. Hoff served four years as a public prosecutor and then went into private practice in Tacoma.

He served four years in the Washington State Senate, he was a governor of the Washington State Bar Association and the Western States Trail Lawyers Association, and became a member of the House of Delegates of the American Bar Association. He taught business law at Pacific Lutheran University.

Hoff is remembered as a showman. He often wore plaid polyester suits to court, "just to thumb his nose at propriety," his daughter, Erica Christenson, said. "He wanted to shock people. He didn't go for the formal lawyer, uptight stuff. He would speak in court just as if he were talking to a neighbor. He would always rather come to a resolution through conversation rather than in court."

Hoff had a love of the outdoors, horses, dogs, peacocks, and wildlife.

Hoff is survived by his daughter, two grandchildren, sister, and eight nieces and nephews. He maintained a lifelong friendship with his former wife, Mary (Schmitz) Hoff, of Seattle.

Neil Hoff was born in Los Angeles on June 17, 1921, and died in Tacoma on June 18, 2005, aged 84.

Martin J. Durkan Sr.

Durkan attended Gonzaga University before joining the Navy during World War II and served with an amphibious team in the South Pacific. After the war,

he earned his law degree at the University of Washington.

Durkan, a politically active Democrat, served a two-year term in the state House, followed by 18 years in the state Senate starting in 1958. He gained power as chairman of the budget-writing Senate Ways and Means Committee in the late 1960s. He helped write some of the early state legislation on oil spills and sponsored the bill that established the state Ecology Department.

Durkan ran for governor in 1968 and 1972 but lost both times in the Democratic primary. He met the same fate when he ran for Congress in 1977. In the succeeding years, he became one of the most effective lobbyists in Olympia. His clients included the state's horse racing industry, and Ken Alhadeff, a senior vice president with Longacres, credited Durkan with designing legislation regarding taxation and regulation that helped horse racing in Washington survive.

"What Martin was about was that old-world kind of political class and style," Alhadeff said. "When Martin Durkan stepped into the room you knew something was going to happen."

Former state Rep. Denny Heck described Durkan as "one of the best governors we never had." Heck added that Durkan's family "never quite became the Washington version of the Massachusetts Kennedys, but came about as close as you could get." His son, Martin Durkan Jr., is a well-known local-government lobbyist, while one of his daughters, Jenny, is a prominent Seattle attorney who represented the Democratic party in the lawsuit challenging last November's governor's race. His daughter, Kathleen, is a former NBC News foreign correspondent; his son, Tim, is a special assistant to Seattle Mayor Greg Nickels; and another daughter, Ryan, is a well-known land-use attorney. Jenny Durkan described her father as "one of the kindest most compassionate people I've ever known," who was known for sticking up for "the little guy and the underdog."

Durkan is survived by his wife of more than 50 years, Lorraine "Lolly" Durkan, and his eight children.

Martin J. Durkan Sr. was born in Great Falls, MT, in 1923 and died May 29, 2005, in Hawaii, aged 81.

Joseph J. Roller

Roller, a 37-year resident of Gig Harbor, passed away after a courageous battle with Parkinson's disease. He was a devoted husband, brother, father, and uncle. He was a loyal member of the WSBA for 47 years. Remembrances may be made to St. Nicholas Catholic School, 3555 Edwards Dr., Gig Harbor, WA 98335.

Roller is survived by his wife, Janet, his five children, a brother and sister, nine grandchildren, and six nephews and nieces.

Joseph Roller was born April 6, 1930, and died May 24, 2005, aged 75.

Stanley E. "Sandy" Erickson

Erickson was a graduate of Ingraham High School, in Seattle, and received an electrical engineering degree from the University of Washington. In 1968 he married Patti Costello and relocated to the East Coast, where Sandy worked for General Electric. The Ericksons returned to the West Coast where Sandy attended Hastings Law School in San Francisco. In 1974, Erickson began a 29-year legal career and eventually founded his own firm with law partner Mary Ann Barkshire in Bellevue.

A successful day for Erickson would include reading his three newspapers, having breakfast at Chace's Pancake Corral, and spending time with his dog. Erickson had an easygoing and ami-

cable manner, always seeing the bigger picture and not sweating the details. He could always be counted on to lend an ear. Remembrances may be made to Childhaven, 1035 SW 124th St., Seattle, WA 98146.

Erickson is survived by his wife, Patty, his parents, three brothers, and 11 nieces and nephews.

Stanley E. "Sandy" Erickson was born November 26, 1945, in Everett and died May 14, 2005, in Bellevue, aged 59.

Wayne C. Booth Sr.

At the age of one, Booth moved with his family to the Skagit Valley in 1917. He attended school in Burlington and graduated from the University of Washington Law School in 1939. After graduation he married Maxine Berger and settled in Seattle.

Booth practiced law for nearly 60 years. He served as president of the Seattle Bar Association and as president of the Seattle Library Board. He was named Outstanding Citizen by the Municipal League of Seattle and King County in 1965 and by the Association of Washington Cities in 1966.

The family suggests remembrances be made to a favorite charity or Hospice of Kitsap County.

His wife, Maxine, preceded him in death, and he married Nancy Ford. He is survived by his wife, Nancy, six children, two stepsons, nine grandchildren, and two great-grandchildren.

Wayne C. Booth Sr. was born on March 21, 1916, in Wichita, KS, and died on May 9, 2005, in Poulsbo.

Samuel W. Peach

Peach began his college education in 1937 at the University of Washington, majoring in chemical engineering, rowing on the crew team, and participating on the swim team. His college career was interrupted by World War II when he was stationed in Paris and flew many solo missions as a P-38 pilot providing reconnaissance photos for the Allied Forces. After the war, Peach returned to earn his law degree from the UW Law School in 1947. He then clerked for the Washington State Supreme Court. For the next 52 years, he had a solo practice in Bellingham. He was best known for his expertise in railroad right-of-way litigation. He argued the first civil case published by the newly created Washington State Court of Appeals in 1969. Peach retired in 2000.

Peach loved the practice of law and described himself as a "country lawyer," focusing on representing individuals rather than corporations. His interests included golfing, the Mariners, swimming, tending to his fruit trees, and watching his grandchildren's sports games.

Peach is survived by his wife, Kate, four children, seven grandchildren, and two step-grandchildren.

Samuel W. Peach was born on March 29, 1919, in Port Townsend, and died April 26, 2005, in Bellingham, aged 86.

Roger W. Johnson

The family hardware store in Rantoul, Illinois, gave Johnson the resources to imagine, plan, and build his dreams. The incredible play structure that he built for his children provided many hours of delight. It was here, while repairing this gift of 20-plus years for the next generation, that he passed away.

Johnson's children were his priority. He encouraged them to think critically, to love, and, most of all, to see value in themselves and others. He enjoyed sailing, fly fishing, woodworking, hiking, and kayaking.

Johnson is survived by his wife, Beth, and his three children.

Roger W. Johnson was born in Champaign, IL, on March 13, 1943, and died May 21, 2005, aged 62.

Correction

In the July 2005 issue of *Bar News*, in "The Board's Work," on page 47 (second column, paragraph 3), it was written: "So in the end the Board voted 9-4 to oppose Initiative 330." This is incorrect. The sentence should read: "So in the end the Board voted 9-4 to table action on Initiative 336." *Bar News* regrets the error.

Question, Comment, Request?

The WSBA Service Center is open Monday through
Friday, 8:00 a.m. to 5:00 p.m.
800-945-WSBA • 206-443-WSBA
questions@wsba.org



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.

Computer Clinic



The WSBA offers a hands-on computer clinic for members wanting 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. 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 August 8 and September 12, 2005, at the WSBA office. For more information, contact Pete Roberts at 206-727-8237 or peter@wsba.org.

Immigration Attorney Ann Benson Cited for Achievement

Seattle attorney **Ann Benson** has been named recipient of the Daniel Levy Memorial Award for Outstanding Achievement in Immigration Law by

the American Immigration Lawyers Association (AILA). Ms. Benson, directing attorney for the Washington Defender Association's Immigration Project in Seattle, received the award on June 22 at the AILA's annual conference in Salt Lake City.

Symposium on Judicial Selection and Independence

The Seattle University School of Law will host a symposium on judicial selection and independence on November 11, 2005. Former Senator **Slade Gorton** and former Governor **Gary Locke** will co-chair this event, which will explore ways to protect judges from undue influence in elections, preserve the appearance of fairness in the judicial selection process, and enhance public confidence in Washington state's judiciary. For more information, contact Alice Paine, executive director of the King County Bar Association, at 206-267-7100.

Assistance for Law Students

The WSBA Lawyers' Assistance Program (LAP) offers long- and short-term psychotherapy to third-year law students attending the University of Washington and Seattle University. Treatment is offered for depression, addiction, family and relationship issues, health issues, and other mental and emotional problems. The fee is based on a sliding scale ranging from no-cost to \$30 and is determined by a student's ability to pay. For more information about the LAP, call 206-727-8268 or visit our website at www.wsba.org/lawyers/services/lap.htm.

More LOMAP Events

LOMAP hosts a meeting of contract lawyers the first Tuesday of each month. The next meeting will take place August 2 from noon to 1:30 p.m. at the WSBA office. The upcoming dates for "LOMAP & Ethics ... on the Road: The 2005 Traveling Seminar" are 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 Julie Salmon at 206-733-5914 or juliesa@wsba.org.

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. The LOMAP staff is available to provide materials, answer questions, and recommend options. To make an appointment, contact Julie Salmon at 206-733-5914 or juliesa@wsba.org.

Jim Bamberger Appointed Director of New State Office of Civil Legal Aid

The Washington State Supreme Court has appointed longtime legal aid attorney **Jim Bamberger** as director of the state's new Office of Civil Legal Aid. The office opened July 1, 2005, with the purpose of providing administration and oversight for civil legal-aid services in Washington state.

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. Exchange information and ideas with other lawyers looking to make a change. For more information, contact Rebecca Nerison at 206-727-8269 or rebeccan@wsba.org.

WSBA-CLE Thanks Members

The WSBA CLE Department extends its sincere thanks to those who participated in this year's Member Appreciation Summer Sale. The annual online event continues to expand and develop into an exciting member benefit. Be sure to

check the WSBA Store (www.store.yahoo.com/wsbastore) and our online seminar calendar (www.wsba.org/cle/seminars/default.htm) regularly to catch our latest offerings.

List Yourself in the Online ADR Provider Directory

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

Random Acts of Professionalism Program



The WSBA Professionalism Committee has created a way for lawyers and judges to recognize their colleagues who have conducted

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

Upcoming Board of Governors Meetings

September 15-16 — Seattle
October 28-29 — Vancouver, WA
December 9-10 — Bremerton

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

maximum allowable interest rate for August is therefore 12 percent. Information from January 1987 to date is on the WSBA website at www.wsba.org/media/publications/barnews/usury.htm.

WYLD Seeks Award Nominations

The Washington Young Lawyers Division (WYLD) is accepting nominations for the Thomas Neville *Pro Bono* Award,



Governor Gregoire signs court funding bill SB 5454.

Governor Signs Court Funding Bill

On May 13, Governor Christine Gregoire signed Senate Bill 5454 into law, which creates a dedicated revenue source for the purposes of meeting the state's commitment to improving Washington trial courts, with the goal of providing adequate representation to criminal indigent defendants, civil legal services for indigent persons, and equal justice for all citizens of the state. Congratulations to the Washington State Supreme Court, the WSBA, the Office of Public Defense, and other stakeholders on this historic achievement for justice in Washington state.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in July 2005 was 3.429 percent. The

Outstanding Young Lawyer of the Year, and the Professionalism Award. These awards recognize lawyers who embody the highest ideals of the legal profession. Nominations are also being accepted for Outstanding YLDA Affiliate or Organization for recognition of public service and/or member-service programs. If you know of someone who deserves to be recognized, please visit www.wsba.org/lawyers/groups/wyld/default.htm for details and nomination forms. Self-nominations will not be accepted. To be considered, a completed nomination form must accompany each nomination. Award recipients will be determined by the WYLD Board of Trustees at their August 27, 2005, meeting. Nomination forms must be received by August 12, 2005, and should be sent to Amy O'Donnell at the WSBA, 2101 Fourth Ave., Ste. 400, Seattle, WA 98121-2330, or e-mail amyoo@wsba.org.



Members of the 2005 Philip L. Burton Memorial Scholarship Dinner Planning Committee (from left to right): LaVonna Jones (co-chair), Sheley Secrest (co-chair), James Andrus, Farah Emeka, Rashelle Tanner, Moni Law, and Zabrina Jenkins. Committee members not pictured: Kwame Amoateng, Ahoua Kone, Akili Estrella, Alfoster Garrett Jr., and Bruce Harrell.

Loren Miller Bar Association Holds Annual Scholarship Dinner

The Loren Miller Bar Association (LMBA) held its annual Philip L. Burton Memorial Scholarship Dinner on June 3, 2005, at the Westin Hotel in Seattle. The event raises funds for law students who have demonstrated a commitment to advancing civil rights. Among the more than 300 guests in attendance were Governor **Christine Gregoire**, WSBA President **Ronald R. Ward**, former Sonics Coach **Lenny Wilkins**, and San Diego District Attorney **Kamala D. Harris**, who delivered the keynote address. The event honored lawyers **Karen W. Murray** and **Bonnie Glenn** with the Excellence in the Practice of Law Award, past-WSBA President **David Savage** received the President's Award, and the Honorable **Franklin Burgess** was given the Lifetime Achievement Award. The 2005-2006 LMBA Board members were also announced, and a complete list can be found at www.lmba.net. To view and purchase event photos, please visit www.pictureman.us (password is "LMBA"). Congratulations to the Dinner Planning Committee, and thanks to all who attended and made this event a success.

WSBA Member Rhonda J. Brown Receives ABA Award

University Place attorney **Rhonda J. Brown** received the American Bar Association's (ABA) 2005 Paul G. Hearne Award for Disability Rights. This prestigious national award, named after a devoted leader and advocate of disability rights, is presented to an individual who, or an organization that, has performed exemplary service in furthering the rights, dignity, and access to justice for people with disabilities. ABA President **Robert Grey** will present the award to Ms. Brown at the ABA Annual Meeting in Chicago on August 8.



Rhonda J. Brown

The group is meeting on a quarterly basis this year. If you're interested in an early-September meeting, please contact Jenny Favell at 206-727-8267.

Senior Attorneys Discussion Group — A Matter of Connection

The group is meeting on a quarterly basis this year. If you're interested in an early-September meeting, please contact Jenny Favell at 206-727-8267.

Fran Chapple Receives WSPA Paralegal Lifetime Achievement Award

The Washington State Paralegal Association (WSPA) has named **Fran Chapple** as the first recipient of its Paralegal Lifetime Achievement Award. The award recognizes Ms. Chapple's long-standing commitment to the paralegal profession and her 30 years of leadership in numerous positions within the WSPA. Ms. Chapple is currently employed as a judicial assistant and courtroom deputy at the U.S. District Court in Yakima.



WSPA Lifetime Achievement Award Recipient Fran Chapple (left) with WSPA President Lauren Cole (right).

ABA National Conference for the Minority Lawyer — A Big Hit in Seattle

On June 23-24, more than 350 attorneys from around the country arrived in Seattle for the Seventh Annual American Bar Association National Conference for the Minority Lawyer.

Conference attendees were warmly welcomed with a reception Wednesday evening at Perkins Coie, hosted in collaboration with **Wayne Michigami** of Starbucks, **Curtis Hom** and **Peter Ku** of Microsoft, and **James Williams** of Perkins Coie. Workshops began the next morning with an intense debate on "Affirmative Action in Law Schools and the Legal Profession." After the plenary, attendees selected from a variety of informative workshops, including "Diversity and Adversity within Diversity" and "Guidelines for Operating Minority and Women

Owned Businesses."

The conference included a long list of prominent speakers, featuring national leaders as well as some from our local esteemed legal community. **Paula Boggs**, executive vice president, general counsel, and secretary of Starbucks, gave an inspirational keynote speech, educating the audience on how diversity can succeed and thrive in the corporate legal world.

Friday workshops maintained Thursday's high standard of excellence. Representative topics included "Shaping the Federal Judiciary: How We Can Change the Face of Justice in America" and "Getting Commercial in Indian Country: Contractual and Litigation Considerations." WSBA President **Ronald R. Ward** inspired attorneys with some motivational words of wisdom at the Marketing Skills Luncheon.

Washington lawyers on the Planning Committee were **Joslyn Donlin**, **Gabriel Galanda**, **Jessie Harris**, **Jayanne Hino**, **Michael Parham**, and **J.D. Smith**. The conference highlighted the importance of diversity in the workplace and legal community here in the Pacific Northwest to the rest of the nation.

Hoop Dreams

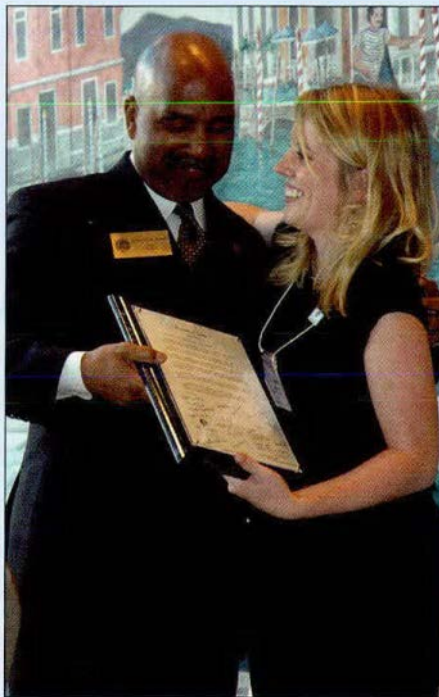
On May 18, the Seattle Lawyers Basketball League wrapped up its 20th anniversary season with the veteran Johnson & Associates (not a real law firm) squad beating the King County Prosecutors 67-58 for the 2005 season title. The Prosecutors had upset the top-seeded and — until the last regular season game — undefeated Stanislaw-Ashbaugh team twice, but proved no match for Johnson & Associates's superior ball-handling and Tenacious D.



The 2005 Seattle Lawyers Basketball League champions! Kneeling, left to right: William R. Spurr, James H. Clark, Eric C. Hanson, and Joshua M. Lipsky. Standing, left to right: Robert Iannucci, Eric S. Nelson, Robert J. "Jack" Slavik, and Anthony C. Johnson. Not pictured: Charles T. Paglialunga and Shannon P. Smith.

10th Annual Access to Justice Conference Held

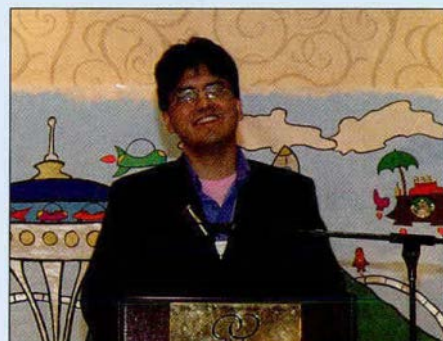
Participants of the 10th annual Access to Justice (ATJ) Conference, held June 3-5 in Bellevue, enjoyed a celebratory ambiance while collaborating with colleagues from around the state in the continuing effort to improve access to justice for low- and moderate-income people. Mark your calendars for the 2006 ATJ Conference, to be held June 9-11 in Yakima. To get on the conference brochure mailing list, contact Sharlene Steele at 206-727-8262 or sharlene@wsba.org. Photos courtesy of Dee Thierry and Jack and Michele Storms.



Sara Zier presents WSBA President Ronald R. Ward with a plaque in recognition of his support of the Equal Justice Coalition.



Author Paul Loeb, editor of *The Impossible Will Take a Little While*, delivers the awards ceremony's keynote address.



Author Sherman Alexie regales the audience during the first evening's keynote address.



Washington State Supreme Court Justice Susan Owens shows off her "Resolution of Thanks" award.



ATJ Conference Chair Colleen Kinerk goes back to the future during the skit "ATJ 2095: A Look Back," presented by the Moderately Talented (Yet Plucky) Repertory Theatre of Justice.



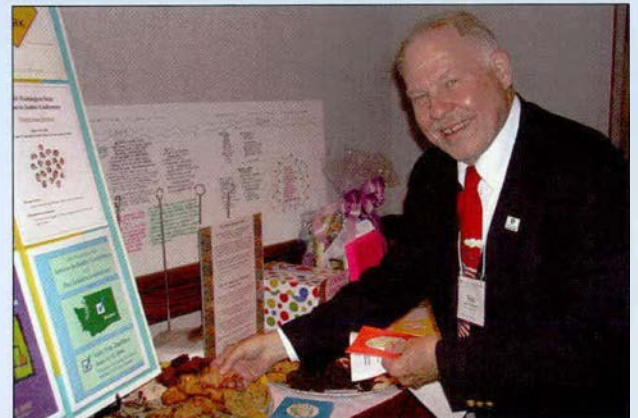
The dapper John McKay, U.S. Attorney for the Western District of Washington, addresses the Equal Justice Coalition celebration.



Plenty of colorful ATJ Conference memorabilia at the lively "Justice Joint" hospitality room.



Barbara Clark (center), of the Legal Foundation of Washington, cryogenically frozen, is thawed for the conference by LeeAnn Friedman (left), of the Northwest Justice Project, and Aurora Martin (right), with Columbia Legal Services.



Retired Judge Paul Bastine gets caught with his hand in the cookie jar.



Sweet, sweet justice!



**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.**

WSBA office use only:

Date _____

Check No. _____

Amount _____

No. AAD50195

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

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Stephanie's practice focuses on insurance coverage and bad-faith litigation. She represents insurers in environmental, construction defect, IP, and securities litigation.

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GROFF MURPHY TRACHTENBERG & EVERARD PLLC

is pleased to announce that

Marisa M. Bavand

and

Michael P. Grace

have become partners in the firm.

Ms. Bavand will continue her practice in construction law and government contracts. Mr. Grace will continue to focus his practice on construction law and suretyship.

and that

Justin S. Anderson

has joined the firm as an associate.

Mr. Anderson received his law degree from the University of Washington and comes to the firm from the King County Prosecutor's Office. Mr. Anderson's practice will focus on litigation.

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HANIS GREANEY, PLLC

is pleased to announce that

Michael Ditchik

has joined the firm as a Partner
and

Florian (Ian) D. Purganan

has joined the firm as an Associate.

Mike will lead the firm's Family Law Department. Mike is a 1987 graduate of Boston University School of Law. He began his career as a litigator in Manhattan. Mike is admitted before the Bars of Washington, New York, and the District of Columbia.

Ian graduated from Seattle University School of Law in 2004, and will practice in the firm's Immigration Department where his Filipino language skills (Tagalog) will enhance that department's multi-lingual practice.

Mike and Ian join the firm's thirteen other attorneys.

HANIS GREANEY, PLLC

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Kent, WA 98032-2900

253-520-5000

Disciplinary Notices

These notices of imposition of disciplinary sanctions and actions are published pursuant to Rule 3.5(d) of the Washington State Supreme Court Rules for Enforcement of Lawyer Conduct, and pursuant to the February 18, 1995, policy statement of the WSBA Board of Governors.

For a complete copy of any disciplinary decision, call the Washington State Disciplinary Board at 206-733-5926, leaving the case name, and your name and address.

Note: *More than 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.*

Disbarred

R. Stuart Phillips (WSBA No. 29701, admitted 1999), of Indianola, was disbarred, 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 his conduct between 2001 and 2003 involving forgery and the filing of false documents, failure to keep a client informed about the status of a matter, and failure to cooperate with a disciplinary investigation.

In August 2001, a client hired Mr. Phillips to represent her in seeking modification of a child support obligation of her former spouse. In December 2001, Mr. Phillips prepared and signed the client's name under penalty of perjury on two declarations and on a child support worksheet, without indicating that he had signed the client's name and without the client's authorization. The declarations contained inaccurate information. At the time, Mr. Phillips knew the documents required the client's original signature. Mr. Phillips filed the documents with the superior court without disclosing to the court or the adverse party that the client had not signed them. One of the declarations contained provocative and demeaning language, and the client

would not have signed it.

Mr. Phillips failed to keep the client informed about the status of the modification hearing. Mr. Phillips failed to notify the client that he had obtained an order continuing the hearing date; as a result, the client did not attend the hearing and was unable to assist Mr. Phillips in drafting the language of the final order. The court denied the client's petition for modification of child support.

During its investigation of the matter, the Bar Association obtained information indicating that Mr. Phillips may have signed another client's name on a document. Although the Bar Association requested that Mr. Phillips provide that client's file as part of its investigation, Mr. Phillips intentionally failed to produce the complete client file.

Mr. Phillips's conduct violated RPC 1.4(a), which requires a lawyer to keep a client reasonably informed about the status of a matter; RPC 3.3(a), which prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal; RPC 3.4(b), which prohibits a lawyer from falsifying evidence; RPC 3.4(c), which prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; RPC 8.4(b), which prohibits 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), which prohibits a lawyer from engaging in conduct involving dishonesty, deceit, fraud, or misrepresentation; RPC 8.4(d), which prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice; and RPC 8.4(i), which prohibits a lawyer from violating a duty imposed by or under the Rules for Enforcement of Lawyer Conduct (here, ELC 5.3(f), the duty to respond to inquiries or requests about matters under investigation).

Debra Slater represented the Bar Association. Mr. Phillips represented himself.

Disbarred

Alec M. Schwimmer (WSBA No. 22588,

admitted 1993), of Jacksonville, OR, was disbarred, effective March 17, 2005, by order of the Washington State Supreme Court following a hearing. This discipline was based on his conduct between 1998 and 2001 involving failure to communicate with and diligently represent a client; misrepresentations to a court; multiple acts of misconduct relating to client funds and trust account matters (including misappropriation of client funds); failure to cooperate with disciplinary investigations; and testifying falsely during disciplinary depositions. For additional information please see *In re Discipline of Schwimmer*, 153 Wn.2d 752, 108 P.3d 761 (2005).

Matter 1: In late 2000, Mr. Schwimmer commenced representing a client in connection with several criminal matters pending in superior court. Mr. Schwimmer signed a scheduling conference order setting an omnibus hearing in all the cases for February 2001. At the omnibus hearing, three of the matters were set for a May 15, 2001, change of plea hearing or for trial on May 30 in the event guilty pleas were not entered. Respondent failed to contact his client following the February hearing. Although he knew of the court dates, Mr. Schwimmer did not appear in court for the May 15 hearing or the May 30 trial date. He did not inform the court or the prosecutor that he would not be appearing on the trial date. The judge set the case over for May 31, 2001, and asked the prosecutor to attempt to contact Mr. Schwimmer. The prosecutor was unable to contact him. On May 31, the judge ordered the trial dates continued, appointed a public defender to represent the client, and set a hearing for June 5. At the June 5 hearing, Mr. Schwimmer appeared and agreed to withdraw. During the hearing, Mr. Schwimmer intentionally made false or misleading representations to the court about his physical and mental condition and about efforts he had made to obtain treatment for alcohol and/or drug abuse. Subsequently, during the course of an ensuing disciplinary investigation, Mr. Schwimmer made false or misleading representations in a deposition about his physical and mental condition and about efforts he had made to obtain treatment

for alcohol and/or drug abuse.

Matter 2: Between August 1998 and June 2001, Mr. Schwimmer engaged in the following conduct that established grounds for discipline:

- Knowingly failing to maintain complete records regarding client funds in his possession, including the failure to maintain any running trust account ledger or balance or any individual client ledgers.
- In two instances, disbursing sums that had been deposited into his trust account on behalf of clients without creating any records to establish what was done with the money or whether it was paid to or for the benefit of the clients.
- In one instance, depositing settlement funds into his trust account without any accompanying information identifying a client, and disbursing those funds without creating any records to establish what was done with the money.
- Failing to notify a client of receipt and deposit into his trust account of a \$5,505.16 settlement check.
- Intentionally misappropriating over \$2,500 of funds belonging to a client and using the funds for the benefit of himself and others.
- Causing his trust account to have a negative balance of \$760.16.

Subsequently, during the course of a disciplinary investigation commenced following the Bar Association's receipt of notice of an overdraft on Mr. Schwimmer's trust account, Mr. Schwimmer failed to respond to requests for information, testified falsely regarding the source of trust account deposits and the disposition of client funds, and failed to provide a client file and a release for medical/treatment records as requested by disciplinary counsel.

Mr. Schwimmer's conduct violated RPC 1.3, requiring a lawyer to act with reasonable diligence in representing a client; RPC 1.4, requiring a lawyer to keep a client reasonably informed about the status of a matter, to promptly comply with reasonable requests for information, and to explain a matter to the extent

reasonably necessary to permit the client to make informed decisions; RPC 1.14(a), requiring that all funds of a client paid to a lawyer be deposited into an identifiable interest-bearing trust account and that no funds belonging to the lawyer be deposited therein except as permitted by rule; RPC 1.14(b)(2), requiring that a lawyer identify and label client property on receipt and put it in a safe deposit box or other place of safekeeping as soon as possible; RPC 1.14(b)(3), requiring a lawyer to maintain complete records of all funds, securities, and other properties of a client and to render appropriate accounts regarding them; RPC 1.14(b)(4), requiring a lawyer to promptly pay or deliver to the client as requested by the client the funds, securities, or other property in the possession of the lawyer that the client is entitled to receive; RPC 3.2, requiring a lawyer to make reasonable efforts to expedite litigation; RPC 3.3(a)(1), prohibiting a lawyer from making a false statement of material fact or law to a tribunal; RPC 8.4(b), prohibiting a lawyer from committing a criminal act (here, theft) 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; RPC 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice; former Rule for Lawyer Discipline (RLD) 1.1(a), subjecting a lawyer to discipline for any act involving moral turpitude, dishonesty, or corruption, or other act which reflects a disregard for the law; and former RLD 2.8(a), requiring a lawyer to promptly respond to any inquiry or request for information relevant to grievances.

David A. Middaugh and Jean K. McElroy represented the Bar Association. Mr. Schwimmer represented himself. Dennis W. Lane was the hearing officer.

Disbarred

Randall St. Mary (WSBA No. 4331, admitted 1971), of Everett, was disbarred, 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 his conduct between 1994 and 2001 involving unauthorized use of the funds of an estate.

In 1993, Mr. St. Mary prepared a will for a client. The will authorized the creation of a testamentary trust for the benefit of the client's children, devised all estate assets to the trust, and directed that Mr. St. Mary be the personal representative and trustee. The will directed Mr. St. Mary to hold the estate's income and assets in the trust until the client's youngest child reached the age of 25, and authorized disbursements to be made for the benefit of the children. The will further directed that if the client were to die before the youngest child graduated from college, then the personal representative was to establish a separate trust for the youngest child's education.

The client died in October 1994, and the will was admitted to probate in November 1994. Mr. St. Mary was appointed personal representative. The client's youngest child turned 25 in November 1999.

Mr. St. Mary did not establish a separate trust for the benefit of the youngest child's education or to hold the assets of the estate. Mr. St. Mary did not invest liquid assets of the estate so as to maximize the value of the estate. Mr. St. Mary kept the estate's assets in a checking and savings account over which he had sole control. Between 1995 and 1999, Mr. St. Mary disbursed more than \$50,000 to the client's youngest child, the majority of which was for her college education.

Between November 1994 and October 2001, Mr. St. Mary billed the estate \$103,369.89 for legal fees and costs and paid himself \$99,553.42 in legal fees without sending any billing statements to the beneficiaries or notifying them of the amounts paid or their basis. Mr. St. Mary sent the estate's billing statement to himself and then authorized payment out of the estate's account. Beginning in January 1998, Mr. St. Mary began to disburse to himself from the estate's account more in fees and costs than he had billed. Between February 1998 and April 2000, in a series of transactions, Mr. St. Mary removed an additional \$134,146.00 from the estate for his personal use, without disclosure to, or the consent of, the ben-

eficiaries. Mr. St. Mary used the funds to purchase publicly traded stocks in his name and to pay his debts. Although Mr. St. Mary characterized these disbursements as "loans" memorialized by unsecured promissory notes, Mr. St. Mary did not contemporaneously provide the unsecured promissory notes to any of the beneficiaries.

Between April 2000 and August 2001, Mr. St. Mary replaced \$87,819.37 of the previously disbursed \$134,146.00 into the estate's bank account. In October 2001, the Bar Association advised Mr. St. Mary that it had opened a disciplinary investigation into his handling of the estate, and disciplinary counsel took Mr. St. Mary's deposition in the matter. Between October 2001 and August 2003, Mr. St. Mary deposited an additional \$51,788.29 of his personal funds into the estate's account.

Mr. St. Mary's conduct violated 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 may be materially limited by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after a full disclosure; RPC 1.8(a), prohibiting a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction and its terms are fair and reasonable and fully disclosed and transmitted in writing to the client, the client is given opportunity to seek the advice of independent counsel, and the client consents; RPC 8.4(b), prohibiting commission of a criminal act (here, theft) that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; and RPC 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, deceit, fraud, or misrepresentation.

Leslie Ching Allen represented the Bar Association. Mr. St. Mary represented himself. Kimberly A. Boyce was the hearing officer.

Suspended

Andrea M. Kester (WSBA No. 23386,

admitted 1993), of Seattle, was suspended for two years, 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 between 1999 and 2004 involving the practice of law while suspended for MCLE noncompliance.

Ms. Kester was admitted to practice law in Washington state in 1993, and commenced work for her family's business in 1996. In February 1999, Ms. Kester was suspended from the practice of law for non-compliance in reporting of mandatory continuing legal education (MCLE) requirements. Following her suspension, Ms. Kester continued to work as a lawyer for her family's business. Between February 1999 and January 2004, on behalf of various business entities, Ms. Kester signed and submitted papers, motions, and pleadings as "Attorney," "Counsel," and "General Counsel" in a number of administrative and judicial matters.

Ms. Kester's conduct violated RPC 1.15(d), which requires a lawyer to terminate representation if it will result in violation of the Rules of Professional Conduct; RPC 5.5(a), which prohibits a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; RPC 5.5(e) and former RLD 1.1(l), which prohibit a lawyer from engaging in the practice of law while suspended from the practice of law; and ELC 14.2 and former RLD 8.2, which require that a suspended lawyer discontinue the practice of law after the effective date of the suspension.

Sachia Stonefeld Powell represented the Bar Association. Patrick C. Sheldon represented Ms. Kester.

Reprimanded

Dean D. Nguyen (WSBA No. 30148, admitted 2000), of Seattle, was ordered to receive a reprimand on February 17, 2005, following a stipulation approved by a hearing officer. This discipline was based on his conduct in 2003 involving the charging of an unreasonable fee and a conflict of interest.

Commencing in June 2003, Mr. Nguyen

and a lawyer in another firm represented a client in a federal criminal matter. Mr. Nguyen and the client entered into a fee agreement drafted by Mr. Nguyen and characterized as a "flat fee agreement." The agreement stated that the client agreed to hire Mr. Nguyen and co-counsel for a flat fee that was "earned upon receipt." The specified fee was \$5,000 for services up to trial, and an additional \$10,000 for services for a bench trial and sentencing, or an additional \$15,000 for services for a jury trial and sentencing. The client paid Mr. Nguyen \$5,000.

In July 2003, the client rejected a plea offer negotiated with the prosecutor. Subsequently, Mr. Nguyen and co-counsel presented the client with a second fee agreement, which required a \$15,000 "nonrefundable" fee and stated that the fee was nonrefundable "in the event the matter is resolved prior to, on the date of, or during trial." A handwritten notation on the agreement indicated that it modified the earlier fee agreement. Mr. Nguyen did not consult with the client regarding a potential conflict of interest, did not obtain the client's consent in writing to a potential conflict of interest, did not fully disclose in writing all the terms of the transaction (including the fact that he was already contractually obligated to provide all pretrial services for \$5,000), and did not provide the client with a reasonable opportunity to seek the advice of independent counsel prior to signing the second fee agreement. The client received no additional consideration in the second fee agreement, and the terms of the second fee agreement were not fair or reasonable to the client in light of Mr. Nguyen's obligations under the first agreement.

The client signed the second fee agreement and subsequently paid Mr. Nguyen and co-counsel an additional \$15,000. In September 2003, the client fired Mr. Nguyen and co-counsel and hired another lawyer, who assisted the client in resolving the case by plea agreement. After the filing of a formal disciplinary complaint against him, Mr. Nguyen refunded his proportionate share of the excessive fee as restitution.

Mr. Nguyen's conduct violated 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, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after a full disclosure; and RPC 1.8(a), prohibiting a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction and its terms are fair and reasonable and fully disclosed and transmitted in writing to the client, the client is given opportunity to seek the advice of independent counsel, and the client consents.

Anne I. Seidel represented the Bar Association. Leland G. Ripley represented Mr. Nguyen. Susan H. Amini was the hearing officer.

Nondisciplinary Notices

Suspended Pending Outcome of Disciplinary Proceedings

Terry O. Forbes (WSBA No. 5626, admitted 1974), of Everett, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.2(a)(1), effective May 13, 2005, by an order of the Washington State Supreme Court. This is not a disciplinary action.

Suspended Pending Outcome of Disciplinary Proceedings

James E. Freeley (WSBA No. 11251, admitted 1980), of Olympia, was suspended pending the outcome of disciplinary proceedings, pursuant to ELC 7.2(a)(3), effective May 11, 2005, by an order of the Washington State Supreme Court. This is not a disciplinary action.

Suspended Pending Conclusion of Supplemental Proceedings

Robert W. Huffhines Jr. (WSBA No. 11279, admitted 1980), of Kelso, was suspended pending the conclusion of supplemental proceedings, pursuant to ELC 7.3 and 8.3(e), effective March 25, 2005, by an order of the Washington State Supreme Court. This is not a disciplinary action.

TEDRA PROCEEDINGS

Sheila C. Ridgway,
Probate Litigation Seminar Chair,
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*For when they insure it is sweet to
them to take the money; but when
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each man draws his rumpback and
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— Francesco di Marco Datini —
Florentine businessman, letter to his wife,
14th century.

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Civil Procedures

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August 3 — Portland (Jantzen Beach), August 12 — Coeur d'Alene, Idaho. 6.5 CLE credits, including 2 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Now What?
September 9 — Spokane. 6 CLE credits. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Representing Clients with Tax Problems
July 13, 20, 27, August 3, 10, 17, 24, 31 — Tele-seminars. CLE credits pending. By The Tax Group LLC; 877-TAX-CREW.

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Washington Criminal Justice Institute
September 8-9 — Seattle. 14.25 CLE credits, including up to 2.25 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

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Ethics, Professionalism and Civility: The Hard Questions

September 30 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Family Law

Counseling 101: For Family Law Practitioners
September 14 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

General

9th Annual Capital Litigation Seminar
August 20 — Boise, ID. By The Capital Habeas Unit of the Federal Defenders of Eastern Washington and Idaho; 509-624-7606.

Accounting for Attorneys
September 21 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Cutting Edge Strategies
September 22 — Seattle. By WSTLA; 206-464-1011.

Gain the Edge! Negotiation Strategies for Lawyers
September 29 — Spokane; September 30 — Seattle. CLE credits pending. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Indian Law

18th Annual Indian Law Symposium
September 15-16 — Seattle. CLE credits TBD. By UW-CLE; 800-CLE-UNIV.

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Will Search

Seeking will of James Alan Williams. DOB: 4-5-1937, DOD: 9-20-2004. Puyallup resident for 40 years. Please call Everett Holum, 253-471-2141, or e-mail to info@holumlaw.com.

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Barbaric yawps in Yelm

BY LINDSAY THOMPSON

The law is a profession of words.

— David Mellinkoff, *The Language of the Law* (1963)

There is, the press reports, distress in Yelm.

The Thurston County town is racked by controversy. Yelm's yeomen are struggling over a moratorium on the use of the word "moratorium."

Wal-Mart, press accounts say, wants to put up a store in Yelm. Some Yelmities are upset. They fear a big store will compromise the community's essential Yelmness. Apparently the matter has come up so many times at city council meetings the council, fearing they might have to review planning authority decisions on the store, banned speaking the word "moratorium" at council meetings.

It's an interesting word, moratorium. The OED calls it a legal term from modern Latin, connoting a legal authorization to a debtor to postpone payment to a certain time. From its first appearance about 1875, that's how people understood it. But in the Depression it came to stand for a broader, more general postponement. In 1944, for example, *Word Study* called for a moratorium on "of course" sentences."

Of course, the usage continued to evolve, and in the late 1950s we had nuclear-arms testing moratoriums; later, the Vietnam War Moratorium marches of 1969, and a 1970 *Daily Telegraph* plaint "for a moratorium on Dylan Thomas records."

In his *Political Dictionary* (1978), William Safire writes, "when political figures want to tell their friends to shut up while they try to settle a sticky situation, they find it more polite to 'request a moratorium.'" The Yelm council appears to be made of sterner

stuff. Running for president in 1968, Richard Nixon was so insistent on his moratorium on talking about Vietnam a frustrated reporter told Safire, "You ought to hold your next rally in a huge moratorium."

I read that the ACLU has the yips about the Yelmish matter. But before anyone launches litigation, maybe there's an alternative. Wear them down with euphemisms.



Now, you're going to say, remember the council also said you can't bring up Wal-Mart by name in council meetings, and when people started asking for a moratorium on "big-box stores," the council nixed that as well. (In the late 1970s, in a British trial of a man accused of violating the Official Secrets Act, it developed that the name of the Post Office Tower, where some of the violations were alleged to have occurred, was itself covered by the Official Secrets Act. Witnesses had to be asked if they knew of the events occurring in "a rather large building in the Tottenham Court Road.")

My plan is for the citizenry to swarm the field with synonyms. Yelmen and Yelmwomen! Gird yourselves with Ro-

get's *Thesaurus*. I pulled down my dad's 1958 edition, and found dozens of alternatives you can use on the council, one after another, until at last they collapse from passing resolutions to ban them.

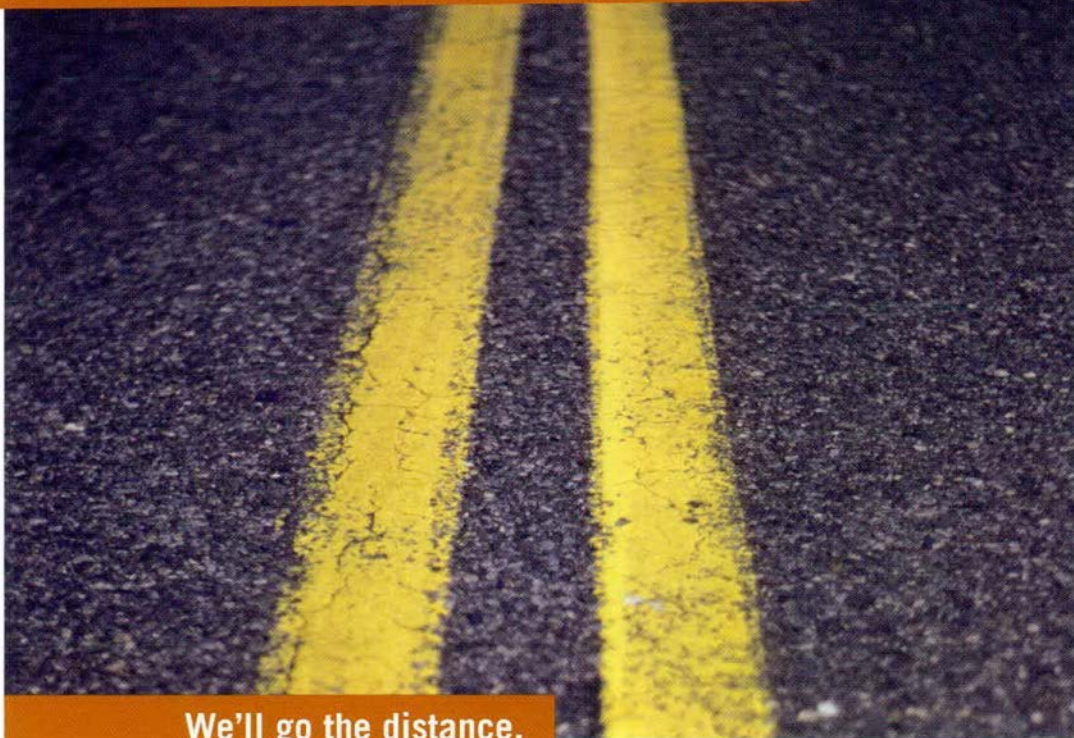
Call, for example, for a delay. More obsoletely, a delayment. One can seek a tarrance, a waiting, or a moration (rare, cautions *Roget's*, and skating close to the edge with the council, I'd say). Seek a retardation of Wal-Mart, or a prolongation, a prorogation, or a postponement; a deferment, a deferral, an adjournment, or an adjournal; a procrastination, a cunctation, a play for time, or (not to put too fine a point on it) a stall.

There are stand-offs, hold-offs, stops, stays, suspensions, and holdups to be demanded. Pauses, respites, truces, reprieves, demurrages, leeways, redtape, redtapism, and redtapery, not to mention referral to a "circumlocution office or court" (Dickens, *Roget's* helpfully advises). There's the fancy French *medicine expectante*, and, in *Roget's* last gasp on the subject, "delayage."

And if nothing else works, try tossing a petition over the wall out at the J.Z. Knight property. I read she's got a bud called Ramtha. He's a warrior spirit from 35,000 years ago, but stays *au courant* on all kinds of modern conundrums, and gives his views to paying audiences through Ms. Knight. He needs to be taking more interest in his hometown. After all, Yelmocracy may be at stake. ☞

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