

LIFE BEGINS

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Senior Lawyers Section

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From the Editor



As your newly appointed Editor, I thought I should introduce myself.

I've recently retired from active practice (primarily family law the last 15 years), having been at it since admission in 1972.

I was Assistant Editor and Editor (one year each) of my law school's publication, "The Willamette Lawyer," and enjoyed the job immensely.

It has been a while since you've seen an issue of this publication and that is partly due to the "fits and starts" of new people (me) in new functions.

We're always looking for articles of interest to publish, so please feel free to send me your contributions and suggestions at rcmattson@att.net!

Regards,
Ron Mattson

Article Ideas? Your Input Is Needed!

Life Begins, the Senior Lawyers Section newsletter, which you are reading at this very moment, works best when Section members actively participate. We welcome your articles and suggestions regarding *your lives in or out of the law*.

Please contact Ron Mattson, editor, to submit an article, if you'd like to write an article, or if you have ideas for article topics. Here's how to reach him: phone (206) 409-0587, email rcmattson@att.net.

Annual Conference – Senior Lawyers Section

May 1, 2015

By Al Armstrong

Part I (to be continued next issue)

On May 1, our Section carried on its tradition of hosting the Annual Senior Lawyers' Conference at the Seattle Airport Marriot. Offering seven hours of CLE credits (including one ethics credit), a line-up of all-star speakers, the usual superb lunch fare, coffee and pastries throughout the day, and the fellowship of long-time colleagues, we did it all for the unbeatable price of \$185. This year we had 129 attendees making the trip to Sea-Tac to join us.

Carole Grayson, our Section Chair, opened the program and welcomed the attendees.

Salvador A. Mungia II – Washington's (Somewhat New) Marijuana Law

Our opening speaker, Salvador Mungia, addressed Washington state's new marijuana law, enacted by the passage of I-502 (with Mr. Mungia as co-sponsor) in November 2012, as well as the various "medical marijuana" enactments of Washington and other jurisdictions. Mr. Mungia gave an overview of federal and state marijuana laws and trends over the years, beginning with the passage of the federal Controlled Substances Act (CSA), wherein Congress designated marijuana as a Schedule I drug, the most stringent classification of five schedules. Congress found that marijuana was highly susceptible to abuse, had no medical use, and could not be used safely in any medically supervised practice.

In 1996, California enacted the first "medical marijuana" law, which the U.S. Attorney challenged. The U.S. Supreme Court ultimately ruled that medical necessity could not be pled as a defense to a violation of the CSA. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that the federal government had the authority to regulate medical marijuana use under the Commerce Clause and the Necessary and Proper Clause, even in the case of intra-

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state cultivation of marijuana for medical use pursuant to a valid California permit. However, although the federal government is seen to have the power to regulate marijuana production and use, the CSA by its terms only provides for actual federal preemption in cases of a “positive conflict” – a situation wherein the given federal statute *forbids* what the state law *requires*, leaving the door open to individual states to deal with tailoring their respective marijuana policies as they may see fit. Mr. Mungia pointed out that in 2013, in response to the recent marijuana enactments of Washington state and Colorado, the Justice Department issued a policy memorandum stating that the federal authorities can rely on the individual states to deal with their own marijuana issues so long as eight listed federal priorities are addressed by individual state legislation. It was Mr. Mungia’s view that our state’s I-502 adoption addresses these federal priorities; this memo represents a “sea change” in federal attitudes toward state enforcement of marijuana laws.

Mr. Mungia also addressed the still-unresolved issue of whether individual municipalities in Washington have authority to ban marijuana within their respective boundaries. He noted that five local Washington jurisdictions have done so, successfully citing Washington Constitution Art. 11, Section 11 (local regulations allowed if not in conflict with “general laws”) at the superior court level. Mr. Mungia disagrees with these rulings and his group is appealing the issue to the state Supreme Court. “Stay tuned,” he advises.

Can an attorney represent and advise a marijuana company, legal under state law but still illegal under federal law? In Washington, an attorney may advise and counsel enterprises that are legal under I-502, as outlined in comment 18 to RPC 1.2. In some other jurisdictions, however, the law is less clear. As far as possession and actual use of marijuana itself by attorneys in Washington (given federal law and the rules of ethics) no specific rule has been enunciated, but marijuana-legal Colorado has the same applicable RPC 8.4 (b), and the Colorado Bar Association has issued a formal opinion that 8.4 (b) (the rule that addresses an attorney committing a violation of law that reflects on the attorney’s honesty, trustworthiness, etc.), does require a nexus between pot smoking/possession and a lawyer’s lack of these character traits.

Thomas W. Hillier – It’s Time to Turn the Tide

Mr. Hillier recently retired from heading the local office of the Federal Public Defender, having held that position for 32 years. Among his many achievements, he has testified before Congress and the United States Sentencing Commission and served as a member of the Advisory Committee on the Federal Rules of Evidence.

Mr. Hillier’s presentation centered on the need for prison reform in the United States, providing the criminal defense point of view. He noted that our country’s incarceration rate far outstrips any other nation, including the

Russian Federation or China. Part of the solution, he opined, would be to give judges more discretion in imposing sentences. In his many years in the federal criminal justice system he has personally witnessed the changes wrought by sentencing restrictions and mandatory minimums binding the federal bench. Chief among these effects is the vastly increased inmate population now in residence at government expense.

In reviewing the recent history of federal sentencing policy, Hillier indicated that the federal prison population (*vis-à-vis* the total U.S. population) had remained somewhat steady from 1926 to about 1972. Beginning in the mid-1970s, however, the federal incarceration rate began to rise and, with the passage of the Comprehensive Crime Control Act of 1984, began a steep climb. That Act created the federal sentencing guidelines. It was fashioned to reflect the drafters’ stated feelings that too many defendants had been given probation rather than prison (however,

Mr. Hillier stressed that 92 percent of those probationers did not re-offend); the guidelines specified what factors could and could not be taken into account by federal judges when handing down a sentence below the guidelines. One factor that could not be considered, according to the drafters, was the “disadvantaged background” of a defendant. The Feeney Amendment to a 2003 federal enactment sought to restrict the ability of judges to impose sentences below these guidelines. The U.S. Supreme Court, in *U.S. vs. Booker* (2004), required sentencing judges to sentence a defendant only for crimes he was specifically found to have committed by the trier of fact or admitted by the defendant himself, and not use unproven crimes as a factor to increase the sentencing, even within the federal guidelines.



Honorees at the WSBA 50 Year Member Tribute Luncheon in October included three members of the Senior Lawyers Section executive committee (standing l.-r.): John Bergmann, Fred Frederickson, and Tom Wampold. (seated) Carole Grayson, Section Chair.

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Mr. Hillier referred to several works that deal with “over-punishment” insofar as it relates to elements of the black community. Among these are *LET’S BE FREE* by Paul Butler and Michelle Alexander’s *THE NEW JIM CROW*. The imbalance in the sentencing guidelines relative to possession/dealing of crack cocaine, as opposed to the “powder” version of the drug, was cited by Mr. Hillier as a manifestation of federal prosecutorial over-zealousness directly affecting the number of prison inmates. There are more blacks in U.S. prisons now than there were slaves on U.S. soil in 1850, according to Mr. Hillier.

Then-Attorney General John Ashcroft directed the Justice Department by memo to always charge the most serious crime possible in any given case and to use the threat of mandatory minimums to extract pleas of guilty. Mr. Hillier acknowledged that the possibility of one’s client being convicted of a crime requiring a mandatory (and usually more drastic) sentence gives a prosecutor quite an advantage in plea negotiations.

There are several trends afoot to address the problems outlined above. One positive development is a growing consensus, from both the political right and left, that our society has become too willing to incarcerate for offenses that could be dealt with more creatively; that we have become an “over-criminalized” society. Conservative columnist George F. Will echoed this viewpoint in his April 8, 2015, opinion piece. Former Attorney General Eric Holder indicated that the federal courts should not seek to double the sentences of repeat offenders. Senator Mike Lee, a Republican from Utah, is co-sponsoring a bi-partisan bill that would dispense with mandatory minimum jail sentences for non-violent drug offenses and would also grant federal judges more discretion in sentencing.

Professor Thomas R. Andrews – Community Property Law Update Including Committed Intimate Relationships, Same-Sex Marriage & Registered Domestic Partnerships

The morning’s next speaker was Professor Thomas R. Andrews of the University of Washington Law School.

Professor Thomas began with an overview of the current state of domestic partnership law. The passage of Referendum Measure 74 in November 2012, legalizing gay marriage in Washington, did not end the practice of registered domestic partnerships. By the terms of RCW 26.60.100, all domestic partnerships would be automatically deemed marriages as of June 30, 2014, unless that partnership has been dissolved or one of the parties is over the age of 62. (The provision for those over the age of 62 is based upon certain “penalties” with respect to taxation involving social security earnings.)

Community liability for the intentional torts of a spouse was Professor Andrews’ next topic. The Washington State Supreme Court decision in *Clayton vs. Wilson* (2010) broadened (or clarified) the scope of community liability for torts committed by a member of the marital community. Mr. Wilson had molested a child while the child was doing yardwork for the benefit of Mr. Wilson’s marital community, the court reasoned, and this subjected the entire marital community to liability as well as Mr. Wilson separately. Due to possibly conflicting holdings in a 1953 case (*LaFramboise*) and one in 1980 (*deElche*), the court took the opportunity to clear up any apparent confusion. The *Clayton v. Wilson* case also dealt with the Uniform Fraudulent Transfer Act, holding that a spouse was an “insider” for the purposes of the statute, and that, when the UFTA is silent on a particular matter, provisions of common law fraud can be used to supplement a creditor’s remedies. Common law fraud also deals specifically with transfers between spouses, which is even more specific than the term “insider.”

Another 2010 Washington Supreme Court case of interest was *Estate of Borghi*. The *Borghi* case dealt with the “joint title gift presumption” arising from a change in title from one spouse to include both spouse’s names on the title. In affirming the Court of Appeals, the Washington Supreme Court (in a 5-4 decision) discarded the joint title gift presumption, absent clear and convincing evidence on the part of the grantor to the contrary. A change in title alone would not suffice. *Borghi* specifically rejected the presumption as set forth in the *Hurd* decision (1993). Professor Andrews noted that the *Borghi* decision (re: joint title gift presumption) appears to conflict with the provisions of 64.28 RCW, authorizing joint tenancy and providing that jointly held property by husband and wife is presumed to be their community property. Professor Andrews cautioned: “the final chapter of *Borghi* has yet to be written.”

Professor Andrews continued: “but what is the state of Committed Intimate Relationships at this point?” That is, relationships where there is no intent to marry but a “marital-like relationship” exists. Are “Committed Intimate Relationships” (CIRs), in effect, Washington’s version of common-law marriages? Not quite. Since the 1984 decision in *Marriage of Lindsey*, our Supreme Court has fashioned a body of law recognizing the marital-like property rights of committed intimate partners, but as yet only community property-like assets are divisible; separate property is not before the court for division, as it would be in a marriage termination. In 2001, the Supreme Court held that CIR applies after death of one of the partners, and in 2007 the court held, in the case of *State vs. Oliver*, that CIR applies even in cases of simultaneous death.

One party to a CIR saying “I am out of here!” ends that CIR, said Professor Andrews. *continued on next page*

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William H. (Bill) Neukom – Corporate Counsel: the Challenge of Advising a Growing Business

Our final speaker of the morning was Bill Neukom, presently of K & L Gates LLC. Mr. Neukom, a 1967 graduate of Stanford Law School, began working for the Shidler, McBroom, Gates and Ellis law firm (now K & L Gates LLC) in 1977. In 1978, he was asked by William Gates, Sr., to advise his son Bill and his 12-employee software company, Microsoft. He joined Microsoft as in-house counsel in 1985, and was instrumental in guiding the company through such matters as the Apple vs. Microsoft case as well as the company's philanthropic endeavors. After years with Microsoft, Neukom returned to his old law firm. He was president of the American Bar Association in 2007-2008. In 2008, he became part owner and Managing Partner of the San Francisco Giants. He is the founder, president and CEO of the World Justice Project.

Neukom talked about the advantages and disadvantages of being corporate counsel – that is, as opposed to private practice. Having experienced both endeavors, he noted that being corporate counsel frees the practitioner from having to seek out new clients, usually provides for a better retirement, immersion in a specific industry, and access to key personnel. The disadvantages include being thought of within the particular business as an outsider, receiving less respect than attorneys in private practice, and loss of professional independence.

In Neukom's opinion, corporate counsel's proper role must be to act not only as legal advisor, but an ethical and strategic guide as well; a *consiglieri*. "Sometimes, as corporate counsel, you just have to say no," he advised. The folks at Enron ran into trouble when no one was willing to stand up for doing the right thing. He reminded the attendees of the old saw that "power corrupts" and, he said, people at the top sometimes get too much respect and deference; good CEO's, however, appreciate honest advice, as it can be lonely at the top. Another role that corporate counsel can fill is that of adult supervisor to the staff and acting as Secretary to the Board. Corporate counsel is in effect an in-house teacher as well: "if you like teaching, this would be a good place for you."

Neukom mentioned the allocation of work within a firm's corporate department; choices have to be made as to when to seek help from outside counsel; how to handle specialized work; conventional, repetitive work; whether to turn to preferred provider plans, etc.

Lastly, the attendees were given a quick overview of the speaker's World Justice Project, which promotes the ideal of the rule of law around the world. The WJP's "Four Principles" said Neukom, set forth conditions required for the rule of law to flourish in any given society. The World Justice Project is based in Washington, D.C. as well as right here in Seattle.

[to be continued next issue]

Old Soldiers Never Die, They Just Mediate Away

By Fred Frederickson

Guest Columnist and Old Soldier, Kyle Johnson, joins the line of venerable lawyers who have become mediators after years of tribulations in private practice.

Kyle matriculated at the University of Washington Law School where he served as Comments Editor on the *Washington Law Review*. Johnson graduated in 1966 along with a host of other legal luminaries including: Norm Maleng, Wolfgang Anderson, Thomas J. Kraft, Earl Lasher and Mike Stocking.

With the ink on his diploma still drying, Mr. Johnson performed his first legal transition by becoming (through the magic of a direct commission) Captain Johnson, United State Army Reserve, and a proud member of the Judge Advocate General's Corps. After a crash course in military law, Captain Johnson was assigned to Korea, followed by a stint at the Pentagon. During the latter assignment, Johnson, ever the scholar, earned an LL. M. at George Washington University in 1971.

Another transition! After four years of active duty, the Army disgorged Captain Johnson who morphed into Mr.

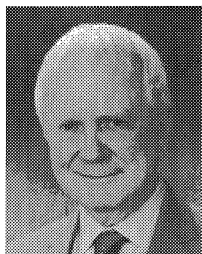
Johnson again. Associating with the prestigious law firm of Foster Pepper & Riviera, he commenced the long trudge from associate to partner. Bypassing the rung-by-rung climb (and transitioning yet again), Johnson bounded to the top of the heap and became founder of his own firm: Brown & Johnson. Thence he became Co-Founder and Managing Partner of Lasher & Johnson (known today as Lasher, Holzapfel, Sperry & Ebberson). Many other transitions are found in the footnotes of his long and varied career in private practice.

Kyle later re-affiliated with the Army, joining the Army Reserve JAG Detachment at Fort Lawton and eventually retiring as a Lieutenant Colonel. Along the way, he found time to: take several AAA arbitration courses; lecture at the Golden Gate University graduate tax program; teach future lawyers at Bar Review Associates courses; and speak at various CLE events. His latest transition is service as a fulltime mediator. See page 5 for Kyle's account of his latest transition.

Transitions

A Story of Change in a Lawyer's Practice

By Kyle Johnson



The picture of lawyers in our state receiving 50-year pins has always caught my attention. This picture, for those of you who don't share my interest, appears annually in the Bar publication. As a general rule, everyone in the picture looks really old (because they are).

I have shown this picture over the years to younger lawyers as an example of what they can expect as they age and where their aspirations can lead if they keep working. The picture can be motivational or scary, depending on perspective. To be frank, until I realized I was about to join their ranks, this picture of a bunch of senior citizens being honored solely for surviving 50 years in the bar always seemed a little off-putting to me, since the reward is based solely on longevity, not on merit. My 50 years in the Bar arrives in 2016 and it will then be *my* turn to be in the picture. You will have no trouble recognizing me as I will be the most youthful looking one.

Practicing law for 50 years was never a goal of mine, but retirement was never a goal either. So I have continued taking advantage of being in a profession without a mandatory shelf life (like that of an airline pilot).

The idea of changing focus or specialty while continuing to practice as one ages is not a new one. But change is sometimes hard and often takes some courage. It might just be a smarter choice to simply retire. In fact, that **is** the choice made by another colleague of ours, Ted Watts, as he explained in a recent issue of this publication. I read Ted's story with great interest and everything he said made perfect sense. The underlying message that resonated throughout his article was: freedom from stress.

In my life I have often gone against choices that made perfect sense to others and this time was no different. Retirement just holds no appeal for me. Rather than retire or just keep practicing law as before, I decided to change the focus of my practice and re-invent myself in a new business model as a mediator of civil disputes with an emphasis on family law and family business disputes. That model makes good use of my background and practice experience. It also matches my skill set (at least that is what I prefer to believe). As for experience, I had sporadically served as a mediator for many years but had never really focused on it as a specialty. I had also been an arbitrator with AAA for years.

The fallout from my decision to launch and go "all in" as a mediator was immediate. I concluded that I should

not be affiliated with a law firm. That meant leaving my Of Counsel position and establishing myself as an independent provider of mediation and arbitration services. As part of that move, I came up with a catchy name - KJAM, an acronym for Kyle Johnson Arbitration & Mediation.

Further fallout came from colleagues: most of it positive, but not all of it. One comment that I heard a lot was akin to: "Mediation – isn't that where old lawyers go to die?" The idea that I was now entering "God's waiting room" had never occurred to me, so I chose to interpret those comments as friendly banter from well-intentioned acquaintances.

As a lawyer in private practice, my marketing was all referral-based. I had nothing against lawyer advertising but "I am the hammer" ads were not my style and I was never active in the yellow pages.

The realization came to me slowly that my marketing approach needed to change to one that was more proactive and in tune with the times. In all honesty my phone was not, at the outset, ringing off the hook. It became apparent that my new business model would require a new marketing model to match my self-image as a synergistic mediator capable of resolving the most acrimonious dispute. In short, I concluded that I needed to engage in some self-promotion and not rely on methods that had worked for me in the past.

With the help of my wife, who possesses the graphic talent that I lack, a brochure and website emerged. You are welcome to peruse my website at kylejohnson4adr.com. Other marketing approaches are in the wings as I get more comfortable with self-promotion. (Keep in mind: at the time people like us "Seniors" were going through law school, the concept of lawyer advertising was just beginning to emerge as an acceptable means of attracting clients!)

Happily, my business has begun to grow as I help others resolve their disputes. I have found this to be a highly competitive field. Fortunately, I am having fun and discovering that what I am doing is not only much less stressful but far more enjoyable. There is real satisfaction in a successful mediation where lawyers and their clients place trust in a process that allows resolution outside of the courtroom and on terms decided by the parties themselves, not by a judge. And there is real enjoyment in being able to set my own calendar without fear of a six-day motion from opposing counsel arriving at 4 pm on a Friday!

Nostalgia Notebook; Mr. Peepers Revisited

By Fred Frederickson

Our stern editor¹ of *Life Begins* (She Who Must Be Obeyed²) has directed her subservient scribes to expand their horizons and write articles on media, books, and other cultural phenomena. In compliance with her mandate, I recently resurrected and viewed again the Mr. Peepers television series in its entirety and herewith submit the following critique.

For the benefit of junior Senior Lawyers, Mr. Peepers was a weekly NBC television show that aired from July 1952 to June 1955. (Happy sixty-third birthday Mr. Peepers!) The protagonist, Mr. Peepers, played by Wally Cox, was a shy bespeckled, general science teacher at mythical Jefferson Junior High School. The stellar supporting cast included Emmy-award-winning performers: Marion Lane (Aunt Clara in *Bewitched*), who could bluster with the best of them; and Tony Randall (Felix in *The Odd Couple*). Mr. Peepers' love interest, Nancy Remington, was played by demure Patricia Benoit, the school nurse. Back in 1952, whenever the comely Patricia Benoit appeared on screen, I experienced a primordial stirring, undoubtedly a precursor to puberty.

Unlike today's television shows, Mr. Peepers contained no murder, mayhem, nudity, violence, greed, or sexual innuendo; seemingly a rapid program. Despite these shortcomings, I thoroughly enjoyed re-watching the series. The story archives included whether Mr. Peepers should euthanize and mount a rare butterfly for the munificent sum of \$50 (he didn't) and whether Mr. Peepers could identify and purchase an unmarked lunch at a box lunch social prepared by Nurse Remington (he did). The comedic timing of the actors was superb and, even 60 years later, I frequently laughed out loud at the skits.

These programs included original Reynolds Aluminum commercials. At the end of each program, the typical American housewife appeared with a fresh permanent wave and manicured, delicately polished unchipped fingernails. She was thoroughly resplendent in a starched, ironed dress. The secret of her flawless appearance was, of course, Reynolds Wrap Aluminum Foil. By wrapping everything in Reynolds Wrap, perhaps including her first born, she was able to devote the balance of her time to perfect grooming.

Mr. Peepers originated in kinescope recordings. I've seen many kinescope programs, dark as a law school library

on the first day of classes with hazy images of furtive law review editors scurrying about. Not so with the version of Mr. Peepers I watched. These recordings were restored by the UCLA Film and Television Archive, a museum dedicated in part to restoration of old movies and television shows. These images were as clear as the pictures I recall watching on the 12-inch Muntz TV ensconced in the family living room during the 1950s.

As this article implies, the Mr. Peepers show is commercially available. I purchased my copy on Amazon for about \$10. I commend it to any of you who may have a yen for the nostalgic.

1 Referring to our previous Editor, Janet Anderson.

2 Borrowed from *FOREVER RUMPOLE: THE BEST OF RUMPOLE STORIES* by John Mortimer, Viking Adult; Reprint 2011.



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