



LIFE BEGINS

A Publication of the
Washington State Bar Association
Senior Lawyers Section

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*This article includes summaries of the speakers at the Section's annual CLE in May 2016.
Part II of the recap will appear in the next Life Begins.*

Recap of 2016 Senior Lawyers Section CLE May 6, 2016: Part I

Our Senior Lawyers Section and guests gathered once again last May at the SeaTac Marriott for the Annual Senior Lawyers Conference and CLE. The theme this year was "The Changing Landscape." The CLE tuition of \$185 entitled the attendees not only to 7 full credits, but also to our now-famous buffet lunch by the hotel pool, as well as pastry, coffee, juice and snacks throughout the day. Our speakers all did their part to make this year the "best Senior Lawyers CLE ever."

Carole Grayson, Section Chair, opened the program and welcomed the attendees. She also thanked our sponsors: Morgan Stanley, Sound Options and Find Law.

Justice is Blind and Other Great Myths – Bias in the Justice System

Salvador A. Mungia

Tacoma attorney and past speaker Salvador Mungia returned this year to open our program with the topic "Justice is Blind and Other Myths." Mr. Mungia, past president of the Washington State Bar Association and a well-known figure in the fields of plaintiffs' personal injury work as well as that of civil rights and appellate practice, is a partner with the firm Gordon Thomas Honeywell. Mr. Mungia stressed that we all can be susceptible to unconscious bias (both as to gender and ethnicity) in our everyday lives, and this bias is reflected in our justice system. He was candid about the biases he previously had entertained, and related that

when he was first called for jury duty, when observing the ethnicity of the defendant, concluded that he must be guilty. This brought to mind Jesse Jackson's story about feeling menaced, when, out for a walk, sensed someone following him and he felt relief when he saw that that individual was Caucasian. Recalling that he had been raised with the idea that women were not as competent as men, Mr. Mungia related an instance involving auditions for a European philharmonic symphony orchestra, wherein the hopefuls would perform from behind a curtain. The judges were awed by one performer, only to register a stunned reaction when it was a woman who stepped into view following her performance. So, Mr. Mungia asked, how do we get this way? He stressed by presenting his topic that "I don't want to point fingers at anyone but myself."

Regarding our justice system, Mr. Mungia stated that unarmed black male suspects were twice as likely to be shot by law enforcement than unarmed whites in similar situations. He related that blacks are less likely than white job applicants to get a call back after submitting an employment application. Blacks are more likely to face the death penalty than whites convicted of similar crimes. United States Supreme Court Justice Sonya Sotomayor recently commented on a case wherein a federal prosecutor, during a criminal trial, implied during cross-examination that the presence of blacks was indicative that a certain transaction must have been a drug-deal in progress. "These remarks are

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Mark the Date: May 5, 2017 Next Senior Lawyers CLE

Our next Senior Lawyers Section CLE will be held at our same location, the SeaTac Marriott, on Friday, May 5, 2017. Be sure to join us then.

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an affront to the Constitution's guarantee of equal protection of the law," wrote Justice Sotomayor.

An interesting experiment in unconscious bias was described: it involved requesting a critique of a legal research memo supposedly written by a Thomas Meyer, identified as a third-year associate and an N.Y.U graduate. The judging panel was comprised of 60 partners from 22 law firms. The legal memo contained purposefully embedded mistakes, some trivial, some otherwise. One-half of the judges were told that the writer was white, with the other half being informed that the author was black. The same writing sample was given to both panels. The judges found substantially more of the errors in the "black" memorandum than the "white" one. An interesting side-note is that the evaluators consisted of 21 members of racial minorities and 37 Caucasians, and there was no correlation between grading and the race of the evaluator.

Mr. Mungia discussed the results of a test designed to detect implicit attitudes, that is, the presence of unconscious bias – the Implicit Association Test. This exercise involved test subjects being timed in selecting their choices of pairing negative and positive concepts or traits with individual pictures of blacks and whites. The subjects were reported, on the whole, to exhibit a detectable hesitance to pair positive concepts with blacks, or negative concepts with whites. That blacks were the "disfavored" group was detectable even when black subjects were tested.

In the civil realm, an Oregon study found that white plaintiffs were awarded greater damages for non-economic losses than Black plaintiffs similarly situated.

Mr. Mungia touched upon the question of evidentiary relevance of a witness or a party's illegal immigrant status. This question has not only been dealt with in court cases throughout the nation but is also in our state's Rules of Professional Conduct. He cited RPC 4.4 – "Respect for Rights of Third Persons." This, as we know, prohibits a lawyer from

using tactics that have no substantial purpose other than to embarrass, delay or burden a third person. Comment [4] thereto notes that "issues involving immigration status carry a significant danger of interfering with the proper functioning of the justice system." Lawyers are further cautioned to avoid using another party's illegal immigration status as a means of seeking tactical advantage by an express or implied threat of reporting such person to authorities.

In 2010, the Texas Supreme Court reversed and remanded for retrial a case wherein evidence regarding the defendant's illegal immigration status was admitted at trial, holding that such immigration status was irrelevant and, more importantly, not harmless error.

Earlier in his talk, Mr. Mungia had recalled William Faulkner's remark that the past is always with us. In closing, Mr. Mungia observed, along with George Bernard Shaw and Robert Kennedy: "some people see things as they are and ask why, and others see things as they could be and ask why not?"

Title IX – The Past, Present and Societal Impact

Patricia L. Bostrom

Longtime residents of the Seattle area may remember Patricia Bostrom's one-woman battle with the University of Washington over women's tennis in the early 1970s. Ms. Bostrom was on hand as our second speaker relating her tale of gaining, for the U.W. women's tennis team, comparable treatment and funding as had until then been given solely to the men's team.

She recalled growing up in Seattle's Fautleroy neighborhood and finding that there were little or no athletic opportunities for girls in the Seattle school system. At Chief Sealth High School, although boys had their tennis team, there was nothing for the girls. Determined to change things, she wrote to the Seattle Public School Athletic Director Frank Inslee (father of our current governor), only to be told "Sorry Trish, you can't play."

Upon her enrolling at the U.W., while excelling on the women's tennis team, she noticed that her gender's team didn't have funding for uniforms, equipment, or scholarships, and, when the team went to the National Collegiate Championship, the women were relegated to sleeping on the floor at various residences while the men were provided with hotel rooms.

She reminded the attendees that Title IX had not yet been enacted by Congress at the time of her struggle (Title IX of the Education Amendments Act of 1972 ensuring equal treatment for girls in education, supplemented earlier-passed federal education legislation.) In order to change the situation at the U.W., she had to rely on other guarantees

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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. Reach him at (206) 409-0587 or rcmattson@att.net.

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of equal gender treatment as then existed under state and federal provisions. She decided to take the matter to court, and Attorney Don Cohan agreed to take her case for no charge. She recalled the help that attorney Gary Gayton and U.W. Professor Harry Cross lent to her cause. With the threat of a lawsuit looming, the U.W. relented, and agreed to institute changes in the women's program; in the interim, Ms. Bostrom would be able to try out for the men's team.

Ms. Bostrom would go on to graduate with Phi Beta Kappa honors from the University, and would later attend law school and pursue a successful legal career.

Although Ms. Bostrom had acted prior to Title IX becoming law (it became effective on June 23, 1973), she stressed the impact Title IX has had on increased opportunities for women, and not just in field of athletics. Noting that women now make up 51% of both law and medical school admissions, and that there have been several attempts to limit the Act's effectiveness, she pleaded "don't let Title IX die!" Ms. Bostrom also contended that the situation is still not ideal, observing that she still finds coverage of women's athletics on the last page of the sports section. She urged all to let the newspapers and other media know when this happens. For Ms. Bostrom, the battle over the Equal Rights Amendment to the U.S. Constitution is still very much alive.

Technology Resources: Finding Answers

Pete Roberts

Many Bar members know Pete Roberts for his work as the Practice Management Advisor for the WSBA's LOMAP (Law Office Management Assistance Program); having acted in that capacity for 13 years, he is now in private consulting practice. Mr. Roberts, in his return presentation, addressed the attendees about computer applications for the law firm.

He noted that he purchased his first computer in 1984 for \$6,000 – almost \$15,000 in today's dollars – and remembers the expenditure as a good investment. There were also magazines devoted to then-current technology: "These publications would keep you up to date but no more than that." He recalled that the Internet, (now a tremendous resource for learning), did not exist at that time, at least as we know it today.

The three somewhat overlapping areas in law office management are: doing the work, managing the work, and managing the money. He outlined the first steps that the practitioner can take to become familiar with current law office technology. Talk with colleagues, utilize the resources of our Bar's LOMAP, and become acquainted with Bar-sponsored vendors.

Mr. Roberts suggested several sources of information currently available, once the practitioner has gained some

familiarity with applicable legal technology. The sources he recommended include:

- **Protonic.com:** This is an online community that provides free technical support to computer users. Registration is required. The site is staffed by volunteers. This service was founded by an individual who wished to ensure that computer help was available to the public at no cost.
- **Wikipedia and Google:** Good sources to keep abreast of new developments in the digital world.
- **American Bar Association Resource Center Legal Technology Webpage:** A great service, and you do not have to be a member of the ABA to use this site.

With respect to "cloud" computing, Mr. Roberts indicated that he is a strong supporter of utilizing this convenience as a back-up for files, as long as the vendor enables encryption of information in transit and while stored. If considering using the cloud, be sure to read the relevant ethics rules and advisory opinions, as well as the vendor's terms of service. He feels it is all right to dictate time entries to a smartphone and email them to your office. He predicted that the time will come when it will be a part of every practice. "The cloud is here to stay."

There are several services that utilize cloud-based law practice management software, providing all manner of technical and billing services to the legal practitioner. Two that Mr. Roberts mentioned were My Case and Clio. One such company advertises that its program takes care of everything from "intake to invoice."

Mr. Roberts mentioned two highly regarded tech shows, both held every two years: The ABA Tech Show (last show in March 2016) and the Pacific Legal Technology Conference, staged each year in Vancouver, B.C. (next show, October 2017).

Other sources of technical information for attorneys include the Digital Lawyering Institute, which specializes in advising attorneys setting up virtual law offices.

The WSBA's free (to members) Casemaker set-up was lauded by Mr. Roberts. He urged those who have questions about Casemaker to send them to lomap@wsba.org.

Mr. Roberts described I.B.M.'s cognitive computer, ROSS, "built on top" of "Watson" of Jeopardy fame, and used for legal research. Any subscriber can ask the device a law-related question. The reply not only can conduct legal research, but can also include some suggested reading for the user! The website is rossintellegence.com. "This is a very, very big deal. This is the future!"

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**Examining the Ethics of Attorney Communication
and Social Media**

Jeanne-Marie Clavere

Jeanne-Marie Clavere, like Pete Roberts, returned to our CLE with a repeat performance, this time addressing the still-evolving area of legal ethics and social media and website based advertising. As the Bar's Professional Responsibility Counsel, her advice relative to lawyers with respect to advertising was to "be careful" and be sure to keep in mind the Rules of Professional Responsibility.

Several specific RPC provisions were discussed:

RPC 1.6 (Confidentiality of Information) puts real limits on an attorney's bragging rights. For instance, do not communicate any information in your ads that could lead to disclosure of your client's confidential information. If you wish to tell the consumer that you have achieved an extraordinary result on behalf of a client, a proclamation along those lines could very well contain confidential information or facts which could lead to disclosure of same. If in doubt, don't do it or be sure to obtain your client's full and informed written consent prior to the posting.

RPC 1.18 (Duties to Prospective Client). Even if no lawyer-client relationship exists, such as an initial consultation that does not result in the attorney taking a case, the lawyer must safeguard any information obtained in that consultation to the same extent as if the lawyer were formally retained.

RPC 3.5 (Impartiality and Decorum of the Tribunal). Does "friending" a judge on Facebook or Connecting with a judge on Linked-in constitute an ex parte communication in a given case? Statements made on Facebook can still reach the judge after the initial "friending." What if, after the initial "friending" the attorney has a matter before the judge at the time additional statements by the attorney reach the judge's

Facebook page? Be careful about this. Also, avoid friending witnesses and even opposing counsel in an active case. Pictures of the advertising attorney with judges and unflattering photos of other lawyers were also discouraged.

RPC 7.1 (Communications Concerning Lawyer's Services). RPC 7.1 forbids an attorney from including "false or misleading" information in advertising. Something as straightforward as "largest verdict in a disability case" could be deemed misleading if another, larger verdict is obtained later by another firm. In other words, it is up to the lawyer-advertiser to keep facts communicated in an ad current. We all know about the prohibition against a lawyer advertising as a specialist, but attorneys are advised to avoid such statements as "I have more experience in such and such a field than other lawyers" – a claim like this proved to be the basis of a legal malpractice claim in Wisconsin. Client testimonials can create too much expectation on the part of a prospective client.

RPC 7.2 (Advertising). Endorsements are allowed by this RPC; however, Ms. Clavere cautioned that trouble can result if the endorser actually does not have much of a connection with the advertising attorney.

Ms. Clavere stressed that it is important to ensure that an advertising site does not give the impression that actual legal advice is being imparted. Disclaimers on the site can be valid, but they must be conspicuous within the ad.

She also sounded this cautionary note: RPCs are for the protection of the client, *not* the attorney. Close issues of ethical violations are usually decided in favor of the client.

Ms. Clavere encouraged lawyers to review the RPCs and advisory opinions thereto. She also welcomes inquiries to the Bar's ethics line. "We handle 2,000-3,000 ethics calls a year."

Part II of the recap will appear in the next Life Begins.

OPINION

Proposed New Rule for MCLE Exemptions

By Ed Huneke

I propose that Washington Admission and Practice Rule 11 (MCLE), should be amended. An addition to the four exemptions (to the requirement that lawyers have 45 hours of credits) in Rule 11(c)(5) should be adopted. In addition to the exemptions for Judiciary, Supreme Court Clerks, Legislators, and the Governor, the Rule should include a subsection exempting attorneys who have been active members for 50 years or more.

While details can vary, in general most lawyers who have practiced for 50 years are approximately 75 years old, usually graduating from law school and passing the Bar exam at around age 25. Many attorneys do not live to age 75, but many do, and many of them have served people well for a long time and have enjoyed helping others, so they may not want to stop. However, to keep our licenses "active," we are still required to meet the MCLE requirements of attending 45 hours of seminars in each three year period. For many of these Bar "elders," their offices get closed or they reduce their time spent practicing, yet these attorneys want to continue helping people as they have for so much of their lives. Requiring continuing CLE attendance also imposes added burdens to them for cost and attendance (roughly \$3,000-\$4,000 for the 45 hours) since their incomes are often substantially reduced.

I closed my Seattle office and moved into retirement back in Spokane where I grew up. I live in the Rockwood Retirement Community which has about 300 residents and 250 employees, for whom I can (and do) provide legal advice and guidance. I do that for free because I enjoy being able to help others in that way. In Spokane, where I live, the only source for any CLE that I could find was with the Spokane Bar Association, although the Bar says that there are webcasts that provide 1.5 CLE credits every month (however, as I recall, there are limits on the number of CLE credits you may accumulate using that means). When I had my office in Seattle, I was close to the courthouse at which there were one or two free CLE hours every month.

I feel that, after having provided good, positive service to clients for 50 years (for which I did receive the WSBA award), I can continue to help people for free. The kind of help I can provide does not require any CLE information (drafting Wills, Directives to Physicians, General (or Special) Powers of Attorney are some examples). I know those and other general fields of practice well enough to give good, effective and helpful legal advice to others. To lose my license because I do not attend the 45 hours of MCLE just feels wrong and unjustified. It eliminates my ability to help others pro bono.

In my opinion, exempting long-term attorneys from the MCLE requirements would actually provide a benefit to the reputation of lawyers in general in the public's eye. They often see and consider lawyers as a very expensive service. Many people do their best to avoid lawyers, because of their fear of what it will cost them. For the legal community to allow elder lawyers to continue serving and advising those who have legal questions and issues without requiring us to maintain the CLE requirements will benefit the reputation of our group, by making more of us available to advise and help.

I was told by WSBA staff that if I took "inactive" status, it would be illegal for me to give any legal advice to any person. So if one of my neighbors asks me if I can help him with a Will or a Power of Attorney or a Directive to Physicians, I would need to tell him that I can't help him because I am "inactive." After 50 years, I enjoy being able to help people with their problems, and I do not need any more CLE in order to do it honestly and effectively.

Looking for a Pro Bono Opportunity?

The *www.ProBonoWa.org* is a tool for volunteers to locate and connect with pro bono opportunities around the state. This site provides clear and easy access listing of organizations, details about their service opportunities and resources that are available to support your service. Check out the pro bono directory to find an opportunity near you!

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