

LIFE BEGINS

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Senior Lawyers Section

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WSBA-CLE Senior Lawyers Section Annual CLE

Co-sponsored by the WSBA Senior Lawyers Section

Reception immediately following -
Sponsored by BECU Trust Company

Monday, April 9, 2007

**Seattle Marriott at SeaTac Airport
3201 South 176th Street
Seattle, WA**



The Innovator in Legal Education™

*6.25 CLE Credits for Washington Attorneys:
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FEATURING TWO KEYNOTE SPEAKERS:

BILL NEUKOM – President-elect, ABA and Partner, K&L Gates, Seattle
Mr. Neukom is the former General Counsel for Microsoft

DAVID NEVIN - Lead counsel for Sami Omar Al-Hussayen

Program Schedule • Topics • Speakers

- **7:30 a.m.** Check-in * Walk-In Registration * Distribution of Coursebooks; Coffee and Pastry Service
- **8:25 a.m.** **Welcome & Introduction by Program Chair**
Jerry Jager – Chairman, Senior Lawyers Section and Sole Practitioner, Seattle
- **8:30 a.m.** **KEYNOTE ADDRESS: Advancing the Rule of Law**
Bill Neukom – President-elect, ABA and Partner, K&L Gates, Seattle
- **9:15 a.m.** **KEYNOTE ADDRESS: The Rule of Law in a Time of Terror**
David Nevin – Nevin Benjamin McKay & Bartlett LLP, Boise, Idaho
- **10:15 a.m.** **Break**
- **10:30 a.m.** **Ethics: Duties and Responsibilities of a Trustee**



Registration fee includes parking at the Marriott, lunch and reception

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Defining Its Mission: Retreat to Go Forward

Your Section leadership will be undertaking its first-ever retreat from April 13-15. Please contact your committee members with your ideas how your Section can serve you and make you feel proud of belonging to this exclusive section for lawyers 55 and over.

What should be its mission?

Hopes?

Future services?

Be proactive! Input from members is appreciated!

Who are your Section leaders? Who are your Section leaders? Their names are legion, and they are listed next to this column.

Gal Noir

By Carole Grayson

The phone rang. It was not a dark and stormy night. It was a weekday afternoon.

"Hiya, kid, how are ya doin'?" I recognized the gravelly voice.

"Say..." and he went on for a few minutes, talking about some group I had never heard of, and its mission, and how he knew I would be perfect, just perfect.

"Just the person for the job," he told me he had told the others.

Is this a mission for Gal Noir?

The group, he said, was the Senior Lawyers Section of the State Bar, and its long-time newsletter editor, Bob Berst, was ready to move on to calmer pastures.

My caller – yes, it was the indefatigable Jerry Jager, man of a million hugs, the Energizer Buddy, a heart as big as the Evergreen State, and a joie de vivre that lost nothing in translation.

"The Senior Bar is for lawyers 55 and over," Jerry was saying, "and it has a newsletter, *Life Begins*, and you'd be great for it, and we meet once a month, but you don't have to attend, but We Start On Time And We End On Time." I heard the capital letters.

I sat there.

"Jerry." I raised my eyebrows. "I'm not 55." I knew he could not see the twinkle in my eye, or how I was intent on milking a pregnant pause (or mangling a metaphor).

Silence...

2006-2007 Senior Lawyers Section

Officers

Chair: Jerry Jager, CLE Chair

Past-Chair: Dudley Panchot

Secretary: Stephen E. De Forest

Treasurer: Joanne Primavera

Committee Members

Carole Grayson,
Editor *Life Begins*

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Robert A. Berst

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Roderick Dimoff

H. Weston (Wes) Foss

Fredrick O. Frederickson

Herbert H. Freise

G. Lawrence Salkield

WSBA Support

Toni Doane

Ali Milks

"Jerry."

Silence.

"I'm 54 – and a half."

His response came fast. "Oh, that doesn't matter," he breathed.

I knew it didn't, too, but I was having fun and playing along and enjoying the distraction from whatever I was working on.

"Jerry," I said slowly. "My spouse is over 55. He's 64 – and a happily twice-retired lawyer. Does that count?"

Didn't matter either, of course. Jerry had already decided. The rest is commentary.

Jerry will learn something when he reads this. His timing was serendipitous. I had been feeling an itch for something new and law-related ... but not anything that would be a major time suck.

This sense would float into my consciousness in my rare moments of calm. I had not told anyone about it.

Who wudda thunk that two decades after falling into my share of land mines as editor of the *Washington State*

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Bar News, wonderful folks I had met then would still be turning up in my life? And in a fun and supportive way! (For the record, there were no land mines when I was editor of the *King County Bar Bulletin* in the early 1990's.)

It was an easy seduction. I happily agreed to replace Bob Berst as editor of *Life Begins*. And so it was that soon after, at a monthly Senior Lawyers Section meeting, one enterprising member made a motion, another seconded it, voices rumbled in pleasure, and your undersigned scribe is now, for purposes of the Senior Lawyers Section of the Washington State Bar Association, 55 and over.

I've noticed, and perhaps so have you, that *Life Begins* is an amalgam. Its substantive articles on law are leavened by lighter pieces on travel, food, entertainment, and the existential questions of life. This, dear readers, is a shameless invitation to you to – please – contribute! You get to choose what you send in, and I betcha you'll have more fun writing a light piece! Send articles to me as email attachments at cag8@u.washington.edu.

You're welcome to call me at (206) 543-6486 if you are feeling timid about setting down your ideas or if you're a Luddite and don't know how to send email attachments. As *Gal Noir*, gal of a thousand dark and stormy nights in the City by the Bay, I've been working on developing my supportive side.

Just who is *Gal Noir*¹? Your editor, Carole Grayson, WSBA #12146.

I direct a great law office at the University of Washington called Student Legal Services. It's been around since the late 60's. I employ third-year law students as Rule 9 legal interns, and we represent only the UW student body. Our website is www.depts.washington.edu/slsuw. I've been at Student Legal Services since 2000, preceded by 15 years in solo practice in Seattle, and stints as a public defender in Snohomish County and Florida going back to 1978.

Let me tell you this: There is nothing like working with students (our clients have ranged from 16 to 54 years old) to make oneself aware of the passage of time. Such changes in fashion, hairstyles, technology, and disposable income!

It is now a dark night. The forecast, well, I'd seen it before:

A CHANCE OF SHOWERS THIS EVENING. SHOWERS BECOMING LIKELY AFTER MIDNIGHT. HEAVIER SHOWERS TOWARD MORNING MAY BE MIXED WITH SNOW OR ICE PELLETS.

This is *Gal Noir* signing off. Be nice to your editor and the right side of your brain. Sit down at your IBM (Selectric or PC) and start hunting and pecking out the great American novella. Or dictate it if you're a happy Luddite.

Life is short. And *Life Begins*, well, with your input.

¹ My Francophone spouse informs me that it should properly be *Gal Noire*.

WSBA Emeritus Status

Are you paying for your "Active" WSBA license but not practicing much these days?

Are you thinking about changing your status to "Inactive" for a reduced licensing fee?

Consider WSBA "Emeritus" status. Emeritus is a limited license to practice with the same low licensing fee as "Inactive" without the mandatory MCLE requirements.

For more information please contact Sharlene Steele, WSBA Access to Justice Liaison, at (206) 727-8262 or sharlene@wsba.org.

The following article originally appeared in the summer 2006 Elder Law Section newsletter, and is being used with our appreciation and consent of the authors.

Estate Recovery Task Force

by Sean Bleck, Jacob Menashe, and Dick Sayre

On April 7, 2006, Sean Bleck and Jacob Menashe, representing the WSBA Elder Law Section and the Washington Chapter of NAELA met with representatives of the DSHS Office of Financial Recovery (OFR) (Dick Sayre was unable to attend). The OFR representatives included the Medicaid estate recovery manager, Bill Ward; Cassandra Batdorf and Shawn Hoage of his staff; and Joe Christy of the Attorney General's Office.

The following represents what Sean Bleck and Jacob Menashe concluded from the meeting, but should not be considered a statement of policy that has been endorsed by OFR or the Attorney General.

- Both "TEFRA" liens (filed during the life of a Medicaid recipient who is in a nursing home and unlikely to return home) and Medicaid estate recovery liens only attach to the ownership interest of the Medicaid recipient in the property. Thus, the interests of co-owners, including a spouse of the Medicaid recipient, are not subject to the lien. We have requested that the Notice of Intent to file Lien and the lien itself clearly state that the lien is limited to the interest of the Medicaid recipient in the property.
- When a Medicaid recipient dies and is survived by a spouse, or minor or disabled child, OFR may file a lien, but may not enforce the lien until there is no longer a surviving spouse or minor child or disabled child. Until such time as the lien is enforceable, **any owner of the property** (not just the surviving spouse or minor or disabled child) is entitled to fully enjoy their ownership interest in the property. This includes the right of the owner to sell, encumber or refinance the property. OFR will adjust their lien to allow this full enjoyment, which can include removing the lien if there is a sale, or subordinating the lien to accommodate another secured interest in the property. We have requested that the following language be added to the Notice of Intent to file Lien and the lien itself: "While there is a surviving spouse, minor child or disabled child, the owner of the property is entitled to fully enjoy all benefits of ownership, and OFR will adjust their lien to permit the sale of the property or obtaining a loan secured by the property."
- When OFR places a lien on property during the life of a surviving spouse of a deceased Medicaid recipient, the lien may be enforced upon the death of the surviving spouse. This can include a claim against the estate of the surviving spouse, but only with respect to property which can be traced to an ownership interest of the deceased Medicaid recipient.
- Only the **value** of property as of the date of death of a Medicaid recipient is subject to Medicaid estate recovery. For instance, if a Medicaid recipient owns property equally with a spouse that is worth \$200,000 on the date of the Medicaid recipient's death, the maximum amount that can be recovered is \$100,000. This is the case even if the property substantially appreciates after the Medicaid recipient's death and before the death of the spouse. The value of property will generally be based on assessed value for property tax purposes, but market analyses may be required where there are questions about the adequacy of the assessed value.
- Interest will not accrue on property while there is a surviving spouse, minor or disabled child. In other words, interest will not accrue on a Medicaid lien until the lien is actually enforceable.
- It is not now the practice of OFR to assert a claim against the estate of a surviving spouse that is unrelated to property owned by a previously deceased Medicaid recipient. However, OFR reserves the right to consider whether a "community debt" theory might be asserted against the estate of the surviving spouse.
- OFR will not assert a Fraudulent Transfer Act claim with respect to any property transferred to a spouse by a Medicaid recipient. Thus, property transferred to a spouse at any time before the death of a Medicaid recipient will not be subject to Medicaid estate recovery related to the Medicaid recipient (unless a "community debt" approach is later adopted).
- OFR will generally not assert a Fraudulent Transfer Act claim with respect to transfers made during the life of a Medicaid recipient if disclosure of such transfers has been timely and appropriately made to DSHS financial eligibility staff. However, OFR would consider a Fraudulent Transfer Act theory where a transfer of assets is made very close to the moment of death of a Medicaid recipient even if the transfer has been appropriately disclosed. Undisclosed transfers that would have affected Medicaid eligibility if disclosed, will be the main focus of Fraudulent Transfer Act claims.

The following article originally appeared in the summer 2006 Real Property, Probate & Trust section newsletter and is being used with our appreciation and consent of the authors.

Good Governance Practices for Family Foundations

by N. Elizabeth McCaw,¹ Stokes Lawrence P.S., Seattle, and
Katie S. Groblewski,² Stael Rives, Portland, Oregon

I. Introduction

When assisting an individual with the formation or the maintenance of a private foundation, it is the attorney's responsibility to advise the client about the ongoing management of the foundation. This is especially important if a donor client or his or her family members will have an active role in the governance and management of the foundation; particularly, if the donor and/or his or her family members will receive compensation from the foundation for their services.

This article summarizes the duties of loyalty, due care and obedience imposed upon the directors of private foundations organized as nonprofit corporations under Washington law, and provides a general overview of the private foundation rules set forth in the Internal Revenue Code of 1986, as amended (the "Code"). Although the tax-exempt status of a private foundation is a function of federal law, state law defines the fiduciary duties of the foundation's Board of Directors, and the proper management of a private foundation requires a keen understanding of both sets of overlapping duties. The foundation and/or its Board members may face adverse tax consequences for failing to adhere to federal law requirements and the Board members may possibly face civil liability for failing to adhere to state law requirements.

II. Washington State Law Fiduciary Duties

The Washington Nonprofit Corporation Act (RCW Chapter 24.03) contains specific provisions dealing with the duties of the Board of Directors. The Board of Directors is the body responsible for the governance of a private foundation organized as a non-profit corporation, and the Board of Directors is ultimately responsible (and liable) for the affairs of the foundation.³ The foundation, its directors, its officers, and the state attorney general may enforce the duties of loyalty, due care and obedience discussed below.⁴ The Board's failure to fulfill these duties may result in civil penalties under state law and could constitute grounds for the imposition of excise taxes or even the loss of a foundation's tax-exempt status under federal law.

In addition to state and federal law, the foundation's articles of incorporation, bylaws, policies and procedures, and resolutions of the Board of Directors further define the duties of a director. The articles of incorporation usually will grant broad authority to the Board of Directors; however, this authority is often narrowed or explained in greater detail in the bylaws. Larger foundations also may have

written operating policies and procedures that cover topics such as personnel, financial management, compensation and expense reimbursement. When drafting organizational documents for a private foundation, whether at the formation stage or after the foundation has been in existence for some time, it is important that all of the foundation's documents address the directors' duties in a consistent manner.

A. General Duty to Manage Corporate Affairs

The most basic duty of the Board of Directors under Washington law is to manage the affairs of the foundation. RCW 24.03.095. This duty requires the Board of Directors to take responsibility for the following items (though the importance of each item will vary depending on the size of the particular foundation and scope of its activities):

- Determining the foundation's mission, purposes and goals;
- Hiring staff, such as a program or executive director, defining his or her duties, setting his or her compensation and bonuses, reviewing his or her performance on a regular basis, and terminating the executive director, if necessary;
- Adopting operational policies and procedures;
- Ensuring adequate financial and human resources;
- Approving budgets and establishing appropriate fiscal policies and financial controls;
- Ensuring compliance with federal, state and local laws; and
- Ensuring legal and ethical integrity and accountability.

The Board of Directors also is responsible for assessing its own performance and the performance of its individual members. The Board should recruit and train new Board members as well as provide ongoing educational activities for the Board.

If a private foundation is to have a limited life span, the term of the foundation's existence and the process for its liquidation and dissolution should be clearly spelled out in its governing documents. If the foundation is to exist in perpetuity or for more than one generation, it is critical for the Board to develop an appropriate succession plan. Au-

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thority can be passed down from one generation to the next by bringing on younger family members as “honorary” or “junior” Board members and then training them over time to assume responsibility as regular members of the Board. It is important to address these issues in the foundation’s bylaws in order to keep the management of the foundation efficient, innovative and focused on its charitable purpose.

In certain circumstances, it may be appropriate for directors to delegate duties to committees, non-director officers, employees or agents, though such delegation will not relieve any director from his or her responsibilities. The articles of incorporation or bylaws may provide that the Board of Directors may designate and appoint committees to have and exercise the authority of the Board in the management of the affairs of the foundation (typically referred to as an “executive committee”). See RCW 24.03.115. However, at least two directors must serve on an executive committee and the delegation of authority to a committee will not relieve the Board of Directors, or any individual director, of any responsibility imposed upon the Board or the individual director by law. RCW 24.03.113 - .115.

Practice Tip: Generally, the larger a foundation is, the more committees the foundation will have. If the private foundation will have a large endowment, it may be prudent to establish at least a nomination committee (to seek out and nominate future board members), a grant-making committee (to identify potential grantees and help distribute the foundation’s funds), and an investment committee (to oversee the investment of foundation assets).

B. Duty of Loyalty

A director must perform his or her duties, including his or her duties as a member of any Board committee, in good faith and in a manner that he or she believes to be in the best interests of the foundation. RCW 24.03.127. The fiduciary duty of loyalty generally has the following three components:

- Directors must avoid conflicts of interest;
- Directors must not to usurp corporate opportunities; and
- Directors must maintain the confidentiality of private corporate affairs. *Arneman v. Arneman*, 43 Wn.2d 787, 264 P.2d 256 (1954).

The duty to avoid conflicts of interest requires directors to always act for the benefit of the foundation and to avoid self-dealing activities (discussed in more detail, below). If a director or his or her family may benefit, directly or indirectly, financially or otherwise, from the director’s position on the Board, a conflict of interest exists.

Consistent with Washington law and the best practices recommended by the IRS, prior to a Board’s discussion or consideration of a matter in which a director has a conflict of interest, the affected director should fully disclose his or her interest and then remove himself or herself from considering or voting on the issue.⁵ Any disclosures should be made in writing and should be recorded in the minutes of the meeting. The conflicted director’s abstention should also be recorded in the minutes. So long as the proposed transaction does not constitute an act of self-dealing, the Board of Directors may ultimately approve a transaction in which a director has an actual or potential conflict of interest, provided that the disinterested directors determine that the decision is in the best interests of the foundation. However, in the private foundation context, it will be rare if there is ever a transaction considered where there exists a conflict of interest but there is no self-dealing involved.

Practice Tip: Transactions in which directors have conflicts of interest are under intense scrutiny by the IRS and Congress. Therefore, it is recommended that every Board of Directors adopt a “conflict of interest” policy. A sample conflict-of-interest policy with language “approved” by the IRS can be found on pages 25 and 26 of the instructions for the Form 1023 Application for Tax-Exempt Status (<http://www.irs.gov/pub/irs-pdf/i1023.pdf>).

The duty of loyalty also prohibits directors from usurping the opportunities of the foundation. Accordingly, a director must disclose business opportunities he or she wishes to pursue if such opportunity is related to the foundation’s business or purpose. Directors also are required to maintain the confidentiality of foundation affairs. Information exchanged and discussed at Board meetings is confidential and should not be discussed with outside parties.

C. Duties of Due Care and Obedience

A director must perform his or her duties, including his or her duties as a member of any Board committee on which he or she serves, with the care, including reasonable inquiry, of an ordinarily prudent person acting in a like position under similar circumstances. RCW 24.03.127. Directors also owe a duty of obedience to the foundation. This duty requires directors to act in a lawful manner and in accordance with the mission of the foundation as it is stated in the foundation’s organizational documents.

The duty of due care is an active duty, and it relates to the level of competence expected of directors. Directors cannot avoid liability by claiming ignorance of corporate affairs. Therefore, the duty of due care requires that:

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- Directors attend Board meetings regularly and read minutes of meetings and reports presented by officers, agents and employees;
- Directors exercise independent judgment when voting, ask questions, participate in discussions and decision-making, and remain informed about the foundation's affairs, programs and activities; and
- Directors require that financial reports and budgets be produced. They must review financial information and evaluate the appropriateness of expenditures, including salaries and other forms of compensation.

It is important to remember that no single director has the authority to act alone on behalf of a foundation. Under Washington law, the act of a majority of the directors present at a meeting at which a quorum is present constitutes an act of the Board of Directors, unless the bylaws of the foundation requires a greater vote. RCW 24.03.110. If neither the bylaws nor the articles of incorporation state the number of directors required for a quorum, then a majority of the directors of the organization constitutes a quorum. *Id.* A foundation's bylaws or articles of incorporation may set a lesser number of directors for a quorum, provided, however, that this number may not be less than one-third of the directors. *Id.*

A director who is present at a meeting of the Board of Directors will be presumed to have assented to any action taken at the meeting. RCW 24.03.113. If the director does not approve of the action, he or she must make certain that his or her dissent or abstention is noted in the minutes of the meeting. In the alternative, the director may file a written dissent or abstention with the secretary during the meeting or immediately afterwards.

Washington law does not permit directors to vote by proxy. See RCW 24.03.110 (providing that the "act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors" unless the articles or incorporation, bylaws or a statute requires the consensus of a greater number of directors). A Board of Directors may take action without a meeting, provided, however, that the action must be taken in the form of a written consent executed by all of a foundation's directors. RCW 24.03.465.

Washington law does not allow directors to hold "e-mail meetings"; however, written consents may be obtained via e-mail. See RCW 24.03.465 and RCW 24.03.005(18). Before notice of meetings may be sent via e-mail, each director must consent, in writing, to the use of electronically transmitted messages. RCW 24.03.009(1)(b). Action taken through written consent, transmitted via e-mail is valid so

long as the transmission may be retained, retrieved, and reviewed by the sender and the recipient and may be directly reproduced in a tangible medium by the sender and the recipient. See RCW 24.03.005(12).

Practice Tip: Include provisions in the foundation's bylaws permitting communication via e-mail. Remember to obtain from each Board member his or her written consent to the use of electronic communications and his or her preferred e-mail address for foundation business.

In fulfilling his or her duties, a director is permitted by law to rely on information, opinions, reports, or statements (including financial statements and other financial data) prepared and presented by (1) officers and employees of the foundation whom the director believes to be reliable and competent; (2) counsel, public accountants, or other persons as to matters which the director believes to be within such individuals' professional or expert competence; or (3) a committee of the Board, acting within its designated authority, which the director believes merits confidence. RCW 24.03.127. However, reliance on such information does not excuse the director from exercising reasonable inquiry and acting as a prudent person.

Practice Tip: If a director who is a professional offers an opinion in his or her professional capacity, he or she should be aware that he or she may be held to a higher duty of care. Therefore, it is recommended that if the opinion or advice of a professional is needed, it might be appropriate to acquire such opinions or advice from an independent third party. Directors are required to know when expertise is required and then obtain it.

III. Federal Law – Private Foundation Rules

In an attempt to curb perceived abuses in the operation of private foundations, Congress enacted a set of "private foundation rules" in 1969, which are found in Sections 4940 through 4948 of the Internal Revenue Code of 1986, as amended. The private-foundation rules generally impose excise taxes on foundations that engage in certain types of prohibited activities. Penalties may apply to Board members and officers that participate in or approve these transactions. The private-foundation rules cover five categories of activities:

- **Self-Dealing:** certain transactions between a foundation and "disqualified persons" (e.g., substantial contributors to the foundation).
- **Failure to Distribute Income:** the failure to distribute a foundation's "net investment income" (this is

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in addition to a requirement to distribute annually a five percent minimum of a foundation's total assets).

- **Excess Business Holdings:** where the foundation holds stock (or other ownership interests) in a business interest in which a contributor (or the contributor's family) owns a substantial interest (i.e., only a family's own closely held stock is transferred to a foundation).
- **Jeopardy Investments:** where assets of the foundation have been invested in any investment that jeopardizes the tax-exempt purpose of the foundation (i.e., trading on margin or trading futures).
- **Taxable Expenditures:** where an expenditure made by the foundation is inconsistent with the organization's tax-exempt purpose (e.g., donating money to a political campaign).

A full discussion of the private-foundation rules is beyond the scope of this article. However, the following provides an overview of the rules regarding self-dealing transactions. It is important to remember that a violation of these self-dealing rules may not only result in the imposition of excise taxes under the Code, but also may constitute a violation of the various duties imposed by state law on the director.

A. Self-Dealing Rules

A private foundation is prohibited from engaging in self-dealing with any disqualified person. IRC § 4941. A "disqualified person" is defined by federal law as any substantial contributor to the foundation. IRC § 507(d)(2)(A). A "substantial contributor" is any person who contributes or bequeaths, in the aggregate, an amount greater than two percent of the total contributions and bequests received by the foundation and \$5,000. Treas. Reg. § 1.507-6(c).

Practice Tip: A donor will become a substantial contributor to the private foundation on the first date on which the foundation has received, in the aggregate, an amount that is more than the two percent/\$5,000 threshold. In other words, a foundation must track all of a donor's contributions for purposes of the self-dealing rules as the donor may not initially be a substantial contributor but may become one over time.

Disqualified persons also include any individual in a position to exercise substantial influence over the affairs of the foundation. IRC § 4958(f)(1)(A). Directors and officers are presumed to be in a position to exercise substantial influence over the foundation's affairs and therefore, are con-

sidered to be disqualified persons. Treas. Reg. § 53.4958-3(c)(1). Family members of directors are also disqualified persons. IRC § 4946(a)(1)(D). A corporation or partnership also may be a disqualified person if a foundation director (or his or her family members) owns more than 35 percent of the total voting power of the corporation or more than 35 percent of the profit interests in the partnership. IRC § 4946(a)(1)(E),(F).

Most financial transactions between a private foundation and a disqualified person constitute acts of impermissible self-dealing, regardless of whether the transaction results in a benefit or detriment to the foundation. The following six categories of transactions are self-dealing, *per se*, under IRC § 4941(d)(1):

- The sale, exchange or lease of property;
- The lending of money or other extension of credit;⁶
- The furnishing of goods, services or facilities;
- The payment of compensation (or payment or reimbursement of expenses);
- The transfer to, or use by or for the benefit of, a disqualified person, of any income or assets of the foundation; and
- An agreement to pay a government official.

There are certain statutory exceptions to the foregoing rules. *See* IRC § 4941(d)(2). Consistent with these exceptions, the following types of transactions are not considered to be self-dealing:

- A disqualified person may make interest-free loans to a private foundation if the loaned funds are used exclusively for the foundation's exempt purposes.
- A disqualified person may offer a rent-free lease to a private foundation and may provide furnishings and equipment to the foundation without charge so long as the facility, furnishings and equipment are used exclusively for the foundation's exempt purposes.
- A private foundation may pay a disqualified person reasonable compensation and may pay or reimburse the expenses of a disqualified person if the amounts are reasonable and necessary to carry out the foundation's exempt purposes and if the total compensation paid is not excessive. IRC 4941(d)(2)(E); Treas. Reg. § 53.4941(d)-3(c).

Practice Tip: Though there are recognized exceptions to the self-dealing rules, any transaction between a disqualified

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person and the foundation that fall within one of these exceptions should still be adopted by the Board by a formal resolution and only after consulting with legal counsel. The resolution also should be adopted in accordance with the conflict of interest policy (see discussion, above).

B. Compensation of Directors

One aspect of foundation governance that is currently under intense scrutiny by the IRS is the reasonable compensation of a foundation's Board members. While the Treasury Regulations of the Code contain the clearest guidelines for appropriate compensation for foundation directors, it is important to also ensure that the any compensation paid also complies with duties imposed by Washington state law described herein.

Compensation may be paid to individuals performing services for the foundation. If a donor or the donor's family members performs services for the foundation, then payment of compensation to such persons involves careful consideration under the self-dealing rules.

The compensation paid should be "reasonable" in order to comply with the exception to the self-dealing rules. Compensation is "reasonable" if it is equal to "such amount as would ordinarily be paid for like services by like enterprises under like circumstances." Treas. Reg. § 1.162-7(b)(3). The Treasury Regulations provide a set of procedures for evaluating the reasonableness of compensation. Pursuant to Treas. Reg. § 53.4958-6, compensation will be presumed to be reasonable if:

- Compensation is approved by those members of the Board who do not have a conflict of interest (or, in the alternative, by a committee of the Board composed entirely of individuals who do not have a conflict of interest) without the participation of the disqualified person;
- Prior to making its determination, the Board obtains and relies upon appropriate comparability data; and
- The Board (or committee) adequately documents the basis for its determination and the date upon which the determination was made concurrently with making its determination.

In evaluating the reasonableness of compensation, a Board of Directors may rely on data such as (1) compensation levels paid by similarly situated foundations for comparable work; (2) the availability of similar services in the geographic area; (3) current compensation surveys compiled by independent firms; and (4) written offers from organizations competing for the disqualified person's services. See Treas. Reg. § 53.4958-6(c)(2)(i).

To protect its directors from financial harm resulting from a civil lawsuit, a foundation may elect to purchase directors' and officers' (D&O) liability insurance when contemplating reasonable compensation. In general, indemnification clauses and the provision of this type of insurance do not constitute impermissible acts of self-dealing. See Treas. Reg. § 53.4941(d)-2(f)(3)(i). Furthermore, these "fringe benefits" generally should not be included in the directors' or officers' gross income. See Treas. Reg. § 1.132-5(r)(3)(ii).

Practice Tip: It is important to ensure that appropriate compensation for each paid position within the foundation is determined using the context of the job description, the expertise and background of the individual performing the work and the time spent performing the work. If a disqualified person is to be paid for his or her personal services to the foundation, it is critical to keep the documentation described herein, which should be incorporated into the formal resolution adopting the foundation's compensation structure.

IV. Conclusion

Private foundations serve vital roles in our community. In consideration for lessening the burdens on government and satisfying community and societal needs, foundations are allowed certain privileges not afforded to for-profit companies. However, it is important to remember that these privileges are extended only so long as the foundation and its Board uphold their obligations under the "social contract" with the IRS and state government.

The Boards of private foundations today are expected to ensure legal and tax compliance, enhance transparency and accountability, and improve governance practices. In an environment of increased public scrutiny and regulation of charitable organizations, it is the responsibility of a Board of Directors to ensure that a foundation operates within the bounds of law and in furtherance of its charitable purpose, and it is the responsibility of the lawyers advising these individuals to offer their clients the education needed to fulfill their duties.

1 N. Elizabeth McCaw is a shareholder with the Seattle firm of Stokes Lawrence, P.S. Her practice focuses on estate planning, gift and estate taxation, probate and the law of exempt organizations.

2 When this article first appeared, Katie Groblweski practiced in Vancouver, WA at Landerholm, Memovich, Lansverk & Whitesides, P.S. She now practices across the Columbia in Portland at Stoel Rives in estate planning, trust and estate administration, taxation and tax-exempt organizations.

3 A private foundation may be structured as a corporation or a charitable trust. The management structure of a foundation organized as a charitable trust will not be discussed in this article; however, the duties and obligations of the Trustee(s) are not unlike those discussed herein.

4 These duties of loyalty, due care and obedience are not enforceable by outside third parties.

5 A director may not vote on a matter in which he or she has a conflict of interest. *Nord v. Eastside Association*, 34 Wn. App. 796 (1983).

6 Note that State law also prohibits a foundation from making loans to its officers or directors. RCW 24.03.140.

Navigating the Retirement Transition

By Mike Long, Attorney Counselor, Oregon Attorney Assistance Program

Introduction

- If you were defining retirement for yourself, how would you define it?
- What are you looking forward to most in retirement?
- What is the one question about retirement that you would like answered?

Increased Longevity

- In 1900, the average life expectancy at birth for a newborn baby was roughly 47 years.
- Presently, it is 74 for men and 81 for women.

Longevity

- The average healthy man who is 65 years old today can expect to live until 81.
- The average healthy woman who is 65 years old today, can expect to live until age 84.
- During most of human history, only one in ten people lived to the age of 65.
- In contemporary America, 8:10 people live past their 65th birthday.

How long will you live?

- **Healthspan Calculator:** Estimate your life expectancy and obtain specific lifestyle suggestions: www.agingresearch.org/calculator/quiz.cfm

Retirement

- In 1900, Americans lived 1.2 years in retirement;
- In 1997, they averaged 17 years in retirement;
- With life expectancies increasing, more people will live 20 years in retirement.

Extended high functioning

- Not only are we living longer, we are maintaining a higher level of physical health and mental functioning as we age.
- We are experiencing physiological old age later in life.

How lawyers are envisioning retirement?

The Lawyer Retirement Survey

- 11% of the lawyers surveyed do not plan to ever retire.

They plan to continue to practice full-time or part-time until they die or are no longer capable of practicing.

- 30% plan to continue practicing law part-time after age 65 mainly for the stimulation, sense of purpose, and satisfaction it provides.
- 11% plan to continue practicing law part-time after age 65 primarily for the income it will provide.
- 18% of lawyers surveyed plan to retire completely and no longer work for pay by age 65;
- almost 60% plan to do so by age 70;
- about 40% plan to continue to practice law or work after age 70.

Hopes and Dreams

- 71% of lawyers envision retirement as a time to begin a new chapter in life.

	Males 50+	Females 50+
Increased control over my schedule	68%	87%
More time and opportunity to travel	68%	87%
More time for family and friends	62%	81%
A slower pace	62%	75%
Time for community service, volunteering, hobbies, recreation or new educational opportunities	62%	81%
More time for exercising and fitness	56%	81%
A decrease in adversarial relationships	55%	75%

Concerns

Financial	(Age) 60+	50-59	40-49
Projecting long-term financial needs	73%	68%	74%
Concerns regarding Medicare, health insurance and long-term care insurance	50%	65%	58%
That you won't be able to afford to retire	20%	36%	52%
Knowing how to invest for and in retirement	26%	36%	47%
Living without a paycheck or monthly draw.	25%	29%	36%
That you will struggle to make ends meet	21%	32%	36%
Concerns regarding the continued existence/availability of Social Security	13%	31%	40%
Other	9%	7%	7%

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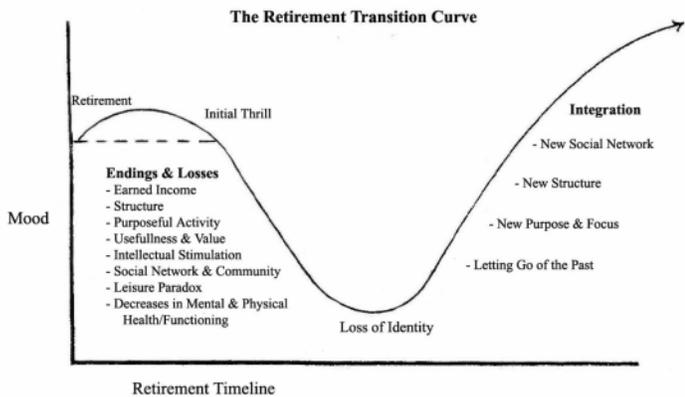
Navigating the Retirement Transition from previous page

Personal Concerns	(Age) 60+	50-59	40-49
Loss of professional camaraderie and affiliations	44%	31%	30%
Loss of intellectual stimulation	40%	37%	31%
Loss of professional identity	38%	22%	9%
Loss of opportunities to use professional skills and experience	35%	29%	14%
Loss of social interactions/social isolation	33%	32%	30%
Loss of daily structure	31%	21%	17%
Concerns regarding how time will be spent	25%	24%	14%
Concerns regarding maintaining health and independence	23%	32%	37%
Other	13%	13%	13%

Deciding to retire

- How do lawyers, particularly lawyers in private practice, decide **when** to retire?

Anticipating Transition



Anticipatory Anxiety

Structure & Purpose

- What will you be retiring to?
- How many of you would say that your interests and leisure activities are broader or more numerous now than before you entered law school?

Know thyself

“The more aware you are of the many different part of yourself, the better prepared you’ll be to handle the stresses and strains that come with life’s transitions.” – *Life Changes, Spencer & Adams*

Maintaining a social network

A University of Michigan study of 100 recent retirees reported that the most powerful predictor of life satisfaction after retirement was the size of a person’s social network.

Relationships in retirement

- De novo review of life decisions.
- Coupled expectations.
- The first two years.

Selfcare

- What is your most valuable asset as a lawyer?
- Life-long learning
- Exercise

Whidbey Delight

By Robert A. Berst

On our wedding anniversary, my wife and I decided to sample the distinctive sights of Whidbey Island.

We again chose the Saratoga Inn, located in Langley, as our accommodation. The Inn has 15 rooms and a spectacular view of the Saratoga Passage. It is located in the town of Langley, within easy walking distance of the shops, galleries, and restaurants. The Inn is a good example of modern convenience combined with traditional décor and amenities, such as an old-fashioned porch and plenty of natural wood.

One measure of a successful trip for Evalie and me is the quality of the dining. I should mention that the Saratoga Inn provides a full breakfast and interesting snacks, with a complimentary wine tasting in the afternoon. On our first day we met our friends Charlotte and Dick for lunch in the well-known Café Langley, right in the middle of town. The restaurant is interesting and includes a number of unusual items as lunch fare.

One highlight of our trip was a return visit to Cultus Bay Nursery and Garden at the south end of the island. The nursery has "an enchanted garden," according to its brochure, and it is truly enchanted. There is a delightful display of perennials, shrubs, herbs, and vines in a very secluded setting. It is well worth a visit. We purchased a couple of drought-resilient plants, and when Mary of the Garden's staff learned it was our wedding anniversary, she presented us with a gift – a very unusual hydrangea.

Another highlight of our trip was a visit to Sunlight Beach, where we had a rustic home-built summer cottage for many years when our children were young. The cottage has been demolished, but the new owners, Dean and Sharon, incorporated much of the cedar paneling, used some of the period light fixtures as ornamental highlights, used the old and very weathered kitchen window as a mir-

ror in the main bath, and even saved the subtly spectacular home-made double-decker beds which do not use any nails or screws in their construction. It brought tears to our eyes just seeing this splendid use of special parts of our old cottage.

Back to the food. Our first evening meal happened to be opening night at a new restaurant in the middle of town: Prima.¹ The chef has a special way with sauces and herbs. Our meal was excellent, as was the service. We can certainly recommend the confit of duck leg over a salad of marinated Walla Walla onions frisee, pay lentils and warm bacon vinaigrette, as well as the sautéed wild Gulf prawns. We also enjoyed our wine from an extensive, unusual, and varied wine list.

Our next evening meal was at the traditional Edgecliff, with its magnificent view of Saratoga Passage. A meal at the Edgecliff is always a wonderful experience.

A surprise highlight of our trip was lunch at a new restaurant in Freeland. It bears the name of the chef/owner, Gordon's. Gordon certainly knows his way around sauces and herbs. The chicken pasta was delectable.

We paid a visit to the Whidbey Island Winery, which is a mile or two south of Langley. It is worth visiting just to enjoy the lovely setting. They make white wine from some locally grown grapes and bring in grapes from Eastern Washington for a nice selection of red wines.

We are blessed in the Pacific Northwest to have an almost inexhaustible list of beautiful locations and Whidbey Island, the longest island in the continental U.S., is certainly one of those special places.

¹ Editor's note: The next issue of "Life Begins" will include a sequel to this article by fellow Senior Bar section member Joanne Primavera. It seems that her life began on Whidbey Island, where the Famiglia Primavera is an old family, long pre-dating Prima Restaurant. Stay tuned for a trip down memory lane.

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Program schedule continued

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- **11:15 a.m. Signs of Aging – Second Installment**
Stephen E. DeForest – Principal, Riddell Williams P.S., Seattle
- **12 noon Lunch Included in Registration**
- **1:15 p.m. The Death and Rebirth of Elder Law**
William L.E. Dussault – Dussault Law Group, Seattle
- **2:00 p.m. What is All the Fuss About? -- Condominiums in 2007**
Steven Jager – Jager Law Office, PLLC, Seattle
- **2:45 p.m. Estate Planning in the Face of the Washington State Estate Tax**
Ben Porter – Shareholder, Porter Kohli & LeMaster PS, Seattle
- **3:30 p.m. Break**
- **3:45 p.m. Ethics**
Megan Nelson – Associate, Buck & Gordon LLP, Seattle
- **4:30 p.m. Complete Evaluation Forms • Adjourn**

Reception following courtesy of Bonnie Amble Pladson, President of BECU Trust Company (a great chance to socialize, taste some good wine, and eat some good food)

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