

# FEDERAL BAR ASSOCIATION

of the Western District of Washington

# NEWS NEWS NEWS NEWS

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SUMMER 2003



## ARGUING THE IOLTA CASE

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## PRESIDENT'S MESSAGE

### FBA ESTABLISHES WILLIAM L. DWYER JURY PROJECT AWARD



I asked Duncan Manville, our FBA News editor, what he was looking for in a president's column. He let slip words like "president's prerogative"—dangerous territory to cede to a one-time history major. Still, deciding what to write was actually pretty easy once I thought about it. Better yet, it's something you'll want to know about.

In early 2002 we lost the Honorable William L. Dwyer, a universally respected trial lawyer and judge who was also a friend and mentor to many of us. I don't need to belabor Judge Dwyer's contributions to the public, bench, and bar—the honors and acknowledgments that he received during his long career speak for themselves.

In Association Board meetings and at public events following Judge Dwyer's death, many of us talked about finding a way to honor his memory in a manner that would be consistent with how he had lived his life. The Board decided that the Federal Bar Association of the Western District of Washington, together with the University of Washington, would establish the William L. Dwyer Jury Project Award. This endowment will provide an annual scholarship to a student of the University of Washington School of Law, based on the outcome of a writing competition on the American jury system. Most of our members know that the public institution of the jury was a cause that Judge Dwyer championed throughout his professional life. As he wrote in his 2002 book on the subject, *In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy*:

At several turning points in Anglo-American history the jury has interposed its common sense, and

its resistance to tyranny, between the government and the powerless individual. In all kinds of cases it has given its members a unique first-hand experience in the workings of government. It has endured because it has worked.

The Dwyer Jury Project Award will help to promote discussion about the jury system, and it will also advance another of Judge Dwyer's causes—the education of young lawyers.

Of course, in order for this program to be a success, we need to raise money. Fundraising is under way. A number of firms, large and small, have donated to the program, and many of our colleagues

have made individual donations as well. I am asking each of you to join me in making a personal donation to the Dwyer Jury Project Award, and to encourage your firm to do so as well. Printed below is a form to mail in with your donation. We understand from the University of Washington that your gifts will be tax deductible pursuant to applicable law.

In my view, the William L. Dwyer Jury Project Award will promote two valuable causes and will honor Judge Dwyer's memory in a way that I hope he would have found meaningful. This is a worthy effort, and I encourage you to contribute to it today.

*Kevin D. Swan*

### **William L. Dwyer Jury Project Award**

Please make your check payable to *UW Dwyer Jury Project Award*.

Name: \_\_\_\_\_ Amount Enclosed: \$ \_\_\_\_\_

Firm (if this is a contribution by a firm): \_\_\_\_\_

Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

*Return with your check to:*

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On the cover: (l-r) Charles Sipos, Kathleen O’Sullivan, David Burman, Nicholas Gellert

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## PROFILE OF JUDGE RONALD B. LEIGHTON

By Duncan Manville

In 1937, the year before the Federal Rules of Civil Procedure took effect, one in five federal civil cases went to trial. By 1990, that number had dropped to 4.3%. Our state courts have witnessed a similar progression away from the public adjudication of disputes. But in 1976, when Ronald B. Leighton—the Western District's newest U.S. District Court Judge—accepted an associate position with Tacoma-based Gordon, Thomas, Honeywell, Malanca, Peterson, & Daheim PLLC, a young Tacoma attorney looking for cases to try could still find them without too much difficulty.

In some areas of law, that is. Judge Leighton wanted to try cases. He had debated in high school and enjoyed trial practice courts as a law student. As an ambitious new associate, however, he was leaning toward antitrust law because "the perception was that the best and the brightest went into antitrust." He was "rescued," he says, by Bud Daheim, who told him, "Look, you're going to like trying cases. Why don't you try cases for a while? And then you can decide if you want to go into antitrust and that's fine, but if you go into antitrust right away, you're just going to be a bag carrier. And you don't want to be a bag carrier."

Judge Leighton did not want to be a bag-carrier. So he began looking for trial work, and within three months was trying a securities fraud case—the first real trial he had ever observed. "Fortunately," he says, "television was close enough as a facsimile that I knew how to comport myself, what to do, and when to do it." (Note: Calista Flockhart was only twelve in 1976.) "It was a wonderful experience." Judge Leighton tried a case every few months for the

next several years, building a "rather eclectic" practice encompassing air-crash, business, environmental, civil-rights, Indian-treaty, and attorney-malpractice litigation on behalf of plaintiffs, defendants, corporations, municipalities, and individuals. He ultimately tried over 60 cases to verdict or other decision during his 26-year career as a litigator.

In 1992, Judge Leighton was nominated by the first President Bush to serve on the U.S. District Court for the Western District of Washington, but he never received a hearing on his nomination. The nomination was withdrawn by President Clinton. Ten years later, in January 2002, the second President Bush nominated Judge Leighton to fill a vacancy created when U.S. District Court Judge Robert J. Bryan took senior status. The U.S. Senate confirmed Judge Leighton's nomination on November 14, 2002, and Judge Leighton received his commission on November 26.

Judge Leighton was born in 1951 in Stockton, California, about 80 miles east of the San Francisco bay area. Home of



the annual Asparagus Festival, Stockton is the focal point for agribusiness in the San Joaquin Valley. When Judge Leighton was twelve, his family moved from Stockton to Salinas, California, some fifteen miles east of Monterey and 100 miles south of San Francisco. Known as the "Salad Bowl of the World," the Salinas Valley grows more produce than any other area in the U.S.—including 80 percent of the nation's lettuce, 50 percent of its cauliflower and mushrooms, 25 percent of its celery, 60 percent of its broccoli, and 90 percent of its artichokes. (Today Judge Leighton's taste in food runs more toward anything that can be cooked on a barbecue.)

Judge Leighton's home in Salinas was an 80-acre ranch rented by his parents. Judge Leighton worked the ranch with his father (a schoolteacher and the principal of one of the tougher schools in the Salinas City School District), his mother (who worked for the School District at North Salinas High School), and siblings Randy, Janice, and Janie. "We had everything," Judge Leighton says. "Everybody except for me was into 4-H and Future Farmers of America

and so Janice had sheep, Janie had pigs, Randy had steers, and I kind of took care of the horses." Judge Leighton's parents and siblings still live in Salinas, all within five miles of each other. His parents are retired. His brother Randy rodeo for a number of years, and is now a horse trainer. ("He's very talented," says Judge Leighton.) Sister Janice is an agricultural science teacher at Alvarez High School in Salinas. And sister Janie is married and a part-time school-bus driver.

While Judge Leighton's siblings focused their attention on farming activities, Judge Leighton studied, ran for and was elected to various leadership positions in school, and played baseball and basketball. Before he graduated from high school in 1969, two professional baseball teams—the San Francisco Giants and the Detroit Tigers—invited him to their California tryouts. Unfortunately, Judge Leighton "ran the hundred in about an hour," and was told after the tryouts not to call either team, that they would call him.

Seeing the writing plainly inscribed on the wall, Judge Leighton enrolled at Whitworth College in Spokane, Washington. He was only the second member of his family to attend college—his father had earned a degree under the G.I. Bill. It was Judge Leighton's first foray outside California. "I went there to play baseball," he says, "and fell in love with the school." He majored in political science, and minored in history and English. After graduating from Whitworth in 1973, he enrolled at the University of California, Hastings College of Law. Law school, he says, was "okay," but he was in a hurry to get out and start practicing. He received his J.D. in 1976, and clerked for Justice Frank K. Richardson of the California Supreme Court.

By that time, Judge Leighton says, he had decided he was a Northwesterner, in large part because he wanted to live in a community where he could have an impact. Tacoma was such a community—a place where life did not have to be attacked but could be lived. And Gordon, Thomas was a firm that prided itself on a commitment to community involvement: "Better municipal government, downtown development, economic revitalization, the arts, you name it, somebody from Gordon Thomas was probably right in the middle of it. That was something that we were expected to participate in, and we did." Judge Leighton is obviously proud of his former firm, for which he was frequently a spokesperson. (In 1995, two of Judge Leighton's former partners—Jim Waldo and Jay Inslee—were running for governor. Judge Leighton quipped to a reporter for the Seattle Post-Intelligencer that "We've got at least 20 lawyers who could run the state but we could only spare two.") Although Judge Leighton says his family misses him, he has never looked back or regretted his decision to relocate from California to Tacoma.

As a Gordon, Thomas partner, Judge Leighton was a Fellow of the American College of Trial Lawyers and the International Society of Barristers, and was listed in the "Best Lawyers in America." In a poll of Washington attorneys conducted in 2001 by Washington Law & Politics, he was voted one of the "Ten Best Lawyers in Washington." He is a past President of the Washington Defense Trial Lawyers and the Washington Chapter of the American Board of Trial Advocates; and a past Chairman of the Pierce County Civil Service Commission and the Washington State Bar Association Judicial Recommendation Committee. He has been a Member of the Board of Trustees of Whitworth College since

1976. Since 1989, he has been an Officer and Director of the R. Merle Palmer Minority Scholarship Foundation, a non-profit organization that provides funding and mentoring so that minority youth of Pierce County can attend college. He lives in Lakewood with his wife Sally (also an accomplished lawyer), and their two sons, Ben and Joe.

Judge Leighton's heroes are Willie Mays and Abraham Lincoln—the latter, Judge Leighton notes, at once an exceptional storyteller and a self-deprecating man who never took himself too seriously. ("I am not an accomplished lawyer," President Lincoln once wrote.) Judge Leighton has endeavored to emulate those qualities throughout his career. Bradley Jones, one of Judge Leighton's former partners at Gordon, Thomas, reports that several months ago one of Judge Leighton's law clerks overheard an attorney on the losing end of one of Judge Leighton's rulings complaining that the decision was the dumbest that she had ever heard. Judge Leighton's response: "She must not know me very well. I'm capable of much dumber decisions than that." Judge Leighton, Mr. Jones notes, also spent well over half his speech at his investiture ceremony in February 2003 praising Judge Bryan and his contributions to the community.

Judge Leighton also admires President Lincoln because while he was practical, he possessed "certain core values that were not for sale." The same appears to be true of Judge Leighton. On the practical side, Judge Leighton believes that judges must be "user-friendly." He is fairly animated on the bench—partly because "like most lawyers, I'd rather talk than listen"; but also because engaging in a give and take with the lawyers who appear before him helps him to understand the parties' respective positions. And as I learned when I called

*Continued on page 13*

## ELECTRONIC FILING: TOP FIVE REASONS TO PARTICIPATE

By Shirley Lindberg

**E**lectronic filing has arrived! On June 23, 2003, the U.S. District Court for the Western District of Washington went live with its new electronic filing program. There are many reasons why litigants and law firms should register to use the new program. Among those reasons are five that appear to be clear front-runners:

- Instant notification of filed documents
- Savings of internal staff time and resources
- Flexibility of filing
- Ability to search documents
- Ability to monitor other cases of interest

### A LITTLE BACKGROUND

The Case Management/Electronic Case Files (CM/ECF) system that replaced the Court's aging case management system is modeled on a system that is being implemented nationwide in the federal judiciary. CM/ECF is now operational in 47 bankruptcy courts and 17 district courts. The Bankruptcy Court for the Western District of Washington has been using CM/ECF since June 2001.

Electronic filing allows all registered users to file their documents with the Court via the internet. The electronic document is the official record of the Court. Paper documents that are filed with the Court are scanned and uploaded into the system by court personnel. The paper documents are discarded upon completion of the upload process. The official Court record is thus "paperless."

Enough background-now on to those five reasons why you should join your colleagues in filing your documents electronically with the Court.

### INSTANT NOTIFICATION OF FILED DOCUMENTS

Almost every day, callers contact the Clerk's Office to ask, "Has the Court entered my order yet?" or "Has a document been filed with the court? It's supposed to be filed today."

To expedite the process of advising litigants about the entry of orders, in May 1999 the Court developed and implemented a fax noticing system for orders and other documents generated by the Court. More than 5000 attorneys consented to receive fax notice from the Court instead of having orders sent to them via U.S. Mail. Thus, many of you took advantage of the opportunity to receive orders from the Court on the date of entry. The fax system was developed as an adjunct to the aging case management system. The demise of the old system meant the simultaneous demise of fax noticing.

Don't panic! CM/ECF allows you to obtain copies of orders and other documents even faster than the fax

system. CM/ECF notifies you by e-mail that a document has been filed, and provides you with a hyperlink to the document. Notification is transmitted instantly with the posting of the document or order! With the notification comes one free look at the document. Be sure to save the document if you think you will want to see it again. If you do not, you can still retrieve the document later via WebPacer for a nominal fee.

In addition to instant e-mail notification of the entry of orders, registered users of the CM/ECF system also receive similar notification of the filing of other documents.

Which takes us to reason number two. . . .

### SAVINGS OF INTERNAL STAFF TIME AND RESOURCES

Registration for CM/ECF comes with the benefit of service of documents pursuant to Rule 5 of the Federal Rules of Civil Procedure. Documents filed electronically with the Court are instantly sent to all other counsel of record who are registered with the Court, thereby eliminating the need for you or your staff to copy the documents and distribute them by mail or messenger. Service is thus accomplished efficiently through the Court's CM/ECF system.

You will also be able to save staff time and resources by filing the documents via the internet rather than having to make that last-minute "mad dash" to the courthouse.

Which takes us to the next reason why you want to file electronically. . . .

### FLEXIBILITY OF FILING

CM/ECF currently allows litigants to file documents with the Court anywhere,

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## ASSOCIATION CELEBRATES SILVER ANNIVERSARY AT 2002 ANNUAL DINNER

By Duncan Manville

The Federal Bar Association of the Western District of Washington held its 19th Annual Dinner on December 4, 2002 in the Spanish Ballroom of the Four Seasons Olympic Hotel. The dinner commemorated the Association's founding 25 years ago by Judge Walter McGovern, Al Malanca, Bill Ferguson, and others.

The 2002 Annual Dinner was preceded by the annual winter CLE, which featured a session on electronic discovery and a discussion of civil liberties and national security issues among a panel that included Chief U.S. District Judge John C. Coughenour, U.S. Attorney John McKay, Federal



Kevin Swan

Public Defender Thomas W. Hillier, II, and National ACLU President Nadine Strossen.

At the dinner, FBA President Kevin Swan spoke about the ways in which the events of the previous year had served to reinforce the importance of our justice system in protecting the rights of the relatively powerless in times of national stress. In this regard no American legal institution, Mr. Swan

noted, is more important than the jury. And no judge placed greater value on the jury than the late Judge William L. Dwyer, who wrote in his 1979 book *In the Hands of the People: Juries and Liberty in the United States* that "[b]y defeating unjust prosecutions, by protecting the weak against overzealous officialdom, by fending off oppressive uses of the law, jurors have strengthened not just liberty but the rule of law itself—and they still do." Mr. Swan announced the establishment of the William L. Dwyer Jury Project Award, a monetary prize that will be presented each year to a student at the University of Washington School of Law who wins a writing competition on the American jury system.

Mr. Swan then introduced Karen Jones, who presented the Association's Service Award to Michele Gammer. Ms. Jones noted that Ms. Gammer's contributions to the Association over the years have been numerous and important, proving the old adage that "if you want to get something done, give it to someone who's busy." Not long after she moved to Seattle in the early 1980s and joined Schweppe Krug & Tausend, Ms. Gammer, with the cooperation of the judges and magistrate judges of the U.S. District Court for the Western District of Washington, established the Federal Civil Rights Pro Bono Panel to provide

volunteer counsel to pro se litigants. She has served as a member of magistrate judge merit selection panels, a lawyer representative to the Ninth Circuit Judicial Conference, a member of the



Michele Gammer

Association's ADR Task Force, a Trustee of the Association's Board of Trustees, and President of the Association—all, Ms. Jones noted, in an "upright, ethical, and publicly quiet" manner that has elevated the bar's good name.

Next on the program was the presentation of a plaque to the Honorable John L. Weinberg in appreciation of his many years of service as a Magistrate Judge of the U.S. District Court for the Western District of Washington. Retired U.S. Magistrate Judge Gene Wilson, Ellen



Magistrate Judge Gene Wilson (Ret.)

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# FEDERAL BAR ASSOCIATION NEWS



Clockwise from top left: Michael Fleming, Bruce Kriegman, Judge Paul Snyder, Susan Jahnke, Charles Ekberg; Kevin Swan, Magistrate Judge John Weinberg, Sarah Weinberg; William Bender, Judge Thomas Zilly, Rita Bender; James Smith, Jr., Todd True, Judge Marsha Pechman; Patrick McVey, Irwin Schwartz; Judge M. Margaret McKeown, Judge Barbara Jacobs Rothstein; Judge Betty Fletcher; Marie Farrelly, Angelo Calfo, Judge Harry McCarthy; Richard Siefert, Mark Hough, David Garrison; Shawn Otorowski, Judge Walter McGovern, James Smith, Jr.



Clockwise from top left: Karen Jones, Carolyn Cairns; Fredric Tausend, Richard White; Tracy Morris, Magistrate Judge Ricardo Martinez; John McKay, Cyrus Vance, Jr.; Judge Barbara Jacobs Rothstein, Judge Robert Bryan, Michael Withey, Cathy Bryan; Al Malanca, Glenna Malanca; Sarah Weaver, Judge Thomas Glover, Gretchen Glover; Magistrate Judge Gene Wilson (Ret.), Judge Philip Swigert (Ret.), Alice Swigert; Judge Franklin Burgess, Paula Olson; Paula Boggs, Chief Justice Gerry Alexander, James Williams, Magistrate Judge Monica Benton

Lenhart Kramer (one of Judge Weinberg's former law clerks), and the Honorable Barbara Jacobs Rothstein offered thoughts and reminiscences about Judge Weinberg, and their best wishes on his imminent retirement.



Ellen Lenhart Kramer

The evening's keynote speaker was Professor Louis Wolcher of the



Magistrate Judge John Weinberg

University of Washington School of Law. Professor Wolcher delivered a speech entitled "What is the Rule of Law?—Perspectives from Central Europe and the American Academy." The text of Prof. Wolcher's speech has been published at 78 Wash. L. Rev. 515 (2003).

Prof. Wolcher's speech was a reflection on the importance of an independent

judiciary as a check on efforts by units of social power to enhance themselves at the expense of the socially powerless. Taking issue with John Adams' characterization of a democratic republic as "a government of laws and not of men," Prof. Wolcher noted that "there is no 'metaphysical certainty' in law." President Adams' epigram, Prof.



Prof. Louis Wolcher

Wolcher said, describes a government built on a system not of legal rules capable of mechanical application, but of fairly uniform social responses that are "wired into us by our legal and social training." The danger inherent in the system, according to Prof. Wolcher, is that this "unthinking process of social interpretation and enforcement" can become a tool of special interests, prejudice, and injustice.



James Stoetzer, Judge Ronald Leighton

But if legal rules can be exploited by the socially powerful, Judge Wolcher noted, they can also be used to hold the socially powerful accountable, largely because they must be interpreted by judges. In the United States, unlike in countries operating under Soviet-era judicial systems, judges are independent. A U.S. judge does not automatically do the bidding of the socially powerful, but rather looks into the past for documents and practices that might, depending on the facts of the case before her, be interpreted to the disadvantage of the elite. From the standpoint of justice, Prof. Wolcher observed, the rule of law is thus "the chance to use social power to thwart social power." But if the rule of law in that sense is an achievement, it is "an achievement that must be continually won" in disputes before independent judges who understand their role as "creative and responsible actors in an unfolding and uncertain historical drama." Such a "humanized" version of the rule of law, Prof. Wolcher concluded, is "well worth fighting for."



Judge Barbara Jacobs Rothstein, Chief Judge John Coughenour

## FIFTY QUESTIONS IN THIRTY MINUTES: AN INSIDE LOOK AT ORAL ARGUMENT IN *BROWN V. LEGAL FOUNDATION OF WASHINGTON*

By David J. Burman

Wednesday, March 26. Today the U.S. Supreme Court decided the IOLTA case—*Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003). Because my mind won't focus on all the other things I should be working on, I might as well get going on the article that I promised Duncan Manville about preparing for and presenting the oral argument in *Brown*. Besides, now that we've won, no one can say that my argument cost us the case. . . .

My firm, Perkins Coie, represented the Legal Foundation of Washington in *Brown*. The Foundation administers the funds obtained through Washington's interest on lawyers' trust accounts (IOLTA) program, under which certain client funds held in trust by attorneys and limited practice officers must be placed in NOW accounts bearing interest that is used for charitable purposes. A similar program is in place in every state and the District of Columbia. The plaintiffs in *Brown* challenged Washington's IOLTA program as violative of the U.S. Constitution—most significantly the Fifth Amendment's Just Compensation Clause. In *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835 (2001) (en banc), the Ninth Circuit Court of Appeals upheld the program's constitutionality.

The oral argument in *Brown* was my first U.S. Supreme Court argument. Over the years, I have helped a handful of excellent lawyers prepare for oral argument in the Supreme Court, and I have been fortunate to have written many petitions and briefs and even had

a few summary victories. But arguing is different. It was a great experience, in which I benefited from the hard and talented work of many people—including the client, my firm, co-counsel's firm, the Washington State Office of the Attorney General, and counsel for various amici. It was humbling to receive the assistance of such great lawyers as Carter Phillips, Walter Dellinger, Marnie Hart, Bob Long, Alan Morrison, John Pickering, Steve Rummage, Paul Smith, and Seth Waxman. We might not have done everything right in preparing for oral argument, but it was not from lack of trying or lack of support.

Of course, the most important thing we did was write an excellent brief, which we had to trust would overcome any deficiencies in my performance and answer all the questions that the Justices might not have time to ask or might think of after oral argument. Indeed, my experience while clerking, confirmed by almost all of the Supreme Court practitioners with whom we consulted, is that oral argument seldom wins a case that is in trouble after the Justices review the briefs. But then my unfailingly supportive colleagues would look at me,

pause, and observe that oral argument can lose a close case.

We knew our case would be close. Four years earlier, a very similar case from Texas, *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), had been decided five to four against our client's interests. And as the other side argued in every subsequent brief, language in the Chief Justice's opinion in *Phillips* seemed to address some of the issues that had not been before the *Phillips* Court but that were critical to our case. I try to avoid counting noses while writing a brief and preparing for argument, but we knew we had to mount arguments powerful enough to pull either Justice O'Connor or Justice Kennedy away from the direction of the opinion that they had joined in *Phillips*.

We started on our brief as soon as the Supreme Court granted certiorari. We had briefed the issues pretty thoroughly in the District Court and the Ninth Circuit and even a bit in the cert. opposition, and I had argued the case three times already (including the en banc hearing in the Ninth Circuit). Still, we thought we should start basically from scratch. The three main authors from Perkins Coie (myself, Nick Gellert, and Katie O'Sullivan) went to work on outlining and then drafting overlapping sections of the brief. We also benefited substantially from background research by summer associates at Perkins Coie and interested lawyers outside our firm.

In my view, the Supreme Court cares very little about court of appeals precedents; it is more interested in one of its own decisions, even if musty or tangential, than a lower court decision that is on all fours. So we compiled a stack of all Supreme Court takings cases. (There are a lot more than you would guess!) I then spent a week away from the office reading them all, searching for

ideas and good quotes, tracking the positions of our key Justices, and outlining what I thought would be our primary arguments. By the week before oral argument, all the annotated cases had been organized into notebooks.

The Court sees more and more amicus briefs, and they cite to them in their opinions with increasing frequency. Whether or not that makes amici necessary, we were blessed to have strong, committed, and well-represented amici supporting our position. To minimize the number of amicus briefs containing substantively overlapping arguments, we encouraged organizations to join in combined briefs where possible. While we could not write any portions of the briefs, we tried to make sure that our amici were coordinating among themselves in the briefs' preparation.

We also knew that it would be important to have the United States on our side (which they had been in *Phillips*), or at least to keep them from supporting the other side (with which the current administration is generally aligned). We had what amounted to a moot court with two lawyers from the Office of the Solicitor General and another dozen lawyers from interested federal departments and agencies. The U.S. appeared to be on the fence until the very last minute, and then decided to stay out. But the other amici were spectacular. Their briefs were first-rate, and they were much more able than we were to address what Justice O'Connor has called "the impact of legal rules on human lives." The importance of what legal services lawyers do every day made winning critical, and explaining that importance made winning possible.

As soon as we heard the date for oral argument—Monday, December 9—we reserved a spot in the Moot Court Program of the Georgetown University

Law Center's Supreme Court Institute. The Institute administers the Moot Court Program as a free public service and teaching aid. About forty to fifty percent of all cases heard by the Supreme Court each year are mooted at the Institute before a panel of "Justices" that includes law faculty and experienced Supreme Court advocates. Moots are provided at no charge to the first party to contact the Institute after the oral argument date is announced. Except under limited circumstances, the Institute only moots one side of a case.

Once we had Georgetown nailed down for Thursday, December 5, we scheduled two other formal moots—an early one in our moot courtroom in Seattle on November 21 and another one in Washington D.C., on Tuesday, December 3, in the moot courtroom of co-counsel Carter Phillips of Sidley Austin Brown & Wood. We also scheduled a number of informal moot courts at Perkins Coie. It was very helpful to me to have had so many moots, with enough time in between them to mull over and thoroughly research the hard questions. I also spent a day before the first moot in D.C. visiting the Supreme Court and working on oral argument ideas with Carter Phillips and his colleagues.

Before the moot courts, however, we had to decide how many people should argue. Had the U.S. filed an amicus brief on our side, we would have wanted the Solicitor General's Office to take ten minutes of argument time, virtually precluding any further division. Because the U.S. elected not to file an amicus brief, the respondents had the full 30 minutes. By that time the Washington Attorney General's Office, representing eight Justices of the Washington Supreme Court, had retained Walter Dellinger of O'Melveny & Myers, and wanted a distinct brief and role at oral

argument. While most knowledgeable observers consider it a mistake to divide petitioners' argument time, there is less concern about doing so on the respondents' side. It's also tough to whine about having a former acting Solicitor General bat clean up for your team. In the end, I took fifteen minutes of argument time, and Walter took the last fifteen minutes.

One preparation technique that was very helpful was to keep a record of every question asked at the meeting with the Solicitor General's Office and at each of the three formal moot courts. Together with the questions that had been posed during the oral argument in *Phillips* and the Ninth Circuit en banc hearing in our case, we felt we had heard and considered most of the tough questions that could have been asked. I had promised the client that I would prepare more intensively than anyone else would. Much of my time from the moment we received the other side's reply brief was spent preparing for oral argument, and almost every waking hour after Thanksgiving was spent in preparation. We debated and re-debated what argument to lead with, what key points had to be made, and how best to answer the difficult questions.

I had the luxury of receiving free advice from the best Supreme Court advocates around. They did not always agree, but here are some of the things that I found most valuable:

- The Justices average fifty questions in thirty minutes. They have no time for fancy rhetoric or for pedantic reading from a script and will cut you off as soon as they see you heading in either direction. The experts told me to pick the single most important point that I wanted to make, reduce it to its essence, make it bulletproof, and get it out in

the first thirty seconds. (They were absolutely right. After the first few seconds of argument, I had no time to look down at my carefully constructed materials.)

- When you are arguing second, the Court might give you a bit of extra time if you announce that you are addressing a question posed by a Justice to the other counsel (never "my opponent").
- If you know that he is against you, do not engage with Justice Scalia. You are not as smart as he is, and he does not care what your answers are, especially if they are good. He is making his points and trying to show your weaknesses, and you do not want to use up your time sparring with him. (I tried to follow this advice. Boy, did I try. But Justice Scalia and Justice Kennedy, whom we had hoped to convince, were relentless.)
- But do not ignore Justice Scalia in a way that alienates his polite colleagues like Justice O'Connor.
- Do not try to refer to the Justices by name. It will only be noticed if you get them wrong. (I think I referred only to Justice O'Connor by name, and then only by starting off my argument by referring back to a question that she had asked of the other lawyer.)
- Stop the moment your time is up; do not even finish your sentence unless the Chief Justice says to do so. (Chief Justice Rehnquist was recovering from surgery and was not on the bench for my argument; Justice Stevens was comparatively generous with time.)
- Scanning the audience might be good advocacy normally, but if you

want to slow down the questions from a hostile Justice, stay focused on the Justice who asked the last, hopefully softball, question. Eye contact is not your friend. (This sounds good but I could not make it work. My head swiveled back and forth wildly as Justices interrupted my answers to ask more questions.)

- Make sure all your answers are as compact as possible. Do not stake out any more ground than you need. Overstatement will only invite dissection.
- Do not let your nervousness show. The Justices are only a few feet from the podium and cannot miss signs of fear. Be as familiar and comfortable as possible with the courtroom.

As I learned today, our position survived my oral argument. In a five-to-four opinion authored by Justice Stevens, the Supreme Court affirmed the Ninth Circuit, holding that Washington's IOLTA program does not violate the Fifth Amendment's Just Compensation Clause. Justice O'Connor joined in the majority opinion. I made one obvious mistake during oral argument, but Justice Ginsburg bailed me out. Otherwise the argument is just a blur in my mind. I sure would love to do it again.

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### Judge Leighton

*Continued from Page 5*

his chambers a few weeks ago with some questions relating to this article, Judge Leighton also occasionally (and quite casually) answers his own phone during the day.

In terms of core values, Judge Leighton is a Republican whose "passion has always been for my profession, not for

my politics." He has always had a firm belief in the equitable administration of justice, and in the necessity of professionalism among all officers of the court:

I think being a trial lawyer is about as difficult a job as you can have: high stress, tremendous workload. Although conflict is inevitable, the administration of justice is in some sense a team sport. Your role as a judge is sort of the captain and the coach of the team. The players, even though they are adversaries, are officers of the court, and have a higher calling than their own self-interest or that of their client. Together they have an obligation to follow the rules, deal with each other in a civil and professional manner, and then process justice in an efficient, expedient way. So I think if, as judge, you are sympathetic and empathetic to the role of lawyers, you're probably going to accomplish more, with their help.

Judge Leighton's new position, he says, is "a wonderful job." "It's an opportunity to serve the community, and to make important decisions in an environment where you've got time to reflect and contemplate. You've got interaction with outstanding lawyers, and you're working in an environment that is populated with great people, and in a facility that has a majesty to it. That is inspiring. What's not to like?"

There is nothing not to like about Judge Leighton's appointment to the U.S. District Court for the Western District of Washington. Judge Leighton's wealth of experience, his legal skills, and his outstanding personal qualities should serve him well during what will undoubtedly be a long and successful career on the federal bench.

## Electronic Filing

*Continued from Page 6*

anytime. All you need is a PC with an internet connection and you can file from your office, home, or even an out-of-town deposition. Filings are accepted 7 days a week, 24 hours a day, giving registered users of the CM/ECF system much greater flexibility than they previously enjoyed.

With increased on-line access to documents comes another feature of CM/ECF. . . .

## ABILITY TO SEARCH DOCUMENTS

Another reason why you should register for CM/ECF is the ease of searching documents. The CM/ECF system requires that litigants upload documents in .pdf (portable document format). This format allows the document to be read by a wide variety of computers-PCs,

Macs, Linux-based computers, and a few others. When a document has been converted to .pdf from a word-processing format, the resulting .pdf file is text-searchable. Although paper documents filed with the Court are scanned into .pdf format, that process simply involves taking a "picture" of the page, and thus the document is not text-searchable.

Which takes us to reason number five. . . .

## ABILITY TO MONITOR OTHER CASES OF INTEREST

Registered users of CM/ECF can keep an eye on other cases in which they may be interested. Such cases of interest are designated in the user's CM/ECF account. Every time a document or order is filed in any case designated in the account, the CM/ECF user receives an e-mail notification of the filing. You may

have used WebPacer or a commercial vendor to keep an eye on cases in the past; that is no longer necessary. The notification feature not only alerts CM/ECF users to the filing of documents, but also comes with "one free look." With CM/ECF, cases of interest can be added to or deleted from a user account at any time. What a bargain!

There are many more reasons to file your documents electronically with the court than can be outlined in this article. To hear more about CM/ECF, come to any of the seminars scheduled at the courthouses in Seattle or Tacoma, or request a speaker from the Court for a meeting at your firm. You may contact Shirley Lindberg, Project Manager for CM/ECF, in the Seattle Clerk's Office at 206-553-4170, or visit the court's website at [www.wawd.uscourts.gov](http://www.wawd.uscourts.gov) for more information on electronic filing at the U.S. District Court.

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Sponsored by The Federal Bar Association of the Western District of Washington

**WEDNESDAY - DECEMBER 10, 2003**

The Fairmont Olympic Hotel, 411 University St., Seattle

**CLE PROGRAM:** 1:00 p.m. to 5:00 p.m.

*ELECTRONIC CASE FILING: Have you been served?*

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*FOLLOWING THE CLE PROGRAM THE FEDERAL BAR ASSOCIATION WILL HOST ITS*

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**Dues:** (make checks payable to the Federal Bar Association of the Western District of Washington)

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# FEDERAL BAR ASSOCIATION NEWS

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