



# LIFE BEGINS

A Publication of the  
Washington State Bar Association  
Senior Lawyers Section

Volume 12

Spring 2010

Number 1

Save the Date! Friday, April 16, 2010

Senior Lawyers Section

## 2010 Annual Meeting & CLE Seminar

Marriott Sea-Tac Airport

by T. Jerry Greenan

Another informative and entertaining seminar is coming your way. You can bank CLE credits, meet old friends, and enjoy the day at our Section's CLE on April 16 at the Marriott Sea-Tac Hotel.

Despite rising costs, we have held the cost to \$150 for Section members and \$170 to join the Senior Lawyers Section and attend the seminar. If there are sufficient registrations, we plan to open the CLE to all other lawyers for \$250.

This remains one of the best CLE bargains anywhere. The cost includes the seminar, written materials, an excellent lunch, parking, and a social hour at the end of the session.

We have arranged a lineup of exceptionally distinguished presenters.

The morning's lineup: WILLIAM H. GATES, SR., retired attorney, philanthropist, and author of the book *"Showing Up for Life: Thoughts on the Gifts of a Lifetime,"* will speak on the benefits of becoming a pro bono lawyer. DAVID POWELL, Professional Responsibility Counsel, WSBA, will address the **Ethics of Protecting Client Interests** when clos-

ing your practice. SCOTT OSBORNE, K&L Gates, Seattle, will talk about current developments in real estate purchase disputes. GEORGE CRITCHLOW, Acting Dean, Gonzaga University School of Law, will discuss **Legal Strategies for Fighting Hate in Washington State**.

The afternoon's lineup: JUSTICE CHARLES W. JOHNSON, Associate Chief Justice, Washington State Supreme Court, will speak on **Technology and the Industry**. DONALD K. QUERNA, Randall and Danskin, Spokane, will parse the **Rules of Professional Conduct and the Estate Planning and Business Lawyer**. GENE B. BRANDZEL, Seattle lawyer, will opine on **Ruminations on What We Can Learn from Native American/Indian Traditional Justice**. MICHAEL S. WAMPOLD, Peterson Young Putra, Seattle, will close the day with **Opening Statements in a Medical Malpractice Trial**.

Please mark your calendar for April 16. Fill out and send in the registration form for the April 16 CLE that you'll find in this issue of "Life Begins." You can also find the registration form at <http://www.wsba.org/seminars.php>? **Seminar agenda and registration form on pages 2 and 3.**

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## WSBA-CLE • The Innovator in Legal Education®

# Join Your Colleagues for the WSBA-CLE: Annual Senior Lawyers Conference: The Past, Present and Future of Law

Co-sponsored by the WSBA Senior Lawyers Section

Friday, April 16, 2010  
Seattle Marriott SeaTac Airport  
Seattle, WA



Approved for 6.25 CLE Credits for Washington Attorneys, including 4.0 General Credits and 2.25 Ethics Credits

### Featured Speaker:

**William H. Gates, Sr.** is a retired attorney, philanthropist and author of the book "Showing Up for Life: Thoughts on the Gifts of a Lifetime". He attended the University of Washington School of Law and practiced law until 1998, primarily with the law firm which he co-founded as Shidler & King in 1964, later known as Preston Gates & Ellis LLP, today known as K&L Gates. In 1998, Gates retired from PGE and currently serves on the Board of Regents for the University of Washington, and is a co-chair of the Bill and Melinda Gates Foundation, which his son Bill and his son's wife Melinda founded. He has served as a director for Costco Wholesale since 2003.

## Programs

7:30 a.m.

**Check-in • Walk-in Registration • Distribution of Coursebooks • Coffee and Pastry Service**

8:25 a.m.

**Welcome and Introduction by Program Chair**

Stephen E. De Forest — Chairman, Senior Lawyers Section, Riddell Williams PS, Seattle

8:30 a.m.

**RPC 6.1 and Ethical Considerations**

William H. Gates, Sr. — Co-chair, Bill and Melinda Gates Foundation, Seattle

8:45 a.m.

**Time for Rewards — Be a Pro Bono Lawyer**

William H. Gates, Sr. — Co-chair, Bill and Melinda Gates Foundation, Seattle

9:15 a.m.

**The Ethics of Protecting Client Interest When Closing Your Practice**

David Powell — Professional Responsibility Counsel, Washington State Bar Association, Seattle

Pete Roberts — Practice Management Advisor, Law Office Management Assistance Program, Washington State Bar Association, Seattle

10:30 a.m. Break

10:45 a.m.

**Alejandre Revisited — Current Developments in Real Estate Purchase Disputes**

Scott Osborne — K&L|Gates, Seattle

11:30 a.m.

**Legal Strategies for Fighting Hate in Washington State**

George Critchlow — Acting Dean, Gonzaga University School of Law, Spokane

12:00 p.m. Lunch Included with Tuition

1:30 p.m.

**Law and Technology**

Justice Charles W. Johnson — Washington State Supreme Court Associate Chief Justice, Olympia

2:15 p.m.

**Rules of Professional Conduct for the Estate Planning and Business Lawyer**

Donald K. Querna — Randall | Danskin, PS, Spokane

3:00 p.m. Break

3:15 p.m.

**Should We Go Native? Ruminations on What We Can Learn from Native American/Indian Traditional Justice**

Gene B. Brandzel — Lawyer, Seattle

4:00 p.m.

**An Opening Statement in a Medical Malpractice Trial**

Michael S. Wampold — Peterson Young Putra, P.S., Seattle

4:45 p.m. Complete Evaluation Forms • Adjourn

Reception Immediately Following

### Lodging Information:

For your convenience, we have made a lodging reservation block for April 15<sup>th</sup> (the night before the Conference) at the Seattle Airport Marriott at SeaTac. We encourage you to make your reservations now, since space is limited. Contact the Seattle Airport Marriott in SeaTac directly at (206) 241-2000, or (800) 228-9290 and indicate that you are attending the WSBA Annual Senior Lawyers Conference on April 15<sup>th</sup>. Act quickly, the room block will be held until **March 15<sup>th</sup>**.

# Annual Senior Lawyers Conference: The Past, Present and Future of Law

Co-sponsored by the WSBA Senior Lawyers Section

Friday, April 16, 2010 • 7:30 a.m. – 4:45 p.m.

Seattle Marriott SeaTac Airport • Seattle, WA



Please fill out the enclosed registration form and mail or fax to WSBA

First Name \_\_\_\_\_ M.I. \_\_\_\_\_ Last Name \_\_\_\_\_

WSBA No. \_\_\_\_\_ Firm/Company Name: \_\_\_\_\_

Street Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_

Email \_\_\_\_\_

**We encourage early registration. On-site registration is on a space-available basis.**

**10860STC • WSBA Annual Senior Lawyers Conference CLE • 4/16/10 \*Lunch and Parking Included in Tuition Fee**

- Standard Tuition • \$250**
- Senior Lawyer Section Member Tuition • \$150**
- I am enrolling as a Senior Lawyers Section Member for \$20 (membership good through September 2010) which qualifies me for the CLE registration fee of \$150 for Senior Lawyers Section Members • \$170 Tuition and Senior Section membership fee**

**Total: \$ \_\_\_\_\_**

**Please omit my name from the list available to exhibitors**

**To register online, go to [www.wsba.org/seminars](http://www.wsba.org/seminars) and enter seminar # 10860STC**

If special accommodations are needed, please contact Program Coordinator Heather Balch at 206-727-8258 or e-mail: [heatherb@wsba.org](mailto:heatherb@wsba.org) or call toll-free at 1-800-945-WSBA.

### Payment Information:

Sorry, the WSBA-CLE PowerPass may not be used to register for this program

Check enclosed payable to WSBA

Visa       MasterCard

Card No. \_\_\_\_\_ Exp. Date \_\_\_\_\_

Cardholder Name (print) \_\_\_\_\_

Authorized Signature \_\_\_\_\_

Registrations received less than 48 hours before a seminar are not guaranteed a coursebook or other presentation materials on site.

#### Register:

- **Internet:** Register online at [www.wsba.org/seminars](http://www.wsba.org/seminars) • Order products online at [www.wsba.org](http://www.wsba.org).
- **Mail:** WSBA, 1325 Fourth Avenue, Suite 600, Seattle, WA 98101-2539.
- **Phone:** 800-945-WSBA or 206-443-WSBA with credit card and Registration/Order Form in hand.
- **Fax:** 206-727-8324 Include credit card information.

#### Payment Policies:

**Payment:** Individual registrants must use a separate form, however, payment may be made with a single check or credit card for multiple parties.

**Note:** Please keep a copy of this brochure for your records.

office use only	Date _____	Check # _____	Total \$ _____
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## Steve DeForest: A Look at the Chair of the Senior Lawyers Section

by Jim Minorchio

What do old goats and Stephen Elliott DeForest have in common? Both roamed the hill that is Magnolia in the early 1930s. Unlike the goats, however, Steve continued to range up Queen Anne Hill as he progressed to Queen Anne High School. He graduated a proud member of the Class of 1951. After that he moved on to a relatively unknown school in New Haven, Connecticut (Yale), graduating, of course, with highest honors. It was there he met his wife of 51 years, Sibby, on a blind date, while she was attending Wellesley.

After a two-year stint in the Navy, Steve graduated from Harvard Law School, again with honors, in 1960. He started at the firm then known as Riddell, Williams, Voorhees, Ivey & Bullitt soon after its move to the top floor of Seattle's 1411 Fourth Avenue Building. For more than 50 years Steve has continued his association with that firm, now known as Riddell Williams, being a preeminent associate, partner and mentor to hundreds of lawyers.

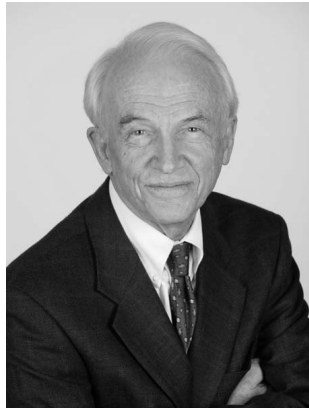
### The Outdoor Life

Most apparent about Steve are his genuine love of the practice of law, love of nature and love of outdoor activities. He proudly displays ski racing trophies in his den, as well as squash trophies from his performances at the Washington Athletic Club. Even today at the age of 77, he rigorously hikes the many trails near his vacation home in Leavenworth, leaving many younger compatriots in the dust, while collecting wildflowers, unusual rocks and fossils, and taking photographs. In keeping with his love of nature, Steve has for more than 25 years been active with the Nature Conservancy, the Trust for Public Land, and the Inland Northwest Land Trust.

Steve is also the proud father of three children: Christopher (50), John (46), and Katherine (44), have given Steve

and Sibby seven wonderful grandchildren. Sibby has assured their many friends that Steve's unflappability in the practice of law extends to his home life, and while raising three children, he never raised his voice or showed anger.

What is most apparent to someone who has practiced law with Steve for many years is that he is extraordinarily brilliant and efficient and remarkably self-effacing. A former Riddell client (who went on to become CEO of a Fortune 200 company) said Steve was the smartest lawyer he ever worked with. Steve, however, does have his dark side. He is a technological Luddite. In fact, the Riddell Information Technology Department replaced his computer with an Etch-a-Sketch two years ago, and he has yet to notice.



### All the World's a Stage

Steve's colleagues at Riddell Williams consider him a wonderful resource (he still is the firm's senior ethics officer) and a great partner. As chair of the WSBA Senior Lawyers Section, Steve exemplifies what a

lawyer should be at any age and stage. He has served as president of the Washington State Bar Association and the King County Bar Association. He received KCBA's Helen Geisness Award for Distinguished Service to the Bar.

In the last few years, Steve and Sibby have continued to travel to unusual places. They spent time in Senegal, Mali, Ethiopia, Malaysia, the Ladakh Province of India, the Tuva Region of Siberia, as well as Thailand. And they have many more trips planned in the future.

*Jim Minorchio is the chair of the tax practice group at Riddell Williams.*

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*Editor's note: Attention armchair travelers: Section Chair Steve DeForest enjoys writing about his travel adventures. His recent travelogues in "Life Begins" include "Where in the World Is Tuva?" (Winter 2009-2010), "How Do Eyewitness Mistakes Happen? The Naked Truth" (Spring 2008), and "Where in the World Is Ladakh?" (Winter 2006-07). All are available on the Section's website, <http://wsba.org/lawyers/groups/seniorlawyers/sr.+lawyers+newsletters.htm>.*

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## Robert Arthur Berst: October 13, 1930 – January 27, 2010

by Dudley Panchot

Bob Berst was a Seattle boy who became a lawyer, musician, pilot, yachtsman, husband, father, bird hunter, traveler, writer, leader, lover of life, gourmet, past chair of the WSBA Senior Lawyers Section, and past editor of the Section's newsletter, "Life Begins." Bob was one of the stalwarts of the Board of the Senior Lawyers Section of the Washington State Bar Association. He was a member of the Washington Bar for over 50 years.

Like many of his ancestors and their kin – Eric the Red, early English nobility, Puritan settlers in 1630, a soldier aided by George Washington, Jacques Offenbach, and cross-U.S. trekkers – Bob was an adroit navigator. But with genes gyrating gamely, he navigated much more than most of us.

### Making Music

Born in 1930, Bob thrived until melanoma took him on January 27 at Swedish Hospital in Seattle, where he was born 79 years earlier. In 1952 he married Evalie Swinburne, entered UW Law School, and began generating offspring Ron, Carla, Russ and Kay, while girding this mighty enterprise by life-guarding and leading a ten-piece band with a wonderful Glen Miller sound, including himself on the clarinet and saxophone.

After all this, building a law practice with Cook, Flanagan, and Berst was a simple pleasure and success partly because, as a later partner has observed, Bob could hardly be tricked into saying anything negative about anyone, was rigorously honest, and almost always cordial with courtroom opponents. This spirit naturally led to his subsequent popularity as president of the Young Men's Republican Club, commodore of the Seattle Yacht Club, chair of the King County Bar Association's Senior Lawyer's Section, and president of the Golden Grads of Roosevelt High School.

In sum, Bob's death is a great loss because he was a great gift for so many.

### Practicing in the Right Way

Bob's trial skills were recognized by King County Superior Court Judge Horton Smith who followed the practice of sending congratulatory letters to lawyers who did outstanding trial work in his court. Bob received one of those letters. Brian Comstock, of the WSBA Board of Governors, recalls that each year Judge Smith honored the top 10 lawyers who were the most outstanding in his courtroom. "Bob was on that list," says Brian, "maybe even at the top of that list."

Jerry Landeen, who worked for 40 years with Bob, gave this eulogy:



"After 40 years of partnering with Bob in the practice of law, it was hard to wake up last week and realize that he was no longer there to carouse with, consult with and generally enjoy our lives together in our profession.

"Bob was my mentor. From the day I walked into the office of Cook, Flanagan and Berst in 1969 to be the fourth guy on the block, Bob treated me with respect and decency, encouraging me to make my way as a lawyer and offering support that really counted. I was to find out that this was his manner with everyone with whom he associated and it remained so throughout the years.

"He had an incomparable zest for life that was, as most of you know, infectious. This included the practice of law and the great joy and satisfaction he found in the law. I sought out his wisdom frequently on just how you go about practicing in the right way. His answers were usually framed with terms such as respect, honesty, integrity and treating others with dignity.

"Bob's clients loved and respected him. His advice to them was usually centered on getting a good practical resolution to the problem or challenge set before them. His colleagues in the Bar have described him as the consummate lawyer. I agree.

"Outside the law he had a passion for life to be envied. Whether it was flying, sailing, or traveling, Bob would come back with tales of how wonderful it all is. Lucky were those that were able to get in on Bob's celebration of life, and he did share it with many of us. He seemed to find the best in whatever he was seeking, the kernel of enjoyment in his selected course whether it be a good wine or a good Bar Association senior lawyers seminar (which he took on as chair). He did tell me several weeks ago when he knew he was in trouble that if it has to be this way then 'I had a great ride and wouldn't change a thing.' "

A final anecdote that demonstrates the esteem in which Bob was held by a law school classmate, your correspondent, goes back about 50 years. After a "take no prisoners" trial and appeal to the State Supreme Court in which Bob's firm prevailed in a hotly contested boundary dispute, I had the privilege of giving testimony in favor of the claim of Bob's firm against their client for fees.

Bob Berst will be greatly missed by all who knew him.

*Editor's note: This article originally appeared in the winter 2009-2010 newsletter of the WSBA Litigation Section. It appears with the permission of the author.*

## Medicare and Medicaid Subrogation Rules

by Barbara A. Isenhour

If the Medicaid or Medicare program has paid for a plaintiff's medical expenses related to a personal injury action, it is critical to address the unique subrogation requirements for these two programs. The subrogation rules for Medicaid and Medicare programs are based upon specific statutes, regulations, and case law. The Medicaid and Medicare subrogation rules are not governed by the doctrine of equitable subrogation set forth in *Thiringer v. American Motors Insurance Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978).

The Medicaid and Medicare programs sound similar and attorneys and their clients often confuse one for the other. In fact, the programs are very different with different rules and procedures for resolving subrogation claims. The first step in handling Medicaid or Medicare subrogation claims is to confirm whether the plaintiff received assistance from the Medicaid program, the Medicare program, or from both programs.

### What Is Medicare and Who Is Eligible?

If the plaintiff is 65 or older, there is a good chance his or her primary health insurance is Medicare. Medicare is a federal health insurance program, primarily for people who are receiving Social Security Retirement Income (SSRI), Civil Service Retirement or Railroad Retirement benefits. People who take early retirement before age 65 are not eligible for Medicare until age 65.

In addition to retirees 65 years of age or older, some people under the age of 65 have Medicare as their primary health insurance if they are disabled and have enough work quarters to qualify for Social Security disability benefits (SSDI). For these individuals, Medicare does not begin until 29 months from the onset of the disability. For that reason, many injured plaintiffs are not receiving Medicare assistance because they are still within the 29-month waiting period for Medicare. If the plaintiff was already disabled at the time of the tort injury then Medicare may be the primary health insurer.

The Medicare program is administered by the Centers for Medicare and Medicaid Services or CMS. Washington state is in Region X of CMS with regional headquarters in Seattle. The Medicare statutes are at 42 U.S.C. §1395 *et seq.* and the regulations are at 42 C.F.R. 405 *et seq.*

### What Is Medicaid and Who Is Eligible?

Medicaid is a health insurance program primarily for low-income elderly and disabled individuals or low-income families with minor children who are receiving Temporary Assistance to Needy Families (TANF). Children under the

age of 19 with low-income working parents may receive Medicaid benefits. Eligibility for most Medicaid programs is based upon the applicant's assets and income. There are several Medicaid programs with different asset and income requirements. If the plaintiff did not have health insurance at the time of the injury, it is possible medical providers will help the plaintiff qualify for Medicaid assistance to help pay for medical treatment.

Medicaid is a joint state and federally funded program. At the federal level it is administered by CMS. At the state level the Department of Social and Health Services (DSHS) administers the program. Applications and subrogation issues are processed by DSHS. Most Medicaid regulations are in WAC 388-500 to WAC 388-540. Medicaid laws are at 42 U.S.C. § 1396a *et seq.* Federal regulations are at 42 C.F.R. § 430 *et seq.* State Medicaid laws are at RCW 74.09.010 *et seq.* and RCW 43.20B.050 *et seq.* DSHS has a manual that can be very helpful in answering questions about the different Medicaid programs: <http://www.dshs.wa.gov/manuals/eaz/index.shtml>.

### Procedure for Resolving Medicare Subrogation Claims

Medicare subrogation claims are handled by CMS through offices in Detroit, Michigan. The first step in resolving subrogation claims is to contact the CMS Coordination of Benefits contractor at 1-800-999-1118. The COB coordinator is a national clearinghouse for information. Initially the coordinator will create a file record of the case.

Once a file is opened, the next step is to contact the Medicare Secondary Payer Recovery Contractor (MSPRC). That number is 1-866-677-7220. The MSPRC website is at <http://www.msprc.info/index.cfm?content=main>. The MSPRC will provide information about Medicare's subrogation claims and will handle initial requests for compromise or waiver of subrogation claims. These are the mailing addresses for the MSPRC:

#### a. Workers' Compensation

Medicare Secondary Payer Recovery Coordinator  
PO Box 33831  
Detroit, MI 48232-3831

#### b. Auto/Liability and No Fault

Medicare Secondary Payer Recovery Coordinator  
PO Box 33828  
Detroit, MI 48232-3828

*continued on next page*

## Medicare and Medicaid Subrogation Rules from previous page

### c. Large Group Health Plans

Medicare Secondary Payer Recovery Coordinator  
PO Box 33829  
Detroit, MI 48232-3829

### Medicare Subrogation Rules

The Medicare subrogation laws are at 42 U.S.C. § 1395y(b) and CMS's regulations are at 42 C.F.R. § 411.20 *et seq.* For any medical services paid by Medicare, CMS can assert a subrogation claim to payment from a responsible primary party. 42 C.F.R. § 411.26; 42 U.S.C. §1395y(b)(2)(A) (ii). Medicare subrogation can apply in three contexts:

- When there is liability insurance covering an accident;
- When there is workers' compensation coverage for on the job injuries (*e.g.*, Labor & Industries or Harbor Workers Longshoremen's Act);
- When there is an employer's large group health plan (EGHP).

In cases where there is potential third-party liability, Medicare may pay the medical bills if the claim is contested or there will be a delay in payment by the insurer, but Medicare considers its payment to be a "conditional payment"—conditioned on reimbursement through subrogation. Medicare's right of recovery is superior to all other insurers, including Medicaid, self insurance plans, liability insurance, no-fault insurance, and uninsured or underinsured motorist insurance.

The Medicare subrogation rules provide for full recovery to the Medicare program even if there is a discounted settlement and the injured party is not fully compensated for damages. If there is an insurance allocation to several plaintiffs, Medicare's claim would apply only to that portion allocated to the Medicare beneficiary.

### How Much Can Medicare Recover?

As a general rule, Medicare is entitled to recover an amount equal to the Medicare payments for the injuries covered by the liability insurance, up to the full amount payable under the insurance. 42 C.F.R. §411.24. Medicare will not limit its recovery request to the portion of the settlement considered to be for medical care.

The Medicare subrogation claim will be reduced by the procurement costs incurred by plaintiff's attorney *if the claim is disputed and litigation costs were incurred by the beneficiary.* The formula for taking into account the costs of litigation is as follows:

- If the Medicare claim is *less* than the judgment or settlement amount, determine the ratio of the procurement costs to the total judgment. Apply this ratio to the

Medicare payments. Subtract this amount from the Medicare payments and this is the amount Medicare can recover. For example, if the judgment is \$100,000, the attorneys' fees and costs are \$25,000 or 25% of the judgment, and Medicare paid \$40,000 in medical bills, its claim of \$40,000 would be reduced by 25% or \$10,000. Of the \$100,000 judgment, \$30,000 would be reimbursed to Medicare.

- If the Medicare claim is *greater* than the judgment or settlement amount, the total procurement costs can be deducted from the Medicare recovery amount. Using the above example, but assuming that the Medicare claim was \$150,000, the \$25,000 in attorneys' fees can be deducted from the settlement amount but the balance would have to be repaid to Medicare, leaving no proceeds for the plaintiff.

### Waiver or Compromise of Medicare Claims

Federal law gives CMS authority to waive, compromise, terminate or suspend its right of recovery. 42 U.S.C. § 1395y. Regulations at 42 C.F.R. § 405.376 authorize CMS to compromise a claim, after considering the following factors:

- The age and health of the debtor;
- Present and potential income of the debtor; and
- Whether assets have been concealed or improperly transferred by the debtor.
- The claim must be less than \$100,000.

Waiver or compromise requests should be made initially to the fiscal intermediary. If resolution is not successful, the waiver request can be made to CMS, Region X Office. The contact information for the CMS Regional Office is Jonella Windell, 206-615-2385. See <http://www.cms.hhs.gov/manuals/downloads/msp105c07.pdf> for a discussion on Medicare Waivers in CMS Medicare Secondary Payer (MSP) Manual, Chapter 7, 50.6.2 through Chapter 50.8.

### Medicare Set Aside Account

Any discussion of Medicare subrogation raises the related issue of whether Medicare requires that a portion of any settlement be set aside to cover future medical expenses related to the injury that would otherwise be paid by the Medicaid program. This account is called a Medicare Set-Aside Account or MSA.

Subrogation deals with repaying the health insurer for past medical expenses incurred up to the date of settlement. An MSA is to cover future medical expenses after the case has settled and subrogation has been resolved.

*continued on next page*

## Medicare and Medicaid Subrogation Rules from previous page

Currently CMS requires an MSA only in workers' compensation cases where the plaintiff is already receiving Medicare or is expected to qualify for Medicare within 30 months. There is no written policy adopted by CMS that requires an MSA in a third-party tort liability case.

There has been a lot of confusion about a Medicare law, the SCHIP Extension Act of 2007. The statute is a reporting statute, requiring all insurance plans to report to CMS information about potential recipients of Medicaid or Medicare benefits who potentially may receive a personal injury settlement. This information is designed to help CMS and state Medicaid agencies enforce their right to subrogation reimbursement. Contrary to some claims, this new law has nothing to do with requiring that a portion of a settlement be set aside to pay for future medical care that otherwise would be paid by the Medicaid program. CMS has the statutory authority to require an MSA in tort liability cases but it has not done so to date.

### Procedure for Resolving Medicaid Subrogation Claims

Medicaid subrogation matters are handled by the Coordination of Benefits Division of the Department of Social and Health Services.

PO Box 45561  
Olympia, WA 98504-5561  
1-800-894-3754

Requests for compromise of any Medicaid lien should be made to the COB legal advisor, Roy Veervarif, 360-725-1060, veervarif@dshs.wa.gov.

State law specifies when DSHS needs to be notified of litigation involving a Medicaid recipient. RCW 43.20B.070 provides that any attorney representing an individual who has received Medicaid benefits, state funded medical treatment, state funded hospitalization for the mentally ill or care in a habilitative care center for the developmentally disabled, as a result of actions of a liable third party, must notify the Department:

- When filing a claim against the liable third party or the insurer;
- When filing a lawsuit against the liable third party or insurer;
- When negotiating a settlement; or
- When accepting a settlement offer from the liable third party or insurer.

### Medicaid Subrogation Rules

Federal law requires all states to take reasonable measures to seek reimbursement for Medicaid benefits paid to the extent there is third-party liability. 42 U.S.C. § 1396a(a)

(25)(H). Federal law at 42 U.S.C. § 1396k(a)(1)(A) requires Medicaid recipients as a condition of eligibility to "assign the State any rights ... to payment for medical care from any third party." Washington's statutory subrogation requirements are set forth at RCW 43.20B.050-.080.

### How Much Can Medicaid Recover?

The state of Washington is entitled to subrogation for medical expenses paid up to the date of settlement by the Medicaid program for medical care related to the tortfeasor's actions. A proportionate share of the attorneys' fees and costs can be deducted from the amount otherwise paid to the Department. RCW 43.20B.060(4). The Department's proportionate share of litigation costs will be based upon:

- The fees and costs approved by the court, with prior notice and an opportunity to be heard afforded to the state; or
- The written fee agreement between the attorney and client, with a copy of the agreement sent to the state with an opportunity to examine documentation of the fees and costs associated with the case.

The state can bring an action in superior court to void a settlement if it believes the calculation of attorney's fees and costs to be inconsistent with the written fee agreement or exorbitant in relation to cases of a similar nature. RCW 43.20B.060(4)(c).

### Waiver or Compromise of Medicaid Claims

The Medicaid program does not have any regulation or statute that specifically authorizes the waiver or compromise of subrogation claims, as with the Medicare program. There is, however, a U.S. Supreme Court decision, *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752 (2006), which sets forth circumstances where the state's Medicaid subrogation claim is limited.

Until the Supreme Court's ruling in *Ahlborn*, DSHS took the position that its subrogation claim applied to the entire settlement or judgment amount. In *Ahlborn*, the Supreme Court ruled that the state's Medicaid claim was limited by federal statute to that portion of the judgment or settlement representing payment for medical care and did not include other damages such as lost wages or pain and suffering. In some cases DSHS will look at the ratio of the total value of the case to the settlement amount and then adjust its lien by that same ratio.

The *Ahlborn* case is based specifically on statutory interpretation of the Medicaid statutes so it is not applicable to Medicare subrogation matters. Equitable subrogation under the *Thiringer* case still does not apply to Medicaid

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## Tom Wampold Writes "For Men Only: A Cookbook"

Reviewed by Fred Frederickson

Noted gourmet and raconteur Thomas S. Wampold, a 1965 graduate of the University of Washington School of Law and current member of WSBA's Senior Lawyers Section Executive Committee, has written *For Men Only: A Cookbook (The Fastest Way to the Bedroom is Through the Kitchen)*. Wampold's magnum opus is, in his words, an ideal gift for "the busy person because the recipes are simple and take little or no time to prepare."

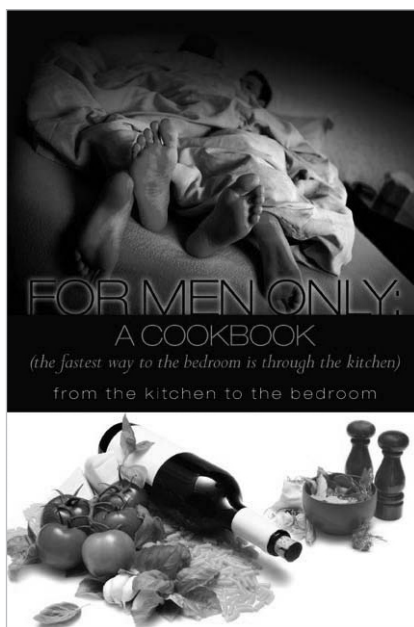
The cookbook reveals these toothsome details, among others:

- The nine basic culinary categories every man can master.
- "Morning after" fare that will impress and delight the opposite sex.
- How to cook cheaply, saving time and frustration.
- How the kitchen can be the fastest way to the bedroom.

Despite a painstaking search, your "Life Begins" investigative team has failed to locate a single female (or even a married one) willing to testify as to the geography of Wampold's kitchen, much less his bedroom.

Forced to rely on secondary sources, "Life Begins" interviewed Stephen J. Bean, a baron of the Olympia bar

and former law school roommate of Wampold's. "Tom was always interested in eating," reports Bean. "Even back then, Tom displayed a great affinity for the culinary arts. I am not surprised that he is now the author of a best-selling cookbook." Bean demurred when asked how Wampold earned the famous nickname 'Next' in Professor Warren Shattuck's contract law class.



### Like Father, Like Son?

Wampold began his storied career in Fairbanks, Alaska, as a law clerk for a U. S. District Court judge. (Whether he could see Russia from this vantage point is uncertain.) Forsaking the comforts of the Far North, this intrepid legal scholar returned to Seattle and next served as a King County deputy prosecuting attorney. Following this service in the public sector, Wampold experienced a meteoric rise in the private sector, eventually becoming senior partner in Thomas S. Wampold & Associates. He served as a King County Court commissioner pro tem for 20 years and vaulted into elected political office in Tahuya, Washington, as chair of the District 8 Board of Fire Commissioners.

*continued on next page*

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### *Medicare and Medicaid Subrogation Rules* from previous page

subrogation claims, but the *Ahlborn* decision can produce a similar result of placing some limits on the scope of recovery from a judgment or settlement.

#### Conclusion

With the SCHIP Extension Act of 2007, which goes into effect in July of 2010, insurance companies will be very concerned that they accurately address subrogation claims in those cases where the injured party's medical treatment was paid by either the Medicare or Medicaid program. The duty for the defense attorney is to be sure the third-party liability insurer reports information to CMS of potential Medicare and Medicaid recipients. For the plaintiff's attorney it is

critical to know whether the client is receiving Medicaid or Medicare benefits in order to know which government bureaucracy to approach to resolve the subrogation claims and in order to know what options are available to compromise or waive the subrogation claims.

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*"For Men Only: A Cookbook" from previous page*

Law is the family business of the Wampold clan. The scion of distinguished Seattle attorney Simon Wampold, Tom is the father of equally distinguished Seattle attorney, Michael Wampold. Unkind rumors sometimes circulate that Tom's successful legal practice was due to the family name faithfully burnished by Simon and Michael. When asked about this, Stephen Bean put the rumor to rest, stating, "*Res ipsa loquitur.*"

### **Chicken and Pie: The Two Basic Food Groups**

*For Men Only: A Cookbook (The Fastest Way to the Bedroom is Through the Kitchen)* has experienced a dazzling rise in sales since it was published in September 2009. It is currently ranked 455,694 on the Amazon best-seller list. Wampold confidently predicts that "it is only a matter of time until my cookbook cracks the top two hundred thousand best seller list on Amazon." To purchase a copy, go to [www.Amazon.com](http://www.Amazon.com) and search for Thomas Wampold in the books department.

In a "Life Begins" exclusive, Wampold has kindly agreed to share with our readers two favorite recipes from the cookbook: GYPSY GREEK CHICKEN and TOM'S FAMOUS PECAN PIE.

### **GYPSY GREEK CHICKEN**

*This is a no-brainer and tastes great.*

- One 4-5 lb. chicken
- Greek seasoning (can be purchased at most super markets)
- ½ cup lemon juice

First, steal one chicken. Second, spray chicken with Pam or put olive oil on it. Sprinkle Greek seasoning on top. (I use Cavendar's all-purpose Greek seasoning), cut lemons in quarters, squeeze lemon into chicken's cavity, and stuff the rest in also. Put lemon juice in pan, and bake for approx. 30 minutes a pound at 325 degrees.

### **TOM'S FAMOUS PECAN PIE**

This is the only pecan recipe I've found that isn't sickeningly sweet. You can serve it with whipped cream, ice cream or plain. Once, when I took it to a party someone told me it was the best pie she ever had! A friend gave me this recipe (after I begged, that is) which he found in historic Williamsburg, Virginia. However, don't make the mistake he made – I suggest you keep it to yourself and don't share with anyone.

- Pastry crust for 9-inch pie shell
- 4 eggs
- ¾ cup sugar
- ½ t. salt
- 1 1/2 cups light corn syrup
- 1 T. butter melted
- 1 t. vanilla
- 1 cup pecan halves

Buy 9-inch crust at store. You can find these in the baking aisle at your favorite grocery store. I prefer vanilla, or graham cracker (I do not use the frozen ones).

For a variation, try a chocolate crust.

Preheat oven to 400 degrees.

For the filling, beat the eggs lightly with a whisk, and add the sugar, salt, corn syrup, cooled butter, and vanilla; stir until mixed well.

Spread the pecan halves on the bottom crust and cover with filling. Place in the oven and immediately reduce the heat to 350 degrees.

Bake for 40-50 minutes or until the mixture is firm. Make sure it is firm. Test with a toothpick or knife placed in the center. If it comes out clean, it's probably done. Remember though, it might take a little longer than 40-50 minutes, so keep checking, even if it is over the allotted time. Also remember that the internal heat keeps cooking it a little, even after removing it from the oven. Let cool before serving.

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