NO. 40737-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

M.R.B., individually; K.B.W., individually; M.L.F., individually; CHARLES FREEDLE and LORIE HUNIU, individually and as Guardians for M.L.F.; W.R.H., individually; and RICHARD HIGGINS and KAREN HIGGINS, individually and as Guardians for W.R.H.,

Appellants,

vs.

PUYALLUP SCHOOL DISTRICT,
a political subdivision of the State of Washington,

Respondents.

BRIEF OF APPELLANTS

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A. INTRODUCTION

The Puyallup School District ("District") had a clear-cut policy giving it and its staff control over speech disseminated in school-sponsored publications. The *JagWire*, a student newspaper at the District's Emerald Ridge High School, was just such a school-sponsored publication. Despite that authority, the District's staff failed to instruct *JagWire* student journalists on proper journalist ethics and then allowed those students to publish a salacious article on student oral sex practices at the high school, identifying other students by name, although the student journalists had not informed the quoted students that they would be identified. Upon publication, the quoted students were subjected to abuse and ridicule, as only can be felt in the high school setting.

In the present action for negligence, negligent supervision and hiring, and invasion of privacy, the trial court allowed the District to argue that the *JagWire* was a so-called "open forum" (also called a "public forum") where any government restraint is subject to strict scrutiny. Not only was "open forum" a flawed legal concept, it was contrary to the District's own policy. Yet the District argued that in this fictional "open forum," school officials were constitutionally prohibited from stopping the publication, contrary to the District's own policy, the facts in this case, and well-settled law. The trial court failed to make an early ruling on that

question of law, and allowed evidence of the alleged constitutional protections of the so-called "open forum" to be admitted at trial when such evidence should have been excluded. The *JagWire* was a non-public forum as a matter of law. The trial court made matters worse by refusing an instruction on how to properly analyze the forum issue, advising the jury that the issue was not before it.

The trial court compounded this legal error by permitting the District's trial counsel to engage in manifest misconduct in pushing the flawed "open forum" argument and misusing the statement of damages submitted by the plaintiffs before the jury.

In order to ensure a fair trial to the children ("student victims") who were the victims of the District's lackadaisical supervision of their fellow students, and who were further victimized by the District's counsel's strident, insistent misconduct at trial, this Court should order a new trial.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in refusing to rule on the forum issue as a matter of law before the trial, including its reservation on the student victims' motions in limine in its order dated March 24, 2010.

2. The trial court abused its discretion in permitting misuse of the student victims' statements of damages by the District's counsel.

3. The trial court erred in permitting testimony, questioning, and argument as to the legal conclusions that the *JagWire* was an open forum, and that the District was prohibited by the First Amendment from stopping publication of the students' sexual status, histories, and details.

4. The trial court erred giving Instruction Number 20.

5. The trial court erred in refusing the student victims' jury instruction number 27.

6. The trial court erred in refusing the student victims' proposed instruction number 36.

7. The trial court erred in ruling post-trial that the school-sponsored newspaper was a limited public forum.

8. The trial court erred in denying the student victims' CR 59 motion for a new trial.

(2) Issues Relating to Assignments of Error

1. Under United States Supreme Court precedent, is a school-sponsored newspaper that is: taught as part of the curriculum, paid for by the school district, proclaimed in written policy to be the speech of the school and not the students, subject to grading and credit, distributed to students at the district's high school, and taught by a regularly paid faculty

member, a non-public forum that may be restricted based upon legitimate pedagogical concerns? (Assignments of error 1, 3-8)

2. Under United States Supreme Court precedent, may a school district-sponsored newspaper that is a non-public forum by policy be transformed into a public forum by the school district's inaction? (Assignments of error 1, 3-8)

3. Does the First Amendment compel a school district to tolerate publication of student sexual histories, details, and status in a school district-sponsored newspaper? (Assignments of error 1, 3-8)

4. After granting a motion in limine that no testimony would be offered as to legal conclusions, may a trial court permit testimony, questioning, and argument as to whether the First Amendment compelled the very inaction that the student victims claimed constituted negligence? (Assignments of error 1, 3-8)

5. After granting a motion in limine that no testimony would be offered as to legal conclusion, may a trial court permit testimony, questioning, and argument regarding the legal conclusion of what kind of First Amendment forum existed? (Assignments of error 1, 3-8)

6. Did the District's counsel engage in misconduct by repeatedly misrepresenting the law, confusing the court, and inflaming the passion and prejudice of the jury by arguing that the student victims had

taken away the First Amendment rights of other students because of their greed? (Assignments of error 2, 3, and 8)

C. STATEMENT OF THE CASE

In the summer of 2007, the District hired an inexperienced journalism teacher, Kevin Smyth, to teach its journalism class at Emerald Ridge High School. Ex. 19; RP 461. Smyth was a regular paid faculty member. RP 461. The main focus of the class was to teach students journalism and produce eight issues of the school-sponsored newspaper, the *JagWire*. RP 2211. The newspaper was operated and financed by the District. CP 164. It was the official school newspaper of Emerald Ridge; students in the class received grades and credit for working on the paper. Ex. 31. Smyth, as the paper's advisor, was the "final arbiter" of the paper's content. CP 138; RP 255.

The District's written Policy 3220 stated that school-sponsored publications were the speech of the school, not the private speech of students. Ex. 3; RP 2190. District Policy 3220 applied to student publications, and stated that those publications were subject to "prompt review" for content that would cause substantial disruption of the school,

invaded privacy, was libelous, obscene, or profane, demeaned certain groups, or advocated violation of the law. CP 140.[1]

Smyth acknowledged that part of his role was to teach the students about journalist ethics. RP 2211. However, when questioned about whether he ensured that his students were well-versed in journalist ethics before they began reporting and editing, Smyth replied that there was "no way" he could teach a semester of journalism ethics and still do his job of helping the students put out the paper. RP 2211.

In February 2008, less than a year after Smyth's hiring, his journalism students began writing an extensive feature article about oral sex. CP 74-77. Dallas Welker, a student reporter and member of the *JagWire's* editorial board, conducted interviews with students about sex and oral sex. The intent was to publish what the students called "sextimonials." RP 773. According to Welker's version of events, she approached students, said she was a reporter for the *JagWire*, and told them she would like to "quote" the students for the paper. RP 550-51. She did not say that the students' names would be used, although she felt that was implied in the word "quote." *Id.* She did not say the students'

[1] District Policy 3220 included an instruction that the district's superintendent should adopt guidelines for its enforcement. CP 140. Neither the superintendent, nor the administrators at Emerald Ridge, adopted any written guidelines for applying Policy 3220. RP 388, 1628. A copy of District Policy 3220 is in the Appendix.

sexual histories would be included in the paper. RP 561. She admitted that she did not say that the article would feature "pull quotes," which were enlarged features displaying the students' name and quotation and disclosing in brackets below whether the student had engaged in sex or oral sex. RP 558, 561.

Four of the students Welker approached were Mikaela Bates, Madeline Freedle, Whitney Higgins, and Kevin Weeks. RP 554, 562. Welker was good friends with Freedle. RP 1277. These students believed their comments would be anonymous. RP 882, 999, 1280, 1396. They did not know that their names and sexual histories would appear in the newspaper. *Id.*

Before publication, the journalism students discussed the article with their former journalism teacher, Jeff Nusser. RP 748. Smyth was embarrassed that the students wanted to consult their former, more experienced, teacher on the article. He asked to be included in the communications with Nusser. *Id.* Nusser responded by email, stating:

> Sextimonials: Wowser. You're probably going to ruffle some feathers there. All those people were very clear that what they said was going to go in the paper? Make sure you've got all you ducks in a row on that one...."

RP 774. Nusser also said he was worried about libel. RP 774. Smyth suggested to Welker that she go back to the quoted students for

confirmation of their consent. RP 764. He did not confirm, however, whether Welker ever did so, or require her to go back and check the quotations. RP 766-67. Welker did not go back and check with the quoted students. RP 776. When asked why he did not verify that Welker confirmed consent, Smyth said "It wasn't my role." RP 777. He also said that it was not his job to "supervise the gathering of names." RP 767.

The resulting article contained quotations and bracketed information about the students' sexual activities. CP 75.[2] Bates was quoted as saying she was "horny." *Id.* Under a quotation by Weeks in brackets it said "Kevin Weeks, senior, has participated in oral sex and sex." The same information was under a quotation by Freedle. Higgins was quoted as saying "It's [referring to sex] not something I want to regret. I don't really regret anything like mistakes and I don't think it was a mistake."[3] *Id.* The quotations were overlaid next to sexually suggestive photographs and a box featuring a list of sexually transmitted diseases. *Id.*

When the newspaper was published, "all hell broke loose" at Emerald Ridge, a fact even Smyth acknowledged. RP 777. The students who were identified by name in the *JagWire* were subjected to ridicule,

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[2] A copy of the article is in the Appendix.

[3] Two of the student quotes had nothing to do with oral sex even though they were made to appear as though they did. RP 584.

harassment, humiliation, and embarrassment. RP 1009-11, 1293-97, 1410-13. Some of the students had not disclosed to their parents or peers that they were sexually active. RP 1415. Bates and Freedle became known as "the two whores." RP 1411. Bates was repeatedly harassed by male students asking her if she was "horny." RP 1420. Students pointed and laughed at Freedle and called her a "slut." RP 1285. The harassment continued, and the students became emotionally distraught, had personality and behavioral changes, started avoiding school social settings such as sporting events and the lunchroom, and suffered other harmful consequences from the article. RP 1296-97.

Even after the uproar began, Smyth and the journalism students decided to enter the newspaper in a statewide journalism contest. RP 800. The story was picked up by the Tacoma *News Tribune* ("TNT") and Smyth was interviewed. He told the TNT that the students in question had given their permission to have the information in the paper. RP 783. Less than a month later, Emerald Ridge Principal Brian Lowney issued a reprimand to Smyth for his "lack of oversight." Ex 9.

Bates, Weeks, Freedle, and Higgins, along with Higgins and Freedles' guardians (hereinafter, "the student victims") filed a claim against the District in the Pierce County Superior Court. CP 1-13. Their

claims for negligence, negligent hiring and supervision, and invasion of privacy were assigned to the Honorable Susan K. Serko. RP 1.

The District requested statements of damages from the student victims under RCW 4.28.360. Their counsel complied with the statute, and submitted responses noting that damages were solely within the province of the jury, but that in similar cases juries had returned verdicts of two to four million dollars. CP 684-706. The statements then suggested that such a verdict would be appropriate in the student victims' case based on the facts presented. *Id.*

During depositions, the District began questioning witnesses about what the District termed the "open forum practice"[4] of teaching journalism at Emerald Ridge. CP 151, 175. According to the District, "open forum practice" was a journalism teaching method where the school exercised no prior review, prior restraint, or editorial control whatsoever over the contents of the school newspaper. Under the District's definition of "open forum practice" the students had final say over all newpaper content and the District was prohibited by the First Amendment from preventing publication of any "protected speech." CP 175-76.

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[4] It was not until the end of the trial that counsel for the District conceded that the term "open forum practice" was synonymous with "public forum" under the case law. RP 2401-02. In this brief, discussions of the legal concept of public forum use the proper

In response to cross-examination during deposition, Smyth admitted that he had the power to stop publication of content that was "extra-objectionable," such as an exposé on the principal which contained private details. CP 160-61. Former State Superintendent of Public Instruction Judith Billings filed a declaration stating that the "open forum" concept, as defined by current District Superintendent Tony Apostle, would violate District Policy 3220. CP 183-85. Principal Lowney confirmed during his deposition that Smyth was empowered to stop publication of any content that violated District policy. CP 148-52. Ashley Vincent, a student member of the *JagWire* editorial board, stated in her deposition that if Smyth said the students were not to print something, it would not get printed. CP 171.

Despite these admissions that the District had control over the *JagWire*'s content, after the completion of discovery the District moved for summary judgment on the grounds that "*JagWire* was an open, public forum student publication where...students were outside the lawful control of school personnel." CP 14-15. The District argued that it was "not legally allowed to interfere with the...students' publication decisions." *Id.*

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term. However, for clarity, much of the factual discussion refers to the District's "open forum" phrase.

It argued that if the District had engaged in prior review or restraint of newspaper content, it would have "violated constitutional rights of the students." CP 26. The trial court denied the District's summary judgment motion.

The student victims moved in limine to exclude the District's "open forum" defense on the grounds that it was incorrect as a matter of law and that, regardless, testimony about the law should be excluded. CP 235. They argued that under controlling United States Supreme Court case law, forum analysis was a matter of law for the court, and that the *JagWire* was a non-public forum. CP 235-47. They explained that by applying the undisputed facts to the factors for forum analysis, the trial court must rule on forum as a matter of law. *Id.* The trial court agreed that forum analysis was a legal issue for the court, but reserved ruling on the student victims' motions in limine regarding the District's "open forum" defense. RP 52; CP 456-57, 464. The trial court did grant a motion in limine to prevent testimony as to legal conclusions. CP 463.

After the motions in limine were resolved and the student victims' counsel had already presented their opening statement, the District orally sought "clarification" of whether it could tell the jury how much the students were "asking for" in damages. RP 245. The District wanted to offer as evidence the statutorily-mandated notices of tort claim and

statements of damages. *Id.* The trial court allowed the use of the statements of damages. RP 251.

The District's trial defense centered on the "open forum" concept. It was a major theme of the District's opening statement. *Id.*; RP 254-56, 261, 263-67. The District presented both lay and expert testimony to the effect that the First Amendment prohibited the District from stopping publication of the students' personal sexual histories. RP 265, 273-74, 428, 479, 528, 604, 660, 667-68, 671, 738, 743, 803, 818, 848-49, 853, 1218-25, 1250, 1267, 1515, 1537, 1554, 1560, 1567, 2075, 2093, 2101, 2150, 2162, 2185, 2206, 2246. The District's counsel and its witnesses repeatedly referred to the article disclosing students' sexual histories and status as "protected speech" or "protected expression" and that only "unprotected speech" could be restrained in an open forum. RP 743, 803, 853, 862, 1218, 2169, 2243.

The trial court struggled with the forum issue throughout the trial. RP 72-73, 1179-84, 1555, 1566-71, 1682-1752, 2387-2427. Several objections to the District's evidence resulted in colloquies, and the trial court was clearly confused about the open forum issue. *Id.* In fact, halfway through the trial, the court expressed uncertainty about its own prior ruling that forum analysis was a matter of law for the court, rather than one of fact for the jury. RP 1179.

After the completion of the testimony, during a colloquy on jury instructions, the trial court again addressed the forum issue. RP 2387-2427. The student victims tried to cure the prejudicial "open forum" evidence and argument that permeated the trial by offering curative instructions, plaintiff's proposed instructions numbers 27 and 36, CP 522, 542, but the trial court largely denied them. RP 2427-2508. Despite ruling that the *JagWire* was a "limited open forum," the trial court did not allow jury instructions attempting to clarify the forum issue for the jury. CP 522, 542. Instead, over objection, the court ordered that the jury instructions not refer to forum at all. RP 2548. The court ordered that one instruction be included, beginning with a statement that student journalists have First Amendment rights, followed by a statement describing the legal standard for a *non*-public forum, contrary to the court's own oral ruling that the *JagWire* was a "limited open forum." RP 2548; CP 606.

The jury returned a verdict in favor of the District. CP 780. The student victims moved for a new trial under CR 59, 629, but the motion was denied. CP 783. This timely appeal followed. CP 777.

D. SUMMARY OF ARGUMENT

The trial court erred in failing to rule as a matter of law that the *JagWire* was not an open forum, as that term is understood in First Amendment decisions of the United States Supreme Court. Ultimately,

the trial court ruled that the student newspaper was not an open forum, but it never apprised the jury of its decision and declined to properly instruct the jury on the issue. The trial court compounded the error by allowing the District to introduce improper legal opinions regarding the law of the First Amendment and the so-called "open forum" and by allowing its counsel to repeatedly argue the issue to the jury.

This Court should reverse the trial court's decision that the *JagWire* was a "limited public forum." The trial court should have granted the student victims' CR 59 motion for a new trial because of the District's trial counsel's misconduct in presenting misleading evidence and argument to the jury on a legal issue that should have been resolved by the trial court prior to trial, and in misusing the plaintiffs' statement of damages.

E. ARGUMENT

(1) Standard of Review

This Court reviews errors of law *de novo*, including errors of law cited as grounds for a new trial in a CR 59 motion.[5] *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812-13, 440 P.2d 834 (1968); *Lyster v. Metzger*, 68 Wn.2d 216, 220, 412 P.2d 340 (1966). "To the extent that an

[5] The grounds for granting a new trial are set forth at CR 59(a), reprinted in relevant part in the Appendix. That rule lists nine potential grounds for granting a new trial, four of which are at issue here: (1), (2), (8), and (9).

order denying a new trial is predicated upon rulings as to the law, such as those involving the admissibility of evidence or the correctness of an instruction, no element of discretion is involved." *Lyster,* 68 Wn.2d at 220.

If, after a *de novo* review of legal issues, this Court concludes that error occurred, it next considers whether it is reasonably probable that the error affected the outcome of the trial. The standard of review is abuse of discretion. *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *review denied,* 118 Wn.2d 1011 (1992).

The standard of review for an order denying a motion for a new trial on grounds other than error of law, such as misconduct of counsel, is also abuse of discretion. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 998 P.2d 856 (2000).[6] Appellate courts afford a trial court less discretion when it denies a new trial, because denial of a new trial concludes the parties' rights. *Palmer v. Jensen,* 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

(2) Background to the First Amendment and Student Expression

[6] "The criterion for testing abuse of discretion is: '[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?'" *Moore v. Smith,* 89 Wn.2d 932, 942, 578 P.2d 26 (1978) (quoting *Slattery v. City of Seattle,* 169 Wash. 144, 148, 13 P.2d 464 (1932)). This rule of abuse of discretion is specific to motions for a new trial. It is distinguished from the general test for abuse of discretion set forth in *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971): "that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."

The case law regarding student expression and the contours of the First Amendment are critical to understanding the trial court's error in allowing the "open forum" defense. The Supreme Court has acknowledged that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 511, 89 S. Ct. 733, 739, 21 L.Ed.2d 731 (1969). They cannot be punished merely for expressing their personal views on the school premises-whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours." *Id.* at 512-13.

In *Tinker* and cases that followed, however, the Supreme Court has recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S. Ct. 3159, 3164, 92 L.Ed.2d 549 (1986), and must be "applied in light of the special characteristics of the school environment." *Tinker,* 393 U.S. at 506. A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school. *Bethel,* 478 U.S. at 685. Accordingly, the Court held in *Bethel* that a student

could be disciplined for having delivered a speech that was "sexually explicit," but not legally obscene, at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. The Court thus recognized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," rather than with the federal courts. *Id.* at 683.

The seminal case on high school student newspapers is *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L.Ed.2d 592 (1988). There, a high school principal prohibited journalism students from publishing provocative exposés on divorce and teenage pregnancy in the high school's newspaper. *Id.* at 264. Although the journalism students had used false names to protect the identities of the students they had interviewed regarding these topics, the principal still refused to publish the stories based on a belief that the articles' sexual references were inappropriate for younger students and that the pregnant students were still identifiable from the text, despite their aliases. *Id.* at 263. The student journalists sued, arguing that the principal had violated their First Amendment rights. The Supreme Court affirmed the principal's right to

restrict content and held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

Thus, under the First Amendment, cases like *Bethel* and *Hazelwood* establish that student expression can be restricted by a school district for pedagogic reasons, one of which is the sensitive high school environment and the heightened impact that certain events can have on adolescents. The Supreme Court has also acknowledged that the high school setting is particularly precarious for children because of the high degree of peer pressure and subtle coercion that can exist there. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 598-99, 112 S. Ct. 2649, 120 L.Ed.2d 167 (1992).

Moreover, whether the setting is in a high school journalism class or the adult world of professional journalism, the First Amendment does not provide blanket protection for speech that invades privacy, even if the information is disclosed voluntarily. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed.2d 328 (1975), the Supreme Court dealt with the same tort as is involved here, characterized by the Court as "the right (of one) to be free from unwanted publicity about his private

affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities." *Cox,* 420 U.S. at 489. The Court noted:

> the appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to the reputation or individual sensibilities.

Id.[7] The Ninth Circuit subsequently ruled in *Virgil v. Time, Inc.,* 527 F.2d 1122 (9th Cir. 1975), *on remand,* 424 F.Supp. 1286 (1976) that a source could maintain an action for invasion of privacy when he volunteered to be interviewed for a magazine article, but later withdrew his consent when he learned more about the article's scope. *Virgil,* 527 F.2d at 1124-27.

The First Amendment also does not protect journalists from actions for damages after they break promises of anonymity to their sources. *Cohen v. Cowles Media Company,* 501 U.S. 663, 665, 111 S. Ct. 2513, 115 L.Ed.2d 586 (1991). "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cowen,* 501 U.S. at 669. *See also, Veilleux v. National Broadcasting Co.,* 206 F.3d 92 (1st Cir. 1990); *Food Lion v. Capital Cities/ABC, Inc.,* 194

[7] The Court held open the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments. *Id.* at 491.

F.3d 505 (4th Cir. 1999); *Ruzicka v. Conde Nast Publications, Inc.*, 999 F.2d 1319 (8th Cir. 1993).

Yet another pedagogic concern the District should have considered before allowing publication of student sexual histories is the employment of proper journalist ethics. The Society of Professional Journalists ("SPJ"), the foremost organization in America on journalist ethics, has a Code of Ethics. In that Code of Ethics, journalists are informed that because they are charged with preserving justice and democracy, they have a duty to uphold the highest standards of integrity. Ex. 5. Among the ethical standards emphasized by the SPJ are: keeping promises to sources, showing compassion for those who may be affected by news coverage (particularly children and inexperienced sources) recognizing that reporting information can cause harm, showing good taste, and refusing to pander to lurid curiosity. *Id.* Smyth testified that he "went over" the guidelines with his students. RP 2211. But he did not properly supervise his students implementation of those ethical standards in this case.

With this legal landscape in mind, the trial court nonetheless allowed evidence and argument that the District and its staff were powerless to stop publication of student sexual histories and details under its curious "open forum" analysis.

(3) The *JagWire* Was a Non-Public Forum as a Matter of Law

The trial court erred in concluding post-trial that the *JagWire* was a limited public forum. Identifying the nature of the forum in which speech is expressed is the first step in understanding whether a state actor may control that speech. *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 887 F.2d 935 (9th Cir. 1989), citing *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 797, 105 S. Ct. 3439, 3446, 87 L.Ed.2d 567 (1985). The inquiry presents a *question of law* for the court. *Id.* Although facts must be examined in deciding what kind of forum is at issue, the legal question of forum is for the court to decide. *Id.*

The United States Constitution does not require a government to open its property to all seeking an outlet for protected expression. *Cornelius,* 473 U.S. at 799-800. Recognizing that a government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. *Id.* at 800, *quoting Greer v. Spock,* 424 U.S. 828, 836, 96 S. Ct. 1211, 1216, 47 L.Ed.2d 505 (1976).

Within this analysis, the Court has identified three types of fora on government property: the traditional public forum, the designated public forum created by clear government action, and the non-public forum. *Cornelius,* 473 U.S. at 802. Traditional and designated public fora are subject to the *exact same constitutional scrutiny*: content-based restrictions on speech must be necessary to serve a compelling state interest and narrowly tailored to that end. *Id.* at 800; *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L.Ed.2d 794 (1983); *Carey v. Brown,* 447 U.S. 455, 461, 100 S. Ct. 2286, 2290, 65 L.Ed.2d 263 (1981). Non-public fora are subject to a very different standard: The state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry,* 460 U.S. at 46.

Traditional public fora are "streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry,* 460 U.S. at 45, *quoting Hague v. CIO,* 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L.Ed. 1423 (1939). Public fora are essentially public places where citizens come and go indiscriminately. *Id.* Although they are technically government

property, they are not controlled by the government in the same way as government buildings or secured areas. *Id.* Designated public fora are created when the government opens its property for *indiscriminate* use by the general public. *Perry,* 460 U.S. at 47.

A designated public forum is one that is not intuitively public like a park, but is affirmatively opened to the public by the government. Examples of designated public fora include public university meeting facilities and a municipal theater. *Perry,* 460 U.S. at 45-46. To determine whether the government has created a designated public forum, courts look to the government's intent. *Cornelius,* 473 U.S. at 802; *Perry,* 460 U.S. at 47. "The government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse." *Cornelius,* 473 U.S. at 802 (emphasis added). The government must be "motivated by an affirmative desire to provide an open forum." *Id.* at 805.

The government may also designate a public forum for a limited purpose such as use by certain speakers or the discussion of specific topics. *Cornelius,* 473 U.S. at 802; *Perry,* 460 U.S. at 45-46 n.7. This is sometimes referred to as a "limited public forum," but it is no different than a designated public forum. *Perry,* 460 U.S. at 45-46. The term "limited" in "limited public forum" simply means that the designated

forum is for a limited purpose, such as a government meeting. Again, a limited public forum is merely a species of designated public forum, and is subject to the exact same constitutional scrutiny as a traditional public forum such as a park or town square. *Id.* at 46. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Id.* The *JagWire* was not such a limited public forum.

If a forum is not traditional public or designated public (including limited public), it is non-public. Courts will not presume the government has converted a non-public forum into a designated public forum unless, "by policy or by practice," *Perry,* 460 U.S. at 47, the government has demonstrated a "clear intent" to do so. *Cornelius,* 473 U.S. at 802. "If the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created." *Hazelwood,* 484 U.S. at 267, *quoting Perry,* 460 U.S. at 46. Finally, "where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum." *Cornelius,* 473 U.S. at 804.

In *Hazelwood*, the U.S. Supreme Court analyzed the issue of whether a high school newspaper was a public forum or a non-public

forum subject to regulation and control by school administrators. Because there was no clear intent to open the newspaper to indiscriminate use by the public, the Court concluded that the paper was not a public forum. *Hazelwood,* 484 U.S. at 269-70. The case arose after a high school principal removed from a school newspaper two pages containing an article describing some of the school's students' experiences with pregnancy and an article discussing the impact of divorce on a number of the school's students. 484 U.S. at 263. In analyzing whether the students' First Amendment rights were violated, the Supreme Court began by noting that the kind of forum in which speech is expressed is vital to First Amendment analysis. It then enunciated the test for courts to use in deciding whether a school newspaper is non-public -- whether school authorities "by policy or practice have opened those facilities for indiscriminate use by the general public." *Id.* at 268. In *Hazelwood,* the Court noted that the journalism class and newspaper production were (1) designated by school policy as part of the curriculum; (2) taught by a regular faculty member during school hours; (3) awarded grades and credit to participating students; (4) controlled and overseen by a faculty member who was the final arbiter of content; (5) was not opened up for public use, and; (6) bore no indicia of "clear intent" by the school to relinquish control and create a public forum. *Id.* at 269-70.

After concluding that the school newspaper was a non-public forum, the Court determined that school officials could regulate the newspaper's contents in "any reasonable manner." *Id.* at 270. The Court then distinguished between (1) tolerance of private student speech that happens to occur on school grounds, and (2) the affirmation, promotion, or sponsorship of student speech by the school itself. *Id.* at 270-71. The former issue – tolerance of private student speech that happens to occur on school grounds – is mandated by *Tinker,* supra, which involved students who wore black armbands to school to protest the Vietnam war. On the other hand, the Court wrote in *Hazelwood*:

> The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Id. at 271. The Court determined that educators' authority in this area enabled them to "assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the

views of the individual speaker are not erroneously attributed to the school." *Id.*

The *Hazelwood* court found a school district does not violate the Constitution by restricting content in a student newspaper published as part of a journalism class for a grade, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 n.7.

The *Hazelwood* court *specifically identified teen sexual issues* as those over which educators needed flexibility and more control:

> Educators are entitled to exercise greater control over ... student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school .... In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting *to the particulars of teenage sexual activity in a high school setting.*

Id. at 271 (emphasis added).

In *Planned Parenthood,* the Ninth Circuit Court of Appeals evaluated a nonprofit family planning organization's claim that its First

Amendment rights were infringed when school administrators declined to publish advertisements for the organization in a school-sponsored newspaper. 887 F.2d at 936. Applying the *Hazelwood* forum analysis, the Court noted that the newspaper was authorized by the school, offered as part of the curriculum, taught by faculty members and offered grades and academic credit upon completion. *Id.* at 942. As such, the newspaper was a non-public forum and was subject to any reasonable restrictions with a legitimate educational purpose. *Id.* at 946.

Hazelwood was consistent with prior Ninth Circuit Court of Appeals' analysis of the rights of student newspapers. *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir. 1982) also dealt with school control of what went into the newspaper the school itself published as part of the school's educational program. In *Nicholson,* the Ninth Circuit court held that "writers on a high school newspaper do not have an unfettered constitutional right to be free from prepublication review." *Id.* at 863.

The Ninth Circuit correctly analyzed the difference between *Tinker* and *Hazelwood* in *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988). In that case, a school attempted to censor a private newspaper produced by students independently, "at their own expense, off school property, and without the knowledge of school authorities." *Burch,* 861 F.2d 1150. The

Court noted accurately that the difference between the *Tinker* public forum and the *Hazelwood* non-public forum was as simple as the distinction "between speech that is sponsored by the school and speech that is not." *Id.* at 1158 (quoting *Hazelwood*).

Here, the evidence showed that the *JagWire* was a *Hazelwood* non-public forum, and there was no clear intent to open the newspaper for indiscriminate use by the public. The paper was Emerald Ridge's official newspaper distributed to its students. Emerald Ridge journalism students staffed the paper and the journalism class was offered as part of the school's curriculum. Ex. 31. Students received grades and academic credit for participation. *Id.* The class was taught by a paid, regular faculty member during school hours. Ex. 19; RP 461. The teacher was the final arbiter of the content of the paper. CP 138; RP 255. School board policy specified that student publications were vehicles for instruction and could not cause a substantial disruption of the school, defined as invading privacy, attacking particular groups, causing "shouting or boisterous conduct" and other speech that would be protected in a public forum. CP 140. District policy stated that student publications were not the private

speech of students, but were considered the speech of the District. Ex. 3; RP 477-78, 2190.[8]

Despite the District's attempt to offer contradictory testimony that the *JagWire* was an open forum "by practice" because Smyth and Lowney refused to provide oversight, the United States Supreme Court has made clear that *a non-public forum cannot be made public by inaction. Cornelius,* 473 U.S. at 802.

Because the District had legitimate pedagogic reasons for restricting the student journalists' activities, which were part of the school curriculum, the First Amendment does not apply. The *JagWire* was a non-public forum as a matter of law. The trial court should have made that legal determination in advance of the trial.

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[8] Early in the trial, Superintendent Apostle admitted facts that totally contradicted the legal theory that *JagWire* was an "open forum" or "public forum:"

> Q. Where is it written that the principal couldn't stop publication?
>
> A. We operated at the time under an open forum.
>
> ...
>
> Q. But there are a number of documents that talk about the fact that the School District can and should promptly review information that will either cause harassment, invasion of privacy, or substantially disrupt the educational environment, correct?
>
> A. *If the publication met any of those conditions, the principal could intervene.*

RP 428-29.

(4) A New Trial Is Warranted Under CR 59(a)(8) Because the District Was Allowed to Present a Defense that It Was Constitutionally Prohibited from Controlling the Content of the School-Sponsored Newspaper

The student victims are entitled to a new trial under CR 59(a)(8) because not only did the trial court err in mischaracterizing the *JagWire's* status, it delayed a final ruling on that question of law, allowing the District to offer testimony on a legally erroneous defense to the jury. The trial court reserved ruling on the motions in limine regarding open forum, allowed testimony as to the law and legal conclusions, and then declined to give the student victims' curative jury instructions.[9] The student victims sought to prevent the District from introducing evidence and argument that the *JagWire* was a so-called "open forum" so that, under the First Amendment, the District could not stop publication of the students' sexual details. CP 235-49. Because that motion was denied, the District was allowed to present evidence that any prior review or restraint of speech in the *JagWire,* a school-sponsored newspaper offered as curriculum, would have been a violation of students' First Amendment rights. The District was allowed to tell the jury that any oversight of the

[9] The trial court's Instruction Number 20 did not reference forum at all, but began with a statement that student journalists have First Amendment rights, followed by a statement describing the legal standard for a *non*-public forum, contrary to the court's own ruling. RP 2548; CP 606.

students who published personal sexual details about other students would have violated the Constitution. That was error.

(a) The Trial Court Allowed Testimony that the District Was Constitutionally Prohibited from Stopping Publication of Students' Sexual Information

Witnesses are not permitted to give testimony about the law (or law mixed with fact). *Orion Corp. v. State*, 103 Wn.2d 441, 461, 693 P.2d 1369 (1985); *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 732 P.2d 1008 (1987); *see also* ER 704; 5B Wash. Prac., Evidence Law and Practice § 704.7 (5th ed.); ER 401-402 (evidence irrelevant and inadmissible unless it has a tendency to prove or disprove a *fact*). It is the role of the Court to determine the law and to instruct the jury accordingly. *Keller v. City of Spokane*, 146 Wn.2d 237, 251, 44 P.3d 845 (2002); Wash. Const. art. IV § 16 (Judges "shall declare the law"). Thus, expert and lay witnesses alike are prohibited from testifying regarding what the law *is*, what they *believe* it to be, or what they think it *should* be. *Cf. Bell v. State*, 147 Wn.2d 166, 180, 52 P.3d 503 (2002); *Orion Corp.*, 103 Wn.2d at 461.

> A witness cannot be allowed to give an opinion on a question of law.... In order to justify having courts resolve disputes between litigants, it must be posited as an *a priori* assumption that there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge.... To allow anyone other than the judge to state the law would

> violate the basic concept... and it would intolerably confound the jury to have it stated differently.

Specht v. Jensen, 853 F.2d 805, 807, *cert. denied,* 488 U.S. 1008 (10th Cir. 1988) (quoting Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution,* 41 Den.L.Cent.J. 226, 237 (1964)).

ER 704 bars a witness from testifying to legal conclusions. *State v. Olmedo*, 112 Wn. App. 525, 49 P.3d 960 (2002); *see also, Hyatt v. Sellen Constr. Co., Inc.,* 40 Wn. App. 893, 899, 700 P.2d 1164 (1985); *Everett v. Diamond,* 30 Wn. App. 787, 791-92, 638 P.2d 605 (1981). Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant's conduct complied with or violated a particular law. *Hyatt,* 40 Wn. App. at 899, 700 P.2d 1164. Furthermore, "[e]xperts may not offer opinions of law in the guise of expert testimony." *Stenger v. State,* 104 Wn. App. 393, 407, 16 P.3d 655, *review denied,* 144 Wn.2d 1006, 29 P.3d 719 (2001).

Under the rule, reference in this case by the District's counsel and its witnesses to the Constitution and the First Amendment should have been excluded. *See Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (reversing and remanding for new trial where trial court admitted impermissible legal testimony that defendant officers' conduct comported with the "standards under the Fourth Amendment").

Our Supreme Court addressed this issue in *Bell,* 147 Wn.2d 166. Bell was a rape victim who sued the Department of Corrections for failing to properly supervise a rapist, Scherf. *Id.* at 169. At trial, the court permitted a former member of the Indeterminate Sentence Review Board (ISRB), David Carlson, to "counter Bell's suggestions that Scherf's parole would have been revoked but for DOC's inadequate supervision[.]" *Id.* at 172. Carlson "testified about the decision-making process at revocation hearings" and "stated an alleged parole violation must be established with an 85 to 90 percent certainty before the ISRB would take action." *Id.* at 173. "Bell objected and moved to strike, noting that not only was Carlson's opinion testimony an incorrect statement of the law but since the matter was a question of law, opinion testimony would be impermissible." *Id.* "The court granted the motion in part, but nevertheless allowed Carlson to testify as to his understanding of the applicable standard of proof." *Id.*

On appeal, the Court held that the trial court had properly sustained the first objection, but that it had erred in allowing "Carlson to testify as to his understanding of the applicable standard of proof." *Id.* at 179.

> It matters little if the opinion is stated vaguely or clearly; if it refers to a legal issue within the court's purview, it is inadmissible. We disagree with the Court of Appeals' reasoning that the impact of this ambiguity "was lessened by the testimony of another former board member

> Katherine Bail, who clearly stated the standard of proof was preponderance of the evidence." Id. The impact of improper opinion testimony on a legal issue is not cured by opinion testimony of another witness on the same legal issue. Two wrongs do not make a right.

Id. at 180. Taken together, *Bell* and the other cases discussing the inadmissibility of legal testimony stand for the proposition that a witness may not testify about the law or about their "understanding" of the law.

Despite evidence provided in advance of the trial that the *JagWire* was a non-public forum, the trial court reserved ruling the student victims' motion in limine to prevent the District from presenting its defense that the *JagWire* was an "open forum" that was not subject to prior review or restraint by the District. CP 456-64. However, the trial court did rule that testimony as to legal conclusions would be prohibited. CP 458, 463.

The trial court then permitted the District to violate that very ruling as the District regaled the jury with misinformation, arguing that the District's act of publishing students' personal sexual histories and details was *compelled by the First Amendment.* RP 265, 273-74, 428, 479, 528, 604, 660, 667-68, 671, 738, 743, 803, 818, 848-49, 853, 1218-25, 1250, 1267, 1515, 1537, 1554, 1560, 1567, 2075, 2093, 2101, 2150, 2162, 2185, 2206, 2246. It was the central theme of the District's defense. *Id.*; RP 254-56, 261, 263-67. The District's counsel, lay witnesses, and expert witnesses alike repeatedly referred to the article disclosing students'

sexual histories and status as "protected speech" or "protected expression," and claimed that only "unprotected speech" could be restrained in an "open forum." RP 743, 803, 853, 862, 1218, 2169, 2243. One juror questioned Smyth on that topic, asking if the "pull quotes" were "protected speech." Smyth answered "yes." RP 862.

At one point during testimony, the District entered into a discussion with a witness about open forum, the First Amendment, and *Tinker*:

> Q. Do you know whether or not open forum is constitutionally protected?
>
> A. I know there is a Supreme Court case and I don't remember exactly its [sic] Hazelwood –
>
> Q. No, it's Tinker v. Des Moines.
>
> A. Tinker – yeah. I'm familiar with it, but I don't know the letter of the case but, you know, it has been brought up in journalism classes in the past.
>
> Q. And you're aware that under the Constitution, open forum is constitutionally protected?
>
> MR. ROBERTS: Objection. Excuse me, objection your honor. This is a motion in limine and we're getting into the law now.

RP 1554-55. After a sidebar, the trial court allowed this line of inquiry. The trial court explained later that the sidebar ruling had prohibited references to case law or *Tinker,* RP 1566, but the trial court did not strike

the question and answer nor ask the jury to disregard them. The court also overruled the student victims' objection that witnesses should not be opining on whether "open forum" is "constitutionally protected." RP 1566.

Because the trial court did not conduct the proper forum analysis prior to trial, the District was allowed to present "evidence" regarding both the legal definition and existence of "open forum" at Emerald Ridge. Had the trial court correctly ruled in advance of trial that the *JagWire* was a non-public forum, the student victims might have received a fair trial. The District's repeated suggestion that the *JagWire* was a "constitutionally protected open forum" was highly misleading to the jury and incorrect as a matter of law. When the trial court ruled post-trial that the *JagWire* was a "limited public forum" (which was also incorrect), RP 2427, the damage was done. The trial court erred in concluding that the District could present facts and argument to the jury that the *JagWire* was an "open forum" and that the First Amendment prohibited the District from stopping publication of student sexual histories and details.

(b) The Jury's Decision Was Tainted by the Trial Court's Decision Permitting an Erroneous Legal Conclusion in Testimony and Argument to the Jury

The student victims anticipate the District may argue the trial court's actions were harmless error. When a trial court admits legally

inadmissible evidence, and it is reasonably probable that evidence affected the outcome of the trial, such error is prejudicial and a new trial is necessary. *Dickerson*, 62 Wn. App. at 433-34;[10] *Smith v. Ernst Hardware Co.*, 61 Wn.2d 75, 377 P.2d 258 (1962).

It is prejudicial error for the jury to consider critical evidence that the court either has not admitted or has been stricken. *State v. Balisok,* 123 Wn.2d 114, 118, 866 P.2d 631 (1994); *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 315, 94 P.3d 987, 992 (2004). This Court's decision in *Magana* is particularly apt. There, the trial court in Clark County sustained an objection by the defense to the plaintiffs' alternate theory of liability is a product liability case, the lack of integrated seat belt design. Despite its own ruling, the court allowed evidence from an expert to be admitted on the integrated seat belt design issue. The court then declined to instruct the jury that it had ruled the alternate integrated seat belt design theory was not properly before the jury. The jury returned a verdict in favor of the plaintiff for over $8 million. On appeal, this Court reversed the judgment on the verdict of the jury, noting that it was error

[10] In *Dickerson,* a bar patron who was injured in an altercation with another patron sued the bar for negligent overservice. *Dickerson,* 62 Wn. App. at 427. The bar sought to introduce evidence that the plaintiff had slapped his girlfriend in the past as evidence of whether the plaintiff had slapped his opponent before the altercation. *Id.* at 429. The trial court denied the plaintiff's motion in limine to exclude the slapping evidence. The entire testimony consisted of one brief exchange during the trial. *Id.* However, the Court of Appeals concluded that even this small amount of prejudicial evidence was enough to warrant a new trial for the plaintiff. *Id.* at 434.

for a jury to consider evidence that the court is not admitted or has stricken. 123 Wn. App. at 315. Such an error by the trial court was not harmless. *Id.* at 316-18. Just as it was prejudicial error for a jury to consider evidence on a theory that was not properly before it in *Magana*, it was prejudicial error for the jury here to consider evidence on a defense unavailable to the District as a matter of law.

The feeling of prejudice engendered in the minds of the jury here prevented the student victims from having a fair trial. This was not an instance of harmless error but a pervasive pattern of District conduct. The central theme of the District's defense was predicated upon a false legal premise: that the District was *constitutionally prohibited* from restraining or reviewing the publication of students' sexual histories and information. The District featured the argument in its opening statement, and with virtually every witness it examined and cross-examined during the trial. The jury was led to believe not only that the District's hands were legally tied by the First Amendment before the incident at issue, but that the student victims harmed both the school and the newspaper because the lawsuit forced the District to take away students' First Amendment rights.

Juror questions indicated that the prejudice was severe. One juror asked Apostle, "Am I understanding the *JagWire* is not endorsed by the District due to it being an open forum?" After Apostle answered that the

District was "not necessarily an endorser of the kinds of topics [the students] select," the juror asked, "Would this make the publication exempt from the review option expressed in the handbook and 3220 [the District's written policy]?" Apostle indicated that the publication was exempt. RP 433. Another juror asked Smyth if the paper contained a "disclaimer" that the content was not endorsed by the school or the District." RP 530. A juror asked Smyth if the "pull quotes" (the highlighted statements that this or that student had had oral sex or sex) were "unprotected speech." Smyth indicated that the particular quotes at issue were protected. RP 862. Another juror asked Lissit, "In an open forum process, who do you recommend have [sic] the final decision to print if no prior review is practiced?" RP 1267. A juror asked Bates, "...why not drop the suit after gaining knowledge that the District created 3320-R to review future paper issues before print?" RP 1490. One juror questioned Smyth on that topic, asking if the "pull quotes" were "protected speech." Smyth answered yes. RP 862.

The District's witnesses stated that the *JagWire* was an "open forum," which is a legal conclusion. RP 2146. They also testified that under the open forum regime, the First Amendment prohibited any prior review or restraint of the *JagWire*. RP 2180. This is also a conclusion of law, and an incorrect one. These conclusions went to the heart of the

District's defense: that the District was not liable because it was bound by law to allow its students to publish the personal sexual histories of fellow students. Not only were these legal conclusions inadmissible as expert testimony, they did not accurately state the law applicable to the District.

The trial court's legal error regarding forum analysis allowed an improper legal defense to permeate the trial and confuse the jury. This error affected the outcome of the trial and was prejudicial. A new trial is warranted.

(5) A New Trial Is Warranted Under CR 59(a)(7) Because Counsel for the District Misrepresented the Law and the Evidence and Inflamed the Passion and Prejudice of the Jury

A new trial may be granted based on the prejudicial misconduct of counsel if the movant establishes "that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record." CR 59(a)(7); *Aluminum Company of America,* 140 Wn.2d at 539. Misconduct of counsel includes misstatements regarding the law, improper argument and comment, and violations of pretrial orders. *Id.* A new trial is warranted where defense counsel introduced evidence prohibited by an order in limine, even if no open objection is made during trial. *Osborn v. Lake Washington School Dist. No. 414*, 1 Wn. App. 534, 462 P.2d 966 (1969).

In closing arguments, counsel may only address the jury "upon the evidence and the law as contained in the court's instructions." CR 51(g).

(a) Public Forum Argument

The trial court ruled in limine that the District would "not be allowed to offer lay testimony regarding the law of "open/public forum" or on any other legal issue in this case." CP 458. The trial court also entered an order in limine "precluding experts from making any legal conclusions." CP 463.

Nevertheless, throughout pretrial motions, opening statements, witness questioning, trial colloquy, and post-trial proceedings, the District's counsel insisted to the trial court that the *JagWire* was operated as an "open forum" as a matter of law and fact, and that under that regime, the District was prohibited from prior restraint or review of the newspaper. CP 14-34, 186-202; RP 265, 273-74, 428, 479, 528, 604, 660, 667-68, 671, 738, 743, 803, 818, 848-49, 853, 1182, 1218-25, 1250, 1267, 1515, 1537, 1554, 1567, 2075, 2093, 2101, 2150, 2162, 2185, 2206, 2246. The trial court's continued confusion about the concept, engendered by the District's counsel, allowed the District to present evidence, including expert testimony, that the *JagWire* was an "open forum" and that the District was powerless under the Constitution to stop publication of students' sexual histories. *Id.;* RP 72, 184-86, 2150.

However, during post-trial colloquy about open forum, the trial court pressed the District's counsel regarding the legal test for determining open forum. For the first time in the case, and contrary to all of the previous argument, counsel stated that "open forum" was synonymous with "public forum" as described in *Tinker.* RP 2397. Counsel went on to state that the United States Supreme Court declared the forum in *Hazelwood* to be a "limited open forum," which is contrary to *Hazelwood. Id.*; *Hazelwood,* 484 U.S. at 269-70 (school newspaper was a non-public forum, "limited open forum" not discussed). Struggling to understand counsel's argument, the trial court inquired as to what case stated the factors for determining an open forum. RP 2401. The District's counsel responded, "That's a problem because it's a public forum. I think the best that you're going to get is what experts testified on the stand they considered to be open forum." *Id.* Then, in response to further questions, Counsel stated that "*Tinker* forum" may be better than "open forum" and then said that in a limited public forum the school could restrict based on legitimate pedagogical concerns. RP at 2409. This is also incorrect; as discussed *supra*, a "limited public forum" is legally no different from a public forum and is subject to strict scrutiny. *Perry,* 460 U.S. at 45-46. "Legitimate pedagogical concerns" is not the standard applied to a limited

public forum; it is the *Hazelwood* *non*-public forum language. *Hazelwood,* 484 U.S. at 273 n.7.

Thus, after arguing repeatedly and extensively to the trial court and the jury that the *JagWire* was an "open forum" as a matter of law, and putting on expert witnesses regarding the legal definition of open forum and its application to the District's action, counsel finally conceded that he was not even sure "open forum" was the right term. RP 2409. Counsel also misrepresented *Hazelwood* repeatedly, suggesting that the newspaper in that case was held to be a limited public forum, which it was not. The trial court ultimately ruled that the *JagWire* was a limited open forum based on misunderstanding of *Hazelwood.* RP 2327-28. The District's counsel misrepresented the law, confusing the court and the jury, depriving Bates of a fair trial.

The District's counsel also repeatedly suggested that Emerald Ridge was a First Amendment utopia destroyed by the student victims' lawsuit, and deceptively lamented that the suit forced the District to abandon First Amendment principles for censorship. RP 266, 501, 853-54, 2146.[11]

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[11] For example, counsel for the District had this exchange with Smyth:

Q. [Mr. Austin]: How is the First Amendment doing these days at Emerald Ridge?

The District's counsel cross-examined the student victims' expert, about why he did not "like" open forums, saying "...what bothers you is that students are given the absolute right to use their First Amendment Rights under the U.S. Constitution, isn't that correct?" RP 1218. Objections to this line of questioning were overruled. RP 1219. In closing, counsel reiterated this theme by saying that the student victims "want to take the First Amendment right away from all students." RP 2744. Counsel also argued that "legitimate educational concerns" meant that the District could only restrain "unprotected speech," which is a First Amendment term of art. RP 2732.

Persistent improper questioning of witnesses constitutes misconduct of counsel and such misconduct is prejudicial error. *State v. Simmons*, 59 Wn.2d 381, 384-87, 368 P.2d 378 (1962). Such misconduct is present even where the trial court generally sustains objections to the questions. The District's counsel was fully aware that the court had not

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A. [Mr. Smyth]:	It's not pretty.
Q:	How so?
A:	Because of the implementation of the Regulation 3220-R, all issues of the JagWire must be reviewed by the principal or his designee and they're subject to censorship.

RP 853.

ruled definitely on the issue of open forum but he nevertheless persisted in pressing the issue to the jury. It was misconduct for him to do so.

It was also flagrant misconduct for counsel to argue in closing that the student victims were trying to "take the First Amendment right away" from students, or that Policy 3220 only allowed the District to restrain "unprotected speech." Counsel had lost the "open forum" argument; the jury instructions stated that the District could restrain student speech based on legitimate pedagogical concerns. Therefore, suggestions that the First Amendment rights of Emerald Ridge students had been altered by the lawsuit, or that the District could not restrain some speech that would normally be First Amendment protected, were factually and legally false.

(b) Statement of Damages

The District's counsel also committed misconduct by abusive misuse of the student victims' statement of damages mandated under RCW 4.28.360. Counsel used the procedural statement to suggest that Bates was demanding excessive damages from the District due to avarice.

Arguments contending that parties are avaricious or parsimonious, or generally bearing on a party's ability to pay, constitute misconduct. For example, "golden rule" arguments, wherein counsel tells the jury to put

themselves in the shoes of a client, are not permitted.[12] Golden rule arguments are forbidden is because they are attempts to appeal to the personal passion and prejudice of a jury: "Such an argument is improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Adkins*, 110 Wn.2d at 139. Whether a plaintiff recovers, and in what amount, or whether a defendant prevails, are questions the jury must resolve solely on the evidence and the law, and not on the basis of appeals to sympathy, passion or prejudice. *Id.*

More directly, in *Day v. Goodwin,* 3 Wn. App. 940, 478 P.2d 774 (1970), *review denied,* 79 Wn.2d 1001 (1971), defense counsel in a wrongful death action asserted to the jury in closing that the case was an attempt by the decedent's mother to get on "Easy Street" and that she was trying to benefit from the death of her child. The court held such argument to be misconduct. Similarly, Washington law is clear that efforts to speak to the financial resources of a party are forbidden. It is "well established" that in personal injury cases the fact that the defendant carries liability insurance is entirely immaterial, and the deliberate or

[12] Generally, reference by counsel to the "golden rule" per se, or allusions to the rule such as "urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position" constitutes an improper "golden rule" argument. *Adkins v. Aluminum*

wanton injection of this matter into the case by plaintiff is ground for reversal. *King v. Starr*, 43 Wn.2d 115, 118, 260 P.2d 351, 352 (1953). Defense counsel may not refer to the fact that a judgment against a government will be borne by the jurors as taxpayers. *Safeco Insurance v. J.M.G. Restaurants,* 37 Wn. App. 1, 680 P.2d 409 (1984).

The District's counsel's use of the student victims' statement of damages was unabashedly an effort to paint those students as avaricious money seekers who did not care that their greed destroyed the First Amendment rights of other students. This tactic was condemned by the *Day* court: "A case should be argued upon the facts without an appeal to prejudice." *Day,* 3 Wn. App. at 944 (quoting *Pederson v. Dumouchel*, 72 Wn.2d 73, 84, 431 P.2d 973, 980 (1967)).

Under Washington law, a plaintiff is prohibited from pleading a dollar figure for damages in the complaint. RCW 4.28.360. However, if a defendant demands a statement of damages from the plaintiff, the plaintiff must comply. *Id.*[13] The statute is procedural, not substantive. *Id.* at 269.

Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257, 1264 (1988) *clarified on denial of reconsideration,* 756 P.2d 142 (1988).

[13] This procedure was adopted in 1975, apparently in response to problems in the medical profession caused by plaintiffs filing medical malpractice claims for "astronomical damages." *McNeal v. Allen*, 95 Wn.2d 265, 268, 621 P.2d 1285 (1980). The legislative history of RCW 4.28.360 establishes that plaintiffs were forbidden from stating general damages in their tort complaints because such statements were often inaccurate and designed to prejudice and influence juries against defendants. The Legislature was concerned about plaintiffs who were filing complaints with

Plaintiffs are not required to certify a statement of damages, and it is not binding at trial. RCW 4.28.360. The statement of damages was designed to be a countermeasure to the prohibition of ad damnum damage pleadings in complaints. That statement was not meant to be a tool for aggressive defense counsel to brand plaintiffs' claims before the jury.

Having thus been the beneficiary of the Legislature's protection under RCW 4.28.360, the District used the statute to inflame the jury against the student victims. The District invoked its right to receive a statement of damages under RCW 4.28.360; the student victims' counsel submitted responses on their behalf. CP 684-706. The student victims' statement explicitly stated that "General damages fall within the exclusive province of the jury." It then went on to generally describe the injuries and stated that "in similar cases involving public ridicule, juries have awarded general damages in the $2 million to $4 million range. An award within this range would be appropriate in this case." CP 685. This was a legal analysis based on case comparisons. *Nowhere* in the statement was there any declaration that the students were demanding two to four million

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"astronomical" damage requests. *See* Appendix. Such complaints were, in the words of the Legislature, "puffery" that would be reported in the news media and could harm the reputation of medical providers. The Select Committee on medical malpractice explained that, "Since pain and suffering damages have no readily discernible limits, plaintiffs often ask for huge dollar amounts in their complaints. *Health care providers are concerned about the publicity given these requests and their influence on juries.*" If defendants needed notice of damages for insurance or other purposes, they could request a statement of damages from the plaintiffs.

dollars. *Nowhere* did the statement declare or imply that the student victims were requesting this amount of damages in settlement or at trial.

After the trial court denied the student victims' motion in limine to exclude the statements of damages, the District's counsel at the trial brandished the statements in front of each plaintiff, asking why each plaintiff was "asking" for two to four million dollars from the District. RP 965, 1116, 1366, 1476. The students were confused, because they had never "asked" for those sums. The only amounts they had ever asked for were during settlement negotiations, which they could not disclose under ER 408. The statement of damages clearly said that damages "were within the province of the jury." CP 684-706. Also, the plaintiffs did not draft or sign the statements of damages, which were procedural documents. *Id.*; RP 965, 1116, 1366, 1476. Yet District's counsel behaved as if the various plaintiffs were trying to be evasive or deny previous demands that never existed. *Id.* During opening statements, the District's counsel stated that "we've got a statement of damages against the School District from these plaintiffs of between 16 and $32,000,000.00. This is serious, folks." RP 261.

Jurors were misled and inflamed by this conduct. One juror asked Kevin Weeks, "You had no knowledge of the statement of damages before today?" CP 467. Another juror asked Higgins' father, "To your

knowledge, did your wife and (or) Daughter know the dollar figure of the damages prior to coming to this court? Did you ever discuss the damages amount with anyone prior to coming to this Court?" CP 528. Another juror asked him, "The school district changed there [sic] policy...your family doesn't feel like that's enough? A settlement would fix the hurt?" CP 529. Another juror asked him "You stated that you hadn't seen the statement of damages before the trial. Had your lawyers told you what dollar amount you could sue for, or did you find out during the trial?" CP 530. Another juror commented post-trial that "the original damages were to be in the 2-4M range per plaintiff *and was lowered to 500k-1.5M in closing.*" CP 708 (emphasis added).

The District's counsel used RCW 4.28.360 as a sword and a shield. The District received the benefit of RCW 4.28.360 and avoided bad press and a prejudiced jury. Counsel then proceeded to use the statement of damages deceptively to inflame the jury to the District's own benefit. This was flagrant abuse of the statute and amounts to misconduct.

Counsel's misconduct, both regarding the open forum misrepresentation and the statement of damages, prejudiced the outcome, as reflected in the jury questions, *supra*. The District's counsel essentially argued: "Do not find in favor of the plaintiffs because they are selfish and greedy. They have destroyed the First Amendment rights of other students

because of their avarice, and they do not deserve to be rewarded." The jury was left with the impression that (1) the District was prohibited by the First Amendment to stop publication of student sexual histories, and (2) the student victims' greed forced the District to take away its students' First Amendment rights. Counsel inflamed and confused the jury, and denied the student victims a fair trial.

(6) A New Trial Is Warranted Under CR 59(a)(1) and (9) Because Pervasive Misinformation, False Testimony as to Legal Conclusions, and Other Errors Were Irregular and Denied the Student Victims Substantial Justice

Under CR 59(a)(1) a new trial may also be granted on the basis of irregularity in the proceedings. Cumulative remarks on immaterial matters are an irregularity in the proceedings. *Storey v. Storey,* 21 Wn. App. 370, 374, 585 P.2d 183 (1978), *review denied,* 91 Wn.2d 1017 (1979). If they are sufficiently pervasive, they can prejudice the outcome, even with curative instructions. *Id.* Under CR 59(a)(9), a new trial is warranted if substantial justice has not been done.

In *Storey,* one party made a series of immaterial and prejudicial remarks on the stand. *Id.* at 374. Despite numerous sustained objections, orders to strike, and admonishments from the judge, the cumulative impact of the statements was found to be prejudicial and incurable. *Id.*

Here, the problem was even more pervasive than in *Storey*. The District was permitted to mount a defense that was unsupported in law or fact, based on a false premise. That premise, if believed, negated the student victims' claims as a matter of law. The jury was repeatedly told, and apparently believed, that the District was *constitutionally prohibited* from doing what the student victims claimed it should have done. Only at the end did the court rule as a matter of law that the District's defense was legally invalid. Then, the court offered an inadequate jury instruction.

A new trial is warranted here. Falsehoods, confusion, and testimony as to conclusions of law and damages, pervaded the trial and prejudiced the outcome. Irregularities abounded, and substantial justice has not been done.

F. CONCLUSION

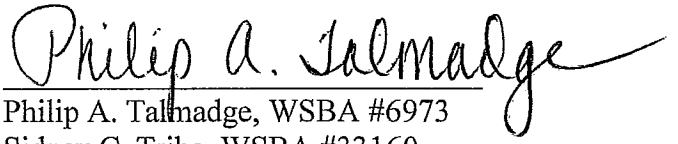
The trial court erred in failing to rule as a matter of law that the *JagWire* was not a public forum. The court compounded this error by not giving curative instructions on the forum question once it concluded that the student newspaper was not a public forum. It allowed evidence from lay and expert witnesses on the First Amendment and argument from the District's counsel that the *JagWire* was a public forum to come before the jury. The court further permitted the District's counsel to misuse the

student victims' statement of damages in argument. The student victims were deprived of a fair trial.

This Court should reverse the trial court's judgment and remand the case for a new trial. Costs on appeal should be awarded to appellants.

DATED this 28th day of January, 2011.

Respectfully submitted,



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APPENDIX

CR 59(a). **Grounds for New Trial or Reconsideration.** On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury;...

....

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

INSTRUCTION NO. 20

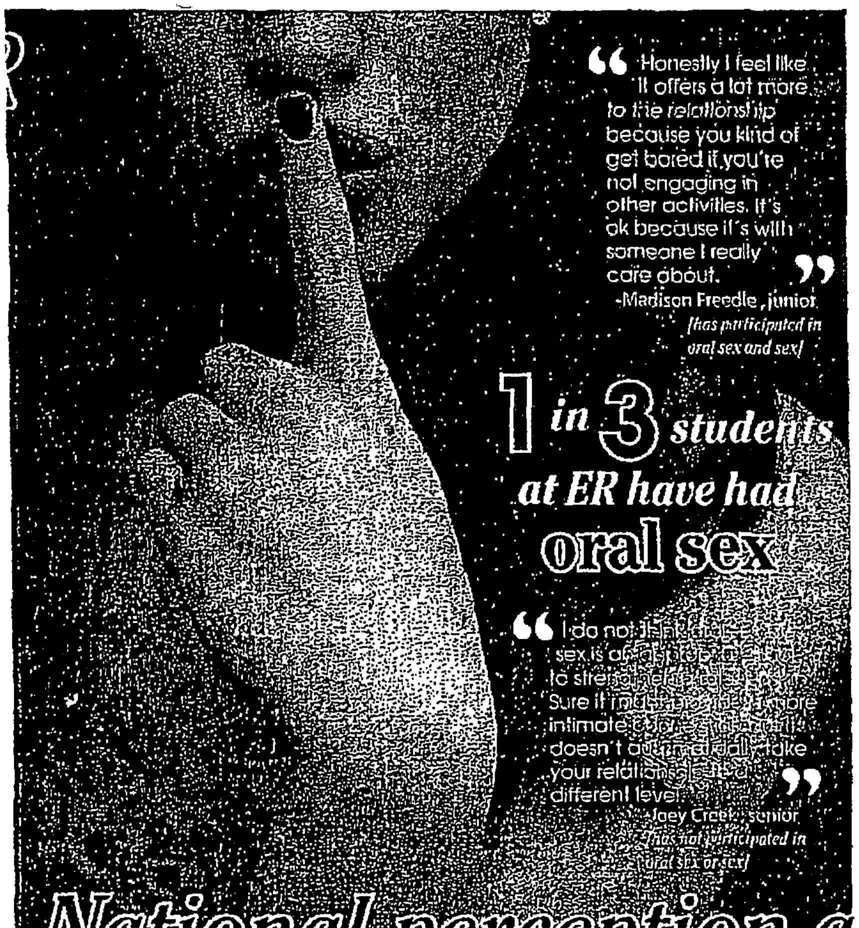
Student journalists possess a First Amendment right to freedom of speech and press. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored student newspapers so long as their actions are reasonably related to legitimate educational concerns.

INSTRUCTION NO. 27

Students in public schools are not entitled to engage in speech which school authorities have reason to believe will substantially interfere with the work of the school or impinge upon the rights of other students.

Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored student newspapers so long as their actions are reasonably related to legitimate educational concerns. School officials need not tolerate speech that is vulgar or lewd, that invades the privacy of others, that interferes with the rights of other students, or that is otherwise inconsistent with the school's basic educational mission.

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).



"Honestly I feel like it offers a lot more to the relationship because you kind of get bored if you're not engaging in other activities. It's ok because it's with someone I really care about."
-Madison Freedle, junior
[has participated in oral sex and sex]

1 in 3 students at ER have had oral sex

"I do not think ... sex is a ... to stre... Sure it ... intimate ... doesn't ... take your relation... different level."
-Joey Creek, senior
[has not participated in oral sex or sex]

Consequences

BY DALLAS M. WELKER
EDITORIAL BOARD

Chlamydia, genital warts, gonorrhoea, hepatitis A, hepatitis B, hepatitis C, herpes, HIV, syphilis. Are you ready for oral sex? For far too long adolescents have viewed oral sex as a safer form of sex, not taking into consideration the numerous sexually transmitted diseases that can be passed through it.

Herpes: The two most frequent types of herpes simplex virus (HSV) are HSV type 1 and HSV type 2. Type 1 usually results in cold sores around the mouth and type 2 usually results in a genital herpes sore. HSV type 1 around the mouth can be transmitted through oral sex to the genital area resulting sores. The same is true for HSV type 2.

Genital warts: An infected person may transmit the papillomavirus, which causes genital warts to the active person (person giving oral sex). This would results in warts in and around the mouth.

Gonorrhoea: passed by giving or receiving oral stimulation. Gonorrhoea in the throat is almost always naturally cleared out by the body within three months. Gonorrhoea in the genital tract usually requires antibiotics to be treated.

Chlamydia: (Less common) passed in the same ways gonorrhoea is. Both can be characterized by a sore throat. However, it is common for both diseases to be asymptomatic (showing no symptoms).

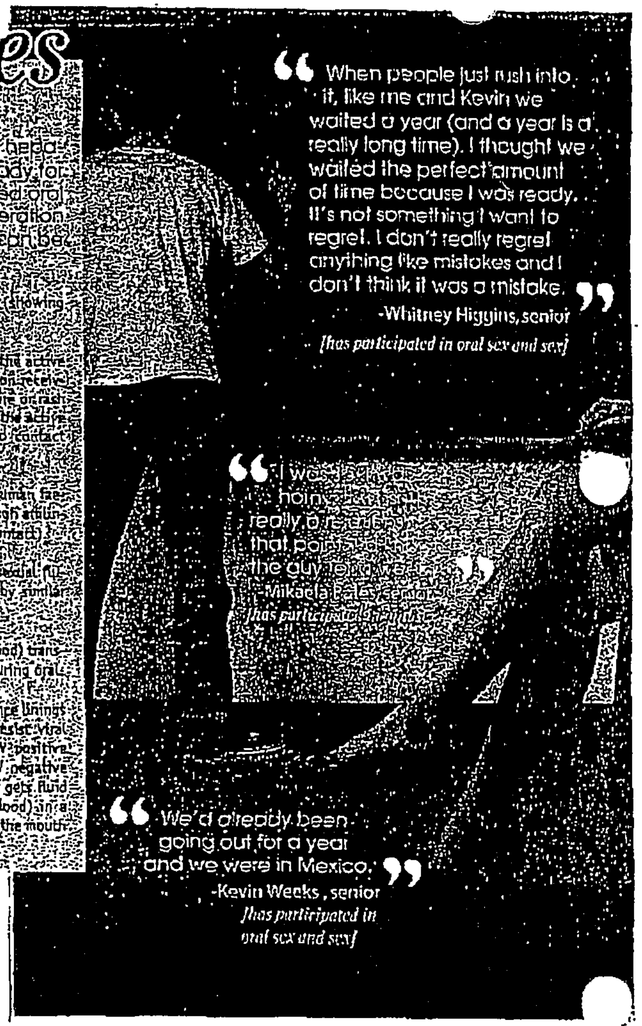
Syphilis: can be acquired by the active partner if the receptor (person receiving oral sex) has an open sore or rash caused by the infection and the active partner's mouth comes into contact with the sore or rash.

Hepatitis A: (contained in human feces) can be contracted through anilingus (rimming, oral-anal contact).

Hepatitis B: (contained in sexual fluids and blood) transmitted by similar method as HIV.

Hepatitis C: (contained in blood) transmitted if blood is present during oral.

HIV: (infection is unlikely since linings of mouth and throat can resist viral infections) passed from HIV positive receptive partner to an HIV negative partner when active partner gets fluid (semen, vaginal fluid, or blood) in a sore, cut or inflamed area in the mouth or throat.



"When people just rush into it, like me and Kevin we waited a year (and a year is a really long time). I thought we waited the perfect amount of time because I was ready. It's not something I want to regret. I don't really regret anything like mistakes and I don't think it was a mistake."
-Whitney Higgins, senior
[has participated in oral sex and sex]

"I wa... hoin... really ... that ... the guy ..."
-Mikaela ...
[has particip...]

"We'd already been going out for a year and we were in Mexico."
-Kevin Weeks, senior
[has participated in oral sex and sex]

National perception and influence

The media and pop culture may be changing the values of today's teenager

BY KRISTEN STEENBEEKE
REPORTER

In the early days of television, it was considered highly racy for a couple to be seen lying in bed together, no matter what their marital status was. On the 1950s show "I Love Lucy," main character Lucy and her real-life and television husband, Desi Arnaz, were portrayed to be sleeping in separate beds. Also, though her character gave birth to a child, the word "pregnant" was not allowed to be used.

Now, in the 21st century, teen television shows hint heavily at unmarried teens having sex. Magazines headlines say, "Ways to please your man in bed." Presidential sex scandals show up across every newsstand. Ask a child or teen about the Iraq war and they give a blank stare; ask them about Paris Hilton's sex tape and they give you a full synopsis.

Parents may ask themselves, "How has it gotten so bad?" The answer is exposure. Whether positive, negative or informational, topics like oral sex have become rampant in the media and many teens have fallen under its spell.

In 2005, an article by the Washington Post revealed that over 50 percent of teens, ages 15-19, have engaged in oral sex. The article also stated that nearly one in four teens who are abstinent from sexual intercourse have participated in oral sex. An article in USA Today clearly insists that teens are viewing oral sex as a more casual sexual act, while their parents believe it to be more intimate than intercourse. Because pregnancy is not a risk in instances of fellatio (oral sex performed on a male) or cunnilingus (oral sex performed on a female), all other risks involving disease or emotional turmoil are disregarded.

It is possible that the rise of sexual references in the media has lent to the rise of alternative sexual practices. Though magazines such as "Seventeen" and "CosmoGIRL!" take all measures to provide protection advice and STD warnings, the mere presence of sexual themes is still available for young teens. Some teen magazines draw in readers even younger than 12, who are now being constantly exposed to articles, advice columns and questions regarding oral sex.

SEXUAL CONTENT APPEARS IN 64 PERCENT OF ALL TELEVISION PROGRAMS.

Aside from the news and magazines, sex and oral sex also appear abundantly in movies, television and music videos. The organization "Common Sense Media" released a study on media exposure in teens, which revealed that sexual content appears in 64 percent of all television programs, and only 15 percent of these programs include messages about risks such as STDs or pregnancies. It also stated that, "On average, music videos contain 93 sexual situations per hour, including 11 'hardcore' scenes depicting behavior such as intercourse and oral sex."

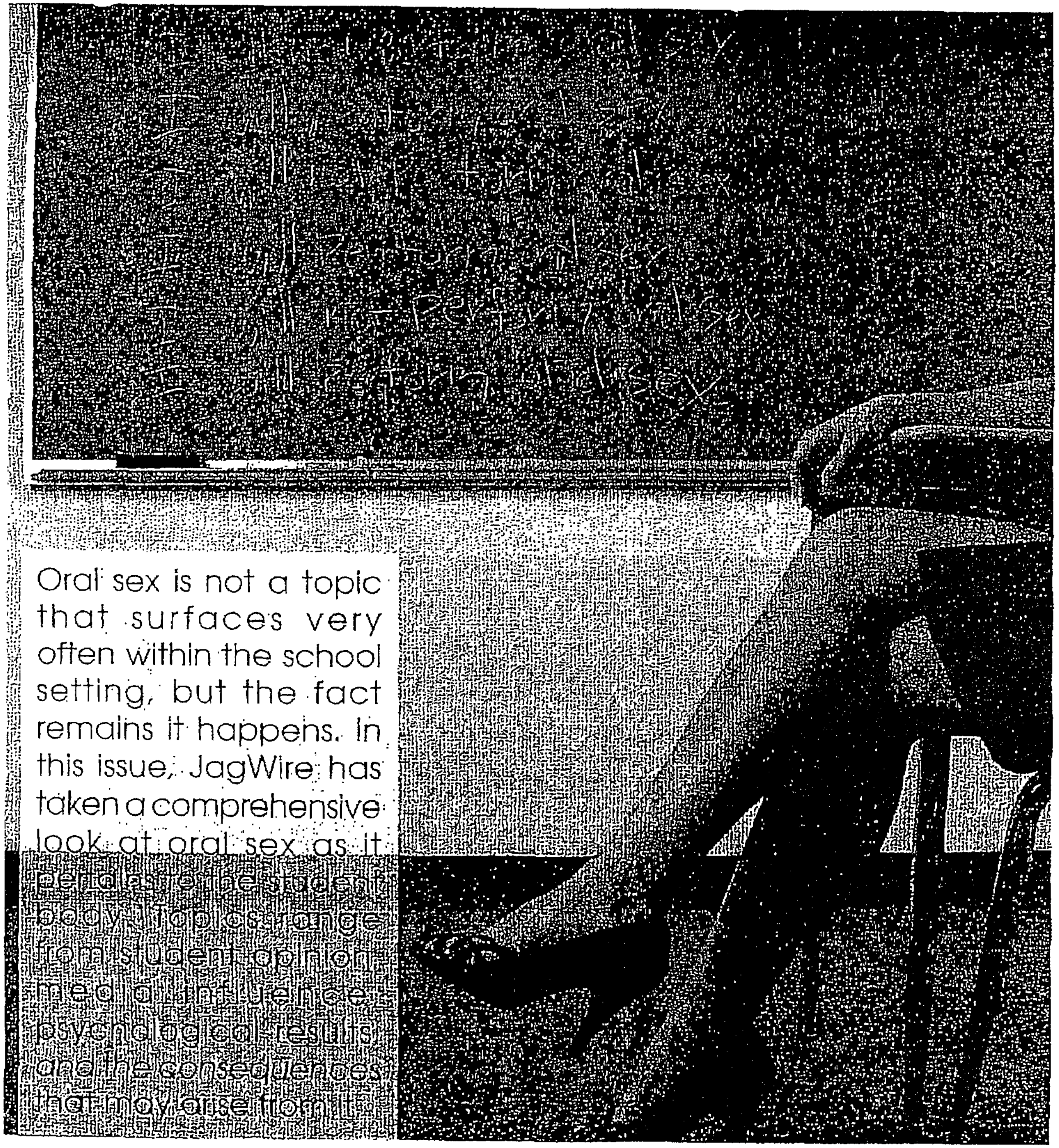
Shows such as "Sex and the City" advertise sex as casual, fun and completely risk-free. Though intended generally for adults, many parents are oblivious to the general theme of their children's shows and the palpably sexual content.

In the past 10 years, oral sex has also become a topic of national discussion due to the Clinton scandal in 1995. When the media acquired news in 1998 of president Bill Clinton receiving oral sex from White House intern Monica Lewinsky, arguments arose as to whether oral sex could be considered "sexual relations." However, it seemed that Lewinsky was almost glorified after the scandal – she became a representative for Jenny Craig dieting program, hosted a reality show called "Mr. Personality" and attempted to design her own line of handbags.

A scandal also arose in 2006, involving R&B singer Ne-Yo. Cell phone video footage was leaked onto the internet involving a backup dancer of the singer giving him oral sex. When rumors came out that she was fired, Ne-Yo admitted to the sexual act but told the press, "Why would she get fired? She's one of my dancers. She's also a good friend of mine." As a role model and idol of teens, Ne-Yo has set an example of casual oral sex.

Oral sex has also appeared in the novel industry. Though it is classified as a "cautionary tale," Paul Ruditis' teen novel "Rainbow Party" exposes the details of parties during which girls don various colors of lipstick and perform oral sex, therefore giving the boys a rainbow of rings around their penises. In the end of the novel, the girl throwing the party acquires gonorrhea and no one attends her party. Though these types of media influences can deter sexual acts such as oral sex, they also have the ability of planting ideas in adolescent minds.

An article from Guttmacher Institute by Lisa Remez states, "[Adolescent health professionals] stress that teachers and parents need to do a better job at helping children interpret the context-free messages of sexuality they are bombarded with in the media."



Oral sex is not a topic that surfaces very often within the school setting, but the fact remains it happens. In this issue, JagWire has taken a comprehensive look at oral sex as it pertains to the student body. Topics range from student opinion, media influence, psychological results and the consequences that may arise from it.

Oral sex at ER

BY ASHLEY VINCENT
EDITORIAL BOARD

A survey of 600 Emerald Ridge students found that 37 percent of respondents had participated in oral sex. Though a third of students have participated in oral sex, it is not something typically *talked about in* the classroom environment.

"Honestly, I usually do not bring it up unless I am asked about it," health and physical education teacher Lynn Wardle said. "The (sexual education) unit we teach is very generic and clinical and I've never really talked about oral sex."

Wardle's approach is not uncommon. In fact it is encouraged by the Puyallup School District. Their curriculum familiarizes students with their bodies and how they work in elementary school and includes a sexual education unit in eight grade health. This unit consists of a state mandated HIV/AIDS program and a lesson on abstinence, sexually transmitted diseases (STDs), and contraceptives.

Currently there is no curriculum approved by the district that specifically discusses oral sex.

"I believe this sky could be the limit on what some would say is appropriate or inappropriate to teach," said Rick Wells, Puyallup School District director for K-12 Health and Fitness. "I would venture to say that every human being has a line of what is too much to teach. So whose line do we stand by? Do we throw sensibility and caution to the wind and use the furthest to the left as the line, or do we put our heads in the sand and take a total abstinence viewpoint on the right? We as a district have to take into consideration the sensibilities on both ends of morality."

> CURRENTLY THERE IS NO CURRICULUM APPROVED BY THE DISTRICT THAT SPECIFICALLY DISCUSSES ORAL SEX.

The district does not want to subject innocent students to explicit lessons, but there is some concern that this causes students to miss out on information they need to make an informed decision.

"I think it is right to have it in schools," senior Cally York said. "People need to be informed. Like the whole AIDS thing; a lot of people didn't know anything about AIDS and we talked about it and it got better. It is still a big problem so I think if we talk about it more people would be better informed."

According to the survey the average age of ER students who first participate in oral sex is freshman or sophomore year [illegible] it is not discussed in high school classrooms. So for many students, oral sex education comes from friends or worse, other persuasive participants.

"I would rather they learned about this stuff from me than from their friends," Wardle said.

Perceptions of oral sex have changed drastically between the generation before this one and today's teenager. Senior Philip Westfall has participated in, and sees no problem with oral sex.

"We did it just because we decided we wanted to get intimate and we were not ready for the real thing," Westfall said. "It is more ca[illegible] actual sex. And, no, I don['t] [illegible] doing it."

Other students are of a completely different opinion.

"I think it is awful," senior Kate Gibson said. "Being a high school female, I don't think it is safe or healthy. A lot can come of doing that just one time, so why risk it?"

Student perception of oral sex is widely varied, but there is a common factor. Every student interviewed said that oral sex is something that is left out of classroom discussion which, if covered, would ultimately give students enough background to make that decision for themselves.

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Photo by Gary LaConte

Is oral sex moral?

More and more teens today believe oral sex is a way to show their love for one another in a safe and moral manner; meaning, a majority of teens are now slipping into an immoral dive, creating a generation of clueless beings.

The increasingly casual practice of oral sex will result in nothing but eventual degeneration of our society's core morals and values that help us differentiate between right and wrong.

Oral sex is just that – sex in the oral variety. Even the simplest of third grade English exercises will show you that 'oral' in this context is the operative adjective and 'sex' the noun. By definition and by nature, oral sex is sex. To say that oral sex is a way to remain abstinent and demonstrate your love in a safe manner makes as much sense as saying that an overdose of sleeping pills is a healthy and effective way of achieving a fitful sleep.

This luridly sexual act is a gateway drug in the gray path of immorality. And while the question of immorality and communal decency as it relates to life is a different argument, it remains the biggest consequence of practicing oral sex. If you don't subscribe to moral reasoning on the topic, by all means, ignore the moral aspect.

Strictly speaking, an action is defined as 'safe' or 'unsafe' from the consequences which results from it. The practice of oral sex can lead to some pretty disgusting outcomes. While I won't delve into detail, itchy, crusty STDs on faces and in throats should be self-descriptive. It can also result in a feeling of degradation, guilt, and it could taint every other sexual experience, possibly with another person, in the future.

Andy Dickerson
Immoral

A repeated act of a sexual nature has been shown to produce unsatisfactory pleasure when practiced casually and with multiple partners. This could then lead to the loss for intimacy.

Oral sex is based entirely on what the individual believes to be the boundary of foreplay and sex. If, in your opinion, partaking in a sexual activity in which climax in one or both partners is reached – one of Webster's many definitions of sex – does not entail the loss of virginity or the breach of abstinence then have a syphilis-filled rainbow party.

In a society where every freedom is attempted enough it is no wonder why every teen should believe everything involves a choice. There is no choice here. A condom cannot protect morality or faith, emotions or future experiences and a mouth certainly won't do much better.

Psychological

By RACHEL WEBBER
REPORTER

The brain: it's good for thinking, good for remembering and critical for sex. Because more and more teens are having oral sex, it is important for them to know what is happening inside of their bodies when they are engaging in sexual activity.

A variety of chemicals are activated in the brain before and during sex. When two people are physically attracted to each other, a hormone called oxytocin is released into the brain. Oxytocin has a calming effect, allowing partners to have a better connection with each other. Once oxytocin levels begin to decrease, the connection between two people starts to decrease as well.

"Oxytocin is released as a consequence of breast or genital stimulation in both sexes," Marty Lobdell, Professor of Human Sexuality at Pierce College, said. "Oxytocin is released as part of the orgasmic response in both sexes regardless of the source of the orgasm: oral, vaginal, etc."

Eye contact often results in an increase of oxytocin. This increase causes feelings of tranquility, allowing a person to feel more affectionate than normal.

Adrenaline, also known as epinephrine, activates the sympathetic nervous system. The sympathetic nervous system increases a person's heart rate and increases blood flow to their muscles during sex.

Another neurochemical that is released into the human body is penylethylamine.

"A little known chemical PEA (phenylethylamine) is released early in relationships and seems to result in the 'high' people report when they first fall in love," Lobdell said. "PEA is also found in chocolate but is broken down in one's stomach and does not impact the eater."

Phenylethylamine releases dopamine, which then travels to the pleasure centers in the brain and is at a high during an orgasm.

"When humans orgasm, dopamine pathways in the brain are activated, resulting in high levels of pleasure," Lobdell said.

Orgasms trigger a release of serotonin, an endorphin, which acts as an antidepressant. The neurochemical discussed earlier, oxytocin, is released during an orgasm as well.

Endorphins are also released during sex, often as a consequence of dopamine pathways being activated," Lobdell said.

In both men and women, testosterone is a critical factor in the sex drive. Testosterone causes in the body a rush of aggressive emotions as well as sexual arousal.

Contrary to popular belief, pheromones have not been shown to affect arousal or attraction.

"What does seem to impact attraction for women is the scent of a man who has a moderately different immune system."

According to Lobdell, this is also sensed by men when they are exposed to a partner with the "right" immune differences carried in their saliva.

"Kissing most likely allows one to sample their partner's immunological make-up," Lobdell said. "People who taste good have the right mix."

Gerry LaConte
Moral

Even though society may see oral sex under the shadow of despicable acts, such as a certain United State President committing infidelity via a certain female intern exploring sexual escapades under a desk, there is no legitimate reason to target the act in itself, and deem it immoral.

The specific act of oral sex is not immoral. There is nothing wrong with one person giving another person oral sexual pleasure or sexual stimulation. The only time this act becomes degrading, hurtful, or unsafe is when it is practiced by irresponsible people, or in irresponsible settings.

The problem with society today is that oral sex is too frequently seen as immoral because of the situation in which it is often found. It has become a common occasion to see news story about teens that were found performing oral sex, or a survey saying that teens are performing oral sex at even younger ages.

Unfortunately, everyone wastes time and energy complaining about sexual stimulation involving the mouth. We involve the penis, vagina, clitoris, hand or earlobe in sexual stimulation, and we're okay. But get anywhere near the mouth, and hold the phone, because our youth is going down the toilet.

When it comes to the morality of the act itself, the majority fail to separate the action from its circumstance and deem oral sex, in general, immoral. By doing this, society has placed oral sex in a bubble of association, full of despicable acts that are frowned upon by the general population. This is simply inaccurate and foolish.

In 2003, a 17-year-old football player from Georgia had consensual oral sex with a 15-year-old girl and video taped the act. When this got out, the community was up in arms and the 17-year-old was brought up on child molestation charges, which resulted in a ten-year sentence in prison. Unfortunately, the sentencing was aided by a disgusted community and it wasn't until 2007, five years later, that the decision was overturned and he was released.

I would have to agree that the 15-year-old giving oral sex is immoral, but is it fair to say that in this situation, the specific act of oral sex itself is immoral? If it were a 32-year-old woman and 34-year-old man would this be a problem? Would it be on the news? Would anyone care?

No. Oral sex was not and is not the moral issue. It isn't even close.

Society needs to stop blaming and labeling oral sex as the degradation of our youth or sexual integrity. To try and send the message that oral sex itself is immoral is a futile and utter waste of time. People enjoy it as it brings them sexual pleasure. Instead, there should be more focus on stopping casual, unsafe sex of any kind throughout teens, because that is where the real problem lies.

December 16, 1975

TO: MY COLLEAGUES

FROM: REPRESENTATIVE WALT KNOWLES

RE: PROGRESS MADE BY THE HOUSE SELECT COMMITTEE ON MEDICAL MALPRACTICE

One of the primary health care delivery issues faced by many states concerns the availability of malpractice insurance at a reasonable price. The clear national trend is for insurance carriers to cease underwriting malpractice risks. Washington has shared in this trend.

Currently, 90% to 95% of our physicians have malpractice insurance from the same carrier and this carrier, along with one other carrier, provides malpractice insurance to all or almost all Washington's hospitals. Recently, a third carrier has indicated an intent to write a substantial volume of malpractice insurance in Washington. If it does so, our malpractice market will then be largely served by three carriers, which will be an improvement.

Recognizing the possibility that Washington could experience the same problems as some other states in respect to the availability of malpractice insurance, the House Rules Committee created the Select Committee on Medical Malpractice. The Committee is composed of representatives of the House Financial Institutions Committee, Judiciary Committee, and Social and Health Services Committee. It is vested with the mandate to study the need, if any, to revise the law pertaining to medical malpractice and to recommend corrective legislation in the event such need is found to exist.

Pursuant to this mandate, the Committee has conducted a series of public hearings and work sessions at which it considered testimony and information on the extent of the malpractice problem in Washington and on the need for legislation to deal with it. Hearings or work sessions were held in Seattle, Olympia, Spokane and at Sea-Tac and were widely attended by representatives of health care providers, trial lawyers, a task force of the Bar Association and other lawyers, including the Dean of the UPS Law School, and various consumer groups. Each of the above provided a great deal of valuable testimony and other information to the Committee.

In light of the available information dealing with malpractice in Washington State, the Committee has developed a number of tentative recommendations for legislation and is presently in the process of perfecting a bill to implement them. These recommendations, as presently drafted in bill form, would provide for the following:

1. Washington law currently provides that a cause of action for medical malpractice may be brought within one year of the time the plaintiff discovers the alleged injury. The bill would expand this discovery rule

by increasing it to two years and would limit it by requiring that the action be filed within ten years after the date in which the alleged injury occurred.

2. Currently under Washington's rules of civil procedure, a plaintiff seeking damages for medical malpractice includes within his complaint a statement containing the amount of damages sought. Generally, the amount of damages mentioned is much greater than the plaintiff realistically believes he will be awarded. Because of this puffery and the fact that the damages stated are frequently published by the news media and therefore injure the reputation of physicians, the bill would bar a plaintiff in a malpractice action from including in the complaint the amount of damages sought. The bill would also provide a mechanism by which a defendant could determine in a timely manner the amount of damages the plaintiff is seeking.

3. Currently under Washington law, a patient frequently is forced to sue in order to obtain copies of his medical records. The bill incorporates the California law dealing with such records and making them available to the patient's lawyer prior to the filing of a suit.

4. The insurance carrier writing almost all Washington physicians' malpractice insurance has adopted a policy of not making advance payments to an injured patient. This policy stems from the carrier's concern that the case law in respect to advance payments in personal injury actions is in the process of evolving in a manner which could render such payments admissible as proof of liability. The bill would codify the existing common law under which an advance payment to a medically injured person is not admissible in any personal injury action as proof of liability.

5. Under existing Washington law, hospitals and other health care providers are generally insulated from civil liability for damages arising out of the performance of their evaluation duties on peer review committees. Apparently, the attorney for the Washington State Hospital Association has advised the Association that the insulation provided by this law may very well not extend to the Board of Trustees or governing body of a hospital. In order to cure this possible oversight, the bill would clearly extend the insulation to the hospital Board of Trustees or governing body.

6. Under existing Washington law, damages for medical injuries sustained by an adult patient are typically awarded in lump sum amounts. The bill would, in certain cases, authorize the court to require that all or any portion of the malpractice judgment be provided in the form of an annuity plan.

In addition to the above tentative recommendations, the Committee has scheduled two early January meetings at which it will consider, among other things, proposed recommendations relating to (1) the establishment of medical review panels to screen alleged acts of malpractice, (2) prohibiting a plaintiff from recovering both from a negligent health care provider and from under a collateral source of compensation, such as the plaintiff's employer-paid health care policy or the employment compensation system, and (3) changing the doctrine of informed consent.

In conclusion, the Committee has considered virtually every suggestion for changing the law in respect to medical malpractice injuries and has thus far developed six tentative recommendations for legislation. [Attached to this report is an Appendix containing a brief listing of these suggestions.] In arriving at these recommendations, the Committee has been guided exclusively by the need to protect the interests of Washington's health care consumers. It will continue to be guided by this need in respect to any future recommendations it develops.

Attachment

State of Washington
House of Representatives

SELECT COMMITTEE ON MEDICAL MALPRACTICE

October 29, 1975

Rep. Walt O. Knowles,
Chairman
Rep. A. A. Adams,
Vice Chairman
Rep. John Bagnariol
Rep. Dave Ceccarelli,
Vice Chairman
Rep. Ted Haley
Rep. Jeannette Hayner
Rep. A. J. Pardini
Rep. Mike Parker
Rep. Ed Seeberger

Staff Office:
Office of Program Research
202 House Office Building
Olympia, WA 98504
(206) 753-0520

NOTICE OF COMMITTEE MEETING

Date: (Thurs.) Nov. 6, 1975
Time: 1:30 P.M.
Place: HOB, Rm. 416
Olympia, Washington

AGENDA: WORK SESSION

Medical Malpractice

AVAILABILITY OF MALPRACTICE INSURANCE

(1) State Reinsurance. This proposal would provide for a Joint Underwriting Authority wherein all casualty carriers would be required to participate in a pool the funds for which would be derived by an excise tax on casualty insurance premiums. The revenue from the tax would be placed into a special state fund which would be used solely to pay claims or judgments above a certain amount.

(2) Industry Owned Insurance. This proposal calls for permitting the creation of malpractice insurance carriers owned and operated by health care providers on a state-wide or national basis.

(3) Assigned Risk Pool. This proposal would require all carriers writing casualty insurance to form an assigned risk pool and to share in providing malpractice coverage to health care providers.

(4) Insurance Rates. There were various proposals for changing rate structures, including proposals that rates should be determined by degree of risk for each class of health care provider, that rates should be determined by the income of each health care provider, and that rates should be determined by state or sub-state underwriting experience or by multi-state underwriting experience.

(5) Reporting of Underwriting Experience

Proposals were made that detailed uniform accounting standards should apply to malpractice insurers. The point was made that the underwriting reports currently required by the insurance commissioner do not adequately show what has happened to the malpractice premiums paid.

PREVENTIVE MEASURES

(1) Licensing Proceedings. Proposals were made to enable the tightening of health care practitioner licensure laws, so that practitioners constituting unreasonable malpractice risks would have their licenses revoked or suspended and that all licensed practitioners would have to continue their health care education.

(2) Peer Consultation. Proposals were made to require health care practitioners to consult with their peers in cases where they are unsure of the illness or appropriate treatment.

(3) Unnecessary Operations. Health care providers and/or licensing boards should adopt standards and guidelines designed to assure that unnecessary operations will not be performed.

(4) Informed Consent. Proposals were made that practitioners should be required to more fully explain to their patients the alternative treatments available and the risks involved. It was stated that such explanations would result in a patient's informed consent as to the treatment performed and risks involved therein, and thereby would decrease the possibility of a malpractice action in the event of a bad result.

(5) Safety Precautions. It was recommended that health care providers should be required to establish safety standards which would include periodic safety inspections of their facilities and drugs. It was also recommended that safety seminars be conducted for such providers.

(6) Access to Records. It was proposed that a patient should have ready access to his medical records. He should not have to sue and use discovery powers to determine the contents of his medical records.

(7) Medical Review Panels. Proposals were made that a panel of experts should be created to review allegations of malpractice and that the opinion of the panel as to the existence of malpractice in each case should be available and reviewed prior to the filing of a malpractice suit.

ATTACHMENT "C"

SUGGESTED LEGAL REMEDIES

(1) Statute of Limitations. Proposals have been made to substantially shorten the statute of limitations for the filing of malpractice cases. Perhaps the most common proposal is to change the law so that the statute will always begin running as of the date of the incidence of malpractice, as opposed to the date on which the incidence is "discovered" by the patient. (Subject of HB 247, passed by the House last session.)

(2) The Ad Damnum Clause in malpractice complaints. Many proposals have been made to eliminate or greatly restrict ad damnum clauses in malpractice complaints. Since pain and suffering damages have no readily discernible limits, plaintiffs often ask for huge dollar amounts in their complaints. Health care providers are concerned about the publicity given these requests and their influence on juries.

(3) Contingent Fee. Many proposals have been made to abolish or limit the contingent fee system. Generally, most of them would place statutory ceilings on contingent fees.

(4) Access to Records. Proposals have been made that a patient should have a statutory right to examine all of his medical records without having to use discovery powers.

(5) No Fault. Some proposals have been made to institute the no-fault concept in the malpractice area. This would mean that a patient would have the right to be compensated for any "bad result", regardless of the presence or absence of negligence on the part of the health care provider.

(6) Compulsory Arbitration. This proposal would remove malpractice claims from the jury system and require that they be resolved through arbitration.

(7) Workmen's Compensation Approach. This proposal would remove malpractice claims from the jury system, and, similar to workmen's compensation, would apply specific statutory and administrative damage schedules to compensate the victims of malpractice. This approach would retain "pain and suffering" damages but would limit them to specified amounts which would vary according to the type of injury or disability sustained.

FREEDOM OF EXPRESSION

The free expression of student opinion is an important part of education in a democratic society. Students' oral and written expression of their own private opinions on school premises is to be encouraged so long as it does not substantially disrupt the educational process or interfere with the right of others in the unique circumstances of the educational environment. Such speech activity by students is solely their own expression of views and the District does not intend to promote, endorse, or sponsor any expressive activity that may occur. However, distribution of written material, oral expression, or any other expressive activity (including the wearing of symbols, clothing, hairstyle, or other personal effects) may be restricted where a substantial disruption of the educational process is likely to result, or does result from such activity. Students are expressly prohibited from the use of vulgar, lewd and/or offensive terms in classroom, assembly, or other school settings. Substantial disruption includes:

A. Inability to conduct classes or school activities, or inability to move students to/from class or other activities.
B. A breakdown of student order, including riots or destruction of property.
C. Widespread shouting or boisterous conduct.
D. Substantial student participation in a school boycott, sit-in, walk-out, or similar activities.
E. Physical violence, fighting or significant harassment among students.
F. Intimidation, harassment, or other verbal conduct (including swearing, disrespectful insulting speech to students, teachers or administrators), creating a hostile educational environment.
G. Defamation or untrue statements.
H. Statements that attack ethnic, religious, gender or racial groups or that tend to provoke a physical response (including gang or hate group symbols or apparel, insults, or other fighting words that could reasonably be anticipated to provoke a physical or otherwise disruptive response).
I. Speech likely to result in disobedience of school rules or health and safety standards (such as apparel, advertising alcohol, drugs, tobacco, etc.).

The Superintendent shall develop guidelines assuring that students are able to enjoy free expression of opinion while maintaining orderly conduct of the school.

A. Student Publications

Student publications produced as part of the school's curriculum or with the support of the associated student body fund are intended to serve both as vehicles for instruction and student communication. They are operated and substantively financed by the district. Material appearing in such publications should reflect all areas of student interest, including topics about which there may be controversy and dissent. Controversial issues may be presented provided that they are treated in depth and represent a variety of viewpoints. Such materials may not: be libelous, obscene or profane; cause a substantial disruption of the school, invade the privacy of others; demean any race, religion, sex, or ethnic group: or, advocate the violation of the law or advertise tobacco products, liquor, illicit drugs, or drug paraphernalia.

The Superintendent shall develop guidelines to implement these standards and shall establish procedures for the prompt review of any materials which appear not to comply with the standards.

B. Distribution of Materials

Except as otherwise prohibited in this policy, publications or other material written by students may be distributed on school premises in accordance with regulations developed by the Superintendent. Such regulations may impose limits on the time, place, and manner of distribution including prior authorization for the distribution or circulation of substantial quantities of printed material or the posting of such material on school property. Students responsible for the distribution of material which leads to a substantial disruption of school activity or otherwise interferes with school operations shall be subject to corrective action or punishment, including suspension or expulsion, consistent with student discipline policies.

Materials shall not be distributed on school grounds by non-students and non-employees of the District.

Cross Reference
Board Policy 2340 Religious-Related Activities and Practices

Legal Reference
WAC 392-40-215 Student Rights

Adopted 04-26-99
Revised 04-12-04
Revised (Legal Reference Only) 03-18-09