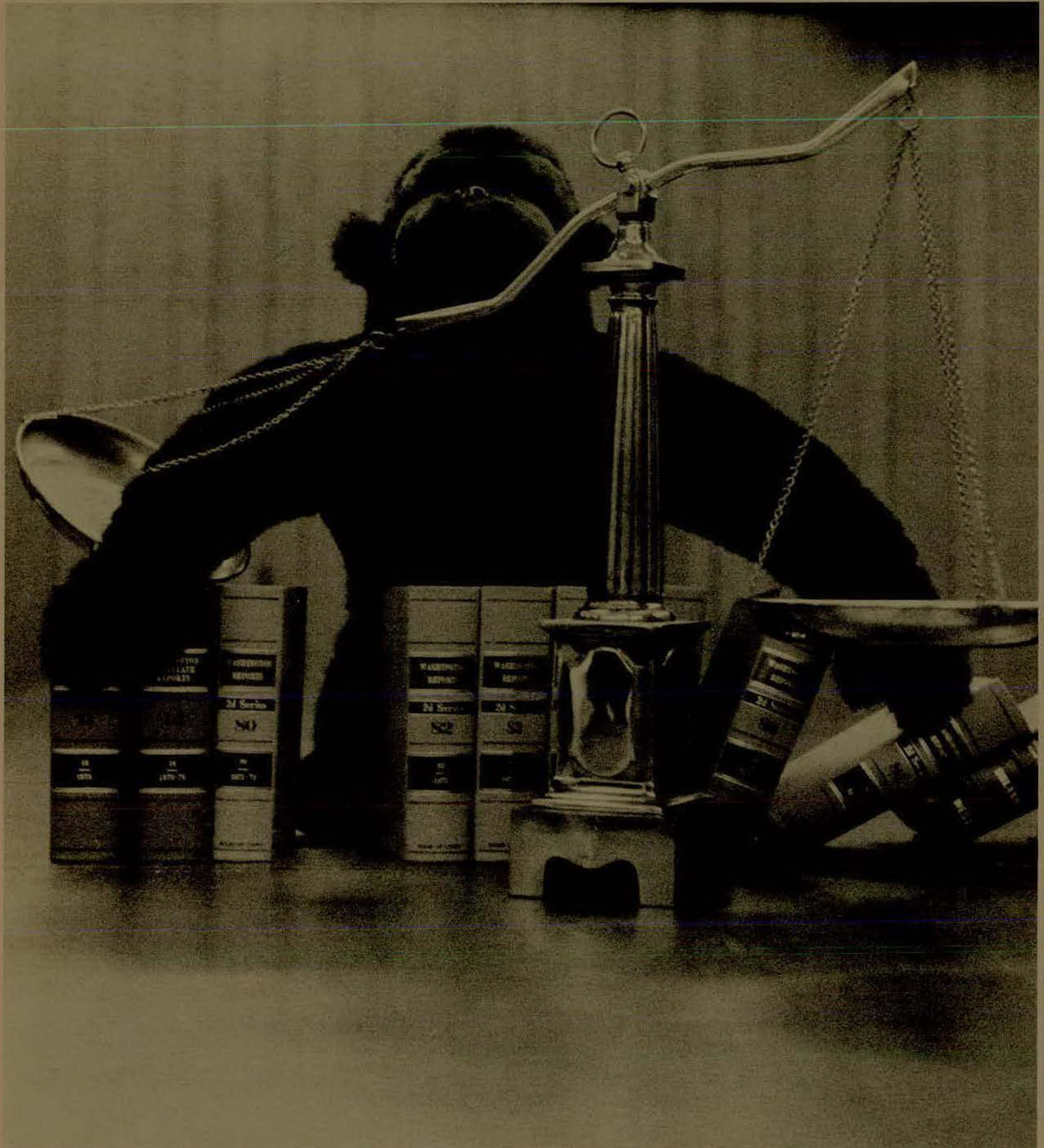
Volume 31, Number 6
June 1977

WASHINGTON STATE BAR NEWS



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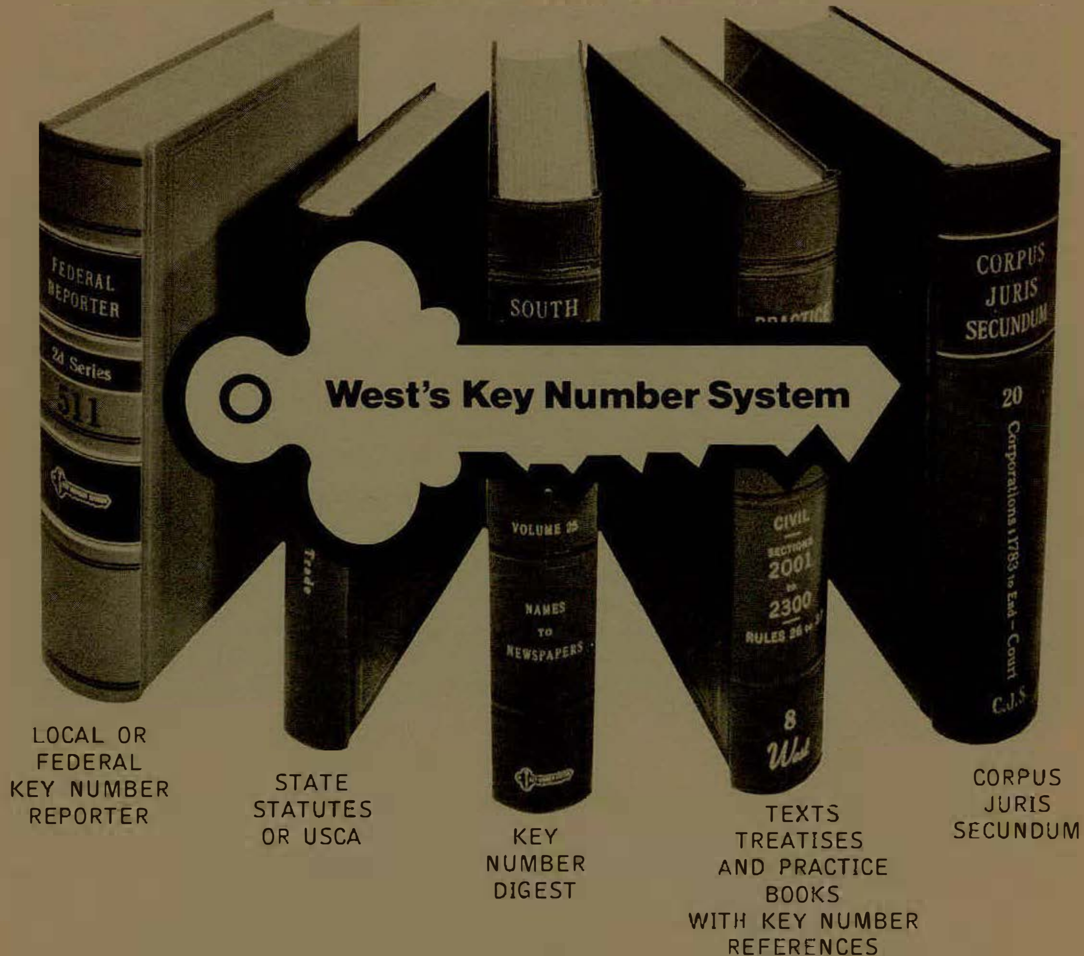

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The boys at local 880 were out of work and out of luck. Their plant was being closed down.

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Our Cover

During the past five years nationally, legal malpractice claims have increased by 50% and malpractice insurance premiums have risen by 300%. So reports Thomas S. Zilly of Seattle during the course of a review of recent malpractice litigation commencing at page 8. Zilly concludes that malpractice litigation will continue to expand: "All the ingenious legal theories developed by our profession will come home to haunt the lawyer." Photograph against his better judgment by Arthur A. Butler of Seattle.

Published by

WASHINGTON STATE BAR ASSOCIATION
505 Madison Street Seattle, Washington 98104

Jay V. White, *Editor*

Material, including editorial comment, appearing herein represents the views of the respective authors and does not necessarily carry the endorsement of the Association or of the Board of Governors. Direct all copy to Bar News, State Bar Office, 505 Madison, Seattle 98104.

Telephone: (206) 622-6054

© 1976 by Washington State Bar Association

Published monthly. Subscription price is $12.00 a year, $1.00 a copy. Subscription included with active membership. Back issues $1.00 per issue.

United Graphics

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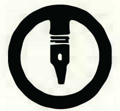
 

The Great Egyptian Adventure

Editor:

The several thousand Washington lawyers who missed the "Splendors of Ancient Egypt" (April 19-May 2) have the condolences of the five of us who made it. Despite our limited number, we scored a few points, which the undersigned, as self appointed tour reporter, begs to relate.

During our stay at the Aswan-Oberoi Hotel, the Crown Prince of Saudi-Arabia arrived with his entourage, and was received in true red carpet form. Paul Clausen drew first blood by photographing His Highness before the latter could remonstrate. (Paul later lost some of these points when his luggage was rifled and his "long johns" were stolen, but he expects to regain some status by introducing "STELLA" beer to the State of Washington).

As the Prince started up the red carpet, he mistook spectators for the official receiving line and vigorously shook the hand of Willard Skeel. He did, however, recover before bestowing the kiss. Willard did not say if it was an oily handshake.

Paul Stritmatter, by rising early in the morning and greasing a few palms, accomplished the difficult and prohibited act of climbing the exterior of the Great Pyramid.

Kathleen Taft will shortly introduce the sport of camel riding to Spokane — she already has the saddle.

Me? I just rode a camel, but I did con the native drover out of his headdress.

Seriously, it was a great trip. Ancient history was relived, not only in the physical monuments of antiquity, but in the age-old habits, customs and methods of the Nile Valley farmers, who feed Egypt by plowing, tilling, harvesting and hauling entirely by hand, oxen, camel and donkey.

S. DEAN ARNOLD
Clarkston

State Border No Haven for Non-Petitioning Spouses

Editor:

Because I practice law in a small town that shares a common border with Lewiston, Idaho, and am therefore plagued with the recurrent problem of having non-petitioning spouses in dissolution actions "taking flight" to sanctuary in said bordering jurisdiction, I found the brief article on page 42 of April, 1977 edition of the *Washington State Bar News* to be of particular interest.

I felt, however, that the *Bar News* was a little remiss in its duty by failing to point out to the members of our bar association that part of the problem covered in the above referenced article has been eliminated by the legislature of the State of Washington in its adopting amended section RCW 4.28.185 (1) (f) which submits a party to the personal jurisdiction of the courts of this state by virtue of "living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state."

Ergo, I thought such amendment was a worthwhile item to note to the general membership who have not had an opportunity to review in depth the recent 1977 Washington Legislative Service Publication distributed by Bancroft-Whitney and West Publishing Company.

Please convey my profound appreciation and thanks to those certain members of the Bar Association, whose names are unknown to me, whom I assume must have been instrumental in the adoption of the above referenced amendment.

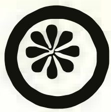
GARY L. CARPENTER
Clarkston

Mussehl on Target

Editor:

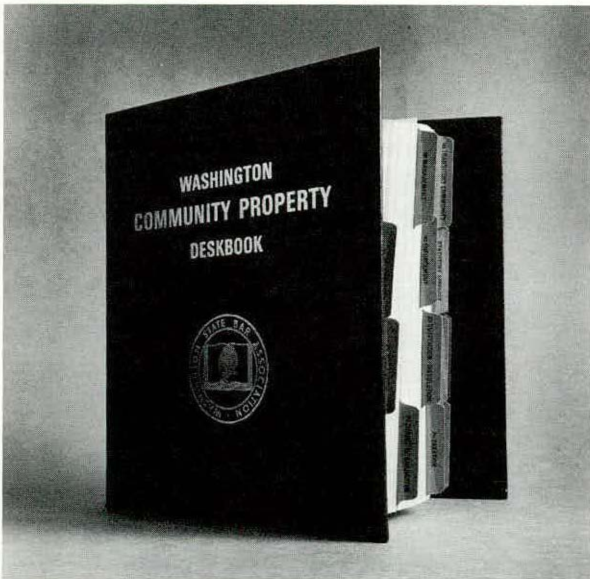
The article by Robert Mussehl entitled "The Divorce Explosion: A New Role for the Lawyer" as published in your March edition was very much appreciated. It is almost an understatement that the lawyer meeting a client with marital problems truly is in a key relationship to influence constructive action. Possibly in the past many lawyers had missed out on the joy of participating in reconciliations simply because of a lack of understanding of their strategic position to be of help. Thank you again for publishing Mr. Mussehl's positive and encouraging thoughts.

ANDREW G. BURNFIELD
Bellingham □



Editor's Page

Introducing . . .



This month marks the appearance of what must be the most significant and ambitious publishing project ever undertaken to date in the history of our bar association: the *Washington Community Property Deskbook*. The *Deskbook*, under the general editorship of Spokane County Superior Court Judge George T. Shields, is the culmination of five years of bench-bar cooperation and effort. It promises to be the basic text and reference work on community property law for Washington lawyers.

Moreover, the *Deskbook* is intended to be the first in a series of permanent deskbooks for Washington lawyers contemplated by the Continuing Legal Education Committee. The bar association's Director of Continuing Legal Education John J. Michalik reports that the next deskbook — on the subject of real property — is already underway under the editorship of Edward Kuhrau of Seattle.

In the meantime, the *Washington Community Property Deskbook* will be a tough act to follow. The *Deskbook* is approximately 700 pages in length, divided into 41 chapters (with an additional 9 chapters reserved for future supplementation), and including extensive cross-references, tables, indexes and the text of applicable statutes. It includes summaries of leading cases, practice tips, and sample forms. It reflects a comprehensive study of Washington community property law, including the discussion or citation of more than 2300 Washington cases, together with major cases in other community property jurisdictions which have been approved by the Washington courts.

As Judge Shields states in his preface to the *Deskbook*, "the members of the Bar through use and reference will determine and measure the value and worth of the project and of this result." Nevertheless, a first reaction to this book is that it will fill a great need for a community property reference designed for the practicing Washington lawyer. It quickly should become a familiar sight on the lawyer's desk and the judge's bench. It well may prove to be an excellent text for law students.

A great deal of thanks is owed to the 37 chapter authors whose work resulted in this *Deskbook*. Several of these authors assumed general responsibility for a number of chapters through service on the 8-person Editorial Board comprised of state Supereme Court Justice Robert F. Brachtenbach, Gordon G. Conger, John C. Huston, Robert H. Lorentzen, Hugh R. McGough, Malcolm A. Moore, Joseph Nappi, and Kenneth L. Schubert, Jr. Huston, together with Harry M. Cross and Beverly J. Rosenow also served as Consulting Editors with responsibility for the entire project. Great credit also must go to the late Roy C. Mitchell, the bar's Director of Professional Activities until 1975, and to John Michalik who, upon becoming director of Continuing Legal Education in January, 1976, undertook to write or complete several chapters which remained uncompleted and otherwise guaranteed publication of the *Deskbook*.

I am sure that each of those named above would want it understood that many others contributed a great deal to making the *Deskbook* possible and deserve equal thanks. Description of the tip of an iceberg reveals little about the substantial part which remains hidden, but the description is irresistible when the scale appears grand. Washington lawyers can take a great deal of pride in the fact that they are in the company of those who worked on the *Washington Community Property Deskbook*.

JVW

The President's Corner

Approximately 40% of your bar dues is spent in administering discipline. Is this money spent wisely? Is our disciplinary system effective?

In 1974 932 complaints against lawyers were filed with the bar office. In 1975 the number was 1,000. In 1976 it was 1,200. That averages more than four complaints each working day. A high percentage of the complaints are not meritorious. Many are simply misunderstandings resulting from poor lawyer/client communications. Yet each must be acknowledged, investigated and either dismissed or referred to the Disciplinary Board for appropriate action. In 1974 the Disciplinary Board reviewed 101 matters; in 1975 the number was 125; and in 1976 it was 278.

Where the complaint appears to have merit but the infraction is not serious enough to justify a formal hearing, the matter is generally disposed of with a Letter of Admonition — "Go, but sin no more." Recipients generally take these warnings to heart. 40 such letters were sent last year.

As to the more serious infractions, in the past three years there have been a total of 11 disbarments, 10 suspensions, 11 reprimands and 22 letters of censure. And the rules have been tightened. Reprimands are now published in the *Bar News*. And a total of three censures (or any combination of censures and reprimands totalling three) can result in suspension. Elsewhere, in this edition of the *Bar News* is one in a series of articles on discipline by the State Bar's General Counsel. Kurt's comments deserve your attention.

Our disciplinary system works well because of the countless hours of volunteer time devoted by members of the local administrative committees, by the trial committees and by our capable Disciplinary Board, ably chaired by Paul Steere. It is also due to the dedication of our bar staff. And since we operate in disciplinary matters as an arm of the Supreme Court, none of it would work without the support and leadership of the justices on the court.

The disciplinary system in Washington is generally regarded as one of the best in the country. Three or four states have adopted our Discipline Rules for Attorneys (DRA) substantially verbatim. Other states have used them as a model. Yet the Disciplinary Board and the Board of Governors are constantly seeking to improve the process.

We find that alcoholic lawyers account for a surprising number of disciplinary complaints. Frequently, the complaints start with a failure to communicate, missed deadlines, protracted delays, etc. Unfortunately, this trail can lead to more serious offenses and ultimate disbarment. We have a state wide committee under Vince Gadbow's chairmanship studying the problem of the alcoholic lawyer. The committee's report should be before the Board of Governors within a month. Our aim is to work through local bar committees to identify those who are so afflicted with the disease (and it is a disease) that they are a problem to their clients as well as to themselves. The primary goal will be to get them help — to salvage them so they can remain productive and honorable members of our profession. Those alcoholics who continue to create problems and who refuse help are likely to come to the attention of the Disciplinary Board more quickly in the future than they have in the past.

Today we have 8,000 active members in our bar. We project a membership of 12,000 by 1982. Continued review and improvement of our procedures is essential to maintain high standards with our exploding membership.

Richard H. Riddell

Recent Developments in Legal Malpractice

By **THOMAS S. ZILLY**

In the past few years legal malpractice claims have increased dramatically. Claims have increased 50% in the past five years and it is now estimated that seven percent (7%), or more, of all attorneys will face malpractice claims this year.[1] Malpractice claims frequently involve claims for procedural irregularities, statute of limitation problems, misfiled documents, an unclear relationship between clients and attorneys and general "forgetfulness." Inadequate legal research and poor office procedures have also contributed to many claims.

American Bar President, James D. Fellers, reported in June 1975 that attorney malpractice insurance premiums had increased 300% in five years and predicted that by 1980 no carrier will be willing to underwrite legal malpractice insurance.[2] In Washington, only American Bankers Insurance Co. of Florida and Lloyds will write new attorney malpractice coverage. The St. Paul Fire & Marine restricts itself to renewals for existing policyholders and the CNA/Insurance Companies and Affiliated FM no longer provide attorney malpractice in Washington.[3]

There are many reasons for the increase in malpractice claims. First, attorneys are no longer reluctant to bring malpractice claims, or to testify as expert witnesses against their colleagues. Second, our society has become more litigious and it is increasingly aware of its rights to seek relief against the attorney for malpractice. Finally, recent court decisions have expanded the scope of the attorney's duties, eroded the requirements of privity in third-party situations and extended the time for bringing malpractice claims.

The purpose of this article is to highlight some of the most recent cases involving legal malpractice which will illustrate the current malpractice crisis.[4] In 1967, Rosemary Smith retained an attorney to represent her in a divorce action against her husband, a retired General in the California National Guard. The attorney advised her that the General's state and federal pension benefits were not community property and he did not seek an apportionment of those benefits in the divorce. The final Decree was entered February 27, 1968. The law in California was unsettled at that time concerning future pension benefits. Many writers had indicated there was a right to the state benefits; however, no reported California case prior to 1967 had held that a court was empowered to award future pension benefits to a spouse in a divorce action. And, in 1967, there was substantial doubt whether federal military pensions constituted community property. Later, when Rosemary Smith sued her attorney for failing to obtain a division of the General's retirement benefits in the 1967 divorce action, the California Supreme Court affirmed a $100,000 judg-

[1] *Justice*. "Suing Your Lawyer" at page 93; American Bankers Ins. Co. of Florida reports that the frequency of claims per 100 policies rose from 2.6% in 1973 to a projected 6.89% in 1976. See ABA report "Special Committee on Lawyers' Professional Liability," Feb. 1977.

[2] New York Times, June 18, 1975 (40:1).

[3] An excellent report prepared by the ABA Special Committee on Lawyers' Professional Liability provides a summary of coverages, restrictions and premiums and it is available from the State Bar Office upon request.

[4] For a general discussion of legal malpractice see *Hanson v. Wightman*, 14 Wn. App. 78, 538 P.2d 1238 (1975); Annot: Attorney's Liability for Negligence, 45 ALR2d 5 (1954); Annot: Attorney's Negligence — Title to Real Property, 59 ALR3d 1176 (1974); Annot: Attorney's Malpractice — Criminal Defense, 53 ALR3d 731 (1973).

[5] *Smith v. Lewis*, 118 Cal. Rptr. 621, 530 P.2d 589 (1975).

ment against the attorney.[5] The California court said:

> "If the law on a particular subject is doubtful or debatable, an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved."

However, the California court did not stop there. The court said:

> "But, even with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." 530 P.2d at 595.

EVEN if the attorney had raised the pension issue in 1967, there was no proof the court would have ruled in the wife's favor. Justice Clark, in his well reasoned dissent, said:

> "Prior to today's majority opinion, a lawyer was 'not liable for being in error as to a question of law on which reasonable doubt may be entertained by well informed lawyers.' " 530 P.2d at 600.

Thomas S. Zilly is a partner in the Seattle firm of Lane, Powell, Moss & Miller. The substance of this article was presented by Mr. Zilly to the National Conference of Bar Presidents at the 1977 Midyear Meeting of the ABA in Seattle.

One commentator has stated that the *Lewis* decision "held the lawyer to a fiduciary standard" something beyond mere negligence.[6]

If *Lewis* is followed, it could substantially increase the scope of liability to which a practitioner is subject. For example, in 1973, in *Gruenberg v. Aetna Ins. Co.*,[7] the California Supreme Court dealt with the refusal of three fire insurance companies to make prompt payment of claims presented under their policies. The insurance companies had demanded the insured submit to an examination under oath at a time when criminal charges for arson were pending. The California court in discussing a claim of outrageous conduct and bad faith remanded the case holding that a breach of an implied duty of good faith and fair dealing would support recovery. A recent writer has stated that this decision extends beyond the insurance field into most areas of breach of contract.[8] Two other California lawyers have written:

> ". . . with the growing popularity of extra-contract damage actions, our prediction is that the maturing of the tort of bad faith will prove to be one of the most significant developments in the history of contract litigation."[9]

Are we as attorneys liable in malpractice for the failure to allege the tort of bad faith in all contract litigation?

Other recent cases also indicate a trend toward a warranty basis of recovery. In 1965 a client asked his New York attorney to examine the title to property being purchased. Prior to closing the attorney advised his client the title was free and clear of encumbrances and the transaction closed. In 1970 the client wanted to sell and discovered an encumbrance. Suit commenced in 1971 was dismissed because of the three year statute. But in

[6]*Neil T. Shayne and Norman H. Dachs, Legal Malpractice – The Rising Cost of the Error of Our Ways*, 25 Def. L. J. 425 (1976).

[7]9 Cal. 3d 566, 510 P.2d 1032 (1973).

[8]*Knepper, Review of 1974 Tort Trends*, 24 Def. L. J. 1 (1975).

[9]*Parks & Heil, The Tort of Bad Faith – The Impact of Gruenberg v. Aetna Ins. Co.*, 24 Fed. of Ins. Counsel Quarterly No. 3, page 9, 18.

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1976 the New York Appellate Court reversed and applied a six year statute holding:

> "There was an express promise by defendant to achieve the specific result of establishing marketability since anything less would defeat the purpose of the retainer agreement."[10]

The case is remarkable because, as the dissent pointed out, there was no written contract or retainer agreement.

In Alabama, the courts have held an attorney, in giving a title opinion "in effect warrants the title with such conditions or exceptions as he sees fit to express."[11]

The doctrine of "informed consent" has been frequently litigated in medical malpractice cases. Because of the fiduciary relationship between doctor and patient, the courts have held that the doctor has a duty to inform the patient of those facts which he needs to know. In *Cobbs v. Grant,*[12] the California court said:

> ". . . an integral part of the physician's over-all obligation . . . is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each."

The doctrine of informed consent may be borrowed from medicine to require the attorney to disclose all of the risks of litigation, or risks in a business transaction, in excruciating detail far beyond what is now customarily expected. In the fall of 1971 a baby was born permanently handicapped in Washington, D.C. The child's parents claimed the doctor was guilty of malpractice and consulted their attorney. The lawyers, without informing the parents, decided the doctor was not liable and failed to file the suit within the statute of limitations. In 1975, a jury awarded the parents a judgment of $516,000 against the lawyers for their failure to fully advise them of their rights.[13] But, the attorney must not act without a reason-

[10] *Boecher v. Borth,* 51 App. Div. 2d 598, 377 N.Y.S.2d 781 (1976).

[11] *Land Title Co. v. State ex rel. Porter,* 292 Ala. 691, 299 So.2d 289 (1974); Comment, the attorney's liability for negligence: an Alabama perspective, 7 S. Cumb. L. Rev. 75 (1976).

[12] 8 Cal. 3rd 229, 502 P.2d 1 (1972).

[13] *Newsweek,* June 23, 1975 at page 93.

able investigation of the facts. In a recent Illinois case, a woman sued her doctor for $250,000 alleging medical malpractice. The doctor counterclaimed against the woman and also sued the attorney for negligence and misconduct in bringing a spurious suit. Testifying as an expert witness on behalf of the doctor's counterclaim, a Chicago attorney said that prior investigation was normal legal practice and that a lawyer "has a duty not to proceed if the suit will have the effect of harassment."[14] It took only 15 minutes for the jury to award judgment against the client and the attorney. After the trial the lawyer said the case would be appealed. He warned, "No lawyer is going to want to take a case because they're afraid of being sued." Similarly, in a recent California case,[15] involving an action for malicious prosecution against an attorney, the court described the attorney's duties, as follows:

> "An attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried. . . . The test is two-fold. The attorney must entertain a subjective belief in that the claim merits litigation and that belief must satisfy an objective standard."

An attorney's duty to investigate may also include a reasonable investigation if he refers business to another attorney. In a 1976 New York decision,[16] a plaintiff obtained a judgment against a lawyer for $150,000 for carelessly referring one of his clients to a New Jersey personal injury lawyer who later absconded with the settlement money.

Let's assume for the moment that you are the specialist and have tried numerous admiralty cases. Do you have a higher duty today? In 1975 a California court, in *Wright v. Williams*,[17] expressly recognized a higher duty of care for the legal specialist. In *Wright*, plaintiff had consulted an attorney regarding the purchase of an ocean-going vessel. The attorney referred the client to Williams, a specialist in maritime law. Plaintiff later sued the maritime lawyer for failing to adequately check the title to the vessel. The California court held that a lawyer holding himself out to the public and to the profession as specializing in an area of the law must exercise a skill, prudence and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field. A Washington court has now held that a physician-specialist has a duty to possess and apply that degree of learning and knowledge possessed by reasonably learned and knowledgeable persons practicing as specialists in that profession.[18]

One of the "hottest" topics of discussion in recent years in the legal malpractice area is liability under the securities laws.[19] First came the landmark decision in *Escott v. Barchris Con-*

[14]*Newsweek*. June 14, 1976 at page 97.

[15]*Tool Research & Engineering Corp. v. Henigson*, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

[16]*Tormo v. Yormark*, reported in *Legal Malpractice Reporter*, April 1976 (later reversed on appeal); *Nation*, November 27, 1976 at 553.

[17]47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975).

[18]*Morrison V. McKillop*, 17 Wn. App. 396 (1977). There is probably no distinction between the medical and other professions insofar as this standard of care is concerned. See *Kundahi v. Barnett*, 5 Wn. App. 227 (1971).

[19]*Bergadano, Developments and Perspectives in Attorney's Professional Liability*, 26 Fed. Ins. Counsel Quarterly 65 (1975).

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struction Corp.,[20] where the buyers of debentures brought a class action under Section 11 of the Securities Act of 1933 against the issuer, and others (including attorneys) for false statements in the prospectus. The *Barchris* court in referring to a lawyer's duties said:

> "It is claimed that a lawyer is entitled to rely on the statements of his client and that to require him to verify their accuracy would set an unreasonably high standard. This is too broad a generalization. . . . Even honest clients can make mistakes. . . . The way to prevent mistakes is to test oral information by checking the original written record."

Then in 1972, the SEC filed the now famous *National Student Marketing* complaint[21] alleging fraud in (1) allowing the subject merger to close, and failing to disclose the contents of a comfort letter; and (2) failing to inform others at the closing of this information. The SEC also claimed fraud in connection with the attorney's comfort letters provided at the time of closing. One of the defendants in the *National Student Marketing* case was a sole practitioner who represented the purchaser of a company from one of the corporate defendants. That attorney rendered an opinion that the proceeds from the sale were includable in net income.[22]

There is now substantial civil litigation against attorneys for damages involving securities transactions. These private claims normally arise under Section 10(b) and Rule 10b-5. In addition to claims under the Federal Securities Laws, attorneys also have substantial potential liability under state securities laws.[23] A recent example may be instructive. In 1967 a California law firm formed a California company who later sold unregistered securities in Oregon. The company, known as Nova-Tech, Inc., used its annual reports in the sale of unregistered stock in Oregon. The annual reports listed the California counsel. An Oregon Federal Court held that even if the California attorney did not know and could not have known of Nova-Tech's failure to register the securities, he was a participant in the sale because without the lawyer's assistance the sale would not have been accomplished.[24] The Oregon court went on to hold that designation of the firm as corporate counsel was also sufficient of itself to make the firm's partners "participate" in any unlawful sale in which the annual reports were used. In contrast, a recent California decision limits the direct liability of the attorney to third persons. In *Goodman v. Kennedy*,[25] it was alleged that an attorney negligently advised his client, a corporation, to issue stock dividends to the corporation's officers during a public offering of securities under a Regulation A exemption. The stock was later sold, resulting in the loss of the exemption, and certain purchasers sued the attorney in negligence. The California Supreme Court, in denying a direct action against the attorney, said:

> "To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to the other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counselling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal 'would prevent him from devoting his entire energies to his client's interests'. . . ."

But, in a non-securities case, a recent Wisconsin court indicated that under some circumstances an attorney could be liable for nondisclosure to persons other than his client. In 1971 Pearl Goerke executed a deed to her home at a time when she was mentally incompetent. She had been represented by an attorney prior to closing. Later Goerke sued to rescind the transaction and the purchaser filed a third-party complaint against the attorney alleging he had a duty to disclose the mental incompetency of his client. The Wiscon-

[20] 283 F. Supp. 643 (S.D. N.Y. 1968).

[21] CCH Fed. Sec. L. Rep., § 93,360, Feb. 3, 1972.

[22] See Footnote 19.

[23] Annot: Securities Regulations — Attorney Liability, 62 ALR3d 252 (1975); *Sumner, The Emerging Responsibilities of the Securities Lawyer.* (1973-74 Transfer Binder) CCH Fed. Sec. L. Rep. § 79,631 (1974). Mere negligence is not sufficient to support Rule 10b-5 recovery against the attorney. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

[24] *Black & Co. v. Nova-Tech, Inc.*, 333 F. Supp. 468 (D. Ore. 1971).

[25] 18 Cal.3d 335, 556 P.2d 737 (1976); Annot: Attorneys — Liabilities to Third Parties, 45 ALR3d 1181 (1972).

sin court[26] held the attorney would only be liable if he actually intended to mislead or misinform the other party. However, in this case the attorney withdrew prior to closing. The Wisconsin court said:

> "Nondisclosure can be actionable where the transaction is completed! But the failure to disclose before the negotiations are completed should not be the basis for attaching liability to your adversary's attorney."

In the past an action for legal malpractice accrued for purposes of the statute of limitations when the negligent act occurred.[27] There has been recent and significant change in this area, to apply a discovery statute of limitations;[28] to require actual damage;[29] and in some cases to apply the continuous treatment doctrine to toll the statute of limitations until the attorney's representation is completed.[30]

It seems clear from these recent decisions that legal malpractice litigation will continue to expand. All of the ingenious legal theories developed by our profession in other litigation will come home to haunt the lawyer. For, as stated by the California Supreme Court:

> ". . . in our complex and interdependent society, human relations are ever being fit into a framework of legal rights and responsibilities, and, in this process the role of the lawyer has become increasingly crucial. As more individuals come to depend upon him, his responsibility must broaden and deepen."[31]

The lawyer has been one of the driving forces in creating new concepts of liability and expanding old ones. He should *NOT* be surprised to find his handicraft now at his own doorstep. ☐

[26] *Goerke v. Mojodich*, 67 Wis. 2d 102, 226 N.W. 2D 211 (Wis. 1975).

[27] *Cornell v. Edson*, 78 Wash. 662 (1914).

[28] Annot: Limitations — Attorney Malpractice, 18 ALR3d 978 (1968); *Peters v. Simmons*, 87 Wn. 2d 400 (1976).

[29] *Budd v. Nixen*, 6 Cal.3d 195, 491 P.2d 433 (Cal. 1971). In *Budd* the court held that any appreciable and actual harm establishes a cause of action. See also *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215 (1975).

[30] *Marine Midland T. Co. v. Penberthy, Delorio & Rayhill*, 60 Misc.2d 11, 301 N.Y.S.2d 221 (1969).

[31] *Neal v. Magana, Olney, Levy, Cathart and Gelfond*, 6 Cal. 3d 176, 491 P.2d 421 (1971).

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A LITTLE PHILOSOPHY

By **MICHAEL W. HERB**

We lawyers are used to analyzing a problem by looking for a close case or statute as a solution. It is reasoning by example. What can be done when there is no close case, or the statute is too vague to help? At this point, the search for "rights" begins.

The fact is, this probing can be elusive and even a distraction.

I. Relationships Over "Rights"

Modern thought needs to be realigned, with the focus on relationships rather than "rights." The word, "rights" is overused to such a degree, it clouds the issues and invites an emotional pronouncement in place of thoughtful analysis.

Legal problems usually evolve around the question of relationships. Some relationship has broken down, or someone wants to create a new relationship. To advise clients, the starting point is to determine who is involved, what have they had to do with each other, and what relationship do they want in the future? This must be approached from a sense of what is fair. Isn't this the very stuff that law deals with, rather than some mystical enumeration of "rights"?

Consider a divorce case. The law enables parties to sever their relationships while establishing new relationships with their children and society. In probate, procedures help creditors and heirs adjust to the fact that the deceased's living relationships have ended. Contract law spells out elements for business relationships and what can be done if the relationship is broken. Anti-trust law is a device to combat improper commercial bullying relationships. Taxation details the financial relationship for the citizen in supporting the state. Constitutional law is a set of guidelines in balancing the relationship between the citizen and local, state and federal governments.

Oliver Wendall Holmes was critical of the overemphasis of rights and has written that all rights were just fictions. [*Tyson Brothers v. Banton,* 273 U.S. 418 (1927); Holmes, "The Path of Law," 10 *Harvard Law Review* 457 (1897)].

Karl Llewellyn, the father of the Uniform Commercial Code, also felt that the term "rights" tended to be more of a diversion than a help. He pleaded for a new "point of reference in analysis" that did not center on words but rather on behavior. The attention should be on the core of law, a center — a point of reference to which all matters can be referred "if they are to be seen with intelligence and with appreciation of their bearings." Llewellyn did not want rules or precepts for the center. He wanted the concen-

tration on behavior; on the interaction; on relationships. [A Realistic Jurisprudence — The Next Step," 30 *Columbia Law Review* 431, (1931)].

Llewellyn's argument was that "rights" and "rules" were words that have become synonymous and interchangeable. If a rule is in favor of a person, he has a "right." A "right" may only be a favorable court decision. Once it is given, it takes on an aura of "rightness" and confusion develops between what the law is and what the law ought to be.

The beginning issue in any case is not, "Whose rights were violated?" It is, "What relationship existed?" "What happened to it?" "Why did it happen?" "What can be done about it?"

A Judge allowed this "relationship" approach recently in a Juvenile Court case. A 19-year old girl made a decision to place her illegitimate one-week old baby out for adoption. A caseworker prepared relinquishment papers and she replied, "I'm ready to sign." As she commenced, her boyfriend, whose background was as disheveled as his appearance, startled her by quietly saying, "I want custody." The young mother ended up fighting in court because she was convinced he would be an unstable father. Everyone knew she had been on the brink of waiving her "rights." Should she have been precluded from testifying? What if she had signed?

The use of a "relationship" approach kept things in perspective. Regardless of paperwork, the 19-year old had a mother's relationship to the infant, and the court was willing to consider this in wrestling with the problem. The primary point isn't who has what "rights," but what is best for the child, the parents and society. (The parties ended up agreeing to a joint relinquishment).

The Uniform Commercial Code rests on this approach. Although "rights" terminology is sprinkled through the cases, the basis of the code is human behavior, not rules, although it is all within a stare decisis context. The rules rest on the behavior patterns which will tend to change. The crux of it is the interaction in society; the relationships of the parties and others.

Wouldn't this perspective help in other areas, like the "victimless crime" debate, for example? The real question is whether or not the conduct has a harmful effect on society in some way, balanced against the interests or drives of the accused. Is there a relationship between homosexual conduct and other problems in society? Does prostitution cause a breakdown in family relationships?

Rather than concentrating on "rights," the analysis should rest on a broader term: a sense of fairness.

There may be a personal (individual) moral guilt in victimless crime cases, but that is different from the legal issues. Law is a social test and only has meaning when more than one person is involved and society is affected in some way.

Michael W. Herb has been teaching a Philosophy of Law Course through Spectrum (Continuing Education Department) at the University of Washington. He is a member of the Edmonds City Council and in general law practice in the firm of Herb and Hedges.

II. The Search for Fairness Within Stare Decisis

Using relationships as the starting point in social or legal analysis will help in understanding the problem at issue and in attempting some type of remedy. A legal solution must rest on whatever precedent is available. There are times when application of the precedent would lead to a poor result. And what do you do when there is no precedent — maybe nothing even close?

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Social studies can be a great help, but sometimes they do not provide a complete answer. The decision must be a just one and to reach this, a Judge cannot limit himself to an empirical approach. As a matter of practice, the courtroom is an arena, receptive to the intuitive hunch, that is intertwined with inductive and deductive analysis, in the quest for a result that is morally acceptable.

For centuries, philosophers have described this moral dimension as the role of a natural moral law, and it seems to be a fact.

From the time of infancy, one of the first things a child comes up with when he has a problem is the argument, "It's not fair." In any case, the Judge struggles for all the facts he can get so he can arrive at "the right decision." Lawyers often can agree on what Judges tend to give "good" results. They aren't thinking of any particular bias, nor of a Judge's strength in the use of logic. They are thinking of his fairness.

Jerome Hall has written that the moral factor, derived from our nature, applies to all government:

> But the decisive fact is that the vast majority of human beings want good government, and they do not want bad ones. For most persons, the primacy of value over disvalue and of justice or injustice is not a question of logic, it is a self-evident truth.

[*Foundations of Jurisprudence*, Bobbs Merrill Co., Inc., N.Y. (1973)]

The influence of some type of higher law can be seen in the opinion covering Egil Krogh's attempt to avoid disbarment because of his role in the "plumbers unit" and break-in of Dr. Fielding's office during the Watergate scandals. Supporters of Krogh had emphasized his very impressive academic and moral background, but the Washington State Supreme Court upheld the disciplinary action, citing the preamble of the Code of Professional Responsibility and holding "the continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law — without it (justice), individual rights become subject to unrestrained power, respect for law is destroyed and rational self-government is im-

possible.'' *In Re Krogh,* 85 Wn2d 462, 536 P2d 578 (1975).

The applicant was very serious about this matter and so was the court. They meant every word of it. This striving for justice is not just emotion. It's more than animal instinct. Emotions are set off by some external stimuli and instincts are inborn impulses to behave in a fixed pattern, keyed to organic needs. Instinctive behavior is something that is uniform throughout the species.

In the *Krogh* case, it's not a uniform, fixed reaction to something. It's not a response based only on an organic function. There is a use of abstract reasoning and symbols with varying approaches by members of the bench that look toward goals much more elevated than a dinner bell.

It can be detected, upon reflection, that natural law is a significant factor in many areas of the system. In the field of administrative law, there are many cases where there are no standards, no procedures to speak of and the whole thing depends on ''reasonableness.'' The only real protection from arbitrary discretionary power is a confidence that the board or examiner will be ''fair.'' In domestic relations custody fights, often the court's only legal guideline is a vague test like ''what is best for the welfare of the child?'' The paramount control is the Judge's inclination to try to be just and reasonable. It's natural law at work.

The belief in a higher, unchanging, a priori law is at least 2500 years old. It's a belief that man has an amazing ability to reason, as evidenced by the ability to land a man on the moon and a machine on Mars. This faculty can be used to give just results. Some go so far as to say that if a law or its application is not just, it's not valid. They equate a definition of law to a definition of natural moral law.

This natural law — the sense of fairness — may be a reflection of the Creator which exists in us. In any event, good legal analysis cannot be accomplished without it.

The search for fairness is what is really going on when we talk about ''rights.'' The label, ''rights'' leads to confusion between what should be done and what courts have done in fact. The analysis should focus on relationships, within the stare decisis system, with the objective of reaching a result that is just. □

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WASHINGTON STATE BAR NEWS

Board Favors Compulsory Bar Self-Insurance When There Is No Competitive Alternative

By **JAY V. WHITE**

WARM SPRINGS, Ore., May 20-21 — By a 9-to-1 vote, the Board of Governors and President Richard H. Riddell have gone on record in favor of the principle of compulsory self-insurance sponsored by the bar association as a solution to the problem of obtaining economical professional liability insurance. It was stressed that such a program should be implemented only in the event that there is no competitive program available from the private insurance industry.

In related action, the Board unanimously approved the expenditure of up to $25,000 for professional assistance to the Attorneys Professional Insurance Committee in its study of the malpractice insurance problem.

The Board's agenda, which was light in comparison to that in recent months, included a short executive session and also was marked by the "unveiling" of the bar association's *Washington Community Property Deskbook* (see Editor's Page); an update on the work of the Continuing Legal Education Committee; and a proposal by the Interprofessional Committee to establish an arbitration procedure to resolve disputes between attorneys and other professionals performing services for clients.

Compulsory Self-Insurance

Board Member Robert R. Redman, chairman of the Attorneys Professional Insurance Committee, reported on the recent work of that committee. Among the proposals under consideration is that the bar association should undertake to self-insure its membership up to certain limits, and obtain excess coverage from the private insurance industry. The experience in other states is under consideration, including a self-insurance proposal by the California Bar (See "The President's Corner," *Bar News,* Vol. 31, No. 3, March, 1977).

President Riddell raised the question of whether, in the event the committee ultimately decides that self-insurance is the only reasonable solution to the problem, such insurance would require the compulsory participation of all members of the bar.

Board Member Redman expressed concern over whether enough information is before the Board to determine whether a self-insurance program would have to be compulsory.

Following further discussion of the problem, Board Member Willard Walker, seconded by Board Member Paul R. Cressman, moved that in the event there is no competitive plan available from the private insurance industry, the Board should favor in principle the implementation of compulsory self-insurance with the 100 percent participation of the membership.

In the ensuing discussion, Board Member Bradley T. Jones suggested that a mandatory self-insurance program might encompass exemptions for house counsel or government lawyers. Board Member Betty B. Fletcher agreed.

Robert W. Burns, ex officio member of the Board representing the Young Lawyers Section, urged the Board to make a minimum amount of self-insurance, such as $25,000 in coverage, mandatory to lessen the impact of premium costs upon younger members of the bar.

Board Member Cressman suggested that a lawyer's age might not be the sole criterion for lowering mandatory premium rates.

Board Member Michael J. Hemovich expressed reservations about any mandatory insurance program, but inquired whether certain specialists might be subjected to higher premiums than other members of the bar in the event a mandatory program becomes necessary.

Board Member Walker stressed that the context of his motion was one in which there is *no* other insurance available, and stated that he is "offended by compulsory requirements, but more offended by a lack of insurance."

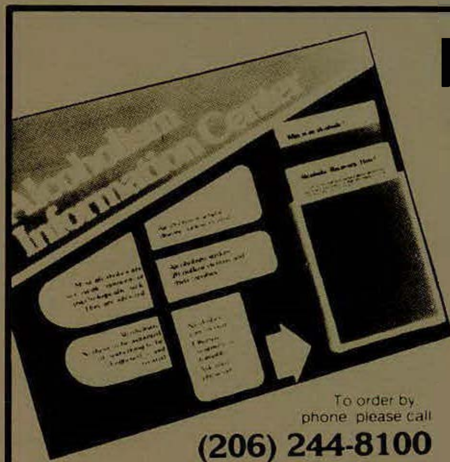
The consensus of the Board was that the details of a compulsory self-insurance program, including possible exemptions, need be defined only in the event such a program becomes necessary.

Ultimately, in a voice vote, the Board approved Walker's motion with only Hemovich being heard to vote "No."

Thereafter, the Board determined that the work of the insurance committee has reached the point that it needs the assistance of professionals to evaluate properly various insurance proposals under consideration. The Board unanimously approved the expenditure of up to $25,000 for such purposes subject to the approval by Redman and President Riddell of specific expenditures.

Community Property Deskbook

John J. Michalik, the bar association's director of continuing legal education, and Michael R. Green, chairman of the Continuing Legal Education Committee, presented the Board with the just-published *Washington Community Property Deskbook*, and briefly reviewed the five-year effort which has culminated in that publication. The book was well received by the Board and all expressed the hope that the project will be successful. It marks the first of a projected series of comprehensive deskbooks to be published by the bar association. *For further details and com-*



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ment, see Editor's Page.

CLE Update

Michalik and Green reported generally upon the work of the CLE Committee and projected planning. The CLE program for the Annual Meeting in Vancouver, B.C. this September was described, including the fact that all sections of the bar will be presenting programs, a number of which will be presented more than once to minimize the conflicts faced by attorneys who want to attend seminars scheduled at the same time.

Green described the committee's work to date on the question of a proposed General Practice Course and stated that the current consensus is that such a course should not be mandatory for all members of the bar, nor should it be a requirement for the admission of new lawyers.

Michalik outlined the work of the Board of Continuing Legal Education in approving courses for credit under the mandatory CLE rule (APR 11). He reported that to date the CLE Board has granted an exemption to only one lawyer from the requirements of the CLE rule. He also stated that although the Board has approved a number of courses not sponsored by the bar association, the available bar-sponsored CLE programs on both the state and county level are sufficient to meet 80 percent of the demand under the rule.

In addition, Michalik presented the CLE Board's request for an advisory opinion by the Board as to whether accreditation should be given to a corporation's in-house legal education program. Upon discussion of this question, the Board voted unanimously to advise the CLE Board that no such accreditation should be granted.

Interprofessional Dispute Arbitration

Brian Comstock, chairman of the Interprofessional Committee, presented that committee's proposal that an Interprofessional Arbitration Board be created to resolve disputes between attorneys and other professionals on a voluntary participation basis. A typical example of such a dispute is one between an attorney and a doctor involving the amount of the doctor's witness, deposition, or examination fee.

The Board unanimously approved the idea in concept.

Thereafter, the Board amended the committee's proposed enabling resolution and procedural rules to permit attorneys as well as other professionals to initiate the arbitration process, and to provide that no costs will be awarded to either party in the arbitration process. With these and further minor amendment, the Board approved the resolution and procedures unanimously.

Miscellaneous Topics

In other action, the Board:

- Authorized President Riddell to appoint a committee to draft regulations in connection with the proposed trust account spot audit rule to expedite the rule's approval by the Supreme Court;
- Agreed to submit to the Governor a list of desired qualities in members of the judiciary to assist in the making of future judicial appointments; and authorized the Executive Director to provide the Governor with disciplinary records pertaining to prospective judicial appointees upon the Governor's request;
- Voted to make no change in the present procedure of filling vacancies on the Board through Board appointment with the appointee to hold office until the next scheduled election for the district in question, and agreed to defer until next month the question of possible redistricting of Board positions.
- Referred to appropriate committees and sections for comment certain proposed uniform acts to be presented to the ABA House of Delegates at the ABA's Annual Meeting in Chicago this August;
- Refused to authorize the Family Law Section to file an amicus brief in connection with the Supreme Court's pending review of *Childers v. Childers*, 15 Wn. App. 792, 552 P. 2d 83 (1976);
- Appropriated $1,000 as this state bar's initial contribution to construction of the National Center for State Court's headquarters building in Williamsburg, Va., and indicated that additional appropriations in the same amount might be made during each of the next two years in accordance with a national solicitation of funds by the Center through the Virginia Bar Association;
- Agreed to sponsor a $500 award for a 1978 High School Law Day Speech Contest. □

CLE Clearinghouse

CLE at the 1977 Annual Meeting

By **JOHN J. MICHALIK**
Director of Continuing Legal Education

Although the 1977 Annual Meeting in Vancouver, B.C. is still a couple of months off, a brief preview of the CLE programming at that Meeting might be of interest.

Perhaps the most important, or at least most innovative, feature of the CLE schedule at the Annual Meeting is the introduction of a series of Workshop programs. Traditionally, the Annual Meeting has featured CLE seminars involving a lecture format, running 3 hours or so in length and designed for large audiences. While seminars of this type will also be on the schedule in Vancouver, a major portion of the schedule will be devoted to Workshop programs designed for smaller audiences and involving presentations of approximately an hour and a half in length. It is hoped that these shorter programs, with a somewhat limited enrollment, will afford an opportunity for general discussion and interchange between the speakers and the audience. In most instances, the subject matter of each Workshop will be rather narrowly defined.

Another feature of the Workshop programs is that most of them will be presented twice during the Annual Meeting. This should provide at least a partial solution to the problem often faced by those attending the Annual Meeting in having to choose between two or more programs of interest which are scheduled at the same time. The first block of Workshop programs will begin at 8:30 on the morning of Wednesday, September 14. A second block of Workshop programs begins shortly after 10:00 a.m. on the same morning. Many of the Wednesday morning Workshops will be repeated in one or the other of two blocks of programs on the afternoon of Thursday, September 15th. Because of this format, an individual attorney will be able to attend as many as four separate Workshops.

Each of the various Workshop programs will be presented under the primary sponsorship of one or another of the various State Bar Association Sections. The space limitations of this column prevent a complete listing, but among the Workshop programs scheduled are: "Handling Litigation Under The Truth-In-Lending Act," sponsored by the Creditor-Debtor Section; "Tax Shelters After The Tax Reform Act Of 1976," sponsored by the Taxation Section; a Young Lawyers Section program on "Commercial Law For The New Lawyer"; "Child Custody Litigation," sponsored by the Family Law Section; and a Trial Practice Section program entitled "Appellate Practice in Washington: Settlement Conferences."

As noted above, the introduction of the Workshop programs does not mean an abandonment of the more traditional seminars. Programs of this type, each running three hours in length, will be presented at various times throughout the Annual Meeting. Again, there is insufficient space to list all of these seminars, but I do note the following: a seminar on the "Economic and Competent Handling of the Small Tort Case," to be presented by the Young Lawyers Section on the afternoon of Wednesday, September 14; "Practical Problems in the Prosecution and Defense of Negligent Homicide and DWI," sponsored by the Criminal Law Section on the morning of Thursday, September 15; on the morning of Friday, September 16, "The New Federal Copyright Act," sponsored by the Intellectual and Industrial Property Law Section; and seminars sponsored by the Antitrust Section and the Environmental and Land Use Law Section on the morning of Saturday, September 17th.

Each of the Workshop programs will be approved for 1.50 hours of credit under the mandatory CLE Rule, while each of the seminars will carry 3.00 hours of credit. The schedule has been so drawn that an individual can attend as many as four different Workshops and four different seminars. A quick computation, therefore, reveals that up to 18 CLE credits may be earned at the Annual Meeting. □

Approved Continuing Legal Education Activities

The Washington State Board of Continuing Legal Education has approved the following courses for use toward the Washington mandatory continuing legal education requirement as set forth in Admission to Practice Rule 11. 1977 is the initial year of the program. Active members of the Washington State Bar Association are required to attend 15 hours of approved continuing legal education each year.

Individuals are reminded that credit figures listed are maximums only. Actual attendance by the lawyer is the determinitive factor. Guidelines for computing credit, obtaining course approval, reporting of attendance and other matters, appear in the booklet THE CONTINUING LEGAL EDUCATION RULE IN WASHINGTON, which was recently mailed to all active members of the State Bar.

The following listing is in three parts. First, a listing of program sponsors who have received general sponsor accreditation pursuant to Board Regulation 106. All courses offered by these sponsors which meet the standards of APR 11 and the Regulations of the Board are approved for use toward the CLE requirement. Second, a listing of individual courses approved by the Board, with the maximum number of credit hours approved for each. Third, a listing of courses which have been disapproved — attendance at these courses and programs may not be used in satisfaction of the CLE requirement.

Future Course Listings

Due to space limitations, detailed course listings in future issues of the *Bar News* may be limited. For questions on the approval of specific courses or sponsoring organizations not listed, call the WSBA Department of Continuing Legal Education, (206) 622-6054, or write c/o the WSBA, 505 Madison Street, Seattle, WA 98104.

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April 6-June 8, 1977, Ten Wednesday Evenings, Washington, D.C., 22.50 credits

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Oct. 9, 1976: Tempe . . . 4.25

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Oct. 16, 1976: Tempe . . . 6.75

Continued on page 26.

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a glimpse at the program...

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in the east...

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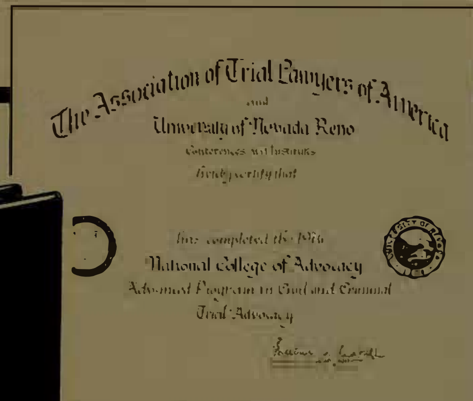

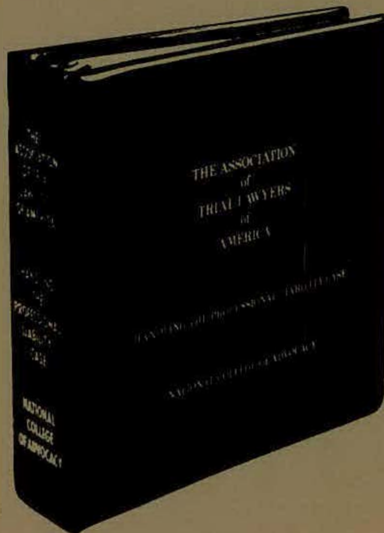

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PLAN NOW TO ATTEND THIS SUMMER

Continued from page 23.

Real Estate
Oct. 14, 21, 28, Nov. 4 & 11: Phoenix 15.00
Nov. 19-20, 1976: Tucson 11.50

Antitrust
Oct. 30, 1976: Tempe 3.50

4th Annual Arizona Family Law Seminar
Nov. 10-11, 1976: Scottsdale 10.50
Nov. 12-13, 1976: Tucson 8.50

Creditor/Debtor
Dec. 3, 1976: Tucson 4.25
Dec. 4, 1976: Tempe 4.25

Tax Reform Act of 1976
Dec. 11, 1976: Phoenix 6.25

GONZAGA UNIVERSITY SCHOOL OF LAW

Third Annual Gonzaga Tax Law Symposium: New Federal Estate & Gift Tax Code
Dec. 4, 1976: Spokane 6.25

1977 Conference on Unfair Trade Practices
Jan. 21-23, 1977: Sopkane 7.75
(No credit for luncheon, dinner or social hour speeches & remarks)

NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL

Central, Eastern & Southeastern Regional Meeting
Feb. 11-12, 1977: Chicago 8.00
(Feb. 11 — 6.00; Feb. 12 — 2.00)

21st Pacific Regional Meeting
May 5-7, 1977: Pebble Beach, CA 8.50
(May 5 — 2.50; May 6 — 3.00; May 7 — 3.00)

NATIONAL HEALTH LAWYERS ASSOCIATION

2nd Annual Program on Nursing Homes & The Law
Feb. 11-12, 1977: New Orleans, LA 10.50

OREGON STATE BAR

*1976 Annual Meeting in Portland: Program Credits As Follows:

September 30, 1976
Drafting Wills & Trusts 3.00

October 1, 1976
Oregon Inheritance Tax 2.50

*Other OSB Programs

Developments in Foreclosing Security Interests
Oct. 14, 1976: Pendleton 3.25
Oct. 15, 1976: Bend 3.25
Oct. 21, 1976: Medford 3.25
Oct. 22, 1976: Eugene 3.25
Oct. 29, 1976: Portland 3.25

Land Use
Nov. 12-13, 1976: Portland 9.25
(Nov. 12 — 6.25; Nov. 13 — 3.00)

International Law
March 5, 1977: Portland 7.00

How To Recognize A Security
Feb. 25, 1977: Portland 3.50
March 9, 1977: Albany 3.50
March 10, 1977: Medford 3.50
March 11, 1977: Eugene 3.50
March 17, 1977: Pendleton 3.50
March 18, 1977: Bend 3.50

Appellate Practice
April 22, 1977: Portland 7.00

SEATTLE-KING COUNTY BAR ASSOCIATION: AVIATION & SPACE LAW SECTION

Aviation Law Seminar
Oct. 1-3, 1976: Ocean Shores, WA 6.50
(Oct. 1 — 2.50; Oct. 2 — 3.00; Oct. 2 — 1.00)

Aviation Law Seminar
Oct. 7-9, 1977: Port Ludlow, WA 8.25
(Oct. 7 — 2.00; Oct. 8 — 3.25; Oct. 9 — 3.00)

SECURITIES & EXCHANGE COMMISSION — SEATTLE OFFICE

10th Annual Northwest State-Federal-Provincial Securities Conference
June 1-2, 1977: Seattle 13.00
(June 1 — 6.50; June 2 — 6.50)

TAX EXECUTIVES INSTITUTE, INC.

Region VII Third Annual Tax Conference
May 5-7, 1977: Monterey, CA 16.75

U.S. DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS — SEATTLE REGIONAL OFFICE

The Longshoremen's And Harbor Workers' Compensation Act As Affected By The 1972 Amendments
May 26, 1977: Seattle 6.50

WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

1976 Fall Meeting
Nov. 12-13, 1976: Vancouver, B.C. 8.00
(Nov. 12 — 5.25; Nov. 13 — 2.75)

21st Annual Meeting
June 23-24, 1977: Ocean Shores, WA 8.50
(June 23 — 5.50; June 24 — 3.00)

PRACTISING LAW INSTITUTE *(partial listing)*

Accountants' Liability
Sept. 13-14, 1976: NYC 13.00
Oct. 21-22, 1976: San Fr. 13.00

Warranties in the Sale of Goods
Sept. 15-16, 1976: San Fr 9.50

Injunctions & Other Equitable Relief in Commercial Disputes
Sept 17-18, 1976: San Fr. 9.50

Banks & The Securities Laws 1976
Sept. 16-17, 1976: NYC 11.75
Oct. 7-8, 1976: San Fr 11.75

Post Mortem Estate Planning
Sept. 16-17, 1976: NYC 12.00
Oct. 7-8, 1976: New Or 12.00

Occupational Safety & Health Law
Sept 16-17, 1976: New Or ... 10.25
Oct. 7-8, 1976: NYC ... 10.25
Oct. 28-29, 1976: LA ... 10.25

Equipment Leasing
Sept. 16-17, 1976: NYC ... 10.50
Oct. 7-8, 1976: New Or. ... 10.50
Oct. 28-29, 1976: San Fr. ... 10.50

7th Annual Estate Planning Inst.
Sept. 16-17, 1976: Atl. ... 9.50
Oct. 14-15, 1976: NYC ... 9.50

Preventing Directors' Liability Under the Securities Laws
Sept. 20-21, 1976: NYC ... 12.00
Nov. 18-19, 1976: San Fr. ... 12.00

Commodities & Future Trading 1976
Sept. 30-Oct. 1, 1976: NYC ... 12.00
Oct. 14-15, 1976: San Fr. ... 12.00

Patent Antitrust Workshop
Sept. 30-Oct. 1, 1976: NYC ... 11.00
Oct. 14-15, 1976: Mpls. ... 11.00

Practical Will Drafting
Sept. 30-Oct. 1, 1976: NYC ... 12.00
Nov. 4-5, 1976: San Fr. ... 12.00

7th Annual Inst. on Intl. Taxation
Oct. 7-8, 1976: NYC ... 12.00

Medical Malpractice Litigation
Oct. 8-9, 1976: NYC ... 11.75
Oct. 29-30, 1976: LA ... 11.75
Nov. 12-13, 1976: Miami ... 11.75

Matrimonial Matters
Oct. 10-11, 1976: NYC ... 11.00
Oct. 24-25, 1976: Rochester, NY ... 11.00

Environmental Regulation & Litigation
Oct. 18-19, 1976: NYC ... 12.00
Nov. 8-9, 1976: Dallas ... 12.00
Nov. 22-23, 1976: Miami ... 12.00

Pension Reform Week
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Nov. 29-Dec. 3, 1976: LA ... 30.00
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Tax Exempt Financing of Hospitals & Health Care Facilities
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Federal Tax Practice & Procedure: Practicing Before the IRS
Nov. 4-5, 1976: NYC ... 9.50
Dec. 6-7, 1976: LA ... 9.50

8th Annual Inst. on Securities Regulation
Nov. 4-6, 1976: NYC ... 18.00

Current Developments in Patent Law
Nov. 10-12, 1976: NYC ... 14.00

New Trends in Public Employee Organizing & Bargaining
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9th Annual Immigration & Naturalization Institute
Dec. 9-10, 1976: NYC ... 11.00

Industry & the Environment
Dec. 13-14, 1976: NYC ... 9.50
Jan 13-14, 1977: LA ... 9.50

Income Taxation of Estates & Trusts
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Consumer Credit 1977
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Counseling Senior Citizens
Jan. 13-14, 1977: San Fr. ... 13.00
Feb. 17-18, 1977: New Or. ... 13.00
March 24-25, 1977: NYC ... 13.00

Current Developments in CATV and Pay Television
Jan. 19-21, 1977: NYC ... 13.50

Fundamental Concepts of Estate Planning
Jan. 19-21, 1977: NYC ... 18.00
March 2-4, 1977: Denver ... 18.00

Strikes, Stoppages & Boycotts
Jan. 20-21, 1977: NYC ... 11.00
Feb. 3-4, 1977: San Fr. ... 11.00
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Drug Liability Litigation
Jan. 20-22, 1977: NYC ... 16.50
Feb. 10-12, 1977: San Fr. ... 16.50

COURSES NOT APPROVED

STATE BAR OF ARIZONA

Managing Stress In A Lawyers Life
Oct. 22-23, 1976: Scottsdale

☐

Ethics from the Inside

Trust Accounts — Part I

KURT M. BULMER
General Counsel, WSBA

The results of misuse or comingling of clients' funds can be catastrophic to a legal career. The Supreme Court has set forth its policy on trust account problems in *In re Deschane*, 84 Wn.2d 514, 516, 527 P.2d 683 (1974) where it was stated:

> Those few lawyers who mishandle trust funds, who fail to maintain complete records of trust funds and who fail to account and deliver funds as requested are reminded that *disbarment is the usual result*. (Emphasis added).

Trust account violations occur primarily in three ways: (1) misuse; (2) comingling; and (3) failure to account or deliver. The misuse of funds is a violation of the Code of Professional Responsibility DR 1-102 and Discipline Rules for Attorneys Rule 1.1(a). These rules generally provide that an attorney shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Comingling and failure to account or deliver is covered in CPR DR 9-102. That rule requires that *all* funds of clients, other than advances for costs and expenses, must be deposited in an account separate from the attorney's or law firm's. Additionally, an attorney must promptly notify the client of receipt of funds or other properties, maintain complete records, provide for safekeeping of funds and properties and promptly pay or deliver funds or properties when requested by the client.

Many attorneys, whether out of ignorance or choice, do not deal with trust funds in a strict fiduciary manner. While the outright theft of funds receives the most publicity there are several other types of misuse which can occur. One of these is the temporary "loan" of trust funds. An attorney may not "borrow" the funds of a client.

Typically the "loans" occur where the attorney dips into the trust account to cover some other pressing obligation. Such "loans" are generally for small amounts and are replaced within a very short period of time.

If an attorney needs short term money he or she is advised to seek out a banker. An attorney must have *all* funds of *all* clients in the trust account at *all* times unless withdrawn for delivery to the client. If an attorney wishes to use the client's funds in any way there must be express permission by the client to do so. It is best if the attorney sends the client to another attorney for advice concerning this "loan" since serious conflicts of interest and joint business venture problems arise with the attorney who does not do so. It is the general policy of the legal department of the Bar Association to recommend to the Disciplinary Board that attorneys who "borrow" money from trust accounts be disbarred.

Attorneys also misuse trust funds where the funds are used to generate earnings but which earnings are not paid over to the client. Typically such earnings come from the placing of trust funds in a savings account. The violation occurs not for earning the interest but for failing to turn the interest over to the client. Unless the attorney is willing to apportion interest earnings to the various clients and is willing to deal with the necessary income tax filings, trust accounts should not be interest earning accounts. (Obviously, the single client trust account in which funds are to be retained for a long period do not fall within this caveat as long as the earnings are returned to the client.) An attorney who retains interest earned from client's funds is misappropriating the money from the client and faces disbarment.

The best rule to remember is that clients' funds are not those of the attorney and must not be used in any way. In the next two months I will be covering comingling, refusal to deliver, attorneys' liens as they apply to trust funds and, finally, the necessary elements of trust account bookkeeping.

CODE OF PROFESSIONAL RESPONSIBILITY COMMITTEE

New Code of Professional Responsibility Rule

The Supreme Court has adopted a new rule CPR DR 8-103 to be effective July 1, 1977. The rule reads in its entirety:

> A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 7 of the Code of Judicial Conduct.

The effect of the adoption of that rule is to bring the enforcement of its provisions within the jurisdiction of the Disciplinary Board. Such jurisdiction occurs because the Disciplinary Rules provide at DRA 1.1 (i) that an attorney may be subjected to disciplinary sanctions for "violation of the Code of Professional Responsibility."

Canon 7 deals primarily with the political conduct of a judicial candidate. It restricts a judge's political activities, provides for resignation when he or she becomes a candidate for other than judicial elections, prohibits identification with a specific political party and controls specific campaign conduct in terms of dignity of the office. It also deals with promises as to how the office will be conducted and controls some aspects of the way in which a campaign for judicial candidacy may collect funds. The full Canon can be found at 83 Wn.2d 1101, 1113 (1973).

TRAVEL COMMITTEE

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Discipline

A reprimand has been issued by the Board of Governors of the Washington State Bar Association to Willis C. Oldfield of Tacoma, Washington.

Mr. Oldfield was reprimanded for his participation in preparing corporate minutes which did not accurately reflect the status of the officers of the corporation nor the true corporate structure.

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TWILIGHT OF THE LAWYER IN WASHINGTON STATE

By **DOUGLAS SHAW PALMER**

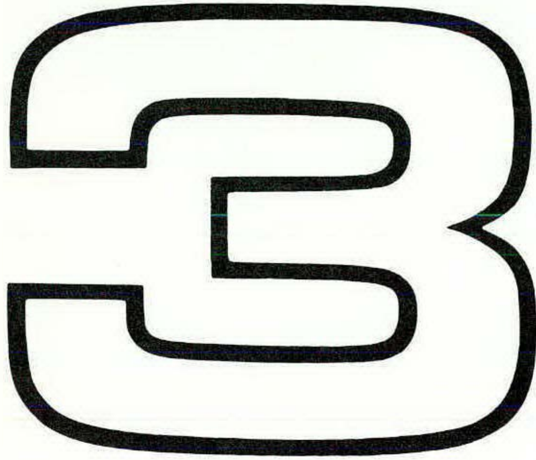
"I think it will not be long before the Washington lawyer is engaged only in the broad field of advocacy, having lost the practice of the rest of the law to non-lawyers. . . ."

After recent talks with lawyers in other jurisdictions within this country and in one other country — Scotland — it has come home to me what a large part of the law practice in this state is being lost to non-lawyers such as realtors, escrow and title companies, accountants, and bankers, many of whom are busily practicing in various nooks of the law where lawyers used to hold forth.

Real Estate Transactions

Consider sales of real estate. The Scottish "solicitor" is a lawyer who may practice all kinds of law including trial work, excepting only felony cases and appeals in the highest courts, which are handled by "advocates." A substantial part of a solicitor's practice, amounting to perhaps a third, consists of handling sales of real estate for his clients. In Scotland, when a property owner wants to sell, he does not list his property with a realtor; instead, the client goes to his lawyer. The lawyer advertises the property, arranges its showing, entertains bids and, with the consent of the owner, arranges the agreement of sale which, of course, the lawyer prepares. For all this the Scottish lawyer receives a fee which is roughly one and one-half percent of the sale price, as I recall.

When I told my Scottish lawyer friends that in this state, in perhaps 90 percent of the sales of residential property, and in a large proportion of sales of commercial property, lawyers have nothing whatever to do with the transaction; that owners go directly to a realtor (whom the Scots call an "estate agent"), who shows the house to prospective buyers, and "fills in the blanks" of the supposedly "simple" contract between the parties which in Washington is called an "earnest money agreement"; that the Washington realtor then turns the matter over to a mortgage company or escrow company which prepares closing statement, deed, mortgage, etc., for a rather nominal fee; and that the realtor gets a commission of six or seven percent of the purchase price — when I told them all of this they gasped at the size of the commission received by the Washington realtor. Moreover, they were appalled that the realtor was practicing law.



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The Scots had raised a question that was also put to me by lawyers in eastern states: Is not the Washington realtor practicing law when he prepares the initial contract or, as we call it, earnest money agreement even if he only "fills in the blanks" on a printed form? Undoubtedly, he is; however, neither the state Supreme Court nor the Court of Appeals has ever said so specifically, perhaps because lawyers themselves have not asked the courts to say so.

In the last decade, the Washington courts have had before them a number of cases in which a complaint was made that a realtor or an escrow company or its employee had engaged in the unauthorized practice of law by preparing legal documents for others. In all those cases the complaint was that a non-lawyer was preparing deeds, mortgages and other legal documents which arose out of and subsequent in time to the earnest money agreement which a realtor had also drawn as the first — and most important — document in the chain. As far as appears from the opinions, in none of the cases was anyone complaining that the realtor was practicing law when he "filled in the blanks" in the initial form earnest money agreement; and the courts have not spoken to that. See *Washington State Bar Association v. Washington Ass'n. of Realtors,* 41 Wn. 2d 697, 251 P. 2d 619 (1952); *Hecomovich v. Nielsen,* 10 Wn. App. 563, 518 P. 2d 1081 (1974); *Burien Motors, Inc. v. Balch,* 9 Wn. App. 573, 513 P. 2d 582 (1973); *Andersen v. Northwest Bonded Escrows, Inc.*, 4 Wn. App. 754, 484 P. 2d 488 (1971).

Thus, in *Washington State Bar Association v. Washington Ass'n of Realtors, supra,* the court recognized that the "representation of qualification and competence to do work of a legal nature and to advise upon that subject . . . is implicit in the preparation of any legal document by the selection and completion of a blank form . . .", but noted that there was no issue in that case "regarding the right of a lay person to prepare legal documents incident to transactions to which that person is a party, such as the preparation of earnest-money receipts by real estate brokers on standard forms or otherwise." 41 Wn. 2d at 701.

The court, however, in language not expressly directed to the preparation of earnest money agreements, has recognized that non-lawyers had

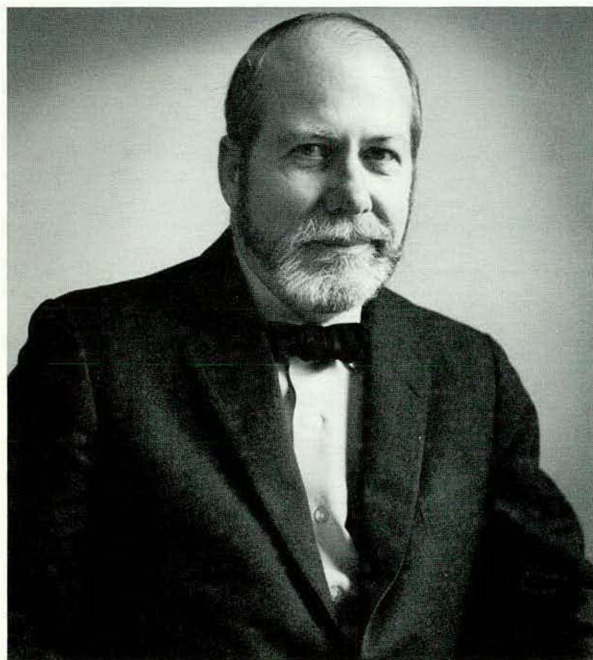
engaged in the unauthorized practice of law when they

> . . . drafted escrow instructions so as to cure mistakes, ambiguities, inaccuracies, and deficiencies in the earnest-money receipts, when they selected the forms they deemed appropriate for various transactions, decided upon the appropriate language to express the intent of the earnest-money receipt, prepared special clauses for insertion into blank spaces to satisfy special situations, and explained to buyers and sellers the meaning and effect of the documents they drafted.

In re Droker and Mulholland, 59 Wn. 2d 707,719, 370 P. 2d 242 (1962).

Moreover, as stated in Anno., 53 ALR 2d 788,789 (1957):

> A distinction is often made between the filling in of blanks and printed forms of instruments relating to land, and the drafting of such instruments, and while there is authority to the effect that such filling in of blanks is merely clerical and so does not constitute the practice of law, a majority of the cases adhere to the opposite view, it being sometimes pointed out that the selection of a particular form to be filled out requires legal knowledge, and that therefore one who makes the selection and fills in the blanks thereby engages in the practice of law.



Douglas Shaw Palmer is a graduate of the Yale University Law School, Ll. B. He has been engaged for 23 years in Seattle in general civil and trial practice.

In any event, in the absence of a definitive ruling in this state, it remains at least a tolerated practice for realtors to prepare the initial earnest money agreements between sellers and buyers in the layman's sense of "just filling in the blanks in printed forms". It is also obviously the practice of law: the fixing of legal rights and duties between the parties in a way which all subsequent documents are expected to reflect. Yet it is only the preparation of the *subsequent* instruments flowing from the earnest money agreement which is considered to be the practice of law and is so proscribed. It is an Alice in Wonderland world.

It may be that Washington lawyers and courts are overlooking the trees because they see only too clearly the forest, namely, the difficulty of enforcing a proscription against realtors' drawing earnest money agreements. When a hot prospective buyer wants to make an offer on property at ten o'clock on a Saturday night, the realtor can immediately write an earnest money agreement ("filling in the blanks"), get the buyer's signature on it, and rush to the seller, and this procedure seems much more efficacious and much less expensive to the parties as well as to the realtor than for buyer and seller to consult their own lawyers.

A consequence of this attitude is that in Washington the preparation of not only the initial contracts of sale, but also of virtually all subsequent documents has become the product of non-lawyers — if not realtors, then employees of the escrow companies and the title companies who conclude the sale. And true enough, once the initial earnest money agreement has been prepared, preparing the other documents is more nearly a ministerial function than it is the practice of law.

Doubtless the timidity of lawyers about this unauthorized practice of law is at least a matter of caution if not self preservation. It was only 15 years ago that lawyers in Arizona sought to pre-

vent realtors and title insurance companies from the unauthorized practice of law in preparing documents in connection with the transfer of real estate in Arizona. See *State Bar of Arizona v. Arizona Land Title and Trust Company,* 366 P. 2d 1 (1961), reh'g *State Bar of Arizona v. Arizona Land Title & Trust Co.,* 371 P. 2d 1020 (1962). As it quickly turned out, the realtors lost part of the battle in court but then went to the polls and won the entire war. The ink was scarcely dry on the second opinion of the Arizona Supreme Court when the realtors succeeded in adding a new Article 26 to the Arizona Constitution:

> 1. **Powers of real estate broker or salesman**
>
> Section 1. Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale. Added, election Nov. 6, 1962.

In eastern states, I have found that lawyers play a much larger role in real estate transactions than they do in this state. While in Washington many if not most sales are closed through title companies or escrow companies which are run by laymen, in eastern states it is usually the lawyers who close the transactions and prepare all the allied instruments which are incidental to the initial contract.

Several eastern lawyers have commented to me that when realtors in Washington draw earnest money agreements for buyer and seller, not only are they practicing law, but also they seem to be violating the lawyers' ethical proscription against the representation of clients who have conflicting interests. Unlike parties in other kinds of transactions (e. g., a parent making a gift to a child, two businessmen making a partnership agree-

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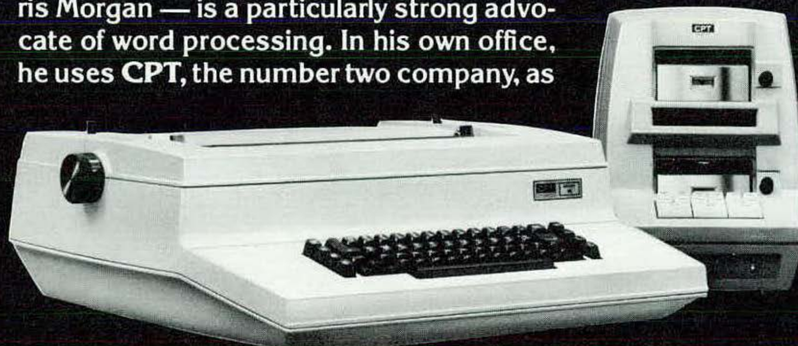

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ment), the interest of seller and buyer of realty are almost by definition diametrically opposed. If a lawyer as distinguished from a realtor — undertook to represent both seller and buyer, then he would be subject to severe censure if not suit, unless both parties consented to it after the lawyer had fully disclosed how his doing so might adversely affect his independent judgment on behalf of each party.

In most cases, realtors are paid for their services in the form of a commission from the seller of property and, in theory, the realtor is the seller's agent. Yet realtors see a lot more of buyers, whom they are squiring around to look at properties, than they do of the seller. They may even go to a seller for the first time and obtain a listing on the strength of near-offers or tentative offers they have from buyers whom they have been seeing for a long time. Small wonder that in these circumstances many brokers tend to speak of the buyers or potential buyers as their "clients" or "customers", and seem to be more eager to earn a commission by persuading sellers to lower their prices than by persuading buyers to raise their offers.

In these circumstances it is understandable that when a realtor sits down to write the crucial earnest money agreement, he seeks to keep it as simple as he can, and avoids disturbing either party with questions about what he intends.

Estate and Income Taxation

Another area where lawyers in Washington appear to be fading from the scene is in the field of estate and income taxation. Increasingly, Washington lawyers are no longer giving tax advice or preparing tax returns for their clients. The lawyer's role in these fields has been taken over largely by accountants who now loom on the scene as the tax experts. There is hardly anything one can do that is more the practice of law than preparing tax returns, and in so doing deciding, for example, whether or not deductions or exemptions are allowable, or whether gains are capital or ordinary. Yet it is accountants who do most of this work almost to the exclusion of lawyers. It may be that lawyers shy away from the arithmetical aspect of taxation which is a substantial part of it, but in so doing they resign all the rest which is certainly the practice of law.

Wills and Trusts

Take the matter of wills and trusts. Lawyers everywhere, as a routine part of their practice, engage in the preparation of wills and trusts for their clients. In many jurisdictions, it is usually the lawyer who is chosen by his client to serve as executor of the client's will, or as trustee of the trust which he is creating. In those jurisdictions it is generally accepted that the lawyer, because of his expertise, and equally and especially because of his long association with the client and the confidence he has personally inspired, is the natural person to administer the estate or the trust. It is the lawyer who can be expected to give to that task the attention of a person who was close to the testator or settlor and to his family or other beneficiaries. The lawyer is the one who knows, through his client's eyes, the situations of the beneficiaries and their needs and who can be counted upon to give due consideration to the different requests made upon him in the years following the death of the testator or the settlor.

In handling trust funds, lawyers in other jurisdictions commonly turn that task over to established investment firms. One eastern lawyer, who is trustee of approximately 100 trusts, turns over all his trust assets to a New York firm of investment bankers, who then put half into "growth securities," and half into "income producing" securities. The banker gives the lawyer a periodic accounting of gains and losses, and receipts and expenditures, which are apportioned among the lawyers' clients.

All this is in strong contrast to the practice in this state. When lawyers in Washington prepare wills and trusts, if there is any substantial property involved, it seems to be the practice for clients to name banks as their executors and trustees, often upon the recommendation of the client's lawyer. The banks do not prepare the wills or trust instruments, as realtors prepare sale agreements and accountants prepare tax returns; the banks only provide helpful forms for the use of lawyers. But the banks administer the estates and trusts.

One rationale for the banks' role is that supposedly they provide expertise in the matter of investments, while lawyers do not — a supposed advantage which, as noted above, does not exist

in other jurisdictions where banks or other organizations simply are used to handle the investment aspects of the trust while the personal aspect is left to the lawyer.

There is also apparently the feeling in Washington that banks provide a continuity which does not exist in the case of a lawyer, who may die tomorrow, while the bank goes on forever. This advantage of continuity, which the bank supposedly has over the lawyer, is less and less evident as the size of the law firm in question increases. Moreover, the continuity of the big corporation is largely mythical. Bank officials die or are transferred and the affairs of the former client, the deceased testator or settlor, are transferred from one bank official to another, each more remote than his predecessor from the affairs of the family whose trust they are administering.

The client could obtain the same or better continuity of administration if he chose his own lawyer as trustee, and gave him power to name his successor trustee in the event of the lawyer's death, and that successor his further successor, and so on down the line. This would enable the first lawyer to appoint as his successor another lawyer whom he knows well and in whom he has confidence. This choice of successor makes as much or more sense than having the administration handed on from one person to another in a bank, all being strangers to the decedent, to his lawyer, and to the beneficiaries.

Lawyers feel awkward when discussing a client's estate affairs, and the client asks "Who should I have for my executor or trustee?" Can or ought a lawyer recommend himself? A lawyer might answer the question at least in part in this way (and I often wish that in the past I had): "That is a hard question to ask lawyers. By their legal training, their experience, and their knowledge of their clients and their wishes, lawyers are often the persons best qualified to be executors and trustees. That kind of work is one of the things that the practice of law is about. Yet if anyone — lawyer, banker, or whoever — recommends himself as a trustee or executor, he is in the awkward position of seeming to be doing so for his own advantage."

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Conclusion

It may be that there have been developments in the advocacy side of the law in this state which have compensated lawyers for the loss of their practice in the areas of real estate, trust administration, and taxation. The last decade has seen the burgeoning of such new areas of the law as the environment, consumer protection, and equal opportunity, all involving advocacy before courts and other tribunal (e. g., county and city councils). Those areas of the law seem to have become the specialty of young lawyers who entered those fields upon finishing law school, and who have had little if any contact with the older dwindling areas of realty, trusts, and taxation. So we have a shift not only in the kind of law the lawyers are practicing, but also in who is practicing it.

I think it will not be long before the Washington lawyer is engaged only in the broad field of advocacy, having lost the practice of the rest of the law to non-lawyers who either claim a special competence, as do banks regarding administration of estates, and accountants in taxation, or who "don't charge" for drawing legal documents because, like the realtor, they get a substantial commission on the sale, analogous to a lawyer's contingent fee. ☐

Immigration Notes

By **DAN P. DANILOV**

TEMPORARY RESTRAINING ORDER ISSUED 3/10/77 SUSPENDING EXPULSION AND DEPORTATION AGAINST CERTAIN WESTERN HEMISPHERE ALIENS, *SILVA, ET Al. V. LEVI, ET AL (U.S.N.D. ILL., E.D., DIV. 76-C-4268)*

On March 11, 1977, the U.S. District Court in Chicago entered a Temporary Restraining Order against the Immigration and Naturalization Service to suspend the expulsion *and* deportation proceedings in all stages against certain Western Hemisphere aliens with Visa Priority Dates between July 1, 1968, and December 31, 1976.

The previous policy directive of the Immigration Service specifying February 1, 1976, Visa Priority Date cutoff has been overridden by the Court Order.

The Order is applicable nation wide to all those falling within the described granted class (Western Hemisphere aliens with priority date between July 1, 1968, and December 31, 1976). It is estimated that some 300,000 aliens will be permitted to remain in the United States to await the disposition of their cases under a ruling by Federal District Court Judge John F. Grady.

The unusual Court action follows a prior ruling by the U.S. Attorney General that the U.S. Immigration and Naturalization Service was not authorized to release Immigrant Visa Quota Numbers to Cuban Refugees from the pool of Visa Numbers which was allocated by Congress for Nationals of all Western Hemisphere countries on an annual fiscal basis of 120,000 numbers.

In order that an attorney may appropriately protect his affected clients, if need be, or those who consult him, it should be noted that the relief provided in the Temporary Restraining Order is very broad, including inter alia:

A. Immigration Service Shall ***NOT:***

1. detain them
2. require them to post bond
3. issue them orders to show cause
4. hold deportation hearing in their cases
5. enter deportation orders against them
6. terminate their voluntary departure
7. issue them warrants of deportation
8. deny them stays of deportation
9. issue them bag and baggage letters (Form I-166)
10. otherwise cause or require their departure from the United States; and

B. Immigration Service ***MUST*** — inform them they are not required to depart the United States until further order of the Court; and supply each of them who is or will be on docket control or subject to expulsion or deportation proceedings with a copy in English and Spanish of the notice attached to the Court's order.

The suggested Notice which has been proposed by the U.S. District Court has been reproduced in its entirely, as follows:

IMPORTANT NOTICE

Date:

Re: Name ________

A- ________

Due to a court order in *Silva V. Levi*, 76 C 4268, entered by District Judge John F. Grady in the District Court for the Northern District of Illinois, we are taking no action on your case until further order from the court. This means that you are permitted to remain in the United States without threat of deportation or expulsion until further notice.

____

District Director/
Officer in Charge ☐

The Courts

SUPERIOR COURT NEWS
By **JUDGE JAMES A. NOE**

The *Seattle Times* and the Ford Foundation will be sponsoring a "Law and Media Seminar" on August 26-28, 1977 at the Washington Plaza in Seattle. The purpose of the seminar will be to expose members of the legal profession and news media representatives to an intensive consideration of conflicts arising within the framework of the First Amendment. Most notable are the continuing issues of "Fair Trial — Free Press", "Gag Orders", and cameras and other recording equipment in the courtroom during court sessions.

The Seattle seminar will be modeled after similar conferences sponsored by the Ford Foundation throughout the United States the last two years. The seminar will feature Professors Charles Nesson and Arthur Miller of the Harvard Law School as moderators. The moderators will stimulate discussions around three hypothetical questions. The program calls for participation by a selected group of about 30 persons while other invited "observers" will attend.

Several Superior Court Judges from the State of Washington will be invited to participate. Jim King, Managing Editor of the *Seattle Times*, and P. Cameron DeVore, Seattle lawyer, are co-chair-persons for the event.

After nearly 200 years of living under the First Amendment, consideration of these vital and fundamental rights continues to occupy the minds of the people of the United States. This conference promises to add to the enlightenment and development of the meaning of free speech in a free society.

Personal Items

JUDGE NANCY HOLMAN (KING) has been elected to the Board of Trustees for Wheaton College, Norton, Massachusetts, her alma mater.

JUDGE GEORGE SHIELDS (SPOKANE) and JUDGE FRANCIS HOLMAN (KING) have been elected by the Superior Court Judges' Association as the Association's representatives on the Judicial Council.

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COURT OF APPEALS
By **RAY E. MUNSON**
CHIEF JUDGE, DIVISION III

New Court Clerk Appointed for Division III

Leonard J. "Jack" Nelson III, a native of Spokane, has been appointed Clerk of the Court for Division III of the Washington State Court of Appeals. He replaces David MacCulloch who retired from the position in February.

Nelson, 27, was a law clerk for Chief Justice Stafford of the Washington State Supreme Court for two years and was a former instructor at Gonzaga University School of Law.

He was graduated cum laude from Gonzaga Law School in 1974, and received a B.A. degree in history from the University of Washington in 1970.

He is married and has two children. ☐

New UW Law School Dean Sought

Dean Richard S. L. Roddis of the School of Law has resigned from the deanship to return full time to teaching and research.

A Committee on the Deanship of the School of Law is seeking a successor to Dean Roddis. Nominations and applications should be addressed to:

Dr. Kermit O. Hanson, Chair, Committee on the Deanship of the School of Law, Office of the Provost, University of Washington, Seattle, Washington 98195.

The dean is responsible for the development and administration of the School of Law.

Qualifications for the position are a strong academic background, experience in or association with law education, and executive and administrative ability. All qualified candidates are invited to apply. The University of Washington is an equal opportunity/affirmative action employer. The deadline for applications is September 15, 1977.

Interdisciplinary CLE Seminar in Criminal Law

The University of Washington Law School is sponsoring on July 30, 1977, a CLE seminar for lawyers interested in issues of the criminal law and its administration.

The seminar focuses on four areas from the dual perspectives of scholarly inquiry and professional practice: (1) Emerging doctrinal issues in criminal law and constitutional criminal procedure; (2) Strategies and problems of systemic reform in criminal justice; (3) Mental illness and the criminal law; and (4) Social science applications to lawyering and law reform.

Lecturers for the seminar are Chief Judge David Bazelon, U.S. Court of Appeals, D.C.; four professors from U.W. Law School and Yale Law School; and three social scientists and psychiatrists.

An application for 6.5 credits of CLE certification is pending. For further information please contact the Office of Short Courses, U.W. Seattle 98195. Telephone (206) 543-5280. Advance registration fee is $25. □

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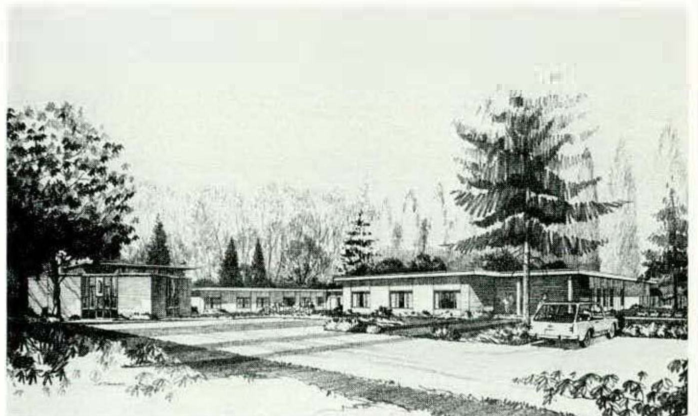

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Section Reports

CORPORATION, BUSINESS & BANKING

By **DENNIS SEINFELD**

Congratulations are in order to Tom Alberg, our outgoing Section Chairperson, and Elvin Vandeberg, Program Chairperson, for an outstanding seminar and section meeting in Richland last month. Our annual meeting/seminar has already become an institution, and all of the fine participants again proved that the reputation is well-deserved. Assisting Elvin were Jerry Whalen and Kevin McMahon, co-chairpersons of the securities subsection seminar; Gordon Willhite, chairperson of the banking and thrift institutions subsection seminar; and Roger Underwood, chairperson of the agricultural law subsection seminar. It goes without saying that the program could not have been put together, nor could it have run nearly so smoothly, were it not for the outstanding hard work and coordination of Cassie Cole of the State Bar staff.

The written critiques turned in by those in attendance, as well as the oral remarks that I heard, indicate a consensus that all participants performed well and those present learned a great deal. We again wish to thank the following for participating so well as panelists: Daniel Caine, Richard Dodd, James Gallagher, Robert Giles, Michael Hansen, Robert Hunt, Robert Ivie, Robert Kaplan, Edward Lange, Richard LeMaster, Mike Liles, Joseph McKinnon, Kenneth Myklebust, James Newton, Charles Osborn, Morris Shore, Michael Stevenson, Robert Zagelow, and Thomas Zilly.

The Hanford House again extended its outstanding hospitality, and those there further enjoyed the swimming pool, park, tennis courts and nearby golf course. We apologize for those of you who were not able to enroll; we urge each of you to join the section so that you can receive the advance announcement for next year's meeting; then of course you must send it in immediately upon receipt.

At the annual meeting on May 21, Tom Alberg gave his report as section chairperson. During this past year our section published a membership directory. Through Tom's efforts, the Board of Governors has now permitted this section, as well as others, to take positions on behalf of the section on proposed administrative rules and regulations, rather than going through the more cumbersome method of obtaining legislative committee and board of governors approval, although the latter process is still necessary for taking positions on legislation.

Cameron DeVore reported on the proposed amendments to the business corporation act, which proposals all section members had received in the mail. The committee received a vote of approval from both the members at the meeting and later the executive committee. It will now solicit the approval of the board of governors, then start pushing in the legislature.

Claude Pearson took the reins as section chairperson for the coming year. Elvin Vandeberg was elected chairperson-elect, Robert Kiesz, recorder and John Wilkins, executive board member at large.

Other new officers include Richard Bangert, corporate law department subsection chairperson; Wayne Booth, banking and thrift law subsection chairperson; Jerome Whalen, securities law subsection chairperson; and Karl Ege, section vice-chairperson and programs chairperson. Roger Underwood will remain chairperson of the agricultural law subsection.

Dave Thorne has been appointed Newsletter editor. He solicits your help by contributing any news items or short articles relevant to the scope of the section. If you are interested in writing, he will suggest topics. Please contact him at 4200 Seattle First National Bank Building, in Seattle, Telephone 622-3150.

The executive committee discussed the location of the 1978 meeting. The consensus was to meet next year on May 5 through 7 again at the Hanford House in Richland. The general feeling was that both the location and the size limitation (250) contributed to the character of the meeting and seminar and to its success. There was some feeling that the size should be increased slightly, although most felt an increase in size would

detract from the overall program. Of the critiques returned from those in attendance, a substantial majority favored continuing to meet at Richland. The feeling was that a notice would be sent out in advance to section members, so that all section members would have an opportunity to make reservations.

Tom Alberg received a hearty "Thank You" from all of the members of the executive board for a job well done as section chairperson this past year. He has worked hard, this section has become more viable, and membership in the section has become even more valuable. Thanks again, Tom!

ENVIRONMENTAL AND LAND USE LAW

By LEE KRAFT

The Land Use and Environmental Law Seminar proved to be a great success. Over 409 lawyers attended in Seattle, 68 in Bellingham and 106 in Spokane with 103 pre-registered for the Yakima Seminar. Emphasis on the Seminar in Yakima and Spokane was on water rights with **Charles B. Roe, Jr.,** Senior Assistant Attorney General, as the key speaker discussing the riparian rights and prior appropriation doctrines.

Doug Peters of Felthouse, Peters, Schmalz and Leadon discussed land use including the taking issue, downzoning and other activities of a municipality. Doug participated in the seminar in Yakima and Spokane, whereas, **Ralph Thomas** of Ostrander, VanEaton, Thomas and Ferrell discussed land use in Seattle and Bellingham. Ralph presented an excellent discussion of the vested rights doctrine, discretionary and conditional approval of development, and legal consideration and judicial tests relating to the development of a land use policy plan.

Ellen Peterson, Hearings Examiner for the Shorelines Hearing Board, spoke on practice before the Shorelines Hearing Board discussing general Pre-Hearing procedures, scope, standard of review and orders. The materials include some excellent forms for use by the practitioner.

Joel Haggard who, according to the rumors, is forming a new Seattle law firm discussed the State Environmental Policy Act, actions subject to SEPA, SEPA documentation and SEPA process.

Charles R. Blumenfeld of Bogle and Gates covered activities under the Shoreline Management Act and Implementation of the Act.

J. Richard Aramburu, a frequent speaker and acknowledged expert in the area spoke on land use and SEPA litigation discussing standing, drafting of pleadings, countersuits, discovery, trial procedures and evidence questions.

Steve Crane, the Editor of the Environmental Law Newsletter submitted written commentary on SEPA's implementation and selected practice tips which will be of immeasurable value to practitioners of environmental law.

Peter L. Buck of Hillis, Phillips, Cairncross, Clark and Martin, a recent partner of the firm with broad experience and expertise in land use and environmental law was the Chairman for the Seminar, proving that Peter's skills in organization are as great as his skills as a trial lawyer. His

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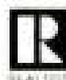

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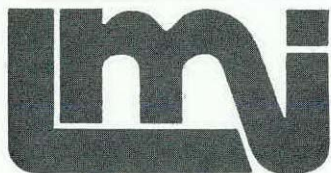

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comments and dialogue kept the CLE program at a fast pace throughout the day's presentations.

Our thanks from the Environmental and Land Use Law Executive Board to the speakers for their time and effort in their presentations and invaluable written material.

YOUNG LAWYERS

Young Lawyers Section Elections

Three terms on the Young Lawyers Section Board of Trustees will expire this year — one in the Second Congressional District, one in the Fifth Congressional District, and one in the Sixth Congressional District. If you reside in one of these districts and wish to run for election, file a notice of intention to stand for election to such office, together with a resume of qualifications, and a statement of position with the Bar Office no later than *August 1, 1977.*

The Chairperson-Elect position is also open for election. Those young lawyers in the Second Congressional District are not eligible to run for this position this election. As with the Trustee positions, file a notice to stand for election, a resume, and a statement of position with the Bar Office by August 1, 1977.

TAXATION

By **DONALD W. HANFORD**

Federal Estate and Gift Taxation

A principal factor which serves to deplete the value of a community estate is the payment of successive estate taxes on that portion of the estate of the first spouse to die which is given outright to the surviving spouse. For example, assume H dies owning a community interest in Blackacre which is valued at $200,000. If he leaves his $100,000 interest in Blackacre outright to W,

she will have to include the full value of the property in her gross estate if she dies ten years later. Thus, H's $100,000 interest in the community asset is subjected to estate tax at the death of each spouse.

The most common estate planning vehicle to avoid successive estate taxes on the same property, yet, at the same time, reserving its full economic use and value to the surviving spouse, is the creation of a trust, either *inter vivos* or testamentary, wherein W is given the income from the property for life, remainder to children, with an independent trustee having broad discretionary authority to invade corpus for the benefit of W, the life beneficiary. Since W's interest in the trust property terminates at her death, no part of the trust corpus is included in her gross estate.

However, the estate owner and his or her attorney must exercise caution when giving the surviving spouse any rights or powers over the trust corpus which, in effect, may constitute a general power of appointment under §2041. If the surviving spouse dies with a general power of appointment over the trust corpus, its entire value will be includable in her estate for federal estate tax purposes, and the purpose behind creation of the trust will be defeated.

A "general power of appointment" is the power to consume, invade or appropriate property which is exercisable in favor of the decedent, his estate or his creditors. Thus, to the extent that W, as trustee or co-trustee, is given complete discretion to distribute any portion of the trust corpus to herself, as the life beneficiary, she will be considered to possess a general power of appointment, whether or not actually exercised for her benefit. However, if W's power to distribute the trust corpus to herself is limited by an "ascertainable standard relating to her health, education, support or maintenance," she will not be deemed to hold a general power of appointment. §2041 (b) (1) (A). In short, to constitute an ascertainable standard, W's power must be reasonably measurable in terms of her needs for health, education or support.

Recent examples of trust language which was held not to constitute an ascertainable standard for exercise of the power to invade are given in *Franz v. United States,* 77-1 USTC ¶ 13,182 and Rev. Rul. 77-60, 1977-11 I.R.B. 10. In *Franz,* the surviving spouse, trustee and life beneficiary was given the power to distribute to himself any portion of the trust corpus necessary for his "care, maintenance and welfare." The Court reasoned that such language was insufficient to constitute an ascertainable standard because, under applicable state law, the word "welfare" did not impose an *objective limitation* on the exercise of the power, other than one of good faith.

In Rev. Rul. 77-60, the trustee — life beneficiary held the power to invade corpus as necessary "to continue the donee's accustomed standard of living." The Service ruled that although such language is "predictable and measurable on the basis of past expenditures," it is nevertheless insufficient for purposes of §2041 (b) (1) (A) because the standard of living "may include customary travel, entertainment, luxury items, or other expenditures not required for meeting the donee's 'needs for health, education or support.' " This ruling emphasizes the Service's position that the power must (1) be restricted by definite bounds, i.e., measurable; and (2) be exercisable only for the designated statutory purposes, i.e., health, education, support of maintenance.

Therefore, where the estate owner insists that the surviving spouse act as trustee and be given the power to invade corpus for his or her benefit, the power to invade, in order to insure the trusts effectiveness as a vehicle to avoid successive estate taxes, should be expressly limited by his or her "*needs* for health, education, support or maintenance," or other language which imposes an objective limitation pursuant to state law, and which does not permit invasion for purposes of travel, entertainment or other luxuries. Although some question exists as to the correctness of the Service's position that the power to invade for travel or entertainment expenditures, even though predictable and measurable, does not relate to "support or maintenance" of the surviving spouse, counsel should not draft the power so as to permit invasion for purposes not clearly within the statutory language, unless his client is prepared to litigate. □

Briefly Noted

New S-KCBA Officers Elected

F. Lee Campbell, Seattle attorney, has been elected President of Seattle-King County Bar Association, succeeding Murray B. Guterson, as head of the Association for the coming year. Other officers elected are: William A. Helsell, First Vice-President; William L. Dwyer, Second Vice-President; Nancy P. Gibbs, Treasurer; and Thomas D. Loftus, Secretary. Elected to Board of Trustees for a three-year term ending June 1980 are: Elizabeth J. Bracelin, Malcolm L. Edwards, and Arthur D. Swanson. New officers and trustees take office July 1.

Campbell is a partner in the law firm Karr, Tuttle, Koch, Campbell, Mawer & Morrow. He was First Vice-President of the Association for the past year.

Suspension for Non-Payment of Dues — Active Members

The following people were suspended by the Supreme Court today — May 10, 1977 — for non-payment of 1977 membership dues:

Harold Chesnin, William D. Hamilton, John Wallace Howard, Clinton E. Jacob, Michael J. Kerley, E. K. Marohn, Ralph K. Mulford III, Tama Zorn, David Charles Anson, Richard Blair Cohen, Gregory J. Conway, Judith Louise Gorfkle, Catherine Elizabeth Gouze, Kenneth O. Larson, Stephanie K. Meilman.

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Assistant CLE Director, Terry Foster and his wife, Meg Horrigan welcomed the arrival of Justin Horrigan Foster, born May 5, 1977 in Tacoma. Although the Hospital staff was somewhat confused by the use of two last names, Justin did not seem to mind a bit.

$19,000 Legal Essay Contest Sponsored by National Legal Center for the Public Interest

"The Judicial System and the Individual" is the subject of the first annual $19,000 essay contest for law students and attorneys, established by the National Legal Center for the Public Interest and associated regional legal centers.

First prize in the contest, open to second and third year law students and all attorneys, is $5,000. In addition, seven $1,000 regional first prizes and fourteen $500 regional second prizes will be offered. Entry deadline is November 30, 1977.

The National Legal Center for the Public Interest is a non-profit, non-partisan public interest legal foundation, organized in 1975.

Essays will be judged by a panel of judges from the contestant's region; for law students the region will be determined by the locality of the school, and for lawyers by the locality of their home residence. The seven regional first prize essays will then be submitted to the NLCPI, where a panel of lawyers, academics and judges will decide

and award the national prize of $5,000. Entry forms can be obtained from the National Legal Center, Suite 810, 1101 - 17th Street, N.W., Washington, D.C., 20036.

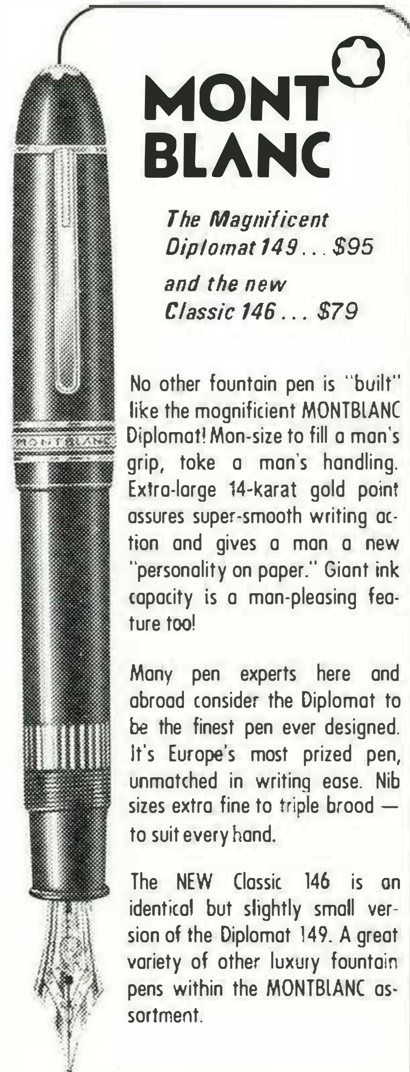
Statewide High School Speech Contest to Commemorate Law Day, 1977

In 1976, Thurston/Mason County Superior Court Judges and the State Court Administrator's Office organized a speech contest to commemorate Law Day. Thirty-four students participated.

At the suggestion of the Thurston County Superior Court Judges, a high school speech contest was promoted statewide by the State Court Administrator's Office. In cooperation with the Superior Court Judges' Courts and Community Committee, the Supreme Court, all Superior Courts and some District Courts, the State Bar Association, and the YMCA, the Court Administrator's Office gathered together 243 juniors and seniors from throughout Washington. Students addressed the following topic at the county, regional and state levels: "Partners in Justice: How Can the Citizen Support and Strengthen the Court System in a Free Society?" Speeches were 10 minutes in length.

The County-Level winners each received $50.00 or more from their local Bar Association; the Regional winners received sponsorship to the YMCA Model Youth Legislature, courtesy of the Superior Court Judges' Courts and Community Committee; and the State Winner a $500 scholarship from the Washington State Bar Association. □

Pictured above are 6 of the 8 finalists who competed in the state contest before the Supreme Court. From l. to r. are: Tom Wilson, Trent Kelly, Lisa Snyder, John Groen, John Wingenbach and Kelly Reagan. John Wingenbach was the scholarship winner.



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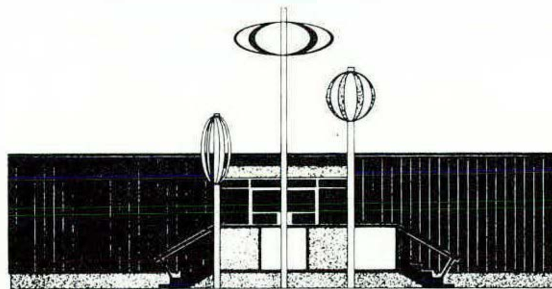

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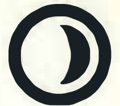

July 10-16 1977	The Association of Trial Lawyers of America: **National Colleges of Advocacy,** University of Nevada, Reno, Nevada. Address inquiries to: The Association of Trial Lawyers of America, 20 Garden Street, Cambridge, Mass. 02138, (617) 868-6900
Jan. 9-13 1978	Institute of Estate Planning: **Twelfth Annual Institute on Estate Planning,** Americana Hotel, Bal Harbour (Miami Beach), Florida. Address inquiries to: Institute on Estate Planning, University of Miami Law Center, P.O. Box 248087, Coral Gables, Florida 33124, (305) 284-4762

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3. Two man Seattle law firm has an opening for an associate preferably with some experience in general practice. Position available on July 1, 1977. Salary negotiable. Send resumes to Box 30, c/o WSBA, 505 Madison Street, Seattle, Washington 98104.

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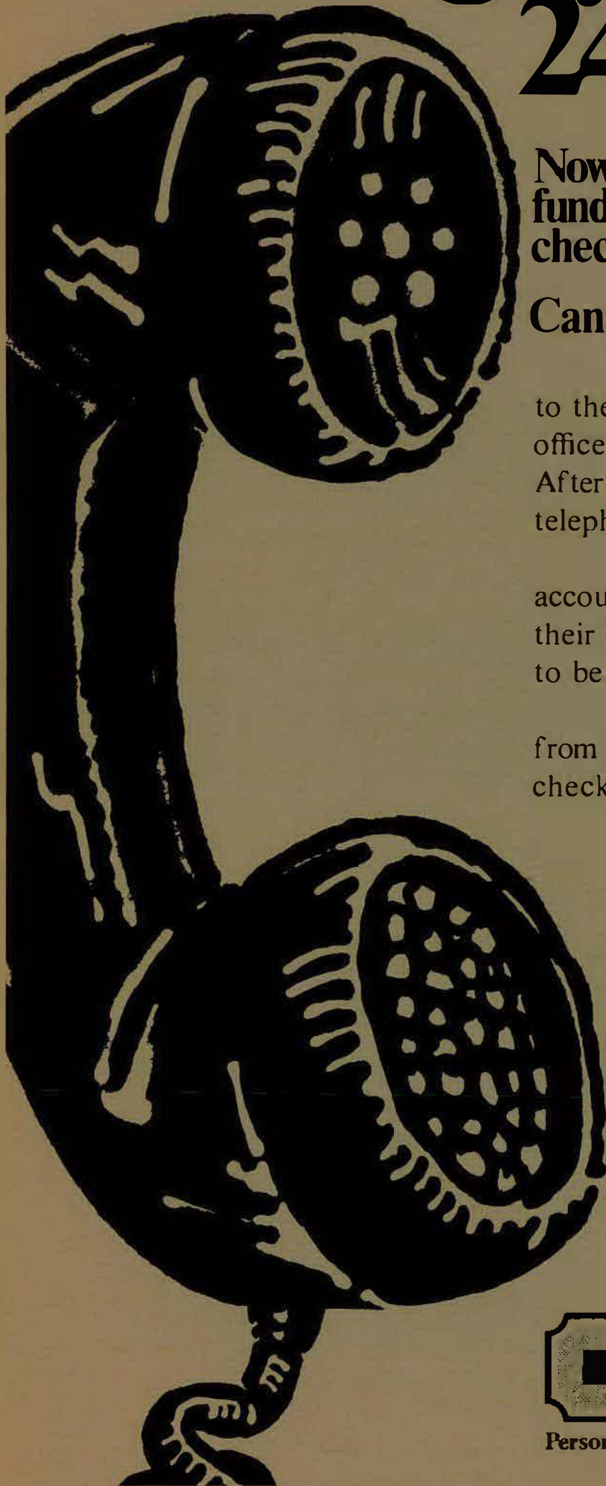

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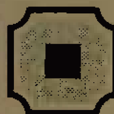

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