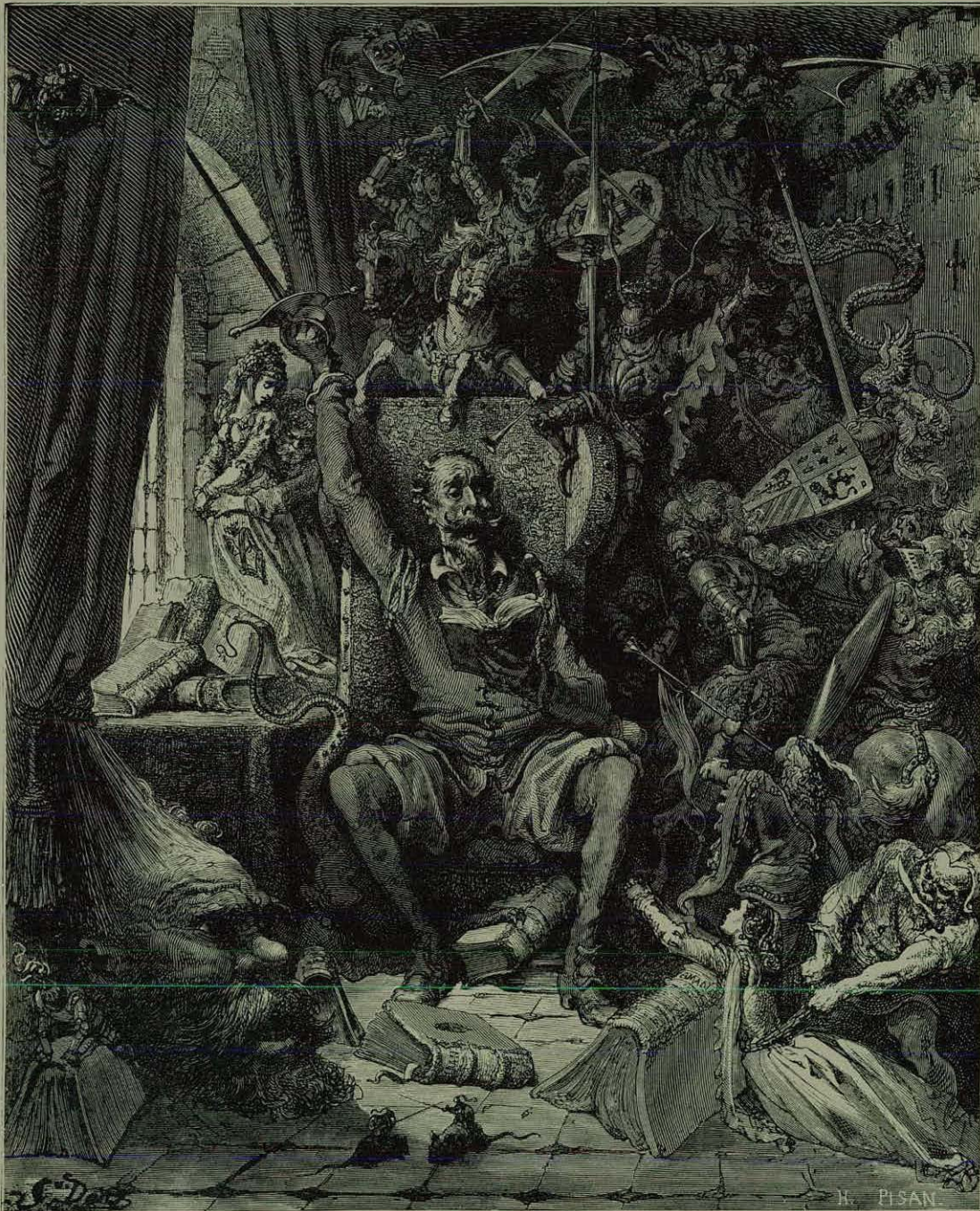
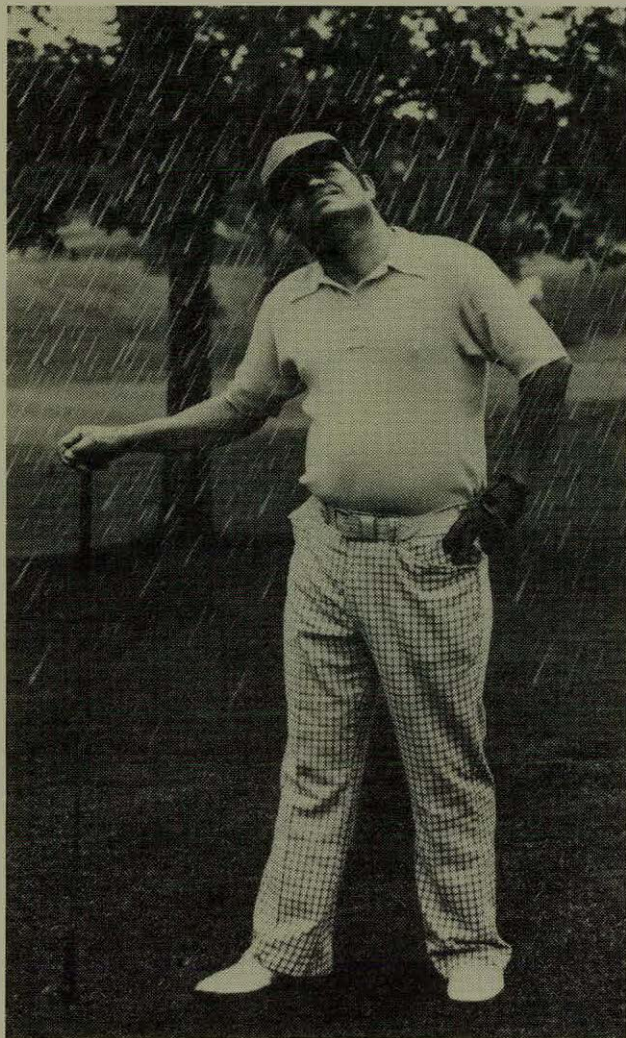

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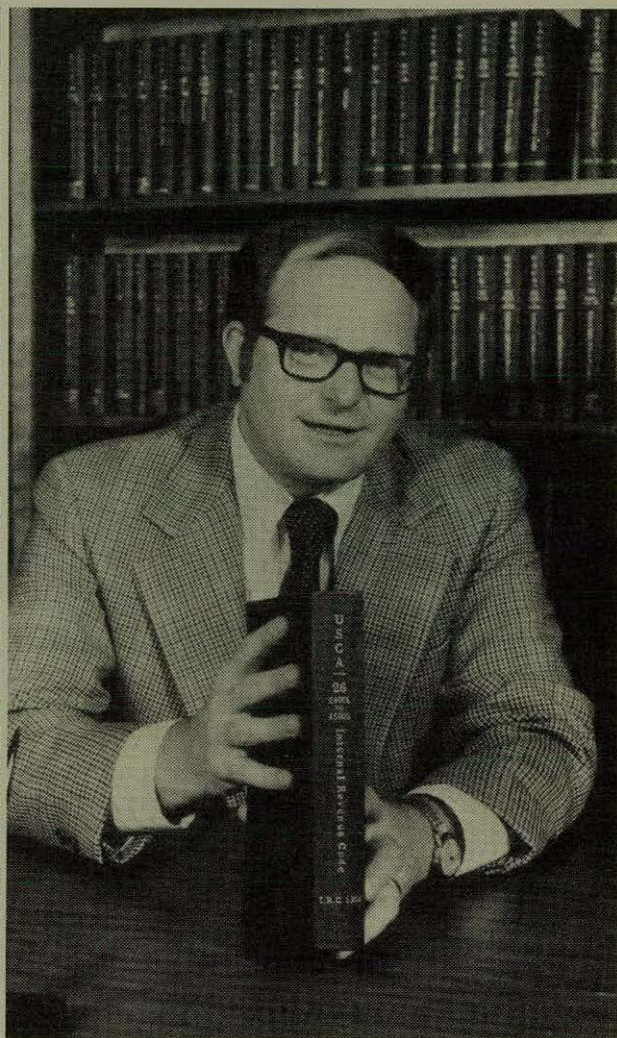


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WASHINGTON STATE BAR ASSOCIATION
505 Madison Street Seattle, Washington 98104

Jay V. White, *Editor*

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Telephone: (206) 622-6054

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

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WASHINGTON STATE BAR NEWS

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Our Cover



"Don Quixote in His Library," a drawing by Gustave Doré to illustrate Cervantes, *The History of Don Quixote*, Cassell & Co., Ltd., London. Cervantes describes the scene: "A world of disorderly notions, picked out of his books, crowded into his imagination; and now his head was full of nothing but enchantments, quarrels, battles, challenges, wounds, complaints, amours, torments, and abundance of stuff and impossibilities. . . ." Complex litigation may seem to be just as confused, but Gerald F. Collier and Thomas N. Bucknell, Jr. show how the general practitioner without the support facilities of a large firm can take a big case and win it. Page 10.

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Clarification of Representation Requested

Editor:

The Appellate Court, Division III, recently published on March 18, 1977, in 16 Wn. App. 893, *Fox vs. Graff*, wherein the Court ruled that the Plaintiff's personal injury action was properly dismissed by the trial court because the Summons and Complaint was not served within 90 days of the filing thereof.

The Appellate Court failed to publish that this firm was not the firm that represented the Plaintiffs in the Franklin County Superior Court, and that this firm did not commit the error. This firm was representing the Plaintiffs (Appellants) only for the appeal.

This opinion has caused some inference of malpractice on the part of this firm by not specifying that this firm did not represent the Plaintiffs in the trial court.

I would appreciate a publication in the *Washington State Bar News* to clarify this fact.

Thanks for your cooperation in this respect.

JOSEPH P. DELAY

Spokane

"Reprimand" Not Enough

Editor:

The May 1977 issue of the *Bar News*, reports that a Washington attorney was "reprimanded for the unauthorized altering of a will so as to have himself named as executor." I hope there were some extenuating circumstances involved (which the

brief article in the *Bar News* did not mention) which would justify such a light penalty. It would seem to me that an attorney who alters a will without his client's authority and for the attorney's personal gain should no longer be permitted to practice law.

E.H. KNAPP, JR.

Seattle

"Faint Fanfare" Nomination

Editor:

If you are interested in inaugurating a "faint fanfare" award column like the *National Observer*, I would nominate for inclusion the current annotation to RCW 23A.28.010 which states:

"The procedure for the dissolution of a possible, be read as being consistent corporation set forth in RCW 23A.28 is with that

statute. Spokane Merchants' exclusive; any court order affecting the *Asso. v. Lobe* (1975) 13 Wn App 68, 533 property of a corporation will, whenever P2d 133."

WAYNE C. BOOTH, SR.

Seattle

Bar TV Cameras From Courts

Editor:

Enclosed please find a copy of a Resolution urging the Supreme Court to change the Rule which, since last September, has permitted the use of television cameras, still photography and tape recordings in Court rooms.

This Resolution was passed by a large majority of the Spokane County Bar Association in its regular meeting on June 3, 1977.

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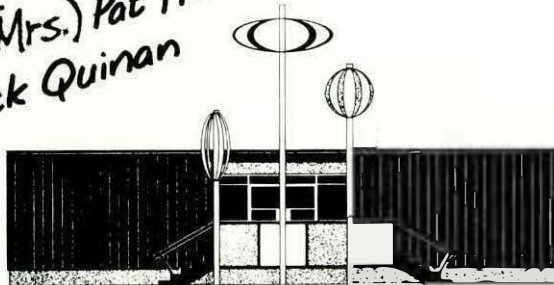
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We purposely used the language of the Yakima Resolution that they unanimously passed last December and would urge all other County Bar Associations to go on record on this extremely serious issue.

JACK R. DEAN

Spokane

**SPOKANE COUNTY BAR
ASSOCIATION
SPOKANE, WASHINGTON**

A PROPOSED RESOLUTION OF THE SPOKANE COUNTY BAR ASSOCIATION OPPOSING THE USE OF CAMERAS AND TAPE RECORDERS IN THE COURTROOM

WHEREAS, the presence of cameras and tape recorders in the courtroom during the trial of a case necessarily distracts the participants and impairs the dignity of the proceedings, and

WHEREAS, it is believed that the intrusion of this extraneous influence upon the proceedings seriously jeopardizes the right of the parties to a fair trial, now, therefore,

BE IT RESOLVED that the Spokane County Bar Association opposes the use of cameras and tape recorders of every description in the courtroom during the trial of a case and favors the reinstatement of CJC 3 (A) (7) by the Supreme Court as it read before September 20, 1976.

SUBMITTED this 20th day of May, 1977.

**JACK R. DEAN
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Discipline

Notice of Petition for Reinstatement of Egil Krogh, Jr.

A hearing before the Board of Governors will be conducted on August 31, 1977 at 8:00, to consider the petition of Egil Krogh, Jr., for reinstatement as a member of this Association after disbarment. Pursuant to Discipline Rules for Attorneys DRA 8.5, on or prior to the date of the hearing, anyone wishing to do so may file with the Board of Governors a written statement for or against reinstatement. Such statements are to set forth factual matters showing why the petitioner does or does not meet the requirements of Rule 8.6(a). DRA 8.6(a) indicates that the Board of Governors may recommend reinstatement only upon an affirmative showing by petitioner that he possesses the qualifications and requirements for attorney applicants under the Admission to Practice Rules and that the petitioner's reinstatement will not be detrimental to the integrity and standing of the Bar and the administration of justice or be contrary to public interest. Except by leave of the Board of Governors, no person other than the petitioner or his counsel shall be heard orally by the Board of Governors. Letters or written statements should be directed to the Board of Governors, Washington State Bar Association, 505 Madison, Seattle, Washington 98104. □



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The Bear in the Buckwheat

The rhetoric got a bit thick at the Board of Governor's meeting last month at Sudden Valley near Bellingham when they voted 6-4 to oppose any proposal to add lay members to the Board. *For details, see "The Board's Work," pp. 19.* Some of the prevailing Board members likened the proposal to add lay members to "putting the President of General Motors on the Union's board of trustees"; "the weasel in the chicken coop"; "gasoline thrown on the fire"; and one concluded: "We're talking about lay people telling lawyers where the bear is in the buckwheat."

In the April *Bar News*, President Riddell suggested the addition of two lay members to the Board and solicited the views of the state's lawyers: "The interim views you express may well determine whether this issue dies a-bornin' or whether it at least proceeds to a vote of the membership."

Despite the Board's action, it is probable that the issue will be put to a vote by the membership at the Annual Meeting in Vancouver, B.C., September 14-17. When it is, it should be voted down. But the vote should be based upon a rationale which was obscured during the Board's debate at Sudden Valley.

In fairness, it is notable that the character of the Board's debate was not typical of its deliberations on other issues, and some Board members did touch upon the basic questions: Is there any need for input by lay persons into the deliberations of the bar's governing body? If so, will the appointment of lay members solve the problem?

The Board's debate, however, was dominated by rhetoric and attention to political considerations. This is regrettable. The metaphors used by some Board members who oppose lay persons' serving on the Board suggests a disturbing *fear* of the public.

I cannot believe that the presence of lay people on the Board of Governors would present any danger to our profession.

The political considerations involved reference to the situation in California where the legislature authorized the governor to add six lay persons to that state bar's 15-lawyer governing body. Board members favoring lay members here argued that action by our state legislature in the matter is imminent; those opposed denied such action is imminent, but said that if it were, then they would favor the bar's voluntary addition of lay Board members. The view also was expressed that legislative appointments to the Board would violate separation of powers principles, the appropriate appointing authority being the state Supreme Court.

The debate about whether legislative action is imminent is irrelevant. The proposal to add lay Board members should stand or fall on its own merits. Moreover, we should not ask the Supreme Court to exercise a power we presume it has in order to prevent the legislature from exercising a power we presume it lacks.

An appropriate rationale for rejecting the idea of adding lay members to the Board may be stated briefly: Governing the legal profession is a responsibility of bench and bar. Delegating that responsibility to the public will do nothing to enhance the credibility of judges or lawyers. I still believe that lawyers can represent the public interest, within their own profession or elsewhere.

Ultimately, the issue of whether lay persons should be added to the Board is one of whether the public interest is adequately represented in the Board's decision-making process. Surely we are good enough lawyers to take on the job.

JVW



Popularity of Annual Convention Presents Location Problems

Success often breeds problems. So it is with our State Bar Convention.

Last September 1,410 lawyers registered for our Spokane convention — the largest number to that date. As of June 28, 1977 — thanks to a steadily growing membership and the advent of compulsory CLE — 1,632 have already paid their fee and registered for this September's convention in Vancouver, B.C. It is apparent that well over 2,000 of our members will attend. For some years now, we have had the highest percentage of membership attending our conventions of any state bar association in the country. This year it will be true in spades.

With excellent CLE offerings, with a top-flight program, with golf, tennis and jogging tournaments, and with lawyer-to-lawyer camaraderie, it should be a great convention. But what does the size of this convention (2,000 lawyers plus spouses) augur for the future?

Spokane and Vancouver, B.C. each can accommodate a sit-down luncheon of 1,200 and 1,000 at a dinner dance. In 1976 and 1975, both luncheons were sold out and so was the dinner dance. Sadly, there were a number of lawyers who wished to attend one or all of those functions who could not. This year the number disappointed will be greater. Unless and until Portland builds larger convention facilities, it is out of the question. At present, Portland can only handle 1,000 at a luncheon and 800 for a dinner dance. Seattle has been ruled out for some years, because Seattle lawyers tend to "drop in" to their offices, get tied up and never do get to the convention. And because the King County lawyers (and they comprise slightly over 50% of our members) return to their homes at night, they tend to miss the evening camaraderie.

Spokane has been scheduled as the convention city for 1978. In Spokane, the new convention facilities are fine, but the big question is can Spokane provide 1,600 to 1,700 hotel and motel rooms? At its July meeting, your Board of Governors will be reviewing its 1976 decision to hold the 1978 convention in Spokane. We'll probably stay with Spokane in 1978 because:



(1) With the smaller turnout last year, the Spokane convention was a big success.

(2) If Spokane thinks it can accommodate a convention of 2,000 plus lawyers, we should give the Spokane lawyers a chance at it, since they did so well for us in 1976.

(3) We're getting so big that it is probably too late to obtain adequate facilities and rooms in another city for 1978.

This discussion leads up to Honolulu as the convention site in November, 1980. Despite a strong dissent, those attending past conventions have twice indicated that Honolulu is their top choice as a convention site. The Board of Governors had decided that the business meeting in 1980 will take place in Seattle the day before the chartered planes leave for Honolulu. And the CLE courses offered in Hawaii will tour this state after the convention ends, so as to be available to those who stayed at home. With chartered planes to reduce the airfare and with three years to plan ahead, we hope that the cost of attending the 1980 convention will be within everyone's reach. We really have to keep more options open if we are to provide for the 2,000 plus lawyers who want to attend.

Richard H. Kiddell

Some Thoughts on Complex Litigation

THE GENERAL PRACTITIONER AND THE LITTLE BIG CASE

By

Gerald F. Collier and Thomas N. Bucknell, Jr.

It has become fashionable for members of large law firms, governmental regulatory attorneys, and assorted experts to publish seminar papers and bar journal articles depicting the trial lawyer engaged in complex litigation as a five star general surrounded by a vast army of other lawyers, assistants, clerks, programmers, secretaries, paraprofessionals and expert consultants superbly equipped for battle with gleaming mag cards, computers, xerox machines and miles of multi-functional files and indices.¹

Obviously, many big complex cases require elaborate personnel and systems support for their management. Examples are the electrical equipment litigation consisting of over 1,900 suits filed in 35 courts by over 500 plaintiffs involving some 18 different product lines and \$6 to \$7 billion in sales,² or the Broad Spectrum Antibiotics cases,³ and numerous other similarly mas-

sive and complex cases. Nevertheless, the general practitioner with limited resources should not be discouraged from undertaking complex cases.

There is a middle and lower range of complex cases well within the resources of the modestly equipped general practitioner: little big cases. All the practitioner requires is an ability to recognize them, a willingness to evaluate their feasibility and an understanding of how best to organize and manage them. Too many lawyers who have elected to practice law outside of the framework of a large firm tend to avoid complicated litigation, or fail to maximize the potential of a case because they believe it to be beyond their resources. Like Don Quixote, such lawyers may imagine dragons where they do not exist.⁴ This is a mistake. Reluctance on the part of sole practitioners and smaller firms to identify and undertake complex litigation is unnecessary, unprofitable, and often a professional disservice to clients.

In this article, we propose to discuss some general approaches to "big" cases; that is, cases which involve big injuries and a substantial chance of a large damage recovery. It is not our purpose here, however, to discuss cases remarkable solely because a significant amount of money may change hands. Rather, we are concerned with "big" cases which are also "complex"; that is, generally characterized by a multiplicity of parties or issues, or both. Commonly, these cases arise from consumer and other commercial transactions and involve issues containing elements of both contract and tort law, such as antitrust,

¹Halverson, *Coping With The Fruits of Discovery in the Complex Case - The Systems Approach to Litigation Support*, 44 ABA Antitrust Law Journal 39, 40 N.2 (1975). Other recent random samplings: *The Big Civil Case and the Federal Rules of Evidence*, 49 Temple L.Q. 898 (1976); *Pretrial Discovery in Multiple Litigation. From the Plaintiff's Standpoint*, 32 ABA Antitrust Law Journal 117 (1966); *The Use of Models in Litigation*, 52 Chicago-Kent Law Review 610 (1976); *Evaluating The Credibility of Computer-Generated Evidence. Ibid.*, at 547; *The Combination of a Manual and an Automated Approach to Trial Preparation*, 11 FORUM 810 (Spring, 1976); *Litigation File Management: Preparation for Trial. Ibid.*, at 820.

²For a discussion of these cases, see Bane, *Pretrial Discovery in Multiple Litigation from the Plaintiff's Standpoint*, 32 ABA Antitrust Law Journal 117 (1966).

³For a discussion of these cases, see Clark, *Settling An Antitrust Class Action*, 41 ABA Antitrust L.J. 248 (1972); *In re Antibiotic Drugs*, 295 F. Supp. 1402 (J.P.M.L. 1968).

⁴See cover.

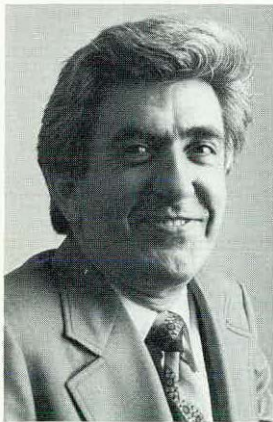
Consumer Protection Act violations, usury, product liability, employment discrimination, securities violations; and a whole host of federal and state statutory private actions designed to provide incentives for private enforcement of public policy.

Such cases may provide punitive damages and prevailing party attorney's fees, and often involve multiple party devices, such as class action, organizational representation and joinder.

Although special expertise often may be needed to deal with complex litigation, a creative approach to screening and analyzing the seemingly everyday cases in most small law offices will occasionally yield cases of potentially large recovery which, if imaginatively pursued, can be effectively managed by the general practitioner.

First Step — Defining the Injury

Understanding the nature of the injury is the



Gerald F. Collier



Thomas N. Bucknell, Jr.

Gerald F. Collier and Thomas N. Bucknell, Jr., both graduates of the University of Washington Law School, are principals in the Seattle law firm, Collier & Bucknell, Inc., P.S., specializing in antitrust, aviation, commercial and business litigation. Collier, admitted to the bar in 1957, was the first Chief Counsel for the state Attorney General's Office, Division of Antitrust and Consumer Protection, and principal draftsman of the state Consumer Protection Act, prior to entering private practice in 1961. Bucknell, admitted in 1971, was a Deputy Prosecuting Attorney for King County, and then served as law clerk to the Hon. Keith M. Callow of the state Court of Appeals, before joining the firm in 1974. The authors acknowledge the work of A. Stephen Anderson, a fourth year student in the J.D.-M.B.A. program at the University of Washington, who made extensive contributions to the research and writing of this article.

first important step to correct evaluation of complex litigation.

A common error in the initial analysis of a case is the failure to distinguish injury from damages. Injury, after all, is the actual hurt suffered by the plaintiff, and damages are only the measure of that hurt. Although the factual issues relevant to both essential elements may be difficult to separate, and often overlap, it is important to make a concerted effort to identify the two separately. This is seldom simple.

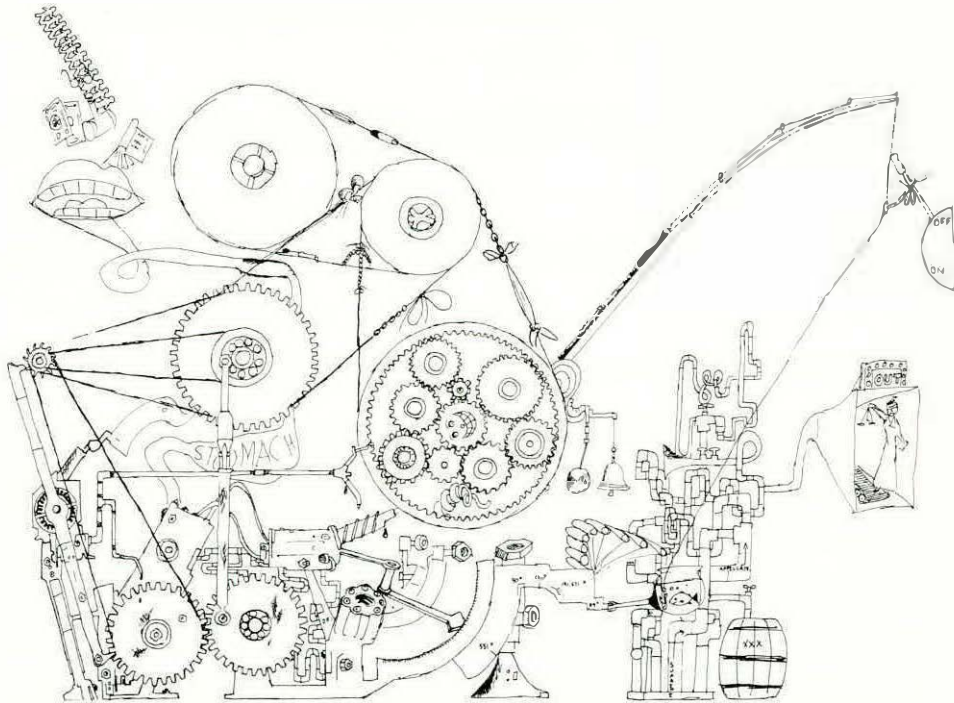
There frequently is a temptation to predicate injury upon damages, instead of the reverse. Without precise identification of the point of injurious impact or trauma, the element of proximate cause can never be anything but fuzzy.

For example, in applying the "before and after" theory which, as a measure of damages, compares profits or property value before and after the alleged injury, it is too often *assumed* that any diminution in the plaintiff's fortunes must be the proximate result of an injury, which is never fully defined. Lost profits may result from many causes other than the wrongful conduct of the defendant. Without independent corroboration of the injury itself, any computation of damages is speculative.

Two of the most common failings in identifying the injury are (1) failure to properly investigate and discover the exact point of trauma, and (2) failure to distinguish the symptoms of an injury from the injury itself.

1. Failure to Discover the Point of Trauma

A recent libel case provides an example of the difficulty in discovering the exact nature of an injury. The plaintiff was an established local attorney, and the defendant a widely circulated, metropolitan newspaper. A front page article extensively described the plaintiff's handling of a particular case in a light which, in our view, constituted actionable libel. In addition to the uncertain liability which always attends libel cases, the problem in this case was the apparent lack of specific impact or trauma which made it difficult to assess actual damages. Personal damages, although arguable, appeared speculative. Because the article painted a false impression of the plaintiff's professional conduct, any chance for substantial recovery had to center



HANDLING THE LITTLE BIG CASE: "All the practitioner requires is an ability to recognize them, a willingness to evaluate their feasibility and an understanding of how best to organize and manage them." Drawing by Andy Sano.

around loss to the plaintiff's law practice. The plaintiff's income from his one-man law practice, however, had steadily *increased* since the publication of the article. Measured against the yardstick of various bar studies available, his income was above average for a sole practitioner.

"Too many lawyers who have elected to practice law outside of the framework of a large firm tend to avoid complicated litigation..."

Further inquiry, however, revealed that the newspaper had submitted the proposed draft to the plaintiff for his comment prior to publication at a time when another lawyer was in the process of moving into the plaintiff's office. They had been considering the formation of a partnership for the practice of law.

Subsequently, it developed that although the second lawyer felt the article was untrue and had not changed his personal impression of the plaintiff, he had, as a result of the article, decided not to follow through on the proposed partnership for fear that his association with the plaintiff would

hurt him professionally.

This was a beginning. Now we had an actual traumatic event, an injury. This development ultimately presented a solution to the damages problem: Labor Department, and various bar studies indicate that attorneys who practice in partnership do better financially than do sole practitioners. This data was strengthened by discovery that the second attorney, since abandoning his plans to associate with the plaintiff, had developed a very successful and rewarding law practice in association with other attorneys.

Had the plaintiff and the other attorney gone into a partnership, the plaintiff's share of their subsequent partnership income would have yielded a substantially higher income than he had in fact enjoyed. An economist was employed as an expert witness to develop the measure of damages based on this specific injury. Following a two week trial, the jury returned an extremely large damage verdict.

2. *Failure to Distinguish Symptoms From the Injury Itself*

This danger is especially present in complex

cases that contain a multiplicity of issues and parties.

A recent case is illustrative of the problem. A class of plaintiffs brought a suit against the developer of a large, commercial building alleging that numerous structural problems, such as wall and floor cracks, leaking windows and sticking doors, had reduced the value of the building. The defects were different in each portion of the building, and the plaintiffs became totally bogged down in a multitude of issues concerning when each defect arose, whether it had been latent or patent at the time of purchase, the costs of repairs,

“Understanding the nature of the injury is the first important step to correct evaluation of complex litigation.”

and the like. The result was a case that was nearly impossible to prove, and nearly all of the plaintiffs’ causes of action were disallowed at trial.

Further factual investigation and analysis would have revealed the very real possibility that these multiple defects, although significant problems, were merely symptoms of a larger single

problem: a defective foundation that resulted in excessive shrinkage and settling.

This theory, if fully supported by an analysis of the building’s design and weight and the soil condition at the building site, would have allowed a much simpler, factual presentation at trial with the possibility of a much greater award of damages. Proof of such a defect would have allowed the argument that the building, in its present condition, was nearly devoid of any future market value.

Damages: Gauging the Pain⁵

Having isolated an identifiable injury, the next step is to determine the measure of damages. Although the peculiarities of each case obviously will dictate to some extent the theory of damages to be employed, there are three traditional approaches to the measurement of damages in business and property losses: (1) “before and after”

⁵“In a world so full of pain and suffering it is strange that no one has perfected a gauge that will accurately measure its value.” *Texarkansas Bus Company v. Carter*, 301 S.W. 2d 300 (Tex. A. v. App. 1957)



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approach;⁶ (2) the so-called "yardstick" approach; and (3) the "market share" theory.

The "before and after" approach compares a claimant's own income or property value situation before and after the injurious impact, while the "yardstick" theory compares the plaintiff's earnings, or property values, during the period of the impact to those of a similar or "yardstick" company or property during the same period that was not adversely affected by the defendant's wrongful conduct.⁷

The so-called "market share" approach involves a comparison of relative changes in market shares of the plaintiff, as compared to a model, possibly the defendant. Damages are computed by translating the plaintiff's lost market share into a dollar volume of goods that he would have sold which is then multiplied by the plaintiff's historical profit margin.

These theories of damages result from the view that injury, once shown with a degree of certainty, allows proof of damages based on any relevant data and acceptable theory, even if exact precision is impossible. Courts are reluctant to force plaintiffs to prove damages with certainty in areas where the lack of proof is very often the very fruit of the defendant's conduct. This is particularly true in antitrust cases.⁸

1. "Before and After" Theory

Under the "before and after" approach, there are three possible variations depending upon the time spans for which given sets of data are available:

(a) Profits or property value during the period of the impact may be compared with the same data for the period immediately following the impact.⁹

(b) Profits earned prior to the period of impact of the injury and profits earned after the period of

⁶See 1 T. Sedgwick, *A Treatise on the Measure of Damages*, §§182, 183 (8th Ed. 1891).

⁷*Bigelow v. RKO Radio Pictures, Inc.* 327 U.S. 251, 90 L. Ed. 652 (1946).

⁸*Eastman Kodak Co. v. Southern Photo Materials Company*, 273 U.S. 359, 71 L. Ed 684 (1927); *Richfield Oil Corp. v. Karsel Corp.*, 271 F.2d 709 (9th Cir. 1959), cert. den. 361 U.S. 961, 4 L. Ed. 2d 543 (1960); *Storey Parchment Company v. Paterson Parchment Paper Co.*, 282 U.S. 555, 750 L. Ed 544 (1931).

⁹*Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir. 1962).

impact may, by interpolation, be used to calculate the profits that a plaintiff could have earned during the impact, absent the violation.

(c) Profits earned during the periods of impact between two distinct injuries may be extrapolated to calculate the profits that a plaintiff would have earned absent the injurious conduct.¹⁰

There are some strict limitations on the use of the "before and after" theory in measuring lost profits.

(a) The plaintiff's business must be one that is established and operating prior to the injury. Thus, the theory is unavailable to a plaintiff who is prevented from entering a market because of the defendant's actions. The court in *Central Coal and Coke v. Hartman*, 111 F. 96 (8th Cir. 1901) stated at 99:

He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced.¹¹

(b) In order to compare earnings before and after the injury, not only must earnings have existed before the injury, but also those earnings must have been reasonably uniform over time. Otherwise, a court applying the theory would not know which earnings to use for the "before" period and the damage calculations would be too speculative.

2. The "Yardstick" Theory

The "yardstick" theory has been applied most frequently in the motion picture industry.¹² But it has some serious limitations:

(a) The plaintiff's firm or property and the "yardstick" firm or property must be comparable, although they need not be identical.

¹⁰See generally, Parker, *Measuring Damages in Federal Government Treble Damage Actions*, 17 Antitrust Bulletin 497 (1972).

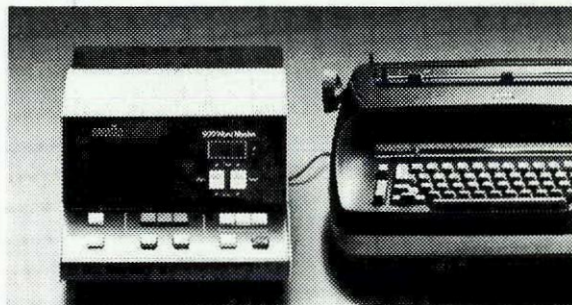
¹¹The wisdom of such an approach was earlier noted by Isaak Walton. "No man can lose what he never had." I. Walton, *The Compleat Angler Pt. I*, Ch. V.

¹²See *William Goldman Theaters v. Loew's, Inc.*, 69 F. Supp. 103, (E.D. Pa. 1946), *aff'd*, 164 F. 2d 1021 (3d Cir. 1948), *cert. den.* 334 U.S. 811 (1948); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Homewood Theater, Inc. v. Loew's, Inc.*, 110 F. Supp. 398 (Minn. 1952); *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F.2d 561 7th Cir. (1951), *cert. den.* 342 U.S. 909 (1952).

(b) Not only must the two firms be engaged in the same business, but also the "yardstick" firm must be operating in a market structure and under costs and demand conditions similar to those that the plaintiff would have faced absent the injury. This means that the "yardstick" theory cannot be used successfully if there is a wide disparity in the size of firms in the market, or if there is widespread product differentiation in the market inasmuch as these factors would be reflected in costs and demand features too disparate as to the plaintiff and any potential "yardstick" firm.¹³

(c) The "yardstick" firm should enjoy a market position similar to that which the plaintiff would have held but for the injury. If the plaintiff is prominent in the market, the "yardstick" firm must also be in that position. Similarly, if the plaintiff is a less dominant firm, so must be the "yardstick." Even if the "yardstick" firm meets all other criteria, the variants in profits attributable to market position might prevent an accurate

¹³*Fargo Glass and Paint Co. v. Globe American Corp.*, 201 F.2d 534 (7th Cir.), *cert. den.*, 345 U.S. 942 (1953).



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damage calculation, absent a market position similar to that of the plaintiff.¹⁴

(d) There are problems in antitrust cases in using the "yardstick." The basic flaw in employing the defendant's firm as a "yardstick" during the period of impact is that if the conduct of the defendant benefited the defendant's business, such business does not represent profits made in a competitive market.¹⁵

3. The "Market Share" Theory

The "market share" theory was first approved by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 28 L. Ed. 2d 77 (1971), *rehearing den.*, 401 U.S. 1015, 28 L. Ed. 2d 552 (1971),¹⁶ in which the court computed the share of the market attributable to Zenith's efforts, deducted the actual share of the market obtained by Zenith, and awarded damages for the difference.

Subsequently, a variation of the "market share" theory of proving damages was approved

¹⁴See Weiss, *Quantitative Studies of Industrial Organization*, 1 *Frontiers of Quantitative Economics* (M. Intriligator Ed. 1971).

¹⁵*Victor Talking Machine Co. v. Kameny*, 271 F. 810 (3d Cir. 1921).

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by the Eighth Circuit Court of Appeals.¹⁷

A major case in which the "market share" theory was applied was *Rangen, Inc. v. Sterling Nelson and Sons*, 351 F. 2d 851 (9th Cir. 1965), *cert. den.* 383 U.S. 936 (1966). There a contractor was accused of obtaining certain contracts by bribing a state official. The evidence established that four firms had bid on the contracts in question, and that the plaintiff and the other three firms had bid with approximately equal success in similar contracts in the past. The court computed the plaintiff's damages by calculating gross revenue from the business of one quarter of the contracts, and then multiplying that amount by the plaintiff's historical profit margin.

Punitive Damages

Having determined the basic damages to be sought, counsel should consider whether punitive damages might be available. Punitive or exemplary damages are designed both to inhibit specific conduct and to provide incentive for the private enforcement of public policy. Generally, punitive damages are not recoverable unless a statute expressly authorizes them.

Statutes authorizing punitive damages are too numerous to discuss in detail here, but they exist in a surprising number of areas. Some of the more prominent and familiar are the Federal Antitrust laws providing for treble damages;¹⁸ the Washington Consumer Protection Act providing an increase in damages not to exceed \$1,000.00 for each violation;¹⁹ the statutes relating to usury, providing for a recovery of double the usurious interest paid.²⁰

Because of the \$1,000 limitation upon punitive damages in the Consumer Protection Act, the act

¹⁶The case involved patent infringement claims and antitrust counterclaims. For those interested in the procedural history of a case like this, it should be noted that the trial court rendered its decision in 1965 [239 F. Supp. 51 (N.D. Ill. 1965)]. The Court of Appeals reversed [388 F.2d 25 (7th Cir. 1967)], and the Supreme Court in its turn reversed in part and affirmed in part [395 U.S. 100 (1969)]. The Court of Appeals then reconsidered the matter, vacated the judgment and remanded the case to the trial court [418 F.2d 21 (7th Cir. 1969)], but this decision was reversed by the Supreme Court [401 U.S. 321, 28 L. Ed 2d 77 (1971)]. It reminds one of the opening pages of Charles Dickens' *Bleak House*, describing Jarndyce and Jarndyce, a case people are born into and die out of.

¹⁷*Arthur Murray, Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138 (8th Cir. 1969).

¹⁸Clayton Act, §4.

lends itself more to class actions and other multiple party claims than to single, small consumer actions.

Multi-Party Problems

1. Class Actions

Class actions were unknown at English common law, litigation being conceived as strictly a two-party affair: one plaintiff against one defendant.²¹

¹⁹RCW Ch. 19.86.

It should be pointed out that a violation of numerous statutory provisions may also be a violation of the Consumer Protection Act. For example, the Camping Club Act, RCW Ch. 19.105 *et seq.*; Chain Distributor Schemes, RCW 19.102.020; charitable solicitations, RCW 19.09.340; the dispensing of hearing aids, RCW 18.35.180; land development, RCW 58.19.270; Discrimination Act violations, RCW 49.60.030; Unfair Motor Vehicle Practices, RCW 46.70 *et seq.*; Usurious Contracts, RCW 19.52.036.

²⁰RCW 19.52.030. In addition to the set-off penalty of twice the interest paid, a debtor under the 1967 Amendment to RCW 19.52.030 has a counterclaim for "the amount by which the amount he has paid under the contract exceeds the amount to which the creditor is entitled."

²¹See Wright and Miller, *Federal Practice and Procedure*, §1751, 503 (1972). Chaffee, *Some Problems of Equity*, 200-201 (1950).

The modern class action is derived from the Bill of Peace developed by the English Chancery Courts which allowed multi-party suits under limited circumstances to promote court convenience and economy.²²

As one writer noted:²³

The King of Brobringnag gave for his opinion that

'Whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together.'

In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before.

Civil Rule 23 provides the modern means of "making one lawsuit grow where two grew before." Rule 23 (a) enumerates the basic pre-

continued on page 31.

²²Wright & Miller, *supra*, §1751.

²³Chaffee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932), quoted in Miller, *supra*, §1751.

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WASHINGTON STATE BAR NEWS

Board Rejects Proposal to Add Lay Members, 6-4

By JAY V. WHITE

SUDDEN VALLEY, June 24-25 — The Board of Governors has voted 6-4 to oppose any proposal to add lay members to its ranks.

Three Board members — Betty B. Fletcher, David D. Hoff and Bradley T. Jones — voted with President Richard H. Riddell in favor of the proposal.

In April, President Riddell argued in favor of the Bar taking the initiative to add lay members to the Board, and solicited the views of the membership. *See* "The President's Corner," WSBN, Vol. 31, No. 4, April, 1977. This prompted Board Member Willard H. Walker of Longview to request that the matter be placed to a vote this month.

Also requesting the vote was Board Member Michael J. Hemovich of Spokane, following a resolution adopted June 3 by the Spokane Bar Association opposing any proposal to add lay members to the Board.

The effect of the Board's vote is to defer any further action on the matter at least until the Annual Meeting in Vancouver, B.C., September 14-17. The Seattle-King County Bar Association Young Lawyers Section and the Spokane Bar Association are expected to present opposing resolutions on the issue for the vote of the membership. Other local bar associations also may offer proposals on the subject. *See below for details on the Board's debate prior to the vote. For editorial comment, see Editor's Page.*

In other action, the Board deferred action on a proposal to approve practice by Army lawyers in state courts (*Details Below*); referred to the Disciplinary Board draft regulations to implement

DRA 13.1-13.5 (Spot Audit of Attorney Trust Accounts) which was approved by the state Supreme Court on June 14; and reaffirmed (7-2) its earlier decision designating Hawaii as the site for the Annual Meeting in 1980.

On Friday, President Riddell addressed the luncheon meeting of the Whatcom County Bar Association.

The bulk of the Board's Saturday session was an executive session devoted to a hearing on the petition of Robert S. Egger for reinstatement. The Board voted to deny the petition.

The ex officio member meeting with the Board this month, representing the Young Lawyers Section, was Robert T. Czeisler, substituting for Robert W. Burns.

Lay Members on the Board? Debate and Vote

Board Member Hemovich opened discussion of the matter of lay members on the Board by reporting upon the vote of the Spokane County Bar Association in opposition. Board Member Walker noted that he also had asked for the matter to be placed on the Board's agenda.

Hemovich, seconded by Walker, moved that the Board go on record as opposed to any proposal to add lay members.

Board Member Paul R. Cressman of Seattle, appointed to the Board following the resignation of Edmund B. Raftis in March, inquired whether the motion included a time factor, i.e., that it state only that lay members "not presently be added to the Board."

Hemovich responded that the thrust of his motion required a clear-cut vote, for or against lay members, without any implication that they may be added in the future.

Walker commented that he anticipated the vote would go on the basis of "liberal and conservative attitudes," and added that there is "one good argument, and one only, in support of lay members and that is, if the legislature is going to do it to you in any event, then do it yourself." Walker stated that he did not believe action by the state legislature is imminent.

President Riddell restated the argument he presented in "The President's Corner" in the April *Bar News*: The California legislature voted in 1975 to add six lay members appointed by the Governor to the California bar's Board of Governors. This action is a forerunner to similar action by other legislatures, including that in this state. It would be good public relations for the bar to take the initiative and, prudent, in light of California's experience, for the bar to have some control over the number of lay members and the manner of their appointment. The appointment of

two lay members by the state Supreme Court may head off a constitutional crisis based on separation of powers issues which might arise if the state legislature were to authorize the appointment of lay members by the Governor. Moreover, President Riddell concluded, the Board could "benefit from the input by two first-rate lay people," just as the bar's Disciplinary Board has benefited from the contributions of its two lay members.

Board Member Jones stated that he believed that the addition of lay members to the Board would bring "the germ of positive benefit in terms of the credibility of this Board," and that this was a more important consideration than whether action by the legislature is imminent.

Board Members Walker and Peterson stated that there was no problem of "credibility" in the districts they represent. Peterson said that if the Board suffered from lack of credibility, the bar membership would elect new Board members to correct the problem as vacancies occur. He also said that he did not want to be in the position of educating lay members about the issues before the Board, and that lawyer Board members "have a background which allows us to start way beyond lay education."

Cressman said he was not concerned with credibility, but only with the question of whether lay members could contribute anything.

Board Member Robert R. Redman of Yakima said that the issue was "whether we honestly think we are doing the job and whether we honestly think lay members could contribute to our decisions." He said that the possible imminence of legislative action is not the appropriate basis for decision, and that it would be "intellectually dishonest to add lay members for Band-Aid PR."

Board Member Fletcher said that she could see "positive benefits" to the addition of lay persons, notably their input as to how "lay people perceive lawyers and what we can do to better serve the public." She said that the addition of lay members to the Board should be "a positive act by the bar, not something that we will do later after we are under siege."

Board Member Hoff stated that he did not believe lay members "could participate in every decision," but that talented laymen would be very useful. "Lawyers do not have the sole corner on

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knowledge," he noted. He also said that inevitably "we are going to have lay members," and that therefore he favored the bar taking the initiative to appoint lay members "at least in an advisory capacity."

Board Member Charles R. Olson of Bellingham stated that he had no comment to add to the discussion but that he was opposed to the addition of lay members.

The question was called for. Voting for the motion to oppose lay members: Cressman, Hemovich, Olson, Peterson, Redman, Walker. Voting against the motion: Fletcher, Hoff, Jones and President Riddell.

Army Lawyers: ELAP

Capt. Steven J. Mura, of the Office of the Staff Judge Advocate at Fort Lewis, and J. Kelley Arnold, president of the Tacoma-Pierce County Bar Association, met with the Board to discuss a proposal that the Board approve establishment of an Extended Legal Assistance Program (ELAP) at Fort Lewis.

ELAP is a program approved by the Department of Defense in 1970 designed to provide legal assistance to military personnel unable to afford legal fees, but who are ineligible for non-military legal assistance programs. It also offers legal experience in state courts to military attorneys. The program has been implemented in ten states.

Some of the military attorneys at Fort Lewis are admitted in Washington; others are not, but presumably would qualify for a limited license to represent indigents under APR 7B.

The problem presented is that even though military lawyers may be admitted in Washington in the usual course or under APR 7B, such lawyers are still barred from state courts because of a military policy which prohibits their appearance unless it is approved expressly by the Board of Governors by action over and above procedures otherwise applicable.

Both the Tacoma-Pierce County Bar Association at its June 16 meeting and the Thurston-Mason County Bar Association at its June 21 meeting have voted to oppose the Army's request that ELAP be approved in this state; however, the state bar's Legal Services to the Armed Forces Committee has recommended approval of

the program.

During the course of his presentation to the Board, Arnold reflected the primary concerns of the local bar associations that there is a lack of need for an indigent assistance program for military personnel who in fact can pay for legal services; and that, although the cases and fees are small, an ELAP program would undercut the efforts of newly-admitted lawyers to develop a practice. In contrast, Mura — who is a Washington lawyer — argued that the practice of military lawyers under ELAP would be strictly limited to assure that only military personnel who actually could not pay legal fees would be served and that there otherwise would be no impact upon the practice of private attorneys.

Following extended discussion, the Board deferred any action and requested that all interested parties present the Board with a specific proposal, identifying the points of conflict between the military and the local bar associations which might be resolved by the Board. The Board agreed to consider the matter at its August meeting after it became apparent that no proposal could be developed earlier. □



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Ethics from the Inside

Trust Accounts — Part II

KURT M. BULMER
General Counsel, WSBA

A more frequent difficulty with trust accounts than dishonesty is the problem of comingling. Comingling occurs when a client's funds are not segregated from the business, personal or other funds of the attorney.

The rules against comingling are found in the Code of Professional Responsibility at DR 9-102 which specifically require that:

All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts . . . and no funds belonging to the lawyer or law firm shall be deposited therein. . . .

The only exception are those funds maintained in an account to pay bank charges.

Essentially what this rule means is that an attorney who has any funds of a client must establish at least one bank account which is used solely for the purpose of handling clients' funds. The funds must not be segregated by an office bookkeeping process while actually being maintained in a single account with other types of funds. The rule requires physical segregation into a separate bank account. However, the comingling rule does not preclude the comingling of various client's funds into a single account. It is only where the lawyer or law firm's funds are mixed with clients' funds that a violation occurs.

Most violations of this rule are clearly inadvertent and stem from a lack of understanding of the various types of clients' funds. Intentional comingling does occur, but this is usually a spin off from the improper use of clients funds for personal purposes.

The most common confusion stems from "retainers" or "advanced funds." Those fees which are earned upon receipt and which would be the attorney's even if no additional work were performed do not need to be placed in the trust account. Such fees might involve the situation where a fee is paid by a corporation, business or decision making board to the attorney or law firm to be "on call." Generally, even if the client makes no use of the attorney's time, the fee is still the attorney's. In such situations a client is paying to have the services of the attorney available if needed.

Alternatively is the situation where the attorney asks for fees before beginning work on a client's case. The client generally understands that this is a "deposit" to be credited towards the total fee and is not earned until some service is actually performed. The easiest way to analyze this situation is to determine what would happen if the day after the funds were paid, the client would dismiss the attorney with no additional services having been performed. In most such situations the client would be entitled to have the funds returned since the client has not advanced the funds to have the attorney available if needed but rather as a deposit towards performance of actual services. It is improper for the lawyer or law firm to use such "deposit" funds until earned and they



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should be placed in the "trust account." The intended function of the funds is the relevant issue and, therefore, the label used to delineate them should not be allowed to control how they will be handled.

The common problem of court filing fees and the like is not really a problem under the rules. These are advances for "costs and expenses" and may properly be placed in the lawyer's business transaction account. If "deposit fees" and "expense fees" come in under a single check, then the appropriate segregation should be made at the time of the deposit.

It is my recommendation that in fee situations in which it has not been clearly determined ahead of time that the lawyer is entitled to funds upon delivery and would be able to keep them even if nothing else happens, that such funds be placed into the trust account and be treated as a "deposit." When services have been performed the account should be billed the appropriate amount and the client notified of the remaining balance or that funds are exhausted and an additional obligation is being created.

I have heard arguments that this means "too much bookkeeping." "Too much bookkeeping" is not a valid excuse for failing to keep funds segregated in a strict fiduciary situation. Actually, relatively simple monthly accounting systems can be developed which make this process cheap, simple and efficient. These systems also build good client relations. An additional objection is heard that "I like to keep my trust account as clean as possible." Trust accounts are not meant to reflect minimal activity. They are to hold clients' funds, and if it takes multiple transactions to effectuate this, then this must be done. There should be no problem with this if a good record keeping system is developed.

While the comingling rules might seem to be "technicalities" an attorney should strictly adhere to them. The trend has been towards requiring increasingly stricter standards with less and less tolerance of sloppy handling of clients' funds even when done in good faith. □



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Mandatory CLE: An Update

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

Admission to Practice Rule 11, the mandatory continuing legal education rule, has now been in effect for about seven months. While all of the kinks have not been worked out, enough time has passed to pause for a moment and survey the workings of the Rule, at least to the extent of answering some questions and delineating some of the policy decisions made by the State Board of Continuing Legal Education.

Computation of Credits. CLE Board Regulation 103(b) provides the general methods of computing credits for attendance at approved activities. The Regulation specifies that one credit shall be awarded "for each sixty (60) minutes actually spent by an active member in attendance at an approved activity. . . ." The key words here are "actually spent." Thus, as should be obvious, an attorney who actually attends only

four (4) hours of a ten (10) credit hour seminar earns only four (4) credits.

New Admissions. Regulation 115(a) provides, in accordance with the provisions of Admission to Practice Rule 11, that an active member is not required to comply with the continuing legal education requirement "during the calendar year in which he or she is admitted to practice nor for the following full calendar year." The key word or point here is that the initial exemption is for the year of actual "admission" to practice in Washington — which, of course, is not necessarily the year in which an individual may have taken and passed the bar examination. The actual date of *admission* controls.

In-House Programs. At its June meeting, the Board of Continuing Legal Education determined that so-called "in-house" programs — those offered by law firms, corporate legal departments and so on, for their attorney members or employees — should not be approved under the CLE Rule. This decision was based upon a number of considerations, including: (1) the opinion that programs of this nature are not the type of programming envisioned by the Supreme Court in adopting APR 11, or by the Board of Governors in recommending to the Court that APR 11 be adopted; (2) the inequities of approving in-house offerings, which are generally capable of being presented only by the largest firms and corporate legal departments; (3) the difficulty of establishing standards and overall control of the potentially widespread offerings of such programs; (4) the difficulties of evaluating the quality of such offerings; and (5) the fact that in other states having mandatory continuing legal education programs similar requests for approval of in-house programs have also been denied. Prior to finalizing its decision on this question, the CLE Board had sought an advisory opinion from the Board of Governors of the Bar Association. As reported in the June issue of the *Bar News*, the Board of Governors was unanimous in recommending that such programs not be approved for credit. □

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Approved Continuing Legal Education Activities

The Washington State Board of Continuing Legal Education has approved the following courses for use toward the mandatory continuing legal education requirement established by Admission to Practice Rule 11.

The following listing, which is supplemental to those appearing in previous issues of the *Bar News*, is in three parts. First, a listing of program sponsors who have received general sponsor accreditation — all courses presented by such sponsors, with the exception of any noted as specifically disapproved, may be used toward the CLE requirement. Second, a listing of individual courses approved by the Board. Because of space limitations, this listing is now confined to programs offered within the State of Washington and other selected programs of national scope. Information relative to courses not listed may be obtained from the CLE Department at the Bar Office. Third, a listing of courses which have been disapproved — attendance at these courses may not be used in satisfaction of the CLE requirement.

Individuals are reminded that credit figures listed are maximums only. Actual attendance by the lawyer is the determinative factor.

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Federal Publications Inc.

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NCDA

National College of District Attorneys

COURSES APPROVED

ALASKA BAR ASSOCIATION

Informational Privacy Conference

March 4-5, 1977: Anchorage, Alaska 12.75

ABA NATIONAL INSTITUTE PROGRAMS

Estate & Gift Tax Provisions of the 1976 Tax Reform Act

Oct. 13-14, 1976: San Fr. 12.75

The 1976 Tax Reform Act (Income Tax Provisions)

Oct. 15-16, 1976: San Fr. 12.50

ACLU OF WASHINGTON

Amended Federal Freedom of Information Act

Nov. 12, 1976: Seattle 6.50

State & Federal FOIA

April 29, 1977: Seattle 6.75

ALI-ABA

Federal Criminal Practice & Procedure

Oct. 15-16, 1976: Seattle 10.75

Practice Under The New Federal Rules of Evidence

Oct. 15-16, 1976: Seattle 9.75

Estate Planning Under the New Estate & Gift Tax Law

March 10-11, 1977: LA 11.00

Pension, Profit-Sharing & Other Deferred Compensation Plans

March 24-26, 1977: San Fr. 19.75

Modern Real Estate Transactions

June 19-24, 1977: Madison, WIS 25.25

Environmental Litigation

July 17-22, 1977: Boulder 30.00

Fundamental Bankruptcy & Business Reorganizations

July 17-22, 1977: Boulder 28.25

Estate Planning in Depth

July 24-29, 1977: Madison, WIS 31.00

FEDERAL PUBLICATIONS INC.

Practical Construction Law

Sept. 13-15, 1976: San Fr. 15.00

Product Liability

Sept. 29-Oct. 1, 1976: San Fr. 24.00

Antitrust Problems

Jan. 10-13, 1977: San Fr. 24.00

Legal Malpractice

May 2-3, 1977: San Fr. 12.00

Medical Malpractice

May 23-25, 1977: Berkeley 18.00

GOLDEN GATE UNIVERSITY — SEATTLE GRADUATE SCHOOL OF TAXATION

Federal Income Taxation of Individuals

Sept. 27, 1976-Jan. 20, 1977: Seattle 41.25

Jan. 31, 1977-May 12, 1977: Seattle 41.25

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<i>Federal Income Taxation of Corporations & Shareholders</i>	
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Jan. 31-May 12, 1977: Seattle	41.25

<i>Estate & Gift Taxation</i>	
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<i>Federal Income Taxation of Partners & Partnerships</i>	
Sept. 27, 1976-Jan. 20, 1977: Seattle	41.25

<i>Federal Tax Procedure</i>	
Jan. 31-May 12, 1977: Seattle	41.25

<i>Federal Income Taxation of Trusts & Estates</i>	
Jan. 31-May 12, 1977: Seattle	41.25

LEWIS AND CLARK LAW SCHOOL

<i>Second Annual Antitrust Symposium</i>	
March 18, 1977: Portland	6.75

NATIONAL COLLEGE OF DISTRICT ATTORNEYS

<i>Executive Prosecutor Course</i>	
June 10-16, 1977: Houston	51.50

<i>Career Prosecutor Course</i>	
June 13-30, 1977: Houston	93.00

NATIONAL CONTRACT MANAGEMENT ASSOCIATION

<i>Government Contract Changes</i>	
June 20-21, 1977: Richland	15.00

NATIONAL WELFARE FRAUD ASSOCIATION

<i>Welfare Fraud Conference</i>	
June 15-18, 1977: Portland	16.75

PENSION PUBLICATIONS OF DENVER

<i>Pension Reform Seminar</i>	
Dec. 8, 1976: Portland	4.00
Dec. 9, 1976: Seattle	4.00

PRACTISING LAW INSTITUTE

<i>Estate Planning & The Closely Held Corporation</i>	
March 24-25, 1977: San Fr.	11.50

<i>Federal Civil Rights Litigation</i>	
March 28-29, 1977: San Fr.	12.00

<i>Representing Publicly Traded Corporations</i>	
June 13-14, 1977: Portland	12.00

<i>Construction Contracts 1977</i>	
June 23-24, 1977: Seattle	12.00

<i>Advanced Negligence Trial Strategy</i>	
May 23-25, 1977: Seattle	15.00

<i>Protecting & Profiting From Trade Secrets</i>	
June 16-17, 1977: Seattle	11.00

<i>18th Annual Antitrust Institute</i>	
July 21-22, 1977: Denver	11.50

<i>9th Annual Criminal Advocacy Institute</i>	
Feb. 4-5, 1977: San Fr.	12.00

PROPERTY PRESS

<i>Real Estate Investment Under The Tax Reform Act</i>	
April 28-29, 1977: Seattle	9.75

SEATTLE-KING COUNTY BAR ASSOCIATION: LABOR LAW SECTION

<i>Arbitration Conference</i>	
Nov. 17, 1976: Seattle	4.50

SEATTLE-KING COUNTY BAR ASSOCIATION: YOUNG LAWYERS SECTION — 1977 BRIDGING-THE-GAP SEMINARS

<i>Representation of the Creditor</i>	
March 12, 1977: Seattle	3.00

<i>Representation of a Debtor</i>	
March 26, 1977: Seattle	3.00

<i>Nuts & Bolts of Justice Court Practice</i>	
April 2, 1977: Seattle	3.00

<i>Opening a Law Office</i>	
April 9, 1977: Seattle	3.00

SOCIETY OF WASHINGTON P.U.D. & MUNICIPAL POWER ATTORNEYS

<i>Semi-Annual Seminar</i>	
Dec. 9, 1976: Seattle	5.25

<i>Semi-Annual Seminar</i>	
July 7, 1977: Seattle	6.00

SPOKANE COUNTY BAR ASSOCIATION: YOUNG LAWYERS SECTION

<i>Intensive Trial Practice Seminar</i>	
June 4-5, 1977: Spokane	14.75

UNIVERSITY OF PUGET SOUND

<i>20th Annual Tax Forum</i>	
Dec. 9-10, 1976: Tacoma	12.00

UNIVERSITY OF WASHINGTON SCHOOL OF LAW

<i>Interdisciplinary Seminar in Criminal Law</i>	
July 30, 1977: Seattle	6.25

WASHINGTON ASSOCIATION OF DEFENSE COUNSEL

<i>Annual Spring Meeting</i>	
May 14, 1977: Vancouver, B.C.	3.50

WHATCOM COUNTY LEGAL SECRETARIES ASSOCIATION

<i>New Appellate Court Rules</i>	
March 23, 1977: Bellingham	3.00

COURSES NOT APPROVED

PRACTISING LAW INSTITUTE

<i>Workshops For The Lawyer's Assistant</i>	
July 20-22, 1977: New York City	
Aug. 10-12, 1977: Los Angeles	□



Around the State

COWLITZ REPORT

By O.H. HUSEMOEN

Changes have taken place in the local Bar Association in the last few months. **Tim Martin** is now a partner with the firm of Walker, Dowell & Martin. **Don Wallace** has moved from Seattle to be an associate with the same law firm.

Bruce Potocki has moved from Sequim to Longview as an associate with Calbom, Cox, Andrews, Hamm & Pond.

Stephen Wanderer and **Carroll C. Bridgewater** are now partners in the law firm of Walstead, Mertsching, Husemoen, Donaldson & Barlow.

Jerry Houston, formerly of the firm of Klingberg, Houston, Reitsch, Frey & Kenny, has retired from the active practice of law and is now residing in California.

It looks like **Graham Cross** and **Reed Hadley** will be building themselves some new offices.

During the last year, **James B. McCoy** has been serving as the local Legal Aid attorney. Jim took over the job following the death of **James Burroughs**, who was covering the Legal Aid program and also was an instructor at Lower Columbia College.

EAST KING REPORT

By BARRY J. HASSON

Flash news item: The East King County Bar Association's annual golf tournament will be held August 19 at the Mount Si Golf Course in Snoqualmie. Tee

off time will be between 1:00 and 2:00 p.m. and there are 40 available spots for those who wish to participate. Following the divot replacing there will be a no host bar from 5:00 to 7:00 p.m. and a spaghetti feed thereafter. All attorneys and judges are invited, and if you wish to participate, please contact **Doug Cowan** at 455-6822. Chairman of the event is the **Hon. Charles C. Ralls**.

In the category of major news events on the East Side, the following are offered: Attorneys dealing with the city of Kirkland in criminal matters will be happy to know that **Harry R. Slusher** has become an associate of the firm of Ostrander, Van Eaton, Thomas and Ferrell, which means that we won't necessarily have to deal with **Clint Ferrell** any more. Harry was an intern with the firm assisting Clint prior to passing the Bar recently.


Speaking of that firm, **Lamar Ostrander** was seen in Kirkland, back from his trip to South America and he may get into the office some day.

In other developments, **Hugh Stroh**, **Steve Funk**, and **Jim Lamont** are now partners and are officing in their new building in Bellevue. **John T. Ludlow** has joined the firm of Boyd, Decker, Hanson and Zwink as an associate, and **Jerry Bird** and **Richard Percival** are practicing law in Bellevue now, in the Crossroads area.

KITSAP REPORT

By J. MICHAEL KOCH

C. Danny Clem is the new prosecuting attorney for Kitsap County. Dan, a '71 UW grad,



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succeeded **John Merkel**, recently appointed U.S. Attorney for Western Washington.

Leonard W. Kruse is quitting the practice of law and going to work for Ryan Construction of Port Orchard. Said Len, "I'm not mad at my law firm or anything like that, I just feel a need for a change. I feel this new position is a challenge. I've been practicing law for some 20 years and everyone needs a change once in a while."

New people: **Robert J. Conklin** (Gon. '76) is a Deputy Prosecuting Attorney; **Ronald Merriitt** (UPS '76) and **Donald Mollick** (UPS '76) are both associated with **William Denend** in Port Orchard; and **Kathy Nolan** (UPS '76) is in the Public Defender's Office. Interns added recently include **Christian C. Casad** (UW '77) in the Prosecutor's Office, and **Kurt Salmon** (Gon. '77) in the Public Defender's Office.

SAN JUAN REPORT

by **MICHAEL C. REDMAN**

Five years have passed since ye scribe began these reports which have persisted despite the repeated expressions of concern for ye scribe's health which have been communicated by local members of the Bar. "For your own good, Redman, I'm telling you . . ." In half a decade, the number of lawyers practicing in this jurisdiction has increased by 300%. **Dennis Gerlt** was recently elected president of the local Bar. **John Linde** has been with **Charlie Schmidt** for almost five years; **Harry Greer** and **Jack Nason**, on Orcas and Lopez

respectively, served the rural portion of the county with a little assist from **Al Rode** whose part-time office on Orcas is a convenient pause on his way to the Doe Bay area. **John Carlson**, the most recent arrival, has taken two weeks off for a European vacation, to the amazement of **Charlie Schmidt** and **George Moseley**, the senior members of the Bar.

On a crass commercial note, the San Juan County Code has gone to the printers, Book Publishing Co., and subscriptions are earnestly solicited. \$35.00 buys the code plus a year's update service and an insight into imaginative legislation such as our "dog control zone" act. Top that, Wahkiakum! And so it goes . . .

THURSTON-MASON REPORT

By **FRED D. GENTRY**

New officers of the Thurston-Mason County Bar Association are: President, **Kenneth Ahlf**; Vice President, **Fred D. Gentry**; Secretary-Treasurer **John Hoglund**. These officers were elected at the recent annual banquet of the Association. Our program this year was declared by many to be the best in a long time. We had no speaker.

J. V. Lyman has left the office of **Don Miles** and is now associated with Owens, Weaver, Davies & Dominick of Olympia.

Jerry Pike, a 1975 graduate of Gonzaga Law School, recently hung his shingle out in the Parkmont complex in Olympia. Jerry was with the Attorney General before opening his office. □



Briefly Noted

FAA Aviation Seminar

"The General Practitioner in Aviation Litigation, Part II" will be the subject of a weekend aviation law seminar set for October 7, 8, and 9, 1977, at the Admiralty Hotel, Port Ludlow, WA.

Seminar plans are being coordinated for the bar association by Ronald A. Bergman, Seattle attorney and chairman of the Aviation and Space Law Section. Inquiries concerning the event may be directed to him at 1310 IBM Bldg., Seattle, WA 98101; telephone (206) 622-3790.

Notice

Washington Women Lawyers is soliciting the names and resumes of women lawyers potentially interested in seeking appointment or election to judicial positions. WWL particularly invites women lawyers interested in seeking appointment by the Governor to the five newly-created King County Superior Court Positions. Please send resume to Helen Johansen, #95 Yesler Way, Seattle, WA 98104, or call her at 622-8953.

In Memoriam

G. R. Nethercutt, 65, of Spokane, died June 4. He was admitted to the Bar in 1941.

Niles A. Pearson, 95, of Seattle, died June 5. He was admitted to the Bar in 1912.

Stanley Joseph Berkey, 56, of Spokane, died June 23. He was admitted to the Bar in 1949.

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Collier/Bucknell continued from page 17

requisites to a class action.²⁴ If the prerequisites are present, it must then be demonstrated that the action falls within one of three categories defined in Rule 23 (b). As soon as practicable after the commencement of a class action, the court determines, normally on plaintiff's motion, whether it is the proper way to proceed.²⁵

In the event the court declines to certify the class for failure to meet the requirements, it may enter an order pursuant to Rule 23 (d) (4) to allow the trial to continue as a routine matter not involving the representation of absent parties.²⁶ Such an order probably is not appealable prior to trial.²⁷

As a practical matter, failure to confirm a class may often doom the entire class action.²⁸ Post-trial appeal is not really an adequate remedy. If the named plaintiff goes on to win the lawsuit, there is little incentive to appeal failure to confirm the class. On the other hand, once the case is lost upon the merits, it makes no sense to appeal for the purpose of including more members in a demonstrable lost cause.

Thus, counsel must devote substantial consideration to the issue of class confirmation. What constitutes a "class" under Rule 23 is a question of fact to be determined at the time the motion for confirmation is brought by the plaintiff.²⁹

Consistent with the often liberal construction given Rule 23,³⁰ the class need not be so ascertainable that every potential member can be iden-

tified at the commencement of the action.³¹ Only the general outlines of class membership must be visible at the initiation of the lawsuit; however, the motion to confirm should define the class as exactly as possible in the interest of carrying the burden of showing that a "class" does exist.

Not only must a class exist, but also it is necessary to demonstrate that the named representative party is a member of the class. This requirement is inherent in Rule 17 (a)'s definition of "real party in interest" and is specifically required by Rule 23 (a).

If plaintiff's counsel has properly defined the class, he normally will have little difficulty in showing the representative party's membership. Difficulties often arise, however, when the court defines the class in a manner other than as defined by plaintiff's counsel. When the happens, a court may find a class exists, but that the representative party is not included in its numbers.

The class must be so numerous that "joinder of all members is impracticable."³² Apparently because of a reluctance to shape inflexible rules, courts have often observed that "impracticable" does not mean "impossible," and only requires a showing that it is difficult or inconvenient to join all members of the class.³³

The requirement that common questions of law or fact exist does not mean that *all* questions of law and fact must be common, nor does it establish any quantitative or qualitative test of commonality.³⁴ Class actions concerning consumer or securities fraud, or antitrust violations, have frequently resulted in disputes over whether or not sufficient commonality exists to justify class action treatment,³⁵ and it is often held that a showing of alleged fraud on class members perpetrated by a single scheme or similar misrepresentations is sufficient to demonstrate a community of interests, even though representations and damages may vary from individual to individual.

²⁴CR 23(a) provides: One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

²⁵CR 23(c) (1)

²⁶See *Brown v. Brown*, 6 Wn. App. 249, 492 P.2d 581 (1971).

²⁷*Brown v. Brown*, *supra*. The appealability of an order denying confirmation of a class has been the subject of much dispute. The general view appears to be in accord with *Brown*. See e.g. *Greenhouse v. Greco, et al.*, 496 F.2d 213 (5th Cir. 1974). The question is usually left to the discretion of the trial court although some courts have found exceptions to the general rule of non-appealability. See e.g. *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974).

²⁸See *Brown v. Brown*, *supra*.

²⁹See generally *Wright and Miller, supra*, at §1760; *Clarke v. Thompson*, 206 F. Supp. 539 (D.C. Miss. 1962).

³⁰Many courts have held that CR 23 is to be liberally construed in cases involving civil or constitutional rights. See e.g. *Senter v. GMC*, 532 F.2d 511 (6th Cir. 1976).

³¹*Veron J. Rockler and Company v. Graphic Interprises, Inc.*, 52 F.R.D. 335 (D. Minn. 1971).

³²CR 23 (a) (1)

³³See e.g. *Goldstein v. North Jersey Trust Co.*, 39 F.R.D. 363, 367 (S.D.N.Y. 1966).

³⁴*Wright & Miller, supra*, §1763.

³⁵See e.g. *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968); *Mader v. Arnel*, 402 F.2d 158 (6th Cir. 1968), *cert. den.* 394 U.S. 930, 89 S. Ct. 1188, 22 L. Ed.2d 459 (1969).

One of the more interesting and troublesome requirements is Rule 23 (a) (4) which requires a finding that the representative parties will "fairly and adequately protect the interest of the class." What constitutes adequate representation, a question of fact, is a matter of judicial discretion. The quality of representation embraces both the competence of plaintiff's counsel and the character of the interest of the named parties in the litigation.³⁶ The representative parties must be of such character as to assure protection of the rights of other class members.³⁷ Counsel has been deemed qualified to represent the class if "he is experienced in the particular type of litigation before the court."³⁸ The court may also look to the quality

and nature of the legal work in the case before it. Thus, in *Northern Natural Gas Company v. Grounds*,³⁹ Rule 23 (a) (4) was satisfied because the work of plaintiff's counsel to that point in the proceeding was of the highest quality.

Due process considerations are implicit in any consideration of notice to members of potential class action litigation. Against any constitutional requirement, however, there must be weighed the practicalities of providing notice to persons whose addresses may be unknown, including the very real financial burden involved.

Rule 23 does not, by its terms, require notice in all class action cases. The rule provides that "the best notice practicable under the circumstances" must be utilized in cases brought under Rule 23 (b) (3). Rule 23 (b) (3) is probably the most commonly used type of class action, and certainly the most frequently used in cases concerning large classes of consumers.⁴⁰

In *Eisen v. Carlisle and Jacquelin*,⁴¹ the court held that in class actions brought pursuant to Rule

³⁶*Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), aff'd 417 U.S. 156, 40 L. Ed. 2d 732 (1974).

³⁷It has been held that a representative party in order to prove he will adequately represent the class must show (1) he has no interests antagonistic to those of other class members and (2) his counsel is capable of handling the action with some degree of expertise. *Sosna v. Iowa* 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed.2d 532 (1975); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 247 (3d Cir. 1975); *cert. den.* 421 U.S. 1011, 95 S. Ct. 2415, 44 L.Ed.2d 679 (1975); *Dorfman v. First Boston Corp.*, 62 F.R.D. 466 (E.D. Pa. 1973).

³⁸*Wright & Miller, supra*, §1766.

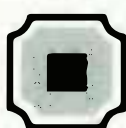
³⁹*Northern Natural Gas Company v. Grounds*, 292 F. Supp. 619 (D.C. Kan. 1968).

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23 (b) (3), individual notice must be given to any member of the class that can be identified, regardless of the burden this places on the representative plaintiff. The court based its decision on a very literal reading of Rule 23 (c) (2), and held that a trial court did not have discretion to construe the rule so as to comply only with the constitutionally minimal requirements of due process notice. Although the *Eisen* decision has met with considerable criticism, it appears that its restrictions can be avoided only by amendment of Rule 23.

2. Joinder

An alternative to class actions is the joinder of several or many plaintiffs or parties on an individual basis. Joinder, where feasible, offers some of the advantages of a class action without many of the problems.

Rule 20 (a) permits joinder in a single action of all persons asserting or defending against joint, several, or alternative rights to relief arising from the same transaction or occurrence presenting common questions of law or fact. The purpose of the rule, like the class action rule, is to promote trial convenience, expedite determination of disputes, and avoid multiple lawsuits. The rule is permissive in character and joinder is not required under Rule 20 unless the parties fall within the scope of the compulsory joinder provisions of Rule 19.

As in class actions, there must be significant common questions of law and fact among the parties, but it is not necessary that all of the questions of law and fact be common to all of the parties, nor that the common questions of law and

fact affect all parties joined in the same manner.⁴² For example, the Washington courts have held that consumer transactions involving similar sales techniques usually satisfy the joinder requirements.⁴³

In many cases, joinder of a smaller number of consumers may be a more manageable and appropriate approach than bringing a large scale class action. Although joinder of plaintiffs appears to have been allowed nationally with great liberality, the rule does not excuse any of the joined parties from the obligation to state a claim against the defendant upon which relief may be granted.⁴⁴

3. Suits by Associations

“It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.” *Sierra Club v. Morton*.⁴⁵

Despite this bold assertion, considerable uncertainty surrounds the question of suits by unincorporated associations. Rule 23.2 generally provides that suits by or against such associations as a class may be maintained only if it appears that the representative parties will fairly and adequately protect the interest of the association and its members. The rule arms courts with broad discretion in making appropriate orders for the protection of association members.

Three conceptual bases exist for allowing suits by unincorporated associations. The first recognizes the association as a jural entity, giving it the capacity to institute or defend lawsuits.⁴⁶ At common law, unincorporated associations had no such status but recent federal and state statutes and, in some cases, court decisions, have provided certain unincorporated associations with the representative capacity to act on behalf of its members. For example, the Washington Condominium Act (Horizontal Property Regimes Act)⁴⁷ allows an owner's association to bring suit on behalf of the individual owners as to certain defects in the common areas of the condominium,

⁴⁰CR 23(b) (3) reads:

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

⁴¹See footnote 36.

⁴²See generally Meisenholder, *The Effect of Proposed Rules. 7 through 25 on Present Washington Procedures*: Part II, 32 Wash. L. Rev. 336, 363 (1937).

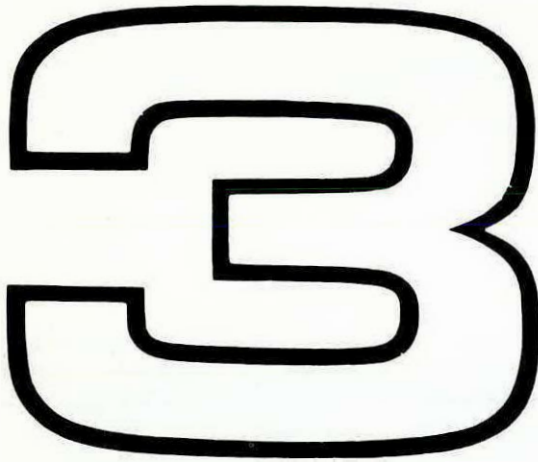
⁴³*Mangham v. Gold Seal Chinchillas, Inc.*, 69 Wn.2d 37, 416 P.2d 680 (1966).

⁴⁴See *Rehrer v. Service Trucking Company*, 112 F. Supp. 24 (D. Del. 1953).

⁴⁵*Sierra Club v. Morton*, 405 U.S. 727, 729. 31 L.ED 2d 636, 645 (1972)

⁴⁶See generally, Wright & Miller, *supra*, §1861.

⁴⁷RCW 64.32, *et seq.*



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and as to individual defects common to two or more owners.

The second method for conducting litigation involving an unincorporated association is to join all of its members. This procedure simply treats the individuals, rather than the association, as parties to the lawsuit.

The third method is to utilize the class action procedure. In these instances, defining the class becomes much easier because all members of the association will be class members. We recently litigated several class actions concerning camping clubs and purchasers in real estate developments, who in addition to purchasing land were given a membership in beach clubs or community clubs. The problems of class definition virtually disappear when the class can be identified as all persons holding memberships in a certain association.

“The ‘catch 22’ of Rule 23 is an ethical dilemma.”

The extent to which the *Sierra Club* rationale will be extended to other organizations is not clear. Suits by unincorporated organizations and associations is an area filled with great uncertainty, but it eventually may prove to be a solution to problems stemming from current interpretations of the class action rule.

The ‘Catch 22’ of Rule 23

The “Catch 22” of Rule 23⁴⁸ is an ethical dilemma. Without a substantial number of nominal parties to realistically finance class action, the routine advancement of costs may subject plaintiff’s counsel to the charge of financing the action himself in violation of the Code of Professional Responsibility.⁴⁹ The catch is if he undertakes to represent the number of plaintiffs necessary to effectively underwrite the cost of the action, he is likely to be accused of having solicited them in violation of the Code.⁵⁰

⁴⁸In *Catch-22*, Yossarian, when told that one could be excused from flight duty only if crazy and if he asked to be excused, but that according to the rules anyone who asked to be excused wasn’t crazy, said “That’s some catch, that Catch-22, . . . It’s the best there is,” Doc Daneeka agreed.” J. Heller, *Catch-22* (1955).

⁴⁹DR 5-103(B)

⁵⁰CPR 2

Unfortunately, Rule 23 does not face up to these problems.

Although the class action device multiplies the potential for damages, costs, and attorney's fees, it also multiplies the cost of litigation, including the cost of notice to the class, which must be borne by the nominal parties.⁵¹ The attorney who advances the cost of class action litigation without an agreement for reimbursement by the nominal

“Certainly, one of the underlying purposes of Rule 23 is to enable individual parties without substantial economic resources to increase their bargaining position by collective action. Yet this is the very premise that provides a target for vigorous defense tactics.”

parties, or with an agreement for reimbursement that is unrealistic either because the nominal client lacks the means to pay the costs, or because the individual cost will obviously exceed individually recoverable damages, risks running afoul of DR 5-103 (B).

It has become routine defense strategy to urge that determination of the adequacy of representation involves an examination of the financial ability of the nominal plaintiffs to undertake the costs of litigation. If successful, this argument necessarily would allow the defense, prior to certification, to conduct extensive discovery into the personal finances of the nominal plaintiffs. The result is to put the nominal plaintiffs on trial as to their financial resources totally aside from consideration of the issues which initially motivated the litigation.

Certainly, one of the underlying purposes of Rule 23 is to enable individual parties without substantial economic resources to increase their bargaining position by collective action. Yet this is the very premise that provides a target for vigorous defense tactics.

Judges and courts have responded favorably to the defense challenge that the nominal plaintiffs have insufficient resources in some cases,⁵² but not in others.⁵³

If defendants seek early discovery confined solely to the issue of adequacy of representation,

it is difficult to understand why the plaintiffs should not be permitted early discovery on the merits — for the purpose of showing likelihood of damage and cost recovery. A strong likelihood of recovery shown early in the case, would have substantial bearing on determining the plaintiffs' ability to undertake the cost of litigation. There is some indication that a number of judges are allowing discovery on the merits prior to class determination.

In a most poorly reasoned case frequently cited by defendants, *Ralston v. Volkswagenwerk, A.G.*,⁵⁴ the court allowed the inadequacy of

⁵²See Concurring Opinion of Judge Duniway in *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974); *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974); *Ralston v. Volkswagenwerke, A.G.*, 61 FRD 427 (W.D. Mo. 1973); *National Auto Brokers Corp. v. General Motors Corp.*, 376 F. Supp. 620 (S.D.N.Y. 1974).

⁵³*Chevalier v. Baird Saving Assn.*, 72 FRD 140 (E.D. Penn. 1976); *Sayre v. Abraham Lincoln Fed. Savings & Loan Assn.*, 65 F.R.D. 379, 384-86 (E.D. Pa. 1974); *P.D.Q., Inc. v. Nissan Motor Corp.*, 61 F.R.D. 372, 380-81 (S.D. Fla. 1973); *Sanderson v. Winner*, 507 F.2d 477 (10th Cir. 1974) *cert. den.* 421 U.S. 914, 43 L. Ed.2d 780 (1975).

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⁵¹*Eisen v. Carlisle & Jacquelin, supra*, at n.36.

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financial resources on the part of nominal plaintiffs to persuade it against certifying the class. But the court had this interesting thing to say:

All of this is not to say that large numbers of persons should not coalesce their finances in supporting a class action. *But the pooling should be made before the suit is filed*, thereby assuring sufficient resources, rather than relying upon court processes to coagulate a class who may be willing and able to underwrite the action.

(Emphasis supplied).

The court ignored several very real questions: How are nominal plaintiffs even to know of the problem without advice of counsel? If they seek the assistance of counsel and are advised that the class action is an appropriate device, but that there must be a pooling of sufficient resources to underwrite the cost of the action, is not the attorney in danger of having invited them to go out and solicit more clients on his behalf?

*Chevalier v. Board Savings Association*⁵⁵ is worth elaboration with respect to several of these defense arguments. In that case it was asserted that the named parties were inadequate to represent the class because the plaintiffs (1) were truly nominal, the real parties in interest being the attorneys; (2) were ignorant of what the case was about and of the underlying facts; and (3) were unwilling to pay all of the necessary costs of the action.

Referring to cases cited by the defendants, as to the first argument, the court commented in 72 F.R.D. at 146:

In those cases, the Court refused to certify class actions where the attorneys involved had sought out persons willing to lend their names to a class action. We are satisfied that such was not the case here. Also, this is not a case where there is any appearance of impropriety, as in the situation where a lawyer represents his partner who is acting as class representative. See *Kramer v. Scientific Control Corp.*, 534 F. 2d 1085 (3rd Cir. 1976).

⁵⁴61 F.R.D. 427 (W.D. Mo. 1973).

⁵⁵72 F.R.D. 140 (E.D. Penn. 1976).

Next:

There is no doubt that the named plaintiffs have a very sketchy view of what this litigation is all about Nevertheless, we cannot agree that this thereby renders a class action inappropriate.

. . . [I]t strikes us as . . . unrealistic to expect the named plaintiffs to have any significant personal knowledge of the facts. . . . This is something which . . . will only be done after . . . investigation and discovery by counsel against a background of legal knowledge. See *Bogosian v. Gulf Oil Corp.*, 337 F. Supp. 1234, 1235-36 (E.D. Pa. 1972). To require the class representative to be sophisticated and knowledgeable . . . would reduce the class action device . . . to an impotent tool.

Finally, at 147-148:

. . . it should be mentioned that plaintiffs' counsel have agreed to advance the costs of this litigation. However, in order to remain within the structures of Disciplinary Rule 5 103 (B) of the Code of Professional Responsibility, this can only be done if the plaintiffs assume responsibility for reimbursing their counsel if the suit is ultimately unsuccessful.

In summary, we offer the following observations:

1. Class actions, in which there are one or very few nominal prospective plaintiffs with limited resources, seeking to represent relatively large classes against well-heeled defendants are, in most cases, ill advised and impractical.

2. It is proper to advise a client whose claim is too small to pursue on its own merits, but which may be representative of claims common to a class, that:

- (a) The class action device may be available to him;
- (b) He cannot hope to represent the class as a nominal party unless sufficient members combine to pool their resources;
- (c) It is proper to contact other members of the class personally, if he can identify them, or by advertising, if he cannot;
- (d) It is proper for these potential class

members to discuss the possibility of combining to initiate and finance a class action; and

(e) It is proper for any member of the group to recommend any counsel they happen to know, and the group is free to seek whatever legal counsel they choose by common consensus.

3. Counsel who finds himself with an opportunity to represent a substantial number of the members of a potential class should consider whether a class action should be brought at all. If the individual members represented are able to underwrite the cost, and their combined potential recovery makes the litigation feasible, it may well be in the best interests of the parties not to opt for a class action.

4. If an association or group, such as a consumer group, community organization, condominium owners' association, etc., already exists, it may provide an established forum for the exchange of information and the pooling of resources.

Attorney Fees — Recoverable From the Defendant

In addition to punitive damages, specific statutory provision often is made for the recovery of a reasonable attorney fee as a further inducement to enforce public policy.

Obviously, the recovery of a substantial attorney fee may, in some cases, especially where the compensation to counsel is contingent, be the deciding factor as to whether litigation is economically feasible. In discussing attorney fee awards, there is occasionally some confusion which should be eliminated at the outset: The source of attorney fees which are awarded in class actions, derivative stockholder suits, and similar litigation is the recovery or fund created by the successful action, *not* the defendant. In other words, the plaintiffs pay the attorney fees from the benefit conferred by the action.

The so-called "American rule" generally withholds from successful litigants the right to recover reasonable attorney fees as a part of costs from the losing party.⁵⁶ There were three exceptions to this rule; now, there appear to be only two.

The first exception is where the parties have contracted for the payment of attorney fees in the event of a dispute. This is exemplified by the standard attorney fee provision appearing in many contracts, promissory notes and other commercial instruments.⁵⁷

Aside from contractual arrangements, attorney fees are recoverable only where expressly authorized by legislation as in antitrust cases,⁵⁸ Consumer Protection Act violations,⁵⁹ usury,⁶⁰ and other specific situations.⁶¹

⁵⁶*Armstrong Construction Co. v. Thompson*, 64 Wn.2d 191, (1964). *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 186 L.Ed.2d 475 (1967); *F.D. Rich Company v. U.S. ex rel. Industrial Lumber Co.*, 417 U.S. 116, 126, 94 S. Ct. 2157, 2163 (1974); RCW 4.84.080; *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 111 P. 2d 612 (1941).

⁵⁷RCW 4.84.020

⁵⁸Clayton Act, §4

⁵⁹RCW 19.86.080

⁶⁰RCW 19.52.030

⁶¹The following is a very random sampling of statutes providing for shifting of attorney fees which will give the reader some idea of the extent to which inroads have been made by legislative fiat into the traditional American rule:

In Oregon, under ORS 3C 075 dealing with wrongful death actions, a reasonable attorney's fee is recoverable as part of the costs of the action, in certain circumstances.

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RECOMMENDATION: AMEND RULE 23

In light of the problems discussed in this article, we cannot resist urging that some consideration be given to modifying Rule 23. The rule should be amended to (1) permit counsel for the named parties to canvass the proposed class members prior to certification, under court supervision, for the purpose of determining interest in the proposed suit and the degree of willingness to undertake the necessary financial obligations; and (2) before any class action is certified, the plaintiff ought to be required to make a showing of the likelihood of recovery or at least be required to demonstrate the necessity of pre-certification discovery on the merits to determine whether the litigation is in the best interest of the prospective parties and warrants marshaling the judicial resources necessary to administer the litigation.

Class actions have an appropriate place in our litigation system. And if we are going to utilize the device with some effectiveness, we should provide realistic guidelines to eliminate the contention and confusion surrounding current procedures.

In California, illegally soliciting or selling enrollments to privately conducted resident schools may result in the recovery of attorney fees. West's *Annotated Education Code*, §29026.5; or attorney fees may be recoverable in cases involving dance studios, West's, *Annotated Civil Code*, §1812.62, or health studios, §1812.94.

Under certain circumstances in Oregon, a plaintiff in an action for breach of an express or implied warranty in the sale of consumer goods or services where the amount pleaded is \$2,500 or less may recover attorney fees. ORS 20.098.

Attorney fees are available for wrongful attachment in Washington, RCWA 7.12.080; see *Olsen v. National Grocery Co.*, 15 Wn.2d 164 (1942); *Taylor v. Wilbur*, 177 Wn. 437 (1934); in declaratory judgment actions involving local bond issues, RCW 7.25.020; in certain cases for the partition of real property held by tenants in common, RCW 7.52.480; in certain will contests, RCW 11.24.250; Violations of numerous statutes may also be violations of the Consumer Protection Act, and therefore subject to the attorney fee provisions of RCW 19.86.080. See

- RCW 19.105.200 (Camping clubs)
- RCW 19.102.020 (Chain distributor schemes)
- RCW 19.09.340 (Charitable solicitations)
- RCW 18.35.180 (Hearing aid dispensing)
- RCW 58.19.270 (Land developments)
- RCW 49.60.030 (Anti-discrimination law)
- RCW 46.70 (Involving unfair motor vehicle business practices).

There was for a time believed to be a further exception: the *pro bono* or so-called "private attorney general" cases.⁶² Until recently, the courts, particularly federal courts, exercised an equitable right to shift attorney fees. This doctrine appeared in certain cases in which the prevailing party (a) should not have had to litigate to realize his rights, but for the oppressive intransigence of the loser; or (b) served a broad, public interest by acting as a private attorney general to effect legal remedies to which the public was entitled; or (c) for some reason was entitled to attorney fees in order to provide an effective remedy. Development of this judicial policy appears to have been arrested by the Supreme Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The court held in effect that only Congress can create new exceptions to the general federal rule that, in the absence of express contract or specific statutory authority, successful parties are not entitled to recovery of attorney fees, and the courts have no authority to otherwise shift the burden of attorney's fees. Congress subsequently adopted the Civil Rights Attorney Fees Award Act of 1976, extending authority for fee awards to prevailing parties in cases involving federal civil rights statutes other than those already authorizing such awards.

Attorney Fees in Class Actions

In class action litigation, the court must approve the award of attorney's fees to be paid to

Attorney fees may be recovered as well in cases of violations of the State Unfair Cigarette Sales Act, RCW 19.91.110; RCW 26.09.140 authorizes the court to award a reasonable attorney fee in dissolution, legal separation and declarations concerning the validity of marriage.

School district employees who appeal their discharge may be awarded attorney fees, RCWA 28.A.58.490. Even if they do not prevail, they may recover attorney's fees so long as the appeal was not frivolous. *Goodman v. Bethel S.D.*, 84 Wn.2d 120 (1974).

Attorney fees may be awarded in sewage lien foreclosure actions pursuant to RCW 35.67.250.

In wage claims against employers, under certain circumstances, attorney fees may be recovered. RCW 49.48.030.

(These examples are meant only to show the tremendous variety of legislative grants of attorney fees and are not intended to be comprehensive in scope.)

⁶²For a general discussion of the philosophical aspects of fee shifting and the American rule, see Sands, *Attorneys' Fees As Recoverable Costs*, ABA Journal, April, 1977, p. 510. See also: *Newman v. Biggie Park Enterprises, Inc.*, 390 U.S. 400, 19 L. Ed.2d 1263 (1968); *North Cross v. Memphis Board of Education*, 412 U.S. 427, 37 L. Ed.2d 48 (1973).

counsel representing a prevailing plaintiff class.⁶³

Attorney's fees are awarded to plaintiffs' counsel in class actions on the basis of the so-called "common fund" or "common benefit" doctrine under which the attorney is entitled to be paid out of plaintiffs' recovery a reasonable fee.⁶⁴ Whether the award of attorney fees is one recoverable from the defendants by statutory authority, or from a common fund of recovery in class actions,⁶⁵ the basic criteria are the same.⁶⁶ The

⁶³*Norman v. McKee*, 296 F. Supp. 29 (N.D. Cal. 1968), *aff'd*, 431 F.2d 769 (9th Cir. 1970).

⁶⁴*Grein v. Cavano*, 61 Wn.2d 498, 379 P.2d 209 (1963); *Trustees v. Greenough*, 105 U.S. 527, 26 L. Ed. 1157; *Paris v. Metropolitan Life Insurance Co.*, 94 F. Supp. 356 (S.D.N.Y. 1950); *Bakery & Confectionary International Union v. Ratner*, 118 App. D.C. 269, 335 F.2d 691 (1964); *Tenney v. Miami Beach*, 152 Fla. 126, 11 So.2d 188 (1942); *Mills v. Electric Auto-Lite Company*, 396 U.S. 375, 24 L.Ed.2d 593, 90 S. Ct. 616 (1970); *Freeman v. Ryan*, 133 App. D.C. 1, 408 F.2d 1204 (1968).

⁶⁵*Kahan v. Rosenstiel*, 424 F.2d 161, 165-166, (3d Cir.), *cert. den.* 398 U.S. 950 (1970); *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974).

⁶⁶See I Speiser, *Attorneys' Fees*, 298, §8.1 *et seq.*; *The Practical Lawyer*, Vol. 19, No. 8, Dec. p. 69 *et seq.*; CPR 12; *In re Bailey's Estate*, 56 Wn.2d 623, 627, 354 P.2d 920 (1960); *Manual for Complex Litigation*, West Publishing Co. (1973).



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attorney fee is a "reasonable fee" to be determined by the court. *See Box.*

"REASONABLE" ATTORNEY FEES

The criteria for determining the "reasonableness" of attorney fees under all the circumstances of the case include:

1. The amount of benefit conferred;
2. The novelty, magnitude and complexity of the litigation;
3. The skill employed by counsel during the litigation;
4. The extent and nature of the responsibility undertaken;
5. The experience, reputation and standing of counsel;
6. The time and labor spent on the matter;
7. Whether the fee is fixed or contingent;
8. The fees customarily charged for similar services in the locality where counsel practices;
9. Whether counsel had the benefit of a prior investigation or proceeding.

The courts customarily have been liberal in awarding counsel fees where authorized in order to provide an incentive for attorneys to engage in private, therapeutic litigation.⁶⁷ Because of the contingent nature of many class actions, as well as many other actions in which attorneys' fees are awarded, courts have often awarded fees in the range of 20 to 40% of the benefit conferred on the class.⁶⁸

⁶⁷*Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 24 L.Ed.2d 593 (1970); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931).

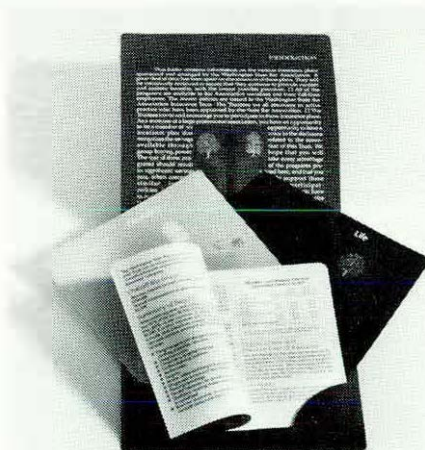
⁶⁸*In the matter of Brown Company Securities Litigation*, CCH F. Sec. L. Rptr., Paragraph 93.751 (S.D.N.Y. 1973); *Rosenfeld v. Black*, CCH F. Sec. L. Rptr., Paragraph 93.635 (S.D.N.Y. 1972); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 FRD 557 (E.D. Pa. 1969). In *Pergament v. Kaiser-Frazer Corporation*, 224 F.2d 80 (6th Cir. 1955), the court awarded a fee of \$182,500 on the basis of a benefit to the class of \$500,000, or 36.5%. In *Paris v. Metropolitan Life Insurance Co.*, 94 F. Supp. 356 (S.D.N.Y. 1950), an attorney fee of \$375,000 was based on a benefit of \$1,000,000, or 37.5%. On the basis of benefits valued at \$653,744 in *Newberger v. Barrett*, 180 Misc. 222, 39 N.Y. Supp. 2d 575 (1942), the court awarded attorney fees of \$200,000, or 30% of the benefit. In *Cowlitz Timber Trails Assn., et al. v. Timber Trails, Inc., et al.*, King County Cause No. 735 325 (1972), the court awarded attorney's fees of \$164,996, which was 33 1/3% of the value of the benefit to the class.

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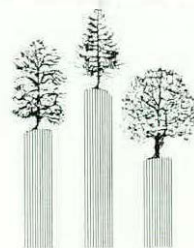
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In class actions plaintiffs' counsel has no fee arrangement with the class members. He will ordinarily have a fee arrangement with the named representative parties which, although not binding upon the court in determining a reasonable fee award, will usually be taken into consideration.⁶⁹

Occasionally, it occurs that members of a class are represented by different attorneys. In a number of cases involving such situations, courts have recognized that those attorneys who have spent the greater time and effort in contributing to the success of the litigation are entitled to a greater portion of the compensation.⁷⁰

Management of Complex Cases

Although no precise equation can be provided showing the relationship between potential recovery and complexity, it logically can be observed that as the potential recovery increases in a given civil case, so does the defense effort. A case against a large corporation on behalf of one individual for \$3,000 evokes neither the quality nor the quantity of opposition as does a class action involving 200 consumers each of whom has a claim for \$3,000, or a total claim by the class of \$600,000.

“The complexity of these cases, unless properly managed, very often will frustrate a plaintiff's effort to gain the potential large awards available.”

Complexity certainly presents a problem to the general practitioner who lacks the support facilities of a large firm, but with proper management it can be controlled. An obvious first step is to recognize when a matter has become so complex that you need either to seek the aid of an attorney experienced in handling complex litigation, or at least to make a special effort to handle the case in a manner recognizing its unusual nature. The *Manual For Complex Litigation*⁷¹ lists eleven

classifications of cases which may require special treatment because of their unusual complexity:

(a) Antitrust cases; (b) Cases involving a large number of parties or an unincorporated association of large membership; . . . (f) Individual stockholders, stockholders derivative, and stockholders representative action; . . . (h) Cases arising as a result of prior or pending government litigation; (i) Multiple or multi-district litigation; (j) Class actions or potential class actions; or (k) Other civil and criminal cases involving unusual multiplicity or complexity of factual issues.

The complexity of these cases, unless properly managed, very often will frustrate a plaintiff's effort to gain the potential large awards available. The following suggestions should, if observed, allow attorneys quickly to bring these cases under control.

1. Preassignment to a Single Judge

Any important case of unusual complexity must be preassigned to a single judge for pretrial proceedings, including supervision of discovery, as well as trial. In many districts in this state especially the smaller districts, all cases are routinely preassigned to a single judge. Such is also the practice in most federal courts. In other districts, however, especially in large counties like King County, a special preassignment procedure must be followed and should be promptly initiated in advance of any substantial pretrial motions.

The principal advantage of preassignment is that at every step of the proceedings, the court will have sufficient knowledge and understanding of the issues to guide the parties through their pretrial discovery and to try the case efficiently.

Although the criteria for preassignment may vary slightly from jurisdiction to jurisdiction, the guidelines set forth in Local Rule 40, King County Superior Court, accurately summarize the relevant considerations:

When it appears in any case that because complicated issues, numerous parties, extensive pretrial hearings, probable length of trial, or any like reason, the hearing of all

⁶⁹See *Timball v. PUD No. 1 of Douglas County*, 64 Wn.2d 252, 391 P.2d 205 (1964).

⁷⁰*Green v. Transiron Electronic Corp.*, 326 F.2d 492 (1st Cir. Mass. 1968).

⁷¹*Manual For Complex Litigation*. West Publishing Company, (1973).

matters by a single trial judge would materially shorten trial time or otherwise promote the efficient administration of justice, the case may be preassigned to one of the judges of this court.

2. Pretrial Conference

Extensive use of pretrial conferences, as provided by CR 16, should be encouraged by attorneys engaged in complex litigation. The *Manual on Complex Litigation* suggests at least four principal pretrial conferences.

1. The initial or preliminary pretrial conference should be held promptly after preassignment. If the court does not automatically schedule such a conference, counsel should propose that one be held. At this conference, the court should require a preliminary statement from counsel of the factual and legal issues; explore the possibility of an early settlement; establish a timetable for certain pleadings and motions; and determine a preliminary discovery schedule for "the first wave" of discovery which is designed primarily to secure the names and locations of witnesses and to secure the production of the basic documents necessary for trial of the case. Other questions, such as the possibility of consolidation of cases, or joinder of additional parties should also be discussed. In potential class actions, the court should establish a schedule for an early determination of the class action questions and enter appropriate orders to prevent potential abuse of the class action.⁷²

2. The second conference should include final determination of class action issues and any other preliminary legal questions, such as jurisdiction, that have not been determined. If possible, cut-off dates for discovery should be established, including both a date before which known documents or information cannot be discovered, and a date beyond which active discovery proceedings may not continue. If the case involves extensive documents, the court should consider requiring the deposit of all documents in a centralized depository providing equal access to all counsel and parties. The court should inquire what expert testimony is going to be necessary, and

require the exchange of written resumes of expert testimony. Finally, the parties should file estimated trial dates and a written statement of how long they believe trial will last.

3. At the next conference, the court should establish time schedules for all important remaining steps in the case including dates and locations for all scheduled depositions. In the event that discovery problems still exist, such as disputes over motions to compel evidence or protective orders, the possible appointment of a magistrate or special master to supervise discovery proceedings should be considered. Most judges, especially federal judges, frequently find themselves too busy to deal with detailed issues of discovery in complex cases. Dates should be set for filing pretrial briefs; the final list of witnesses; the pretrial order; and the final pretrial conference and trial. If depositions are going to be utilized at trial, specific portions of the depositions should be designated by each party in lieu of witnesses. Further, especially in federal court where *voir dire* of the jury is normally done by the judge, preliminary questions and a preliminary draft of all jury instructions should be submitted by counsel.

4. The final pretrial conference should be utilized for the drafting of a pretrial order under Rule 16, which will then control all important aspects of the trial.

The use of pretrial conferences, of course, need not be limited either to the four pretrial conferences suggested by the *Manual on Complex Litigation*, or to those issues listed above. Innovative use of the conference mechanism by counsel and the court can be a great aid in easing the burdens of complex trial.

3. Narrowing the Issues for Trial: Pretrial Orders and Partial Summary Judgment

Counsel should, from the very initiation of the lawsuit, aim to narrow the factual and legal issues prior to trial as much as possible. Only if the issues are narrow, well defined and understandable to either the court or the jury can counsel reasonably expect to convince the trier of fact of his version of the case.

The pretrial order contemplated by Rule 16 in both the state and the federal civil rules is a proce-

⁷²See e.g., Local Rules of the Superior Court for King County, LR 23(f).

ture too rarely used by counsel. Although it is mandatory in most federal courts, many attorneys do not utilize nor take advantage of Rule 16, or the similar Rule 56 (d), in preparation of complex matters in state courts. Nearly every case of any complexity at all, and certainly every case involving multiple parties or issues, can be tried much more efficiently and fairly if a pretrial order is entered.

Unlike the complaint and answer, which ordinarily frame the issues in most trials, a final pretrial order is written, edited and entered *after* discovery and *after* the essential facts are known to all counsel, and to the preassigned judge who has supervised pretrial activity.

Rule 16 reads in part as follows:

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and *such order when entered controls the subsequent course of the action*, unless modified at trial to prevent manifest injustice.

(Emphasis supplied.)

A well drafted pretrial order should include a recitation of jurisdiction; a list of all admitted facts, including in detail all facts established by the pleading and discovery upon which the parties agree, and upon which formal proof will therefore not be necessary; a list of all disputed facts as contended by both plaintiff and defendant; a list of the issues of fact to be determined by the court or jury; a list of the issues of law to be determined by the court; a list of all expert witnesses to be called by each party, including a brief statement of the issue upon which said expert will testify; a list of all other witnesses and the general nature of their testimony; a list of all exhibits which may be received in evidence without objection; and a list of all exhibits the authenticity of which is challenged.

In conjunction with preparation of the pretrial order, all exhibits, both contested and admitted, should be marked with a uniform numbering system and indexed to the pretrial order. Once this is done, neither party may introduce issues or evi-

dence not covered in the pretrial order. It should be sufficient objection to any such material to simply point out that the pretrial order does not include an issue, or a proposed exhibit or witness which the other side wishes to present.

A similar method utilized even less than the Rule 16 order, which is valuable in narrowing the issues in complex litigation, is found in Rule 56 (d), Partial Summary Judgment.

Divisions A and B of Rule 56 authorize a motion for summary judgment "upon all or any part" of an action and while many courts seem to utilize Rule 56 (d) merely as a means of deciding one of several causes of action, or upon the issue of liability alone, case law supports a much broader utilization of Rule 56 (d). Indeed, the proper use of Rule 56 (d) is analogous to that of a pretrial order under Rule 16 in which all factual issues that exist without substantial controversy are decided in advance of trial.

Although it is often not easy to convince a court that Rule 56 (d) *requires* it to decide those factual issues which are not substantially controverted, there is a substantial case law on the federal

CORRECTION

In 1976, a book entitled "Destination Disaster," by London Sunday Times journalists Paul Eddy, Elaine Potter, and Bruce Page, was published in the United States by Quadrangle/The New York Times Book Company, pursuant to rights granted to it by Times Newspapers Ltd., of London England. "Destination Disaster" concerned the Paris air crash disaster on March 3, 1974 and the massive damages litigation which followed, including the wrongful death action on behalf of the survivors of David and Phyllis Kween.

It has since been brought to the attention of Times Newspapers Ltd., that the book's treatment of the Kweens' case could have implied that the Seattle law firm of Krutch, Lindell, Donnelly & Judkins was not involved in the actual trial of the Kween case. In fact, Richard F. Krutch and Vernon T. Judkins actively represented the plaintiffs in the trial, together with Gerald Sterns of San Francisco.

Times Newspapers Ltd., and the authors regret it if a false impression was created and any consequent embarrassment to Mr. Krutch or his law firm.

**Times Newspapers Ltd., Paul Eddy,
Elaine Potter and Bruce Page,
P.O. Box No. 7, New Printing
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level which indicates this is the rule. In *Woods v. Mertes*, 9 F.R.D. 318 (D. Del. 1949), the court stated at 320:

An order under Rule 56 (d) is actually in the nature of a pretrial order under Rule 16, except that under Rule 56 (d) it is compulsory, while under Rule 16 it is discretionary with the court. An order under Rule 56 (d) narrows the issues, enables the parties to recognize more fully their rights and yet permits the court to retain full power to make one complete adjudication on all aspects of the case when the proper time arrives.

4. *A Note on Discovery*

Volumes have been written on the problems of discovery in complex litigation. All the considerations cannot be discussed here, but there is one area relating to class actions which is worthy of note: There is confusion and difference of opinion as to the degree of discovery to be allowed prior to certification of the class. Typically, plaintiffs try to limit pre-certification discovery, if any, to the propriety and scope of the class, whereas defendants favor discovery against the class

members on the merits.

The *Manual for Complex Litigation*⁷³ favors limiting early discovery to determination of the class action issue. Most courts do agree that determination of whether an action may be maintained as a class action cannot ordinarily be made without an evidentiary hearing which may require discovery on issues of adequacy of representation, management of the action, and notice.⁷⁴ There is, however, another group of cases which propose that some discovery on the merits may be necessary to determine conflicts, if any, among members of the class.⁷⁵

Once class certification has taken place, there is another problem which seems to plague plaintiff's counsel, but about which little judicial record has been made. What happens when class members fail to respond to discovery under Rules 22 and 34? In *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999 (7th Cir. 1971), the court upheld a lower court which had granted defendant's motion to produce and to

⁷³*Ibid.* Part 1.6.

⁷⁴*Eisen v. Carlisle & Jacquelin*, *supra* at n.36.

⁷⁵*City & County of Denver v. American Oil Co.*, CCH Trade Reg. Rptr., §73,783 (D. Colo. 1971).

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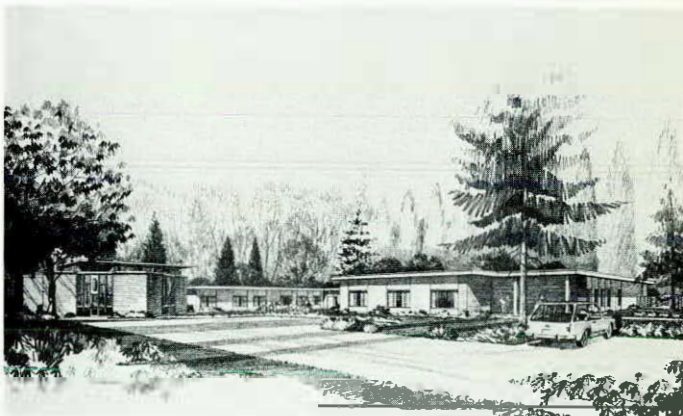
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compel answers to interrogatories to members of the class, and which ultimately dismissed the suit as to class members who failed to respond.

Our experience is that courts occasionally will dismiss class members for failure to respond to discovery. In one recent class action we defended, 80% of the class members were dismissed for failure to respond to discovery.

Nevertheless, the dissent by Judge Stevens in *Brennan* raises the question of whether failure to respond should be grounds for dismissal with prejudice, or merely exclusion from the class. The consequences for defendants are obviously of some concern.

5. Settlement

A few rules, familiar to all trial lawyers, should be re-emphasized in connection with settlement of complex cases.

Pretrial organization is essential. Only if you are prepared to go to trial will you be able to settle. If you are representing the plaintiff, a firm trial date is essential. Counsel should move to establish a trial date at the first opportunity and fight to keep it. Defendants simply do not settle, especially for large amounts of money, unless faced with the threat of a trial.

Following detailed discovery, an organized settlement presentation should be prepared. The chances of a successful settlement depend upon convincing opposing counsel that despite a case's complexity, you will be able to present to the court or jury an understandable and convincing argument as to liability and damages. The process of drafting a pretrial order, as described above, provides an opportunity to organize your case and show the opposition its settlement value. By deciding in advance of trial on all exhibits, witnesses and their proposed testimony, you can demonstrate the strength of your case to your opposition.

Class Actions. Special settlement problems are presented by class actions. Rule 23 (e) provides:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

In general, the standard used by courts in evaluating a compromise is the requirement that

it be fair and reasonable and in the best interest of all those who will be affected by it.⁷⁶

Considerations properly before the court concerning a proposed settlement include the presence or absence of opposition to the proposal;⁷⁷ the likelihood of success in litigation;⁷⁸ the prospective cost of litigation; and whether the settlement would compromise other potential claims.⁷⁹

The procedure for approving a settlement generally is left to the court's discretion by Rule 23. The court should offer all persons properly objecting to settlement a chance to be heard, and to present evidence and cross-examine witnesses who favor settlement, but may limit proceedings to whatever is helpful in reaching an informed and reasoned decision.⁸⁰

Whether an evidentiary hearing is necessary before approval of a proposed settlement depends upon the circumstances of each case.⁸¹ We recently settled a large class action in which the court held a settlement hearing that lasted in excess of ten court days. Whether or not an evidentiary hearing is held, it is incumbent upon counsel urging the settlement to provide the court with an evidentiary basis to support the proposal. This may be done by testimony, exhibit, or affidavit.⁸²

* * *

Complex litigation, often thought to be the exclusive domain of the large law firm, can be handled successfully by the general practitioner. The key is extensive analysis and management to simplify the problems presented by multiple parties and issues, and to maximize the potential recovery.

The process of simplification is inevitably more time consuming and demanding than in ordinary cases, but the reward may be commensurate with the effort. □

⁷⁶See e.g., *Young v. Katz*, 447 F.2d 431 (5th Cir. 1971); *Amalgamated Meat Cutters & Butcher Workmen of No. America, AFL-CIO: Local 340 v. Safeway Stores, Inc.*, 52 F.R.D. 373 (D. Kan. 1971).

⁷⁷*Hartford Hosp. v. Chus, Pfizer & Co.*, 52 F.R.D. 131, 137 (D.G. N.Y. 1971).

⁷⁸See e.g., *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 322 F. Supp. 834 (D.C. Pan. 1971).

⁷⁹*Norman v. McKee*, 290 F. Supp. 29 (N.D. Cal. 1968) affirmed 431 F.2d 769 (9th Cir. 1970).

⁸⁰*Flinn v. FMC Corporation*, 528 F.2d 1169 (4th Cir. 1975).

⁸¹*Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976).

⁸²For general discussion of settlement techniques in class actions, see Levy, *Class Action Settlement Techniques and Procedures*, 19 Practical Lawyer 69 (Dec. 1973).



SUPERIOR COURT NEWS

By **JUDGE JAMES A. NOE**

The annual State Judicial Conference will be held at Bellevue's Greenwood Inn from September 11th to 14th. Judges from courts of record will take part in the two and ½ day conference.

Chief Justice Charles Wright is in charge of the Conference and has arranged an outstanding program. Robert Boochever, Chief Justice for the State of Alaska, will address Judges and spouses at the annual Judicial Banquet Sept. 13th. Edward Novack, Washington State Bar Assoc. President-Elect, will provide the Judges with an important message from the bar at the Tuesday luncheon. The conferees will also hear from Edward B. McConnell, Director for the National Center for State Courts in Denver. Mr. McConnell is a recognized leader in the field of Judicial Administration and currently serves as Chairman of the Judicial Administrators Division of the A.B.A.

Also, other timely and provocative topics have been selected for program items. The Judges will listen to panel presentations on such subjects as avoidable trial errors, problems in Superior Court due to Supreme Court rules, jury selection and voir dire, and proposed rules of evidence. The Board of Prison Terms and Parole will also provide a portion of the program on Sept. 14th.

State Juvenile Court Code Revised

On June 8, 1977, following extensive debate, the Senate passed a revision of Washington State's juvenile court code.

The bill, Engrossed Third Substitute House Bill 371 (HB 371), is the product of nearly 10 years of effort to eliminate outdated and unnecessary provisions of the existing juvenile court code, and to modify unlimited discretion and authority of juvenile court judges.

The law upon which the existing juvenile court system is based dates back to 1913.

Senator Pete Francis, a primary supporter of the bill, remarked that "the most significant change made by HB 371 is the way in which children who come to the juvenile court will be handled."

"Under existing law, children who are referred to juvenile court because they have been abused or neglected may be locked up with children who have committed serious crimes. The bill prohibits this inexcusable detention and provides instead that these children be placed in foster family homes."

"Children who run away from home, who are truant from school, or who are 'incorrigible' (that is, beyond the control and power of their parent), will no longer be handled by juvenile courts. Instead, a family may seek help from the state department of social and health services which, under the bill, is to provide crisis intervention services to families in conflict. These services will include temporary foster care for children who refuse to return home or for children whose parents refuse to let them return home. If a family cannot agree about a child's placement after crisis

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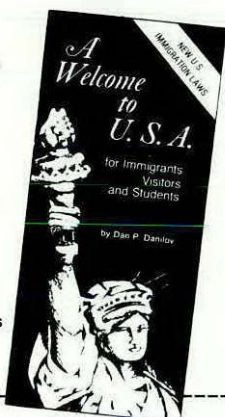
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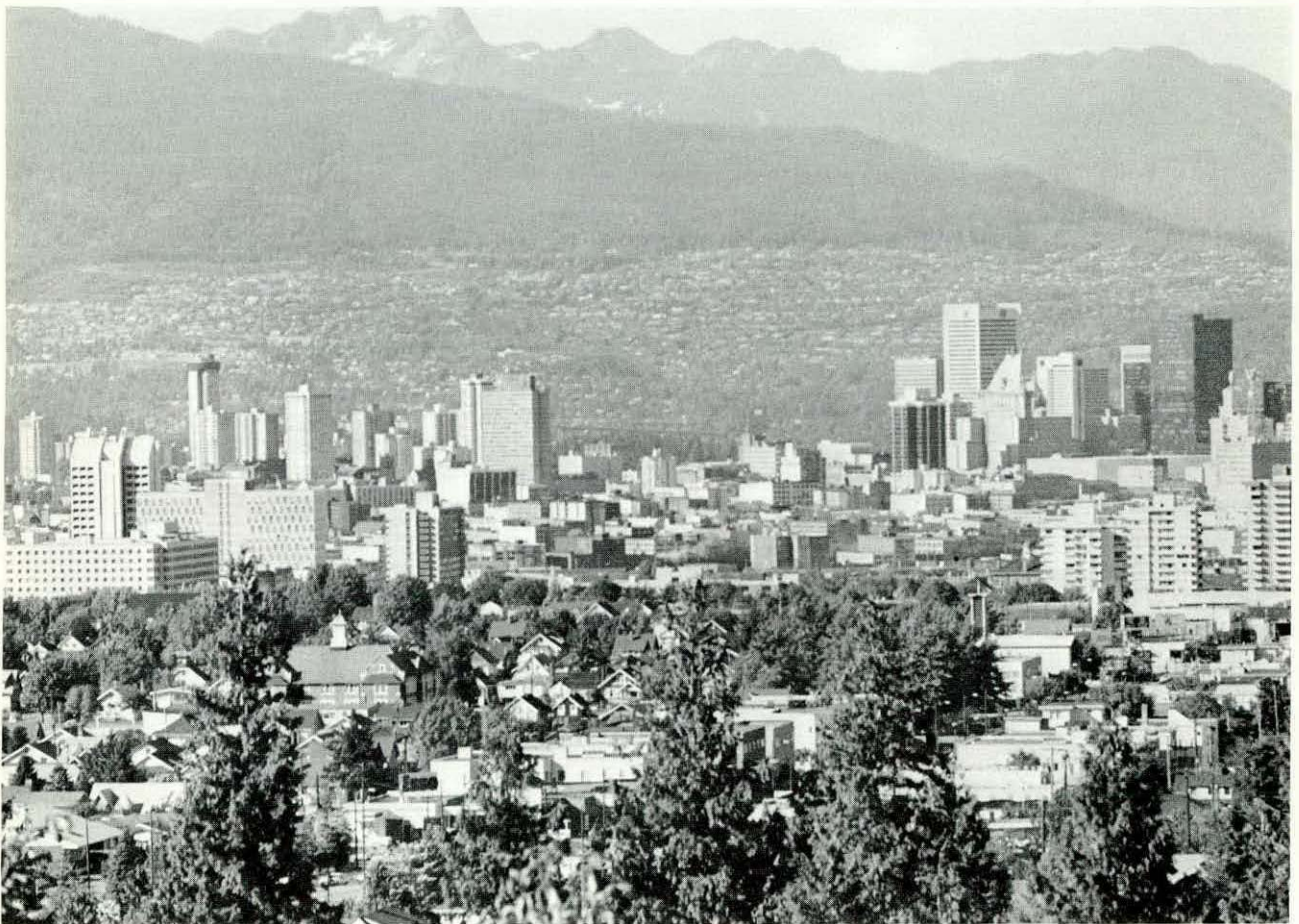
intervention services have been tried, a parent or child may ask the juvenile court to decide the child's placement. The bill also provides that a runaway may be placed in detention for only 72 hours but then only if the child runs away from a nonsecure placement, such as a foster home."

"The final group affected by the revision of the juvenile code are the young people throughout the state who commit crimes and the people who are the victims of those crimes. A juvenile who commits a minor offense must make restitution to the victim and may be required to perform community service. The bill also provides that the serious juvenile offender will be punished with a sentence of confinement. The most substantial change in the juvenile court system made by this

legislation is to change it from a system where punishment is unevenly meted out or perhaps too frequently not imposed, to a system where all juveniles must answer equally and in a degree that has some relationship to the seriousness of the offense he or she has committed."

Senator Francis and other proponents of HB 371 believe these changes in Washington's juvenile court system are long overdue and will greatly improve juvenile justice programs for children in this state.

HB 371 passed the Senate by a vote of 27 to 13 and now goes back to the House for approval of the amendments added in the Senate. Earlier this session HB 371 passed the House by a vote of 83 to 8. □



Rugged mountain peaks and dense Northwest forests crowd behind Vancouver, B.C., spectacular site of the 1977 Washington State Bar Association's Annual Meeting, to be held September 14-17. Be sure to send in your registration early for this year's convention. It looks like a sell out, with 2,000 lawyers expected to attend.



Committee Reports

RESOLUTIONS COMMITTEE

Filing Deadline for Resolutions to be Presented at Annual Meeting

Anyone desiring to have a resolution presented to the Annual Meeting should file it with Kimbrough Street, Chairperson of the Resolutions Committee, 4200 SeaFirst National Bank Building, Seattle, Washington 98154.

Resolutions may be presented to the Resolutions Committee up until 20 days before the Annual Meeting, that is, sometime prior to August 25th, but not thereafter.

All Resolutions should be accompanied by a written report (not to exceed a combined total of 1,000 words) explaining the resolution.

Preliminary Notice of Special Public Hearing on Resolutions and of Publication Deadline

The Resolutions Committee of the Bar will, as

usual, hold a public hearing at the Bar Convention to consider the views of the proponents and opponents of resolutions to be presented to the membership of the Bar at the annual meeting. The hearing will be held on Wednesday evening, September 14, 1977, so as not to conflict with continuing legal education seminars. In addition, in an effort to allow more time to those presenting views and in an effort to give the members of the Committee more time to consider the resolutions and to request any additional information which might be helpful to the Committee, an advance public hearing will be held prior to the convention in Seattle on September 6th at the offices of the Bar Association, 505 Madison Street. The time of both hearings will be announced in the next *Bar News*. Proponents and opponents of resolutions are urged to attend the September 6th hearing if at all possible, and, if not, to present their views in concise written form for consideration by the Committee at that hearing. Presence at or absence from the September 6th hearing will not affect any right under the bylaws to present views at the September 14th hearing. At that hearing, preference in presenting views will be given to those with viewpoints which were not expressed at the earlier meeting.

If a resolution is to be published in the *Bar News* before the annual meeting, the bylaws provide that it must be received by the Resolutions Committee at least 60 days prior to the annual meeting. The meeting starts September 14th. In addition to resolutions received in time for publication, the next issue of the *Bar News* will contain further details regarding the purpose, function, and personnel of the Committee and the exact times and places of the two hearings.

Annual Reports!

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