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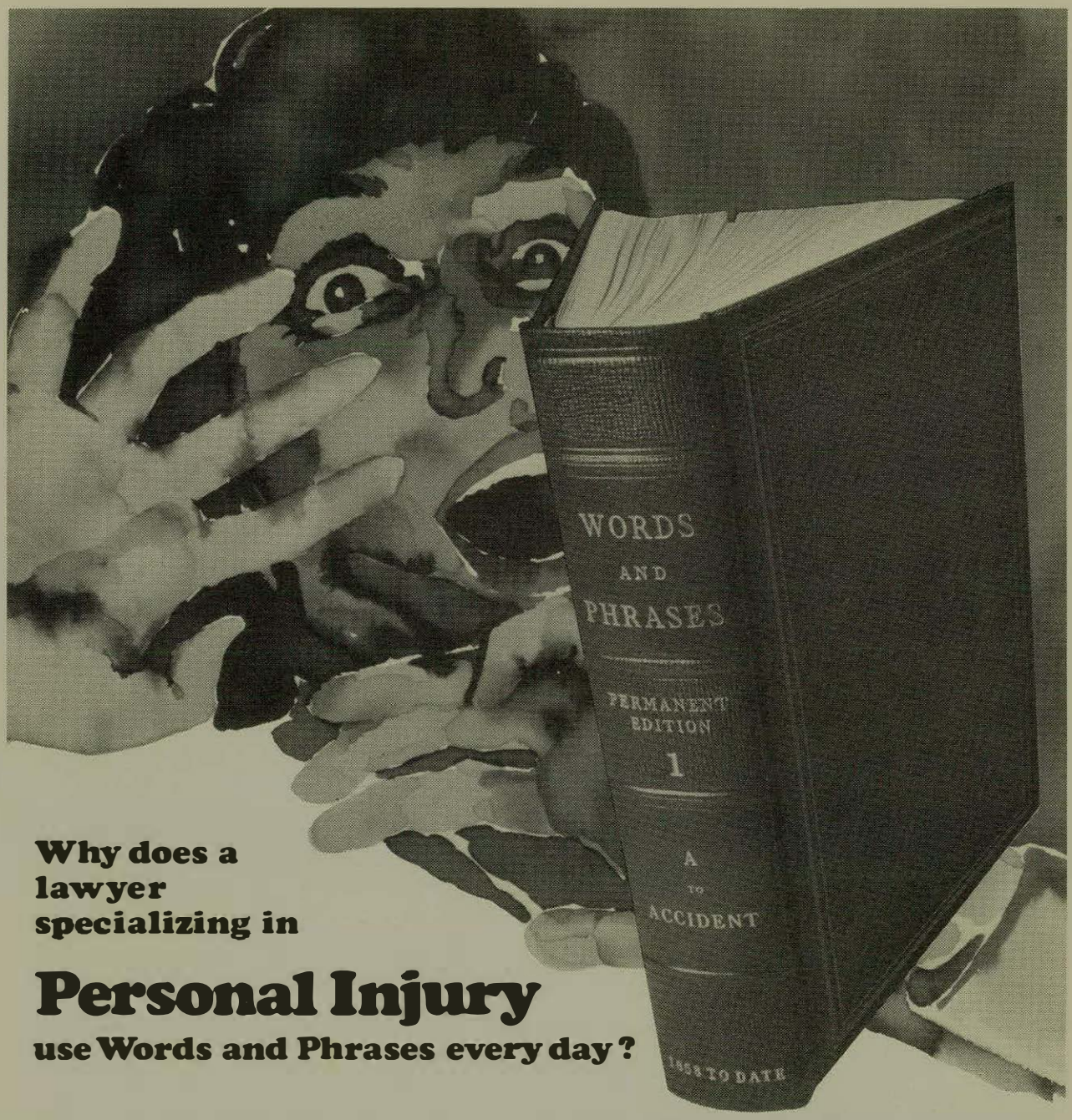
WASHINGTON STATE BAR NEWS

EDWARD J. NOVACK, PRESIDENT 1977-78



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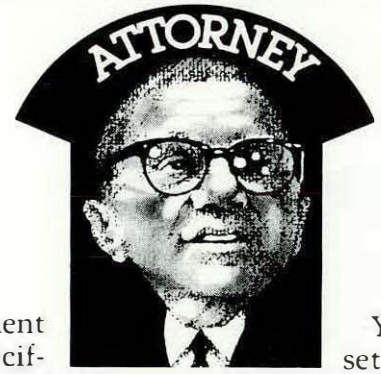

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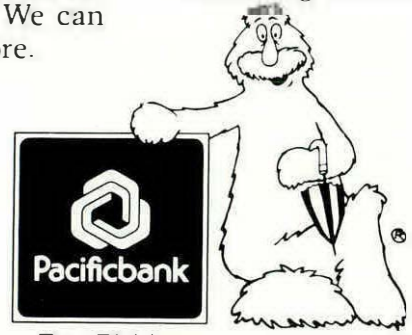

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*Frank Russell Co., Inc. ranks the Pacificbank Trust Division fourth nationally of 83 banks in equity investment performance for the eight years ending September 30, 1976.

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FEATURES

IN THE NEWS

DEPARTMENTS

Our Cover

Edward J. Novack has been elected 1977-78 president of the Washington State Bar Association. See story on p. 21.

Letters

Eastern Law Practice Jus' Like Western Variety

Editor:

As a member of both the Washington and New York Bars, I feel I have some insight into the contrasts between Washington and "eastern" lawyers Douglas Shaw Palmer purports to find in his article "Twilight of the Lawyer in Washington State," *Bar News,* June 1977. One gets the impression from reading the article that "eastern" lawyers have not been preempted by laymen in the areas of real estate, tax returns, and estates and trusts. By and large, that is not true, and the situation he bemoans in Washington prevails in the east also.

The "purchase offer," prepared by a broker, initiates most residential real estate transactions in New York. Mortgages, bonds, and related documents are prepared by the mortgage review departments of the principal lenders, savings banks and savings and loans, simply because the forms are so standardized and it is much more efficient. These documents are reviewed by the bank's attorney as is the abstract of title, which has been prepared by an abstract and title company. This latter function has displaced the ancient "lawyers search and opinion letter" because, again, the procedure became so standardized that it was economically unproductive for the lawyer to do it.

In short, in New York, 90% of the mechanical work is done by laymen, the bank's attorney is actively involved, the seller often has an attorney (if only to prepare the deed), and the buyer will retain a lawyer about half the time. Is that so radically different than in Washington?

In the estates and trusts area, it is rare outside of New York City for lawyers to act as trustees and executors, except for small estates. Where the estate or trust is substantial, invariably a bank trust department is trustee or executor, although lawyers are active in court proceedings, tax matters, judicial settlement of accounts and the like. This situation prevails, first, because of the bank's efficiency in the fiduciary ministerial functions, and, second, lawyers in this state do not want to expose themselves to the legal burdens of managing and reinvesting estate or trust port folios. Again, is that not the same situation as exists in Washington?

DAVID A. BRADY
Syracuse, New York

The editor confesses that he deleted Mr. Palmer's specific references to "New Jersey and Connecticut" and substituted "eastern states." He regrets the resulting mischaracterization of the apparent practice in New York and other states, such as Idaho, which are east of Washington. Moreover, he will hold his breath for short periods in anticipation of comment from lawyers in New Jersey and Connecticut.

–Ed.

Editor's Page

We're Heading the Wrong Way on Advertising

Here is a quick review of terms:

Bates and O'Steen v. State Bar of Arizona: A Supreme Court case, decided June 27, 1977, holding that the First Amendment bars a state from prohibiting truthful advertisements in newspapers by lawyers concerning the terms and availability of legal services.

Proposal A: The ABA's "regulatory" response to *Bates,* describing permissible content for "print media" and radio (but not television) advertising, and prohibiting anything not prescribed. This proposal, rather than Proposal B, was adopted by the ABA House of Delegates on August 10.

Proposal B: The ABA's "directive" response to *Bates,* establishing anti-fraud guidelines for permissible "print media" and radio (but not television) advertising, and permitting anything not proscribed.

WAR: Acronym for Washington Advertising Rule, a convenient way to refer to proposed amendments to the Code of Professional Responsibility adopted by our Board of Governors at its August 18-20 meeting. WAR is much the same as Proposal A, but is more restrictive, notably because it proscribes both radio and television advertising. *See* "The Board's Work," pp.

Comment: We're heading the wrong way on advertising because the thrust of the *Bates* opinion, notwithstanding the die hard dissent of Mr. Justice Rehnquist, is that the First Amendment protects the dissemination of "commercial speech," such as lawyer advertising, which is not "false, deceptive or misleading."

The *Bates* opinion may be traced directly to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 48 L.Ed. 2d 346, 96 S.Ct. 1817 (1976) where the Court held (7-1, Rehnquist dissenting, Stevens not participating) that the First Amendment protects advertising by pharmacists as to the price of prescription drugs. Significantly, the *Pharmacy* opinion emphasizes the public's right to *receive* advertising: "If there is a right to advertise, there is a reciprocal right to receive the advertising. . . ."

Two recurrent themes in *Bates* are the supposed benefits which will accrue to the public as recipients of lawyer advertising and the responsibility of the bar to regulate such advertising to prevent it from being misleading, *not* to limit its content: "Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less."

Thus, the Supreme Court's invitation for regulation of lawyer advertising is not directed to limiting disclosure, but to the establishment of guidelines to prevent "false, fraudulent, misleading or deceptive" advertising. The ABA's Proposal B needs revision but it reflects the correct approach.

True, the *Bates* opinion indicates, "As with other varieties of speech . . . there may be reasonable restrictions on time, place and manner of advertising," but the Court does not contemplate extraordinary measures unique to lawyer advertising ("*As with other varieties of speech . . .*"). Examination of the Court's references bears this out.

The Court notes that "special problems of electronic media will warrant special consideration," referring to *Captial Broadcasting Co. v. Mitchell,* 333 F. Supp. 582 (DC 1971). That case upheld (2-1) the right of Congress to prohibit the advertising of cigarettes on radio and television. It is difficult to spot any analogy between cigarettes and nondeceptive lawyer advertising. In any event, as Circuit Judge J. Skelly Wright observed in dissent: "Any statute which suppresses speech over any medium for any purpose begins with a presumption against its validity."

The WAR approved by the Board invites a litigation war neither mandated by *Bates,* nor worth fighting. The First Amendment is a broad gauge track, reduced to standard gauge where commercial speech is involved. The Board of Governors has hooked us to a narrow gauge train created by the ABA and headed in the wrong direction. We're being taken for a ride. The situation warrants critical analysis by all members of the bar and by the members of the state Supreme Court who may yet correct our course. All aboard, please.

JVW

The Intent of the Bates and O'Steen Decision

Bates and O'Steen! What does it mean? This question is posed by the recent decision of the U.S. Supreme Court, holding that certain newspaper advertising of the price and availability of "routine legal services" could not be constitutionally prevented.

A common reaction is disbelief and/or anger that the time-honored ban of lawyer advertising, developed and refined to protect the public from hucksters (at least in our view) should now be fractured. I suggest, however, that the Court is repeating a message that is not new, but largely ignored until very recently — namely, that there *is* a substantial segment of the public that is not accessing our system of justice through the doors presently provided. I further suggest that the Court, in an agonizing 5-4 decision, felt that increased awareness through advertising of the cost and availability of legal services would serve to enhance the use of the judicial system.

Frankly, I doubt that the lifting of the ban will have the beneficial effect intended. Nevertheless, the message seems clear to the organized Bar — methods must be found to enable access to our judicial system for dispute resolution for those unable to pay the costs presently being exacted. The Department of Justice seems clearly on this tack, and I believe it would be a serious mistake to simply limit *Bates* to the facts of the case, and ignore its philosophy.

There are ways to approach the solution — Group Legal plans, so-called "public interest" law firms, reduction of costs through paralegals, expanded small-claims courts, etc. — which *do* expand the availability of legal services and access to the judicial system without injuring the lawyer's ability to serve his clients at a cost acceptable to both.

This area is being strongly addressed by the Board of Governors and will no doubt be a major direction during my term.

Edward J. Howard

Past and Present Trends Which Influence the Economics Expert in Litigation

By **ROBERT T. PATTON**

In a case of wrongful death or injury the plaintiff's attorney will frequently employ the services of an economic expert to analyze the present value of lost future earnings. This figure becomes an important part of the damages sought by the plaintiff. Although most attorneys understand the mechanical aspects of the analysis conducted, little attention has been given in the literature to the economic trends which influence the analysis. The purpose of this article is to reveal these economic trends and by example show how these data affect the testimony of the economic expert.

The increasingly frequent appearance of the economic expert in the courtroom is a realtively recent phenomenon. This is an effect of court rulings occurring throughout this country in the past decade. These rulings are defining the basis for determining the amount of damages due to lost income. For example, in *Warner v. McCaughan* 77 Wn. 2nd 178, 460 P. 2d 272 (1969), the court ruled that even in wrongful death cases where the decedent had no dependents, a claim for damages survives to the estate of the deceased and the estate may recover an amount equal to the present value of lost future earnings appropriately adjusted and discounted. In *Hinzman v. Palmanteer* 81 Wn. 2nd 327, 501 P. 2d 1228 (1972), the court further defined the accepted approach for calculating and adjusting lost future earnings. The court indicated that the proper measure of damages could be determined by projecting future earnings to a normal life expectancy, then subtracting the personal expenses of the deceased and discounting the resulting net earnings to present value. The court also ruled that when income projections were not expected to be "extremely high" the effect of income taxes should be ignored.

As a result of rulings such as these there has been an increase in written material concerning the testimony of the economic expert. There are two noteworthy works which should be read by anyone involved in a case where an economic expert will be used to assess damages from lost income. The first of these is *The Economic Expert in Litigation,*[1] published by the Defense Research Institute in 1971. This work was designed to aid defense attorneys in understanding the nature of the testimony of the economic expert and provide guidance in cross examination of such witnesses. The second work, written by Dr. John A. Carlson, "Economic Analysis v. Courtroom

[1]The document titled *The Economic Expert in Litigation* was published in 1971 by the Defense Research Institute, Inc., 1212 W. Wisconsin Ave., Milwaukee, WI 53233.

Controversy — The Present Value of Future Earnings,''[2] was published in the May 1976 issue of the *American Bar Association Journal.* Dr. Carlson presented a very clear description of the nature of the analysis which is carried out by the economic expert. He argued that the entire courtroom exchange on this matter could be simplified by a commonly accepted acknowledgment that the anticipated economy-wide wage increases will be equal to the appropriate discount rate over time. Once one accepts this premise, the present value of lost future income is calculated by simply multiplying the lost wages in the current year by the number of years the individual would be expected to remain in the labor force. This, of course, assumes that the person would not experience any career path growth in wages beyond those gained by the average wage earner, an assumption which will not always be appropriate.

[2]John A. Carlson's article "Economic Analysis v. Courtroom Controversy, the Present Value of Future Earnings," was published in the *American Bar Association Journal,* May 1976, 62:628.

Robert T. Patton is an Associate Professor of Finance at Western Washington State College and has served as an economic expert to several law firms in Western Washington. He has a B.S. degree from the University of Michigan, a MBA degree from the University of Minnesota, and a Ph.D. degree from the University of Washington. The author acknowledges the assistance of three attorneys in the preparation of this article: Eugene M. Moen and Dwayne A. Richards of Seattle, and Lewis A. Hutchison of Monroe.

Economic Trends

This approach suggested by Dr. Carlson is frequently used by the economic expert. It is a very reasonable approach to take in light of past and present economic trends. Some of the important data affecting the thinking of the economic expert are shown in Figure 1. This figure has been created by using economic data which have been recorded and maintained by the United States Government over the past thirty years. Specifically, economy-wide wage rates, yields on government bonds, yields on corporate bonds, and the cost of living index have been taken from various documents[3] and recomputed against an index of 100 beginning in 1947. The data displayed in Figure 1 will be interpreted as follows:

If a person who had earnings of $100 per month in 1947 and had annually received a raise precisely equal to the average increase in the economy-wide pay rate then that person would be earning $547 per month by the end of 1976. This represents an average annual increase of 5.8% over the 30 year period.

In the case of the yields on bonds,[4] Figure 1 shows that $100 invested in an average government bond in 1947 would have grown to $346 by the end of 1976 if the yearly average yields had been allowed to compound along with the original investment. If $100 had been invested in the average corporate bond the investment would have grown to $419. The average annual compound yield on government bonds would have been 4.2% and on corporate bonds 4.9%. It will be noted that the average increase in wages is greater than the average yields on either government or corporate bonds.

[3]There are several sources for the type of information used in this article, including the following:

U.S. Bureau of the Census, *Current Population Reports,* Series P-60, No. 101, "Money Income in 1974 of Families and Persons in the United States," U.S. Government Printing Office, Washington, D.C., 1976.

U.S. Department of Commerce, *Survey of Current Business,* U.S. Government Printing Office, Washington, D.C.

International Financial Statistics, International Monetary Fund, Washington, D.C.

Moody's Bond Record, Moody's Investor's Service, Inc., 99 Church Street, New York, N.Y.

[4]This unusual representation of bond yields is used to enhance the pictorial comparisons desired.

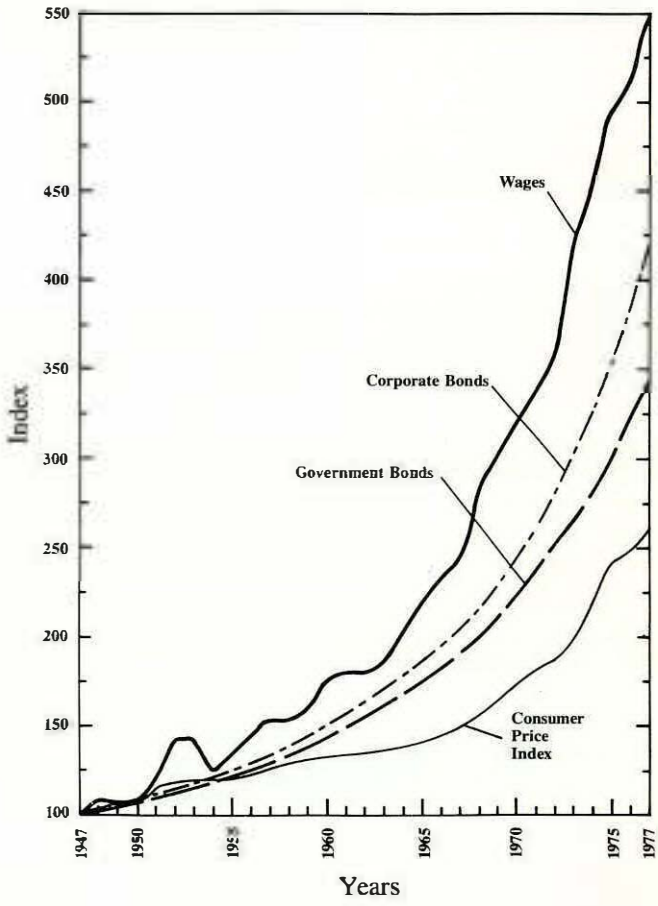

Figure 1

30 year economic trends affecting the testimony of the economic expert.

The remaining curve in Figure 1 shows the effect of inflation. Today it would take $263 to buy the same goods which could have been bought for $100 in 1947. This is an average rate of inflation of 3.3%. Inflation is a common factor affecting both interest rates and wage increases. A rise in inflation or even an expected rise in inflation will have the effect of causing interest rates to rise. Inflation is not the only factor affecting the level of interest rates, so care must be taken to keep from over-simplifying the issue; however, the point is still valid. Likewise, inflation is a factor which affects the wage demands of all elements in the labor force. Increases in inflation will bring about higher wage increases on a yearly basis. Again, the issue is not quite this simple, but the effect is well known to anyone in the labor force.

The Carlson Conclusion

Although Dr. Carlson noted that the percentage increases in wages are generally greater than average taxable government bond yields, he stated that it would be reasonable, when computing the present value of future earnings, to let the discount rate exactly offset any projected economy-wide wage increases. I happen to agree with Dr. Carlson, but it is important that we understand the implications of this conslusion. Actually, past and present data, as indicated in Figure 1, reveal that wages on the average are increasing at a rate greater than the average yields on government or corporate bonds. The differential is even further accentuated when it is realized that the average wage increases reported by the U.S. Government are actually less than the annual

wage increase which will be realized by the average individual. This is because the annual figures reported by the U.S. Government are impacted in a downward direction by deaths and retirements in the higher income levels while new entries into the labor force generally start in the lower income ranges. Hence, if one were to track an average individual's wage rate over his working life, it would be noted that his wages actually increase at a faster rate than the economy-wide wage increases reported in the government figures.

What do current economic conditions suggest concerning this issue? A glance through the Wall Street Journal reveals that an investor can obtain yields of approximately 7% per year on long term government bonds and as high as 9% per year on some AAA corporate bonds. Therefore, a portfolio combining these two types of investments would yield an average of 8% per year on invested capital. This would certainly be a reasonable discount rate to use in calculating the present value of future earnings. History would suggest that the average wage increases per year would be at least a full percentage point above the average yield on the two types of bonds or, specifically, greater than 9% per year. Actually, over the past year many wage contracts have exceeded 10% annual increases. I was amused recently by an article in the Wall Street Journal,[5] which suggested that wage demands would be moderate in the coming year, only 8 to 10 percent on an annual basis.

Thus, one can see that current conditions are quite consistent with the implications of the 30 year trend noted in Figure 1. This means that at present an economic expert could make a pretty good case for using a discount rate of 8% per year and an expected growth rate in future wages of 9 or 10% per year. But, it will be remembered, I said that I agreed with Dr. Carlson's conclusion that a reasonable approach to computing the present value of future earnings is to let the discount rate exactly offset any projected economy-wide wage increase. The reason is simple. In such situations it is better to err on the conservative side. It is easy to provide ample support for the more conservative computation and the damages, even by a conservative measure, will still likely be higher than the average jury will be willing to award.

[5]The article titled "Unions will stress Job-Security Issues; Moderate Settlements Are Seen Next Year," was published in the *Wall Street Journal*, December 16, 1976, p. 38.

An Example

Let's examine the implications of the discussion thus far through the use of an example. In order to facilitate comparisons let us use an example which is essentially the same as that used by Dr. Carlson. The situation was as follows. A thirty-two year old man is permanently and totally disabled by a wrongful act and will not be able to work for the remaining 31 years of his expected work life. If he had been able to work he would have earned $10,000 the next year. However, the disability has obviously deprived him of an opportunity to earn the $10,000 in income, and thus the immediate cost of the accident is easily recognized. The difficult question is how much future income will this man also lose because of the disability, and if the court desires to see him compensated for that loss, what is the present value of the total lost income? In other words, how much money should be awarded to the man now to compensate for loss of his remaining lifetime income? The procedure for making this computation was well described by Dr. Carlson, so it will not be reviewed again. However, it is important to understand the differences between the economic realities of the past and present, as compared with the conclusion that we should let the discount rate equal, and thus off-

Figure 2

Sensitivity analysis of present value of lost income due to disability using various discount factors and wage growth rates.

Wage Growth Rate	Discount Rate 7%	8%	9%	10%
7%	$310,000	$270,562	$238,048	$211,074
8%	$357,652	$310,000	$270,890	$238,596
9%	$414,900	$357,173	$310,000	$271,220
10%	$483,838	$413,741	$356,699	$310,000

set, projected economy-wide wage increases.

Figure 2 shows the results of computations of the present value of total lost income for the individual in the example, using various discount rates and growth rates in wages. Earlier it was indicated that at the present time an 8% discount rate would be appropriate. Furthermore, it was shown that a thirty year trend supported by current conditions would indicate a wage growth rate of 1% to 2% per year more than the discount rate. Figure 2 shows that the present value of future lost earnings for this individual, assuming a 9% per year growth in wages and using an 8% per year discount rate, is $357,173. Assuming a 10% growth in wages, using the same discount rate, this figure grows to $413,741. One of these two numbers most accurately reflects the actual present value of the disabled man's future wages. Will he be awarded that much in today's courtroom? It is not very likely. So in order to be conservative in the computation the expected growth rate in wages is set equal to the discount rate or 8% per year, and the courtroom testimony reports the present value of lost income to be $310,000 in this example. The award will likely be even less than this lower figure, and thus it is evident that the disabled man has not come very close to recovering his actual losses. However, it is the realities of courtroom practice which cause the economic expert to project the more conservative estimate of loss rather than economic conditions. Thus, the economic expert fails to report the full implications of long standing economic trends.

The question may arise, as it typically does in the courtroom, what if economic conditions change? Suppose the yields on the portfolio of bonds were to increase over the years to 10% per year. If that were to happen, wage increases would also tend to be larger just as they were in 1974 and 1975 when interest rates were higher than at present. The effect on the projections would be nil. As shown in Figure 2, when the economic expert takes the conservative approach suggested by Dr. Carlson, he would report to the court that an appropriate discount rate at that time would be 10% per year. Further, wage increases conservatively estimated will also be 10% per year. The results of his calculations would show a present value loss to the injured man equal to $310,000, precisely the same result as computed before. In fact, over time as economic conditions vary over a wide spectrum, as they have in the past thirty years, the results of the computation would always be the same — $10,000 per year × 31 years = $310,000. It must be recognized that this computation would be substantially modified in instances where career path growth in wages is anticipated. In such a situation the actual growth in wages will be greater than economy-wide wage increases resulting in a larger loss to the plaintiff.

In summary, there is practical wisdom in using the approach suggested by Dr. Carlson; that is, to let the discount rate in the present value calculations equal and thus offset the economy-wide wage increases. This approach does, in fact, underestimate the actual loss incurred by an injured party based on past and present economic trends. However, as a conservative estimate, it is more in line with the view of justice which is meted out by the courts at this time. In the future a more accurate projection of loss may be acceptable and, as changes in attitudes allow, the economic expert will respond in the direction presented above. □

Un-advertising Solutions to the Lawyer's Communications Gap

By **PATRICIA M. JOHNSON**

In view of the Bates and O'Steen *decision on the subject of lawyer advertising, lawyers may want to consider advertising techniques which have been used successfully, by some members of other professions. The author of the article which follows describes some of these techniques based upon her experience as a professional marketing consultant. She is not a lawyer and therefore expresses no legal opinion as to whether the communications methods discussed are permissible either under* Bates and O'Steen *or under amendments to the Code of Professional Responsibility relating to advertising now under consideration by the state Supreme Court.*

–Ed.

The distaste which many attorneys hold for the prospect of advertising their own services is seldom hidden. Few other subjects, it seems, can more readily produce a shudder from a lawyer than the suggestion of advertising legal services.

Editorialists responding to the Supreme Court's ruling in *Bates and O'Steen v. State Bar of Arizona* (June 27, 1977), permitting limited advertising, offer little comfort. These writers provide seemingly endless "examples" of attorney advertising. "We meet *all* price competition" or "free parking" or "no frills" or "Special summer rates on Wills"[1] are offered as promises of things to come.

Even more alarming than these examples is the extent to which they are accepted as plausible and representative. The heat generated by discussions of lawyer advertising fails to illuminate the facts that free will and choice do influence advertising. Indeed, control can be exercised by the person or firm which wishes to have advertisements prepared.

Any promotional tool paid for by a business firm is selected for its contribution to the firm's overall communications objectives. Whatever direction these tools follow in content and format depends on what the firm is trying to communicate, and to whom. It is certainly possible for

[1]Bailey, Philip. "*Argus* Will Help Lawyers Plan Advertising Programs." *The Argus.* July 8, 1977. p. 1.

these promotional materials to be tasteful, dignified, and even substantive.

Those which are not of this quality also tell us about the firm which paid for them. For instance, the signals given off by the "examples" of attorney advertising so eagerly offered by the editorialists are clear to me: any firm choosing to speak for itself in those ways has bad taste, bad judgment, and a disdain for the prospective client.

The Distractions of the Advertising Question

In the wake of the *Bates and O'Steen* decision, state and local bar associations have become engrossed in debate about procedural questions. Guidelines as to the permissible scope of lawyer advertising are being formulated: what can be advertised, where, how, how often, etc.

Aside from the question as to whether any or all of these guidelines may be maintained constitutionally, the major drawback of this entire advertising debate has been its success in diverting attention from the fundamental issue facing every attorney. There is a *vast communications gap between the attorney and the public.* No widespread understanding exists concerning the situations in which legal advice can be helpful, or the benefits which an attorney's work offers. Consider these symptoms:

—The public's recognition of matters in which legal advice is needed is not very high. The "Survey of Legal Needs" showed that in only 3 of 29 major categories of disputes or damage have a majority of persons sought help from an attorney. (The 3 categories are drawing wills, alimony problems, and child support and custody difficulties.)[2]

—Bank trust officers, realtors, escrow and title companies, professional labor negotiators, accountants, do-it-yourself divorce kits, *et al,* are servicing client needs in matters formerly served by attorneys.[3]

[2]"Excerpts from the 'Survey of Legal Needs.' " *Trial Magazine.* June 1976. p. 22.

[3]This phenomenon has been noted by two recent writers for the *Bar News:* Bullitt, Stimson. "Lawyers Are *Not* A Plague!" *Washington State Bar News.* December, 1976. p. 35.

Palmer, Douglas Shaw. "Twilight of the Lawyer in Washington State." *Washington State Bar News.* June 1977. pp. 31-36.

—"It is generally conceded that at least 70% or some 140,000,000 people in this nation do not have access to legal services, and there is some question about an additional 40,000,000."[4]

One of the results of this communications gap is that the legal needs of many persons remain unmet. Ironically, this is being accompanied by a dramatic increase in the numbers and per capita incidence of attorneys.

Overcoming the Communications Gap

Certainly, no single law practice can seek to overcome this total communications gap. On the other hand, a general educational and informational program (such as "institutional advertising" conducted by state and local bar associations) may only succeed in sending persons with legal needs to the "wrong" law firm: a small businessperson may appear at the doorstep of a corporate law practice. This can cause some uneasiness for both parties as the firm tries to steer away a client who is "inappropriate" because of the simplicity of his legal needs.

A solution to this dilemma is available, and could help to provide a better match between the client and the law practice. This solution simply assumes that *the attorney will take the initiative for communicating.*

The attorney would volunteer information explaining the types of legal problems and clients which he serves. This information would be available so that individuals could determine for themselves whether they should seek legal counsel, and which firms seem appropriate for them to approach.

Justice Blackmun discussed the merits of this approach in the majority opinion in *Bates and O'Steen.*

> Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and this performs an indispensable role in the allocation of resources in a free-enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision-making.[5]

Un-advertising Tools Used By Other Professionals

The un-advertising tools available to attorneys and other professionals are numerous. The ones you choose to use will depend on what you are trying to communicate, and to whom. Consider these examples of communications approaches from other professions.

Newsletters

Some prepaid medical plans publish monthly newsletters for their members. This helps to inform their subscribers not only about various medical topics or illness prevention techniques, but also regarding administrative policies of the group practice as well.

Although you may not wish to publish monthly, there probably is general information which your clientele could receive and, more importantly, would appreciate knowing about.

For example, a checklist could be provided to

[4]Campbell, John Harl. "The Unfortunate Compromises of Reform, and How We Drove Them To It — A Look at the Present Crisis in the Delivery of Legal Services." *Forum.* Fall, 1975.

Patricia M. Johnson, a graduate of Whitman College and a former Trust Marketing Officer at Seattle-First National Bank, established *Market Planning for Professionals* in Seattle in early 1976. The firm specializes in meeting the strategic planning and promotional needs of professional organizations and services.

[5]Justice Blackmun's remarks were noted in another article: Nash, Ernest. "The Bar's Niggardly Approach to Lawyer Ads." Seattle *Times.* June 29, 1977. p. A 12.

help them determine when they should seek legal advise about a particular topic: "How to tell when you need a Will (or a new Will)" or, "Your legal rights in seeking credit," or whatever.

Explanatory Brochures

Many professionals, from architects and engineers to financial consultants, are already preparing materials which summarize their talents and experience. Formats range from photo-copies of typewritten information to rather elaborate full-color brochures. Whatever the format, *it is the content which is important.*

A common characteristic of the best of these publications is an *explanation of the benefits to the client* of that professional's services.

These brochures also serve to give the prospective client some background knowledge. This lets him ask better questions and to more readily understand how you will be helping him. Such information can also increase the client's understanding of the scope of work which his fee is supporting.

Such explanatory brochures can be available at your office, or possibly even mailed to individuals whom you know to have an interest in a particular aspect of your service.

Slide Presentations/Visual Aids

This may strike you at first as a little flamboyant, but consider its educational advantages. An opthalmologist, for instance, presents a brief slide show to each of his patients which relates good nutrition and regular exercise to better health and thus better vision. Because opthalmologists are also MD's, the overall health of the patient is a legitimate concern of this doctor. He is reminding his patients of the full scope of his expertise, while providing some useful information for them.

What can you describe for your clients which can help them help themselves? Could the communication of that information be improved with illustrations, charts, or graphs?

Print Advertising in Other Professions

Finally, there it is: advertising. *Bates and O'Steen* contemplates the purchase of space in a newspaper or magazine to help a firm communicate with its prospective clients.

We are not talking here about the back cover of

Time Magazine or a full page in *The Wall Street Journal*. Print media offer excellent opportunities for great selectivity in reaching your prospective clients.

Consider, for instance, the architectural firm which ran a partial-page ad in an "in-flight" magazine (the ones that are handed out on airliners) about their skills at designing vacation homes.[6] Even though they do many other design projects, in this case they selected one of their strengths and acted upon it. These architects were able to reach persons highly likely to be good prospects for their services because they knew what they had to say, and who they were trying to serve.

Communication Initiatives from the Legal Profession

The solution to the communications gap of the legal profession, just as the solution to many other issues, must come from the actions of individuals. Certainly each attorney has the analytical skills to plan a coordinated communications program relevant to his practice and his clients. And the array of communications tools insures that each attorney can tailor the descriptions of his services to his own tastes and style.

The educational and informational function that such communications offer can significantly expand the accessibility of legal services. Those persons who can most benefit from legal advice, but do not now know that, would have an opportunity to recognize their legal needs and to seek counsel.

Bates and O'Steen should not, I believe, drag the practicing attorney to Madison Avenue, kicking and screaming. But it does signal *the need for more information from and about attorneys.*

Those firms which recognize this ruling as an opportunity instead of a threat should move as rapidly as possible to overcome this unnecessary communications gap between the bar and the public.

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[6]The American Institute of Architects is a voluntary professional association for licensed architects; the individual states are the licensing agent. While the AIA Code of Ethics does not approve of advertising by its members, advertising is not prohibited by the state. Thus, because the architects referred to who advertised do not belong to the AIA, they did not "break any rules" by advertising. □

SOURCES OF DISCIPLINARY LAW

By **KURT M. BULMER**
General Counsel, WSBA

Many attorneys have no contact with the disciplinary system until a complaint is filed against them. At that time they find themselves without any knowledge about how the system works, what rules apply and where to find necessary information. The following is, therefore, a brief outline of the various sources of the law in discipline cases.

The Code of Professional Responsibility (CPR) — This is the primary source of the professional standards which an attorney must maintain. The CPR was adopted in 1972 and replaced the previous standards, the Canons of Ethics. As a Supreme Court rule the CPR has the force of law as to attorneys. These rules consist of a hierarchy of canons, ethical considerations and disciplinary rules. The canons are "statements of axiomatic norms"; the ethical considerations are "aspirational . . . objectives"; and the discipline rules set forth a "minimum level of conduct below which no attorney can fall without being subject to disciplinary action." An attorney seeking guidance as to whether conduct is proper should first check the CPR as it includes most of the basic rules established by the court.

Discipline Rules for Attorneys (DRA) — This set of rules contains primarily the procedures under which disciplinary matters are to be reviewed and heard as well as the requirements to be met after discipline has been imposed. The rules also provide for additional requirements beyond the CPR, which an attorney must meet or else face potential discipline. These requirements include sanctions for practicing with a disbarred attorney, violating the oath of attorney, failing to respond to an inquiry from the Disciplinary Board and other matters covering attorney conduct. Primarily, however, the rules provide for how complaints are filed, the structure of the reviewing committees and boards, the time periods involved, the appeals mechanism and the type, nature and administration of actual discipline.

Admission to Practice Rule (APR) — These rules provide how a person will be admitted to the practice of law, who can practice law and under what circumstances attorneys may continue to practice law in the State of Washington. A recent addition to these rules are the Continuing Legal Education requirements. These rules also provide for exceptions (such as Rule 9 Interns, indigent representation, and attorneys admitted for education purposes) from the otherwise mandatory rule that all persons practicing law in the State of Washington must take the bar examination.

Ethics Opinions — These opinions are drafted pursuant to requests submitted to a committee appointed by the Board of Governors. A similar committee exists in connection with the American Bar Association. The opinions stand as the committee or bar association's interpretation of the applicable rule, however, since they are not adopted by the Supreme Court they are not formally binding upon either that court or the Disciplinary Board. Ethics opinions are primarily secondary authorities but it would appear that in Washington, at least, no attorney has been disciplined who relied in good faith upon such an opinion.

Washington State Bar Act — While in large part superceded by Supreme Court Rules and case law the State Bar Act still covers some aspects of the nature of an attorney's practice. This includes the mandatory requirement of paying dues, residency within the State of Washington to practice law and restrictions upon who can generally practice law within the State of Washington.

Case Law — There are approximately 260 cases in the State of Washington dealing with disciplinary violations and attorney professional responsibility. There are a large number of additional cases covering civil litigation between lawyers and their clients on such subjects as fees, malpractice and standards of representation. These cases provide a great deal of guidance to an attorney on a wide variety of circumstances and deal with both specific situations as well as general principles which the court and the Disciplinary Board are guided by when considering disciplinary action against an attorney.

Oath of Attorney — The Discipline Rules for Attorneys specifically provide that a violation of the oath of attorney shall serve as grounds for disciplinary action. While the oath of attorney contains some clauses of a generalized nature it also contains specific reference to maintaining respect of the courts, misleading the court and jury, failure to properly maintain an action or the bringing of an improper defense as well as covering the attorney-client privilege and the acceptance of compensation without a client's knowledge. Disciplinary actions have been brought charging primarily violations of the oath of attorney and those actions have been sustained.

These seven sources are the primary areas from which disciplinary law is drawn. Not all of these sources fit neatly together to provide a consistent pattern since they represent a collection of thought and policy on this area covering 90-100 years of legal development. However, the attorney who faces a decision as to whether conduct is potentially improper or who faces a disciplinary action can, through these sources, gain the basic knowledge upon which the final decision can be based. □

All you need to know about Professional Liability insurance.

A program of professional liability insurance for Washington attorneys, underwritten by the American Bankers Insurance Company of Florida, is available through three authorized brokerage firms. One of them is Alexander & Alexander.

Professional liability insurance is a highly specialized form of coverage, usually hard to get and often costly. But since Alexander & Alexander is the oldest and largest brokerage firm in the nation with expertise in this important coverage, we can make it easier for you to get the protection you need.

Is there anything else you need to know?

Alexander & Alexander

For further information, call or write Harrison P. Sargent, C.P.C.U., Alexander & Alexander, Inc.; IBM Building, Seattle, WA, 98101; Telephone: (206) 623-7070.

Our Professional Liability Plan has received the endorsement of the state bar associations in New York, Virginia, Ohio, Texas, Wisconsin, Mississippi, Utah, District of Columbia, Montana, Nebraska, Pennsylvannia, West Virginia and others.

BOARD APPROVES STRICT ADVERTISING RULE, REJECTS SELF-DESIGNATION OF SPECIALTIES

Rule Is More Restrictive Than ABA-Approved Plan

Certified Specialties Approved In Five Areas of Practice

By **JAY V. WHITE**

SUN VALLEY, IDAHO, August 18-20 — The Board of Governors unanimously has approved a proposed advertising rule which generally is more restrictive than the "regulatory" draft recommended by the American Bar Association House of Delegates at the Chicago ABA convention in early August.

The proposal has been submitted to the state Supreme Court for final action.

The most conspicuous difference between the contemplated Washington rule and that offered by the ABA is that the former prohibits all broadcast advertising. The ABA rule bans television advertising, but permits radio advertising subject

Edward J. Novack Elected WSBA PRESIDENT, 1977-78

Combine a precise legal mind with a genial personality and you've described Ed Novack, newly-elected president of the Washington State Bar Association.

Edward J. Novack, an Everett attorney and member of the State Bar for 24 years, is a partner in the seven member firm of Williams, Novack & Hansen, P.S.

Ed was born in 1926 in Red Lodge, Montana and was raised in the Black Diamond/ Ravensdale area of Washington.

Leadership is a way of life for this multifaceted man. After completing high school, he was graduated at the head of his Navy electronics class and assigned to sea duty in the Pacific. Upon his discharge in 1946, he enrolled in the University of Washington and was graduated with a B.S. in electrical engineering, summa cum laude. He then graduated at the head of his U.W. Law School class in 1953. Ed joined Parker Williams to form a partnership in Everett in 1953.

Long active in the affairs of the Bar, Ed was a member of the Board of Governors, 1971-74. He is known for incisive, balanced thinking in both law practice and Bar activities, and we look forward to his leadership over the next 12 months.

to restrictions comparable to those established for advertising in "print media." The Board's action to ban radio advertising came in a 5-4 vote.

A more subtle restriction in the proposed rule, in contrast to the ABA draft, is reflected in the procedure established for a lawyer to apply for expansion of the scope of permissible advertising. The ABA draft provides that, in addition to the applicant, representatives of lawyers and consumers "shall be heard" on the merits of the applicant's proposal. The proposed Washington rule affords an in person hearing for the applicant before the Code of Professional Responsibility Committee, but makes it a matter of the Committee's discretion "to hear such other persons as it deems appropriate."

Both the ABA and Washington proposals prohibit a lawyer from holding himself out as a "specialist" unless certified as such by the appropriate authority, but the Washington provision is more explicit. Moreover, the Washington rule may be regarded as more "liberal" than the ABA draft in that it contemplates the certification of specialties beyond the fields of admiralty, trademark and patent law which are the only areas recognized by the ABA "where a holding out as a specialist historically has been permitted."

In this connection, the Board revised the proposed plan of legal specialization in this state to prohibit self-designation of specialties, and voted to forward the plan to the state Supreme Court with the recommendation that it be adopted by court rule. At the same time, the Board instructed the Legal Specialization Committee to draft procedures for the certification of specialties in five areas of practice: patent, trademark and copyright; admiralty; taxation; labor; and workman's compensation.

The Board rejected a proposal to approve criminal law as a specialty.

The single area in which the Washington rule clearly appears to offer greater flexibility than the ABA proposal involves the authorization given to advertise areas of practice or the fact that practice is limited to certain fields. The ABA proposal would limit such advertising to expressly authorized definitions and designations. In a 7-3 vote, the Board and President Richard H. Riddell rejected this "words of art" approach.

Further details on advertising below.

The Board's meeting was extended by one day to accommodate a "long range planning session" participated in by former bar Presidents Cleary S. Cone of Ellensburg; Robert S. Day of Pasco; and Kenneth P. Short of Seattle. A court reporter was present during this session and, upon receipt of the transcript, a summary will be published in a future issue of the *Bar News.*

In addition to the subject of lawyer advertising, the Board's meeting was marked by discussion of the Army's proposed Extended Legal Assistance Program (ELAP) at Fort Lewis; malpractice insurance; and the bar's credit union project. *Details below.* The Board's Saturday session was devoted almost entirely to reports from the two committees which have been studying the performance of minority applicants taking the bar exam. *See separate story in Box, p.*

Meeting with the Board were incoming President Edward J. Novack of Everett; Board Members-elect Charles W. Cone of Wenatchee, David A. Welts of Mount Vernon, and Lowell K. Halverson of Seattle; incoming Young Lawyers Section President Kenneth B. Rice of Everett who will meet with the Board as an ex officio member, succeeding Robert W. Burns of Spokane; and Paul M. Silver, representing the Seattle-King County Bar Association Young Lawyers Section.

Background:
ABA Proposals on Advertising

The ABA Board of Governors appointed the Task Force on Lawyer Advertising, just 20 days before the decision in *Bates and O'Steen v. State Bar of Arizona* (June 27, 1977). *For a summary of the Bates opinion, see* "Board Adopts Restrictive Philosophy on Regulation of Lawyer Advertising," *Bar News,* August/September, 1977, pp. 21-26. The ABA Task Force submitted two drafts of advertising-related amendments to the Code of Professional Responsibility — known as "Proposal A" and "Proposal B" — to the ABA House of Delegates which, on August 10, 1977, approved the adoption of "Proposal A." For a report on this subject by one of this state's ABA delegates, see "ABA Recommends Advertising Amendments for CPR," in the November issue of the *Bar News.*

In this state, at the Board's July 15-16 meeting, President Riddell appointed Board Members Betty B. Fletcher (chairperson), Paul R. Cressman and Willard H. Walker as a subcommittee to recommend to the Board CPR amendments on lawyer advertising. This subcommittee recommended the adoption of the ABA's "Proposal A."

"Proposal A," described by the ABA Task Force as "regulatory," generally is regarded as a more restrictive approach to lawyer advertising than "Proposal B," which the Task Force termed "directive."

"Proposal A" defines what sort of advertising is permissible and presumably prohibits anything else. "Proposal B" defines elements of impermissible advertising deemed "false, fraudulant, misleading or deceptive," and presumably permits anything else.

"Proposal A" permits the advertising of "name, rank and serial number" information: name, address, telephone number, fields of practice, date and place of birth, date and place of admission to the bar of state and federal courts, schools attended, public offices, military service, legal authorships and teaching positions, bar as-

sociation and other professional memberships and licenses, foreign language ability, bank references, clients names (with their consent), etc. Regarding fees, "Proposal A" permits advertising of credit card acceptance, the fee for initial consultation, availability of fee schedules or estimates, contingent fee rates, range of fees for services, hourly rate, and fixed fees for specific legal services — all subject to various conditions. "Proposal A" retains many of the present CPR provisions which limit the public identification of a lawyer as such, including rules relating to the use of office signs, letterhead and business cards.

In contrast, "Proposal B" does not present a list of permissible items to be advertised, and it eliminates many of the "anti-advertising" aspects of the present CPR, including those governing office signs, letterhead and business cards. "Proposal B" simply proscribes anything "false, fraudulent, misleading or deceptive." "Proposal B" limits fee information in much the same way as does "Proposal A" and, in this area, is more restrictive than "Proposal A" because it implicitly prohibits the advertising of fixed fees for specific legal services.

Neither ABA proposal would permit in person solicitation, but both permit radio advertising, deferring the matter of television advertising to the states. *For the ABA Task Force's statement on this subject, see Box.*

Board Action: Advertising and Specialization

Board Member Fletcher, as chairman of the subcommittee on advertising, opened the discussion by reporting the committee's view that in the interest of uniformity with the ABA and other states, the ABA's "Proposal A" should be adopted. She described the proposal as one offering "commonsense guidelines to lawyers, and most lawyers who want to advertise will be able

ABA TASK FORCE POSITION ON BROADCAST ADVERTISING

In this state, the bar association's Board of Governors has voted not to permit any broadcast lawyer advertising, including both television (8-1) and radio (5-4). In contrast, both ABA proposals on advertising would permit radio advertising, and they defer the matter of television advertising to individual states. In its report to the ABA Board of Governors, the Task Force stated:

"Both proposals refer the question of television advertising to the states. Upon consideration of the testimony of several witnesses at the Open Hearing and a review of the Constitutional considerations involved, the Task Force concludes that certain radio advertising should be permitted now and television advertising should be permitted if, as the Task Force has been assured, safeguards can be developed that will effectively regulate such advertising. However, the Task Force recognizes that it has not had sufficient time and does not have sufficient expertise to identify or fully evaluate all the problems involved or to develop appropriate proposed regulations. The Supreme Court itself recognized that certain electronic advertising might offer special problems. Some observers suggest that print and radio advertising will provide a substantial measure of legal service information needed by the public, and fear that advertising by television may be apt to emphasize style or substance. On the other hand, it appears that even a temporary prohibition against the use of all electronic media might preclude communication to a large segment of the population who are only marginally literate or who do not normally read print media, but who are exposed to electronic medial regularly."

On the last point, the Task Force offered this footnote: "A 1975 report by the Department of Health, Education and Welfare indicates that approximately one-fifth of the adults in this nation are functionally incompetent in basic skills, including reading skills. A 1976 Roper survey indicates that a large majority of the American public obtain information about current affairs from radio and television, rather than newspapers."

to say most things they want to say."

She expressed concern over possible constitutional problems with "Proposal A," but stated that her committee's "mandate of this Board was to allow only those things we're sure must be allowed." She stated, for example, that the prohibition against television advertising may be an approach which is "too formalized and too narrow" in view of the high rate of functional illiteracy among adults in this country.

Fletcher concluded that although there was some likelihood that this or another bar association may be sued and will have to risk the cost of defending the proposed rule, but that the rule "on balance presents a fairly good set of guidelines for lawyers."

Board Member Walker, a member of the advertising subcommittee, also commented on the potential for litigation challenging the advertising rules. "You have to accept the fact you'll be sued," he said. "It is difficult to predict the context and cost of defense of any lawsuits in this area unless we hold off until precedents are established."

"Our alternative is to do nothing," he added.

Board Member Michael J. Hemovich inquired as to the subcommittee's position on "doing nothing" about advertising.

Board Member Paul R. Cressman, the third member of the advertising subcommittee, expressed the view that it would be "a dangerous position to do nothing." He said that the Board should act to prevent in person solicitation and deceptive advertising.

"We owe it to the profession to give guidelines," he said. Regarding possible legal challenges, Cressman stated that he thought legal damages likely would be "nominal," and that the "cost of defense is small in proporation to the damage which would result from doing nothing."

Walker commented: "We have to recognize that we are not able to predict the effect of advertising on the profession. Anything we do will be partly wrong."

Hemovich, seconded by Board Member Robert H. Peterson, moved that the Board adopt the ABA "Proposal A."

In the ensuing discussion, the Board's attention was focused upon the language in "proposal

A'' [DR 2-101 (b) (2)] permitting a lawyer to publish:

> ''One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105.''

The relevant provisions of DR 2-105 contained in ''Proposal A'' provide:

> ''(2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].
> ''(3) A lawyer who is certified as a specialist in a particular field of law or law practice by [the authority having jurisdiction under state law over the subject of specialization by lawyers] may hold himself out as such, but only in accordance with the rules prescribed by that authority.''

Regarding these provisions, President Riddell observed that if the Board adopted ''Proposal A,'' then ''this bar must grasp the specialization issue.''

No Self-Designation of Specialties

The Board reviewed the ''Plan for Legal Specialization'' which the Legal Specialization Board twice previously has recommended for adoption. The plan involves ''two tiers'' of self-designation and certification of specialists. In August, 1976, the Board approved the plan in principle by a one-vote margin, but declined to implement it. In January of this year, the Board reconsidered the matter, but tabled it pending the *Bates* decision, again by a one-vote margin.

On this occasion, the Board made major changes in the specialization plan. Although the final text of these amendments is not available at this writing, the Board action may be summarized as follows:

- No self-designation of specialties will be permitted, but the bar will move toward certification of specialties.
- The Board approves the creation of specialties in five areas of practice: patent, trademark and copyright; admiralty; taxation; labor and workman's compensation. A motion to add criminal law failed for want of a second. Other specialties may be approved as presented by individual sections.
- No ''grandfathering'' of specialists will be permitted, but a minimum of three years' practice in a field will be required before certification.
- A certified specialist may advertise his status to the extent permitted by the CPR.
- The specialization plan should be established by Supreme Court rule.

Generally, the Board's voting on the specialization was either unanimous or 8-1.

Having thus outlined a plan to certify specialists, the Board amended the ABA's ''Proposal A'' relating to advertising to remove any notion that a ''law firm,'' as distinguished from an individual lawyer, could be a ''specialist,'' and to

make the prohibition against holding oneself out as a specialist, absent certification, more explicit. Accordingly, under the proposed Washington rule, DR 2-101 provides in relevant part that a lawyer may publish:

> "To the extent authorized under DR 2-105, a statement that the lawyer specializes in a particular field of law practice. Absent such authorization, a lawyer may not hold himself or herself out as a specialist or as specializing in any field of law."

The Board also amended the applicable portion of DR 2-105 so that the proposed Washington rule states:

> "A lawyer who is certified as a specialist in a particular field of law or law practice pursuant to legal specialization rules and regulations promulgated by the Supreme Court may hold himself out as such, but only in accordance with the rules and regulations prescribed by that authority."

No "Words of Art"

The Board discussed whether to retain the language in "Proposal A" (quoted above) permitting a lawyer to advertise areas of practice or the fact that practice is limited to certain fields but only through use of authorized definitions and designations.

Board Member Robert R. Redman, seconded by Hemovich, moved that "practices in" and "practice limited to" be adopted as terms of art and that no other definitions or designations be either adopted or accepted to describe a lawyer's practice.

Board Member David D. Hoff argued that such a move would result in "unnecessary nitpicking," and that lawyers should be left free to use any nondeceptive characterization of their practice. Walker disagreed, arguing that inasmuch as the Board in effect had made "specialist" or "specializing in" words of art reserved to the certified specialist, it would be inconsistent to permit a lawyer to use a phrase such as "concentrating in" to describe areas of practice.

The question was called for and the motion lost, 3-7, with Redman, Hemovich and Walker voting in favor. Accordingly, the proposed Washington rule, in contrast to the ABA's "Proposal A," prescribes no words of art, but simply provides that a lawyer may advertise:

> "One or more fields of law in which the lawyer or law firm practices or a statement that practice is limited to one or more fields of law."

No Radio or Television

Board Member Walker raised the question of broadcast advertising, noting that "Proposal A" permits radio advertising but leaves it to individual states to provide for television advertising. He moved, seconded by Hemovich, that no rule be adopted permitting the use of television advertising.

Board Member Fletcher stated that she could see little distinction between television and radio, but had accepted the ABA proposal limiting broadcast advertising to radio in the interest of uniformity. She stressed that television advertising may be necessary to reach a large segment of the public. She proved to be the only dissenting vote. The Board voted 8-1 to prohibit television advertising, but Walker accepted an

amendment to his motion referring the question to the advertising subcommittee for further study.

Walker then offered a similar motion directed at radio advertising, suggesting that such advertising also should be studied further before implementation. Jones and Cressman argued against the motion in the interest of uniformity with the ABA proposal. Fletcher argued that prohibition of all broadcast advertising would subject the bar association to litigation on the subject.

The motion carried 5-4, with Cressman, Fletcher, Hoff and Board Member Bradley T. Jones opposed. Thus, in contrast to the ABA's "Proposal A," the proposed Washington rule on advertising operates to prohibit all broadcast advertising.

Finally, the Board unanimously voted to adopt the ABA's "Proposal A" as amended and directed the advertising subcommittee to prepare a final draft reflecting the Board's action and forward it to the state Supreme Court for approval.

Army Lawyers: ELAP

Capt. Steven J. Mura, a Washington lawyer serving with the Office of the Staff Judge Advocate at Fort Lewis, met with the Board to report the continued opposition of the local bar, notably the Young Lawyers Section of the Tacoma-Pierce County Bar Association, to establishment of an Extended Legal Assistance Program (ELAP) to provide free legal services to "indigent" soldiers. *See* Bar News, July, 1977, p. 21.

Although the military lawyers may offer this service either under APR 7B or to the extent individual lawyers are admitted in this state, Army policy requires express approval of the Board of Governors.

Board Member Robert H. Peterson of Tacoma argued that the Board should deny the Army's request and ask the local Young Lawyers Section to establish a referral panel to provide legal assistance to soldiers. Board Member Charles Olson, seconded by Peterson, moved to defer action for 8 months pending the response of the local bar.

Board Member David D. Hoff, arguing that the local bar has already had ample time to solve the problem, moved (seconded by Fletcher) to grant the Army's request on a trial basis for 13 months. The motion was defeated 3-5, Hoff, Fletcher and Jones in favor, and Redman not voting due to

temporary absence from the meeting.

Thereupon, Cressman, seconded by Hemovich, moved that the local bar be given 90 days to set up a lawyer referral panel and establish that it was serving the need identified by the Army lawyers. This motion carried 7-1, with Walker opposed and Redman absent.

Malpractice Questionnaire

Board Member Redman, as chairman of the Attorneys Professional Insurance Committee, presented the final draft of a questionnaire to be submitted to all members of the bar seeking information deemed by the Committee to be essential to any possible bar-sponsored self-insurance plan.

The Board voted 8-1 (Walker opposed) to recommend that the Supreme Court order every Washington lawyer to complete the questionnaire within 90 days or face suspension from practice.

The Board unanimously adopted the questionnaire and agreed to seek the membership's approval at the Annual Business Meeting in September.

Credit Union Project

Robert S. Day of Pasco, as president of the bar association's Federal Credit Union Board of Directors, reported that the bar's application for a federal charter had been approved but would lapse within 90days of approval unless action was taken to implement the credit union. He reported that, due to a change in federal policy, employees of lawyers would not be eligible for credit union membership. In contrast, he noted that the state apparently has reversed its former policy excluding such employees.

Accordingly, the Board unanimously (Jones abstaining) moved to permit the federal charter to lapse and to apply for a state charter so that employees would be eligible to join the bar association's credit union. ☐

Waiting for Bakke

Board Receives Bar Exam Reports, Defers Commitment to Minorities

By **JAY V. WHITE**

The Board of Governors has received two reports — both termed "excellent" by Board consensus — from two committees appointed to identify causes and recommend solutions for the low pass rate among minority applicants taking the bar exam, particularly those graduating from the University of Washington School of Law prior to this year.

One committee, chaired by G. Keith Grim of Seattle, studied bar examination procedures. The other, chaired by Thomas S. Zilly of Seattle, with the full cooperation of the University of Washington law school, reviewed the Special Admissions Program at the law school and made recommendations designed to improve the performance of minority applicants to the bar. The primary conclusions and recommendations of these committees were summarized by President Richard H. Riddell in "The President's Corner," *Bar News,* August/ September, 1977.

A detailed review and analysis of these committee reports will be published in a future issue of the *Bar News.*

Following extended discussion, the Board rejected 7-2 a motion by Board Member Betty B. Fletcher (seconded by Board Member Paul R. Cressman "to get it on the floor") that the Board constitute a permanent committee "committed to trying to encourage the admission of more minorities into the profession." Several Board members expressed support for Fletcher's motion, but indicated they deemed it premature for the Board to make any commitment — particularly financial commitment — to the recruitment of minorities into the bar. Cressman abstained from the vote.

The primary reason given for deferring action to implement any of the committee recommendations is the pending review by the United States Supreme Court of *Bakke v. Regents of University of California,* 553 P. 2d 1152 (1976) in which the California Supreme Court (6-1) ordered the admission of Allan Bakke, a white applicant to the University's medical school. The court concluded Bakke was twice denied such admission because of the existence of a special admissions program which reserved 16 places in the entering class for minority applicants less qualified for admission than Bakke. The case presents the "reverse discrimination" issue deemed moot in *De Funis v. Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L. Ed. 2d 164 (1974).

A secondary reason for delay was the feeling on the part of some Board members that no action should be taken until the response of the University of Washington law school to the Zilly Committee report is known. The Board unanimously voted to forward the Zilly report to the state's law schools and interested minority representatives for comment.

By voice vote, the Board accepted and approved the Grim Committee report which substantially approves past and present bar examination procedures. In a related vote, the Board authorized publication of the text of past bar examination questions as an aid to applicants.

Briefly Noted

Seattle Attorney Elected to Third Term as Treasurer of American Bar Association

J. David Andrews, Seattle, has been elected to a third term as treasurer of the 218,000-member American Bar Association.

Andrews is a partner in the Seattle law firm of Perkins, Coie, Stone, Olsen and Williams. He has long been active in city and state bar work, served in the ABA's House of Delegates from 1967 to 1969 and became assistant treasurer in 1973, a post he held until moving up to treasurer in 1975. He is on the ABA's 22-member Board of Governors, which acts for the House when it is not in session.

Also active in civic and community affairs, Andrews is vice president of the Cornish Institute and a member of the University of Puget Sound Law School Board of Visitors.

King County Superior Court Filing Fee Increase

Attorneys and others using superior court services are advised that there will be an increase in filing fees, effective September 21, 1977, as a result of the legislature's passage of Chapt. 107, Laws of 1977 (SB-2196).

The following services have been raised from thirty-two dollars to forty-five dollars: (1) filing the first or initial paper in any civil action, including an action for restitution, or change of name; (2) filing the first or initial paper on an appeal from justice court or on any civil appeal; (3) instituting probate proceedings; and, (4) filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected.

Program for Divorced Fathers Offered by the Seattle YMCA

Divorced men seeking closer, warmer relationships with their children are being offered a new program by the YMCA of Greater Seattle.

The purpose of the program is to help divorced men to learn new skills and continue being effective fathers for their children.

The program will run for eight weeks beginning in October 1977 and will be offered in Seattle and on the East Side.

For more information call Fred Niederman, at (206) 447-4551.

Alcohol and the Law What You Can Do

A comprehensive one day seminar for the legal profession entitled "Alcoholism — A Major Legal Problem" is planned for Friday, October 14, 1977 in Spokane, Washington at the Sheraton Hotel. Application for CLE credits has been made to the Washington State Bar Association.

Featured speakers include: Honorable David N. Bates, a recovered alcoholic and Judge of the District Court of the State of Maryland. Judge Bates has been instrumental in establishing a variety of programs for helping the person with an alcohol problem who is also having legal problems. His talk will discuss the court as an agent of change as they relate to alcoholism.

The seminar is co-sponsored by Raleigh Hills Hospital and the Washington State Council on Alcoholism and will cover the major ramifications on alcoholism and the law.

Washington Women Lawyers

Washington Women Lawyers, a statewide organization of over 100 women attorneys and law students, has elected its first slate of officers. Jane Noland, an associate with the law firm of Perkins, Coie, Stone, Olsen and Williams and a graduate of the University of Puget Sound Law School, was elected President. Nancy Miller, an associate with the firm of Jones, Grey and Bayley and a graduate of the University of Washington Law School, was elected Secretary-Treasurer. Both Ms. Noland and Ms. Miller are residents of Seattle.

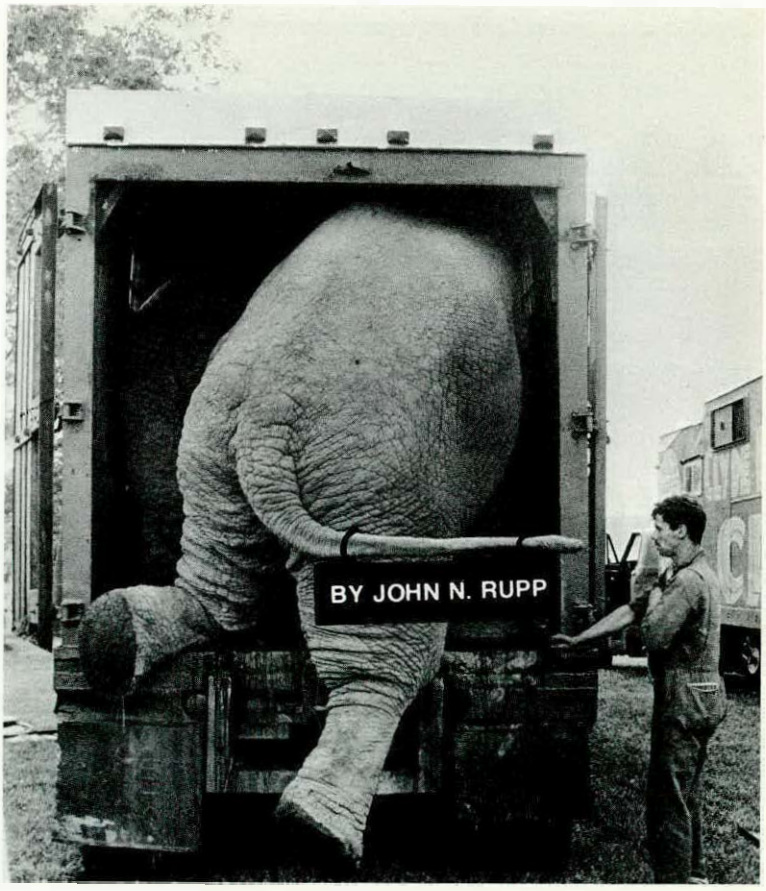
Washington Women Lawyers holds noon meetings in Seattle on the first Tuesday of every month in a central downtown location. Contact Nancy Miller at 624-0900 for membership information.

In Memoriam

Gerald L. Bangs, 42, of Seattle, died Aug. 7. He was admitted to the Bar in 1959.

Senator Frank J. Woody, 40, of Mt. Lake Terrace, died July 25. He was admitted to the Bar in 1960.

On Making An End



A recent incident caused me to reflect on the remarkable difficulty that many of us have in bringing a brief or an argument, or, indeed, almost any speech or written statement, to an appropriate conclusion.

The incident was that, at the start of his argument before an appellate court, counsel asked to be informed when he had two minutes left of his allotted time. When the time came and he was so informed, he paused, shuffled his notes, said, "In conclusion, your honors, . . ." and then told the court the same things that he had already told it. Finally he said, "Thank you, your honors," and sat down.

What an ineffectual performance, I thought, and yet how many times have I heard the same sort of thing, and been guilty of it myself. And I got to wondering whether The Gettysburg Address would really have been improved if Lincoln had paused, looked at his watch and said:

> "And, in conclusion, my friends, may I say that I do hope that we here will highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.
>
> I thank you for your kind attention."

Let us deal first with this "Thank you" business, with a view to its eradication from arguments and speeches. It is hard to think of a situation where it is appropriate. Even in a speech it is superfluous, and more important, it is a distraction. Usually your appearance as a speaker is the result of an invitation, and, especially if your speech is a good one, the thanks should go the other way. (If you make a poor speech, thanking the audience won't help.) There may be occasions where you have volunteered, or have

thrust yourself on the audience, and believe that you should express your appreciation at having been allowed to come. In those situations your thanks should come at the beginning of your remarks, not at the end.

Thanking a court for listening to your argument is, however, completely out of place. Not only that, but some judges actively resent it. The only time you thank a court is when the court has extended you a courtesy. Courts don't want to be thanked for doing their duty. And the supreme gaucherie is to thank a judge for ruling your way — the judge ruled that way because it was right, not because he or she was being nice to you or your client. A gentle judge will merely raise eyebrows, a brusquer judge is likely to tell you to save your thanks.

I leave the "Thank you" aspect and move on to "In conclusion, your honors, . . ." as used near the end of an argument, and to its counterpart as used in a brief.

I think of the countless hours that have been spent in composing ringing perorations to arguments or in writing brilliant "CONCLUSIONs" in briefs. And I think of the correlative, namely the scant minutes that I suspect that judges spend on reading or listening to those carefully composed words and on the slight impact which I believe those final effusions have on the judicial mind. Think of your own experience — when you are listening to an argument or reading a brief, and counsel says, "Finally . . .," or when you come to a section headed "CONCLUSION," does not your mind sort of shift into overdrive and skip along to the end? How many times have you been swayed by a "CONCLUSION"?

Thinking back over all the classy Conclusions that I have composed over the years, I can remember only one that I think had any significant impact, and that one arose from a purely fortuitous circumstance. In that instance my opponent had called an expert witness named Magill. In his testimony Magill illustrated his major point by quoting a line from Milton: "They also serve who only stand and wait." The quotation was apt, and all might have been well for him except that counsel was, to say the least, hardly a student of English literature, and when he came to write his brief he alluded to "Mr. Magill's quotation

of that splendid line from Milton's great poem, 'Paradise Lost.' " Oh, boy! So I got to conclude my brief with a one-sentence paragraph to the effect that we were much moved by Mr. Magill's quoting Milton and were obliged to counsel for reminding us of it; that we were constrained to point out, however, that the line does not appear in "Paradise Lost" but rather in another poem by Milton — one with the remarkably appropriate title of "On His Blindness."

And I remember my father's telling me, "Well they may not remember anything else in your brief, but they'll remember that last paragraph." And they did.

Felicitous circumstances such as that occur only rarely, and, while they must be promptly seized and savored, one is seldom lucky enough to encounter them.

Most Conclusions, then, are pretty dull stuff. You can't very well put new material in a Conclusion, so what you usually do is compose what strike you as brief, hard-hitting sentences or paragraphs which sum up what you have already said. And I submit that if you have already said it well and said it right, there is no need for such a Conclusion. When you come to the end of what you want to say, stop. Even if you are one of those who think that your reader or auditor won't get it the first time and has to be told twice, you will have done that before you come to your Conclusion. So finish what you have to say and then stop.

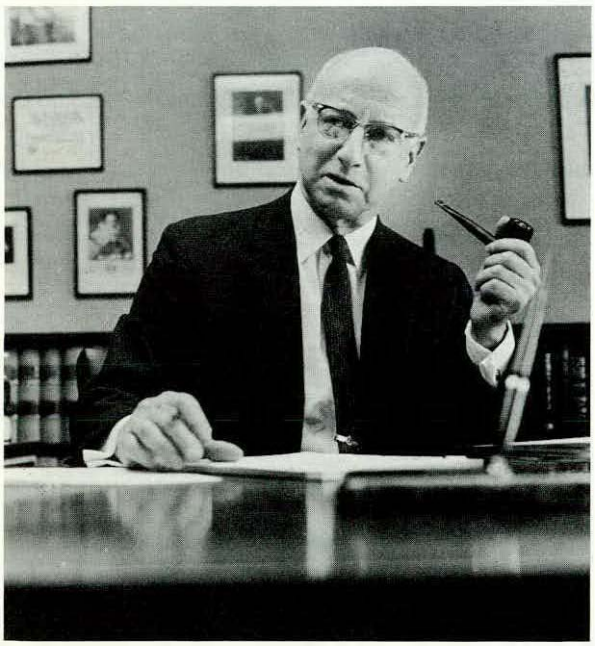
As an aside, I point out that in many court arguments, especially in appellate courts, you are strictly limited as to time. The fact, however, that you have, say, thirty minutes does not mean that you are required to take the whole thirty minutes. If you don't need the whole time, don't take it. I have never known a court to reprimand counsel for using less time than that allotted.

I do not suggest that you should not end on a high note. A well-composed argument or brief will very likely so end, and your last words may well, to borrow William Alexander Percy's elegant phrase, "hang in the heart like a star." But it should flow naturally from what you have said and should not be a dull distraction, dragged in at the end and proclaiming your inability to know when you have finished. One of my favorite examples of this proposition is the end of William Jennings Bryan's speech at Chicago in 1896:

> "You shall not press down upon the brow of labor this crown of thorns; you shall not crucify mankind upon a cross of gold."

Then he stopped and sat down. Observe that he did not introduce that sentence with "Finally," or "In conclusion . . ."; he did not thank the audience, and he did not congratulate the ladies of the Dorcas Society for the beautiful table decorations. He had finished and he stopped. And he got the Democratic nomination.

If, after all this, you are still unconvinced — if you believe that somehow the package is incomplete until you have tied the ribbon in a neat bow and stuck on a rosette — I can recommend a device related to me by Donald A. McDonald, late the bailiff of the Supreme Court of Washington. According to Don, there was an elderly lawyer who, when he had concluded his argument before that court, would pause, step back one pace, look up at the Chief Justice, and say: "I have spoken." □



John Rupp started practicing in 1937. In 1962 he left his partners in the Schweppe firm in Seattle to be Vice President and General Counsel to Pacific Northwest Bell. In August, 1974, he spent two weeks on jury duty, and though there may have been no relationship between the two events, he returned to the Schweppe firm less than a year later where he currently is putting in long, hard hours of work.

CLE Clearinghouse

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 presented 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 State 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 in computing credits.

ACCREDITED SPONSORS

SMU-CLE
Southern Methodist University School of Law Office of CLE

UNIVERSITY OF IOWA COLLEGE OF LAW-PROGRAM OF CONTINUING LEGAL EDUCATION

UNIVERSITY OF MISSOURI-KANSAS CITY LAW CENTER OFFICE OF CONTINUING LEGAL EDUCATION

COURSES APPROVED

AMERICAN ARBITRATION ASSOCIATION

Grievance Case Preparation and Presentation
March 11-12, 1977: Seattle 14.50

ABA-AMA

1977 Medicolegal Symposium
March 17-20, 1977: San Fr. 13.75

ALI-ABA

Atomic Energy Licensing & Regulation
Sept. 29-Oct. 1, 1977: Washington D.C. 16.00

Land Use Litigation
Oct. 20-22, 1977: KanCity, Missouri 15.50

Tax and Business Planning for the Small Business
Nov. 17-18, 1977: KanCity, Missouri 13.00

CONFERENCE OF UNITED STATES MAGISTRATES

15th Annual Conference
June 24-25, 1977: San Diego, CA 5.75

FEDERAL PUBLICATIONS, INC.

Labor Relations
Oct. 3-4, 1977: San Fr. 15.00

Concentrated Course in Pension Reform
Sept. 26-28, 1977: Berkeley 22.50

Practical Labor Law
Sept. 26-28, 1977: Seattle 16.50

Product Liability
Oct. 25-28, 1977: Berkeley 26.25

FORD FOUNDATION/SEATTLE TIMES

Washington Conference on the Media & the Law
Aug. 27-28, 1977: Seattle 8.75

GOLDEN GATE UNIVERSITY/SEATTLE GRADUATE SCHOOL OF TAXATION

Advanced Federal Income Taxation of Corporations & Shareholders
Sept. 27, 1976-Jan. 20, 1977: Seattle 41.25
June 6, 1977-Sept. 15, 1977: Seattle 41.25

Tax Research & Decision-Making
Sept. 27, 1976-Jan. 20, 1977: Seattle 41.25
Jan. 31-May, 12, 1977: Seattle 41.25
June 6-Sept. 15, 1977: Seattle 41.25

Taxation of Capital Assets
Sept. 27, 1976-Jan. 20, 1977: Seattle 41.25
Jan. 31-May, 12, 1977: Seattle 41.25
June 6-Sept. 15, 1977: Seattle 41.25

NATIONAL ASSOCIATION OF COLLEGE & UNIVERISTY ATTORNEYS

17th Annual Conference
June 22-24, 1977: Atlanta 14.75

NATIONAL LAWYERS GUILD

Military Law Practice Skills
August 19, 1977: Seattle 2.50

PEOPLES NATIONAL BANK-TRUST DIVISION

Nuts & Bolts Aspects of the Estate & Gift Tax Provisions – TRA OF 1976
Sept. 30, 1977: Yakima 6.25

PERRYMAN & ASSOCIATES, INC

Skiing Accident Litigation
Nov. 19, 1977: Seattle 7.00

PRACTISING LAW INSTITUTE

Personal Injury Claims & Suits
Sept. 8-10, 1977: San Fr. 16.00

Basic Labor Relations
Oct. 20-21, 1977: Seattle 12.50

Litigating an Antitrust Case
Dec. 15-16, 1977: San Fr. 12.00

Equipment Leasing
Nov. 10-11, 1977: San Fr. 12.00

Hospital Liability
Nov. 18-19, 1977: LosAng. 13.00

TACOMA-PIERCE COUNTY BAR ASSOCIATION

General Law for the Average Practitioner
Oct. 1, 1977: Tacoma 7.75

WASHINGTON EDUCATION ASSOCIATION

Grievance Case Preparation & Presentation
March 11-12, 1977: Seattle 14.50

WASHINGTON JUDICIAL CONFERENCE

Annual Meeting
Sept. 11-14, 1977: Bellevue 9.00

WASHINGTON SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

17th Annual Northwest Tax Institute
Oct. 20-22, 1977: Maui 10.50

WASHINGTON STATE BAR ASSOCIATION

Legal Problems of the Elderly
Sept. 21, 1977: Seattle 5.00
Sept. 30, 1977: Spokane 5.00
Oct. 4, 1977: Tacoma 5.00

Trial Advocacy IV
Oct. 7, 1977: Spokane 6.50
Oct. 11,1977: Seattle 6.50
Oct. 21, 1977: Yakima 6.50
Oct. 28, 1977: Olympia 6.50

Washington Administrative Practice and Procedure
Oct. 19, 1977: Seattle 5.00
Oct. 28, 1977: Spokane 5.00
Nov. 4, 1977: Olympia 5.00

Twenty-Second Estate Planning Seminar
Nov. 17-18, 1977: Seattle 11.25

Commercial Law I: Sales Transactions
Dec. 2, 1977: Yakima 6.00
Dec. 9, 1977: Olympia 6.00
Dec. 16, 1977: Spokane 6.00
Dec. 20, 1977: Seattle 6.00

WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Prosecution of Traffic Offenses
Sept. 9-10, 1977: Spokane 10.50
Sept. 23-24, 1977: Seattle 10.50

WASHINGTON STATE SOCIETY OF HOSPITAL ATTORNEYS

Annual Seminar
Jan. 28, 1977: Seattle 5.00

Section Reports

TAXATION
By **DONALD W. HANFORD**

Federal Income Taxation

When incorporating a going business which had previously been operated as a proprietorship or partnership, the practitioner should give due regard to the possible application of I.R.C. §357(c) at the time the business assets are transferred to the new corporation. As explained below, §357(c) is a "trap for the unwary," which can result in significant adverse tax consequences to the proprietor or partner in the absence of proper planning.

Generally, under I.R.C. §351, the transfer of property to a controlled corporation solely in exchange for its stock or securities does not result in the recognition of gain or loss to the transferor. The unrecognized gain or loss, if any, is deferred until the transferor disposes of his stock or securities, which take a basis equal to his basis in the property transferred, increased by any gain recognized and decreased by any liabilities assumed by the corporation. The rationale for non-recognition is that the transfer of appreciated business property to a controlled corporation is a mere change in form which does not justify immediate tax consequences since the transferor has not really "cashed in" on the theoretical gain.

One of the exceptions to non-recognition is provided by §357(c), which requires a transferor to recognize gain to the extent the total liabilities assumed by the corporation exceed his aggregate basis in the property transferred. This rule is designed to prevent tax avoidance by a transferor who refinances the transferred property in excess of his basis, keeps the cash and causes the corporation to assume the liability. If such a device were tax-free, the purpose behind enactment of §351 would be frustrated since it is equivalent to the transferor having received cash, rather than solely stock or securities, in the §351 transfer, resulting in a cash out of a portion of his gain.

Over the past ten years, the definition of the term "liability" in §357(c) has occasioned a great amount of controversy in the Tax Court and vari-

ous Courts of Appeals. For the most part, the controversy has centered around a §351 transfer, by a cash basis transferor, of business assets, including zero basis accounts receivable, together with an assumption by the corporation of the business' accounts payable. Traditionally, the Tax Court has taken the position that all liabilities in the accounting sense, including accounts payable, constituted liabilities for purposes of §357(c). Thus, if A, a cash basis taxpayer, transfers to corporation X a building worth $50,000 with a basis of $10,000, accounts receivable worth $50,000 with a basis of zero, and accounts payable of $50,000, he would recognize a gain equal to the difference between his aggregate basis ($10,000) and the liabilities assumed ($50,000), or $40,000. Obviously, such a strict and literal construction of the term ''liability'' did not comport with the purposes of §351 and §357, in that the nature of the gain was purely artificial since A's economic position remained unchanged following the incorporation. It was viewed as patently unfair to tax the transferor on liabilities assumed by the corporation for which he had never received the benefit of a deduction as a result of his cash basis method of accounting. Further, since the cash basis transferor had a zero basis in his receivables, the treatment of his accounts payable as liabilities resulted in his stock basis being reduced to zero, thereby increasing his gain on a subsequent disposition.

Almost unanimous dissatisfaction with the traditional Tax Court position culminated in reversals by the Second Circuit. In *Bonglovanni v. Commissioner,* 470 F. 2d 921 (1972), and the Ninth Circuit in *Thatcher v. Commissioner, 533 F. 2d 1114 (1976).* In *Bonglovanni,* the Court sought to equalize the treatment of cash basis and accrual basis taxpayers by ruling that a cash basis transferor's accounts payable for deductible expenses would be treated as non-liabilities until actually paid. In *Thatcher,* the Ninth Circuit approved of the result in *Bonglovanni,* but adopted a different rationale. It held that while the transferor's accounts payable *did* constitute a liability under §357(c), thereby giving rise to recognized gain, the accounts receivable also transferred were in substance ''sold'' to the corporation in return for its assumption of the accounts payable. When the accounts payable are actually satisfied

by the corporation, the sale becomes "complete" and the transferor becomes entitled to a deduction which offsets that portion of his recognized gain attributible to the zero basis receivables.

In *Focht v. Commissioner,* 68 TC (1977), the Tax Court finally abandoned its traditional position, and adopted an approach similar to *Bonglovanni* by defining "liabilities" for purposes of §357(c) to exclude any *deductible* obligations of a cash basis transferor. Thus, if the transferor's accounts payable represent debts for deductible expenditures, their assumption would not give rise to gain under §357(c).

Thus, with respect to the example cited above, both *Bonglovanni* and *Focht* would consider the accounts payable as nonliabilities, A would recognize no gain on the transfer, and his stock basis would be equal to his basis in the building and accounts receivable, or $10,000. Under the *Thatcher* analysis, the accounts receivable would constitute a §357(c) liability, A would recognize a $40,000 gain, and his stock basis would be zero. However, if X were to pay off $40,000 of the accounts payable, A would be entitled to offset the entire amount of his recognized gain.

A comparison of the various approaches to the problem indicate that the most favorable tax treatment is that given by *Bonglovanni* and *Focht,* which completely ignore deductible liabilities for purposes of §357(c), thereby preventing the recognition of any gain and preserving the transferor's stock basis. The same result is achieved under the *Thatcher* analysis only if the corporation pays a sufficient amount of the payables in the year of transfer to equal that portion of the transferor's gain attributable to the zero basis receivables. However, if no receivables are transferred, or if the value of the receivables are less than the §357(c) gain recognized, the transferor's gain can never be completely offset even if all the payables are satisfied by the corporation in the year of transfer. Further, since the payables are considered liabilities, their assumption by the corporation will result in a reduction of the transferor's stock basis to zero, and his gain will be increased on a later sale or other disposition.

Unfortunately, since Washington is in the Ninth Circuit, the Tax Court will be forced to resolve the issue according to the *Thatcher* rationale, rather than its own analysis in *Focht.*

Therefore, when incorporating a cash basis business whose accounts payable exceed its aggregate basis in the assets transferred, the practitioner should consider advising his client to transfer additional property in order to increase the aggregate basis, or retain the accounts payable, together with sufficient assets to satisfy them.

Expand the Bridging the Gap Seminars?

The Bridging the Gap Committee of the Young Lawyers Section of the Seattle-King County Bar Association annually puts on educational seminars of interest to attorneys. Typically, there have been four three-hour seminars, held every second Saturday morning beginning with a Saturday in the middle of March. Recent seminars have included topics such as: Creditors' and Debtors' Rights, Justice Court Practice, Opening a Law Office and Starting Your Own Practice, Appellate Advocacy, Landlord-Tenant and Wrongful Death. The seminars given in 1977 were approved for credit by the Washington State Board of Continuing Legal Education and the Bridging the Gap Committee has made application for status as an accredited sponsor of continuing legal education activities.

The Bridging the Gap Committee is interested in knowing whether you would be interested in five annual seminars (with the same three-hour format, designed to qualify for 15 hours of continuing legal education credit for each year), and what topics you would like to see as the subjects of upcoming seminars. Please complete the attached questionnaire and return it to the Seattle-King County Bar Association office. ☐

QUESTIONNAIRE

1. The Bridging the Gap Seminars ☐ should or ☐ should not be expanded to five seminars of three hours each, designed to qualify for 15 hours of continuing legal education credit each year.
2. I would like to see the following subject(s) covered at upcoming Bridging the Gap Seminar(s). (Attach suggestions on separate sheet.

The Courts

SUPERIOR COURT NEWS

By **JUDGE JAMES A. NOE**

Annual Judicial Conference

Judges from District Court, Superior Court, Court of Appeals and Supreme Court concluded a successful annual judicial conference at Bellevue on September 14. Many common problems affecting the state's judiciary were considered during the three-day meeting. The conference again established that communication between judges of varying jurisdiction and authority is important to the improvement and further development of the system of justice in the state of Washington.

"The Media and the Law" Conference

A conference which provided news media persons, lawyers and judges with an arena for nose-to-nose discussion and at times confrontation concerning relationships among the bench, bar and press was held at the Washington Plaza Hotel in Seattle August 26 through 28. The 33 participants were provided three hypothetical questions dealing with contemporary constitutional issues such as First Amendment rights, rights of privacy, "Fair Trial," libel, confidentiality of news sources and news gathering rights. The discussion was stimulated by three visiting law professors, BENNO C. SCHMIDT, Jr., Columbia Law School; CHARLES NESSON, Harvard Law School; and ARTHUR MILLER, Harvard Law School. The format has been developed by the Ford Foundation and used throughout the country to increase awareness and sensitivity to First Amendment issues. The *Seattle Times* co-sponsored the event with the Ford Foundation. Participants included publishers, editors, newscasters, reporters, judges and lawyers. Superior Court Judges participating in the weekend event were JUDGE JEROME JOHNSON (King), JUDGE THOMAS McCREA (Snohomish), JUDGE STANLEY SODERLAND (King), JUDGE WILLARD ROE (Spokane), JUDGE ROBERT DORAN (Thurston-Mason), JUDGE BARBARA DURHAM (King), JUDGE H. JOSEPH COLEMAN (King), and JUDGE JAMES A. NOE (King).

Annual Meeting of National Judges

A number of Superior Court Judges from the State of Washington attended the annual meeting of the National Conference of State Trial Judges which was held in Chicago in August in conjunction with the annual meeting of the ABA. The judges participated in business meetings dealing with national programs affecting the state judiciary, attended educational programs and listened to speeches and reports from such persons as VICE PRESIDENT WALTER MONDALE, ATTORNEY GENERAL GRIFFIN BELL and WILLIAM SPANN, President of the ABA.

Judges Attend College

Several Judges and a Court Commissioner attended the National College for the State Judiciary at Reno during the past four months. Attending the basic three-four week course at the college were JUDGE BARBARA DURHAM (King), JUDGE WILLARD A. ZELLMER (Lincoln), JUDGE HERBERT E. WIELAND (Pacific), JUDGE FRED VAN SICKLE (Douglas-Grant), and COMMISSIONER ROBERT DIXON (King). JUDGE WARREN CHAN (King) attended a graduate course. Judge Chan in the past has been on the staff as an advisor.

Superior Court JUDGE B.J. McLEAN (Douglas-Grant) recently completed an intensive one-week seminar designed for experienced judges on "how to conduct a jury trial" presented by the American Academy of Judicial Education at Stanford University, Stanford, California. The session was an in-depth program which featured a complete simulated trial. Each participant presided over one of the 16 segments which ranged from pretrial matters through sentencing and covering most every aspect of trial events.

JUDICIAL COUNCIL REPORT

By **KARL TEGLAND**

Judicial Council Attorney

Proposed Rules of Evidence

The enactment of the Federal Rules of Evidence has brought about a considerable interest in codifying the law of evidence at the state level.

At least seven states — Maine, Wisconsin, Nevada, New Mexico, Arkansas, Nebraska, and Florida — have adopted the federal rules substantially intact, and the rules, with few substantive changes, are recommended by the National Conference of Commissioners on Uniform State Laws. Several other states are presently working on new rules based upon the federal rules. For a thorough discussion of the development of the federal rules, see Wright and Graham, 21 Federal Practice and Procedure: Evidence (West 1977).

In 1976, the Hon. Charles F. Stafford, then Chief Justice, appointed a Judicial Council Task Force to study various codifications of the law of evidence to determine the wisdom and feasibility of codifying the law in this state. An effort was made to have a balanced representation on the task force, including persons from both branches of the legislature, the Court of Appeals, the trial courts, the bar association, the criminal prosecution and defense bar, the civil plaintiffs' and defense bar, and from the law schools.

After eleven monthly meetings, the task force reported its recommendations to the Judicial Council in two days of meetings in June of 1977. The task force recommended the adoption of rules based upon the federal rules, but with what it felt were particularly troublesome rules amended or deleted. The Judicial Council made changes in a relatively small number of rules and approved the draft, as amended, for distribution to the bench and bar for comment. The Council does not intend to recommend the rules for adoption by the Supreme Court until interested persons and organizations have had an opportunity to respond.

Advance typewritten copies of the manuscript have been sent to various statewide organizations such as the Washington State Association of Prosecuting Attorneys and the Washington Defenders Association. In addition, the proposed rules, with commentary, will be printed in pamphlet form and mailed to every judge and lawyer in the state. We hope that this can be accomplished before the end of the year. The Council hopes to evaluate the comments received from the bench and bar and report its final recommendations to the Supreme Court by the spring of 1978. □

Committee Reports

1977-78 Committee Appointments

Attorneys Professional Insurance Committee

Robert William Burns, Spokane; William H. Gates, Seattle; Robert Johnson, Advisory Consultant, Olympia; Bradley T. Jones, Seattle; Thomas P. Keefe, Seattle; Victor D. Lawrence, Seattle; Michael Mines, Seattle; Frederick J. Orth, Seattle; Robert R. Redman, Yakima; Richard H. Riddell, Seattle; Dean C. Smith, Spokane.

Bar-Bench-Press Committee

Storrs B. Clough, Monroe, Chairman; Gordon Gene Conger, Seattle; Raymond E. Ferguson, Seattle; Carl P. Gilmore, Seattle; E. Glenn Harmon, Spokane; Valen H. Honeywell, Tacoma; Robert H. Peterson, Tacoma; Jeffrey C. Sullivan, Yakima; Charles H. Todd, Seattle; Wayne L. Williams, Olympia.

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Around the State

EAST KING REPORT
By **BARRY J. HASSON**

The annual golf tournament sponsored by the East King County Bar Association at the Mount Si Golf Course on Friday, August 19th, was a genuine success. Nearly two dozen judges from local District Courts, King County Superior Court and the Court of Appeals, attended along with a number of judge-hopefuls.

Nearly 50 in all attended the spaghetti feed later in the day after 23 golfers made it around the course. Winners of trophies included **Gail Ryder,** low gross (read: best score), whose trophy is threatened to be retired this year because of the monotony with which he continues to win the tournament; **Dave Deits,** longest drive; **Tom West,** closest to pin; **Brian Gain,** high gross (read: not too good); and **Dick Holt** is still trying to figure out why he won a trophy. In sum, fun was had by all who attended.

New faces on the Eastside include **Mike Spencer** and **Dick Carlson,** graduates of Gonzaga, who have opened an office in the Crossroads area; old faces getting a facelift are **Bill Morris** and **Mike Rodgers** who have renovated a building for their new offices in Bellevue.

CHELAN-DOUGLAS REPORT
By **J. KIRK BROMILEY**

H.B. "Jerry" Hanna accepted a position with Governor Dixy Lee Ray as her personal attorney and legislative liaison. Jerry was a legislator for a substantial number of years, and will hopefully be able to aid Governor Ray in establishing a good working relationship with the legislature.

The vacancy created by his departure was recently filled by the Douglas County Commissioners' appointment of **J. Kirk Bromiley** as Douglas County District Court Judge. Kirk, who was a part time Deputy Prosecuting Attorney for Chelan County, has thus traded his prosecutor's hat for judicial robes. One of the first items on that court's calendar was to ask the law enforcement officers of the county to closely scrutinize the operation of a certain bright red V-12 Jaguar XKE convertible customarily driven by our local Bar president, **Garfield Jeffers.**

We have previously reported rumors concerning the partnership of **Robert H. Scott, Jr.** and **Gay Cordell.** The rumors were confirmed recently, when they tied the nuptial knot. At the first Bar Association meeting following the wedding, one chauvinist lawyer referred to the new bride as Mrs. Scott. Needless to say, he was soundly rebuked by Ms. Cordell.

Last, but by no means least, we should report that **Milburn D. "Bud" Kight** recently did all plaintiffs' personal injury lawyers in our area great service. Bud represented an insured logger in a suit against Pack River wherein the jury returned a verdict somewhere in the neighborhood of $870,000.00. That verdict was a substantial shock to the systems of all insurance defense lawyers in our area.

LEWIS COUNTY REPORT
By **JOHN PANESKO, JR.**

Most counties report new attorneys every month. Our growth is more conservative. Here is our annual report:

Rich Paroutaud joined with Baker & Lund whose 12 foot office became overcrowded. They all packed up and moved to the south end of Chehalis where their office is so big they can clear out the furniture and play tennis. Rich then left for Europe for a month to visit relatives. **Chuck Althauser** is now a part of Olson, Pietig & Althauser, helping to pick up the load left by **Dale Nordquist** who became our second Superior Court Judge last year. Chuck is handling the City of Centralia's criminal work.

Dale McBeth has moved into Baker & Lund's vacated office and has received our "stamina" award for starting a sole practice in a county that doesn't take much liking to newcomers. **Jim Turner** is now with Panesko, Panesko & Turner, who remodeled their offices for the expansion. According to the firm's tradition, Jim had to wield a hammer to help in the construction.

Jim Gober, ex-District Court Judge, moved into **Jim Turner's** vacated office and he only had to change part of the gold lettering on the door to make the move complete. The number of attorneys in the east end of the county almost doubled when **Bill Boehm** joined **Paul Logsdon's** firm. Paul needed an extra hand to watch the office while he is

part-time District Court Judge and private home-builder.

The new District Court Deputy Prosecutor is **Darvin J. Zimmerman,** who has added to our unusual first-name list involving **Dorwin J. Cunningham,** our senior Superior Court Judge, and **J. Dorman Searle,** of Searle & Brosey. Searle & Brosey have a new office surrounded by two acres of Courthouse parking. **Ken Johnson** moved in with them for a taste of private practice after a year as District Court Prosecutor.

Dysart, Moore, Tiller & Murray are holding their own private population explosion with the addition of **Ron Morgan** and **Larry Fagerness.** Ron is a member of the Washington, D.C., Bar as well as the Washington Bar. Larry joins the rest of us in believing that passing the Washington Bar exam is more than enough.

Don't expect an answer when you call Cunningham & Agnew in Centralia. **Jack Cunningham** is more likely to be found in Ireland or Hawaii and **Dan Agnew** is limiting his practice to have more time for the family business, Agnew Enterprises. **Norm Stough** left to become a hearing examiner for the state and likewise, **Jim Rolland.**

That's it for this year.

SEATTLE-KING COUNTY REPORT

by **JOHN SOLTYS**

Gordon L. Creighton and **Douglas W. Scott** announce the relocation of their law offices to the Dravo Building, Suite 311, 225 108th Avenue N.E., Bellevue, Washington 98004.

Glenn R. Nelson announces the opening of an office for the practice of law at 2424 The Financial Center, Seattle, Washington 98161. 624-5606.

SNOHOMISH REPORT

By **JIM TWISSELMAN**
and **DON CARTER**

The Snohomish County Bar honored its brother, State Senator **Frank J. Woody,** in a memorial service held August 18, 1977. Senator Woody died on July 24, following a prolonged struggle against leukemia. The last legislature session witnessed Senator Woody's devotion to service. He performed

his duties as Chairman of the Financial Institution and Insurance Committee, Vice-Chairman of the Judiciary Committee, and member of the Senate Ways and Means Committee from a hospital bed in the capitol. His family has requested that any memorials be sent to the Tumor Institute of the Swedish Hospital in Seattle.

State Bar Association President **Edward J. Novack** has started his gruelling duties. Ed attended the ABA convention in Chicago. The windy city was, and Ed returned with a liberal sample of Gary, Indiana. Shortly after his return from Chicago, Ed attended the Board of Governor's meeting at Sun Valley. Will the hard work of conventioning allow Ed time to get his grape press ready for the fall vintage?

Kent Millikan won low gross honors at the bar golf tournament following the disqualification of **Richard J. Thompson.** Thompson was disqualified in an arbitrary and capricious rules decision by **Dennis Jordan.** Jordan's partner, **Joseph Brinster,** won low net, and **David Sweetwood** offset Millikan's victory for Cogdill-Deno by winning the crying towel for high gross.

SOUTH KING REPORT

By **JAMES L. VARNELL**

Par for the Course. **Bill** ("Air Mail") **Levinson** coasted to his second straight victory in the South King County Bar Association golf tournament held in Enumclaw, according to tournament directors **Phil Biege** and **Mel Kleweno. Tom McElmeel,** resident pro from Black Diamond, was one stroke back for second place, while **Bob Kuvara** and **Paul Houser** tied for third. **Bob Jaffe** showed a markedly-improved game from last year, but his touring partner, **David Koopmans,** finished out of the money.

Judges attending from the King County Superior Court bench included **Judges Cushing, Roberts, Dore, Eberharter, Bever and Mifflin** (ret.), **Court Commissioner Niles,** along with **Court of Appeals Judge Swanson** and **District Court Judges Mattson and Eide.**

CLE: Skagit County Practice. Counsel who appear infrequently in Skagit County Superior Court might wish to contact **John M. Meyer** prior to appearing in court to determine whether or not service of process regarding another matter awaits counsel's client(s).

Reporter's Paragraph. **Cris F. Crumbaugh,** a 1976 graduage of the University of Puget Sound Law School is now associated with the law offices of **Richard M. Barney, Jr.** Elsewhere, this correspondent is informed that **Tom Bucknell** and his wife have recently returned from Luckenbach, Texas, where they attended the annual country music festival held there. Finally, in view of the courtesies extended **Bob Rockman,** Case Assignment Administrator, at the golf tournament, this correspondent has been exempted for one year from the usual waiting for assignment to trial in the Presiding Department. Counsel opposing this correspondent in trials in King County Superior

Court should welcome that information, and may contact this correspondent prior to trial to determine to which courtroom the case will be immediately assigned on the day set for trial.

SPOKANE REPORT

By **ROBERT H. HUNEKE**
and **BRYAN P. HARNETIAUX**

FINALLY! We have been able to squeeze back into the *Bar News*. Since you've last heard from us there have been a few things that have happened in sunny old Spokane.

May was highlighted by the "Bloomsday Run" in Spokane, a fund-raising affair for the Special Olympics. Some 1300 local denizens ran an eight-mile serpentine course through the Spokane area. Among those members of the local bar finishing the race were, *inter alia*, **Steve Crumb, Bob Dellwo, Sr., Ron Douglas, Joe Erickson, Roger Felice, Larry Gustafson, Don Hackney, Lloyd Herman, Rob Huneke, Tom Kingen, Tim Quirk, Arthur H. Toreson, Doug Tuffley, Terry Whitten.** Incidentally, a Colorado lawyer and Olympian marathoner, **Frank Shorter** out distanced the local legal fraternity. Seattlite attorney, **Tom Wolfendale,** also finished.

In June the new Spokane county officers and trustees were elected as follows: President **Richard D. McWilliams;** Vice President **Leo J. Driscoll;** Secretary-Treasurer **Kermit M. Rudolf;** Trustees **Smithmoore P. Myers; Jerry R. Neal; Wm. Fremming Nielsen;** Holdover Trustees: **Eugene I. Annis; Justin L. Quackenbush; Robert A. Southwell.**

Also during recent months there were a few transitions:

Transitions: **Larry Taylor,** formerly of Gordon, Ripple and Taylor, has set up practice on Mission St. in Spokane. **Thomas F. Kingen** has established offices in the Jefferson Building and **Stan Schultz** recently opened offices with his partner, **James A. Fish** in the Paulsen Building.

John Toohey has recently opened an office in the Peyton Bldg. A former reporter of this column **Gregory Tripp** is leaving Hennessy and Curran to go to Seattle where Greg will be with Bogle & Gates. One of your current reporters **Robert H. Huneke** formerly with Hamblen, Gilbert & Brooke P.S. has opened an office in the Paulsen Bldg. A continuation of the Renaissance of the Paulsen Building referred to in recent columns.

James J. Gillespie formerly with Gillespie & Crumb and formerly, deputy prosecutor for Spokane before that, has been appointed by President Carter to be the new United States Attorney for Eastern Washington. His predecessor **Dean C. Smith** has entered into a partnership of Hemovitch, Smith & Nappi with **John W. Murphy** as an associate.

Everett Stinson is about to retire from the Estate and Gift Tax Division of the I.R.S. thus leaving **Richard A. Staeheli** in charge. Dick had enough foresight to hire two budding tax attorneys **Marc E. Wallace** with his tax degree from Miami and **Stephen P. Zagelow** with his tax degree from the University of Florida and formerly with Reed, Offenstran and Giesa.

James C. Dahl is now associated with Frederickson, Maxey, Bell & Allison. **Dave Henault,** formerly with that firm has started his own office with **John Hancock** in a newly modernized old building on West 3rd Avenue.

The Spokane County Bar Annual golf tournament results! Many people won prizes at that wonderous event, however **Jack Ripple** was the low gross winner.

The Fourth Annual Police Lawyers Golf Tournament was held August 21, 1977. Perpetual co-chairman **Bob Henderson** reports that mysteriously, after many hours of recalculating, the police managed to tie the lawyers. He wasn't suggesting any foul play, but last year somehow the trophy disappeared and some months later reappeared.

THURSTON-MASON REPORT

By **FRED D. GENTRY**

Ralph Swanson of Pebbles, Swanson & Lindskog, has been accepted as a Fellow by the American College of Trial Lawyers. Ralph and his wife intend to travel to Chicago this summer for the induction.

Stephen Way has associated with **Don Miles** in the Rainier Bank Building. Steve was with the State for twenty-five years, twenty-two years with the Attorney General's Office and the last three as the Assistant Director and Supervisor of the Industrial Insurance Division of the State of Washington Department of Labor and Industries. □

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For Sale: CJS. Current to 1971. Cost approx. $340 to bring current to date. Excellent shape. Best offer will be accepted. Hugh Rehberg, (206) 246-8772.

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Space Available: Four-attorney office; word processing, library, phone, secretarial. Attractive Pioneer Square location. Phone: (206) 682-2616.

Bellevue Office Space Available: 1,600 sq. ft., new building under construction, city center, parking under, air-conditioning, utilities, office layout to tenant specifications, lease occupancy December 1977. Phone (206) 454-7277.

Bellevue Office Space Available: Share space with one attorney in the Bellevue Seattle Trust Building. (206) 455-5744.

Will Sought: The Will of Billy J. Burnap, prepared in the City of Seattle. Mr. Burnap was a hospital patient approximately April or May of 1972. Anyone knowing the whereabouts of this will please contact Wm. M. Hamilton, Professional Centre — Suite A, Wenatchee, Washington 98801 — Phone (509) 662-7102.

Zenta Simanis: Information on possible recent will — Contact Edmund J. Jones, Attorney at Law, 1123 East John, Seattle, WA 98102.

Wanted: One copy of Gray, John C. *The Rule Against Perpetuities,* 4th ed. Boston, Little, Brown & Co., 1942. Call R. Stone (206)-593-6550 or write 1321 Highlands Parkway North #5, Tacoma, WA 98406

Wanted: *Couch on Insurance* with Supplements. Raekes, Rettig & Osborne, (509) 783-6154.

For Sale: Complete set of U.S. Supreme Court Reports (Lawyers Ed.) with Digest. $1,000. Phone (206) 357-9776 — Olympia.

Calendar

Oct. 7	CLE SEMINAR: **Trial Advocacy IV,** full day, Ridpath Motor Inn, Spokane, Washington, $40.00
Oct. 11	CLE SEMINAR: **Trial Advocacy IV,** full day, Olympic Hotel, Seattle, Washington $40.00
Oct. 19	CLE Seminar: **Washington Administrative Practice and Procedure,** half day, Sea-Tac Motor Inn, Seattle, Washington $25.00

LAWYER PLACEMENT

1. Large Seattle based firm desires energetic lawyer with minimum of 4-5 years experience in handling a wide variety of legal problems to join corporate legal staff. Salary open. Must be member of WSBA and have good writing ability and academic excellence. Send resumes to Box 10, c/o WSBA.

2. Medium size law firm in Seattle with extensive commercial litigation practice seeks associate with 1-2 years litigation experience. Position available immediately. Send resumes to Box 17, c/o WSBA.

3. Grays Harbor County is seeking a Deputy Prosecuting Attorney whose primary responsibility would be the prosecution of felony offenses. Applicant must be a member of WSBA with at least 1 year trial experience preferably in prosecution. Salary to $21,000, doe. Send resume to P.O. Box 550, Montesano, WA 98563.

4. BOISE REDEVELOPMENT — General Counsel. Salary negotiable. Minimum 3 years experience, real estate and HUD background required. Will pay while taking Idaho Bar exam. Phone (208) 384-4264, George S. Gatter, Executive Director.

5. Large nationally known life insurance firm is interested in attorneys who want an opportunity in business. Starting salary to $1200 a month with incentive increases as earned. Send resumes to P.O. Box 5100, Seattle, WA 98105.

6. Two positions available with the Washington Association of Prosecuting Attorneys: 1. Executive Secretary-Prosecutor Coordinator; prosecution experience desirable. Salary: $21,500 to $25,000 depending upon experience. 2. Technical Assistance Project Director; prosecution experience desirable. Salary: $18,000 to $21,500 depending upon experience. Submit resumes to: Board of Directors, Washington Association of Prosecuting Attorneys, 105 E. 8th Avenue, Suite 302, Olympia, WA 98501.

7. Well established Central Washington law firm wishes to hire a tax lawyer, preferably with an LLM but not essential. Please submit resumes to Box 33 c/o WSBA, 505 Madison, Seattle, WA 98104.

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