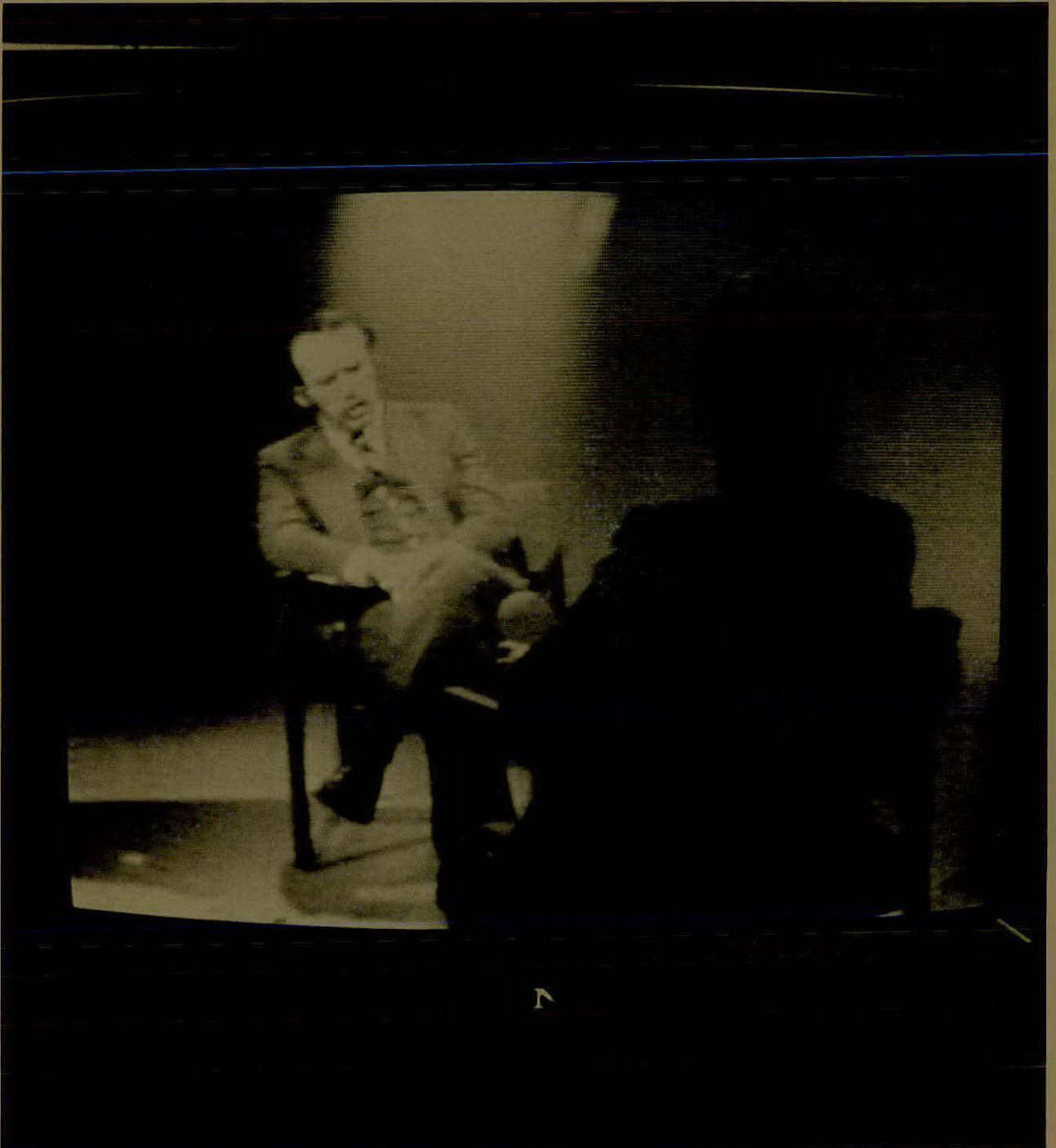

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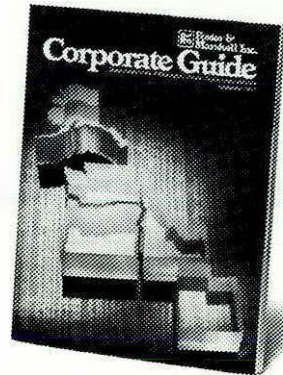
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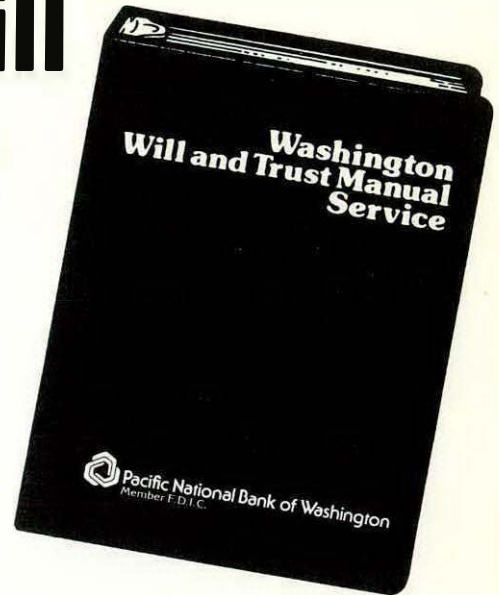
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505 Madison Street Seattle, Washington 98104

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Telephone: (206) 622-6054

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

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Our Cover



The television screen on our cover shows a scene from "Trust Accounts and the Spot Audit Rule," the first Continuing Legal Education videotape produced by the bar association. The tape is designed for use at CLE programs for lawyers and will be available for showing by local bar associations. George Riemer offers a comprehensive overview of the operation of the new "spot audit" rule (DRA 13) and reviews trust account procedures in an article beginning at page 8.

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Lay Board Members Not Needed

Editor:

I challenge the Statement in Support of Lay Member Resolution which accompanied the recent referendum ballot.

We are not "indifferent to the needs and best interests of our society," as suggested in that statement.

People who express such ideas must be speaking for themselves; not the members of the bar.

From the time this nation was founded to the present day, the presence of lawyers in social, civic and political life has always been and now is an important factor in our country's life.

Witness the number of lawyers who have served as President of the United States, on the United States Senate and House of Representatives, to say nothing of the prominence of lawyers as Governors of the states, members of the legislatures, Mayors, City Council members.

This is augmented by a veritable army of lawyers who serve many times without pay on boards, commissions, committees and like service with all types of organizations which serve our society.

I would challenge any other profession or any other organized group to equal the historical record of lawyers serving in a vast number of capacities.

Just remember that because every lawyer isn't a black, a Chicano or some so-called minority group doesn't mean that lawyers neglect our society or our communities. We serve.

CHESTER A. LESH

Seattle

In Conclusion, Thank you

Editor:

I am responding to John Rupp's article, "On Making an End," in the October issue of the *Bar News* [31:9:33] limited to his theory that a speaker should never end his talk with "thank you." Because I have always admired John so, my letter is probably not a dissenting opinion — rather merely "another view."

It is apropos that I read John's article shortly after I had concluded a seminar presentation to some 600-800 lawyers (among them John Rupp) with "thank you." Only now do I realize that I always do this.

Over one hundred juries have persevered now with my parting "thank you." Only the good Lord knows how many Judges have tolerated the same after argument "thank you, Your Honor." Why do I do this? Probably because I consider it a privilege to be in court or where ever and allowed free speech.

Or maybe it goes back to when I began trying cases — against Alfred McBee, who taught me (the hard way) much of whatever I know today. Whenever my client, who was usually deserving, prevailed, and McBee's client, who was usually undeserving, did not, I observed that in light of the job Mac did at trial, such a result had to be a stroke of good fortune. So, I said "thank you" to no one in particular.

I guess I can't shake the syndrome. Please bear with me. It's been an honor.

Thank you.

DAVID A. WELTS

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New Year's Resolution (Check Off and a Check)

The reason that most of us have difficulty in keeping our New Year's Resolutions is that many of them are founded in an optimistic view of self-discipline which holds that we can sustain our resolve past January. By the time we get to February, however, we usually can think of reasons to resume smoking, drinking or eating too much, and we find we are too busy to keep jogging, reading good books or balancing the checkbook.

If you still have your 1978 dues statement on your desk, here is a New Year's Resolution that requires very little effort, time or money, and which can be accomplished before February 1: Check off the box which authorizes the Board of Governors to spend your voluntary contribution of from \$1 to \$10 in support of public interest law firms. Write a check for \$10 and send it to the bar office along with your annual dues payment.

In providing for the creation of a voluntary fund to support public interest projects, the Board of Governors has taken a significant positive step for the new year. It is a step which deserves the support of every member of our association. The Board has moved an inch down the right track; the membership should carry it a mile.

The Board's action followed a proposal by the Young Lawyers Section of the Seattle-King County Bar Association — modeled after a similar program implemented by the Arizona bar in 1976 — which would permit members to earmark up to \$10 of their annual dues for public interest law projects. In part because of uncertainty about the 1978 budget caused by the then pending referendum to roll back the dues increase, the Board declined to make dues revenue a basis for the public interest fund, but approved the voluntary contribution program. The Board may make appropriations from the fund only to support public interest legal services as generally defined by a 1975 ABA resolution. *See The Board's Work, p. 19.*

The voluntary fund provides every Washington lawyer with the opportunity to give practical meaning to Canon 2 of the Code of Professional Responsibility: "A lawyer should assist the legal profession in fulfilling its duty to make legal

counsel available." See EC 2-24, 2-25. EC 2-25 states in part, "Every lawyer regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged . . . but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs. . . ."

A 1974 ABA study shows that *two-thirds* of the public has never or seldom ever used a lawyer. It may be surmised that this large segment of the public either cannot afford or thinks it cannot afford a lawyer, or it does not know it needs one or how to find one. Public interest firms can address these problems relating to the delivery of legal services. A 1975 study indicates that no more than 6.2 percent of the average lawyer's billable time is devoted to public interest work, and only an additional 27 hours a year is spent on nonbillable time in the public interest. If that is all the time we have, we can afford to contribute \$10. *See generally, J. Frank and M. Traynor, "Public Responsibilities," 51 California State Bar Journal 293 (1976).*

The cited article, reviewed by the Board during its long range planning session last August, points out that nearly every major consumer and environment law enacted in the past five years grants citizens standing to sue, and many of these laws authorize the award of attorney fees to prevailing plaintiffs. Support of public interest firms' efforts to enforce these laws may result in an increase in *paid* employment opportunities for lawyers. The article also provides examples illustrating that public interest firms not only can provide free or low cost legal counsel for individuals, but also can serve broad public interests previously unrepresented.

There are only a few public interest firms in this state, but the availability of bar funding doubtless would foster an increase in their number. If every member of our association contributed \$10, we would have a fund in excess of \$80,000. Even if the average contribution by our association came to just \$5, we would do much to improve the public's perception of our profession. We might even get President Novack on the *Today* show.

JVW



Ongoing Debate— Question of Lay Members on Board of Governors

At the annual meeting in Vancouver, B.C., the resolution to add two lay members to the Board of Governors carried by one vote — 464 to 463. The referendum recently returned reflects the close division of the Bar — or, at least, the 55% that voted — on this subject. Fifty-six per cent of those voting were *opposed* to lay members — even though they were to be non-voting and for a limited period of two years.

The Bylaws state the effect of the referendum as follows:

Whenever any such referendum shall be taken, the result of said referendum shall be effective for a period of a minimum of two years and may not be modified or repealed by any action of the Board of Governors during the two year period.

Although alternates might be argued, as a practical matter the Board will probably feel bound by the “sense” of the Bar’s response, and lay the matter to rest for the next two years.

Lay representation on the Board of Governors has been raised with increasing frequency in past years, particularly following the addition to the disciplinary board of two voting lay members. With varying degrees of discord, the Boards of Governors have consistently opposed it. It is my view that the majority of the Board feels rather strongly that Board members are as deeply concerned with the public interest as would be a lay member and, further, that a great deal of the Board’s work requires legal expertise and would likely be hindered rather than helped by lay involvement. The other side of the argument not only rejects the majority view, but also points out the Justice Department threats — sometimes very thinly veiled — to inject lay involvement into bar associations, and further contend that voluntary compliance will avoid and be preferable to compulsory compliance.

Whatever your preference may be, the fact is that no bar association has yet voluntarily added lay members to its governing body. One bar asso-



ciation — California — was recently required by legislative action to add to the 15 member lawyer board six voting lay members, such to be appointed by the governor. Without comment on the present or future success or failure of this action, it is clear that it created schisms and conflicts that may well take years to heal.

I urge those favoring the referendum to direct their efforts and skills — not to downgrading the ability of the Board to represent the public interest without lay participation — but rather to aid the Board in recognizing and performing those duties. With that contribution and with the aid of expanded public information and legislative affairs programs, the true message can be heard that the Bar and its Board are not simply “lawyers-for-lawyers,” but actively serving the public interest. That is the result we must reach if the will of the majority is to be carried out.

DRA 13 and Attorney Trust Accounts: An Overview

By GEORGE A. RIEMER

The Washington Supreme Court has recently adopted Discipline Rule for Attorneys 13¹ dealing with the audit of trust accounts maintained by attorneys licensed to practice in this state.² DRA 13 — known as the "spot audit" rule — gives the bar association's Disciplinary Board the authority to "examine, investigate and audit the books and records of any attorney for the purpose of ascertaining and reporting whether (CPR) DR 9-102 has been or is being complied with by

such attorney . . ."³ The implementation of DRA 13 should cause all practicing attorneys to reflect for a few moments on the way they maintain and use their attorney's trust account.

This brief article has as its purpose a general review of the rules regulating the use of trust accounts by practicing attorneys. Hopefully, a greater awareness of the rules requiring attorneys properly to maintain and use their trust accounts will reduce the chance that disciplinary proceed-

¹88 Wn. 2d 1114-1116 (1977). DRA 13, effective July 1, 1977, provides as follows:

Rule 13.1

Audit and Investigation of Books and Records

The Board and its chairperson shall have the following authority to examine, investigate, and audit the books and records of any attorney for the purpose of ascertaining and reporting whether (CPR) DR 9-102 has been or is being complied with by such attorney:

(a) The Board may from time to time authorize examinations of the books and records of any attorneys or firms of attorneys, selected at random. Such examinations shall extend only to the books and records of such attorneys or firms of attorneys.

(b) The chairperson of the Board may, upon information that a particular attorney or firm of attorneys may not be in compliance with (CPR) DR 9-102, authorize an examination limited to the scope set forth in section (a).

(c) Upon the examination set forth in section (a) or (b), if the chairperson of the Board shall determine that further examination is warranted, the chairperson may then order an appropriate audit of the attorney's or the firm's books and records, including verification of the information therein from available sources.

Rule 13.2

Cooperation of Attorney

It shall be the duty and obligation of any attorney or firm

who is subject to examination, investigation, and audit under Rule 13.1 to cooperate with the person conducting the examination, investigation, or audit subject only to the proper exercise of any privilege against self-incrimination where applicable, by:

(a) producing to such person forthwith all evidence books, records, and papers as such person shall request for the purpose of his or her examination, investigation, or audit;

(b) furnishing forthwith such explanations as the person may require for the purpose of his or her examination, investigation, or audit;

(c) producing, in those cases where the examination, investigation, or audit is being conducted pursuant to Rule 13.1(c), to such person forthwith written authorization, directed to any bank or depository, for the person to examine, investigate, or audit trust and general accounts, safe deposit boxes and other forms of maintaining trust property by the attorney in such bank or depository.

Rule 13.3

Declaration or Questionnaire

The Association shall cause to be directed annually to each attorney a written declaration or questionnaire designed to determine whether such attorney is complying with (CPR) DR 9-102. Such declaration or questionnaire shall be completed, executed, and delivered by such attorney to the Association on or before the date of delivery specified in such declaration or questionnaire.

ings will be instituted against a lawyer who has become the subject of a trust account audit pursuant to the provisions of DRA 13.

To paraphrase Disciplinary Rule 9-102 of Washington's version of the Code of Professional Responsibility, all funds of clients given to a lawyer or a law firm must be deposited in one or more identifiable bank accounts within the State of Washington. This requirement excludes the deposit of advances to the attorney to cover costs and expenses.⁴ The attorney's own funds cannot be deposited in an account maintained for the deposit of clients' funds except for an amount sufficient to cover bank service charges.⁵ The purpose of DR 9-102 is to avoid even the appearance

Rule 13.4
Disclosure

The examination and audit report shall be open to the Disciplinary Board, the attorney examined, investigated, or audited, and to the Board of Governors upon its request, unless a disciplinary proceeding is commenced in which event the disclosure provision of Rule 11.7 shall apply.

Rule 13.5
Regulations

The Board may adopt regulations pertinent to the powers set forth in this rule subject to the approval of the Board of Governors and the Supreme Court.



George A. Riemer is Assistant City Attorney in Vancouver. He was admitted to the Washington State Bar in 1975, after graduating from Pacific Lutheran University and obtaining his law degree from Valparaiso University School of Law.

of impropriety by keeping the lawyer's money separate and apart from the money of his clients.⁶

"Commingling" Prohibited

DR 9-102 was enacted to prevent the "commingling" of an attorney's funds with those of his clients. Commingling is ordinarily established when a client's money is intermingled with that of his attorney in such a way that it may be used by the attorney for his own personal expenses. *Greenbaum v. State Bar*, 15 Cal. 3d 893, 126 Cal. Rptr. 785, 544 P. 2d 921 (1976); *Vaughn v. State Bar*, 6 Cal. 3d 847, 100 Cal. Rptr. 713, 494 P. 2d 1257 (1972). Commingling also occurs when a lawyer leaves earned attorney's fees in his trust account and then draws upon that account for his own purposes. A trust account cannot be used as a personal checking account by an attorney regardless of whether or not an appropriate accounting is eventually provided each and every client who has funds on deposit in that account. See *Black v. State Bar*, 57 Cal. 2d 219, 18 Cal. Rptr. 518, 368 P. 2d 118 (1962).

It might appear incongruous to require an attorney to maintain the separate identity of his personal funds from those of his clients so long as the attorney ultimately accounts to each client

²At least one other state has adopted a comprehensive trust fund rule for attorneys. Iowa has adopted a provision that authorizes an investigation and audit of attorney's trust accounts, safe deposit boxes and any other form of maintaining trust property by designated officials. See Rule 121.4, 40 I.C.A. Chapter 610 Appendix. An attorney subject to an investigation by the appropriate state officials must promptly comply with any request to execute and deliver a written authorization, directed to any bank or depository, allowing the investigator to audit and inspect all trust accounts of the attorney in that institution. Rule 121.4(a) (2), 40 I.C.A. Chapter 610 Appendix. Trust account records are to be retained by each attorney for a period of five years from the conclusion of each trust fund transaction. Rule 121.4(a) (3), 40 I.C.A. Chapter 610 Appendix.

³DRA 13.1

⁴Dr 9-102(A) indicates that advances for costs and expenses from the client to the attorney need not be deposited in the trust account. At least one authority recommends, however, that clients' funds to cover costs and expenses should always be deposited in the trust account. Costs and expenses are paid from the attorney's general office account and reimbursed immediately from the trust account. P. Wolkin, "Bookkeeping for the Small Law Office," *The Practical Lawyer's Law Office Manual* (1956).

⁵See DR 9-102(A) (1). It has been suggested that bank service charges be deducted from the attorney's office account instead of adding those funds to the trust account in order to avoid using any client's funds for the payment of those service charges. A. Clark and K. Strong, *Law Office Management*, Chapter 6 (1974).

⁶See Ethical Consideration 9-5, Code of Professional Responsibility.



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for every penny that client has given the lawyer. It should be noted, however, that though the rule against commingling seeks to protect clients from financial loss by the attorney-embezzler, loss can also occur through unforeseen circumstances. As explained in *Heavey v. State Bar*, 17 Cal. 3d 553, 131 Cal. Rptr. 406, 551 P. 2d 1238 (1976) at 1241:

. . . (T)he prohibition against commingling was adopted "to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money." [Citation omitted.] That no harm may result from commingling in a particular case is mere fortuity. An attorney who, like petitioner, spends trust fund money for his personal use, runs the risk that an unexpected contingency — such as a sudden illness — will prevent him from replenishing the fund.

Many attorneys may equate commingling with the crime of embezzlement or theft. A disciplinary charge of commingling can be established, however, without showing that the attorney engaged in an intentional or willful act of misappropriation.⁷

The conversion is complete when the account in which the client's funds are deposited is overdrawn or when the balance of the account is less than the client's interest in it. The conduct of the attorney is not excused because the improper handling of the funds is due to mismanagement rather than misconduct. [Citations omitted.]

In re matter of Anschell, 53 A.D. 2d 297, 385 N.Y.S. 2d 771, 772 (1976).

In Archer v. State, 548 S.W. 2d 71 (Tex. Civ. App. 1977, writ ref'd, n.r.e.), the court indicated that the actions of an attorney need not be fraudulent, culpable or willful to violate the trust fund provisions of the Code of Professional Responsibility. Several Washington cases have indicated that an intent to defraud is an essential element of proof in a disciplinary case involving a charge of misappropriation. See e.g., *In re Fraser*, 83 Wn. 2d 884, 523 P. 2d 921 (1974); *In re Ward*, 106 Wash. 147, 179 P. 76 (1919), appeal dismissed, 257 U.S. 612 (1921); *In re Gowan*, 104 Wash. 166, 176 P. 7 (1918). Misappropriation is not a synonym for commingling, however. Commingling is the improper management or utilization of an attorney's trust account which may or may not be accompanied by an unauthorized expenditure of clients' funds for the attorney's own purposes. See *Vaughn v. State Bar*, 6 Cal. 3d 847, 100 Cal. Rptr. 713, 494 P. 2d 1257, 1264 (1972).

Few Defenses to Commingling

Few defenses are available to a charge of commingling. No defense is set out by the fact that an attorney does not know of the rules proscribing the personal use of clients' trust funds nor does "good faith" raise a defense to a charge dealing with the improper utilization of trust funds. *Silver v. State Bar*, 13 Cal. 3d 134, 117 Cal. Rptr. 821, 528 P. 2d 1157 (1974). In *Heavey v. State Bar*, *supra*, the attorney's defense to a charge of commingling was that no client ever lost money because of his improper use of his trust account. The California Supreme Court rejected this argument, 551 P. 2d at 1241:

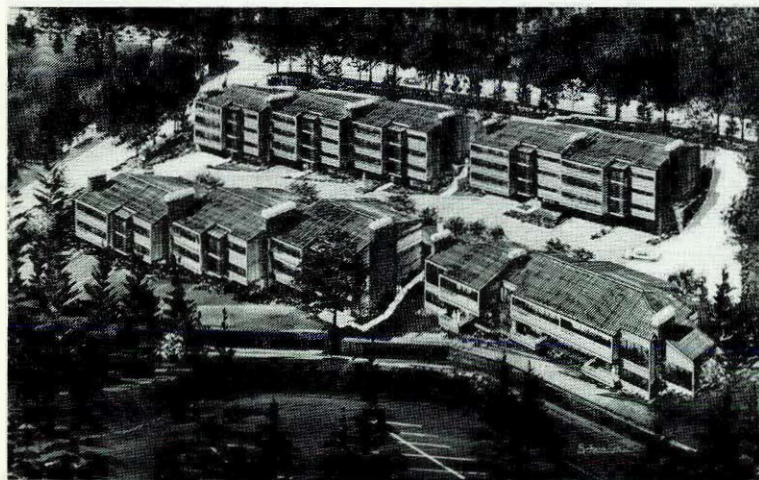
Actual financial detriment to a client is not the crucial element in a disciplinary proceeding, which seeks to determine not the extent of the damage caused by the attorney but rather whether his conduct was unprofessional. [Citations omitted].

Other defenses which have been rejected in misappropriation and trust account cases include mental illness, *In re Abbott*, 19 Cal. 3d 249, 137 Cal. Rptr. 195, 561 P. 2d 285 (1977); *In re*

Moody, 69 Wn. 2d 808, 420 P. 2d 374 (1966); drinking, *In re Stromberg*, 75 Wn. 2d 955, 452 P. 2d 547 (1969); ill health, *In re Johnson*, 74 Wn. 2d 21, 442 P. 2d 948 (1968); extreme emotional distress, *In re Hutchins*, 67 Wn. 2d 144, 406 P. 2d 777 (1965); and financial distress, *In re Park*, 45 Wn. 2d 383, 274 P. 2d 1006 (1954).⁸

A disciplinary charge dealing with the improper utilization of clients' funds often is sought to be mitigated by an attorney with what can be denominated the "sudden conscience" defense. After disciplinary charges are brought against the attorney for failing to account to his client for funds placed on deposit in the attorney's trust account, the attorney seeks to repay to the client part or all of the client's funds. Such a defense was met with the following rebuff by our Supreme Court in *In re Grant*, 4 Wn. 2d 617, 104 P. 2d 602 (1940) at 604:

⁸Even a defense based on the attorney's lack of experience and training was rejected by the court in *Wrighten v. United States*, 550 F. 2d 990 (4th Cir. 1977). It should be noted, however, that financial and familial difficulties were considered by the court in determining the severity of discipline imposed in *In re Ross*, 66 Wn. 2d 233, 401 P. 2d 975 (1965). The court also gave some consideration for an attorney's family tragedy in *In re Phelan*, 24 Wn. 2d 872, 167 P. 2d 676 (1946).



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An attorney who uses funds of a client for his own benefit is not excused, even though he may repay or agree to repay such funds before disciplinary proceedings against him are concluded.

See also *In re Abbott, supra*; *In re Hall*, 73 Wn. 2d 401, 438 P. 2d 874 (1968); *In re Peterson*, 56 Wn. 2d 187, 351 P. 2d 533 (1960) (partial restitution is no defense); *In re King*, 42 Wn. 2d 617, 257 P. 2d 219 (1953).⁹

The penalties for even minor trust account violations often are quite severe. The Washington Supreme Court has continually stressed that mismanagement of clients' trust funds ordinarily results in the imposition of the most serious discipline. As explained in *In re Hutchins, supra*, 406 P. 2d at 778:

Embezzlement, conversion, refusal or inability to properly disburse or account for funds entrusted to the care of an attorney begets disbarment. [Citation omitted.]

⁹Accord *State ex rel Nebraska State Bar Association v. Ledwith*, 197 Neb. 572, 250 N.W. 2d 230 (1977); *State ex rel Oklahoma Bar Association v. Bishop*, 556 P. 2d 1276 (Okla. 1976).

Neglect, delay or procrastination in managing those funds warrant disciplinary action ranging from suspension to disbarment. [Citations omitted.]

In re Deschane, 84 Wn. 2d 514, 527 P. 2d 683 (1974) re-emphasized this point, 527 P. 2d at 685:

Those few attorneys who mishandle trust funds, who fail to maintain complete records of trust funds and who fail to account and deliver funds as requested are reminded that disbarment is the usual result. [Citations omitted.]

Proper Use of Trust Accounts

An awareness of DRA 13 and the Code of Professional Responsibility's trust account provisions is only the first step in implementing proper procedures concerning the use of an attorney's trust account. In fact, many questions concerning the proper handling of trust funds are not answered by reference to any disciplinary rule. DR 9-102 answers few questions beyond mandating that attorneys refrain from commingling their

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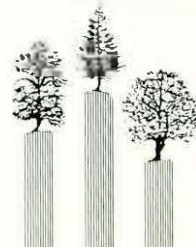
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own personal funds with those of their clients.¹⁰ Even that conclusion is based more on inference and interpretation than explanation.¹¹

Questions are often raised about what funds need to be deposited in an attorney's trust account and whether trust funds can be placed in interest bearing accounts to generate income from otherwise unproductive resources. A brief review of these two areas, and several others, may be of value to an understanding of proper trust account procedures.

Can a retainer or other lump sum payment for legal services rendered or to be rendered by the attorney be deposited directly into the attorney's general account without first being deposited in his trust account? An answer to this question often depends on whether payments are con-

¹⁰It is interesting to compare the rules dealing with attorney trust accounts with those statutory and administrative regulations applicable to real estate brokers in Washington State. The only rules that presently deal with trust accounts for attorneys are DR 9-102 and DRA 13. These rules do not assist attorneys in setting up or maintaining a trust account nor do they outline operating procedures to facilitate the proper handling of clients' trust funds. On the other hand, the regulations governing real estate brokers provide that a broker can be temporarily suspended or have his license permanently revoked for failing to keep a clients' trust account. *Ree R.C.W. 18.85.230(19)*. In addition, *R.C.W. 18.85.310* specifically requires a broker to maintain a real estate trust fund account in a recognized Washington State depository which account must be separate and apart and physically segregated from the broker's own funds. *R.C.W. 18.85.310* also requires the broker to deposit clients' funds he or she has received in the trust account no later than the first banking day following the receipt of those funds.

Certain administrative rules have also been adopted concerning the proper administration of trust accounts by real estate brokers. Several provisions are worth mentioning. *WAC 308-124E-010(4)* requires that each deposit to the real estate trust account be identified on a duplicate deposit slip as to the specific transaction which it applies to. *WAC 308-124E-010(5)* mandates that the real estate trust account must be in agreement at all times with the outstanding trust liability. *WAC 308-124E-010(6)* requires that the broker prepare a monthly trial balance of his clients' ledger, reconciling the ledger with the trust account bank statement and the trust account checkbook. *WAC 308-124E-010(7)* and *(8)* particularize the type of information that must be entered in the clients' ledger for each debit and credit.

The implementation of DRA 13 may very well require the adoption of detailed rules for the administration of trust account by attorneys similar to those promulgated for real estate professionals.

¹¹The State Bar of California recently adopted a rule of professional conduct that may be a considerable improvement over the Washington version of DR 9-102. The new California rule incorporates DR 9-102 into a provision that more fully explains what a lawyer must do in handling his or her clients' funds and property. California Rule of Professional Conduct 8-101, West's Ann. Bus. & Prof. Code, foll. Sec. 6076, provides as follows:

PRESERVING IDENTITY OF FUNDS
AND PROPERTY OF A CLIENT

sidered to be funds of the client or of the attorney at the time of transfer to the attorney. If the payment is for services already performed, then the funds need not be deposited in the lawyer's trust account. To avoid controversy, it would be preferable to deposit all monies received from clients into the trust account and then transfer those funds to the attorney's general account when earned. Obviously, checks whose proceeds are joint funds of the client and the attorney, in the sense that only a portion of the client's funds will be paid to the lawyer as his fee, must be deposited in the trust account. Once the attorney's share of the check is ascertained, and sufficient time has passed to insure that the check has cleared the bank, a check can be drawn to the attorney for the appropriate amount due against

-
- (A) All funds received or held for the benefit of clients by a member of the State Bar or firm of which he is a member, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in such other jurisdiction where there is a substantial relationship between his client or his client's business and the other jurisdiction and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited therein or otherwise commingled therein except as follows:
- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
 - (2) Funds belonging in part to a client and in part presently or potentially to the member of the State Bar or firm of which he is a member must be deposited therein and the portion belonging to the member of the State Bar or firm of which he is a member must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member of the State Bar or firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (B) A member of the State Bar shall:
- (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
 - (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
 - (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them.
 - (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive.

the trust account and immediately be deposited in the attorney's general office account. It should be stressed that funds due the attorney should be promptly transferred from the trust account to the general account. To leave attorney's fees in the trust account until some unspecified date at which time a transfer to the general office account is made is commingling regardless of good intentions. See *Black v. State Bar*, *supra*. The funds due the attorney must be immediately withdrawn from the trust account lest the attorney lose the ability, through poor record keeping or forgetfulness, to ascertain how much of the funds in his trust account belong to him or his clients.

Can clients' funds be deposited in an interest-bearing account while in the possession of an attorney? This would appear to be proper so long as all of the attorney's clients agreed to such an arrangement with the understanding that all interest earned by such a deposit would be properly allocated to the appropriate client according to the size of his or her share of the account. B. Hildebrant, *Financial Management for Law Firms*, Chapter 1 (1975). But see A.B.A. Committee on Ethics and Professional Responsibility Informal Opinions 545 (1962) and 991 (1967); W.S.B.A. Code of Professional Responsibility Committee Opinion 86 (1960). No portion of the interest earned on the savings account can inure to the benefit of the attorney or law firm operating the account. Naturally, this savings trust account would have to be maintained separate and apart from any savings account the attorney used for his own funds. One drawback is that short term deposits in such a savings trust account can cause confusion since it is difficult to allocate to each client the interest earned on his or her money.

Several other items are worth brief mention. Serious problems can be created when an attorney negotiates an oral loan from a client to be obtained from funds on deposit in the attorney's trust account. If absolutely necessary,¹² the attorney should execute a written loan agreement with his or her client to insure that documentation exists to support a transfer of trust funds to the attorney. Obviously, the recommended proce-

sure is to refrain entirely from borrowing money from clients when the funds to be loaned are on deposit in the attorney's trust account. In *In re Mitchell*, 189 Wash. 612, 66 P. 2d 300 (1937), an attorney justified use of his client's money by alleging that the client had acquiesced in such an arrangement. The client denied that any agreement was made with the attorney concerning the use of his funds. The attorney was suspended from the practice of law for one year. See also *In re Ward*, 106 Wash. 147, 179 P. 76 (1919), *appeal dismissed*, 257 U.S. 612 (1921).

A final item of concern relates to the withdrawal of fees from the attorney's trust account without the client's approval or knowledge. Improperly deducting or appropriating attorney's fees when the fee arrangement is in dispute can result in discipline. See DR 9-102(A) (2); *Jackson v. State Bar*, 15 Cal. 3d 372, 124 Cal. Rptr. 185, 540 P. 2d 25 (1975); *In re Kennedy*, 80 Wn. 2d 222, 492 P. 2d 1364 (1972); *In re Warnock*, 70 Wn. 2d 457, 423 P. 2d 929 (1967); *In re Foster*, 40 Wn. 2d 1, 239 P. 2d 1060 (1952); *McGrath v. State Bar*, 21 Cal. 2d 737, 135 P. 2d 1 (1943). Failure to promptly return unearned fees paid in advance can also subject the attorney to discipline. *Matter of Burr*, 228 S.E. 2d 678 (S.C. 1976).

Accounting Guidelines

No particular accounting system is mandated by DRA 13.¹³ Regardless of the type of accounting system utilized, however, several rules are often cited as good office practice when dealing

¹³Many different types of trust account accounting systems have been devised. Complicated journal systems compete with pegboard arrangements often praised for their simplicity and efficiency, especially for medium and small size law firms. Pegboard systems utilize a set of carbonized forms including checks, ledger cards and journals in conjunction with a metal pegboard. The pegboard system reduces the number of journal entries that would ordinarily have to be made if receipt and disbursement journals are maintained. For receipts one need only place a client's ledger card and a bank receipt slip over the receipts journal. In the case of disbursements, the checks, as written, carbonize the client's ledger card and the disbursements journal. For a brief description of the "Safeguard" pegboard accounting system, see Machles, "An Efficient Accounting System for Small and Medium Size Law Firms," 82 *Case and Comment* 13 (March-April 1977). For a more comprehensive examination of accounting systems for lawyers, see B. Hildebrant, *Financial Management for Law Firms* (1975); A. Clark and K. Strong, *Law Office Management* (1974); M. Altman and R. Weil, *How to Manage Your Law Office* (1973); P. Bigelow, *Law Office Economics and Management Manual* (1971).

¹²See DR 5-101(A); DR 5-104(A); EC 5-1, 5-2, 5-3 and 5-5 of the Code of Professional Responsibility regarding conflict of interest considerations when entering into a business transaction with a client.

with trust funds. The following list¹⁴ restates but a few of these rules:

- (1) Make sure that no trust account check is drawn against a particular client's funds unless the check upon which the client's deposit is based has cleared through the banking process. A good rule of thumb is to allow three days for local checks, seven days for all other checks and even longer for foreign checks.
- (2) Thought should be given to purchasing a blanket fidelity bond for all of the lawyer's employees or at least for those employees who are authorized to issue checks on the firm's trust and general office accounts.
- (3) It makes good sense to consider making arrangements to have your firm's books audited about once a year by an accounting firm which is not related to, or a client of, your office or firm.
- (4) Have the employee who handles the daily mail prepare a list of checks received in the mail each day. Have an employee other than the one responsible for maintaining the office's books tabulate the firm's daily receipts.
- (5) Refrain from complicating your bookkeeping and personnel problems by refusing to allow employees to obtain cash advances against their salary or borrow money from your law firm.
- (6) Centralize your firm's bookkeeping system to avoid too many employees from gaining access to the firm's trust account and general account checks and ledgers.
- (7) Make arrangements with your bank to have bank service charges deducted from your general office account so as to avoid even the possibility of using your clients' funds for the payment of those service fees.
- (8) An effort should be made to reconcile your clients' ledger cards, netting re-

ceipts and disbursements, with the trust account bank statements on a periodic basis to verify the accuracy of your accounting system.

- (9) All deposit records should indicate whose money is deposited in the trust account or general office account and for what purpose. This proves helpful when it is necessary to reconstruct the deposit of funds in both the trust and general office accounts.
- (10) Consider using a duplicate receipts book for all cash received by the firm to insure that a proper record is maintained of all cash received. Refrain, if possible, from delegating cash receipt and bookkeeping functions to one employee.

Conclusion

With the advent of more sophisticated discipline rules dealing with the proper use of attorney trust accounts, all lawyers who receive money and property from their clients must take care to avoid the commingling of trust funds with their personal funds. DRA 13 was formulated to prevent trust fund violations by attorneys. The adoption of DRA 13 making all lawyers subject to a comprehensive audit of their trust accounts should compel the implementation of generally accepted accounting procedures by attorneys handling their clients' funds and property. Perhaps a joint attorney-accountant committee organized by the State Bar Association could be created to develop model accounting rules for use by law offices of varying sizes.¹⁵ This would benefit the Disciplinary Board's investigators, who ultimately will perform the spot audits contemplated by DRA 13, and all practicing attorneys by giving them a number of accounting systems to consider while insuring compliance with this new trust account rule. □

¹⁴The list of suggested procedures cited in the text have been condensed from B. Hildebrant, *Financial Management for Law Firms* (1975); A. Clark and K. Strong, *Law Office Management* (1974) and P. Bigelow, *Law Office Economics and Management Manual* (1971).

¹⁵It appears that the Board of Governors of the Washington State Bar Association has referred draft regulations for the implementation of DRA 13 to the Disciplinary Board for consideration. See "The Board's Work," *Washington State Bar News*, July, 1977, at 19. The scope of the regulations being promulgated could eliminate the necessity for additional guidelines. The successful implementation of DRA 13 will depend, however, upon the adoption of trust fund guidelines that (1) attorneys will be able to comply with without undue expense; (2) will take into account the differences between small, medium and large law firms; and (3) will not create a "paper juggle" of compliance forms.

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Fees — Part III

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There is a great deal of confusion about the attorney's lien, the duty to withdraw and the protections an attorney has from clients who won't pay fees. Some of this confusion is caused by a lack of understanding of how the attorney's lien works and from a conflict between the withdrawal statute and the withdrawal rules of the Supreme Court.

The attorney's lien, RCW 60.40, provides that an attorney has a lien upon the papers, money and judgments of a client. When the papers or money are in the possession of someone else the lien begins with the giving of notice. If the attorney has possession of the papers or money it is effective when the attorney refuses to deliver them to the client.

After the attorney refuses to deliver the papers and money he or she may be required by a court to deliver them or to show cause why not. However, with the attorney's assertion of the lien the court can make provisions to protect the attorney's fees. The court can also refer the matter for handling as in any other type of case or the court can summarily decide the merits of the lien.

The client is entitled to seek an order to compel delivery but at the same time the attorney can seek a judicial determination of the appropriateness of the fees. The judge can then provide protection for the attorney's fees by issuing a judgment, by requiring the client to give security or by requiring the client to take such other action as might be necessary to protect the attorney. The client is protected because the show cause hearing provides a means of compelling production of the files and, therefore, avoids any prejudicial effect on the underlying case by an attorney's fee claim. It also allows the client to dispute any fee claim and obtain a judicial determination on its merits.

There would appear to be a second protection for attorneys, at RCW 2.44.040 and .050, if an

attorney has been discharged by a client. These sections provide that a change of attorney may be made upon the order of the court but "no such change can be made until the charges of such attorney have been paid by the party asking such change to be made." The sections also provide that the attorney must continue to be recognized by the adverse party until the charges are paid.

In essence what these sections allow is an attorney to refuse to withdraw from a case until the fees and costs are paid. The adverse party is compelled to recognize the creditor attorney, therefore, preventing the debtor client from obtaining counsel who can be recognized by the opposing side. The recent Court of Appeals case of *Rogers Walla Walla v. Ballard*, 16 Wn. App. 92, 553 P. 2d 1379 (1976), appears to uphold the principle that an attorney can refuse to be substituted on a case despite his or her adverse interests or the client's desire to discharge him or her.

The withdrawal statutes and the *Rogers* case seem to be directly contradictory to the Code of Professional Responsibility — DR 2-110 (B) (9) which make withdrawal from a case *mandatory*, (unless a *court* rule is contrary) where an attorney is discharged by the client. There is no discussion of the Code of Professional Responsibility in the *Rogers* case, apparently because the issue was not raised to the court.

Until the *Rogers* case it had been assumed RCW 2.44.040 and .050, had been superseded by the court rules to the contrary. The Supreme Court's inherent authority over who may appear in legal matters as well as RCW 2.04.200, which provides that all laws in conflict with court rules "shall be and become of no further force or effect," gave support to the belief that the Supreme Court's mandatory withdrawal rules were controlling. Since *Rogers* the question of which rule is to be applied remains subject to further interpretation.

It has been my policy to advise attorneys who inquire to proceed cautiously about not withdrawing while relying on RCW 2.44.040. When the Supreme Court has an opportunity to directly review the two rules I feel it is likely that the 1972 Code of Professional Responsibility enacted by the Supreme Court will be found to be controlling over legislative enactment which attempts to control who can appear in legal actions. □

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Dues Statements to Provide for Collection of Voluntary "Public Interest" Contributions

By JAY V. WHITE

PORT LUDLOW, November 4-5 — The Board of Governors has agreed to administer a fund to be created through voluntary contributions of the membership which may be used to support "public interest" law firms.

Members of the bar may contribute to the fund through "self-assessment" of between \$1 and \$10 as an addition to their payment of 1978 annual dues. The method of collection is similar to the voluntary \$15 payment sought in support of legislative programs on past dues statements.

The Board's action came in response to a recommendation by the Seattle-King County Young Lawyers Board of Trustees that the 1978 dues statements include a "check-off" permitting individual lawyers to request that \$10 of their regular dues payment be placed in a fund to support public interest law firms at the Board's discretion. The Board rejected the idea of such "ear-marking" of regular dues payments, but approved a substitute proposal offered by Board Member Betty B. Fletcher to implement the voluntary fund over and above the mandatory dues assessment.

Approval of the program is conditioned upon the Board's receiving a legal opinion that the collection of "public interest" funds will not jeopardize the bar association's tax exempt status. No difficulty in obtaining such an opinion is anticipated.

In other action, the Board discussed the pending referendum to roll back the dues increase recently approved by the Board [*Bar News* 31:10:21], and drafted a statement in opposition; adopted and forwarded to the Supreme Court regulations to implement DR 13, the trust account "spot audit" rule; previewed a videotape prepared by the CLE Committee which describes the proper use of trust accounts and the operation of DR 13; forwarded to the Supreme Court alternative language to the Board's previously recommended rule on lawyer advertising [*Bar News* 31:9:21] to permit radio and television advertising; and voted 5-4 to investigate the merit of the bar association's filing an amicus brief on rehearing in *Young v. Konz*, 88 Wn. 2d 276, pet. for reh. granted, 89 Wn. 2d 276 (1977) challenging the constitutionality of the use of lay judges.

Meeting with the Board was Ex Officio Board Member Kenneth B. Rice, representing the state Young Lawyers Section; and Seth Armstrong, representing the Seattle-King County Young Lawyers. Board Member Willard H. Walker was unable to attend.

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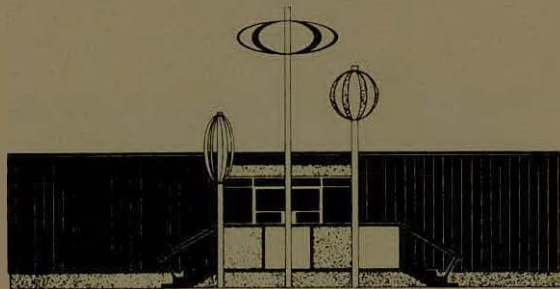
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that the Board permit members of the bar to "check-off" up to \$10 of their 1978 annual dues to support public interest law firms. He stated that the proposal is modeled after successful programs instituted by California's Beverly Hills Bar Association and the Arizona State Bar Association.

Under the proposal, the membership would be advised on the 1978 dues statements that the "check-off" would not obligate the Board to spend the money, but any money appropriated from the fund would have to go to public interest projects. Thereafter, the Board publicly would request proposals from public interest groups seeking funds and decide which, if any, groups or individual projects would receive support from the bar association.

Armstrong stressed that the proposal is a practical way for this state's lawyers to meet ethics code provisions (Canon 2; EC 2-24, 25) obligating them to support efforts to render free legal services to those unable to pay reasonable fees for such counsel. He suggested that the Board adopt a definition of "public interest legal service" adapted from a resolution by the American Bar Association House of Delegates in 1975. See 61 A.B.A.J. 1084 (1975). Under the definition, such a service is one provided without charge or at a substantially reduced fee (1) to individuals who cannot afford counsel; (2) in cases seeking vindication of a fundamental civil right; (3) for interests belonging to a significant segment of the public; (4) to charitable organizations when payment of customary fees would significantly deplete the organization's resources or be otherwise inappropriate; and (5) to increase the availability of legal services or otherwise improve the administration of justice.

As examples of public interest activity, Armstrong stated that the Arizona program has supported legal projects relating to representation of the public in utility rate proceedings; honesty in government; health issues, such as evaluation of the performance of state agencies regulating nursing homes; and representation of handicapped and disabled persons. He also pointed to the work of a public interest law firm in Seattle, the Northwest Labor and Employment Law Office (LELO) which provides legal counsel to minority workers' groups as described in J. Burnett, "Lawyers

Who Work For Workers," *Juris Doctor*, October 1977, pp. 25-28.

In the ensuing discussion, President Novack inquired whether there have been any legal challenges made to the use of a bar association's funds to undertake or support litigation to which the bar association is not a party. Armstrong said he knew of no authority which would support such a challenge and reemphasized that the program would be voluntary.

Ex Officio Board Member Rice voiced support for the proposal and suggested the Board permit the membership to require that the fund be spent for public interest projects. Board Member Betty B. Fletcher stated that the Board should retain discretion to determine whether any project is worthy of support, but said that she favors the proposal which she said has received support from ABA groups around the country. She said that the proposal offers "another way of law reform" in addition to bar-sponsored projects to draft model legislation in such areas as landlord-tenant relationships and probate: "Litigation in a judicious manner can work as well as legislation."

Board Member Michael J. Hemovich questioned the purpose to be served by the "check-off" plan, given the fact that the Board retained its present discretion to fund or not fund any public interest project. He suggested that individual groups simply should make direct requests to the Board for funding.

Rice suggested that the "check-off" would be helpful because it would reflect the degree to which the membership wanted its money to be spent on public interest projects: "This Board will be hesitant to spend money in the abstract, but if you have dollars set aside, you're going to be more responsive to public interest projects."

Hemovich responded that he could judge future projects on their merits and that the presence or absence of a "check-off" fund "wouldn't influence me one iota."

Board Member David A. Welts and President Novack questioned whether the proposal might be premature in view of the pending referendum on the recent dues increase. Board Member Lowell K. Halverson responded that approval of the project could be made contingent upon the result of the referendum.

Board Member Paul R. Cressman suggested that the program could be implemented as a voluntary payment by interested lawyers over and above whatever dues are in force. He also noted that the matter could be deferred until the Annual Business Meeting when it could be presented directly to the membership.

Hemovich, seconded by Peterson, moved to reject the "check-off" proposal at this time. The motion carried, 5-2, with Halverson and Fletcher opposed and Board Member Bradley T. Jones not voting.

Fletcher, seconded by Board Member Charles W. Cone, moved that a "check-off" box be included on the 1978 dues statement to allow the membership voluntarily to pay between \$1 and \$10 in addition to their dues for use in public interest projects (under the ABA definition) approved in the Board's discretion. As part of her motion, Fletcher stressed that although the Board would not be required to spend the money, any money from the fund which was appropriated would have to go to public interest projects and could not be used for unrelated purposes.

Hemovich stated that he favors the purposes of the proposal, but opposes its means.

The motion prevailed, 7-1, Hemovich opposed and Jones not voting. Subsequently, the Board voted to make the project contingent upon the Board's obtaining a legal opinion stating that the project is not inconsistent with the bar association's tax exempt status.

Dues Referendum

Executive Director G. Edward Friar reported that a valid petition had been filed October requiring a referendum vote of the entire membership on the question of whether the dues increase approved by the Board on September 14 should be rescinded. He emphasized that the referendum should be submitted immediately to permit the membership a sufficient time in which to vote and to permit the 1978 dues statements, reflecting the result of the referendum, to be timely mailed by December 1.

On the motion of Board Member Fletcher, the Board unanimously voted to submit the referendum as soon as possible and to include in the mailing single statements by the Board opposing and by the referendum sponsors favoring the pro-

posed rescision of the dues increase.

Thereafter, the Board approved a draft of its statement in opposition and agreed to seek the support of local bar associations. [Referendum results, p. 23]

"Spot Audit" Regulations and CLE Videotape

The Board unanimously approved and forwarded to the Supreme Court draft regulations to implement DR 13, the trust account "spot audit" rule which became effective July 1, 1977. In related action, the Board approved and forwarded to the Supreme Court proposed amendments to the Disciplinary Rules which would (1) make failure to cooperate with a DR 13 auditor an independent ground for discipline; and (2) include DR 13 audit costs as an "expense" which may be assessed against a disciplined attorney.

Director of Continuing Legal Education John J. Michalik met with the Board and presented a color videotape prepared by the CLE Committee which is designed to educate the membership as to the proper use of trust accounts and the operation of DR 13. He reported that the tape is scheduled for presentation to local bar groups statewide through the end of February, and that it would be available to private law firms.

The strong sense of the Board was that the subject matter of the videotape is of such vital importance that every effort should be made to make it available to the membership without charge. [An article detailing the operation of DR 13 appears in this issue at page 8.]

Lawyer Advertising

The Board unanimously approved and forwarded to the Supreme Court alternate language to its previously recommended rule on lawyer advertising to permit radio and television advertising. Under the recommended rule, lawyers would be prohibited from advertising on radio and television. The Board agreed to submit the alternative language following its meeting September 15 with members of the Supreme Court (*Bar News* 31:10:25).

Challenge to Lay Judges?

The Board considered requests from the Yak-

ima County Bar Association and Yakima Valley Legal Services that the bar association prepare an amicus curiae brief on rehearing in *Young v. Konz*, 88 Wn. 2d 276, pet. for reh. granted, 89 Wn. 2d 48 (1977), challenging the constitutionality of the state's lay judge system.

Board Member Fletcher moved, seconded by Hemovich, that two attorneys be appointed to review the case to see if an amicus brief would be appropriate and, if so, upon consultation with President Novack, such a brief could be prepared and filed. The motion carried, 5-4, with Cressman, Jones, Peterson and Welts opposed and President Novack breaking the tie.

Disciplinary Board

The Board unanimously approved and forwarded to the Supreme Court a proposed amendment to DR 2.4 relating to complaints filed against members of the Disciplinary Board. The amendment provides:

In the event any complaint is made to the State Bar alleging a violation of the rules of professional conduct by an attorney member of the Board, such member shall take a leave of absence from the Board until the matter is resolved, unless otherwise directed by the Board of Governors. If a disciplinary sanction is imposed against the member, he

shall be ineligible to serve further on the Board. The resulting vacancy shall be filled as set forth in DR 2.4(e).

Miscellaneous Topics

In other action, the Board:

- Appointed James P. Curran of Kent to fill the unexpired portion of the term of Cleary Cone who resigned as one of the association's delegates to the ABA House of Delegates;
- Agreed to advise informally an inquiring member that the Board does not expect that any disciplinary action will be taken against an attorney who lists his name in the Seattle Chamber of Commerce Membership Directory and Buyers' Guide;
- Agreed that the June Board meeting will be at Ocean Shores;
- Tabled a request by the Administrative Law Section for a \$2,000 appropriation to fund a project to analyze and propose amendments to the state's Administrative Procedures Act;
- Approved and forwarded to the Legislative Committee for implementation legislation proposed by the Court Rules and Procedures Committee relating to Small Claims Court;
- Tabled consideration of a recommendation by the Executive Committee of the Board of Bar Examiners relating to publication of Bar Exam questions. □

Referenda Results

Membership Rejects Dues Increase, Lay Board Members

The following are the results of the two recent referenda relating to the proposed addition of lay members to the Board of Governors and to the dues increase approved by the Board on September 14, 1977:

	Dues Increase for Fiscal 1977-78	Addition of Lay Members to Board of Governors
In Favor	28%	44%
Opposed	72%	56%
% of Member- Ship Voting	64%	55%



Around the State

BENTON-FRANKLIN REPORT

By STEPHEN T. OSBORNE

It is that time of year again when we start seeing new faces in the legal community. Six new lawyers were sworn in recently in ceremonies held in Franklin County Superior Court, with Superior Court Judges **Richard G. Patrick**, **Fred R. Staples**, and **Robert S. Day** presiding.

Francois X. Forgette will join the firm of Raekes, Rettig & Osborne as an associate; **George Critchlow** will associate with his father's firm, Critchlow, Williams, Ryals & Schuster; **Allen Brecke** will be indentured to Leavy, Taber, Schultz, Bergdahl & Sweeney; **Patricia Chvatal** and **Don E. Powell** have joined Bennett & Carroll as associates; and **Alan Gunter** apparently will head for greener (?) pastures in Moses Lake with **Harrison Dano**.

It is always refreshing to hear the oath which contains many high ideals and noble thoughts. One courthouse wag observed that the oath prohibits a lawyer from associating with offensive personalities and wondered if **Allen Brecke** had received some sort of dispensation since he would be working with **John Schultz**.

The ski enthusiasts are rubbing their hands together chanting snow, snow, snow. The "young" lawyers of the Benton-Franklin County Bar are organizing a basketball team to participate in the local recreation league. Noting that most of those desiring to play have not had much recent physical exertion, it was suggested that the team con-

sist of 50 players allowing for quite liberal substitution. It was also suggested that the team secure a member adept in the techniques of cardio pulmonary resuscitation. **Tom Cowan** assures all that he will keep a sufficient quantity of "adrenalin" on ice and court-side at all times. Good luck guys.

CHELAN/DOUGLAS

By GAY CORDELL

The local bar has been blessed with a good number of activities involving festivities and merriment in the last several months.

The first annual bar softball game occurred in August, 1977 with sufficient bar members to complete two full softball teams. Great feats of daring and skill were accomplished such as **Gordon Kelley** making it to third base on a home run and **Grant Mueller's** surprise pitching. As one might expect the original seven inning game proceeded into nine innings with the Greens in the lead in the 7th and the Blues in the lead at the end of the 9th. A goodly amount of discussion ensued as to the true winner.

Additional festivities this fall season have been a number of housewarmings for new law offices. Whitmore, Warren & Bromiley had an outstanding opening with a majority of the bar members crowded around the punch bowl leaving the remaining guests to eat hors d'oeuvres.

Davis, Arniel, Dorsey, Kight & Parlette, who has recently acquired two new members; **Jay Johnson** and **Ray Foianini** also displayed gracious manners in elegant surroundings and a stock room which converted itself

nicely into a portable bar. We lost two local bar members, their remains are still being sought.

The Prosecutor's Office has acquired a new deputy named **Cliff Webster**, who by volunteering to file advance sheets in the County Library has been unanimously proclaimed official librarian for Chelan County.

EAST KING REPORT

By BARRY J. HASSON

The November luncheon of the East King County Bar Association featured the Honorable **William C. Goodloe**. He gave some interesting insights into what has been happening regarding the two week jury term; he also discussed the history and use of the *voir dire*, giving some insights into how to approach it from a practical standpoint. All those in attendance found his speech to be interesting and informative.

Members of the East Side Bar are saddened to note the recent passing of **Saul D. Herman** of Bellevue and **Frank C. Trunk** of Kirkland.

SOUTH KING REPORT

By JAMES L. VARNELL

Joint Return. In November the attorneys from the South King County Bar Association held their annual meeting with accountants from the south King County area at the Meridian Valley Country Club (Kent). Featured speakers included **Mel Kleweno**, **Steve Johnson**, and **Robert E. Shannon**. Unfortunately, C.L.E. credit was not allowed for this meeting, in spite

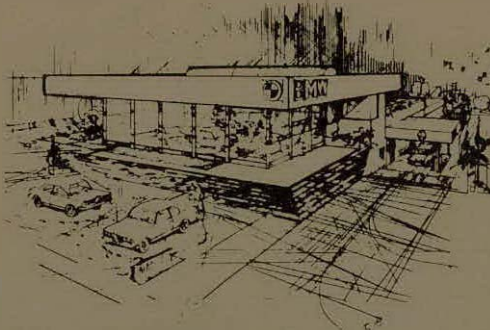
of the excellent presentations made.

Annual Awards of Merit. The Truex-Cosway award for excellence in the study of deficiency judgments-sales, RCW 62A.9-501 (1), was made to **Robert G. Wallace**. The Wurlitzer prize was given to **James F. Sanders** for his assistance in the successful, thus far, defense in the Waylon Jennings case. The James Buffett-Changes in Latitude plaque was presented to **Charles R. Branson**, who has practiced (within the past two years) in Renton, Burien, Seattle and is now officing in Burien again. Voting for the best-dressed attorney for 1977 resulted in a four-way tie among **Charles A. Burgeson**, **Richard C. Conrad**, **Gary F. Faull**, and **Robert C. Van Sien**. The Mel Tillis award for effective oral presentation on the motion calendar was made to **Kameron C. Cayce**.

Equal Time. At the request of **David L. Harpold**, this correspondent acknowledges publication of a pamphlet discussing how an attorney explains to his client that temporary attorney fees pursuant to RCW 26.09.140 are not always ordered, even when one's client is unemployed with no prospects of income and the other party is employed on a fulltime basis.

New Associations. **Ross E. Taylor**, a 1977 law school graduate of the University of Washington, is now practicing in Federal Way. **Steven J. Callson**, a 1975 law school graduate of the University of Puget Sound and formerly practicing in Moses Lake, is now associated with **Robert J. Hall** in Burien.

Good News!



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SEATTLE-KING REPORT

By JAMES R. DICKENS

The big news in the Seattle area, of course, is that many local members of the bar and the judiciary will be spending New Year's in Pasadena — yelling "Go Huskies!" If return flights are delayed out of Los Angeles, you may find some attorneys still absent on January 3 and 4, so watch your scheduling of depositions and otherwise for those days. Besides, attorneys shouldn't be working too hard at the beginning of a new year anyway.

Among changes by attorneys in the area, **Roger Leed** has opened new offices at 1411 4th Avenue and also will be of counsel to Smith, Brucker, Winn &

Eblert. Just across the floating bridge in Bellevue, **William M. Taylor** and **Miles C. Dillon** have formed a new partnership, Dillon & Taylor, Suite 303, Dravo Building, 225 108th N.E.

The Lane, Powell, Moss & Miller firm recently packed its law books and moved from the Washington Building across the street to the new Rainier Bank Tower. Despite some apprehensions about the move, everything seems to have gone smoothly. The Perkins firm, still expanding, has now taken over some of the space formerly occupied by Lane, Powell and has the 17th, 18th, 19th and part of the 20th floors in the Washington Building.

Another new tenant of the Rainier Bank Tower, formerly Graham, McCord, Dunn, Moen, Johnston & Rosenquist, has

changed its name at the time of the move to Graham & Dunn. This sure makes it easier to remember.

In Memoriam

William H. Cook, 86, of Seattle, died during October. He was admitted to the Bar in 1925.

Saul Herman, 72, of Bellevue, died October 8. He was admitted to the Bar in 1933.

Raymond F. Kelly, 77, of Spokane, died November 13. He was admitted to the Bar in 1924.

Burton Winfred Lyon, 63, of Tacoma, died November 7. He was admitted to the Bar in 1940.

Jack B. Regan, 44, of Seattle, died September 21. He was admitted to the Bar in 1958. □



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CODE OF PROFESSIONAL RESPONSIBILITY COMMITTEE

Informal Opinion* — I-2** on Attorney's Obligation to Dismiss Action on Client's Instruction

We have been asked whether a lawyer who has commenced an action on a client's behalf must have the action dismissed, in response to a client's instruction to do so, if the client has not paid the attorney's fee.

The Code of Professional Responsibility sanctions withdrawal from a case by a lawyer whose client "(d)eliberately disregards an agreement or obligation to the lawyer as to expenses or fees." DR 2-110 (C) (1) (f). However, a lawyer who chooses not to withdraw is bound "to seek the lawful objectives of his client through reasonably available means. . . ." DR 7-101(A) (1). Where a party wants an action dismissed, and the opposing party does not object, the means to the client's lawful objective are reasonably available and the lawyer should either withdraw or have the action dismissed.

There are legal remedies available to a lawyer in such a case. *See, e.g. Firchan v. Gaskell*, 88 Wn. 2d 109 (1977).

**Informal Opinions are published pursuant to authorization granted by the Board of Governors but they have not been individually approved by the Board and do not reflect the official position of the Association. An Informal Opinion is provided for the education of the Bar and reflects the opinion of the Code of Professional Responsibility Committee.*

***Please note that the Informal Opinion of the Code of Professional Responsibility Committee which appeared in the May, 1977 Bar News on page 45 entitled "Informal Opinion on Use of Attorney's Letterhead" should be numbered as I-1.*

Informal Opinion — I-3 on the Ethical Considerations of an Attorney Drafting a Will naming Himself as a Beneficiary*

The Code of Professional Responsibility Committee has been asked to consider the ethical considerations of an attorney drafting a Will, Naming himself/herself as beneficiary therein.

A lawyer should look to Canon 5 of the Code for guidance. DR 5-101(a) provides:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

Ethical considerations 5-1, 5-2, 5-5, 5-6, and 5-11 should also be consulted.

There are cases involving the disciplining of attorneys who have drafted Wills under which they are beneficiaries. *See e.g. Columbus Bar Association v. Ramey*, 32 Ohio St. 2d 91, 610 Ops. 2d 338, 290 N.E. 2d 831 (1972). (Reprimand).

The committee makes no comment as to the legal implications of an attorney drafting a Will in which that attorney is a beneficiary, such as, attempting to probate such a Will under a claim of undue influence. *See In re Smith's Estate*, 68 Wn. 2d 145, 411 P. 2d 879, 416 P. 2d 124, 19 ALR 3d 559 (1966).

In conclusion then, it is the opinion of the Committee that great caution should be exercised by a lawyer drafting a Will, naming himself/herself as a beneficiary therein.

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Discipline

Notice of Disbarment

James McGuire has been ordered Disbarred by the State Supreme Court. McGuire was disbarred pursuant to a stipulation entered into between himself and State Bar Counsel and adopted by the Disciplinary Board. This notice is published pursuant to DRA 11.7 (c) (1).



Section Reports

ADMINISTRATIVE LAW

By C. ROBERT WALLIS

A driving downpour of Canadian precipitation did nothing to dampen the enthusiasm and interest of persons attending the Administrative Law Section's Convention CLE in Vancouver. The Section's appreciation is expressed to CLE program participants: C. Dean Little, Chairman; John M. Cary, Michael B. Crutcher, Charles R. Blumenfeld, Donald H. Brazier, C. Robert Wallis and Supreme Court Justice James M. Dolliver.

Officers and Executive Committee members for 1977-78 are: Chairman, C. Robert Wallis; Chairman-elect, C. Dean Little; Secretary-Treasurer, John M. Cary; Two-year Board Term, James M. Vache and Richard L. Wiehl; Three-year Board Term, Thomas Beierle and James Pharris. These individuals join present Board Members Douglas Beighle and Richard Mattsen and Immediate Past Chairman, George Kargianis, to form the Section's Executive Committee.

The Section expressed its appreciation to retiring Board Members William M. Lowry, James B. Strong and Clyde H. MacIver and voiced particular appreciation to retiring Secretary-Treasurer Harold Baily for his numerous years of service in that post since the founding of the Section.

Work is proceeding on numerous Section projects, including possible legislative revision to the State Administrative Procedures Act, possible legislation on local government procedures, preparation of the 1978 Convention CLE and a possible CLE on Federal Administrative Law jointly sponsored with the State of Oregon, production of a Section newsletter, and the possibility of subgroups within the Section for governmental attorneys and administrative law judges. These projects are all in addition to the CLE road show being presented across the State in October and November.

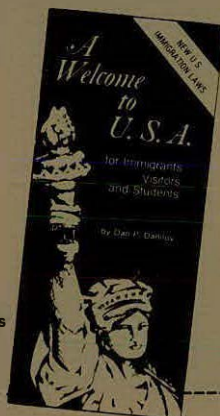
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CORPORATION, BUSINESS AND BANKING LAW

The Corporate Law Department Subsection of the Corporation, Business and Banking Law Section, has published a Corporate Law Directory. The directory provides a membership listing both by attorney and by corporation of attorneys who are practicing law in various capacities for corporations throughout the State.

Anyone interested in obtaining copies of this directory may purchase them at a cost of \$2.00 per copy by contacting Sandy Russo at the Bar Office.



JUDICIAL COUNCIL REPORT

By **KARL TEGLAND**

Judicial Council Attorney

Proposed Evidence Rules Distributed

In a recent issue of the *Bar News*, I reported that the Chief Justice had appointed a task force to explore for the Judicial Council the possibility of codifying the law of evidence in Washington. After eleven monthly meetings, the task force recommended to the Judicial Council the approval of rules based upon the Federal Rules of Evidence, but with what the task force felt were particularly troublesome rules amended or deleted. Following two days of deliberation, 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 proposed rules were printed in pamphlet form and mailed to all judges and attorneys during the month of November. I would like to take this opportunity to comment again on the rules and to remind *Bar News* readers that comments on the proposed rules are earnestly solicited.

The Judicial Council is indebted to the task force for its major role in developing the proposed rules. Its proposal to the Judicial Council was not, and was not intended to be, merely a restatement of the federal rules, and the preparation of a draft called for long hours of hard work and considerable debate. Given the nature of the project, further discussion and amendments at the Judicial Council level were inevitable. I say this not to diminish the importance of the task force draft, but only to make it clear that the pamphlet mailed to the bench and bar does reflect the revisions by the Judicial Council.

For those with an interest in comparing the task force draft with the Judicial Council draft, the Judicial Council's revisions are summarized here. Rule 103(d), which deferred to the Rules of Appellate Procedure relating to the scope of appellate review, was deleted. Rule 410, taken from the federal rules, was modified to allow evidence of pleas, offers of pleas, and related statements to be admitted under some circumstances. Rule 606(b), taken from the federal rules and relating to inquiry into the validity of a verdict, was deleted. The

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last paragraph of Rule 608, taken from the federal rule and relating to self-incrimination, was deleted. Rule 609, taken from the federal rule and relating to impeachment by prior conviction, was added to the proposed state rules. In Rule 803, relating to exceptions to the hearsay rule, paragraphs (18), (22), and (24) of the federal rule were added to the proposed state rule. In Rule 804, relating to exceptions to the hearsay rule, paragraph (5) of the federal rule was added to the proposed state rule.

At this point, the rules are still only a proposal, and the Judicial Council will not recommend them for adoption by the Supreme Court until it has had an opportunity to receive comments from the bench and bar. Any person or organization wishing to comment on the proposed rules should write to the Washington Judicial Council, University of Washington School of Law, Seattle, Washington 98105. All comments will be given careful attention, and the Judicial Council will reconsider each rule in light of comments received before recommending a draft to the Supreme Court. The Council wishes to report to the Court

by the spring of 1978 and accordingly requests that comments be mailed prior to January 31, 1978.

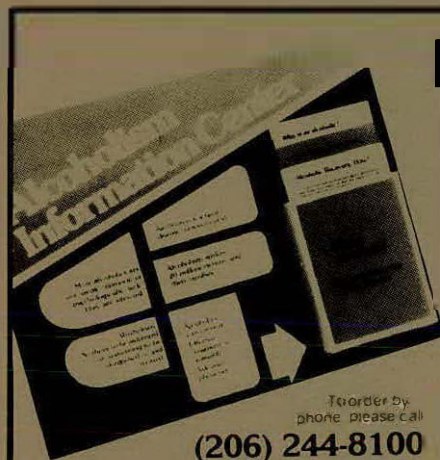
SUPERIOR COURT NEWS

By JUDGE JAMES A. NOE

Nine New Judges for Superior Court

Governor Dixy Lee Ray has appointed nine new Superior Court Judges to take office November 1, 1977. The new positions were created by the 1977 legislature. The new judges are: Richard P. Guy (Spokane), Robert S. Day (Benton-Franklin), James I. Maddock, (Kitsap), Richard L. Pitt (Island-San Juan), Liem Tuai (King), Stephen M. Reilly (King), Jack Scholfield (King), Gerard Shellan (King), and Barbara Rothstein (King).

The new judges are expected to assist in catching up on civil case backlogs and to meet the ever expanding litigation in Washington state trial courts. □



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Warning: Toys May Be Hazardous To Your Health

By QUENTIN STEINBERG

When George's Grandmamma was told
That George had been as good as Gold,
She promised in the Afternoon
To buy him an Immense BALLOON,
And so she did; but when it came,
It got into the candle flame,
And being of a dangerous sort
Exploded with a Loud Report!
The Lights went Out! The Windows broke!
The Room was filled with reeking smoke!
And in the darkness shrieks and yells
Were mingled with Electric Bells,
And falling masonry and groans,
And crunching, as of broken bones,
And dreadful shrieks, when worst of all,
The House itself began to fall!
It tottered, shuddering to and fro,
Then crashed into the street below —

The moral is that little Boys
Should not be given dangerous Toys.
— Hilaire Belloc

Few things provide as much joy as our observing children opening gifts and playing with bright and shiny new toys. Yet each year an estimated 700,000 children are injured by dangerous toys. E. Swartz, *Hazardous Products Litigation* 376 (1973).

Largely as a result of action by the legal profession through products liability lawsuits (claims resulting in lawsuits predicated upon products liability have increased from 50,000 in 1960 to 500,000 in 1970 and amounted to more than one million in 1975, *Forbes Magazine*, Sep. 1, 1975, at 63-64), as well as other action by parents, consumer groups and governmental agencies, toys have become a little safer than they have been in the past. A little safety, however, is not suffi-

cient consolation to a child who has been injured or to the parent of that child. This article offers a review of products liability law, particularly as it relates to the problem of unsafe toys, so that we, as attorneys, can have a better appreciation of the problem and contribute to the goal of total toy safety.

Basis For Liability

There are three basic theories from which to fashion liability. No matter upon which theory you proceed — negligence, strict liability or warranty — it is important to recognize that children



"Boss, we've created a new toy. A rocket ship with a real nuclear warhead. To be safe we're placing a warning on it — 'Not for Children Under 3'."



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are a separate species and are not held to the same standard of care that is applied to adults. The standard of care applied to children is formulated in terms of the conduct that can be expected of a "reasonable person of like age, intelligence under like circumstances." "Products Liability for Personal Injury to Minors," 56 Va. L. Rev. 1223 (1970). It is to be assumed that children will, out of curiosity or ignorance, expose themselves to danger in ways unexpected of adults. "Youth is ever the time of heedlessness, of impulsiveness and of forgetfulness." *Calandri v. Ione Unified School Dist.* 33, Cal. Rptr. 333, 338 (1963). This is sound public policy from which the courts have not deviated. The designer, manufacturer or distributor of a toy, in determining its duty and standard of care, must base its decision upon this fact of life.

1. Defect in Manufacture

In *Ulmer v. Ford Motor Co.*, 75 Wn. 2d. 522, 452 P. 2d 729 (1969), the court affirmatively held that a tort cause of action existed for injuries resulting from a dangerously defective product. The court in *Ulmer* adopted Section 402A of the Restatement (Second) of Torts (1965) as the law of Washington and held that a manufacturer selling a product in a defective condition unreasonably dangerous to a user or consumer or to his property is strictly liable for physical harm caused to the ultimate user or consumer or to his property, if the product reaches him without substantial change in the condition in which it was manufactured. Such liability exists even if all possible care was used in the manufacture of the product and the user or consumer had no contractual relation with the manufacturer.

The advent of the strict liability concept has not eliminated other theories of recovery. In *Brown v. Quick Mix*, 75 Wn. 2d. 833, 454 p. 2d 205 (1969), the court recognized that alternative theories of recovery could be presented. Therefore, if sufficient evidence of negligence is available, it might be advantageous to present this theory, in that a negligence concept may be more readily understood by a jury.

The requisites demanded for recovery in a negligence theory are found in Restatement (Second) of Torts § 395 (1965) which was adopted in Washington by *Dipangrazio v. Salamonsen*, 64

Wn. 2d. 720, 725, 393 P. 2d. 936 (1964):

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.

The importance and use of negligence as a viable theory of recovery has diminished in that the defense of comparative negligence is applicable to a negligence claim whereas it is inappropriate and cannot be used in a strict liability cause of action. Restatement (Second) Torts § 402A, comment n (1965); *Williams v. Brown Mfg. Co.*, 261 N.E. 2d. 305 (Ill. 1970); W. Prosser, *Torts*, 670-71 (4th ed. 1971).

2. Design Defects

Some products are fundamentally unsafe because of flaws in their basic design: they are perfectly made according to imperfect plans. Our



● Quentin Steinberg, a 1971 graduate of the University of Washington Law School, is a partner of the Seattle firm of Steinberg & Steinberg.

court in *Seattle First National Bank v. Tabert*, 86 Wn. 2d. 145, 542 P. 2d. 774 (1975), extended the doctrine of strict liability to design defects. In explaining that strict liability encompasses both design and manufacture, the court logically stated at 149:

A product may be just as dangerous and capable of producing injury whether its condition arises from a defect in design or from a defect in the manufacturing process. While a manufacturing defect may be more easily identified or proved, a design defect may produce an equally dangerous product. The end result is the same — a defective product for which strict liability should attach.

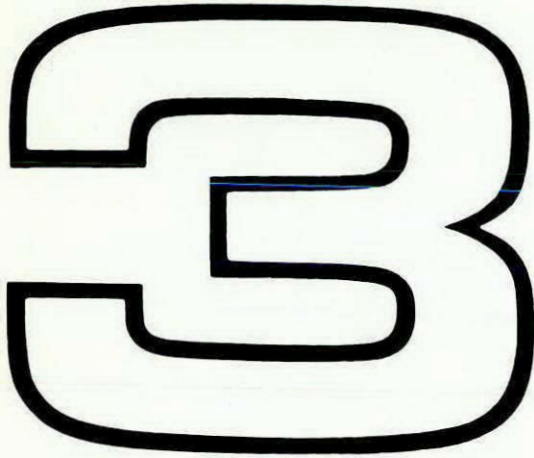
Manufacturers sought to escape liability in situations where the defect in the design of the product was a patent defect as opposed to a latent defect. The Court of Appeals in *Palmer v. Massey-Ferguson, Inc.*, 3 Wn. App. 508, 476 P. 2d. 713 (1970), rejected this contention and stated at page 517:

It seems to us that a rule which excludes the manufacturer from liability if the defect in the design of his product is patent but applies the duty if such a defect is latent is somewhat anomalous. The manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form.

In addition, the manufacturer may be held liable where the defective design does not cause the accident but merely aggravates or enhances the injury. In *Baumgardner v. American Motors Corp.*, 83 Wn. 2d. 751, 522 P. 2d 829 (1974), The court accepted this “enhanced injury” or “second accident” theory and ruled that a manufacturer has a duty to use reasonable care in the design of a product so as not to subject the user of its product to an unreasonable risk of injury or enhancement of injury.

3. Inherently Dangerous Toys

A manufacturer or distributor may be held liable for injuries caused by toys which are well



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designed and well made, but are inherently dangerous. These toys include products sold to children who are too young to use them; toys that are too easily adopted for unorthodox use; or toys that are too easily broken causing injury in their broken condition.

Edward Swartz, in his book, *Toys That Don't Care* (1971), castigates the toy manufacturers who spend enormous sums promoting their toys, but spend few dollars making these toys sturdy and safe, stating at 183:

Children play hard. Their toys are unavoidably subject to heavy wear and tear. Toys are put to novel, often strenuous uses. Accordingly, a toy that cannot stand up against this kind of ordinary play by normal children is not suitable for children at all. To market such an item with the claim that it is suitable for children is simply wrong. This is equally true when the defect involves the often deceptive and usually inadequate promotional and cautionary material that accompanies the average toy.

4. *Inadequate Warnings and Improper Instructions*

Manufacturers and others may be held liable for the failure to direct the consumer as to the proper use of a toy and/or for the failure to warn against dangers that might be present in the product. "There is substantial authority that the manufacturer must give adequate directions for use and adequate warning of potential danger. Directions and warnings serve different purposes. Directions are required to assure 'effective' use, warnings to assure 'safe' use." Frumer & Friedman, *Products Liability*, sec. 8.05, pp. 186.4-186.23 (1975). It is not always sufficient to provide directions as to proper use of a product. If there is a danger which may result from the failure to follow directions the manufacturer must warn about that danger.

The duty to warn is predicated upon the foreseeability of the danger or the foreseeability of a use from which danger might be present. A manufacturer has a duty to warn against any danger which is foreseeable, irrespective of whether the danger arises from use or misuse of the product. *Cassetta v. U.S. Rubber Co.*, 67 Cal. Rptr. 645 (1968). Therefore, because a

manufacturer can appreciate and reasonably foresee that a child will use its product in ways perhaps not intended by the manufacturer, it has an obligation to warn of the danger which might result from such misuse or misapplication of the product and it will be held liable for injuries when that duty has not been fulfilled.

In the past it was believed that a warning was adequate if it gave notice of the dangers known according to the available information and technology at the time the warning was given. Courts, however, are beginning to recognize the "continuing duty doctrine" which requires a manufacturer to incorporate advancements into its products and its warnings. *Braniff Airways v. Curtis Wright Corp.*, 411 F. 2d. 451 (CA 2 1969). Therefore, a manufacturer may be required to continually update its product, including attaching advanced safety devices, as well as upgrading its warnings when the information or the technology is reasonably available to him.

Often the manufacturer will place the warning or the direction upon the package in which the product is placed and not upon the product itself. Some courts have questioned whether this is sufficient since these packages are discarded prior to use of the product. In *Griggs v. Firestone Tire and Rubber Co.*, 513 F. 2d. 851 (8th Cir. 1975), the manufacturer distributed literature in which was included a warning against using mismatched rim components. No such warning was imprinted or impressed upon the product itself. The plaintiff replaced a flat tire with a mismatched rim and it exploded causing him serious injury. The court ruled that the warning to be adequate must remain with the product. Other cases have similarly held that warnings must be open and obvious to the user. See *Eck v. E.I. DuPont de Nemours Co.*, 393 F. 2d. 197 (CA 7 1968).

5. Unsafe Packaging

In addition to providing warnings and instructions, a manufacturer must provide safe packaging for its products. The classic case of unsafe packaging is that of a poisonous substance packaged in a bottle which can be easily opened by a child. In *Spruill v. Boyle-Midway, Inc.*, 308 F. 2d. 79 (4th Cir. 1962), a boy found some furniture polish in his home, opened the cap and swallowed the contents. The court ruled that it was foresee-

able by the manufacturer that a housewife would use furniture polish in the vicinity of young children who might drink it, and stated at page 83 that a maker must "be expected to anticipate the environment which is normal for the use of his product and where, as here, that environment is the home, he must anticipate the reasonable foreseeable risks of the use of his product in such an environment."

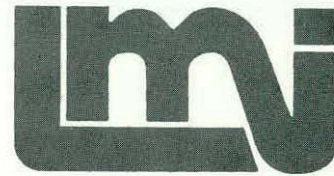
Persons Liable

1. The Manufacturer

Naturally, the primary target, when available, is the manufacturer. In 1963, in a landmark decision, Justice Traynor of the California Supreme Court, stated the liability of the manufacturer in strict liability tort actions as follows:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . .

. . . . To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product]



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in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.

Greenman v. Yuba Power Prods. Inc. 59 Cal. 2d. 57, 62, 377 P. 2d. 897 (1963). Six years later the Washington court accepted this principle and permitted recovery against a manufacturer on a strict liability claim in *Ulmer v. Ford Motor Co.*, *supra*. Long before this, the courts permitted claims by injured parties against manufacturers in negligence actions. *MacPherson v. Buick Motor Car Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

2. Distributor and Seller

The courts logically extended liability through the entire chain of commerce and have held distributors and sellers liable under the theory of strict liability for injuries caused by defective products.

The California Supreme Court, again under the leadership of Justice Traynor, provided the following reasoning in *Vandermark v. Ford Motor Co.*, 61 Cal. 2d. 256, 391 P. 2d. 168, 171 (1964):



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Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.

The Restatement (Second) of Torts § 402A, in addition, premised this extension of liability on consumer reliance. The argument is that the retailer is in a better position than is the consumer to know and ascertain the reliability and responsibility of a manufacturer, and also that the consumer is forced to rely upon the retailer's selection. *See Note*, 45 *Wash L. Rev.* 431 (1970).

The Washington Court in *Seattle First National Bank v. Tabert*, 86 Wn. 2d. 145, 148, 542 P. 2d. 774 (1975), emphatically endorsed this extension to a broad field of distributors, when it stated:

Strict liability is applicable if 'the seller is engaged in the business of selling such a product' even though the 'user or consumer has not bought the product from or entered into any contractual relation with the seller.' Restatement (Second) of Torts, sec. 402A (1) (a) and (2) (b), comment f states that the rule is intended to apply to any manufacturer, wholesale or retail or distributor. Thus, such liability is extended to those in the chain of distribution.

3. Multiple Defendants

It is not unusual in a product liability case to have multiple defendants, of which only one has

caused the injury. The courts have assisted the plaintiff in these situations by shifting the burden to the defendants to determine who caused the injury. In *Litzmann v. Humboldt*, 273 P. 2d 82 (Cal. App. 1954), a boy was injured by an aerosol bomb found on a fairground. It was discovered that two defendants had brought similar bombs to the fairground but, because all the evidence was destroyed in the explosion, the plaintiff was unable to determine which defendant brought the bomb that injured the child. The court ruled that both defendants could be held liable. Similarly, in *Dement v. Olin Mathieson Chemical Corp.*, 282 F2d. 76 (5th Cir. 1960), wherein the plaintiff sued for injuries when some dynamite exploded prematurely, the court shifted the burden to the defendant maker of dynamite and the defendant maker of the cap which was attached to the dynamite to determine who caused the injury on the ground they both cooperated to contribute component parts to an integrated whole.

4. Entire Industry

There may be occasions when the injured party is unable to determine with any certainty which defendant may have manufactured a product.

In the landmark case of *Chance v. E.I. DuPont DeNemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), the court permitted suit against an entire industry. In that case 13 minor plaintiffs were injured in separate blasting cap accidents. In each instance the child was unable to identify the manufacturer of the blasting cap which injured him. All six major national manufacturers of blasting caps were sued by these children even though only one of the defendants in each accident could have been negligent and caused each injury. Nevertheless, the court refused to dismiss the defendants holding that there are situations in which an entire industry can be held liable under negligence and strict liability.

In *Chance* the children alleged that the defendants had a joint awareness of the existence of the risks to children and that they had a joint capacity to reduce those risks. The court shifted the burden of proof to the defendants to prove who caused the specific injuries.

5. Product Endorsers and Advertisers

Endorsers of products have also been held to be liable for injuries caused by defective products. For example, Underwriters Laboratories, a test-

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ing company, was held liable for negligence in prescribing standards to make the design of a fire extinguisher safe. *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967); *Good Housekeeping Magazine* similarly was held liable to a purchaser of shoes for its negligence in certifying imported shoes to be of proper quality. *Hanberry v. Hearst Corp.* 81 Cal. Rptr. 519 (Cal. App. 1969). See 39 A.L.R. 3rd. 181 (1971).

Damages

1. Physical and Psychological

Damage to Minors.

Toys that may not be physically harmful may nonetheless psychologically damage the child. Many toys are manufactured that exploit children's aggressive impulses by encouraging physical attack. Toys that tend to glorify war or violence have come under attack by psychiatrists and humanists, and lawyers should join their ranks. Pope Paul VI, in a 1969 address to European toy manufacturers, stated:

It is our duty to remind you that toys have a great educational importance; luxury toys root certain habits in the minds; weapons develop aggressiveness; other toys incite cruelty toward animals and still others invite dangerous attitudes.

It is paradoxical that the government has proven that cigarettes are harmful to your health, yet toy manufacturers still produce toy cigarettes, lighters and candy cigarettes. We criticize auto manufacturers for their emphasis on speed instead of safety, yet toy manufacturers emphasize speed in the production of toy cars designed to simulate automobile crashes.

How can we curb the disturbing growth of our national propensity to violence when we perpetuate and glorify violence in the playthings given to our children? Why should this psychological damage incurred by our children not be governed by the same rules applicable to physical damages to children?

2. Loss to Parents.

In addition to a child's recovering for his physical and psychological injuries, a cause of action also exists on behalf of the parents of that child.

A parent may recover for the loss of the aid, comfort, society and companionship of a minor who has been injured by the negligent act of another, *Shockley v. Prier*, 225 N.W. 2d. 495 (1975), as well as for the loss of his or her services.

The Washington Court was one of the first to move away from the economic measure of damages in cases involving the death of children and to provide meaningful damages to the parents. In *Lockhart v. Besel*, 71 Wn. 2d. 112, 426 P. 2d. 605 (1967), the court struck down the common law rule that limited damages in death cases to include only loss of services of the minor child, and extended the measure of damages to include the loss of companionship of a minor child during his minority. "What is said with respect to parental loss in the event of death of a child is equally true in the case of injury. Our wrongful death statute already recognizes the loss of society and companionship as an element for damages in the case of death. It seems reasonable to recognize this same type of loss where there has been injury to a minor child." *Shockley v. Prier*, *supra* at 499.

Conclusion

We in the legal profession have an opportunity through the exercise of our professional skills to make toys and other products safer for the consumers who purchase and use them.

We also, as parents and consumers, have a responsibility to children to look out for their safety and purchase only toys that are safe. It is far better to prevent the first injury than to prevent the second tragedy. In shopping for toys, we should apply the following criteria to the intended purchase:

1. Is the toy designed and built properly or will it easily break and expose children to hazards?
2. Are there adequate warnings and directions imprinted on the toy itself?
3. Can the toy be misused by children to cause harm to them or others?
4. Could the psychological effects of the toy be disturbing or damaging?

Remember the "moral is that little Boys [and little girls] should not be given dangerous Toys." □

Advice to New Members of the Bar

NEW LAWYERS, NEW HORIZONS

By JUSTICE ROBERT F. UTTER

I am honored to have this opportunity to address the men and women of our profession who will shape its course during and after my lifetime. In reviewing my files, I note my first welcoming address to new members was in 1965, shortly after I had been elected to the King County Superior Court.

Many things I said then are as appropriate now as they were then. The practice of law is still one of the great privileges available to citizens of this country and each of you has sacrificed time, money and effort to further your education and equip yourselves to enter the legal profession. Many of you have had partners who have worked alongside you to reach the place you occupy today and many parents as well have shared not only financial resources but also emotional ones to achieve this goal.

The oath of admission is the same now as it was in 1965 — long, convoluted, and in parts repetitious, but well worthy of attention and use as a guideline for your entire life in this profession. Only one sentence is devoted to what is assumed of all, that you will abide by the Code of Professional Responsibility. The rest of the oath consists of portions of your obligation deemed serious enough to bear special emphasis over and above the Code. It stresses the need for a lawyer to be selfless, rather than selfish, sensitive to the weak as well as strong voices, and calls upon lawyers to reexamine their goals continually, not with reference to financial success but stressing service to the public.

A sharpened social conscience is not enough, however, to be a great lawyer. As Daniel Webster noted, "to be a great lawyer you must first

consent to be a great drudge." The law remains a profession of intellectual and personal challenge. It emphasizes learning, but also in almost every aspect pits the skills of one person against another. There never has been and never will be a place for you as a good loser unless you first know you have given your client the best representation available.

Law, by virtue of the many fields it touches, offers unique opportunities for service. The lawyer who strives to serve his country, community, profession and client also finds the greatest fulfillment in his professional life.

The fellowship of other lawyers is also one of the great rewards of the profession. It is not open to all, but those who strive with honor, integrity and diligence, do find a common bond whose ties are strong.

These observations are as applicable now as they were in 1965. There have been, however, dramatic changes in many areas where things never will be the same as they used to be and which deserve comment at the start of your career. The story numbers alone tell is awesome. In 1965, there were 3,100 members of the Washington Bar. Now there are over 8,000. The Bar Association has grown more in the last five years than it did in the preceding 45 years. There have been 11,000 lawyers admitted to practice law in this state in the last 88 years subsequent to Washington's admission to the Union. Of those 11,000 lawyers, 8,000 are practicing today. More people took the mid-year bar examination this year than attended the annual meeting of the bar in 1971. More people took the mid-year bar exam this year

than took the July bar exam in 1971. Graduates of 87 law schools in addition to the three law schools in our state took the July bar examination. There is a healthier cross-section of the community represented in those now being admitted to the bar. When I was admitted in 1954, five women took the examination. As recently as five years ago only 2 percent of those persons taking the bar were women and this number has increased each year until now some 15 percent of those taking the bar examination are women. There is a continuing and I believe healthy interest in encouraging members of racial minorities to attend law school and enter the practice of law. This is reflected in your current class as well.

This broadened representation is critical. For law to function properly, members of the legal profession must identify what divergent interests exist in society and which of these are and should be the subject of legal recognition. This is partly a problem of sociology and ethics, but mainly one of law and the reconciliation of conflicts between competing interests which is, in a broad sense, the fundamental problem of justice. Lawyers with a cultural as well as an intellectual com-

mitment to the diverse interests in our society will help us to achieve a more broad based, equal brand of justice for all.

A short, but far from inclusive, list of fields of law developed since 1965 may help you appreciate how difficult it is for me to forecast what your challenges will be 12 years from now. Since 1965, the entire area of environmental law has been developed. Public defenders and poverty law centers have become an important and recognized part of the profession's obligation to the public. Broad areas of government regulation with the concomitant need for legal specialists have developed: energy, discrimination involving hiring, safety regulations and other equally important fields have all come on the horizon in the last 12 years.

New constitutional imperatives have been extended to voting rights, apportionment and privacy. Due process and equal protection have been applied to financing problems and disciplinary hearings in schools; rights of the mentally ill in hearings; and rights of men and women in custodial institutions.

I have stressed the new fields available for lawyers because I believe the pessimism, voiced by some, that our society is over-crowded with lawyers and there is little room in the profession for new faces, overlooks our inability to forecast what new areas of practice will develop. Current statistics on employment are encouraging and show 92 percent of graduates nationally are employed in law-related vocations. For minority graduates, the figure is 94 percent, and for women graduates, 91 percent.

In a speech to new lawyers given last year by Justice Charles Horowitz, he discussed in detail the income and placement figures for lawyers in our state. Of interest is the fact that the median income for eastern Washington was \$1,300 higher than that for western Washington, and that the highest median income by far was earned in cities where the population range is 50,000 to 150,000, and the second highest income median is in cities with populations from 5,000 to 9,000. Because the ability to research is one of a lawyer's stock tools in trade, I will not quote Justice Horowitz' speech further but will point out it is available in the *Washington State Bar News*, Vol. 30, No. 11, November, 1976, and it contains several

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helpful hints on how and where to locate employment.

Placement figures from law schools are also encouraging. The placement statistics from the University of Puget Sound School of Law for their December, 1975, and May, 1976, classes show that of those who graduated and passed the bar, 93 percent are now employed in legal fields.

Although I do not pretend to have a crystal ball giving me the ability to foretell what undeveloped areas of law will require new skills, I can describe one existing field where lawyers are needed which offers the broadest possible area of service to the people of this state and provides a background of knowledge helpful in almost any area of practice. What is this neglected, yet extremely worthwhile area? It is the Washington State Legislature. Twelve years ago in 1965 there were 19 members of the bar in the state Senate and 17 members in the House of Representatives. The Judiciary Committees, comprised of 28 members, were filled with members of the legal profession. Many members in leadership positions in the House and Senate were lawyers



JUSTICE ROBERT F. UTTER has been a member of the Supreme Court since December 20, 1971. He served as a King County Superior Court Judge from 1965 until 1969 when he became one of the first twelve members of the state Court of Appeals. He is a graduate of the University of Washington School of Law, and was admitted to the bar in 1954. This article is the full text of a speech Justice Utter delivered at the King County swearing-in ceremony for new lawyers on November 3, 1977. Justice Utter spoke to approximately 300 of the 461 attorneys who passed the July bar exam.

as was the Governor. At this time, there are 5 lawyers in the House and 8 in the Senate. Of 11 seats on the House Judiciary Committee, 4 are filled by lawyers and of 9 seats on the Senate Judiciary Committee, 5 are filled by lawyers. Although a broad cross-section of representation is important to both the people of this state and the legislature, it is critical in this arena where laws are enacted that lawyers be an integral part of shaping that law. At the present time they are not, and the legal community is indebted to those few lawyers who remain in the House and Senate to furnish guidance on complex pieces of legislation.

Politics in this state is an honorable profession in which members of the bar historically have performed their role. It is an equal opportunity field available to men, women and minority groups. As demonstrated by the current composition of the legislature, legislative service requires a period of apprenticeship, devotion to detail and expenditure of great personal effort. Any area of law in which success is to be achieved, however, requires the same.

It is my hope that the younger members of the profession will fulfill this obligation to the public and that more lawyers once again can be of assistance to other members of the House and Senate in their important and complex roles.

Not to be forgotten is the need for skilled lawyers as district and municipal court judges and hearing examiners. Important rights of citizens are determined in administrative tribunals and in district courts. We are fortunate in this state to have a high quality administrative, district and municipal court judiciary but there is a continuing need for young men and women to see this as a challenging and important area of public service.

It seems impossible that it has been 23 years since I stood where you are now, and 12 years since I first addressed a class of incoming lawyers. I suppose the rapidity with which time has passed is an indication of my deep gratitude to and happiness with a profession that has always been challenging and enormously satisfying. I wish for each of you the same overview, not only at the end of 23 years of practice, but during each year of your membership and participation in this challenging, rewarding profession. Good luck to you all. □

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**To: Washington State
ABA Members**

**Re: ABA
Reorganization**

*By WILLIAM H. GATES
ABA State Delegate*

There are some organizational matters current in the ABA legislative process of which you should have notice. There are committees of the House of Delegates working on two significant reforms: The selection of membership of the House of Delegates and the election of the President of the ABA.

The problem about membership in the House of Delegates arises from two principal concerns. First, state representation to the House of Delegates is based on the number of lawyers in the state as a result of which the size of the House continually increases with the number of lawyers. The present size of the House (361) is such that there is a feeling that some limitation on its number is necessary if it is to continue to perform a deliberative function effectively, also, it is already so large that only a very few facilities in the United States are large enough to provide an appropriate meeting place. Second, many conclude that present selection procedures lead inevitably to a House membership seriously non-representative of the true cross section of the profession today — particularly in respect to the number of younger lawyers.

As to the election of a President, many of us question the propriety of a system where ambitious political contenders are already attempting to stake out delegate support for elections which will occur in 1981. Also, questions are raised about the propriety of the nomination by just 52 people (the elected state delegates) of a single candidate, which nomination is tantamount to election.

These questions will be discussed at length at the next meeting of the House of Delegates in February. As your delegate I would be very pleased if any of you who have questions or comments about these subjects would write me. □



**"The Practice of Law
in Washington"
—A New State Bar
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By **JOHN J. MICHALIK**
*Director of Continuing
Legal Education*

The fact that the attorney population in Washington is growing by leaps and bounds is well-known to all of us. Approximately one-half of the members of the State Bar Association have been admitted to practice for less than six years and the rate of growth of the Bar seems sure to continue — for example, current forecasts indicate that the Association will have close to 12,000 members by 1982.

As the numbers grow, the problems of the new attorney also increase, including the very basic one of "finding a job." The Board of Governors has been acutely aware of these problems for some time and has seen the need for providing new attorneys, and law school students, with some basic information on the job market and the practice of law in the state. Of course, it is not only the new attorney who has an interest in the "state of the art" — that interest is shared by experienced practitioners.

In partial response to these needs, we are pleased to announce a new publication, in booklet form, entitled "The Practice of Law in Washington." While no publication, of whatever length, can present a complete picture of the profession — and this one does not attempt to do so — we do believe that this booklet provides some of the best existing information on where the lawyers are, what they're doing and, to the extent possible, what the prospects are for those entering the profession. The booklet has three major divisions.

First, a statistical compilation, on a county-by-county basis, of attorney population, types of court filings and other information relative to the nature of the practice in the various areas of the state. There are over thirty-five separate tables in this part of the booklet, covering a diversity of

matters including population per lawyer in each county, Superior and District Court filings per lawyer, and breakdowns of particular types of filings — with further breakdowns in the latter category to cover particular types of civil and criminal filings. The purpose of this division of the booklet is to provide a glimpse of the legal activity in the state.

The second division of the booklet contains transcribed and edited interviews with persons responsible for the hiring of new lawyers in their respective law firms or organizations. Three such interviews are included: one with the chairman of the hiring committee of a large law firm, another with a person having similar duties in a medium-sized firm, and the third with a person involved with the hiring process in a corporate legal department. This division of the booklet is designed to present law students and new attorneys with some idea of what the interviewers for these firms are looking for in a new lawyer and how those interviewers view the existing job market.

The third division of the booklet presents, for the first time, the results of a Bar Association survey on employment and compensation patterns for recently admitted lawyers. The survey group consisted of successful applicants from the Bar Examinations given in 1975 and in February of 1976. Included, among other things, is information on (1) the type of practice or other non-legal work the individuals in the survey group found after graduation; (2) length of time required to find employment; (3) starting salaries; and (4) verbatim comments from survey group members on a variety of topics, including their experiences in seeking employment.

"The Practice of Law in Washington" is in the process of being distributed to all students currently enrolled in the state's three law schools. A *very limited* number of additional copies of this booklet are available, for the asking, from the CLE Department at the Bar Office. The only charge is a modest \$2.00 to cover postage and handling. As noted, the quantities are limited and, in order to effect as wide a distribution as possible to the practicing bar, we ask that interested firms order one or two firm copies rather than having each firm member order individually. Requests for this booklet will be honored on a first-come, first-served basis. □

Approved Continuing Legal Education Activities

Members of the Washington State Bar Association subject to the requirements of Admission to Practice Rule 11 are reminded that they *must* complete 15 hours of approved continuing legal education activity by December 31, 1977 and *must* file an affidavit evidencing such compliance by January 31, 1978.

The following listing of continuing legal education activities is supplemental to those appearing in previous issues of the *Bar News*. This listing provides an update of approved courses offered in 1977 and also provides a prospective listing of approved courses to be presented in early 1978. Attorneys are reminded that courses presented and attended in 1978 are eligible for use in satisfying the 1978 CLE requirement — they may *not* be used in satisfaction of the 1977 requirement.

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<i>Labor Law for the General Practitioner</i>	
Jan. 19-21, 1978: Phoenix	19.25
<i>Estate Planning in Depth</i>	
Dec. 1-3, 1977: San Fran.	16.00

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Dec. 19-20, 1977: Seattle 14.25

MONTANA STATE BAR

Tax for the General Prac.

Dec. 1, 1977: Missoula 6.50

NATIONAL INSTITUTE OF TRIAL ADVOCACY

Sixth Annual Session

June 19-July 8, 1977: Boulder, Colo. 158.25

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Legal Seminar XVII

July 14-15, 1977: Denver 12.00
Feb. 4-5, 1978: Las Vegas 12.00

NATIVE AMERICAN RIGHTS FUND

Indian Law Seminar

June 1-3, 1977: Boulder, Co. 18.25

NEW YORK LAW JOURNAL

Legal Problems of Bank Reg.

Oct. 20-21, 1977: San Fran. 12.00

OREGON TRIAL LAWYERS ASSOCIATION

Basic Trial Advocacy

Nov. 4-5, 1977: Portland 14.25

Mid-Winter Seminar

Dec. 2-3, 1977: Portland 10.50

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Jan. 26-27, 1978: San Fr. 12.00

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Oct. 6, 1977-April 20, 1978: Tacoma 48.00

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Jan. 9-13, 1978: Miami 24.25

10th Medical Institute
Mar. 2-4, 1978: Miami 16.50

**UNIVERSITY OF WASHINGTON
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Death Investigation
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Human Reproduction, Etc.
Dec. 9-10, 1977: Seattle 7.00

**WASHINGTON SOCIETY OF
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Dec. 1, 1977: Richland 6.50

Dec. 2, 1977: Spokane 6.50
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Dec. 13-14, 1977: Seattle 9.50

WASHINGTON STATE TRIAL LAWYERS ASSOCIATION

Dissolution Update
Nov. 5, 1977: Seattle 6.50

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Dec. 3, 1977: Seattle 6.00

Mexico Travel Seminar
Jan. 21-25, 1978: Mexico 12.00

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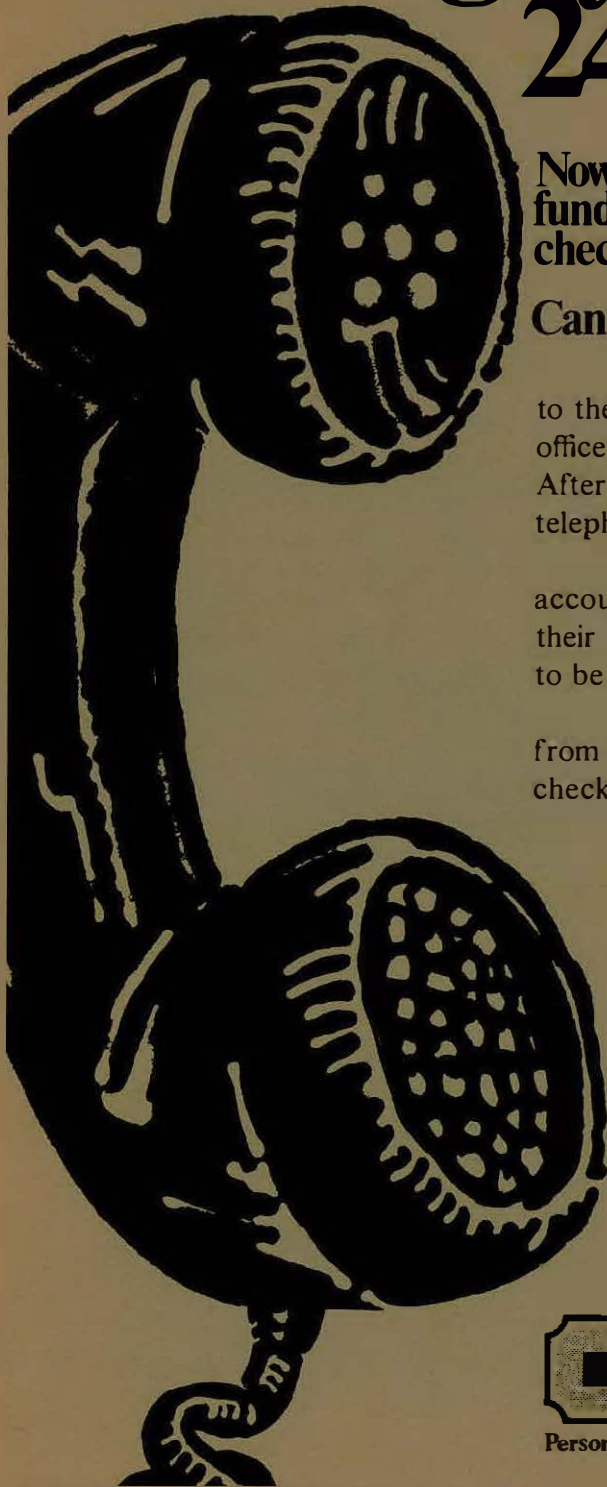
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