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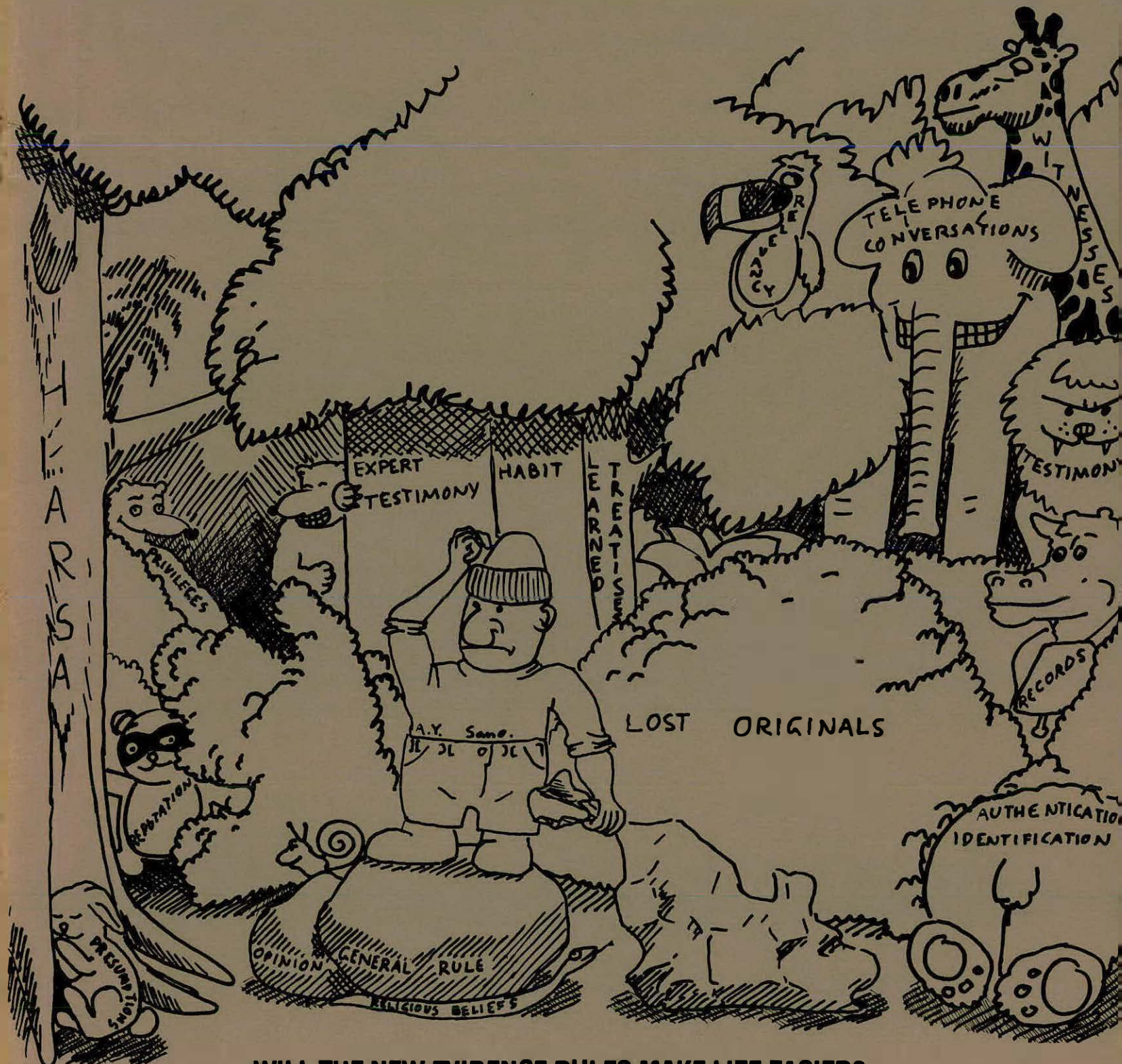
WASHINGTON STATE BAR NEWS



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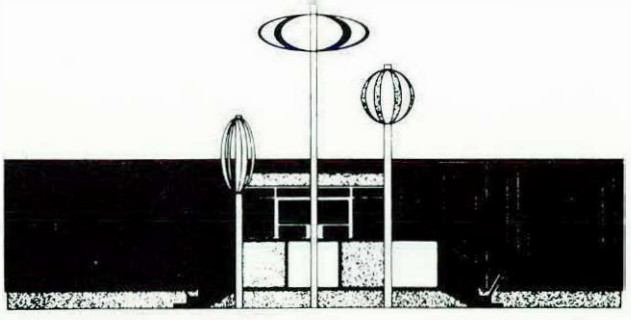

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WASHINGTON STATE BAR NEWS

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Jay V. White, *Editor*

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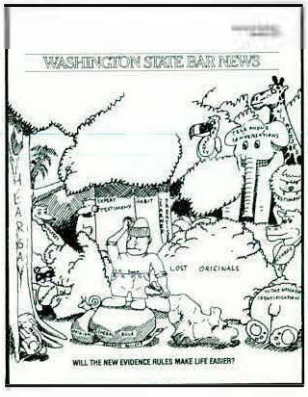
FEATURES

IN THE NEWS

DEPARTMENTS

Our Cover



1979 is marked by a major development in the law with the adoption of the new Washington Rules of Evidence. This month's Bar News *features two articles about the new rules: Lewis H. Orland offers an overview highlighting differences between the new Washington rules and the existing federal rules; and Karl B. Tegland makes a case for the newly approved codification of evidence law. Our cover artist, Andy Sano, suggests the new rules may get us "out of the woods."*

Does Anyone *Not* Want Supreme Court Issue Summaries?

Editor:

In the October, 1978, issue [*Bar News* 32:10:22], you invited comment about the column on issues pending in the Supreme Court. This is a particularly helpful column for trial judges. If we are aware of what is pending in the Supreme Court we can secure copies of the briefs or, on occasion, delay a case until the issue is determined and thereby avoid possible error and its attendant problems to counsel and litigants. The column also tips us off to issues we may not otherwise be aware of in cases before us. It is a worthwhile endeavor and I hope the column will continue.

ROBERT J. BRYAN
President-Judge
Superior Court Judges' Association

Editor:

The summary of issues pending before the State Supreme Court, September term, printed in the October *Bar News* was most informative. Unfortunately, there is no readily accessible source by which counsel or the public can learn what cases are pending before the various appellate courts in Washington, the issues involved in those cases, and the status of those cases relative to motions, argument, etc.

While the economics of space undoubtedly limit your ability to provide this information, it is valuable. I only wish it was possible to find a source on a regular basis which contains similar information concerning all appellate courts.

Please continue publishing this information.

CAMDEN M. HALL
Seattle

Editor:

I was delighted to see the summary of issues pending in the Supreme Court in the October *Washington State Bar News*. As far as I know, there is no other readily available source for this information. I read the article with interest and will keep it for future reference. I expect to find it most helpful.

I did feel that the headings under which the cases were gathered were somewhat misleading. For example, certain cases under criminal law seem to me to involve criminal procedure. Another example which struck me was the topic heading "Sterilization of Incompetent Minor." It might be more appropriate to categorize that case under juveniles or perhaps under constitutional law.

I hope that you will continue to feature this type of information, and perhaps even expand it to include cases pending in the Court of Appeals.

CHARLES K. WIGGINS
Seattle

Editor:

I found the "Issues Pending In Supreme Court, September Term", a valuable addition to the *Bar News*, and I would certainly like to see it continued. A similar listing of Court of Appeals cases would also be welcomed.

JEFF SPENCE
Seattle

Editor:

A summary of issues pending before the State Supreme Court should be a regular feature of the *Bar News*. Such a summary is not only professionally valuable, but it is most enjoyable to see what brother lawyers are involved in. Please keep the summary coming, and I would like to see such a summary from the Court of Appeals as well.

I am even interested in knowing what issues are presented to the

Superior Courts, and how they are resolved at the trial court level.

ANTON J. MILLER
Raymond

Editor:

I strongly recommend that the *Bar News* include as a regular feature the summary of the issues pending in the Supreme Court, as was done in the October, 1978 issue.

GEORGE V. POWELL
Seattle

Editor:

Please tally one vote to retain the *Bar News* feature, "Issues Pending in Supreme Court." It's an excellent addition to the *Bar News* and provides practicing attorneys a time-saving scan of important civil and criminal issues before the Supreme Court. Keep up the good work.

BILL H. WILLIAMSON
Seattle

Editor:

Please continue to include a summary of issues pending in the Supreme Court as a regular feature. Most helpful.

J. PATRICK AYLWARD
Wenatchee

Editor:

The *Bar News* coverage of Issues Pending In Supreme Court is useful and should be continued.

SAMUEL W. FANCHER
Tacoma

Editor:

In response to your invitation to comment as to whether a summary of this nature should be a regular feature of the *Bar News*, I feel this would be very helpful, and indeed, interesting, and therefore would recommend that

you continue publishing such a summary.

RONALD W. GREENEN
Vancouver

Editor:

The inclusion of this feature in the *Washington State Bar News* would fill an informational gap and should be continued.

WILLIAM H. THOMAS
Seattle

Editor:

Yes! Such a summary should be a regular feature of the *Bar News*. Informative and interesting.

DENNIS LEE BURMAN
Everett

Maintain Status Quo Re Bar Exam

Editor:

I have followed with interest the challenge by certain segments of our Bar to the present method, scope, coverage and purpose of our Bar examinations, including the lament over the number of failures by minorities.

After looking over my shoulder at 45 years of practice, and reflecting on these problems objectively, I beg leave to make the following suggestions:

First: Theory is the essence of the profession and the student will never be exposed to it again after law school. It is more important that he or she learn theory while it is available. Practice knowledge can be acquired later (if necessary).

Second: Law School should teach theory only, to the exclusion of practice, and Bar examinations should test theory only, omitting questions on practice.

Third: The law students will acquire knowledge of practice, as they become operational, from other lawyers or from courtroom observation and further study in the particular field of their practice.

Fourth: The modern practice of internship, prior to the Bar examination, will do the student more harm than good, if it interferes with or detracts from law school classes on theory. My current experience with interns shows a transfer of interest from study to practice. I consider this unfortunate.

Fifth: Equal opportunity and equality are not the same thing, and the terms should not be confused. The Constitution guarantees an equal opportunity to everyone to study law, but it does not guarantee a diploma, a successful examination, or a lucrative practice. The lowering of standards to permit underqualified persons to practice law is a detriment to the individual and the clientele as well as a shadow on the profession.

I suggest we maintain the status quo.

S. DEAN ARNOLD
Clarkston

Human Rights Convention Should Be Ratified

Editor:

Those who supported the resolution passed at the State Bar Conference in Spokane in 1976, recommending ratification of the *American Convention on Human Rights*, will be glad to know that the Convention has now been ratified by thirteen members of the Organization of American States: Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Panama, Peru and Venezuela. The Convention is now in force in those States.

As a result an *Inter-American Court of Human Rights* will soon be

set up with headquarters in San Jose, Costa Rica. The Court will have jurisdiction to hear appeals in cases of alleged violation of Human Rights in the above states in matters where the Inter-American Commission on Human Rights has not been able to settle them.

Having visited a session of the *European Court of Human Rights* in Strasbourg, France, I was impressed with what it was doing, and I look forward to seeing such a court set up in our hemisphere.

The *American Convention on Human Rights* was first brought to the attention of members of the World Peace Through Law Center at its Conference in Belgrade, Yugoslavia, when the President of the Central American Bar Association introduced a resolution in support of the Convention which was adopted. Similar resolutions have been adopted at all of the Center's Conferences since then.

In order that we may be effective in persuading more states to ratify the Convention, it is hoped the United States will soon ratify it. President Carter has signed it and has submitted it to the Senate for ratification. Those of you who are interested should write to Senators Magnuson and Jackson urging them to support its ratification.

EDWARD E. HENRY
Judge, Retired
King County Superior Court
Seattle

Guilty Plea by Alien May Cause Deportation

Editor:

I am writing this letter as a suggestion to the members of the Washington State Bar that serious consideration should be given to enacting legislation in the State of Washington which would require any

person who is not a citizen of the United States and who pleads quilty to criminal charges should be advised by the Court that such action may result in deportation from the United States.

I am pleased to report that the State of California has enacted Section 1016.5 to the Penal Code which provides that a Judge of every Court in the State of California must advise a person who is not a U.S. citizen of the consequences of deportation.

The U.S. Immigration Laws presently provide that an alien shall be deported upon the conviction of a crime involving moral turpitude committed within five years of entry and for which there was a conviction and sentence of over one year, or confinement for over one year. Further, an alien who is convicted of two crimes involving moral turpitude at any time after entry into the United States shall be deported, and there need not be a sentence and the crimes need not be felonies. (8 U.S.C. Section 1251 (a) (4)).

California-type legislation has been enacted in Texas and such legislation will be introduced in Oregon State next January. I respectfully submit that similar legislation should be introduced in the State of Washington.

DAN P. DANILOV

Seattle

Publish All Divided Appeals Court Opinions

Editor:

Thank you very much for publishing the article "The Washington Court of Appeals" in your November, 1978, issue. [*Bar News* 32:11:10]

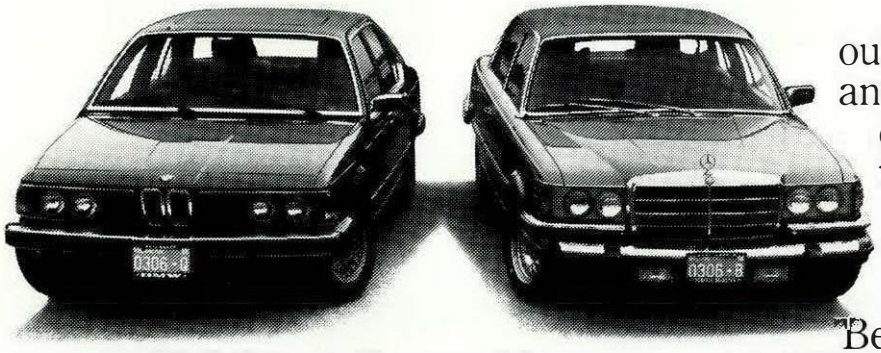
Toward the end of the main body of the article the author, Robert A Leflar, discusses policy on publication of opinions. I have been concerned for some time about the manner in which the discretionary decision not to publish an opinion of the Court of Appeals has been exercised. For example, I recently noted in an advance sheet that in Division One a case was reversed by unpublished opinion. In that case the reversal was by a two judge majority, with a written dissent. The judge who was reversed is a judge noted for his depth and accuracy in understanding the law. It appears to me that when there is that kind of decision, publication is clearly merited.

I would feel more comfortable with the system in which any opinion where a dissent was filed would be published, since it is apparent that there is a division of understanding within the court itself about the state of the law.

CHARLES L. SMITH

Seattle

SMART INVESTMENTS



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Editor's Page

A New Beginning

My father—who found a way to make a living writing words—always said that an editor is only as good as his next issue. He always said a lot of things, such as, "Well, I guess I have to take out the garbage." Actually, he never said very much about editors; he always said that a *writer* is only as good as his next writing. But he also always said that a writer has to fictionalize the truth to make it believable. That's something that lawyers can understand. We do it all the time.

Speaking of lawyers, during the time that I have been editor of this paginated publication held together by two staples and a prayer, some people (typically a lawyer in my own office) have been surprised to discover that I actually practice law. A number of my clients have expressed a similar emotion.

(I work for Houghton Cluck Coughlin & Riley. The firm's name is punctuated and pronounced without commas, which pleases editors but causes considerable confusion. For example, one caller swears that our embattled receptionist answered the telephone, "Holdin' a collect call fer Riley.")

Getting back to the editor and his next issue, one of the things that I do when I am trying to ward off insomnia is to count the ways the *Bar News* could be improved. Try it! Never fails. I always instantly fall asleep without remembering a thing that I have been counting. I return, well rested, to the practice of law. The next thing I know, the *Bar News* is out and 9,000 lawyers are counting.

The Editorial Advisory Board and others have been helpful in suggesting content for the *Bar News,* but their discussions, together with my own thinking, largely have been theoretical because new ideas for the *Bar News* inevitably require new pages, and therefore new money, and we have not had much of that. All "bright ideas" have been put in abeyance during the past fiscal year because the "austerity" budget adopted by the Board of Governors after the membership's rejection of last year's dues increase reduced projected funds for the *Bar News* by $15,000 and we had to cut back from 52 to 40 pages per issue. With so much subtraction, there has been no room for addition.

There are now signs, however, that the situation may be improving.

Although the fiscal year began with another $1,000 cut from the *Bar News* budget, the Board of Governors voted at its October meeting to transfer $5,000 from the contingency fund to the *Bar News*. The total budget is now $80,000 for "direct costs" and I am told that the bar association's accountants assign to the *Bar News* another $50,000 in "indirect costs" (bar office overhead, staff salaries, etc.).(Accountants always tell you that you had money you didn't get to spend.) In any event, given advertising revenue of at least $70,000, and considering both "direct" and "indirect" costs, it appears that the *Bar News* costs $60,000 in dues money, which works out to about 56 cents per lawyer per month. More cents would make more sense.

At my request, the Editorial Advisory Board considered and subsequently voted an increase in the page-size of the *Bar News*. This issue is the first with the "new look", and we hope you will agree that bigger is better. Not only is the larger size more economical, but also it offers greater flexibility in layout, and we will be experimenting with it in the months ahead. This 40-page issue is equivalent to about 44 pages of the old format, but costs less. The budget may allow some 44 or 48-page issues before the year ends.

Although *Bar News* space remains limited, we hope to find room to restore old features on a more regular basis, and to add some new ones. For example, this month, "Around the State" returns in regular type-size, and a new "open to anyone" opinion column, "If You Ask Me...", makes its first appearance. Aspiring artists, cartoonists, photographers, writers, poets and sculptors are invited to send their creations to me at 900 Hoge Building, Seattle, Wa., 98104. There is risk in creation. Take a chance. Help me with that next issue.

JVW

The Medical Lobby Versus The Legal Lobby

Two years ago the Washington State Medical Association raised approximately $350,000 through their Political Action Committee for the purpose of lobbying in the Washington State Legislature. This year they have again produced a legislative package which will be presented early in the legislative session. The package is presently composed of the following proposals:

1. To limit the Statute of Limitations for medical malpractice to two years generally and specifically in the case of a child under age six to provide that the suit must be commenced before the child reaches the age of eight. In suits regarding foreign objects left in the body, the patient or his or her representative would have only one year from the time of discovery to commence an action. Their proposal would also require a Notice of Intent to file a civil action to be served on the medical malpractice defendant ninety days prior to filing;

2. A proposal to limit contingent fees in medical malpractice actions to the following: 50% to the first $1,000; 40% of the next $2,000; 33 1/3% of the next $47,000; 20% of the next $50,000; and 10% on any amount over $100,000;

3. A proposal allowing a credit against the Business and Occupation tax on medical services of the difference between what is actually paid for services rendered to medicaid patients and the usual and customary charge for such services as determined by the Department of Social and Health Services for such person;

4. A proposal to extend RCW 7.70.080 (the Collateral Source Rule in medical malpractice cases) to allow the plaintiff to present evidence of the value of any right or chose bargained by the plaintiff for compensation for the injury, received from any source except the assets of the patient, his or her representative, his or her immediate family or insurance purchased with such assets;

5. A proposal to extend the Collateral Source Rule in medical malpractice cases to allow any party to present evidence that the patient can reasonably expect compensation in the future from any source except the assets of the patient, his or her representative, his or her immediate family or insurance purchased with such assets;

6. A proposal that in any civil action if an agreement has been entered into by the plaintiff and one or more of the defendants regarding damages, including but not limited to covenants not to execute or enforce judgments, said agreement must be approved by the court, and the jury, if any, must be informed of the agreement;

7. A proposal to allow health care professionals to form their own insurance company without complying with the State Insurance Code;

8. A proposal to extend the privilege preventing discovery presently existing for medical review societies to members, employees, staff persons or investigators employed by them.

It is also expected that additional legislation will be proposed by the Washington State Medical Association during the course of the legislative session, primarily directed to the medical malpractice field.

In addition to opposing specific proposals of the Washington State Medical Association in the malpractice area, your Board of Governors has generally taken the position that tort law reform or changes should be addressed to the entire tort arena and not just medical malpractice torts.

Judging from the fact that $350,000 has already been raised, it is anticipated that the Medical Association will engage in a strong and active lobbying effort. By contrast, the lawyers in this State have yet to establish a Political Action Committee to raise funds for any significant lobbying effort.

In the past, lawyers have generally felt that there were a sufficient number of lawyers in the legislature to adequately reflect the input of lawyers to these and other proposals. In the current legislative session however there will be only eight lawyers in the Washington State Legislature, two in the House of Representatives and six in the Senate. In recent years, several members of the legislature have openly expressed antagonism to lawyers generally and any Bar sponsored legislation specifically.

The record shows that an overwhelming majority of

the legislation sponsored and supported by the Washington State Bar Association in previous legislative sessions has not been directed towards the self-interest of lawyers (as contrasted to the physicians' legislative practice), but has rather been directed towards law reform and changes in the law and the legal system to benefit the public generally.

In light of the current composition of the legislature, it is folly for us to think that our voice can be heard without a Political Action Committee adequately funded. There have been murmurings of movements to create such a committee and in the event of its creation, I strongly urge all members of the Bar to participate in order to enable our voice to be heard in Olympia.

David D. Hoff

Discipline

Notice of Disbarment

James L. Pence, was disbarred by order of the Supreme Court on November 16, 1978.

Leslie M. Yates Suspended for One Year

Seattle Attorney Leslie M. Yates was suspended from the practice of law for a period of one year by the State Supreme Court, beginning November 2, 1978.

Yates was suspended upon a finding of conduct demonstrating unfitness to practice law and pursuant to the cumulative discipline provision of DRA 10.1.

Arthur T. Bateman Receives Letter of Censure

Arthur T. Bateman has been issued a Letter of Censure by the Board of Governors.

Bateman was censured for neglect of a legal matter, intentional failure to carry out a contract of employment and failure to cooperate with Bar Counsel's investigation. This notice is published pursuant to DRA 11.7(c)(2).

Let's Do Something About Court Congestion in King County

By **RONALD J. PEREY**

It is nothing new to hear a trial lawyer complain about "congestion at the courthouse." This has been an ongoing problem and a frustration to every trial lawyer. I have been practicing law in King County for ten years with a primary emphasis on litigation. I have always had to contend with this rather irritating problem. Historically, the problem was seen as a need for more judges, however, when more judges were added to the bench, the congestion seemed to get worse.

Waiting a few days, or even a week, was "par for the course." Expecting such a delay, an experienced trial lawyer could plan around it and keep his clients happy, his witnesses happy (especially doctors and experts) and still enjoy trying cases. But things have changed for the worse. The situation is now intolerable. The system has become so unwieldy and burdensome that it is barely workable. I am certain that every trial lawyer in Seattle feels the same way.

My most recent irritation was *Constantine v. Ostenberg*, King County Cause No. 837256. It was originally scheduled for trial on Monday, October 16, 1978. Due to an anticipated delay, however, the case was put over for two weeks until Monday, October 30, 1978. Neither my clients nor the doctors (witnesses) were happy. Nevertheless, after much explanation, they were resigned to the continuance and accepted it.

On Monday, October 30, 1978, I went down to the presiding department with my two clients, three witnesses, and packing all of my exhibits, charts, x-rays and photographs, only to find out that the docket was completely inundated with criminal cases. Furthermore, I was surprised to learn that I was only one of a dozen or so cases that were put over two weeks, some were put over for three weeks. Thus, I was still way down on the list for assignment to a courtroom. I was advised that there were only a few judges available and we would have to come back on Tuesday. Okay. I'm easy to get along with. I explained the situation to my clients, rescheduled my doctors and other witnesses, and went back to my office. The defense lawyer returned to Tacoma somewhat dismayed.

On Tuesday, October 31, 1978, I again took my clients, witnesses and exhibits down to the presiding department. This was Halloween and the presiding department looked like it. It was packed full of lawyers trying to get assigned out to courtrooms. We were again faced with the problem of congestion, lack of jurors and lack of judges and were told to come back on Wednesday, November 1, 1978. We returned to the courtroom on Wednesday, November 1, and we were told that the congestion was no better and, moreover, there were simply no jurors whatsoever even though there were a few judges available. We were told to come back on Thursday, November 2, 1978. Unfortunately, it was anticipated that the case would take three days to complete. The defense attorney from Tacoma had another trial scheduled solidly to commence on Monday, November 6, 1978, in Pierce County. Therefore, the defense lawyer moved the court for a continuance and the case will now be continued to a later date.

Needless to say, my clients were furious and my medical witnesses were exasperated. The doctors had courteously rescheduled their testimony on two separate occasions and now, after reserving the time, they would no longer be needed. I had to pay the doctors and several other witnesses a witness fee for canceling their testimony.

This was an extremely frustrating, time-consuming and expensive experience for all parties. Sadly, we will probably face the same idiotic delay on the date to which this case is continued. This is not the first time I have had an experience such as this and it certainly makes the practice of law burdensome and less than enjoyable.

I urge that we do something to bring about some change. Many counties (Pierce, in particular) have workable systems: all cases are preassigned to a certain judge on a certain date. Certainly, King County, the biggest and most affluent county, should be able to develop a workable system for trying cases.

I recommend that all members of the bar consider and seek action upon the following proposals:

1. Preassignment of all cases to a certain judge on a certain date.
2. All motions on the matter to be heard by that judge.
3. Schedule fewer cases for trial on a particular day. This would spread the trials out considerably.
4. Do away with trial setting entirely until each side (or at least one side) has filed an affidavit of completion of discovery and readiness for trial.

Continued on page 35.

Ronald J. Perey practices law in the Seattle law firm, Reed, McClure, Moceri & Thonn, P.S. This column is based upon a letter by Mr. Perey addressed to Frank D. Howard, Presiding Judge, King County Superior Court; David D. Hoff, President of the state bar association; William A. Helsell, President of the Seattle-King County Bar Association; Dean Bender, President of the Washington State Trial Lawyers Association; Frederick V. Betts, President of the Washington Defense Counsel Association; and Lewis Stephenson, King County Court Administrator.

Progress in Evidence Law:

The Proposed Washington Rules

By **LEWIS H. ORLAND**

Any substantial change in the law creates a certain amount of anxiety among the members of the profession. Practitioners and judges alike, accustomed to things as they are, approach a new codification with the uneasiness that comes from attempting to deal with the unfamiliar. And well they might. Often, new codifications are imperfect. Oversights in drafting soon appear. Previously unperceived ambiguities become apparent. Patch-up work is necessary, either through amendment or through random appeals, as appropriate test cases arise. Meanwhile, the profession is troubled by a feeling of uncertainty.

One may hope, indeed predict, that, under the Washington proposed rules of evidence, these problems would be minimal. The federal version, from which Washington proposed rules are drawn, is a relatively conservative set of rules, carefully considered by an advisory committee of great skill and national prominence representing the bench, the practicing bar, and academia, and further considered by the Congress under the guidance of knowledgeable committee chairmen. The soundness of the rules is further demonstrated by the action of the Commissioners on Uniform State Laws in incorporating almost identical concepts in the Uniform Rules of Evidence (1974-75).

> "Washington practitioners should feel comfortable with the proposed rules. Most of the familiar statutes are preserved. . . and the bulk of the concepts in the rules coincides with the more settled principles of Washington case law."

Washington practitioners should feel comfortable with the proposed rules. Most of the familiar statutes are preserved, such as those relating to privileges, and the bulk of the concepts in the rules coincides with the more settled principles of Washington case law.

The rules are arranged under eleven articles or titles, all of which carry orthodox rubrics and appear in a sequence which will startle no one who has had a standard evidence course. Practically no new termi-

Lewis H. Orland, whose legal scholarship is nationally recognized and well known to Washington lawyers, is Associate Dean, Gonzaga University School of Law. He is Chairman of the Washington Task Force on Proposed Rules of Evidence.

nology is introduced; practitioners will not need to acquire a new vocabulary.

The transition from prior practice to practice under the new rules would be easiest, of course, for those practitioners who spend some or a large part of their time in federal courts. A word of caution, however: The federal rules would not be adopted wholesale. It is well to consider the major deletions and changes.

Flexible Judicial Notice

The Washington drafters deleted Subdivision (g) of Federal Rule 201. Federal Rule 201(g) provides that, in a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed, and that, in a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. The Washington drafters, in deleting this rule subdivision, considered that the provision might result in comments on the evidence, which are, as every Washington lawyer knows, prohibited by Article IV, Section 16, of the state constitution. One might argue that judicial notice, by definition, is a matter confided to the trial judge, and thus not within the constitutional prohibition. However that may be, the deletion seems wise; flexibility is maintained in dealing with judicial notice.

Presumptions Omitted

Presumptions are omitted. There are two federal rules on presumptions. Federal Rule 301 relates to presumptions in civil proceedings; 302 relates to the applicability of state law in federal civil proceedings. Federal Rule 302 was eliminated by the Washington drafters in the first draft; it was obviously not relevant to a state system. Even the federal people did not touch presumptions in criminal cases. Federal Rule 301, relating to civil cases, was carried through several Washington drafts. The federal rule basically provides that a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A congressional conference report on the rule stated that if the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact; if the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

As federal textbooks on the rules began to be published (Weinstein, Wright, Moore, Louisell), it became apparent to the Washington drafters that there was a serious divergence about the meaning and operation of the rule—and there were no definitive federal judicial opinions. Rather than propose a text about which there was serious dispute, the drafters elected to retain the presumption problem for further study.

IMPORTANT NOTICE

EVIDENCE RULES ADOPTED

As the *Bar News* was going to press, the Supreme Court (December 12) ordered the adoption of the proposed Washington Rules of Evidence, subject to minor editorial changes. An effective date for the rules had not been established, but was expected to be announced shortly. The two articles in this issue about the evidence rules do not appear to have been affected substantively by the court's action but, of course, the new rules are no longer "proposed".—Ed.

Proof of Character

The Washington drafters altered Federal Rule 405, relating to methods of proving character. The federal rule authorizes evidence of character "by testimony as to reputation or by testimony in the form of an opinion." The Washington drafters thought that permitting opinion testimony would broaden permissible character evidence unduly. They preferred Washington's established practice. See *Thompson-Cadillac Co. v. Matthews*, 173 Wash. 353, 23 P. 2d 399 (1933); R. Meisenholder, 5 Wash. Prac. Sec. 4 (1965 & Supp.).

Evidentiary Privileges

Federal Rule 501, dealing with evidentiary privileges, was deleted by the Washington drafters. The federal rule simply refers to the common law unless state law, as in diversity cases, supplies the rule of decision, in which event the state law privilege is to be applied; the federal rule would therefore not be appropriate for adoption in a state system. By deleting Rule 501, the Washington drafters preserved the established, current state law dealing with evidentiary privileges, including that relating to attorney-client, husband-wife, physician-patient, priest-penitent, psychologist-client, optometrist-patient,

informers, grand jury proceedings, and the various provisions dealing with governmental information.

Competency of Witnesses

The Washington drafters substantially departed from Federal Rule 601, relating to the competency of witnesses. The basic thrust of the federal rule is that all witnesses are competent. The proposed Washington rule

"The Washington drafters substantially departed from Federal Rule 601, relating to the competency of witnesses."

provides that every person is competent to be a witness except as otherwise provided by statute or by court rule. Thus, established practice, largely statutory, is maintained. The rule, in deferring to statute, preserves RCW 5.60.030, including its dead man's provisions, the subject of some skirmishes in the initial drafting stages. Likewise preserved are RCW 5.60.020, the basic provision on competence; RCW 5.60.050, particularizing some instances of incompetency such as unsoundness of mind, intoxication at the time of production, and tender years; and RCW 5.60.040, relating to competency after a conviction of perjury. Some of these statutes may have been affected in criminal cases by CrR 6.12. The drafters recommended that CrR 6.12 be amended to make it clear that the competency statutes apply in criminal cases. RCW 71.05.360 and 71.05.450 also may have a bearing on mental competence. Several of the proposed evidence rules subsequent to Rule 601 deal with competence in narrowly-defined circumstances, e.g., Rule 605, prohibiting the judge's testifying; Rule 606, prohibiting jurors' testifying.

Impeachment of Verdicts

A subdivision of Federal Rule 606 was deleted in the Washington proposed rule. The drafters deleted 606(b) of the federal version, relating to the impeachment of verdicts. It was thought by the Washington drafters that the federal provision was somewhat narrowly drawn and that established Washington practice was working well.

Impeachment of Witnesses

Federal Rule 608, dealing with impeachment of witnesses, was modified by the Washington drafters. The federal rule provides that the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation. Consistent with the decision reached on Rule 405, dealing with character evidence, and for the same reasons expressed in connection with

that rule, the Washington drafters deleted the reference to opinion testimony.

Memory-refreshing Writings

Only a slight modification of Federal Rule 612, relating to the inspection of writings used by a witness to refresh memory, was proposed by the Washington drafters. The federal version was designed to mesh with the Jencks Act, a federal statute of no concern in a state system. Under the Washington version, if a writing is not produced for inspection pursuant to order under the rule, the court may make any order justice requires. The imposition of sanctions probably could take a number of forms, including striking the testimony, declaring a mistrial, finding the recusant person in contempt, or dismissing the action.

Prior Inconsistent Statements

The Washington drafters did not wholly accept the federal language of Rule 613(a), relating to the examination of a witness concerning a prior statement. The federal version provides that the prior statement need not be shown, nor its contents disclosed to the witness, at least in the initial stages of the examination. (Rule 613(b) relates to extrinsic evidence of prior inconsistent statements.) The federal version affords a possible element of tactical surprise. See M. Ladd, "Some Observations on Credibility: Impeachment of Witnesses," 52 *Corn. Law Quarterly* 239, 246-247 (1967). The Washington version gives the trial court discretion. The proposed rule provides that, in the examination of the witness, the court may require that the statement be shown or its contents disclosed to the witness at that time.

Exclusion of Non-Party Witnesses

Federal Rule 615 requires the mandatory exclusion of nonparty witnesses, with some exceptions, at the request of a party. The Washington drafters thought that the established discretionary practice was better, and altered the federal language so as to provide in the proposed Washington version that the trial court may exclude nonparty witnesses. Also, the federal version excepts from exclusion a person whose presence is shown by a party to be essential to the presentation of that party's cause. The proposed Washington counterpart reduces this standard by substituting the term "reasonably necessary" for the word "essential."

Agent's/Servant's Statements

The provisions of Federal Rule 801(d) (2) (D), relating to the admissibility of statements by agents and servants of a party, were modified by the Washington drafters. The federal version contemplates the admissibility of an agent's or servant's statement if the statement concerns a matter within the scope of the agent's agency, or the scope of the servant's employment, made during the existence of the relationship. This test is broader than the established Washington law, which turns on whether the agent or servant was authorized to make the statement on behalf of the principal. See *Kadiak Fish Co. v. Murphy Diesel Co.*, 70 Wn. 2d 153, 422 P. 2d 946 (1967). The Washington drafters thought that the established Washington test was, as a matter of policy, the better test. The proposed Washington version thus provides that the statement should be one made by an agent or servant "acting within the scope of his authority to make the statement for the party."

Authentication and Identification

One provision of Federal Rule 901, relating to authentication or identification, is modified in the proposed rule and another is deleted. The federal rule, in Subdivision (a), states the general principle that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it is. The rule relates only to the threshold question of admissibility. Once the evidence is admitted, the opponent may continue to attack its genuineness; the admission of the evidence does not

foreclose litigation of the issue of authenticity. Federal Rule 901(b) proceeds by way of illustrations of the general principle stated in Subdivision (a). It is in these illustrations that the Washington drafters made changes. Federal Rule 901(b) (3) provides for authentication or identification through comparison "by the trier of fact or by expert witnesses with specimens which have been authenticated." The proposed Washington rule substitutes the word "court" for the words "trier of fact," to avoid any inference that the jury makes the initial determination of admissibility. It may be that the federal version was intended to mesh with Rule 104(b), dealing with conditional relevancy, but the point is so subtle that its pragmatic significance is small.

The provisions of Federal Rule 901(b) (7), dealing with the authentication or identification of public records, was deleted from the proposed Washington rule. The deletion was not caused by any essential disagreement with the federal version. The Washington drafters simply felt that the subject matter was adequately covered by existing statutes and rules. Reference is made to RCW Ch. 5.44 and CR 44.

Expert Witnesses—Hypothetical Questions

Although one may anticipate some dissent from any script or concept, most practitioners will probably welcome the treatment of the subject of expert witnesses' testimony in proposed Rule 705, which is the same as Federal Rule 705. The rule provides that an expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may, in any event, be required to disclose the underlying facts or data on cross-examination. The rule does not eliminate the hypothetical question entirely, but would make the use of such questions less frequent. The hypothetical question device has been criticized for many years as being clumsy, complex, confusing, and time-consuming. *See e.g.*, M. Ladd, "Expert Testimony," 5 *Vand. L. Rev.* 414, 426-427 (1952); Uniform State Laws Commissioners' Model Expert Testimony Act (1937).

"The rule does not eliminate the hypothetical question entirely, but would make the use of such questions less frequent."

Besides being time-consuming and somewhat noncommunicative, the hypothetical question is beset with technical restrictions on what facts must be included and excluded, frequently resulting in quibbling, and occasionally resulting more disastrously in having the question thrown out. The rule contemplates that cross-examination will effectively expose weaknesses in the expert's testimony. It will generally be necessary for the cross-examiner to be well informed through pretrial discovery of the problems to be faced.

The rule does not eliminate the necessity for some foundational examination; there must be a demonstration that the expert testimony is relevant. For example, if the expert is to testify about skid-marks, it must be shown that the skid-marks were made by the car in question. See *Twin City Plaza, Inc. v. Central Surety & Insurance Corp.*, 409 F. 2d. 1195, 1200 (C.A. 8th, 1969).

As a safeguard when effective cross-examination would be difficult, the rule gives the trial court discretionary authority to require the preliminary disclosure of the factual basis of the expert's testimony.

Finally, the rule is permissive or facilitating; it does not prohibit the use of the old hypothetical question. Practitioners who prefer to use hypothetical questions may continue to do so.

Hearsay Exceptions

The hearsay exceptions in the federal and proposed state rules are arranged according to whether the declar-

ant is unavailable or unavailability is immaterial. Although this is contrary to the approach of many standard texts which make scattered references to unavailability (e.g., McCormick on Evidence (2d Ed., 1972); Meisenholder, 5 Washington Practice (1965)), this arrangement may prove to be convenient.

Under the rubric of "Availability of Declarant Immaterial," proposed Washington Rule 803 gathers (1) present sense impressions; (2) excited utterances; (3) statements of then-existing mental, emotional, or physical condition; (4) statements for purposes of diagnosis or treatment; (5) recorded recollection; (6) records of regularly-conducted activity (by reference to RCW Ch. 5.45); (7) absence of entry in records (with partial reference to RCW Ch. 5.45); (8) public records and reports (with reference to RCW 5.44.040); (9) records of vital statistics; (10) absence of public record or entry; (11) records of religious organizations; (12) marriage, baptismal, and similar certificates; (13) family records; (14) records of documents affecting an interest in property; (15) statements in documents affecting an interest in property; (16) statements in ancient documents; (17) market reports and the like; (18) learned treatises; (19) reputation concerning personal or family history; (20) reputation concerning boundaries or general history; (21) reputation as to character; (22) judgment of previous conviction; (23) judgment as to personal, family, or general history, or boundaries.

Under the rubric of "Declarant Unavailable," proposed Washington Rule 804 gathers (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; (4) statement of personal or family history.

Current Washington case law on unavailability is largely unclear or absent. See Meisenholder, 5 *Washington Practice* (1965) §§ 404, 442, 443; Task Force comments on proposed Rule 804.

Proposed Rule 804(a) would provide some organizing principles for this area of evidence law. That subdivision states that unavailability of testimony includes situations in which the declarant (1) is exempted by ruling of the court on the ground of privilege; (2) persists in refusing to testify despite an order of the court ordering testimony; (3) testifies to a lack of memory; (4) is unable to testify because of death or then-existing physical or mental illness; (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or, in the case of a hearsay exception under Subdivision (b) (2), (3), or (4), declarant's attendance or testimony) by process or other reasonable means.

In literal terms, Subdivision (a) (3), relating to lack of memory, would appear to require only an assertion of lack of memory. The wording of the subdivision may have been tailored to considerations under the confrontation clause; the physical presence of the person is required in order to make the subdivision operative. See *People v. Green*, 3 Cal. 3d 981, 479 P. 2d 998 (1971) (on remand from United States Supreme Court). In any event, it was not the intent of the federal drafters that the bare assertion of lack of memory was sufficient to invoke the subdivision; the court may choose to disbelieve the declarant's testimony asserting lack of memory. See Task Force Comment on proposed Rule 804.

Several subdivisions of Federal Rule 803, relating to those hearsay exceptions as to which the availability of the declarant is immaterial, were deleted or modified in the proposed Washington rule. The Washington rule deletes the provisions of Subdivision (6) dealing with records of regularly-conducted activity. A reference is made to RCW CH. 5.45, the Business Records Act. The Washington rule modifies the provisions of Subdivision (7) of the federal rule relating to the absence of entry in records kept of a regularly-conducted activity. The modification was effected by substituting RCW Ch. 5.45 at appropriate points as the relevant reference for the types of records to be used to demonstrate a lack of entry. The Washington version deletes the provisions of Subdivision (8), dealing with public records and reports. A reference is made to RCW 5.44.040, relating to certified copies of public records as evidence. None of the dele-

tions in Rule 803 mentioned above were caused by any quarrel with the federal script. It was simply considered by Washington drafters that familiar statutory systems which were working reasonably well should be preserved.

Subdivision (24) of Federal Rule 803 was more controversial. The subdivision in its federal form authorizes other hearsay exceptions if the statement has circumstantial guarantees of trustworthiness equivalent to the statements in the specifically-mentioned exceptions, and if certain subsidiary guidelines are satisfied. The federal language moved in and out of the Washington drafts at various times, and was finally deleted. It was thought that the provision invited a lack of uniformity at the trial court level, and that if there were affirmance on appeal, it might be difficult to know if a new exception was being approved or simply that the appellate court was approving the trial court's exercise of discretion. The same provisions in Federal Rule 804(5) were likewise deleted for the same reasons.

". . . the rules do not, and cannot properly, affect constitutional law."

Constitutional Limitations

Although some of the rules are written with the silent assumption of a constitutional limitation, (e.g., 104(c), hearings on confessions—see *Jackson v. Denno*, 378 U.S. 368 (1964)) the rules do not, and cannot properly, affect constitutional law. Nor is there an attempt to make declaratory statements of current constitutional law. That enterprise would be hazardous at best. Thus, for example, Rule 104 does not deal with the subsequent use of testimony given by an accused at a preliminary hearing, although an early federal draft would have permitted the use of such testimony for impeachment only. See *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971) (permits use for impeachment); *McGautha v. California*, 402 U.S. 183, 91 S. Ct. 1454 (1971) (similar). Compare CrR 3.5(b).

Likewise, Rule 105, dealing with limited admissibility and authorizing restricting instructions, does not attempt to solve the problem of the efficacy of instructions restricting the consideration of evidence. See *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968) (restricting instruction did not overcome prejudicial effect of admission of co-defendant's confession which denied defendant's 6th Amendment right to confront and cross-examine).

Rule 804, dealing with hearsay exceptions when the

declarant is unavailable, does not purport to address 6th Amendment issues connected with unavailability. See *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, holding that the confrontation clause requires the government to make more than ordinary efforts to procure the attendance of a prosecution witness before the witness can be considered unavailable (witness was in penitentiary 225 miles from courthouse). On the general relationship between hearsay and the Confrontation Clause, see *California v. Green,* 399 U.S. 149 90 S. Ct. 1930 (1970).

Impact Upon Other Rules

The adoption of the proposed rules would require conforming amendments in other rules of court. CR 30(c), relating to examination and cross-examination in depositions upon oral examination, would be amended by deleting the reference to CR 43(b), and inserting in its stead a reference to the rules of evidence, most particularly Evidence Rule 611(b) and (c). In CR 43, the caption would be changed and three subdivisions of the rule would be deleted. Subdivision CR 43(b) relates to the scope of examination and cross-examination, with particularized provisions with reference to adverse parties and their officers, directors, and managing agents. The subdivision would be deleted because Evidence Rule 611 covers much of the same ground in its provisions, including the scope of cross-examination and the use of leading questions. Evidence Rule 607 contains liberalized provisions permitting impeachment by any party, including the party calling the witness. The provisions of CR 43(f) relating to the attendance of a party, director, or managing agent, on simple notice, would be preserved.

Subdivision CR 43(c), dealing with offer of proof, would be deleted because Evidence Rule 103(a) (2) covers the same subject. Subdivision CR 43(i), dealing with testimony at former trial, would be deleted because Evidence Rule 804 covers the same subject.

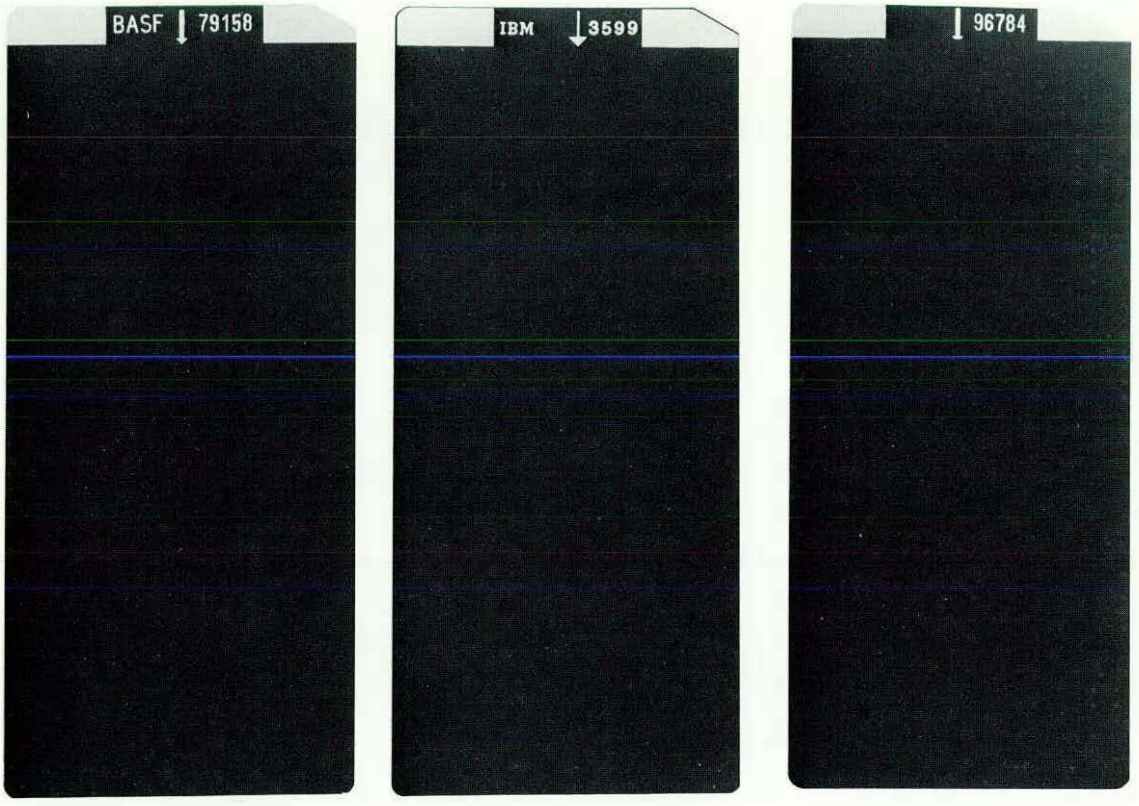
CrR 6.12, through lack of a prohibitory provision, does not prevent a juror from testifying. Evidence Rule 606 contains such a prohibition. CrR 6.12 would be amended to incorporate by reference the provisions in the evidence rules, which in turn incorporate the statutes dealing with the competency of witnesses.

JCR 43 would be amended by deleting its Subdivision (b), relating to scope of examination. The provisions are similar to those of CR 43(b) and would be deleted for the reasons expressed in the discussion of CR 43(b).

Concluding Caveats

Only selected aspects of the proposed rules are covered in this article. It is impossible in limited space to discuss the rules in their entirety. The valuable but abbreviated comments of the Task Force alone exceed 45 typewritten pages; multi-volume treatises have been published on the federal rules.

For those who have the time and inclination for broader studies of the proposed rules, a minor caveat: After the publication of the pamphlet published by the West Publishing Company in 1977, containing the proposed rules, the Judicial Council made a relatively small number of changes on June 16, 1978. The changes follow: Rule 301, dealing with presumptions, was reserved for further study; Rule 410, dealing with the inadmissibility of pleas and offers of pleas, was restored to substantially the federal version; Rule 606(b) relating to the impeachment of verdicts was deleted in favor of current practice; Rule 612, relating to writings used to refresh memory, was modified by striking the exception in the last sentence; Rule 613, relating to impeachment by a prior statement, was modified to authorize the trial court to require that the prior statement be shown to the witness; Rules 803 and 804 were modified by deleting Subdivision (24) of Rule 803 and Subdivision (b) (5) of Rule 804. Those subdivisions would have permitted the court to create other exceptions to the hearsay rule under specified guidelines. □



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Board Funds Tel-Law In Spokane, Seattle

By **Jay V. White**

SEATTLE, December 8-9—The Board of Governors has agreed to appropriate a total of $14,300 to support Tel-Law programs based in Spokane ($9,300) and Seattle ($5,000).

Certain "strings" are attached to the funding—the details of which remain to be negotiated—to facilitate future expansion of Tel-Law to statewide service. The sense of the Board appears to be that the bar association ultimately should be reimbursed for the appropriation by local bar associations in Spokane and King counties, but it is unclear whether the bar association will own the Tel-Law equipment in the event of such repayment.

The Tel-Law projects—spearheaded by the Young Lawyers Sections of the Spokane and Seattle-King County bar associations—will also receive substantial financial support from the parent bar associations and contributions from local business and other sources.

Tel-Law is a public information service providing tape recorded information about legal rights to the public by telephone. Since March, 1977, the Board has appropriated $7,660 to support a pilot program in Pierce County which has proven to be very successful and is now virtually self-sustaining. There has been a substantial increase in the use of the Pierce County Lawyer Referral Service which proponents attribute to the Tel-Law program.

The Board's action followed a report by M. Wayne Blair of Seattle, chairperson of the Tel-Law Task Force. Appearances also were made by F. Douglas Tuffly, Rich Matthews and Terry Lumsden, who served on the Task Force, and Lish Whitson, chairperson of the Seattle-King County Bar Association's Young Lawyers Section.

Blair's report concluded that a "regional approach" (Tacoma, Seattle, Spokane) is more economically feasible than a statewide program, and recommended implementation of Tel-Law on a phased basis to coincide with existing lawyer referral programs in Pierce, Spokane and King counties in that order: "Once these programs are set up, they should be able to operate on a financially self-sustaining basis. These three regional programs would cover approximately 51% of the population in the state and would consist of twelve telephone lines—six operating out of Seattle, three out of Spokane and three out of Tacoma."

The final phase would be expansion to a statewide service in conjunction with the state lawyer referral service, presumably with financial subsidies from the self-sustaining programs and the state bar association.

Blair's report recommended immediate funding for the Spokane program ($9,300), contemplating that King County would make a funding request when the details of its program could be presented. Matthews, however, stated that King County had prepared such a report justifying a request for $5,000 and would submit it to the Board.

The Board voted unanimously to fund the Spokane program and agreed (Danielson and Hemovich opposed) to make the appropriation to King County subject to receipt of its formal report.

The money will be drawn from the bar association's contingency fund. (That fund totals $25,000 for fiscal 1979. With the $14,300 appropriation to Tel-Law and the $5,000 previously earmarked for the *Bar News* in November, the fund retains a balance of $5,700.)

Professional Liability Insurance

Board Member Paul Cressman, chairperson of the Attorneys Professional Insurance Committee, reported that it is that committee's recommendation that the bar association request the state legislature to amend two sections of the insurance code and to enact and include lawyers in legislation expected to be requested by the medical profession, the net effect of which would be to permit the Board in the future to implement either a voluntary or mandatory self-insurance (malpractice) plan for this state's lawyers.

He indicated that the committee does not recommend amendment of the State Bar Act, after the model of legislation enacted in Oregon, to authorize mandatory self-insurance.

The Board voted to approve the committee's recommendations (Hemovich, Danielson opposed).

Criminal Code Task Force

Murray B. Guterson, chairperson of the Criminal Code Task Force, appeared to describe "housekeeping" amendments to the criminal code which the Task Force

believes should be enacted by the legislature. Subject to review, if necessary, and possible minor changes in language, the Board endorsed the amendments which would:

- Change the definition of excusable homicide so that it will be in accord with the definition of criminal negligence;
- Change one type of assault from a Class B to a Class C felony, to remove the present anomaly wherein punishment is more severe if an assualt victim lives than if he dies;
- Permit aggregation of a series of malicious mischief incidents so that if total damage exceeds $250, then the defendant will be charged with a Class C felony rather than a misdemeanor;
- Distinguish between first and second degree criminal trespass, so that a trespass in a building is first degree and a trespass in other enclosed or fenced areas is a misdemeanor. (The Criminal Law Section had recommended (7-6) a more restrictive definition, limiting first degree criminal trespass to trespasses in dwellings.)'
- Permit aggregation of unlawfully issued bank checks charges so that if the total exceeds $250, then the defendant will be charged with a Class C felony rather than a misdemeanor;
- Provide a definition for the term "sexual conduct" in prostitution cases;
- Place existing rape statutes in Title 9A (with the rest of the "new" criminal code) rather than in Title 9 of the Revised Code of Washington.

Medical Profession's Legislative Proposals

The Board reviewed a number of proposed statutes which representatives of the medical profession are expected to urge the legislature to enact, and took the following positions (by divided vote as to some items):

- Oppose reduction of the three-year statute of limitations on malpractice claims against medical practitioners to two years;
- Oppose a requirement that in cases of malpractice involving children under age 6, the action must be commenced before the child reaches age 8;
- Oppose a requirement that in malpractice actions a notice of intent to sue be served on the defendant 90 days prior to filing suit;
- Support expansion of the immunity from discovery extended to committees or boards of a professional society or hospital charged with evaluating the competency of members of the medical profession;
- Oppose limitations on contingent fees for lawyers representing plaintiffs in medical malpractice actions;
- Oppose provision that party may show patient reasonably can expect compensation for his injury from

any source except his own assets (and those of his representative or immediate family) and insurance purchased with such assets.

• Oppose provision that agreements with one or more co-defendants regarding damages ("Mary Carter agreements") must be approved by the court and disclosed to the jury, if any.

OTHER BOARD ACTIONS...

■ **UW LAW SCHOOL**—Ernest Gellhorn, dean of the University of Washington School of Law, met with the Board to describe policies and programs at the law school, including these points:

- He defended the law school curriculum, notably against the complaint that a course in evidence is not required. He pointed out that only one student had graduated recently without electing to take evidence. He described a clinical training program, soon to be implemented under the direction of Prof. Charles Smith and a staff attorney who will be hired shortly.
- He suggested that law school alumni meetings be held at a luncheon at the bar association's Annual Meeting, rather than at early morning breakfasts which he said discourage attendance.
- He stated that the law school would like to participate in the CLE program presented at the Annual Meeting, "with a say in quality control."
- He said that he does not think the law schools are producing too many lawyers for the market demand, and that he finds it unfortunate that law schools must limit enrollment because the law schools should not be a "bottleneck on opportunity."
- He urged the Board to evaluate the "costs and benefits" of mandatory CLE.
- He does not think "internship" for lawyers is practical.

■ **COURT CONGESTION**—The Board approved draft legislation designed to implement the recommendation of the Committee on Court Congestion and Delay that the use of court commissioners be expanded. (See *Bar News*, 32:12:22).

■ **CLE PUBLICATIONS**—The go-ahead was given to three proposed CLE publications: *Washington Civil Procedure Before Trial Deskbook; Washington Plaintiff's Injury Manual* (subject to release of previously copyrighted material); and *Washington Statutes of Limitations* (a compilation of every statute of limitations in effect in this state.

It was noted that the two-volume *Washington Real Property Deskbook* will be published in April or May of this year.

■ **WAIVER OF CLE TUITION**—The Board (7-3) rejected a recommendation by the CLE Committee (10-9, one abstention, 4 absent) to waive CLE tuition charges for members of the judiciary. Under the defeated proposal, judges would still have been charged for meals and course materials.

In a related action, the Board referred to the CLE Board the question of whether lawyer members of the legislature should recieve a 50% credit in satisfaction of the mandatory CLE requirement because of their role in the development of state laws.

■ **INSTITUTIONAL ADVERTISING**—The Board considered a brief report from Board Member Halverson outlining the purposes which might be served by a committee on institutional advertising. (In October, the Board directed Halverson and Cressman to monitor this field.) The Board defeated a motion favored by only Halverson, Cressman and Holm to appoint such a committee.

■ **CONVENTION CENTER**—Hartley Kruger, Executive Vice President of the Seatle-King County Convention & Visitors Bureau met with the Board and secured its endorsement of concept of the proposed Washington State Trade and Convention Center, which would be located in Seattle. □

The Proposed Rules of Evidence: An Opportunity For Codification

By **KARL B. TEGLAND**

Introduction

The enactment of the Federal Rules of Evidence has brought about a considerable interest in codifying the law of evidence at the state level. At least eight states—Maine, Wisconsin, Nevada, New Mexico, Arkansas, Nebraska, Wyoming, and Florida—have adopted the federal rules substantially intact, and the rules, with few substantive changes, are recommended by the National Conference of Commissioners on Uniform State Laws. Several other states are presently developing new rules based upon the federal rules.

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

After eleven monthly meetings, that task force recommended to the Judicial Council the approval of rules based upon the Federal Rules of Evidence, but with some rules—which the task force felt were particularly troublesome—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. This draft was printed by West Publishing Company and mailed to all Washington attorneys and judges in November, 1977.

It is not the purpose of this article to evaluate the merits of individual rules. The reader will find an abundance of substantive analysis in the task force comments following each rule, in CLE materials, and in materials relating to the federal rules. Elsewhere in this issue of the *Bar News*, Dean Orland highlights differences between the federal rules and the proposed Washington rules.

The discussion here is limited to the questions of whether a codification of the law of evidence is desirable and, if so, whether it should take the form of statutes or court rules.

Karl B. Tegland, a member of the Washington bar, served as the Reporter to the task force appointed to develop the Proposed Rules of Evidence for the state of Washington. The views expressed in this article are solely those of the author and are not necessarily those of the task force or the Judicial Council.

Codification

The Federal Rules of Evidence were the first comprehensive codification of the law of evidence in the federal courts. Similarly, if the Proposed Rules of Evidence are adopted in Washington, they will represent the first comprehensive effort to codify the law of evidence in this state. Any major effort at codification is, in part, a scholarly exercise in legal analysis and drafting. Consequently, codification has an obvious appeal to academically inclined professionals having an instinct for order

and consistency. It cannot be assumed, however, that the concept of codification will meet with unanimous approval. It has been the author's experience that apart from the merits of any particular rule, there is some measure of opposition in principle to any codification of the law of evidence beyond what is presently found in the statutes and court rules. This view is often a natural reaction among knowledgeable, experienced trial practitioners who regard a thorough understanding of uncodified evidentiary law as a tactical advantage.

". . . it is true that a codification may not offer immediate tangible benefits to the experienced practitioner. This view, however, overlooks a number of potential benefits which. . . can be described in relatively practical terms."

Except to the extent that new rules may accomplish substantive changes perceived as desirable, it is true that a codification may not offer immediate tangible benefits to the experienced practitioner. This view, however, overlooks a number of potential benefits which, although perhaps not immediately apparent, can be described in relatively practical terms.

Codification should tend to lessen the burden of researching and determining the law on a given point. Washington practitioners are fortunate to have Professor Meisenholder's current, comprehensive treatise on this state's law of evidence. Many evidentiary issues are, nevertheless, unanswered, or at best ambiguously answered, in the decisional law. Consequently, much of the law can be determined only in a speculative manner by reference to the majority view. Digests and similar research tools are not particularly helpful, and the practice on a particular point may vary widely from one county to the next. By contrast, throughout the official Task Force Comments to the proposed Washington rules, the drafters have called attention to rules which would clarify Washington law. The concentration of the essential rules of evidence in one source, together with the potential relevance of federal treatises to Washington practice, should be advantageous to lawyers and judges in this state.

A closely related benefit is an improvement in trial performance by lawyers. Law school textbooks and other course materials now include coverage of the Federal Rules of Evidence. As more states adopt rules based upon the federal and uniform rules, these rules will inevitably become the framework around which the law of evidence will be taught and, in the future, developed. Although it is too soon to cite concrete results, it seems likely that the adoption of rules substantially the same as the rules newer lawyers have learned in law school will give those members of the bar additional confidence and effectiveness as trial advocates. An additional benefit, of course, will be that the lawyer who practices in both federal and state courts generally will only be required to learn one set of rules instead of two.

Another practical result of codification will be that attorneys, judges, and others having an interest in the subject will be in a much improved position to influence growth and development in the law of evidence. Development of the law on a case-by-case basis is necessarily haphazard. It depends entirely upon which cases are appealed and the manner in which the issues are presented to the appellate court for review. Except to the extent that they are personally involved in a particular appeal, individuals and organizations seldom have an opportunity significantly to influence new developments in the law. By contrast, the proposed Washington rules were developed by a task force consisting of persons representing a wide variety of interests and organizations. The rules were then reviewed by the Judicial Council, an organization with similarly broad representation. The proposed rules were then distributed to every lawyer and judge in the state for comment.

Most importantly, the legal profession will have a greatly expanded opportunity to influence development of the law after the rules are adopted. Proposed amendments will be inevitable, and by simply writing a letter to the Judicial Council or the Supreme Court, interested

individuals and organizations will, for the first time in this state, be able to readily propose—or oppose—changes in the law of evidence without the necessity of appealing a trial court decision.

The expanded role of the legal profession has an additional, somewhat broader, implication. It was observed earlier that the present, haphazard way in which the law of evidence is developed effectively denies the legal profession the opportunity to influence that development. It is equally clear that the case-by-case approach is an extremely inefficient means of developing a coherent body of evidence law. Despite the fact that controlling case law on many issues is outdated, a trial judge is unlikely to depart knowingly from a clear precedent. Archaic practices are perpetuated, not because the decision makers in a position to change the law believe the old rule is still the best rule, but because no lawyer has yet deemed the point to be of sufficient significance to appeal it. What lawyer, for example, would insist upon the introduction of a photocopy in place of an original, risking an adverse ruling and the expense of an appeal in order to establish the more realistic approach taken in Proposed Rule 1003? Theoretically, a rule of evidence could be perpetuated despite the fact that every resident of the state, including the lawyers and judges, disagreed with it.

"Archaic practices are perpetuated [in the absence of codified rules], not because the decision makers in a position to change the law believe the old rule [under present practice] is still the best rule, but because no lawyer has yet deemed the point to be of sufficient significance to appeal it."

The rules of evidence, on the other hand, offer greatly expanded opportunities for an orderly and sensible development of the law to accommodate modern realities. For example, Proposed Rule 1001 defines "originals" and "duplicates" in terms deliberately designed to encompass developing electronic techniques for the storage and retrieval of data. With the present case-by-case approach, the application of common law concepts to modern technology would be apt to remain a matter of speculation for years.

Statutes or Court Rules?

The task force, from time to time, discussed the question of whether a codification of the law of evidence should take the form of statutes or court rules. The drafters tentatively felt that court rules would be preferable, both because of the relatively simple methods for enactment and amendment, and because much of the

law of evidence is procedural. There was, however, some concern about whether rules of evidence were within the Supreme Court's rule-making power.

A statute, RCW 2.04.190, authorizes the Supreme Court to adopt rules of procedure for all state courts. Rules thus adopted supersede conflicting statutes. RCW 2.04.200. The statute, among other things, authorizes the Supreme Court to prescribe, "...the mode and manner...of taking and obtaining evidence...." It cannot be said definitively whether the statutory authorization relates only to discovery or to rules of evidence generally. In *State v. Pavelich*, 153 Wash. 379, 279 Pac. 1102 (1929), the Court upheld a court rule making it mandatory to instruct the jury that no inference of guilt could be drawn from the accused's failure to testify. In the course of its discussion about the difference between substance and procedure, the Court, in dictum, said that "rules of evidence constitute substantive law, and cannot be governed by rules of court."

It is doubtful that *Pavelich* is still controlling. A clear distinction between substance and procedure is no less elusive today than it has been in the past. Justice Finley, in *State v. Smith*, 84 Wn. 2d 498, 527 P. 2d 674 (1974), wrote:

> Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

It is equally apparent, however, that the Supreme Court's own view of its rulemaking power is broader than it was when *Pavelich* was decided. One restriction on this power was eliminated in 1974, when the Court declared that its power to adopt procedural rules was an inherent judicial power in no way dependent upon the statutory delegation of rulemaking authority. *State v. Smith*, *supra*. This view makes academic an earlier concern, discussed above, that rules of evidence may not be within the Supreme Court's statutory authority.

The Court's power to adopt rules independently of the statutory authority to do so does not, of course, resolve the issue of whether rules of evidence are procedural and therefor within the Court's rulemaking authority. It is, however, the overwhelming view that most evidentiary questions are procedural matters. *See* Note, 49 *Wash. L. Rev.* 1184 (1974).

Can it be seriously argued, for example, that a rule defining the acceptable methods of authenticating a document in the courtroom, to use Justice Finley's terms, "prescribes norms for societal conduct"? Most rules of evidence serve the important, but limited, purpose of aiding in the discovery of truth. Like the rules of civil and criminal procedure, the rules of evidence are designed largely to "regulate the judicial process for enforcing rights and duties recognized by the substantive law." *Note, supra,* at 1191. The Washington Supreme Court has, on several occasions since the *Pavelich* decision, adopted court rules relating to the law of evidence. CR 43, for example, contains several provisions affecting the admissibility of evidence. CrR 6.12 defines the competency of witnesses in criminal proceedings. In a 1977 decision, a unanimous Court indicated that a rule restricting the impeachment of a witness by evidence of a prior criminal conviction would be within the Court's rulemaking power and, if adopted, would supersede statutes to the contrary. *State v. Ruzicka*, 89 Wn. 2d 217, 570 P. 2d 1208 (1977).

Some evidentiary principles are clearly meant to further strong social policies and are most appropriately regulated by the legislature. The law of privileged communications, for example, obviously protects selected relationships at the expense of full disclosure of the truth. The drafters of the proposed Washington rules were well aware of the close association between

substantive law and certain rules of evidence, and the fact that this close association contributed to congressional preemption of the Federal Rules of Evidence. The rules as proposed by the Judicial Council, however, should cause little concern in this regard. It has been observed that the deletion of the rules on privileges and presumptions, alone, would have probably brought the Federal Rules of Evidence within the rulemaking authority of the United States Supreme Court. *Note, supra.* In the proposed Washington rules, the rules relating to privileges and presumptions, as well as key rules in nearly every Article, defer to applicable statutes. *See, e.g.* Rules 402, 601, 802, 901, 902, and 1002. This approach reflects a notable regard for legitimate legislative prerogatives without compromising the Supreme Court's inherent, preemptive authority to promulgate procedural rules. The fact that there was no significant discussion of this point when the Judicial Council reviewed the recommendations of the task force demonstrates a high level of confidence that the rules, as proposed by the task force, were within the rulemaking authority of the Supreme Court.

Conclusion

As the Supreme Court considers the adoption of the proposed rules, individual rules will be analyzed in detail, by the Court and elsewhere. Some rules will be praised; others will undoubtedly be the subject of criticism. Numerous questions will be raised about the practical application of the rules. All of this is, of course, entirely appropriate. It is hoped, however, that critical analysis of individual rules will not result in a total frustration of the effort to codify the law of evidence in the form of court rules. To oppose codification in principle because of objections to a few particular rules is to overlook many potential benefits to be derived from codification. It has been shown that one of those benefits is, in fact, the expanded influence of the legal profession upon the development of the law and upon the process by which troublesome rules are amended. The Proposed Rules of Evidence represent a valuable opportunity to clarify the law and to provide a framework for orderly growth in the future. It is hoped that opposition to individual rules will result not in an abandonment of this opportunity, but in a concerted effort to improve the rules both before, and after, they are adopted. □

"The Proposed Rules of Evidence represent a valuable opportunity to clarify the law and to provide a framework for orderly growth in the future."

CODE OF PROFESSIONAL RESPONSIBILITY COMMITTEE

Formal Opinion No. 169
Contingent Fees in Maintenance Modification Proceedings are Unethical

ISSUE: May an attorney ethically represent a person in a petition to obtain an upward modification of a maintenance payment (RCW 26.09.170) on a contingency basis?

RESPONSE: No.

REASONS: The committee recognizes the validity of the argument stressed by the attorney who posed the question that the basic public policy consideration which led to the general rule that contingent fee agreements are unlawful in connection with divorce or dissolution proceedings is not present. That consideration, as identified in *In re Smith,* 42 Wn.2d 188, 254 P.2d 464 (1953) is that which seeks to maintain the family relationship and to promote reconciliations.

However, the additional consideration referred to in the *Smith* case is applicable:

> Where, as here, the contingent fee contract is related, at least in part, to the amount of support money and alimony awarded to the wife, there is additional objection that such a contract, if valid, would interfere with the duties of the court, as prescribed in the divorce statutes. RCW 26.08.090 (Rem. Supp. 1949, §997-9); RCW 26.08.110 (Rem. Supp. 1949, §997-11). In fixing the amount and time of payment of support money and alimony, the court is entitled to have all the facts which would influence its decision. It is also entitled to be free from side agreements which would frustrate the court's effort to make suitable provision for the wife without undue burden on the husband.
> 42 Wn. 2d at 196. (citations omitted).

Additionally, the issue posed and the accompanying factual summary do not explain why the provisions of RCW 26.09.140 permitting the court to allow attorneys' fees in modification proceedings would not apply.

Additional support of the conclusion reached is found in the recent decision of *Fuqua v. Fuqua,* 88 Wn.2d 100, 588 P.2d 801 (1977), in which the Supreme Court unanimously held that attorneys' liens cannot be maintained against funds representing, in whole or in part, current or past due child support, citing as authority the language from the passage of the *Smith* decision set out above.

It should be noted that the issue addressed does not include the question of whether or not an attorney may be retained on a contingent fee basis to collect past due alimony or maintenance. We intend no implication that such a contract is improper or subject to approval of the court. Such contracts have been approved by ethics opinions of the New York County Lawyers' Association, No. 275 (1929), and of the Oregon Bar Association, No. 56 (1957). Our Supreme Court in the *Fuqua* decision appears to have recognized the propriety of contingent fee contracts in such situations 88 Wn. 2d at 108-9.

Formal Opinion No. 170
Formal Opinion 82 is Withdrawn

ISSUE: When a personal injury claimant effects recovery for his injury which includes medical expenses upon which the claimant's own insurance carrier has a subrogation claim, is it ethical for the claimant's attorney to assert a right to deduct pro-rata attorney's fees from the subrogated amount where the subrogation insurance carrier has not retained plaintiff's attorney in connection with the subrogation?

OPINION: Yes.

REASONS: An argument could be made under Opinion 82 of the Washington State Bar Association (1960) that the assertion of a right to deduct attorney's fees from the subrogated amount is unethical.

However, subsequent to the date of that opinion, a large and ever-expanding body of law has developed which demonstrates clearly that the issue is one pertaining to equitable principles as between the subrogation insurance carrier, the injured claimant, and claimant's attorney. See *United Service Automobile Ass'n. v. Hills,* 172 Neb. 128, 109 N.W.2d 164 (1961) and annotation based thereon at 2 A.L.R.3d 1441 (1965). Also pertinent is the principle, firmly recognized in Washington, that a claim for personal injury cannot be split as between the portion representing medical expenses and other elements of the claim. *Hardware Dealers Mut. v. Farmers Ins.,* 4 Wn. App. 49, 480 P.2d 226 (1971). Although a right of subrogation exists, all elements of the claim remain the property of the injured claimant.

The great majority of cases considering the question have held that where the claimant retains an attorney and effects a recovery under a personal injury claim which includes elements such as automobile damage and/or medical expenses for which the claimant has received payments from his own insurer, at such time as the claimant pays over the portion of the recovery subject to a claim of subrogation by his insurer, the claimant may deduct a pro-rata share of his attorney's fees. This holding is based most frequently upon the equitable principle that where one has recovered a fund for the

Continued on page 34.

Section Reports

TAXATION SECTION
By **MALCOLM D. KATZ**

Recovery of Bad Debts in Inflationary Times

In a series of recent Revenue Rulings, the IRS held that: 1) an accrual basis taxpayer who incorporates his sole proprietorship by transferring his receivables, part of which have been written off as bad debts in prior years under the reserve method and which therefore have a basis less than face amount, does not have income from the transfer so long as the receivables are worth no more than the basis, although the need for the reserve ends with the transfer; 2) the corporation takes a basis in the receivables which the transferor had, so that if the prior years' write-off turns out to have been in error and the face amount is collected by the corporation, the corporation has income equal to the tax benefit which the transferor obtained as in the prior years with the bad debt deduction; 3) the corporation has a similar amount of income if, later on, the entire business is sold to an outsider pursuant to a § 337 plan of complete liquidation and the receivables are valued for more than the basis, but if the corporate seller only gets cash equal to its basis, there is no recovery under the tax benefit theory; and 4) the purchase of a corporation's stock by a corporation followed by an immediate liquidation of the acquired subsidiary into the parent produces similar results.

In so holding, the IRS applied the Supreme Court's eight-year-old holding in *Nash v. United States* and its progeny, and revoked or superceded prior rulings to the contrary. The consequences of these rulings mean that where the receivables are worth more than basis, substantial federal tax advantages can result from properly timing (1) the fiscal year of the corporation, so as to protect the corporation from multiple surtax rates; (2) the election under Subchapter S status where there are several transferors, each with varying effective tax rates, and (3) the adoption under a § 337 plan, so that the income is offset by expenses or losses. Then in the most interesting facet of the rulings, the IRS left the door open for the taxpayer to argue that the amount received in excess of the basis is not a recovery of a tax benefit, but rather, is attributable to "economic factors such as appreciation in [the] value of. . . accounts receivable resulting from changes in prevailing interest rates." Aside from the lack of authority for this escape hatch, the question may be asked: What *other* factors would enable a taxpayer to avoid the tax benefit theory, and must the factors be economic in character? What happens, for example, if the accrual basis creditor compromises a $1,000 debt for more than basis (say $900), but less than face, as a result of talking the debtor into a cash payment of, say, $950, or providing services worth that amount, or granting a $950 discount on the purchase of future items? Is there a recovery of $50 of the $1,000 bad debt and taxable income, or was the recovery attributable to "economic factors such as. . ."? The Revenue Rulings are silent of these questions. □

Continued from page 33.

benefit of others, he may deduct the others' pro-rata share of expenses of that recovery, including attorney's fees, before remitting their portion of the fund.

In a large number of these cases, the insurance carrier argued that no fee could be charged to it because it had never entered into a consentual attorney-client relationship with the insured's attorney. The courts uniform response is that this fact is not relevant to the determination of the issue.

It follows that whether an attorney's fee may be deducted from the subrogated amount is a question of law and equity involving no ethical considerations. Accordingly, Opinion 82 is withdrawn. □

Continued from page 15.

5. Do away with the "Motion for Early Trial Date" which is now the common way to obtain a trial date.

6. Have criminal, civil and short matter trials on separate and independent dockets. These matters then could be assigned to separate panels of judges on a rotating basis.

7. Bring in more jurors on Mondays to cover the jury trials.

8. Reduce the number of persons on a jury to six in *all* cases.

None of these proposals can offer me solace at this point. But, maybe future frustration can be avoided if we apply some collective effort to this problem. □

"If You Ask Me. . ." is a new Bar News *feature which will appear periodically. The column is intended to be a forum for provocative opinion or comment. It offers writers a bit more type than generally is available in the "Letters" department. All contributions to this column will be considered for publication, and they should be sent to the Editor at Houghton Cluck Coughlin & Riley, 900 Hoge Building, Seattle, Wa., 98104. Preferred length: 3 double-spaced, typewritten 8½ × 11 pages. —Ed.*

EAST KING COUNTY BAR ASSOCIATION
Potpourri for the General Practitioner
Jan. 20, 1979: Bellevue 3.00

NATIONAL LAWYERS GUILD
Police Misconduct Litigation
Jan. 12, 1979: Seattle 6.50

UNIVERSITY OF MIAMI LAW CENTER
13th Annual Institute on Estate Planning
Jan. 8-12, 1979: Miami 22.75

UNIVERSITY OF WASHINGTON SCHOOL OF LAW
Federal Rules of Evidence & Proposed Washington Rules of Evidence
Jan. 5-6, 1979: Seattle 8.00

WASHINGTON STATE BAR ASSOCIATION
Problems of Corporate Counsel
Jan. 19, 1979: Seattle 5.00
Federal & State Securities Regulation
Jan. 20, 1979: Seattle 3.00
Real Estate Financing
Jan. 26, 1979: Spokane 5.00
Feb. 2, 1979: Seattle 5.00

WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION
Judicial Orientation and Refresher
Jan. 2-6, 1979: Seattle 31.50

WEST PUBLISHING COMPANY
Bankruptcy & Commercial Transactions
Jan. 19, 1979: Seattle 6.75

Around the State

SOUTH KING COUNTY REPORT

By **PETE CURRAN**

The bulk of legal partnerships come and go with but few enduring the stresses unique to this special relationship. In the mid-fifties, **Ken Ingalls** late of knickers and down east upbringing, and **Jack Hawkins**, cultured in the backwoods of Bucoda, Washington, matriculated at the University of Washington Law School. Marrying smart, their gifted wives taught school to assist them through the hunt and peck stages of the law practice, which commenced in 1958 in the city of Auburn.

They recently celebrated, with a candlelight party, (at the only restaurant in South King County with candles) their 20th anniversary. Their entire office staff and recent attorney additions, partner **Bob West** and associates **Tim Edwards** and **Katie Moore**, joined with them. A remarkably civil way to toast a warm 20 year association and too often overlooked by most of us.

GOVERNMENTAL LAWYERS

By **RICHARD A. FINNEGAN**

Hello again. Governmental Lawyers began the fall season with a well-attended meeting featuring Judge **William H. Williams** and Judge **Francis Holman**. The two aspiring justices discussed their reasons for running and judicial philosophies. Both made excellent presentations. In addition to a heavy Governmental Lawyer turnout, several of our friends and colleagues from the Thurston-Mason Bar also were in attendance.

This summer two long-time members of the Attorney General's office retired. **Bill Rosatto** and **Paul Murphy**, each with over 20 years experience, have left government service. Their experience and abilities will be missed. Many other changes have occurred, too many to list them all. A few of the more notable job changes include **Ken Elfbrandt**'s move from the AG's office to a position with the Personnel Board. **Richard Fink** has taken his wife and stolen away from the damp greenery of Olympia to the warmth of the Island of Truk. **Sax Rodgers** has left his position advising the Human Rights Commission and entered the uncertain world of private practice in Olympia, with **Richard Ditlevson**, d/b/a as Ditlevson and Rodgers. In the believe it or not category, **Pat Biggs** has left the Tort Claims Division of the AG office for private practice in Roslyn, Washington (it is near Cle Elum). In two other moves to east of the Cascades, **H. Terry Lackie** has joined Lorenz, Parry & Esposito in Spokane and **Sally Austin** moved to a position as Assistant AG at WSU in Pullman. **Lloyd Peterson**, Sr. AAG at Pullman is ecstatic to be able to have someone negotiate coaches contracts with him (hear that Warren Powers).

SKAGIT COUNTY REPORT

By **ELLIOT W. JOHNSON**

With pleasure I accept my new duties as the reporter from the Skagit County Bar. I failed to attend the first meeting of our new president, **Al Rode**, and this is his way of getting back at me. For those of you who don't know Al, he practices with **Chuck Twede** in Burlington under the firm name of Twede & Rode.

The influx of new attorneys into Skagit County has slowed somewhat this past year. This is partially because of a lack of openings in our area and partially because we have worked out an agreement with our local police to provide escorts through the county and out the other side. A few have made it through our defenses and recently settled here. **Don Bisagna** is sharing office space with **Dave Strong** in Burlington (Don is also our Bar Secretary), **John Oswald** left Seattle for the Skagit County Prosecuting Attorney's Office, and **Dave Day** is looking for space somewhere (I suggested Omak).

In other news, **Mike Lewis** has moved his office to ground level and **Kent Haberly** is sharing space with **Alfred McBee. Ken St. Clair** felt we should "Send a Saint to Congress" but the local voters decided that he was too well liked for that fate. Legal Services discovered that its budget and priorities would not permit it to provide services to uncontested divorces and the legal secretaries association named a non-lawyer as "Boss of the Year."

Unless a recall petition is forthcoming, I will continue to provide such marvels of information and insight during the months to come.

PIERCE COUNTY REPORT

By **JOE GORDON JR.**

A new record for hangovers may have been set following the 15th Annual Bosses' Night Banquet staged by the Tacoma-Pierce County Secretaries Association. U.S. District Court Judge **Jack Tanner** was the featured speaker, but the honor for Boss of the Year was shared by two local attorneys who have shared almost everything else over the years, brothers **Mike** and **Pete Sterbick**.

On the afternoon following the banquet, two of Tacoma's largest law firms squared off in a touch football game. Utilizing a suspiciously large number of legal interns, Davies, Pearson, Anderson, Seinfeld, Gadbow, Hayes and Johnson finally prevailed by a score of 16-14. The deciding tally occurred when **John Kouklis** trapped **Ron Leighton** in the end zone for a safety. Apparently based upon a review of the game films, the winners announced a few days later that **Bob Nelson** and **Dick Benedetti** had become members of the firm. **Janice Brown**, although not a participant in the game, has become associated with the firm. □

Children's Legal Services Offers C.L.E. Seminar

"CHILD CUSTODY LITIGATION: APPROACH AND AVOIDANCE" is the topic and Saturday, January 20, 1979, is the date of an upcoming continuing legal seminar to be held in Seattle at the Olympic Hotel. The program is being presented by Children's Legal Services, a non-profit corporation one of whose purposes is to provide educational programs to the Bar for the benefit of children who come into contact with the legal system. Co-sponsored by the Young Lawyers Section of the Seattle-King County Bar Association, the seminar program will focus on the child as the subject and often abused object of custody related litigation. Topics to be presented include adoption, third-party custody actions, joint custody, family court, the role of the child's advocate as court appointed attorney or guardian ad litem, the role of the mental health professional in custody settlement and litigation, and judicial prospectives on child custody issues. Speakers include the Honorable Nancy Ann Holman, King County Superior Court Judge; Seattle psychiatrist Jack M. Reiter, M.D.; King County Family Court Administrator Alice Y. Thomas; and Seattle attorneys Wendy Gelbart, John Fox, Eugene M. Moen and Steven M. Gaddis. The seminar sponsors expect the program to be approved for 6.25 hours of continuing legal education credit.

Dates Announced for "CLA" Examination

The National Association of Legal Assistants, Inc., has announced sites and dates for the fourth administration of the "CLA" Examination designated for certifying legal assistants on a national scale. The examination will be administered *March 23 and 24, 1979*, at Seattle, Washington.

Deadline for receipt of applications for the March examination: *January 23, 1979.*

Applications for taking the CLA examination may be obtained upon request from NALA Headquarters, 3005 East Skelly Drive, Suite 122, Tulsa, Oklahoma 74105. The applications must be completed and returned to the Tulsa office by January 23, 1979. A comprehensive Study Guide is available at a cost of $3 as well as a CLA mock examination available for $5 (quantity discounts are given for multiple orders of the mock examination).

The schedule for administration of the examination is annually in the spring, with the next test date to be set for the spring of 1980.

Seattle Municipal Court Rules Available

Copies of Seattle Municipal Court Rules are available at the Counter in Room 102, Seattle Public Safety Building, 1st Floor, 610 3rd Avenue, Seattle, Washington 98104, at $1.00 per copy.

Lawyer-Pilots Bar Association Meeting to be Held

The Mid-Winter Meeting of the Lawyer-Pilots Bar Association will be held February 22-25, 1979, at the La Costa Hotel in Carlsbad, California. For further information, please contact Vernon T. Judkins, (206) 682-1505.

In Memoriam

George C. Butler, 71, of Richland, died in September. He was admitted to the Bar in 1946.

Evan S. McCord, 79, of Seattle, died November 4. He was admitted to the Bar in 1922.

Paul F. Schiffner, 71, of Spokane, died October 27. He was admitted to the Bar in 1930.

Charles B. Welsh, 69, of South Bend, died November 25. He was admitted to the Bar in 1937.

David J. Williams, 81, of Seattle, died October 27. He was admitted to the Bar in 1924.

Notices

PROFESSIONAL

Dan P. Danilov of the Washington State Bar announces his availability to lawyers for consultations and referrals in U.S. Immigration and Nationality matters re: applications for nonimmigrant and immigrant visas, admission to United States, adjustment of status to permanent residence, and other proceedings before American Consulates abroad and U.S. Immigration Service in United States.

Latest booklet and information about U.S. Immigration Laws sent upon request without charge.

Dan P. Danilov, Esq.
3828 Seattle First National Bank Bldg.
Seattle, Washington 98154
Telephone (206) 624-1580

John O. Durkan announces his availability to assist lawyers to guide clients through civil or fraud tax audits, to negotiate settlements or to prepare and try federal tax cases before the U.S. District Court or the U.S. Tax Court.

Mr. Durkan served seventeen years with the IRS as corporate auditor, review and trial attorney and as Assistant Appellate Counsel of the Seattle District. Member of Washington and Montana Bars.

John O. Durkan, Esq.
155 N.E. 100th, Suite 403
Seattle, Washington 98125
Telephone (206) 523-5783

Ronald D. Flansburg of the Washington State Bar announces his availability for appellate consultation or association in matters of notices, motions, evaluation and development of appellate arguments and briefs or client referrals.
CONTACT:

Ronald D. Flansburg, Esq.
P.O. Box 7625
Olympia, Washington 98507
Telephone (206) 943-8888

Douglass A. North, recently Clerk to Judge Keith M. Callow of the Washington State Court of Appeals, announces his availability for referral or consultation on appellate arguments and briefs.

DOUGLASS A. NORTH
Hennings, Maltman, Weber & Reed
414 Central Building
Seattle, Washington 98104
Telephone: (206) 624-6271

Calendar

Jan. 5-6	**Federal Rules of Evidence and Proposed Washington Rules of Evidence**, sponsored by the University of Washington School of Law. Registration Fee: $100. Contact Francia Luessen, CLE Director, UW School of Law, 338 Condon Hall. Approved for 8.00 CLE credits.
Jan. 12	**Police Misconduct Litigation**, sponsored by the National Lawyers Guild. Plymouth Congregational Church, Seattle. Contact the NLG at 622-5144. Approved for 6.50 CLE credits.
Jan. 19	CLE Seminar: **Problems of Corporate Counsel**, Washington Plaza Hotel, Seattle; $25.00. Approved for 5.00 CLE credits.
Jan. 20	CLE Seminar: **Developments in Federal and State Securities Regulation**, Washington Plaza Hotel, Seattle; $20.00. Approved for 3.00 CLE credits.
Jan. 26	CLE Seminar: **Real Estate Financing**, Sheraton-Spokane, Spokane; $25.00. Approved for 5.00 CLE credits.
Feb. 2	CLE Seminar: **Real Estate Financing**, Olympic Hotel, Seattle; $25.00. Approved for 5.00 CLE credits.

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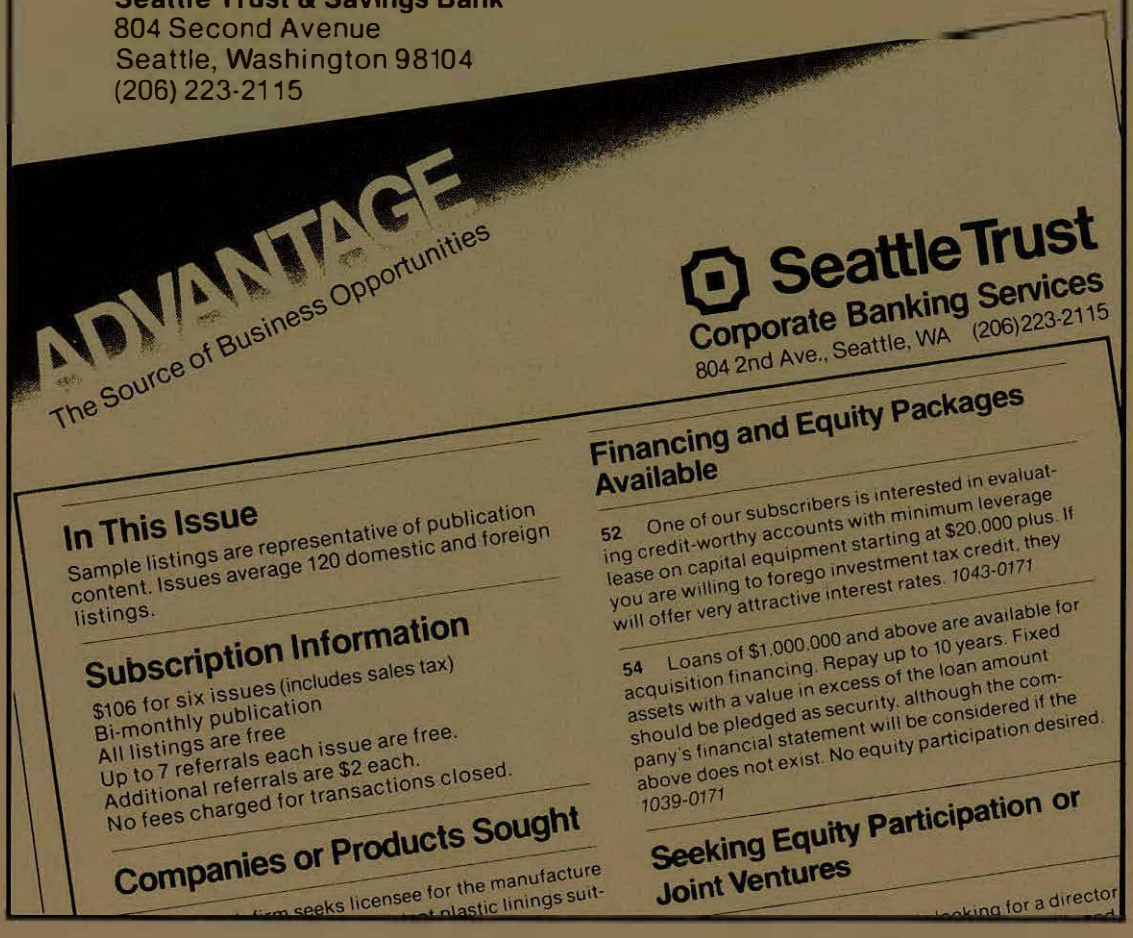

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