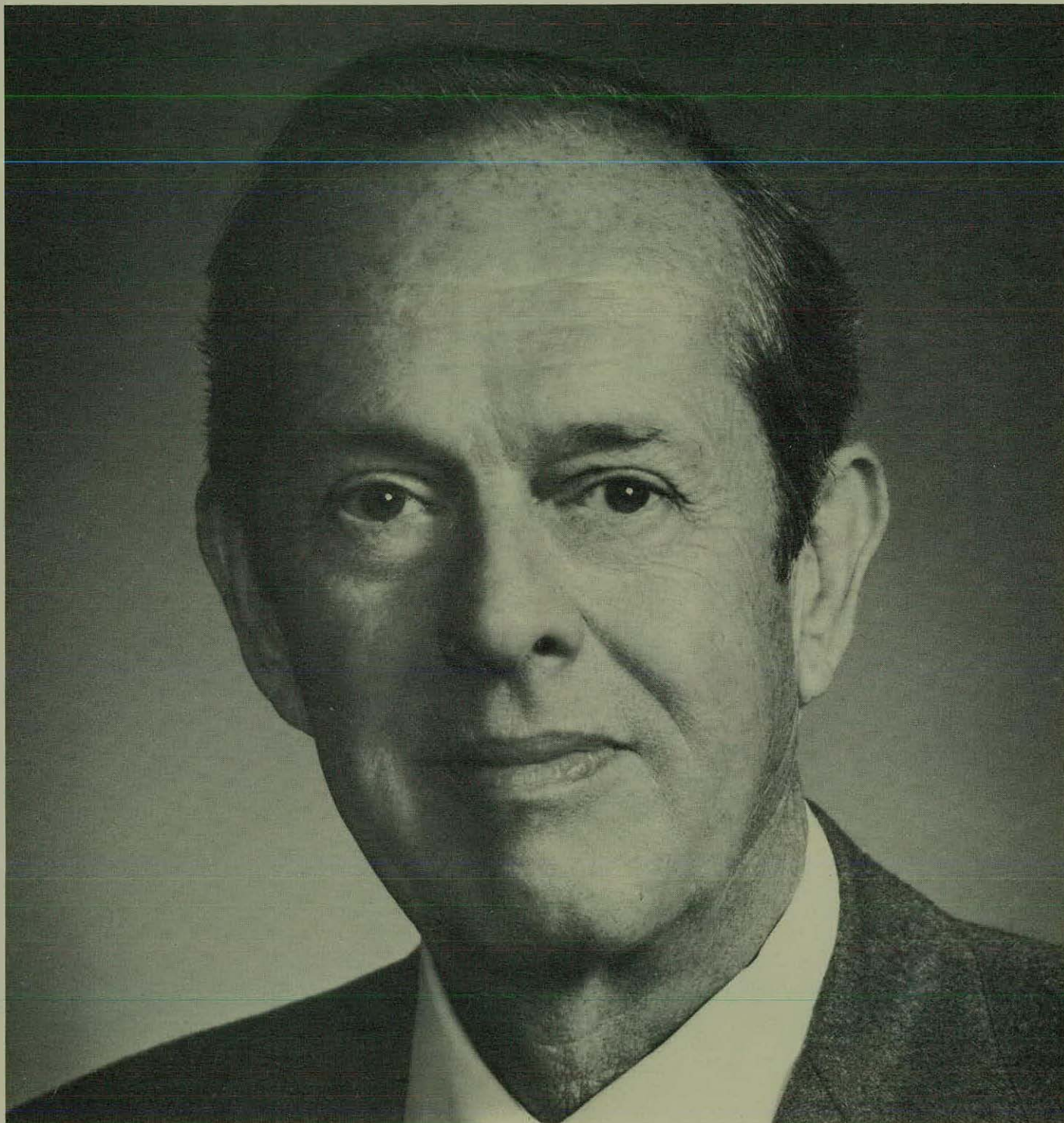

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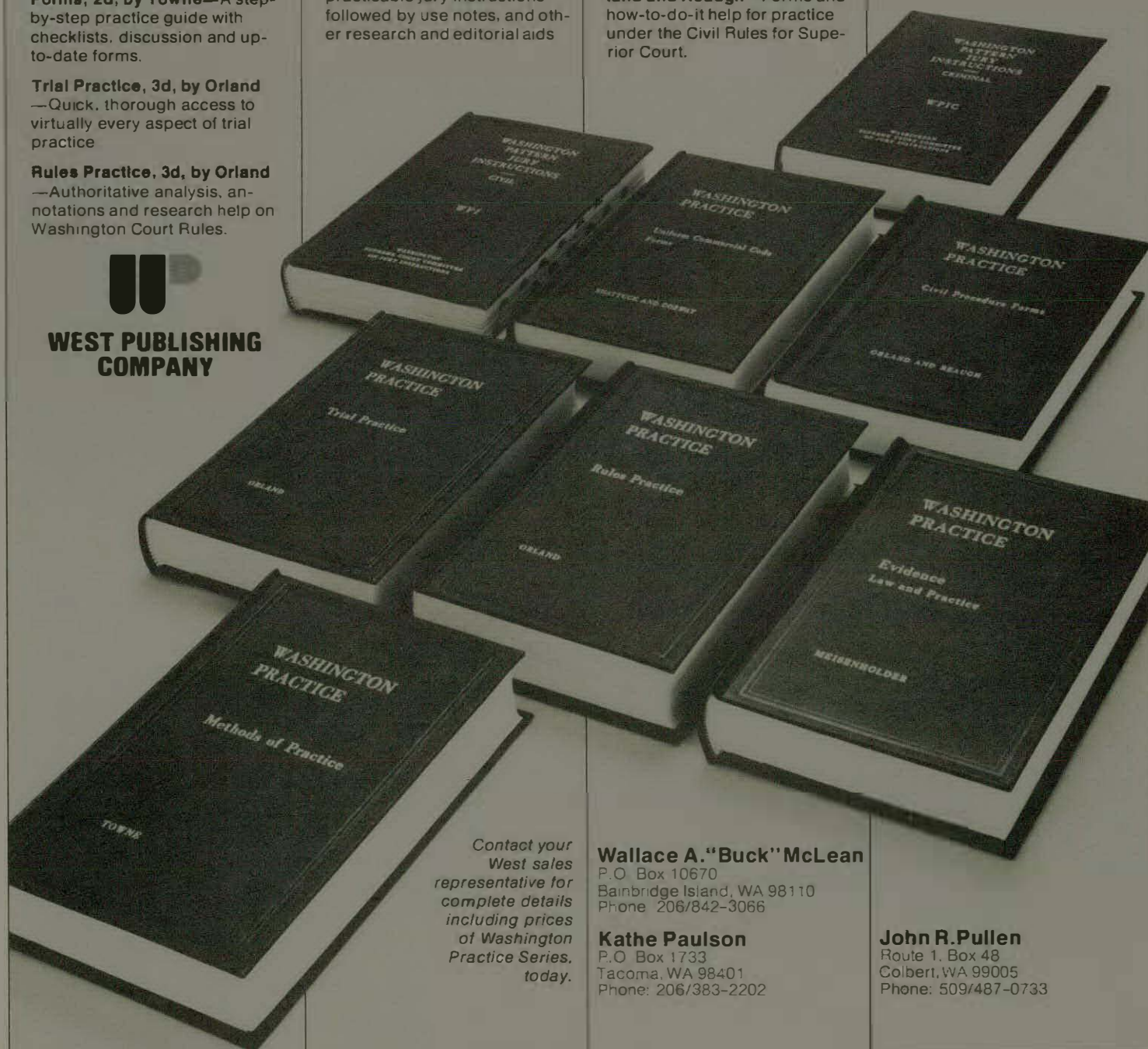
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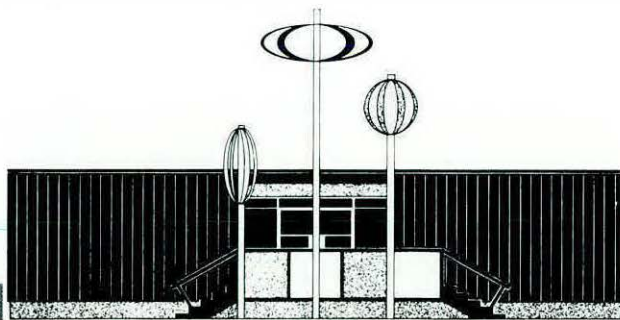
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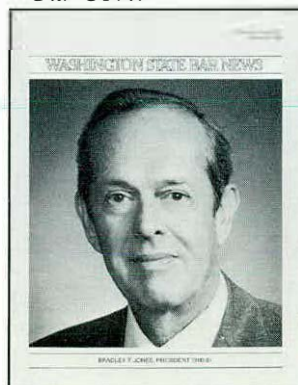
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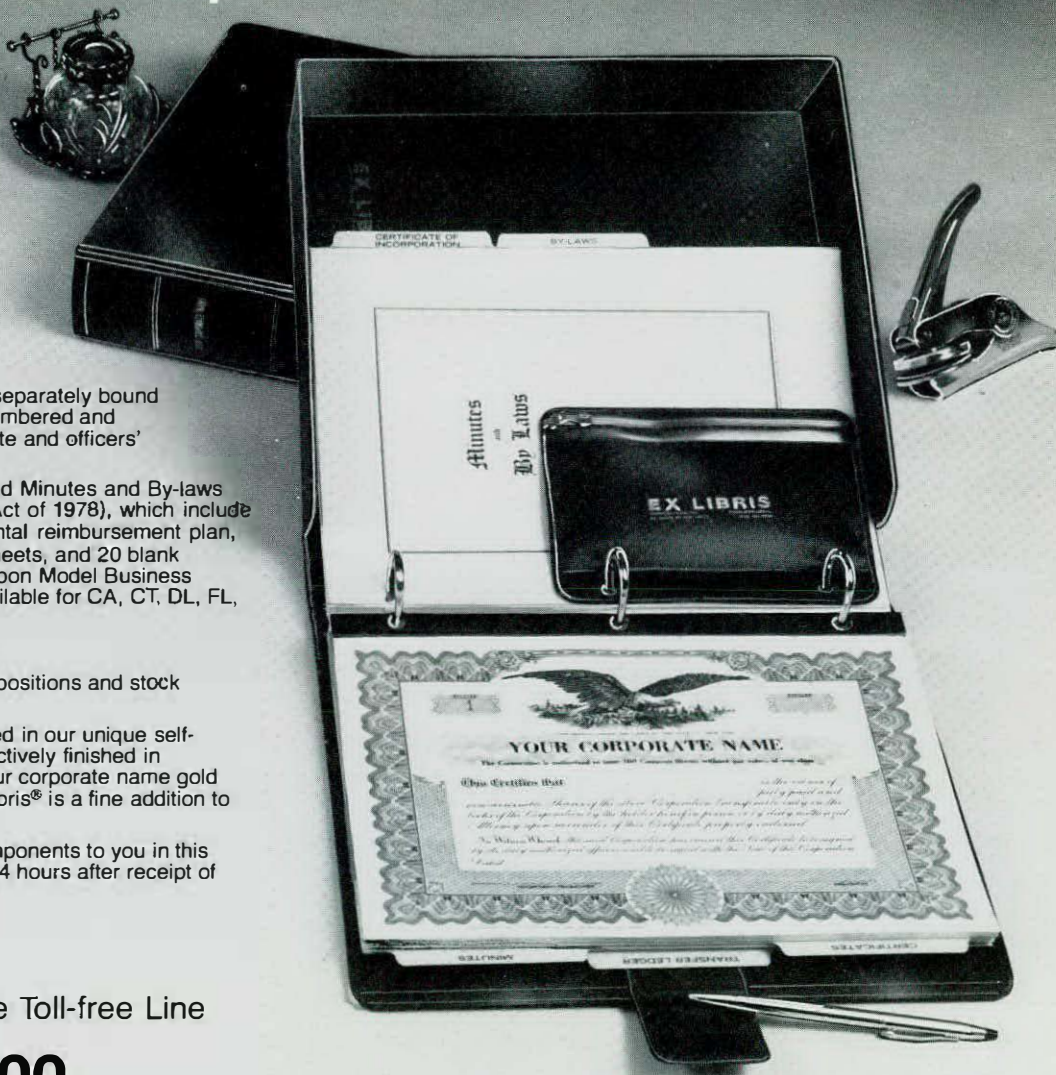
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We Have A New Editor

Seattle attorney Steven A. Reisler has been selected to be editor of the *Bar News*, effective with the January issue. This magazine can be expected to improve dramatically after the first of the year because Reisler has promised to do all of the things that I intended to do.

You will recall that I announced my resignation in the June issue which had a picture of the eruption of Mount St. Helens on the cover. Most people who read my column at that time assumed that it meant that I was leaving, and so they were irritated when I elected to remain, resigned to resigning month after month until December.

The reason that Reisler was chosen to be editor, rather than one of the several people who applied who actually are qualified for this job, is suggested elsewhere in this column, somewhere below the three stars.

Local historians should note that Reisler will be the seventh editor of the *Bar News*. During a low ebb in creative thought which resulted in my June column, I said I would refer to the next editor as "Lucky 7". Isn't there always a low ebb before the seventh wave?

Reisler was the unanimous choice of the Editorial Advisory Board and he was unanimously confirmed by the Board of Governors at the October meeting in Spokane, proving once again how uncritical Boards of anything can be.

Reisler has outstanding credentials, which I will get around to mentioning, and it is because he has such outstanding credentials that I feel a little sorry for him. The reason for this is that he's out there trying to get a job as a lawyer somewhere in this

state but he is having some difficulty because all of his potential employers read my June column in which I said the *Bar News* only pays \$200 per month but requires 50 or 60 hours per month, about half of which I have spent on my law firm's time. Reisler tells people he is going to be editor of the *Bar News*, and they start multiplying all those theoretical billable hours. The don't want to hire him. The truth is the *Bar News* hardly takes any time at all. I usually do it in my sleep. I just wrote that stuff about 50 or 60 hours to preserve the illusion held by the members of my law firm that I am doing something during all those hours I don't bill.

Anyone glancing at Reisler's resume would find it impressive, although I'm always a bit suspicious of anyone who consistently holds a 4.0 grade average. How can you know anything if you haven't failed anything? Anyway, Reisler has an undergraduate degree and a masters from Pennsylvania State University, and he has done all sorts of impressive things in Germany and Israel. He is a 1979 honors graduate of Georgetown University Law Center, admitted to the Washington Bar in the same year, and for the past year has served as law clerk to King County Superior Court Judge George H. Revelle. He has had law clerk experience at three different law firms, and he taught legal writing to first-year students at Georgetown in 1977-78. He was an instructor at the 1980 Washington State Judicial College. His resume indicates that he speaks "fluent German, proficient French, rudimentary Italian and Yiddish". Obviously, those latter two language skills will serve him well in both legal

writing and writing for the *Bar News*.

The resume lists Reisler's "interests" as "folk guitar, running, tennis, free-lance fiction". I can't tell from the resume whether he actually does any of those things, but it's interesting to know what he's interested in.

Reisler's writing experience includes work for a student newspaper and a student literary magazine, and he recently published a feature article in *The Seattle Times*. It appears from Reisler's resume that he never wrote for a law review. This probably explains why he has such a clear writing style.

* * *

We are now below the three stars. Few people read this far, so it is safe to record here my speculation as to what prompted the Editorial Advisory Board to come up with Reisler.

It all makes so much sense in retrospect. I first heard from Steven Reisler on April 22, 1980 when he sent me a letter with an article for the *Bar News* called "Time and Punishment: A Proposal for Depopulating the Jails". He said in the letter that the article "satirically addresses the problem of overcrowded jails" and that "some will surely miss the point" but "my intention is to keep the pot boiling until the community can devise some long range programs to deal with the problem."

In accordance with my usual practice, I published the article without reading it. Coincidentally, the article appeared in the Mount St. Helens issue just ahead of my column entitled, "Who Wants to Edit the *Bar News*?" I think that's called "foreshadowing".

In the article, Reisler concluded:

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Ten thousand Washington lawyers presumably read that article, shrugged their shoulders, and then went back to taking depositions or whatever it is that lawyers do.

There was one exception. One lawyer wrote to me: "I was completely shocked by the article written by Reisler . . . One can only be sickened by the mentality which calls for the forced sterilization of criminals. Reisler's article reflects the thinking of an immature and specious mind."

At the time, it occurred to me that such a mind is just the sort we need for the *Bar News* editor, but I didn't do anything about it.

Reisler surfaced again on August 24, 1980 when *The Seattle Times* published his article charging that the King County Juvenile Court wastes time and taxpayers' money. This article prompted two published critical responses, including one by King County Prosecuting Attorney Norm Maleng who wrote:

"It is clear from the article that Mr. Reisler was like the blind man feeling one unknown part of the elephant. He apparently lacked the experience and journalistic thoroughness to see the whole picture."

Just the guy we need to edit the Bar News, I thought. Then my telephone rang. It was David Broom, who heads the Editorial Advisory Board. "Somebody named Reisler just applied to be editor," he said. "You ever heard of him?"

"No," I said. "But he'll be excellent. Just excellent."

* * *

There's a postscript to all of this. After Reisler was selected to be editor, Broom showed me Reisler's letter of application in which Reisler says, "I have a penchant for seeing the humorous side of this mad world, and humor will probably serve any *Bar News* editor best of all."

I told Broom that I am wary of anyone who has a "penchant", let alone one who admits to it. But it was too late. We were going back to basics, the 3R's. The *Bar News* already was destined to go from Rupp to Raf-tis to Reisler.

On October 18, as I flew back to Seattle from Spokane where the Board of Governors had just confirmed Reisler's appointment, I glanced through the airplane window at Mount St. Helens. The mountain blew up *twice*.

JVW



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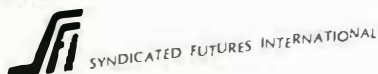
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*Adjusted Gross Estate TOTAL

*Deductions

Amount to spouse tax free
for bequest to charity TOTAL

**NET TAXABLE ESTATE

MARGINAL FEDERAL ESTATE TAX BRACKET

*Tentative Federal Estate Tax
Less Credit for State Death Tax

**ESTIMATED NET FEDERAL ESTATE TAX

*Cash Requirements

Estimated Net Federal estate tax
Estimated state death tax
Funeral and administration expenses
Debts, mortgages, and liens
to be liquidated at death
Cash or insurance
bequeathed to charity
Cash or insurance
bequeathed to others TOTAL

*Funds Available

Real and personal property
available for estate liquidity
Life insurance in estate
Proceeds outside estate TOTAL

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**ESTATE SETTLEMENT COST

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The Year Ahead

This column is prepared in advance of my assuming the presidency of the Association in November, for publication in the issue of the *Bar News* next following the Annual Meeting. An opening column may best be devoted to identifying areas of concern which are likely to be facing the Board of Governors during the coming year. Limitations of space and lack of prescience preclude identifying any likely outcome of such matters. Four topics of reasonably frequent consideration but not presenting current major issues are Admissions, Discipline, CLE and Trust Account Audits. These items appear to be in a good state of health.

Some more difficult matters are these:

Legislation. The rewritten "Products Liability" bill will be before the 1981 legislative session. Considerable give and take among interested groups will be required for adoption. Several items sponsored by our Committee on Court Congestion and Delay will be worked on, together with the usual defensive efforts against "anti-lawyer" bills.

Administrative Law. A task force headed by Robert Felthous is engaged in basically a two-stage effort to increase the independence and judicial stature of Administrative Law Judges, together with revisions of the Administrative Procedure Act to increase the appearance of fairness aspect of Departmental Regulatory Administration.

Federal Trade Commission. Intrusion by the FTC is still pending in the form of burdensome demands for detailed records of all Association actions and records over a period of years as relate to such topics as unauthorized practice, restrictions on legal clinics, or otherwise affecting the delivery of legal services. The Association has engaged experienced outside counsel on the subject.

Unauthorized Practice. Both the FTC and Department of Justice are critically attentive to efforts to control the unauthorized practice of law. Whether the subject can be brought within the "State Action" concept, perhaps by court rule, is being explored. The Board's view is that both the social and political climate require that any action in this field must be rationalized on the basis of protection of the public and not as a selfish retention of monopolized services.

Kutak Committee. This is an effort for a full revision of the present Code of Professional Responsibility and involves a number of issues (e.g. mandatory pro-bono) still receiving substantial criticism.

Devitt Commission. As an outgrowth of Justice Burger's diatribes on competency, the Commission re-



port (criticized by our Association) tends towards a separate federal bar qualification basis.

Prepaid Legal Services. The Association has sponsored an open panel prepaid program identified as Washington Legal Services, Inc., which to date has had only limited success in marketing its concept in competition with closed panel programs and clinics.

Advertising. It is anticipated that the ABA will this year publish an additional alternative rule on advertising along the lines of "anything goes unless misleading or deceptive", rather than the more detailed listing of permitted and prohibited practices. Either form of rule requires consideration of how to administer and enforce it.

Specialization. The extension of professional advertising following the *Bates* decision outlines the utility of defining specialized fields of practice. Conflicts of view between younger lawyers desiring the right to practice in any field and the views held by experienced de facto specialists are difficult to reconcile. Overtones of malpractice exposure and questions of periodic re-examination for certification are additional considerations.

With such subjects as these and with the myriad of internal and administrative matters, the Board of Governors will have a year of heavy agendas. Both I and the new members of the Board are complimented by the opportunity of service extended to us for seeking the enhancement of our profession and its service to the public.

Bradley T. Jones

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Mandatory Arbitration of Civil Claims in Washington

by **KARL B. TEGLAND** and **M. WAYNE BLAIR**

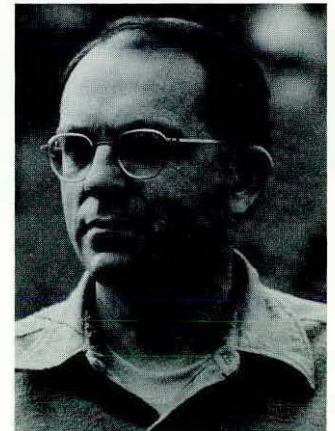
Court congestion, particularly in the superior court, has become a significant and continuing problem in many of Washington's counties. In King County the time from the filing of the answer to the date of trial now exceeds two years and is rapidly approaching three. Conventional litigation in the superior courts simultaneously has become increasingly costly and time consuming.

As a partial response to these problems, the 1979 Legislature enacted House Bill 425, establishing a system of mandatory arbitration for certain civil actions. Thus, Washington has joined a growing number of states (14 at the last count) which have looked to mandatory arbitration as a preferable way of resolving relatively small civil claims. Arbitration has the potential for reducing court congestion and at the same time reducing the cost and delay of litigation without sacrificing a party's sense of having a fair "day in court". The new legislation offers a simplified and economical procedure for the prompt and equitable resolution of disputes involving civil claims of \$10,000 or less.

Although the suggestion for mandatory arbitration of civil claims has been made from time to time, the first organized efforts came in 1978. A number of organizations and committees studying court congestion and alternative ways of resolving disputes, working independently of each other, all supported the concept of mandatory arbitration. These organizations included the Washington State Trial Lawyers Association, the Court Congestion and Delay Committee of the Washington State Bar Association chaired by Bradley T. Jones, the Court Congestion Committee of the Seattle-King County Bar Association chaired by William L. Dwyer, and the Honorable David W. Soukup, then Presiding Judge of the

King County Superior Court. Legislative Committees were also studying the idea.

The trial lawyers since 1977 have actively supported mandatory arbitration of civil claims. The support from the trial lawyers arose out of that organization's positive experience with arbitration of uninsured motorists claims. The support of other organizations was more halting and reflected strong feelings by many lawyers



Karl Tegland is a staff attorney for the Washington Judicial Council. He assisted in drafting the Supreme Court rules for mandatory arbitration and is a member of the committee which drafted the King County local rules for mandatory arbitration. He is a 1972 graduate of the University of Washington School of Law and a member of the Washington bar.

M. Wayne Blair graduated from the University of Washington School of Law in 1968 and is a partner of Montgomery, Purdue, Blankinship & Austin. He served as a member of the Court Congestion Committee of the Seattle-King County Bar Association which originally drafted the arbitration legislation, served as an augmentee to Committee 1 of the Judicial Council which originally drafted the Supreme Court Rules for Mandatory Arbitration, and served as co-chairperson of the committee which drafted the King County local rules for mandatory arbitration.

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who questioned whether mandatory arbitration was appropriate and constructive because of its significant departure from traditional notions of dispute resolution.

Those opposed to arbitration argued that the parties were entitled to their day in court before an elected judge, not an appointed arbitrator answerable to no one, and that the solution to court congestion was more judges. Supporters of arbitration argued that court annexed arbitration (arbitration under the authority of the judicial system) would have most of the safeguards and advantages of a judicial hearing, but would allow for a cheaper and faster, but still equitable, means of resolving small claims. The Washington State Bar Association Board of Governors initially rejected the concept of mandatory arbitration, but upon reconsideration approved it by a narrow vote. (*Washington State Bar News*, December 1978). The Seattle-King County Bar Association initially rejected endorsement and support of the concept, but upon reconsideration changed its position. Likewise, the Superior Court Judges Association at its annual meeting in July of 1978 rejected the concept of mandatory arbitration; but the Board of Trustees at a later date eventually approved the legislation in principle upon a close vote after considerable debate.

Given the support of these organizations, and vigorous lobbying by Bill Gissberg and Mike Ryherd, the legislature in 1979 enacted House Bill 425 (sponsored and supported by representatives Rick Smith and Irv Newhouse, Co-Chairmen of the House Judiciary Committee). The legislation, now codified as RCW 7.06, took effect on July 1, 1980. It gives each county the option to authorize mandatory arbitration within that county. Currently, only King County has chosen to adopt mandatory arbitration. A number of other counties have expressed interest but are awaiting the results in King County.

This article offers an introduction to the mandatory arbitration statute, the Supreme Court rules, and the King County Local Rules. It does not discuss all rules and therefore is not intended as a substitute for a careful reading of the statute and rules.

The Washington Statute

The Washington legislation consists of nine short sections. The statute essentially authorizes arbitration under rules to be promulgated by the Supreme Court. The first section provides that arbitration is optional with each county by a majority vote of the superior court judges of that county. The second section specifies the actions subject to mandatory arbitration which generally are civil actions involving claims of \$10,000 or less.

Subsequent sections authorize the Supreme Court, by rule, to adopt procedures for arbitration and prescribe qualifications for arbitrators; authorize compensation to arbitrators in the amount and manner as judges pro ten-

pore of the superior court; and preserve the right to a trial de novo in the superior court.

The statute does not apply to a case involving any claim for equitable relief. If a claim is for a money judgment coupled with a foreclosure of a security interest, for example, mandatory arbitration is not applicable. This restriction was in keeping with the experimental nature of the program. If arbitration proves successful, subsequent legislation may expand the types of claims subject to arbitration.

Although mandatory arbitration under the new statute is in some respects similar to general, voluntary arbitration under RCW 7.04, care should be taken to distinguish between the two. Each is governed by its own statutes and rules, and decisional law relating to general arbitration is not necessarily controlling in cases determined under the new mandatory arbitration statute and rules. Similarly, the new mandatory arbitration process should be distinguished from arbitration under specialized statutes such as RCW 39.04.120 (public works contracts) and RCW 41.56.540 (collective bargaining by uniformed personnel). The mandatory arbitration statute does not apply to arbitration under these specialized statutes.

Supreme Court Rules

The Supreme Court's rules were developed by Committee I of the Judicial Council as augmented by representatives of other organizations.¹ These rules as proposed for comment were first published May 16, 1980 in the Washington Reports Advance Sheets. The rules were adopted on June 24, 1980, with few modifications. 93 Wn.2d 1109. The rules are called the Superior Court Mandatory Arbitration Rules, MAR.

The Supreme Court rules, in deference to the local option concept of mandatory arbitration, cover only the basic framework of the arbitration process and authorize additional procedures to be established by local rule. A number of rules and Judicial Council comments to the rules identify areas in which local rules are appropriate. The fact that local rules are encouraged in some areas does not, however, restrict the adoption of local rules in other areas.

Matters Subject to Arbitration

Civil Cases subject to arbitration are defined by RCW 7.06.020:

All civil actions, except for appeals from municipal or justice courts, which are at issue in the superior court in counties which have

authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of \$10,000 exclusive of interest and costs...

MAR 1.2 adds that attorney fees are also excluded when determining whether a claim exceeds \$10,000. MAR 1.2 also adds that similar cases in which the parties waive claims in excess of \$10,000 for purposes of arbitration are subject to arbitration. Thus, a plaintiff whose claim potentially exceeds \$10,000 may choose to limit the claim to \$10,000 in order to obtain an earlier hearing through the arbitration process. If the arbitrator awards less than \$10,000, the plaintiff may still request a trial de novo and assert a larger claim in superior court.

Under MAR 8.1, the parties may, by stipulation, transfer any civil action to arbitration. Thus, a case involving sums in excess of \$10,000 could be assigned to arbitration without a limit on the award. Likewise, a case with equitable remedies, such as a marriage dissolution, could be arbitrated by stipulation. Counsel should be aware of these possibilities in a case in which a prompt hearing is important.

Relationship to Superior Court Jurisdiction and Other Court Rules

MAR 1.3 provides that a case filed in the superior court remains under the jurisdiction of the superior court

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¹Serving on Committee I were: Dan Reaugh, Senator George W. Clarke, John Ward, Malcolm L. Edwards, John C. Lombard, Senator Daniel G. Marsh, Professor Luvern V. Rieke, Hon. Frank Sullivan, Professor Philip A. Trautman, Senator Roy Van Hollebeke, and Hon. Ward Williams. Augmentees were: M. Wayne Blair, Neal Blacker, American Arbitration Association; Kenneth S. Helm, King County Clerk; Dennis Johanson, King County Clerk's Office; F. Lee Campbell; Hon. Lloyd Bever; Hon. Arthur E. Piehler; Hon. David W. Soukup; and Greg Walters (unofficially).

in all stages of the proceeding, including arbitration. Until a case is assigned to an arbitrator, the normal rules of civil procedure apply. After a case is assigned to an arbitrator, the arbitration rules apply in lieu of the civil rules.

Despite the continuing jurisdiction of the superior court after the assignment of a case to an arbitrator, mandatory arbitration will succeed in reducing the court's workload only to the extent the court is disengaged from the arbitration process. Lawyers share a responsibility with the court to trust the work of the arbitrator and to avoid the temptation to invoke the jurisdiction of the court to review rulings of the arbitrator prior to the arbitration award. As stated in the Judicial Council comment to MAR 1.3, the court, after the assignment of a case to the arbitrator, should not ordinarily entertain procedural motions, receive papers for filing, or the like. The case should be, for all practical purposes, in the hands of the arbitrator until entry of the award. The court should intervene prior to the arbitrator's award only in the most exceptional circumstances. Normally, the right to a trial de novo will afford an adequate safeguard against an unjust result from arbitration.

Transfer to Arbitration and Assignment to Arbitrator

Under MAR 2.1, the point at which a case is transferred to arbitration and the procedures for accomplishing

such transfer are to be established by local rule.

Court May Determine Arbitrability

MAR 2.2 authorizes the Superior Court on its own motion or on the motion of the party to determine whether a case is "actually" subject to arbitration. The court can, for example, determine whether a case should be arbitrated if frivolous equitable claims or exaggerated damages are asserted for the sole purpose of avoiding arbitration. The procedures for making this determination are not set forth. Because of the difficulty of establishing frivolous equitable claims or exaggerated damages by motion, the courts will probably compel arbitration sparingly, if at all. In King County no screening process is planned to determine the extent to which damages are exaggerated or equitable claims are frivolous.

Assignment of Arbitrator

MAR 2.3 provides that if parties do not stipulate to an arbitrator within 14 days after the case has been placed on the arbitration calendar, the court will promptly select an arbitrator. Other procedural details are left to local rule.

Qualification of Arbitrator

In order to serve as an arbitrator, a person must either be a current member of the Washington State Bar Association and have been so for a minimum of five years, or a



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retired judge, unless otherwise ordered or stipulated. Under MAR 3.1 the parties may stipulate to nonlawyer arbitrators, which might be desirable, for example, in certain construction cases.

Authority of Arbitrators

Under MAR 3.2, the arbitrator has authority to decide all procedural issues, examine any site or object relevant to the case, issue subpoenas, administer oaths, rule on evidence, determine the facts, decide the law, make an award, and generally perform acts authorized by the statute and rules.

Communication Between Arbitrator and Parties

No disclosures or offer of settlement may be made to the arbitrator prior to the announcement of the award, nor may there be any ex parte communication between the parties and the arbitrator. MAR 4.1. If the parties intend to discuss the case with the arbitrator, including discussions concerning the scheduling of hearings or continuances, the discussion should either be on notice, in a conference, or by a conference telephone conversation.

Discovery

Discovery is unrestricted until a case is assigned to an arbitrator, but is limited thereafter. The initial draft of the state discovery rule provided that after the case is assigned to the arbitrator, no additional discovery is allowed except as the parties may stipulate or as the arbitrator may order. MAR 4.2. The rule further provided that the arbitrator should allow discovery only when "reasonably necessary." Following the publishing of the proposed rules, the committee drafting the King County local rules, the Washington State Trial Lawyers, and the Washington Association of Defense Counsel all wrote the Supreme Court asking that the discovery rule be revised to assure at least "minimum" discovery unless the arbitrator restricts even minimum discovery.

The proposed revised discovery rule would allow the parties to demand a specification of damages under RCW 4.28.360, to request from the arbitrator an examination under CR 35, and to take the deposition of another party, unless the arbitrator orders otherwise. There would be no additional discovery except upon stipulation or as ordered by the arbitrator. The Supreme Court adopted this revised version and added that a request for admissions under CR 36 would be also allowed after the assignment of an arbitrator.

The arbitrator should arrange an early conference with the lawyers to reach some understanding of the issues and the extent of discovery.

Hearing

Under MAR 5.1 the arbitrator has authority to set the time, date, and place of the hearing upon reasonable

notice. In an effort to expedite the hearing, the rule provides that the hearings should be scheduled not sooner than 21 days nor later than 63 days from the date of assignment of the case to the arbitrator unless the parties stipulate otherwise or for good cause shown. The number of days specified in this rule follows the modern practice of defining time limits in multiples of seven.

A somewhat unusual rule, MAR 5.2, requires each party at least 14 days prior to the date of the hearing to file with the arbitrator and serve upon other parties a statement containing a list of witnesses whom the party intends to call and a list of exhibits and documentary evidence. The statement should also contain a brief description of the matters about which each witness will testify. Upon request, the parties are to make these exhibits and documentary evidence available to the other parties. The rule is designed to preclude surprise at the hearing where discovery is being limited.

Failure to comply with the rule could prevent a party from producing the evidence at the hearing. The rule has been criticized because it requires a brief description of the matters about which a witness will be testifying. Further, the rule raises questions of compliance if a party discovers additional evidence during the 14 day period prior to the hearing. Compliance is a realistic problem since much of the preparation for a hearing would probably be done just prior to the hearing. In defense of the

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rule, it should eliminate the need to depose a minor witness. If a party discovers additional evidence within the 14-day period, the party should notify the arbitrator and the other parties immediately. The other parties, if prejudiced by the lack of time to refute such evidence, could request a continuance.

The rules do not specify any particular procedure at the hearing except to require the arbitrator to exercise reasonable control over the "mode and order of interrogating witnesses and presenting evidence". This particular rule is adapted from Evidence Rule 611(a). The arbitrator then has discretion to modify the traditional trial procedure to fit the circumstances of each case.

The extent to which the evidence rules will be applied is discretionary with the arbitrator. MAR 5.3. A potential problem with this rule is that the parties, in preparation of the hearing, must assume that all evidence rules will apply. This may require excess preparation and the needless production of live testimony if the arbitrator at the hearing chooses not to apply all aspects of the evidence rules. Likewise, parties to an arbitration hearing customarily stipulate to the admission of documentary evidence when there is no governing issue as to admissibility. A King County local rule, discussed below, may lessen this problem.

If a party is absent, an arbitration hearing may proceed and an award may be made based upon the evidence

presented at the hearing. The arbitrator, for good cause shown, may allow an absent party an opportunity to appear at subsequent hearings. A party who fails to participate without good cause waives the right to a trial de novo. MAR 5.4.

Award and Judgment

Under MAR 6.1, the arbitrator's award must be in writing, though formal findings of fact and conclusions of law are not required. Within 14 days following the conclusion of the hearing, unless extended, the arbitrator files the award with the clerk and serves a copy upon each party. MAR 6.2 authorizes the filing of an amended award, but only to correct an obvious mistake such as an inadvertent error in a calculation or description. The rule does not authorize the use of an amended award to change the arbitrator's intended decision on the merits.

The prevailing party on notice presents a judgment 20 days following the filing of the award if no other party requests a trial de novo. MAR 6.3. Costs may be awarded, and the judgment may be enforced to the same extent as other civil judgments. The judgment differs from other civil judgments only in the sense that it is not subject to review in the Court of Appeals or Supreme Court, and it may be attacked only by a motion to vacate under Civil Rule 60. The restrictions on appellate review and other avenues for challenging a judgment arise partly because of practical considerations (e.g. no record of the arbitration hearing) and partly because a much broader remedy of a trial de novo is available.

Trial De Novo

A party aggrieved by the decision of the arbitrator has the right to a trial de novo in superior court. RCW 7.06.050. The trial must be requested within 20 days after the award is filed and is calendared in a manner established by local rule.

MAR 7.2 states that the trial de novo shall be conducted as though no arbitration proceeding has occurred. The rule is intended to protect a party's right to a superior court trial free from the sort of prejudice which would inevitably result if the trier of fact were aware of the arbitrator's award. The fact that an arbitration hearing occurred will be known by the trial judge, although the amount of the award will not. The trial de novo will be conducted in the same manner as a trial de novo on an appeal from district court. Thus, for example, a witness who changes his or her testimony between the arbitration hearing and the trial could be cross-examined at trial about statements made at the arbitration hearing. In order to avoid a direct reference to arbitration, the cross-examiner would refer only to statements made "at a previous hearing", as is the custom on an appeal from district court.

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arbitration will, of course, be lost if losing parties routinely request superior court trials. The court rules to some extent, discourage appeals. MAR 7.3 provides that the court *shall* assess costs and reasonable attorney fees against a party who appeals the award and fails to improve his or her position on the trial de novo. The rule gives the court no discretion to waive the sanctions. Further, the rule provides that the court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. The latter provision is intended to discourage a party from requesting a trial de novo solely for the purpose of delaying enforcement of the arbitrator's award.

King County Local Rules

The King County Local Rules, cited as LMAR, also give considerable discretion to the arbitrator.² These rules are not designed to answer every question of procedure which may arise and the arbitrator is advised in the rules not to hesitate to exercise discretion consistent with the purpose and policy of the statutes and rules.

Transfer to Arbitration

Under LMAR 2.1, a case is transferred to arbitration in King County at the time it is noted for trial on a revised form prescribed by the court. The party noting the case for trial will complete a Statement of Arbitrability, which would indicate whether or not the case is subject to arbitration. Any other party disagreeing with the Statement of Arbitrability has 14 days to respond on a similar form. The Director of Arbitration, appointed by the presiding judge, will determine whether the case is subject to arbitration on the basis of the information on the forms. If one party asserts that its claim or counter or cross claims exceeds \$10,000 or involves relief other than a money judgment, the matter will not be subject to arbitration unless both parties stipulate to arbitration. If the parties stipulate to arbitration under MAR 8.1, the claim can be arbitrated even though the claim exceeds \$10,000 and the arbitrator is not then limited to an award of less than \$10,000.

Under LMAR 2.1(b), a party may opt out of arbitration by amending the Statement of Arbitrability and may do so without leave of court prior to being assigned an arbitrator or a trial date (with leave of court after a trial date or arbitrator has been assigned). A party will not lose its position on the trial calendar during the arbitration process.

Assignment of an Arbitrator

Once a case has been assigned to arbitration, the

² Members of the Committee drafting the local rules were M. Wayne Blair; Robert Cannon, Superior Court Administrator; Hon. Robert E. Dixon; Malcolm L. Edwards; Jan Eric Peterson; Hon. Arthur E. Piehler; Hon. Norman W. Quinn; Hon. Jack D. Scholfield; Hon. David W. Soukup; R. Jack Stephenson; Karl B. Tegland; Greg Walters, Director of Arbitration.

parties will receive a list of five proposed arbitrators selected at random by the court from the master list of those who have indicated interest and experience in that area of law. A master list of arbitrators will be made available upon request. The parties are encouraged to stipulate to an arbitrator. If the parties are unable to stipulate, they will each nominate one or two arbitrators and strike two arbitrators from the proposed list of five arbitrators. The parties will have 14 days to so respond. If neither party responds, the court will randomly select one of the arbitrators. If one party responds, the court will appoint the one the arbitrators nominated. If both parties respond an arbitrator nominated by both parties will be appointed. Otherwise the court will randomly select one of those not stricken.

An arbitrator may refuse to serve in a given case. LMAR 3.1. The arbitrator is also under a duty to determine whether any cause exists for disqualification from a case upon any of the grounds set forth in CJC Cannon 3(c) governing the disqualifications of judges.

Discovery

The local discovery rule provides some guidelines to assist the arbitrator in exercising discretion on the extent of discovery. The arbitrator shall "consider the nature and complexity of the case, the amount in controversy or other values at stake in the litigation, and the discovery, if

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any, which has already been had". LMAR 4.2(b). The arbitrator should also consider that unrestricted discovery may result in excessive expense, but that undue restrictions on discovery may result in unfair surprise and unnecessarily encourage an appeal.

A local rule on evidence has been drafted to assist the arbitrator in exercising discretion. The rule will be controversial. It is designed to encourage parties to stipulate and not quibble over relatively unimportant evidentiary issues. Under LMAR 5.3 certain documents are presumed admissible at the arbitration hearing, but only if the party offering the document serves on all other parties a notice accompanied by a copy of the document, and the name and address of the author or maker, at least 14 days prior to the hearing in accordance with MAR 5.2. Those documents "presumed admissible" include hospital, doctor, and dental records on a letterhead or billhead; bills for drugs, medical expenses on a letterhead or billhead; bills or estimates of property damage on a letterhead or billhead. If an estimate is offered, the party intending to offer the estimate must also forward a notice indicating whether or not the property was repaired and if so, whether the estimated repairs were made in full or in part. Certain other types of documents are deemed authenticated, but the evidence contained in those documents must be otherwise admissible under the rules of evidence. These include police reports, weather reports, wage loss reports, traffic signal reports, life expectancy tables, photographs, x-rays, drawings, maps, blueprints and similar evidence. Under this rule, depositions and affidavits are admissible, including affidavits containing statements of opinion from lay witnesses and experts alike. This latter rule is consistent with the rules of the American Arbitration Association.

Other documents not specifically covered by the rule, but having "equivalent circumstantial guarantees of trustworthiness" are "presumed admissible". The rule provides that the statements or documents are only entitled to such weight as the arbitrator deems appropriate. This provision in the rule is perhaps unnecessary but does emphasize that the arbitrator need not attach much weight to an affidavit, for example. In those areas where the opposing party deems it important to cross-examine the author or maker of an otherwise admissible document under this rule, that party at its own expense may subpoena the author or maker and examine the author or maker as if under cross-examination.

Place of Hearing

The arbitration hearing may be scheduled at any reasonable time and place designated by the arbitrator. LMAR 5.1. The rule does not restrict the hearing to the King County Courthouse or even to a location in the county.

At this time the King County Superior Court is plan-

ning to have a facility available for arbitration hearings. To what extent the facility will be able to accommodate the number of hearings is unknown. For that reason, lawyers are encouraged, as is anticipated to be the case in any event, to hold most of the hearings in private offices.

Compensation of Arbitrators

At the time the arbitrator files the award, the arbitrator also submits to the Director of Arbitration a request for payment on a form prescribed by the court. This form will ask the arbitrator to describe the services rendered and the time to render those services. Based upon judge pro tem rates, it is contemplated that an arbitrator will be paid approximately \$25 per hour for both hearing time and reasonable preparation time. Where the arbitrator's time is considered excessive, the Director, subject to review by the presiding judge, will have discretion to determine reasonable compensation.

Effective Date of Local Rules

The Local Rules became effective October 1, 1980. If a case pending on that date has not received a trial date or if the trial date is after January 1, 1981, any party may serve and file a statement of arbitrability under LMAR 8.3 indicating that the case is subject to mandatory arbitration. When the trial date is scheduled before January 1, 1981, the parties may stipulate to arbitration. LMAR 8.3.

Conclusion

Arbitrators have a heavy responsibility. They are, in effect, the court. An arbitrator has an obligation to perform in a competent, professional manner, both to preserve respect for the court and to instill in the parties a sense of fairness which will dilute the natural tendency to want to appeal. Mandatory arbitration will benefit the judicial system only if all of its participants — practitioners, arbitrators, and the parties — use the process conscientiously and avoid the possible temptation to abuse a system which is deliberately less formal than that of superior court.

Mandatory arbitration is still, in this state, an experiment. Whether it will actually reduce the expense and delay inherent in litigation remains to be seen. If the rate of appeal is high, the overall effect of this program will be to complicate further an already complex process by adding another layer of hearings. If the experience in other jurisdictions is any indication, however, and if the process is viewed with respect by its participants, there is reason to be optimistic. Ultimately, the success of mandatory arbitration will be measured not by whether lawyers and judges are pleased by it, but by whether the public accepts it as a process capable of producing a fair and just result. Practitioners, arbitrators, and judges all share a responsibility for keeping this broader objective in mind. □



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Traffic Infractions —

New Approach for Handling Traffic Cases

by HON. GEORGE T. MATTSON, THOMAS HOEMANN and HARRY F. REINERT

Legislative History

On January 1, 1981, Washington will join a number of other states which have in recent years decriminalized minor traffic offenses and established procedures for adjudicating those offenses. Washington's "Disposition of Infractions Act," RCW 46.63, takes effect on that date. This article will discuss the background of the legislation, its content, and court rules and administrative steps necessary for its implementation.

The legislation is primarily the product of the Task Force on the Decriminalization of Minor Offenses appointed by the Washington Judicial Council in 1976. The task force was given the responsibility of examining the possibility of decriminalizing minor criminal offenses, alternative ways of expeditiously adjudicating decriminalized offenses, appropriate sanctions for those offenses, and means of enforcing those sanctions. For several reasons, the task force eventually focused on the area of traffic offenses. First, traffic cases comprise by far the greatest share of the case load in courts of limited jurisdiction. By devising a way to more expeditiously deal with these cases, congestion and calendaring problems in the lower courts could be alleviated. Second, several other states had previously enacted legislation decriminalizing minor traffic offenses. By limiting itself to consideration of the decriminalization of traffic offenses, the task force was able to draw upon the experi-

ence of these states in drafting a proposal. Finally, the decriminalization of minor traffic offenses provided an opportunity to eliminate uncertainty created by some existing statutory provisions. Prior to 1975, minor traffic offenses were classified as misdemeanors for which a defendant could be fined and incarcerated. Recent decisions of both the United States Supreme Court and the Washington Supreme Court had held that an indigent defendant had the right to appointed counsel if he or she was charged with an offense for which imprisonment was a possible punishment. In 1975, the legislature amended the motor vehicle code to remove the possibility of a jail sentence from most minor traffic violations. While this amendment achieved its primary goal of eliminating the need to appoint counsel for indigent defendants in all traffic cases, it left unanswered the question of whether these violations remained criminal in nature. The Attorney General concluded that those traffic offenses were still crimes and that an individual could be arrested and prosecuted in the normal manner provided by law. Further confusion arose, however, when the new criminal code took effect in 1976. The criminal code defines a "crime" as an offense for which a sentence of imprisonment may be imposed. Thus, under the provisions of the criminal code, it appeared as if most of the minor traffic offenses specified in the motor vehicle code were no longer crimes. In the minds of some, this situation created new problems such as the authority of law enforcement officers to stop, detain, or arrest a person for a traffic offense, and the authority of a city attorney or county prosecutor to prosecute such actions. In part, the legislation drafted by the task force was an attempt to clarify these ambiguities and address these problems.

The task force worked throughout the last half of 1976 to prepare a bill for the 1977 session of the legislature. The primary policy issue confronting the task force was

George T. Mattson has been Renton District Court Judge for ten years. A former president of the Washington State Magistrates' Association and currently a member of the Judicial Council, Judge Mattson has been appointed to the King County Superior Court, effective January 1, 1981.

Thomas C. Hoemann is counsel to the Senate Judiciary Committee. As a Judicial Council staff attorney, he worked with the task force which developed the initial decriminalization legislation. He also shepherded the bill through the 1979 Legislature.

Harry F. Reinert is currently a staff attorney for the Judicial Council and assisted the Council in developing the proposed Traffic Infraction Rules.

which branch of government was to have responsibility for the adjudication of the newly decriminalized traffic violations. Some states, such as New York and Rhode Island, have placed this responsibility in the executive branch by providing for the administrative adjudication of these offenses. Other states, such as Oregon, have continued to give the judiciary jurisdiction over decriminalized violations. The task force initially considered two drafts of bills, one of which provided for an administrative adjudication procedure operated under the auspices of the Department of Licensing, and another in which Washington's courts of limited jurisdiction would hear and adjudicate decriminalized offenses. The draft submitted by the task force to the Judicial Council and eventually to the legislature reflected the latter approach. The task force and the Judicial Council believed that judicial adjudication of these offenses was most appropriate for several reasons. The components of a judicial adjudication system already existed in the form of the state's courts of limited jurisdiction. Administrative adjudication would necessitate the creation of a new statewide hearing system under the auspices of the Department of Licensing. Judicial adjudication would also enhance the public's belief that the impartial adjudication of law violations properly resides with the judicial branch of government rather than the executive

branch—that it is the courts which are responsible for dispensing “justice” under our legal system. Finally, it was also felt that the lack of information on the efficiency and effectiveness of administrative adjudication dictated against the installation of an adjudicatory process so radically different from the existing system.

The bill introduced in the 1977 session of the legislature passed the Senate but failed to gain the approval of the House. A revised bill introduced in 1979, SHB 101, did pass the legislature that year. A package of technical amendments, HB 1418, designed to address problems and issues which had arisen during the course of preparing for the implementation of the law was passed in 1980. That bill also set the effective date of the new law as January 1, 1981.

Since the passage of the legislation in 1979, numerous steps have been taken toward implementing the new law. The Judicial Council has drafted proposed court rules and a penalty schedule to govern the procedure in traffic infraction cases. The proposed rules and penalty schedule have been submitted to the Supreme Court for its consideration. They are discussed in more detail in the remainder of this article. Washington's Uniform Citation and Notice to Appear form is also being revised to reflect the new law. Numerous informational and training seminars have been and will continue to be held across the

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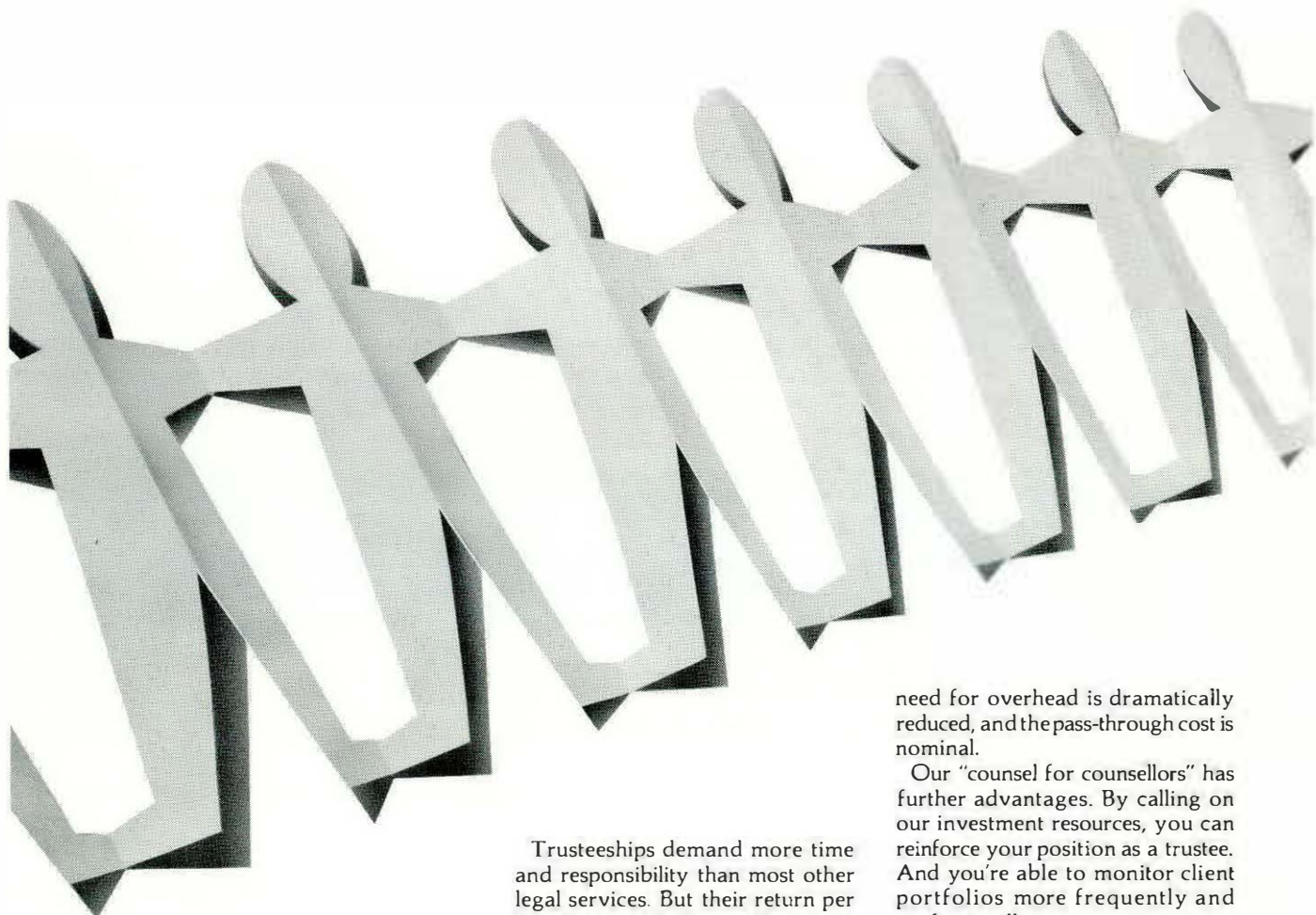
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state to assist law enforcement and judicial personnel in the implementation of the new procedures.

Court Procedures

RCW 46.63 and the proposed court rules provide for a different process for initiating traffic cases from the current practice. Under the present system, law enforcement officers will give the defendant a citation and notice to appear. The defendant may be required to appear at an arraignment or he or she may be permitted to post and forfeit bail. Defendants must often contact the court to determine the amount of the bail.

Under RCW 46.63, however, the law enforcement officer will still issue a notice of infraction, but the defendant then decides how to proceed. The officer is required to place the penalty amount on the notice. The defendant may pay the penalty within seven days. This closes the case and the Department of Licensing is notified that the defendant has committed the infraction.

Instead of paying the penalty, the defendant may within seven days of the notice of infraction, request one of two hearings. One is a "mitigation hearing." The defendant admits having committed the infraction, but may explain the circumstances surrounding the commission of the infraction. The defendant may be represented by counsel and may have witnesses present, but there is no right to subpoena witnesses. The prosecutor may be present, as may be the citing officer, but they are not required to be there. The mitigation hearing is intended to be an informal proceeding, similar to the Magistrates' hearings now held in Seattle Municipal Court and many district courts throughout the state.

The other hearing that may be requested is a "contested hearing." The defendant requests this hearing when he or she denies having committed the alleged infraction. This is a formal proceeding. The defendant may be represented by counsel and may subpoena witnesses. There is no right to a jury trial, however. The proposed rules would require the prosecutor to be present at the proceeding. This is a change from the current practice in many jurisdictions, but is in line with case law and the rules governing the practice of law. *Everson v. Assink*, 15 Wn. App. 842 (1976).

The prosecution has the burden of proving the commission of the infraction, but the burden has been lowered from the criminal standard of beyond a reasonable doubt to the civil standard of a preponderance of the evidence.

The court, after a contested hearing if it determines that the defendant has committed the infraction, or after a mitigation hearing, may impose a monetary penalty on the defendant. The penalty schedule will serve as an upper limit on the amount of the penalty that may be imposed by the court. The court may require that a

defendant complete a number of hours of community service in lieu of a monetary penalty, or may permit time payments. The court will also notify the Department of Licensing that that defendant has committed the infraction.

The defendant who has been issued a notice of infraction and who fails to respond to the notice may be charged with a misdemeanor of failure to respond. The defendant's driver's license will not be renewed until the penalty for the infraction plus an additional \$25 statutory penalty is paid to the court. The defendant may also be charged with a misdemeanor if he or she fails to appear at a hearing he or she requested. Under the proposed rules, the defendant has 60 days to request the court to set aside the judgment that the infraction was committed if the defendant is able to show good cause for the failure to appear. There is no similar provision for a failure to respond to the notice of infraction. The Department of Licensing will not renew the driver's license of a person who has failed to appear at a requested hearing.

There are, of course, several traffic offenses which have not been decriminalized by RCW 46.63. Most significant among these are driving while intoxicated, reckless and negligent driving, and driving without a valid operator's license. This latter offense serves as one of the key elements in enforcing the traffic laws under the infractions system since the Department of Licensing will not renew the license of any person who has an outstanding notice of infraction.

Penalty Schedule

One of the major innovations included in the proposed court rules is a comprehensive traffic infraction penalty schedule. The sanction for the commission of a traffic infraction is no longer referred to as a "fine," but rather as a monetary penalty. A monetary penalty may not exceed \$250 except when the infraction involves a size, weight, or load violation. The Supreme Court may by rule set out a schedule of monetary penalties. When that has been done, the maximum penalty is that which is designated by the Supreme Court. The court imposing the penalty may waive, suspend, or reduce the designated penalty. It can also impose community service in lieu of the penalty.

A proposed penalty schedule has been developed by the Judicial Council and recommended to the Supreme Court. Several factors were considered in drafting the penalty schedule.

One factor was the need to have a comprehensive schedule since the officer must write in the penalty amount on the notice. Frequently committed offenses should have uniform penalties statewide. Certain types of violations, however, are subject to peculiar problems of abuse in specific geographical areas. For example,

vehicle license offenses are more prevalent in Clark County than in King County. As a result, it was felt that certain penalties should be subject to locally established penalty schedules adopted by local court rule. If a court has not, by local court rule, set a different penalty, the proposed schedule establishes a single penalty for all otherwise undesignated infractions.

A second factor considered in developing the penalty schedule was the penalty amount. Deterrence seemed an obvious goal. It might be assumed that the higher the penalty, the greater the deterrence. Three considerations mitigate against that theory. First, some statistical studies question the relationship between the amount of the penalty and its deterrent effect. Second, high penalties, which exceed the level of current public acceptance, could produce a significant number of cases being scheduled for court. This would create a counterproductive cost to the system. Third, it appears that the frequency of violations by an individual is more predictive of accident occurrence than the type of violation.

Even though frequency of violation is important in predicting accidents, certain offenses can be, and were, considered inherently serious in the drafting of the proposed penalty schedule. These infractions were given the highest designated penalties.

Another factor considered in developing the proposed

schedule was achieving some statewide consistency in penalties assessed after a hearing. The proposed rules do not allow the local court to impose, after a hearing, a penalty greater than that provided for in the penalty schedule. Under the current system, the judge can impose a fine greater than the uniform bail schedule. Since only downward flexibility will exist under the new system, the proposed penalty schedule has an upward bias to give the court discretion to lower the penalty in those situations in which the circumstances surrounding the commission of the infraction justify a reduction.

The proposed penalty schedule was designed to take into account the results of the commission of certain infractions. For "rules-of-the-road" infractions, RCW 46.61, two different penalties have been proposed, depending upon whether an accident occurred as a result of the commission of the infraction. The penalty is higher if an accident occurred.

Since the law enforcement officer issuing the notice of infraction will have to fill in the appropriate monetary penalty, the ease of use of the schedule was a serious consideration. Complex formulas for computing the monetary penalty must be avoided. There are a number of assessments added to fines currently imposed for traffic offenses. These assessments will continue under the new infractions system, but the proposed penalty

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schedule includes these so that no complicated computations will need to be made by the citing officer. In addition, the number of individual penalties has been reduced, with infractions grouped together into a few penalty categories.

An example of how some of the above considerations have been integrated can be seen when the infraction of speeding is examined. Instead of a separate penalty for each mile over the limit, the current procedure, the proposed penalty schedule sets penalties in five mile increments. Since the seriousness of speeding is related to the speed limit in effect, the proposed schedule divides into two ranges the penalties for speeding, depending upon whether the speed limit is under or over 40 miles per hour. Finally, consideration was given to the argument that speeding for the first 15 miles over the speed limit of 55 should be significantly lower since the limit was originally lowered to 55 as an energy saving measure, not a safety measure. That argument was rejected since studies have shown a significant beneficial effect on accident rates as a result of the 55 mile per hour speed limit.

In summary, the proposed schedule attempts to integrate and reconcile the following considerations: (1) finding an appropriate balance between the goal of statewide uniformity and the special problems of par-

ticular geographical areas; (2) setting higher penalties for inherently serious infractions; (3) providing flexibility to account for the contexts in which particular infractions may be committed; (4) providing ease of use of the schedule by the citing officer; and (5) balancing the amount of the penalty against the counterproductive pressure on the system when public acceptance levels are exceeded.

Conclusion

The "Disposition of Infractions Act" is the first experimental step in Washington with decriminalization of a large area of law. Though the initial application of this new law will likely cause some confusion, the expectation is that the infractions system will be more efficient for the courts and more honest to the public. □

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Cross-Examination of Defendant's Medical Expert in "Whiplash" Case

by PAUL N. LUVERA, JR.

It is not uncommon for the plaintiff's attorney to be faced with the job of cross-examining the defendant's medical expert in a cervical strain, or what is called by some a "whiplash" case. The plaintiff's lawyer's problem is that the injuries do not involve broken bones, and cannot be demonstrated on x-ray. Ordinarily, the client exhibits symptoms which are subjective only. There is a substantial problem in persuading the jury that, in fact, the client is really injured.

The defendant's approach to such a case frequently is that while the plaintiff may have received some obscure and minor injury at the time of accident, the plaintiff had blown the entire matter all out of proportion. The defendant will, in addition, frequently hint, if not overtly allege, that the plaintiff is a malingerer or perhaps neurotic.

In this setting, the plaintiff's attempt to persuade the jury is made even more complicated by defendant's use of a medical examiner. Frequently, the physician, who has examined the plaintiff at the request of the defendant, has written a report in which it is suggested that there is no evidence of injury at all other than the unsupported claims being made by the plaintiff. The physician will often testify that all tests and x-rays were totally negative for any sign of injury, that there were no objective indications of injury whatsoever and that there is no medical reason for the plaintiff to be making the complaints being made. At the very least, the physician will suggest that the plaintiff is grossly exaggerating, is neurotic, or indirectly leave the clear impression that the plaintiff is a malingerer.

Many physicians who are called upon to perform examinations of plaintiffs in injury cases become very skilled in the forensic arena. A plaintiff's lawyer cross-examining an experienced witness of this type has a substantial problem of not doing more harm to his client's case than good by the cross-examination. Not infrequently, experienced witnesses of this kind seem to

save their most devastating opinions for cross-examination. The lawyer approaching such a witness in a case of this kind must proceed very cautiously. On the other hand, one is reluctant not to cross-examine a witness who has devastated the plaintiff's case through his testimony. Then the dilemma is how to cross-examine such a witness and yet not make matters worse than before the cross-examination started.

One way to approach a situation of this type is to use a very well thought out and controlled cross-examination. The function of the cross-examination is to minimize the impact of the testimony, utilize the witness to prove plaintiff's claims and lay a foundation for final summation on the medical issues. It is essential that the cross-examination be well thought out and controlled in order to avoid non-responsive statements or speeches from the witness which will damage plaintiff's case.

One such cross-examination in a case of this type would attempt to accomplish four points. The first point is that the defendant's medical examiner is not in as good a position as is the plaintiff's physicians to evaluate

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whether or not the plaintiff is injured, and to what extent. This lays a foundation for the plaintiff's attorney to argue to the jury that the plaintiff's treating physician was in a much better position to really know what was wrong with the plaintiff than was the defendant's medical expert.

The second point in the cross-examination would be to bring out any affirmative matters which the defendant's doctor may have related about the plaintiff's injuries. This examination should be limited strictly to those matters the defendant's expert has testified to or are contained in the written report, if any, made by the expert. One should not be tempted to stray from these admitted, affirmative matters into unknown areas, no matter how tempting it might be. This allows one to argue to the jury that, in some regards, both doctors agreed and to repeat and emphasize affirmative findings regarding plaintiff's injuries.

A third point in such a cross-examination is to utilize the defendant's medical expert for the purpose of describing anatomy and testifying to known medical facts regarding injuries of the type plaintiff sustained. If the cross-examiner restricts the inquiry to matters which are basic, known anatomy and uncontroversial medical facts, the defendant's expert can become plaintiff's witness to that extent. Such an examination will allow the plaintiff to emphasize to the jury that even where there

are no objective findings, injuries can nevertheless be present. Furthermore, this will assist the jury in understanding the nature of plaintiff's claimed injuries.

The last point to be made in such a cross-examination is to make a series of concluding points which may safely be made in support of plaintiff's claims. This would normally be the concluding part of the cross-examination.

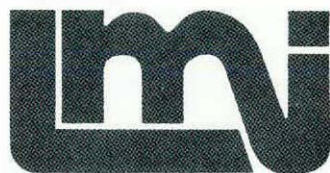
The cross-examination example which follows is a brief illustration of a cross-examination which might be used in such a case of the defendant's medical expert:

A. Ability to Form Opinion

1. Doctor, so that the jury will understand your role in this case, would you tell us when you first saw the plaintiff, Mr. Jones?
2. That examination took place, did it not, at your office in Mount Vernon?
3. This was during your normal working hours, was it not?
4. I assume you saw your patients that day as usual?
5. How long, doctor, did your physical examination take?
6. Had you ever examined Mr. Jones before this day, doctor?
7. You have not examined him since that day, have you, doctor?
8. So, doctor, you only saw him on this one occasion some five months after his injuries, and you haven't examined him since — is that correct, doctor?
9. On this one occasion when you examined Mr. Jones, you did not do it for the purpose of treating him, that is to help him improve medically, did you, doctor?
10. Actually, doctor, the purpose of the examination was not for treatment, but for the sole purpose of making a report of your findings and to testify if it became necessary for the defendant in this case, isn't that true?
11. You were hired to do this by the defendant's representatives, isn't that correct, doctor?
12. You, of course, were paid for your examination and report?
13. And, doctor, you are being paid for your testimony here at court today, are you not?

B. Affirmative Findings of Examination

1. Doctor, one of the first things you did was to take a history from the plaintiff, Mr. Jones, isn't that true?
2. This history consisted of what Mr. Jones told you in answer to your questions about the collision and his injuries?
3. In giving that history, did Mr. Jones tell you that



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his car was stopped waiting for a red light when it was violently struck from the rear by another car?

4. In giving the history, did Mr. Jones tell you, doctor, that when the impact took place he felt his head snap back and that the car was driven ahead?
5. Did Mr. Jones also tell you, doctor, that he was unable to work for the next three days?
6. Doctor, when you examined Mr. Jones, the plaintiff, you found that he was cooperative, did you not?
7. You noticed during your examination, doctor, that he held his neck rather rigidly fixed?
8. Doctor, you found that Mr. Jones did not have a full range of movement in his neck at the time of your examination, did you not?

C. General Anatomy

1. Doctor, do you have any idea how much Mr. Jones' head might weigh?
2. What are cervical vertebrae, doctor?
3. Doctor, in between each of these vertebrae are discs called intervertebral discs, are there not?
4. Would it be reasonably accurate to refer to them as cushions or shock absorbers?
5. Through the vertebrae passes the spinal cord which connects with the brain, isn't that true, doctor?
6. Out of the cervical spinal cord emerge cervical nerve roots, do they not, doctor?
7. These nerve roots pass through openings or canals in the vertebrae, don't they, doctor?
8. Doctor, in the area of the cervical spine there are ten soft tissues such as (1) muscles, (2) ligaments, (3) tendons, (4) veins, (5) arteries, (6) cartilage, (7) nerves, (8) joint capsules, (9) glands and (10) synovial membranes.
9. Doctor, when we use the term "sprain" we are referring to the stretching of tissue, are we not?
10. Where there is the stretching of tissue, there can be a tearing of tissue as well, can there not?
11. There can be a stretching, tearing or bruising of soft tissue without any damage to the bone itself, can't there, doctor?
12. Soft tissue damage can result in the formation of scar tissue?
13. Scar tissue where formed in the soft tissues of the neck is generally regarded as permanently present?
14. What are remissions and exacerbations? In some cases injuries of the type sustained by Mr. Jones are characterized by periods of remission and exacerbation isn't that correct, doctor?

D. Conclusion

1. Every doctor, including yourself, treats people on the basis of "subjective symptoms" in their practice, isn't that correct?
2. It is not unusual or improper for a physician to treat people on the basis of subjective complaints, is it, doctor?
3. It is possible to have injuries to the soft tissues of the neck even where there are no broken bones, is it not, doctor?
4. One can have a real injury in one's neck even if the normal x-ray film does not reveal clear signs of injury?
5. A person can have an injury to their neck even if the x-ray film is described as "normal"?
6. The skill and judgement of the examining physician is an important factor in arriving at an accurate conclusion about a person's injuries — would you agree with that fact, doctor?
7. It is also an important factor for the physician to have as much information about the patient's condition as is needed to arrive at an accurate determination?
8. In general, the more one knows about the patient's condition, the better able that physician is to arrive at an accurate conclusion.
9. You haven't had an opportunity to confer with Dr. Brown who has seen, examined and treated Mr. Jones over the past year have you, doctor? Your only chance to examine this patient was about a month ago when you took about 30 minutes to look him over in your office was it not, doctor?
10. Have you had occasion to change your mind about a patient's condition from your first impression as you have seen them over a period of time?
11. You have concluded that Mr. Jones did suffer injuries in the collision?

While this example is primitive and not artful, it hopefully conveys the idea of what one is attempting to accomplish through such a cross-examination. The cross-examination can be expanded with additional medical information to fit one's particular case. It is recommended that all of the questions be reviewed with a physician to make sure that each question can be safely asked without fear of having it turned around and used against the examiner. One should also strive for more brief and precise questions than those set forth in the example in order to keep tight control over the witness.

An artful cross-examination of defendant's medical expert can enhance the plaintiff's case while, at the same time, avoid the risk of doing more harm than good. □

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Law Libraries Losing to "Double Inflation"

by HUGH SPITZER

Inflation, as we all know, is driving up the cost of tools and materials in every sector of the American economy. Gas prices translate into higher prices for fertilizer and farm commodities; high interest rates increase the cost of buying a home; in the law business, a rise in charges for office space or copying machines, or increased wages for clerical workers, all mean higher fees for clients.

Yet, while many cost boosts can be passed on directly to consumers, a "double inflation" in a critical component of legal work—libraries and their research materials—may mean that lawyers, judges and scholars will have to entirely forego some tools of their trade.

In this short article, I will take a look at the largest law library in the Northwest, the University of Washington's facility, and outline how inflation is eating away at this particular institution. Then I will suggest some ways to cope with the problem if we want to maintain the quality of research materials which many of us are used to.

The UW Law Library: A Public Facility

The University of Washington Law Library serves a number of functions: first it is used regularly by UW and University of Puget Sound law students for class preparation; second, it is a primary research facility for law professors and for scholars from other departments; third, because of the breadth of its collection, it is heavily used by attorneys, judges, government and business people from throughout the Northwest.

Outside demands on the University's library have grown substantially in recent years. The number of registered non-law school users grew from about 4,500 in 1975 to 7,982 by mid-1979. 1,667 attorneys were recorded as asking for reference help in the 1976-77 school year, and 2,706 did so in 1978-79. The number of loan transactions with other libraries (the UW library is usually the lender because of its collection size) grew from 843 in 1976-77 to 1,338 in 1978-79. A scan at the list of borrowers takes us from Agana, Guam to New York City; from Juneau to Puerto Rico. But records show the most frequent use by attorneys from Seattle, Olympia, Yakima, Spokane, Pullman, Bellingham and (for some reason) from Selah, Washington.

The University law library's popularity is due, simply, to its size. At 300,000 volumes, it ranks 17th in the country. The library has slipped from 9th place 25 years ago, and is 107,000 books behind the library now ranked number nine; but it is still one of the important legal research facilities in America, particularly in British Commonwealth, Japanese and general East Asian materials. To give some perspective, the size of other important Washington law libraries include the Washington State Law Library in the Temple of Justice at Olympia (209,000 volumes, including three appellate branch libraries); Gonzaga Law School Library (130,000 volumes); the University of Puget Sound Law Library (140,000 volumes, half of it in microform); the King County Law Library (75,000 volumes) and Spokane County's facility (20,000 volumes).

These law libraries all serve their local lawyers and judges, and they constantly trade books among themselves for local users; yet they play different roles: the county facilities are aimed primarily at practicing attorneys; the law school libraries are similarly used by lawyers, but must serve professors and students; the State Law Library, housed in the judicial branch, services public library users throughout Washington. According to State Law Library Director Connie Bolden, the University's facility has a special—and expensive—function. Bolden says the UW Law School is "a primary resource library. They should get materials for in-depth...research that we wouldn't need as much and King County certainly wouldn't...for example, we are a federal depository, but limited to only 30 or 40 items. They get thousands. That means they need special documents librarians and foreign language librarians. There's also tremendous public use of their library." But, Bolden warns, "the Bar may be in the position of taking the UW law library for granted. People have grown to expect it", and he adds that the high cost of processing, cataloguing and maintaining all the special books and documents, endangers the facility.

Hugh Spitzer is Legal Counsel to Seattle Mayor Charles Royer.

Double Inflation

The UW's dilemma, which is in fact shared by every public and private law library in the state, is caused by a "double inflation": first is the inflation in the cost of books, similar to price increases everywhere. But compounding this is the explosion in litigation, and hence in the number of reported cases, which translates into more, and more varied, sets of reporter series and looseleafs to maintain. The rising number of these so-called "continuations", together with inevitable salary increases for staff, squeezes out acquisition of single, non-serial books: treatises, volumes on legal history or theory, research studies, or up-to-date analyses of tax or commercial law, for example. These are the big losers to inflation.

In the 1973-75 budget biennium, the University's Law Library allocated 76% of its \$256,505 book budget to continuations. In the current biennium, 91% of an estimated \$412,000 book acquisition fund is earmarked for serials. This means that the money available for collection development has actually dropped, from \$61,000 to \$37,000, while prices for books and special research materials such as briefs, are increasing between 12% and 18% per year. Labor costs have of course also grown, hitting major libraries like the University's hard because of the high number of professional staff required to

maintain specialized collections. Salaries and other operations costs take the lion's share of a library's total budget—and the lion's share of any budget increases.

The UW Law Library has tried to save money by reducing the number of sets of some reference works, and by altogether eliminating over a dozen loose-leaf services and form sets. Most of the cuts are in specialized services of particular use to practitioners. But even with these reductions, the overwhelming cost of continuations keeps the University's library from staying current with all commonly-used materials; it has lost its position as one of the very best law collections in the country, and can neither keep up with new literature in most fields nor fill in its gaps in legal classics.

Dennis Stone, Gonzaga Law School's librarian, estimates that it would cost at least \$40,000 a year for the University of Washington to keep current with the important legal literature; that figure doesn't include the latest special subject materials or books oriented toward individual states. Stone notes that all the major law libraries in Washington play an important public function, but says the UW's facility "isn't being funded for the kind of library it is." Stone says "we have to let state officials know how important the University of Washington Law Library is to everyone. They have materials that may rarely be used, but they *are* used. You need books on Canadian and Kuwaiti law, for instance, because people

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from those countries are buying things here. And if you want scholars on the faculty, and good students, you have to give them the resources."

Solutions to a Tough Problem

If the bar wants to give the UW Law School's library, and other major libraries, the resources to adequately serve attorneys, judges, professors and students, there are a number of approaches which have been, or might be, effective:

1. *Cooperative Acquisitions* — Washington's major libraries can expand their practice of conferring before acquiring new books, in order to reduce duplications in specialized materials. Then volumes could be traded through interlibrary loans. This is often done now, but the University of Washington is hampered because it can't afford to be part of the Washington Library Network, a computerized catalogue that helps over fifty other library systems share their materials. Although the UW has a terminal, it lacks the \$5,000-8,000 needed each year to participate.

2. *Filing Fee Funding* — By state law, county law libraries receive a portion of court filing fees for their operations. The King County Law Library, for example, now gets \$7 for each Superior Court case and \$3 from each District Court filing. This yields over \$300,000 annually. This is a funding mechanism that might be used

to support other law libraries heavily used by the bench, bar and public.

3. *New Fund Sources* — In Ohio, a percentage of each criminal fine, as well as a portion of filing fees, goes to support local law libraries. This approach could be adopted on a statewide basis in Washington, with revenues going to County and university libraries that serve the bar and the public. In British Columbia, a province-wide law library system receives 80% of its outside revenues from the interest on trust accounts, and the University of B.C. and University of Victoria law libraries both get capital development and special acquisition funds from the same source. 20% of the provincial system's money comes from the Law Society, which is similar to the Washington State Bar Association; those funds originate in attorney dues to the Society. Although it would be difficult to tap trust account interest to support law libraries in Washington because of the prevailing attitude toward client's funds, we might successfully earmark a portion of criminal fines, or lawyer dues, for law library support.

4. *Increased Direct State Funds* — Both the University of Washington and the State of Washington law libraries receive state general funds for their support. The UW facility and the University's medical library are both in a special budget category because of their unique service

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to public-serving professions and the general public. A quite direct approach to alleviating the University library's funding crisis is to lobby the State legislature for more money. People who work in the justice system can argue honestly that the lack of accessible, public research materials, means that only those who can afford expensive law firms (with massive in-house libraries) or large copying bills, will have well-prepared lawyers representing them. We can also effectively argue that if Washington's statutory and common law is to keep up with the times, we must have well-equipped lawyers and legal scholars, and well-educated students; those require public law libraries that are well-maintained in a variety of fields.

5. Foundation and Private Support — Both the University of Washington and Gonzaga law schools rely on special foundations to help their libraries. Gonzaga has been particularly effective in using its foundation's contributions for capital development. Both institutions, and the University of Puget Sound, receive funds from businesses and other private donors with an interest in a specific field of law. The UW, for example, has used money from Japanese corporate contributors to develop its well-known collection on the law of that nation. Unfortunately, private donors cannot be counted on for funding the ongoing costs of continuations and non-

serial collection development; this requires a steady, predictable source of funds.

6. Attorney Charges — A change that would yield a small addition to every law library's revenues would be a charge or membership fee for attorneys and others who wish to check out books. The University of Puget Sound is implementing such a scheme, with graduated fees based on years of practice or firm size. This is a sensible approach, but a charge for use of public libraries like the University of Washington's would weaken its ability to serve the general populace.

7. Security Improvements — Another small-scale action that could give important results is a strong security program to reduce book thefts. Sad to say, searches for lost books at the University facility resulted from 10% of the requests made in the 1977-78 school year, but jumped to 21% in 1978-79. According to UW Law Librarian Marian Gallagher, spot checks have shown that 26% of the titles in General Law and Legal Philosophy are missing, 46% of the volumes on Capital Punishment and Rape are gone, and 26% of the collection on Estate Planning and Trusts cannot be accounted for. This is in part due to the large number (17) of unguarded exits at the law school library, and lack of funds to pay people for surveillance activities. The school is trying to remedy the exit problem to the extent allowable by the fire code, but

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it has yet to gain funds for security personnel.

A Coordinated Approach

The solution lies in a combination of the approaches outlined above. Different funding techniques make more sense for different kinds of libraries, but the service all the major law library facilities give cannot be allowed to deteriorate indefinitely because of "double inflation".

For the University library, for example, the best approach might be increased security and participation in Washington Library Network as a beginning. Then the facility will be able to go to the legislature and demonstrate that it is doing what it can to conserve and make best use of existing materials. Next, the University and concerned lawyers and judges could ask state lawmakers for budget increases that would at least allow the library to keep current with inflation. Over the long run, if Washington is to have first-class law library materials available to attorneys and citizens throughout the state, we should consider a funding program combining a percentage of criminal fines with a modest charge to each practicing lawyer, based on length of membership in the bar. This approach may meet resistance from attorneys, who are rightly skeptical of any dues increase. But we, and the public we serve, deserve to have the finest law library facilities we can command. □

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Minutes of the Meeting Board of Governors

October 17th & 18th, 1980

In last month's issue, there was a promise that "The Board's Work" report would resume this month, and that there would be a report on any Board action relating to a proposed pilot program to handle appeals by indigent criminal defendants in Division I of the state Court of Appeals. This program has prompted criticism from C.C. Bridgewater, who chairs the Young Lawyers Section. (Bar News, 34:10:6). This month, with only slight editing, we publish the actual formal minutes of the Board meeting for two reasons: (1) it has been so long since the actual minutes have been published that their publication is newsworthy; and (2) as we went to press, the lame duck editor was so busy preparing for two jury trials that he was unable to write his usual report. —Ed.

The Board of Governors of the Washington State Bar Association convened at the Davenport Hotel in Spokane on Friday, October 17th, beginning at 8:00 a.m., and on Saturday, October 18th, beginning at 9:00 a.m. Those present were: Paul W. Steere, David A. Welts, Edward G. Holm, Jack R. Dean, Quinby R. Bingham, Lowell K. Halverson, William Wesselhoeft, and F. Lee Campbell.

Also present and participating were Bradley T. Jones, the President-Designate of the Bar Association, and C.C. Bridgewater, Jr., representing the Young Lawyers Section. G. Edward Friar, Executive Director, acted as Secretary for the meeting.

Executive Session

Only white space appears here—about a page and a half this month. The copy of the official minutes which is sent to the Bar News editor always has any report on an executive session deleted, presumably because the executive session is the Board's only opportunity to discuss the Bar News. —Ed.

The Minutes

It was moved, seconded and carried that the minutes of the September meeting of the Board be approved as circulated.

Indigent Appellate Program

The Board received a comprehensive report from its Specially Designated Ad Hoc Committee of One, Paul W. Steere, on the general subject of the indigent appellate representation program, problems and plans. Following this report, the board heard from Keith Callow, the Chief Judge of the Court of Appeals, C. C. Bridgewater, Jr., Howard Primer, Pat Williams, Don Curran, Ray Thoenig, Robert Boruchowitz, Fred Weedon, Steve Moen, Jerry Parks, Peter Greenfield and others in a discussion on this topic. Thereafter:

(1) It was moved, seconded and carried that the Bar Association takes the position that it supports in principle the awarding of a contract with a qualified group of attorneys in Division I on a pilot program basis for the handling of indigent appeals. It was further made a part of this motion and agreed that when the trial counsel does not have a conflict of interest and wishes to continue participation in the proceedings through the appellate process that trial counsel should be given the opportunity to do so. Finally, it was made a part of this motion and agreed that basically the Board approves of the provisions of the Resolution adopted by the Bar Association's Criminal Law Section in its meeting of October 11, 1980, to the effect that (A) the selection made through the contract proposal should be based on the quality of service which can be generated by that proposal rather than the price bid for the services, (B) there should continue to be a significant portion of indigent appellate cases assigned to private practitioners for representation, (C) the Appellate Court should be encouraged to increase fees paid to private practitioners for representation of indigents on appeal until the cost of that representation is adequately paid and some reasonable profit to the private practitioner generated, and (D) that immediate implementation of an appellate defense program in accordance with these terms be made in Division I. A copy of the said Resolution is attached herewith and made a part of these minutes as if copied verbatim herein. The vote on this motion was 4 to 2.



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(2) It was moved, seconded and carried that the Board's support of the representation contract as proposed and as described in the previously considered motion be predicated on the concept that no more than a proportionate pro rata share be reflected in the budget allocated to the contract to be let for Division I and that the concept of full equity of compensation as between the various divisions and as between contract counsel and private counsel be maintained to the greatest possible degree.

Editorial Advisory Board

David Broom, the Chairman of the Editorial Advisory Board, met with the Board of Governors to present the Editorial Advisory Board's recommendation for the appointment of an Editor for the *Bar News* to succeed the present Editor, Jay V. White. Thereafter, it was moved, seconded and carried that the Editorial Advisory Board's recommendation of Steven Reisler of Seattle be approved and that he become the Editor of the *Bar News* effective with the January 1981 issue.

Committee on Court Congestion and Delay

Board Member Lee Campbell, the Chairman of the Committee on Court Congestion and Delay, gave a report on the work, progress and plans of that Committee.

The Legislative Session

John Fattorini, Jr., gave the Board a report on developments connected with and looking toward the 1981 session of the Legislature.

Corporation, Business and Banking Section

It was moved, seconded and carried that the request of the Corporation, Business and Banking Section that it be allowed to amend its By-Laws to show an increase in its dues from \$5 per member to \$10 per member, be approved.

Law Clerk Program

It was moved, seconded and carried that *(name deleted by editor)* be approved for and enrolled in the Law Clerk Program subject to the following terms and conditions:

- (1) After proper background investigation of his application.
- (2) With *(name deleted by editor)* as his tutor.
- (3) With no retroactive credit.
- (4) With 1½ years of advanced standing under the conditions and circumstances presently existing.
- (5) His advanced standing to be increased to 2½ years in the event he is successfully admitted to membership in the Bar of either the State of California or the State of Montana.

Evergreen Legal Services Board

It was moved, seconded and carried that the following persons be named for appropriate terms as members of the Evergreen Legal Services Board: 1st District—Gordon Wilcox, 2nd District—Philip Brandt, 3rd District—Lar Halpern, 4th District—Tim Weaver, 5th District—Edward Shea, 6th District—Chris Bell, and 7th District—Gale Barbee.

Annual Meeting Site for 1983

After a vigorous and comprehensive presentation by Board Member Jack Dean, it was moved, seconded and carried that the Bar Association's Annual Meeting in 1983 be held in Spokane and that proper arrangements and plans be made accordingly.

Tort Reform Task Force

Board Member David Welts gave a report on the progress and status of the work of the Tort Reform Task Force.

HJR 37—Request for Support

After a presentation by Peter Greenfield, it was moved, seconded and carried that a Resolution relating to HJR 37 forwarded to the Board by Charles A. Goldmark, the Chairperson of the Young Lawyers Section of the

Seattle-King County Bar Association, be adopted, approved and appropriately distributed.

Residence Requirement Committee

Board Member William Wesselhoeft, the Chairman of the Committee, gave the Board a report on the recent meeting and the further plans of the Residence Requirement Committee recently appointed by the President of the Bar Association.

Joint Meeting with Judges of the Court of Appeals

On Saturday morning, October 18th, the Board met in Joint Session with the Judges of the State Court of Appeals to discuss matters of mutual interest and concern.

Date and Place of Next Meeting

It was moved, seconded and carried that the next meeting of the Board of Governors be held at the Sheraton Waikiki Hotel in Honolulu, Hawaii, on Monday, November 3rd, 1980.

Respectfully submitted,

G. Edward Friar

□

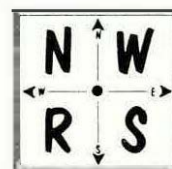
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It's late in the year and some of you may be hard pressed to find informative and useful CLE courses to fulfill your 1980 mandatory CLE requirement. In late November and during December, your woes should be ended by attending one or both of the last two WSBA/CLE seminars of 1980.

The Antitrust Section is co-sponsoring a full-day seminar that plays in Spokane on November 21 and Seattle on December 12 entitled *Enforcement of Antitrust Laws*. Chairperson Marvin L. Gray, Jr. has taken a "nuts and bolts" approach to this seminar and has selected a very capable panel. Government attorneys will inform you as to how their respective offices operate and the types of investigations they conduct. Private practitioners will inform you about client rights, tactical problems, and how to negotiate with the enforcement agency. The seminar, designed for general practitioners as well as business lawyers, will help you to respond to an unexpected call from a client who is the subject of an antitrust investigation and to avoid the pitfalls of antitrust matters. You will leave this seminar with practical advice on how to proceed with such cases. Intended as a follow-up

seminar to May's seminar on antitrust compliance programs, those with business clients of any sort should not miss this one.

The Young Lawyers Section is the co-sponsor of the final seminar of the year, *Misdemeanors and Moving Traffic Violations/DWI*. This half-day seminar will appear in Spokane on December 5, Yakima on December 12, and Seattle on December 19. It is chaired by Peter Moote, who recently wrote about the new DWI laws for the *Defense of a Criminal Case 1980* seminar. The December seminar has a self-explanatory title. It will provide both young lawyers, who are most likely to handle such cases, and experienced practitioners with insights into the new DWI laws. Information from both the prosecutorial and defense perspectives will be provided. Views on the effect of the new District Court Rules on the practice of law will be offered by a District Court Judge. If you fail to learn anything from this one, you'll still be armed with enough trivia to hold an interesting conversation with any non-attorney that you may happen to meet at some holiday gathering.

And, speaking of trivia, the following information was gathered by the Association of CLE Administrators from a varying number of responding State Bar CLE organizations. The four states discussed here all have mandatory CLE. Colorado and Wisconsin claim bar memberships of 10,000, while Minnesota and Washington claim 9500, making them the 16th-19th largest bars out of 38 respondents. Colorado and Minnesota do not have an integrated bar, whereas Washington and Wisconsin do. Ranked by CLE budget, Washington was 10th with \$590,000; Minnesota 11th with \$494,400; and Wisconsin 12th with \$480,000. Colorado, which produces CLE for the Denver County Bar Association, the University of Denver Law School, as well as the state of Colorado, did not respond. As to CLE credit hours produced, Colorado was 2nd with 806, Minnesota 6th with 509, Washington 7th with 420, and Wisconsin 8th with 380. Colorado's total probably includes CLE produced for all three of its users. Cost per credit hour to produce was averaged by region, rather than by state. The average for 46 respondents was \$1874.39; for the Great Lakes Region (Wisconsin) \$2138.46; for the Plains Region (Minnesota) \$1923.22; for the Rocky Mountain Region, Colorado apparently failed to respond, but the average for Idaho and Montana combined was \$233.84; for the Far West Region (Washington) \$3241.04, with Washington's actual average at \$1410.00. For comparison's sake, California leads everybody: membership then at 65,000; CLE budget at \$8,450,000; 2200 hours of CLE produced; and an uncalculated cost of CLE/hour (but guess who upped the Far West average).

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COURT OF APPEALS

The Unpublished Opinion

by **WARD WILLIAMS**

Of the many adjustments made by the State Court of Appeals in its eleven year history to meet the crisis of volume, the most significant is the unpublished opinion. Before amendment of RCW 2.06.040 permitting non-publication, all opinions of the court were published. With two-thirds of the judge time of the court devoted to writing, the limit was 43 opinions per judge per year. Now, with less than half of the opinions being published, each judge is writing about twice that number per year with the prospect that the rate will go even higher.

Although there have been some recommendations that in some cases there be no opinion at all, the better policy is that a reasonably comprehensive opinion, oral or written, should be given by every court in every contested case. For the Court of Appeals, the purposes of the opinion are:

1. To conform to the law, RCW 2.06.040;
2. To advise litigants, their counsel and the trial judge of the decision of the court and the reasons for it;
3. To test the solution by articulation in writing;
4. To develop the common law;
5. To advise the public of the decision of the court and the reasons for it.

The non-published opinion need not contain a recitation of the facts nor discuss the law. The facts are known to the litigants, their attorney, and the trial court, and the law has been developed. The decision of the court, and the reasons for it, may be given in a simple information style without the polish of one destined for the bond volumes of the reports. Of course, the decision in the

non-published opinion should be the result of the same thoughtful and deliberate consideration as leads to the decision in a case in which the opinion is published. *State v. Herman*, 11 Wn. App. 465, 526 P.2d 1221 (1974), which was not prepared for publication, is an example of a simple but informational opinion which did not take too long to write. I believe that it was a responsible disposition of the case.

The only justification for publication is No. 4, the making of precedent. This vital function of the court has been undertaken responsibly by each member serving upon it. The time necessary to write the opinion having truly significant precedential value must be allocated. But for the remainder, a crisp, clear and concise statement of the reasons for the decision in ordinary prose should suffice. In that way, the court can keep up with its primary task which is to decide cases promptly. □



Ward Williams has been an appellate court judge since 1969 on Division I of the Washington State Court of Appeals.

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Brad Jones Takes Office As 1980-81 State Bar President

"Practical thinker" . . . "Firm but fair" . . . "A brilliant legal mind." These positive qualities are among many offered by peers to describe Bradley T. Jones, new President of the Washington State Bar Association. Selected earlier this year as 1980-81 President-Designate by a unanimous vote of the Board of Governors, Jones assumed office at the close of the State Bar Annual Meeting in Hawaii.

Jones, 63, is a partner in the Seattle firm of Davis, Wright, Todd, Riese & Jones. He brings to the presidency a distinguished legal career well seasoned with service to his profession. He was graduated from the University of Washington Law School in 1941, where he was president of the Law School student body. Jones then joined the law firm of Emory and Howe, a predecessor of Davis, Wright, et al.

He served as an Infantry officer in World War II. After practicing law in his firm 1945-48, he was engaged in the food processing industry and was director and officer of several trade associations in that industry. He rejoined his law firm in 1956.

Jones served as president of the Seattle-King County Bar Association in 1970-71. He has been active in a number of State Bar positions, including chairmanships of the Committee for the Adoption of the Uniform Commercial Code, the Legislative Review Committee, the Editorial Advisory Board and the Committee on Court Congestion and Delay. He has been a panelist on Continuing Legal Education programs and served as a Bar Examiner for several years. Most recently he was a member of the Board of Governors representing the First Congressional District in 1976-79.

Jones is married to Phyllis Howard Jones and has three children, Carolyn

Briefly Noted



(Mrs. Carolyn Dewald), Bradley T., Jr., and Robert. When he can squeeze in the time for a little recreation, his favorite retreat is his house on Hood Canal. Rumor has it that he has extraordinary luck growing vegetables there, and that with the true heart of a logger, he is a mean hand with a chain saw.



Brad Jones brings to the State Bar presidency very evident and extensive qualities of professional experience, leadership and talent. We welcome him to the office, and we look forward to a progressive and stimulating year.

All-Day Conference on Law and Women

A CLE seminar on "The Law and Women: Issues for the 80's" will focus on new developments and practical techniques for the attorney representing today's woman client. It is accredited for 6.5 hours of CLE credit for Washington attorneys and will be offered in Portland on Saturday, November 22, 1980, at the Cosmopolitan Airtel, 6221 N.E. 82nd Avenue, near the Portland Airport. The seminar is sponsored jointly by Legal Advocacy for Women Fund, Inc. (LAW Fund) of Portland and the

Northwest Women's Law Center of Seattle.

Registration for the all-day conference is \$75 and includes luncheon, coffee service and extensive written materials. For further information or to register, contact LAW Fund, 1017 S.W. Washington, P.O. Box 1143, Portland, Oregon 97207; phone (503) 224-8666.

Association of Legal Administrators

The national Association of Legal Administrators was formed in 1971 when a small group of administrators began meeting to share the problems and solutions of law firm administration. The first membership count was 25; the present membership is almost 2200.

The Seattle Chapter was formed in nearly the same manner with a small group of approximately ten administrators meeting informally for lunch in the Seattle-First National Bank Building Cafeteria conference room. Today, we number fifty and meet the last Thursday of every month at the Washington Plaza Hotel.

The purpose of the association is to promote the exchange of information

regarding the administration and management problems peculiar to legal organizations, including private law offices, corporate legal departments, government legal and judicial organizations and public service legal groups. This association also provides information on the value and availability of professional administrators and participates in any other way in the advancement of the art of

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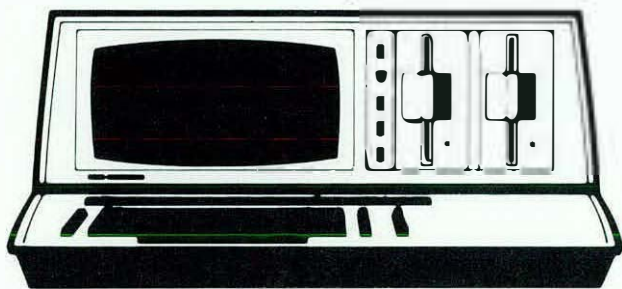
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If anyone wishes details regarding criteria for membership, application forms or information regarding our next meeting, please contact any of the above officers.

In Memoriam

J. Harris Lynch, 79, of Seattle, died September 22. He was admitted to the Bar in 1926.

A. Monroe Watt, 70, of Seattle, died September 14. He was admitted to the Bar in 1934.

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SEATTLE-KING REPORT

By JAMES L. VARNELL

C.L.E.: Trial Practice. In an effort to enhance the competence of some of the more inexperienced attorneys appearing in courtrooms of the state this correspondent has compiled a series of hypothetical situations which such an attorney might be confronted with at trial. Responses to these hypothetical questions are solicited from experienced trial attorneys throughout the state.

1. You represent the wife of a career Navy man whose wife has had numerous affairs while he has been out to sea as the commander of a nuclear submarine. Their marital community has acquired substantial community assets. The wife has petitioned for a dissolution of the marriage and the case has been set for trial in King County Superior Court before **Judge Horton Smith**. Your client is concerned that Judge Smith may not condone or approve of such trysts and that it may affect the distribution of the property acquired by the parties. What advice do you give her?

2. You represent a defendant who has entered a plea of guilty to a violation of the Uniform Controlled Substances Act, and after affidaviting the judge first assigned to the sentencing, you are now set for sentencing before **Judge Eugene Cushing**. You assure your client that he will probably receive probation with possibly a weekend in the county jail in spite of his two prior, drug-related convictions. Was your advice sound?

3. After a one day civil trial before **Judge Pro Tem James Mifflin** you move for reconsideration without presenting any new legal theories or any new evidence. You assure your client that you will be able to convince Judge Mifflin that he made the wrong decision and that the judge

will reverse himself and grant your motion. Was your advice sound?

4. You represent the respondent in a marriage dissolution proceeding, and the petitioner is represented by **Bernice Jonson**. Even though the parties have acquired substantial community assets and custody of the children is involved, you assure your client that the attorney fee to be charged will be no more than \$500.00 because you anticipate a short trial with very little discovery in the form of depositions, interrogatories etc. and no motions pending trial. Was this good advice?

Recent Associations. **Frederick Mendoza, Gregory F. Cromwell** and **Jerry J. Belur** are now practicing at 6300 Southcenter Boulevard under the name of Cromwell, Mendoza & Belur. **Thomas H. Murphy, James P. McGowan** and **Mark S. Elgot** have formed a partnership and are practicing under the firm name of Murphy & McGowan at the Fourth & Blanchard Building. **Houger, Garvey, Schubert, Adams & Barer** announce that **A. Daniel O'Neal** has joined the firm, and **Mary Sheehan** and **Alastair K. Maxwell** have become associates. **Robert J. Rohan, Margaret L. Barbier** and **J. Ronald Sim** have joined Schweppe, Doolittle, Krug, Tausend & Beezer as associates. **Fredric C. Tausend** has become Dean of the University of Puget Sound Law School and will be of counsel to the firm. **Gilbert H. Levy** and **Jerome J. Doherty** announce the formation of their law partnership with offices at the Hoge Building. **Marvin B. Durning** and **Michael Richardson** announce their association with offices in Washington, D.C. and at the 1411 Fourth Avenue Building in Seattle. **Lane, Powell, Moss & Miller** announces that **Mark E. Johnson, G. Val Tollefson, James L. Robart, C. William Bailey, Evan O. Thomas III** and **Michael E. Morgan** have become members of the firm and that **Scott F. Campbell, Rudy A. Englund,**

Daniel Gandara, Thomas F. Grohman, Wayne W. Hansen, D. Joseph Hurson, Neil R. Keller, Richard J. Morrissey III, Ellen O. Pfaff, W. Craig Smith and **Lee A. Thorson** have become associates.

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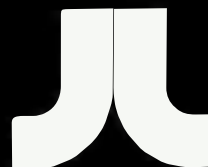
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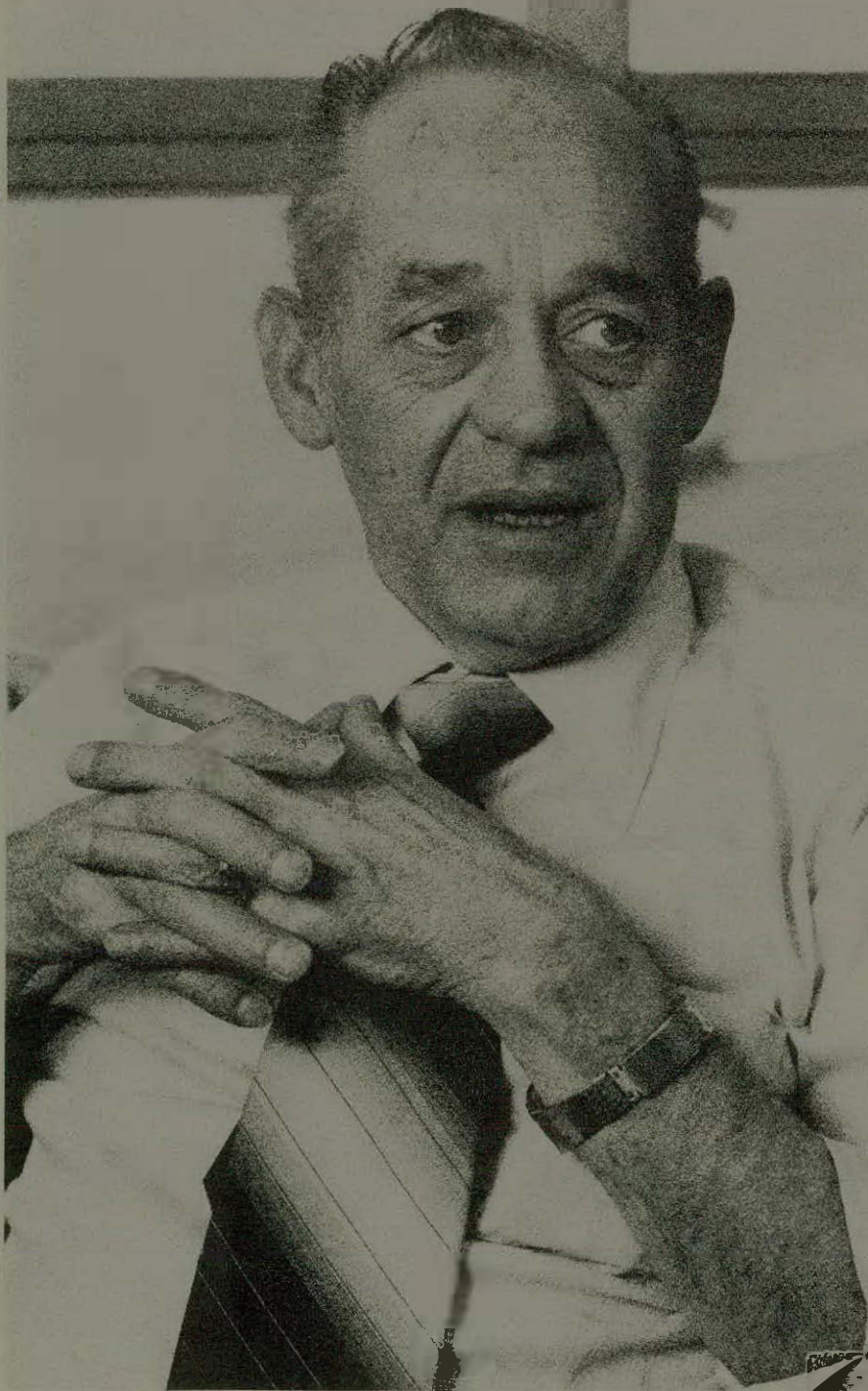
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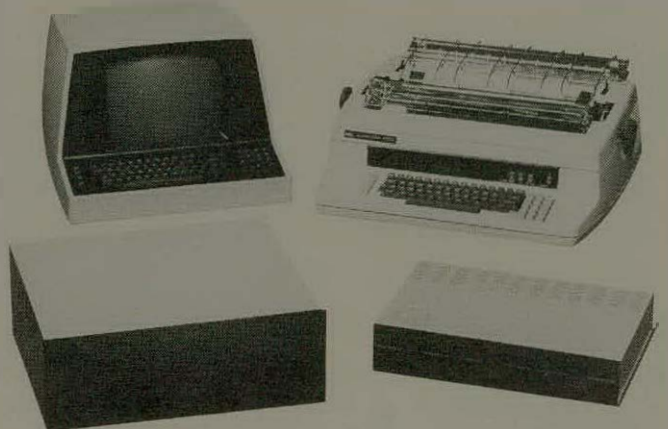
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