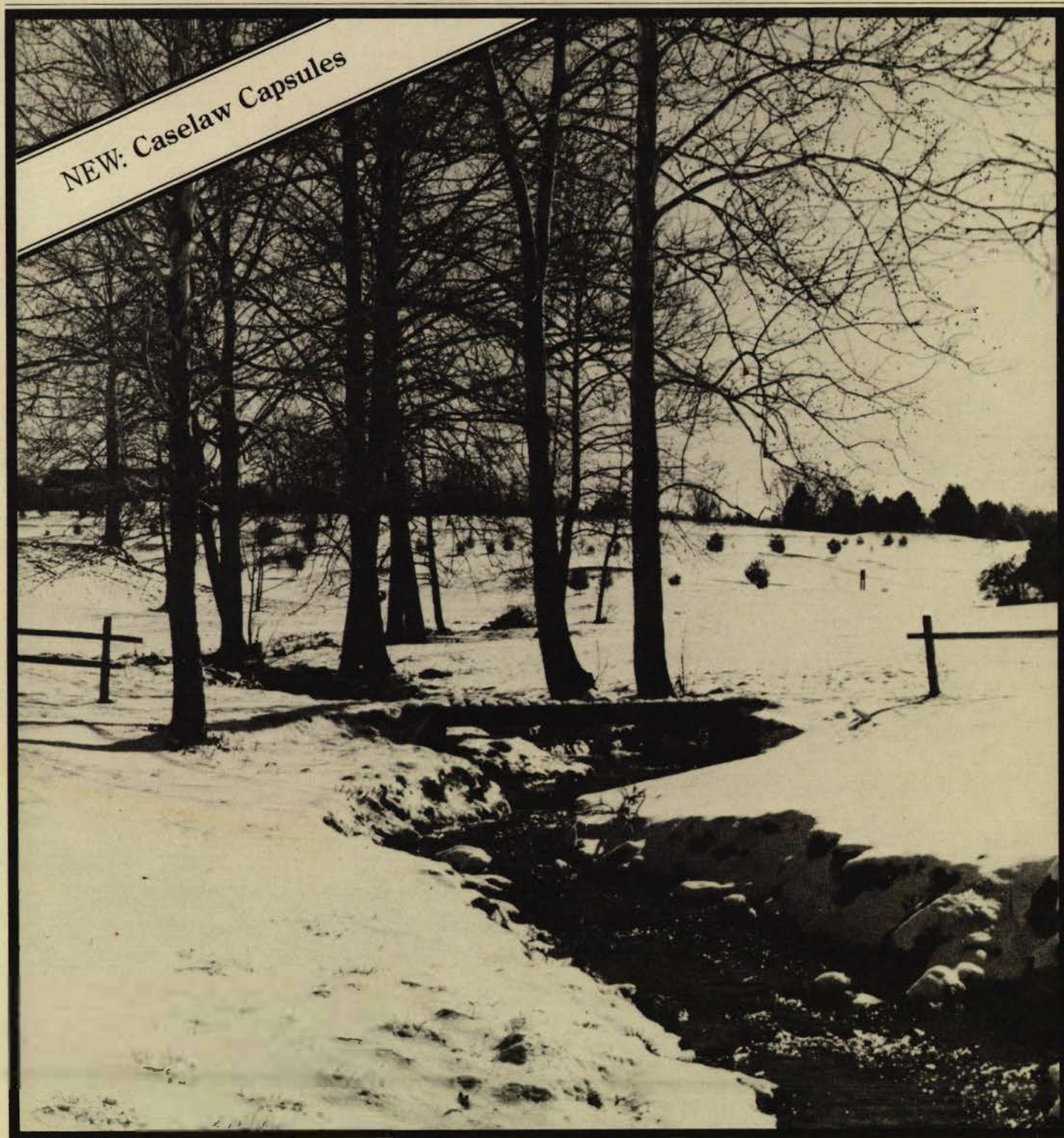


Washington State **Bar News**

Volume 37, No. 1, January 1983



Inside: Court Rules Blues

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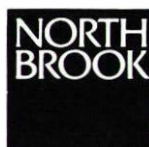
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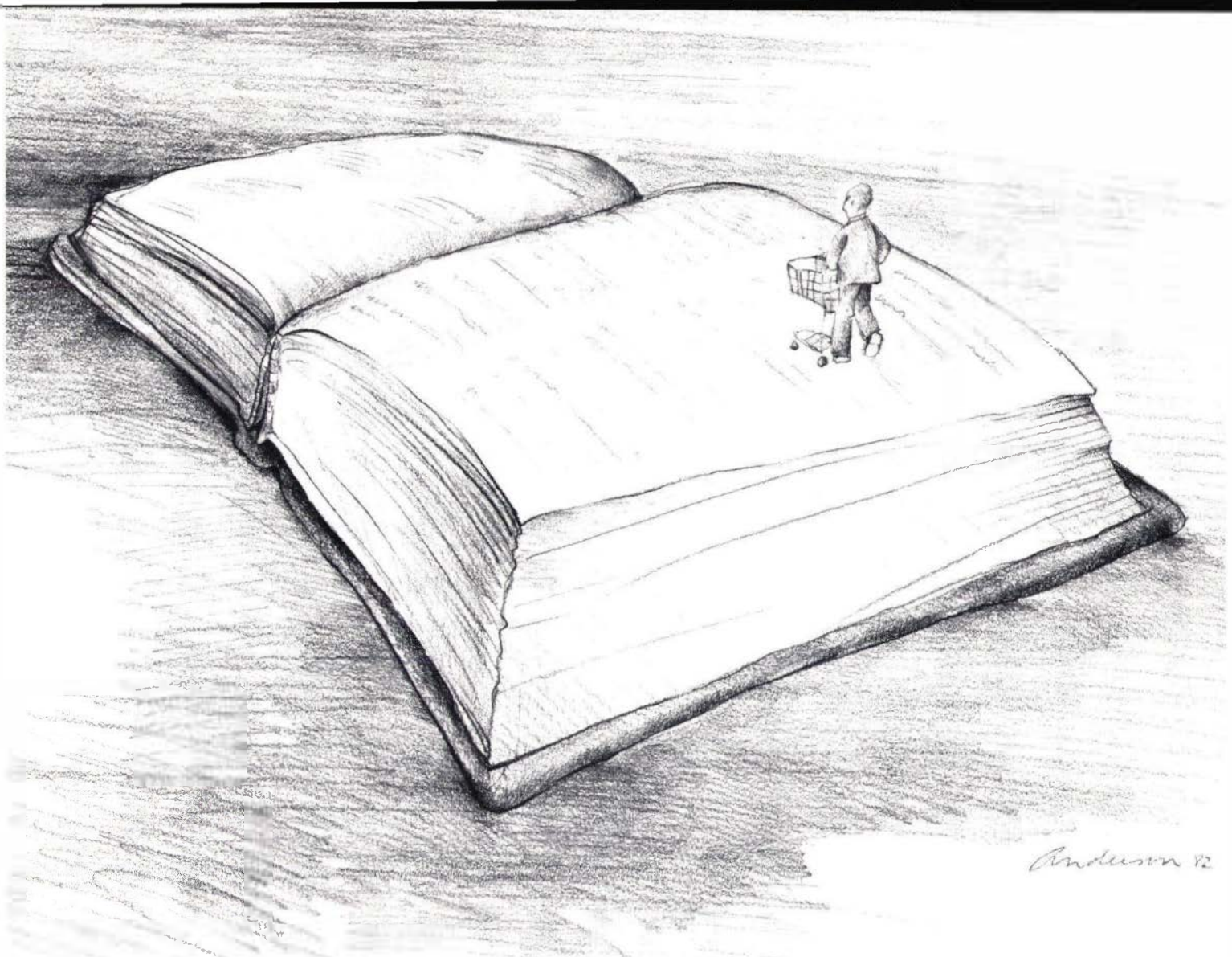
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ABA Delegate Resigns

Editor:

I have resigned as State Delegate to the American Bar Association House of Delegates. Since my term ends with the conclusion of the 1984 Annual Meeting, an election will be held for my unexpired term. Persons interested may procure nominating petitions from the Board of Elections of the ABA. The petition must be filed by January 24, 1983. The filing requirements appear in Section 6.3 of the ABA Constitution and at page 1564 of the December ABA Journal.

KENNETH P. SHORT

Seattle

Legal Education in Public Schools

Editor:

I just finished reading your editorial in the current issue of the *Bar News*. I could not agree more with your recommendation for legal education in the public schools.

The Law Foundation of British Columbia has chosen legal education in the schools as one of its top priorities. We are in the process of receiving proposals from the universities in this Province to implement a Province-wide legal education program. This would include teacher-training at the university level, the development of materials for both primary and secondary levels, and follow-on training for teachers who are presently in the system.

In my own view, this is the best project that our Law Foundation could ever support.

I am pleased to note that the Board of Governors is recommending a similar project to the Supreme Court. It holds great promise and

can serve the public interest in a number of ways.

Let me say that I have always enjoyed your editorial remarks. While I did not know Thomas Neville, it is sad to lose one of our profession at such an early age and under such senseless conditions.

MICHAEL JACOBSEN

Vancouver, B.C.

A Call For Immediate Responsible Action

Editor:

I read with interest and frustration the Editor's Page "Public School Legal Education: Antidote to Frustration" [*Bar News* 36:10:7]. The concluding sentence, "Legal education at the public school level will help insure that if and when we decide that the judicial system needs fixing, an informed and enlightened populace will do the fixing," unfortunately suggests a major change in the system is necessary to remedy

complaints that lawyers hear everyday and not just from disgruntled losers.

I believe the answer to many of the common complaints is not a major change in the system suggested by an "enlightened populace" but responsible immediate action by members of the bar, the Washington State Bar Association and the judiciary. Isn't it time to respond by improving the deficiencies we all know exist, without waiting for the panacea?

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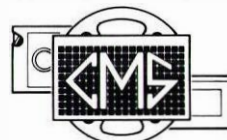
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Teetering on the Brink

The justice courts are teetering on the brink of a nervous breakdown.

In the old days — 1980, that is, — justice was swift at the justice court level. The courts tried municipal ordinance violations and almost all types of traffic offenses. Jury trials were not allowed and the proceedings were not of record because a defendant on appeal had a right of trial *de novo* (with jury, if so desired) in the superior court.

The old system worked like a charm...except that 1) it was probably unconstitutional, and 2) it compounded the congestion problems in the superior court.

The solution to both problems was to make the justice courts courts of record with opportunities for trial by six jurors when so authorized "by the constitution, statutes or decisions of the supreme court." JCrR4.04. Thus ended the need for trial *de novo* which, theoretically, eased the caseload logjam in the superior courts (by shoving it into the lower courts, of course).

There were two catches, however: 1) a defendant automatically waived her right to a jury trial if she did not affirmatively demand a jury at arraignment, JCrR4.07(a), and 2) violations of municipal ordinances (with certain exceptions) were tried by the court without a jury, JCrR4.07(c).

Enter the Washington Supreme Court.

In *Seattle v. Filson*, ___ Wn. 2d___ (1982) the Court held that this state's constitution guaranteed the right to a jury trial at the trial level, and a *de novo* jury trial at the appellate level just did not do the trick. Thus the old justice court procedures, already legislatively dead, were constitutionally buried.

The second shoe dropped in *Pasco v. Mace*, ___ Wn.2d___ (1982). The Court in that case concluded

that "under the concept embodied in the constitution of Washington... no offense can be deemed so petty as to warrant denying a jury if it constitutes a crime." In short, there is a right to a jury trial in EVERY criminal case, including misdemeanors, whether punishable only by fine or imprisonment or both.

Now there are a total of eighteen feet on the High Bench, so it was no surprise when the Court dropped still another shoe in *Seattle v. Crumrine*, ___ Wn.2d___ (1982). In *Crumrine*, the Court held invalid JCrR4.07(a) insofar as it provided that a defendant waived a jury trial if she did not demand one at arraignment. After *Crumrine*, "the burden is on the prosecution to establish that the [jury] waiver was knowing and voluntary."

As things presently stand, all criminal misdemeanor charges — municipal or state, punishable by imprisonment or solely by fine — are subject to jury demand (traffic infractions excepted). Furthermore, a jury can only be waived knowingly and voluntarily.

At the justice court level, these Supreme Court decisions unleashed more anxiety than did the comet Kohoutek's prophesized collision with the earth. By the time you read this column, either the whole thing will have blown over harmlessly or those anxieties will have proven themselves justified.

As of this writing, however, the indications are that jury trial demands at the justice court level will skyrocket, already overburdened judges and staff will be burdened still more, court facilities not designed for juries will be crammed with jury panels, and — combined with a steadily increasing caseload — all that will in turn cause a marked increase in dismissed prosecutions for violation of the speedy trial rule. This may be good for individual clients, but it is one helluva way to run a criminal justice system.

Our options, therefore, are 1) decriminalize many offenses by making them civil infractions, as suggested by the Supreme Court in *Pasco v. Mace*, *supra* (whether the traffic infraction rules are a good idea and/or working satisfactorily is a can of worms I won't address here; 2) encourage prosecutors to selectively prosecute certain defendants (presumably those they don't like); 3) eliminate civil trials altogether in the justice courts (the Superior Court will love that); 4) lengthen the speedy trial rule from 60 days to 600 days; or 5) wait for the backlash from citizen's groups and the media, appalled at the mess we have made, who will call for the inevitable constitutional amendment to abolish the courts and lawyers altogether.

We cannot criticize the legislature for enacting legislation, albeit it unconstitutional, which attempts to deal with a burgeoning criminal/civil caseload and a shrinking state budget. We cannot criticize the Supreme Court for striking down this same legislation because it does not constitutionally achieve its goal. We cannot even honestly criticize anyone who takes advantage of the temporary confusion in the justice courts.

We can — perhaps we must — step back, however, and consider whether this system, teetering on the brink of a nervous breakdown, can be made healthy merely with legislative aspirin and bedrest, or whether it needs to be retired and replaced with a different, healthier system.

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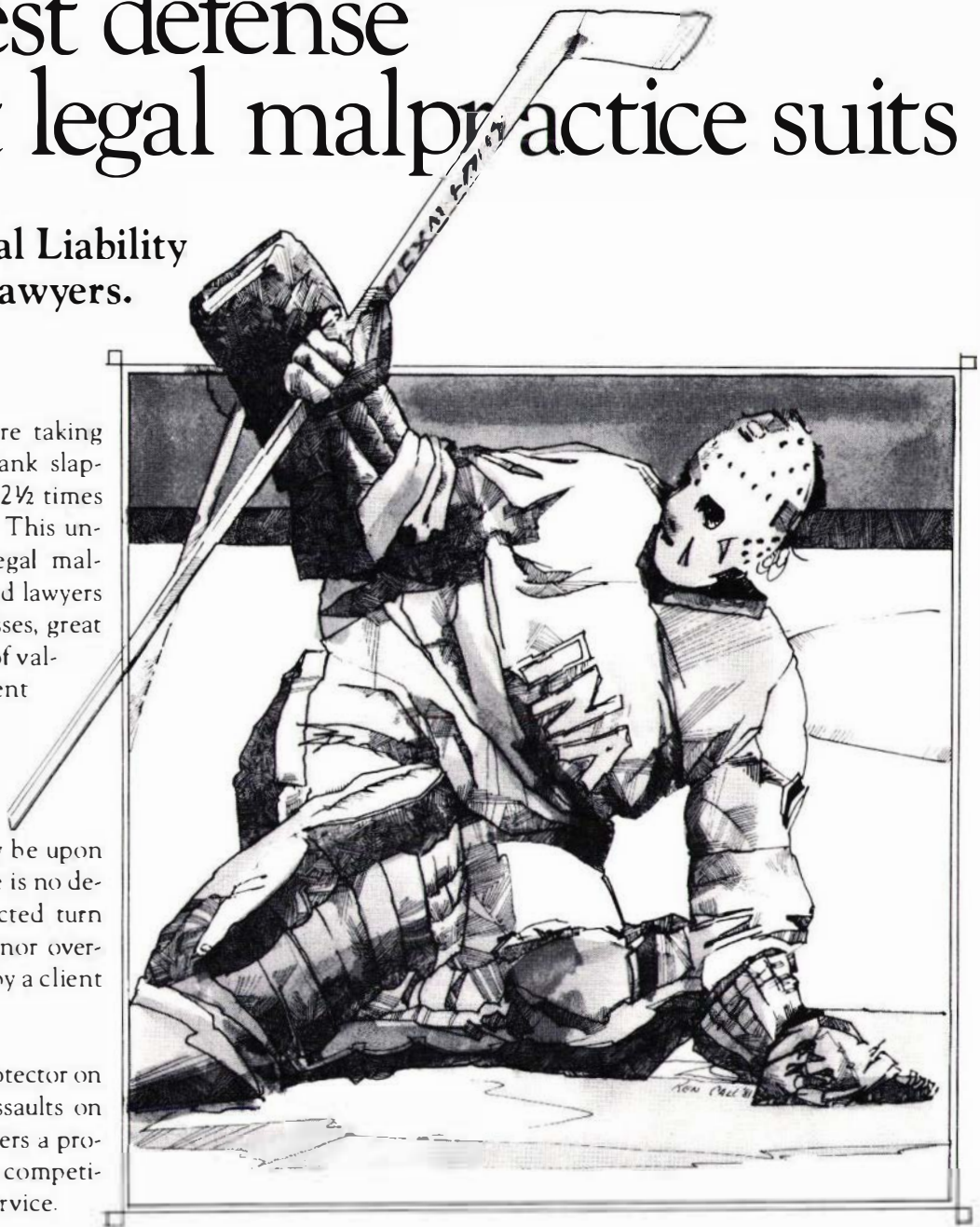
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January Potpourri

This month's letter will be a *potpourri* of items.

Last month I wrote about the proposed new "interest on trust account rule" and advised that the Board of Governors had completed its input and had sent the draft rule on to the Supreme Court.

The Seattle-King County Bar Association, through its own task force, has now issued a comprehensive report on the proposed rule, which I mention because it differs from the Board's version in two major respects. First, the King County Task Force draft requires automatic inclusion of all short-term, minor trust deposits in the program, without seeking or taking clients' instructions. The Board's draft *permits* but does not require the attorney to obtain a client's instructions as to use of the funds. The King County report bases its approach on the practical ground that a rule of mandatory application will have a better chance of working, and on the technical ground that if the client has discretion, the interest is attributed to him for tax purposes.

The second major change concerns the manner of spending the money. The Board of Governor's draft suggests use of the Washington State Bar Foundation, whereas the King County draft proposes the creation of a new, nonprofit corporation governed by nine persons, three appointed by the Supreme Court, three by the Board of Governors, and three by the Governor of the State.

The King County comments were well thought out and are well presented. They underscore the fact that the Supreme Court has some controversial questions yet to decide. When the time comes, your own comments and opinion will be of much value to the Court.

Kurt Bulmer, former general counsel of the Bar Association, wrote to report on another important subject that is hard upon us: the ABA's adoption of the Kutak Committee report.

I just returned from a meeting in Chicago of the Professional Discipline Committee. A major subject was... the "Kutak Committee" (report)... At the February 1983 Mid-Year meeting (of the ABA), some version of the new model code will be adopted.

The latest draft of the model code appears as an insert in the last issue of the *ABA Journal*. If adopted, the code will then go to the states for implementation. In our own state, this will require a court rule, which can add such modifications to the model code as are necessary to accommodate the needs of the legal profession and the public in Washington. Here again, input from lawyers will be of great importance. The Kutak report is a com-



plete re-write of our code of legal ethics, so it is not too early to begin to study it carefully.

At the November meeting of the Board of Governors, David Boerner, the able Chairman of the Code of Professional Responsibility Committee, recommended that over 35 ethics opinions be pulled from the book and voided. All relate to lawyer advertising and soliciting. He advises that all are now unconstitutional under the rule of *In re R.M.J.*, 102 Sup.Ct. 929 (Jan. 25, 1982). This came as a major culture shock to me, personally, because every single one of these opinions was written since the date I was admitted to practice. They have formed an important part of the common law of our professional behavior. Mr. Boerner's recommendation and the related subject of updating the Supreme Court rules relating to lawyer advertising will receive priority in the next few Board meetings.

Paul W. Steere

Rules Blues

Resurrecting the Judicial Council

by Hugh Spitzer

The 1982 Washington Legislature drastically cut the Judicial Council's budget and turned that body into a mere shadow of its former self. The Council, a small state agency which for decades has aided Washington's Supreme Court in promulgating court rules, lost its lawyer staff members and clerical support.¹

The day-to-day functions of the Council have gone to the Court's own administrative staff, but the Legislature did not significantly increase that group's capacity to take on new work.

In cutting back the Judicial Council, the Legislature meant to save money, and perhaps, took a swipe at the court system with which it has occasionally jostled. But the real effect of demolishing the Judicial Council has been to increase the Supreme Court's power to legislate rules of procedure on its own, to the detriment of both lawmakers and the general public.

In short, the Legislature did the opposite of what it should have done. *This article does not propose that the Judicial Council be returned to its former status; it should be strengthened substantially. The Council should be given constitutional status as the court rulemaking body, to promulgate rules as do other rulemaking agen-*

cies, and the Legislature should retain a formal, but limited, role in the development of court rules.

RULEMAKING & CASEMAKING DON'T MIX

Several problems exist with rulemaking by a body whose primary function is case-by-case appellate adjudication.

First, the State Supreme Court has, on occasion, used rulemaking to make law in areas more appropriate to legislative action—matters with large budget and organization impacts.

For example, in 1980, the high court (ostensibly at the command of the Legislature) for the first time required verbatim electronic recording of misdemeanor trials in most municipal and county district courts.² These new rules abolished trials *de novo* in the superior courts. Some municipalities asserted that the requirement was too costly, was adopted too rapidly, or went beyond the Legislature's mandate. The line between legitimate court rules necessary for the proper internal functioning of the judiciary, and general legislating through court rules, is hard to draw.

Hugh Spitzer practices law with Roberts and Shefelman in Seattle. He recently published an extensive review of court rulemaking in Washington, appearing at 6 U. Puget Sound L. Rev. 31 (1982).

¹The Judicial Council was established by Ch. 45, Laws of 1925, Ch. 252 RCW. The 1982 cutback was ordered in Laws of 1982, Ch. 50, Section 10 (1st Ex. Sess.).

²RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDICTION, 94 Wn.2d 1140 (1980), followed from a 1980 law, Ch. 3.02 RCW.

A direct clash between the Supreme Court and the Legislature recently developed from a 1980 rule change that required towns and counties to be represented by an attorney in traffic court.³ Previously, no prosecutors were used in smaller jurisdictions; instead, the police officer and citizen simply told their stories to the judge. This new requirement had been hotly and openly debated before the Judicial Council and through correspondence with the Supreme Court.

The argument did not cease with the rule's promulgation. The counties, towns and prosecutors went to the Legislature to obtain a statute overturning the Court's dictate. The local officials there effectively argued that the attorney requirement was a budgetary and structural issue within the proper sphere of legislative control. In response, the Supreme Court modified—but did not rescind—its rule on this subject, and the Legislature reaffirmed its position by revising the statute after the Court's modification.⁴ A confrontation between the Court and the Legislature is now possible.

The Judicial Council should be given constitutional status as the court rulemaking body.

This sequence of events underscores the ongoing tension and the potential for direct conflict between the legislative and judicial branches over the promulgation of court rules, particularly rules that affect individual rights or create significant costs that must be borne by other government agencies.

Testing Judges

A third issue developed when the State Supreme Court, without issuing a draft for comment, increased testing requirements for lay judges.⁵ These new requirements were an excellent idea, but they took smaller jurisdictions by surprise, and interested parties were not afforded an opportunity to comment. This raises the question whether an appellate court, when it assumes a prospective rulemaking/legislating function, ought not to exercise that function in the open as do other agencies and legislative bodies—subject to the administrative procedures act, the Open Meetings Law, public disclosure and other procedural safeguards.

Washington's Supreme Court has recently made great strides in opening the rulemaking process. Last year it promulgated General Rule 9, which provides a procedure for notice and comment on all proposed rules, and fixes the normal issuance of rules as a single date each year.⁶ But the Court is not obligated to follow its own procedure, and it does have the ability to ignore its procedure.

Self-Judgement

Another problem with appellate court rulemaking is that the Supreme Court might sit in judgment on itself if a party challenged a new rule on statutory or constitutional grounds.

When the Court issued the district and municipal court recording requirements in 1980, defense lawyers claimed that those rules infringed on certain jury trial rights, exceeded state constitutional authority, and abolished appeal rights guaranteed by state law. Whether or not these criticisms were valid, they raised the question whether an appellate court, in its administrative capacity, should promulgate rules which may later be challenged and appealed to that same body. The court system is, after all, a complex bureaucracy with its own interests.

⁶97 Wn.2d 1101 (1982).

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³JTIR 3.3(b), 94 Wn.2d 1173 (1980).

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⁵G.R. 8, 1-8.5, 94 Wn.2d 1103 (1980).

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The court system is a complex bureaucracy with its own interests.

Yet one of the fundamental rules of justice is that no individual or institution should sit in judgment of itself.

Competence

A final problem is that a supreme court may not in fact be the most competent body to issue procedural rules governing day-to-day operation of trials.

For example, in 1973, the Supreme Court issued a speedy trial rule requiring that criminal defendants be brought to trial within sixty or ninety days "following the preliminary appearance" in court.⁷ Because of recurrent problems defining which of several pretrial proceedings constituted the "preliminary appearance" contemplated in the rule, Washington's Judicial Council recommended a 1978 rewording of the rule that would require the speedy trial within sixty or ninety days of arraignment. But the Judicial Council's draft did not define when an arraignment had to occur. The Supreme Court noticed this and entirely rewrote the rule, requiring a trial within sixty or ninety days of arrest or at the point at which a defendant was "bound over," or transferred, from the jurisdiction of a state or municipal court to a superior court.⁸

Appellate judges, already overburdened, may not be sufficiently in touch with the current practical aspects of trial law to write court rules.

Because the Supreme Court rewrote the rule without involvement of Judicial Council staff or the Council's trial judge, attorney or legislator members, the new version itself contained loopholes which enabled prosecutors to delay trials past sixty or ninety days. Under the Court's revised 1978 speedy trial rule, prosecutors frequently delayed the date of "bindover" of felonies from the district to superior courts in order to gain time before trial. When this practice became apparent, the Court again rewrote the rule, this time with the extensive involvement of a special task force and the Judicial Council.⁹

At roughly the same time, the Supreme Court was placed in the uncomfortable position of having to "re-write" the meaning of the earlier version in the context of a specific criminal appeal: in doing so it released a convicted rapist in a controversial case where prosecutors believed they had brought him to trial within a technically correct time.¹⁰ *This incident suggests that appellate judges, already overburdened with a heavy appeals calendar, may not be sufficiently in touch with the current practical aspects of trial law, and perhaps should not be weighted down with the responsibility of writing trial court rules.*

COURT RULES IN PAST AGES

Controversy over the control of court rules is nothing new. The Roman official Appius Claudius (better known for financing the Appian Way) is credited with destroying a patrician monopoly over legal procedure by allowing his secretary to publish Rome's hitherto secret judicial rules in 304 B.C. This led to a role for the plebeian Assembly in the formulation of procedure; formerly patrician priest-magistrates had controlled rule-promulgation.

At the time of the American Revolution, English and American colonial judiciaries exercised a great deal of control over the complicated (and at times artificial) forms of legal process. In America's new national government, the tradition of common law judicial rulemaking from English law, combined with the considerable congressional control of the federal courts granted by the Constitution, resulted in a joint legislative-judicial approach to rulemaking in the nation's first Judiciary Act of 1789 and in the subsequent Process Acts.

During the 19th Century, however, popular dissatisfaction with the frustrating technicalities of forms of action led to state legislative movements for reform and the enactment of codes of court procedure. New York's Field Code, copied in other jurisdictions, was a statutory attempt to consolidate, systematize, and simplify American common law forms of action and court procedures. Washington Territory's birth in 1853 occurred just when the Field Code approach to rulemaking was gaining popularity, particularly in the West. Whatever common law forms of pleadings had previously been used were swept away by the first territorial legislature in 1854, which provided:

⁷Former CrR 3.3, 92 Wn.2d 1125 (1973).

⁸Revised CrR 3.3, 93 Wn.2d 1122 (July 1, 1980).

⁹Revised CrR 3.3, 94 Wn.2d 208 (August 21, 1980).

¹⁰*State v. Edwards*, 94 Wn.2d 208 (August 21, 1980).

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All forms of pleading heretofore existing in civil actions, inconsistent with the provisions of this act, are abolished; and hereafter the forms of pleading, and the rules by which the sufficiency of the pleadings is to be determined, shall be those prescribed by statute.

Thereafter, almost all court rules, including many internal administrative procedures, were promulgated by the legislature.

The 20th Century saw a swing back to court control over rulemaking because the public and practitioners alike found that the skeletal "reform" codes themselves had been expanded and reworked so as to be complex and contradictory. Legislatures were also criticized as being too resistant to change, too inexperienced in technical judicial procedures, and too susceptible to direct political pressure and delay.

Dissatisfaction with the code system led to a new reform movement aimed at court sharing of rule promulgation with the legislatures. Impetus for this push came from the American Bar Association beginning in 1912, the American Judicature Society in 1917, and the National Municipal League in 1920. In the 1920's, there was a flurry of law review articles and a nationwide push both for court-dominated rulemaking and the establishment of judicial councils to provide lawyers and judges with joint participation and control over the reform of rules of procedure.

The line between legitimate court rules necessary for the proper internal functioning of the judiciary, and general legislating through court rules, is hard to draw.

In accordance with the trend, in 1925, Washington's Legislature voted to get out of the business of rulemaking. It delegated most of its power over procedure to the Supreme Court and established a judicial council to help develop simple, straight-forward rules of court.

THE PRESENT: A PATCHWORK QUILT

Despite the existence of general trends in the history of court procedures, nationwide there exists a hodge-podge of methods of court rulemaking.

At the federal level, the Supreme Court prescribes rules upon the recommendation of a Judicial Conference, but the Court must file new rules with Congress for 90 days before their effective date; Congress can and occasionally does amend or totally rewrite them. For exam-

There is nothing sacred in having court rules issued by the highest court in the state.

ple, criticism from the bar and the general public about the procedural and policy impacts of new rules of criminal procedure and rules of evidence caused long delays and substantial changes in those proposals.¹¹

Rulemaking in the states includes a few jurisdictions where legislatures still dominate court procedures through statute, some where supreme courts exercise full control, many where supreme courts enact rules subject to legislative veto or revision, systems that entrust rulemaking to judicial conferences or councils (with or without legislative or supreme court involvement) and an incredible variety of hybrids.

The Pacific Coast states exhibit the same variation in rulemaking plans. For example, Alaska's 1959 Constitution establishes a judicial council of three attorneys, three lay people and the chief justice as chair; this body recommends court rules or amendments to the Supreme Court, which may alter them and then issue the rules subject to a veto of two-thirds of each house. This explicit constitutional delineation of rulemaking power between the separate branches is rare.

Oregon enacted a new approach to court rules in 1977. For many years it had been a "code state" where rules were prescribed by the legislature; that body was unwilling to cede rulemaking to the Supreme Court on the grounds that the latter was too removed from trial court practice and was busy enough rendering appellate decisions. Therefore, the lawmakers established a 23-member Council on Court Procedures composed of two appellate judges, eight trial court judges, one lay person and 12 attorneys, at least one of whom must be a law professor. The Council was charged with revising civil rules only, and enacting them subject to a 90-day legislative review.

California promulgates its court rules by means of a constitutionally-established judicial council. The legislature is able to alter proposed court rules, continues to prescribe many trial court rules by statute, and gives some explicit statutory direction to the council to issue rules in some areas.

A CONSTITUTIONAL JUDICIAL COUNCIL

These examples from other jurisdictions illustrate the point that there is nothing sacred in having court rules issued by the highest appellate court in the state. We in Washington have the ability to establish any system of

rulemaking we believe is practical and fair. A change in the method of court rule promulgation in Washington should be developed to meet most of the specific problems recently encountered in Washington:

- the "legislating" of budgetary matters by a court;
- the need to minimize legislature-judiciary conflict;
- the benefit of an "open" rulemaking process;
- the avoidance of a court's conflict of interest when it sits in judgment on the rules they themselves write; and
- the need to entrust rulemaking to the most competent body for that task.

The Proposal

Washington's Supreme Court has in recent years asserted that it has "inherent" jurisdiction over court rulemaking, so the following proposal would likely have to be enacted by constitutional amendment. This proposal intends to create a practical balance between the needs of those who work in courts, the general public interest in rules that affect people's lives and pocket-books, and the legitimate interests of the Legislature:

1. *The Judicial Council should be the primary rulemaking body in Washington*, established by the Constitution to promulgate rules at regular times, under the procedures of the Administrative Procedure Act, the Open Public Meetings Act, and the Public Disclosure Law. The Council should be reduced in size to improve its effectiveness, and it must be properly funded and staffed. The Council should include trial judge and attorney members, and should be chaired by the Chief Justice.
2. *The Legislature should have a formal but limited role in court rulemaking*, empowered to change new rules by a two-thirds vote of each house. Rules once changed should be subject to revision within or after a set period.
3. *The Judicial Council should appoint an Administrator for the Courts*. The Administrator is currently appointed by the State Supreme Court. Although a detailed discussion of this issue is beyond the scope of this article, it should be noted that the Administrator's breadth of responsibility is now limited by trial court concerns about central administration and appellate court direction of that administration. Making the Administrator responsible to a broadly-based Judicial Council would enhance central coordination, as well as relieve the Supreme Court, as an entity, from time-consuming administrative responsibilities. □

¹¹J. Weinstein, *Reform of Court Rule-Making Procedures* 3 (1977).

WASHINGTON STATE BAR NEWSLINE

The Board's Work



by Steven A. Reisler

BARPAC BACKS WINNERS

SEATTLE, WASH., December 17 — BARPAC, Washington's political action committee for lawyers, helped put nine new lawyer legislators in Olympia. Spokane lawyer Jack Dean and Seattle lawyer Lee Campbell, members of BARPAC's executive committee, told the Board of Governors that the political action committee raised nearly \$18,500 in only a few weeks with a single mail solicitation. The fund had started with only \$352 in the kitty.

BARPAC spent \$1,866 on office supplies and overhead in an effort to disassociate itself from the State Bar Association as much as possible. Dean explained that in the last election, BARPAC contributed \$8,500 to political campaigns and retained a war chest of \$8,100 for the future.

Although BARPAC primarily supported lawyer candidates for public office, it also supported eight non-lawyer candidates, seven of whom were elected. Seventy-five percent of BARPAC's money went to Democrats and the balance to Republicans. BARPAC chose not to support three lawyer candidates, none of whom were elected.

Dean acknowledged that despite BARPAC's autonomy, some lawyers complained about its political activities. Notwithstanding those complaints, Dean stated, "If you're going to give to BARPAC, you're going to have to trust us. If you don't like what BARPAC's doing, don't contribute to it."

Campbell explained that BARPAC's future goals are ambitious. The group plans to solicit contributions from major law firms on an annual basis with commitments made in the spring. Additionally, BARPAC will conduct direct mail campaigns to involve as many non-urban lawyers as possible. The intention, Campbell explained, is to make BARPAC a relatively permanent fixture rather than a crash program whipped into activity just before elections.

INTEREST GROWS IN IOLTA

IOLTA, the proposal to establish interest-bearing trust accounts benefiting public-interest foundations, continues to stir controversy in the Bar Association. Although WSBA President Paul Steere stated that he believes the proposed IOLTA rule is "an idea whose time has come," he acknowledged that lawyers still differ on two key points: whether participation should be mandatory, and how the money should be distributed. The rule recommended to the Supreme Court by a special task force will require a lot of lawyer input, Steere said.

Steere explained that the "participation" issue boils down to three viewpoints: 1) mandatory client consent to IOLTA must be obtained; 2) client consent to participate in IOLTA may be obtained, at the lawyer's discretion; and 3) participation in IOLTA shall be mandatory, with or without client consent. The WSBA has endorsed the second concept [Bar News 36:11:26].

By unanimous vote, the Board accepted an invitation to send Supreme Court Justice Utter and Special Task Force Chairman Jack Dean as delegates to the ABA's National Conference on Interest on Lawyer's Trust Account Programs to be held in January in Tampa, Florida.

OTHER BOARD ACTIONS

- **FEE ARBITRATION PROGRAM** — By unanimous vote, the Board approved the third revision of the Fee Arbitration Program revised procedures and pamphlet.



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● **DOUGLAS MEMORIAL** -- Yakima attorney Paul Larson addressed the Board about the Yakima Valley Museum's new national fundraising drive to build a special museum wing to house its unique collection of William O. Douglas memorabilia. Douglas, who was the longest serving member of the United States Supreme Court, grew up in the Yakima Valley and attended Whitman College in Walla Walla.

● **JUDGES' SALARIES** -- Bar lobbyist Bill Gissberg reported to the Board that although increasing judicial salaries was a high priority issue for the Bar Association, it could not be the WSBA's top priority in the next legislative session. The court system, Gissberg explained, consumes only one-half of one percent of the state's annual budget; nevertheless, legislators always want to know how judicial pay increases will be funded.

● **KASSLER FALLOUT** -- Bellevue attorney Richard Nelson requested WSBA assistance in his dispute with the Department of Revenue regarding taxes due for performing real estate transactions. Nelson argued that under the Kassler decision, escrow and real estate transactions were the practice of law and could not be taxed. The Department of Revenue has sought back taxes from Nelson in what he described as a potentially precedent-setting action. The Board decided that it should not take a position against audit activity by the Department of Revenue. The Bar may become involved at a later time if audit activities appear to affect the general Bar membership.

THE NEXT MEETING OF THE BOARD OF GOVERNORS WILL BE HELD AT THE WESTWATER INN IN OLYMPIA ON JANUARY 14-15.



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Notes From the Academy

Edited by **Professor William B. Stoebuck**
University of Washington School of Law

(NOTE: This column is the first in a semi-regular series of capsule reports by UPS, Gonzaga and UW Law School professors regarding significant developments in Washington caselaw. Prof. William B. Stoebuck of the UW Law School edits and coordinates this column. The names of the authors of individual caselaw reports appear at the end of each capsule.)

—Bar News Ed.)

CONSTITUTIONAL LAW. (1) Party who claims damages against a municipal entity for illegal search under 42 U.S.C. sec. 1983 must show it was official police policy to issue warrants upon inadequate facts. Majority and dissent disagree on whether such showing made here. *Turngren v. King County*, 33 Wn. App. 78 (1982). (2) Under 18 U.S.C. sec. 3231, state courts have no jurisdiction to try crimes under federal law. This includes juveniles; 18 U.S.C. secs. 5001 et seq. do not create exception for them. *State v. Tidwell*, 32 Wn. App. 971, 651 P.2d 228 (1982).

—R. L. Fletcher

CRIMINAL LAW AND PROCEDURE. (1) To be guilty of burglary, one must intend to commit crime within a building. However, information need not specify, and jury need not agree upon, which crime was intended. *State v. Chelly*, 32 Wn. App. 916, 651 P.2d 759 (1982). (2) In prosecution for first-degree murder on theory of premeditated intent to kill, evidence of voluntary intoxication may be considered on issue of premeditation, even if accused clearly had specific intent. Premeditation and intent are distinct mental states; one who has intent may be too drunk to premeditate. *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982).

—G. R. Nock

FAMILY LAW. (1) After death of a spouse, marriage dissolution may be decreed nunc pro tunc to date preceding death. No decree entered before death. Only "error" was counsel's demand for fee before he would submit decree to court. *Marriage of Pratt*, 32 Wn. App. 665, 649 P.2d 141 (1982). (2) Military retirement pay may not be divided in marriage dissolution nor its value offset by award of other assets. Judge may "consider" retirement pay in dividing assets. *Marriage of Dessauer*, 97 Wn.2d 831, 650 P.2d 1099 (1982). Quaere: Now that Congress has by Military Spouse Protection Act (see 8 F.L.R. 2640) terminated federal pre-emption of this question, will Washington return to its earlier decision in *Wilder v. Wilder*, 85 Wn.2d 364, 534 P.2d 1355 (1975)? (3) Division One of the Court of Appeals disagrees with Division

Three, holding that child support payments may not be made to escalate solely on basis of obligor's income or ability to pay. Judge Roe's dissent in *Marriage of Mahalingam*, 21 Wn. App. 228, 584 P.2d 971 (1978), approved. *Marriage of Peters*, 33 Wn. App. 48, 651 P.2d 262 (1982).

—L. V. Rieke

LAND-USE PLANNING. County may not impose monetary fees for services such as parks, schools, etc., on subdividers as condition to plat approval. Would be a tax not authorized by RCW 58.17.110. Case of first impression in Washington on hotly debated issue of "in-lieu" fees. *Hillis Homes v. Snohomish County*, 97 Wn.2d 804, 650 P.2d (1982).

—W. B. Stoebuck

TORTS. Industrial employee injured by machine, allegedly through negligence of both his employer and machine's manufacturer. He received industrial insurance benefits for injury. In his negligence suit against manufacturer, latter seeks contribution from employer under RCW 4.22.040. Held, because Industrial Insurance Act immunizes employer from fault-based liability to covered employees, employer not liable for contribution. *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880 (1982).

—R. S. L. Roddis

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For Future Reference....

by **John M. Redenbaugh**

Assistant Director of Continuing Legal Education

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The faculty intends to provide a review of recent developments at the Securities and Exchange Commission, developments in State Securities laws, and developments in Federal Securities Laws. In addition, other topics to be covered during the Friday and Saturday sessions include: An Overview of the Securities Laws in British Columbia; Due Diligence and Legal Opinions in Securities Transactions; New Products (Securities Transactions by Banks and Other Financial Institutions); and Securities Problems in Bankruptcies.

This year's distinguished faculty includes a bankruptcy judge, experienced securities practitioners from Oregon, Washington and the province of British Columbia, plus securities administrators from the Federal and State levels. We are also extremely pleased to announce that the Saturday, February 26, luncheon speaker will be SEC Commissioner James C. Treadway, Jr., and that Lee B. Spencer, Jr., Director of the SEC's Division of Corporation Finance in Washington, D.C. will be present to add his comments during portions of the program sessions.

The Third Annual Northwest Securities Institute will be held at the Westin Hotel in downtown Seattle. The *Friday, February 25*, and *Saturday, February 26*, sessions will be open to securities practitioners, securities regulators, accountants, and all other persons with an interest in the subject matter. Don't hesitate to make plans now to attend this informative program.

TAX STRATEGY: S. CORPORATIONS IN LIGHT OF TEFRA AND SUBCHAPTER—S REVISIONS—Seattle's Sheraton Hotel will be the site of this CLE taxation program. The day-long seminar will be presented on *Friday, March 11*, and features a faculty that

includes a Staff Attorney from the Joint Committee on Taxation in Washington, D.C., experienced tax practitioners and an Associate Professor of Law. The program is classified as an intermediate and advanced level presentation and is designed to provide attendees with valuable information about the effect of TEFRA on P.S. Corporations and important aspects of the Subchapter—S Revision Bill of 1982. This is your opportunity to learn more about some vital changes in tax law and to pose specific questions about such changes to a distinguished panel.

FAMILY LAW MID-YEAR MEETING & SEMINARS—This, the second Family Law Section Mid-Year, will be held in Seattle (Sea-Tac area) at the Hyatt Hotel on *March 25, 26 & 27*. It is designed to be of value to both newly-admitted attorneys and experienced family law practitioners. Just some of the important topics to be dealt with include: goodwill and the treatment of pensions, Appellate Court review of a dissolution case, a discussion of custody issues, a discussion of advanced aspects of tax and dissolution cases, and a discussion of the Uniform Child Support Guidelines. In addition, a series of workshops will be utilized to aid in presenting some of the program topics. Mark your calendars now for March 25-27.

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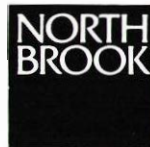
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Code of Professional Responsibility Committee Procedural Rules

The Code of Professional Responsibility Committee is an 18-member committee appointed by the Board of Governors. As the workload of the Committee increased, it became necessary to adopt procedural rules for the handling of written inquiries.

Those procedural rules are printed below for the information of the members of the Association.

Ethics inquiries or inquiries about these rules should be directed to the Code of Professional Responsibility Committee, c/o WSBA, 505 Madison, Seattle, Washington 98104.

David Boerner, Chairperson

Rules of Procedure

1. The purpose of the Committee is to advise members of the Bar upon the ethical propriety of their contemplated professional conduct, to advise officers and appropriate committees of the Washington State Bar Association as to the ethical propriety of past, as well as contemplated, professional conduct of members of the Association and others under their jurisdiction, and to recommend appropriate amendments to the Code of Professional Responsibility.

2. The Committee will issue opinions of two kinds: Formal Opinions and Informal Opinions. Formal Opinions are opinions upon subjects which the Board of Governors determines to be of significant impact upon the ethical conduct of the Bar. They will be published in the *Washington State Bar News* upon approval of the opinion by the Board of Governors. Formal Opinions are binding upon members of the Washington State Bar. Informal Opinions will be issued to the inquirers and will be published in the *Washington State Bar News* at the option of the Committee. Informal Opinions are advisory in nature.

3. A written opinion of the Committee shall set forth the operative facts and the basis for the decision, citing to appropriate sections of the Code of Professional Responsibility. To the extent possible, identifying information shall be deleted.

Members who do not agree with the majority opinion may, if they wish, file a minority opinion.

All Formal and Informal Opinions of the Committee shall be kept on file in the office of the Washington State Bar Association, and shall be made available to all inquirers.

4. A later Formal Opinion overrules earlier Formal Opinions or Informal Opinions with which it is necessarily in conflict. A later Informal Opinion overrules earlier Informal Opinions with which it is necessarily in conflict, but does not overrule an earlier Formal Opinion.

5. The Code of Professional Responsibility, as amended from time to time, shall be the standard to be applied by the Committee in formulating opinions pertaining to professional conduct.

6. A quorum shall consist of a majority of the members of the Committee. All opinions shall be adopted, at a called meeting, by a majority of a quorum of the Committee.

7. The Committee will not issue opinions on questions of law, or the propriety of a lawyer's conduct which is the subject of pending litigation or disciplinary action.

8. The Committee will not issue opinions involving past conduct unless: a) the request is from another committee of the Washington State Bar Association or the Board of Governors; or b) the conduct in question is likely to occur again by the same person; or c) it is likely that other lawyers engaged in the practice of law in the State of Washington may engage in similar conduct and therefore, for the guidance of the Bar in general, the opinion of the Committee will be provided.

The Committee may refuse to issue an opinion as to the proposed conduct of someone other than the inquirer. In making these determinations the Committee may look to sources of information beyond that contained in the inquiry itself.

If the Committee determines that it would be appropriate to issue an opinion about the conduct of someone other than the inquirer, the individual whose conduct is the subject of the Committee's deliberations must be notified of the inquiry and given an opportunity to provide any information he/she deems relevant to the Committee's consideration.

The failure of the person so notified to submit any information shall not prevent the Committee from considering the inquiry.

9. Any inquiries regarding the work of the Committee in progress or past deliberations shall be referred to the chairperson of the Committee for response. The chairperson may refer the inquirer to the Committee member who researched the question in issue. Reasons for the opinion may be revealed; however, the individual opinions of the Committee members shall be kept confidential in responding to inquiries.

10. The Committee will issue opinions interpreting the Code of Professional Responsibility when requested to do so by the Board of Governors.

11. Amendments to these procedural rules shall be adopted by a majority of a quorum of the Committee subject to final approval by the Board of Governors.

12. If a member has two unexcused absences from Committee meetings during one year, a recommendation that the member be removed from the Committee shall be made to the Board of Governors.

13. Meetings of the Code of Professional Responsibility Committee shall be open, except where, by vote of a majority of Committee members, the Committee elects to proceed in an executive session. Public participation shall be permitted only as authorized in DR 2-101(C), or by prior permission granted by the Committee. Care shall be taken by the bar liaison, the chairperson of the Committee and all Committee members to avoid revelation of information which would identify the inquirer or the individual contemplating the conduct under consideration.

14. The Committee shall reconsider a Formal Opinion at its own motion or at the request of the Board of Governors.

The Committee may reconsider an Informal Opinion at its own motion or the request of the inquirer or the person whose conduct is the subject of the inquiry. An Informal Opinion will be reconsidered only if the person requesting reconsideration submits a statement of material facts which were not submitted and which were not known to such person at the time of the Committee's initial consideration.





U.W. School of Law Calendar of Events



January 22, 8:30 to 12:30

Condon Hall, University of Washington

"Public International Law"

Faculty: Professor William Burke
Professor Anthony Giffard
Professor Roy Prosterman
Professor Ted Stein

(Co-sponsored by the World Peace Through Law Section, Washington State Bar Association).

Course No. 8301; 4 CLE Credits; \$50 (\$35 for Section members).

January 28, 1:30-5:30

●lympia

"Basic Estate Planning After ERTA"

Faculty: Dean John R. Price

Course No. 8302; 3.5 CLE Credits; \$50

January 29, 9:00 a.m. to 3:00 p.m.

Condon Hall, University of Washington

"Coastal Zone Law and Shorelines Management"

Faculty: Professor Marc Hershman
Professor Ralph Johnson

Course No. 8303; 5 CLE Credits; \$90

February 25, 1:30-5:00 p.m.

Everett

"Basic Estate Planning After ERTA"

Faculty: Dean John R. Price

Course No. 8307; 3.5 CLE Credits; \$50

February 12, 9:00 to 3:00

Condon Hall, University of Washington

"Basic Issues in Computer Law"

Faculty: William Baron
Professor Donald Chisum
David Deits
Jeffrey T. Haley

Course No. 8304; 5 CLE Credits; \$85

February 12, 9:00 to 3:00

Condon Hall, University of Washington

"Criminal Law and Procedure"

Faculty: Professor Robert Aronson
Professor John Junker
Professor Wallace Loh

Course No. 8305; 5 CLE Credits; \$85

For full information, write or call
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Washington School of Law,
430 Condon Hall, JB-20,
Seattle, WA 98105,
(206) 543-0059.

BENTON-FRANKLIN COUNTY

by STEPHEN T. OSBORNE

The annual Benton-Franklin Bar Association election of officers and golf tournament was recently concluded. President-Elect is **Carl G. Sonderman**, Vice-President is **Donald Stancik**, and Secretary/Treasurer is **Linda Waite**. Past President **Diehl** (Humble Harry, and I don't mean Hairy) **Rettig** was the winner of the golf tournament. He was much chagrined but undaunted when he got a rejection notice for the story from *Sports Illustrated*.

There was never any concern that **Mike** (Clothes-Horse) **Pickett** would be in contention for the Worst-Dressed Lawyer Award (see this column, volume 36, No. 10). Mike, in an unprecedented show of generosity, contributed two of his favorite suits to an indigent defendant to wear during a recent jury trial. Following the conviction, it was thought that the defendant would be the best-dressed guy in the joint. However, the suits were retained by the county to be used in the future by any other unfortunate indigent who finds himself short on court apparel. There is no truth in the rumor that **John Schultz** wanted to borrow them in the meantime.

Speaking of criminals, discretion prevents this writer from naming the two Franklin County Deputy Prosecutors who recently found themselves locked in the hallway between the court chambers and the exit. Only persistent yelling and banging on the doors, which was heard one floor below, prevented the dynamic duo from doing solitary confinement for the weekend. Just when I was beginning to think that there might be justice after all...

Congratulations are also in order to Franklin County Prosecutor, **Jim Rabideau**, recently re-elected for another four-year term, who this

past summer was promoted to CAPTAIN (Full Colonel for you land-lovers) in the United States Navy Reserve. Also promoted was **Craig Liebler**, who is a very young looking Commander in the USNR.

Finally, there are some new faces on the scene recently. **George Fear- ing**, a 1982 graduate of the University of Washington, joined the firm of Leavy, Schultz & Sweeney as an associate, and **Jim Hurson**, son of Court Commissioner Dan Hurson, and also an 1982 UW graduate, has joined the firm of Raekes, Rettig, Osborne, Forgette & Brecke.

PIERCE COUNTY

by GEORGE KELLEY

The Tacoma-Pierce County Bar Association honored the late **Robert Copeland** at a ceremony for the *USS Copeland*, a frigate named after the WWII naval hero. **Murray Anderson** and **Pat Comfort** presented an engraved silver plate to the ship's officers and men.

A luncheon was recently held to discuss an arbitration program similar to King County's. A straw vote of those in attendance favored the proposal by a 16-2 margin. Furthermore, Arbitration Committee chairperson **Charlotte Chalker** reports that our Board of Trustees also favors the program. Yet to be heard from are Superior Court Judges.

The Puyallup firm of Campbell, Dille, Barnett, McCarthy and Adams held an open house in their newly remodeled offices. Most Tacoma attorneys, being unable to find Puyallup, did not attend.

Suzanne Carmicheal and **Martha Eller** have been elected co-chairmen of the Pierce County Washington Women Lawyers.

Celia E. Holuk is an associate with the firm of Kane, Vandenberg, Hartinger and Walker.

Discovery Compliance: Counsel Must Confer

Effective January 1, 1983, the King County Superior Court will not entertain any motion or objection with respect to Rules 26 through 37 of the Rules of Civil Procedure, unless it affirmatively appears that counsel have met and conferred with respect thereto. Counsel for the moving or objecting party shall arrange such a conference. If the Court finds that counsel for any party upon whom a motion or objection in respect to matters covered by such rules is served willfully refuses to meet and confer, or having met, willfully refuses or fails to confer in good faith, the Court may take appropriate action to encourage future good faith compliance.

At the time of noting motion or objection for consideration, counsel for the moving or objecting party shall serve and file a certificate of compliance with this rule and enumerate therein the matters remaining for disposition by the Court.

Bankruptcy Panels Expand Jurisdiction

Chief Judge James R. Browning of the U.S. Court of Appeals has announced the expansion of the United States Bankruptcy Appellate Panels of the Ninth Circuit to all districts of the Ninth Circuit Court of Appeals, effective December 1, 1982. Bankruptcy appeals filed on or after that date will be processed to the appellate panels.

The Bankruptcy Appellate Panels, first authorized in late 1979, have been operating in all districts of California as well as the districts of Arizona and Nevada. Five bankruptcy judges form the pool from which three-judge panels are appointed to decide the appeals.

Information on the U.S. Bankruptcy Appellate Panels of the Ninth Circuit can be obtained from the Office of the Clerk, U.S. Bankruptcy

Appellate Panels, P.O. Box 350, Los Angeles, California 90053, telephone number (213)688-6861.

IN MEMORIAM

Seattle attorney **Hubert M. Jones**, 65, died November 6. He had been a member of the Bar since 1952.

Attorney **Mitchell Doumit** of Cathlamet died November 12 at the age of 76. He was admitted to the Bar in 1928.

DISCIPLINE

Annon W. May Reprimanded

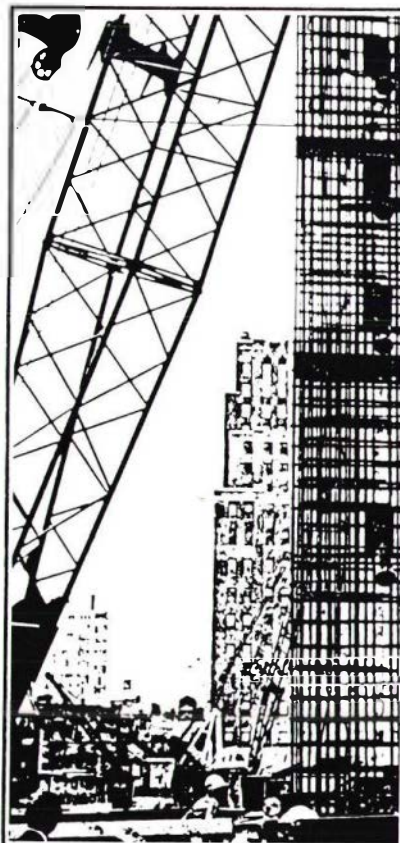
Tacoma attorney Annon W. May received a Reprimand before the Board of Governors on November 19, 1982. Mr. May was disciplined for his violation of DR 6-101(A)(3), DR 7-101(A)(2), DR 2-110(A)(2), and DR 7-101(A)(3).

The discipline was imposed upon findings that Mr. May undertook representation of a client but failed to take the steps necessary to protect the client's interests. It was found that he neglected to inform his client of a decision he had made not to pursue the case, and failed, when he ceased the representation, to advise his client that her claim could soon be barred by the statute of limitations.

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STATE LAW LIBRARY Recent Acquisitions

Listed below are some of the new titles recently acquired by the State Law Library, and available for loan by calling (206) 753-6525 or by mailing your request to: Washington State Law Library, Temple of Justice, Olympia, Washington 98504. A bi-monthly Selected Recent Acquisitions list, generally containing 250-350 new titles, is also available at our cost of \$5 for six issues. Copies can be obtained by sending your check, payable to the Washington State Law Library, to the above address.

BANKRUPTCY

Zweibel, Joel B. *Creditors' rights handbook under the Bankruptcy Reform Act of 1978*. 2d ed. New York: Clark Boardman, 1982. Pp. 192.

COMMUNITY PROPERTY

Community property law: January 10-13, 1982, Reno, Nevada. Seattle: Washington State Bar Association, 1982. V.p. (loose-leaf).

Mennell, Robert L. *Community property in a nutshell*. St. Paul: West, 1982. Pp. 443.

CRIMINAL LAW & PROCEDURE

Bailey, F. Lee, and Henry B. Rothblatt. *Handling misdemeanor cases*. San Francisco: Bancroft-Whitney, 1976. Pp. 545.

Bond, James E. *Plea bargaining and guilty pleas*. 2d ed. New York: Clark Boardman, 1982. (loose-leaf).

Business crimes: a guide for corporate and defense counsel. New York: Practising Law Institute, 1982. Pp. 440.

Criminal law: procedural and ethical considerations. Seattle: Washington State Bar Association, 1982. 1 vol. (loose-leaf).

DAMAGES

Damages in the 80's. Seattle: Washington State Trial Lawyers, 1982. 1 vol. (loose-leaf).

Drugs in litigation: damage awards involving prescription and non-prescription drugs. 2d ed. Indianapolis: Allen Smith, 1982. Pp. 525.

ESTATE PLANNING

Hoops, Frederick K. *Family estate planning guide*. 3d ed. San Francisco: Bancroft-Whitney, 1982. 2 vols.

Kellogg, Irving. *Managing an estate planning practice; client communication and automatic drafting*. 3d ed. Berkeley: California Continuing Education of the Bar, 1982. Pp. 284.

ETHICS

Bayles, Michael D. *Professional ethics*. Belmont, Calif.: Wadsworth Publishing, 1982. Pp. 159.

Ethics, economics, and the law. New York: New York University Press, 1982. Pp. 323.

Fretz, Donald R., Rodney A. Peebles and Thomas C. Wicker. *Ethics for judges*. Reno: National Judicial College, 1982. Pp. 88.

EVIDENCE

Advanced cross-examination. Houston: National College for Criminal Defense, 1980. V.p.

Clark, Ronald H. *Making and meeting objections: evidence handbook for Washington trial attorneys*. Olympia: Washington State Criminal Justice Training Commission, 1980. 1 vol.

Iannuzzi, John Nicholas. *Cross-examination: the mosaic art*. Englewood Cliffs, N.J.: Prentice-Hall, 1982. Pp. 247.

LAW OFFICE MANAGEMENT

Altman, Mary Ann, and Robert I. Weil. *An*

introduction to law practice management. New York: Matthew Bender, 1981. Pp. 422.

Kurzman, Robert G., and Rita K. Gilbert. *Paralegals and successful law practice*. Englewood Cliffs: Institute for Business Planning, 1981. Pp. 401.

Law office management 1982. New York: Practising Law Institute, 1982. Pp. 568.

Law office staff manual: model policies and procedures for law office personnel. Chicago: American Bar Association, 1982. Pp. 175.

Legal Assistants 1982. New York: Practising Law Institute, 1982. Pp. 952.

LEGAL PROFESSION

A lawyer's guide to legal malpractice insurance. Chicago: American Bar Association, 1982. Pp. 83.

SETTLEMENTS

Fisher, Roger, and William Ury. *Getting to yes: negotiating agreement without giving in*. Boston: Houghton Mifflin, 1981. Pp. 165.

Williams, Gerald R. *A lawyer's handbook for effective negotiation and settlement*. Minneapolis: National Practice Institute for Continuing Legal Education, 1981. Pp. 161.

TORTS

Anatomy of a personal injury lawsuit. 2d ed. Washington Association of Trial Lawyers, 1981. Pp. 504.

Dooley, James A. *Modern tort law: liability & litigation*. Willmette, Ill.: Callaghan, 1982. 1 vol.

Product design litigation. New York: Practising Law Institute, 1982. Pp. 736.

TRIAL PRACTICE

Fundamental trial practice: back to basics. Seattle: Washington State Bar Association, 1981. V.p. (loose-leaf).

Goldberg, Steven H. *The first trial: where do I sit? what do I say? in a nutshell*. St. Paul: West, 1982. Pp. 396.

Jury selection techniques. Rev. ed. Houston: National College for Criminal Defense, 1981. Pp. 172.

Opening statements and closing arguments: speeches and demonstrations from a decade of advocacy institutes. Ann Arbor: Institute for Continuing Legal Education, 1982. Pp. 430.

Using experts in civil cases. 2d ed. New York: Practising Law Institute, 1982. Pp. 339.

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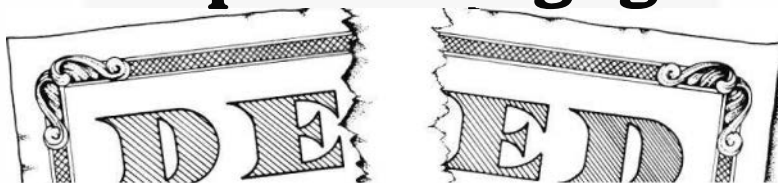
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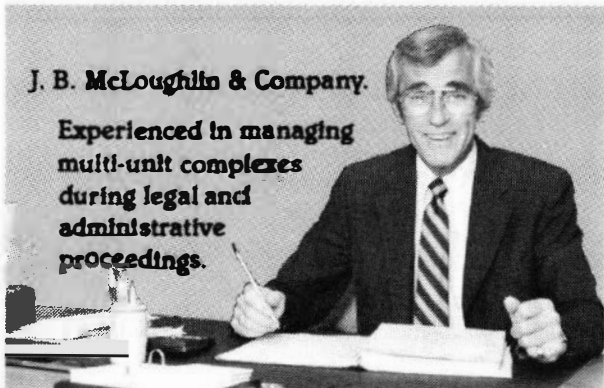
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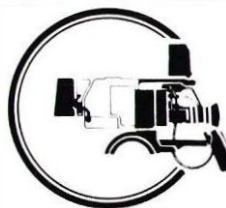
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