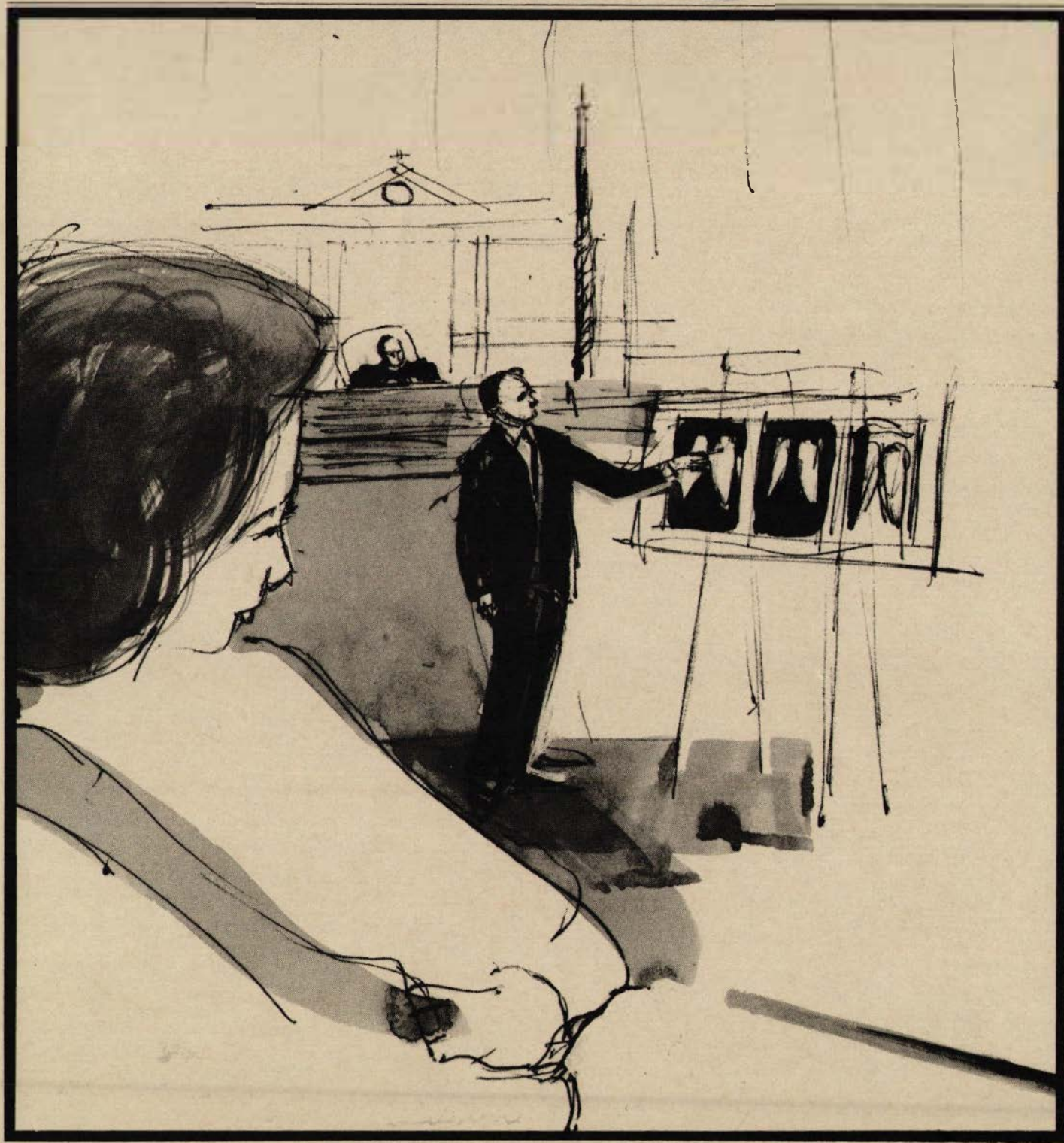


# Washington State Bar News

Volume 37, No. 11, November 1983



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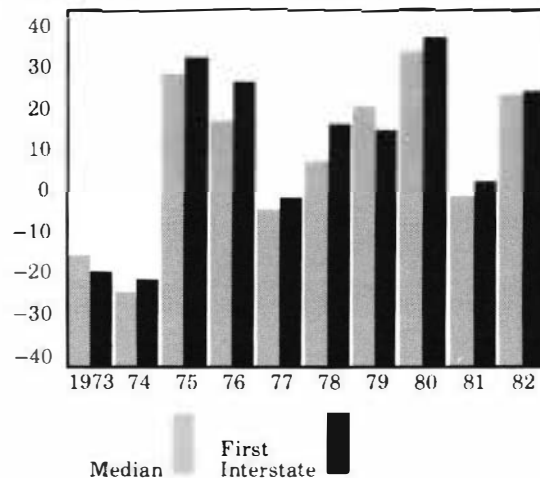
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# Washington State Bar News

Volume 37, No. 11, November 1983

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## Our Cover



## ART CREDITS

Cover art and interior art at page 12 by Tacoma artist and calligrapher **Harry Musselman**. Musselman has exhibited at the Washington State Fair, the Annual Exhibition of Northwest Water Color and the Louise Matzke Gallery in Seattle.

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## Sincere Efforts Appreciated

Editor:

I disagree with John L. Farra's letter regarding counsel fees in indigent criminal appeals [*Bar News* 37:8:5]. Present policy for payment in such cases is to pay a flat fee of \$941.00, barring unusual circumstances which would raise or lower the payment. Mr. Farra may not have been so notified when he wrote.

The present policy is a distinct improvement over the old payment schedule of \$20.00 per hour. Under that system an attorney who, through experience and familiarity with the details of the criminal law, could prosecute an appeal with efficient dispatch (say, in twenty hours) would be grossly under-compensated, while an attorney with little experience could take fifty or more hours to prosecute the same appeal and feel adequately compensated.

Now that we have a statewide appellate defender, virtually every non-conflicted appeal will be referred to them if trial counsel chooses to withdraw; thus, a private attorney need do an appeal only if he or she chooses.

I have frequently been vocal in complaining about what I considered to be arbitrary or unfair treatment of counsel in these cases; it is only fair to support the Court in its sincere efforts to achieve a uniform and just system for dealing with indigent appeals.

**CHARLES L. SMITH**

Seattle

## Communist Dominoes and the WSBA

Editor:

The resolutions which liberal groups presented at the business meeting of the Bar Association in Spokane were attempts to restrict this country's activities

in Central America. They profess to be against covert action and in favor of human rights. If their actions resulted in the withdrawal of this country from its covert or military actions, the Cubans and Russians would be free to complete their subversive and military activities. It would be only a short time before these countries would be entirely controlled by the Communists. Their next target would be Mexico. Then this country would be faced with a war on its own borders.

I cannot understand lawyers taking this position, for were the Communists to gain control in Central America, and ultimately in this country, what would happen to their legal profession? From what I have observed, lawyers play a very minor role in the countries controlled by Russia.

They also profess to be concerned with human rights. They point out that the present Central American governments have little concern for such rights. This may be true, but what are the alternatives? Turn the countries over to the

Communists? How much concern for human rights have the Russians shown in Afghanistan, Cambodia, Cuba, or any of the other countries where they control? How much concern did they show for human rights in shooting down Korean Airliner Flight 007?

I do not believe these liberal members of our Bar are really interested in human rights, for if they were they would try to encourage our government's help and participation in Central America, instead of trying to discourage it.

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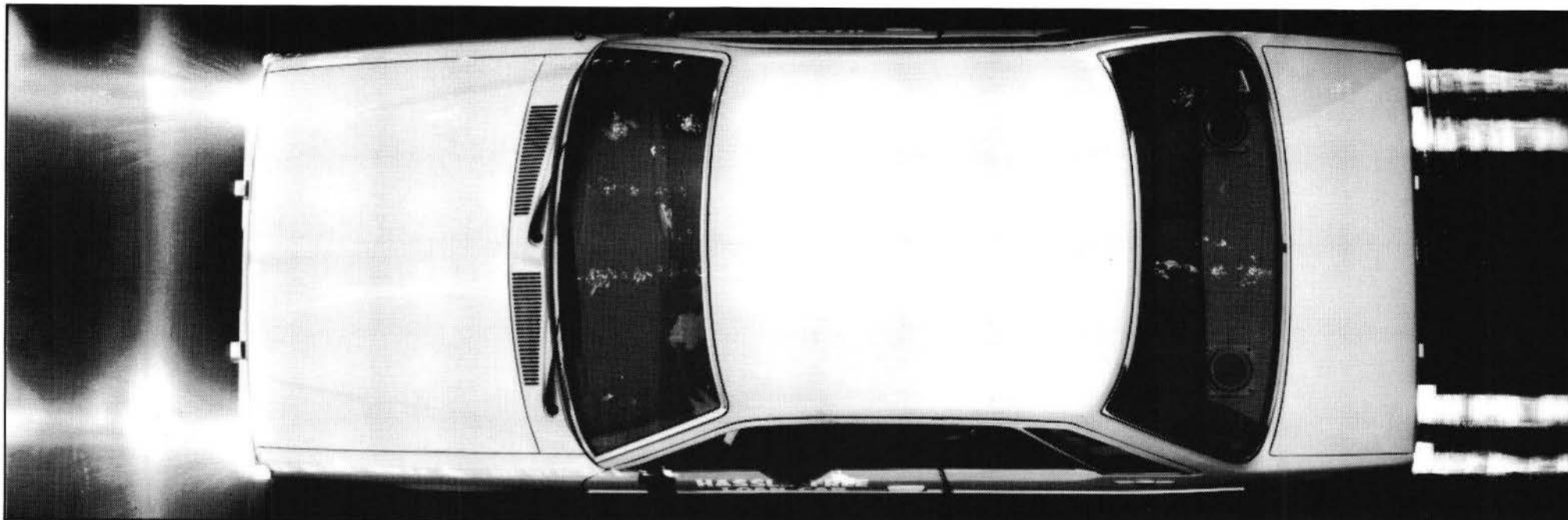
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## Oblivion

It's autumn. The World Series is over, all the leaves have fallen, and Olympia is beginning to brace itself for another legislative session.

We lawyers, perhaps more than any other profession, are directly affected by what our representatives do in the Legislature each year. Although judicial opinion is the staple of the law practice, it is the plateful of bills and statutes dished out by the Legislature each year which is our real meat and potatoes. SB 8363-X, for example, may not affect you individually or professionally, but eventually one of your clients will hire you to explain it, avoid it, use it or abuse it.

Lawyers are once more conspicuous in the legislative process. In 1967, there were nearly 40 of our profession sitting in Washington's House and Senate. From our representative nadir of eight in 1981, we rebounded in 1983 to sixteen lawyers in the Legislature.

Naturally, lawyer/legislators represent a broader constituency than just the attorneys in their districts. Lawyers do make their special concerns heard in the legislative arena through other means, however. Various bar committees and sections often work closely with legislators in formulating complex legislation; organizations such as WSTLA send their representatives to testify for or against bills; and the WSBA, too, retains special counsel to lobby for or against legislation of interest to the bar in general.

All this lawyers' involvement in the legislative process is healthy. Lawyers, by education and experience, are particularly well-qualified to advise our representatives and senators as they seek to govern the state. In this editor's three-year tenure with the *Bar News*, I have observed, however, that although some lawyers actively participate in the legislative process, a depressingly large number of us do not. I suspect, in fact, that many hundreds (if not thousands) of Washington's lawyers do not fully appreciate the taste of legislation cooking in Olympia's kitchen until after that legis-

lation is already out of the skillet and on their plates.

Of course, we have a representative form of government because it is practically impossible for every citizen to directly participate in the affairs of state. Similarly, lawyers elect representatives—members of the Board of Governors—to whom is delegated the responsibility of governing the Bar. The Board of Governors is a particularly significant body in the overall state legislative process: first, because it is the Board of Governors which decides what proposed legislation the Bar shall support, condemn, or ignore; second, because the prestige of the Bar's imprimatur can be the decisive factor in determining whether a bill goes on the books or into the waste basket.

Delegating power to the Board of Governors, however, does not mean that we lawyers abdicate our personal responsibility to keep abreast of events in Olympia. For our delegates on the Board of Governors to do their job effectively, you must advise them what position the Bar should take regarding proposed legislation, and you must do it before the Board goes on record one way or the other. The Governors want to know your opinion.

In the thirty-plus Board meetings I have reported, I could count on one hand the number of non-agenda lawyers in attendance. Important issues which concern us all are decided in every meeting of the Board of Governors. Representatives of special groups and sections of the Bar attend these meetings and faithfully represent their constituents' opinions. But many lawyers are not appointed to committees, do not belong to special groups, do not participate in section activities. Where is the majority of the Bar? Where are you?

The Board of Governors meets one Friday/Saturday per month in various parts of the state primarily to "take its show on the road," to make its meetings accessible to lawyers from every geographic part of Washington. The *Bar News* tries to announce the various meeting sites several weeks in advance;

admittedly, we do not always get the word out in timely fashion. Nevertheless, a simple call to the Bar Association provides quick information on where the Governors next meet. And if your practice does not permit you the luxury of attending a meeting in person, write a letter to your representative on the Board. Or use your telephone.

The Bar Association can and should take certain steps to facilitate your involvement in the governing process. For one thing, the *Bar News* should publish the annual meeting schedule in advance. For another, Bar members should be kept advised, by mailed legislative summaries for example, of proposed legislation in the works — before the Board takes a position. Controversial items on the Board's agenda also should be publicized as early as possible before a meeting date, in order to give the Governors time to hear from you.

Any measures to be taken by the Bar Association would be for naught, of course, if lawyers still would not respond to the stimulus. You can stay abreast of developments in the Legislature. You can advise your state and Bar representatives how you feel about important issues. Or you can remain oblivious, impotent . . . and ignored.

**Pardon our red face. . .** In the heat of battle to publish the October, 1983, issue of the *Bar News*, the headline on our President's Corner page declared Robert R. Redman to be our new President for the 1982-83 year. The headline should have read "1983-84," and we apologize.

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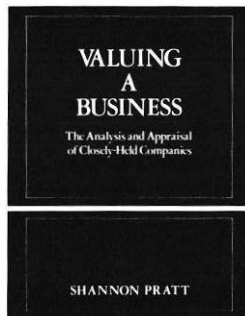
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## Keep the Bar Out of Commercial Affairs

by Evan E. Inslee

I am an old-fashioned lawyer. It used to be, and remains my perhaps antiquated thought, that the Washington State Bar was an association to which I mandatorily and yet willingly paid my dues for the purpose of dealing with and regulating issues that were unique to the Washington State Bar and the Washington State Bar Association.

You, therefore, perhaps can appreciate that when I received a notice from a collection agency that their collection agency had been somehow endorsed or authorized to solicit collections from attorneys in the State of Washington who desired that their fees be collected by this collection agency, it was somewhat of a shock to me. That the Washington State Bar Association should be even suggesting that it was giving its aura of approval to a collection service was indeed a surprise.

With this background, you then perhaps can appreciate my reaction when I received a letter with the Washington State Bar Association's stamp and logo at the top advising all fortunate members of the Washington State Bar Association, that the Washington State Bar Association "has made arrangements with McGraw-Hill, Inc., for interested members to subscribe to *Business Week* magazine at a special group rate." The letter went on to state that this was an opportunity for me to stay current with management trends, international business, technology, finance, commerce and more. Upon receiving this commercial endorsement, I think you can appreciate the fact that I arose from my chair with righteous indignation and promptly dictated this epistle to the *Bar News*, and to all members of the Board of Governors of the Washington State Bar Association.

The undersigned respectfully requests

that the Washington State Bar Association Board of Governors advise me and other members of the Washington State Bar Association why in the world the Washington State Bar Association thinks that it has the right, duty or privilege to use our State Bar Association as a vehicle to endorse commercial enterprises, such as *Business Week*.

Although, obviously, the undersigned would represent a minority position on the Board of Governors on this subject, it is suggested that this letter does not represent a minority position by lawyers throughout the State of Washington.

As any lawyer in this state will attest, there is already enough junk mail reaching our offices so as to fill an entire office if allowed to accumulate throughout the course of a year. To now have the Washington State Bar Association collaborate with *Business Week* to tell me that a special rate has been negotiated on my behalf is indeed an affront. I do not expect my Bar Association to sell its "customer list" to commercial establishments. Further, I don't expect my Board of Governors or its Director of Public Affairs to be working on my behalf to make "arrangements with McGraw-Hill...to subscribe to *Business Week* magazine at a special group rate...."

Where will it end if this is going to be a new start for the Bar Association? Am I soon to get automobile insurance quotes via the auspices of the Washington State Bar Association's stamp of group approval? Am I going to start getting special group rates for making a dinner reservation at a particular restaurant? What about a group rate for Bar Association members who purchase from Safeway?

To suggest the problem is to suggest the answer.

The Washington State Bar Association has absolutely no business getting involved in these commercial affairs. In my mind, the test of whether the Washington State Bar Association should become involved or make a statement on a proposition should be based on whether the issue presented is uniquely applicable to lawyers of the State of Washington in the practice of the legal profession, or directly related thereto. If it is not, then the Washington State Bar Association has no "darned business" in getting involved. The delegation of power to the Washington State Bar Association does not encompass this type of activity.

I would urge the Board of Governors to take a formal position on this matter, and to recant any policy of participating in commercial ventures using the Washington State Bar Association name, official logo, and members mailing list as an introduction thereto.

In the meantime, the Washington State Bar Association purposes, to cultivate and advance the science of jurisprudence, to promote reform in the law, to facilitate administration of justice, to elevate the standard of honor, of integrity and of courtesy in the legal profession, to encourage higher and better education for membership in the profession and to promote a spirit of cordiality and brotherhood, as well as to promote, protect and further the public interest, as set forth in Article I, Section I, of the Washington State Bar Association Bylaws, do not seem to be fostered in any respect by the *Business Week* liaison.

---

*Evan E. Inslee is a partner in the Bellevue firm of Inslee, Best, Chapin & Doezie, P.S.*

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### The Year Ahead

The Washington State Bar Association starts its second fifty years a healthy and active organization. For those members who did not attend the Convention in Spokane—you missed a good one! Some twelve hundred attendees will, I'm sure, join me in congratulating and thanking the Spokane County Bar Association, its president, Gene Huppin, and its Board of Trustees for their work in staging a fine luncheon, and for their generous hospitality throughout the entire Convention. I certainly would not want to overlook 5th District Governor Joe Delay, who played no small part in acting as liaison between the Board of Governors and the staff on the one hand, and the Spokane Bar Association on the other. Joe must have a direct pipeline, because the weather, after a shaky start on Sunday, turned simply superb for the remainder of the Convention.

One of the pleasant assignments of the incoming State Bar president is to meet with the local bar association presidents or their representatives during the Convention. This year I am delighted to say that for the first time, thirty-four local bar associations out of thirty-four were represented.

The purpose of these twice-a-year meetings is to keep our local bar associations well informed on matters concerning the practice of law and the Washington State Bar Association. The meetings, one in May and one at the Annual Convention, have been held for the past ten years, and have clearly proven their worth in providing a way to get information to the bar associations and, most importantly, to give them an opportunity to be heard about their needs, concerns or wishes. I think this is particularly good for the smaller associations that sometimes tend to feel "left out." One of the projects, if not the prime project, of my year as president will be to develop more frequent contacts with the smaller bar associations in particular, and to develop some programs for an ongoing liaison relationship between these associations and Bar Staff. The problem is complicated, because there are a number of local bar associations, they are widely dispersed around the state, and each bar association has its own particular time for election of officers. Nevertheless, some positive steps can and should be tried, and I intend to see what can be done along those lines.

The major item on the agenda at the meeting with the local bar association presidents was the number one priority of the Washington State Bar Association this year: support of Senate Bill 3208 increasing salaries of our judiciary to a level that will retain the quality of the bench as it exists, and also attract well-qualified lawyers to consider the bench hereafter as vacancies occur.

The Board of Governors, in its August meeting, *and* the WSBA, at its Annual Meeting, adopted a resolution urging the passage of Senate Bill 3208. This Bill reflects the recom-

mendation of the Judicial Salary Commission that the compensation of Superior Court judges be increased to \$60,000. Our Superior Court judges' present salary—they haven't had a raise since 1980—ranks them 46th of 50 in the United States, and 49th of 50 if the cost of living in a state is considered a factor. The salary of a judge at the Court of Appeals would be increased to \$63,000, and at the Supreme Court to \$66,000.

The quality of our judges has a direct impact on the interests of our clients. Our sense of responsibility to the client alone should make us, as lawyers, want to take the lead in seeing that this grossly unfair situation is corrected. Beyond that, I think our sense of professional responsibility to lawyers who have assumed, often at our urging, a career of public service on the bench would dictate our strong support of adequate compensation. I urge all lawyers to contact their legislators, and the media, and, most of all, to tell their clients that the Bar needs support from these areas to help us keep our judicial system from eroding because of continued neglect.

I am proud of my profession and of the Washington State Bar Association. Needless to say, when I stop long enough to focus on the fact that I am representing it as its president, I am almost overwhelmed by the thought. I will try to serve well, following the examples of Paul Steere and others who have preceded him. The Board of Governors is strong and able. Gone are stalwarts like Julian "Pete" Dewell of the 2nd District, Dale Read of the 4th District, and Bob Beezer of the 7th District; but, as always, their replacements are of equal talent. I look forward to working with the holdover members of the Board, and with new members Ted Zylstra, Don Bond, and Betty Bracelin. It will be a busy and challenging year.

# Using an

**Y**our success or failure as a trial lawyer depends upon your ability to effectively examine and cross-examine expert witnesses. This statement should not surprise you. The use of expert testimony is increasing "by leaps and bounds" in both civil and criminal litigation. The victor in the "battle of the experts" is the victor in the case.

This increased use of expert testimony is very much affected by the Washington Rules of Evidence (ER) adopted April 2, 1979, which were patterned after the Federal Rules of Evidence adopted January 2, 1975. If you think these new rules of evidence do not change the old practices, *you're wrong!*

Since there is already a plethora of legal literature on the subject of expert witnesses, including other articles in this issue, this article addresses just a few aspects of the subject, with some practical suggestions from the standpoint of a trial judge. In keeping with that idea, this article does not contain citations to the numerous cases and authorities on the subject.

## SUBJECTS OF EXPERT TESTIMONY

Under ER 702, expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." It is true that the language of the rule is broad and the rules of evidence are liberally construed by the courts to permit the admission of expert testimony. It is also true that judges are more likely to get reversed for refusing to admit than for admitting expert testimony.

Even so, not all such testimony is admissible, and you, as opposing counsel, should have as many viable objections in mind as possible. The following paragraphs comment on some of the most common possible objections:

1. *Object to the opinion testimony if it is not relevant to an issue in the case.*

2. *Object to the opinion testimony if it is a matter of common understanding and knowledge;* if such, the jury does not need any expert help. For example, an expert testifying that the stairway was safe or dangerous; if the jury hears the facts, it does not need any help from an expert.

3. *Object to the testimony if it is not generally accepted as reliable within the scientific community.* Many courts, including Washington's, follow the "general acceptance standard" as to scientific evidence. The theory is that if the principle or technique upon which the expert bases an opinion does not have a measure of acceptance in the scientific community, it is not reliable, is likely to confuse the jury, and is not admissible.

The objection is likely to arise when expert testimony is based on newly discovered scientific information. Refusal to admit the results of a lie detector examination or the manner in which breathalyzer ampoules are retested are examples



of the application of this standard. Even though this standard was developed prior to the new rules, in my opinion, our court will continue to follow the standard, but will likely apply it more liberally.

4. *Object to the testimony if it is an opinion on a question of law.* Under ER 704, opinion testimony is not excludable, because it embraces an ultimate issue to be decided by the jury; the point of impact based upon skid marks is an example. However, testimony is excludable if it is an opinion on a matter of law (the defendant was negligent, or the defendant is guilty are examples).

An expert is not competent to tell the jury how to apply the law or what conclusions to reach—that would be invading the province of the jury. In determining whether the matter is an opinion on an ultimate issue (admissible) or a matter of law (inadmissible), the court, in the exercise of its discretion, will sustain the objection if the expert is trying to tell the jury what the verdict should be.

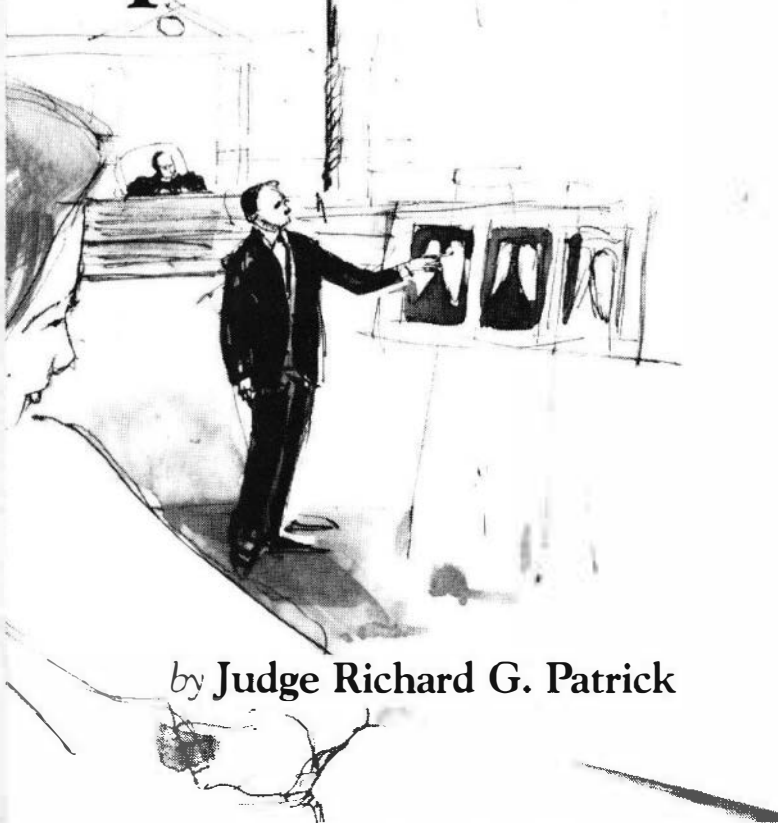
5. *Object to the testimony if the opinion amounts to no more than conjecture or speculation by the expert.* You would use this objection in a situation where you had reason to believe the expert was not thoroughly familiar with all the facts and circumstances involved in the case, and so could not testify in terms of reasonable probabilities.

## DIRECT EXAMINATION

The discussion under this section will include the procedures for qualifying an expert, what the expert may rely

*Judge Richard G. Patrick has sat on the Superior Court bench for Benton and Franklin Counties since 1969. A University of Michigan Law School graduate, he practiced law in Pasco from 1952 to 1969. He was president of the Superior Court Judges Association from 1979 to 1980.*

# Expert at Trial



by Judge Richard G. Patrick

upon in arriving at an opinion, the techniques used by a proponent for eliciting the opinion of an expert, and what the judge may require of the proponent before an expert opinion is permitted.

## Hearsay

On what may the expert witness rely as the bases for an expert opinion? Before the new rules, there were three common ways for the expert to obtain the facts or data:

- by personal first-hand knowledge of the relevant facts made known before the hearing,
- by listening to the witnesses in court, and
- by hypothetical questions asked the expert on the stand.

ER 703 makes a *radical* change in practice. Now the expert can rely on facts or data of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, even though the facts or data are not admissible in evidence. The practical effect of ER 703 is to create another exception to the hearsay rule.

The data must be the type customarily and reasonably relied upon by experts in the field. The court will make the determination whether the reliance by the expert on the hearsay data is reasonable.

Most lawyers, even though they have read the new rules, do not realize the full impact of this matter. The typical hearsay objection will not suffice. Instead, the objection should be that experts in the field do not customarily and reasonably rely on such facts and data in forming their opinions; therefore, the opinion is inadmissible.

## Techniques for Eliciting Opinion

What techniques can a lawyer use in getting the expert opinion before the trier of fact? "Unless the judge requires otherwise," under ER 705, three of the possible scenarios are set forth below:

1. Once the expert has been qualified, the lawyer may ask the expert to state the opinion and give the reasons therefor "without prior disclosure of the underlying facts or data." Again, ER 705 is a *radical* change in traditional procedures. Under this procedure, the opponent would be required to ferret out the underlying facts and data by cross-examination as contemplated by ER 705.

Even though the proponent could do so, it may not be wise to proceed in this manner, keeping in mind that the proponent is trying to persuade the jury on a particular theory which might better be accomplished if the jury knew the underlying data. Further, the proponent might consider the possibility that opposing counsel will not opt to cross-examine the expert, choosing instead to present opposing counsel's own expert to establish a theory. In that event, the opinion might fall flat since the underlying data is not before the jury.

2. After qualification, the lawyer may ask the expert to set forth the underlying facts and data, and then ask the expert to express an opinion and the reasons therefor. Or conversely, the lawyer may ask for the opinion, and then ask the expert to set forth the underlying facts and data immediately thereafter.

3. After qualification, the lawyer may ask hypothetical questions relative to facts and data, and then ask the expert to state an opinion and the reasons therefor.

Since everything the expert relies upon does not need to be supported by evidence under ER 705, the hypothetical question is no longer required. Even so, many lawyers are accustomed to its use and the opportunities it affords for summing up data for the jury. The rules do not prohibit its use. If used, the hypothetical can be streamlined, and it will no longer be necessary for the court to check off each fact contained in the hypothetical to be sure it is either in evidence or will be in evidence. Even though some counsel like the hypothetical, the court will probably discourage its use.

## Qualifications

In qualifying an expert witness under ER 702, remember that you are trying to establish two things:

- the witness's *competency* to render an expert opinion, and
- the witness's *credibility*.

Lawyers always recognize the former but sometimes forget the latter. They go through the qualification procedure mechanically, primarily for the benefit of the judge, realizing that the witness will probably be accepted by the court as competent. They fail to take full advantage of this opportunity to impress the jury and establish the expert's credibility.

Do not stipulate to qualifications as a time-saving suggestion by opposing counsel. The opposition does not want to



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hear what an impressive person your expert really is. It would be error for the judge to require that you accept such a stipulation since you are also establishing credibility by going through the qualifications.

If your expert does not have a written listing of qualifications and accomplishments, ask your expert to prepare one for you. It is a good basis for your own questioning and serves to remind the expert of what should be covered. Do not be bashful.

Opposing counsel is unwise to *voir dire* the expert unless counsel truly believes the expert is incompetent or counsel is trying to make a particular point. When the judge rules that the witness is qualified, which is most likely, the jury perceives such ruling as a victory for the proponent of the expert, and this enhances the expert's credibility.

Upon completing qualifications questions, some counsel will ask if the court accepts the expert as qualified. As you would expect, the judge will be cautious about commenting but will usually respond by stating that if there are no objections by opposing counsel, you may proceed.

In short, do not overlook the opportunities you have during the qualifications procedure.

### What the Judge May Require

When, under ER 705, will the judge require that the underlying facts and data be divulged before the opinion is elicited? What will the judge require? That obviously depends upon what objections are made by opposing counsel. If opposing counsel objects to an opinion before the underlying facts and data are divulged by the expert, the judge has a number of options depending upon the thrust of the objection:

1. The judge may overrule the objection, and let the expert give an opinion without disclosure of the underlying facts or data. The rule contemplates that the underlying facts can be brought out on cross-examination. Besides, it might save considerable time.

The judge would be more likely to follow this procedure if discovery by opposing counsel had been extensive, such as it often is in many civil cases; opposing counsel already knows the facts and data and can bring out what is desired on cross-examination. However, if the discovery has been rather limited, as it often is in criminal cases, then opposing counsel may not know all of the underlying facts and data, and the judge might well require such to be disclosed prior to the opinion being given.

2. The judge may sustain the objection and require the underlying facts to be disclosed first by requiring the proponent to lay further foundation for the opinion. Or, the court may allow the opposing counsel to *voir dire* the expert relative to the facts and data before allowing the opinion.

3. The judge may order a hearing outside the presence of the jury under ER 104 to determine a number of questions: What data is the expert relying upon? If the data is inadmissible, is it reasonable for the expert to rely on such data? Is

Make sure your expert knows how certain he must be. Certainty to a reasonable possibility won't "cut the mustard."

the opinion sought a proper subject for expert testimony? Et cetera? Opposing counsel would want to ask for such a hearing if counsel had a good faith basis for believing that the opinions sought to be offered will ultimately be inadmissible. This prevents the "unringing of the bell" problem.

4. The judge may require the proponent to proceed by hypothetical questions to the expert. Although a unique case might require such a procedure, in the usual situation the court is unlikely to require hypothetical questions.

5. The judge may, upon request from opposing counsel, give a limiting instruction under ER 105 if the data on which the expert relies is inadmissible hearsay. After all, ER 703 does not make the hearsay admissible even though the expert relied upon it. Even so, counsel would be well advised to proceed cautiously with such a limiting instruction, as it would probably have the effect of highlighting that testimony to the jury.

There are, of course, many other possibilities which are not thoroughly discussed above.

### CROSS-EXAMINATION

There is nothing sacrosanct about an expert; you can cross-examine the expert just like any other witness. In this regard, keep in mind Irving Younger's "Ten Commandments of Cross-Examination" found in his book, on the *Art of Cross-Examination*.

A good way to impeach your opponent's expert witness is to show that the expert's opinions are inconsistent with established writings on the subject. The procedure for you to accomplish this is much simplified by ER 803(18), which makes learned treatises an exception to the hearsay rule under certain circumstances. There is a noticeably increased use of this procedure by lawyers.

This is how you do it. First, you must establish the writing as a reliable authority on the subject at issue. This can be done in any one of three different ways:

1. Get the witness to admit that the writing has been relied upon in forming the expert opinion. (This may not be easy to do.)

2. Get the witness to admit that the writing is reliable and authoritative, even though not relied upon in forming the expert opinion. If the witness is prepared for this and is unwilling to help you out, you can use your own expert witness, or any other expert witnesses for that matter, to establish that it is a reliable authority.

3. Get the court to take judicial notice of the writing. This will be difficult unless it is something very well known, such as the current edition of *Gray's Anatomy*.

Once you have established the writing as authoritative, you can read from it to the jury, but you cannot introduce it as an exhibit. It all comes in as substantive evidence; no longer will you need to concern yourself with a limiting instruction that it is to be considered for impeachment purposes only and not to prove the truth of the matter asserted.

You can even use a writing to bolster your own expert's direct testimony. Simply establish that it is a reliable authority used by your expert in forming an opinion, and the appropriate part of the writing can be read to the jury and is considered as substantive evidence. However, the rule is not a substitute for an expert witness. You would not be able to get this type of material into evidence except through an expert witness on the stand.

Since this technique is being used increasingly more often, you must learn from your own expert prior to trial what writings are consistent and what writings are inconsistent with the expert opinions. Consistent writings can be used to bolster the expert's testimony, and to prepare you for the cross-examination of your opponent's expert. You need to know

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about inconsistent writings to prepare your witness for cross-examination by opposing counsel, who is very likely to be using such inconsistent writings to attempt to impeach your expert witness.

Do not overlook ER 803(18) just because it is included in a long list of hearsay exceptions.

### PREPARING THE EXPERT FOR TRIAL

Although by no means exhaustive, the following paragraphs are a potpourri of practical suggestions for preparing your expert for the courtroom:

1. Make sure your expert knows how "certain" an expert must be. The lawyers and the judges know that expert opinions must be based upon reasonable probability or reasonable certainty; reasonable *possibility* won't "cut the mustard." Professional expert witnesses will know the magic words, but the doctor, or other expert, who is testifying for the first time, may not. If a cross-examining lawyer senses that the expert is not aware of these distinctions, the lawyer may destroy the expert and successfully get the expert testimony stricken. I have seen this happen a number of times. Be sure your expert knows the magic words.

2. Experts are most effective if they are direct and sincere, and express themselves in simple terms that everyone will understand. Remember when presenting expert testimony that if you do not understand what your expert is trying to ex-

plain, neither does the judge or jury. In this connection, prepare your experts and present your testimony the same way whether you are playing just to the judge or to a judge and jury.

3. A witness who is polite and does not argue with the cross-examining lawyer and responds with "yes, sir" or "yes, ma'am" type answers impresses the trier of fact whether it be judge or jury.

4. Suggest to the expert that the testimony be explained by way of an illustration or by way of analogies whenever possible; stepping down from the witness box to the easel to illustrate with a simple drawing can be particularly effective, because it gets the attention of the jury and helps them better understand the testimony.

5. Many experts make lousy witnesses. Some doctors are particularly bad. In the first place, they dislike testifying in court and, in the second place, they are often poor communicators. In spite of it all, they might appreciate a few suggestions. Instruct them to speak up and enunciate what they have to say. Remember that many courtrooms do not have a public address system. Do not let them read from the medical report any more than is necessary. Punctuate the medical history and medical examination testimony with questions to break it up and make it more interesting for the jury.

6. Your expert must be prepared to recite the litany of everything that has been considered in making an opinion.

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A question of this tenor is always asked, usually in both direct and cross-examination. If your expert is adequately prepared for this question, the jury will be more impressed.

7. If you are in a case involving considerable technical expert testimony, and can possibly afford it, do not hesitate to use a consulting expert, or your own testifying expert, for advice. In many situations, having your own expert present when the opponent's expert is testifying can improve upon your own expert's testimony if your expert has not yet testified, as well as being helpful to your understanding of technical matters.

8. Often an expert witness who is candid in other respects gets befuddled in explaining that a fee is expected for testifying and the amount of the fee. Obviously, the jury does not expect a highly qualified person to do all that work for nothing; so tell your witness to be prepared and give a direct answer. Also, the expert should understand, and so should the attorney, that it is unethical for an expert to be paid on a contingent fee basis.

9. There may be exceptional circumstances in which an unwilling expert witness could be subpoenaed. In such a situation, the witness would not be limited to the statutory witness fee but would obviously be entitled to a fee as an expert. Were those affected unable to agree, the court would set a reasonable fee.

No effort is made here to discuss the many aspects of pre-trial discovery as it relates to expert witnesses. Admittedly, this is extremely important, but the emphasis here has been primarily on the trial itself.

### CONCLUSION

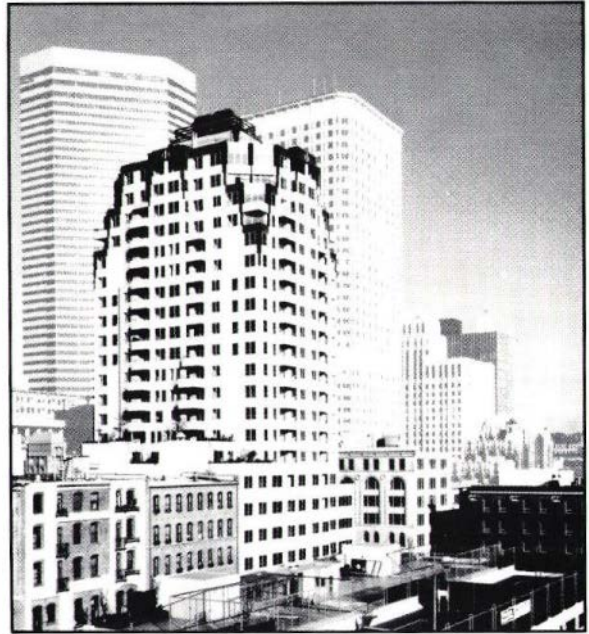
Many judges are concerned about the way in which professional expert witnesses sometimes dominate trials. As lawyers, we know there are two sides to everything, but the so-called "battle of the experts" seems sometimes to get out of hand. It is expensive, time-consuming, and sometimes bewildering to jurors.

In this connection, the court will, on occasion, grant a request to limit the number of expert witnesses each side will be permitted to call during the trial. Such a request is sometimes prompted by the fact that one party to the litigation is better equipped financially than the other to obtain expert testimony.

Another idea is to have the court appoint an expert under the detailed provisions of ER 706. At first blush, this sounds very appealing. But can you tell the jury that the witness is appointed by the court? Such comment would probably cause the jury to give undue weight to the witness's testimony. And it would probably be an unconstitutional comment on the evidence. After considering some of the problems raised by the use of this procedure, it would probably be impractical except for non-jury cases, or jury cases where both counsel were in substantial agreement, which, as you know, is unlikely in most cases. □

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**—Winston Churchill**



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# Choosing the Right Expert Witness



by Douglas W. Purcell

**I**n the past several years, two sets of circumstances have combined to significantly increase the impact of expert witnesses on the course of litigation.

One contributor has been the rapid acceleration of the number and complexity of issues which are the subject of litigation.

A second has been the adoption of Rules 702 through 706 of the proposed Federal Rules of Evidence by the United States Supreme Court in the mid-1970s, and their subsequent adoption by many of the states, including the State of Washington (the rules became effective in Washington on April 1, 1979). The rules expanded both the uses of expert testimony and, at least as subsequently interpreted, the definition of an expert.

According to Rule 702, an expert may have become such by reason of his or her knowledge, skill, experience, training or education. This broad statement of the basis for expertise has reduced the threshold level necessary for qualification as an expert. For instance, the Washington Supreme Court has recently held that a witness not licensed to practice medicine was not precluded by that fact alone from testifying as to a doctor's standard of care in a medical malpractice case. *Harris v. Groth*, 99 Wn.2d 438 (1983). The extent of expertise goes to the weight to be accorded the testimony rather than its admissibility. It remains clear, however, that some threshold level of expertise must be proved.

The purpose of this article is to help the lawyer who has identified a circumstance in which "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and, consequently, goes searching for "a witness qualified as an

expert by knowledge, skill, experience, training, or education." This article attempts to answer the question "Who is the right expert witness?"

In answering that question, one must evaluate the purpose for which an expert witness is brought into a case. For purposes of this discussion, it is assumed that the lawyer has identified an issue about which he or she believes that an expert with some particular scientific, technical, or other specialized expertise will be either necessary or useful in best presenting the case to the ultimate trier of fact. It is also assumed that counsel wishes to use the expert as a pretrial aid, both in developing the specialized aspects of the case and in presenting the technical information to the trier of fact as a witness at trial.

## THE EXPERT'S ROLE

If one were to ask for perfect participation by an expert witness in the course of a lawsuit, one would look for an individual who could

- bring particular specialized knowledge to bear on the exact question which the lawyer is attempting to present;
- utilize that specialized knowledge from an early stage in the lawsuit to help develop and test various theories upon which the lawyer is attempting to base the legal arguments;
- develop an integrated, independent opinion which supports one or more of the lawyer's theories;

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*Douglas W. Purcell is a partner in the Seattle firm of Davis, Wright, Todd, Riese & Jones. He received his J.D. at Harvard in 1973 and tries civil cases in a variety of areas ranging from plaintiff's personal injury to securities law defense.*

—present that opinion and its basis to a lay jury in a manner which is wholly believable;

—defend the opinion against rigorous and skillful cross-examination, acknowledging its difficulties as necessary without appearing arbitrary or biased; and

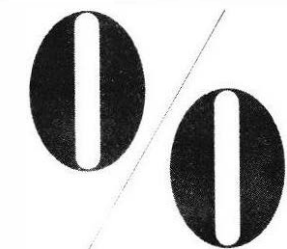
—do all of the above for a fee which is commensurate with the expected importance of the testimony to the case.

How does counsel locate a person who might qualify? How does one determine which of those found will perform this role? These are the two questions this article attempts to answer.

As an initial *caveat*, the issues raised by these two questions are *practical* as opposed to *legal*, and generally *subjective* as opposed to *objective*. Consequently, the views expressed in this article result from the author's perceptions as developed by his experience and thought processes, interviews with other trial lawyers, and a review of various pieces of literature on the evaluation and use of expert witnesses. The traits attributed to expert witnesses and the means of evaluation described are more a developing process than a concrete structure.

## LOCATING & EVALUATING AN EXPERT

Locating an expert witness raises three questions: Why? When? and How? This discussion assumes "Why," and tries to answer "When" and "How."



Skip Foss et al

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## "When" to Find an Expert

Generally an expert witness should be sought as soon as the need is identified. Various aspects of the role of the expert are enhanced by early contact:

- The expert can become actively involved in helping to identify the issues which counsel is likely to face in the course of the litigation.
- The expert may have access to important pieces of evidence which counsel may have let get away or which might deteriorate or otherwise become unavailable by the passage of time.
- The expert will have time to perform the necessary steps to develop an independent analysis rather than being brought in at a later time to confirm counsel's conclusions.
- The expert and the lawyer can begin to develop the rapport which will enable them to work together throughout the case.

## Locating an Expert

Prior to actually locating an expert, counsel should have developed a sufficient concept of the issues. This conceptual development may, at least in the early stages of some cases, be an easy determination. In an injury case, the lawyer has no difficulty determining the need for medical expertise. Likewise, for issues raised by a case of accounting malpractice, one would look to the accounting profession as the source of one's experts. Even these two "easy" cases can raise some difficulties, however. For instance, one would not want an internist as an expert in a case where the issues arise from performance of orthopedic surgery, nor would one want a tax accountant as an expert in a case where the allegations concern a negligent audit.

A construction case or injury arising from an alleged defect in a building offers a more concrete example of the lawyer's need to develop an initial concept of the theory of liability. If the theories revolve around overall development and supervision of the construction, an architect might be the appropriate expert; if the theories revolve around structural issues, an engineer could be the appropriate expert; or, as may frequently be overlooked, if the theories involve technical issues of application, the foreman or onsite job superintendent might be the most logical expert.

## Read the Literature

In developing the concept of what expertise is appropriate, the lawyer should review and be comfortable with the literature covering the particular issues raised by the lawsuit. Such a review serves three purposes:

- It allows the lawyer to develop some sense of the specialized knowledge being sought.
- It begins the lawyer's education process on the subject of the lawsuit (a process which will hopefully continue throughout the course of the lawsuit).

Jurors tend to believe an expert who tells them what does happen, rather than one who tells them what *should* happen.

- It enables counsel to talk with the potential expert witness from a knowledgeable standpoint, so as to determine with some validity whether or not the expert will be appropriate.

#### *Consult Colleagues*

Once counsel has a general category of expertise and some specific possibilities in mind, he or she must next locate particular individuals within this category. Alternative methods of locating expert witnesses are about as many as the facile minds of litigators can develop.

The single most popular source for locating individual expert witnesses appears to be other members of the bar who have had prior experience in similar lawsuits with particular experts. This procedure has the benefit of providing both the names of particular experts and a significant amount of in-

put about the performance of the experts while working with other lawyers. The mere fact that an expert has been referred to counsel by a fellow lawyer should not, however, preclude the full evaluation process which is described in this article.

Additionally, professional bar organizations frequently maintain lists of expert witnesses and the lawyers who have used those experts.

#### *Call a University*

Universities and university hospitals are a frequent source for names of experts both within and without the university community. Universities and university hospitals have an advantage over private industry in that they are divided along areas of expertise. If one wants to talk to a Professor of Electrical Engineering, one simply calls the university and asks for the Department of Electrical Engineering (assuming, of course, that there is a local or regional university and that it has a Department of Electrical Engineering).

One attempting to find an electrical engineer in the private sector does not necessarily have the same sort of access to a discrete segment of a company or industry, since electrical engineers employed may serve various functions within the company or industry. (However, as indicated hereafter, the additional work necessary to locate an expert with practical rather than academic experience may well be worth the effort.)

Frequently, counsel's client, or the client's responsible employee, will know or have access to the names of in-



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dividuals working or otherwise involved with the same types of work. Such sources are frequently very accurate in terms of the areas of expertise which are required but must be carefully evaluated for potential bias.

### *Check the Library*

Libraries are a significant source of information on a variety of topics related to the location of experts. First, in reviewing the literature, one can identify and locate specific individuals who have written or developed written work in the particular areas of expertise which the lawyer is attempting to address.

Additionally, libraries can provide lists of individuals enrolled in societies or associations pertaining to a specific subject or area of expertise. Many of these societies or associations

also serve as certifying boards, so that an individual's appearance on a particular list may both describe activity in a particular area and certain minimum qualification standards in connection with that area of expertise.

It is necessary in using these types of sources that counsel understand the purpose of the particular society or association. A lawyer's Fellowship in the American College of Trial Lawyers says something different about him than does his membership in the American Bar Association; that same sort of difference may be reflected by an expert's membership in particular associations or societies.

### *Use the Phone Book*

The Yellow Pages of the telephone book divide many segments of our technologic society into categories of

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## Observations from an Expert Witness

by Henry V. Benson, Jr., C.P.A.

**T**hese are the cardinal rules attorneys should remember when retaining an expert witness.

I. The most important thing that an attorney can do is contact an expert *as early as possible*, so that he can obtain the necessary information, and have plenty of time to prepare properly for the case. Too often, an expert is called just a few days before trial, which makes it difficult, if not impossible, to perform the best service to the attorney and the client. The expert also needs to know as early as possible when he may be called to testify, so that he can arrange his schedule accordingly.

II. The expert witness should prepare an engagement letter with a *clear understanding* of what he is to do, who is to pay the fee, who is the client, and what the expert's role is going to be.

III. The attorney should outline a timetable for the expert so that the expert knows what is expected of him, and should provide the expert ample time to review documents and perform whatever work is necessary to express his opinion, and further, provide him time to review his opinion with the attorney. If depositions are necessary, the expert should review his findings with the attorney prior to deposition.

IV. The expert should help in the preparation of exhibits, charts, and graphs for the court, in as clear and concise a manner as possible, and in as non-technical a language as possible.

V. The attorney should review the case with the expert *from both points of view*, so that the expert has an understanding of what allegations are for both the petitioner and the respondent. The expert should read all depositions which might affect his testimony.

VI. It is helpful for the expert to be informed of who the expert is on the opposing side. Listening to that expert's testimony or deposition can enable your expert to rebut such testimony, if necessary.

VII. It is critical that the expert know all of the issues involved, so that he does not receive any surprises when on the witness stand, or in deposition.

There is no substitute for good, careful preparation. Reviewing questions and answers with the attorney before trial and trying to anticipate questions to which the expert might be subjected on cross-examination is a good investment of time.

The expert should also know what papers can be subpoenaed from his records or made a part of the court record, so that he is not embarrassed when he attends a deposition or trial.

Frequently, an expert, with his specialized knowledge, can assist the attorney in proposing a settlement for the case.

The expert should meet the party for whom he is testifying and converse with him or her about the case. It can also help the expert, especially when a business evaluation is required, to visit the premises of the client's company.

The careful preparation of an expert, and close cooperation between the expert and the attorney, can relieve many frustrations. Cooperation and preparation spell success for the client.

---

*Henry V. Benson, Jr., C.P.A., has consulted with at least 25 lawyers on approximately 200 lawsuits. A 1941 graduate of the University of Washington, Benson is past president of the Washington Society of C.P.A.s and a member of the State Bar Fee Arbitration Board.*

specialization on very broad bases, and, as with doctors, for example, a very specific area of expertise can be identified. Various other publications describe expert witnesses by name, among them *Jury Verdicts in Washington*, (which offers the advantage of naming the lawyers who have both used and opposed each particular witness).

Both of the national on-line computer research services contain lists of expert witnesses by specialty. The lists are derived from *The Forensic Service Directory*, published by The National Forensic Center in Princeton, New Jersey. The experts on this list appear primarily as a result of self-application, and are generally self-described. Consequently, mere listing as an expert witness should not preclude a full evaluation. However, such sources can be especially useful in circumstances where the expertise required is esoteric, or it is useful to obtain names of various individuals in a particular industry or area of expertise so as to better evaluate expert witnesses in the local area, or discover which experts are generally accepted as being leaders in the field.

Each of these sources, and many others counsel can devise, will develop the names of individual experts within a field of expertise, one of whom may be able to fulfill the goals desired from the services rendered by an expert witness. In order to determine whether that individual will, in fact, fulfill those goals, the lawyer needs to review the expert with particular characteristics in mind which, if met or accommodated, will provide the lawyer with an expert who will best fulfill the goals set by counsel for the prosecution and trial of the lawsuit.

### Characterizing an Expert

An expert witness, to be useful to an attorney at trial, must be a credible witness. However good the expert witness, he or she will not be able to teach either a lay jury or judge enough about the area of special expertise so as to allow each of them, in effect, to become an engineer or a doctor. Consequently, the jury or judge must believe in, and rely upon, the expert's opinion. The trier of fact

—must believe that the things the expert says about his field of expertise are true;

—must believe that this expert has appropriately applied his or her expertise to the facts of the particular case; and,

—ultimately, must believe that the opinion expressed by the expert as to the interaction of the facts of that particular case and the specialized knowledge is a valid conclusion.

In order to achieve this credibility, an expert witness must bring the facts of the case as those facts interact with his or her special expertise, within the practical and common sense belief structure of the judge or jury, in a way which will allow the trier of fact to make the inference, render the verdict, or grant the judgment sought by the lawyer offering the expert witness.

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By constructing a model of those characteristics of an expert witness which most lend themselves to developing and maintaining credibility, it is possible to develop a series of questions and procedures which counsel can utilize in both choosing one's own expert witnesses and determining areas of significant vulnerability in the expert witnesses offered by his opposition. In the context of developing such a model, it is necessary to recognize that the "ideal" expert witness probably does not exist, and the evaluation of an expert will, in reality, call for the balancing of the pros and cons of various of the factors, so as to determine how well a particular expert witness will serve the role the lawyer seeks to have him play.

### 1. *Is the expert independent?*

The expert's role differs from the lay witness's role in a very important way. The lay witness is asked to describe the facts as he or she recalls them. A trier of fact generally recognizes that the lay witness's perception of fact will be colored by his or her personal bias or interest in the case; so the trier of fact adjusts his or her perception of the facts revealed accordingly. The expert witness, on the other hand, is expected to perform the processes of applying specialized knowledge to a series of facts which are externally presented (that is, in which the expert has no interest) and to arrive at a conclusion based upon the interaction of those facts with that specialized knowledge.

If the expert witness is unwilling to advise you of the weaknesses of your case, you are liable to discover those weaknesses at trial.

If the trier of fact does not believe that the expert is independent, this process is short-circuited, because the trier of fact is then going to apply the same adjustments for bias as are applied in the case of interested witnesses. A significant risk in the course of expert testimony is the possibility that the expert will convey to the judge or jury the impression that he or she is an active advocate on behalf of the litigant. Counsel should be aware that the appearance of advocacy can arise not only out of the expert's identification with the litigant (or counsel), but also as a result of the expert's espousal of a particular cause which the expert believes to be related to the issues raised by the litigant. Under such circumstances, the credibility of the expert witness can be seriously undermined, if not totally destroyed.

The independence of the expert witness also serves two additional useful functions associated with the goals set forth in the introductory paragraph. First, a truly independent expert will test the theories offered by counsel by refusing to blindly accept counsel's characterizations of facts and other matters. Consequently, the expert can help counsel narrow the theories of his case to a concise and believable structure. If the expert witness is unwilling to advise counsel of the weaknesses of the case, counsel is liable to discover those weaknesses in the course of trial. The opposing experts can destroy weak theories, casting doubt on the remaining theories which, had they been earlier identified and presented without the encumbrance of the questionable theories, might well have persuaded the jury.

Second, unless the expert has arrived at an independent conclusion (as opposed to simply supporting counsel's opinion), the expert will be less able to present that conclusion in a credible manner, and will certainly be more susceptible to rigorous cross-examination by the opposition. (The expert's opinion should not be *different* from counsel's opinion, but arrived at by an independent analysis.)

Nor should the expert be *too* independent. The lawyer is the expert on how the case should be best presented. The expert witness should be willing to take direction from the lawyer and litigant, and allow the lawyer to provide the focus for the expert testimony.

## 2. Is the expert honest?

The integrity of the expert is closely tied to the issue of independence, although it also affects a wide variety of questions of credibility, in not only expert witnesses, but also in lay witnesses. Essentially, the issue of honesty has to do with whether the expert believes his or her own opinion. If not, then, in all likelihood, the trier of fact is not going to believe the expert either.

## 3. Is the expert competent?

The issue of competence (in a practical rather than a legal sense) has several facets:

(a) *Does the expert have the natural intelligence to formulate and defend his or her opinions?* Facility of mind is a great benefit in an expert witness who will be required to take the stand alone against rigorous cross-examination.

(b) *Does the expert have the specialized expertise required for this particular case?* Society tends to divide areas of knowledge into broad categories. Consequently, an expert may have generalized knowledge about a particular subject, but the testimony may lose credibility when contradicted by an opposing expert with expertise in a more narrowly focused sub-specialty which is the exact subject of the lawsuit. Such a situation could come about if counsel focused too heavily on the credentials of the expert witness, and not his or her experience.

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For instance, a highly regarded, intelligent real estate appraiser, with all the necessary certification and honors and twenty years of experience, may be the wrong expert to use if his education and experience has been devoted to the appraisal of commercial office space, and the issue before the jury is the value of an apartment building. Likewise, the best real estate appraiser in New York City probably does not have the specialized knowledge of the Seattle market required to be an effective expert on Seattle real estate. Note that in each of these cases, the individual would probably qualify easily as an "expert," and be allowed to testify. However, the weight of the testimony would be seriously impacted by the fact that the expertise is not sufficiently specific to the issues in the case.

(c) *Did the expert obtain the specialized knowledge in a way which will be convincing to the judge or jury?* It is sometimes easy to confuse articulateness (see below) with competence. Articulateness has to do with how well the expert explains his opinion. Competence has to do with the basis for the knowledge which went into formulating the opinion.

Of primary importance in choosing an expert witness is the basis of the special knowledge. The best basis for most types of expertise is *experience*. Both the professional witness (one who spends his time testifying about his area of expertise) and the academic (one who teaches about and does research in his particular area of expertise) lose credibility when

opposed by the expert who has day-to-day responsibility for performing the tasks which are the subject of the expertise.

Of course, fields of expertise exist in which no real practice occurs. Also, questions can arise which are so esoteric that the practical expert may never have to deal with them. Under those circumstances, experts further removed from the day-to-day practice would be appropriate. However, for the most part, jurors tend to believe an expert who tells them what *does* happen, rather than one who tells them what *should* happen.

#### **4. Is the expert hardworking?**

The use of the phrase "hardworking" is meant to convey the sense that the expert is willing (native intelligence and special expertise having provided the ability) to perform all those tasks which are necessary to reach an independent reasoned opinion. The expert's opinion requires the application of specialized knowledge to a particular set of facts. In order for the testimony to be persuasive, the judge or jury must be convinced that the expert has performed the work necessary to understand the facts and to apply the specialized knowledge.

#### **5. Can the expert convey his opinion clearly and persuasively?**

(a) The expert should be able to speak simply, in language which is understandable to the jury, and which logically and economically describes the matters about which he or she is



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testifying. If the expert's testimony is full of jargon, or masked by indecipherable accents, or the delivery confounded by tics or pauses, the message will not reach the jury, and the expert might as well not have been called.

(b) The expert witness's demeanor should allow him to express himself in a manner which conveys to the jury

—his conviction about the correctness of his opinion;

—the importance which he attaches to the issues in the case; and

—his belief in the validity of the process by which this jury will pass upon the opinions and conclusions of the expert.

The expert cannot be arrogant or condescending. The expert must be able to respond appropriately, and calmly, to rigorous cross-examination which attempts to undermine the conclusion presented by attacking both the personal credibility of the expert and the process by which the expert reached the particular conclusion. This response must be done with a demeanor which retains the impression of independence, honesty, knowledge, and a willingness to work which, it is hoped, has characterized the direct testimony.

### Evaluating an Expert

The evaluation process involves a thorough examination of the potential expert as to education, credentials, experience, articles and publications, and prior activities as an expert witness.

Initially, it is important to ascertain that the views the expert holds are compatible with counsel's attempt to prove the identified issues. So, as the next step (having already reviewed some general literature in the area and gone through the location process), counsel should thoroughly interview by phone or in person the proposed expert. In the course of the interview, or by follow-up letter, the following topics should be discussed:

- The expert's credentials, including his education and experience, a list of which should be obtained.
- The expert's articles and publications, a list of which should be obtained.
- Prior employment as an expert witness, including cases where the expert did not testify in court, and the names and addresses of counsel by whom he or she was employed.
- The salient facts of the case as presented by counsel, and the expert's general reaction to those facts.
- The expert's area of expertise, as perceived by the expert, and as applicable to the facts.

After the initial interview, counsel should use the information obtained to follow up on the status of the expert. Calls to counsel who have used the expert previously can be very helpful in providing information on many aspects of the witness's prior performance.

The writings of the expert should be reviewed, and prior testimony by the expert should be investigated. The expert's credentials can be "checked out" to the extent that they ap-

pear unusual. References and experience can be verified if the initial contact indicates such verification is necessary.

At some early point, counsel should have a face-to-face meeting with the proposed expert (assuming much of the earlier contact has been by phone).

Each of the above steps can, and will, provide counsel with information about the expert, and a basis for choosing whether this expert is appropriate. The lawyer ought to try to answer the following sorts of questions:

#### 1. *Is the expert consistent, but not too consistent?*

Consistency is a measure both of independence and of integrity. However, consistency in the face of differing fact situations can indicate inflexibility, or a cause-oriented or one-sided attitude, which could ultimately be destructive to the witness's credibility.

#### 2. *Are the expert's assertions of competency supported?*

Practical experience and a hardworking attitude should be reflected in the credentials, the description of the expert's work in prior cases, and all articles and publications. Again, these should provide a consistent picture. The written work should be a quality product. The credentials, associations, and awards should truly reflect the expert's participation in his field, and the recognition of his peers. If his credentials appear inflated, or do not ring true, the integrity of the expert is open to question.

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### 3. *Is the expert in the right area of specialization?*

The expert's area of expertise should be explored in depth to determine that it is in fact the area which counsel wishes to exploit. In the course of this exploration, counsel should be wary of attempts by the expert to paint his expertise with too broad a brush.

### 4. *Is the expert convincing?*

Contact with the expert, and other aspects of the investigation, should expose any arrogance, lack of candor, or inability to communicate. Seriousness *and* humor are required. The expert must appreciate the seriousness of the litigation process, but not take him or herself too seriously. Above all, the expert must be able to communicate in a way which is persuasive.

### 5. *Is the expert's position compatible with the position put forth by counsel?*

Every area of expertise has its different schools of thought. If "opinions" did not differ, there would be no need for opinion testimony. Where the expert *fits* in the range of opinion is important to a determination of whether one has found the right expert. For instance, in a soft tissue injury case, a doctor may be of the opinion that soft tissue injury cannot exist in the absence of objective symptoms. Such a witness, no matter how well-qualified otherwise, would be a poor expert for the plaintiff where soft tissue injury sup-

ported only by subjective symptoms was the principal allegation of damage.

### 6. *Will the expert follow the lead of counsel?*

Without affecting the independence of his opinion, it is important that the expert defer to the lawyer in regard to trial tactics and strategy.

### 7. *Has the witness been in court too little or too much?*

If too little, the witness may be shaken by the experience and leave an unfavorable impression with the jury. If too much, the jury may simply believe that the expert's testimony is for sale.

In making the evaluation, counsel will have to strike a balance among various of the characteristics. For instance, under certain circumstances (perhaps to keep costs low), counsel may determine to use the client or an employee of the client as the expert witness. Under such circumstances, the lawyer should remember that the independence and honesty of such a witness will be questioned by the jury. Consequently, the witness's expertise, practical experience, and ability to communicate with appropriate demeanor must all be very strong. If not, the money saved by not hiring an outside expert may be lost, possibly many times over, in the litigation process.

Academics who are used to teaching, and professional witnesses who have much experience testifying, will often be extremely articulate in presenting their opinions to the jury. At the same time, they may well have little practical experience

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in the field in which they profess expertise, and, consequently, will lose a significant amount of credibility with the jury. Keep in mind that communication skills can be taught to an uncommunicative expert, but nothing a good communicator can do will give him thirty years of experience in the field of expertise.

In balancing the various characteristics, counsel should be guided by the goals and purposes the expert witness is expected to serve.

### Paying the Expert Witness

Another difference between expert witnesses and lay witnesses is that experts expect to be paid. Frequently, expert witness fees can be the most significant cost in the litigation. As with many other balancing judgments, counsel must determine when to accept something other than the "best," because of limited resources, or the minor significance of the question on which the expert is expected to testify.

The following are some thoughts about paying expert witnesses:

- Counsel for the opposition will ask about the compensation, hoping to imply that the witness is simply a hired gun, selling his opinion. This approach should be short-circuited on direct examination, and in the initial hiring process, by a clear identification of how the expert will be compensated and the services for which the expert will be paid.

- A high hourly rate does not, by itself, mean the expert will provide the best testimony for the case. The entire evaluation process is necessary for such a determination.

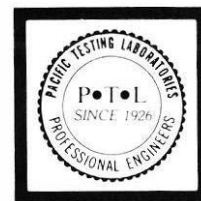
- The expert should be willing to address, with counsel, the need to control costs. This control can be established by early identification of the parameters of the expert's work and the tasks to be performed, regularly monitored by both the expert and the lawyer.

### CONCLUSION

The use of expert witnesses has expanded extensively in the past several years. With the increase in complexity of the litigation marketplace and the loosening of the common law restrictions on the use of experts, such growth can be expected to continue. Unlike fact witnesses, expert witnesses can be *chosen* by the lawyer. In so doing, counsel must review carefully the goals which he or she wishes to achieve, and identify those characteristics of an expert witness which will best serve those goals.

Once the traits of the expert witness have been identified, counsel should review extensively the expert witness's credentials, experience, articles and publications, and prior testimony, as well as discuss the expert witness's performance as witness with other counsel.

Using the "ideal" expert witness as a model, the lawyer should compare the reality to the ideal and determine the extent to which the individual proposed to be hired can fill the goals needed for the particular litigation. □



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# Lawyers, Scientists and Billiards



by Edward A. Dawson and Marcia M. Meade

**S**imply stated, the problem is a conflict between art and science. The practice of law is more of an art form; but the everyday practice of most expert witnesses is an exercise in science.

The purpose of this article is to provide information and ideas about expert witnesses that the reader has not read or heard elsewhere. It will explore some of the problems attorneys have in communicating with a scientific expert witness, suggest how to utilize the scientific thought process, and propose ways to help an expert adapt effectively to litigation.

For the sake of simplicity, the following analysis is confined to those expert witnesses that can be called scientists, and throughout this article, "expert witness" and "scientist" will be used interchangeably.

## ART MEETS SCIENCE

Generally, legal authors attempt to communicate the essentials of using expert witnesses in legal terms, rather than in scientific terms. This primarily legal approach to the use of expert witnesses carries over into the discovery process, and on into the courtroom. And this exclusively legal frame of

mind spawns many problems which are the scourge of every trial attorney.

Conversely, one would be hard pressed to find an expert witness (except in a legal malpractice case), whose expertise, and opinion, is not grounded in some scientific school of thought. When outside the courtroom, most expert witnesses perform their work in a scientific manner, rather than in the manner in which attorneys ask them to perform.

In the last two decades, numerous legal authorities have pointed out that "there is an expert in every field, no matter how esoteric the field." There has been a plethora of advice on how to use expert witnesses, and on the importance of using them in almost every type of trial. The advice has repeatedly emphasized the need to *control* an expert, whether he be yours or that of the opposition. In seminars, articles and texts, attorneys have demonstrated their methods of controlling expert witnesses.

Yet, despite the amount of information available, there has been almost no analysis of how inherently difficult it can be to predictably control an expert witness. It may help to analyze the factors which produce the differences between lawyers and scientists.

## Control Requires Understanding

Attorneys have trouble controlling expert witnesses when they are unable to effectively communicate with them. The problem stems from how we attorneys look at a situation,

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*Edward A. Dawson and Marcia M. Meade are both attorneys in private practice in Spokane. Dawson is a 1956 graduate of Gonzaga Law School, and Meade also earned her J.D. from Gonzaga, in 1980.*

compared to how expert witnesses see that same situation; we are taught to think differently.

In law school, students are taught to define the issue, which in effect is to arrive at a conclusion; then find a rationale to support that conclusion. The law teaches us to use deductive reasoning to substantiate conclusions. Deductive reasoning provides conclusive grounds for the truth of the conclusion.

On the other hand, scientists use *inductive* reasoning. A scientist analyzes an array of facts and principles before arriving at a probable conclusion. Whatever the school of thought, a scientist is taught to first collect all data in an area; then assess the data; then determine what the data shows. Only then may he or she arrive at a conclusion. The scientific method requires inductive logic. To scientists, inductive reasoning establishes a conclusion as being probably true.

The first major problem in communication between lawyers and scientists is that a lawyer, as an advocate, must go into the courtroom with firmly established conclusions. This attitude also tends to permeate all of trial preparation. A scientist may have a difficult time accepting this method of reasoning. A scientist believes it is wrong to arrive at a conclusion before collecting and examining all of the data. Moreover, once a scientist has reached a conclusion, it is hard for him or her to see conflicting conclusions as being valid.

Do not be fooled by a scientist's difficulty in acknowledging conflicting conclusions. In the scientific world, when a second conflicting conclusion is determined to be untrue, that does not make the first conclusion an absolute truth. A scientist is taught to say and believe his or her conclusion is "probably" true. In science there are few absolute truths. Conversely, an advocate states without doubt that his or her conclusion "is" the truth. The proof of liability and proximate cause can suffer because of this perceptual difference of the quality of a truth.

To understand this conflict between attorneys and scientists, one should consider a change in the method by which man, over the centuries, has explained his world. When the fundamental principles of our legal system were being developed, man made his world understandable, and hence manageable, by reliance on a system of beliefs which were based upon various religious convictions. In today's modern world, man's understandings are increasingly derived from the body of scientific knowledge. Every aspect of modern day life is affected by scientific knowledge—the courtroom is no exception. Over the years, our legal system has slowly recognized the growing presence of science. However, our system of legal education has not evolved a method to explain the impact of scientific thought on litigation.

The presence of expert witnesses in almost every trial is evidence of scientific thought permeating the courtroom. There is no question that trial work is an art form. It is the trial attorney's obligation to incorporate the science into the art form.

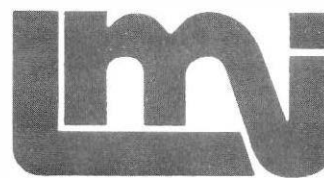
## Billiard Balls & Cue Sticks

Some of our finer trial attorneys have yet to explain how they artfully utilize expert witnesses. An analogy to a game of billiards can help to divide and define the difference between the art of an attorney and the science of an expert witness.

Assume that the attorney is a billiard player and the expert witness is a cue stick. With time and practice, an accomplished billiard player develops an uncanny ability to control the path of the ball. The billiard player may not totally understand how he controls the path of the ball; he just knows how to do it.

If one were to ask a billiard player to explain scientifically each shot, it is most unlikely that he would be able to do so. He might say that before shooting he is able to visualize each shot and the expected result. If a scientist were watching the game, he would be able to explain in scientific principles how each shot occurred.

Imagine two attorneys playing a game of billiards with just one cue stick. How effectively each attorney uses that cue stick will determine the winner. Imagine further that the two attorneys are equally skilled in billiards. If one player understands all the scientific principles in a billiard game, that player will have a substantial advantage over the other player.



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The successful billiard player knows how to predict the path of a billiard ball. By understanding what the predictable path should be, a successful player is better able to control the game.

A successful billiard player also recognizes that there are different types of cue sticks, and that the quality of the cue stick can affect the game. A seasoned billiard player knows that even the best cue stick will not win the game if he does not understand and appreciate the balance of that particular cue stick.

The power of expert witnesses' testimony on a jury should not be underestimated. There is a subtle factor in the testimony of an expert witness which may carry as much persuasive weight as his proven expertise. The subtle message an expert witness is sending to the jury is that inductive reasoning should be used to arrive at a conclusion. The judge instructs the jury to reach a limited conclusion by inductive reasoning. Just like a scientist, a juror is asked to consider all of the evidence before he or she decides. In effect, the juror is asked to be a scientist.

On the other hand, throughout the trial the lawyer *states* his conclusions; *then* tells the jury what facts or premises justify those conclusions. One can see how a juror might accept the inductive prattlings of an incompetent expert witness over the eloquent arguments of a deductively reasoning lawyer.

### THINK LIKE A SCIENTIST

Before selecting an expert witness, one should try to analyze the issues scientifically. The scientific method is an ordered process. It includes collecting data, assessing the data, evaluating the dynamics of the data, considering what the dynamics show, and then arriving at a conclusion.

The scientific method of solving problems is not a static process. At different stages of problem solving, each of the five steps may occur simultaneously. The collection of data is an ongoing process. If conclusions are reached exclusively by legal reasoning, other avenues of thought will be cut off. It is natural to discard information and ideas which do not mesh with the conclusion.

In the last couple of decades, there have been many textbooks on medicine or other sciences published specifically for legal use. There are two major deficiencies in textbooks which claim to explain the sciences to attorneys:

- The first is that they are written from *legal* analysis rather than from scientific analysis. Often, when the scientific information is analyzed legally, something is lost in the translation.

- The second deficiency is an information flow problem. For example, publishers of medical texts for attorneys wait until medical facts have been published in authoritative medical textbooks. Then the medical information has to be translated into legal jargon. By the time the information comes available to attorneys, it can be out of date by five years or more.

Materials written by and for scientists can help. Often, these materials provide a logical and natural examination outline. In almost every scientific field, someone has developed a "cookbook" method of evaluating common situations or phenomena.

In the health care sciences, there are thousands of lists and detailed articles on how to diagnose and treat every conceivable condition. Most of these scientific outlines are to help the scientist learn to evaluate a situation. A lawyer and a jury could derive the same benefit from these scientific outlines.

### You Must Prepare

An understanding of the relevant science will help you maintain control over the witness in a deposition. Knowledge of the relevant scientific principles will let you know, *during the deposition*, when a witness is misapplying or perverting the laws of science.

To control the deposition of an expert witness, you must prepare. A deposition notebook, similar to a trial notebook, should be prepared in advance. The notebook should include copies of all the pertinent documents, key scientific articles, any information known about the witness, such as curriculum vitae, an examination outline, copies for exhibits of any documents, necessary photographs, copies of any other relevant written discovery, and a checklist of what should be covered.

A systematic checklist can help develop a scientific outline of legal issues. For example, any opinion expressed by an expert witness must be based upon the facts in evidence. *Tukarz v. Ford Motor Co.*, 8 Wn App 645 (1973), *Neel v. Henne*, 30 Wn.2d 24 (1948).

By planning a detailed and systematic discovery of the basis of an expert's opinion, you may find that the facts do not support the opinion. Furthermore, a scientifically planned deposition of an honest opposing expert may prove *your* case.

You can easily adapt your deposition notebook for use at trial. The same deposition notebook can also be used in a settlement conference, or in planning further discovery. The material used in the deposition of an opposing expert should be used to prepare your expert witness.

The valid practice of any science first requires collection of all the data. An expert witness is going to be uncomfortable, and possibly confused, if you provide him or her only with the data you think is relevant. You may be exactly right about what is relevant, but that does not matter. The expert witness needs to feel and believe the conclusion is valid, and if he or she has not collected and reviewed all the data, it is not scientifically valid.

Your personal preparation and that of your expert witnesses for depositions should be extensive. It is never wise to assume that your expert witness will independently prepare for a deposition. An expert witness needs to thoroughly understand how his or her scientific evidence should be presented for legal purposes. An expert witness who knows ahead of time the

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Mr. Clausen has published, lectured, and testified on numerous professional matters. He holds a B.S. in engineering and a Masters in Business Administration. Previously he managed the Business Valuation Services of Seafirst N.B.

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legal significance of the scientific evidence can better handle "curve balls." The deposition of a well-prepared expert witness can never hurt your case; but an inadequately prepared expert can be devastating.

### THE ART OF USING AN EXPERT

Jurors in a trial are like passengers in an airport terminal: they are trying to reach a destination. A trial attorney, like the employee of an airport, helps the passengers arrive and board the correct airplane. When the attorney does not control the flow of the evidence, and act as interpreter and guide to help the jury understand the scientific evidence, it can be like having an airport terminal with no directions or guidance to the passengers—chaos.

### Help Your Expert to be Comfortable

Remember that the courtroom is as foreign to a scientist as the laboratory is to a lawyer. Helping your expert witness to be comfortable in the courtroom is part of the art of practicing law. Once you understand how the expert witness thinks, you can plan how to control the flow of information from the expert. (In formulating a plan, each attorney should, of course, objectively assess his or her own legal talents.)

Spend time explaining the courtroom dynamics to your expert. Often, experts have never had their opinions questioned except in a litigation situation. For that reason, an expert may not know how to handle the confrontive nature of cross-examination. It may help to give an expert a demonstration of what he or she should expect from cross-examination. It also helps to explain that it is the opposing counsel's job to agitate and confuse the witness. Generally, if an expert witness is up to the challenge, he will be able to maintain control.

It is fair to say that most expert witnesses are uncomfortable with public confrontation. However, there are a few experts who crave confrontation. They typically shift out of a basic scientific thought process when they are in battle. On occasion, these witnesses can be subtly controlled by forcing them to deal with very basic scientific principles. It is not wise to try to spar in more complicated scientific principles with a combative expert witness.

Deposition and courtroom appearances are intellectually draining experiences. A novice expert may not appreciate this fact. There never has been, nor will there ever be, an expert witness who is not human. So tell your expert to get a good night's sleep and to eat a meal before testifying. *Never let an expert witness testify twice in one day.* You would not want your witness to "run out of steam" during your deposition. A light snack, such as fruit or yoghurt, can recharge an expert witness on a break. Be sensitive to your witness becoming tired during a deposition, or at trial.

### Motivate Your Expert

One of the fundamental problems in dealing with expert witnesses is that they normally do not make their living by

litigation. For that reason, there may be no great motivation for an expert witness to adapt or change his or her manner of presentation. With an attorney, the situation is just the opposite; his or her career and income are based upon winning.

So an attorney must often find a way to motivate an expert to adapt or change his or her bad courtroom habits. Usually, because expert witnesses are in a professional role, they will cooperate with you out of pride and a desire to be competent. Often the expert witness will want to be helpful to whomever your client is. The fact that your client gets only one day in court should be explained to an expert witness. There are many experts who know just enough about the legal system to get themselves into trouble.

When your expert witness is a poor dresser, or has bad body language, use behavioral or social science to explain and encourage him or her to change. Because an expert witness can be key to your case, it is a good idea to consider his or her courtroom appearance as much as your own.

### Control Costs

If you are concerned about the time (read: *money*) spent by the expert reviewing every piece of information, you can mark or summarize what you believe to be relevant. In any event, all of the information should be logically organized before providing it to the expert. It can be expensive for an

expert to organize what your office staff could have organized in the beginning. If you do the organizing, moreover, the expert's perception of the information can be better controlled. Also, many scientists are meticulously organized persons. If you present them with logically organized materials, you will gain their confidence and respect.

A number of expert witnesses do not understand the cost of litigation. There are some experts who overestimate the value of their services to a case. Also, some experts are not able to reasonably curtail the cost of their services. An expert who has had almost unlimited access to funding may not realize that it is not so for your case. For all of these reasons, it is important to discuss fees and cost in the beginning and throughout your relationship with any expert witness.

### CONCLUSION

Once you are aware of the subtle differences between the practice of law and the practice of the sciences, you can plan your use of an expert witness more effectively. The use of expert witnesses in litigation will probably grow as science continues to advance in its application to everyday life. So an ability to understand the scientist and to communicate and work with him will become increasingly important to every trial attorney. □



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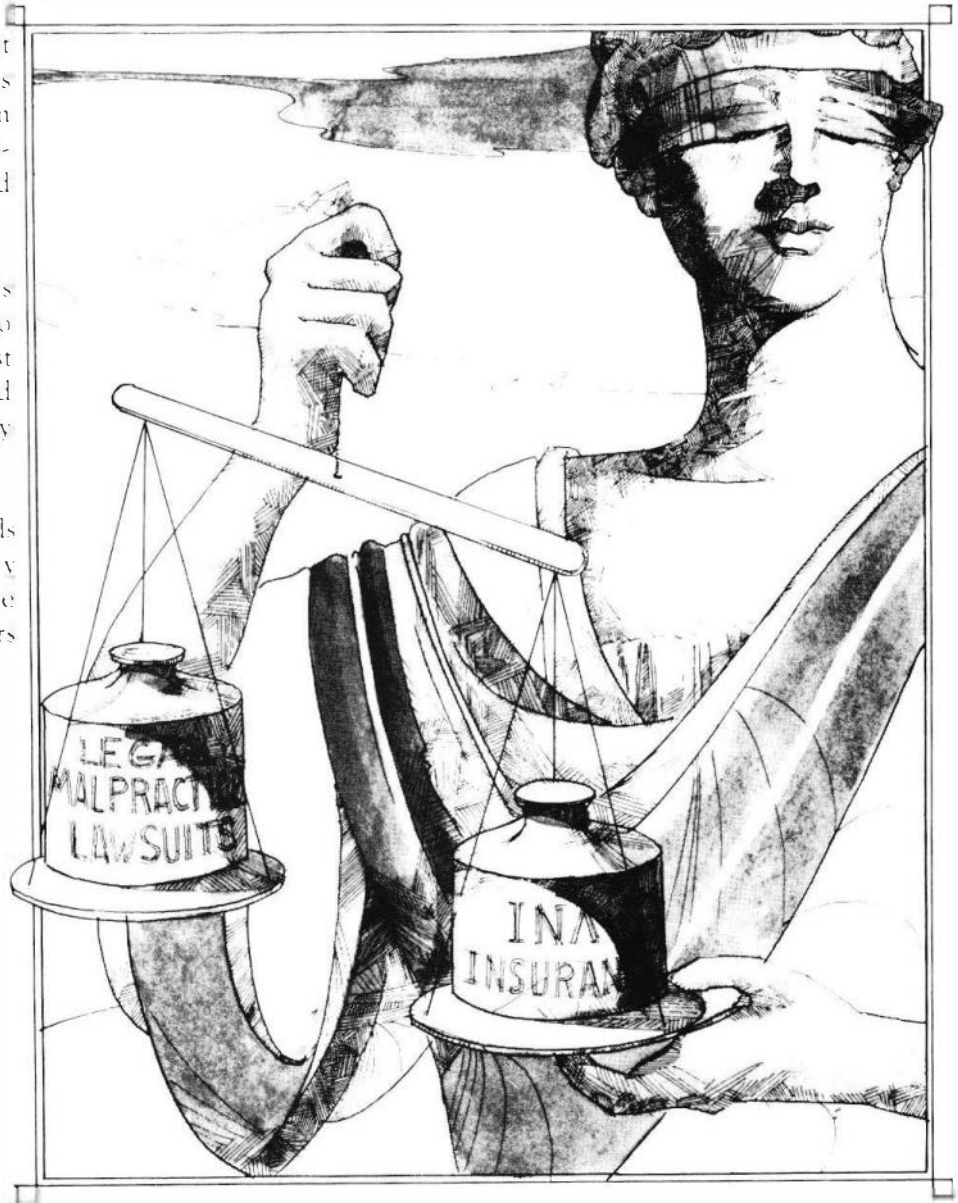
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**M**uch has been written about the admissibility of expert testimony. Rarely, however, is the *utility* of expert testimony examined. The Washington Rules of Evidence, generally following the Federal Rules of Evidence, provide guidelines for when an expert can be used, and for qualifying that expert. But the rules do not discuss the efficacy of expert testimony in promoting the search for the truth. Frequently, expert testimony obstructs the search for truth, instead of facilitating it.

### THE THEORETICAL BASIS

Given the complex nature of our contemporary society, we find it impossible to have a working knowledge of all the areas in which legal actions arise. For this reason, expert witnesses can perform a vital function in the judicial process. Most lawsuits involve a complicated set of facts and circumstances. Twelve laypeople, acting as the fact-finder, often experience difficulty in sorting and interpreting the information admitted into evidence.

The expert's function is to assist the jury by performing several different tasks. The expert is brought in to provide and interpret technical data, to sort out those facts which are more important than others in developing a conclusion, and to reach opinions based on the evidence presented and on the expert's source of knowledge. The expert may perform any or all of these tasks, depending upon trial strategy and the scope of the expert's knowledge.

Expert testimony, however, must be examined within the context of the entire trial proceeding and the functions of the other court officers and parties. The expert, while assisting the fact-finder, must not pre-empt the jury's role. In *Gerberg v. Crosby*, 52 Wn.2d 792, 799, 329 P.2d 184, 188 (1958), the Court quoted an Iowa court to help illustrate this necessary separation:

"Jurors and witnesses have separate and distinct functions. It is the duty of the jury to decide issues of fact. A witness could not usurp that function or invade the province of the jury, by his opinion, if he wished. It may accept it wholly, or in part, or reject it in toto. If the opinion meets with its approval it should accept it. The purpose of court trials is to ascertain the truth and rightness of the matters in issue, and the purpose of expert opinion testimony is to instruct and aid the jury in ascertaining the truth, whether it be the ultimate fact or some minor evidential fact." *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942).

In order to help insure this separation, several limitations are placed on expert testimony in the Washington Rules of Evidence. See ER 702-706.

---

*Betsy L. Wolf* is a third-year student at Northeastern University School of Law. She has completed a 1982 legal internship program with King County Superior Court Judge George H. Revelle.

## Does Expert Testimony

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by Betsy L. Wolf

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In addition to the limitations placed on expert testimony by the Rules of Evidence, two other theoretical limitations exist:

- First, experts are limited in their testimony to matters which lie within the scope of their expertise. Simply, the witness is called to testify about a specific area of knowledge and not about knowledge outside of that field.
- The other limitation is the general jury instruction which usually accompanies expert testimony. In this instruction, the court advises the jury that it is not compelled to accept the expert's testimony as fact. The Washington Pattern Jury Instruction No. 2.10 reads:

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

In theory, the jury will use the expert's testimony to the extent that the jurors believe its validity. Beyond that point, the jurors will discard the testimony and replace it with another witness's testimony, or with their own common sense experiences.

Even with the aforementioned limitations, however, there are points at which expert testimony frustrates the fact-finding process rather than facilitates it. To illustrate this, one only needs to ask the following questions:

1. Is the expert clearly and effectively communicating the opinions and technical knowledge?
2. What are the problems the jury confronts when presented with conflicting expert testimony?
3. Is there a time limit after which the jury begins to lose interest in acting as the fact-finder?
4. Should there be a limit to the number of experts a party can call?
5. Should there be closer scrutiny of the expert's prejudices and biases?
6. Does the jury understand the facts and data upon which the expert is basing the testimony?
7. Has the witness been sworn in as an expert in the field to which she is testifying?

### DANGERS OF EXPERT TESTIMONY

Three major situations arise in which expert testimony actually *frustrates* the fact-finding process:

- Counsel has inadequately established the basis for the expert's testimony.
- Counsel has called too many experts who have presented too much information.

- Counsel has chosen a method of presenting the expert testimony which is ineffective and confusing.

### **Inadequately Established Opinion**

Presenting an expert without disclosing the facts and data upon which the testimony is built undermines the fact-finder's job. When the jury is unaware of the basis for an expert's opinion, it cannot give accurate credibility to that testimony. Rule 705, however, does not require that all facts and data be disclosed unless the judge requires otherwise, or unless the cross-examiner requires such a disclosure. In a complicated factual situation where an expert has relied upon a large amount of detailed data, Rule 705 makes sense in that it promotes efficacy within the trial proceedings. In all other situations, however, the expert should be required to disclose all of the facts and data upon which she relied to formulate her testimony. Only then does the jury have enough information to determine the witness's credibility, and thereby find the facts in the case.

The argument behind Rule 705 is that the opposing counsel has the obligation to raise questions challenging the basis for the expert's testimony during cross examination. This brings us to another obstacle in the fact-finding process. Because the cross-examiner must expose the facts and data used by the expert, and opposing counsel must know which questions to ask in order to obtain the desired information, the rules of evidence presume adequate pretrial discovery. The Civil Rules of Procedure, however, create obstacles in obtaining full discovery of expert testimony. Washington Civil Procedure Rule 26(b)(4) states:

(4) *Trial Preparation: Experts.* Discovery of acts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation litigation or for trial, may be obtained *only as follows* (my emphasis):

(a)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Rule 26(b)(4) limits the form and content of discovery to general summary information, rather than to the details of the proposed testimony. The result of this inadequate discovery is an inability to ask specific questions during cross-examination about the facts and data which the expert used.

As the Washington rule now stands, an expert may not be deposed unless counsel requests, and is granted, leave from the court. Cross-examination is meaningful only when the expert's opinion has been subject to adequate discovery.

The expert's opinion is also inadequately established when the mode of analysis used by the expert lacks scientific reliability. Under such an analysis, the jury is unable to deter-

mine the weight of credibility that should be attached to the testimony. In addition, the analysis promotes speculation, a result which the rules of evidence attempt to eliminate. Speculation hinders the jury from finding the facts of the case. Unless the speculation is grounded in a high degree of probability, it obscures the purpose of bringing the expert in to testify in the first place.

A large number of experts who are called into court to testify lack scientific reliability and, consequently, their opinions are inadequately established. A brief examination of these different experts will help illustrate that they are sometimes retained by counsel to purposefully obstruct the truth.

#### **1. Psychiatrists**

Although psychiatrists can easily be qualified as "experts," with their educational background and practical experience, their testimony is usually of little use to the fact-finder, because it is largely based upon hearsay evidence. The psychiatrist bases his or her opinion on information provided by friends and family, as well as by the defendant and any prior treating doctors. The psychiatrist takes what these parties say as true, and does not "cross-examine" the patient defendant. That is, the psychiatrist indiscriminately elicits as much information as possible from the defendant to try to interpret the behavior. In addition, the psychiatrist attempts to testify about the defendant's mental condition, but no one can know what someone else is thinking or has thought, especially at any given moment in time. Hence, the psychiatrist's opinion is highly speculative and largely based on hearsay. Moreover, any "interpretation" of behavior can easily be adjusted to fit the needs of the party who retained the psychiatrist.

In one of the mental illness hearings this author has observed, three psychiatrists gave their prepared testimony about how unresponsive and uncommunicative the defendant-patient was. The defendant-patient then spoke on her own behalf and *clearly articulated* her previous and current state of mind, as well as her commitment to follow the medical doctor's recommendations. When the psychiatrists testified during rebuttal, they agreed that the defendant-patient was articulate and understood the matter before her, but then reiterated their prepared testimony. They continued to argue that the woman should be involuntarily committed based upon their original—obviously incomplete—data.

#### **2. Medical Experts**

Medical experts are chiefly found in medical malpractice and personal injury cases. In medical malpractice suits, experts attempt to testify about the standard of care in the community. These experts, however, only know what they have heard from other practitioners, nurses, and hospital records—all of it hearsay. The only way these experts could realistically testify to the standard of care would be to actually observe dozens of surgical procedures (or the medical procedure over which the case arose) done by others who are recognized experts in the area.

In the above-mentioned medical malpractice case, 19 medical experts testified in the proceedings. Some of the experts were not from the community, some of them relied upon other testifying experts' opinions, and others were in direct contradiction with one another. What did the jurors understand? What should they have understood?

In personal injury cases, experts attempt to testify to pain, treatment, medications, and prognosis. Their testimony on pain is based upon what the patient tells them, not upon what they can see, feel, or detect from x-rays or other objective tests. Consequently, this testimony is speculative, and based upon a party's particular point of view—a party who has an interest in the litigation.

### 3. Unsworn Experts

The "unsworn" expert is perhaps the most subtle offender in obstructing the fact-finding process. This witness testifies as an expert about one of the parties without first being qualified and sworn in as an expert witness. The unsworn expert includes, among others, the probation officer, the social worker, and even the party's attorney. The testimony frequently is present in the form of presentence reports, juvenile court studies and recommendations, and social worker reports. Although the witness is not declared an expert, the evidence is accepted as "expert" testimony.

Moreover, the testimony is often admitted through the party's attorney, who may then add comments which allude to

her expert knowledge of the party. Examples of these comments are, "My client is sorry for what he did. My client is a loving father. He is gainfully employed and is safe to be at large on parole or bail."

Testimony from an "unsworn" expert, if allowed into evidence, leads the fact-finder to believe that the person testifying is qualified to testify to such information; therefore, the fact-finder accepts the testimony as true. When this happens, the truth has been potentially obstructed, because the testimony may not be true; and, in a case where the testimony comes in through reports and other documents, the fact-finder has not had the opportunity to determine and weigh the credibility of the unsworn expert.

Too often, experts testify only about the facts favorable to the party by whom they have been retained. The trial has become not a search for truth but an adversary game, in which "winning" depends upon emphasizing the facts that favor the client, while at the same time excluding the evidence that disfavors the client.

### Information Overload

In attempting to present the tightest case possible, counsel may overestimate the fact-finder's capacity to understand and retain all of the information presented. Attorneys are frequently so involved in their cases, they lose sight of the fact that the jurors may know nothing about the subject matter.

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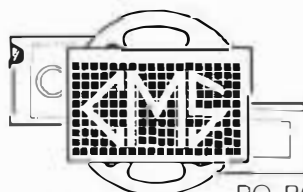
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In addition, counsel must remember that the jury is being bombarded with information, often of a very technical nature. If the jurors do not understand the evidence, or cannot remember it, then the attorney's efforts have been futile and costly to the client, both monetarily and judicially. The selection of experts, therefore, must be made with the fact-finder in mind. This pertains to the number of experts as well as to the nature and quantity of the testimony.

Moreover, the jury spends most of its time sitting, either listening to testimony or waiting for the proceedings to continue. In the author's own experience as a juror in King County Superior Court in October of 1978, it was difficult to sit day after day listening to a stream of experts talk in a technical, specialized language. Even more difficult, however, was trying to keep each expert's testimony separate from the others. When the jury is unable to separate the testimony or is unable to understand it, the use of experts frustrates the fact-finding process.

Another situation involving a number of experts which frustrates the fact-finder is the phenomenon known as “the battle of the experts.” While it is rational for both parties to present their cases using expert testimony, it also presents a confusing dilemma for the jury. The standard retort to this situation is that the jurors should weigh the credibility of the witnesses and choose whom to most believe. But what about the medical malpractice case which involves five or six medical experts on each side? And what if some of the experts are more credible than others on the same side (which is quite likely)? Moreover, what if the jury determines that *none* of the experts are credible enough to warrant reliance on their testimony? The more experts who testify to the same issue with varying conclusions, the less assured the jury is about finding the facts of the case.

The fact of the matter is that *everybody* has an opinion, and when the jury is subject to listening to as many experts as each counsel wants to submit, the fact-finding process can become even more frustrated. For these reasons, the number of experts each side is allowed to call should be re-examined.

### **Ineffective Presentation**

Expert testimony can be presented in a variety of ways, including live testimony, depositions, documents and records, and more recently, video. The choice of presentation is usually based on factors such as trial strategy, witness availability, equipment availability, and cost of presentation.

It is beyond dispute that live testimony is the most effective means of presenting an expert. This effectiveness increases when the expert uses large visual aids to help demonstrate the testimony.

Reading depositions, on the other hand, tends to frustrate the jury's function. Not only are the jurors unable to observe

the witness's demeanor, but they are often unable to distinguish between the witness and the attorneys in the depositions. This is especially true when the attorneys do nothing to dramatize the reading. For example, in one of my court observations, I watched three jurors fall asleep within a thirty-minute period during a deposition reading.

Not only is the medium of presentation critical to the jury's reception of the evidence; the form of the testimony is important as well. The choice of language and the method of communication are also potential obstacles. If the jury does not understand the expert's vocabulary, then the testimony hinders the jury from finding the facts of the case. Another frequent problem of communication is that the jury is unable to adequately *hear* the testimony. Since the information the expert presents is usually of a technical nature, the expert must speak slowly and clearly in order for the jury to hear and retain the testimony.

Furthermore, the attorney's oral presentation is vital to the jury's understanding of the expert testimony. Counsel must interrogate the witness in such a way as to interpret or emphasize the evidence elicited from the expert. If, after the expert has begun to answer, the jurors are still trying to figure out what counsel has asked the witness, then the jurors will miss part of the expert's response.

## **PROPOSED SOLUTIONS**

### **Limit on the Number of Experts**

One of the most important considerations in deriving these solutions is increasing the efficacy of the court's administration of justice. The first step which should be taken is the elimination of repetitive testimony. Limiting the number of experts would reduce the time for litigation, reduce the scope of the battle of the experts, reduce the jury's inattentiveness during the trial, and reduce the jury's tendency to blur the testimony of the witnesses.

Judicial implementation of this solution would allow the judge to use discretion on, first, whether a limitation is necessary and, second, how severely to limit the experts. Extensive pretrial conferences would provide judges with the information necessary to make these determinations. Taking time before trial commences to resolve such issues can significantly reduce the fact-finder's time to reach the facts at trial. The criteria by which the judge could limit the experts can include the number of experts proposed by each party, the repetitiveness of the testimony, the qualifications of the experts, and the number of issues and facts in dispute.

### **Court-Appointed Experts**

Closely related to limiting the number of experts is having the court appoint the experts when it determines that experts

are needed. During a pretrial conference, the parties could each propose one or two experts from each area of needed expertise, and then either the attorneys could stipulate agreement on one of the experts, or the judge could appoint one.

The argument against this proposal is that each party should be allowed to present its case in any way that counsel desires. However, trial strategy should not obstruct the search for the truth. Since attorneys usually seek an expert who will testify to facts favorable to the client, they do not want an expert who will testify to those facts favorable to the opponent. On the other hand, if the court appointed the experts, or if the parties stipulated that one of the experts out of those that both proposed could adequately testify, then two things would result:

- The expert would be unbiased and would have no financial interest at stake, so she could testify to the facts, both those favorable and unfavorable to the respective parties.
- Trial time would be significantly reduced. Instead of a "battle of the experts," the fact-finder would be presented with an agreed-upon expert who could testify to all the issues in the case falling within her expertise.

These two factors would greatly enhance the fact-finder's role.

Another proposal would be to allow the jury to ask questions of the experts by writing the questions on paper and submitting them to the judge for evidentiary qualification.

The judge could also inquire of the expert. If the judge were to adopt this latter suggestion, then she would need to be sure that her questions do not comment on the evidence. Both of these techniques are already used in a few courtrooms, although the occasions are rare.

## CONCLUSION

The theoretical basis for expert witnesses justifies their use as an integral part of the trial process. As mentioned in the introduction, we live in a complex society, and because of this we do need experts to explain the various technical aspects of a case.

The trial process is a means by which we resolve our disputes. At the heart of the process is the search for truth. If this search is not realized to the greatest extent possible, then the judge cannot fairly perform her duty.

Experts, in a variety of ways, obstruct this search for the facts. Although some experts do assist the fact-finder, others purposefully manipulate the facts to reach a favorable conclusion for the parties who retain them. In addition, some experts testify to an opinion without adequate supporting data.

These problems must be recognized by the legal community, and the legal community must take steps to alleviate them. □

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Clarkston, WA 99403  
(509)758-9591

### BENTON COUNTY

Community Alcohol Services  
Association (C.A.S.A.)  
17 No. Cascade  
Kennewick, WA 99336  
(509)586-2161  
  
Alcohol Detoxification Center  
7th and Ainsworth  
Pasco, WA 99301  
(509)547-0213

### CHELAN COUNTY

Chelan-Douglas Alcoholism  
Services Association  
327 Okanogan  
P.O. Box 950  
Wenatchee, WA 98801  
(509)662-9673

### CLALLAM COUNTY

North Olympic Counseling  
Services  
913 W. 8th  
Port Angeles, WA 98362  
(206)452-2381  
  
Forks Community Hospital  
RR #3, Box 3575  
Forks, WA 98331  
(206)374-6177

### CLARK COUNTY

Clark County Council on  
Alcoholism/John Owen  
Recovery House  
P.O. Box 1678  
1950 Fort Vancouver Way  
Vancouver, WA 98668  
(206)696-1631

Senior Alcohol Services  
P.O. Box 425  
1705 Main Street  
Vancouver, WA 98666  
(206)696-1659

SWARF Alcohol & Drug  
Programs  
P.O. Box 1738  
Vancouver, WA 98668-1738  
(206)696-1659

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SWARF Inpatient  
Alcoholism Treatment  
Center  
V.A. Medical Center  
4th Plain Blvd. at "O" St.  
P.O. Box 1738  
Vancouver, WA 98668-1738  
(206)696-1659  
  
SWARF Outpatient  
Alcoholism & Drug  
Center  
2703 Mill Plain Blvd.  
Vancouver, WA 98661  
(206)695-1297

St. Joseph Community  
Hospital  
P.O. Box 1600  
600 N.E. 92nd Ave.  
Vancouver, WA 98668  
(206)256-2170

*Branch Office*  
St. Joseph Community  
Hospital  
Intensive Outpatient  
Treatment Program  
P.O. Box 1600  
116 E. 33rd St.  
Vancouver, WA 98668  
(206)699-4433

V.A. Medical Center  
Alcohol and Drug Dependence  
Treatment Section  
P.O. Box 1035  
3710 S.W.  
U.S. Veterans Hospital Road  
Portland, OR 97201  
*street address*  
4th Plain Blvd. at "O" St.  
Vancouver, WA 98661  
(206)696-4061

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Columbia County Services  
206 So. 4th St.  
Dayton, WA 99328  
(509)382-4198

### COWLITZ COUNTY

Lower Columbia Council  
on Alcoholism  
Community Alcohol Center  
1317 Hemlock  
Longview, WA 98632  
(206)577-7105

Monticello Medical Center  
CareUnit  
600 Broadway  
Longview, WA 98632  
(206)577-6955

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Longview, WA 98632  
(206)425-1914

### DOUGLAS COUNTY

*see Chelan County*

### FERRY COUNTY

Ferry County Community  
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P.O. Box 443  
Klondike Plaza, Clark St.  
Republic, WA 99166  
(509)775-3341

### FRANKLIN COUNTY

*see Benton County*

### GARFIELD COUNTY

Garfield County Alcoholism  
Program  
P.O. Box 758  
805 Main St.  
Pomeroy, WA 99347  
(509)843-3791

### GRANT COUNTY

Grant County Alcoholism  
Programs  
P.O. Box 1217  
502 So. "C" St., Room 1  
Moses Lake, WA 98837  
(509)765-5402

#### *Branch Office*

300 Lincoln Ave.  
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### GRAYS HARBOR COUNTY

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(206)533-2529

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404 So. Main St.  
Coupeville, WA 98239  
(206)678-4005  
  
Whidbey Island Naval Air  
Station  
Counseling and Assistance  
Center  
Oak Harbor, WA 98278  
(206)257-2394

### JEFFERSON COUNTY

Halcyon House  
P.O. Box 481  
14 E. Fremont  
Quilcene, WA 98376  
(206)765-3421 or 765-3411  
  
Community Alcoholism Center  
802 Sheridan, MS 115  
Port Townsend, WA 98368  
(206)385-0650

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*This listing is reprinted with minor revision from State of Washington Approved Alcoholism Treatment Facilities, January, 1983, and Approved Washington State Drug Treatment and Prevention Programs, August, 1983, both published by the Department of Social and Health Services, Bureau of Alcohol and Substance Abuse. Although we have tried to confirm all entries herein, the Bar News is not responsible for their accuracy.*

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(206)789-7209

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(206)225-7614

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920 Terry Ave.  
Seattle, WA 98104  
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CareUnit Hospital of  
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Seattle, WA 98121  
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Milam Recovery Centers, Inc.  
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(206)453-0550

North Community Alcohol  
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10501 Meridian Ave., Suite E  
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(206) 367-2700

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9010 13th N.W.  
Seattle, WA 98117  
(206)789-5911

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2200 Rainier Ave. So.  
Seattle, WA 98144  
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Kent, WA 98032  
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Redmond, WA 98052  
(206)881-7084

Sunrise Centers  
920 S.W. 152nd St.  
Burien, WA 98166  
(206)248-3006

Thunderbird Fellowship House  
1531 - 13th Ave. So.  
Seattle, WA 98144  
(206)322-6230—*nights*  
(206)324-9360—*days*

Vashon Community Alcohol  
Center  
P.O. Box 99  
Sunrise Ridge Vashon-Maury  
Health Center  
Vashon, WA 98070  
(206)463-9492

Veterans Administration  
Hospital  
Alcohol Dependence Treat-  
ment Program—116ADTP  
1660 So. Columbian Way  
Seattle, WA 98108  
(206)762-1010, ext. 45

**KITSAP COUNTY**  
Awareness Express  
614 Division St.  
Port Orchard, WA 98366  
(206)876-9430

Kitsap County Alcoholism  
Recovery Program (KCARP)  
2051 Pottery Ave.  
Port Orchard, WA 98366  
(206)876-5577

Kitsap County Council on  
Alcoholism  
532 - 5th St.  
P.O. Box 512  
Bremerton, WA 98310  
(206)377-0051 or 377-0052

**Branch Office**  
P.O. Box 324  
122 Moe Street  
Poulsbo, WA 98370  
(206)779-2900

Navy Alcohol/Drug Safety  
Action Program  
P.O. Box 4D, Bldg. 433  
Puget Sound Naval Shipyard  
Bremerton, WA 98314  
(206)476-2594

Olalla Guest Lodge  
12851 Lala Cove Lane S.E.  
Olalla, WA 98359  
(206)857-6201 or 857-2026

**KITTITAS COUNTY**  
Community Alcoholism Center  
507 Nanum, Room 106  
Ellensburg, WA 98926  
(509)925-9821

**Klickitat County**  
Klickitat County Community  
Alcoholism Center  
P.O. Box 147  
228 W. Main St.  
Goldendale, WA 98620  
(509)773-5801

**Branch Office**  
P.O. Box 5  
White Salmon, WA 98672  
(509)493-3400

Nuri Institute  
150 E. Jewitt  
White Salmon, WA 98672  
(509)493-3588

**LEWIS COUNTY**  
Lewis County Mental Health  
and Mental Retardation  
Program  
P.O. Box 1445  
135 W. Main  
Chehalis, WA 98532  
(206)748-6696

Lewis County Community  
Alcohol Center  
P.O. Box 706  
360 N.W. North St.  
Chehalis, WA 98532  
(206)748-9121, ext. 235

**SWARF Outpatient Alcoholism Center**  
151 No. Market Blvd.  
Chehalis, WA 98532  
(206)748-0940

**LINCOLN COUNTY**  
Lincoln County Community Alcohol Services  
P.O. Box 152  
7th and Park Sts.  
Davenport, WA 99122  
(509)725-2111

**MASON COUNTY**  
see Thurston County

**OKANOGAN COUNTY**  
Okanogan County Alcoholism Center  
P.O. Box 2027  
107 W. Apple  
Omak, WA 98841  
(509)826-5600

Colville Indian Alcoholism Program  
P.O. Box 150  
Agency Campus  
Nespelem, WA 99155  
(509)634-4512

**PACIFIC COUNTY**  
Pacific County Community Services Alcohol and Drug Programs  
P.O. Box 65  
914 W. Robert Bush Drive  
South Bend, WA 98586  
(206)875-6541

**Branch Office**  
P.O. Box 861  
Long Beach, WA 98631  
(206)642-4475, ext. 404

**PEND OREILLE COUNTY**  
Pend Oreille County Community Alcoholism Center  
P.O. Box 5000  
So. 230 Garden Ave.  
Newport, WA 99156-5055  
(509)447-3175

**PIERCE COUNTY**  
Alcoholism Treatment Clinic  
3629 So. "D" St.  
Tacoma, WA 98408  
(206)593-4275

**C.A.R.E.**  
705 So. 9th St.  
Suite 301  
Tacoma, WA 98405  
(206)572-2273

Fort Lewis/Madigan Army Medical Center (MAMC)  
Alcohol and Drug Abuse Prevention and Control Program (ADAPCP)  
HQ I Corps and Ft. Lewis  
ATTN: AFZH-PAD  
Fort Lewis, WA 98433  
(206)967-4351 or 967-5831

Hilltop Community Alcohol Center  
2550 So. Yakima  
Tacoma, WA 98405  
(206)383-4004

McCord Air Force Base  
Social Actions Office  
Building 1155  
McCord AFB  
Tacoma, WA 98438  
(206)984-5675

Puget Sound Alcoholism Center  
Puget Sound Hospital  
So. 36th and Pacific Ave.  
Tacoma, WA 98408  
(206)474-0533

Puyallup Indian Nation Alcoholism Program  
2209 E. 32nd St.  
Tacoma, WA 98404-0188  
(206)597-6217

Shared Health Services  
615 So. 9th, Suite 304  
Tacoma, WA 98405  
(206)627-8783

**Branch Offices**  
Puyallup Valley CAC  
1005 E. Main  
Puyallup, WA 98371  
(206)848-5598

Lakewood CAC  
9112 Lakewood Drive SW.  
Tacoma, WA 98499  
(206)582-5600

University Place CAC  
7014 - 27th W.  
Tacoma, WA 98466  
(206)564-2526



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- ☐ **MARIJUANA?**
- ☐ **COCAINE PROBLEMS?**

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*You'll be making a big investment in his time. He or she will be making a big commitment to get well. And in the end what's in it for both of you? Only a life.*

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Seattle, WA 98104*

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Challenge Point  
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Tacoma, WA 98402  
(206)272-9901

Small Tribes of Western  
Washington (STOWW)  
Alcoholism Program  
Education and Prevention  
P.O. Box 578  
520 Pacific Ave.  
Sumner, WA 98390  
(206)593-2894

St. Joseph Hospital's Alcohol  
Program  
1718 South "I" St.  
Tacoma, WA 98405  
(206)627-4101, ext. 221

Veterans Administration  
Medical Center, Ward 7  
Alcohol/Drug Treatment  
Program  
American Lake, WA 98493  
(206)582-8440, ext. 6102 & 6105

**SAN JUAN COUNTY**  
San Juan Community  
Alcohol Center  
P.O. Box 755  
820 Guard St.  
Friday Harbor, WA 98250  
(206)378-4994

**SKAGIT COUNTY**  
Skagit County Council on  
Alcoholism, John King  
Recovery House  
121 Broadway  
Mount Vernon, WA 98273  
(206)336-5757  
*Recovery House*—(206)336-9511

Pioneer Cooperative Affiliation  
Pioneer Center North  
P.O. Box 231  
Northern State Multi-Service  
Facility  
830 Fruitdale Road  
Sedro Woolley, WA 98284  
(206)856-3186

**SKAMANIA COUNTY**  
Skamania County Counseling  
Center  
P.O. Box Q  
Stevenson, WA 98648  
(509)427-5636, ext. 39

**SNOHOMISH COUNTY**  
Community Alcohol Services  
2809 Rockefeller  
Everett, WA 98201  
(206)258-2631

*Branch Office*  
Community Alcohol Services  
19920 Highway 99, Suite E  
Lynnwood, WA 98036  
(206)775-4686

Evergreen Alcoholism  
Rehabilitation Program  
P.O. Box 12  
2605 Summit Ave.  
Everett, WA 98201  
(206)258-2407

Intensive Outpatient Treatment  
Program  
P.O. Box 12  
2601 Summit Ave.  
Everett, WA 98201  
(206)258-2407

Norcross Clinic, Inc.  
209 Dayton, Suite 207  
Edmonds, WA 98020  
(206)771-1194

Snohomish County Alcohol  
Detox Center  
3430 - 112th S.W., Building 703  
Everett, WA 98204  
(206)355-9890

Valley General Hospital  
Alcoholism Treatment Center  
14701 - 179th S.E.  
Monroe, WA 98272  
(206)794-7497

Walnut Manor, Inc.  
P.O. Box 12  
1409 Walnut Ave.  
Everett, WA 98201  
(206)258-2407

**SPOKANE COUNTY**  
Alcohol Information Network  
Spokane County Health  
District  
W. 1101 College Ave.  
Spokane, WA 99201  
(509)458-2528

Alcoholism Outpatient Services  
So. 406 Washington  
Spokane, WA 99204  
(509)624-1230

Community Alcohol Center  
E. 2211 Sprague  
Spokane, WA 99202  
(509)534-5070

Daybreak of Spokane  
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So. 3220 Grand Blvd.  
Spokane, WA 99203  
(509)747-3088

DO ANY OF YOUR CLIENTS NEED A GOOD\*  
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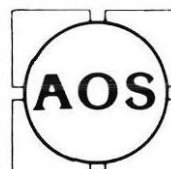
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(206) 771-1194

## **ALCOHOLISM OUTPATIENT SERVICES OF SPOKANE INC.**

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628 Cowley  
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Spokane Alcoholism Care  
Service  
E. 415 Sprague  
Spokane, WA 99202  
(509)838-2771

Spokane Alcoholic  
Rehabilitation Center, Inc.  
(SPARC)  
P.O. Box 2198  
1513 W. 8th Ave.  
Spokane, WA 99210  
(509)624-3251

SPARC's Women's Day  
Treatment Program  
P.O. Box 2198  
So. 812 Walnut  
Spokane, WA 99210  
(509)624-5228

Spokane Community Mental  
Health Center, Emergency  
Services Unit  
So. 107 Division St.  
Spokane, WA 99206  
(509)838-4651

Spokane Urban Indian  
Health Services  
No. 2002 Atlantic  
Spokane, WA 99205  
(509)326-7600

Veterans Administration  
Medical Center  
Alcohol-Drug Treatment  
Program  
No. 4815 Assembly  
Spokane, WA 99205  
(509)328-4521, ext. 228

**STEVENS COUNTY**  
Stevens County Counseling  
Services Center  
So. 603 Infirmary Road  
Colville, WA 99114  
(509)684-4597

**THURSTON COUNTY**  
Crisis Clinic of Thurston and  
Mason Counties  
P.O. Box 2463  
Olympia, WA 98507  
*Thurston—*  
(206)754-3888—*business*  
(206)352-2211—*services*  
*Mason—*  
(206)754-3888—*business*  
(206)426-3311—*services*

Thurston and Mason  
Alcoholism Recovery  
Council, Inc.  
(TAMARC)  
P.O. Box 1216  
Olympia, WA 98507  
*street address*  
1625 Mottman Road S.W.  
Tumwater, WA  
(206)943-8510

Western Washington Alcohol  
Centers  
I.B.E.W. Labor Temple  
30409 So. 36th, Suite 222  
Tacoma, WA  
(206)473-7122  
*Branch Office*  
4404-B Pacific Ave.  
Lacey, WA 98503  
(206)459-7122

**WAHIAKUM COUNTY**  
*see Cowlitz County*

**WALLA WALLA COUNTY**  
Veterans Administration  
Medical Center  
Alcohol Dependence  
Treatment Program  
77 Wainwright Drive  
Walla Walla, WA 99362  
(509)525-5200, ext. 280

Walla Walla Community  
Alcoholism Center  
180 So. 5th  
Walla Walla, WA 99362  
(509)525-7800  
*Branch Office*  
Newhouse (Recovery House)  
180 So. 5th  
*street address—*  
612 E. Main  
Walla Walla, WA 99362  
(509)529-9101 *or* 525-9843

**WHATCOM COUNTY**  
Human Services Associates, Inc.  
Alternatives to Addiction  
P.O. Box 363  
1200 Dupont Ave., Suite 2F  
Bellingham, WA 98225  
(206)671-9797

Olympic Center—Bellingham  
1603 E. Illinois  
Bellingham, WA 98225  
(206)733-9111  
Whatcom County Community  
Alcoholism Center  
1000 No. Forest  
Bellingham, WA 98225  
(206)733-1400, 676-2147  
*or* 676-6871

**WHITMAN COUNTY**  
Whitman County Alcoholism  
Center  
N.E. 340 Maple St.  
Pullman, WA 99163  
(509)332-6585

**YAKIMA COUNTY**  
Community Alcoholism Center  
P.O. Box 2849  
102 So. Naches Ave.  
Yakima, WA 98907  
(509)248-1800  
*or* 1(800)572-8124

New Life Association  
P.O. Box 2849  
206½ No. Naches Ave.  
Yakima, WA 98907  
(509)453-8651

Newstart Social Detoxification  
Program  
P.O. Box 2849  
308 No. 4th St.  
Yakima, WA 98907  
(509)457-1623

Sundown M Ranch  
P.O. Box 81  
Mission Road  
White Swan, WA 98952  
(509)874-2520

Valley Alcohol Council  
202 So. Toppenish  
Toppenish, WA 98948  
(509)865-3020

*Branch Office*  
2201 E. Edison  
Sunnyside, WA 98944  
(509)837-7700

Yakima Indian Nation  
Comprehensive Alcoholism  
Program  
P.O. Box 523  
Shearer Lane  
Toppenish, WA 98948  
(509)865-5121

*Branch Office*  
Receiving and Recovery  
Fort Road  
Toppenish, WA  
(509)865-5656

## Drug Abuse

**ADAMS COUNTY**  
Adams County Counseling  
Services  
165 No. 1st  
Othello, WA 99344  
(509)488-5611

**ASOTIN COUNTY**  
Asotin County Community  
Services Program  
1603 Dustan Loop  
Clarkston, WA 99403  
(509)758-3341

**BENTON/FRANKLIN  
COUNTIES**  
Mid-Columbia Mental Health  
2211 W. Court, Suite B  
Pasco, WA 99301  
(509)547-4122

**CHELAN/DOUGLAS  
COUNTIES**  
Chelan/Douglas Counties  
Community Mental Health  
Drug Abuse Program  
110 No. Wenatchee Ave.,  
Suite 2  
Wenatchee, WA 98801  
(509)662-7105

Chelan/Douglas Alcoholism  
Services Association  
327 Okanogan Street  
P.O. Box 950  
Wenatchee, WA 98801  
(509)622-0460

**CLALLAM COUNTY**  
Peninsula Counseling  
Center, Inc.  
603 E. 8th St., Suite 4  
Port Angeles, WA 98362  
(206)457-0431

West End Outreach Svcs.,  
Forks Hospital  
RR 3, Box 3575  
Forks, WA 98331

North Olympic Counseling  
Center  
(Clallam County Council on  
Alcoholism)  
913 W. 8th  
Port Angeles, WA 98632

**CLARK COUNTY**  
SWARF Outpatient  
Alcoholism & Drug Center  
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Vancouver, WA 98661  
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- Drug Screen Urinalysis

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*Youth Unlimited is located 1/2 mile north of Aurora Village, readily accessible to King and Snohomish County residents. Fees are based on family income.*

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Edmonds, WA 98020  
(206) 771-2254

A Program of  
The Drug Abuse Council

**COLUMBIA COUNTY**  
Columbia County Services  
213 W. Clay  
Dayton, WA 99328  
(509)382-2525

**COWLITZ COUNTY**  
Drug Abuse Prevention  
Center  
2112 So. Kelso Drive  
Kelso, WA 98626  
(206)636-1050

**FERRY COUNTY**  
Ferry County Community  
Services  
P.O. Box 443, Klondike  
Plaza  
Republic, WA 99166  
(509)775-3752

**GARFIELD COUNTY**  
Western Consortium for  
Human Services  
P.O. Box 758  
Pomeroy, WA 99347  
(509)843-3791

**GRANT COUNTY**  
Grant County Mental Health  
& Family Service Center  
P.O. Box 1216  
Ephrata, WA 98823  
(509)754-2011

Grant County Mental Health  
P.O. Box 1057  
518 Valley Road  
Moses Lake, WA 98837  
(509)765-9239

**GRAYS HARBOR COUNTY**  
Catholic Community Services  
611 8th St.  
Hoquiam, WA 98550  
(206)538-0191

Youth Help of Grays Harbor  
510 1/2 8th St.  
Hoquiam, WA 98550  
(206)533-7500

**ISLAND COUNTY**  
Island County Mental  
Health Center  
P.O. Box 160  
Coupeville, WA 98239  
*street address*  
904 Main St.  
Coupeville, WA 98227  
(206)678-5555

**JEFFERSON COUNTY**  
Jefferson County Alcohol  
and Drug Abuse Center  
802 Sheridan St., MS 115  
Port Townsend, WA 98368  
(206)385-0650

**KING COUNTY**  
Alcohol and Drug 24-Hour  
Helpline  
3700 Rainier Ave. So., Suite B  
Seattle, WA 98118  
(206)722-3703

Auburn Youth Resources  
117 "D" St. S.E.  
Auburn, WA 98002  
(206)939-2202

CareUnit of Kirkland  
10322 N.E. 32nd St.  
Kirkland, WA 98033  
(206)821-1122

Cedar Hills Alcoholism  
Treatment Center  
15900 - 227th Ave. S.E.  
Maple Valley, WA 98038  
(206)392-9159

C & M Counseling &  
Consultant Services  
2366 Eastlake Ave. E.  
Suite 428  
Seattle, WA 98102  
(206)323-3699

Center for Addiction  
Services  
120 - 23rd E.  
Seattle, WA 98112  
(206)323-0930

The Center for Human  
Services  
17011 Meridian Ave. No.  
Seattle, WA 98133  
(206)546-2411

Central Area CAC  
340 - 15th Ave. E., Suite 301  
Seattle, WA 98112  
(206)322-2970

Central Area Mental Health  
Center  
2200 Rainier Ave. So.  
Seattle, WA 98144  
(206)329-1751

Chemical Dependency  
Program  
3927 No. Aurora  
Seattle, WA 98103  
(206)634-3947

Community Psychiatric  
Clinic  
4319 Stone Way No.  
Seattle, WA 98103  
(206)447-3614

Conquest Center  
P.O. Box 667  
8021 230th S.W.  
Edmonds, WA 98020  
(206)774-9551  
*Women's Residence*  
19204 15th Ave.  
Seattle, WA 98155

Consejo  
3808 So. Angeline  
Seattle, WA 98118  
(206)721-0800

Eastside Alcohol Center  
1111 110th N.E., Bldg. 400  
Bellevue, WA 98004  
(206)454-1505

Evergreen Treatment Services  
557 Roy St.  
Seattle, WA 98109  
(206)282-2959

Genesis House  
4508 16th Ave. N.E.  
Seattle, WA 98105  
(206)524-6767

24-Hour Helpline  
3700 Rainier Ave. So.,  
Suite B  
Seattle, WA 98118  
(206)722-3703

Highline West Seattle Mental  
Health Clinic  
10015 28th Ave. S.W.  
Seattle, WA 98146  
(206)241-0990

Highline Youth Service  
Bureau  
156th & Des Moines Way So.  
P.O. Box 66086  
Seattle, WA 98166  
(206)243-5544

Kent Valley Youth Services  
525 No. 4th, Kent Commons  
Kent, WA 98031  
(206)872-3550

King County Detoxification  
Center  
1421 Minor Ave.  
Seattle, WA 98101  
(206)587-0161

Mental Health North  
10510 Meridian Ave. No.  
Seattle, WA 98133  
(206)365-5550

Mount Baker Youth Service  
Bureau Community  
Association  
1730 Bradner Place So.  
Seattle, WA 98144  
(206)322-7676

North Community Alcohol  
Center  
10501 Meridian Ave. No.  
Seattle, WA 98133  
(206)367-2700

Northwest Treatment Center  
9010 13th N.W.  
Seattle, WA 98117  
(206)789-5911

Renton Area Youth Services  
918 So. 3rd  
Renton, WA 98055  
(206)271-5600

Seattle Drug and Narcotic  
Center  
P.O. Box 24344  
Seattle, WA 98124  
(206)767-0244 or 284-2010  
*Phase I*  
976 So. Harrey  
Seattle, WA 98108  
(206)767-0244

*Phase II*  
809 15th E.  
Seattle, WA 98112  
(206)722-3703

Seattle Mental Health  
Institute  
Substance Abuse Recovery  
Program  
1600 E. Olive St.  
Seattle, WA 98122  
(206)281-4357

Southeast Community  
Alcohol Center  
P.O. Box 1041  
232 So. Second  
Kent, WA 98031  
(206)854-6513

Seadrunar-Queenanne  
200 W. Comstock  
Seattle, WA 98119  
(206)284-2431

**KITTITAS COUNTY**  
Kittitas County Alcohol  
and Drug Dependency  
Services  
507 Hanum, Room 106  
Ellensburg, WA 98926  
(509)925-9821

Vashon Community Alcohol  
Center  
P.O. Box 99  
Vashon Island, WA 98070  
(206)463-9492

Washington Drug Rehabilita-  
tion Center  
421 30th Ave. So.  
P.O. Box 4036  
Seattle, WA 98104  
(206)325-4005

Youth Eastside Services  
257 100th NE  
Bellevue, WA 98004  
(206)454-5502

**KITSAP COUNTY**  
Kitsap Resources  
Consolidated  
500 Union Ave.  
Bremerton, WA 98310  
(206)373-5031

Awareness Express, Inc.  
614 Division St.  
Port Orchard, WA 98366  
(206)876-9430

**Klickitat County**  
Counseling & Resource  
Center of Klickitat County  
228 W. Main St.  
Goldendale, WA 98620  
(509)773-5801

*Branch Office*  
P.O. Box 5  
White Salmon, WA 98672  
(509)493-3400

**LEWIS COUNTY**  
Lewis County Mental Health  
P.O. Box 1445  
134 W. Main  
Chehalis, WA 98532  
(206)748-6696

**LINCOLN COUNTY**  
Lincoln County Community  
Services  
P.O. Box 278  
Davenport Professional  
Building  
Davenport, WA 99122  
(509)725-3001

## LEGAL ASPECTS OF TOXICOLOGY

In depth review of legal and scientific  
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# Convention 1983: McLauchlan's View



*Photographs courtesy of Seattle attorney John D. McLauchlan*

Pictured above: Our photographer-at-large **John D. McLauchlan** has a friendly chat with **Mary Fung Koehler**;

Top left corner, and continuing clockwise: **Bar Governor Donald Bond** (l.) enjoys the fine company of **Phyllis and Bradley Jones**, past Bar President; **Bar Governor George Kargianis** (l.) displays the sign of victory before the Two-mile Sprint, joined by Governor **Joseph Delay** (must have worked—Kargianis goes on to win in the men's over-51 division—Delay is close on his heels in third place); **Laura Inveen** stretches muscles before the Six-mile Marathon (and cinches a win in the overall women's division); runners gather poised before the race, ready for the challenge; (l. to r.) **Robert Huneke, Victoria Vreeland, Lawrence Vance and Edward Huneke** say hello; and lawyers soak up knowledge in a top-notch seminar.

See you next year!





photo courtesy Dorian Photographers

### Special Award of Honor

**FIFTY-~~YEAR~~ LAWYERS**—Thirty-eight lawyers were honored at the 1983 Annual Business Meeting for having completed fifty years of service as members of the Washington State Bar Association, some of whom are pictured above: Joseph P. Adams, Hugh J. Aitken, Daniel Boone Allison, Arthur G. Barnett, William T. Beeks, Karl R. Bendtsen, Alexander L. Cain, Fred (Ted) G. Clarke, Jr., Harold W. Coffin, Edward G. Cross, Q. Robert Davis, Eli E. Dorsey, Bryant R. Dunn, F. J. Finucane, Horace G. Geer, Harold L. Hawkins, Oliver E. Henderson, John Horrigan, Ronald R. Hull, Elmer Godfrey Johnson, R. DeWitt Jones, George F. Kachlein, Jr., Maurice Kadish, Patrick M. Kildea, Wilbur J. Lawrence, John S. Lynch, Robert W. Maxwell, Edwards Merges, Albert M. Nanney, Albert J. Page, James E. Prince, Russell S. Randall, Albert D. Rosellini, Hugh J. Rosellini, Gershon C. Rowland, Philip R. Short, Merrill Wallace and S. Boyd Williams.

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# WASHINGTON STATE BAR NEWSLINE

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## The Board's Work



by Steven A. Reisler

### CENTRAL AMERICA RESOLUTIONS INDEFINITELY POSTPONED

HOOD RIVER, Ore., October 14 -- Without dissent, the Board of Governors approved a resolution calling for Washington's Legislature to set state judicial salaries

at the following levels: Supreme Court -- \$66,000; Court of Appeals -- \$63,000; Superior Court -- \$60,000.

Lawyers at the Annual Business meeting of the Washington State Bar Association, aware that Washington's judges are among the lowest paid jurists in the United States, overwhelmingly adopted the resolution at the Spokane Convention in September.

The Board of Governors, also without dissent, indefinitely postponed voting on two resolutions concerning human rights in Central America and Central American national sovereignty. At the Spokane Convention, lawyers voted to table both Central America resolutions for future consideration.

Under the By-laws of the WSBA, Article VII, Section 11, no action taken by the Association at any annual meeting is final unless and until it is approved by the Board of Governors. Executive Director John Michalik advised the Board that although the Association's only action concerning the two Central America resolutions had been to table them, those tabled motions, according to accepted rules of procedure, would automatically come up for a vote at the 1984 annual meeting.

First District Governor Paul Gibbs then moved that, rather than leave the resolutions on the table for next year, they be indefinitely postponed. Gibbs explained that a decision to indefinitely postpone voting on the resolutions would necessitate their resubmittal to the Resolutions Committee for 1984. Sixth District Governor Pat Comfort favored the motion and commented that there was no reason why the Central America resolutions should be allowed to short-cut the normal process by which resolutions are annually presented to the Association.

Second District Governor Ted Zylstra also endorsed Gibbs' motion, but preferred that the Board take a clear stand on the issues. Zylstra asked the Board to address the Central America resolutions squarely. . . and reject them as matters in which the Association should not get involved.

King County Governor Bill Dwyer, too, supported the motion to indefinitely postpone, but counseled against more direct action: "There was a sense at the Annual Meeting that the resolutions were not a proper subject of debate. The motion to indefinitely postpone expresses the intention of the membership that this is not a proper subject for this body to debate. If there is strong sentiment in favor of them, I am sure they will come up again next year."

The Board also considered taking action to curtail or eliminate voting by proxy in the Resolutions Committee. At the suggestion of Sixth District Governor Betty Bracelin, the Board voted 6-2 to table until November a motion by King County Governor Tom Loftus to prohibit proxy voting in committees.

1983-84  
MEETING SCHEDULE

Published below is the meeting schedule for the WSBA Board of Governors for November, 1983, through May, 1984. All meetings of the Board of Governors, except executive sessions, are open to members of the Association.

Governor Bracelin, noting that the Board intends to meet later in 1984 at Sunriver, Oregon, and at Coeur d'Alene, Idaho, asked why the Board meets out-of-state so often. Other Board members observed that the Governors try to meet in a variety of locations, both in Washington and in neighboring states, in order to facilitate accessibility to Board meetings. It was pointed out that except for Victoria, B.C., and Sunriver, Oregon, all of the meetings of the Board in 1983-84 will be easily accessible to different parts of Washington's bar. Although local participation in Board meetings is minimal, Governor Dwyer said it is important that the meetings remain accessible.

BOARD OF GOVERNORS MEETING SCHEDULE, 1983-84

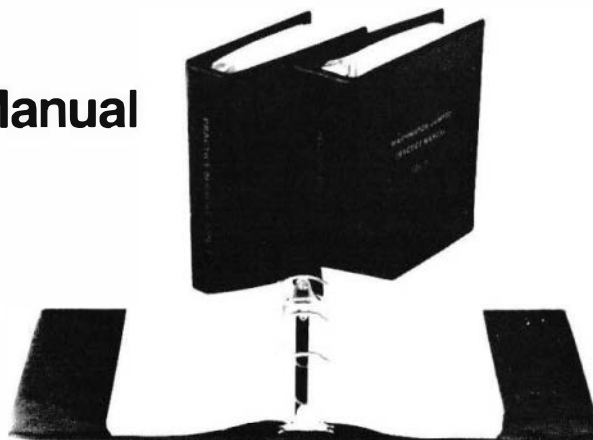
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November 18 & 19 -- Red Lion, Port Angeles  
December 16 & 17 -- Four Seasons Olympic, Seattle  
January 13 & 14 -- Westwater Inn, Olympia  
February 10 & 11 -- Executive Inn, Fife  
March 16 & 17 -- Red Lion, Pasco  
April 13 & 14 -- Laurel Point Inn, Victoria, B.C.  
May 18 & 19 -- Towne Plaza, Yakima

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**WASHINGTON STATE BAR ASSOCIATION  
BOARD OF GOVERNORS**

WHEREAS, Henry M. Jackson was admitted before the Supreme Court of Washington on August 23, 1935, to practice as an attorney and counselor at law in all of the courts of this state; and

WHEREAS, Henry M. Jackson rendered service to the people of this state as the Prosecuting Attorney of Snohomish County from 1938 to 1940; and

WHEREAS, Henry M. Jackson gave service to the United States and to the people of Washington as a member of the United States House of Representatives from the second congressional district during the 77th to 82nd sessions; and

WHEREAS, Henry M. Jackson gave unselfishly of himself to the service of all the citizens of this state and of the nation from 1953 to the date of his death as a United States Senator, in which service, the Senator acted to protect the environment of the nation, proposed legislation to provide for the adequate defense of the nation and recognized the acute needs of the people of the nation, seeking always to assure a better quality of life for us all; and

WHEREAS, we, the members of the Board of Governors, on behalf of the membership of the Washington State Bar Association take notice of the death of our beloved colleague and friend, Senator Henry M. Jackson, on September 1, 1983, be it now, therefore,

RESOLVED, that we express our deep sorrow at his death and we extend our profound sympathy to Mrs. Jackson and her family. It is further,

RESOLVED, that this memorial resolution shall be forwarded by the Executive Director of the Washington State Bar Association to Mrs. Henry M. Jackson, 1703 Grand Avenue, Everett, Washington.

DONE at Spokane, Washington, on the 11th day of September, 1983 in witness whereof, at the direction of the members of the Board, we have affixed our signatures and the seal of the Association.



Paul W. Steere, President

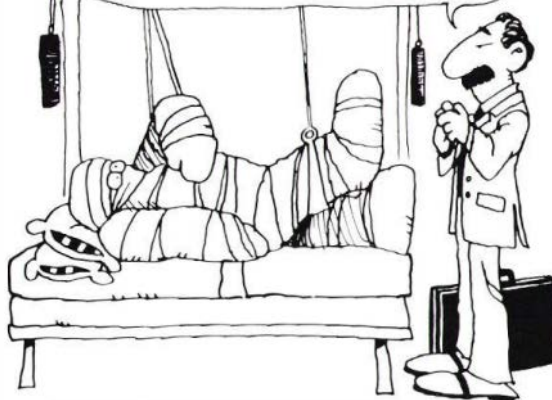
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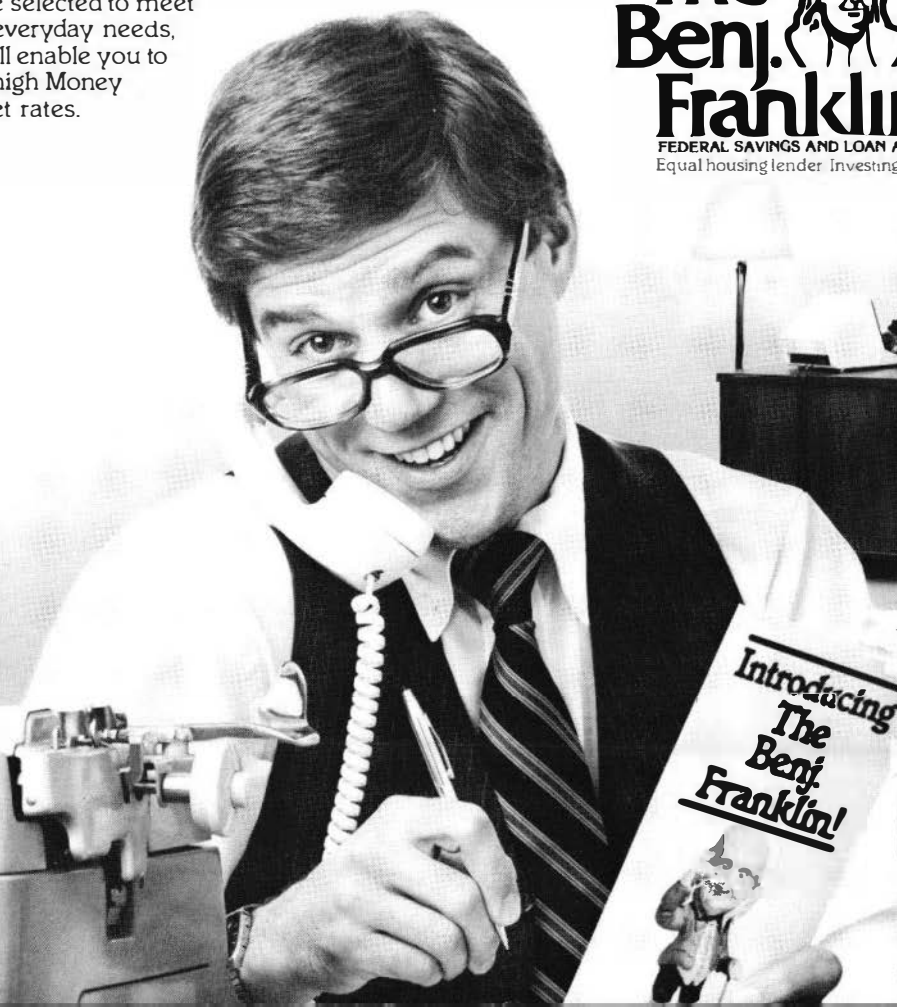
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## Dissolution of Marriage Seminar

by **Joel G. Green**  
*Assistant Director of CLE*

The DISSOLUTION OF MARRIAGE seminar is a one-day skills-training course on how to handle marital dissolutions. It is a road map designed to take the Washington attorney through the entire divorce process. This practical program is based upon a specific factual situation. Course materials will include completed forms and letters normally required when handling a divorce case.

From the initial client interview all the way through trial, the program features videotaped presentations followed by comments and critiques by panel members. Although intended primarily for recently admitted lawyers, this program will provide useful information for all practitioners involved in family law. The program will be presented on the following dates at the following locations:

Friday, October 28 — Yakima, Convention Center  
 Friday, November 4 — Olympia, Westwater Inn  
 Wednesday, November 9 — Bellevue, Red Lion Inn  
 Friday, November 18 — Spokane, Inn at the Park

Through the use of videotaped presentations and panel commentary, registrants will view the important aspects of a dissolution trial. The tactics involved will be stressed. Attendees will learn how to present testimony effectively, how to discredit witnesses, and how to avoid tactical errors. The comments and critiques of the panel members will be supplemented by those of a local Superior Court judge in each location.

The seminar chairperson and program designer is **Lowell K. Halverson** of Halverson & Strong, Seattle. Mr. Halverson has been involved in a variety of CLE programs for many different sponsors and was one of the primary motivators of skills-training courses for lawyers in the early 1970s.

The other panel members, representing the wife and husband, respectively, are **Robert R. Beezer** of Schweppe, Doolittle, Krug, Tausend & Beezer, P.S., Seattle, and **Jane B. Hall** of Newman, Bradshaw & Richards, P.S., Seattle. Mr. Beezer is a well-known Seattle attorney and respected trial lawyer whose experience at the bar will provide many useful tips. Although recently admitted to the Washington Bar, Ms. Hall is also an experienced trial attorney whose practice over the past few years has concentrated in family law matters. Her philosophical viewpoint will provide a different perspective on how to handle marital terminations.

The program begins with a videotaped initial client interview of both the petitioner and respondent—the first office visit. After a review by panel members, a videotape of a motion and counter motion for restraining and temporary orders will be shown. This will be followed by a videotape of the deposition of the respondent-husband. After a brief videotape of a motion for appointment of a special master,

the morning portion of the program concludes with a videotape of a settlement conference featuring King County Superior Court **Judge James W. Bates, Jr.**

After lunch, the afternoon portion of the seminar will deal with various facets of pre-trial preparation and the trial of the marital dissolution. You will see the examination and cross-examination of three expert witnesses: a career-vocational counselor, an actuary, and a CPA/business valuator. A review of the trial by panel members will be followed by a videotape of King County Superior Court **Judge Anthony P. Wartnik's** oral decision. The program will conclude with audience questions and participation, giving registrants an opportunity to exchange ideas with panel members.

The parts of the wife and husband were played, respectively, by **Jacqueline Tacher**, a paralegal with Halverson & Strong, Seattle, and by **Paul Reni**, a solo practitioner from Seattle. The filming was done by Pool & Crew Communications, Inc., of Seattle.

Tuition for this full-day seminar is \$95. Each registrant is entitled to admission, coffee service, the program luncheon, and a copy of the course materials prepared for the program. The materials will include a complete set of pleadings for both petitioner and respondent, as well as the judge's conclusions of law and fact.

The seminar has been approved for 7.00 hours of continuing legal education credits by the Washington State Board of Continuing Legal Education and is intended to present the basic elements needed to try a marital dissolution.

To receive a registration form and complete brochure for the program, please contact Joan Freed at the Washington State Bar Association, 505 Madison Street, Seattle, WA 98104, or telephone (206)622-6021.

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## Notes from the Academy

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

**ADMINISTRATIVE LAW.** Utility rate setting by municipal corporation is legislative act, properly delegated to city. Neither procedural safeguards appropriate for judicial proceedings nor appearance of fairness doctrine applies to such rate setting proceedings. *Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 665 P.2d 1328 (1983).

—J. M. Vache

**CRIMINAL LAW AND PROCEDURE.** (1) Although Rule 9 intern may properly represent indigent defendant in criminal case, judicial action effectively preventing intern from discussing case with his supervising attorney and obtaining latter's consent to the representation amounts to per se deprivation of right to counsel. *City of Seattle v. Ratliff*, 100 Wn.2d 212 (1983). (2) Instructional errors placing burden of proof of self-defense on defendant and failing to instruct *sua sponte* on presumption of innocence may be raised on collateral attack, even if they were not raised on appeal. However, petitioner must prove that errors were prejudicial. *In re Lile*, 100 Wn.2d 224 (1983). (3) Overruling its decision in *State v. Plakke*, 31 Wn. App. 262, 639 P.2d 796 (1982), Division Two, Court of Appeals, holds that knowledge that an accomplice is armed with deadly weapon is not an element of first-degree robbery. *State v. Davis*, 35 Wn. App. 506 (1983).

—G. R. Nock

**INSURANCE.** Auto policy exclusion of insured vehicle from definition of underinsured vehicle, thereby preventing recovery by passenger, injured and killed in single accident caused by negligence of driver, under both liability and underinsured motorist coverages of policy, is not invalid under underinsured motorist statute. *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 1, 665 P.2d 891 (1983).

—R. S. L. Roddis

**LOCAL GOVERNMENT.** Affirmative action plan adopted by county does not violate competitive bidding statute, federal equal protection, state privileges, and immunity clause, or immunity clause of state equal rights amendment. *Electrical Contractors v. Pierce County*, 100 Wn.2d 109 (1983).

—J. M. Vache

**REAL PROPERTY.** (a) Where, at time of conveyance, grantor has a line marked on ground (by fence) that is short of the line described in the deed, and grantee purchases "with reference" to such line on ground, it is binding on grantee, who takes only to that line. (b) When grantee reconveys his land to subsequent grantees, they too are bound by the line on the ground as long as it still appears to be marked on the ground. *Winans v. Ross*, 35 Wn. App. 238, 666 P.2d 908 (1983).

—W. B. Stoebuck

## 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 200-300 new titles, is also available. Copies may be obtained by sending your request to the Washington State Law Library at the above address.

### ACCOUNTANTS & ACCOUNTING

*Handling business valuation disputes.* Seattle: Washington State Bar Association, 1983. 2 vols.

### ARBITRATION

Goldberg, George. *A lawyer's guide to commercial arbitration.* 2d ed. Philadelphia: ALI-ABA, 1983. Pp. 167.

### BIOGRAPHY

Burgess, Harold D. *Sixty years at the bar: anecdotes of a corporation lawyer.* Smithtown, N.Y.: Exposition Press, 1981. Pp. 182.

Paper, Lewis J. *Brandeis.* Englewood Cliffs, N.J.: Prentice-Hall, 1983. Pp. 448.

*Progressive masks: letters of Oliver Wendell Holmes, Jr. and Franklin Ford.* Newark: University of Delaware Press, 1982. Pp. 141.

### CIVIL RIGHTS

Richey, Charles R. *Manual on employment discrimination and civil rights actions in the federal courts.* Washington: Federal Judicial Center, 1983. V.p.

### COMMUNICATIONS

Washington, Harold R. *Communications skills and the lawyering process.* Tarrytown, N.Y.: Associated Faculty Press, 1983. Pp. 161.

### COMPUTERS

*Choosing and using computers to improve your law practice.* Chicago: American Bar Association, 1983. Pp. 157.

### CORPORATIONS

*Handbook on the Subchapter S Revision Act of 1982.* Englewood Cliffs, N.J.: Prentice-Hall, 1982. V.p.

### CRIMINAL LAW & PROCEDURE

Minker, Allen G. *Making the criminal record on appeal.* Tucson: Arizona Law Institute, University of Arizona, 1983. Pp. 139.

Misner, Robert L. *Speedy trial: federal and state practice.* Charlottesville, Va.: Michie Co., 1983. Pp. 700.

Rhodes, William M. *Plea bargaining: who gains? who loses?* Washington: Institute of Law and Social Research, 1978. Pp. 88.

### DAMAGES

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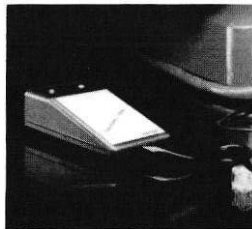


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## NOTICE TO ATTORNEYS

Changes in names, including firm names, addresses and telephone numbers of Attorneys in King County for the new 1984 Directory of Attorneys of King County are now being compiled. If you have changed your address and/or telephone number during 1983 and have not yet given the new information to the Public Access Section in the office of the Superior Court Clerk please stop by the Public Access Section counter and fill in a new information card. Cards are available there for your convenience. If your information will be the same as your listing in the 1983 Directory it is not necessary to fill in another card.

If you are a new attorney who has started practicing in King County in 1983 please be sure to fill out an information card as mentioned in the Clerk's office.

Below is a print of this information card which you may clip and mail to the Clerk's office as an alternative to coming into the Clerk's office.

Attorney: For listing changes of your address or telephone number please fill in below. If you have a new practice in King County this year please write in below where indicated. If your firm name is changed or if the firm is entirely new fill in below. Your changes will be published in the Daily Journal of Commerce and the next annual Directory of Attorneys of King County. (Print or Type)

INDIVIDUAL ATTORNEY'S NAME ONLY. Please check in the box if your's is a new practice started in King County this year. ☐ (new practice)

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Please return immediately to Public Access Section of the Clerk of the Superior Court.

## PIERCE COUNTY

by GEORGE KELLEY

Sandwiched between "Athletic Organizations" and "Auctioners" in the Yellow Pages of the telephone book is a twenty-page list of attorneys, a five-page (33%) increase from last year. Breaking new ground are Herrmann, Levensen, et al., and Manza, Mocer, et al., P.S., who have also placed ads in the book's inside back cover. Presumably, this placement is crucial in reaching those injured clients who have not yet learned the alphabet.

This year's offering shows an increase in those firms no longer appearing by the traditional listing of partners' names. Examples are the Sharpe Law Offices and the Yando Law Clinic. Then there is the Emery Law Group, which features **Jack Emery** and **Charles McCullough**. As they add additional members, might the "group" become a "crowd" or even, ultimately, a "mob"?

**Tom Fogg's** ad states that he is a B.A., M.B.A., and J.D. If he has to describe it by initials, maybe he shouldn't advertise it.

Finally, this year's best Yellow Pages ad is **David Johnson's**. He forgot to notify the telephone company that he was moving his practice to **Dave Schweinler's** office and is consequently unlisted. This reduces the number of Yellow Pages listings for attorneys named Johnson to ten.

**Alvin Anderson** was recently featured as part of a national TV. news story as having assisted in programming a computer to practice law. Look for next year's Yellow Pages to see if Al's computer is given a full partnership or is simply listed as "of counsel."

The Young Lawyers announce the election of the following officers: **Jack Connelly**, president; **Kathryn Nelson**, vice president; **Jeffrey Jahns**, secretary; and **Marilyn Mauer Wahlberg**, treasurer.

**James Buckley** has moved his practice to 818 South Yakima, and limits himself to criminal defense, personal injury, and immigration cases.



## Briefly Noted

### Convention Sports Results

The results are in for the Seventh Annual Sports Games held at the State Bar Convention in Spokane in September:

#### 1983 Race Ipsa Loquitor

**SIX MILE MARATHON**, 13 finishers.

**MEN**—1st place, **Steve Jones**, 33:04; 2nd place, **Bill Shaw**, 35:17; 3rd place, **Todd Gay**, 35:55. *Division winners—Ages 35 and under:* 1st, **Steve Jones**; 2nd, **Bill Shaw**; 3rd, **Charles Szurszewski**. *Ages 36 to 50:* 1st, **Todd Gay**; 2nd, **Dennis Dellwo**; 3rd, **Ed Holm**. *Ages 51 and over:* 1st, **Bob Dellwo**; 2nd, **Harold Clarke**; 3rd, **Don Bond**.

**WOMEN**—1st place, **Laura Inveen**, 50:54; 2nd place, **Sharon Bond**, 55:40; 3rd place, **Donna Moniz**, 57:56. *Division winners—Ages 35 and under:* 1st, **Laura Inveen**; 2nd, **Donna Moniz**. *Ages 50 and over:* 1st, **Sharon Bond**.

**TWO MILE SPRINT**, 14 finishers.

**MEN**—1st place, **Dave Morado**, 12:00; 2nd place, **Ben Vaux**, 12:18; 3rd place, **Joe Shogan**, 12:36. *Division winners—Ages 35 and under:* 1st, **Dave Morado**; 2nd, **Joe Shogan**; 3rd, **Don Koler**. *Ages 36 to 50:* 1st, **Ben Vaux**; 2nd, **Eli Halpern**; 3rd, **Chris Shea**. *Ages 51 and over:* 1st, **George Kargianis**; 2nd, **Bill Mays**; 3rd, **Joe Delay**.

**WOMEN**—1st place, **Joan Giller**, 16:41; 2nd place, **Margaret Cunniff**, 20:55; 3rd place, **Chris Messerve**, 20:57. *Division winners—Ages 35 and under:* 1st, **Joan Giller**; 2nd, **Margaret Cunniff**; 3rd, **Chris Messerve**. *Ages 36 to 50:* 1st, **Micki Hemstad**. *Ages 51 and over:* 1st, **Barbara Dolliver**.

#### Golf Tournament

**MEN**—*Low net:* **Mark Casey**, 55. *Low Gross,* **Mark Wallace**, 75. *Highest admitted score:* **Rob Huneke**.

**WOMEN**—*Low net:* **Judith Corbin**, 59. *Low gross:* (tie) **Rusty Bensussen** and **Jean "Scottie" Clark**, 92. *Highest admitted score:* **Judy Eiler**.

*Closest to the pin:* **Greg Dow**, 4 feet. *Longest Drive:* **Steve Stocker**.

### No-Fault Tennis Tournament

**MIXED DOUBLES**. *Division I*—1st place, **Marylee** and **Michael Pickett**; 2nd place, **Margaret Wesselhoeft** and **Robert Kane**; 3rd place, **Kathy** and **Scott East**. *Division II*—1st place, **Rebecca** and **John Sells**; 2nd place, **Rita Salazar** and **Blaine Tamaki**; 3rd place, **Berith** and **Randolph Petgrave**. *Division III*—1st place, **Gail** and **Jerry Hall**; 2nd place, **Ellie** and **Robert Koelker**; 3rd place, **Mary** and **John Underwood**.

#### Court-Awarded Fees

"Court-Awarded Attorney Fees" is the topic of a seminar to be held Friday, November 18, at the Madison Hotel in Seattle, sponsored by the American Civil Liberties Union of Washington.

The program will cover the entire spectrum of fee award issues under federal and state law, focusing on when fees are available and how to assure an adequate award. Featured speakers will include: E. Richard Larson of New York, author of *Federal Court Awards of Attorney Fees*; State Supreme Court Justice Robert F. Utter; Thomas J. Boeder; Kelly Fletcher; M. Margaret McKeown; and Philip Talmadge.

The seminar has been approved for 6.00 CLE credits. For more information, call Judy Porterfield at (206)624-2180.

#### On Wearing Two Hats

Dual licensing and dual practice will be the subjects of a luncheon meeting of the Washington Chapter of the American Association of Attorney/ C.P.A.s at 11:30 a.m. on November 16 at the Washington Athletic Club in Seattle.

Featured speakers will be Prof. David Boerner, Assoc. Dean of UPS Law School and chairman of the State Bar's Code of Professional Responsibility Committee, and E.W. (Bill) Parker, C.P.A. and chairman of the Washington State Board of Accountancy.

Members, potential members, and guests should call (206) 325-3537 for information and reservations.

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## AA for Attorneys

Alcoholics Anonymous meetings for attorneys are held Wednesdays at noon at the Thirteen Coins Restaurant, 125 Boren Avenue North (near the Seattle Times Building) in Seattle.

## IN MEMORIAM

Seattle attorney **David L. Scott**, 45, died September 12. A graduate of Whitman College and the University of Washington Law School, Scott was a deputy prosecutor for King County before entering private practice. He was admitted to the Bar in 1965.

**Ivan Merrick**, Seattle attorney and associate Episcopal priest, died September 26 at age 68. Merrick graduated from the University of Washington Law School and was admitted to the Bar in 1938. He became a priest in 1952.

Seattle attorney **Max Nicolai, Sr.**, 68, died September 20. Nicolai was a graduate of the University of Washington and the University of Chicago School of Law. His legal career included service as a King County prosecutor and as legal advisor to former Gov. Albert Rosellini. He was admitted to the Bar in 1941.

## DISCIPLINE

### Suspended

By order of the Supreme Court, dated September 9, 1983, Shelton attorney **Robert C. Brungardt** was suspended from the practice of law for 30 days, beginning September 9, 1983. The suspension was the result of a stipulation between Brungardt and State Bar Counsel to violations of DR 6-101(A)(3) and DR 7-101(A)(1), (2), and (3). Brungardt also violated DR 1-102(A)(4) and DR 9-102. He was required to pay \$420 in restitution to the clients affected by

his neglect. This notice is published pursuant to RLD 8.4(a).

Vancouver attorney **Randolph L. Johnson** has been ordered suspended from the practice of law for 61 days, beginning October 1, 1983. Johnson was suspended for 30 days for violating DR 6-101(A)(3) for his neglect in failing to collect a judgment in a lawsuit. He was suspended for 31 days for violating RLD 1.1(j) by willfully failing to cooperate with the Bar Association's investigation. This notice is published pursuant to RLD 8.4(a).

### Disbarred

**Raymond Sarna** has been ordered disbarred by the Washington State Supreme Court. Sarna was convicted of a violation of 18 U.S.C. 1952(a)(3), interstate travel in aid of racketeering, by the unlawful distribution of cocaine. Sarna violated RLD 1.1(a) for commission of an act involving moral turpitude. This notice is published pursuant to RLD 8.4(a).

## WASHINGTON STATE REGISTER

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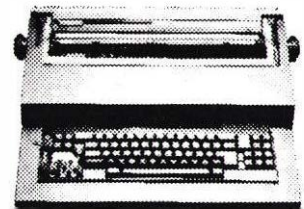
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**Attorney** with 3 to 5 years experience, specializing in commercial law with banking emphasis, for position with growing Seattle firm. All replies confidential. Reply to Box 160, WSBA.

**Position Available:** Small Seattle litigation firm seeks attorney with excellent academic credentials and a desire to do tort and commercial litigation. Job requires demonstrated analytical and writing ability, and the capability to perform superior legal work. Please send written responses only. All responses will be held in confidence. Send resumes to Perey & Smith, Market Place One, 2001 Western Avenue, Seattle, Washington 98121.

**Immediate opening** in real estate area of large Seattle firm. Seeking associate with 1-3 years of general experience and outstanding academic credentials. Experience in real estate practice helpful, but not required. Reply to Box 156, WSBA.

**Personal Injury Litigation Attorney:** Deluxe growth opportunity in plaintiff firm for the right person with at least 3

years P.I. discovery and trial experience. Plaintiff or defense background OK. Reply to Box 159, WSBA.

**Tax attorney** with a CPA background in private practice for a full-time position in a rural community. Needs to have experience in personal and corporate taxes. Please send resume to Coordinated Planning Services, P.O. Box 896, Sunny-side, WA 98944, attn: Barbara.

**Attorney Wanted:** 0-3 years litigation experience, preferably in construction contract related law. Reply to Box 151, WSBA.

**Position Available:** Two-man, well-established firm in south-central WA seeks associate with some general practice and trial experience to assume existing case load. Reply to Box 154, WSBA.

**Position available** in Legal Office at Battelle-Pacific Northwest Laboratories, Richland, Washington. Prefer lawyer admitted to Washington Bar. Some experience in government and commercial contracting, labor and personnel relations, and civil litigation desirable. Send resume with references to Charles W. Hill, General Counsel, Battelle-Pacific Northwest Laboratories, P. O. Box 999, Richland, WA 99352.

## POSITION WANTED

**Trial Attorney** w/3 years experience, as prosecutor and in private practice, seeks civil litigation position with Seattle area firm. Have personally tried 15 Superior Court jury trials. Litigation experience includes criminal, personal injury, real estate and commercial trials. Box 148, WSBA.

**Tax Attorney** wants to move to Spokane. Law Review and LL.M. Reply to Box 152, WSBA.

**California in-house** corporate counsel; J.D.-M.B.A.; licensed in California and Washington State; 7 years of varied legal experience. Seek position in Seattle area. Reply to Box 153, WSBA.

**Attorney, female**, for immediate associateship/office share. Member Wash./Federal Bars. 2 years civil (domestic +), 2 years criminal (prosecution). Excellent references professional/ personal. Tacoma/Seattle areas. Reply Box 155, WSBA.

**Legal Secretary:** AAS degree in legal secretarial science, NSCC 1982. General office experience; some probate, property management and WP knowledge. Resume/references available. (206)782-7555.

## SERVICES

**Legal Research and Writing Service:** David Mark, J.D., magna cum laude, Cornell Law School; editor *Cornell Law Review*; 3½ years litigation experience out of state. Call me in Seattle at (206) 323-8586.

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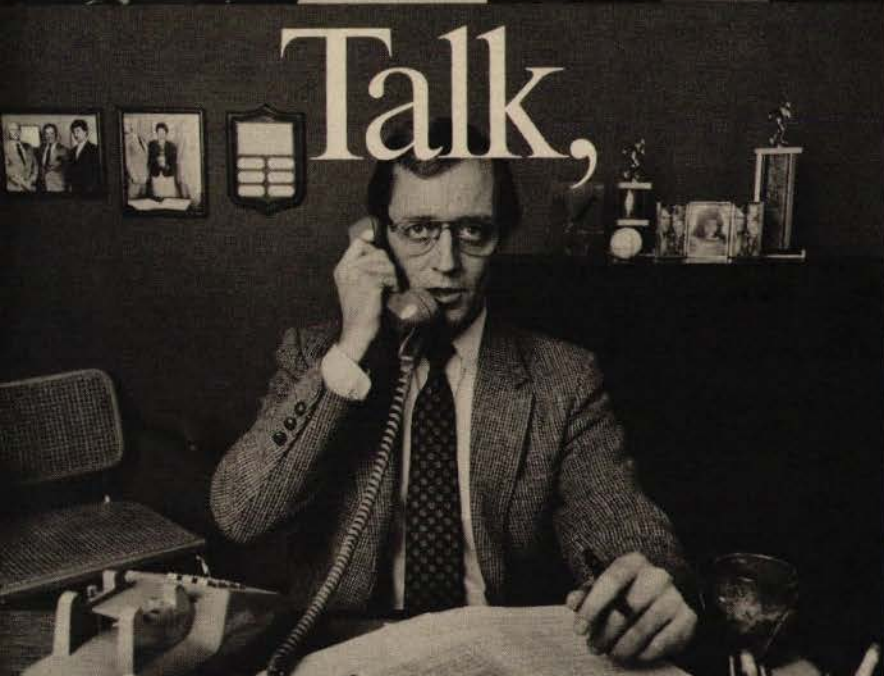
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