

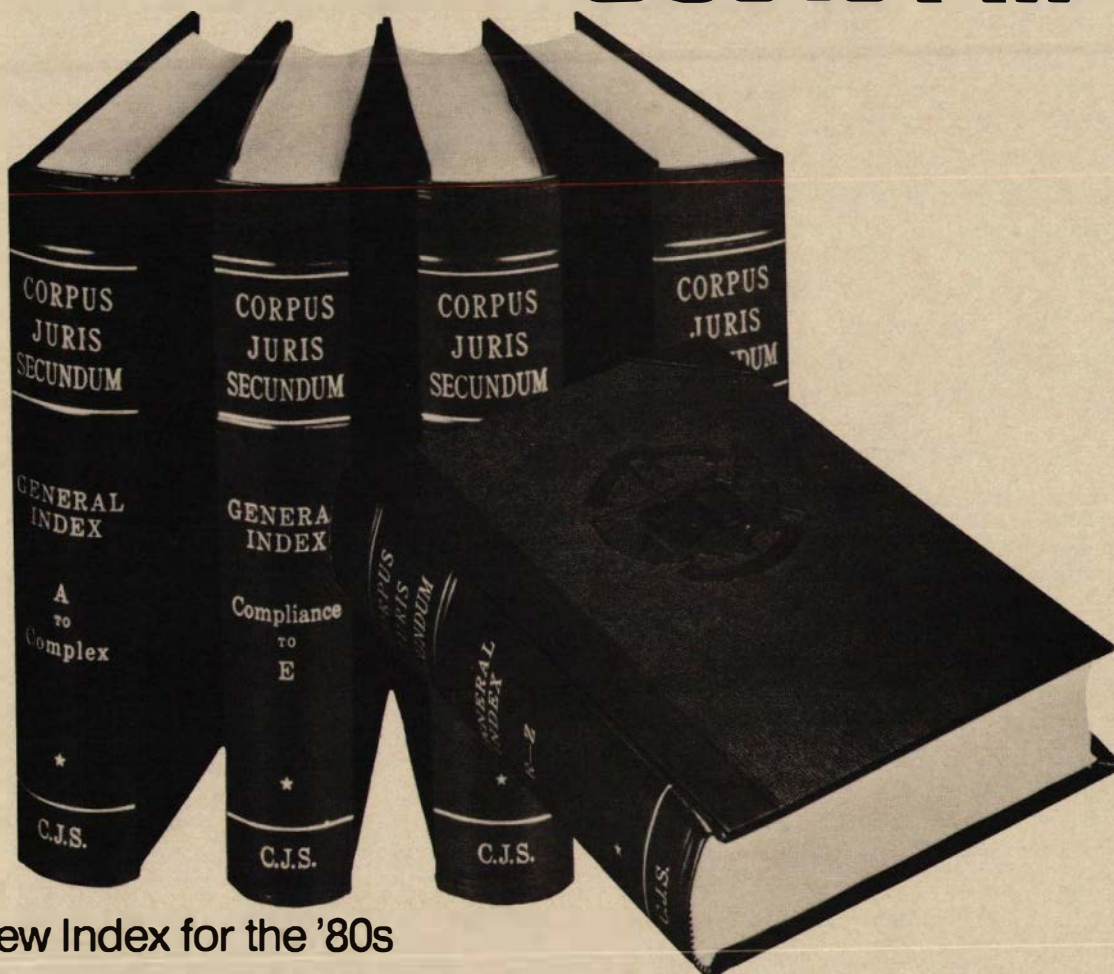
Washington State **Bar News** Volume 37, No. 9, September 1983



Law Practice Management: Decisions, Decisions, Decisions

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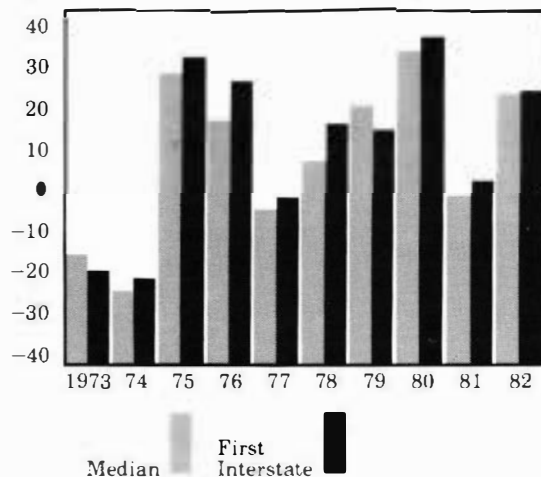
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Volume 37, No. 9, September 1983

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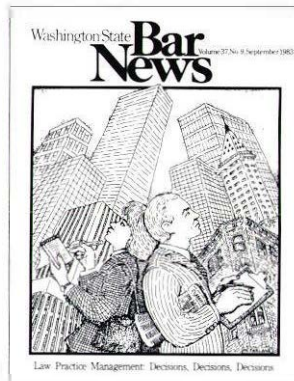
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Our Cover



ART CREDITS

Cover art and interior art at pages 9, 14, and 29 by Seattle artist **James McFarlane**. Mr. McFarlane's studio is located at 1906 Fifth Avenue North in Seattle.

Interior art at page 23 by **Marie G. Creson**, Asst. U.S. Attorney General. At page 41, art by Everett attorney **Royce Ferguson**.

How do you start your own law practice? What word-processing system should you purchase? How can you cope with occupational stress? How can you market your services? Decisions, decisions, decisions... in this issue, our authors explain how to do it.

See us at Annual Meeting Booth #57

Tips from CPT on what to look for in a word processor

CPT offers a plain English explanation of exactly what word processing is, and some helpful pointers on how to choose from over 70 makes.

Word processing is simply a faster, easier, less expensive way to type.

With a modern word processor (such as the CPT 8000, right), you type on a screen instead of paper.

You can type at full rough-draft speed without worrying about errors. Leave out a word or a paragraph? No worry. Just go back and type it in. You can readjust the entire text without retyping.

"Electronic filing"

Most word processors have some form of memory. This may range from a magnetic card, which holds a single business letter, to the disks used in the CPT 8000, which hold over a hundred full-page letters.

This electronic storage allows you to recall individual pages to the

begin with these basics:

1. Don't buy too little—or too much—word processor.

Least expensive are "intelligent typewriters,"

with very limited functions. At the other end of the scale are expensive shared systems.

Most popular by far are the "standalone" models. The CPT 8000, for example, fits easily on a desk top,

yet has nearly all the automated features of even the largest systems.

2. Look for a full-page screen with a clear image. The full-size, black-on-white screen is a major feature of the CPT 8000. Some competitive models have only a partial-page display, and a green-on-green computer-like screen.

3. Be sure the word processor you select is

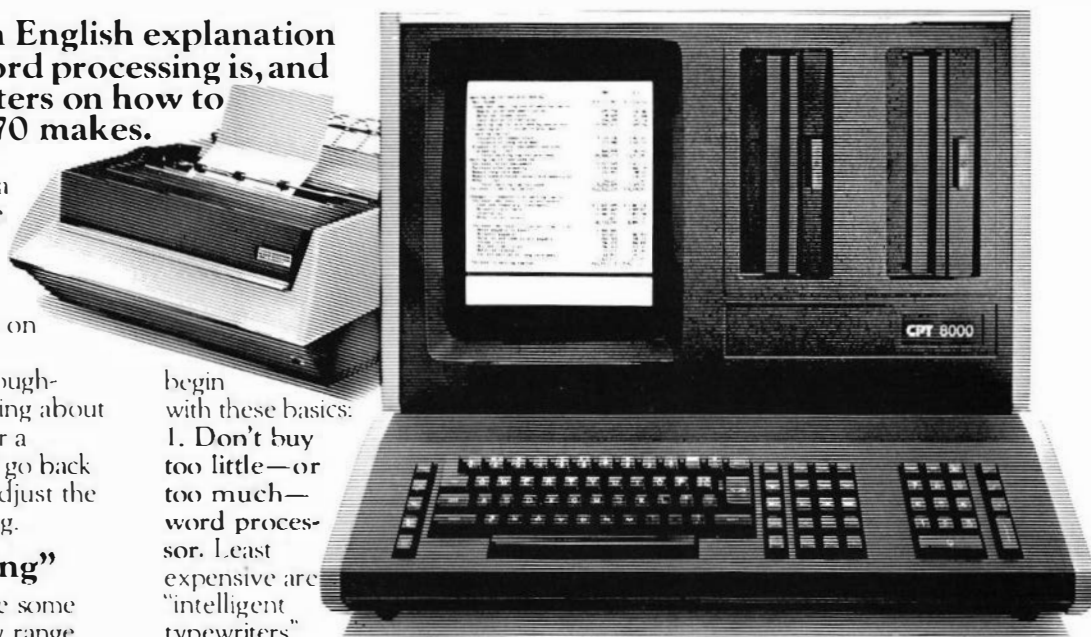
easy to use. Look for things like a standard keyboard, and plain English commands. The CPT 8000 is so easy to learn, most secretaries will be turning out actual work after a short period of instruction.

4. Plan for your needs. It is tempting to use your word processor as a "fancy typewriter" just because your procedures are set up that way. However, a relatively new feature,

called "software programming," can enhance your word processor so it can perform many other office tasks.

The CPT 8000, for instance, can also be used to prepare your office payrolls, keep ledgers, handle inventory and bookkeeping, and more. Be sure the word processor you choose has this important feature.

There are more things to look for than we can touch on here. For a thorough explanation of word processing, and more tips on what to look for, send for our free booklet *CPT Takes the Mystery Out of Word Processing*.



Clip and save this checklist of features to compare different models						
Feature	CPT 8000		Brand "B"		Brand "C"	
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Black-on-white full-page screen	✓					
Easily expanded with software packages	✓					
Standard keyboard and plain English commands	✓					
Computerized hyphenation	✓					
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Simultaneous input/output	✓					
Comprehensive training and local dealer support	✓					

screen in seconds. So you can make changes at any time as easily as you corrected the original.

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Things to look for

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Letters to the Editor of reasonable length are invited. Such letters should be typed and signed. The Editor reserves the right to select communications or excerpts therefrom for publication, and to edit any letter as may be appropriate.

Stealing is Stealing

Editor:

Once upon a time there was a man who had no money to support his family. So one day he went out and stole a loaf of bread to feed his wife and children. After he was arrested for the theft he explained to the Judge that the bread wasn't for himself, rather he was merely trying to save the lives of his wife and children. The Judge sentenced the man according to the law, telling him, "No matter how altruistic your reasons are, the fact remains that taking and using someone else's property is stealing."

Once upon a time there was a Bar Association that decided that they would take and use the interest from clients' trust funds for good works for the poor, who often could not afford expensive legal services. But, no matter how altruistic their motives, no matter how many tax opinions, no matter how many people could benefit, that is *still* stealing! And when a group of people discuss how they are going to steal that is conspiracy!

If our clients want us to use the interest from their trust funds, no matter how large or small the amount, we *must* have their knowing consent. Merely to *tell* them that we are using their money in this manner is not consent. Using it without telling them, or with the option to tell them, is not good enough.

JUDITH R. EILER

Federal Way

IOLTA Referendum

Editor:

With all due respect to the dedicated individuals who have spent much time studying the proposition of whether Washington should adopt a program of Interest On Lawyer Trust Accounts (IOLTA), I suggest that this is an issue of such fundamental importance as to

justify a referendum to the members of the Bar Association. Incidentally, I do not simply mean a proposal to be voted on at the WSBA Convention. This is an issue that concerns more than the few hundred that can afford the time and cost of attending the convention.

Would it be possible to simply enclose a ballot form in an upcoming *Bar News* asking whether we should adopt (1) no IOLTA, (2) mandatory IOLTA or (3) optional IOLTA? Surely nobody could object to a bit of democracy being involved in the decision-making process.

SAM F. COZZA

Spokane

The Board of Governors has taken a position on IOLTA ["Board's Work," August, 1983]. Thus, a ballot in the Bar News would be untimely. Ed.

R.S.V.P.

Editor:

I read with interest President Steere's column in the July *Bar News*. He urged all members to apply for positions on the Standing Committees and Boards.

In fact, I have applied for membership on various committees in *each* of the three years I have practiced in Washington. Because I have never received a response of any kind from the Bar Association, I do not even know if my applications were received. Other young attorneys I have spoken with have received a similar response, or lack of response, to their applications.

Can a young attorney do more to improve his or her chances of being selected for a Bar committee than merely submit an application?

BLAINE G. GIBSON

Yakima

Defined Benefit Plan

Editor:

The Keogh plan William Schaumberg suggests for partnerships in his June, 1983, article, "How to Choose Your Own Bank," will be a nonexistent concept on January 1, 1984. The Profit-Sharing or Money Purchase pension

plan "may work," as Mr. Schaumberg says, but very often a Defined Benefit pension plan provides far greater retirement planning opportunities for the law firm.

For a Defined Benefit plan not to be considered in the design stages of a retirement plan may well be malpractice.

MARK G. POWERS

Spokane

Dismal Picture

Editor:

I was pleased to read the article by Hwa-Tsun Feng on minority lawyers in this State [*Bar News* 37:7:8]. While the statistics in Table I show a dismal picture, it looks even worse if you carve out King County from the data.

Living in eastern Washington, one can feel pretty isolated. I wonder what source the author used to get his data on minority attorneys who do not belong to any minority organization and reside *east* of the mountains.

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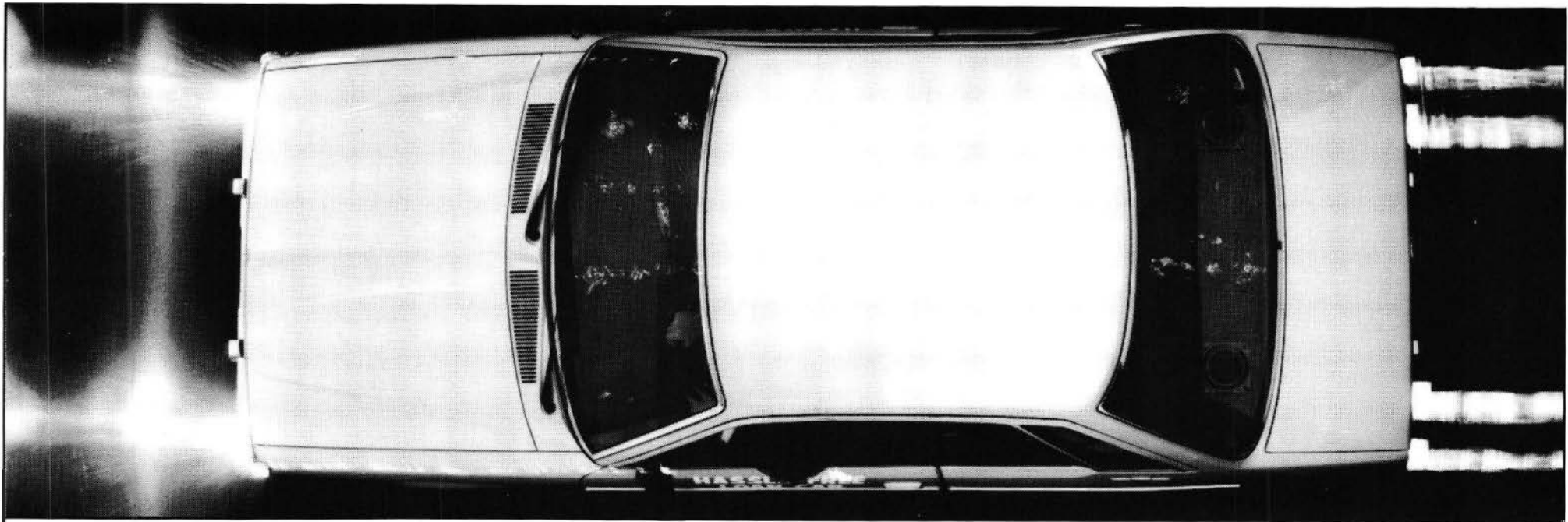
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In my opinion, the author's assertions have greater validity if directed toward the legal profession in eastern Washington where the social consciousness has probably not changed substantially in the last fifty years. In relating this article to the recent one on "Lawyer Glut" [*Bar News* 37:4:8], I wonder how any recent law graduate, let alone a minority, can break into this state's "old boys' club."

GEOFFREY J. ENG

Spokane

No Proof

Editor:

At first glance, the article published in the July, 1983 *Bar News* by Hwa-Tsun Feng concerning the numbers of minority lawyers in Washington appears to be the result of a conscientious effort by the author. However, despite the statistics and the obvious effort that was put into the article, many of the conclusions and assertions are the result of bias on the part of the author.

There is absolutely no proof of any covert or overt effort on the part of white male lawyers in Washington to exclude any person from a minority group (including women) from participating in legal education or the practice of law. Mr. Feng contends, "...the legal profession's continued dominance by white males has adverse effects on American society." The author asserts this is true but provides no proof. He becomes offensive to many of us "white males" when he uses the words "largely excluded." The word "excluded" implies a systematic effort to prevent minorities from participating in the profession. My experience in law school and the following twelve years of participation as a trial lawyer in Washington have revealed not the slightest shred of evidence to suggest that women or minorities were being "largely excluded."

Until recent years, women or minorities simply didn't apply, or if they did so, they apparently didn't qualify to attend a law school or to receive a license to practice law. The mere fact of white male dominance is not "res ipsa" proof of discrimination.

Where is the author's proof? He admits that the statistics do not prove these conclusions or assertions. The author fails to cite one example of unfair practice in the admission procedures of our state law schools or the testing and licensing procedures of our state bar association. None are cited because none exist.

If an applicant has demonstrated proper academic performance and competence, he or she will be invited to attend the law school. If a minority person so qualifies and then chooses not to attend, that does not become the social burden of the white male lawyers of the State of Washington. Fortunately, the author stopped short of suggesting that the admissions standard be modified to allow minorities greater participation, as such would clearly be an unconstitutional dual standard.

If the author and his fellow minority lawyers feel financial support needs to be provided to encourage more minority law student participation, then he and

his fellow minority students are certainly welcome to establish their own educational fund. It is not, and should never be, a function of the state bar association to in any way create any fund for the benefit of any individual, because our duty is to the public at large. The financing and aid to minority students is a private function.

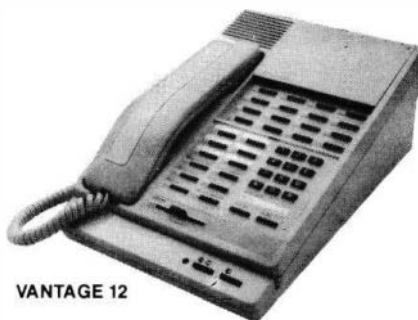
To the author's concerns the answer is clear. Give it time. Witness the continued growth of women in the profession as has been demonstrated in the past ten years. So too will the racial minority participation grow. Women began sporadically in the 1950s and are today actively involved in the practice of law in Washington.

The author will not gain much favor by accusing the bar of engaging in covert or overt efforts to "largely exclude" minorities. This is simply not true and I resent the accusation.

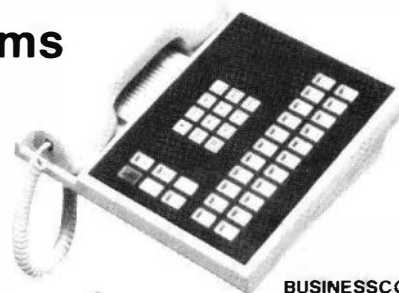
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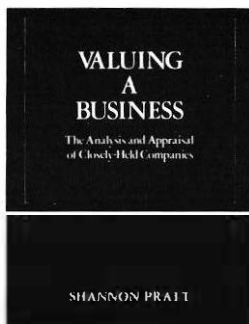
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Does your secretary refuse to run down the street anymore to answer your calls at the public telephone booth?

Have all the court reporters boycotted you because you conduct depositions in your hall closet?

Maybe it's time you considered moving your practice to bigger and better quarters!

Where you hang your shingle makes a statement about you. Your clients and professional colleagues learn a lot about who and what you are just by the office you keep. For example, a penthouse office suite on the 60th floor of the Twisp Savings & Loan Tower tells the local community that you are an ambitious lawyer with drive and imagination (but mostly imagination). You communicate that same message to the Seattle community when you lease a single office for yourself and then lease the entire parking garage of the new Columbia Center for your clients.

Office space is available to fit every budget. Prices range from the very expensive to the unbelievably expensive depending on whether you desire such amenities as electricity and running water. Bear in mind that although your clients will be impressed with your fancy new space, they will certainly recognize that it is they who are ultimately paying for it.

Remember to locate your new office where it is convenient for your clients. Rural clients do not like looking for parking in the big city and big city clients would rather have their lawyers only an elevator ride away. If you practice in one of the less-populated counties and have a far-flung clientele, you might consider hanging your shingle from the back of a Winnebago motorhome.

If you decide to lease office space, inspect the premises carefully before you sign anything. In high-rise office buildings in particular, find out whether anyone has starved to death in the lobby



waiting for an elevator to come. If you plan to work on weekends, visit your prospective high-rise office building on a summer Sunday afternoon and note whether the air conditioning is on. Remember that most skyscrapers' windows will not open and that without your own respirator and supply of bottled air, you will last no longer on a hot Sunday afternoon than a pedestrian in Seattle at rush hour.

If you love old-fashioned buildings and disdain modern conveniences like air conditioning, be on guard for convection currents in your neighborhood. Downtown Seattle and Tacoma lawyers know that devilish air currents can suck the briefs and memoranda right off their desks and out of their office windows, scattering them like snowflakes on the

streets below. Remember, too, that if you must have an office with a view, the view is for your clients, not for you. Nothing will kill a law practice faster than the million-dollar view which takes your mind away from the million-dollar case.

Once you decide where to locate your new office, do not overlook considerations about interior decor. With the right designer touches, a factory warehouse can be made into a first-class law office. A little schlock and kitsch, conversely, can make even the most opulent office suite look like a bordello.

Whether you are a sole practitioner or the managing partner for a national mega-firm, moving to new offices can be one of your most time-consuming, traumatic experiences. After spending thousands of person-hours checking out

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possible buildings, listening to proposals, poring over architects' drawings, and arguing with your partners about the color of the drapes, you will finally sign a contract. Months later you will make "the big move," and if you are very lucky you will be able to find everything again less than a year later.

And then you will look back nostalgically to those happy (and impoverished) days when you practiced law in the service bay of the Chevron station, when your business card bore the number of the telephone booth down the street, when you conducted depositions in the hall closet, and you will ask yourself, "Was it really worthwhile moving?"

Of course it was!



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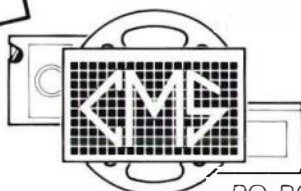
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Thank You

These past twelve months have been an extraordinary highlight in my professional career. As President of our Washington State Bar Association, I have been privileged to take part in the governance of an outstanding Bar—one which, this summer, began its second half-century of service.

In addition to being an enjoyable experience for me, it has been a learning experience. WSBA members familiar with the full schedule of issues which come before the Board of Governors will agree that the Board does not duck the tough ones, nor does it shy away from initiating actions to improve the legal processes for the benefit of both members and the public.

Our Board is made up of a talented and energetic group of lawyers. Each individual has devoted an enormous amount of time to resolving the issues at hand. The average governor spends approximately 30 working days a year on Board business. The experience of working with them, individually and collectively, has been a most rewarding aspect of my year of elected duty.

The same can be said for my association with those who have served so well on State Bar committees, boards, and task forces. Such service reminds us that, despite the official *imprimatur* of the State Bar Act, our Association is really comprised—from high level management to individual members statewide—of professionals who care about service and the improvement of our legal system.

As I reported earlier in the *1983 Annual Report* (see the June, 1983, *Bar News*), we have had a good year. Our legislative program met with marked success, an effort due primarily to the work of our Legislative Committee, our legislative representatives, and in large part, to the support of our lawyer-legislators in Olympia. Major rule changes were approved for the benefit of both the WSBA and the public, including the newly revised Rules for Lawyer Discipline and the Limited Practice Rule for Closing Officers.

We have increased an already excellent rapport with the judicial community through the continued encouragement of two-way communication at all levels. We have begun providing direct assistance to the Supreme Court in the formulation of proposed changes in court rules.

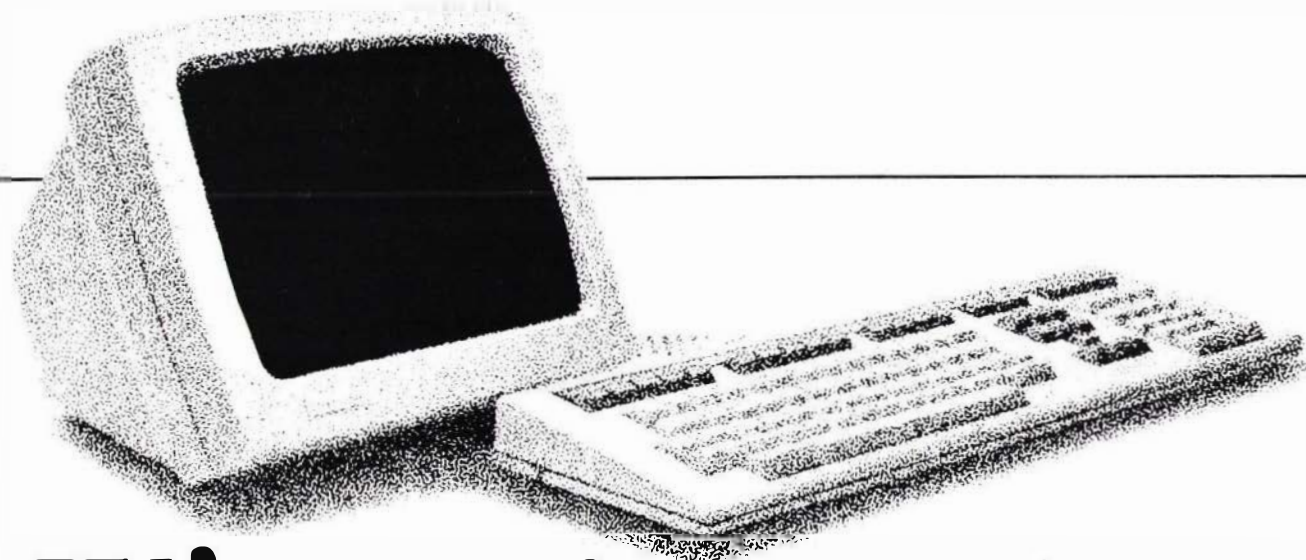
As an association, we are in a strong and balanced financial position and should remain so for the foreseeable future. This pleasant state of affairs has been brought about not by an excessive dues structure, but by the application of professional management techniques. The quality of our Association's administration has been for years a bellwether for other bar associations. Citing just one example, our data processing and programs are among the best in the nation, and are copied extensively by other state bars.

No association the size of our State Bar can function efficiently without the professional guidance of an outstanding Executive Director. We have our own in the person of John Michalik. John has guided a capable staff in the administration of a large and complex assortment of Bar activities. Having served on the Bar Staff for almost eight years, John is now completing his second year as Executive Director. John was selected for that position after a nationwide search for the very best, and we could not have done better.

As my term of office comes to a close, I can thus report that our Association is in good shape and, with the election of Bob Redman of Yakima as our new President, our future is in excellent hands.

My only disappointment at this time is that one major issue remains to be resolved. The deplorable levels of judicial salaries in Washington State is an issue that your State Bar intends to follow through to a successful solution. It is inexcusable that judicial salaries in our state are among the lowest in the nation. It is unacceptable that members of the Bench are resigning or opting for early retirement because they cannot provide adequate support for their families. It is unthinkable that political expediency should be allowed to stand in the way of fair and just compensation for those upon whose judicial wisdom and experience we depend.

Our Association has been working on this issue for many months. In preparation for, and during, the upcoming Legislative Session, we will continue our efforts to resolve this matter. It *must* be resolved in a way that will assure that the high quality of our Judiciary will be maintained. To accept anything less will court disaster for the Bar, the Judiciary, and the public at large. Although my term of office comes to an end in September, your Board of Governors is committed to devote as much energy as necessary in the coming months to make adequate judicial salary levels a reality in Washington State.



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Bond, Bracelin and Zylstra Elected to Board of Governors

The Board of Governors will welcome three new members at the State Bar Annual Meeting held this month in Spokane. Donald H. Bond, Elizabeth J. Bracelin and Ted D. Zylstra will begin their three-year terms at the close of the Annual Meeting.

Yakima attorney Donald H. Bond has been elected to represent the lawyers of the Fourth Congressional District. Bond graduated in Economics from Washington State College in 1951, and from the University of Washington School of Law, where he was a member of the Order of the Coif and the *Washington Law Review*, in 1957. Having been admitted to the Bar in 1957, he spent his first eight years of practice in Sunnyside with the firm of Salvini & Bond, then joined the Yakima firm of Halverson, Applegate & McDonald, where he has been managing partner for the last nine years.

His professional activities have included service on the State Bar Board of Bar Examiners, as a panelist at CLE seminars, and as a contributing author to the Real Property Deskbook. He is also active in his community, having been a founder and president of the Yakima



Donald H. Bond

Valley Hearing and Speech Center, chairman of the Yakima Valley Chapter of the American Red Cross, president of the Board of Directors of Valley Memorial Hospital in Sunnyside, director of the Yakima Rotary Club, and director of the UW School of Law Alumni Club.

Bond will succeed Dale W. Read as the Fourth Congressional District representative on the Board.

Elizabeth J. Bracelin, of Seattle, will represent the lawyers of the Seventh Congressional District. Bracelin is a principal in the Seattle firm of Peterson, Bracelin, Young & Putra, Inc., P.S. She



Elizabeth J. Bracelin

graduated from the University of Washington School of Law in 1969, was admitted to practice that same year, and for four years was an associate with Horswill, Keller, Rohrback, Waldo & Moren. She joined her present firm in 1973.

Bracelin has been active in local and state bar activities as a member of the Board of Trustees of the Seattle-King County Bar Association, member of the SKCBA Judicial Evaluation Committee, chairperson of the SKCBA Young Lawyers Section, and editor of the SKCBA *Bar Bulletin*; and as a member of the State Bar Board of Bar Examiners and the Board of Trustees of the State Bar Young Lawyers Section.

She has also been a member of the Boards of Trustees of the Public Defender Board and the Legal Services Board; a member of the American Trial Lawyers Association and the Washington State Trial Lawyers Association; and co-founder and member of Washington Women Lawyers. She was an instructor at the ATLA Regional College of Trial Advocacy and has been a frequent speaker at CLE seminars.

Bracelin is the second woman to serve on the Board—the first was Betty Fletcher. She will succeed Robert R. Beezer to represent the Seventh District.

Oak Harbor attorney Ted D. Zylstra has been elected to serve as the Second District representative on the Board. An Oak Harbor native, Zylstra earned a B.A. in Economics from Whitworth College in 1954, and graduated from the University of Washington School of Law, where he was a member of the Order of the Coif, in 1957. That same year he was admitted to the Bar, and his first two years of practice were with Johnson & Zylstra, after which he was a sole practitioner from 1959 to 1961. For the seven years following, he practiced with Patrick & Zylstra, then with Patrick, Zylstra & Pitt until 1970, when the firm became Zylstra & Pitt until 1978. In 1978, he formed Zylstra, Beeksmas & Waller, his present firm.



Ted D. Zylstra

Zylstra is a member of the American Bar Association, the American Trial Lawyers Association and the Island County Bar Association. His active community service has included terms as president of the North Whidbey Chamber of Commerce, the Jaycees, the Rotary Club and the Navy League of the United States. He is also a member of the Reformed Church in America.

Zylstra will succeed Julian C. Dewell as the Second Congressional District representative on the Board.

Are you tired of the look on your secretary's face when you tell her that the fifth redraft she just typed of your 30-page brief, which is due in three hours, has five typos and three misquotes, and does not yet contain the most sanguine of your arguments, which you just formulated?

Are you trying to think of some way to improve your staff's morale, now that you've advised them that the personal injury verdict which was to be the basis for staff bonuses has been received, and you have lost on all theories of liability?

Do you recognize the advantages of a high-speed printer, but feel uncertain as to whether you can afford one?

Are you overwhelmed by sophisticated video cartridges and wondering whether your nine-year-old will outdistance you in the computer age?

Anxiety?

Have you discovered that the "state-of-the-art" Mag Card machine you bought five years ago is now obsolete? Do you need an efficient flow of information processing *and* paper production?

You may well be a candidate for the acquisition of a dedicated word processor system, a microcomputer system, or a minicomputer system.

A FEW POINTERS

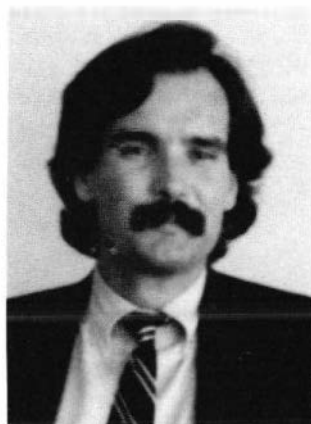
This article will not be a rehash of technical terms, confusing phrases, and other bits of computerese, which tend to boggle the mind, dazzle the uninitiated, and otherwise throw smoke over an already foggy picture. It is intended to provide a few brief pointers, gleaned from my own practical experience and that of my clients, to help in the pre-acquisition and contract negotiation phase of your transition into the Automated Office.

The Costs

In deciding whether to automate, a key factor you must initially consider is *money*. It is important to review not only the direct costs but also the indirect costs.

Direct costs would include hardware, software, training and maintenance costs, and any modification of existing office space, such as dedicated lines, anti-static mats, special chairs, and other office furniture which may be required.

Indirect costs would include the additional staff hours necessary to make the transition from a non- or semi-auto-



Seattle attorney **Michael J. Garrison** is a partner in the firm of Kimball and Garrison. A graduate of the University of San Diego School of Law, his practice encompasses general commercial and civil litigation, with an emphasis in computer products liability.

Before You Buy

Ways to Avoid Computer Anxiety

by **Michael J. Garrison**



mated to a fully automated office, as well as new paper or forms, and miscellaneous supplies like ribbons, cleaners and diskettes. You should also consider the time that *you* anticipate being personally involved in the transition.

Once you have come up with what you think are your direct and indirect costs, consider whether direct financing or lease financing would be more appropriate.

Financial planning should be done at the front end, so that when the time comes to negotiate an agreement with your ven-

ly



dor, you will be able to negotiate not only for price and performance, but also for terms and method of payment. Pre-acquisition financial planning can also help narrow your field of potential vendors—some may just be too expensive.

Office Needs

With the financial picture reasonably clear, examine the particular needs of your office environment. Consider the size of your current staff and how that may change over the next five

years, the general expansion plans of the firm, and whether you need greater efficiency in your billing system or in your word processing system.

At this point in your planning, give additional thought to the time which you reasonably anticipate will be needed to adjust from your present operation to a fully automated system. Consider the staff time needed to adapt forms from your Mag Card system or regular printed format and place them onto disk storage. Include the time needed for adjustments which the attorneys and other non-secretarial staff will have to make in their dictation style, turnaround time, and the demands which they place upon the staff during this period of transition. Depending upon the commitment your office is willing to make, your transition time may be anywhere from two to six months, or longer.

Staff Involvement

Before deciding which vendors to review, talk with the members of your staff who will be operating the equipment. It is extremely important to know how your staff feels about the acquisition of this "new, modern, sophisticated" hardware. Some older employees may feel threatened, fearing for their tenure with the firm. The result could be the loss of a valued staff member who has overreacted to a change in equipment.

You can avoid such problems by inviting your employees to provide input into the decision-making process. Have your office manager or a team from the secretarial staff go along with whomever is investigating the prospects, or at least have them participate in in-office demonstrations, so that they can provide you with direct input.

As the person in charge of purchasing the equipment, you could probably care less whether the screen is black, green, gray or amber. This is because you are not *sitting* in front of it for six to eight hours a day, watching the letter "e" trail off into a distant "o" and eventually disappear from the screen, or experiencing the frustration of typing out what you thought was an entire sentence and finding that there was a delay between the time that you struck the key and the time that the letter appeared on the screen.

By taking the staff's input into your evaluation, you will create allies on the staff, and potentially reduce the amount of time spent complaining about the new equipment, thus allowing more time for the productive use of it.

Finally, when the time comes to decide how many of your operators are to be trained by the vendor and how many of them are to pick up their training on the job, it is entirely possible that the feelings of goodwill and camaraderie which you initially generated in the exploration phase of your purchase will carry through, such that an operator trained will then work with another employee to teach him or her how to use the machine, saving you some training costs.

(It should be noted that some manufacturers will limit their liability if the operator has not received company training. This is a point which should be carefully negotiated, as maintenance and support of your automated equipment is absolutely critical to its short- and long-term utilization.)

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Other Factors

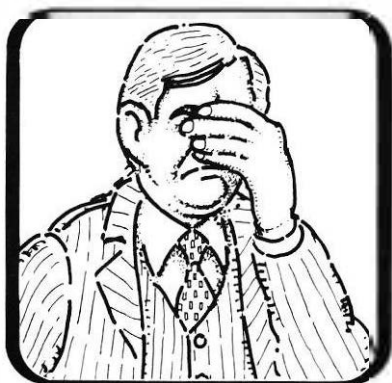
Other factors to consider are the noise of your printer and the potential changes in lighting and physical plant modifications which the new equipment may require. Again, I cannot overemphasize the need for staff involvement when reviewing the equipment, because your employees are the ones who will be confronted by the noise factor and have to cope with inadequate lighting.

The Paid Consultant

If you are contemplating an automated system for an office of more than five attorneys, I suggest you seriously consider retaining a consultant to help you review and assess the marketplace for the purchase of this equipment. In an office of this size, you are probably thinking of two or more terminals, as well as future expansion.

Thus the decision whether to go with a straight disk drive floppy disk system or a hard disk expandable system could be a crucial one—crucial in that your costs, both short- and long-term, as well as the functional utilization, could depend greatly upon the decision made at the time of your initial acquisition.

In short, the \$3,000–\$5,000 you may save when you purchase two stand-alone, dedicated word processors could end



up costing you substantially more when a decision is made to go to a hard disk system three years later. Thus a consultant who can adequately advise you as to his or her perception of your current and long-term needs will help you make the right decision *now*, and avoid a serious financial miscalculation.

Vendor Longevity

One final consideration before calling the 15 or so different vendors. Check various periodicals and talk to colleagues to get a sense of which companies are going to be around in the future. It is *critical* that your automated system be continuously maintained and upgraded.

Most companies will tell you that you will receive the latest in software enhancements as well as continuous maintenance



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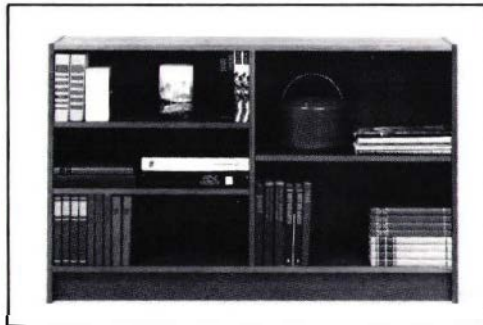


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Contracts from vendors benefit the vendor, not the vendee.
Strive to strike as strong a bargain as possible.

on your particular piece of hardware. What they *don't* tell you is that if they should go out of business, then, of course, the maintenance and software enhancements would also "go out of business."

Thus, in the middle of your precedent-setting brief to the United States Supreme Court, when your system shuts down for some unexplained reason, and you remember having received a letter from your vendor advising you that they are about to go into bankruptcy and thus cannot provide you with hardware and software support, and further that the five "select" people whom they have trained to continue that software and hardware maintenance and support have elected to move to southern California, you are faced with a grisly situation.

A possible solution at this point would be to contact some third-party software and/or hardware maintenance firm and hope that they can carry on where your vendor left off, and do so in a timely and efficient manner.

Another reason why the longevity of your vendor is critical is that, like the Mag Card system, your recently acquired automated system will someday need to be updated. You would like to be able to either sell or trade in your existing equipment, but this becomes more difficult if the vendor from whom you originally purchased it is no longer in business, and thus the market for that equipment has dwindled from a small share to *no* share.

(This, accompanied by the feeling of ineptitude on your part because *you* were the one who argued long and hard at the partnership meeting for the acquisition of this now "worthless" piece of equipment. . . .)

CONTRACT CONSIDERATIONS

When you have decided which vendor to go with, after consulting with your staff numerous times and twisting your partners' arms so that they are not shocked at the cost, you are now ready to negotiate the agreement.

Keep in mind that you are dealing in one of the most competitive fields of international business today. Thus all aspects of any contract should be considered subject to negotiation. When I say *all* aspects, I mean precisely that. Do not be afraid to take the form contract which you are handed and rewrite it. Depending upon the vendor, there is generally a willingness to negotiate most critical areas of a contract.

Some of the factors which a vendor will take into consideration when negotiating with you will be the size of your order, the vendor's place in the market—both locally and nationally—and whether he is willing to make concessions to you to further establish himself in this particular market, and whether the vendor has substantial inventory which he needs to unload.

Maintenance and Support

A key item to negotiate is the maintenance and support which your system is to receive. Typically, you will be promised software enhancements as they are available, as well as some basic training (usually at cost), and a service agreement for the maintenance of the hardware of the system.

If it has been represented to you that the response time on maintenance or repairs is to be four hours or less, make sure that response time is set forth in the contract. Remember, you are a lawyer. You are negotiating a contract. If anything goes wrong with that contract which you have specifically negotiated, the court is going to take a somewhat jaundiced look at a provision in the contract which you may or may not be contesting. It is my opinion that lawyers are held to a higher



standard in contractual negotiations than are other professionals and laymen. This arises from the presumption (albeit unfounded) that lawyers should know what the terms and conditions set forth in a contract mean.

One final point insofar as the maintenance and software is concerned. The more integrated your system (integrated meaning the use of more than one software application, *e.g.*, word processing, accounting, document control, *etc.*), the greater the need for quick service response, as well as for software upgrades. This becomes particularly critical when you have a central processing unit with a variable number of work stations accessing that unit, so that if there is a problem in one work station it does not affect the remaining work stations linked to that central processor.

Remedy and Relief

It is important to be aware of the limitations on remedy and relief which are contained in most form contracts. Typically, you will be asked to contract away your implied fitness for use and implied merchantability warranties. Some vendors may even ask you to contract away any express war-

PERFORMANCE IS THE ISSUE IN LEGAL TIME & BILLING SYSTEMS

<u>TASK</u>	<u>HEURISTIMA TIME</u>	<u>WANG TIME</u>	<u>IBM TIME</u>	<u>OTHERS TIME</u>
1. ENTER CLIENT (1)	35 sec	_____	_____	_____
2. ENTER MATTER (1)	22 sec	_____	_____	_____
3. ENTER TEN TIMESLIPS (1)	2 min 40 sec	_____	_____	_____
4. ENTER TWO COSTS ADVANCED (1)	36 sec	_____	_____	_____
5. ENTER ONE PAYMENT (1)	23 sec	_____	_____	_____
6. GENERATE BILL REFLECTING ITEMS 1-5 (2)	35 sec	_____	_____	_____
7. GENERATE CLIENT LEDGER REFLECTING ITEMS 5 AND 6 (2)	23 sec	_____	_____	_____
8. TRANSACTION UPDATE TIME REQUIRED TO COMPLETE ITEMS 1-7 (2)	0 min 0 sec	_____	_____	_____
9. REVERSE ABOVE BILL SO THAT IT MAY BE CHANGED AND REGENERATED (1)	19 sec	_____	_____	_____
10. PRODUCE A/R AND TRUST BALANCE SHEET FOR FOLLOWING PERIODS: (3)				
—MONTH	1 min 45 sec	_____	_____	_____
—QUARTER	2 min 31 sec	_____	_____	_____
—YEAR	2 min 39 sec	_____	_____	_____
11. PRODUCE AGED A/R BY: (2)				
—FILE	18 sec	_____	_____	_____
—ATTORNEY/FILE	47 sec	_____	_____	_____
12. PRODUCE A/R BY: (2)				
—FILE	22 sec	_____	_____	_____
—ATTORNEY/CLIENT	55 sec	_____	_____	_____
13. PRODUCE ALLOCATION OF FEES RECEIVED BY WORKING ATTORNEY REPORT—ONE MONTH PERIOD (2)	2 min 58 sec	_____	_____	_____
14. ASSUME POWER FAILURE PRIOR TO STORING DATA AND RECOVER ENTIRE BENCHMARK—INCLUDES TERMINAL PRINTING OF REPORTS	26 min 43 sec	_____	_____	_____
15. BACKUP DATABASE				
—FOREGROUND	7 min 8 sec	_____	_____	_____
—BACKGROUND	7 min 8 sec	_____	_____	_____

(1) Time computed from main menu to completion of task and return to main menu

(2) Time computed from main menu to commencement of printing

(3) Time computed from main menu including 9600 baud terminal printing

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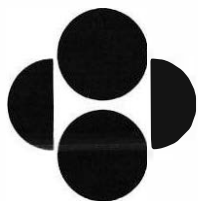
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ranties which have been made insofar as the equipment is concerned.

This is an area where your contract negotiation skills are going to be put to the test. I would strongly encourage you not to give up any rights you would otherwise have under applicable Uniform Commercial Code provisions.

One strategy which has proved successful in these negotiation sessions is to have the company allow relevant pieces of sales literature or pertinent correspondence to be attached and incorporated into the contract. By incorporating the specific representations, you have at least preserved a potential warranty claim you may wish to make, as well as put the company/vendor on notice that if the product fails to perform in the manner as represented, you fully intend to see that those representations are, in fact, upheld.

If a vendor is unwilling to incorporate sales representations into the contract, this should put *you* on notice that the vendor has some reservations about the equipment's ability to perform as represented. If the vendor or its agent has some reservations, you, as the contracting party, should also have some strong reservations which should be explicitly set forth in any of the contract documents.

IN CONCLUSION

The move from semi-automated to fully automated can be both rewarding and exasperating—exasperating because time

which should be spent on client files and other projects which generate fees must be devoted toward the study, analysis and acquisition of equipment. However, I believe that if you follow some of the basic steps I have outlined (by no means to be considered complete, and I would strongly advise a review of the abundance of literature available on the subject), it will help you to decide.

Once the decision has been made (and the office staff is basically satisfied), then the contract negotiation phase is critical. In advising my clients, both pre-sale and post-sale during the enforcement phase of a contract, I urge them constantly to maintain a steadfast position in their negotiation and enforcement tactics. As would be anticipated, contracts from vendors are for the vendor's benefit and not for the vendee's benefit. The law firm or sole practitioner who is contemplating the acquisition of automated office equipment must strive to strike as strong a bargain as possible.

Don't overlook the details. Make sure that the company is willing to provide you with an environmental inspection and certify that the electrical, atmospheric and temperature conditions within your office are satisfactory for the use of the equipment.

And once it is plugged in and you receive your first draft, ask your secretary to redraft it. If she returns in five minutes with a gleam in her eye, you will know you have made the right choice—at least until it refuses to operate. □

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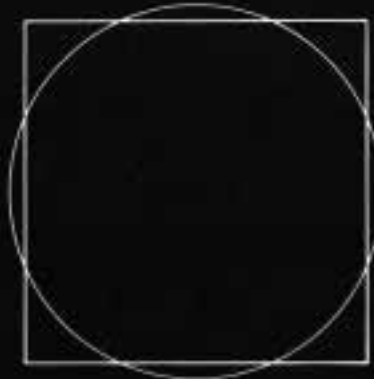
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How to Hang Out Your Own Shingle ... Without Hanging Yourself

by Jeff Tolman

In 1977, I graduated from Gonzaga Law School and looked at my options for the future. An entrepreneur at heart, I was not interested in a government job. Having grown up in a small town, I did not want to work in a city.

Those factors, and my natural inclinations, led me to seriously consider two options: 1) opening my own office, or 2) finding a wealthy (but ailing) sole practitioner (or two or three ailing partners) with a lucrative practice who wanted to teach me how to be a fine lawyer, and then retire. I would not have been disappointed if one of these wealthy (but ailing) practitioners had a Rhodes Scholar daughter who looked like Candice Bergen.

Stamina, brilliance, and minimum wage...

I began interviewing to decide whether hanging out my shingle or working in a firm was the better option. I must confess, I was a horrible interviewee. I am gregarious by nature, and although I received no awards (or nominations for any awards), my practical legal experience through University Legal Assistance at Gonzaga gave me a fair taste of what lawyering was like. Having grown up in a small town, I certainly knew what the fears, attitudes and expectations of small town people were. I was convinced that I had a good start on being a fine small town lawyer.

In my interviews, I was more concerned about my prospective employers' long-term expectations of and plans for me. I saw an Associate as a young person recently out of law school with a lot of energy, ambition and idealism, willing to work himself to death, make his senior partner a pile of money, and in two or three years seek a small, but increasing, partnership interest. My interviewers, conversely, defined an Associate as someone with a brilliant legal mind, inexhaustible stamina, and no interest that would not relate to his law practice, who would bring several huge accounts into the office and work for less than minimum wage.

In one interview I was told that I would be expected to work at least 12 hours a day, five days a week, at least eight



hours a day on Saturday and three or four hours a day on Sunday... for \$800.00 per month. When I verbally computed that working those hours I could earn more selling pencils or picking up beer cans along the highways, the interview ended abruptly.

On another occasion, after what I thought was a fair interview, my interviewer said, "Based on your law school performance (which places you in the severe-to-profoundly undistinguished part of your class) and your lack of contacts in the area, we will pay you \$750.00 per month to work your



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brains out for us." That reminded me of the dance studio which, after my five free lessons, indicated that they could make me an average dancer in the town of Asotin (population 1,000) for \$1,250.00. Needless to say, I am neither a good dancer nor working for that firm.

After a couple of other interviews, I found myself still uninterested in entering indentured servitude and unable to find a wealthy, sole practitioner ready to retire, so I decided to open my own law office.

Finding the perfect town . . .

When I decided to open my office, I was free, single, and had some pocket money from my sawmill job, so I decided to look around the country for a perfect town in which to settle. I spent three months travelling around the country looking at several areas with great reputations: Aspen, Bozeman, Spearfish (South Dakota), Boulder and Maui. All my travels taught me was that there is no place like the state of Washington.

Once I had decided to open my office in Washington, I concentrated on finding a growing small town that felt like home and was able to support another lawyer. After three weeks of searching, two small towns emerged as the most likely places to open a successful office: Asotin (the town I grew up in . . . 1,000 people and no lawyers) and Poulsbo (a small Norwegian town west of Seattle). In each area, I checked with judges, attorneys and laypeople to learn their feelings about the area and whether a new lawyer could make a living there.

It became apparent that although Asotin County was a wonderful place in which to be raised, there was not enough growth to support more lawyers. In addition, people I knew there already had me established in their minds as a small, balding, local kid with thick glasses. I was worried that I might be destined to spend my life not getting paid by my (ex-) friends who would constantly return their bills marked "I appreciate your help, Pal."

Poulsbo, on the other hand, was a closeknit small town within one hour of Seattle, growing because of the increase



Jeff Tolman is a partner in Roof, Green & Tolman, the largest law firm in Poulsbo, Washington.

I was going to be rich.
It would be easy. . . .

in activity at the nuclear submarine base. The laypeople and local lawyers all felt that area growth would support a new law office. I liked the area and the local lawyers and, most importantly, Poulsbo felt like home.

My decision was made. I was going to be a Poulsbo lawyer.

Setting up shop . . .

There were two theories about how to open a new office. The conservative approach suggested that I buy everything used, with the understanding that it is not how much money I bring into the office that counts, but how much I take home after overhead and expenses. Keeping the overhead down would keep the creditors away from the door and give me more time to develop a clientele.

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The second theory, a more radical approach, suggested that I buy everything new, to look successful. Would you go to a doctor who had his office in a cobweb-filled, low-overhead warehouse? Of course not. Like your doctor, your lawyer must look successful, even if he cannot afford to.

Despite having almost zero net worth, I borrowed \$20,000 (with the help of my folks' signature) and rented a nice office on a busy highway, bought nice furniture, bought new law books, hired a part-time secretary, and was ready for business. I looked very successful. Everything I owned was new. All I needed was clients.

Keeping more clients than creditors in the waiting room...

When I opened my office, my financial expectations were, to say the least, unrealistic. Having worked in a sawmill for seven years, I computed my law income as I would have my sawmill income. That is, \$50 per hour (my rate then) times eight hours a day, times five days a week, times 50 weeks a year, equalled \$100,000. Subtracting 20% for taxes, I would have \$80,000 for my overhead and myself. I was going to be rich. It would be easy....

As the water poured from behind my ears, I learned very painfully that lawyers do not bill eight hours a day, that people do not always pay their bills, and that initially, my clients would be those people around Poulsbo who owed every other area attorney money. In retrospect, it is probably good that

I did not understand those things or I would still be in indentured servitude earning \$800.00 a month.

My unanticipated experiences in the office began quickly. Rather than being inundated with clients, I was swamped by salespeople. I was dunned by everyone from Amway to Zebra Life Insurance Company. The salespeople seemed to understand that I did not have any money, but did not care. The life insurance salesman explained that an obvious future success like me needed a \$500,000 whole life policy, although I could not afford the premiums. The book salesman stressed that books about multi-district class action litigation were a necessity to the properly-equipped Poulsbo lawyer. The Dictaphone salesman emphasized my need for a Dictaphone, even though three days a week I was secretary-less and typed the letters myself.

I'm thankful for the barrage of salespeople. They helped toughen me up, and I learned to say "no," without hesitation. That toughness has been a godsend at times.

Mistrust and P.R....

I was surprised by the mistrust some clients (who I think liked me very much) held for me because of my profession. They inherently mistrusted lawyers. One good, paying client ended every phone call and conference with a recitation of how much time we had spent together. He would say, for example, "Jeff, what an interesting 22-minute conference," as



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he was leaving the office. I'm sure each month when he receives his bill he checks to see if he is being overcharged by his lawyer.

Anyone opening an office must realize that over the years many lawyers have not been good P.R. people. Understand that it may take time and a lot of effort to gain the confidence of some of your clients.

Perhaps the biggest surprise I had after I opened my office was how difficult it is to be a small town lawyer. Not having the luxury of specialization, you are expected to know all things about all legal problems. I have had clients quiz

Like it or not, law is a business,
and sole practitioners (especially)
can never forget that.

me about Arkansas inheritance tax law and, in the same conference, about the effect of a Washington Community Property Agreement on Nevada real estate. Knowing when to bluff and when to retreat is very important for both small town practitioners and poker players.

A final shock has been having to fight for fees. Although clients have seldomed complained about the services rendered, too often they have paid little or nothing on their bills. Having grown up in a family which made sure the bills were paid, I was shocked at how many non-payers I had on my books my first year. My first year in practice I wanted clients. After I had awakened to life's financial realities, I wanted *paying* clients. Like it or not (and I don't), law is a business, and sole practitioners (especially) can never forget that.

Life, and law, goes on . . .

On January 1, 1983, my Associate (a brilliant young man with inexhaustible stamina who brought no huge accounts into the office and makes barely over minimum wage) and I merged with another Poulsbo law firm. My reflections of five years on my own are fond. It was harder than I had thought, but more rewarding than I had anticipated. My colleagues in Kitsap County were always helpful and courteous as I began to learn my trade. I took some licks, but then, everyone does.

Opening your own practice, if examined scientifically and objectively, is an honest option today. You need the right personality, the right financial situation and the right small town. When those come together, the results are personally and professionally rewarding. Some rich old philosopher-lawyer must have said on his retirement day from a large law firm, "I only wish I would have tried practicing law on my own." □

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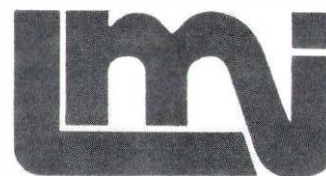
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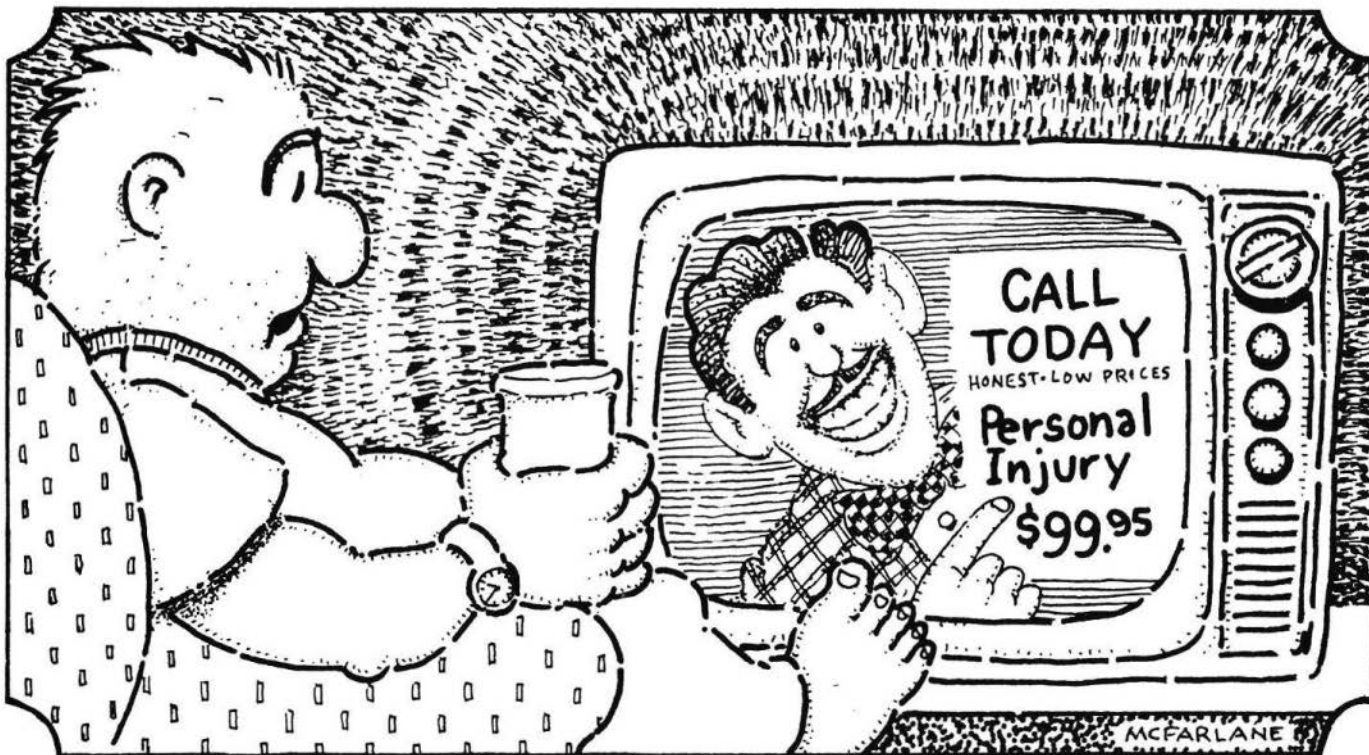
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The Public Relations Alternative

by Lonnie Lusardo

You're watching the late late movie. A commercial break beams in and, sandwiched between a monotone used car dealer and a discount furniture store salesman, is an overly effervescent pseudo-attorney in a plaid suit, with mustache and shiny black hair.

"Are you an unemployed minority who was recently injured in a freak accident?" he asks. "Do you hurt?" Well, *why suffer needlessly?* What you need is the *will to act today*. Yessir. And we've got it for you at Smith Smyth Smithe Panik Shukk and Jive," he bubbles.

"We'll prepare your personal injury suit for you, and, if you come in before November 1, we'll throw in—*absolutely free*—the will you need—your very own last will and testament—all for the low, *low* price of \$99.95. Isn't that amazing? Just \$99.95. . . ." He gushes a final "You, too, can. . . ." before you flick the switch.

An unlikely scenario? Well, maybe. It's advertising at its worst.

Contrast the approach of that Johnny Caronesque television caricature with an item you see in the next day's paper.

At breakfast, you turn the page to see your former associate Alexander Smoothington, III, pictured seriously in a dark three-piece over a caption saying: "Alexander Smoothington, II, has been named senior partner at Rivers & Moore, a law firm specializing in maritime law."

An accompanying profile describes Alex as a civic leader, public speaker, responsible citizen and father of three. Public relations at its finest.

ADVERTISING

It is the *fear* of what advertising could do to the image of the legal profession, today's lawyers say, that first inspired bar associations to prohibit lawyers from advertising.

But in the landmark *Bates v. Arizona Bar Association* decision, 433 U.S. 350, 53 L.Ed. 2d. 810, 97 S. Ct. 2691 (1977), the Supreme Court set a precedent for lawyers' advertising when it ruled that the Bar's advertising prohibition was an infringement of the plaintiff's First Amendment right to free speech.

The tradition however, lives on. Attorneys today are still reluctant to advertise, although they do take a closer look at image building.

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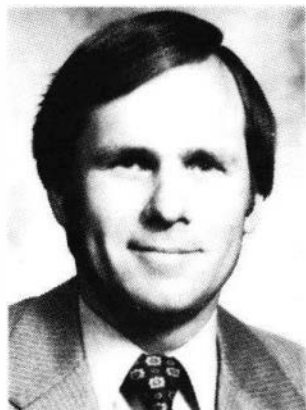
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Paul Clausen, President of Business Valuations, has professionally appraised in excess of 300 closely held businesses since 1970. Many have been acquisitions by Fortune 500 firms



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requiring in-depth analyses of the company's earnings, assets, marketing and manufacturing operations, and management. Many have been instrumental in negotiating mergers, settling shareholder disputes, establishing employee stock ownership plans, structuring buy/sell agreements, recapitalizing and reorganizing businesses, amortizing intangibles, and determining reasonable compensation.

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.

Without question, the practices of some attorneys have mushroomed because of advertising campaigns. Some buy TV and radio time and display space in the press on a continuing basis.

Yet, perhaps in deference to the overall image of the profession and because bar associations nationwide continue to impose advertising restrictions, the preponderance of lawyers turn their backs on advertising. Giving a pitch in the public forum, they say, bears too many risks.

For example, a lawyer who has been perceived by existing clients as successful risks alienating those clients, should they discover an ongoing ad campaign and think, "How successful can he be?" Some clients may also reason that, like retailers, lawyers who do not advertise charge less.

Lawyers' ads listing a host of legal services have been criticized by some attorneys for promoting such a diversity of expertise that it becomes questionable whether one firm can provide each of its special services with the same degree of competence.*

If their advertising is successful, lawyers risk overloading their schedules, thereby siphoning away time from loyal clients. Advertising may attract clients whom a practitioner may deem "undesirable"—clients who are unable to pay, or "clients" just looking for "a little free advice." As any of the risks materializes, the advertising lawyer's prestige erodes.

But a blanket condemnation of advertising would be out of order. Some lawyers whose ads are tasteful and discreet are pleased with the return on their advertising dollar.

Furthermore, the American Bar Association's Code of Professional Responsibility protects the profession from unconscionable advertising practices. The Code attempts to legislate good taste in advertising and is regarded as an effective measure.

*Note that in Washington a lawyer may, at the present time, identify himself as a "specialist" only in the areas of admiralty, patent, and trademark law.



Lonnie Lusardo, president of Lusardo & Associates Public Relations in Seattle, is a former correspondent and editor for the Bridgeport (Conn.) Post Telegram, and currently teaches press-release writing courses. He has a degree in Journalism and Public Relations from Boston University, and has been published in many local, regional, and national publications.

If you don't toot your own horn,
somebody is going to use it
as a spittoon.

Disciplinary Rule (DR) 2-101 (A), adopted by the ABA in 1977, states that attorneys "shall not participate in any form of public communication which contains deceptive, self-laudatory or unfair statements or claims."

However, for the discreet attorney who still finds advertising objectionable, there is another way. Public relations. The practice offers a less aggressive approach to promoting a professional image. It is designed to work *with* the media, not as an adjunct to them.

Therein lies the basic difference between advertising and public relations. *While the primary purpose of advertising is to sell a product or service, the SOLE purpose of public relations is to create or enhance a FAVORABLE public image.*

CREATING AN IMAGE

Public relations is further distinguished from advertising by the *credibility* afforded a carefully coordinated program. In public relations, the message is fashioned to be placed or edited into the columns of a newspaper or incorporated into radio or television newscasts. Screened by editors, the information bears the endorsement of the medium which communicates it.

In advertising, the client pays not only for space in a publication or air time on an electronic medium, but for the graphics, copywriting, typesetting and other related costs as well. Dollar for dollar, the cost of advertising dramatically outweighs the cost of public relations, and advertising has a more commercial, less professionally credible impact and no greater certainty of being read. How many times do *you* pick up a magazine to read the ads?

LAWYER PR.

More and more law firms are beginning to develop public relations goals and objectives, particularly those with practices concentrated in one area of the law. "In the past three or four years," says Washington State Bar Association Public Affairs Director Wayne Wilson, "Lawyers have begun to recognize that some degree of public relations is not only desirable, but necessary."

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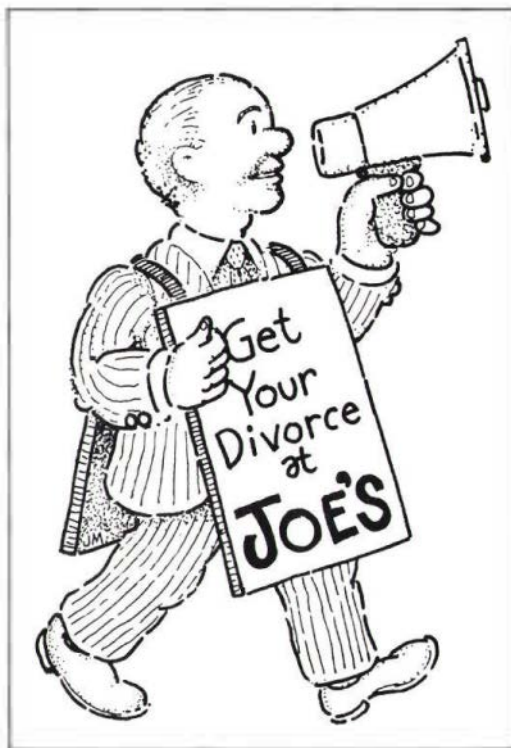
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One explanation for the heightened interest in public relations may be a recognition that the legal profession has lost some of its glow in the eyes of the consumer. "We find the public perception of lawyers to be a negative one," says Chris Rigos, a Seattle lawyer who recently developed a P.R. program for Breskin, Robbins & Merkel.

"In general," Rigos explains, "most non-lawyers are unaware of their legal rights and responsibilities." Some popular misconceptions, he said, include the feeling that "lawyers set guilty people free and that personal injury lawyers win favorable verdicts when nothing is physically wrong with their clients."



Another lawyer commented that most consumers believe lawyers charge outrageous fees. "They think we solve cases through a phone call and a quote from a book on the shelf," he said. And perhaps the allegation of "high pricing" is fostered internally. "The combined income of lawyers in the United States would pay off the national debt," said one attorney.

Given the myths, the lawyer who makes a conscious effort to dispel them is a stride ahead of his or her competitors.

HOW TO DO IT?

Although a public relations consultant can offer expert guidance and direction, with time, one lawyer at a firm may be designated to take over the P.R. program and adopt new P.R. functions when the need arises. The consultant may be called on to assist with specific tasks.

A Public Relations Manual

Ideally, the law firm would hire a P.R. consultant to develop a public relations manual, a comprehensive plan with a paradigm of strategies to address certain contingencies affecting that law firm's area of expertise—and designed expressly for the use of that law firm.

These contingencies may be categorized into three units: those likely to generate favorable publicity, those likely to have little or no news value, and those likely to generate unfavorable news.

To prepare for favorable publicity, the manual might contain models for news releases to be distributed when announcing new employees, office promotions, retirements, staff recognitions, special events, or when lawyers in the firm make presentations. A game plan is advised for responding to press inquiries following court decisions which rule in a client's favor.

In addition, the manual would establish a plan to avoid, or brace members of the firm for, negative publicity. This category would detail, for example, how to protect clients from the media, and how best to respond to reporters in the wake of negative court decisions.

The News Release

However elaborate your public relations manual, the key to gaining media access is the *news release*. This simple tool may well be one of the most misunderstood, but most meaningful, elements in the field of public relations.

In brief, a news release is a news story written for a medium (or many media) by a source outside of that medium's staff. In its most effective form, it contains the traditional elements of a news story: who, what, where, why, when and how.

The value of a well-written news release cannot be overemphasized. Consider the results of a 1981 study by a public relations firm in Seattle which concluded that *between 10 and 25 percent of all news in the print and broadcast media is obtained from sources outside the medium*, particularly from news releases.

At a recent media seminar, I asked news editors and producers from three major television stations in Seattle how much of their news *really* comes from releases. I was astounded to learn that at both KING-TV and KIRO-TV, more than 50 percent of the local news broadcasted comes from releases and phone calls made to the newsroom. And the third, a cable station, receives closer to 70 percent of its news from outside sources.

But before you start cranking out reams of copy to editors, consider another, more sobering, statistic. The aforementioned study also revealed that *more than 70 percent of all news releases received at both print and broadcast media never get past the editor's desk*.

Making positive progress with editors and reporters challenges even the most adept professional—in the P.R. industry or elsewhere. The American Bar Association's regula-

tion DR 2-101 (I) sets a limit on how far lawyers can go to get good press. The code provides that "... a lawyer may not compensate or give anything of value to representatives of (the) press, radio, television or other communication medium in anticipation of, or in return for, professional publicity in a news item."

Photographs

Of comparable value to the news release is the press photo. Useful to have on hand, a supply of photographs can add extra news appeal to a release sent to the print media. The value of a photograph lies in its ability to make a page of editorial copy look less intimidating to the reader. For that reason alone, editors are always on the lookout for good photos.

Editors look for photos with creative flair, particularly those which have depth, high (black/white) contrast and a feeling of movement. To reproduce best, a press photo should be glossy black and white print, large enough so the editor can distinguish details. An eight by ten print is preferred by most editors. The subjects in the photo must be named (left to right) so that they may be identified in the publication.

Editors are as attuned to the technical detail of a photograph as they are to its overall composition and its news value. The effect of an amateurish photograph may be counterproductive if it casts an unprofessional impression over the accompanying release.

Making Contact

In addition to knowing how to garner favorable publicity, the public relations consultant earns a portion of his fees by cultivating a garden of contacts in newsrooms around his or her city.

The respect of those contacts, akin to a lawyer's friends on strategically placed benches, is not always a breeze to nurture. The most successful way to an editor's heart however, is to give the gift that pleases him or her the most—*news!* Not hyperbole, not rehashed ad copy, not a martini—news, *stated briefly, clearly and accurately.* To an editor, poetry is the articulate brevity of a snappy news lead, with substance and readability.

What is and is not news has a variety of interpretations. Its definition is the source of more disputes among P.R. consultants and editors (and between P.R. consultants and their clients) than is any other issue affecting the profession.

Most editors look at news as anything that a larger number of people would consider interesting, amusing, unusual or controversial. They look for the "man-bites-dog" angle.

Lawyers become instant newsmakers when they represent controversial clients—as long as the controversy is still smoking or, with luck, the public is pressuring the court for a verdict *in the client's favor.*

Nonetheless, few lawyers, save the celebrities, choose to ride the wave of a decision that could, given the right tide, bring

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them right to shore. Instead, most lawyers seem to *avoid* the press at those times when favorable coverage is most likely. Taught to be cynical, journalists consider this suspect.

Ride the Wave

At those times when a lawyer's name is recognized favorably, it is to his or her advantage to organize some back-up programs and maintain a positive momentum. The extent to which this back-up is developed depends, of necessity, upon the degree of exposure desired.

Appearances on television talk shows, on radio interviews, at speaking engagements and at seminars, each conducted with an ample supply of information on hand about the speaker, virtually assures continuity.

No hyperbole, no rehash,
no martini — give 'em *news*.

To achieve such assurances, any concerted public relations effort must first convince an editor, news director or producer of the subject's ability to attract an audience as an interviewee or as the focus of a feature article in print. *The ultimate decision to use or to scrap any promotional concept remains with the medium.*

A loss of editorial flexibility is the one trade-off inherent in exercising the P.R. option over advertising. With an ad, because you purchase the time or space, the freedom to say what you'd like is almost unlimited—within legal and ethical boundaries.

When negotiating with editors or producers over the use of a news release or a client's appearance on a talk show, the P.R. consultant is dealing with certain journalistic (and Bar Association) constraints. The constraints may be the audience's known likes or dislikes, a sponsor's preference for subject matter, the producer's programming philosophy—and timing. These constraints are determined by the executives of any given medium, and are usually rigid standards.

Diplomacy

Media relations plays a vital role in persuading executives to use releases and in convincing producers that an idea for a talk show will not bomb on the air. Each process is a sensitive one, and diplomatic skill is required to achieve one's goal without having to make concessions that might damage that goal.

Say, for example, a producer will allow a talk show to feature a flaming liberal *only* if he agrees to a live debate with a fundamentalist. The decision to accept such an offer would not always be a satisfactory compromise just to attain the objective of appearing on television.

If you want to know about word processors ask the people who use them.

Advanced
Office Concepts
did.

Rating Scale: 4 Outstanding 3 Good 2 Satisfactory 1 Improved	OVERALL RANK Ranked winners (in brackets) Summary of Advanced Office Concepts' 1982 Survey of Word Processing Users										
	Price/Value	Ease of Learning	Human Engineering	Page processing	Program Efficiency	Operator Training	Publication	Reliability	System Capabilities	Rank 1982	Rank 1981
CP1 9000	3.33	3.11	2.85	2.68	3.02	2.84	2.71	2.90	3.31	8	8
A.B. Data Magna 51	3.44	3.00	2.90	3.11	3.45	3.00	2.80	3.40	3.20	10	10
DCTAPHONE Build/Display	3.50	3.30	3.20	2.93	3.20	3.20	2.88	3.40	3.40		
EXXON Vproc 1400-1800	2.60	2.94	2.20	2.31	2.54	2.30	2.00	2.45	2.25	24	24
IBM Displaywriter	3.04	3.00	2.98	2.70	3.00	2.90	2.60	2.81	2.90		
LANIER Neolution	3.30	3.34	3.00	2.80	3.00	2.90	2.80	2.84	2.91		
LEXTRON 1280021303	3.19	3.76	3.20	2.91	3.12	3.00	2.52	3.10	2.93	6	3
PHILIPS Micom 2000/1	3.62	3.40	3.20	3.34	3.40	3.02	2.80	3.20	3.80	1	1
NBI 3000 System 1/2	3.57	3.33	3.18	3.00	3.00	3.00	2.80	3.20	3.60		
WANG VAPC 5	3.24	3.00	3.06	2.70	2.70	2.35	2.24	2.20	3.10	14	16
WordPerfect	3.00	2.75	2.80	2.80	2.90	2.80	2.70	2.70	2.80		

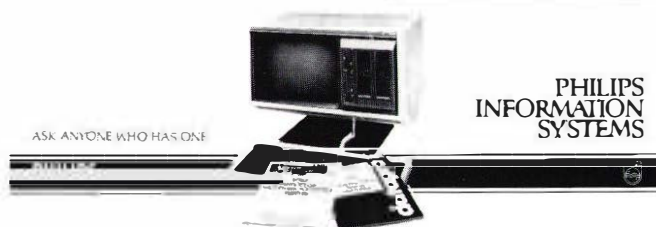
Philips placed #1 overall in 1981 and 1982—of all the word processors rated in the Advanced Office Concepts® Survey.

Datapro did.

Datapro Honor Roll of Word Processing Systems

1978	Philips (Micom)
1979	Philips (Micom)
1980	Philips (Micom)
1981	Philips (Micom)
1982	Philips

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It is the fear of what advertising could do to the image of the legal profession that first inspired bar associations to prohibit lawyers from advertising.

Often, the human equation being what it is, media personnel get “stressed out” on a daily diet of deadlines and time pressures. It is best to avoid confrontations at such times, respect the occupational hazards, and call back later. An adversary relationship with an editor is *suicidal*.

If a talk show is approved, try to find out as much as possible in advance about the format of the show and other guests who will appear with you. This will help you prepare notes. If you’ll be discussing how a lawsuit was won, for example, would it be best to have the client with you?

If you anticipate in-depth questioning, a mock interview with a journalist may prepare you for the unexpected. Try to arrange to have the show videotaped to allow a thorough evaluation afterwards. It may also be advisable to review the tape before speaking engagements in the future.

Should your media relations process pay off with a feature story in a newspaper or magazine, the article may be used to generate coverage by other media as well. Largely because of media ratings, journalism awards and other media recognition, the media have become parasitic. Each tends to feed off the other’s news. Ratings induce editors to scrutinize the competition daily and see what was missed.

Include a neat, clear photocopy of a previously published news article when sending an updated release to an editor. Editors appreciate the news judgment of their competitors. “If the Trib used it,” one may say, “I suppose we should, too.”

This rationale, however, should not suggest that an editor be struck with a jackhammer to change his or her mind. Wielding a stack of other articles is an overly aggressive approach and may reverse an editor’s comment to “This guy has gotten all the publicity he deserves.”

Articles and Speaking Engagements

Another route many professionals take to gain publicity is to write articles about their area of expertise for trade publications or publications with a specialized readership. These may include financial magazines, business publications and a plethora of others. This highly effective means of image building may also lead to speaking engagements at service clubs and organizations.

Community involvement and appearances before civic organizations can be helpful for networking and for gaining name (and *image*) recognition. Lawyers who speak at meetings of legislative bodies, associations and other groups are reinforcing their images through exposure.

Most organizations solicit articulate, knowledgeable persons to speak on issues relevant to their memberships. The more controversial the subject matter, the better for the organization, as more of its members will be drawn to the meeting; and the more listeners, the greater the image building.

At such occasions, depending upon the anticipated size of the audience and how incendiary the speech may be (and whether or not the presentation has been sufficiently publicized to draw media attention), the speaker may wish to have on hand a packet of supplementary information.

Press Kits

For additional impact, and to reinforce an image, the speaker may wish to gather the information into a press kit folder. Press kits generally include such information as a copy of a speech (lest we be misquoted), a photo of the speaker, a biographical sketch of the speaker, and one or two articles published by or about the speaker.



The organization sponsoring such a presentation may also wish to disseminate information in the same press kit. A history of the organization or a brochure is usually sufficient.

To increase the probability of the press using the information, charts and graphs of any statistical data might be drawn up and included in the press kit. Be mindful when preparing such a packet that editors are not only interested in news, but also in the composition of each page from a graphics standpoint. Most editors strive to find visuals other than ads to incorporate into their layouts.

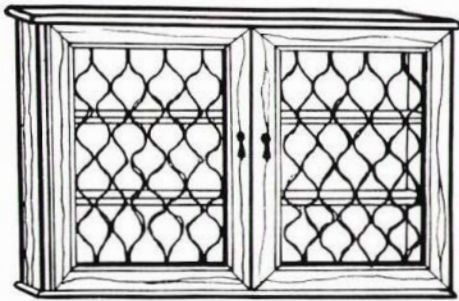
Two other communications strategies are available to lawyers, each of which addresses the need for an educational component to raise the public consciousness about the practice of law. They are *training sessions* and *newsletters*.

Training Sessions

Free or low-cost seminars, workshops, and legal clinics are a valuable method to increase awareness and deliver helpful advice to an often disadvantaged audience. Such programs are frequently successful in drawing mention in the press.

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If the law firm has produced press kit folios for other purposes, the same folios may be used to distribute handouts at seminars. Having the information in one handy container also encourages participants to save it. Many press kits are constructed with slits into which a business card can be inserted for future use.

Newsletters

Today newsletters are used by more and more businesses and organizations as a communications tool to keep clients and members informed. Aside from the other advantages of a newsletter, the document allows a service business like a law firm to inform its clients of services it offers which they may currently be obtaining from other providers.

When a firm has a large staff offering a variety of specialized services, spreading the news can be of great benefit both to the firm and to the client, who may have been unaware that one firm was able to serve all of his legal needs.

Newsletters also permit a firm to focus on its individual lawyers and profile, in depth, their professional interests. In those firms with a practice concentrated in one area of the law, clients, too, may be spotlighted to add a new dimension to the newsletter as a networking instrument for those clients who work in a specialized industry.

To make newsletters more affordable, lawyers in related practices might group together and publish a single newsletter mailed to a single mailing list. This cuts down overall production costs, affords higher quality at a fraction of the expense, and increases the dissemination of favorable information about participating firms and their areas of practice.

IN CONCLUSION

The P.R. strategy you choose to employ at your firm—whether it be an all-encompassing P.R. manual, media coordination, seminars and workshops, speaking engagements, a newsletter, or all of the above—can, if managed properly, provide excellent public exposure and incomparable image-enhancing possibilities.

Were most law firms in this state to develop an ongoing P.R. strategy to be implemented by their staffs, legal professionals, as a whole, would feel the positive impact of a resurgence in the perceived credibility of the profession.

Although the role of public relations in the modern business world is far more misunderstood than is law, its benefits are apparent to those thousands of businesses and corporations which engage its services as a staff function. One thing P.R. is *not* is paying to say, "I'm good. I'm great. Use me." That's *advertising*.

Last April, while conducting a seminar in Bellevue, Kenneth H. Blanchard, author of the best-selling book *The One Minute Manager*, capsulized a segment of his presentation into a one-line prophecy endeared to any publicist. "If you don't toot your own horn," he said, "somebody is going to use it as a spittoon."

That's P.R. □



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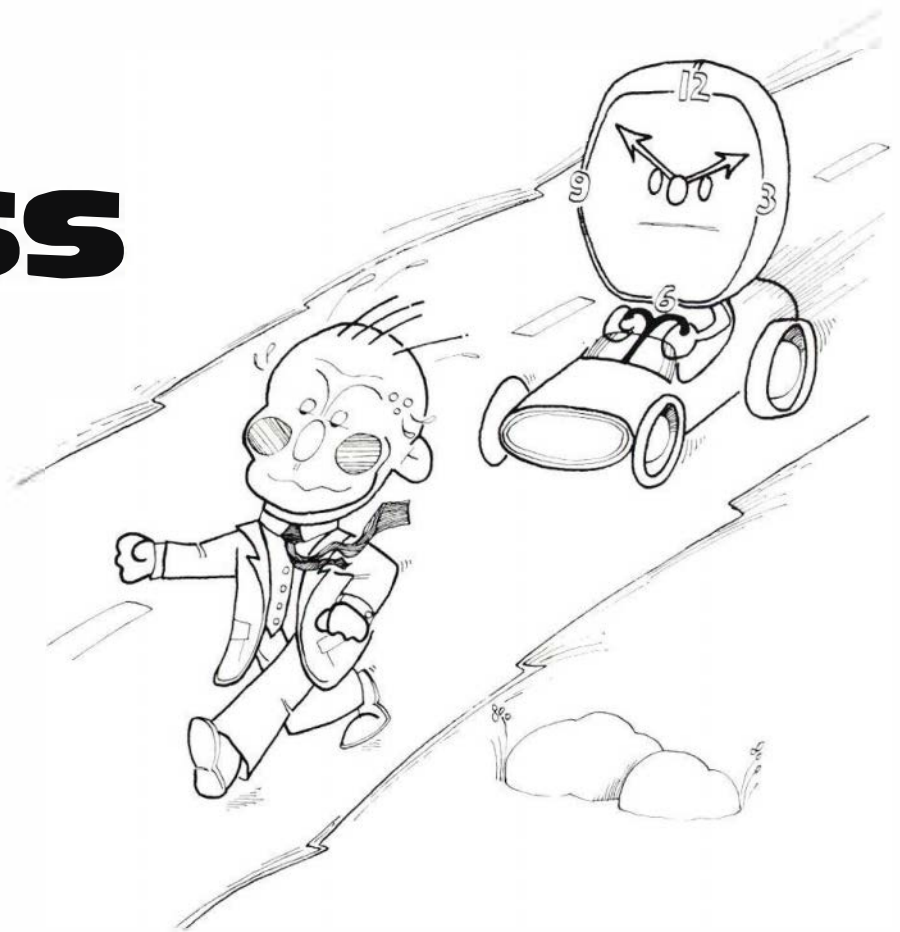
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STRESS

Don't Let the Practice of Law Become Hazardous to Your Health

by **Maria Pertik**



Being a professional means remaining objective and composed. Although attorneys get angry, they must contain and restrain themselves. Clients expect their attorneys to be in control, especially when the clients themselves feel a loss of control.

The accumulation of stress in a lawyer's life eventually takes its toll. Psychological and psychophysiological responses have been documented to strongly influence psychosomatic disorders such as hypertension, ulcers and asthma. Even susceptibility to and recovery from infections and genetic disorders (ranging from the common cold to cancer) are determined, at least in part, by environmental stress and a person's ways of coping with it.^{1 2}

CAUSES OF STRESS

In interviewing several attorneys in the greater Seattle area, I identified some prominent, recurring occupational causes of stress:

- 1) Extreme uncertainty about the outcome of a lawyer's tasks;
- 2) Role conflict;
- 3) Accountability for other people's lives and property;
- 4) Competition;
- 5) Work overload;
- 6) Ongoing contact with highly anxious clients and colleagues;
- 7) The need to define one's professional ego in terms of being "right" and winning; and
- 8) The need to remain unemotional.

As would be expected, the type of law practice seems to determine the level of stress. Litigators, personal injury lawyers

and family practitioners are in the high stress range, whereas business and corporate lawyers are in the lower stress range.

The Outcome of a Lawyer's Tasks

The outcome of a lawyer's tasks is uncertain and depends upon numerous variables in presenting the client's side of a case. The represented perspective is not necessarily "right," especially in litigation. The chances of "winning" a case are unpredictable.

One lawyer I interviewed said, "Going to court is like throwing dice." This unpredictability, coupled with one's own

¹ Selye, H., *Stress in health and disease*, Butterworth Publishers, Inc., Wolburn, Maine, 1976.

² *Ibid.*

Maria Pertik, M.A., R.N., is the director of Preventive Health Consultants in Seattle, where she conducts professional stress management and "optional wellness" seminars. She earned her B.A. in Nursing and in Psychology from Elmhurst College, and her graduate degree in Stress Management/Biofeedback Therapy from Antioch University.



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inevitable emotional tendency to become involved with the client, can cause the attorney anxiety and stress.

Role Conflict

The lawyer is an advocate, an actor. He may be called upon to represent a client whose case is contrary to or in conflict with his value system. He must concentrate on how he *should* act in a given situation. This can cause role conflict.

Accountability

Within the context of a particular legal matter, the attorney may be responsible for his or her clients' properties—even their lives. The Bar Association's self-policing activities and the Code of Professional Responsibility increase an attorney's sense of client accountability.

Competition

Depending upon the individual attorney's self-esteem, the law can be seen as a profession in which only the "fittest" survive. The security (or insecurity) that one attorney feels may grossly affect his interrelationships with colleagues. An example is the need to accommodate oneself to the schedules of other attorneys for depositions, hearings, and the like. This can easily become a major cause of stress in the course of a day.

Overload

The type of law an attorney practices is a factor in determining his or her work load. It is not uncommon for the work day to surpass eight, nine, even ten hours. Many attorneys work one or both weekend days.

Others' Anxiety

Lawyers usually see clients and colleagues in "crisis" situations. The coupling of emotional counsel with legal counsel is inevitable in a crisis situation. Because there are few formal support groups, attorneys "ad lib" informal group therapy sessions. This is healthy on the one hand, but also perpetuates contact with occupational stress.

"Winning" and Being "Right"

The ultimate ego trip in law is *winning*. Some lawyers define their self-worth by their win-loss records. They can seldom find peace or relaxation.

Personal Life Stresses

The way a lawyer approaches his or her practice may increase the risks associated with living a highly stressed personal life. Some causes of stress found in the personal lives of attorneys I interviewed were:

- 1) Competitive leisure activities (e.g., marathon running, competitive tennis and golf);
- 2) Difficulty with interpersonal relationships (e.g., trouble separating from the professional role of being in control and winning); and
- 3) Alcohol and drug abuse.

If persistent, this hyperarousal can wear the body out. Mental or physical illness will likely follow.

EFFECTS OF STRESS

There have not been specific studies on the stress-related disease risk factors of attorneys. However, a recent paper by Chesney and Feuerstein³ highlights important research on the stresses of white collar workers.

Using a homogeneous population of 1,540 white collar workers (84% male) in a large financial institution, Weiman⁴ confirmed Selye's⁵ hypothesis that both overstimulation and

understimulation are sources of stress and are associated with a higher level of disease or risk of disease. Weiman observed a relationship between stimulation (measured by an index of workload, role conflict, task ambiguity and responsibilities) and disease (including smoking-related disease, hypertriglycerides, hypercholesterolemia, atherosclerotic heart disease, essential hypertension, exogenous obesity and peptic ulcer).

Numerous studies support a relationship between stress and heart disease.

Chesney and Feuerstein⁶, in collaboration with Chadwick⁷, attempted to define relationships between coronary heart disease risk status and job and life stresses, personality characteristics, behavior patterns, job and home environments, and physiological strain. They assessed these variables over an 18-month period for 397 men. The data shows a higher level of catecholamines* correlated with job

*Catecholamines are thought to act as neurotransmitters, sending brain nerve impulses across synapses from one neuron to another. When an excess level of catecholamines is present, nerve impulses fire more rapidly and stress may result.

³ Chesney, M.A., and M. Feuerstein, "Behavioral Medicine in the Occupational Setting," *Behavioral Medicine*, 1979.

⁴ Weiman, C.G., "A study of occupational stressors and the incidence of disease risk," *J Occup Med* 19: 119-122.

⁵ Selye, H., *The stress of life*, McGraw Hill, Inc., New York, 1956.

⁶ Chadwick, J.H., M.A. Chesney and M. Feuerstein, "Psychological Job Stress and Coronary Disease," *National Institute of Occupational Safety and Health Press*.

⁷ Ibid.

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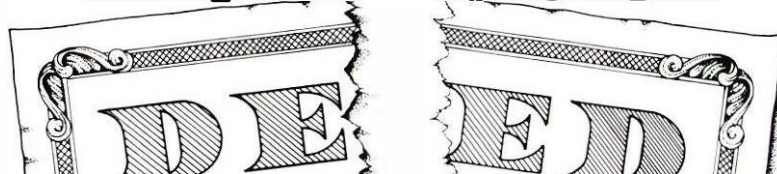
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stress as measured by the work pressure subscale of the work environment scale⁸. Zorn⁹ found that increased levels of catecholamines correspond with job stress and heart disease.

UNDERSTANDING AND MANAGING STRESS

How Stress Works

The stress response is centered in the hypothalamus, a primitive part of the brain which controls our sympathetic nervous system. When the hypothalamus is activated by one's sense of danger, the sympathetic nervous system initiates the "fight or flight" response, releasing adrenalin and cortisone to ready the body to protect itself from threat.

According to studies by Benson¹⁰, psychic stress can elicit the "fight or flight" response. Because the hypothalamus is as primitive in us as in lower mammals, anxiety about making a deadline for a deposition may cause the body to respond as though one had seen a grizzly bear! Blood vessels constrict, blood pressure rises, reserve glucose is called to the fore; sodium is retained, heart rate increases, respiration quickens—all ways in which the body readies itself against threat.

If persistent, this hyperarousal can wear the body out. When this occurs, mental or physical illness will likely follow.

De-arousal of the mind, or relaxation, has a quieting effect on the hypothalamus, which in turn quiets the sympathetic nervous system, which quiets the body.

Techniques to Reduce Stress

There are many techniques for reducing stress. They should be chosen to match one's individual coping style, and can be used in conjunction with one another.

Cognitive Restructuring

If you say to yourself, "I'll never finish that brief by noon tomorrow!", what do you see, feel and hear? Perhaps an image of the courtroom, the judge, an angry client, and your frantic state.

Your subconscious mind believes and reacts immediately when aroused. You actually experience what you think. Your interpretation of an anticipated situation creates the images, which alarms your body, even though nothing has yet happened. Your thinking molds reality. Learning positive strategies can turn back negative messages.

Affirmations

An affirmation is a mental description of a desired condition. You describe your desire for the future in the present, as if the result has already occurred. This, in turn, causes a favorable response in the body. The trick is not to analyse, just act. You positively reinforce yourself by pointing out the positive aspects.

⁸ Ibid.

⁹ Zorn, E.W., J.M. Harrington and H. Goethe "Ischemic heart disease and work stress in West German Sea Pilots," *J Occup Med* 19: 762-765 (1977).

¹⁰ Benson, H., *The relaxation response*, William Morrow and Co., Inc., New York, 1975.

Altered States of Consciousness

There are several ways to alter one's state of consciousness, among them meditation, self hypnosis, hypnosis, autogenic suggestion (planting a positive suggestion in the subconscious) and guided imagery (using images to produce a positive experience).

Someone who experiences anxiety upon entering a courtroom might try using guided imagery by visualizing, in advance, the calm relaxed manner he will have, and imagining the other details of the experience in the same positive way. Evoking positive imagery can elicit deep muscle relaxation and thereby help one to cope with anxiety and distress. The more one practices these techniques, the better they will work for him or her.

Progressive Relaxation

Progressive relaxation involves a tensing and releasing of muscle groups. The purpose is to learn to differentiate between tension and relaxation.

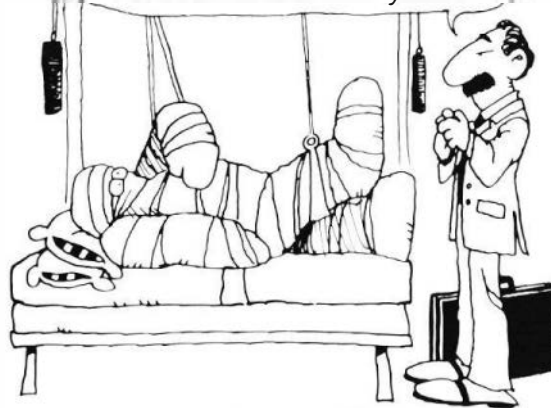
Biofeedback

Biofeedback is an electronic means of teaching specific voluntary control over particular muscles or visceral (internal organ) responses¹¹. Biofeedback uses an electronic feedback loop to make normally unconscious physiologic tension visible and conscious. The depths of one's relaxed state can be measured by the machine.

¹¹ Ibid.

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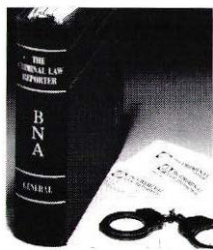
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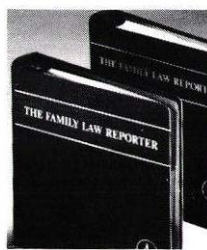
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Biofeedback is helpful because it documents the amount of voluntary control one has over physiological responses and the amount of stress in the body. The positive reinforcement of seeing and measuring the self-regulation of one's own body can be extremely rewarding.

Biofeedback is also useful in learning to control pain from injury or headaches, and can be used to teach people to lower their own blood pressure.

ADVANTAGES OF MANAGING STRESS

Benson and colleagues published a study comparing the effects of daily "relaxation breaks" on five self-reported measures of health, performance and well-being¹², as well as on measures of blood pressure and heart rate¹³. For twelve weeks, 126 volunteers filled out daily records and reported bi-weekly blood pressure measures.

After four weeks of monitoring, they were divided randomly into three groups. Group A was taught a relaxation technique developed by Benson. Group B was instructed to sit quietly and relax any way they wished. Group C received no instructions. Groups A and B were asked to take two 15-minute relaxation breaks daily.

Results showed that the blood pressure measurements of each group paralleled their self-report measures. Systolic blood pressure decreased by 11.6 mm Hg for Group A and 6.5 mm Hg for Group B, and increased by 0.4 mm Hg for Group C. Moreover, within Group A, the higher the initial blood pressure, the greater the decrease with relaxation training.

It Only Costs Time

The practice of relaxation as a preventive measure for good health only costs time. It can be practiced on an ad lib basis each time a person experiences stress. The more a person practices, the deeper the habit of relaxation becomes.

Stress management can enhance peak performance and reduce illness by:

- 1) Decreasing the need for alcohol and drugs;
- 2) Enhancing interpersonal relationships;
- 3) Enhancing pure concentration and increasing productivity;
- 4) Decreasing psychosomatic disease;
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¹² Peter, R.k., H. Benson and D. Porter "Daily relaxation response breaks in a working population. I. Effects on self-reported measures of health, performance and well being," *AM J Public Health* 67: 946-953 (1977).

¹³ Peter, R.K., H. Benson and D. Porter "Daily relaxation response breaks in a working population. II. Effects on blood pressure," *AM J Public Health* 67: 954-959 (1977).

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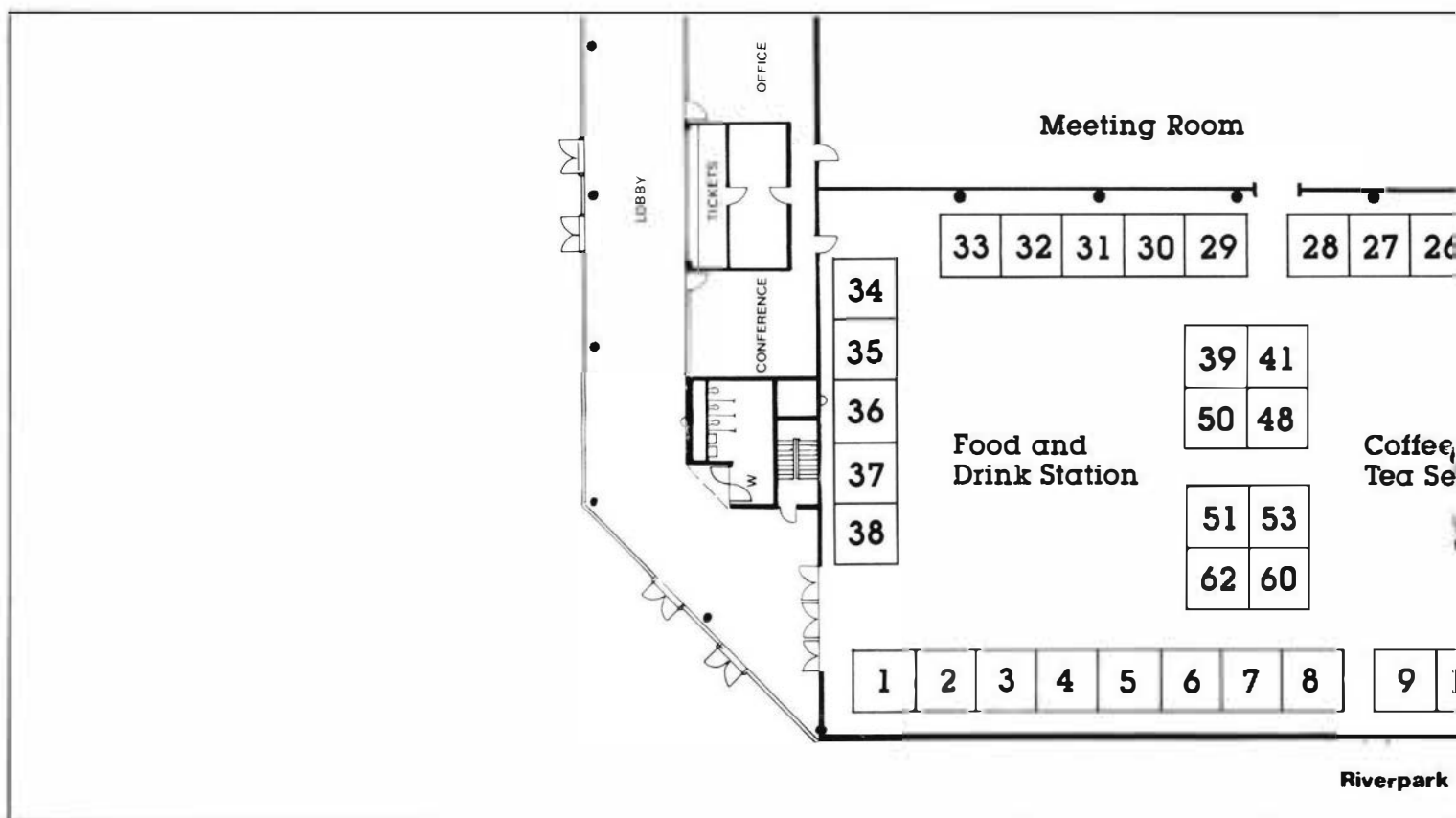
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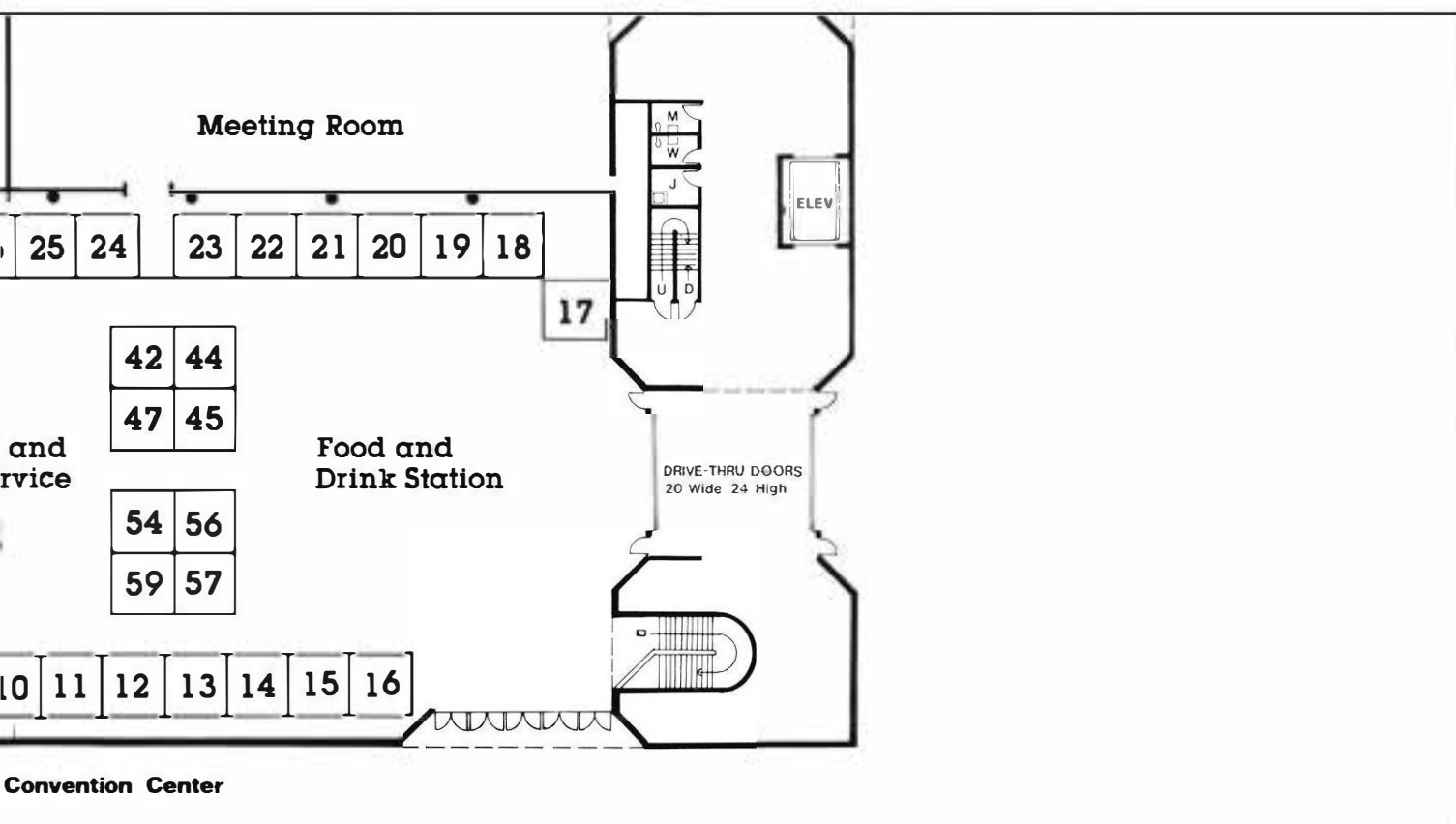
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Trade Secrets & Computer Software

by Jeffrey T. Haley

Since the early manufacturers of computers began distributing software in the 1950s, the most commonly used method of software protection has been *trade secret*. Although copyright is usually the only protection used for widely distributed software, trade secret is still commonly used where the supplier establishes contact with each recipient of the program.

Trade secret protection is also commonly used between suppliers and distributors to increase the deterrence against making unauthorized use of versions of programs that are only delivered to the distributors. Trade secret protection is usually used as a supplement to copyright protection where the copyright is not registered.

With the proliferation of small computers and programs for every conceivable purpose, lawyers are *increasingly* called upon to create trade secret protection schemes for computer software or to advise clients regarding their rights and liabilities where trade secret protection of software is involved.

Basically, trade secret can be used to protect computer programs if authors of the programs *treat* them like secrets and either a) distribute them in code that is difficult for humans to decipher or b) distribute copies of the programs only to those who have a duty not to disclose the programs to others. The duty may be created by a special relationship or by contract and should be evidenced by a signed agreement. The general rules of trade secret law apply to the protection of computer software with little distortion.

ELEMENTS OF CIVIL TRADE SECRET LAW

The Uniform Trade Secrets Act

In 1981, the Washington legislature passed without modification the Uniform Trade Secrets Act, as approved by the National Conference of Commissioners on Uniform State

Laws in 1979. In a prefatory note, the commissioners describe the Uniform Act as follows:

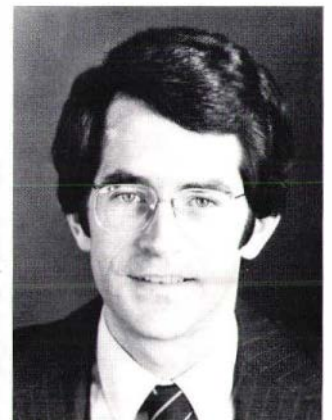
The Uniform Act codifies the basic principles of common law trade secret protection . . . The contribution of the Uniform Act is substitution of unitary definitions of trade secrets and trade secret misappropriation, and a single statute of limitations for the various property, quasi-contractual, and violation of fiduciary relationship theories of non-contractual liability utilized at common law. The Uniform Act also codifies the results of the better reasoned cases concerning the remedies for trade secret misappropriation.

Trade Secrets

The Uniform Trade Secrets Act defines trade secret as information that:

. . . derives independent economic value from [1] not being generally known to, [2] and not being readily ascertainable by proper means by, other persons [3] who can obtain economic value from its disclosure or use; and [4] is the subject of ef-

Jeffrey T. Haley practices general business law in Seattle, with an emphasis in the problems of computer businesses and intellectual property protection for software. A 1971 graduate of Amherst College and a former computer programmer, Mr. Haley received his law degree from the University of Washington. This article is based on materials he presented at a recent UW-CLE program on computer law.



forts that are reasonable under the circumstances to maintain its secrecy. RCW 19.108.010(4).

Trade secrets do not include information that a business wishes to keep secret, such as the terms of a secret bid or the salaries of certain employees, where this information is not valuable to others. *Restatement of Torts* (1st) §757 Comment b.

Court decisions applying the common law of trade secrets have unanimously concluded that computer programs qualify as trade secrets, and the Uniform Act specifically mentions "program[s]" as included in the definition of trade secret.

Misappropriation

The Uniform Act prohibits misappropriation of trade secrets and defines misappropriation to include both:

- 1) the *acquisition* of another's trade secret by a person who knows or has reason to know that the acquisition is improper, and
- 2) the *disclosure or use* of another's trade secret, without consent, by a person who knew or had reason to know
 - a) of a previous impropriety in the chain of information,
 - b) that a duty has arisen not to use or disclose the secret, or
 - c) that a previous person in the chain of information owed a duty to the person who wishes to maintain the secrecy. RCW 19.108.010(2).

A previous impropriety in the chain of information includes:

... theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means. RCW 19.108.101(1).

The law of trade secrets reaches not only those who have a special or contractual relationship with the owner of the trade secret, but also those who came upon a trade secret by accident or through an intermediary and have notice that the information might be a trade secret. Therefore, if a valid trade secret is involved, the reach of a trade secret law is much broader than the reach of contract law.

Innocent Recipients

The general rule of liability contains an exception for innocent recipients of trade secrets who have materially changed their positions in reliance upon a good faith belief that they were entitled to the information. RCW 19.108.010(2)(b)(iii); *Conmar Products Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150,157 (2d Cir. 1949).

However, where the innocent recipient has already received benefits from the use of the trade secret which equal the amount paid for it, a court might impose an injunction following notice of trade secret status.

Remedies

Remedies under the Act include damages for past acts and royalties or injunctions, including mandatory injunctions,

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regarding future use or disclosure of the trade secrets. Damages for past acts include actual losses suffered, restitution for unjust enrichment, and exemplary damages up to double the regular damages for willful and malicious misappropriation. RCW 19.108.030.

Although an injunction against future use or disclosure might be perpetual, the injunction may be terminated after the trade secret has ceased to exist plus a reasonable period of time to eliminate commercial advantage that would otherwise be derived from the misappropriation. RCW 19.108.020(1).

The most common problem is the wholesale electronic copying use or sale of programs in machine readable form.

Attorney's Fees

Attorney's fees may be awarded to the prevailing party if willful and malicious misappropriation exists, a claim of misappropriation is made in bad faith, or a motion to terminate an injunction is made or resisted in bad faith. RCW 19.108.040.

The Requirement of Secrecy

Under the common law, trade secrets are enforceable only as long as secrecy is maintained. However, absolute secrecy is not required; relative secrecy is enough. *E.W. Bliss Company v. Struthers-Dunn, Inc.*, 291 F. Supp. 390, 400 (S.D. Iowa 1968). Rather than consider levels of relative secrecy, the Uniform Trade Secrets Act goes directly to the heart of the matter. Information is sufficiently secret if it derives independent economic value from not being generally known or readily ascertainable. RCW 19.108.010(4)(a).

The common law also requires that the owner of the secret treat the information as a secret and protect it against disclosure to others. One should not be able to reap a windfall by claiming damages against a person who misappropriated information that the owner did not consider valuable. The Uniform Act simply states that reasonable efforts must be made to maintain the secrecy of the trade secret. RCW 19.108.010(4)(b).

As a practical matter, the conscientious owner will make reasonable efforts to protect secrecy. Such efforts may include:

—employee agreements upon hiring;

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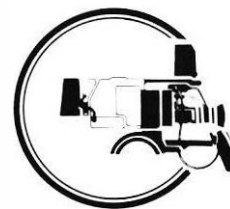
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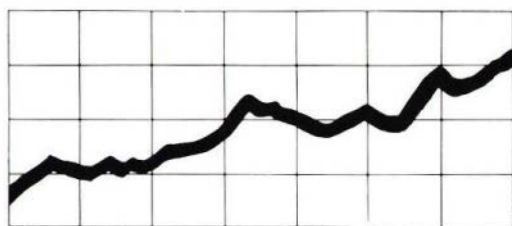
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- non-disclosure agreements signed by transferees of information.

See generally, *Telex Corporation v. IBM*, 510 F.2d 894 (10th Cir. 1975).

Although employees have implied duties to protect the trade secrets of their employers due to the nature of the relationship, if an employer asks an existing employee to sign a new non-disclosure agreement, he should offer additional consideration to be sure that the agreement will be enforceable as a contract. See *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543, 548 (1944).

The Reverse Engineering Limitation

Trade secret law does not prevent someone who obtains a product on the open market or through other permissible means from reverse engineering the product to discover the "secret." *Analogic Corp. v. Data Translation, Inc.*, 358 N.E.2d 804, 807 (Mass. 1976). See *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 470, 476, 94 S.Ct. 1879, 1883 (1974).

Software distributed only in object code form may frequently contain programming ideas that the supplier considers to be trade secrets. As decompilers become more sophisticated, and decompiling the object code into humanly readable source code becomes practical, suppliers will be faced with the loss of their trade secrets under the doctrine of reverse engineering. See Gilburne and Johnston, "The Protection And Enforcement Of Trade Secrets In Software And High Technology Information," *Software Protection*, 225, 248-51 (1982). Of course, an injunction should still be granted for the length of time that would be required for this reverse engineering. *Data General Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 433 (Del. Ch. 1975).

By the process of reverse engineering, the programming ideas can be discovered, but not the particular expression of the original source code. The expression of the source code would therefore still be a valid trade secret after the object code has been decompiled to discover the programming ideas.

State Trade Secret Law & Federal Copyright Law

The 1976 Copyright Act specifically preempts State law with respect to "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified" in the Act. 17 U.S.C. §301(a). This provision has intensified a debate over federal preemption of

state trade secret law that began under the 1909 Act using general principles of federal preemption.

Some defendants and commentators have taken the view that the 1976 Act has preempted state trade secret law to the extent that trade secret law prohibits the copying of copyrightable works even if no notice is affixed. See *M. Bryce and Associates, Inc., v. Gladstone*, 107 Wis.2d 241, 319 N.W.2d 907 (1982); *Avco Corporation v. Precision Air Parts*, 210 U.S.P.Q. 894 (M.D. Ala. 1980) *aff'd on other grounds* 676 F.2d 495 (11th Cir. 1982).

However, these views have largely been rejected by the most persuasive court opinions. See *Technicon Medical Info. Systems Corp. v. Green Bay Packaging, Inc.*, 687 F.2d 1023 (7th Cir. 1982), *M. Bryce*, supra. According to the *Technicon* court, the proper analysis is to determine whether a statutory estoppel of state law exists. If the plaintiff has availed himself of the copyright laws and obtains judicial enforcement of a statutory copyright, any subsequent assertion of trade secret violation as to the same material would be estopped.

Under this view, the plaintiff may plead alternative remedies under FRCP 8(e)(2), and once a judgement is obtained under one remedy, other remedies are precluded. Copyright law would therefore preempt trade secret law only when the copyright claim is successful.

In light of the uncertainty regarding preemption, software authors should pursue both forms of protection where

appropriate and hope that the preemption question is finally decided before they must choose between enforcing copyrights in federal court and enforcing trade secret rights in state court. Federal courts have jurisdiction to decide both claims where the trade secret claim can be considered a claim of "unfair competition" 28 U.S.C. §1388(b).

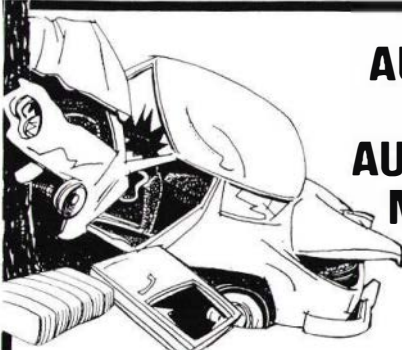
The registration of a claim of copyright also presents a problem for the maintenance of a trade secret, because unless the Copyright Office grants special relief to allow a secret-protected registration, the registration of a copy constitutes a public disclosure. Where trade secret protection is important, a regular copyright registration should be made only if the trade secrets are not discernable from the identifying materials submitted.

UNDERLYING LEGAL PRINCIPLES

Abuse of Confidence & Unfair Competition

To analyze incidents of ownership, trade secrets are usually treated as property. However, when rights to prevent the unauthorized use or disclosure of trade secrets are litigated, the property aspects of trade secrets are usually irrelevant. The legal principles invoked involve abuse of confidence and unfair competition.

In their opinions on the subject of trade secrets, many courts mention that expectations regarding morality and



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fairness in business dealings have been increasing and that the law of trade secrets has become more strict to enforce the moral consensus. See, e.g., *Ivan's Tire Service Store, Inc. v. Goodyear Tire and Rubber Company*, 10 Wn. App. 110, 517 P.2d 229 (1973); *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879, 1896 (1974) [. . . maintenance of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secrets law.]

Contract

Where a contract is involved, the lawsuit may include an additional and independent claim for breach of contract. Although the Uniform Act displaces conflicting tort, restitutionary, and other law pertaining to civil liability for misappropriation of trade secrets, it does not effect contractual liability that is separate from the misappropriation claim. RCW 19.108.900. Any written agreement may provide proof of elements of the trade secret action, and if the trade secret action fails for any reason, the contract action may nevertheless survive. See *Warner-Lambert Pharmaceutical Company v. John J. Reynolds, Inc.*, 178 F. Supp. 655 (S.D.N.Y. 1959).

If the trade secret which is the subject of the contract is lost due to loss of secrecy, the contract may no longer be enforceable for failure of consideration. However, if the contract provides for such a contingency, it may still be enforced. *Dollac Corp. v. Margon Corp.*, 164 F. Supp. 41 (D.N.J. 1958).

Public Policy Limitations

The law of trade secrets generally allows the owner of a trade secret to reap the benefits of property ownership, enforce contracts restricting the use or disclosure regarding the secret. However, two restrictions are imposed upon these generalizations by public policy embodied in other law.

First, one must not use the leverage of a trade secret to attempt to monopolize an industry or lessen competition. The anti-trust aspects of trade secret law constitute a substantial subject which is not addressed by these materials.

Second, public policy limits post-employment restrictions upon the activities of former employees. An employer cannot prevent a former employee from using general information learned from the employer which is necessary to the practice by the employee of his chosen trade. See *Telex Corporation v. IBM*, 510 F.2d 894, 929 (5th Cir. 1975). The determination of what information a departing employee can use for himself or his next employer is a complex issue that is beyond the scope of these materials.

PROBLEMS OF TRADE SECRET PROTECTION

The content of computer programs can be conceptually divided into two elements, both of which can be protected by trade secrets. The first element consists of the programming ideas such as algorithms, structure of the program, and data structures, and includes any programming ideas that

might be patentable. The second element consists of the particular expression for those programming ideas, which is the same element that can be protected by copyright if there is sufficient authorship involved.

If the first element is disclosed to a competent programmer, he can use the programming ideas and his own form

The conscientious owner will make reasonable efforts to protect secrecy.

of expression to write a new program. This would constitute a misappropriation of trade secrets and infringement of any patents on the programming ideas, but would not constitute a copyright violation.

However, the most common problem for computer programs is the wholesale electronic copying and use or sale of the program in machine readable form. This constitutes a misappropriation of trade secrets and infringement of both

copyright and any patents involved. It can be done quickly and easily by anyone who has access to a machine readable copy of the program and a computer that is capable of making copies.

If only object code copies of the program are available, it is very difficult to extract the programming ideas from the code, because object code is only comprehensible to machines, and it is very difficult to translate this into source code that humans can easily read.

Source code, however, can be easily modified to eliminate trademarks and copyright notices and to change the form of expression. If the change in expression is insufficient, the new work would still be considered a derivative of the original work for copyright purposes. However, once the source code has been extensively modified, it is difficult to detect that it is a copy of another's program and likewise difficult to prove.

Most suppliers are therefore reluctant to distribute copies of source code and do so only with the most stringent protection structured in a fashion that is likely to induce compliance. Often, the source code is sent to distributors or dealers, who do not have authority to further distribute the source code, so that they can modify and maintain the object code program distributed to customers. The object code versions are frequently protected only by copyright, while the source code versions are usually protected by both copyright and trade secret.

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Following is a discussion of some of the problems that may arise where source code or object code is distributed with trade secret protection.

Peripatetic Employee

An employee of the supplier leaves his employment, taking copies of the programs or memorizing programming ideas. If, either for himself or as an employee of a new employer, he then uses these secrets or discloses them to others, he has violated his implied duties as an employee and any express agreements.

To protect himself from the above scenario, the supplier should have the employee sign a non-disclosure agreement and perhaps a non-competition agreement when the employment commences, and then have the employee sign a memorandum of understanding when the employment is terminated. The supplier should also limit access to trade secret programs to only those employees who have a need for access. The supplier should have a check out system for all copies of the program and should limit access to copying equipment.

If the employee goes to work for a competitor, the supplier should consider insuring that the competitor has notice that the employee might offer some of the supplier's trade secrets. However, the supplier must be careful not to intentionally interfere with existing or prospective business rela-

tionships of the competitor. The notice should be couched in terms of beliefs and intentions to be sure that it is truthful. See Gilburne and McLoon, "The Grey Area Of Third Party Use And Receipt," *Software Protection*, 283, 288 (1982).

Piracy By Distributor

The distributor receives a copy of the source code and decides that he can make more money by removing the trademarks and copyright notices and selling the program as his own without paying royalties to the supplier.

The most commonly used defense against such a possibility is to charge a large amount of money for a copy of the source code. If the price received is large enough, the distributor might be expressly authorized to modify, copy, and distribute the program without limitation. If the amount received is less than full value of the program, improprieties by the distributor should still be inhibited by copyright and trade secret protection.

A second defense is to include strict audit provisions in the agreement between the supplier and the distributor which allow the supplier or an independent accountant to examine the records of the distributor at any time for evidence of impropriety.

Customer Fails To Sign Non-Disclosure Agreement

The supplier who furnishes software directly to customers, or the supplier's distributor, fails to obtain non-disclosure

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agreements from each customer. In either case, customers might receive copies of the program without a duty to maintain confidentiality, threatening the status of the trade secret.

If the supplier is lax in obtaining signatures on non-disclosure agreements, a defendant might successfully argue that the supplier showed little intent to keep the information a secret. If the distributor violates his agreement when he fails to obtain the customer's signature, the supplier would have an action for damages against the distributor, but he would not be legally entitled to recover the trade secret status.

However, if the supplier contacts every customer or transferee who received an unrestricted copy of the program and offers each transferee new consideration in exchange for a non-disclosure agreement, the supplier should be able to prevent loss of the trade secret status.

Lax Security By Customer Or Distributor

The customer or distributor is lax in restricting access to the materials and in encouraging employees to adhere to proper behavior. The customer or distributor allows access to non-employees such as service contractors without obtaining promises to take no copies and keep all learned information confidential. Employees of the customer or distributor pass copies to friends.

These breaches of security are not as dangerous as breaches of security by the supplier because they do not show lack of effort on the supplier's part to maintain secrecy. If all disclosees can be learned by the supplier, trade secret status can probably be regained by obtaining voluntary agreements or court orders which require non-disclosure or by simply placing the disclosees on notice that the software is a trade secret and that they may be liable for further disclosing it to others.

Unenforceable Agreements

If an enforcement action is commenced against a customer for breach of the duties of non-disclosure, the customer might raise a defense that the contract is unenforceable for reasons such as adhesion or lack of effective acceptance. For example, some software programs are sold with a plastic seal and a warning that breaking the seal constitutes acceptance of an agreement not to disclose the program to others. The warning states that the program may be returned for a refund if this agreement is not acceptable. Does breaking the seal legally constitute acceptance?

Espionage

For especially valuable programs that are not widely distributed, such as source code revealed only to select distributors, there is a danger that without any breach of confidentiality a thief or a spy will manage to obtain a copy of the program. In this case, there are few alternatives to swift legal action if the espionage can be discovered. Double damages can be recovered under the Uniform Trade Secrets Act and the thief should be criminally liable. □

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Pleading and Proving Foreign Law — The New Rules —

by Melvyn J. Simburg,
Donald P. Swisher and Ronald G. Brown

On September 1, 1983, a new Civil Rule takes effect which will revolutionize the pleading of foreign law in the State of Washington. The new CR 9(k) on pleading foreign law, the existing CR 44.1 on proof of foreign law and the recent amendment to RCW 5.24 (Uniform Judicial Notice of Foreign Laws Act) have effected sweeping changes which provide a more comprehensive approach to pleading and proof of foreign law than any other in the country.

The term "foreign law" in Washington practice includes the law of sister states, U.S. territories, other jurisdictions of the U.S. and the law of other countries. The purpose of this article is to direct the practitioner to the controlling Civil Rule or statute and to provide background on the intent of the drafters. Civil Rules 9(k) and 44.1 and the amendment to RCW 5.24.040 are the end results of the efforts and recommendations initiated by the Seattle-King County Bar Section on International and Comparative Law.

PREVIOUS RULES

Prior to the adoption of Civil Rule 44.1(a) in 1977, the same requirements for pleading the laws of a foreign country were applicable to pleading the laws of a state, territory, or other jurisdiction of the United States. RCW 5.24.040.

In *Bryne v. Cooper*, Division I of the Court of Appeals characterized the pleading requirements as follows: "Applicable foreign statutes should be set forth with their citations, and decisional foreign law should be concisely recapitulated." II Wn. App. 549, 551, 523 P.2d 1216 (1974); See also *Martin Bros. v. Nettleton*, 138 Wash. 102, 106, 244 P. 386 (1926).

CHANGES IN PLEADING REQUIREMENTS

In the federal court system, there has been no statute governing the pleading of foreign law. Federal cases were in conflict as to whether a party claiming reliance on the law of a foreign country was required to so state in its formal pleadings until 1966 when the adoption of F.R.C.P. 44.1 provided a rule for pleading and proof of foreign country law. The rule simply requires notice that is "written" and "reasonable." The notice need not be contained in the pleadings. The rule does not define at what stage of pro-

ceedings a notice is still "reasonable" notice. The notes of the Advisory Committee on Rules, however, suggest an analysis similar to a determination under Rule 15 as to the reasonableness of allowing a requested amendment to the pleadings.

In 1977, the Washington State Supreme Court adopted a new Civil Rule 44.1 entitled "Determination of Foreign Law." The new rule substantially adopted the Bar proposal regarding proof of foreign law, but also adopted the federal rule allowing "reasonable written notice" for pleading the law of a foreign country.

In 1981, the legislature amended RCW 5.24.040. By recent Supreme Court action effective September 1, 1983, the "reasonable notice" provision in CR 44.1(a) will be eliminated in favor of a cross-reference to the new CR 9(k). Effective the same date, the new CR 9(k) will provide a comprehensive pleading rule for both United States and non-United States jurisdictions.

LAW OF U.S. JURISDICTIONS

The new CR 9(k)(l) specifies the pleading requirements for raising an issue concerning the law of a state, territory or other jurisdiction of the United States. The provision substantially incorporates the notice pleading requirements of former CR 44.1(a) and F.R.C.P. 44.1, with certain exceptions. The new rule explicitly permits the notice requirement to be fulfilled through allegations of fact which suggest that the law of another jurisdiction may apply. This language clarifies that such a factual allegation provides sufficient "notice in the pleadings." In addition, the rule provides for "other reasonable notice" as long as that other notice is served. It therefore eliminates notice in the form of a document, such as a letter, which is not entered in the court file. A document that must be "served" must also be filed with the court pursuant to CR 5(d)(l).

The provision does not suggest a time limit or schedule to determine what constitutes "reasonable notice." Instead, that matter is left to the discretion of the court, with the date of notice being fixed by the date of service. Whether such notice is reasonable may depend in part on the similarity of the proposed choice of law to Washington State law and the

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ease with which the parties can research the substantive law of the other United States jurisdiction. The allegations of fact which suggest "minimum contacts" or "significant contacts" in other jurisdictions are generally sufficient to raise a choice of law issue without having to identify at the beginning of a lawsuit the other United States jurisdiction which a party may ultimately contend is the controlling body of law.

LAW OF FOREIGN COUNTRIES

Under the new Civil Rule 9(k)(2) the notice of an intention to rely upon the law of a foreign country or other non-U.S. jurisdiction must be contained in the pleading, including any amended pleadings. The "other reasonable written notice" method is not permitted. In addition, the party must specify the foreign jurisdiction whose law the party contends is applicable.

For foreign country law, the rule provides the trial judge with better control over last-minute claims that foreign law should apply, since any such claims would need to be brought through amended formal pleadings (complaint, answer and counterclaim, reply). In that event, the trial judge will be guided by CR 15 and the body of case law which has developed under that rule and the parallel federal rule.

EXAMPLES UNDER THE NEW RULE

If a party alleges personal injury from an accident occurring in Portland, Oregon, that allegation, of itself, would be sufficient to inform defense counsel that the laws of Oregon and ordinances of Portland might be relevant to the case, and that damages and other issues might be controlled by Oregon law. Opposing counsel would not be unduly burdened in preparing to defend on the basis of possible application to one or more issues.

However, if a party alleges personal injury from a small aircraft accident in northern British Columbia, that allegation, of itself, would not be sufficient to inform the defense counsel that plaintiff may be relying upon some aspect of the laws of British Columbia. In this case, if the plaintiff claims that British Columbia or Canadian law might be applicable, he must so allege in the pleadings.

Finally, assume a party who purchased business property located in Vancouver, Washington, from a Bahamian corporation, with negotiations in Portland, Oregon, sues the seller, alleging fraud in those Oregon negotiations. That allegation should be sufficient to appraise defense counsel of the possible application of Oregon law to the transaction. If defense counsel, in turn, claims that Bahamian law should apply, he must so allege in his answer.

DISCOVERY OF FOREIGN LAW

Changing from an *in haec verba** pleading requirement to a notice pleading requirement is a complete swing of the pendulum from full disclosure to minimum disclosure. The

* See *Byrne v. Cooper*, *supra*.

danger in effecting that shift is that the exact law of a foreign jurisdiction which previously had to be disclosed in the pleadings might now be withheld from the opposing counsel under the attorney "work product" privilege embodied in CR 26(b)(3).

For foreign country law, the new CR 9(k)(2) does not describe the content of notice beyond identification of the foreign jurisdiction, but contains a specific description of matters which should be available for discovery even if they have not been pled. The discovery provisions apply only to non-U.S. jurisdictions. For U.S. jurisdictions, the trial court must still determine whether in specific instances the difficulties of research would outweigh the needed protection of the "work product" privilege.

There are no Washington cases on point, but federal cases have faced the application of the work product privilege to discovery of intended use of foreign law and interpretation of foreign law. The results have been conflicting. Some federal cases have rejected discovery related to legal opinions and information prepared by experts regarding foreign law; other cases have permitted discovery, reasoning that the matters sought are essential to the case of the party seeking discovery and comparable expert testimony is generally or practically unavailable. Miller, "Fed. R. 44.1 and the 'fact' approach to determining foreign law: death knell for a die-hard doctrine," 65 *Mich. L. Rev.* 615, 665 (1967). Some federal courts have ruled that the discovery provisions of the federal rules do not provide for disclosure of an attorney's research. e.g., *Fishermen and Merchants Bank v. Burin*, 11 F.R.D. 142 (S.D. Cal. 1951) (declining discovery as to particular citations in foreign law). Other courts have permitted such discovery. *Bernstein v. N.V. Nederlandsche-Amerikaansche-Stoomvaart-Maatschappij*, 11 F.R.D. 48 (S.D.N.Y. 1951).

The trend in recent cases and rulemaking has been to allow such discovery and even to require attorneys to produce the research materials for the benefit of the court if research is not readily available. Local Rules for the United States District Court for the Eastern District of Washington provide that citations and references to cases in publications other than in the National Reporter System, Washington Reports or Federal Reporters are to be accompanied by a copy of the cited opinion. Rule 11(f). In a recent United States Tax Court case dealing with the discovery of West German laws of taxation, a taxpayer was required to produce evidence of the foreign law relied upon. The court cited the high cost of obtaining such information and the unique character of foreign law in its rejection of the "work product" defense. *Owens-Illinois, Inc., v. C.I.R.*, 76 T.C. 493 (1981).

In the context of sister state law, unlike foreign country law, courts are moving toward the position that another state's law, even if unknown at the pleading stage, could be researched in modern law libraries and determined before trial. See, e.g., *Prudential Insurance Co. v. O'Gurdy*, 396 P.2d 246 (Ariz. 1964) (abandoning the rule that sister state law be specifically pleaded). Similarly, the Wisconsin Supreme Court has recognized judicial notice of sister state law, but not the foreign law of Iceland. *Milwaukee Cheese Co. v. Olafsson*, 162 N.W.2d 609 (Wis. 1968).

APPLICATION OF CIVIL RULES 16 & 56

The new CR 9(k)(3) provides that foreign law issues are subject to simplification pursuant to CR 16 and determination in advance of trial pursuant to CR 56. In federal court, both procedures would take place as a matter of course under the mandatory pretrial conference procedure. There is federal



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court authority to the effect that notice of reliance on foreign law is not allowable after a pretrial conference has been held. *Valdesa Compania Naviera S.A. v. Forta Nacional de Petroleiras*, 348 F.2d 33 (3d Cir. 1965).

In Superior Courts, the pretrial conference procedure is rarely used. Cases involving non-United States jurisdiction law frequently are appropriate for preassignment to a trial judge and for application of the pretrial conference/pretrial order procedure. Domestic law cases involving choice-of-law issues should also determine as early as feasible which law is applicable to which issues and what the substantive content of that law is.

Although the determination of which law is applicable may depend upon determination of disputed facts, responses through discovery regarding reliance on foreign law should not be delayed to the final days before trial. To be "reasonable," the notice of intent to rely on foreign law must be given sufficiently in advance of trial to allow a meaningful pretrial formulation of issues through CR 16 and CR 56. Determination of foreign law is a question of law rather than a question of fact. The new rule encourages the use of CR 16 and CR 56 to simplify and determine in advance of trial the foreign law issues involved in the case.

FAILURE TO PLEAD FOREIGN LAW

Civil Rule 9(k)(4) provides that the failure of a party to plead the law of a non-U.S. jurisdiction signifies acquiescence

in application of the law of the forum, Washington State. No similar provision is provided for the law of states, territories or other jurisdictions of the United States.

Under CR 9(k)(1), the allegation of facts sufficient to suggest applicability of sister state law would allow the sister state law to be presented and its applicability argued at the time of trial, if not earlier. Under most conceivable complaints, therefore, the potential application of the foreign law will be disclosed very early. If no such factual allegation is contained in the complaint and no other reasonable notice is served, then Washington case law (based on the former *in haec verba* pleading requirement) presumes that the law of the other jurisdiction is the same as the law of Washington. See, e.g., *Allen v. Saccomanno*, 40 Wn.2d 283, 242 P.2d 747 (1952) (regarding Idaho law); *Safe-Way Drug, Inc., v. Standard Investment Co.*, 5 Wn. App. 726, 490 P.2d 1342 (1971) (regarding Oregon law).

The new CR 9 (k)(4) substantially adopts the approach for foreign country law that failure to plead and prove foreign law means acquiescence to the law of the forum. Compare alternatives, *Leary v. Gledhill*, 84 A.2d 725 (N.J. 1951). That approach provides a standard with a reasonable degree of certainty without engaging in unwarranted presumptions concerning the substance of foreign country law. The new rule also provides flexibility to allow the court to apply the appropriate law should application of Washington law appear to be manifestly unjust.



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Contrast that approach with *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872, 77 S. Ct. 97, 1 L.Ed. 2d 77 (1956). There the court dismissed plaintiff's claim for personal injuries incurred when he was struck by an oil company vehicle in Saudi Arabia, because plaintiff failed to plead and prove Arabian law. Some cases have applied the presumption that the law of the foreign jurisdiction is the same as the law of the forum when there was a failure to plead or prove foreign country law. See, e.g., *Gasaway v. Thomas*, 56 Wash. 77, 105 P. 168 (1909) (British Columbia law); *Ostrander v. Yokohama Specie Bank*, 153 Wash. 427, 279 P. 585 (1929) (Japanese law). On the other hand, in *Toshoku Ltd. v. Blackmar*, 72 Wn. 2d 10, 431 P.2d 599 (1967), the Supreme Court, as in *Walton*, dismissed defendant's claim for failure to plead or prove Japanese law.

PROOF OF SISTER STATE LAW

Proof of sister state law is controlled by statute in Washington. Like determination of foreign country law, the determination of the law of a state, territory or other jurisdiction of the United States is treated as an issue of law rather than an issue of fact. See RCW 5.24.030. As the determination is made by the court rather than by a jury and is a determination of law, it is subject to a *de novo* review on appeal. This right has been of particular importance to criminal defendants where prior convictions took place in foreign states.

Although a prosecutor might prefer to submit a prior conviction to a jury under the Habitual Criminal Act, the judge must first rule on whether the prior convictions are felonies in Washington State at the time the acts were committed. *State v. Jackovick*, 56 Wn. 2d 915, 355 P.2d 976 (1960).

The statute provides that the court determines sister state law by taking judicial notice of the constitution, common law, civil law and statutes of every state, territory and other jurisdiction of the United States. RCW 5.24.010. The judge is not required to be omniscient or to undertake his own research. The burden is on the parties to present case law and statutes to the court. *State v. Jackovick*, *supra*; *Edlin v. Edlin*, 42 Wn. 2d 445, 256 P.2d 283 (1953). The court may, however, perform its own research and take judicial notice based on that research. RCW 5.24.020; *State v. Jackovick*, *supra*.

The statute is not specific on proof of ordinances, regulations or other official acts of less stature than statutes. Pleading those matters for sister states requires resort by analogy to Civil Rules 9(d), (e), (h), (i) and (j). As a practical matter, proof will likely require production of a copy of the research materials themselves for the benefit of the court, unless such research materials are otherwise easily available to the judge. Such a requirement is part of the Local Rules for the United States District Courts for the Eastern District of Washington. Rule 11(f).

PROOF OF FOREIGN COUNTRY LAW

Proof of the law of a jurisdiction other than a state, territory or other jurisdiction of the United States is similar to



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proof of sister state law, except that the law is not as easily researched. It is up to the judge to determine whether citations to the statutes, decisional law and translations thereof are sufficient, or whether the parties must submit copies for the court's consideration.

It is common in cases involving proof of foreign country law to present live testimony by an expert on the law of that country. Such testimony is specifically authorized in Civil Rule 44.1(c). The testimony and other proof submitted is addressed to an issue of law and therefore not subject to the Rules of Evidence. It is up to the court to determine the extent to which offered proof meets the court's standard of sufficient trustworthiness to be probative.

As in proof of sister state law, the court may engage in its own research. Unlike sister state law, however, it is important that all data relied upon by the court become part of the court record.

The drafters of CR 44.1 desired to assure that the attorneys have an opportunity to respond to information obtained by the court through its own research. Accordingly, if the judge decides to call a friendly professor at his alma mater law school or otherwise to obtain information independently, the judge is required to:

- (1) identify in the record such material or source;
- (2) summarize in the record any unwritten information received; and
- (3) afford the parties an opportunity to respond thereto.

CR44.1.(c)(1)-(3).

This way the attorneys have the ability to present their arguments completely and to respond tactfully to the authorities obtained by the court on its own. In addition, the appellate court will have sufficient data from the record of proceedings to again determine the issue on appeal.

Rule 44.1 does not address the problem of failure to present proof of the content of foreign law sufficient for the court to make a determination of the parties' rights under that law. In that situation, Washington cases have reached inconsistent results. *Compare Gasaway, supra*, and *Ostrander, supra*, with *Blackmar, supra* (cases involving failure to plead and prove foreign law).

CONCLUSION

The process of extinguishing the requirement of proving foreign law like facts and extinguishing the burdensome requirements for pleading foreign law has been long and arduous for all those involved in the process. With the addition of the new Civil Rule 9(k) to complement Civil Rule 44.1 and the amendment to RCW 5.24.040, Washington State has been able to achieve a comprehensive approach to pleading and proof of foreign law. It is hoped that the new rules will also minimize traps for the unwary and provide sufficient guidance to enable the practitioner to conduct foreign law cases with the efficiency that the presiding judges expect from us. □

HELP

Washington's Revitalized Victims of Crime Program

by Victoria L. Vreeland

Your client was assaulted, robbed, and seriously injured. Limited sick leave benefits and some medical insurance is available, but your client has no long- or short-term disability insurance. The assailant has not been apprehended and may never be. Your client will probably be out of work for many months, and has no available assets for current living expenses. In fact, the injuries may result in a permanent disability, and your client cannot even afford the initial medical costs, let alone the costs of extended treatment. How can you help? Under the Washington Victims of Crime Act—Compensation & Assistance, ch. 7.68 RCW (“the Act”), your client may be eligible to receive financial and medical assistance.

The 1982 legislature, due to broad-based public support, reestablished the crime victims’ fund by creating a “new” revenue source and providing an incentive to prosecutors to assist in collecting that revenue. The legislation, SSHB 828, Laws of 1982, 1st Ex. Sess., Chapter 8, also significantly amended the Act by imposing monetary restrictions on benefits. This 1982 package was designed to fill, at least in part, a public need without creating a new tax liability. Although commonly referred to as the Crime Victims’ Compensation Act, it actually provides for compensation to both victims and survivors, and for assistance to victims and witnesses in the criminal justice system by a sharing of the revenue with county prosecutors’ offices. (Amendments to the Act were adopted by the 1983 legislature, and are included in this discussion. Sen. Bill No. 3022, Laws of 1983, Reg. Sess., Chapter 239.)

THE FUND

SSHB 828 established a “new” revenue source¹ for the victims of crime compensation fund and for local victim-witness

assistance programs. The Act now mandates that all municipal, district and superior courts impose a crime victim penalty assessment in the form of an additional fine upon persons who enter a guilty plea or who are convicted of a crime, excluding certain minor traffic infractions; and that the penalty assessment be deducted from the amount of bail posted and forfeited without conviction. The penalty is \$25 for a misdemeanor, and \$50 for a gross misdemeanor or felony, now assessed on a per case basis. SSHB 828 set forth these assessments in ch. 7.68 RCW, and likewise amended RCW 9.92.060 and RCW 9.95.210 mandating payment of the assess-

¹ Much like the new law but with more limitations, former section RCW 7.68.035 enacted by Laws of 1977, Ex. Sess., ch. 302, sec. 10, also directed that penalty assessments for the crime victims’ fund be imposed. That provision, standing alone, however, generated little revenue.

Victoria L. Vreeland is an attorney with the Seattle firm of Gordon, Thomas, Honeywell, Malanca, Peterson & O'Hern. A graduate of Gonzaga University School of Law, she once served as Assistant Attorney General for the Crime Victims Compensation Section of the State Department of Labor & Industries Division.



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ment as a condition of suspension of a sentence or probation. The penalty is also required in juvenile offense dispositions under Title 13 RCW, but the court may now modify the assessment upon a showing of good cause.

SSHB 828 provided that if a prosecuting attorney's office established a "comprehensive" victim-witness assistance program which was approved by the state, the county could retain twenty percent of the assessments collected in that county for exclusive use in the local assistance program. To constitute a comprehensive program, directed by the legislation "to encourage and facilitate testimony by the victims of crimes and witnesses to crimes," the statute requires coverage of all crimes without restriction to type with particular emphasis on serious crimes, and maintenance of existing local funding levels. Basically, the local program must be designed to inform victims and survivors of the local assistance and state compensation programs, assist victims in the restitution process, and assist victims of violent crimes in presenting a claim for compensation. As of this writing, all but one of the state's 39 counties have submitted comprehensive program applications which have been approved or are pending approval.

In its January, 1983, Legislative Report, the Department of Labor & Industries reported that as of the end of November, 1982, \$637,522 had been received in the state account from the new penalty assessments. Since the effective date of the new legislation, the revenue received has substantially increased each month. The legislature expressly stated its intent that the program be self-funded, directing that benefits not be paid beyond the resources of the account. Because the penalty assessments are the sole source for payment for claims after July 1, 1981, the collection of which is untested in this state, claims are paid out in chronological order to the extent of funds available. Payment of claims did not begin until January 1, 1983.

THE ADMINISTRATIVE AGENCIES

The program is administered by the State Department of Labor & Industries through its Crime Victims Section. The section staff members investigate and adjudicate all crime victim claims, and make decisions on all issues pertaining to application of the Act.

Review of final orders, decisions or awards of the Department's Crime Victims Section, upon appeal by the claimant, is by the Board of Industrial Insurance Appeals, a separate state agency. Once the administrative appeal process is exhausted, an aggrieved party can seek further review in superior court. (See THE APPEAL, *infra*.)

THE CONDITIONS

Mandatory Threshold Requirements

First, an application for crime victim benefits must be received by the Department of Labor & Industries within one year after the date of the criminal act; or within one year after the date that the rights of beneficiaries or dependents

accrue, *i.e.*, the date of death or proof of death. For injuries which occurred during the hiatus period between legislative demise and reinstatement of the program (July 1, 1981, to January 1, 1983), the limitation period for filing a claim does not begin to run until January 1, 1983.

Second, the victim, or his/her representative, must report the criminal act to a local police department or sheriff's office within 72 hours. If it could not have been reasonably reported during that time period, the crime must be reported within 72 hours of the time when a report could have reasonably been made.

Timely submission of a claim to the Department *and* timely report to the police or sheriff's office are mandatory, as the Act explicitly prohibits compensation unless these two conditions are met. RCW 7.68.060.

Eligibility Conditions

The Act is designed to benefit "...innocent victims of criminal acts who suffer bodily injury or death...", RCW 7.68.010, and incorporates in large part the workers' compensation system of Title 51 RCW. Only bodily injury or death are compensable; the Act does not cover property theft or damage.

Result of a "Criminal Act"

To be eligible, the injury or death must be a proximate result of a criminal act of another person, and by definition

excludes suicides. Also covered are "good samaritan" acts, injuries or deaths which are a proximate result of the victim's good faith and reasonable effort to prevent a criminal act, or the victim's good faith effort to apprehend one reasonably suspected of engaging in a criminal act. RCW 7.68.020(3).

"Criminal act" is specifically defined as "...an act committed or attempted in this state which is punishable as a felony or gross misdemeanor under the laws of this state..." RCW 7.68.020(2). A victim, therefore, will be eligible to receive compensation even though the offender is not identified, apprehended, arrested, charged or convicted. A victim may also qualify for benefits even if the offender is acquitted of the crime or the charge is dismissed. Further, one is deemed to be a "victim" of a "criminal act" in cases in which the offender is adjudged not guilty by reason of insanity or mental irresponsibility. RCW 7.68.020(2)(c). Evidence that the alleged offender has been acquitted or has not even been charged is not admissible to prove the noncriminal character of the act; whereas evidence of a conviction is admissible, but only to show the criminal nature of the act.

Generally, no claim is denied on the basis that it was not the result of a "criminal act" *if* a conviction has been obtained or if there is evidence that a criminal act, a felony or gross misdemeanor did occur. This provision of eligibility is used when there is inadequate evidence from the complaint to the

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law enforcement office that a crime occurred, or when the injury did not result from the criminal act. If the complaint and followup investigation by police or the Department reveal that no criminal act has occurred or caused the claimed injury, the claim will be denied.

In one case, a woman who observed her daughter's murder grieved for two years and then committed suicide. The Board upheld the Department's denial of the claim for benefits arising from the mother's death on the basis that the mother was not considered a victim of the crime which took her daughter's life. The Board did acknowledge that the mother was a "victim" in the general sense of the word, and that a non-participating observer *may* be a victim due to the psychological impact. The Board's decision left open the issue of eligibility of indirect victims by its language that it was not prepared to state, in this case, that the legislature did not intend to compensate "indirect" victims of crime.

Motor Vehicle Exclusion

Excluded from the definition of "criminal act" is the operation of a motor vehicle in violation of law, *unless* the death or injury was intentionally inflicted (e.g., intentional use of the car as a weapon) or the operation was part of commission of another criminal act (e.g., driving from the scene of a robbery and injuring an innocent bystander). RCW 7.68.020(2). Under the 1983 amendments, a "criminal act" now includes vehicular homicides and vehicular assaults *only if* a conviction

has been obtained. This is the one exception to the rule that a victim may qualify even if the offender is acquitted.

Residency/Location

A non-resident of the state is eligible for benefits if the criminal act is committed or attempted in this state, but one who is a victim of a criminal act while confined in a state, federal, city or county jail, correctional facility, or an institution maintained by the Department of Social & Health Services or the federal government is not covered. RCW 7.68.070(3)(e).

Absence of state criminal jurisdiction over the criminal act, if committed in the state, will not automatically disqualify the victim for benefits. In *Dept. of Labor & Indus. v. Sergeant*, 27 Wn. App. 1, 615 P.2d 579 (1980), the victim was murdered by a fellow tribal member on an Indian reservation in the State of Washington, a crime over which the federal government has exclusive jurisdiction. But, since the Act covers "... a criminal act which is *punishable as* a felony or gross misdemeanor under the laws of the state. . .," the court reasoned that this definition meant more than just a criminal act which *is* a felony or gross misdemeanor. The court concluded that state criminal jurisdiction is not a prerequisite to compensation but rather, that the focus of the Act is compensation to innocent victims without regard to prosecution of the criminal action.

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Thus, victims of federal criminal acts are eligible for benefits provided that such criminal conduct is punishable as a felony or gross misdemeanor under the laws of the state and the conduct occurs within the state's territorial boundaries.

Provocation, Incitement or Consent

Although one may indeed be a victim of a criminal act, the Act prohibits payment of benefits when the victim is not "innocent" and when the injury was the result of "consent, provocation or incitement by the victim." RCW 7.68.070(3)(a).

The majority of appeals to the Board have been due to denial of the claim on the grounds that the victim consented, provoked or incited the criminal act.

In *Hansen v. Labor & Industries*, 27 Wn.App. 223, 615 P.2d 1302 (1980), the court upheld the administrative decision that Hansen was not an innocent victim because she provoked or incited the criminal assault which resulted in her injuries. Hansen and the assailant, Adele, were shouting derogatory remarks to each other from across a street, and Hansen crossed the street to confront Adele. When Adele reacted hostilely, an altercation ensued, and Adele warned Hansen she had a knife. Hansen did not retreat and was cut several times by Adele, who was convicted of assault. The court relied on the plain meanings and dictionary definitions of the words "innocent," "provoked," and "incited" in determining that Hansen was not eligible for benefits.

The bulk of claims denied due to provocation or incitement, nearly all of which have been upheld on appeal, involve disputes, arguments, or taunting, aggressive behavior between individuals, usually unknown to each other, which escalate into fisticuffs and ultimately result in a serious injury or death with a deadly weapon. Many such criminal acts are precipitated during and are related to the consumption of alcohol, or are a result of jealous reactions.

Because the limitation of RCW 7.68.070(3)(a) raises a statutory bar to recovery, the claimant's burden of proof is high: "...unless the claimant can prove the absence of consent, provocation or incitement when the facts in evidence raise an issue as to one of these elements, the claimant has not demonstrated his claim by strict proof." *Stafford v. Labor & Industries*, 33 Wn.App. 231, 237, 653 P.2d 1350 (1982). Each of the eligibility conditions of RCW 7.68.070 is a statutory bar to recovery and, therefore, the claimant's burden would be the same in challenging a denial based upon any of these conditions.

Engaging in a Criminal Act

The Act prohibits benefits if the injury was the "...result of the victim assisting, attempting or committing a criminal act..." RCW 7.68.070(d). Surely the legislature did not intend to pay benefits to one who was engaged in criminal conduct which *resulted* in his or her injury. The key to such a condition, however, is causation. For example, if the victim of a burglary and assault happened to be illegally using a controlled substance at the time and such use constituted a



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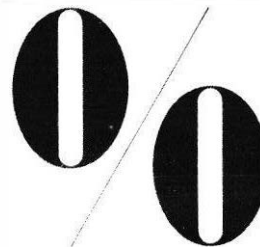
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felony or gross misdemeanor, and the burglary and assault had nothing to do with the presence of such controlled substance, the criminal conduct by the victim would not "result" in the criminal injury. This criminal conduct by the victim would not be a cause of the injurious criminal act. On the other hand, if the evidence revealed that the motive for such a burglary was theft of controlled substances known to the offenders to be at that location, and in the course of the burglary an assault was committed, the assault victim may be deemed to be ineligible under the condition of RCW 7.68.070(d).

Relationship to the Offender

Victims of crime who live "in the same household" with the offender are not eligible for benefits. RCW 7.68.070(3)(b). The term "household" is not defined in the Act, so its ordinary meaning pertains: "Those who dwell under the same roof and compose a family, . . . a domestic establishment, . . . a social unit. . . ." *Websters Third International Dictionary* (1966). It is apparent that the legislature intended "household" to include more than persons related by blood or marriage, since subsection (3)(c) of RCW 7.68.070 disqualifies victims of crimes committed by certain relatives regardless of their residence. However, use of the word "household," rather than "house," implies more than simply living in the same physical structure; and depending on the facts of the living arrangement, mere tenants in a boarding house who do not compose a "social unit" may be deemed eligible.

If the offender is a nuclear family relative² of the victim at the time of the criminal act, the victim is not entitled to benefits. With this particular prohibition, however, the Act grants authority to allow the claim if

- . . . in the director's sole discretion it is determined that:
- (i) The parties to the marriage which establishes the relationship between the person committing the criminal act and the victim described above are estranged and living apart; and
 - (ii) The interests of justice require otherwise in the particular case; . . .

Cooperation with Law Enforcement

The final condition of eligibility is clear and concise: No person or spouse, child or dependent of such person shall be entitled to benefits under this chapter where the person making a claim for such benefits has refused to give reasonable cooperation to state or local law enforcement agencies in their efforts to apprehend and convict the perpetrator(s) of the criminal act which gave rise to the claim. RCW 7.687.070(11).

Once the criminal act is reported, if the victim refuses to provide a statement, identify a known assailant, testify, or otherwise give "reasonable cooperation," the claim may be rejected.

² Spouse, child, parent, or sibling of the victim by the half or whole blood, adoption or marriage, or the parent of the spouse of or sibling of the spouse of the victim by the half or whole blood, adoption or marriage, or the son-in-law or daughter-in-law of the victim.

BENEFITS

The Act incorporates much of the scheme of benefits of workers' compensation under Title 51 RCW, with express inclusions, exclusions, restrictions, and limitations peppered throughout the chapter. The basic benefits, medical aid, and disability pensions available under industrial insurance are available to crime victims, with very definite monetary limitations, many of which were established by SSHB 828. If one is injured by a criminal act during the course of his or her employment, workers' compensation should be sought, since such benefits will be higher than those for crime victims.

Minimum Loss Deductible

Unlike workers' compensation, SSHB 828 provides that no crime victim is eligible for the first \$200 worth of loss suffered. RCW 7.68.070(13). This provision works like a basic deductible on a private insurance contract—if the total of all losses is less than \$200, no benefits are paid; and if the total exceeds \$200, the first \$200 is not covered. The only exceptions to this rule are costs of examination of sexual assault victims for evidence and prosecution and other medical costs incurred by such victims. RCW 7.68.170, RCW 7.68.070(13). Thus, no medical costs incurred by a victim of a sexual assault are ineligible or subject to the deductible, but other losses are, such as time (wage) loss.

Collateral Sources

In addition to the deductible, all public and private insurance benefits (except the first \$40,000 of private life insurance) available to a victim must be subtracted from the benefits payable by the crime victims program. RCW 7.68.130. The Act specifically directs that its benefits "shall be secondary" to other insurance benefits; and by Laws of 1980, chapter 156, the legislature clarified this intention. (See note following RCW 7.68.020.) Thus, all benefits available to a victim or the survivor-beneficiary from state or federal statutory social welfare or insurance programs,³ or from private disability or life insurance (over \$40,000), are deducted from the crime victim award. In some instances, this deduction can eliminate crime victim benefits on such claim.

Awards Potpourri

Medical aid is paid at 100% with no maximum level, after the minimum loss deduction and after reduction of collateral sources. If the victim was "gainfully employed" as defined in the Act and meets the Act's conditions of employment, an award of temporary total disability (time loss) is payable while the victim is medically certified as unable to return to

³ These include but are not limited to Social Security, Medicare, Medicaid, veterans' benefits, longshore and harborworkers' benefits, industrial insurance, LEOPF, public employees' and teachers' retirement programs, firemen's relief and pension plans, and DSHS entitlement programs.

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work. The time loss award is based on a statutory schedule of percentages, under chapter 51.32 RCW, and the amount depends upon marital status, number of dependents, and actual earnings.

If the victim is not employed as defined under the terms of the Act, medical aid is paid, but there is no time loss award arising from a temporary disability. When a criminal injury results in a permanent disability, either total or partial, awards are payable according to ch. 51.32 RCW schedules, or according to special schedules of the Act for victims who were not employed.

Likewise, death benefits in the form of a pension are available for beneficiaries of employed victims, and lump sum awards are made in cases where the victim was unemployed. Again, SSHB 828 established ceilings for awards: maximum of \$15,000 per single injury or death excluding medical aid; maximum of \$10,000 for time loss, loss of support, or total permanent disability; maximum of \$5,000 for vocational rehabilitation; and maximum of \$500 for burial expenses.

THE APPEAL

Challenges to rejection or denial of a claim due to statutory eligibility conditions, challenges to types, amounts, or methods of computation of temporary or permanent disability awards, challenges to denials or awards due to aggravation of condi-

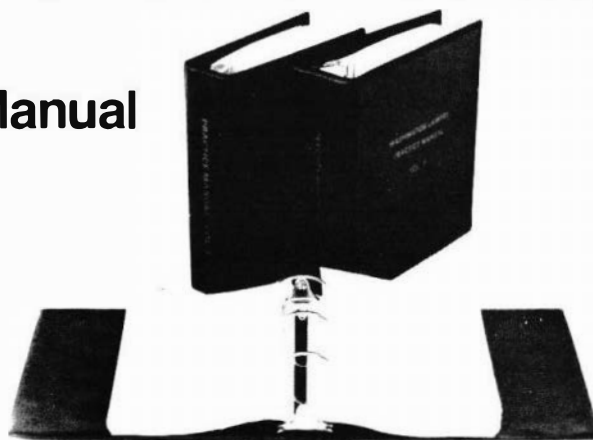
tion, and challenges to any Department decision on any issue affecting a claim may be made. The Department issues an Order & Notice setting forth its administrative decision, and the claimant is entitled to file a Protest & Request for Reconsideration to the Department, whereupon the Department will subsequently issue another decision, again by Order & Notice. The Protest is not required in order to preserve the right to appeal, but many times it may work to provide valuable information resulting in a Department decision concurring with the claimant's position, thereby avoiding the costs of appeal. If the claimant elects to appeal, it must be accomplished by a written Notice of Appeal filed with the Board within sixty days.

The Board's rules of practice and procedure are found in the Washington Administrative Code at Chapter 263-12, and incorporate the Superior Court Civil Rules and Rules of Evidence, with a few exceptions. The Board functions in solely an appellate capacity and can only hear and rule on matters already passed upon by the Department. The Board's procedure for crime victim appeals is the same as industrial insurance appeals. Of critical importance is the timely filing of the Notice of Appeal from the Department Order, and timely filing of the Petition For Review to the Board after issuance of the Proposed Decision & Order by an Industrial Appeals Judge. Unless the appeal is timely, the Board has no jurisdiction to hear the claim; and the Petition For Review to the

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Board is a prerequisite to further appeal to the courts. To preserve the issues for appeal to the courts, each must be set forth in the petition or are deemed waived.

Unlike appeals to the courts from Board decisions in workers' compensation cases, which are *de novo* jury trials, appeals to superior court in crime victims' compensation cases are governed by the Administrative Procedures Act, ch. 34.04. RCW 7.68.110. The court appeal is initiated by the filing of a Petition For Review, and review is accomplished without a jury and is confined to the certified Board record.

The review standards for reversal in RCW 34.04.130 and RCW 34.04.140 pertain: clearly erroneous, arbitrary and capricious, affected by error of law, unconstitutional, in excess of jurisdiction, or made upon unlawful procedure. An appeal to the appellate courts is a review of the Board's decision, not that of the superior court. Again departing from workers' compensation law, since appeal to the court is governed by ch. 34.04 RCW, there is no provision for payment of attorneys' fees to the claimant.

THE "THIRD PARTY"

For criminal injuries occurring after April 1, 1980, the Act incorporates the subrogation and third party provisions of ch. 51.24 RCW. A crime victim who receives compensation can still bring suit against the offender, and the Department has a statutory lien upon the recovery, if any, to the extent of benefits paid. RCW 7.68.050. As a practical matter, many offenders, even if known, have little or no assets, hence the need for the Act in the first place.

FINAL WORDS

Public compensation programs for victims of crime first began in the contemporary world in New Zealand in 1963. The first in the United States was in California in 1966, followed by six other states and then Washington in 1973. Acknowledging a *public obligation* to victims of crime through such a program says much about the society in which it operates, and in many respects, is the first step in recognizing the long forgotten victim.

The success of the program in Washington depends upon the legislative commitment to fund the program, as well as the continued imposition and collection of penalty assessments, which may or may not prove adequate. In addition to new claims, the annual liability on claims prior to enactment of SSHB 828 is approximately \$1.2 million paid from sources other than the penalty assessments. Plus, the fund must cover victims of federal crimes for which the state receives no federal revenue.

Now, as in past years, Congress is entertaining legislation to provide federal programs and compensation, with financial assistance to state funds. Proposals at state and federal levels, however, suffer from political oversight, as victims of crime are easily overlooked by those who have yet to join their ranks. ☐

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WASHINGTON STATE BAR NEWSLINE

The Board's Work



by Steven A. Reisler

SPECIALIZATION: THE ISSUE OF THE '80S?

PORT LUDLOW, August 19-20 -- Specialization? What do our lawyers want? That was the question posed by Board member Tom Loftus, after Claude Pearson, chairperson of the Specialization Board, presented an interim report to the Board of Governors.

The question of specialization last came up in May of 1981, when the Governors requested that the Specialization Board study a plan for self-designation of legal specialization. Having now studied self-designation plans in other states, the Specialization Board unanimously recommended against a self-designation plan for Washington. Self-designation of specialized areas of practice, Pearson reported, could result in confusing legal advertising and discredit the Bar Association by implying assurance that those who designate specialties are competent in their advertised fields.

In light of the rejection of self-designation, Pearson asked that the Governors allow the Specialization Board to continue its study for one more year, to develop an umbrella plan for specialization.

Sixth District Governor Pat Comfort urged Pearson's Board to press ahead with its study. "Specialization is the issue of the '80s," Comfort said. "It is of vital interest to small practitioners, who number between 3,500 and 4,000 in this state."

Fourth District Governor Dale Read said the real issue is whether specialization will aid the public in obtaining legal services. Read encouraged further study of the issue, but expressed his view that the present informal system of lawyer referrals to de facto experts works well enough. Conversely, Eighth District Governor George Kargianis said that an informal referral system is inadequate, because with the number of attorneys in practice today, a lot of lawyers try to hang on to whatever kind of practice they can bring in.

Upon the motion of Second District Governor Pete Dewell, the Board ultimately voted unanimously to accept the Specialization Board's report, and to continue its mandate to further study the issue.

COURT CONGESTION: SOME GOOD NEWS AND SOME BAD NEWS

Lee Campbell, outgoing chairperson of the Court Congestion and Delay Committee, reported to the Governors that there is generally less congestion and delay today than in prior years at the Superior Court level, but significantly more delay at the appellate court level. In King County in 1980, it took 27 months to get a civil jury trial; now it takes, on the average, 15-17 months.

Campbell reported that in Yakima, Thurston and King Counties, mandatory arbitration has contributed to keeping trial delays to a minimum. The elimination of de novo appeals has relieved pressure in the Superior Court, but increased pressure in the District Court. Delays are lengthening at the appellate level. In 1982, in Division I of the Court of Appeals, it took 18 months to get an oral hearing after filing; now it takes 26 months. The typical appellate court judge now churns out as many as 80 opinions per year.

OTHER BOARD ACTIONS:

- **PEACE THROUGH LAW** -- By unanimous vote, the Board allowed the Peace Through Law Section to express itself on House Concurrent Resolution 123 regarding an immediate, mutual and verifiable freeze on nuclear weapons. The Board requested, however, that any opinion expressed by the Section disclaim any endorsement by the Bar or the Board of Governors.
- **BARPAC** -- BARPAC, which started in 1982 with only \$382 in its warchest, currently has \$26,782 in its coffers. BARPAC intends to seek regular contributions from the membership in order to enhance its ability to "help our friends and hurt our enemies, if necessary."
- **CRIMINAL LAW** -- The Board voted 9-1 to allow the Criminal Law Section to file or participate in a U.S. Supreme Court amicus brief opposing the "good faith" exception for search warrants in the case of U.S. v. Leon. The permission was conditioned on the Section remaining within the confines of its budget and conducting its amicus activities only in the name of the Criminal Law Section.
- **COMMITTEE APPOINTMENTS** -- The Board of Governors made approximately 600 committee appointments for the year 1983-84. Over 3,400 lawyers applied for these positions. The Board resolved to encourage all lawyers to continue their interest in Bar activities, and resolved to call attention to section activities when committee appointments are unavailable.

SCHEDULE OF BOARD MEETINGS:

September 11. Spokane
October 14-15 Hood River, Oregon



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The Trouble with Lawyering Skills Training

by **T. Noble Foster**

Director of Continuing Legal Education

There has been a lot of talk these days regarding the improvement of lawyering skills through basic "skills training" courses, "bridge-the-gap" seminars and similar CLE programs. Herewith, some comments about the present state of the art and the future of this concept.

It is clear from talking with CLE organizations around the country that some state and local bar associations have been successful in presenting lawyering skills courses, while others have not. One reason for this discrepancy has been the confusion about which lawyers need skills training. Frequently, the target group has been lawyers admitted to practice five years or less. Yet, more experienced lawyers who choose to switch areas of practice may also be candidates.

Skills training is now seen by most as an essential part of a lawyer's education. So, perhaps these courses are more suited to presentation as third-year law school courses. For the following reasons, teaching skills training in law school would eliminate many of the problems facing state and local bar associations as providers of skills training courses:

- Law schools offer an academic atmosphere, with law professors to act as overall team leaders and coordinators;

- Law school instructors are generally backed by a large administrative support staff;

- The audience is "captive" and can be kept to an easily-handled size;

- The time-frame required would be available in the law school setting (it takes time to teach drafting, counseling, and negotiating—more time than that contained in a CLE production); and

- Law professors would have more time to review materials, provide comments, and return materials to students for revision, and students would obtain more "hands on" experience.

Programs offered by both non-profit and for-profit CLE providers are often criticized as being too long, too complex, and too expensive. But it is too easy to say the course should be shorter, simpler and cheaper. For CLE organizations, these problems are compounded by the difficulties of finding and training faculty, locating necessary physical space and technical support, and finding lawyers who can leave their offices for several consecutive days to attend the program.

Some skills courses have overcome some of these problems and have been successfully operated for several years. But they are usually long, complex, and very expensive, and they do not cover all of the essential skills. This has resulted in their diminished popularity at a time when the need for skills courses has become more recognized.

As a partial solution to these problems, the WSBA presents skills training courses to about 110 registrants at a time. There are usually 6 faculty members. The continuity of faculty training is enhanced by adding new faculty members to an experienced group of team leaders each time a course is presented. Rather than avoid substantive law, as some skills courses do, a healthy dose of it is provided through lectures in the early stages of our 2 to 3 day programs.

Instead of individual participation in every exercise by each registrant, the group is generally divided into smaller discussion groups, where volunteers participate in role-plays. This is often preceded by faculty role-playing, which serves to demonstrate the skills taught. Discussion leaders ask the role-players and observers their opinions regarding the performance, and follow this up with comments designed to synthesize the discussion. Although only a few of the registrants receive actual "hands on" experience, this loss is balanced by the gain realized in presenting the material to a greater number of registrants than would otherwise be possible. The method has proved to be successful.

It must be repeated that this is only a partial solution. We will continue to improve our methods of instruction in this important area. The larger question of who has responsibility to provide instruction in essential lawyering skills still needs to be answered. It is, however, necessary now to move beyond that debate and to offer some means of delivering skills training in subject areas where it is needed, to as many people, and as inexpensively, as possible.

Approved Continuing Legal Education Activities

WASHINGTON STATE BAR ASSOCIATION

Bench-Bar-Press Committee Regional Seminar

November 5, 1983: Chehalis.....3.00

Trial Advocacy: Evidence

October 7, 1983: Olympia.....7.00

October 14, 1983: Sea-Tac.....7.00

October 21, 1983: Spokane.....7.00

28th Estate Planning Seminar

October 27 & 28, 1983: Seattle.....15.25

Dissolution Practice

October 28, 1983: Yakima.....6.50

November 4, 1983: Olympia.....6.50

November 11, 1983: Bellevue.....6.50

November 18, 1983: Spokane.....6.50

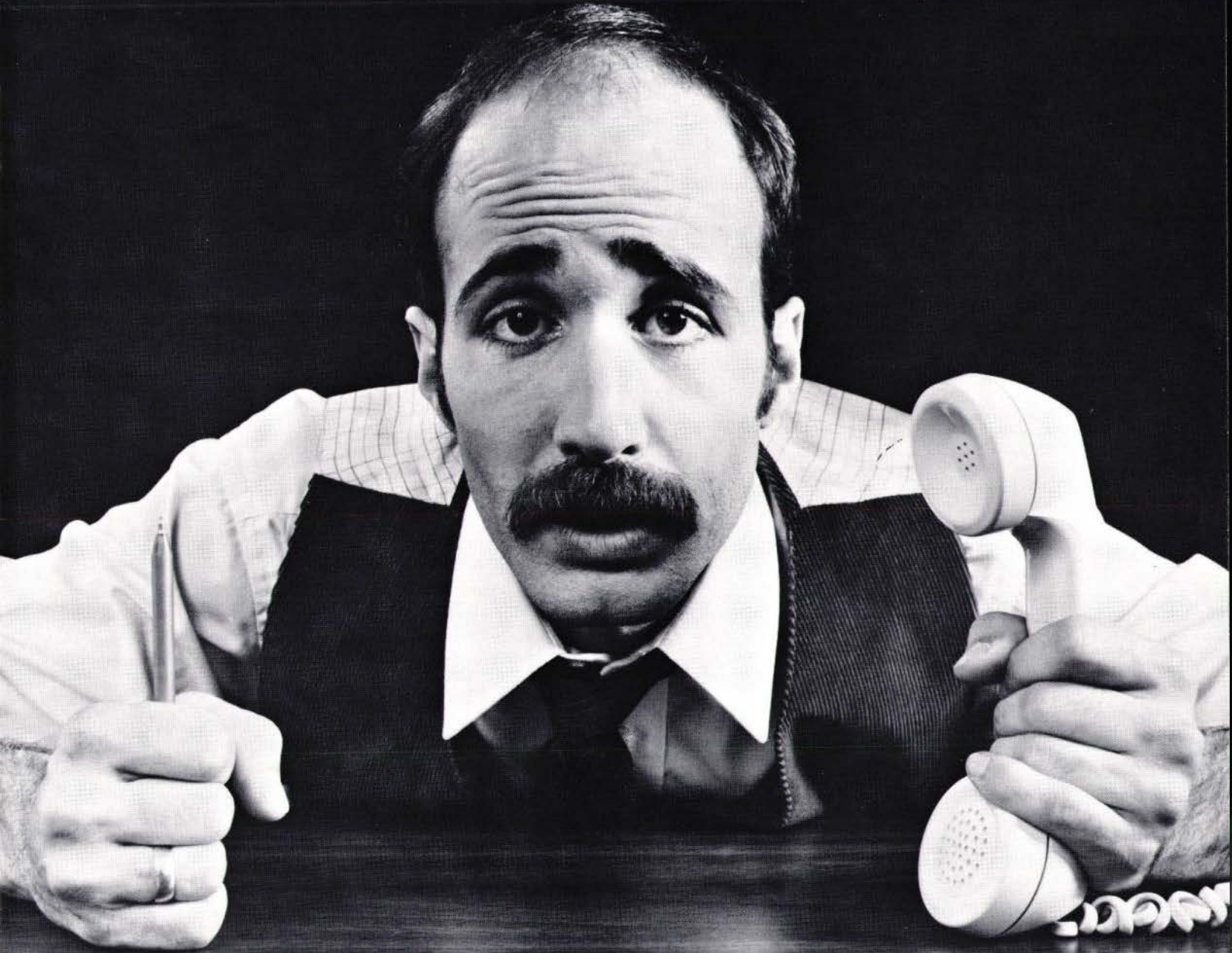
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December 9, 1983: Spokane.....4.50

December 16, 1983: Seattle.....4.50

December 30, 1983: Bellevue.....4.50

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Notes From the Academy

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

CRIMINAL LAW AND PROCEDURE. (1) It is first-degree rape to rape victim after threatening her with pistol that may have been toy or may have been real. Four judges affirm conviction on theory that threat to use toy pistol is threat to use deadly weapon; one judge affirms on theory jury could have found pistol was real. *State v. Hentz*, 99 Wn.2d 538 (1983). (2) RCW 10.43.040 prohibits prosecution in Washington for any offense "in fact" identical to or included within any offense for which defendant has been prosecuted by another sovereign. This is a stricter test than constitutional guarantee against double jeopardy. *State v. Caliguri*, 99 Wn.2d 501 (1983). (3) When two persons are jointly tried under a charge that they conspired with each other, acquittal of one requires acquittal of the other because verdicts are inconsistent. *State v. Valladares*, 99 Wn.2d 663 (1983). [Note. Prior acquittal of alleged co-conspirator is not defense to charge of conspiracy in separate trial.] (4) *State v. Edwards*, 94 Wn.2d 208, 616 P.2d 620 (1980), interpreting court rules governing time to bring a criminal case to trial, is retroactive to November 17, 1978. Its benefits are available at least to persons not yet tried and to those whose cases are on direct appeal and who have raised the point at trial and, at every opportunity, on appeal. *State v. Darden*, 99 Wn.2d 675 (1983). (5) It is error for trial court to enter plea of not guilty by reason of insanity over objections of defendant competent to stand trial, who knowingly and intelligently refuses to enter such plea. *State v. Jones*, 99 Wn.2d 735 (1983). (6) It is error to allow separation of jury in criminal case once deliberations have begun. No presumption of prejudice arises, however, if defendant has agreed to the separation. *State v. Smalls*, 99 Wn.2d 755 (1983).

—G.R. Nock

INSURANCE. Insured who recovered judgment against tortfeasor was collaterally estopped to deny he was made whole by verdict, for purposes of determining whether insurer was entitled to reimbursement for benefits it had paid for medical expenses and lost wages. *United Pacific Ins. Co. v. Boyd*, 34 Wn. App. 372, 661 P.2d 987 (1983).

—R.S.L. Roddis

LAND-USE PLANNING. (1) Floating business park zoning is valid in a generally undeveloped area; it is not spot zoning. Court's decision contains language criticizing inflexibility of "traditional 'euclidean' zoning philosophy" and praising flexibility allowed by floating zoning. *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983). (2) Appearance of fairness doctrine applies to a public

hearing on design review when previous petition for rezoning had been granted upon condition that city approve design of building. Design review hearing was "continuation" of statutorily required hearing on rezoning. [Comment. Other recent decisions, especially *Harris v. Hornbaker*, 98 Wn.2d 650, 658 P.2d 1219 (1983), and *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978), have suggested the Supreme Court intended to limit the appearance of fairness doctrine. The present decision suggests a purpose to extend it once again.] *Zehring v. City of Bellevue*, 99 Wn.2d 488, 663 P.2d 823 (1983).

—W.B. Stoebuck

REAL PROPERTY. (1) In unlawful detainer action, defense of retaliation is not permitted; right to possession is only question in controversy over continued tenancy of mooring site for houseboat. *Granat v. Keasler*, 99 Wn.2d 564, 663 P.2d 830 (1983). [Note. See special comment on *Granat* case, *infra*.] (2) Landlord impliedly covenants, not only for tenant's quiet possession, but that tenant shall be able to take possession of premises at commencement of term. Therefore, failure of previous tenant to leave involves breach of this implied covenant to deliver possession. Normally, tenant would be allowed to "rescind," but in this case, because tenant took possession after a period of delay, tenant was entitled only to consequential damages for that period. [Note. This appears to be a case of first impression in Washington on the implied covenant, the existence of which has produced a split in American decisions on the issue.] *Draper Mach. Works v. Hagberg*, 34 Wn. App. 483, 663 P.2d 141 (1983).

—H.M. Cross

REAL PROPERTY. (1) For purposes of determining if tracts of land were five acres in size, which would exempt them from county platting requirements, portions of tracts that were submerged under non-navigable water should be included. *Island County v. Dillingham Dev. Co.*, 99 Wn.2d 215, 662 P.2d 32 (1983). (2) When grantor placed deed in hands of third person with instructions that it was to be effective only upon occurrence of some condition, there was no delivery, and no passing of title, when condition never occurred. *Bull v. Fenich*, 34 Wn. App. 435, 661 P.2d 1012 (1983).

—W.B. Stoebuck

TORTS. (1) Standard of care for determining professional negligence of physician (or other "health care provider") is that of reasonably prudent practitioner possessing the degree of skill, care, and learning possessed by members of same profession in State of Washington. Under appropriate circumstances, expert testimony on issues of reasonable prudence and causation may be provided by non-physician. [Note. This decision resolves an issue with which the court and legislature have struggled for years.] See also Laws 1983, Ch. 149. *Harris*

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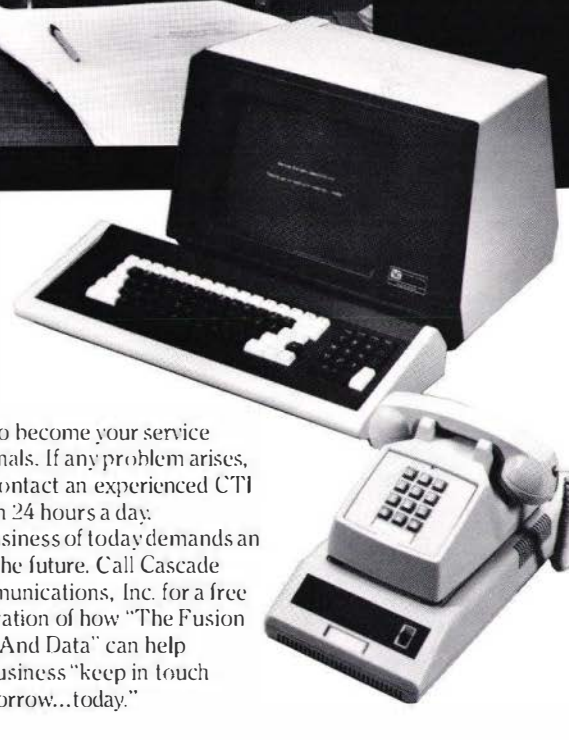
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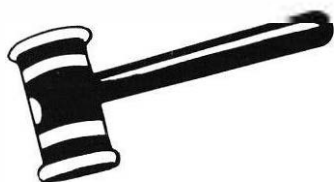


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v. Groth, 99 Wn.2d 438 (1983). (2) Sale by tavern of alcoholic beverages to minor without taking reasonable precautions to ascertain age is negligence per se. Purchase of the beverages by minor is contributory negligence as matter of law. Proximate causal relationship of tavern's negligence and minor's contributory negligence to subsequent accidental death of the minor is for jury. *Young v. Caravan Corp.*, 99 Wn.2d 655, 663 P.2d 834 (1983). (3) Plurality of court holds that physician's negligent failure timely to diagnose cancer, resulting in reduction of subsequently deceased patient's already less than 50 per cent chance of survival, created survivable cause of action under RCW 4.20.046 and cause of action for "wrongful death" under RCW 4.20.010. Damages measured by reference to limited chance of survival that patient had irrespective of the malpractice. *Herskovits v. Group Health*, 99 Wn.2d 609 (1983). (4) In product liability case in which plaintiff relies solely on alleged availability of alternative safer design to establish that product is unreasonably dangerous, plaintiff has burden of proving availability of the safer design. *Connor v. Skagit Corp.*, 99 Wn.2d 709 (1983).

—R.S.L. Roddis

TRUSTS. Trustee breached duty to beneficiaries by: (a) failing to inform them of decision to sell trust's sole asset, valuable downtown Seattle real estate, to tenant of premises, who had right of first refusal of purchase, and of steps taken leading to sale, thereby failing to allow beneficiaries to protect their interests; and b) failing to obtain best possible price, having failed to negotiate with tenant-purchaser over certain restrictions in lease, some burdensome to landlord, some burdensome to tenant, having failed to offer premises for sale on open market, and having failed to get independent appraisal. Court remands for determination of damages to beneficiaries and of amount of attorneys' fees to be awarded them, for both trial and appeal. Court discusses but does not decide whether, absent contrary specification in trust instrument, corporate professional trustee is held to higher standard of care than individual trustee would be. *Allard v. Pacific Nat'l Bank*, 99 Wn.2d 394 (1983).

—R.L. Fletcher

Editor's Note. Contributors of these case summaries report them from current advance sheets. It is possible, by the time this is published, that rehearings or other developments may have altered the situation as reported. Readers should trace such matters. —W.B.S.

SPECIAL COMMENT

The State Supreme Court's decision in *Granat v. Keasler*, 99 Wn.2d 564, 663 P.2d 830 (1983), contains two holdings that will come back to haunt the court. The case, which received prominent coverage in Seattle newspapers, involved



the validity of a Seattle ordinance governing evictions of tenants of moorage space for floating homes.

The ordinance provided that a landlord of such space could not evict his tenant without locating for him "...another lawful moorage site within the City." Without locating such a site, the plaintiff landlord gave the tenant a notice to quit and when the tenant did not leave, commenced this unlawful detainer action. The landlord contended the ordinance was "...an unconstitutional taking of his property without compensation."

As an affirmative defense, which the court labeled a "counterclaim," the tenant asserted that the unlawful detainer action was commenced in retaliation against the tenant's asserting the city ordinance. The ordinance, in a clause after the one previously quoted from, prohibited such retaliatory evictions.

In its first holding, the court determined that the city ordinance was "...a deprivation of property without just compensation and violates the fifth amendment of the United States Constitution and article 1, section 16 of the Washington State Constitution." The haunting problem here is that the court further compounded the already inconsistent and unpredictable body of Washington law on the "taking issue." Washington law already suffered from a lack of consistent theory and from decisions that were not only conflicting but that seemed capable of producing almost any result desired. See W. Stoebuck, "Nontrespasory Takings in Washington," § § 2.42-2.46 (1980). *Granat* suffers from a total lack of theory or analysis on this point.

It is the court's second holding, however, that is far worse. The court does something no court should ever do: *Granat v. Keasler* throws Washington into two separate, absolutely contrary lines of authority on a given point of law. The issue is whether, in a statutory unlawful detainer action, the tenant may assert a set-off or counterclaim.

Prior to 1973, there was an unbroken line of six holdings, beginning with *Ralph v. Lomer*, 3 Wash. 401, 28 P. 760 (1891), and extending to *Young v. Riley*, 59 Wn.2d 50, 365 P.2d 769 (1961), that no such affirmative defense could be interposed in the special, limited unlawful detainer action. Dictum in other decisions was to the same effect. This rule was the general rule in the United States. See Stoebuck, "The Law Between Landlord and Tenant in Washington: Part II," 49 Wash. L. Rev. 1013, 1073 (1974).

In 1973, *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160, without citing any of the prior decisions and without even suggesting the question had previously arisen in Washington, held that a tenant might assert a set-off. After reading *Foisy*, one would likely conclude that the earlier decisions were overruled *sub silentio*.

Granat v. Keasler returned to the earlier line of cases, citing as authority *Young v. Riley* and another of that line. *Foisy v. Wyman* was not cited, nor was there any suggestion that Washington had ever allowed counterclaims or set-offs in

unlawful detainer actions. It is not possible now to say that the earlier line of decisions has been overruled, and surely the court did not mean to overrule so important and recent a decision as *Foisy*. This leaves Washington with two directly opposite lines of authority.

At the time this is written, the court has before it a petition for reconsideration. Although that petition raises only the constitutionality issue, the court certainly may reach out to the counterclaim issue. It should do so. The law can tolerate rules that are unwise. It cannot tolerate two rules on the same point.

—W.B. Stoebuck

Judicial Qualifications Commission Elects Officers

The Judicial Qualifications Commission recently elected new officers for two-year terms. They are: William W. Baker, Chairperson; Ann Sandstrom, Vice-Chairperson; and Honorable W. Laurence Wilson, Secretary.

Chairperson William W. Baker was selected last September to serve the remainder of F. Lee Campbell's term, when Mr. Campbell resigned as the organization's first chairperson.

Mr. Campbell had established an excellent beginning for the Commission. He represented the Commission at various conferences and meetings of judges, and 132 complaints were considered during his term.

Mr. Baker was nominated to serve a full four-year term when his initial two-year term expired June 17. His alternate, Robert R. Redman, will serve as State Bar President for 1983-84, and thus concluded his term on the Commission on June 17.

The Board of Governors selected Roger H. Underwood to serve as Mr. Baker's alternate for the four-year term. Mr. Underwood, of Spokane, is president of Underwood, Campbell, Brock and Cerutti, P.S. He is chairperson-elect of the State Bar's Real Property, Probate and Trust Section, and has chaired several other Bar committees. He is also a frequent speaker at State Bar CLE seminars, CPA seminars, and estate planning councils.

When F. Lee Campbell resigned last fall, Thomas D. Loftus was selected by the Board of Governors to serve the remainder of Mr. Campbell's term on the Commission. Mr. Loftus' term will run through June 16, 1984.

Mr. Loftus has been a trial attorney with Unigard Mutual Insurance Company since 1958, and Assistant General Counsel since 1969. He served seven years as a Judge Pro Tem in Seattle Municipal Court, and has been a U.S. Military Judge since 1975.

Honorable Ray E. Munson, having concluded his initial two-year term representing Court of Appeals Judges, was again selected by his peers to serve a full four-year term. His

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Ethics from the Inside



original alternate, Herbert A. Swanson, was named as alternate for the four-year term. Judge Munson serves as Court of Appeals Judge in Division III, Spokane. Judge Swanson serves in Division I, Seattle.

The Commission continues to meet monthly. At the close of the first biennium, it had received 239 complaints for review.

Can I Impersonate My Client?

by Robert T. Farrell

WSBA General Counsel

Steve, a Seattle lawyer, has a \$200 dog bite case coming up in Seattle District Court. Since his client/defendant didn't own Fido, he believes victory is well within his grasp. His problem is that his client now lives in Alaska, and is in no position to attend the trial. Always resourceful, Steve puts his friend Merlin on the stand posing as the defendant, asks him two questions about Fido's ownership, and gets the case dismissed.

It is hoped that every lawyer will recognize that Steve's conduct should lead to disciplinary action against him. He has worked a fraud upon the court and opposing counsel in misrepresenting the identity of Merlin to the court. The fact that Merlin's testimony was true will not help Steve too much.

A Similar Fraud

There appear to be some lawyers, however, who are quite willing to participate in a similar fraud with a slight change of facts. If we put his case in Superior Court, Steve can move for summary judgment. Unfortunately, he has been dilatory, and needs to get his motion filed quickly. The problem is getting an affidavit from his client, whose mail is delivered by dog sled from Taktinoosh. Steve signs his client's name to an affidavit, and his associate, Bill, readily notarizes it, although Bill knows the client has not set foot in the office in eight months.

In this case, Steve has not stood up in court and lied to a judge. But he has deceived the court and opposing counsel by representing to them that his client, under penalty of perjury, has sworn to the facts stated in the affidavit. If the truth is discovered, Steve is probably still going to find himself involved in disciplinary proceedings.

This time he may well have company. Bill, who notarized a signature which he knew was not that of the client, has assisted in the fraud. He could also find himself facing a criminal gross misdemeanor charge under RCW 42.20.050.

Simply a "Detail"?

It is understandable, though not forgivable, that attorneys take a somewhat cavalier attitude toward affidavits and their appended notary certificates. In most cases, the attorney has

drafted the affidavit. Having the client read it and obtaining his or her signature is simply a "detail." In very few cases is an oral oath actually administered. As the attorney knows, the notary's subscription says nothing about the truth of the contents of the documents. A notarized affidavit on a sweepstakes promotion does not impress a lawyer.

The law continues to believe, however, that a sworn statement is more likely to be true than one which is not. A lawyer who is called upon to swear to tell the truth in open court may feel this effect, no matter how routine oaths administered to others may seem.

Furthermore, the law imposes severe criminal penalties on those who give false information under oath. A lawyer who signs a client's name to an affidavit destroys the deterrent effect of these criminal penalties with regard to the client. The lawyer may at the same time be subjecting himself or herself to a perjury charge if all facts in the affidavit are not true. Under RCW 9A.72.080, "Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false."

Excuses, Excuses

Although there are excuses for signing a client's name to an affidavit, none is a good one.

A lawyer who has neglected a case until the last minute certainly does not have a good excuse for signing a client's

name so as not to reveal his or her own delay. The conduct is just as unacceptable, although the motives may be better, if the client's own delay has caused the problem. In either case, the lawyer has essentially two choices: doing without the affidavit, or seeking a continuance.

The lawyer whose client does not have ready access to a notary public has an easy solution. Since 1981, notarization has not been required for most documents previously required to be notarized, and is not required for affidavits. RCW 9A.72.085 provides a form of verification without notarization, which appears usable on any affidavit. There is no practical reason to ask a client to sign an affidavit and return it for notarization (or worse, to have the client sign a blank page to be filled in later with what purports to be the client's sworn statement).

Playing with the Truth

The public's attitude towards the legal profession is affected by little things. In 90 cases out of 100, a client is not going to say anything if asked by a lawyer to sign an affidavit or other form in blank, to sign it and return it to be notarized, or to authorize the lawyer to sign it with the client's name. But even an unsophisticated client may well have read the notarization subscription, or know what it is about, and in many cases will realize that the lawyer is playing with the truth. The client is right.

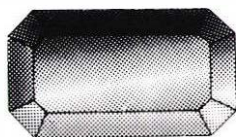
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ALA "Nuts & Bolts" Seminar in Law Office Administration

The Association of Legal Administrators (ALA) is pleased to announce a new eight-week seminar, "Introduction to Law Office Administration," which will be taught in Seattle beginning in October. This special eight-week program is geared to new law office administrators, small firm attorneys, legal assistants, secretarial supervisors and others interested in law office administration as a profession.

"Introduction to Law Office Administration" will begin Tuesday, October 4, 1983, and will run through November 22 on eight consecutive Tuesday evenings from 6:00 p.m. to 8:30 p.m. The location will be the offices of Foster, Pepper & Riviera, on the 34th floor of the 1111 Third Avenue Building in Seattle. Tuition is \$225 and includes a comprehensive course manual.

This seminar evolved out of a very successful pilot program in San Francisco and is now being introduced to several major cities in the U.S., including Seattle. The purpose of this program is to introduce, explore and examine in detail the applications of new and proven methods of administration necessary for managing a successful law office.

Designed by practicing legal administrators, the seminar is a basic, "nuts & bolts" course, geared to individuals who have little or no previous experience in the field of law office management. Students will be provided with a course manual, recommended readings, and handout materials.

The seminar instructor will be **Thomas M. Chase**, Administrative Manager at Foster, Pepper & Riviera and currently President of the Seattle Chapter of the ALA. Mr. Chase is a member of the faculty at Highline Community College and teaches a course on Law Office Management and Economics.

Guest lecturers for the seminar series will include:

Barry C. Mills, Director of Administration for Bogle & Gates, past president of the Seattle Chapter of the ALA, and current chairman of the ALA's Director of Administration Section. Mr. Mills has taught law office management courses at the T.C. Williams Law School, University of Richmond, and at the J. Sergeant Reynolds and Highline Community Colleges.

Gerald I. Ainsworth, Business Manager at Culp, Dwyer, Guterson & Grader, past president of the Seattle Chapter of the ALA, and current Assistant Regional Vice President of the ALA. Mr. Ainsworth has been a member of the faculty of the University of Colorado, and guest lecturer at the University of Washington and Highline Community College.

Gail C. Gosney, Administrator at Keller, Rohrback, Waldo, Hiscock, Butterworth & Fardal, and former Court Clerk Manager for King County Superior Court.

Gary R. Garrett, Ph.D., administrator for Davis, Wright, Todd, Riese & Jones, past president of the Seattle Chapter of the ALA; past Regional Vice President of the ALA and past Chairman of the ALA's Section on Technology; and currently Vice President and member of the Board of the ALA. Dr. Garrett has been a member of the faculty of Highline Community College and Griffin College. He has also authored many articles on law office management and has lectured for numerous law firms, Bar Association meetings, law firm retreats and seminars around the country.

Mary McLendon Simpson, Administrator for Burns & Ricketts, P.S. In addition to her work as a legal administrator, Ms. Simpson has five years of experience as a management consultant. Her primary areas of expertise as a consultant include strategic planning, organizational development, and compensation & benefits.

For additional information regarding the course, please contact the ALA, 1800 Pickwick Avenue, Glenview, Illinois, 60025, (312)724-7700. You may also contact Tom Chase in Seattle at (206)447-4400.

Course Outline:

I. Introduction

- a. Review of course outline
- b. Introduction of students
- c. Course objectives and procedures
- d. Role of administrator
- e. Law firm structure: committees, methods of management
- f. Styles of Management Inventory test

II. Management Techniques and Styles

- a. Application of various management techniques
- b. Styles of Management Inventory—test results
- c. Selling your ideas

III. Personnel Administration

- a. Recruiting
- b. Interviewing
- c. Hiring
- d. Training
- e. Wage & salary administration
- f. Performance reviews
- g. Fringe Benefits
- h. Discipline & discharge
- i. Legal assistants
- j. Supervision & delegation
- k. Staff meetings

IV. Interpersonal Communications Skills

- a. Employee communications
- b. Communicating with lawyers
- c. Office morale
- d. Body language
- e. Written communications
- f. Office grapevine

V. Financial Management

- a. Budgeting
- b. Timekeeping

- c. Billing (fees & disbursements)
- d. Financial statements
- e. Expenses
- f. Lease vs. purchase

VI. Computers, Equipment and Systems Applications

- a. Data Processing
- b. Word processing
- c. Filing systems
- d. Docket controls
- e. Conflict checks
- f. Disbursement recovery
- g. Use of computer-generated reports
- h. Communicating with branch offices
- i. Copiers, telecopiers, telex machines, call detail recorders, transaction recorders, binders, OCR devices, printers, etc.

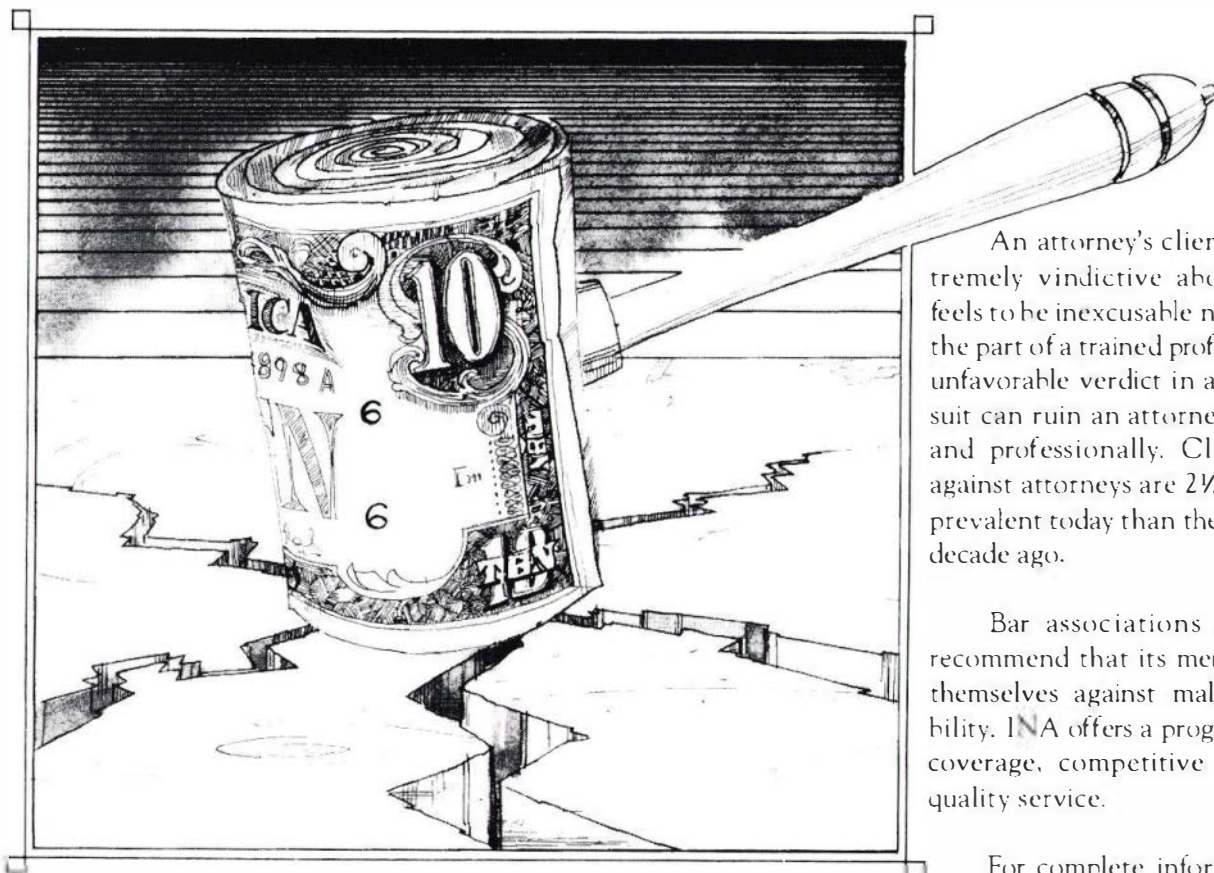
VII. Planning

- a. Insurance coverages
- b. Branch offices
- c. Strategy & model
- d. Growth
- e. Space—Layout & design
- f. Mergers & acquisitions
- g. Case study (time permitting)

VIII. Miscellaneous Systems, Procedures and Course Review

- a. Review of case study solutions
- b. Libraries
- c. Public relations
- d. Office manuals
- e. New employee handbooks
- f. Firm resume
- g. Course review and open discussion

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Around the State

PIERCE COUNTY

by GEORGE KELLEY

It is rumored that **Murray Anderson** and **Frank Girolami** have revived the ancient practice of trial by combat. In a hallway discussion in a bitterly disputed divorce trial, Murray ripped the buttons off Frank's shirt. This practice, if carried to the use of deadly weapons, might reduce the present surplus of attorneys.

Sports Believe It Or Nots—The annual Bar Association Golf Tournament was held across the tideflats from town at North Shore Golf Course. **Art Paulson**, who is close to shooting his age, won overall honors with a gross score of 75. In another notable effort, **Scott Candoo** placed second in the Calloway Division, taking 114 strokes for a 72.5 net score. Finally, **Craig Adams** won the Longest Drive Division, having come in from Puyallup.

Puget Sound National Bank slow pitch team, a/k/a not-so-young lawyers, finished first in its league with an 8-2 record, its first division crown in 12 years.

L. Paul Alvestad and **John Hoffer, Jr.**, have become associates with the firm of McGavick, Graves, Beale and McNerthney. Billett, Comfort & Rosenow have added recent UPS graduates **Christopher W. Keay** and **Patricia I. McCotter** to the firm. **Richard G. Rodger** and **Walter S. Corneille, Jr.**, have announced the opening of their partnership at the Norton Clapp Law Center.

SPOKANE COUNTY

by JONATHAN C. RASCOFF

Those Lazy, Crazy, Hazy Days of Summer—The Spokane County Bar Association's annual golf tournament for lawyers and judges was held on June 24, with 120 participants in the field. Low gross was taken by **Bill Goss**, at 76, with Court Commissioner **David Thorn** coming in second. **Dan O'Rourke** took low net. Highest score was registered by **Scott Simpson**, at 200 plus.

A golf tourney of a different breed, the Father Giuseppe Memorial Golf and Quaffing Classic was held at Hangman Valley on August 6th. The brainchild of L and I jock **Robert Milhem**, this competition is a scientific exercise designed to determine whether the adage, "If you drink, don't drive," applies equally to the game of golf. Results to be published in next month's column.

The Spokane County Bar Association has a new slate of officers, the result of elections which were held on June 3rd. **C.E. "Gene" Hupp** is now president, with **Paul Basine** serving as vice president, and **Patricia C. Williams** as secretary-treasurer. New trustees are **Robert H. Leeds, Jr.**, **Richard J. Schroeder** and **Thomas Milby Smith**.

Legal Issue—Summer Edition—Congratulations to the following individuals, all recent recipients of a visit from the stork: **Mike Connelly**—girl; **John Zeimantz**—boy; **Mike Loft**—girl.

If It Pleases the Court—Wedding bells recently sounded for **Christine Cary**, District Court Judge, and **Joel McCormick**, an attorney with the firm of Winston and Cashatt. Betrothal also announced by State Representative **Dennis Dellwo**. When not in Olympia, Dennis practices with the firm of Dellwo, Rudolf and Schroeder.

The Young Lawyers Section of the Spokane County Bar Association recently elected trustees and officers for the coming year. **Cynthia McMullen** is president, replacing **John M. Riley, III**. **Bob Roberts** is vice president, with **David Gallik** and **Steven Hughes** filling the posts of secretary and treasurer, respectively. New trustees are **Randy Gregory**, **Larry Weiser** and **Roseann Verrecchio**.

Friends and Neighbors—Layman, Mullin and Etter have split, giving birth in the process to Layman, Loft, Smythe and Arpin, at 650 Lincoln Building, and Mullin, Etter and Cronin, at 640 Lincoln Building. . . **Richard White**, formerly at the firm, is now an associate at Anderson, Evans, Craven and Lackie. . . **Phelps R. Gose** is now associated with Axtell, Karademos, Ross and Briggs. . . **John M. Riley, III**, recently accepted a position as



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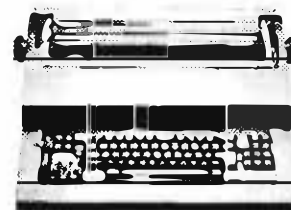
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in-house counsel with First American Title Company of Spokane. John was formerly with the Smith Law Firm. . . **Maureen McGuire**, formerly with the Court of Appeals, Division III, has joined D.S.H.S. as an assistant attorney general. . . **Laurie Connelly** has been hired on as an assistant A.G. with the Department of Labor and Industries. . . **Marc E. Wallace**, formerly an I.R.S. estate tax attorney for Eastern Washington, has joined his brother, **Richard P. Wallace**, in Coeur d'Alene, Idaho, in private practice.

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Christian Legal Society to Sponsor Breakfast

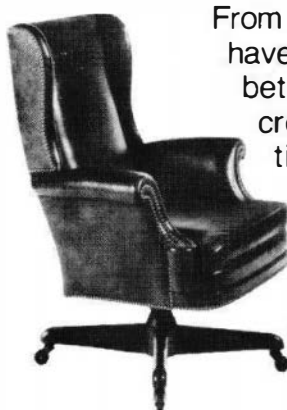
The Christian Legal Society will sponsor its twelfth annual breakfast during the State Bar Convention in Spokane. The breakfast will be held on Thursday, September 15, at 7:30 a.m. in the Palouse Room of the Sheraton Hotel. A featured speaker will be announced.

Attorneys and their spouses who are interested in attending should make reservations before September 9 with Raymond Eberle, North 2610 Pines Road, Spokane, 99206, telephone (509)924-9930, or with Lyle Wilson, 11320 Roosevelt Way N.E., Seattle, 98125, telephone (206)365-5500.

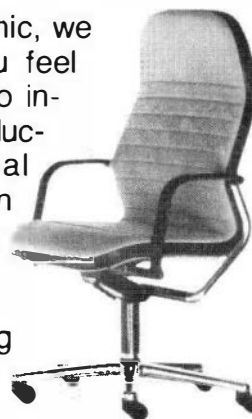
Geo. Washington Law Alumni to Meet

The Washington State Chapter of the George Washington Law Alumni Association will hold a luncheon program on Tuesday, September 13, in conjunction with the State Bar Annual Meeting in Spokane.

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The featured speaker will be Prof. Teresa Schwartz, administrator of the law school's Enrichment Program, which offers lectures and informal seminars by eminent legal scholars, judges, and high-level public officials.

For further information, contact Paul W. Chemnick at (206)621-8300.

IN MEMORIAM

Former Board of Governors member **Harold A. Pebbles, Sr.**, of Olympia, died July 4 at the age of 74. Mr. Pebbles served as Third District Representative to the Board from 1953 through 1956. Having graduated from the University of Washington Law School in 1933, he served as an Assistant State Attorney General, then entered private practice in Olympia in 1947, semi-retiring in 1976. Mr. Pebbles was a member of the State Game Commission for 16 years, and was a past Master of Olympia Masonic Lodge F & AM #1.

After over 54 years as a member of the Bar, **Edward J. Crowley, Sr.**, 78, died July 20. A Spokane native, Mr. Crowley graduated from Gonzaga Law School in 1928, and was admitted to practice in 1929. From 1937 until his semi-retirement in 1978, he practiced law in Spokane, and was a candidate for Superior Court judge in 1958. Mr. Crowley also taught mortgage law at his alma mater, and served from 1949 to 1954 on the State Board of Bar Examiners.

Prominent labor law attorney **George Joseph Tichy**, also of Spokane, died July 24 at the age of 65. A University of Oregon graduate, Mr. Tichy attained international recognition as the U.S. representative at five meetings of the International Labor Organization in Geneva, Switzerland. He served as chairman of the employer delegation in 1973 and 1977, and was general chairman of the last meeting in 1981. Mr. Tichy was admitted to the Bar in 1940, and was Longview deputy city attorney and Cowlitz County municipal judge before serving on the National War Labor Board.

During World War II, he was in Army Intelligence and the Medical Corps. He moved to Spokane in 1946 as general manager and counsel for Timber Products Manufacturers, where he continued until his death.

DISCIPLINE

Censured

Spokane attorney **Gary J. Gainer** received a Censure on August 4, 1983, based upon findings that Mr. Gainer had allowed a default decree to be entered against his client without her consent in violation of DR 7-101 (A)(1) and (2).

Port Angeles attorney **John H. Doherty** received a Censure on June 28, 1983, based upon findings that Mr. Doherty had violated DR 6-101 (A)(3) by neglecting to complete a probate.

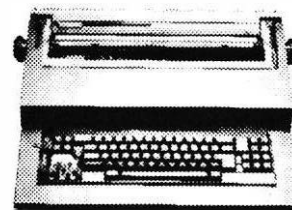
Suspended

Seattle attorney **William A. Noble** has been suspended from the practice of law for a period of ninety days beginning July 28, 1983, by order of the Washington Supreme Court. Noble was suspended for misappropriating trust funds from his father's estate for which he was acting as executor. The Supreme Court additionally conditioned Noble's reinstatement after the expiration of ninety days upon his filing an affidavit with the court showing that he had returned executor and attorney fees he charged for handling the estate, paid his brother the \$2,147 still owing him, and arranged for the payment of taxes and interest necessary for the closing of the estate.

Puyallup attorney **Jon W. Orton** was suspended on June 29, 1983, by order of the Supreme Court for a period of one year, to be followed by a period of probation on conditions for an additional one year pursuant to RLD 5.2. Mr. Orton's suspension was based upon a hearing officer's findings that he had neglected legal matters and intentionally failed to carry out contracts of employment with two separate clients, and that he had failed to cooperate during the bar disciplinary investigation.

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WILL SEARCH

Information needed re: Wills of Vernon L. St. George and Carmel L. H. St. George, long time Seattle residents, recently passed away. Please contact Carl P. Jensen, 2000 Pacific Building, Seattle, Washington 98104, telephone (206) 292-9953.

Will sought of Clair L. Underdahl who resided in Tacoma, Washington, until his death in May, 1983. Please call Jeffrey J. Jahns at (206)475-8400.

Information needed re: Existence of Will of Katherine A. Sloby. Contact Noel P. Shillito, 625 Commerce, Suite 320, Tacoma, WA 98402. (206)383-4891.

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