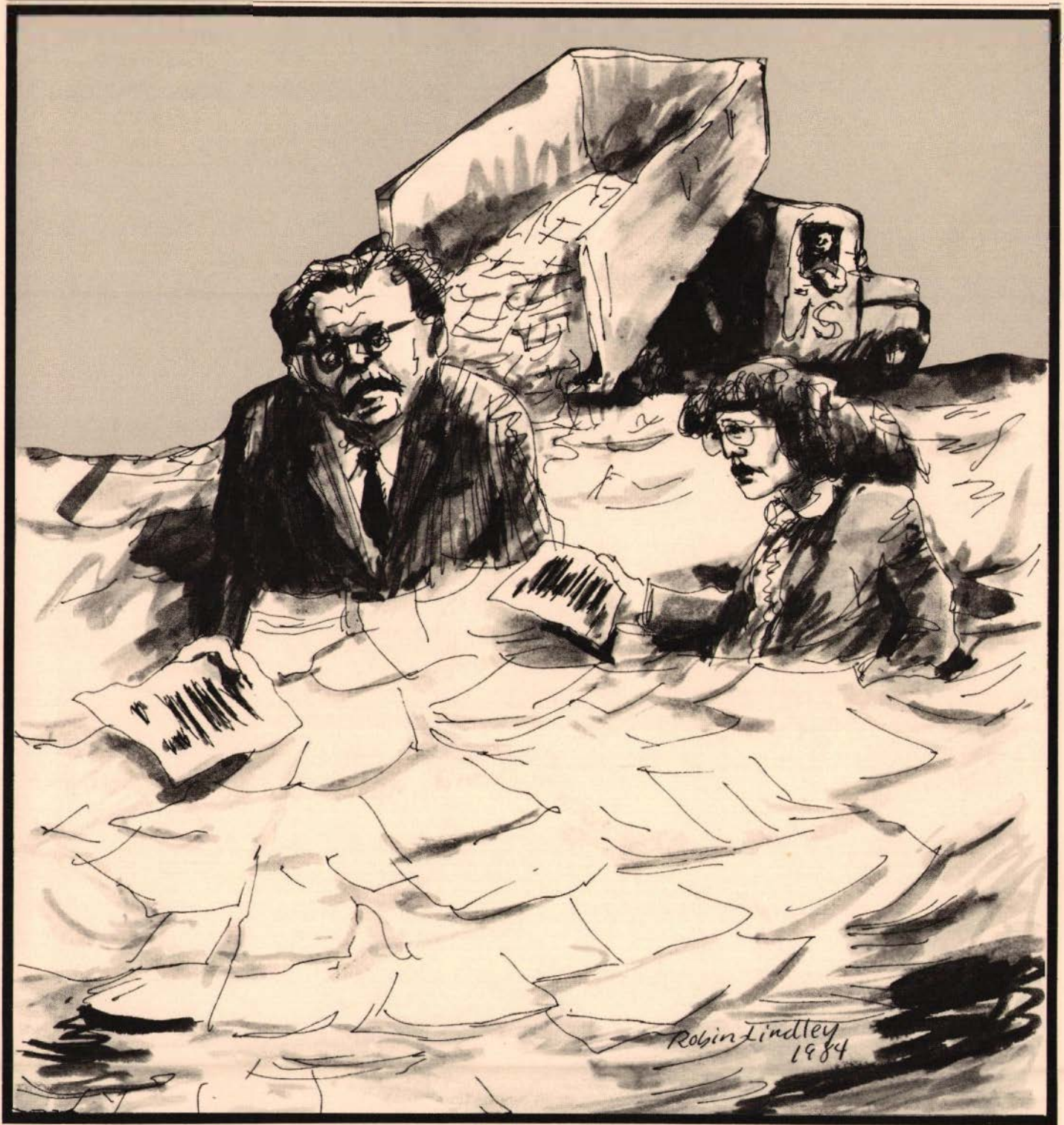


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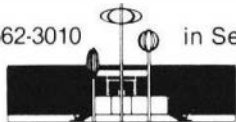
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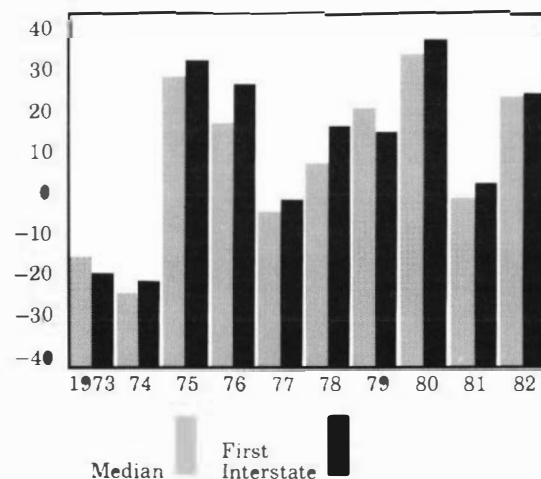
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Washington State Bar News

Volume 38, No. 3, March 1984

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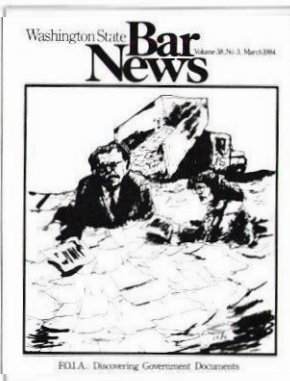
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Our Cover



ART CREDIT

Pen-and-ink drawing on cover and interior illustrations by Seattle attorney **Robin Lindley**. Mr. Lindley's drawings have also been featured in *Newsweek* and *Seattle's Weekly*.

How do you obtain documents from the government? Does a federal agency have the scoop on your client? See "Freedom of Information" on page 11.



Letters

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.

Whose Snake Is the Consumer Protection Act?

Editor:

Having not the means or facilities to address the entire Bar by personal letter, I write this letter wondering if I may be one of a number of silent, placid members of the Bar. I believe I have a right and duty to express my reaction to the letter recently sent by our President to every member.

The letter proposed that the Bar expend time and money (as it already has) representing a large Seattle law firm by *amicus curiae* participation in the fee

dispute between the firm and its client. Apparently, the client claims he dealt with a senior member of the firm but was billed the senior's price for work done by a junior, whose participation had not been known to the client.

Apart from the legal question of whether the Bar is subject to the Consumer Protection Act, I wonder if we are not killing someone else's snakes. Why should we participate in a fee dispute on the assumption that it is "good" for all of us?

I cannot help but wonder: if some *country* lawyer had sued a client and the client, for the same reasons, resisted the charges, whether the State Bar would volunteer to join forces, staff and funds for the lawyer whose defense seems to be the medieval claim of sanctuary. It would seem the fight should be between the attorneys, who presumably can justify their charges, and the client who has expressed some grievance with them.

I can only conclude that a lot depends on whose snakes are being killed. I

wonder, in the two or three disputes which I have had in a considerable number of years at the bar, whether I can in any *future* dispute call on the Seattle office to devote its time, and some considerable funds, to my cause.

A parallel matter would be the issue of legal advertising. You will recall that at one time, advertising was considered unprofessional, and therefore illegal. The bar associations participated in an appeal to the high courts (*Bates*), seeking to have the bar blessed with an annointment that it was not a business, trade or commerce and was not subject to the rules of the marketplace. You will recall the court allowed and, indeed, encouraged advertising, on the premise that the bar was *in fact* a trade or commerce, and the Bar could not ban competitive practices.

It appears that the Bar is asking again to be placed above the law. It should not.

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Jurors, Take Note!

Editor:

Congratulations on Judge Winsor's article about jurors taking notes [*Bar News*, January, 1984, p. 12]. It appears to me that immediate steps should be taken to correct the handbook for jurors which states that notetaking is not allowed. Judge Winsor should be congratulated on the step that he has taken.

I also enjoyed the Caselaw Capsules column by Professor William B. Stoe-buck. I find it to be very helpful and informative.

I appreciate the occasional practice tip for office management. Personally, I would like to read more office tips.

Keep up the good work.

PAUL W. HOUSER, SR.

Renton

IOLTA Vote

Editor:

In the January 1984, issue of the *Bar News*, Gary L. Carpenter wrote a thoughtful letter opposing IOLTA and suggested that the matter be subjected to a referendum of the attorneys in this state. I support his position totally.

ROGER L. DECKER

Bellevue

Flea Bargaining Verboten!

Editor:

I am compiling a list of legal malapropisms for the enjoyment of myself and my brothers and sisters of the bar.

I am sure many of us have clients who have come in to have us handle their "disillusionment of marriage" or because they were "in the rears" in child support. I even know a lawyer who had a client make it perfectly clear that he didn't want "any flea bargaining" in his case (and a civil dispute it was, at that!)

A district court judge told me a woman had wandered into her courtroom inquiring as to whether there were a "notorious Republican" before whom she could execute the deed she was carrying.

If anyone has a similar anecdote he or she would be willing to share, I would

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greatly appreciate having it. If I get enough of them, I'll surely get around to putting them into a form in which we can all enjoy them.

REBECCA M. BAKER

Republic

Share the News with the Public

Editor:

I would like to compliment you for your touching column, "The News," at page 7 of the December, 1983, *Washington State Bar News*. My law associate, Jennifer C. Rydberg, and I truly believe that it would be in the best interest of the legal profession if the contents of your column would be read and enjoyed by the general public.

DAVID A. GAGLEY

Kent

1984 CLE Calendar

Editor:

On behalf of myself, and I am sure many others, I would like to compliment the Continuing Legal Education Committee of the Washington State Bar Association for its fine idea of providing all members of the Bar Association with a calendar of 1984 CLE events. For those of us who are involved in trial practice, it is a very handy and useful tool in planning out our schedule for the upcoming year. Hopefully this procedure will be continued in the future for the mutual benefit of all concerned.

Again, my compliments and thanks to the Continuing Legal Education Committee.

GARY L. CARPENTER

Clarkston

Lawyer Made Good

Editor:

With respect to the comment on page 7 of the October, 1983, *Washington State Bar News*, that "Jackson was a lawyer who made good," I think I understand what you were trying to say, maybe.

MICHAEL S. CURTIS

Seattle

Maybe...

-Ed.



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Gerry Spence Heads Poulsbo CLE

The Poulsbo Bar Association proudly announces its first annual CLE class to be held March 15, 1984, at the Sons of Norway Hall in Poulsbo.

Speakers include Jay B. Roof of Poulsbo, Kitsap County Superior Court Judge Robert Bryan, Mount Vernon attorney Paul Luvera, Justice James Doliver of the Washington State Supreme Court, and Gerry Spence of Jackson, Wyoming. Spence, who was featured on a *60 Minutes* segment last year, has won substantial civil verdicts representing Karen Silkwood and a former Miss Wyoming against *Penthouse* magazine.

Space is limited to the first 350 registrants. Registration for members of the Kitsap County Bar Association is \$55.00; for all other attorneys, \$95.00. Full-time judges and legislators will be admitted free. Lunch will be served, and the always entertaining Poulsbo Bar Convention will be held that evening.

This class has been approved for 6.25 CLE credits by the WSBA. To pre-register for the CLE, or for further information about the Poulsbo Bar Convention, please write to the Poulsbo Bar Association, P.O. Box 851, Poulsbo, WA 98370.

King County Considers Discovery Rules Change

King County Superior Court is considering a rules change which would require attorneys to complete discovery in non-jury cases within seven (7) months and, in jury cases, within nine (9) months of the date the case is at issue, except by leaves of the court on a showing of extraordinary circumstances supported by affidavit.

Comments on this procedural change should be received by the Chairman of the King County Superior Court Rules Committee on or before April 1, 1984.

Avis Rent-a-Car Discount Offer

Effective March 1, 1984, WSBA members are eligible for a 25% discount off Avis's unlimited mileage, "We Mean Business" rates on local and intercity rentals.

Avis offers WSBA members discount I.D. stickers at no cost and Avis Wizard Numbers to those interested in Avis Express. For further information, contact Avis District Sales Office, 15078 N.E. 40th Street, Redmond, WA 98052, telephone (206) 881-7577.

IRS Moves

The Special Procedures Staff of the Internal Revenue Service has changed its location and post office box number. As of February 6, the new addresses are: *mailing*—P.O. Box 1729, Seattle, WA 98111; *office*—Room 2040, 915 Second Ave., Seattle, WA 98174.



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The meeting continued with discussion about a wooden-legged pig, the censorship of "Leave it to Beaver," comments on the "Old Bailey," and "Wendall at the Kingdome."

Outgoing President **Don Schacht** then made a timely announcement about a DWI Seminar, whereupon he was immediately nominated to serve a second term. Outshouting his most ardent supporters, Don was able to put the kibosh on the grassroots movement. After a bitter struggle and numerous votes to get a clear majority, **Greg Lutch** was elected President, **Jim Barrett**, Vice-president, and yours truly, Secretary (The latter expects a recall after these minutes are disseminated).

The formal festivities concluded with several bar members performing a skit completely lacking in any redeeming social value, but causing one member to vote against bringing spouses to next year's meeting.

With the arrival of a window-rattling band, many bar members adjourned to the anteroom for a nightcap and more socializing. As the evening progressed, the phrase "sober as a judge" took on new meaning. In ones and twos, members began peeling off for home, leaving the creme behind to rise to the top. Thereafter, three or four of our most respected members joined in the multi-masochistic ritual known in the legal profession as "shutting the place down." The meeting was adjourned at 2:00 a.m. by voice vote.

MEMORANDA . . .

Max Kaminoff has joined the Jack A. Benaroya Company, a real estate development firm, as general counsel. Kaminoff was a senior partner with Bogle & Gates law firm in Seattle. . . Recently selected to membership in the American College of Probate Counsel are **Thomas C. Gores**, of Bogle & Gates in Seattle, and **Kimbrough Street**, of Davis, Wright, Todd, Riese and Jones in Seattle. . .

Royce A. Ferguson, Jr., of Everett, recently received the James Madison

Award for "excellence in journalism promoting the individual right to keep and bear arms" . . . Seattle attorney **Robert C. Mussehl** has been appointed to a three-year-term on the seven-member ABA World Under Law Committee.

IN MEMORIAM

Olympia attorney **Smith Troy**, 77, twice Thurston County prosecutor and Washington State Attorney General from 1939 to 1952, died January 17. Mr. Troy was perhaps best known for winning a milestone lawsuit in 1953 which returned all state agency headquarters to Olympia. During World War II, he served with the Judge Advocate Corps (reelected attorney general in absentia), and was chief lobbyist and counsel for the Teamsters Union from 1952 to 1970. A graduate of the University of Washington School of Law, Mr. Troy was a member of the Bar for nearly 54 years.

NALS Meets in Seattle March 15-17

The Greater Seattle Legal Secretaries Association will introduce legal secretaries from around the nation to "The Sights and Sounds of Seattle—the Emerald City" when it hosts the National Association of Legal Secretaries' (NALS) 1984 Spring Board Meeting at the Westin Hotel March 15 to 17.

The agenda includes: a NALS Executive Committee Meeting March 15-16; an all-day tour of Seattle March 16; a CLE Membership Workshop and a National Directors' Rap Session March 16 from 4 to 6 p.m., followed by a Get Acquainted Party at 7:30 p.m.; the 1984 Board Meeting on March 17 at 9:00 a.m.; and a reception for the NALS President-Elect at 7:00 p.m. on March 17, followed by a banquet.

For more information, contact Judith Lackstrom at (206)624-5622, or W. Joyce Waddell at (206)623-9900.

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RLD: A Positive Program for Maintaining High Professional Standards

One of the most important responsibilities mandated to the Washington State Bar Association by the Washington State Supreme Court is the administration of the attorney discipline program. Yet, for all the emphasis placed on this vital area of activity, many of our members are not entirely familiar with the program's objectives, procedures to achieve them, nor the results obtained.

Ideally, attorneys should conduct their practices in such a way that no complaints are ever filed against them. In reality, the WSBA receives 1,200-1,400 complaints over the course of a year. The processing of these complaints is a time-consuming, costly, but clearly necessary activity of the WSBA.

Briefly, the primary objectives of the attorney discipline program are 1) to determine if complaints received involve violations of the Code of Professional Responsibility (CPR); 2) to take the appropriate steps to protect the public from actions that violate the CPR; and 3) to take whatever action would most probably avoid the repetition of a violation.

The *primary emphasis* is on taking the actions necessary to maintain the highest standards of professional service — not on "punishing" attorneys for code violations.

The disciplinary program is administered according to the Rules for Lawyer Discipline (RLD), which are applied under the supervision of the Disciplinary Board. The Board's membership is comprised of a minimum of eight lawyer members, with not less than one lawyer from each Congressional District, appointed by the Board of Governors, plus a minimum of three non-lawyer members appointed by the Supreme Court. The actions of the Disciplinary Board are independent of any direct or indirect control by the Board of Governors.

Among its other functions, the WSBA Legal Department performs the administrative duties for the Disciplinary Board, including investigating complaints and representing the Board at disciplinary hearings. A major time commitment of the Department's six lawyers, three investigators, and support staff is required to handle the Board's workload.

A major updating of the disciplinary rules became effective in January, 1983. While the objective was to streamline the administrative procedures, the change most obvious to the public at large was that a major portion of disciplinary proceedings are now a matter of public record. Once an investigation has been completed and a review committee (comprised of three members of the Board) finds that there is probable cause for discipline, a formal complaint is issued. After the subject attorney has been given the opportunity to reply, the formal complaint and reply become the basis of a file that is open to the public from that point forward, including any documents which may be subsequently added.

Also from that point forward, all hearings relating to the matter are open to the public. Depending upon the severity of the case, a hearing may be conducted by one hearing officer or a panel of three persons. When a three-member panel is constituted, one of the members may be a non-lawyer. Disciplinary recommendations by hearing officers or panels are forwarded to the Disciplinary Board for appropriate action.

Another major change in the rules was the expansion of non-lawyer members of the Disciplinary Board from the previous limit of two. In fact, there are now four non-lawyers on the Board. They have full voting privileges.

The results of these and the other changes are that 1) the Board is able to process complaints and make final determinations more quickly and efficiently, and 2) the process may now be viewed by the public at large as it really is — an effective, fair, and open process by which the standards of the CPR are upheld for the benefit of our citizens.

We are considered by other state bar associations to have one of the most effective disciplinary programs in the nation. What does that mean to you as an individual attorney?

First, it means that we are following our mandate to protect the public and uphold the highest standards of law practice in Washington State.

Secondly, it means that we are fully committed to both you and your colleagues to *help* you maintain high standards. Aside from attending to violations of the CPR, the State Bar offers a number of programs aimed at preventative actions, including educational programs to explain the purposes and procedures of the CPR and RLD; a spot audit program to assure that lawyer trust accounts are being properly maintained and to offer suggestions for improving trust accounting systems and controls; and a disabled attorneys program to help the alcoholic, mentally incompetent, senile, or drug-addicted attorney who may cause client problems without really intending to do so.

The intent of the entire program is to deal openly and fairly with the public and the lawyer, protecting the one and encouraging the maintenance of high professional standards for the other.

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■ Freedom of Information ■

by Neil Schickner

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, entitles "any person" to obtain copies of "records" in the possession of a federal "agency." The Act provides a relatively fast and inexpensive means of obtaining a variety of potentially useful information in the form of investigative, research, statistical and administrative documents, reports, memoranda, and other material generated by federal agencies.

I. DISCLOSURE PROVISIONS.

FOIA has three separate disclosure provisions in §§ 552 (a)(1), (2) and (3). Subsection (a)(1) requires federal agencies to publish certain information in the *Federal Register*. Agencies must publish, for example, a general description of the agency's organization and functions, rules of procedure, forms available for public use, and substantive rules, statements of policy, and interpretations adopted by the agency.

Subsection (a)(2), in turn, requires agencies to index and make available for public inspection and copying:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*; and

(c) Administrative staff manuals and instructions to staff that affect members of the public.

Most agencies satisfy the requirements of (a)(2) by maintaining the specified material in a public reading room.

Subsection (a)(3) is a general catch-all provision covering all other material not subject to the publication or reading room requirements. Subsection (a)(3) provides:

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.

The FOIA is typically associated with the request procedure of (a)(3), but the material available through (a)(2) should not

be overlooked. See, e.g., *Stokes v. Brennan*, 476 F. 2d 699 (5th Cir. 1973) (training manuals for OSHA compliance officers).

II. WHO MAY FILE A FOIA REQUEST?

Subsection (a)(3) is explicit in stating that "any person" may request agency records. The motive, purpose or need of the party requesting records is irrelevant and may not be considered by an agency or reviewing court. The only exception is where the agency claims records are exempt on grounds of invasion of privacy [§ 552(b)(6)], in which case a balancing test is applied. Once a right to records is found, the requester's purpose may be considered where a waiver of fees is requested. In practice, most FOIA requests are filed by attorneys on behalf of unnamed clients.

III. AGENCIES SUBJECT TO FOIA.

For purposes of the FOIA, "agency" is defined in § 552(e) to include:

...any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

This definition was intended to be broader than the definition of "agency" governing the Administrative Procedure Act. See 5 U.S.C. § 551(1). Note that Congress and the Judiciary are not subject to FOIA. Case law has also excluded personal advisors to the President. Otherwise, virtually all governmental entities are FOIA agencies. Most are obvious: cabinet departments, the FTC, FCC, Federal Reserve Board, etc.; some are less obvious: the Federal Home Loan Mortgage Corporation and Amtrak (both "government-controlled corporations").

IV. DRAFTING THE FOIA REQUEST.

FOIA § 552(a)(3) sets forth two requirements for FOIA requests. An agency must respond to a request for records

Neil Schickner graduated from Stanford Law School and was admitted to the Washington Bar in 1979. He is now legal counsel for Sparkassen SPS Bank, the second largest bank in Denmark.

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only if the request "(a) reasonably describes such records and (b) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed..."

The starting point in writing a FOIA request is the particular agency's FOIA regulations in the CFR. These regulations state the address to which requests are to be sent, usually specify certain matters which must be addressed in the re-



Sometimes material
is released with deletions.

quest (such as payment of fees), and generally describe the agency's procedures for processing requests. Failure to comply with agency regulations will usually result in delay in processing the request.

The reasonable description requirement has been generously construed by the courts. A FOIA request does not have to specify the particular government form or government file in which the information is contained. The typical FOIA request asks for "all documents referring to or concerning 'X' in connection with 'Y' event." Such a request reasonably describes the desired information and is sufficient to compel the agency to respond. The typical FOIA request is no more than two pages.

V. AGENCY FEES.

FOIA authorizes agencies to collect fees for document search and duplication. Each agency must publish its fee schedule in the *Federal Register*. The Federal Deposit Insurance Corporation, for example, lists the following fees: \$14.50 per hour for professional search time, \$7.50 per hour for clerical search time, and 10 cents per page for copying. Requests

involving fees less than \$25 are processed for free. These provisions are typical.

Most agency regulations require that a FOIA request include a statement that the requester will pay search and duplication fees. Most agency regulations also allow a party to request an estimate of fees or state a maximum fee amount the requester is willing to pay. Requesting an estimate of fees, however, will result in delay in the processing of the request.

FOIA directs that documents shall be released without charge or at a reduced charge where the agency determines that disclosure of the records will serve the public interest. 5 U.S.C. § 552(a)(4)(A). A request to waive fees on this ground generally must be included in the initial FOIA request.

As a practical matter, agency fee schedules look more costly than what is charged in practice. Typically, FOIA requests are processed for free or for a minimal charge. Fees over \$50 are unusual. This policy has been recently criticized, however, and agencies may in the future tighten up on fee assessments.

VI. EXEMPTIONS.

FOIA in § 552(b) recognizes nine exemptions to the rules of mandatory disclosure stated in § 552(a). An agency is authorized, but not required, to withhold material falling within an exemption. Therefore, unless prohibited by another statute, an agency has the discretion to release material even though an exemption applies. Even where an agency claims an exemption, FOIA requires that all non-exempt material be segregated and released after deletion of exempted portions. Where an agency claims an exemption, the agency bears the burden of proving the applicability of the exemption to the withheld material. § 552(a)(4)(B).

The nine exemptions are briefly described below:

(1) Material properly classified in the interest of national security. See Executive Order No. 12356, 47 Fed. Reg. 14874 (April 6, 1982).

(2) Material "related solely to the internal personnel rules and practices of an agency." This exemption has been narrowly construed by the courts as applying only to purely internal agency matters of no public interest, such as assignment of agency parking places. See, e.g., *Dept. of Air Force v. Rose*, 425 U.S. 352 (1976).

(3) Material specifically exempted from disclosure by other statutes.

(4) "Trade secrets and commercial or financial information obtained from a person and privileged or confidential." See, e.g., *National Parks & Conservation Association v. Morton*, 498 F.2d 765(D.C. Cir., 1974).

(5) Inter-agency or intra-agency memoranda or letters which would be privileged in litigation; principally the attorney/client privilege and the deliberative materials discussing policy options. Internal agency interpretations or evaluations of established policies are not protected. See, e.g., *EPA v. Mink*, 410 U.S. 73 (1973).

(6) "Personnel and medical files and similar files, the dis-

Chief Belly-button Inspector
Navel Records and Information
Management Division
Washington, DC 20000

in re: Freedom of Information Act Request

Dear People:

This is a request under the Freedom of Information Act (FOIA) as amended (5 U.S.C. §522).

We write to request a copy of all records referring or pertaining to any review or consideration of the national security implications of the proposed "Navel Inspector Academy" under construction in Twisp, Washington.

FOIA provides that if only portions of a record are exempt from release, the remainder must be released. We request that we be provided with all non-exempt portions of the requested records which are reasonably segregable. We, of course, reserve the right to appeal the withholding of any information.

We are prepared to pay reasonable costs for locating and reproducing the requested documents. FOIA provides, however, that you may reduce or waive the fees if it "is in the public interest because furnishing the information can be considered as primarily benefitting the public." 5 U.S.C. §522(a)(4)(A). We believe this request falls within this provision and request a waiver of fees.

We are making this request on behalf of XYZ Newspaper. The proposed construction of a "Navel Inspector Academy" has important economic and environmental implications for the State of Washington and is of critical interest to Washington residents. Besides the Academy's purely local impact, proponents and opponents of the Academy have engaged in considerable debate regarding the significance of the construction for national security policy. Release of the requested material will benefit the public by providing the government's views on this important issue.

If you have any questions regarding this request, please telephone me at the office number listed above.

As provided in FOIA, we will expect to receive a reply within ten (10) working days.

Sincerely,

Attorney At Law

closure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption is routinely invoked, but even where justified, the segregation rule requires that material be released after deletion of identifying materials. See, e.g., *U.S. Dept. of State v. Washington Post Co.*, 102 S. Ct. 1957 (1982).

(7) "Investigatory records compiled for law enforcement purposes," but only to the extent disclosure would (a) interfere with enforcement proceedings, (b) deprive a person of a right to a fair trial or impartial adjudication, (c) constitute an unwarranted invasion of personal privacy, (d) disclose the

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identity of a confidential source, (e) disclose investigative techniques, or (f) endanger the life of law enforcement personnel. See, e.g., *FBI v. Abramson*, 102 S. Ct. 2054 (1982).

(8) Information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." See, e.g., *Consumers Union of the US v. Heimann*, 589 F.2d 531 (D.C. Cir., 1978).

(9) "Geological and geophysical information and data, including maps, concerning wells." See, e.g., *Pennzoil Co. v. Federal Power Commission*, 534 F.2d 627 (5th Cir., 1976).

The Privacy Act of 1974 [5 U.S.C. § 552(a)] imposes restrictions on the disclosure by federal agencies of records concerning individuals. A major exception to the Act's prohibition against disclosure, however, is for records disclosure of which is "required" by FOIA. Records concerning individuals which do not fall within a FOIA exemption, principally the privacy exemption in § 552(b)(6), are "required" to be disclosed and therefore are not protected by the Privacy Act. On the other hand, records falling within a FOIA exemption are not "required" to be disclosed and agency discretion to waive the exemption is restricted by the Privacy Act.

VII. AGENCY PROCESSING OF FOIA REQUESTS— TIME DEADLINES, APPEALS.

FOIA requires agencies to respond to requests within ten working days. § 552(a)(6)(i). A ten-day extension is available in "unusual circumstances," such as a request requiring extensive search. In practice, most agencies meet the ten-day time limit. The agency response must either state that the requested records will be released or state which exemption is being claimed for withholding the records.

Most agencies provide for administrative appeal of an exemption claim. FOIA requires agencies to rule on appeals within twenty days after the appeal is received. § 552(a)(6)(ii). If the administrative appeal is adverse or if the agency fails to respond to the initial request or to act on an appeal within the prescribed time limits, FOIA authorizes suit to compel release in the district court where the requester resides or maintains his principal place of business, where the records are located, or in the D.C. District Court. § 552(a)(4)(B) and (a)(4)(C). FOIA suits are entitled to priority on the docket. § 552(a)(4)(D). The court has discretion to assess attorneys' fees against the agency where the FOIA requester prevails. § 552(a)(4).

When material is released with deletions, the exemption claim is often noted next to the deleted material and some idea of what was deleted can be deciphered from the context of the deletion and the specified exemption. This is not the case, however, when an agency withholds entire documents, and often it cannot be determined from the agency's response whether entire documents have in fact been withheld. The administrative appeal procedure is fairly simple, inexpensive and expeditious, and given the routine nature of many ex-

emptions claims, may succeed in prying loose additional material or throwing additional light on claimed exemptions.

If the material sought is important enough to justify the expense of litigation, filing suit to contest an adverse administrative appeal will generally yield additional information. Once in court, a requester may file a "*Vaughn*" motion which requires the agency to provide an itemization of the records



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withheld describing each document or portion of a document not produced along with a detailed description of the agency's claimed exemptions for withholding the documents. See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Even if the suit is unsuccessful, the *Vaughn* affidavits produced by the agency will usually contain significant clues as to the nature of the withheld documents.

VIII. "REVERSE" FOIA SUITS.

"Reverse" FOIA suits are actions by private parties who have submitted information to an agency to enjoin the agency from releasing the information to a third party in response to a FOIA request. Most "reverse" FOIA actions involve FOIA Exemption (b)(4) and the Trade Secrets Act (18 U.S.C. § 1905). FOIA Exemption (b)(4) exempts from disclosure "trade secrets" and "commercial or financial information" which is "privileged or confidential." The Trade Secrets Act makes it a crime for any federal employee to disclose in any

manner "not authorized by law" any information concerning or relating to the "trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures" of any person or business entity.

In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Supreme Court held that neither FOIA nor the Trade Secrets Act provided a private cause of action to enjoin an agency from releasing documents. The Court, however, did rule that such a challenge to agency disclosure could be maintained under the Administrative Procedure Act (APA) 5 U.S.C. § 702. The Court further ruled that where information falls within FOIA Exemption (b)(4) and the Trade Secrets Act, agency disclosure of such information would be "not in accordance with law" under APA 5 U.S.C. § 706(2)(A).

To maintain a reverse FOIA suit, therefore, the information which an agency intends to release must (1) fall within a FOIA exemption, for otherwise the information would be subject to mandatory FOIA disclosure, and (2) other statutory authority must clearly deny the agency any discretion to waive the applicable FOIA exemption. Besides the Trade Secrets Act, the various statutes falling within FOIA Exemption (b)(3) have been relied on in reverse FOIA suits. See, McCarthy, "Maintaining the confidentiality of Confidential Business Information Submitted to the Federal Government," 36 *Business Lawyer* 57 (1980). □



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The Department of Revenue's ETB on Attorney Reimbursements

by Susan G. Duffy

The rules under which lawyers are deemed taxable on client reimbursements were recently addressed by the Department of Revenue in an Excise Tax Bulletin. ETB No. 530.04.111 outlines the Department's current thinking on the subject, taking into consideration both its Revenue Rule 111 and a recent Washington Supreme Court decision interpreting that Rule. The ETB indicates that the Department intends to resist broad application of Rule 111 to exclude attorney reimbursements from gross income.

Revenue Rule 111 provides that money or credit received by a taxpayer as reimbursement of an advance made in accordance with the regular and usual custom of his or her business or profession is excludable from gross income for the purposes of computing business and occupation tax liability. Thus where an attorney is reimbursed by a client for advances customarily made on behalf of such clients, those items may be excluded from the attorney's gross income. The Rule gives several examples of properly excludable reimbursements, among them reimbursements for filing fees or court costs in litigation. Those fees and costs, paid by the attorney as agent for the client, are properly excluded from the attorney's gross income when reimbursed pursuant to Revenue Rule 111.

Recently, the Washington Supreme Court elaborated on the application of Revenue Rule 111 to attorneys. In *Christensen, O'Conner, Garrison & Havelka v. Dept. of Revenue*, 97 Wn. 2d 764, 649 P.2d 839 (1982), the court held that certain amounts a law firm receives from its clients as reimbursements for advances made by the firm on their behalf are properly excluded from the firm's gross income for purposes of the business and occupation tax. The reimbursements that the *Christensen* court determined to be properly excludable included fees charged by foreign lawyers for handling foreign patent matters for clients of the firm, fees charged by out-

of-state lawyers for litigation and patent-related activity outside the state, fees of independent professional draftsmen who prepared drawings for patent applications, and fees charged by various governmental entities with respect to obtaining and maintaining patents in foreign countries.

The court laid down a three-part test for determining whether a payment by a client to a law firm is properly excluded from the firm's gross income. Such a payment is properly excludable if:

- (1) It is a customary reimbursement for an advance paid to procure a service for the client;
- (2) The taxpayer does not or cannot render the service; and
- (3) The taxpayer was not liable for the payment.

Many found in the *Christensen* decision the basis for excluding from gross income a number of other reimbursements normally received by lawyers from their clients, including fees of court reporters, expert and other witnesses, private investigators and other similar items where the third parties billing for the services understand that the lawyer is working on behalf of a named client. As noted above, the Department of Revenue has taken a more restrictive view. In its recent ETB, the Department takes the position that in order for an attorney to claim an exclusion from gross income for reimbursements of advances made on behalf of a client, the attorney must demonstrate all of the following:

- (1) That the advance was made in accordance with the regular and usual custom of the profession;
- (2) That the service for which the advance was made is one which historically has not been rendered in the normal course of the attorney's business; and
- (3) That the attorney has no liability for the payment of the costs of that service. (It should be noted that the *Christensen* court held that an attorney is not liable for charges incurred by the attorney on behalf of a client unless the attorney assumes that liability.)

According to the ETB, the Department will allow no exclusion with respect to payments received by an attorney (a) for expenses of litigation or other services provided by third persons where those services constitute an integral part of the total services provided by the attorney or (b) where the attorney arranges for goods or services and the client does not have an independent and exclusive obligation to pay the pro-

Susan G. Duffy graduated from the University of Washington School of Law and was admitted to the Bar in 1981. She is an associate with the Seattle firm of Davis, Wright, Todd, Riese & Jones.

vider of the services. That this formulation represents a narrow reading of *Christensen* is evidenced by the fact that the Bulletin specifies that "no exclusion is allowed for costs incurred by attorneys on behalf of clients for a number of services, such as court reporter services, where in the usual and regular custom of the court reporter, the court reporter looks to the attorney for payment, not the client of the attorney."

Under this rationale, the Department will seek to include in attorneys' gross income not only court reporter fees, but fees for expert witnesses and private investigators, services that form a major part of client-reimbursed expenses incurred by law firms.

The Department justifies its restrictive reading of *Christensen* on the basis that when the Supreme Court decided the case on stipulated facts, it left the door open to

The Department will seek to include in attorneys' gross income fees for services that form a major part of client-reimbursed expenses incurred by law firms.

a different result should litigation reach the Court on other specific attorney reimbursements. The Department also points out that the purpose of Rule 111 is to define administratively the term "gross income of a business" as provided in RCW 82.04.080, not to create exemptions in addition to those specifically authorized by statute.

There is substantial question whether the Department is correct in its definition. Many law firms have rejected the Department's restrictive view and are filing B & O returns in a fashion suggested by a broader reading of *Christensen*. The result of the Department's restrictive interpretation is likely to be further litigation as law firms seek judicial determinations of the excludability of major payments customarily advanced on behalf of clients.

On October 3, 1983, the Thurston County Superior Court ruled on the first of these cases. The court granted summary judgment in favor of the Walthew, Warner, Keefe, Arron, Costello & Thompson firm on the excludability of reimbursements for court reporters, medical examinations and expenses for medical testimony, as well as fees for costs of filing and serving process. The Judge ruled that where attorneys, in the regular course of practice, arrange for these services on behalf of their clients, reimbursements are properly excludable from gross income under Rule 111. The Department of Revenue is likely to appeal this ruling. □

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WASHINGTON STATE BAR NEWSLINE

The Board's Work



by Steven A. Reisler

INVITATION TO TYRANNY OR BULWARK OF DEMOCRACY?

FIFE, February 10-11 -- Proposed legislation which encountered little controversy in Olympia triggered an emotional debate among the WSBA's Governors. At issue was Substitute Senate Bill

No. 3223, an act relating to antitrust and unfair and deceptive business practices.

The first part of SB 3223, a reaction to the recent Supreme Court case of *State v. Black*, 100 Wn.2d 793 (1984), reestablishes the "per se" antitrust rule for contracts, combinations and conspiracies that unreasonably restrain trade or commerce. The second and most controversial part of the bill (also an apparent reaction to the Black Court's affirmation of a \$300,000 attorneys' fee award against the State) would amend RCW 19.86.080 to permit the courts to award attorneys' fees to the State A.G. only if it prevailed in an antitrust action; defendants who prevailed, however, would only be entitled to attorneys' fees pursuant to RCW 4.84.185 -- that is, if the A.G.'s lawsuit were deemed "frivolous."

Several Governors wondered aloud why an apparently unequal formula for the awarding of attorneys' fees was desirable. Seattle attorney Tom Boeder, speaking for the WSBA's Antitrust Committee, explained that, from a policy perspective, it was not good to make it too easy to award attorneys' fees against the State A.G. because that would make the agency timid in bringing enforcement suits. Moreover, he explained, any organized Bar opposition to the proposed legislation would look like the lawyers were looking out only for their own interests.

Fourth District Governor Don Bond asked whether the A.G. could be equally well protected if no attorney fees were ever awarded to anybody. Bond further inquired whether the approach proposed in SB 3223 was evenhanded and whether it would hurt "ordinary people" as well as "bloated corporations."

Boeder responded that the practical effects of burdening the A.G. with the risk of attorneys' fees would be 1) that the State would commence future antitrust actions in federal court, and 2) that antitrust enforcement would be chilled. Discouraging State antitrust actions, Boeder said, would place the entire burden of antitrust enforcement on private individuals who may not have the public interest at heart. Boeder also observed that approximately 25% of the A.G.'s antitrust division's costs are paid by attorneys' fees awards against defendants.

King County Governor Bill Dwyer urged the Board to take no position on SB 3223. "These laws support the free enterprise system against extreme concentrations of economic power which can undermine our democratic form of government," Dwyer said. "The attorney fee section is intended for a public purpose. . . it is part of the sanction for conducting improper business activity." Governors Vander Stoep, Delay, Bracelin and Zylstra agreed with Dwyer that this was legislation about which various members of the Bar would disagree and, therefore, the Board should take no position on the issue.

The Board ultimately voted 7-3 to take no position. President Bob Redman, however, in the first vote of his presidency, added his vote to the dissenters. "I believe that anytime government has an opportunity to oppress anyone where it is financed by public funds and the oppressed are privately financed, that is an invitation to tyranny, and I think this body should oppose every invitation to tyranny." In response to the comment that most antitrust litigation is directed against big corporations, Redman remarked, "That's the difference between the eastside and the westside of the mountains! The law applies equally to all and a lot of little people will get caught in the snapper [by this legislation]. It keeps everyone real honest if when you go to war and lose, you will be penalized."

Swayed by Redman's comments, the Board voted 6-4 to reconsider its prior "no position" vote. It then voted unanimously to take no position as to Sec. 1 of SB 3223. By a 7-4 vote (Redman voting with the majority), the Board finally voted to take no position on Sec. 2 of the bill with, however, a strong expression of deep concern about the wisdom of that section.

APPELLATE COURT REPORT

Presiding Chief Judge of the Court of Appeals, J. Harold Petrie, addressed the Board about the current state of the Court of Appeals. He

reported that 1982-83 showed a leveling-off of the appellate caseload with only a 1% overall increase in filings. 46% of all appeals are criminal and the remainder civil. Divisions I

and III showed a filings increase of 3% and 6% respectively, while Division II in the same time period showed a 6% decrease. J. Petrie told the Board that roughly 50% of all appeals drop off for one reason or another. Approximately 1/3 of all appeals are unpublished. The average appellate judge authors 79-81 opinions per year which, he said, is "bordering on the outrageous."

J. Petrie described several methods by which the appellate divisions are attempting to streamline their operations, including computerized "issue-tracking" and "fast-track" appeals for cases with simple, straight-forward issues.

OTHER WORK

- **IOLTA** -- By a 9-1 vote, the Board approved a motion to pick up the travel and conference call expenses of the King and Walla Walla County Bar Associations as they prepare their briefs, ~~pro and contra~~, for Supreme Court debate on the proposed establishment of interest-bearing client trust accounts.
- **PEACE THROUGH LAW** -- Voting 9-1, the Board authorized the World Peace Through Law Section, speaking on its own behalf, to endorse a resolution calling for a mutual, verifiable nuclear arms freeze. Governor Zylstra opposed the motion and said he would vote "no" for the next 2-1/2 years on all such "nonsense." "I thought this was a bar association," he complained.
- **BAR CONVENTION** -- Without dissent, the Board voted to site its 1991 annual convention at an unspecified "distant" location. The 1989 convention will be held at the Whistler Mountain Resort in British Columbia. Spokane is under consideration for the 1990 convention site.

THE NEXT MEETING OF THE BOARD OF GOVERNORS WILL BE: March 16 & 17 -- Red Lion Inn, Pasco

IN MARCH, THE BOARD WILL DISCUSS A FINAL PROPOSED REVISION OF THE ADMISSION TO PRACTICE RULES. COMMENTS ARE INVITED.

SPECIAL ANNOUNCEMENT

The Washington State Supreme Court's schedule for consideration of the proposed IOLTA rule is as follows: MARCH 5 -- Amicus briefs in support of IOLTA to be filed by the Washington State Bar Association and the Seattle-King County Bar Association. APRIL 5 -- Briefs in opposition to IOLTA to be filed by the Walla Walla County Bar Association. MAY 2 -- Reply briefs to be submitted by the WSBA and/or the SKCBA. MAY 14 -- An open hearing to be held by the full Court at 11:00 a.m. in Olympia.

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The WASHINGTON PARTNERSHIP LAW AND PRACTICE HANDBOOK Introductory Seminars

by James M. Jerge, *Editor-in-Chief*
and John M. Redenbaugh, *Asst. Director of CLE*

A seminar introducing the **WASHINGTON PARTNERSHIP LAW AND PRACTICE HANDBOOK** will be presented on April 6, 1984 in OLYMPIA (at the Westwater Inn), on April 13, 1984 in YAKIMA (at the Holiday Inn) and on April 20, 1984 in SEATTLE (at the Westin Hotel). Thereafter, on April 27, 1984, the seminar will be presented at three locations throughout the state as a "videotape replay" with at least two faculty members present for fielding questions from the audience. The sites for the April 27 presentations are SPOKANE (at Cavanaugh's Inn at the Park); BELLINGHAM (at the Holiday Inn); and PORTLAND (at the Red Lion).

The **WASHINGTON PARTNERSHIP LAW AND PRACTICE HANDBOOK** is the second in a series of **HANDBOOKS** published by the Washington State Bar Association. As was the case with the WSBA's previously published **HANDBOOK** and **DESKBOOKS**, this newest major publication will be an additional *practical* and *valuable* reference book for Washington practitioners.

As pointed out in last month's CLE Clearinghouse column, an excerpt from Chapter One of the **HANDBOOK** points out that:

The major objective of the **WASHINGTON PARTNERSHIP LAW AND PRACTICE HANDBOOK**... is to provide in a single volume a book on partnership law that will be useful to Washington attorneys with varying amounts of experience. It is, in some respects, similar to a hornbook on the Washington law of general and limited partnerships in that the substantive law of partnerships is treated in a comprehensive fashion with citations to controlling statutes and cases. But it contains more than a discussion of substantive law. The reader will find useful practice tips, commentary, sample agreements and discussion of tax issues. Also, as an aid to the reader, cross references have been inserted in various sections to guide the user to additional discussion.

The **HANDBOOK** is designed to acquaint the Washington attorney with initial considerations regarding the use of partnerships for doing business or making an investment. In addition, the book focuses on selected concerns involving the use of limited and general partnerships and addresses matters which must be confronted when a partnership dissolves.

The book is divided into nine major parts and each such part is marked by a tab for swift location. The nine parts are **Introduction; Substantive Law of General Partnerships; General Partnership Forms; Substantive Law of Limited Partnerships; Limited Partnership Forms; Accounting, Bankruptcy and Securities Laws Aspects; Family Partnerships; Taxation of Partnership Operations; and Selected Bibliography of Partnership Law.**

The authors and editors of the **WASHINGTON PARTNERSHIP LAW AND PRACTICE HANDBOOK** have collectively contributed



Ethics from the Inside

thousands of hours towards the production of this HANDBOOK. Their unselfish willingness to share their knowledge and experience through the pages of this publication and the presentation of these seminars provides every Washington attorney with an opportunity to improve his or her understanding of partnership law. If you are unable to attend one of the programs, the HANDBOOK may be purchased separately following the final seminar presentations on April 27.

For further information regarding registration for the WASHINGTON PARTNERSHIP LAW AND PRACTICE HANDBOOK seminar, please contact Sherrie Hewitt, Washington State Bar Association, 505 Madison Street, Seattle, WA 98104, telephone (206)622-6021.

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Commercial Real Estate

April 6, 1984: Spokane.....	7.00
April 13, 1984: Seattle.....	7.00

CODE OF PROFESSIONAL RESPONSIBILITY COMMITTEE

FORMAL ETHICS OPINION NO. 177

An attorney may enter into an arrangement with a financial institution whereby the attorney's credit is used to permit immediate payment of trust obligations, provided that there is a written agreement with the financial institution guaranteeing that the trust deposits of any other clients are never affected.

We have been asked to review the question of whether or not it is proper under DR 9-102 and the Trust Account Guidelines for attorneys to enter into and use an arrangement of bank guarantee of trust account withdrawals pending formal written notification by a bank that funds behind a trust account deposit have been collected by the bank in

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which such funds were deposited. The situation has arisen where non-cash or "draft" deposits have been made to an attorney's trust account and a period of delay has been experienced by the attorney and the client as a result of the collection process instituted by the bank in which the funds were deposited.

Some attorneys have made formal arrangements with their trust account financial institutions whereby the bank will "guarantee" that the funds represented by the instrument of deposit will be guaranteed to be paid from the trust account, even if there is a problem in collecting the monies from the institution of deposit. In those situations reviewed, in essence the trust account bank is agreeing to or has guaranteed a loan to the attorney and the client for the amount of the trust deposit pending collection of the amount of that deposit from the institution on which the instrument has been written.

It is our opinion that it is ethical under DR 9-102 and the Trust Account Guidelines promulgated by this association for such formal arrangements of guarantee to be entered into by attorneys for trust account deposits. These arrangements will allow quicker and more expedient clearance of the funds through the trust account for payment to the client or the designees and the attorney. These arrangements will decrease the interest loss forced on trust deposits and as a result of collection delays.

It should be noted that our approval of this practice is premised on (1) formal written agreement by the attorney with trust account institutions, and (2) written assurance by the attorney that no other client's money will be used to pay for the withdrawals from the trust account on behalf of the client for which the guaranteed arrangement is entered into.

To this end, our Trust Account Guidelines III, "The Disbursement of Client Trust Funds," subparagraph 2 is amended by adding the following: "Clearance through the banking process may include a written arrangement or written guarantee agreement between the attorney and the trust account financial institution to provide for disbursement of trust deposits prior to formal notice of dishonor or collection. Such a written guarantee agreement must ensure that the trust deposits of any other client's monies into the attorney's trust account would not be affected."

Notes From the Academy

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

CREDITOR-DEBTOR. Judgment lien is junior to prior unrecorded mortgage. Judgment creditor is not "purchaser" under recording act, RCW 65.08.070, because he parts with no consideration. Court followed *Dawson v. McCarty*, 21 Wash. 314, 57 P. 816 (1899), rejecting the argument that it should not control because recording act was then "notice"

instead of present "race-notice" type. *Aberdeen Fed. Sav. & Loan Ass'n v. Empire Man. Homes*, 36 Wn. App. 81, 672 P.2d 409 (1983).

—M.D. Rombauer

CRIMINAL LAW AND PROCEDURE. (1) Trial court should not attempt to define for jury concept of "right and wrong" in insanity test; one who kills on basis of belief God told him to do it may be insane even if he knows the act is legally wrong. Hearsay declarations of victim that she was afraid of defendant are not admissible on issue of self-defense where defendant has not raised that defense and it is not really in issue. *State v. Cameron*, 100 Wn.2d 520 (1983). (2) Conviction based upon guilty plea may be set aside where plea is coerced, even if coercion was by a private person, defendant affirmed the voluntariness of the plea when it was entered, and defendant has unsuccessfully raised issue in earlier personal restraint petition. *State v. Frederick*, 100 Wn. 2d 550 (1983). (3) At instance of criminal accused, trial court ordered newspaper to turn over confidential data for in camera hearing. Court of Appeal reversed. Judge Andersen says Washington Constitution gives journalists absolute privilege in criminal cases. Judges Durham and Ringold would apparently recognize qualified privilege but divide on whether sufficient showing to override claim was made here. *State v. Rinaldo*, 36 Wn. App. 86 (1983).

(4) Evidence that breathalyzer showed .10 is sufficient to show driver's blood alcohol was .10, at least where there is

some other evidence of heavy alcoholic consumption, even though breathalyzer has a .01 margin of error. *State v. Keller*, 36 Wn. App. 110 (1983). (5) In trial for third-degree assault, it must be shown that officer who was out of uniform gave fair warning he was a peace officer. *State v. Brown*, 36 Wn. App. 166 (1983). But arrestee's knowledge of lawfulness of arrest is not element of third-degree assault. *State v. Goree*, 36 Wn. App. 205 (1983). (6) In statutory rape trial, defense that defendant reasonably believed the victim was of age must be based on victim's declarations; behavior, appearance, and demeanor are not enough. *State v. Bennett*, 36 Wn. App. 176 (1983). (7) To constitute a public indecency, an exposure must occur in a public place. *State v. Sayler*, 36 Wn. App. 230 (1983). (8) Failure to transport DWI arrestee to hospital for blood tests is not per se denial of his right to have his own blood test performed, where he has adequate alternative means to obtain such tests. *State v. Reed*, 36 Wn. App. 193 (1983).

—G.R. Nock

FAMILY LAW. When a court has jurisdiction to award maintenance in a dissolution of marriage but finds no existing need and makes no award, the matter is *res judicata*. Therefore, the court may not later award maintenance. The award of a nominal amount of maintenance does *not* give the court jurisdiction, so that it can later increase the amount. *Marriage of Rouleau*, 36 Wn. App. 129 (1983).

—L.V. Rieke



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Around the State

SOUTH KING COUNTY

by CARLOS M. SOSA, III

A review of the major events of 1983 in the South King County Bar Association reveals one major highlight: the formation of the South King County Bar Association Co-Ed Softball Team. "SCKBA" (sic) played eight (8) games during the summer, and ended up with a fine 0-8 record.

Although no wins were recorded by the team, there were some stellar performances, particularly by pitcher **Bill Bryan**, first baseman "Hon." **Steve Sward**, and outfielders **Leslie Wagner** and **Bob Thomson**. The team was not without controversy, not the least of which was the misprinting on the team jerseys. Also, one of the more exciting moments of the season was the injury sustained by **Joe McGoran** in the last game of the season; however, Joe did come out A-okay (no lawsuits filed to date). . . .

On December 2, 1983, the South King County Bar Association Christmas Party was held at the Rainier Golf & Country Club, in Seattle. There was an excellent turnout from the membership, with superb cocktails and dinner and excellent music provided through the work of **Judith Eiler**, Party Chairman. President **Robert West** is to be commended for the party, which was the best in recent memory. . . .

Mark Davis and **Jeff Loudon** have become partners in the firm of Curran, Kleweno, Johnson & Curran, in Kent Also, **Mark Davis** is the father of a nine-pound baby girl, Sara, and wife Kathy is doing just fine. . . . **Carlos M. Sosa, III**, has become a partner with **Robert M. Smythe** and **Robert C. Van Sieten**. The new name of the firm is Smythe, Van Sieten & Sosa, in Auburn. . . .

The March, 1984, SKCBA trip to Olympia is currently being planned—this is always a well-attended event. Make sure you contact the SKCBA for further information pertaining to the trip. . . .

every word mangled by an unruly P.A. system. Many who purchased the lunch buffet were involuntarily converted to vegetarianism. Bad luck befell late arrivals, as silverware, glasses and dishes were in short supply. Despite these obstacles, Judge Clark's presentation on docket control and related problems was well received by all in attendance.

Department of Legal Issue—The following individuals have been newly elected to the stork club: **Jerry Dyreson**—girl; **Richard Bechtolt**—girl; **Tom Kelleher**—girl; **John Loeffler**—boy; **Bob Milhem**—boy; and **Larry Meteiver**—boy.

News from here and there—MacGillivray and Jones, P.S. has announced the addition of **Susan L. Brennan**, formerly with Sax and MacIver in Seattle, to their firm. Susan Brennan holds an LLM in taxation. . . . **Robert S. Young, III** has recently been appointed to the position of Attorney Advisor to the Spokane office of the Small Business Administration. Bob also announced that his days of bachelorhood are numbered—he will be married to **Laurie Woods**, clerk to Appellate Court **Justice Dale Green**, by the time you read this.

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SPOKANE COUNTY

by JONATHAN C. RASCOFF

Justice—1984 Style—The new year finds two respected Spokane-area Judges with new positions, while a well known local attorney gets his first taste of life on the bench. **Judge Philip J. Thompson** has been elected to the Court of Appeals, Division III, filling the vacancy left by the death of **Justice Willard Roe**. **Judge John A. Schultheis**, a Spokane County District Court Judge for the past 9 years, has been appointed to the Superior Court. Spokane attorney **Richard J. Richard**, long prominent in local Republican affairs, now serves as the county's newest District Court Judge.

Roughing it—White Linen Style—Those attending the Spokane County Bar Luncheon on Friday, January 13, will never again pass off the old bad luck rap as mere superstition. **Judge Harold D. Clarke**, the featured speaker, conquered a case of the flu only to find his

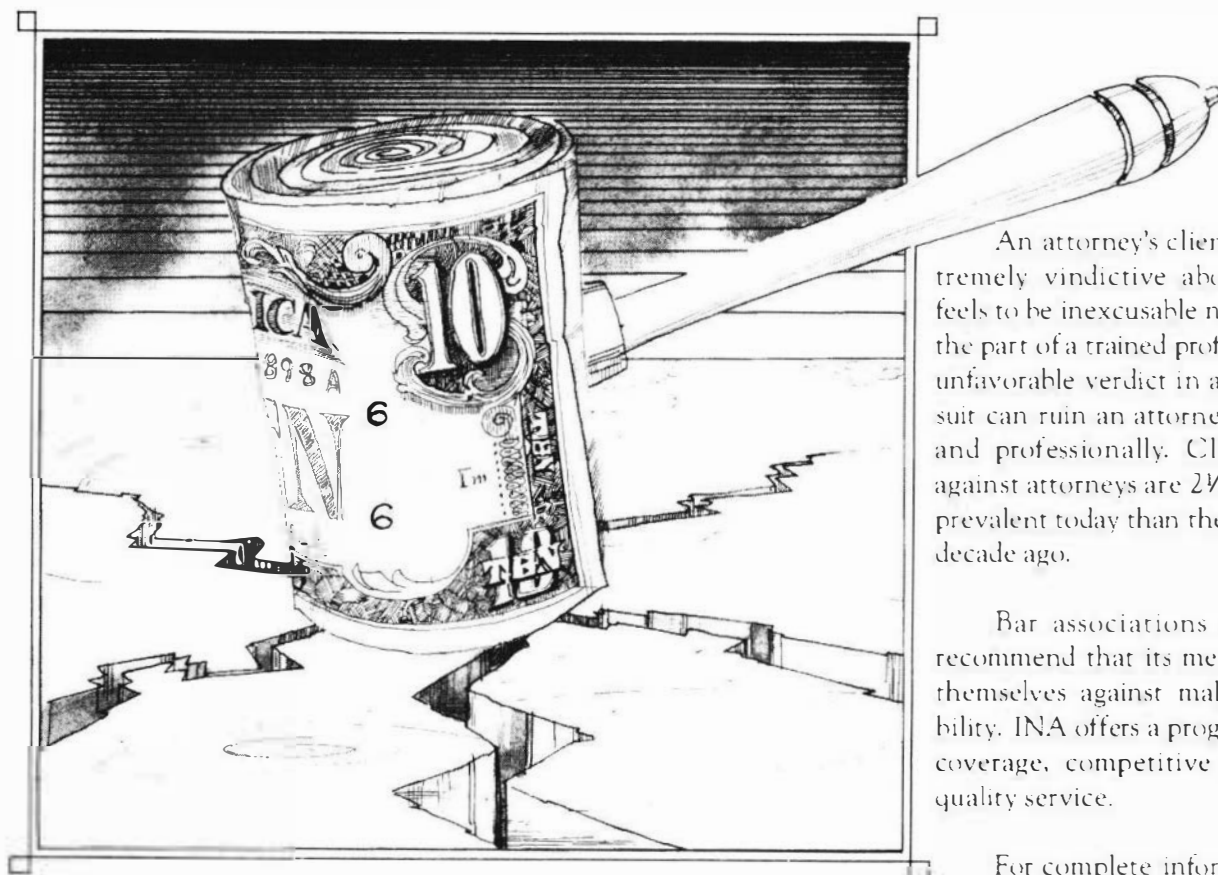
WALLA WALLA COUNTY

by LARRY SIEGEL

Our year-end annual meeting began at 6:30 p.m. at the 19th Hole with much social intercourse and holiday good will. By 7:30 p.m., members who hadn't spoken since the last Christmas party were backslapping each other again. Before anyone could get too friendly, dinner was served.

During the dinner meeting, many critical issues were discussed. On the topic of judicial salaries, there was little sentiment for lowering them, at least not until all the judges had left for the evening. Concerning a salary increase for judges, one local attorney remarked he had a legislator in his pocket. A member on my left asked me if that would constitute a sexual offense. "Ask Eggers. He's the piccolo player," I responded.

Recently, an Ohio Jury Awarded \$2.35 Million in a Legal Malpractice Suit!



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On Assignment

JANUARY 10, 1984. Beirut. El Salvador, Angola. All *Bar News* reporters were on foreign assignment when Dan Mitchell III, owner and operator of three Seattle restaurants, contacted our news office about a DWI Awareness Program he was sponsoring.

The purpose of the program, "Pappa Mitchell's" explained, was to educate the public about alcohol consumption, Washington's DWI laws, and the problems faced by restaurateurs whose customers drink and drive. Pappa Mitchell had invited thirty members of the Seattle restaurant, business and news community to drink the night away—at his expense—in the interest of science and public education. Would the *Bar News* send one of its reporters?

It sounded like a tough assignment. Because all reporters were abroad, I decided to cover the story myself. I volunteered to be one of those thirty public-spirited guzzlers.

JANUARY 16. 5:30 p.m. I arrived at the Osteria Mitchell restaurant a half hour ahead of schedule to begin the dirty business of swizzling all the free drinks I could stomach in two hours. I was in august company: reporters from the *Times*, *PI*, and the *Weekly*; restaurateurs, police officers, automobile dealers; and lawyers, including Lee Corkum from Ogden, Ogden & Murphy, Darcia Owings Tudor, representing WSTLA, and Doug Whalley from the Seattle City Attorney's Office.

6:00 p.m. We were divided into three groups of ten. Members of one group had free access to the bar, but no food could pass their lips. Another group had free drinks with hors d'oeuvres. My group had the toughest assignment: all the drinks we wanted, plus dinner on the house.

7:00 p.m. We kept track of our alcohol consumption throughout the evening. A scotch & soda here, a little vermouth there, some vodka, some wine, some Grand Marnier. During the program, various speakers talked about drinking and driving—Curt Winston from the National Highway Traffic Safety Admin-

istration, Sgt. J.J. Hill from the Seattle DWI Squad, Jim Hammand, President of Puget Sound Auto Dealers Association, and Tom Gulickson of Washington's Highway Traffic Safety Administration, to name a few.

The police are concerned because 44% of Seattle's 500 traffic deaths in the past ten years were caused by drinking drivers. The lawyers are concerned because some of the steps taken to curb drunk driving seem to threaten individual rights and liberties. The restaurateurs are concerned because pressure is building on the courts and legislature to reinstate the old "Dramshop Act," repealed in 1955, by which the victims of alcohol consumers could sue the liquor server for damages.*

8:00 p.m. All of their concerns are legitimate, but the serious messages presented by the speakers, I confess, fell largely on deaf ears. Or, rather, on drunk ears. For in proving what our host set out to prove, members of our high-spirited group of thirty were in various stages of inebriation by the time the third speaker took the podium. As might be expected, we "dinner drinkers" were still politely quiet at that time, but truly unable to listen coherently. Those of the "hors d'oeuvres & drinks" crowd were loudly conversing among themselves, paying no attention to the speakers. And the "drinks only" table was, of course, oblivious to everything, as its garrulous, glassy-eyed members raucously partied into alcoholic nirvana.

9:00 p.m. As we drank, police officers periodically administered physical sobriety and breathalyzer tests to us pickled guinea pigs. The woman on my right blew a .11 BA, but swore she had drunk too little to be legally intoxicated. She told me this as her nose speared my ear and her wine glass dribbled Chianti on my suit jacket. The gentleman across from me registered a .14 reading (five consecutive Black Russians), but he

passed every physical test. You would not have guessed he was drunk but for his remarkable personality change. Before he started drinking, this gentleman was shy, soft-spoken and reserved; by the time he had blown a .14 BA, he was slapping me, a complete stranger, on the back, assuring me that the only legitimate test of *my* sobriety was whether I could *miss* the tip of *my* nose!

10:00 p.m. I got a lot out of Pappa Mitchell's DWI Awareness Program.

I got a great Italian dinner.

I got a great big headache the next morning.

I got a lot of insight into how complicated the DWI problem really is. Different people were affected differently by what they drank. The bartender served one fellow twelve shots of tequila—and he looked as straight as an arrow by the night's end. I, on the other hand, barely got beyond the wine-tasting stage and never felt sillier in my life.

I learned that breathalyzer machine readings do not always correspond well with a person's physical and mental capacities; but when they do err, they tend to err in favor of the person being tested. I learned that, by my own experience, when someone even gets *close* to a .10 blood alcohol level, he or she has no business behind the wheel of a car. I learned that there is no rational way a restaurateur can know which customer has had too much to drink or who will be a menace on the road, unless that person is blatantly drunk.

11:00 p.m. I learned that if you drink, you shouldn't drive. If you must drive, call us at the *Bar News*, and we'll do your drinking for you. Seriously, if *you* drink too much and drive, *I* could be at greater risk on the streets where I live than covering a story in Beirut, El Salvador or Angola.

I left my car at the restaurant. A friend drove me home. I think it was my wife.

JANUARY 16. Midnight. Trying to sleep off a hard night's work. On assignment for the *Bar News*.

* For the current state of the law, see *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982), in which the Supreme Court held that it was up to the Legislature whether "the social and economic consequences of mixing gasoline and liquor should lead to a rule of accountability by those who furnish intoxicants..."

AA for Attorneys

Alcoholics Anonymous luncheon meetings for attorneys are held Wednesdays at noon at the Claremont Hotel, 4th and Virginia Streets, in Seattle.

STATE LAW LIBRARY Recent Acquisitions

Listed below are some of the new titles recently acquired by the State Law Library, and available for loan by calling (206) 753-6525 or mailing your request to: Washington State Law Library, Temple of Justice, Olympia, Washington 98504. A bi-monthly Selected Recent Acquisitions list, generally containing 200-300 new titles, is also available. Copies of the list may be obtained by sending your request to the Washington State Law Library at the above address.

ATTORNEYS

McRae, James W. *Legal fees & representation agreements*. Chicago: American Bar Association Section of Economics of Law Practice, 1983. Pp. 106.

Miller, Ellen J. *Video: a guide for lawyers*. Santa Monica: Law-Arts Publishers, 1983. Pp. 133.

Telephone equipment for the law office: a lawyer's guide to communications systems. Chicago: American Bar Association Section of Economics of Law Practice, 1983. Pp. 80.

BIOGRAPHY

Rothblatt, Henry B. *That damned lawyer*. New York: Dodd, Mead, 1983. Pp. 218.

Ervin, Sam J., Jr. *Humor of a country lawyer*. Chapel Hill: University of North Carolina, 1983. Pp. 230.

CRIMINAL LAW AND PROCEDURE

Abrahamsen, David. *The mind of the accused: a psychiatrist in the courtroom*. New York: Simon and Schuster, 1983. Pp. 224.

EVIDENCE

Rossi, Faust. *Evidence update*. St. Paul: National Institute for Trial Advocacy, 1983. Audio-cassette, 3 tapes, 3 hrs.

Younger, Irving. *Basic concepts in the law of evidence*. St. Paul: National Institute for Trial Advocacy, 1983. Audio-cassette, 15 tapes, 15 hrs.

Saks, Michael J. *The use of scientific evidence in litigation*. Williamsburg, Va.: National Center for State Courts, 1983. Pp. 153.

JURY AND JURORS

Hastie, Reid, and others. *Inside the jury*. Cambridge: Harvard University Press, 1983. Pp. 159.

PRACTICE AND PROCEDURE

Direct and cross examination. St. Paul: National Institute for Trial Advocacy, 1983. Audio-cassette, 8 tapes, 8 hrs.

How to increase and "market" a P-I practice. Seattle: Washington State Trial Lawyers Association, 1983. Pp. 160.

Levin, Fredric G. *Effective opening statements: the attorney's master key to courtroom victory*. Englewood Cliffs, N.J.: Executive Reports Corp., 1983. V.p.

Preparation and trial of a personal injury case. Seattle: Seattle-King County Bar Association Young Lawyers Section, 1983. V.p.



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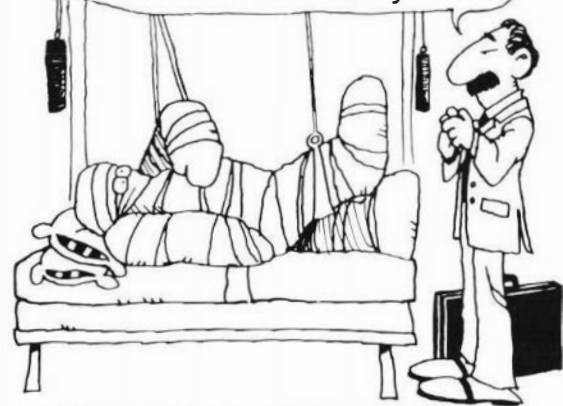


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