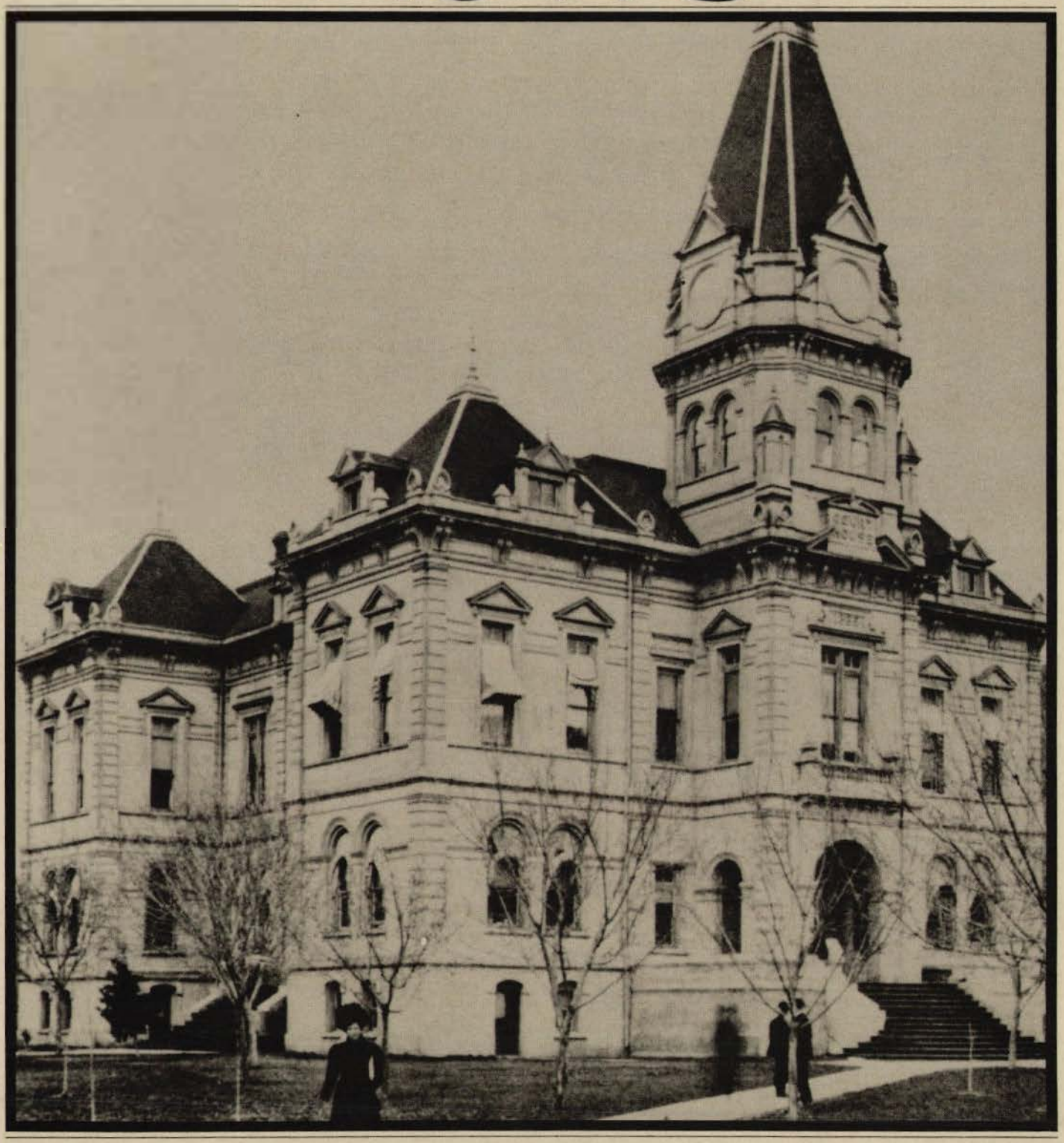
Washington State Bar News
Vol. 39, No. 7, July 1985



Computers and the Law

Washington State Bar News
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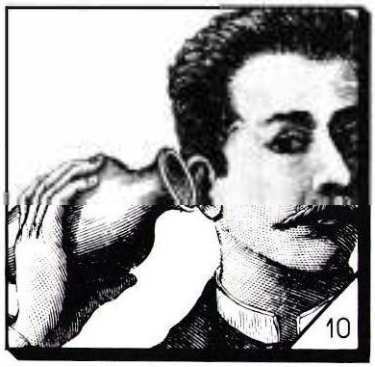
FEATURES



DEPARTMENTS

IN THE NEWS

ART CREDITS

COVER: ***Asahel Curtis,*** *"Commercial Photographer, 625 Colman Block, Seattle," captured the Whitman County Courthouse on film sometime after its construction in 1889. The Colfax landmark was razed in 1954. Photograph courtesy of University of Washington School of Law.*

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Letters

Letters to the Editor should be double-spaced typed and signed. The Editor reserves the right to edit any letter as may be appropriate.

Re: Directory

Editor:

Thank you very much for the 1985 Directory of Attorneys. My compliments to you on a nice edition. The Directory of Attorneys is very helpful in the practice of law. It saves a lot of time. Thank you very much.

JOSEPH P. ERICKSON
Kennewick

Errata

Editor:

One of the judges of my Court just stopped by to tell me that even though I was not listed in the *Bar News* as a commissioner in this Division, I still am on the payroll. Of course, I was pleased to hear that. He also suggested I drop you a line to confirm I am still here.

I would take it kindly if you would be sure to include my name next year among the court commissioners of Division III. I have been in this position since June, 1984, and plan to be here in 1986 unless the judges stop by with a different message.

Thank you.

FRANK V. SLAK, JR.
Spokane

Editor:

Please note that due to a clerical error my name was given to the *Bar News* as a judge of Cascade District Court. This is not correct. I am actually a full-time judge pro-tem/court commissioner.

In order to avoid any undue hostility from the local bench and bar I would appreciate it if you would print my letter of disclaimer in your letters column.

I hope that everyone in the bar will accept my apology for this unfortunate mistake.

PAUL F. MOON
Arlington

Vote By Mail

Editor:

Group Health Cooperative, the largest consumer-owned health maintenance organization in the United States, recently adopted a new policy to provide for voting by mail on resolutions presented at its annual meeting. I would like to suggest that the Bar Association consider doing the same.

After the September, 1985, meeting in Seattle, the Bar Association will not hold an annual meeting in the state of Washington until 1990. Wouldn't now be a good time to adopt a rule allowing for the members to vote by mail on issues for the annual meeting?

MARY ALICE THEILER
Seattle

See Page 5

Editor:

Page 6 of the May issue of the *Bar News* contained a letter from a lawyer in Fall City. He wrote that he didn't have the time or inclination to involve himself in WSBA politics, didn't know who his representative was, and had never been consulted on his views. He was certain that contacting his unknown representative would entail a long distance call from Fall City. He wanted all major decisions to be resolved by ballot.

Having recently concluded three years as a member of the Board of Governors, I want to respond. On page 5 of the same issue is the name and congressional district of each member of the Board. This information is printed in every issue of the *Bar News*. If the lawyer from Fall City would inquire of most anyone, he could learn the number of his congressional district, look at the *Bar News*, find the identity of his representative, and communicate his views. Actually, he has three representatives to elect, one from his district and two from King County at large.

If he would attend a monthly meeting of the Board, he would find that these are hard working, conscientious people who are indeed laboring in the interests of the entire bar association. He would find that there is seldom unanimity on matters of major import. They debate long and intelligently and then abide a majority view.

This complaint reminds me of people who never run for the school board, seldom vote at school elections, but are very vociferous on how the district should be run.

The lawyer urges that on important issues the membership should ballot. This recommendation is from a person who doesn't exhibit the interest to look in the *Bar News* to see who his representatives are and probably doesn't return ballots when his representatives are elected. Also, I suspect he doesn't attend the annual meetings of the WSBA and doesn't volunteer to serve on committees.

The WSBA is very well served by its elected representatives. They are a dedicated, intelligent group of first class lawyers who take the time from their practices and private lives to serve the members of our profession.

The $165 that the Fall City lawyer spends for his annual dues is the best investment he can make. If he would take the time to involve himself in or, at least, inform himself of bar activities, he would find out that ours is a real leader among bar associations and that he is part of it. If he has a problem in learning how to become involved, he should turn to page 5 for the name of his representatives and phone one of them. The phone toll would be well spent.

J. A. VANDER STOEP
Chehalis

Pool or Pipes?

Editor:

The May, 1985, *Bar News* had an excellent article by Zachary Mosner on *Cox v. Helenius*, 103 Wn.2d 383 (1985).

I represent San Juan Pools Corporation and write to request that a correction be printed concerning Mr. Mosner's statement, in the third paragraph of the article, that "The pool was defective." The Supreme Court's interpretation of the facts found on the second page of the written decision was that certain pipes installed by San Juan collapsed, resulting in a problem.

The most interesting aspect of this whole matter is that the issue concerning any negligence on the part of San Juan Pools in the installation of the Cox's pool has still to be determined, inasmuch as the initial lawsuit filed in Superior Court for King County under Cause No. 82-2-12123-1 has yet to come to trial. It is San Juan Pool's position that it was not negligent in any fashion. In fact, it has a release signed by Mrs. Cox covering the temporary repair work done to the sewer line in question.

Of course, all of that will come out at trial and be decided at a future date. We do feel, however, that Mr. Mosner's statement that the pool was defective is incorrect.

ROGER E. RAHLFS
Seattle

Just What Is "Competency?"

Editor:

In the last *Bar News*, the President of the WSBA reported that plans are underway to improve lawyer competency. I would like to know what that means.

The Board of Governors has recommended to the Supreme Court that competency be subject to disciplinary enforcement. This is among the Rules of Professional Conduct which the Board would substitute for the Code of Professional Responsibility.

The Board did not explain what it meant by competency. The Rules do not explain what competency means, because the Board recommended the deletion of commentary to the Rules.

In the April *Bar News*, President Campbell reported that plans are under study to improve competency, but space does not allow him to discuss them.

It is time for the Board to say what it means by competency. It appears that it intends to have the legal profession submit to regulation as if it were a trade or industry. The Board does not have that authority. The issues should be brought before the membership of the Bar for its informed review and decision.

HOWARD K. TODD
Seattle

Come on Down!

This is an unabashed request for some warm bodies . . . for a very licit purpose. The third Friday and Saturday of every month the Board of Governors goes on its road show. As *Bar News* editor, I tag along and report on the board's work for the 13,000 of you who are not editor.

A modest proposal: Why not take time out from the tyranny of your schedule? Consider attending a meeting of the Board of Governors. You'll be pleasantly surprised by what you see and hear . . . and, I suggest at the risk of sounding like I've been co-opted, you'll probably rest better at night. The Bar Association is in good hands . . . but it still could stand some fresh ideas and input. (That's *another* editorial.)

Sometimes I hear grumbling that the Board of Governors should meet only within the confines of Washington. The notion seems to be that meeting in Vancouver, B.C., or Sun River, Oregon, or Coeur d'Alene, Idaho, just doesn't jibe with our being the *Washington State* Bar Association.

Informed sources in the Bar Association and/or the Board of Governors counter that the only lawyers who ever come to the Board meetings are there on behalf of a group (judges, young lawyers, government lawyers, *etc.*), or a Bar section or committee (law office management, environmental and land use, *etc.*), or who have a specific proposal to make. Then there are the unfortunates whose attendance before the Board is, shall we say, less voluntary—that is, for disciplinary purposes.

What can you learn at a meeting? That the governors whose names appear on the title page of the *Bar News* have faces. That for each meeting they receive and review an agenda that is weighty, literally and figuratively. That the choices before them may have tremendous repercussions for the practice of law (*e.g.*, specialization) or none at all (*e.g.*, whether to allow a second Seattle hotel to advertise a special rate for Washington lawyers). That not one of them, thank God, is a devotee of the filibuster.

Once upon a time, the story goes, the Board of Governors met in Tacoma. The president, as was his habit, introduced everyone who was present (both governors and groupies). He then came to a lawyer who was neither governor nor groupie. "Can we help you?" inquired the president. "Aren't these public meetings?" asked the lawyer. He was assured that they were. "Well," he continued, "I just came here to see what goes on at a Board meeting."

His attendance made him an endangered species, but he was no dodo.

A Cowgirl Goes to Cambridge

A cowgirl grows up on the Yakima Indian Reservation on land her father's father received as an original tribal allotment in 1899.

She is offered admission at all five prestigious law schools from sea to shining sea to which she applies.

She is calm under pressure, tough under a beautiful exterior, perceptive, creative. A great eye for design, a ready smile to combat the blahs. The kind of person who only has to be told how to do something once.

Add these up and you get Karin Foster, the Managing Editor of the *Bar News*. For the last three years Foster's name has appeared in eight-point type on the table of contents page as managing editor; before that, as business manager. Her daily efforts in seeing that the *Bar News* makes it to your desk every month merit a 48-point headline.

No iron-fisted, beery-eyed big city managing editor here. Foster's knack for keeping the *Bar News* a monthly reality belies the complexity of her tasks. Contract negotiator, red pen artist, word processor whiz, humorer of lawyers accustomed to having their way, layout and design star, disciplinarian. Exactly what *this* procrastinator of an editor needs. Her shoes will be tough to fill.

Karin L. Foster
Bar News Managing Editor

You might think that after five years with the Bar, Foster would have had her fill of lawyers and the convoluted webs we seem to delight in weaving. Not so. Foster *wants* a piece of the legal action. So, with this issue of the *Bar News* under her belt, she leaves the misty Northwest for the musty Northeast. Harvard Law School beckons.

Do ya think that crusty institution gives Advanced Standing to law students who have had real-life, hands-on dealings with lawyers? It might be a good idea.

Carole Grayson

The President's Corner

The Door Is Open

Something has been bothering me lately. The May issue of the *Washington State Bar News* included a letter to the editor from a lawyer who practices in east King County. He complained that the leaders of the Bar didn't seem interested in obtaining his views on issues and that he had never been contacted by the governor representing his district. Also, he commented that he didn't even know the name of that particular governor. This seemed rather strange to me as the *Bar News* is mailed monthly to every lawyer in this state. One of the first pages in each issue contains the names of all members of the Board and the districts which they represent. The author of the letter in question actually has three Board representatives, including the governor from the Eighth District and two King County at-large governors. Apparently he had either ignored the Board listing in the *Bar News*, or he had simply not taken the time to inquire. A call to the Bar office would have quickly solved his problem.

All of this underscores the need for lawyers to know who is representing their interests on the Board of Governors. They should also know that each of the governors is anxious to hear from anyone who wishes his or her thoughts and ideas to be considered. Service on the Board requires a great deal of time and it is very difficult, if not impossible, for the governors to communicate directly with each of the lawyers in their respective districts. An occasional visit to a bar association luncheon within a particular district allows for good input on issues before the Board; however, the best way for a governor to learn how his or her constituents feel is through direct communication. A telephone call or a letter to the governor is all it takes. Remember that your governor (or governors) are serving you without compensation and each is doing his or her best to also maintain a law practice. Still the time which they give to Bar matters is quite extensive. If any of you have ideas or thoughts which you want to be considered, just take a minute to either call or write your representative. I can assure you that he or she will be pleased to hear from you and that your input will be given full consideration.

There is one other matter which I would like to address this month. It involves specialization. In May, the Board of Governors rejected the proposal of the Specialization Board and that subject is now at rest. We cannot, however, overlook the outstanding accomplishment of that Board in formulating and bringing to us a plan which, although rejected, represented hundreds of hours of effort, thought and discussion. The Specialization Board was given the assignment of presenting a plan to us— they did this, and did it exceptionally well. Members of the Board gave countless hours in explaining and debating the plan. Seldom (if ever) has this association been served so well by so few. Our sincerest thanks and appreciation must be extended to Claude Pearson, chairperson of the Specialization Board, who so efficiently and ably presented the plan to the Board of Governors and all members of our Association— and to each of the other members of the Specialization Board, Ted Kuhrau, Ben Gantt, John Binns, Brian Clark, Ric Fancher, Bob Jensen, Dick Matthews, Dustin McCreary, Don Pietig and Dave Thorner. Their hard work gave each of us the opportunity to understand and evaluate the subject of specialization. If and when this issue confronts us again in the future, we should have an excellent basis for deliberation, due to their fine efforts.

Lee Campbell

Enforcing Intellectual Property Rights in Computer Software

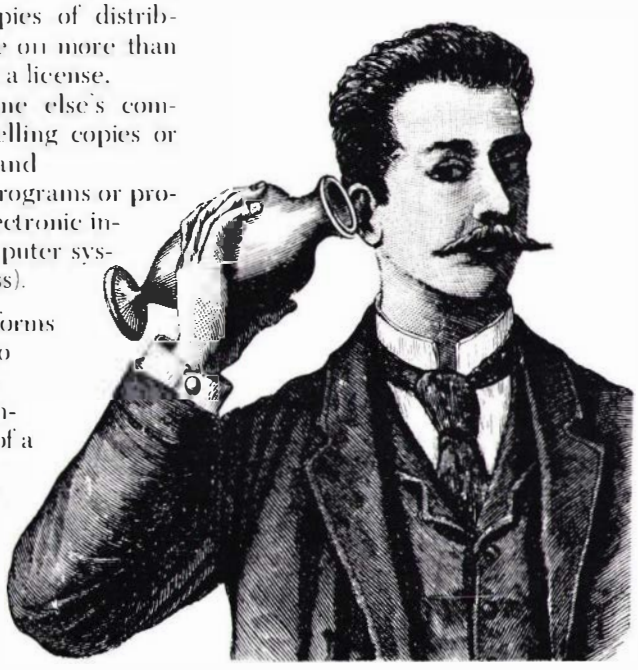
by **Jeffrey T. Haley**

Intellectual property rights in software can be infringed in a myriad of ways. Well-known ways include:

- making exact copies of distributed programs for use on more than one computer without a license,
- modifying someone else's computer program and selling copies or licenses as your own, and
- taking copies of programs or programming ideas by electronic invasion of a major computer system (computer trespass).

Other less obvious forms of infringement may go unrecognized. For example, a company commissions the creation of a custom program and becomes the owner of the copyrights under the work for hire provision of the Copyright Act, 17 U.S.C. §201(b). If the programmer later incorporates a portion of this program into a program created for someone else or for distribution to the public, he is infringing the copyrights of the original company.

The risks for the programmer *and* the recipient of infringing programs can be high. Section 503 of the Copyright Act allows the court to order infringing copies of programs in the hands of third parties to be impounded. The copyright owner can disrupt the recipients of infringing copies, because impounding is automatic once requested by the plaintiff. The District Court shall order impoundment of "all articles alleged to infringe the Copyright" upon posting of an approved bond. Rules 3 and 4, 383 U.S. 1031 (1966), 17 U.S.C.A. following §501.



Enforcement of intellectual property rights in software where the infringement is less obvious is illustrated by the following hypothetical.

HYPOTHETICAL: THE FACTS

1. Work Made for Hire

Typical Business decides to computerize a major portion of its operations that have thus far been done by hand. Typical asks Custom Software to write this package of programs for use on a minicomputer with many terminals. Typical approaches his banker to finance the development. The banker insists on some kind of writing from Custom which states that Typical will own "all right, title, and interest" in the programs.

Before Custom Software begins its work, Typical tells the two programmers who will be working on the project that it has developed special manual processing methods which give Typical an advantage over its competitors within the county. Typical tells the two programmers that they are not to disclose these methods to anyone. These methods are to be incorporated into the programs.

Custom completes the package of programs and, after six months of debugging and minor improvements, Typical no longer needs additional services from Custom.

2. Oral License Back to Author

Months later, realizing that the programs may be valuable to similar businesses, Custom approaches Typical to obtain the right to sell the programs to others. Typical orally authorizes Custom to sell copies of the programs to any business not in the same county, provided Custom pays Typical 10% of the price received for each sale. During the next few months, Custom reports four sales of the programs to customers outside the county. Custom pays royalties on $8,000 for each sale. Typical hears nothing more from Custom for over a year.

3. Failure to Pay Royalties

At a regional trade show, Typical visits a booth operated by Custom and sees a demonstration of a package of programs that appears to be the same as his. He asks for a list of satisfied customers and learns that there are at least 30, including the original four.

Typical contacts Custom and demands royalties on the remaining 26 sales. Custom refuses, claiming that it is no longer selling the same package, that the new package is three times as big as the old one and has many additional features, and that every module

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***Jeffrey T. Haley** is an attorney with the Seattle firm of Simburg, Ketter, Haley, Sheppard & Purdy, whose practice is concentrated in computer law. This article is based on materials presented at a WSBA CLE on intellectual property held March 22, 1985.*

of the original package has been changed. The programs now sell for $20,000 each.

Typical reports to his lawyer that Custom is handsomely profitting on a package of programs that Custom would never have developed had Typical not requested and financed the original programs. He feels that Custom is being sneaky. What can Typical do?

Obvious Remedy: Sue for Breach of Contract

The oral contract required Custom to pay royalties of 10% on each sale of the program. The right to obtain royalties may be enforceable under contract law even if Typical holds no valid intellectual property rights in the new software. To the extent the contract contemplates performance more than one year in the future, any statute of frauds limitation is avoided by the intervening part performance.

Unless there is diversity jurisdiction, a suit under the contract must be commenced in state court. *3 N. Nimmer, Copyright* §12.01[A]. The litigation will focus on three issues:

(1) whether Typical holds any valid copyrights to the new program that compel payment of royalties.

(2) whether the program contains trade secrets belonging to Typical that compel payment of royalties, and

(3) whether the contract is enforceable even if Typical holds no valid intellectual property interests in the new package.

When suit is brought in state court to enforce contract rights to receive royalties, state courts can decide ancillary issues regarding the validity of copyrights, even though federal courts have exclusive jurisdiction of copyright cases under 28 U.S.C. §1338. *3 N. Nimmer, Copyright* §12.01[A].

It would take at least a year or two to obtain a trial court judgment in this case. Attorney fees would be considerable, but the prospects of recovering them would be slim. By the time a judgment is obtained, the program may be nearing the end of its life cycle, and Custom Software might have paid out the profits it earned from the software, leaving few assets in the corporation.

Alternative Remedy: Preliminary Injunction

If Typical has valid intellectual property interests in the new version of the program and can terminate the oral license, additional reproduction or distribution of the program by Custom infringes Typical's rights in the software. It may then be possible to obtain a preliminary injunction against further copying or distribution under copyright or trade secret law. The injunction would bring Custom's business to a halt and provide sufficient leverage to negotiate a fair and speedy settlement with a minimum of attorney fees. Typical's attorney might take the following steps.

> The laws governing software infringement are complex and esoteric.

1. Terminate or suspend the license.

At common law, where no date of termination is contemplated by the parties, or where their intent cannot be ascertained, a contract may be terminated at will by either party after a reasonable time and upon reasonable notice. *Cromwell v. Gruber*, 7 Wn.App. 363, (1972).

This rule has been modified for copyright licenses. Absent any express provision, the duration of a copyright license is presumed to be the life of the copyright. *3 N. Nimmer, Copyright* §10.10F (1984).

However, where the licensee is refusing to pay royalties under the license agreement, courts have refused to allow the licensee to continue to generate income from the license without ensuring that royalties will be available for the licensor if she prevails. In *Columbia Broadcasting System, Inc. v. ASCAP*, 320 F. Supp. 389, (S.D.N.Y. 1970), the defendant was ordered to pay license fees while the suit was pending. In *Yale University Press v. Row, Peterson & Co.*, 40 F.2d 290 (1930), the defendant was ordered to post a bond to cover the royalties and to render monthly accountings if he wished to continue sales while the suit was pending. In *Pamar Systems, Inc., v. Bair*, unreported (W.D. Wash. cause #C84-449R, 1984), the court acknowledged the termination of an oral license and granted a preliminary injunction.

2. Register the copyrights in the original programs.

As an independent contractor rather than an employee, Custom would have owned the copyrights in the programs had it not given these rights to Typical in writing. 17 U.S.C. §101 (definition of "work made for hire") and §201(b).

17 U.S.C. §411(a) requires claims of copyright to be registered before an action for infringement can be instituted. Registration usually takes 12 weeks, although it can be accomplished in five days or less by requesting "special handling" and paying an additional $120. *Federal Register*, May 4, 1982, at 19254.

Lack of copyright notices on the original programs does not invalidate the copyrights *if* a relatively small number have been distributed to the public *or* registration is made within five years after the first publication without a copyright notice *and* a reasonable effort is made to add the notice to all copies that are distributed to the public after discovery of the omission. 17 U.S.C. §405(a).

Since Custom knew that Typical was the holder of all rights in the programs, Custom cannot claim that it was misled by the omission of the copyright notice or that it was an innocent infringer entitled to the protection of 17 U.S.C. §405(b).

3. Select Federal or State Forum.

If plaintiffs seek damages or injunc-

tions under the Copyright Act. 17 U.S.C. §§504, 502, the suit must be brought in federal court, since 28 U.S.C. §1338(a) grants exclusive jurisdiction over copyright cases. Under 28 U.S.C. §1338(b) and federal case law of pendent jurisdiction, *e.g. United Mine Workers v. Gibbs*, 383 US 715, 724 (1966), the federal court will also hear the trade secret and contract claims, since they arise from a common nucleus of operative facts.

If there is a tactical reason to be in state court, the suit can be brought on the trade secret claims without mentioning copyrights. Injunctions can be obtained under the Uniform Trade Secrets Act. RCW 19.108.020.

However, Custom may be able to have the action removed to federal court by arguing that the trade secret claim is preempted by §301(a) of the Copyright Act: "All legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title." At least the question of preemption, if not the entire case, would probably be decided by a federal court.

4. Collect Proof of Impending Infringement.

To obtain an injunction under the Copyright Act, Typical must show that Custom is reproducing or distributing a program that is a copy of, or a "derivative work" based upon, the original program. 17 U.S.C. §106.

"Derivative work" as applied to literary works is adequately defined in §101 of the Copyright Act, but it sheds no light upon whether one computer program is a derivative work of another. Based upon limited judicial precedents, commentators have developed analyses for determining when a program is a derivative of another. *See* Reback & Siegel, "Toward a Comprehensive Test for Software Copyright Infringement," 1 *The Computer Lawyer*, No. 11, pp. 1-11 (December 1984).

Generally, if the alleged infringing work contains many consecutive lines of code which are identical to portions of the original program, the copyright is infringed unless there is no other way to write this portion of the program. On the other hand, if some changes have been made in every line of code, proof of copyright infringement becomes a difficult issue.

As soon as possible, counsel for Typical should attempt to find proof that many consecutive lines of code that could have been written many ways are identical. If a printed listing of source code recently distributed by Custom can be obtained, excerpts of it can be competently examined by the court.

It might be possible to obtain a copy of the source code by serving a *subpoena duces tecum* upon Custom. If Custom appears but refuses to disclose the source code, claiming it is a trade secret, have a copy of the code placed in sealed envelopes or containers for subsequent *in camera* examination by neutral experts or a magistrate. This will ensure that no changes are subsequently made.

As quickly as possible, depose Custom's programmers. Explore the structure of the programs and the history of each portion. The programmers will be able to describe the origins of each portion of the programs without disclosing trade secrets. With carefully composed questions on the details of each program, it should not be difficult to obtain admissions from programmers that large blocks of code have not been modified.

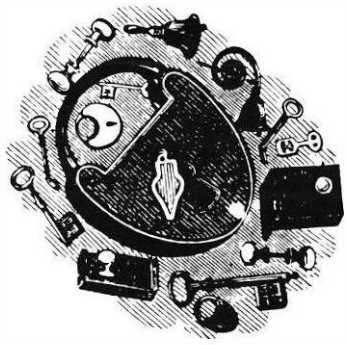
A less desirable alternative is to obtain an object code version of the programs to compare with the original. Comparison will be far more difficult than working with source code and will require extensive use of expert testimony to present your proof to the judge.

5. Move for a Preliminary Injunction.

As soon as proof that Custom's current package of programs infringes Typical's copyright is at hand, move for a preliminary injunction. Be prepared to post a large bond to indemnify Custom in the event that Custom has been wrongfully enjoined, under FRCP 65(c).

1. Proof of Copyrights. To establish copyright infringement, a plaintiff must prove (1) ownership of a copyright, and (2) copying of the copyrighted work. *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir. 1982). Issuance of a Certificate of Registration by the Copyright Office within five years of the first publicaton of a work is prima facie evidence of copyright ownership. 17 U.S.C. §410(c).

In our case, the package of com-



puter programs was first published when Custom transferred a copy of the package of programs to the first customer under the oral license agreement. If the date of registration is less than five years after the first publication, Typical has established ownership of the copyrights in the package of computer programs. If Custom wishes to contest ownership, it will bear the burden of proof. *Rohauer v. Friedman*, 306 F.2d 933 (9th Cir. 1962); *Williams Electronics*, *supra*, at 873.

2. *Granting a Preliminary Injunction.* Section 502(a) of the Copyright Act specifically authorizes courts to "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."

To obtain a preliminary injunction, plaintiff must show (1) likelihood of success on the merits, and (2) "irreparable harm" if the injunction does not issue. *See Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264 (8th Cir.).

Irreparable harm has been presumed in copyright cases, at least where computer programs are involved. "A copyright plaintiff who makes out a prima facie case of infringement is entitled to a preliminary injunction without a detailed showing of irreparable harm." *Apple Computer, Inc., v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (1983). *See*, 3 *Nimmer*, *Copyright* §14.06[A], 14-50, 14-51 & n. 16 (collecting authorities). Speedy remedies are required because computer programs can be easily copied and distributed and because product life cycles in the industry are usually short. A knowing infringer cannot be permitted to construct its business around infringement. *Apple*, 714 F.2d at 1255; *Atari*, 672 F.2d at 620.

SPOTTING SOFTWARE INFRINGEMENT

Evaluating a claim for infringement of software rights is not easy. The laws are complex and esoteric. An understanding of the technology is required.

Generally, infringement of software rights should be suspected and investigated:

(1) when substantial portions of code, without an express or implied license, are "based upon" or copied from, with or without changes, software developed by another, or

(2) when a company has saved substantial time or effort in the development of software by using the work product of another without compensation or express or implied license.

The first test focuses primarily on principles of copyright and protection of "expression". The second test goes beyond ideas or "expression" and focuses on work effort. An underlying principle of all intellectual property law is that the result of productive work which can be appropriated for another's benefit without the theft of physical property should be protected. Those who seek the benefits of the work product should be compelled to pay compensation to the creator.

Where the benefits of the intellectual work product of another have been appropriated without compensation or license and, for some reason, no protection is afforded by established intellectual property law, try to revive the common law theory of "misappropriation" which has been comatose since *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). These cases held that any state law protecting intellectual property which "clashes with the objectives of the federal [intellectual property] laws" are preempted by the supremacy clause. *Sears*, 376 U.S. at 231.

A suitable case to revive the theory of misappropriation may exist where substantial work effort has been misappropriated but the existing intellectual property laws do not prohibit the misappropriation because a new form of technology exceeds the bounds of existing law. □

The Admissibility of Computer Records as Evidence

by **Anthony M. Medina**

RCW 5.45, Washington's Uniform Business Records as Evidence Act ("The Act") establishes a statutory exception to the hearsay rule, where records are regularly maintained of events taking place contemporaneously with the making of the record. It reads:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The theory is that records admissible under the Act are relied upon in the course of a business and therefore should be sufficiently reliable to be heard in a suit.[1]

THE BUSINESS RECORDS EXCEPTION

The business records exception evolved from principles which long antedate computerized record keeping:

> Beginning in the 1600s a practice developed in England by which the "shop books" of tradesmen and craftsmen were admissible as evidence of debts. The rules prohibited a party from being a witness. This rule, therefore, developed as a necessity, as well as a rule of convenience, being the only way to prove debts. Abuses in this rule led to a number of statutory limitations.
>
> In the 1700s an alternate, but broader doctrine developed in English common law courts. This rule after some expansion, permitted use of all entries made by a person, since deceased, if made in the ordinary course of business.
>
> The rule developed somewhat unevenly in America. By the 1800s, however, an American equivalent to the English regular business entries began to emerge. Rule 803(6) simply represents a later, more relaxed, codification of the English rules.[2]

The modern theory behind the business records exception is that business records have a special indicia of reliability:

> The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or education.[3]

The custodian or other qualified witness must testify to the methods of keeping the information. This provides the trier of fact with a rational basis by which to evaluate the accuracy of the record, and thus its trustworthiness.

In the normal course of business, three motives operate to make records fairly trustworthy:

- It is easier to state what is true than what is false.
- An error or misstatement is likely to be detected.
- To be inaccurate would subject the record keeper to censure from the employer.[4]

The federal and Washington rules also require the propounded evidence to be authenticated or identified.

COMPUTERIZED RECORDS

The historical reliance upon the testimony of the chief record keeper may be misplaced when courts are confronted with computerized business records. The business records of days past were written in the relatively permanent medium of ink on paper, by a small number of individ-

[1] *Washington v. White*, 72 Wn.2d 524, 433 P.2d 682 (1967), citing *Young v. Liddington*, 50 Wn.2d 78, 309 P.2d 761 (1957); *Benjamin v. Havens, Inc.*, 60 Wn.2d 196, 373 P.2d 109 (1962). 5A Wash. Pract. (Tegland) 2d ed. § 369.

[2] *N.L.R.B. v. First Termite Control Co., Inc.*, 646 F.2d 424, 427, n. 4 (9th Cir. 1981).

[3] *Id.*

[4] *Id.*

***Anthony M. Medina** is a 1984 graduate of the University of Washington School of Law. He studied fundamental computer theory at the National Cryptologic School in 1978.*

uals. Changes were difficult to conceal. Today we deal with electronic impulses flowing within a framework of silicon and metal. Ink on paper compares with computerized records like a carving in wood with chalk on a blackboard. We often underestimate how easily computer records can be altered—either intentionally or by oversight—and how difficult it can be to find an error.[5]

The computer operation in a business usually requires several individuals in two or more departments such as data processing, accounting, or sales. This decentralization of control means that a supervisor may know only a limited aspect of the data processing operation. Therefore, it is difficult to establish a foundation consistent with the historical reliance upon the chief record keeper's testimony.

Decentralization of control over computerized records makes it easy for errors to be created accidentally:

> The possibility of an undetected error in computer generated evidence is a function of many factors: the underlying data may be hearsay; errors may be introduced in any one of several stages of processing; the computer might be erroneously programmed, programmed to permit an error to go undetected, or programmed to introduce an error into the data; and the computer may inaccurately display the data or display it in a biased manner.[6]

Computers also offer opportunities for fraudulent record alteration:

> Since the record can be erased as easily as standard recording tape, and since no prior records are available to check consistency or continuity, safeguards must be established to ensure against tampering. [Safeguards would include] codes, restricted access to machines, and periodic compilation of records . . . to protect against the possibility of fraudulent alteration of records.[7]

But such security measures are not foolproof. Authors of commercial software build in "back doors" through which they can bypass attempted security closures.[8] Although the

[3]A computer programmer's "prayer" implores that if one makes a programming error, that it be a big one; if one can find it, one can fix it.

[6]J. Roberts, *A Practitioner's Primer on Computer Generated Evidence*, 41 U. Chi. L. Rev. 254, 255-56 (1974).

[7]Note, *Admissibility of Computer-Kept Business Records*, 55 Cornell L. Rev. 1033, 1035 (1970).

[8]*Office Information Systems System Security User Manual*, (2d ed. June 1982), Wang Laboratories, Inc.

mechanical integrity of a computer may be generally reliable, if "a computer is not secure from all possibilities of tampering, then it cannot be said for sure that the information stored within the computer has not been altered."[9] Moreover, the proliferation of telecommunication networks provides "out-of-shop" access to many computer systems. If terminals, tapes, disks, or cards have not been kept in a secure place at all times, doubt may exist as to the accuracy of the records.

Four steps should be taken to evaluate the reliability of a particular operation:

(1) Study the input procedures for possible errors.[10]

(2) Evaluate the program software to see if the evidence could possibly be altered.[11]

(3) Investigate the physical security of the system from intentional alteration.[12]

(4) Judge the credibility of the witness conveying the print-out from the computer to the court.[13]

THREE-PRONG TEST

Applying a lax standard of foundation testimony with respect to computer records admission could possibly erode the validity of the business records exception, especially as it may pertain to computer generated records. Admission of computer records in Washington is relatively easy. Testimony of administrative level supervisors, as opposed to operator level supervisors, has been allowed to lay an acceptable foundation.

In the leading Washington case, *Seattle v. Heath*,[14] appellant sought to exclude abstracts of his driving record in a negligent driving case. The attack focused upon the foundation laid by the prosecution, which consisted of testimony from the assistant director of the Traffic Violations Bureau of the Seattle Municipal Court. His testimony established that:

(a) the Municipal Court had access via teletype to a computer at the Department of Motor Vehicles in Olympia;

(b) the abstract of defendant's driving record was a record in the computer;

(c) the driver's license information was contained in the computer;

[9] J. Sprowl. *Evaluating the Credibility of Computer-Generated Evidence*, 52 Chi-Kent L. Rev. 547, 557 (1976).

[10] *E.g.*, what is the source of the information put into the computer? Is the information verified for accuracy, and if so, how? What becomes of the original information?

[11] Some programs might not be completely debugged for months or even years after initial operation. Thus, some information might disappear, be altered, or placed in unintended fields. Sprowl, at 559.

[12] Can anyone access a database via a terminal or via a telecommunications link? If so, are there any records to indicate such access? What safeguards are installed to flag intentional alteration of the compnter records, if any?

[13] J. Sprowl, *supra* at 562.

[14] 10 Wn. App. 949, 520 P.2d 1392 (1974).

(d) the records were retrieved by name and birthdate;

(e) the computer matched the records with name and birthdate; and

(f) the records before the court were printed out under his direction and observation several minutes earlier.

Cross examination established that the assistant director was custodian of the records from the teletype but not of the department. Apparently there was no cross-examination about the accuracy and verification of the records.

The court found the assistant director a qualified witness with respect to the identification and preparation of the teletype printouts. The court noted that RCW 5.45 was intended to permit admission of systematically entered records made in the usual course of business without having to identify, locate and produce as witnesses each individual who made the original entries into the records. In a footnote, the court cautioned, however, that great care should be exercised by a trial court in admitting an entry whose trustworthiness is questionable and which could not be refuted because of the exigencies of time.[15] Still, the court was satisfied of the integrity of the computer records offered under the business records exception to the hearsay rule.[16]

Heath also incorporated the three-prong approach of the Mississippi court to admitting computer records. In *King v. State*, 222 So.2d 393 (Miss. 1969), the issue was whether witnesses were required to testify as to the input of each item of information. *King* held that such testimony was not required as long as the records passed a three-prong test:

(1) The computer is "recognized as standard equipment;"

(2) Entries were made in the regular course of business at or near the time of the event recorded; and

(3) The foundation presented satisfies the court with respect to the trustworthiness of the information presented.

In weighing the third element, the court should consider the source of information, method and time of preparation.

Heath tells us that it is not necessary to provide testimony about each item of information entered into a computer recording system. Citing the earlier *Seib* case, *Heath* equates "tape or some other appropriate memory bank" with an "account or record recording the same information."

If you seek to exclude computer records, attack their accuracy.

The facts in *Heath* do not indicate whether the assistant director's testimony reflected any technical knowledge of the electronic or mechanical aspects of the record keeping device or of the system through which the device was operated. Had this aspect of the testimony been examined, the records offered for evidence might have been rejected as hearsay lacking sufficient foundation for admission. Despite leaving open the possibility of a successful attack upon the records admissibility, the *Heath* decision is not inconsistent with those federal decisions on the admissibility of computer records under the hearsay exception.[17]

BRADLEY MAY WEAKEN REQUIREMENTS

In the 1977 case of *State v. Bradley*,[18] computer printouts recorded the actions of police in response to telephone calls. Defendant, convicted of felony murder, claimed that the computer printout contained double hearsay: it had the statements of the person who received the call, dispatched the officers and recorded the time of their arrival; and it contained the declarations of the person who placed the phone call and described the nature and location of the incident. In ruling that a computer printout which was evidence of police response to telephone calls is a record made in the regular course of business without the testimony of its maker required, the court noted:

> The printout is a record of an event made in the regular course of business that satisfies the requirements for admission under The Uniform Business Records as Evidence Act. A document that qualifies as a business record cannot be denied admission on the ground that the person who entered the information in the record does not testify in court. Thus the statements of the person who received the phone call come within an exception to the hearsay rule for business records. [Citations omitted.][19]

There is no indication that the defendant raised the reliability of the records as a basis for objecting to their admission. The only attack was based upon the double hearsay theory.

A LOWER ADMISSIBILITY THRESHHOLD?

The 1979 case of *State v. Kane*[20] continued the trend of avoiding close examination of the computer process. Unless a legitimate question is raised about the reliability of the evidence, technical information about the computer equipment or programming is not necessary.

Kane was convicted of passing bad

[15] 10 Wn. App. 949, at 955.

[16] The records were hearsay for being out of court statements offered for the truth of the matter asserted. However, this information was said to have been entered regularly and at or near the time of the happening of the event.

[17] *See e.g., United States v. Escobar*, 674 F.2d 469 (5th Cir. 1982) (without a foundation being laid, information received from a computer is objectionable as hearsay).

[18] 17 Wn. App. 916, 567 P.2d 650 (1977), *review denied*, 89 Wn.2d 1013 (1978).

[19] *Id.*

[20] 23 Wn. App. 107, 594 P.2d 1357 (1979).

checks. The prosecution introduced computer evidence of other bad checks written by appellant. Appellant claimed that admission of previous bad checks was proof of uncharged crimes, but the court disagreed. Alternatively, appellant attacked the foundation laid by the prosecution. The trial court's admission of a computerized summary of appellant's account activity, the complete records of which were stored in the bank's computers, was upheld.

The bank's branch officer testified that the bank used computers to store records on closed accounts and that a summary was prepared because to bring all the records contained in the computer would have been too burdensome. He also testified that he was the custodian of the records and that the records were kept in the ordinary course of business. Although the jury did not see the computer records, the court admitted the bank officer's testimony.

Where the reliability of the computer generated evidence is not at issue, the proponent need not submit technical information about the type of computer or program that was used:

> Certainly when the computer-generated evidence is provided by a well established national banking institution, maintaining numerous branches in the state, it is reasonable for a court to assume that the "electronic-computer" equipment is reliable.[21]

Kane thus seems to lower the threshhold of admissibility for computerized records. First, the court looked primarily at the reliability of the computer equipment—a reasonable concern, but perhaps too narrow in scope. Reliability of computer records is as much a function of system and process as it is of well-maintained hardware.

Second, the decision implies that one should consider the status, size, and stature of the institution operating the computer equipment. This suggests that admission will be weighted in favor of records created and maintained by large institutions and against those of smaller companies—even though the former might be using first or second generation equipment and the latter employing state of the art equipment. Further, the nature of the computer industry is such that company size affects the volume of information processed, but not necessarily the reliability of that information.

EXPERT FOUNDATION WITNESSES

The 1983 case of *State v. Ben-Neth*[22] concerned appellant's conviction for unlawful issue of checks

[21] 23 Wn. App. at 112.
[22] 34 Wn. App. 602, 663 P.2d 159 (1983).

drawn on insufficient funds. Rather than attack the reliability of the computerized bank records, appellant sought exclusion of the evidence because the bank officials were not proper foundation witnesses. The two witnesses neither created nor supervised creation of the computer records. They did not understand how the records were assembled at the computer center, nor had they ever been to the computer center.

In affirming admission of the evidence, the court noted that Washington courts have broadly interpreted the statutory terms "custodian" and "other qualified witness" under RCW 5.45.020, and further, that it is not necessary to examine the person who actually created the record provided it is produced by one who has custody of the record as a regular part of the job, or who supervises its creation. Thus the production of computer records by one who either has custody or has supervised the creation of the record meets the statutory requirements of RCW 5.45.020, if the trial court then concludes that the evidence was reliable.

Judge Ringold indicated why Washington courts' scrutiny of computer records is not unduly rigorous:

> Given the complexity of modern institutions one cannot expect routine record-keeping to be error-free. Where actual error is suspected the challenge should be to the accuracy of the business record, not to its admissibility.[23]

CONCLUSION

The hearsay nature of computer generated records does not appear to be a significant barrier to proponents of such evidence under Washington's Business Records Act, RCW 5.45.020, provided that a supervisor or administrative chief supplies the foundation testimony that the entries were made in the regular course of business and the equipment used "is of a standard type."

Washington courts seem to have departed from the original application of the business records exception to the hearsay rule which was concerned with the inherent reliability of the records before admitting them into evidence. Today, this concern with the reliability of the records has shifted from pre-admission to post-admission attacks on the weight and credibility of the evidence. This shift warrants our attention.

If you seek to exclude computer records, attack their accuracy. Systems analysts or programmers could be a resource as expert witnesses in this regard. You may have more success in attacking the credibility of the evidence than in attempting to bar admission of the evidence. If, on the other hand, you wish to rely upon computer records for evidence, consider additional efforts to buttress any prima facie impressions of accuracy and reliability. Again, expert witnesses could be helpful. □

[23] 663 P.2d. at 159, n. 2.

WASHINGTON STATE BAR NEWSLINE

The Board's Work

by Carole Grayson

OCEAN SHORES--June 21-22, 1985. Present: All Governors (Gibbs absent p.m. 6/22). Also present: L. Edward Brown (Magistrates Assn.), Dale Green (Ct. of Appeals Judges Assn.), Patricia Schlosser (Washington Women Lawyers), Robert Farrell (WSBA Counsel), Mary Alice Theiler (SKCBA Young Lawyers). Deborah Arron (SKCBA Board of Trustees), John Gray (Governmental Lawyers). 6/21: Jeff Campeche (Wa. Assn. of Prosecuting Attorneys). 6/22: Terence Hanley (Superior Ct. Judges Assn.)

MANDATORY MALPRACTICE COVERAGE SOON?

Article X, Section 1, of the WSBA Bylaws reads: "As soon as is feasible, every active member except those who satisfy the conditions for exemption in Section 4 of this Article shall be insured for professional errors and omissions on an insurance contract or plan arranged for by the Association."

The Board of Governors unanimously passed an amended motion by Governor Dwyer to appoint a short-term task force (to include nonlawyers expert in the field) to study implementation or amendment of Article X. H. Graham Gaiser, Seattle, chair of the Attorneys Professional Insurance Committee, said mandatory insurance would work if all lawyers could be assured of reinsurance, but currently, he said, this is not the case. Washington could start its own plan, or join with Oregon, the only other state bar with mandatory malpractice coverage. The Oregon plan has generated a $7.5 million surplus, with an average premium of $900, and no deductible.

According to the National Legal Malpractice Data Center, 70 per cent of claims are resolved for between $0-$1000. 82 percent of claims are made during the first five years of coverage. "Underwriting is not a science or an art; it's black magic," said Gaiser, as he contrasted the premiums charged for a $200,000 liability policy: $656 (Home Insurance), $1,442 (CNA), and $2,890 (St. Paul).

Governor Moceri wondered: "Is there any information that the uninsured lawyer is a problem in this state?" Lane suggested mandatory insurance in combination with self-insurance. Gibbs feared that would result in all the high risk candidates being covered under the self-insurance plan, and said he thought the private market should take its share of high risk candidates.

CLIENT$ $ECURITY FUND

The Board of Governors followed three recommendations of the Clients Security Fund Committee: 1) unanimously denied the claim of Jose A. Correa against Robert J. Gunovick (suspended) (no evidence Gunovick received funds or misappropriated them); 2) unanimously approved the claim of Kathie Lynn Ackley against R. Bruce McFarlane (disbarred May 29, 1985) for $75; 3) unanimously denied the claim of Fisherman's Boat Shop, Inc., against Michael M. Moore (disbarred) (no evidence of misappropriation, over one year since disbarment (see Rule 7B), over one year since "discovery" made (see Rule 7A).

The Governors voted 9-1 (Delay dissenting) to table the Committee's recommendation that $25,000 (beyond the $25,000 approved by the Governors in February, 1985) be paid to Doris Johnson against J. Rex Behrhorst (disbarred May 29, 1985). Committee member Deborah Arron, Seattle, said the parties had a long-term fiduciary relationship, and also were neighbors.

PHYSICIAN-WITNESS

What is the duty of a lawyer requesting information from a physician in the absence of knowledge by the lawyer that the doctor-patient privilege has been waived? David Boerner, chair of the Code of Professional Responsibility Committee and assistant dean of the University of Puget Sound Law School, presented the committee's proposed ethics opinion, but the Board of Governors approved 7-1 a substitute proposal by Fred M. Zeder of Seattle. Petruss dissented; Gibbs and Bond abstained. New formal opinion #115 reads:

(1) It is improper for a lawyer to discuss any matter pertaining to a patient with a physician who has examined that patient, if a patient physician privilege exists and has not been waived.
(2) Where no patient physician privilege exists or where the privilege has been declared waived by Court Order or by the express written consent of the patient, a lawyer may interview a physician in the same manner as any other witness.
(3) Where a patient physician privilege exists and waiver is claimed upon any basis other the above, a lawyer may discuss matters pertaining to a patient with an examining physician only through the use of discovery procedures provided in the Superior Court Civil Rules.

NEW DISCIPLINE: ADMONITION

The Board of Governors unanimously adopted RLD 5.8, which creates the admonition as the newest form of discipline an attorney may receive. The admonition is a sanction which involves a finding of misconduct, as are four other forms of discipline: disbarment, suspension up to two years, reprimand, and censure. The admonition does not replace the advisory letter, which is not considered a sanction and does not involve a finding of misconduct.

The admonition will be "limited or restricted to (matters involving) inattention, neglect or lack of competence." An attorney who within 30 days after receiving an admonition contests it is entitled to a hearing. The admonition implements the recommendation of the Task Force on Continuing Professional Qualifications in October, 1984, for "discipline for demonstrated incompetence".

CRIMINAL RULES

The Board of Governors unanimously approved the Court Rules and Procedures Committee's recommendation to amend the following Superior Court Criminal Rules: 2.1, 2.2, 2.3, 3.1, 3.3, 4.2, 4.3, 4.7, 7.1, 7.2, a companion amendment to RAP 5.3, and new CrR 7.8. These rules will be forwarded to the Supreme Court with the recommendation that, after publication for comment, they be adopted.

The committee had rejected the amendment of CrR 3.2 ("Release of Accused") proposed by the Washington Association of Prosecuting Attorneys (WAPA), which would allow consideration of the defendant's dangerousness in the pretrial determination of release. The committee was concerned with possible constitutional infirmities, and because, in committee chair Malachy R. Murphy's words, it was "so thoroughly a departure from current policy that it should be subjected to full public hearing."

Governor Dwyer moved that the Board adopt all the committee's recommendations except as to 3.2, which it would forward to the Supreme Court without a recommendation and with comments pro and con. But by a vote of 6-2, the Governors approved Governor Vhugen's amended motion to endorse all the other changes and defer consideration of the WAPA-proposed 3.2 until August. Governors Delay and Dwyer dissented. Said Delay, "It is not a function of this Board to determine constitutionality. The Board should not act in a judicial capacity." Governor Gibbs was absent.

OTHER WORK:

- COMPLAINTS ANYONE? -- In 1983, the Bar received over 1,400 written complaints; in 1984, 1,545; in 1985, 1,701 are projected. As of May 1, 1985, 991 cases were pending. In September, 1983, when the Bar staff was increased to its current size (five lawyers, three investigators, and five support staff), 632 cases were pending.

- DISPUTE!?# RESOLUTION!?# -- The Board of Governors endorsed 9-1 a resolution supporting establishment of a dispute resolution center in King County.

- JUDICIAL IMMUNITY -- Thomas D. Loftus of Seattle was appointed by President Campbell to a task force headed by Chief Justice Dolliver studying the U.S. Supreme Court's Pullion decision, under which judges may be responsible for attorneys fees and costs.

- EVERGREEN APPOINTMENT -- J. Rick Potter of Vancouver was unanimously appointed to the Board of Directors of Evergreen Legal Services.

- TODAY'S CONSTITUTION & YOU - The Governors unanimously approved a request for $5,500 for the Today's Constitution & You project for an exhibit booth.

- DEATH & THE ATTORNEY GENERAL -- The Governors unanimously approved $4,000 for the Office of the Attorney General to revise and reprint its booklet on "What to Do When a Death Occurs."

CLE Clearinghouse

Real Estate Contract Forfeiture, Skills Training & Estate Planning

by **John M. Redenbaugh**
Assistant Director of CLE

Learn about the new REAL ESTATE CONTRACT FORFEITURE ACT from members of the Task Force Committee involved in drafting this important legislation. A half-day seminar will introduce the new statute this fall at four sites throughout the state: October 4 at the Sheraton Hotel, Seattle; October 9 at the Thunderbird Hotel, Yakima; October 16 at Cavanaugh's Inn at the Park, Spokane; and October 24 at the Seattle Hyatt House near Sea-Tac Airport.

The distinguished faculty comprises **Ned M. Barnes** (Witherspoon, Kelley, Davenport & Toole), **Robert M. Leadon** (Velikanje, Moore & Shore, Inc., Yakima), and **David H. Rockwell** (Jones, Grey & Bayley, P.S., Seattle).

The focus will be on changes in forfeiture under the new act, including a review of legislative history and how to apply the new provisions. The course materials feature helpful forms and a checklist of issues to consider when forfeiting a real estate contract. Ample time will be allowed for questions to the faculty.

For more information contact program coordinator Sharon Clemence, WSBA, 505 Madison Street, Seattle, WA 98104, telephone (206) 622-6021.

Get involved! in the new SKILLS TRAINING: TRIAL PRACTICE seminar on Saturday, August 3, at the King County Courthouse in Seattle. Attendees at this intensive one-day program will participate in voir dire and present an opening statement, direct examination, cross-examination and closing argument. Each registrant will be assigned to a group of six, and each group divided into three teams of two. Experienced trial attorneys will play superior court judges and preside over an entire mock trial.

Program co-chairpersons **David D. Swartling** (Karr, Tuttle, Koch, Campbell, Mawer & Morrow, P.S.) and **Bruce E. Larson** (Karr, Tuttle, Koch, Campbell, Mawer & Morrow, P.S.) have assembled a top-notch faculty: **Kathy A. Cochran** (Reed, McClure, Moceri, Thonn & Moriarty), **John Patrick Cook** (Lee, Smart, Cook, Martin & Patterson, P.S., Inc.), **Joel D. Cunningham** (Williams, Lanza, Kastner & Gibbs), **Thomas H. Fain** (Williams, Lanza, Kastner & Gibbs), **Steven F. Fitzer** (Burgess, Kennedy, Fitzer & Strombom), **Eric L. Friese** (Law Office of Eric L. Freise), **H. Graham Gaiser** (Gaiser & Tibbs), **Daniel C. Goodwin** (Goodwin, Grutz & Scott), **Douglas A. Hofmann** (Williams, Lanza, Kastner & Gibbs), **Ronald B. Leighton** (Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim), **Lawrence L. Longfelder** (Longfelder, Tinker, Kidman & Flora), **David L. Martin** (Lee, Smart, Cook, Martin & Patterson, P.S., Inc.), **Frederick M. Meyers** (Karr, Tuttle, Koch, Campbell, Mawer & Morrow), **Delbert D. Miller** (Bogle & Gates), **Peter P. Strand** (Peter P. Strand, P.S.), **John D. Wilson, Jr.** (Reed, McClure, Moceri, Thonn & Moriarty), and **Fred M. Zeder** (Fred M. Zeder, P.S.).

Enrollment is limited to 120, and pre-registration by mail or in person is required (no over-the-phone or at-the-door signups allowed). For more information contact program coordinator Debbie Kirchhauser, WSBA, 505 Madison Street, Seattle, WA 98104.

It's not too early to begin making plans to attend the 30TH ESTATE PLANNING SEMINAR. This year's program will be presented at the Westin Hotel in Seattle on November 7-8. It will feature **Henry Gissel, Carolyn McCaffrey, John A. Wallace, Mark Neese, Jere McGaffery, Stan Johnson, Jack Huston** and **Robert Muckleston.** Watch for the seminar brochure that describes this important program!

APPROVED CLE COURSES

WASHINGTON STATE BAR ASSOCIATION

Collection of Judgments in Washington
July 12: Seattle 6.50

Creative Estate Planning
July 12: Spokane 6.50
July 19: Seattle 6.50

Creditor-Debtor Section Mid-Year Meeting and Seminars
July 19–20: Richland 11.50

Alternatives to Litigation
July 26: Seattle 4.25

Skills Training: Trial Practice
August 3: Seattle 8.50

What You Need to Know About Construction Law and Claims Management
August 9: Seattle 6.75

The New Real Estate Contract Forfeiture Act
October 4: Seattle 3.00
October 9: Yakima 3.00
October 16: Spokane 3.00
October 24: Sea-Tac 3.00

30th Estate Planning Seminar
November 7–8: Seattle 15.00

SEATTLE-KING COUNTY

by JAMES L. VARNELL

Office Shifts. **John Veblen** has become a member of Jones, Grey & Bayley and **John J. Sullivan** and **Lawrence Repeta** have become associates. Roberts & Shefelman announces that **Jon W. MacLeod** and **Paul L. Ahern, Jr.**, have become partners and that **J. Tayloe Washburn, Gregory C. Simon, Bradley J. Berg, William H. Chapman** and **Gail T. Voigtlander** have become associated with the firm. Carney, Stephenson, Badley, Smith, Mueller & Spellman announces that **John D. Spellman,** former governor of the State of Washington, has become a shareholder of the firm. Helsell, Fetterman, Martin, Todd & Hokanson has opened a Bellevue office with resident partners **John E. Ederer** and **Thomas W. Huber.**

Michael D. Sandler has become a partner of Foster, Pepper & Riviera, and **William C. Erxleben** has become of counsel to the firm. **Joy K. Smucker** has joined Adler, Giersch and Read as an associate. **John M. Junker,** professor at the University of Washington School of Law, has become of counsel to the firm of **Sharon E. Burrows.** Hardwick & Conrad announces that **Boyd F. Buckingham, Jr.,** and **M. Scott Erieson** have become partners, and the name of the firm has been changed to Hardwick, Conrad, Buckingham and Erieson.

Tailor Made. After exhaustive research and thorough consultation, the committee appointed to determine the 10 best-dressed attorneys in the Seattle area has selected: **Jackie Brown, F. Lee Campbell, Elsa Cole, Kelly "Bow Tie" Corr, Gary "Flash" Gayton, Darcy Goodman, Heng-Pin Kiang, Ron "Add In" Neubauer, Marsha Pechman** and **Robert M. Taylor.**

This year the committee selected four individuals for induction into the Sartorial Splendor Hall of Fame: **Charles A. "Jack" Burgeson** (he was wearing collar pins before they were stocked at Nordstrom); **Gary Faull** (and you thought Paris has something over Renton); **Sally Gustafson** (how can she afford it on an Assistant U.S. Attorney's salary?); and **Mike Cohen** (what else can you say about a man who taught Rex Reed how to dress).

In the Judicial Division, the William Faulkner Southern Gentleman Award was presented to Chief Justice **James Dolliver.** In the Sport/Leisure Activities category, the plaid, golf slacks of Judge **Jack Scholfield** were retired and are now being used as an out-of-bounds marker at the Enumclaw Golf Club.

IN MEMORIAM

Ralph E. Foley, 84, died April 15 in Spokane. The father of U.S. Rep. Thomas S. Foley, he was a Superior

UW Law School Alumni Activities

WSBA Annual Convention Events

Hosted Wine and Cheese Reception
Wednesday September 11, 1985 5:30-7:00 pm
Columbia Seafirst Center

No-Host Alumni Breakfast
Thursday September 12, 1985 8:30 am
Seattle Sheraton Hotel

Annual Alumni Recognition Banquet

Saturday, November 2, 1985 6:00 pm
Madison Hotel
HONORING:
US Congressman Thomas S. Foley '57
DeWitt Williams '32
Judge Eugene A. Wright '37

For details about any of these events, call
Susan Schroeter-Stokes (206) 543-8707

Briefly Noted

Court judge for 34 years. At his retirement in 1974, he was the senior member of the state's judiciary. Born in Barnesville, Minnesota, Foley moved to Washington in 1907. His playmates at Webster Grade School included Harry Lillis "Bing" Crosby. Foley received his bachelor's degree from Gonzaga in 1923 and graduated from its law school in 1926; in 1940, he became its first graduate to serve as a Superior Court judge. A teacher of criminal law for many years at Gonzaga and a judge pro tempore on the Washington Supreme Court, he served as president of the Washington Prosecuting Attorneys' Association and the Association of Superior Court Judges.

Harold M. (Hi) Tollefson, 76, died February 28 in Tacoma. A three-term mayor of Tacoma, Tollefson attended the then-College of Puget Sound and the University of Washington. He began practicing law in Tacoma in 1939. His brother, Erling, is a Municipal Court judge in Tacoma. Another brother, Thor, represented the 6th District in Congress for many years.

DISCIPLINE

Suspended

Spokane attorney **Riner E. Deglow**, admitted to practice in 1954, has been suspended pending the outcome of disciplinary proceedings by order of the Supreme Court, effective May 7, 1985. The suspension results from numerous trust account violations, including a failure to identify client deposits of $87,405, and the issuance of $21,900 in checks to himself that failed to identify the client against whose account the funds were drawn. Also cited in the complaint were Deglow's refusal to answer the formal complaint and his failure to appear for a show cause hearing.

In January, 1984, Deglow stipulated to the issuance of three Letters of Censure for neglect of a legal matter, intentionally failing to seek the lawful objectives of a client, intentionally failing to carry out a contract of employment, intentionally prejudicing a client, conduct involving dishonesty, fraud, deceit or misrepresentation, and failure to pay out client funds.

Federal Way attorney **Hamilton B. Underwood**, admitted to practice in 1976, was ordered suspended pending the outcome of disciplinary proceedings against him by order of the Supreme Court entered May 7, 1985. The suspension resulted from a pattern of neglect of legal matters, failure to provide information to clients and failure to cooperate with the Bar investigation, including a failure to appear when subpoenaed. These violate RLD 1.1(c), RLD 1.1(j), DR 1-102(A)(3), DR 6-101(A)(3) and DR 7-101(A)(2).

Seattle attorney **Don Gordon Willhite**, admitted to practice in 1964, has been suspended from the practice of law pending the outcome of disci-

plinary proceedings against him by Supreme Court Order entered April 26, 1985. The suspension resulted from Willhite's conviction in King County Superior Court Cause No. 84-1-03468-4 for vehicular homicide, a Class B felony. On the evening of November 17, 1984, Willhite's automobile struck and killed a motorcyclist. At the time of the accident, Willhite was driving without his lights and under the influence of alcohol. Willhite has a previous DWI conviction.

Reprimanded

Everett attorney **Victor E. Haglund,** admitted to practice in 1953, has been ordered to receive a Reprimand pursuant to a stipulation that he had paid himself fees from client trust funds without his client's consent, and that he had failed to account to his client for funds received on the client's behalf. These actions violate RLD 1.1(i), DR 9-102(A)(2) and DR 9-102(B)(3). By terms of the stipulation, Haglund agreed to submit to arbitration the fee question and will pay attorney's fees and administrative costs of $200. Haglund was reprimanded in 1972 for mishandling client funds and for inappropriate behavior in court, and was suspended for sixty days for conduct involving the retention of unearned fees.

Resolutions at the 1985 WSBA Annual Meeting

WSBA bylaws require resolutions and reports received by the Resolutions Committee at least 60 days before the Annual Business Meeting to be published in the *Bar News* preceding the Annual Business meeting.

The Resolutions Committee reports to the membership of the Association on each resolution, giving its recommendation and any proposed amendments or comments.

Send your written responses and comments about proposed resolutions to the Resolution Committee, c/o Washington State Bar Association, 505 Madison, Seattle, WA 98104.

On September 5 at 10:00 a.m., the Resolutions Committee will hold an advance public hearing at the WSBA. Upon completion of business or at the chair's discretion, the hearing will be adjourned to reconvene on September 11 at 9:00 a.m. at the Seattle Sheraton. The advance hearing will provide more time for those presenting views and will give the committee more time to consider resolutions and request additional information before making its recommendations to the membership.

Proponents and opponents of resolutions are urged to attend the September 5 hearing or to present your written views before September 5 to the committee for its consideration on September 5. Your presence at or absence from the September 5 hearing does not affect your right under the bylaws to present your views at the reconvened public hearing on September 11. You will receive preference on September 11 if your views were not expressed on September 5. Proponents and opponents will be given reasonable opportunities to be heard at both the advance session and the reconvened hearing.

The Resolutions Committee will recommend approval or rejection of each resolution following discussion at the reconvened hearing on September 11.

The WSBA bylaws contain information about time deadlines and submission of resolutions. You may obtain a copy from the WSBA office.

Big Names in a Small Town

The Poulsbo Bar Association is preeminent among non-metropolitan bars. Its second annual CLE, on August 1, features some of the biggest names in the U.S. and Washington. For your $95 (attorneys), $25 (full-time judges), or $45 (others), you get to see and hear Justice John Paul Stevens of the U.S. Supreme Court; "Racehorse" Haynes of Houston; Al Lindseth of Atlanta; Greg Canova, head of the Attorney General's Criminal Division in Olympia; Paul Luvera of Mt. Vernon; and Richard Johnson of Everett. The full-day program includes lunch. Jeff Tolman, (206) 779-5561, will be glad to give you more information on the hottest CLE in Washington in years . . . well, since last year in Poulsbo.

Notice

Spokane attorney, **Larry E. Krueger** was transferred to inactive status on May 8.

Hearings on DWI Client Assessment System

The Department of Social and Health Services Office on Alcoholism and its DWI Assessment Monitoring Committee will sponsor public hearings to elicit comment on the progress, problems, and future direction of the DWI Client Assessment System.

On January 1, 1984, the DWI Client Assessment System was implemented in Washington pursuant to HB 498. By June, 1985, 35,000 people had been evaluated by the system.

The hearings will be: July 10—1:00 p.m. to 4:00 p.m., DSHS, 12th & Franklin, Olympia; and July 11—9:00 a.m. to 4:00 p.m., Crestview Conference Center, 16200 42nd Ave. So., Seattle.

Consumer Pamphlet on Wills

The Washington State Bar Association, as part of its consumer information pamphlet series, has a new publication on wills. For a sample copy and ordering information, send a self-addressed, stamped business envelope to: "Wills Pamphlet," WSBA, 505 Madison Street, Seattle, WA 98104.

WSBA Credit Union News

New directors and officers were elected at the 7th Annual Meeting of the Washington State Bar Association Credit Union in Seattle recently. Directors for 1985 are: Anthony Butler, Robert Denomy, Thomas Hayward, Robert Henry, Christine Higashi (Secretary), Brian Lawler (President), H. Tony Martin (Treasurer), Barry Mills, and Marc Slonim (Vice-president).

Over the past year, Credit Union assets have increased 30 percent, IRAs 45 percent, and Money Market Accounts 45 percent. New branches have opened in Mount Vernon and Puyallup, in addition to existing branches in Seattle, Bellevue, Tacoma and Everett.

WALJA Convention

The Washington Administrative Law Judges' Association (WALJA) has its annual convention August 1-3 at Sun Mountain Lodge in Winthrop. A CLE program on administrative law on August 2 deals with proposed revisions to the Washington Administrative Procedures Act, proposed ALJ orders, Fair Labor Standards act provisions on exception work periods, and child abuse.

Nonmembers may register for the CLE by paying $30.00 at the door or by mail to WALJA, P.O. Box 7249, Olympia, WA 98506. Contact Christy Gerhart, (206) 464-7095, or Ernest Heller, (206) 753-2472, for more information.

Notices

NOTICES ADVERTISING

Professional: WSBA Members only. $40.00 per inch. Billed at publication.

Classified: Members—$25 for 25 words, each add'l 25¢. Non-members—$35 for 25 words, each add'l 75¢. Box number service—$6. Prepaid.

Deadline 25th of each month for second issue following. No cancellations after deadline.

Submit double-spaced typed copy (no phone orders) to Lorraine Wall, *Bar News*, 505 Madison Street, Seattle, WA 98104.

PROFESSIONAL

Ann Forest Burns, attorney and forester, is available for consultation or association in timber-related matters.

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Antonio Salazar, an attorney with nine years active experience in immigration matters, is accepting consultations and referrals in United States Immigration and Nationality matters.

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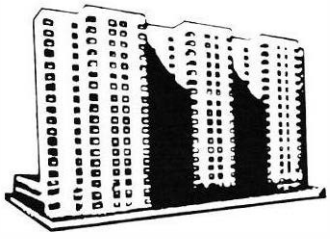

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is available for consultation, mediation and planning with regard to the federal tax consequences of divorce.

42 U.S.C. §1983
Lawrence B. Linville would like to exchange briefs, ideas and other information with other attorneys who also represent clients pursuing claims under 42 U.S.C. §1983.

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John Cooney announces his availability for referral, consultation or association on refusal to take breathalyzer, loss of driving privileges, hearings on appeal with Department of Licensing.

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FOR SALE/WANTED

Washington Citation—$120; Washington Reports First—$1,950; Am Jur Legal Forms Second—$450; Washington Digest—$400; antique captains chairs—$135 each; secretary desk—$125; Lathem time clock—$50; (509) 773-5888.

Attorney Jobs: The National and Federal Legal Employment Report—a monthly detailed listing of hundreds of attorney and law-related jobs with the U.S. Government and other public and private employers in Washington, DC throughout the U.S., and abroad. 3 months—$30; 6 months—$50; 12 months—$90. Send check to Federal Reports, P.O. Box 3709, Georgetown Station, Washington, DC 20007, or call (202) 393-3311. Visa/MC.

Law Books—New and used—Bought for cash, sold (convenient terms), consignment service, computer-assisted appraisals, John Teskey Law Books—Seattle (206) 325-1331; Portland (503) 644-8481.

For Sale: Olivetti ET 221, attorney's desk, credenza, and chairs. Call (206) 624-9400.

For Sale: *Corpus Juris Secundum* (West). Complete set. Mint condi-

tion. *Bender's Federal Practice Forms*. Complete set. Mint condition. Contact Librarian, Sax & MacIver, (206) 624-1940.

New and used law books for sale, steel book shelving also. Call us for your library needs. Rod Pullen & Company, Rt. 1, Box 48, Colbert, WA 99005, (509) 466-6312.

For Sale—Lanier No Problem Word Processor with extensive forms for general practice. $5,000 or assume monthly payments. Will train your word processor. (206) 483-5878.

For Sale: Complete set of Corpus Juris Secundum, in excellent, up-to-date condition. $1200, (509) 488-5636.

For Sale: Mag Card II with cards, always under Maintenance Contract. $1500, (509) 488-5636.

Wanted: Attorney seeks adoptable baby for client who can provide a good home. Please call or write Alexandra Cock, PO Box 19343, Seattle, WA 98109, (206) 282-9818.

For Sale: Proof of Facts, 1 & 2 complete. Price negotiable. David Welts, PO Box 1108, Mount Vernon, WA, (206) 336-5141.

OFFICE SPACE

Market Place Two. One to four offices available in ten-office suite. Exceptional view—Puget Sound, Mt. Rainier. Across from Seattle Club. Parking within building. Secretarial space, receptionist, telephones, copier access, law library, conference room, kitchen, file and supply storage. Contact Anita, (206) 448-1010.

Colman Building, Pioneer Square: Attractive office space available in top floor suite. Conference room, library, receptionist, copier, messenger service, supplies, etc. Word processing available. Very convenient location. Browne, Ressler and Foster, (206) 624-7364.

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SEEKS ASSOCIATION

Bellevue—Two experienced attorneys with emphasis in litigation and real estate seek experienced third attorney to share office space with view toward future partnership. Direct confidential reply/inquiry to Attorneys, 10112 N.E. 10th Street, Bellevue, WA 98004; telephone (206) 451-9568.

POSITION AVAILABLE

My practice is mostly real estate and conveyancing. I want to hire or make a partnership with a lawyer experienced in these areas. James Deal, 209 4th Ave., S., No. 201, Edmonds, 98020.

Medium size Seattle law firm seeks associates for its Wenatchee office. 1-3 years general business and/or litigation experience plus strong academic record required. Reply to Ogden, Ogden & Murphy, 2001 - 6th Avenue, Seattle 98121, Attn: John Wallace.

Southeastern Washington firm seeks associate for general practice with emphasis on litigation. Send resume to Box 60, WSBA.

Insurance defense litigation associate: Seattle firm with established insurance defense litigation practice invites resumes from attorneys with 3-5 years experience in product, personal injury or medical malpractice defense litigation. Superior credentials and jury trial experience are essential. Compensation and placement commensurate with experience. Response to Reed McClure Moceri Thonn & Moriarty, 3600 Columbia Center, 701 Fifth Avenue, Seattle, WA 98104-7007.

Medium-sized southwest Washington law firm is seeking an associate for the general practice of law with some emphasis on business and commercial work. Superior academic record preferred. Reply with resume to Box 61, WSBA.

Drake & Whiteley seeks a lawyer with a minimum of two years' experience in general corporate practice with a strong tax background. Applicants with excellent academic credentials and the requisite experience should apply to David R. Wilson, 1300 Skyline Tower, Bellevue, Washington 98004. Inquiries will be kept confidential.

Spokane Law Firm—seeks experienced criminal and felony attorney. Salary negotiable. All correspondence confidential. Submit resume to P.O. Box 9081, Spokane, WA 99209.

Small Spokane business-oriented law firm seeks attorney with emphasis in taxation. Candidate must have strong academic credentials. CPA and/or advanced degree in taxation highly recommended. Reply to Box 62, WSBA.

Established Skagit County Firm seeks associate with an interest in general practice of law. Opportunity to become firm member within three years. Compensation based on qualifications and experience. Resumes to Box 63, WSBA.

Medium-size Seattle insurance defense firm seeking lawyer with 2 to 5 years experience. Confidential resumes to Box 64, WSBA.

Experienced litigation attorney desired by small but growing law firm located in Yakima, WA. Minimum of three to five years experience. All replies strictly confidential. Reply to Powers & Therrien, P.S., 811 Summitview, Suite 4, Yakima, WA 98902.

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Tax attorney seeking position with law firm in Seattle-Bellevue area. Member of Washington State Bar. Law Review, LL.M. Reply to Box 53, WSBA.

Attorney with five plus years experience in general business, construction and securities litigation seeks position with Seattle or Bellevue firm committed to producing top quality legal work. Law review editor; top 5% of law class; academic honors. Reply to Box 65, WSBA.

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WILL SEARCH

Seeking will of Florence Jean Satre of North Seattle who died April 1985. Contact John M. Haggerty, Attorney, 1712 Pacific Ave., Everett, WA 98201. (206) 339-2326.

Will Information: Any person having knowledge of a will executed by Raymond Lee VanHorn, a/k/a Raymond Lee Noggles, please contact Houger Law Offices, 1319 Lee Blvd., Richland, WA 99352, (509) 943-8331.

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