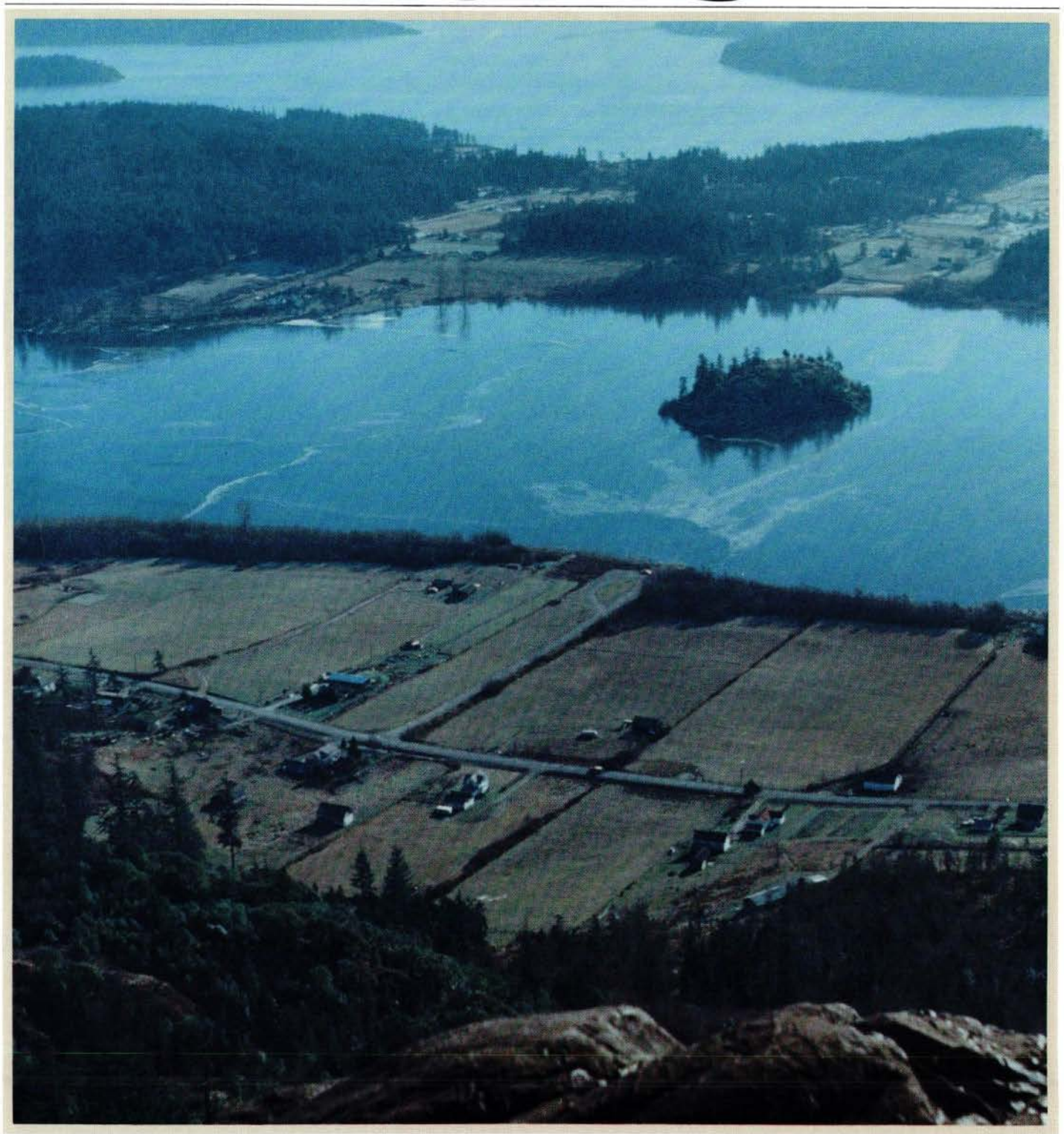
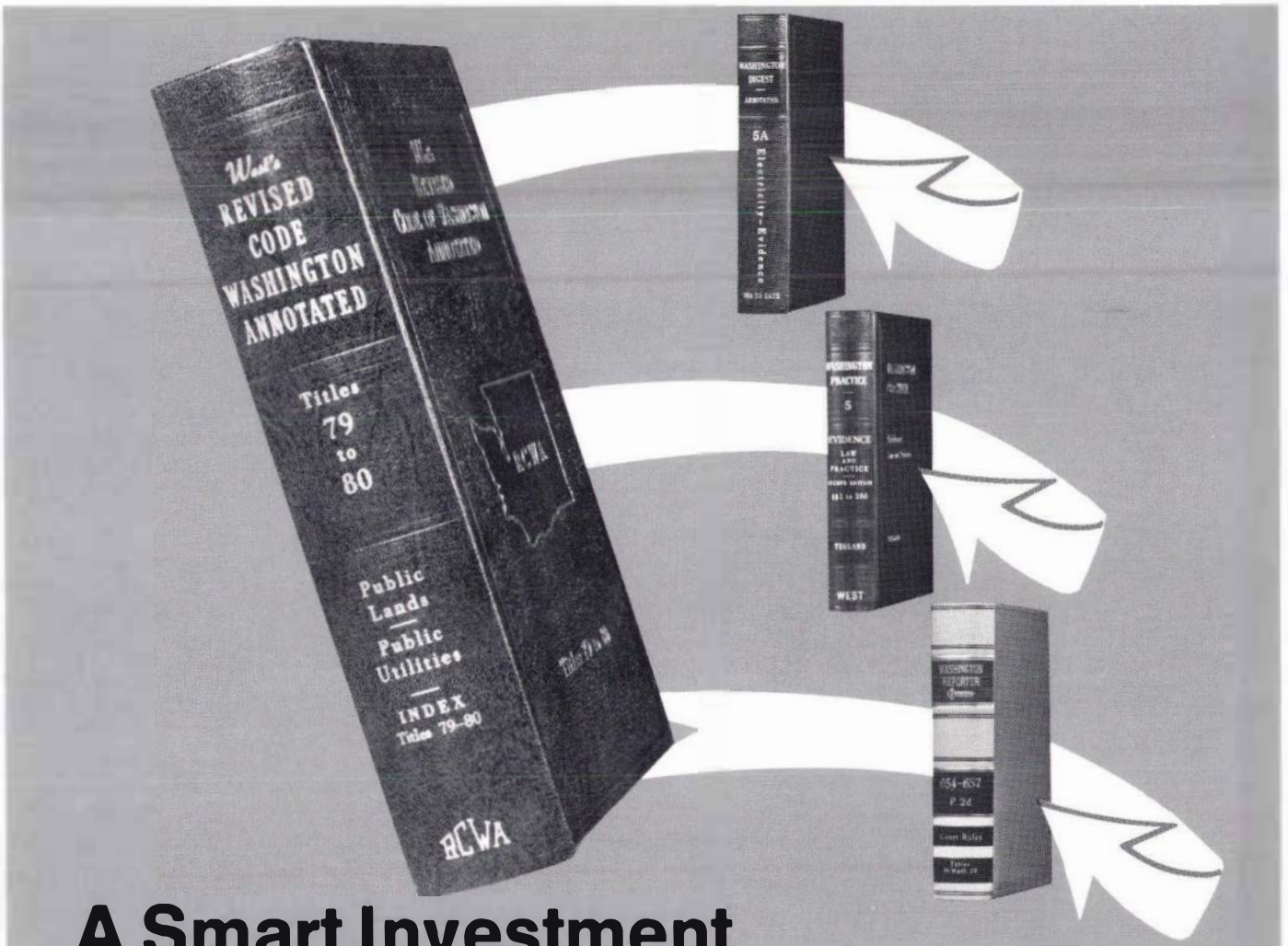
Washington State Bar News
Vol. 40, No. 10, October 1986



Real Property and Probate



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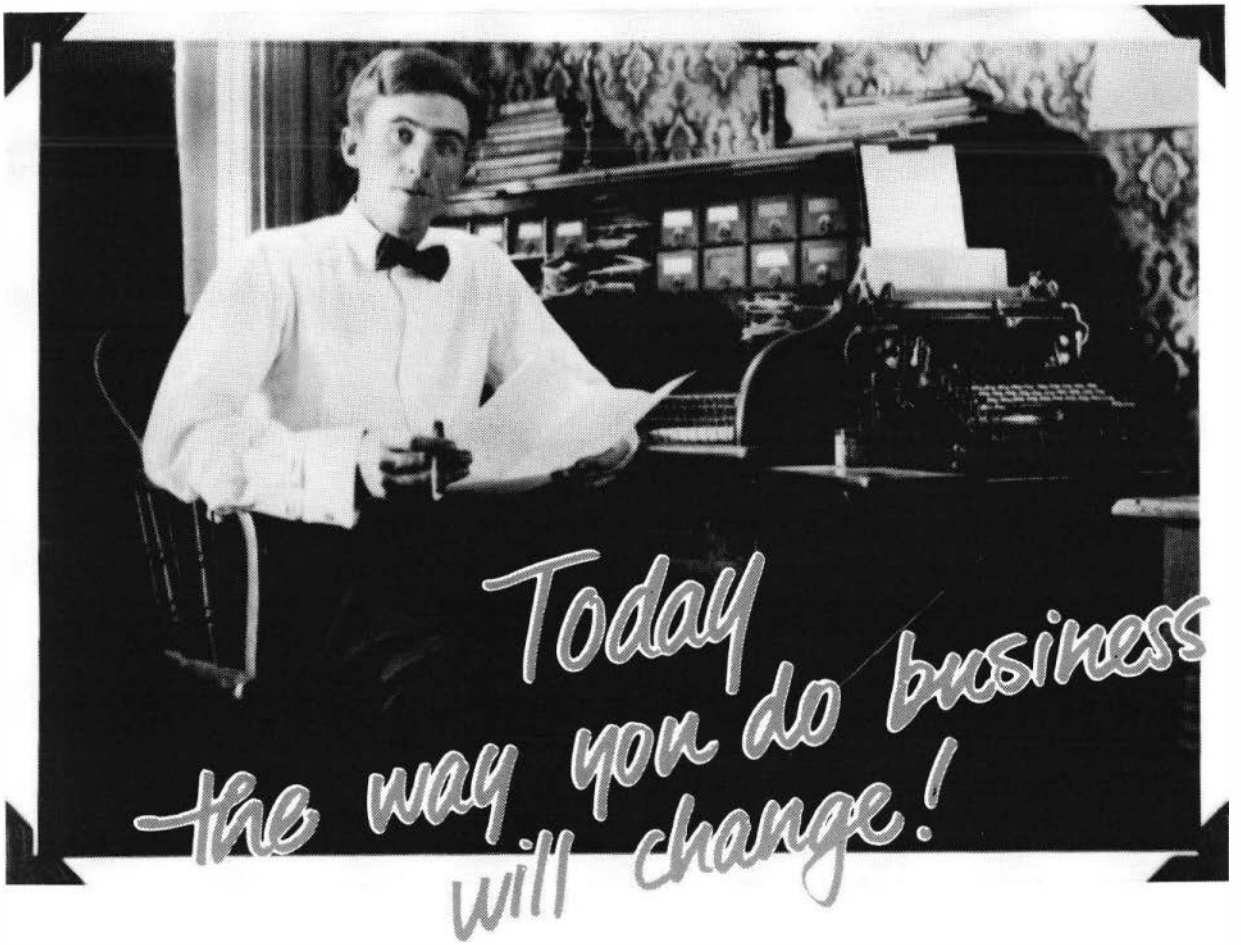

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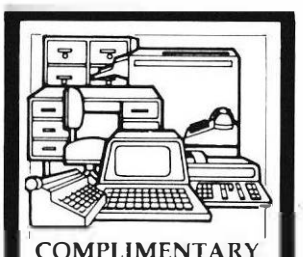

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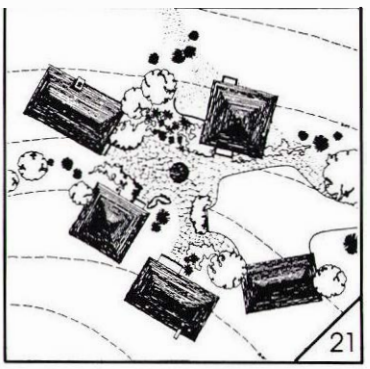
Washington State Bar News
Vol. 40, No. 10, October 1986

FEATURES



STATUS REPORT ON MALPRACTICE INSURANCE COVERAGE AND PROFESSIONAL LIABILITY FUND PROPOSAL

SEE PAGE 27.

IN THE NEWS

DEPARTMENTS

ART CREDITS

Cover: Developed and undeveloped lands near Deception Pass, viewed from Mount Erie, near the town of Anacortes. Photo by **John Redenbaugh**, Seattle, attorney.

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LETTERS

Fresh Air

Editor:

Your editorial entitled "Effective Bar Promotion" in the August *Bar News* was a "good, strong whiff of invigorating fresh air." It has needed to be said in print for a long time. This profession (if it still is one) is in great need of rebuilding a public image that once rightly commanded respect and held honor. We are responsible for letting others, and some of ourselves, tarnish the image.

I am proud of and pleased to be associated with many in this profession, and I am proud of you and pleased at your statements on this subject. Now, let's spend some of that dues money on stating our profession to someone other than ourselves.

DAVID P. MICKELSON
Bellevue

Services

Names Wanted for Attorney Referral List

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For further information, or if you have questions, call **Wendy Krakauer** at the Legal Aid Office, (206) 543-6486.

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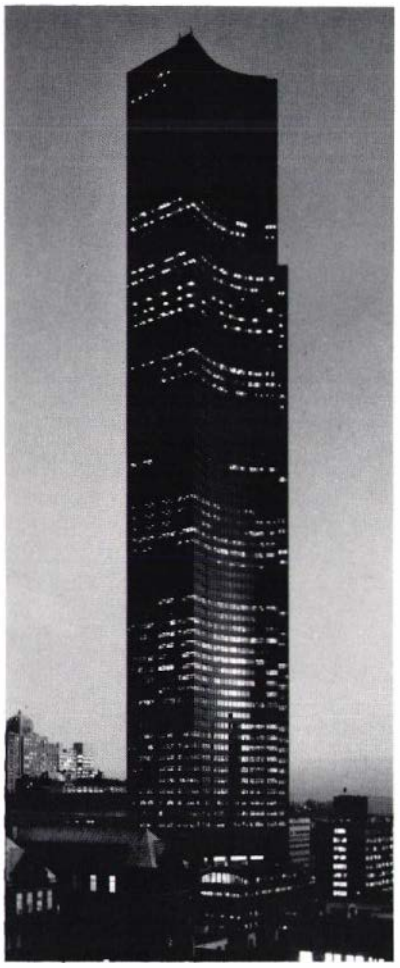

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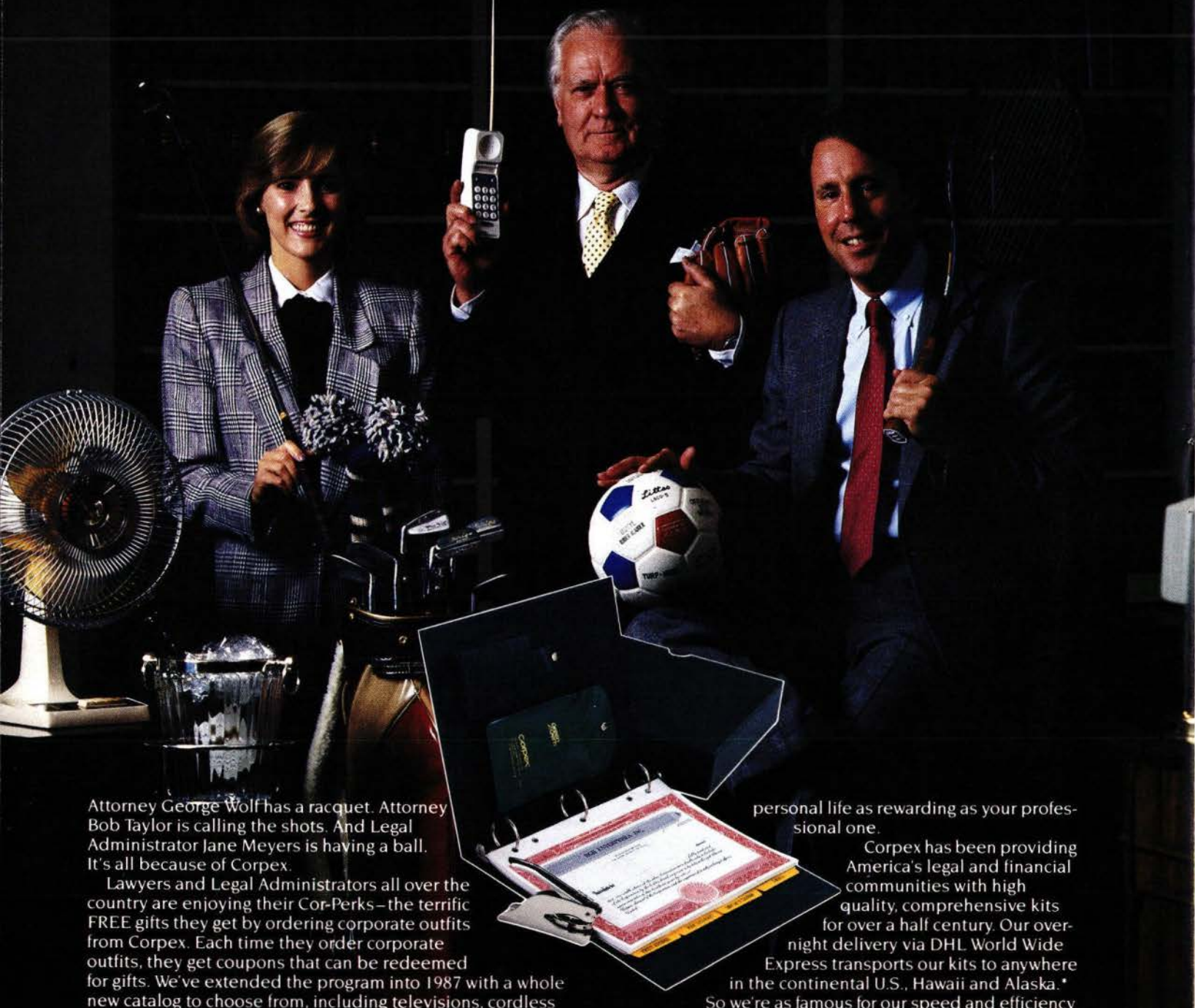

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The Legal Profession

Lee Campbell said in this column two years ago that he was concerned that the practice of law was losing its professionalism, and I want to second that comment. I think, in our daily practices, we have moved too far over on the side of business and away from public service. I am not talking about our bar associations, which are probably at an all-time high of public service activity. I am talking about how we act in conducting our practices.

What is the evidence?

Do you know what we tell new lawyers coming to our firm? We tell them that their progress is substantially dependent on their ability to attract clients.

You know what the job description of the newest staff position in most of our major law firms is? It is a job called public relations manager, and the assignment is to get the name of that firm, or the names of its lawyers, in the newspaper—a bonus if the article includes a picture.

Most of us have learned more than we want to know about hourly rates, billable time, monthly statements, accounts receivable and, of course, the bottom line. Slowly but surely we have been turned into businesspersons, even hucksters, and away from the real genius of our profession—public service.

When he was asked to define a profession, Dean Roscoe Pound of Harvard Law School said:

> "The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."

The practice of law twenty-five years ago more nearly conformed to that high principle.

I am not so naive as to suggest that in 1961 lawyers were unconscious of means to attract clients or oblivious to the need to make a dollar. What I do say is that we were more conscious of our higher calling—less absorbed in business development tactics.

"Higher calling"—fancy words, idealistic, yes, but an ideal which must not be lost. The change is certainly not black and white; it is a matter of emphasis—a matter of degree. Water does not freeze at fifty degrees Fahrenheit or at forty degrees Fahrenheit but, if you keep going in that direction, you do not have water anymore—you have ice. Can we so ignore professionalism that we eventually lose our profession?—You bet we can.

What does a person think of when he sees ads in yellow pages, fancy brochures on high-gloss paper, artsy letterheads and logos? Does he think of his doctor or his minister—certainly not. He thinks of sales, business, profit. Are these the indicia of a profession? There is a lot of reality generated by the image we see reflected in the public's eyes. There is a lot of reality created by the standards we set for one another—low or high.

Fortunately, this issue of waning professionalism is beginning to receive organized attention by the profession. An ABA commission has published a classy report on the subject. Task forces in many state bars are addressing the issue. I intend to ask your Board of Governors to give the matter attention.

What we are talking about here does not lend itself to any legislative solution or rule making. It is a condition based upon the cumulative attitude of the individual members of the bar. What goals do we set for ourselves—what are the real priorities in our practice? With the hope of lifting our sights a bit, let me recall to you my favorite lawyer story:

To Kill a Mockingbird is the tale of a respected lawyer in a small southern town in the 1920s, appointed to defend a black man unjustly accused of rape. His cause is unpopular, the testimony perjured, the jury biased. The balcony of the courthouse is occupied by the black persons in the community led by their patriarch. Seated in the front row with them is the lawyer's young son who has viewed the trial uncomprehendingly. A verdict of guilty is returned; the courtroom slowly empties. As the lawyer, utterly defeated and alone, walks slowly out, the small group of black citizens rises. The son stays seated, watching his father. With quiet dignity and love, the patriarch, in six short words, distills the essence of what I am trying to say:

"Stand up, boy—your father's passing."

William N. Gates

Guest Editorial
by **Scott B. Osborne**

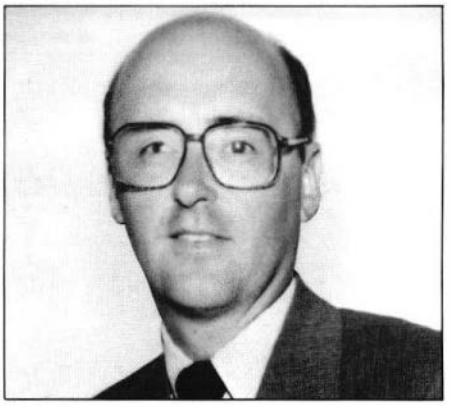
The Real Property Probate and Trust Section of the Washington State Bar maintains an active and diverse schedule of events for its members. As well as the business meeting and seminars at the annual meeting, a mid-year program is held every year in late spring, a quarterly newsletter is published (although not exactly on schedule), and various Section committees are continuously meeting to study legislative proposals, participate in community events and assist in CLE programs sponsored by the WSBA.

The Section is administered by an executive board which is divided into the Real Property Council and the Probate and Trust Council. The Section Chairman's position alternates from a member from one of the two councils to a member of the other on an annual basis. The Section is currently considering establishing some permanent subcommittees to broaden the base of people actively participating in Section activities.

Like all Bar sections, the Real Property, Probate and Trust Section not only wants to have more members, but needs more help from its members. The law affecting real property probate and trust matters used to have a glacial quality to it—nothing much happened and when it did, it happened slowly. After all, if you were dealing with instruments purporting to lease property for 99 years or keep property in trust for a lifetime, a premium was placed on safety and certainty, not creativity and innovation.

Now, particularly in the legislative area, the rules which govern these transactions change continuously. Keeping up with these changes and trying to have some meaningful input to improve the legislative product is almost a full-time job. The recently enacted Real Estate Contract Forfeiture Act is a dramatic example of a meaningful piece of legislation which Section members were able to significantly improve in a joint effort with other interested parties through study and careful drafting. Although some might question the need for the legislation in the first place, and I am certain that not all real estate contract vendors are pleased at having to leap through the procedural hoops created by the statute, by the time the Section became involved in the process it was clear that the legislature was going to pass a bill on the subject. What was being proposed had been modeled on another state's real property law. The act the legislature ultimately passed is much the better for the participation by volunteers from the Section.

But to be effective, the Section needs more people who can volunteer their time. If you have an interest in writing, legislative activities or CLE programs in the area of real property or probate and trust law, the Section officers would like to



have your help. As the articles in this *Bar News* demonstrate, there is a broad spectrum of issues with which the Section must be concerned, and there is room for all interested members of the Bar to participate.

Hazardous Waste and Real Property Transactions

Residences surround the Midway landfill in south King County. Photo by William Dahl courtesy of City of Seattle Engineering Department Solid Waste Utility

by **Anne DeVoe Lawler** and **Mark Weiss**

How To Avoid It and What To Do if You Find It

A client enters your office complaining that when his crew started construction on property purchased for development they unearthed sludge containing PCBs. Another client discovers that the foliage on his property is dying from an underground infusion of di-chloro ethylene. Yet a third client discovers soil contamination from leaking underground storage tanks.

These are only a few ways in which innocent landowners may be injured by hazardous wastes which have leached onto their property or which were deposited by predecessors-in-interest. With cleanup costs climbing into the hundreds of thousands, even millions, of dollars, what is a landowner to do? Selling contaminated land is difficult at best, and cleanup is prudent, usually mandatory, and always very expensive.

In another scenario, let's say clients contact you concerning property they are interested in purchasing or leasing for development. They ask how to determine if the property is contaminated by any hazardous or toxic substances. They wish to avoid being faced with staggering cleanup costs.

Property owners who discover they own or lease contaminated property and prospective purchasers or lessees evaluating property share a common concern—the very high cost of cleaning up contaminated soil. Under Washington statutes and the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the *present* owner may be held strictly liable for the cleanup costs. These costs include any emergency or long-term clean up costs incurred by the United States, any cleanup costs required by the state government or a private individual, and damages for injury to natural resources.[1]

Confronted with contaminated property and high cleanup costs, the innocent owner looks for monetary relief from parties responsible for the contamination. Tort remedies as well as actions for contribution[2] or indemnification may be available avenues of relief.

The prospective purchaser, on the other hand, should take preventive measures. These include developing information on the prospective site, e.g., an historical profile and an extensive soil analysis, and should make his or her offer to purchase contingent on satisfaction with the results. Once a decision to purchase is made, (s)he may take the additional step of requiring an indemnification and express warranty from the seller or ground lessor.

Remedies for Damage to Property

Many problems are involved in prosecuting a tort action against the party originally responsible for the waste. Aside from the obvious difficulties in identifying and locating the responsible party, the issue is complicated by the fact that there are often several, and sometimes hundreds of, prior generators of hazardous waste at any particular site. Add to this the fact that either a two- or three-year statute of limitation applies, and a plaintiff's problems in seeking a tort remedy mount rapidly.

The problem in determining exactly which party deposited the injurious waste is solved in part by the Washington Supreme Court's adoption of the Market-Share Alternate Liability doctrine in *Martin v. Abbott Laboratories*, 102 Wn.2d 581 (1984). Although *Abbott* involved a drug manufacturer's product liability, its principles presumably apply to the hazardous

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waste arena. Applying the *Abbott* reasoning, a plaintiff need commence suit against only one defendant and prove that that defendant was the responsible party for at least *some* of the hazardous waste on (or in) the plaintiff's land. Individual defendants may exculpate themselves from liability if they can prove that their waste could not have entered the plaintiff's land.

As to the statute of limitations, the Washington Supreme Court recently adopted the "discovery" rule in an environmental law context. *Bradley v. American Smelting*, 104 Wn.2d 677 (1985) *("ASARCO")*, holds that the statute of limitations begins to run only when the plaintiff discovers, or with due diligence could have discovered, the injury or damage arising out of the invasion of pollutants on his or her land. For damage of a continuing nature, damages may not extend past the period of limitations.

The *ASARCO* court provided some valuable clues as to how Washington courts may determine issues posed by waste found on an innocent party's property. The court held ASARCO liable for trespass resulting from the deposit of airborne pollutants emanating from ASARCO's Tacoma smelter onto the plaintiff's property on Vashon Island. The fact that air flows or underground aquifers might also transmit pollutants did not exculpate the source of the pollution because the chain of causation was not broken. The court found that modern scientific techniques can adequately trace the source and flow of wastes through air flows and aquifers.

Several theories, besides trespass, may be useful in this context. Strict liability may be imputed to the responsible party on the basis of abnormally dangerous activities. No Washington case to date has squarely held that the generation, transportation or handling of hazardous waste is abnormally dangerous, although *Langan v. Valicopters, Inc.*, 88 Wn.2d 855 (1977), held that aerial crop pesticide spraying was an abnormally dangerous activity when some of the pesticides drifted onto an organic farmer's field. The same would presumably hold for the migration of other hazardous compounds, particularly if a business or the property suffers a diminution in value as a direct result.

Common law negligence and negligence per se might also be applicable as against the owner or operator of a toxic waste dump. Although no Washington court has considered the question, other states have held defendants liable under negligence theory. *See, e.g., Ewell v. Petro Processors of Louisiana*, 364 S.2d 604 (Louisiana 1978).

Both private and public nuisance theories may impute potential tort liability on neighboring toxic waste dump operators. The *ASARCO* court expressly held that nuisance might be an appropriate theory for prosecuting hazardous waste invasions.

As to predecessors-in-interest, there is also potential liability for actions alleging misrepresentation by the non-disclosure of the presence of hazardous waste, as well as potential breach of warranty actions.

Preventive Measures

Investors in real property do not want to find themselves evaluating the various tort or contractual remedies listed above. Therefore, they need to take preventive measures when evaluating property for purchase or lease. Those measures include two general phases—an historical analysis of the uses of the property and actual soil and water testing. The information generated may indicate whether the property contains contaminants. The investor can evaluate that information and determine whether to abandon the transaction or how to renegotiate with the prospective transferor or grantor.

The potential purchaser can attempt to gather the historical information on the site or he or she can contract with one of the firms who provides this service, as well as the follow-up and more extensive site, soil and water analyses. Two such Washington firms who have found their work for such historical and site analyses increasing rapidly in the past few years are Hart Crowser, Inc. and Earth Consultants, Inc.

The analysis offered by these and similar firms is essentially the same. The initial focus is to develop an historical profile of the site to see if there are any indications of possible contamination based on prior uses of the property. Sources which might be checked include the chain of title for the property, building department records, fire insurance maps, aerial photos, health department and Department of Ecology files, historical society records, surveys, and old newspaper clippings. The current uses of adjacent properties might also be checked.

The time required for this historical search and resulting report to the prospective purchaser would be one week or more, depending on the size and locale of the property. The cost, depending again on the same variables, could range from five hundred to several thousand dollars.

This search might reveal, for example, that the property was used previously for disposal purposes or had underground storage tanks. Based on this information alone, a prospective purchaser may choose not to purchase the property. Or, if it reveals the property is virgin timber land with no previous history of use, a purchaser may choose to proceed with the transaction without further studies.

More typically, the investigation proceeds to the next step, which includes a site evaluation and some soil and water testing. Philip Spadaro, Project Geochemist at Hart Crowser, Inc., described the on-site analysis to include walking the site and examining any existing structures for obvious signs or indications of contamination. These would include drainage oil spillages, evidence of dumping, or the pres-

ence of distressed vegetation, ponds or slag.

Information gathered from the site reconnaissance and history profile would give an indication where soil tests and borings should be taken. Bill Chang, Project Manager for Earth Consultants, Inc. stated that the soil and ground water tests would show the range of heavy metals present in the soil and the presence of PCBs or solvents.

The time required for the soil and water testing and analysis can range from a minimum of one to two months to four or five months, depending on the size of the property and the number and type of tests done. The cost of the analysis, including the test costs and the consultant's fees can be high, ranging from a minimum of $2,000 for a small parcel up to several hundred thousand dollars.

Both Bill Chang at Earth Consultants, Inc. and Philip Spadaro at Hart Crowser, Inc. indicated that these types of environmental assessments are becoming increasingly common for parties interested in purchasing industrial or commercial land. The seemingly high cost for the assessment is being viewed as *de minimis* in light of the potential astronomical cleanup costs that a property owner could be assessed if toxic or hazardous substances were discovered subsequently.

Once the test results are analyzed, the purchaser can evaluate the risk of proceeding with the transaction. If the purchase of the property remains important, for example, because of its locale, the purchaser has a basis for renegotiating certain aspects of the transaction with the seller.

The practice tips to be gained by attorneys advising parties interested in real property purchases or ground leases, particularly when industrial or commercial land is involved, are (1) to advise clients to consider obtaining an environmental assessment of the property being considered; (2) to build into the contingency section of any earnest money agreement, option agreement, real estate purchase and sale agreement or similar document (a) a requirement making the purchase contingent upon the purchaser's receipt of an environmental analysis of the property satisfactory to the purchaser, and (b) a requirement allowing purchaser or its agents on the property before closing for environmental testing; (3) to require the seller or ground lessor of the property to warrant that, to the best of their knowledge, there has been no contamination of the property; and (4) to require the seller or ground lessor to agree to indemnify the purchaser or lessee should any contaminants subsequently be discovered.

While taking all of the foregoing steps will not totally eliminate the possiblity that contaminants may be found on the property, they should assist the purchaser in making a more informed purchase and provide some avenues for redress if contaminants are discovered. □

[1] *U.S. v. Northeastern Pharmaceutical and Chemical Co., Inc. (NEPACCO)*, 579 F. Supp. 823, 844 (W.D. Mo. 1984); Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 Harvard L.R. 867, 986-87 (1986); 42 USC § 906(a)(4)(A), (B), (C).

[2] *See, U.S. v. Ward*, 575 F. Supp 1.59 (E.D. NC 1984).

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The Limited Practice Rule—

Its Track Record After Four Years

photo by Tony Duffy/Duomo 1980

by **Andrew F. Fuller**

Nearly four years have passed since the Limited Practice Rule became effective in Washington State. The Rule was initially promulgated by the Supreme Court following the confusion which resulted when the Court decided *Hagan* v. *Kassler Escrow, Inc.* in 1981. The Rule allows non-attorneys who meet the limited practice license requirements to engage in the limited practice of law, specifically, selecting and filling out certain forms for the conveyance of real property.

The LPO Population

According to Susan Cartwright, Administrator for the Washington Supreme Court, the state currently has approximately 700 active Limited Practice Officers (LPOs). Of this total, approximately thirty percent (30%) are escrow officers and thirty percent (30%) work for title companies. The remaining LPOs are lenders or real estate agents, with the latter comprising the smallest percentage. Cartwright noted that 30 to 40 LPOs have become inactive in the past year. Those individuals can remain on inactive status for one year, during which time they are not required to pay an annual fee or meet the financial responsibility requirements of the Rule. The number of LPOs is expected to remain constant in the future, with new licensees replacing those who become inactive.

The Limited Practice Board, which supervises LPOs and compliance with the Rule, has approved over 45 forms for use by LPOs. A complete list and copies of the forms can be obtained from the Administrator's Office of the Supreme Court. In addition, the Board will review and approve forms which meet its standards at the request of private parties.

Reactions

Ted Zelasko, Chairman of the Limited Practice Board, stated that most persons are delighted with the Limited Practice Rule. The exception is some lawyers who feel that their territory has been invaded. Zelasko observed that few real estate agents or brokers have taken the Limited Practice exam. The majority of persons are associated with title companies and lenders. The agents and brokers have found that they prefer to let someone else draft the final documents.

Zelasko stated that the major effect of the Rule is to provide adequate protection to the public by making certain that persons who select and fill in documents for the conveyance of real property are reasonably qualified. The Rule accomplishes this by requiring LPOs to pass an initial exam and to complete ten hours of continuing education per year.

Zelasko also noted that the Rule requires LPOs to be financially responsible. They may become financially responsible in any of three ways: (1) by employer endorsement; (2) by an employer's audited financial statement acknowledging employment of the employee; or (3) by independent insurance. Zelasko stated that the major problem which persons seeking to practice under the Rule have encountered is the escalating cost of liability insurance required for financial responsibility.

Reaction to the Limited Practice Rule has generally been positive from those involved in real estate transactions west of the Cascades. According to Marria Fuqua, an LPO and manager of escrow services for Safeco Title Insurance Company in Seattle and Bellevue, the establishment of the Limited Practice Rule is the "most effective change" in the 25 years she has worked in the escrow business.

She indicated that the Limited Practice Rule gives a great deal more credibility and a more professional impression to the escrow business. She has observed that the standard of care has greatly increased and that the Rule has made escrow officers who are licensed as LPOs more aware of their responsibility.

Fuqua finds the requirement of notice to her customers of the LPO's responsibility a good idea. In her experience, the customer has become a more important, integral part of the real estate transaction. The Rule has caused her personally to be more careful in terms of advising customers that they need to see an attorney.

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In addition, Fuqua stated that the requirement of advising clients to consult an attorney removes a marketing concern. Before the Rule, escrow agents may have been somewhat reluctant to do so. Clients or real estate agents may have felt that introducing a lawyer into the real estate transaction created an unnecessary cost. If an escrow agent refused to complete the transaction without the assistance of a lawyer, there was concern that the customer or real estate agent would not bring future business to the escrow agent. The Rule eliminates this concern by making such advice mandatory.

According to Sherri Pelletier, also an LPO and escrow agent at Safeco, the Limited Practice Rule has had the greatest impact in the residential area because, prior to the Rule, closing officers prepared the majority of the conveyancing documents. In commercial transactions, all sides are normally represented by counsel who document the transaction.

Both Fuqua and Pelletier react positively to the Rule's specification of which documents an LPO can and cannot prepare. Among the documents the rule allows LPOs to prepare are warranty deeds, notes, real estate contracts, and deeds of trust. Pelletier finds the industry as a whole to be more selective in preparing documents. For example, LPOs are unlikely to include subordination clauses and deed releases in documents, whereas escrow officers often included such clauses before the Rule. LPOs can also easily inform customers which documents they are not authorized to prepare.

Judi From, an LPO and co-owner of Puget Sound Mortgage and Escrow, a residential escrow company located on Bainbridge Island in Kitsap County, agrees that the Rule makes LPOs careful about forms: LPOs do not fill in forms that escrow officers would have filled in before the Rule. Prior to the Rule, From indicated, escrow officers filled out addenda to purchase agreements and powers of attorney. Now, LPOs fill in only the specific documents they are allowed to complete. LPOs also will not answer questions if the answer might sound like legal advice. From finds that the Rule generally makes LPOs and escrow agents more reluctant to answer questions.

From has mixed feelings about the Rule. On the one hand, the theory and the intent behind the Rule make sense to her. Real estate transactions involve a lot of money; often they are the largest purchase or sale of a person's life. However, From finds the customer is not necessarily "better off." She is not sure that customers read the notice that they are entitled to an attorney carefully or that they do things differently.

The financial responsibility requirements of the Rule cause From the greatest frustration. The Rule requires escrow companies to obtain a certain amount of E&O (errors and omissions) coverage. She is concerned that the high cost or the inability to obtain insurance may put small escrow companies out of business. These companies do not have the option to put up a certain amount of money or establish a certain net worth that larger companies have. Moreover, the cost of insurance is passed on to consumers. From acknowledged, however, that the cost of insurance was an issue apart from the Limited Practice Rule; it was not generated by the Limited Practice Rule in itself.

From's statements are verified by the reaction of Safeco's escrow officers. According to Pelletier, the financial responsibility requirements do not have a great impact on her since Safeco has offered a statement of financial liability demonstrating an ability to respond to damages, instead of her carrying insurance.

East of the Cascades

The experience with the Limited Practice Rule east of the Cascades varies widely. In the Tri-Cities and Walla Walla areas, the experience with the Rule parallels that found west of the Cascades. Kay Farrell, an LPO with Safeco's office in Kennewick, indicated that it is well received. The LPOs draft most conveyancing documents for residential transactions, which comprise the bulk of real estate transactions in that area. Farrell commented that there are not many independent escrow companies in that area so she has not perceived a problem with the financial responsibility criteria. James Hayner, an attorney in Walla

Walla, indicated that, with respect to residential transactions, title companies continue to handle all aspects of closings, including document preparation. If transactions have special "quirks" or involve commercial or large farm parcels, the parties usually seek an attorney's advice. He noted, however, that this was the practice before the Rule was enacted.

In Spokane, however, where the *Hagan* v. *Kassler Escrow, Inc.* lawsuit originated, the Rule has had very little impact. The practice in that area in the majority of real estate transactions is for the paperwork to be completed under the auspices of a law firm. Linda Cash, an LPO with Inland Empire Escrow, Inc., indicated that there are only a few LPOs in the Spokane area. She believes she operates one of the only two independent escrow and closing offices.

Cash observed that the few title companies or escrow companies that used to do closings have ended that practice. Many of the individuals who were working for those companies are now employed by law offices.

This observation was shared by Sharon Bordner, who handles real estate closings for the Hackney Law Office in Spokane. Both Bordner and Cash commented that, in the majority of instances where transactions are closed through law firms, the responsible attorney will have little contact with the paperwork and probably will not see the clients unless a special question or concern arises. In a few instances, the real estate closings are operated out of "satellite" offices which may be miles away from the attorney's regular offices. One such satellite office is operated by an attorney whose principal office is in Bellevue.

Cash shares the concerns about the costs of satisfying the financial responsibility requirements. She noted that she had great trouble getting insurance coverage this year and is uncertain if it will even be available to her next year. She also commented that she has had problems getting CLE credits because there are not many courses available to her.

Cash also noted that the expense of satisfying the financial responsibility requirements and the concern of liability have kept some certified LPOs from stepping out from under a law office's protective shield to pursue their own business.

Broker Response

The response to the Limited Practice Rule from real estate brokers is neutral or non-existent. According to Tom Abbott, the head of Cushman & Wakefield in Seattle, the Limited Practice Rule is "a non-issue" with respect to commercial transactions because attorneys are routinely involved in such transactions. John Jacoby, a broker at Wind-

ermere Realty, commented that the Limited Practice Rule has had no effect on brokers in the residential setting. Jacoby stated that the reason for this is that brokers do not generally close transactions. Thus, the rule has not changed their practice "one iota."

Certification

Cartwright stated that the Office of the Administrator of the Washington Supreme Court receives approximately 150 phone calls per month regarding the Limited Practice Rule. Most calls concern becoming qualified under the Rule, financial responsibility requirements, and insurance questions. Exams for becoming an LPO are offered twice per year, in April and October. Approximately 70 persons passed last April's exam and 50 persons passed the previous October's exam. Cartwright also indicated that the majority of continuing education classes have been conducted by escrow associations. In addition, title insurance companies have held in-house programs, the Bar Association has offered classes, and community colleges offer real estate law programs.

Escrow and Closing Officers

The Rule generally has been well received by those it affects the most—escrow and closing officers. The Rule seems to have been embraced enthusiastically by escrow and closing agents in most areas of Washington, with the exception of the Spokane area. In Spokane, the Rule appears to have had a *de minimis* impact as far as having persons qualify under the Rule. Few persons are licensed as LPOs, and residential real estate closings continue to be handled almost exclusively by law offices, although not personally by attorneys. To a great extent, this is simply a continuation of the methods of practice in Washington which existed prior to the Rule—in the Spokane area, real estate closings have traditionally been handled in law offices, while in Western Washington, title companies, mortgage firms and escrow companies have normally handled this work.

Summary

The overall assessment is that the Rule has had little or no effect on how closings are handled statewide. With respect to commercial and complicated real estate transactions, people continue to use attorneys. Residential closings are handled in the same manner as before *Hagen* v. *Kassler Escrow, Inc.* The process has simply been "legitimized," although there is the hope and perception that LPOs are better educated and that parties to the transactions are better informed of their rights and the need to consult an attorney about the legal impact of the transactions. □

Andrew F. Fuller is a third-year law student at the University of Washington.

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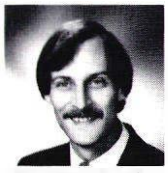
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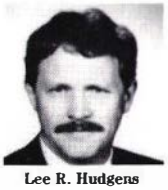
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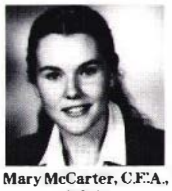
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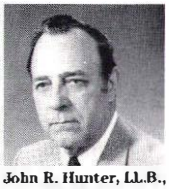
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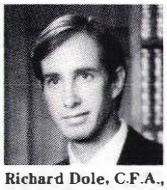
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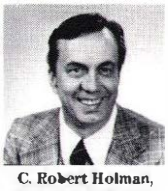
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Liquidity for Real Estate Limited Partnership Interests

by **Mark S. Thompson**

An estate you represent holds a limited partnership interest in a real estate syndication. The interest has value, and the estate wants to realize that value. How do you liquidate a limited partnership investment interest in syndicated real estate? All too often, you should not, you cannot, and you do not. What you can do is face the problems of liquidation of limited partnership interests, seek the advice of liquidation services, and determine who should liquidate the investment.

Limited Partnerships

Limited partnerships invest in several types of real estate, from conventionally financed income-producing properties, including investments in commercial real estate, to government-assisted housing. This latter group is the most common limited partnership investment, although partnerships investing exclusively in commercial properties have become more common through large, relatively inexpensive public offerings. In these syndications, investors exchange investment dollars for highly predictable tax shelter benefits. Most government-assisted housing properties are run under the provisions of the Section 8, Section 236, or Section 515 Programs. In these programs, portions of the rents are paid by the government to enable persons of low and moderate income to afford better housing. These rent supplement arrangements often act to promote high occupancy and to ensure rental income adequate to cover expenses and debt service. In return for the guaranteed rent supplements, the government limits the cash that may be paid out to investors, has the right to veto any proposed rent increases, and will not allow conversion of the property to other uses for extended periods—usually 20 years. Much government-assisted housing has, in addition to the rent subsidies, mortgage financing provided at highly favorable interest rates under Section 211 (d)(3) or (d)(4) programs.

In commercial real estate programs, investors receive a stated share of "cash flow," as well as tax losses. Rents are typically projected to escalate over time, but the limited partnership bears the full market risk if the property does not lease according to schedule or at projected rents.

Tax Shelter Value

For government-assisted housing, the preeminent investment return is the tax shelter value. Cash flow is limited. For original investors, conversion to other uses is too far in the future to be a major consideration. A standard rule of thumb has been that, for each dollar invested in these programs, 85 cents is spent for the tax shelter, 10 cents for the cash flow, and 5 cents for the residual value. Although resyndication transactions—especially from late 1981 through 1984—have enhanced the residual values of these properties, the emphasis remains on the tax shelter value. For market-rate apartments, the absence of restrictions on rents, cash distributions and conversions significantly increase the importance of cash flow and resale values relative to the tax loss value. Over the past 15 years, both types of investments have proven highly profitable for investors with marginal tax rates of 50 percent or above. Many investors, perhaps the majority, have received annual after-tax rates of return in excess of 20 percent.

Likewise, in typical commercial syndications, tax benefits provide the bulk of initial returns on invested capital. Lately these trans-

actions have been more "economically" structured (*i.e.*, the syndication projects a current cash return on investment), but the real return other than tax benefits comes from a hypothetical sale of the property somewhere between seven and ten years after the investment. Returns on large syndicated ventures typically are in a range associated with high-yielding securities—anywhere from 12 percent to 20 percent "after tax" which includes the calculation of gain after the hypothetical sale.

As this article goes to press, the U.S. Congress is considering many possible changes in the tax laws with significant potential impact on real estate partnerships. Tax shelter value may be substantially affected by changes in the marginal tax rates, by application of "at-risk" provisions to real estate, by changes in depreciation schedules, by limitation of the use of "tax shelter losses" to offset other income, and by special provisions of government-assisted housing—among other legislative proposals.

Illiquidity

If these limited partnership investments have been profitable, they have also been illiquid. The investors knew this from the start. Typical offering statements required investors to sign documents stating that they recognized the illiquidity and had ample assets and income that they would not need to cash out early. Sometimes, however, unforeseen events occur and the interests must be sold. An investor might have severe financial reverses, not be able to use the tax losses and have sufficiently reduced income that the tax consequences of sale are not great. Or the investor may die and the interest pass into an estate. The will may call for complex percentage divisions of the estate—divisions that are much more readily carried out with cash than with partnership interests.

The prospective seller of a limited partnership interest typically has few choices. For privately placed investments, sale is especially difficult. The securities laws of the various states prohibit general advertisement or offering of these interests. ("Blue-sky laws" vary from state to state, and the rules governing the sale of partnership interests must be consulted to avoid adverse financial consequences to the investor or estate.) The limited partnership agreement itself may restrict sales to third parties, contain rights of first refusal or even prohibit the partnership interest from passing to heirs. In practice, the best the seller usually can do is to inform the other limited and general partners in the same investment of his or her need to liquidate. The limited partners are typically not interested. The general partners, with more of a responsibility to be helpful, may make an offer, but this offer

may represent a fraction of the value of the interest and is probably not going to be the "fair market value" for the interest because a market rarely exists. The general partner may not have the liquidity necessary to "cash out" a limited partner, or the general partner may have little incentive to invest cash in a project which it already controls unless that cash investment is expected to yield a substantial profit. In public programs, the brokerage firm which originally sold the interest may attempt to resell it, but the market is usually very thin, large discounts are not uncommon, and brokerage firms make no guarantees as to the ability to get full value for the interest. The seller rarely knows the true value of the interest, does not see any alternatives, and accepts this offer.

New Liquidation Possibilities

In recent years, the emergence of firms specializing in the acquisition of limited partnership interests has significantly improved the prospects for sale at reasonable prices of limited partnership interest in real estate investment. One such firm, Liquidity Fund in Emeryville, California, offers reasonable wholesale prices to persons wishing to liquidate interests in publicly placed limited partnerships. For private placements, where liquidation is more difficult, another firm, Equity Resources Group, Inc., plays a similar role. Equity Resources specializes in valuing government-assisted housing and market-rate apartments as well as interests in commercial holdings. The latter firm gives particular attention to its valuations to possible elections under Section 754 of the Internal Revenue Code and to determining residual values which are often achieved through the process of resyndication. Taking these aspects into account can substantially enhance the value of a partnership interest. The net result of involving such independent firms is to achieve offers for partnership interests that may be many times higher than those frequently made by general partners. Equity Resources is quick to cite an example of a bankruptcy trustee about to accept the offer of the current general partner of a few thousand dollars for a partnership interest. After a thorough review of the partnership, an offer fifteen times that made by the general partner was ultimately solicited. However, it must be remembered that firms which acquire partnership interests do so for profit—they buy at wholesale in the expectation of future profit. Sellers must be prepared for a discount from what they may feel the real value of the interest may be. However, independent firms give a seller an alternative to the "take-it or leave-it" offer which typically is made by the general partner.

Who Should Sell Their Interests?

For limited partnership interests in market-rate apartments or commercial properties, selling or not selling is a matter of personal preference and judgment. The possible seller should estimate what is likely to happen, calculate the likely tax consequences of both selling and holding, and decide what to do on that basis. Selling an interest will probably result in net proceeds to the seller which are substantially less than if the partnership sold its property and distributed the proceeds to the partners. In certain types of investments such as historical building rehabilitation projects, selling an interest may trigger a substantial recapture of tax benefits. A trustee or executor needs to seek expert accounting advice on the exact nature of the tax consequences of a sale of the interest.

For partnerships in government-assisted housing, a simple rule will usefully guide most investors: if they are alive, they probably should not sell. The tax consequences of sale are so severe for a living partner that seldom does it make sense to sell. Even the highest fair prices that could be offered rarely suffice to do much more than pay the contingent tax liability triggered by the sale.

For estates, however, the picture is quite different. Upon passage into an estate, the contingent tax liability is forgiven—although an estate tax liability on the fair market value is incurred. If the estate has ordinary income in need of tax shelter, then it may reasonably retain real estate tax shelter interests. If heirs need tax shelter, interests could sensibly be distributed to them. Otherwise, the estate will probably do best to sell the interests to investors who can use the tax benefits associated with the partnership interests. The maximum price for an interest is usually achieved by inviting specialist firms to make offers which can be compared with the value the general partner is willing to pay. □

***Mark Thompson** is Executive Vice President of Equity Resources Group in Cambridge. He holds a Ph.D. in Public Policy from Harvard University and for more than ten years was Professor of Financial Analysis at Harvard University.*

Notes From the Academy

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

Creditor-Debtor Law Sales taxes collected by seller more than three years before seller's bankruptcy were non-dischargeable trust-fund taxes under sections 523(a)(1)(A) and 507 (a)(6)(C) of Bankruptcy Code. Reversing district court decision reported in this column in October 1985. Dissenting judge relied on legislative history for contrary conclusion. ***In re Swank***, 792 F.2d 829 (9th Cir. 1986).

—*M.D. Rombauer*

Evidence In action in which Group Health sought refund of business and occupation taxes: (a) Trial court properly allowed expert in area of wage and salary studies to testify that Group Health executives were paid salaries comparable to salaries paid for like positions in public service, where the expert's testimony was based upon his own studies, which in turn were based upon Group Health's organizational charts, job descriptions, and salary records and upon interviews conducted by his assistants. Testimony had reasonable basis, as required by ER 703, and, under ER 704, was unobjectionable as addressing ultimate issue. (b) Copies of charts and studies upon which expert's opinion was based were properly admitted under ER 705 to show basis for expert's opinion, though they were not admissible as proof of matters asserted because they were hearsay. ***Group Health Cooperative of Puget Sound v. Department of Revenue***, 106 Wn.2d 391 (7/17/86).

—K.B. Tegland

Planning and Zoning Washington adheres to (minority) rule that land developer's rights are "vested" when application for building permit is made; *i.e.*, subsequent changes in local ordinances do not affect application. City ordinance required developers to delay building permit application until various approvals, such as site plan review and design review approvals. Court said ordinances violated this rule, denied due process, and were void. ***West Main Assocs. v. City of Bellevue***, 106 Wn.2d 47, 720 P.2d 782 (6/12/86).

—*W.B. Stoebuck*

Torts In action seeking damages for which plaintiff's spouse is partially at fault, under RCW 4.22.020 plaintiff is entitled to full recovery of past and future medical expenses, all damages characterized as separate property (*e.g.*, pain and suffering), and one-half of damages characterized as community property (*e.g.*, lost earnings), with other half of community property damages reduced by percentage of spouse's comparative fault. ***Vasey v. Snohomish County***, 44 Wn. App. 832 (6/16/86).

—*J.T. Richardson*

WASHINGTON STATE BAR **NEWSLINE**

The Board's Work

by James J. Sullivan

Westin Seattle, September 18-20, 1986

[Sept. 19] Resolutions highlighted the sparsely attended 97th Annual Meeting. 18 of 48 lawyers were present to receive their Awards of Honor for 50 years as Bar members. The late Charles A. Goldmark of Seattle received the Bar's Award of Merit.

About 100 lawyers voted on the resolutions. One resolution was withdrawn (skills training), one was tabled narrowly ("no first use" of nuclear weapons), one passed by acclamation (members should be polled on any malpractice insurance proposal), and one passed narrowly (recommending amending referendum Bylaw). The August Bar News contained the complete text of all resolutions.

[Sept. 18-20] PRESENT: President Pat Comfort (Fircrest); Governors Ted Zylstra (Oak Harbor); Roy Moceri, Jay White, Elizabeth Bracelin, Steven Reisler, & Hal Vhugen (all Seattle); Ed Lane (Tacoma); Angelo Petruss (Olympia); Frank Hayes Johnson (Spokane); Governors-elect Julie Weston (Seattle), Myron (Mike) Carlson (Everett), Ed Shea (Pasco). ABSENT: Governor Don Bond (Yakima). OTHERS PRESENT: Mel Simburg (WSBA Section on Intl. Law & Practice); John Fattorini (WSBA lobbyist); Chuck Snyder & Thomas Fitzpatrick (WSBA Young Lawyers); William Gates (WSBA president-designate); Solie Ringold (Ct. of Appeals Judges Assn.); John Skimas (Superior Ct. Judges Assn.); Janet Gaunt [also present at July meeting] and Joan Antonietti (Wa. Women Lawyers); R. Bryan Geissler; Doug Lambarth; Jerry Boyd (Res. & Refdm. Task Force); Scott Smith (SKCBA Young Lawyers); Robert Farrell (WSBA counsel); Mary Alice Theiler (SKCBA Bd. of Trustees); James Vache (Dean, Gonzaga Law School); Steve Rosen (Assistant WSBA CLE Dir.); Pat Sutherland (Wa. Assn. of Prosecuting Attys.); Don Means (WSTLA); Louise Seeley & Steve Bernheim (WSBA World Peace Thru Law); John Michalik (WSBA Exec. Dir.).

MALPRACTICE INS. FINETUNING

At the suggestion of the Professional Liability Task Force, the Governors voted 6-3 (Vhugen, Petruss, Bracelin) to put off further action until December to allow the Task Force to "finetune" its proposal, in Task Force chair William Gates' words. [Ed. note: For a status report on the malpractice situation and the professional liability fund proposal, see the special article at page 27 of this issue.]

In recommending "some fairly significant changes in planning and timing", Gates said that the Task Force "simply had to respond to the lawyers with limited practice and limited income...We're actually quite sympathetic."

Governor Steven Reisler considered Gates' proposal "politically more palatable" but wondered, "Is it as actuarially sound?" Responded Gates, "Yes, but the arithmetic will be more complicated."

Governor Elizabeth Bracelin said, "It's very irresponsible to go forward without strong data...None of us would walk into a lawsuit with anecdotal information."

The Governors continue to agree that, should they take a positive position on any proposal, it would be submitted to a vote of the membership.

RESOLVING RESOLUTIONS

David Hoff of Seattle, chair of the Task Force on Resolution and Referendum Procedures, presented the recommendations of the Task Force.

The Task Force voted 5-1 to recommend amending Article VII, Section 5 of Bar Bylaws to provide that any ten members can present to the Governors at least 60 days before the Annual Meeting any written resolution pertaining to the governance or regulation of the practice of law or the administration of justice in Washington. The Task Force felt that the subject matter of referenda should be handled equally.

Said the Task Force's report, "The net effect is to give the Governors the discretion to determine whether or not a resolution is appropriate for consideration at the convention." Because potential personal liability resides in the Governors, the Task Force felt that they were the appropriate body to decide if resolutions are appropriate.

Task Force member Lembhard Howell of Seattle, in his written dissent, termed the Task Force's recommendation "far too limiting and not in previous practice since as lawyers we profess to believe in the rule of law."

After discussing the report, the Governors unanimously voted to refer the question of proper Association activities to outside legal counsel for a report, if possible, in December.

Governor Roy Moceri said, "We have to find our charter to see what our source is, but the thought has always been, 'Don't rock the boat; the system's working.'" Feeling "ambivalent", Governor Hal Vhugen said that the report is inconsistent with Bar Bylaws, but he felt that the Governors "should review the purposes of the Bylaws." Governor Angelo Petruss said, "Look to the State Bar Act and the Supreme Court, not to the Bylaws, to review the purposes of the Bar Association."

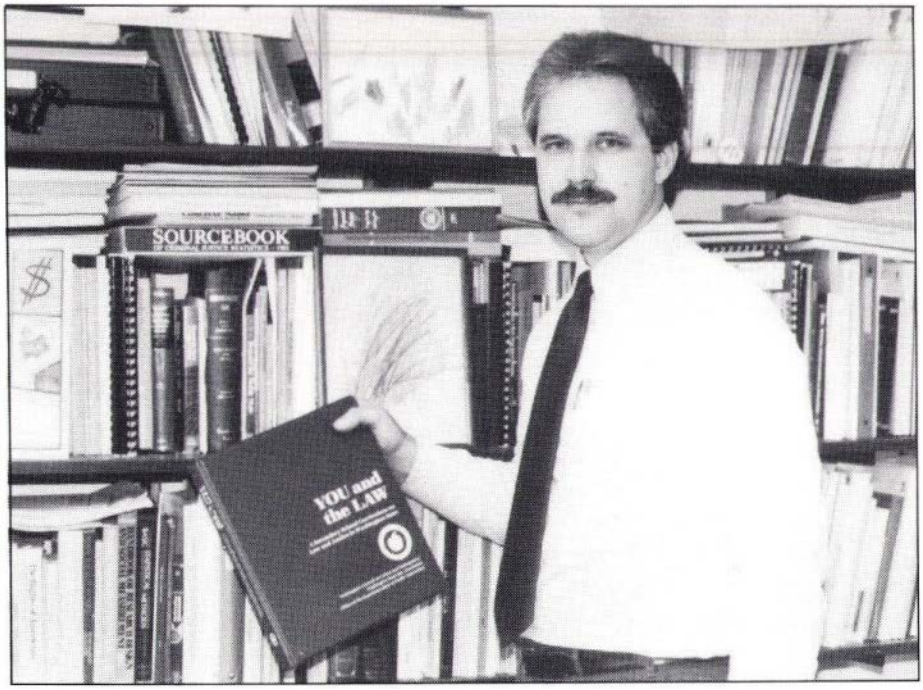
OTHER WORK

- The Governors unanimously approved what Executive Director Michalik termed "a barebones budget in many respects" of $4,766,101 for FY 1987. Michalik said that the Bar had had "to cut areas to balance the budget." FY 1986 budget of $4,172,838 is projected to wind up with $4,205,316 income and about $4,300,000 expenses.
- The Governors unanimously approved Bylaw changes that will permit the Young Lawyers Division to come into existence October 1, 1986. The Governors also adopted a budget of $80,500 for the Division.

L.E.A.R.N.-ing About the Law

by **Jo Rosner,**
Attorney/Educator

"I know of no safe depository of the ultimate powers of the society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education."
—Thomas Jefferson



Larry Fehr holding a copy of *You and the Law*

This quote from Thomas Jefferson exemplifies the purpose of L.E.A.R.N., the Law-Related Education and Resource Network, which brings together Washington State lawyers, teachers, judges, law-enforcement officers, community leaders and others.

Among the goals it has set for itself, L.E.A.R.N. includes:

- Serving as a statewide law-related education clearing-house, providing information exchange.
- Being a statewide advocate for law-related education, improving awareness and creating interest.
- Improving the competency of persons involved in law-related education through training opportunities.
- Conducting a law-related needs assessment in Washington, and formulating both strategies and priorities.

Larry Fehr, Executive Director of the Washington Council on Crime and Delinquency, is the president of the Network. Twenty members, including Dr. **Frank B. Brouillet,** State Superintendent of Public Instruction, and Chief Justice **James M. Dolliver,** serve on L.E.A.R.N.'s Board of Directors.

As director of the Washington Council on Crime & Delinquency, Fehr has had extensive experience in helping educate the public. Under his direction, the Council regularly sponsors a lunchtime forum where speakers share their expertise on topics of criminal and juvenile justice. The WCCD's monthly newsletter announces the time and place of these meetings.

In the accompanying photograph, Fehr is holding a copy of the newly revised *You and the Law*, a secondary-level resource book on criminal and civil law in Washington state. This law-related education project, originally developed by WCCD in 1975, is now a joint effort of the WCCD, the Washington State Bar Association and the Office of the Superintendent of Public Instruction. Free copies have been sent to every high school in the state.

L.E.A.R.N. publishes its own newsletter, *LRE ACCESS*, to help inform interested members of the state about current law-related events. The Washington State Bar Association helps support the newsletter, and **Cheri Brennan** of the Bar's Public Affairs Office is its editor.

MEMORANDUM

TO: ALL WASHINGTON LAWYERS

RE: STATUS REPORT ON MALPRACTICE INSURANCE COVERAGE AND PROFESSIONAL LIABILITY FUND PROPOSAL

Background

In May of this year a special WSBA Task Force reported findings to the Board of Governors and described possible models of a professional liability fund and a traditional insurance company. After reviewing this report, the Board of Governors appointed a new Task Force to design a professional liability fund. This Task Force did its work and sent out a description of its proposal in late August. It then conducted hearings in six different cities in the state, at which Bar members had an opportunity to see the details of the plan as set forth in the documents available at those hearings.

During this period and in addition to the hearings, there has been a large amount of communication from members in the form of letters and phone calls to members of the Task Force and the Board of Governors. In addition, a formal study of the proposal was conducted by a task force of the Seattle-King County Bar Association.

The intention had been to have the Board of Governors act at their September 20 meeting. It became obvious that this time table was too short. Accordingly, on the recommendation of the Task Force, the Board set a new time table. It also provided for this special *Bar News* article.

The revised time table now calls for the Board of Governors to act on the proposal at its December meeting. *If* the Board approves the concept/proposal, a substantial portion of the January *Bar News* will be devoted to a final description of the plan and the arguments pro and con.

What Now?

It is hoped that bar organizations of one kind and another, law firms and groups of Washington lawyers everywhere will exchange ideas, ask questions and debate this program. Members of the Task Force will be available to come talk to any group. The coupon included with this article is for you to send in to get a copy of the proposed court rule and the coverage plan.

All of the elements of this proposal are based on the deliberations of the Task Force, which undoubtedly will be meeting again before the December Board meeting; if you have questions or comments, the Task Force would be pleased to receive them. In addition, you should feel free to address any comments you want to any member of the Board of Governors.

The Task Force would like to note here that it has simply not been able to respond to all of your letters. In many cases, the letters have asked questions, and it is hoped that this material will furnish the answers. If it does not, please write again, and an effort will be made to respond promptly.

It seems unlikely that the ingredients of the plan would be changed in any substantial way from this point forward. However, the plan remains to be approved by the Board of Governors and, in this process, changes could occur.

Recent Changes

After receiving your many comments and conducting the hearings, the Task Force concluded that two fairly fundamental changes had to be made: provision for a less expensive program for those with part-time practices and a provision for a schedule of "deductibles."

One consistent and impressive objection came from those lawyers who have only a very small practice. While this may not be a large number in terms of the size of our Bar, nevertheless it did not seem right to fail to make a provision in the plan to avoid the possibility of terminating the practices of some of these part-time practitioners. Accordingly, the following provisions would be made for the lawyer who complied with the criteria: a lower coverage limit of $100,000 and a substantially reduced assessment, *i.e.*, 35% of the regular assessment or $417 per year in the start-up phase. The criteria for this status have not yet been formalized. They will appear in the material which will be mailed to you if you send in the coupon which is part of this article. Generally, the thought is that the provisions would be available to a lawyer whose legal work over a period of the last three or four years has not exceeded an average value of $20,000 per year and who does not have any vicarious liability for the activities of any other lawyer.

Since it was concluded that the above special category of limited exposure should be recognized, it seemed to follow that a lawyer should be permitted to elect to have only $100,000 in coverage rather than the full normal $250,000. One

thought here is that there will be many lawyers who do not have large practices and who will not qualify for the special limited exposure category but who should have the opportunity to pay a somewhat lower assessment and have lower coverage. The assessment for $100,000 coverage would be 70% of the normal assessment for the full coverage of $250,000.

Finally, the Task Force has decided to design into the schedule a series of "deductibles" ranging from $2,500 up to $100,000. These are not deductibles in the strict sense because, in keeping with the principle of the Fund which addresses public or client protection, the Fund should be committed to pay all losses from the first dollar. Therefore, the deductible would actually be an amount for which the lawyer indemnifies the Fund, and it would apply to both damages and claims expense. The Fund would have the right to demand the payment of the indemnified amount from the lawyer at any time after a claim was made.

The deductibles of $2,500 and $5,000 would be available to a lawyer electing to have only $100,000 of coverage. The higher deductibles would be available only in the case of the full coverage of $250,000 of the Fund.

As to the larger deductibles beginning at $25,000, there would be a requirement of a showing of financial ability to cover the indemnity. This requirement could take a variety of forms depending on the circumstances.

Structure

The proposal is that the Fund would operate essentially under the control of the State Supreme Court. Under the terms of the rule, a nonprofit corporation, the Washington Lawyers' Professional Liability Fund, would be created with a Board of nine members, six of whom would have to be lawyers.

Failure to pay an assessment or failure to pay a "deductible" would be grounds for suspension from practice.

The key elements of the Professional Liability Fund are the assessment schedule and the coverage plan. The assessment schedule would set forth the assessment amount for the various types of coverage available including any surcharges that might be imposed and obligatory deductibles. The coverage plan would describe the acts and omissions which are covered; the exclusions would contain all of the terms which are typically in an insurance policy. The proposed court rule provides that each year the assessment schedule would have to be furnished in advance to the Board of Governors of the State Bar, and that Board would have the ability to ask the court to review the schedule. In addition, the rule would require that any change in the coverage plan would have to be submitted to the Board of Governors in advance of its acceptance by the court so that the Board of Governors would have an opportunity to object or seek modifications.

The rule *does* contemplate that the Board of the Fund would have the authority to establish a basis for both surcharges and imposed deductibles. This means that, as is presently the case in Oregon, the lawyer who generates claims would be required to pay a higher assessment or to accept a substantial deductible. It is also possible that the Board of the Fund could conclude from its observation of the loss data that certain types or characteristics of practice require treatment with larger assessments or imposed deductibles.

The Amount of the Assessment

A professional liability fund is different from an insurance company. An insurance company sets a premium for a year of coverage on the basis of a prediction of the amount of money that will be necessary to cover all of the claims that will be made during that policy year, whether paid during that year or not, and cover its profit and taxes. The company relies on these premiums and its capital to be able to pay all claims. A Fund, on the other hand, relies simply on its membership to pay assessments from year to year to cover its cash needs. Because of this difference, the start-up of a Fund permits it to make a lower charge because its cash needs to pay the claims in the first year are obviously smaller than will be the case after it has been running for a period of time and has accumulated a history of claims which will mature in the year ahead.

To compute what is needed for a Professional Liability Fund for lawyers in Washington, the actuary engaged by the Task Force studied loss data from Washington insurance carriers and from the Oregon Professional Liability Fund. These studies led to the conclusion that, on a paid-claim basis, the assessments required for 1987, 1988 and 1989 would be, respectively, $571, $1,227 and $1,776. The actuary counseled against a start-up with minimum funding, and the Task Force agreed. The Task Force resolved this by averaging the three figures for 1987, 1988 and 1989 to come up with an assessment of $1,191. It is the hope that starting with what amounts to a substantial cushion would enable the Fund to maintain the same assessment for a period of three years.

It should be pointed out that the actuary concluded that there would be a 15%-per-year increase in claims expense based on observed results in recent years and a 7% increase in expenses. On these assumptions, the assessment for 1990 for the basic coverage would be $2,282. Again, using these assumptions, the figures become rather staggering as one looks ahead even further. The implication of this, of course, is that the trend of increasing claims must be terminated.

This article is *not* intended to make a case for the Fund—It is intended to bring everyone up to date and to encourage all members to make the effort to become as knowledgeable as possible.

WASHINGTON LAWYER'S PROFESSIONAL LIABILITY FUND
DESCRIPTION OF THE PLAN

PARTICIPATION: Required of all lawyers who are members of the Washington State Bar Association engaged in private practice with their principal office in this state. The coverage applies to individual lawyers, not firms.

Government lawyers, corporate lawyers or any others with no private practice will be exempt. The performance of pro bono legal work by exempt lawyers will not cause them to lose their exemption.

LIMITS: *Normal:* $250,000 per incident during a plan year and a $250,000 annual aggregate. The $250,000 limit would apply regardless of the number of lawyers involved in the incident unless the lawyers were in separate firms. Claim expense will be included in this limit.

If lawyer "A" has more than one claim in a year and has exhausted his limit he will no longer be covered, but lawyer "B" who is vicariously liable for the negligence of "A" will still be covered.

$100,000 Limits: A lawyer shall have the option, provided that all with whom he/she is associated do the same, to have a limit of $100,000 rather than $250,000.

Part-time/$100,000: The precise formal statement of this category has not been completed. Generally it covers a lawyer who for a period of the past several years has done legal work of a value less than $20,000 per year and has no vicarious liability for any other lawyer.

DEDUCTIBLE:

Amount	Credit
$ 2,500	to be determined
5,000	8%
10,000	15%
25,000	25%
50,000	45%
100,000	60%

The above percentages are intended to relate to a regular assessment, hence it would not apply precisely to the assessment level for the first three years. In effect the percentage of saving would be somewhat less than the percentages stated above.

SEND

TO: Liability Fund Update
WSBA
505 Madison
Seattle, WA 98104

FROM: _____
NAME

_____
ADDRESS

_____
CITY - ZIP

PLEASE SEND ME A COPY OF THE CURRENT COURT RULE AND COVERAGE PLAN FOR THE PROPOSED PROFESSIONAL LIABILITY FUND.

Any deductible above $5,000 would be available only with the full coverage of $250,000. The fund would pay the claimant and the claims costs from the first dollar and the lawyer who elects for any of the above deductibles would indemnify the fund up to the amount of the deductible. In the case of deductibles at $25,000 and above, satisfactory proof of financial responsibility will be required.

The deductible amount applies to both damages and claims expenses.

ASSESSMENT:

$1,191 for a lawyer who has been admitted four years or more. For newly admitted lawyers the schedule would be:

First year after admission: 30% of above
Second year: 50% of above
Third year: 80% of above

The part-time limited exposure status would have an assessment of 35% of the above.

The person not eligible for the special part-time coverage but who elects to have just $100,000 limits would pay 70% of a normal assessment.

COVERAGE AND EXCLUSIONS:

The plan would cover claims arising out of the lawyer's capacity as such or as a fiduciary or notary public. The coverage would be on a "claims made" business. There would be coverage for errors or omissions before the effective date of the plan, but only if the claim is made after the effective date of the plan and the lawyer had no reason to know that a claim would be made.

The exclusions are very similar to those which are found in a commercial policy including an exclusion for any dishonest fraudulent or deliberate act and would not extend coverage to an innocent partner or other lawyer who is vicariously liable for such act. Coverage would be excluded for any claim against the lawyer as owner, part owner, promoter or manager of a business enterprise. Also any exemplary damages, fines, sanctions or penalties would be excluded.

You are encouraged to obtain a copy of the coverage plan for a more detailed statement of the coverage and exclusions.

COUPON ON REVERSE SIDE

Upcoming Programs: Preventive Law for Business Clients & How to Draft Wills and Other Estate Planning Documents

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

Are your business clients safe from dangerous pitfalls? "Preventive Law for Business Clients" is designed to increase your effectiveness when you advise clients about potential legal problems in the business arena and to assist you in improving your ability to identify issues that should be addressed regarding certain business matters. The program will be offered only once, on Friday, November 14, at the Greenwood Inn in Bellevue.

Each registrant will receive one copy of *Legal Compliance Checkups: Business Clients* as the course book. This is a three-volume, loose-leaf work published in 1985 by Callaghan & Company and includes the 1986 supplement. With 27 chapters, tab dividers and more than 1600 pages, this set of books was the recipient of the May 1985 Annual Preventive Law Prize Award, presented by the Emil Brown Fund for a work by attorneys in the field of Preventive Law. Attendance also includes at no extra charge any supplementation published within six months of the seminar date.

Program Chairperson **Robert B. Hughes** (Hughes & Cassidy, P.S., Sumas), has assembled an excellent faculty to make the presentations for this seminar. The faculty includes **Gene B. Brandzel** (Jones, Grey & Bayley, P.S., Seattle); **Donald C. Dahlgren** (Dahlgren & Dauenhauer, P.C., Seattle); **William C. Erxleben** (Foster, Pepper & Riviera, Seattle); **Dennis S. Harlowe** (Gordon, Thomas, Honeywell, Peterson & Daheim, Tacoma); **Dan P. Hungate** (Bogle & Gates, Seattle); **Michael E. Kipling** (Graham & Dunn, Seattle); **Kevin C. McMahon** (Jones, Grey & Bayley, P.S., Seattle); **J. Shan Mullin** (Perkins Coie, Seattle); **Alex W. Munro, Jr.** (Boeing Aerospace Company, Seattle); **Dudley Panchot** (Wolfstone, Panchot, Bloch & Kelly, Seattle) and **Daniel P. Pepple** (Gordon, Thomas, Honeywell, Peterson & Daheim, Tacoma).

For further information about this program, please contact Program Coordinator Colette Robertson at the Washington State Bar Association, or call (206) 622-6021.

"How to Draft Wills and Other Estate Planning Documents" will be presented at two sites. The first presentation will be in Spokane at the Sheraton Hotel on Thursday, December 11. The second presentation will be in Seattle at the Westin Hotel on Thursday, December 18.

Almost every general practitioner will from time to time be faced with drafting a will or other estate planning documents. This course is designed to provide a "how to" approach and malpractice avoidance tips at the basic and intermediate levels.

Following a client interview demonstration on videotape, faculty members will lead you through an overview of such matters as understanding community property and survivorship agreements; drafting simple wills; appropriate usage of durable powers of attorney and directives to physicians; significant estate and gift tax issues; tax reform concerns; the use of lifetime gifting and the Uniform Gifts to Minors Act; marital deduction planning and the use of testamentary trusts; and a focus on malpractice issues and ethical concerns.

Although the course is designed to stand as an independent seminar, it also serves as the first presentation of a two-part estate planning series. The second leg of the series is entitled "How to Probate an Estate and Handle Post-Mortem Matters"; it will be presented in Spokane on January 15, and in Seattle on January 16.

The faculty for this program includes Chairperson **Paul V. Rieke** (Hatch & Leslie, Seattle); **Sandra R. Blair** (Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, Seattle); **Michael D. Carrico** (Riddell, Williams, Bullitt & Walkinshaw, Seattle); **James K. Hayner** (Minnick-Hayner, Walla Walla); **Deborah S. Malane** (Hillis, Cairncross, Clark & Martin, Seattle); **Donald K. Querna** (Randall & Danskin, P.S., Spokane); and **Timothy J. McDevitt** (Foster, Pepper & Riviera, Bellevue).

For additional information, please contact Louise Thomas, Washington State Bar Association, 505 Madison Street, Seattle, WA 98104 or telephone (206) 622-6021.

APPROVED COURSES

Washington State Bar Association

Motor Vehicle Accident Insurance
7.00 credits **$95**

OCT 3	Spokane (Ramada Inn)
OCT 10	Everett (Holiday Inn)
OCT 17	Yakima (Towne Plaza)
OCT 22	Seattle (Stouffer Madison)

Thirty-First Estate Planning Seminar
15.00 credits **$185**

OCT 23-24	Seattle (Westin Hotel)

Preventive Law for Business Clients
7.00 credits **$175**

NOV 14	Bellevue (Greenwood Inn)

Hawaii bound? Check out our comprehensive seminar listings in this issue, page 38.

Tort Reform

by **Steven W. Edmiston**

Washington's newly enacted Tort Reform Act, ESSB 4630, effective as of August 1, 1986, includes among its other broad-sweeping and perhaps controversial provisions, a change in the law regarding indemnification agreements. Although these changes upon first impression appear restricted in application to liability issues arising from construction contracts, the alert practitioner should consider the effect of the amendment of the act to RCW 4.24.115 on a wide variety of agreements which may be executed in connection with real estate transactions. Leases, condominium documents, loan agreements and conveyance instruments all represent instances in which counsel should consider the application of amended RCW 4.24.115 to the indemnity clauses typically included in such agreements as well as the inclusion and phrasing of provisions indemnifying a party to the agreement.

Prior to the Tort Reform Act, and after amendment, RCW 4.24.115 applied to agreements involving the "construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of" any improvement to real property. Although clearly applicable to contracts relating to construction of improvements, the statute may also apply to parts of agreements concerning the obligations of one or the other parties to maintain, repair, alter or construct improvements to real estate. RCW 4.24.115 previously declared as unenforceable only those provisions which compelled indemnification by the indemnitor if the indemnitee was solely negligent in the construction, alteration, or improvement of a structure attached to real estate. Thus, where a contract held one party harmless for that party's own negligence, that contract term was held invalid as against public policy, void, and unenforceable. However, where the parties to an agreement were found concurrently negligent, the parties were permitted to place the entirety of the obligation upon the indemnitor. Additionally, prior to the Tort Reform Act, RCW 4.24.115 contained no provisions regarding whether or not an indemnitor could waive immunity under Industrial Insurance, Title 51 RCW.

Judicial dissatisfaction with attempts to shift risk and responsibility away from a party's own wrongful acts via indemnification manifested itself in a series of Washington decisions, the thrust of which created a requirement that there be at least some negligence on the part of the indemnitor in order to invoke the indemnification provision. Although the statute merely prohibited the holding of an indemnitee harmless from acts caused or resulting from that indemnitee's sole negligence, the courts construed the provision as requiring some negligence on the part of the indemnitor. Thus, an indemnification provision could not be triggered by the indemnitee's negligence alone, nor apparently could such a provision be triggered by the negligence of a third party, or the concurrent negligence of the indemnitee and a third party. *Stocker v. Shell Oil Co.*, 105 Wn.2d 546 (1986); *Gall Landau v. Hurlen Constr. Co.*, 39 Wn.App. 420 (1985).

Similarly, the Washington courts expressed a reluctance to liberally construe indemnification agreements to waive workers compensation immunity, requiring rather that an indemnification agreement could operate as a waiver of workers compensation immunity only if it clearly and specifically contained a waiver of the immunity, either by simply so stating or by specifically stating that the indemnitor assumed potential liability for the actions brought by its own employees. *Brown v. Prime Constr. Co.*, 102 Wn.2d 235 (1984).

The provisions of the Tort Reform Act follow this judicial reluctance to liberally construe and apply contract indemnification provisions. Regarding indemnification provisions, the act not only parallels the previous judicial construction, but goes much further in limiting their valid application.

RCW 4.24.115 now provides:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other

Meets Real Estate

structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property:

(1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable;

(2) Caused by or resulting from the concurrent negligence of (a) the indemnitee or the indemnitee's agents or employees, and (b) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after the effective date of this 1986 section.

Now, if there is concurrent negligence of the parties, an indemnification provision is valid only to the extent of the indemnitor's negligence. Thus, one cannot indemnify another for the latter's comparative negligence. Additionally, the indemnification agreement must, in the event of comparative negligence, specifically and expressly provide for the indemnification.

Finally, an indemnification agreement may waive the indemnitor's immunity under the industrial insurance laws only if the indemnification agreement specifically and expressly so provides, and the waiver is mutually negotiated by the parties.

On its face, RCW 4.24.115 applies to all agreements related to the "construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of" a structure attached to real estate. Clearly, the statute governs construction contracts. Care should be taken in reviewing standard form construction contracts, particularly those promulgated by the American Institute of Architects ("AIA"), with respect to their indemnification provisions in light of the Tort Reform Act. Generally these form documents will have to be modified to comply with the requirement of the act concerning indemnity obligations.

However, the provisions of the statute quite probably govern a large variety of agreements typically encountered in a real estate transaction. For example, in drafting leases need the practitioner be concerned with the phrasing of provisions purporting to indemnify the lessor from damages arising from the alteration or repair of the approvements subject to the lease to comply with RCW 4.24.115? Will RCW 4.24.115 affect indemnification provisions which typically appear in condominium declarations regarding the unit owner's duty to indemnify the owner's association from damages arising from the alteration of the owner's unit? The answer to both questions appears to be yes.

In drafting indemnification agreements that comply with the newly amended statute, the practitioner should pay close attention to the fact that the provision reflects the language required by the Tort Reform Act. For example, counsel seeking to indemnify one party should clearly and expressly state that indemnification is being sought only to the extent of the other party's negligence. Failure to so clearly express this intent may cause the entire indemnification provision to be stricken.

When attempting to waive an

indemnitor's industrial insurance immunity in compliance with the Tort Reform Act's requirement that the indemnification provision "specifically and expressly" provide therefor and be "mutually negotiated," counsel should not only draft the provision to reflect the specific language of the statute, but should further require that both parties sign or initial the provision itself to indicate that both parties were specifically aware of the provision in the contract or that the provision was in the contract and that both parties acknowledge that it was mutually negotiated. To this end, because of the stringent requirements imposed by the Tort Reform Act, it is not unlikely that future indemnification agreements will often be executed as contracts entirely separate and apart from the underlying contractual relationship from which they stem, so as to satisfy the required specificity and mutuality of the negotiation process in the act.

Likewise, indemnification provisions within ground leases that involve construction on the property, or within build-to-suit leases, should reflect the language and changes within the statute. Management agreements wherein the managing agent has any maintenance or repair responsibilities should also conform to the statute. Lenders who seek indemnity from borrowers in construction loan agreements against any claims arising from the construction activity should also consider complying with the statute provisions. With regard to conveyances instruments, counsel should be especially aware of the form of any indemnification agreements if construction is being allowed before closing. This concern should also be addressed in the drafting of any earnest money agreement which allows construction or occupancy before closing.

Although the Tort Reform Act was not specifically directed toward real estate transactions, the broad language of RCW 4.24.115, which was amended by the act, means that real estate practitioners will have to comply with the indemnification provisions of the act in a large number of the documents which they draft. That amended statute follows the trend of judicial decisions in the state of Washington striking down attempts by parties to contract away the damages associated with their own negligence. Agreements relating to the construction, maintenance or alteration of improvements to real property which continue to place the entire risk of any loss on one party irrespective of the other parties' own negligence run the risk of being invalid both under judicial precedence and the requirements of the Tort Reform Act. □

[1] ***Steven W. Edmiston*** *is a third-year law student at the University of Washington School of Law.*

ALOHA!

Welcome to Hawaii 1986

photo courtesy of Hawaii Visitors Bureau

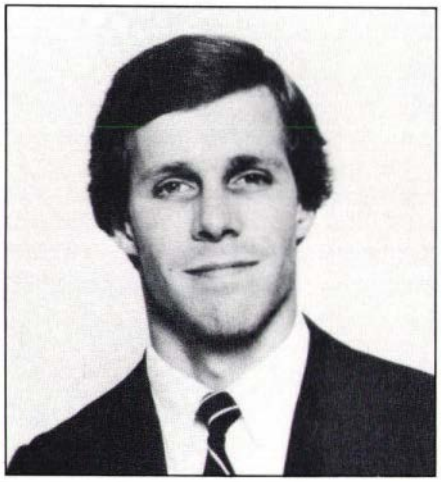
A PREVIEW OF WSBA ANNUAL MEETING HIGHLIGHTS - NOVEMBER 3-9

It's almost here . . . Get ready for the Annual Meeting of a lifetime as we return to beautiful, tropical Hawaii. Six years have passed since our previous visit to Honolulu. The time has come to revive old memories and create new ones as we hold our 97th Annual Meeting there November 3-9. As always, it will be a stellar occasion filled with a great variety of educational and entertainment opportunities for everyone.

Actually, the Hawaii sessions will be the spectacular "conclusion" of the 1986 Annual Meeting. The "official beginning" was the Annual Business Meeting of the State Bar, held September 19 at the Westin Hotel in Seattle. The Seattle portion of the Annual Meeting featured the traditional events, including a state-of-the-Bar report from president Patrick C. Comfort, a state-of-the-Judiciary report by Supreme Court Chief Justice James M. Dolliver, the recognition of a number of lawyers and judges in our state who have passed the fifty-year mark in service to the profession, the presentation of an award of merit (posthumously to the late Charles Goldmark) and consideration of a number of resolutions proposed by members of the Bar. Those events and actions will be reported elsewhere in this and following issues of the *Bar News*.

Rewarding CLE Seminars

Back to the future! Coming up during a full week of activities at Waikiki Beach will be 10 superb CLE seminars. These sessions will be, as always, the core of our Annual Meeting and will provide a great opportunity to satisfy your mandatory CLE requirements for the year. If you're diligent enough to attend a full schedule of seminar days—Tuesday November 4 through Saturday, November 8, you'll be able to accumulate 20 CLE credits. As outlined more fully in the seminar schedule following this article, timely topics include "Corporate Partnership & Asset Transactions—The Impact of Washington Taxes" . . . "Lawyer Marketing for Those Who Didn't Understand It the First Time Around" . . . "Domestic Violence" . . . "Administrative and Constitutional Issues in Environmental and Land Use Law" . . . "Purchase and Sale of an Ongoing Business: Enforcement of Remedies and Contingent Lia-



Special WSBA Annual Meeting Luncheon guest speakers will be Eugene C. Thomas, president of the American Bar Association, and lawyer/author/humorist D. Robert White.

bilities" . . . "Dare to Go Bare? Tricks, Traps and Pitfalls for the Uninsured Professional" . . . "Domestic and International Antitrust and Computer Related Technology" . . . "Advising the Financially Troubled Business" . . . "Staying Out of Trouble," plus the Young Lawyer videotaped "Update on the Law" . . . "AIDS and Other Communicable Diseases—Issues in Screenings and Control: Public Health Litigation" . . . and "Effects of U.S. Foreign Policy on Doing Business Abroad."

Enough to keep you busy? That's just the beginning . . . Now add in our legendary series of guest speakers, athletic events and social occasions; you'll see the broad picture of just how entertaining and rewarding a *real* Annual Meeting can be.

In a unique format change, our major convention luncheon will this year present *two* headline speakers. We will be honored to have with us American Bar Association president Eugene Thomas. Mr. Thomas is a native of Boise, Idaho, the first ABA president from the Northwest in many years. He will deliver the opening remarks at our State Bar Luncheon on Wednesday, November 5. Following Mr. Thomas will be D. Robert White, our keynote luncheon speaker.

Mr. White is the author of the hilarious national best-sellers *The Official Lawyer's Handbook* and *White's Law Dictionary.* A fourth generation lawyer as well as a humorist (are they synonymous?), Mr. White graduated from Harvard College in 1975, and Columbia Law School in 1979, where he was an Articles Editor of the *Columbia Law Review.* In addition to his "moonlighting career" as a nationally recognized humorist, he practices law with the twenty-lawyer Washington, D.C. firm of Ross, Dixon and Masback.

We are delighted to have Mr. Thomas and Mr. White as the speakers for our Wednesday luncheon, and we know that you will enjoy them.

Other very special events in Hawaii include a presentation on the world-famous Bishop's Museum on Tuesday morning, November 4, a convention luau in Grand Hawaiian luau style on the evening of the 4th, and a moonlight dinner cruise on the evening of Thursday, November 6.

Bishop's Museum Preview

You will have a great chance to get some insights into the famous Bishop's Museum. Beginning at 10 a.m. at the Sheraton Waikiki, our convention headquarters hotel, a continental breakfast will serve to start your morning right. We will then have a special slide presentation on Hawaiian culture and the exhibits at the Bishop's Museum. This is an informative introduction to the museum—which you may wish to explore on your own later in the week. The program will finish by noon—leaving you plenty of time for the mid-day sun and afternoon activities.

Convention Luau

No convention in Hawaii would be complete without a luau, and we're going to have a great one on the beautiful Diamond Head lawn at our headquarters hotel, the Sheraton Waikiki. Fabulous luau food, including traditional roast pig, right from the imu. Great and gorgeous entertainment with a cast of talented islanders . . . colorful costumes, Hawaiian music and dance, and an evening you'll long remember! A great early Convention Week event!

Moonlight Dinner Cruise

Join us for an All-American, moonlight dinner cruise aboard the Ali'i Kai—the world's largest catamaran. Your complete evening will begin with roundtrip transportation leaving the Sheraton Waikiki at 8 p.m. to the Ali'i Kai pier. On board, our All-American theme will include a red, white and blue election week motif; great down-home food including jumbo hot dogs, hamburgers and all the fixin's, fried chicken, potato salad, etc., etc.; a full open bar throughout the cruise; Polynesian revue entertainment; dancing to live music; and a great evening that winds up with your return to the hotel around 11 p.m. Best of all, this is an *exclusive* cruise—for State Bar Convention registrants only!

The above three events are ticketed and are not included in your basic registration fee. Consult your Annual Meeting registration materials about costs and how to reserve your place for these outstanding events.

Also included in this year's schedule are two very special events at *no extra cost.* They are included in your basic registration fee. You will enjoy a presentation by Pulitzer Prize-winning cartoonist Mike Peters on

Friday, November 7. To cap the Annual Meeting, an Aloha Reception will be held Friday evening.

Mike Peters

Mike Peters is a cartoonist whose political cartoons appear frequently in *Time*, *Newsweek* and *The New Republic*. He is syndicated in more than 250 newspapers. His comic strip "Mother Goose & Grimm," which he calls both social and political, is seen in over 200 newspapers daily. Mr. Peters joins us in Hawaii for a truly special program for everyone, "Confessions of An Editorial Cartoonist," a slide-illustrated program on the games politicians play. In this program, Mr. Peters also does original sketching and cartoons.

Aloha Reception

Wrap up your week, and start off your Friday night on the town in Honolulu, by joining us for hors d'oeuvres (wih a Hawaiian touch!), a cold drink and some light music and entertainment. This is the final social event of the Annual Meeting and a great garden party reception you won't want to miss. Join your friends for a "just right" cap on a sparkling week of social events.

Sporting Events

Golf and tennis are once again on the State Bar Convention schedule . . . and this year at some truly unbeatable and legendary locations.

Put all that tennis practice into action at the **Annual WSBA No-Fault Tennis Tournament. No** Tort-Reform or Foot-Fault corrections here—just a premier event that will be held on Tuesday and Wednesday, November 4 and 5 at the Tennis Center at the Ilikai Hotel, just down the beach from the Sheraton Waikiki. An unbeatable facility. This is a MIXED DOUBLES tournament, limited to 30 **TEAMS**. Registrations will be accepted on a first-come, first-served basis. The tournament will be conducted on a round-robin basis with each team playing other teams of similar ability over the course of each session. The cost will be $20 per person, which includes courts, balls and trophies for the winners.

Once again, you are invited to the **Annual WSBA Golf Tournament.** The Place? **Makaha**—a legendary golf course, one of the top 50 courses in the United States—will be the site of the WSBA Golf Tournament on Thursday, November 6. This will be an 18-hole tournament with a variety of prizes for low gross, low net, longest drive, closest to the pin on a Par 3, etc. We will have an early morning shot-gun start. Those signing up for golf will be sent full information on the tournament and the schedule in October. **Makaha.** Don't miss it.

The cost will be $85 per person, *including* an early morning continental breakfast at the Sheraton Waikiki; round-trip transportation to the course via air-conditioned coach; greens fee and power carts for 18 holes; and a full buffet with an awards program.

Great CLE seminars . . . great luncheon speakers . . . great social and sporting events . . . They all add up to an unbeatable combination of education and entertainment at the 97th WSBA Annual Meeting in Hawaii. The frosting on top will be the usual myriad of reunions, hospitality suites, cocktail parties, breakfasts, and other special events which will be mounted for you and your colleagues. Have we persuaded you? We will look for you there! If you have not already registered, do it today. See you in Hawaii!

photo courtesy of Hawaii Visitors Bureau

1986 WSBA Convention CLE Seminar Schedule

Tuesday, November 4

8:00 a.m.— Tax Section
10:00 a.m. 1

Corporate Partnership & Asset Transactions The Impact of Washington Taxes—

Tax Section Chairperson:
D. Michael Young, Seattle
Topics and Speakers:
"Sales for Cash"
"Like-kind Exchanges"
"Transfers of Stock"
"Liquidations"
and more . . .
John T. Piper, Seattle
D. Michael Young, Seattle

2.00 CLE CREDITS

10:00 a.m.— Law Office Economics and
12:00 noon Management Section

Lawyer Marketing For Those Who Didn't Understand It The First Time Around

Section Chairperson:
Stephen W. Horenstein, Vancouver
Topics and Speakers:
"Getting Your Name Out in the Community"
Sam Smith, Miami (videotape)
"How to Develop Your Own Marketing Plan"
Stephen W. Horenstein, Vancouver

2.00 CLE CREDITS
(4.00 CLE CREDITS FOR BOTH TAX AND LAW OFFICE MANAGEMENT PROGRAMS)

8:00 a.m.— Family Law Section and
12:00 noon Criminal Law Section 2

Domestic Violence

Family Law Section Chairperson:
Kenneth Weber, Vancouver
Criminal Law Section Chairperson:
Robert J. Wayne, *Seattle*
Speakers and Topics:
"Psychological Testing as Applied to Custody Valuation or Sex Abuse Allegations - Treatment of Victims"
Dr. Ellen Hervey, Seattle
"Tough Issues in Domestic Relations: Sex Abuse Allegations in Custody Fights; Property Liens v. Bankruptcy v. Homestead Exemption v. Attorney Fees".
Miles F. McAtee, Seattle
"Civil Remedies Available to Persons Wrongfully Arrested Under the Domestic Violence Act"
Kenneth Weber, Vancouver
"Handling a Domestic Violence Criminal Case in District and Superior Court"
Robert J. Wayne, Seattle
"Child Abuse Issues in Domestic Violence"
Michael A. Frost, Seattle

4.00 CLE CREDITS

Wednesday, November 5

8:00 a.m.— Administrative Law Section and
12:00 noon Environmental and Land Use Law Section 3

Administrative and Constitutional Issues in Environmental and Land Use Law

Administrative Law Section Chairperson:
Jeffrey O.C. Lane, Olympia
Environmental and Land Use Law Section Chairperson:
Thomas M. Walsh, Seattle
Speakers and Topics:
"The Environmental Hearings Office: An Alternative to In-House Review"
"What Process is Due on De Novo Review?"
Wick Dufford, Member, Shorelines Hearings Board, Olympia
"Hazardous Waste: Administrative Law Overlay"
Charles K. Douthwaite, Tacoma
"Taking and Substantive Due Process"
Donald E. Marcy, Bellevue
"A Procedural Guide to the Shorelines Hearings Board: A Comparison with the Civil Rules"
"Exhaustion of Administrative Remedies"
J. Richard Aramburu, Seattle

4.00 CLE CREDITS

8:00 a.m.— Corporation, Business & Banking Law Section and Trial Practice Section
12:00 noon

4

Purchase and Sale of an Ongoing Business
Enforcement of Remedies and Contingent Liabilities

Corporation, Business & Banking Law Section Chairperson:
William E. Van Valkenberg, Seattle
Trial Practice Section Chairperson:
D. Roger Reed, Spokane
Speakers and Topics:
"Sale of Business - Preliminary Negotiations, Warranties, Good Faith, Opinion Letters, Security Agreements, Financing"
Paul M. Larson, Yakima
William E. Van Valkenberg, Seattle
"Enforcing the Agreement - Breach of Covenant, Breach of Warranties, Failure to Convey Title; Contingent Liabilities of Corporation, Shareholders, Directors, Accountants and Lawyers"
Robert G. Andre, Seattle
Joseph P. Delay, Spokane

4.00 CLE CREDITS

Thursday, November 6

8:00 a.m.— Creditor/Debtor Law Section and Real Property, Probate & Trust Law Section
12:00 noon

5

Dare to Go Bare? Tricks, Traps and Pitfalls for the Uninsured Professional

Creditor/Debtor Section Chairperson:
Malcolm C. Lindquist, Tacoma
Real Property, Probate & Trust Law Section Chairperson:
Thomas C. Gores, Seattle
Topics and Speakers:
"Trusts, Fraudulent Conveyances, Profit Sharing and Pension Plans, Professional Corporations, Insurance and Annuities - Vulnerability to Creditors and/or Trustees in Bankruptcy"
Dillon E. Jackson, Seattle
Kenneth L. Schubert, Jr., Seattle
"The Real Estate Contract Forfeiture Act From the Perspective of the Vendor and Vendee"
Ned M. Barnes, Spokane
"Bankruptcy Issues"
Robert L. Beale, Tacoma

4.00 CLE CREDITS

8:00 a.m.— Antitrust Law Section and Intellectual and Industrial Property Law Section
12:00 noon

6

Domestic and International Antitrust and Computer Related Technology

Antitrust Law Section Chairperson:
James L. Magee, *Seattle*
Intellectual and Industrial Property Law Section Chairperson:
David H. Deits, *Seattle*
Topics and Speakers:
"International Protection for Software"
David H. Deits, Seattle
"Patents, Trademarks, Copyrights and Trade Secrets - Interface with Antitrust"
Lucinda S. Whaley, Spokane
"Patenting Software"
Jerry E. Nagae, Seattle
"Domestic and International Antitrust and Computer Related Technology"
James L. Magee, Seattle

4.00 CLE CREDITS

Friday, November 7

8:00 a.m.— Continuing Legal Education
12:00 noon Committee

7

Advising the Financially Troubled Business

Committee Chairperson:
Philip H. Brandt, Tacoma
Bar Convention Sub-Committee Chairperson:
Dillon E. Jackson, Seattle
Topics and Speakers:
"The Role of the Business Consultant"
John G. Wiencken, Portland
"State and Federal Taxation Issues"
Joseph Wetzel, Portland
"Perspective of the Commercial Lender"
Thomas G. Thorbeck, Seattle
"Relief Under the Bankruptcy Code"
Jack J. Cullen, Seattle

4.00 CLE CREDITS

more . . .

8:00 a.m.— Young Lawyers Section
12:00 noon 8

Staying Out of Trouble
Plus
Young Lawyers Videotaped Update on the Law

Section Chairperson:
Charles R. Snyder, Bellingham
Topics and Speakers:
"Legal Malpractice"
Jeffrey L. Tolman, Poulsbo
"Lawyer Discipline and Spot Audits"
Stew Cogan, Seattle
"State Sponsored Liability Funds and Legal Malpractice"
William H. Gates, Seattle
"Videotaped Update on the Law"
Joel Green, Seattle

4.00 CLE CREDITS

Saturday, November 8

8:00 a.m.— Continuing Legal Education
12:00 noon Committee 9

AIDS and Other Communicable Diseases
Issues in Screening and Control, Public Health and Litigation

Committee Chairperson:
Philip H. Brandt, Tacoma
Bar Convention Sub-committee Chairperson:
Dillon E. Jackson, Seattle
Topics and Speakers:
"Medical and Public Health Aspects of AIDS"
Robert H. Finch, Pasadena
"Employment Issues: Testing, Employment Discrimination, Refusal to Work with Patients or Co-workers"
Mary E. Drobka, Seattle
"Tort Aspects of Sexually Transmitted Diseases"
Jan Eric Peterson, Seattle
"Insurance Issues: Exclusions of AIDS Patients Under Group or Individual Health and Life Insurance Policies, Financing the Costs of Care"
Michael B. Goldenkranz, Seattle

4.00 CLE CREDITS

8:00 a.m.— International Law Section and
12:00 noon World Peace Through Law Section 10

Effects of U.S. Foreign Policy on Doing Business Abroad

International Law Section Chairperson:
Richard M. Rawson, Seattle
World Peace Through Law Section Chairperson:
Deborah Perluss, Seattle
Seminar Moderator:
Melvyn J. Simburg, Seattle
Topics and Speakers:
"Imposing Economic Trade Sanctions/Export Controls"
Robert C. Musseh!, Seattle
"Legal and Practical Considerations of Sanctions: Current Situations and U.S. Government Assistance to the Private Sector"
David Stewart, Washington D.C.
"Role of the Private Sector in U.S. Foreign Economic Assistance Programs"
Norman B. Page, Seattle
"Disputes with Foreign Government Enterprises"
Michael Sandler, Bellevue

4.00 CLE CREDITS

Appeals of Partial Judgments

by **Frank V. Slak, Jr.**
Court Commissioner, Division II

Multi-party litigation can pose as many problems on review as it does at any other stage of the proceedings. Often, as issues and interests crystallize, summary judgments are entered as to one or more, but fewer than all, the parties or issues. Clearly, review of those orders does not lie as a matter of right. RAP 2.2(d)[1] provides that no appeal may be taken from a judgment disposing of fewer than all the claims as to all the parties. Such a judgment is subject only to discretionary review.

The rule significantly impacts the litigation, counsel and both the trial and appellate courts. The judgment may change a party's theory of the case. There may be a trial of the "empty chair" defendant who has been dismissed. The ramifications go on.

This article is intended to acquaint counsel with procedural problems inherent in seeking review of orders disposing of fewer than all the claims and parties.

Initially, attempted review of a judgment disposing of fewer than all the claims as to all the parties will probably result in at least one additional procedural step outside the normal appellate routine. RAP 2.5 (a) allows the appellate court to raise the question of its jurisdiction. Accordingly, if a partial judgment is appealed and it contains no certification of its finality, the appellate court on its own motion notes the case for determination of its appealability. RAP 6.2(b). Such a motion also may be noted by a party.

As a practical matter, the Supreme Court and all divisions of the Court of Appeals routinely note such matters on their own motion. What can and should counsel do if confronted with such a problem?

The first thing counsel should have done is to have obtained a certification from Superior Court that the matter is final,[2] but RAP 2.2(d) allows it to be obtained even post-judgment. *See Soper v. Knaflich*, 26 Wn. App. 678, 613 P.2d 1209 (1980). However, the trial court's certification is not binding on the appellate court, *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 567 P.2d 230 (1977), and even if the challenged judgment contains such a certification, the matter will be placed on the docket anyway. The reason is that an early determination of appealability can avoid significant delay and costs. *See, e.g., Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887, 652 P.2d 948 (1982) (judgment filed November 1981; court raises appealability question sua sponte October 1982; judgment held not appealable of right).

Note that the trial court's certification must meet three basic requirements set out in *Doerflinger v. New York Life*, 88 Wn.2d 878, 881, 567 P.2d 230 (1977):

> (1) There must be more than one claim for relief or more than one party against whom relief is sought;
>
> (2) there must be an express determination in the judgment that there is no just reason for delay; and
>
> (3) there must be an express direction for the entry of the judgment. It is the function of this court to determine whether these tests have been met. *See Schiffman v. Hanson Excavating Co.*, [82 Wn.2d 681, 513 P.2d 29 (1973)] *supra*. The trial court cannot in "its discretion" treat as "final" that which is not "final". *Sears, Roebuck & Co., v. Mackey*, [351 U.S. 427, 100 L. Ed. 2d 1297, 76 S. Ct. 895 (1956)] *supra* at 437.

And, as the *Doerflinger* court cautioned at p. 882:

> [A]n express determination that "there is no just reason for delay" is not enough. "There must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal." *Campbell v. Westmoreland Farm, Inc.*, 403 F.2d 939, 942 (2d Cir. 1968).

While great deference is accorded the Superior Court's determination as to finality, the appellate court still reviews the "finality" determination on its own and generally applies the measuring criteria of

Lindsay Credit Corp. v. Skarperud, 33 Wn. App. 766, 772, 657 P.2d 804 (1983), viewing:

> (1) [T]he relationship between the adjudicated and the unadjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case, (3) whether it is likely that the need for review may be mooted by future developments in the trial court, (4) whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial, and (5) the practical effects of allowing an immediate appeal.

Although the *Lindsay Credit* court phrased the scope of review as involving only a search for abuse of discretion, the widely recognized discretion tests, *see, e.g., In re Marriage of Nicholson*, 17 Wn. App. 110, 561 P.2d 1116 (1977) (discretion abused when no reasonable judge would have ruled as the trial court did) may not be as applicable in this context. That is because interests of "sound judicial administration," *Lindsay Credit, supra*, at 772, and "juridical concerns," *Curtiss-Wright Corp. v. General Electric*, 446 U.S. 1, 64 L. Ed. 2d 1, 100 S. Ct. 1460, 1466 (1980), also are involved. A lengthy wait for an appellate decision serves no one if a trial which could resolve, and possibly moot, all issues could be concluded in the meantime.

Also, regrettably, the Superior Court often signs orders or judgments containing "finality" language without having engaged in any evaluation of the *Lindsay Credit* factors. If the trial court has not exercised any discretion, the appellate court should not be expected to be bound by the Superior Court's "finality" determination.

If counsel intend immediate appeal of such an order or judgment, they should consider (1) having the Superior Court enter findings directly addressing application of the *Lindsay Credit* factors; (2) including CR 54(b) and RAP 2.2(d) "finality" language in the order, and (3) specifically arguing the question when the appellate court notes its motion. On the other hand, counsel believing the matter is not ripe for review should be prepared to take issue with the "finality" findings and determination, noting specifically the absence of any hardship if appeal of the matter were delayed until all claims and parties were disposed of. *See Campbell v. Westmoreland Farms, supra.* In any event, copies of all parties' pleadings usually are essential to the appellate court's review and should be appended to a party's response to the Court's or another party's

motion.

In the alternative, counsel should brief and be prepared to discuss whether discretionary review should be granted. RAP 6.2(b).

If the matter is not deemed immediately appealable of right and discretionary review is not accepted, the question proposed for review may still be raised on appeal once a truly final judgment is entered. RAP 2.2(d); 2.3(c); 2.4(b). Furthermore, the order remains "subject to revision [by the Superior Court] at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." CR 54(b). In appropriate instances, then, the need for further review may be mooted by an intervening change in the trial court's decision.

A survey of the applicable cases and rules, with some thoughts given to the *Lindsay Credit* criteria, should help counsel through the procedural maze in seeking review of less than wholly conclusive orders and judgments.

[1]RAP 2.2(d) *provides:*

In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment which does not dispose of all of the claims or counts as to all of the parties, but only after an express direction by the trial court for entry of judgment and a written finding that there is no just reason for delay. The finding may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required finding. In the absence of the required finding, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights and liabilities of all the parties.

[2]CR 54(b) *provides:*

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

AROUND THE STATE

CLARK COUNTY REPORT

by **JOHN F. NICHOLS**

The dog days of summer found the Clark County lawyers and lawyerettes engaged in the annual rites of the season—elections and golfing. The C.C.B.A. elections were in marked contrast to previous campaigns in their intensity and spending. **Jerry King** par laid early primary victories in Camas and La Center with a lucrative city expense account into an electoral, if not popular, victory as President. The remaining candidates were left to vie for what pass as symbolic offices. **Barbara Johnson** used her cutesy smile and pastel ensemble to garner the vice-president spot. Barbara, as is customary, was advised that she is only a heart beat away from the presidency and that she could not ride in the same vehicle as President Jerry. **Doug Bratt** was enticed to be treasurer with the promise of someday being my proofreader. Filling out the unenviable position of secretary was **John Stichman.** I was unable to fulfill my promised third term, as my usual bonding company "Carlo's Bonds and Burgers" upped its rates, thus becoming another victim of insurance non-reform.

With the hard work of electioneering out of the way, your C.C.B.A. members dusted off their clubs and clients and prepared for the annual Golf Tournament. This year's event had a definite judicial flavor. Longest Drive: (from Tacoma to Washougal) Justice **Ed Reed.** Longest Drive on the course: Judge **James Ladley.** Low Gross: **John Nichols** followed by **Rich Saunders** and Judge **John Skimas.** Most Gross: **Billy Thayer.** Publication of Billy's score has been ruled illegal in Georgia and recently upheld by the Supreme Court. Finally, the coveted award for the lowest score by one of the female gender, formally but respectively known as the "low chick" award, was won by **Susan Caulkins.**

Other noteworthy events found **Roger Bennet** being featured in a full-page article or exposé in the "Columbian" newspaper. In said piece, Roger introduces a relatively new legal procedure called "getting in momma's face". Whether this is an attempt to encourage a reluctant witness or a repressed maternal complex was not clear from the article. **Mike Hicks** has unveiled his new line of business cards for the 1986-1987 lawyer season. The cards feature Mike in semi-living color surrounded by his standard research materials—Gilbert's on General Practice. Next year's edition promises to be in 3-D with tiny sunglasses. With the appearance of new business cards, can the Yellow Page ads be far behind?

EAST KING COUNTY REPORT

by **DOUGLAS W. HARRIS**

It's not too early to start thinking of the EKCBA Annual Christmas Party and general membership meeting. The "event" will take place on Thursday, December 18, at a site not known at the time of this writing. Wherever it is held, the meeting will include the election of three trustees and the installation of new officers. Watch for the announcement in the mail and make plans to attend. There's always a lot of good food, a no-host bar and some pretty ridiculous speeches.

Doug Harris has been chosen to be the Law Day Chairperson for the EKCBA this year. He's not sure what the chairperson does, but he may be calling on some of you for help in organizing Law Day on the Eastside. Please don't hang up on him.

The Eastside Neighborhood Legal Clinic is in dire need of volunteer attorneys to staff the clinic. Speaking from personal experience, I can tell you that this can be a rewarding experience for a minimum expenditure of your time. The clinic is open to the public one night per week, and volunteers serve on a rotating basis of approximately one evening every eight weeks. I highly encourage your participation. For more information call Dave Williams at (206) 453-8161.

The firm name of Revelle, McCarthy, Ries & Hawkins, P.S., has officially adopted that name effective July 1. **Richard McDermott** and **Jeffrey Jones** have formed their own firm of McDermott & Jones, P.S. **Stephen Dwyer** has joined them as an associate in their office located in

the Honeywell Building in Bellevue.

In other news, **Mary Gaudio** and **Megan Heath** announced the relocation of their offices to 1800 Skyline Tower effective August 5. Also, the office of **Thomas R. Sabin** announced its relocation to 611 4th Avenue, Suite 203, Kirkland, effective July 31.

Finally, a new arrival to the Eastside is **Charles B. Allen.** He has recently moved over from that city across the lake and now has offices at 15606 N.E. 8th, Bellevue, 98008. We all welcome Chuck to the Eastside.

GOVERNMENTAL LAWYERS ASSOCIATION

by **FRANK K. EDMONDSON**

At the August luncheon, **Bob Jensen** discussed the proposed Thurston County charter revisions and proposed freeholder elections. Bob, an Assistant Attorney General assigned to the General Administration Division of the Office of the Attorney General, has long been active in civic affairs. He is currently on the Lacey City Council and is the Vice President of the Thurston County Better Government League, which was formed in the Spring of 1986 to explore ways to improve the organization of Thurston County government.

The speaker at the September luncheon will be **Marla Elliot,** Puget Sound Legal Assistance Foundation. She will discuss the Attorney Referral Project and pro bono services.

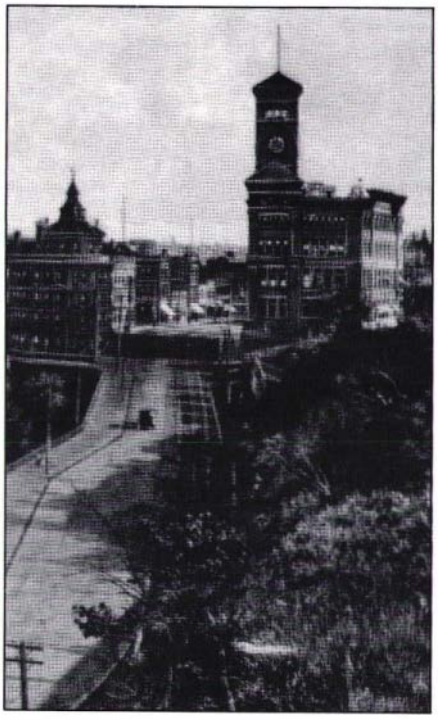
In October, Gov. Law will sponsor a CLE on Appellate Advocacy.

PIERCE COUNTY REPORT

by **ROBERT W. MARSDEN**

Ron Leighton, Bill Bergsten and **Wally Cavanaugh** shared top honors at this year's Tacoma-Pierce County Bar Association golf tournament. All three carded five-over-par seventy-sevens over the North Shore Course. **Stu Shelton** finished first in the handicap division, **Tad Dodge** was the winner of the Calloway division and **Janet Whitney** won the women's division.

The only casualty reported during this year's event, most embarrassingly, was your reporter's driver, which now lies at the bottom of the pond on the fifteenth hole. May it rest in peace.



Congratulations to **Alvin Anderson** for being awarded the President's Award at the recent annual convention of the Washington State Trial Lawyers Association. Congratulations also to Puyallup attorney **Gerald Hulscher.** Hulscher was recently named as part-time Magistrate for the United States District Court for the Western District of Washington.

Keith McGoffin and his son, **Kevin,** have left the law firm formerly known as Rovai, McGoffin, Larkin, and Miller. That firm is now known as Rovai, Miller, Foley, Orlando, and Larkin. **Tom Campbell,** a deputy Pierce County prosecutor for the past two years has opened his own law offices in downtown Tacoma. **David Marshall,** another former deputy Pierce County prosecutor and former associate with Williams, Kastner, and Gibbs, has recently joined the firm of Prince, Kelley, and Newsham in Seattle.

After three tries, Tacoma attorney **Robert Denomy** finally passed the state CPA exam. Bob's conclusion: It's much more cost effective to hire a CPA.

SEATTLE-KING REPORT

by **JAMES L. VARNELL**

Office moves. **John R. Allison** has joined Betts, Patterson & Mines, P.S., as a principal, and **Richard S. Ralston** is now an associate there. **Marsha J. Pechman, William S. Bailey** and **Ronald R. Ward** have become partners in Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz. **Laurence J. Severance** is now associated with East & Helenius. **Sharon Ambrosia-Walt** and **Amy Thompson-Amis** are now associated with Houger, Miller & Stein, which has moved its offices to 1800 Metropolitan Park. **Nancy L. Fukuda, Howard A. Coleman, Michael D. Pierson, David R. Peeler, Ira S. Rubinstein** and **Stephan M. Salzberg** are now associated with Riddell, Williams, Bullit & Walkinshaw. **Jeffrey L. Jernegan** has become a partner in Mikkelborg, Broz, Wells, Fryer & Yates, and **G. Lawrence Salkield** has joined the firm as counsel.

James Walker and **Jon Scott Fox** have moved to Market Place Two. **John A. Strait,** professor of law at the University of Puget Sound Law School, has become of counsel to MacDonald, Hoague & Bayless, and **Andrew H. Salter** has been made a partner in the firm. **Julie A. Kesler** has been selected as the new executive director of Washington Appellate Defender Association. **Jennifer B. Eychaner** has recently joined the legal department of Unigard Insurance Group. **Craig S. Sternberg** has joined Hatch & Leslie as a partner. **Ron J. Perey** and **Julia A. Langley** have formed a partnership, with

offices at Market Place One. **Jim Purcell** has opened an office at 1700 Century Square.

Honorable Mention. **Thomas M. Fitzpatrick** has been reappointed co-chairman, representing the American Bar Association, of the National Conference of Lawyers and Representatives of the Media. **C. James Judson** has been named to the American College of Tax Counsel. **Judith Lonnquist** has been named the first recipient of a scholarship awarded by The Natalie Skeels Memorial Foundation in recognition of her outstanding leadership and support for the career development of other women. **Lembhard Howell,** one of Seattle's two most recognized graduates of N.Y.U. Law School, was named Trial Lawyer of the Year at the Washington State Trial Lawyers Association convention. **Susan R. Davis** was elected president of WSTLA. **Linda Dunn McQuaid** has been promoted to chief of the Consumer Protection section of the Attorney General's Office.

Scene Around Town. At the Port Ludlow Creditor-Debtor Section meeting, **John Gose** took time away from lecturing about real estate contracts, mortgages and deeds of trust to memorize one item of baseball trivia: the name of the only player ever to complete an unassisted triple-play in the World Series. Meanwhile, **Noel Shillito** and **Larry Engel** were skipping Gose's lectures in favor of touch football.

Woody Wallen, visiting from Miami, was wined and dined by former law school classmates **Don Swisher, Jay Causey, Steve Anderson** and **Steve Chestnut.** Conspicuous by their absence were **Ross Boundy** and **Tom Bucknell.**We hope "Sedro Woolley Tom" will be taking more luggage to the Bar convention in Hawaii this year than he did to Vancouver in 1974. Finally, **Ken "Rag Arm" Petty** proudly reports that Williams, Kastner & Gibbs won the Law Firm League softball championship for the fifth time in the eleven years of its existence, with strong support from **Arley Harrel** and **Bill Leedom.**

SOUTH KING COUNTY REPORT

by **LESLIE A. WAGNER**

Golf Tournament. The 29th annual South King County Association Golf Tournament, the "Biege Open," held July 25 at Enumclaw Golf Course, was a rousing success. Special thanks to **Phil Biege** and his secretary **Sheila Lindsay** for planning the event, to all of the companies who donated prizes, and to **Bob Hall** for manning the grill at dinner and barbecuing everyone's steaks to perfection.

Congratulations to **Bob Kuvara** and **Paul Houser, Sr.** who share joint custody of the tournament trophy for low gross in the bar member category; both shot a 77 and agree to rotate physical possession of the trophy at three-month intervals, giving to the noncustodial golfer liberal rights of visitation.

Other honors went to the Honorable **Jack P. Scholfield,** Judge of the Court of Appeals of the State of Washington, Division I, who received the award for low gross in the judge's category (King County Superior Court Judges **Richard Ishikawa** and **Frank Eberharter** came in second and third respectively) and to **Phil Biege, Jr.,** who won low gross in the guest category; attorney **Don Mirk** was second. Winning judges in the Calloway division were **Liem Tuai** with a 74, **Gerard Shellan** with a 76, and **Norman Quinn** with a 76 (but whose actual score was 109).

Jane Rhodes won the prize for "most inspirational/courageous golfer", playing 18 holes despite a broken or seriously sprained right index finger (see below). The "I could have danced all night" award for post-tournament activities went to **Harrison de Mers,** with **Pete Curran, Judy Eiler, Tom McElmeel, Jane Rhodes** and **Gary Slater,** all serious contenders for the runnerup prize. The "I should have danced all night" prize goes to **Mark Davis.** Finally, **Jim Varnell** received the award for "most post-tournament water hazards avoided."

Everyone was happy to see the throng of judges who showed up for this year's event; it must be pure happenstance that the high ratio of judges coincided with an election year.

Soft Ball. This year's South King County Bar Association softball team is well on its way to a winning season. As of the time this article was submitted for publication, the team was 1 for 1, the victory coming after prevailing in a hotly contested forfeit. Coaching duties are shared by **Bill Ells** and **Bill Hollowell.** Other member/players include **Bob Thomson, Terry Burns, Mark Quigley, Laird Pisto, Tom Kalenius, Terri Roberts, Leslie Wagner,** and **Carlos Sosa** (who acted shocked when told to use a bat instead of a hockey stick for this league). The team hopes that **Jane Rhodes** (who injured her finger in a practice game when she went to catch a fly ball with her ungloved hand) will be back to her second base position in the near future; until then, she is official scorekeeper. Legal assistants **Sherri Trudeau, Beth Olson, Rosie Martinelli** and **Darla Vasquez,** and court reporter **Caren Gibson,** also play, along with willing spouses and friends.

Challenge Issued. Speaking of softball, **Bill Ells** challenged Federal Way attorneys (or as he refers to them, the "woosies"), to play the "Kent Bar" in a softball game on Wednesday, September 10. Results to follow.

Announcements. The Renton firm of Anderson & Jackson is

pleased to announce that **J. Roderik Stephens** has become an associate of the firm, effective July 1. Renton attorney **Peter Banks** married attorney **Gail Holcomb** in March of this year. Congratulations!

Thanks. Special thanks to Curran, Kleweno & Johnson, P.S. word processor **Jody ("Flying Fingers") Bizzle** for typing up this article for submission and for putting up with numerous revisions, additions, etc., etc.

SPOKANE COUNTY REPORT

by **JUDY J. FOSTER**

Swearing-in ceremonies were recently held for the successful applicants of the July Washington State Bar examination. A very special thanks goes to Spokane Young Lawyers president, **Michael J. Custer** and his committee for the orientation provided to the new admittees and the nicely sponsored reception that followed. Welcome to the new admittees!

Is everyone in Spokane County going to Hawaii next month! It would seem so. The Washington State Bar annual conference is being held in November in Honolulu! If you have not made reservations and plans to attend (and I am sure the entire membership here in Spokane has) this should be done soon. Trying to plan any type of "bar" function in early November brings disgruntled and most times, outrageous screams of "No, no—I won't be here!" So those of us left behind will be forced to view the tans acquired in November—long after the tans of the summer of 1986 have faded. Have a good time all of you that are going. And think about those of us left behind to "man the shops!"

At the November 21 bar sponsored CLE, Legal Foundation of Washington president **Jack Dean** and executive director **Barbara Clark** will address the membership about the IOLTA funds and the pro bono programs around the state. Our bar association will undoubtedly receive many ooh's and aah's since we have the largest number of attorneys within a county bar association signed up to do referrals for the entire state! Pretty impressive aren't we. Our membership is right at 850 and we have nearly 500 attorneys signed up to take referrals. At the time of this writing, 350 referrals had been made from our program. There are not enough pages to thank all of you who have so kindly offered your services and taken cases. Your time, assistance, willingness and attitude are to be commended. Thank you, thank you, thank you!

On the Move! **Eric M. Butterworth** recently announced opening of a new office at W. 201 Francis Ave., Spokane, 99205; (509) 489-6855. **Jeff R. Brown** is now located at South 1401 Grand Blvd.,

Suite 203 N., Spokane, 99203; (509) 456-5100. **Drew M. Bodker** is also relocated to South 1401 Grand Blvd., Suite 203 N., Spokane, 99203; (509) 456-5100. **Gregory Morrison** has relocated to W. 1728 Jackson, Spokane, 99205; (509) 326-1700. **Conrad Lysiak** is now located at W. 601 First Avenue, Spokane, 99204; (509) 624-1475. **Cristian E. Anderson** has moved his offices to South 1401 Grand Blvd., Suite 201 S., Spokane, 99203; (509) 838-1187. **Joseph S. Esposito, William A. Tombari, Jr.,** and **Richard M. George** have formed a new firm under the name of Esposito, Tombari & George, P.S. Associated with the firm are **John W. Campbell** and **Nancy L. Dykes.** The office is at 960 Paulsen Building, Spokane, 99201; (509) 624-9219. Attorney **Thomas R. Brown** has opened a new office located at E. 111 Lincoln Rd., Suite 6, Spokane, 99208; (509) 467-5659. **Phillip "Dutch" Wetzel** and **Michael Perrizo** have moved to N. 921 Adams, Spokane, 99201; (509) 326-0550.

DISCIPLINE

Suspended

Seattle attorney **Jean H. Scharf** (admitted 1977) was ordered suspended for 90 days effective April 16, 1986, by order of the Supreme Court denying State Bar counsel's petition for discretionary review. This action was based upon a hearing officer's findings that Scharf had directed his secretary to falsify evidence which Scharf provided during discovery in a lawsuit between himself and a former client and in the course of disciplinary proceedings, and that he failed to protect a client's interest and made misrepresentations to the client.

In addition, the Disciplinary Board ordered that Scharf receive a Reprimand based upon findings that he failed to promptly deposit client funds into a trust account and refused to promptly disburse to the client funds which the client was entitled to receive; and that Scharf receive a Censure based upon findings that after the client had retained a new lawyer to represent him in collecting his funds from Scharf, Scharf directly communicated with the former client regarding the dispute without the consent of the new lawyer.

Censured

Pamela J. Anderson (admitted 1981) has been ordered to receive a Censure for failure to cooperate with a disciplinary investigation and failure to file a trust account affidavit in a timely fashion.

Seattle attorney **Sam B. Franklin** (admitted 1967) has been ordered censured following a hearing in which he was found to have neglected his client's collection matter. Although Franklin and his client discussed the collection matter on several occasions during a 16-month period, and although Franklin was aware that his client expected him to proceed with the litigation, Franklin took no action until his client complained to the Association.

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IN MEMORIAM

Vancouver attorney **Albert M. Nanney** passed away on June 12, 1986, and his law practice has been closed. He was admitted to the Bar in 1933. He received a commemoration from the Bar for 50 years of continuous practice. He practiced up until a few months ago, doing mainly probate work in Vancouver.

Eastside Human Services Forum V

Eastside business people who are looking for opportunities to become more involved with their community will want to attend the Fifth Annual Eastside Human Services Forum, "A Celebration of Caring," October 24 at the Red Lion Inn in Bellevue.

The Forum will have a day-long drop-in Resource Fair with over 75 human service agencies available to answer questions about their programs and services and to discuss volunteer opportunities. In addition, 12 free workshops will be held during the day, with the content around three tracks:

The first track, "Issues in the Workplace" has 4 1½-hour workshops including: Dealing with Substance Abuse in the Workplace; Corporate Social Policy; Child Care Options and Implementation Strategies; Vietnam Vets in Business.

The second track, "Resources for the '80s and Beyond" focuses on non-profit organizations, their issues and concerns. Workshop topics are: Who's Doing What—And What's Not Getting Done, Managing Scarcity; Finding and Soliciting Support From Small Business; Advocacy and Lobbying for the Human Service Community.

The third track is entitled "How the Eastside Cares for Families" and also has four workshops: Overview of Demographic Changes in Eastside Families; Family Care in the 80s; Developing Personal Support Network; and Aging on the Eastside: Advocacy, Independence and Care.

The Forum is co-sponsored by East King Council and the Eastside Human Services Coalition. Over 300 people representing business, government, education and the community are expected to attend.

All interested Eastsiders are invited to participate in any or all of the day's events. The Workshops and Resource Fair are free, luncheon with keynote speaker **Glenn Pascall** is $15. For more information and to register, please call East King Council, (206) 641-2418.

Seminar on Mental Illness

Dr. Thomas Szasz, author of *The Myth of Mental Illness* and *Law, Liberty, and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices*, will present a one-day workshop, "Mental Illness: The Idea and Its Consequences," on October 18, 1986. For information, call Northwest Family Training Institute, (206) 545-4428.

Mussehl Appointed To Chair Standing ABA Committee On World Order Under Law

Robert C. Mussehl, Seattle attorney, has been appointed by **Eugene C. Thomas**, President-Elect of the American Bar Association (ABA), to chair the ABA's Standing Committee on World Order Under Law. Mussehl's term begins with the adjournment of the 1986 annual meeting; he will succeed former U.S. Congressman **Robert F. Drinan**, of Washington, D.C.

Mussehl has been a member of the ABA House of Delegates since 1979.

Fitzpatrick Reappointed Co-Chair of National Conference for Lawyers and Media Representatives

Thomas M. Fitzpatrick, a partner in the Seattle law firm of Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, has been reappointed co-chair, representing the American Bar Association, of the National Conference of Lawyers and Representatives of the Media.

The conference group provides a forum for ABA leaders to share ideas with representatives of the American Society of Newspaper Editors, the National Association of Broadcasters, the Radio and TV News Directors Association, the National Cable TV Association and the Soci-

ety of Professional Journalists (Sigma Delta Chi). Fitzpatrick was reappointed to lead the ABA delegation to the group by incoming ABA President Eugene C. Thomas of Boise, Idaho, effective at the close of the 1986 ABA Annual Meeting in New York City. With more than 320,000 members, the ABA is the largest voluntary professional organization in the world.

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

PROFESSIONAL

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

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FOR SALE/WANTED

For sale: Negligence Compensation Cases Annotated (complete set) $1,000; Washington Practice, 14 Volumes, $250; Am Jur POF (complete set) $700; Selected Restatements. (206) 357-7791.

For sale: ALR 1-4th, ALR-Fed; CJS; U.S. Supreme Court, Lawyers Ed.; Wright & Miller Fed. Practice & Proc.; USCA; Shepards US Citations; Washington Practice; Washington Digest; Washington Session Laws. All curent. RCW (3 Volumes); Washington Law Review - complete to 1981; Rabkin & Johnson Current Legal Forms; CCH Labor Cases - to 1980; CCH NLRB Decisions - to 1980; CCH Employment Practices Decisions - to 1980. Call Donna (206) 423-450.

For sale: Rolltop, locking computer desk and Walt terminal and Westlaw terminal and printer. Call (503) 296-2181 - The Dalles, Oregon.

Want to buy: Set or partial set of Washington Appellate Reports. Call (509) 332-2750.

Opportunity knocks: For a young ambitious attorney. I'll sell, lease, or trade my office location of 40 years, including office equipment, library ($30,000.) and real estate, and including rental income. Call (509) 246-1841 for appointment. K. Edison Gimple, P.O. Box 938, Soap Lake, WA 98851.

For sale: Washington Reporter (West), contains cases from 47 Washington 2nd (1955) to present; 290 Pacific 2nd; and all Washington Appellate Cases. 106 Volumes. $1,000. Call (509) 332-2750.

Justice William O. Douglas' secluded country estate. Located in the shadow of Mt. Adams, this beautiful 35-acre layout includes a quality 3,000 sq. ft. home, in-ground pool, corrals, outbuildings. A rare opportunity. Contact Roger for information and tour of this unique property. Klickitat Valley Realty, Inc., P.O. Box 251, Goldendale, WA 98620; (509) 773-3755.

For sale with supplement to August 1986: Revised Code of Washington; Washington Digest; Washington Practice; Washington Reports, Second; Shepards Washington Citation; Washington Court Rules Annotated; Call (509) 248-8229.

CPT Phoenix System for sale. 10 megabyte disk with 2 stations. Under maintenance agreement since purchase 1 yr. ago. Call (503) 687-9210.

OFFICE SPACE

Downtown Bellevue: Attorney sought to share five-office suite.

View of Lake Washington/Olympics. Secretarial space, receptionist, library, copier, conference room, and free parking. WANG equipment, legal time and billing, and phone systems, and P/T evening secretary available. (206) 462-8222.

Bellingham: 600 sq. ft. newly remodeled office space one block from courthouse. $350 includes utilities and parking. Contact Lori (206) 734-2206.

Office Space, Ballard area: (4) offices available - newly remodeled, carpeted, ground level. Amenities: secretarial area; conference room; library; copying; reception; CPA at location. Terms: Lease or month to month - $350 per month per office (negotiable); furnished/unfurnished; secretarial services available. Contact Laura at (206) 783-1161.

New Bellevue office spaces available to share in 10-attorney space. Located in north Bellevue. Instant freeway access. Beautiful space includes: receptionist, library, conference rooms, telephone hardware, copier access, coffee service, kitchen facilities. Free Parking. Athletic facility and showers to be added. (206) 822-5580.

Office space: Unique opportunity to increase caseload while working in team-oriented, office-sharing arrangement in attractive Seattle suite. Receptionist, secretarial and word processing included. Contact Maryellen, (206) 443-0800.

Office sharing - Bellevue: Sunrise over the Cascades; four story atrium; remodeled office suite; two partner-sized offices available; secretaries, receptionist, library, conference room, word processing, telephones, photocopier, kitchen, comfortable eastern exposure, immediately off elevator, parking in building. Call Jack at (206) 453-9200.

Boise, Idaho law office and receptionist available to nonresident attorneys wanting to establish an Idaho practice. Minimum rate $75 per month. Contact Hugh Mossman, 611 West Hays Street, Boise, Idaho 83702, (208) 342-6900.

POSITION AVAILABLE

Commercial attorney. Small commercial firm in Seattle seeks associate with 3-5 years' sophisticated commercial law/bankruptcy experience. Please reply to Box 58, WSBA.

Associate attorney wanted: Entry level or one to two years' experience; well-established, medium size Spokane-based law firm. Reply to Box 63, WSBA.

Attorney Jobs: 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/private employers in Washington, D.C., nationwide, and abroad. $30-3 months; $50-6 months. FEDERAL REPORTS, 1010 Vermont Ave. N.W., #408, Washington, DC 20005. Attn: WAB. (202) 393-3311. Visa/MC.

Highly selective Seattle firm with solid business, real estate and tax practice seeks established, creative attorneys with 5-10 years' experience in real estate, business planning, commercial, and real property and securities litigation fields. Excellent credentials and exceptional skills required. All responses in the highest confidence. Reply to Box 69 WSBA.

Bellevue office of Davis Wright & Jones has twelve attorneys with a rapidly expanding full-service practice, offering all of the benefits of a smaller firm along with the full support and practice mix of a large firm. We are seeking three attorneys:

1. Real estate and business attorney with one-three years' experience;

2. Commercial litigation and labor attorney with one-three years' experience;

3. Tax attorney with two-four years' experience (L.L.M. or C.P.A. preferred).

Excellent academic credentials and references required. All responses confidential. Please contact Judith A. Shulman, Davis Wright & Jones, 110 110th Avenue

N.E., Suite 700, Bellevue, WA 98004. Telephone (206) 451-8686.

Associate wanted. Small real estate/business law firm seeks associate with at least two years' experience to work in Tacoma or Puyallup. Salary dependent upon experience and case load brought into the firm. All replies confidential. Demarest & Denomy. P.O. Box 44, Tacoma, 98401.

Seattle firm seeks associate with 1-2 years' business litigation experience. Firm emphasizes bankruptcy and commercial litigation. Prior bankruptcy experience not essential. Academic achievement desirable. Contact: Thomas Bucknell, Shulkin, Hutton & Bucknell, Inc., P.S., 1100 Pacific Building, Seattle, WA 98104 by mail only.

Small growing Seattle maritime firm seeks attorney with one to three years' experience in marine insurance, P&I clubs, cargo litigation and knowledge of seamanship practice. Applicant must have outstanding academic credentials, have obtained an LL.M. in Admiralty, be conversant in at least one foreign language, and be admitted to practice in a foreign country. Salary negotiable. Reply to Box 72, WSBA.

Attorney position available in growing one-attorney firm. Requires minimum three years' litigation, commercial law, bankruptcy, real estate experience. Response is confidential. Please reply to: Box 74, WSBA.

Established, growing, eight-person firm in suburban King County seeks attorney with two to three years' experience in family law. Must be willing to relocate. Please reply to Box 77, WSBA.

Medium-sized Yakima law firm engaged in general and trial practice, seeks attorney with zero to three years' experience. All inquiries confidential. Reply to Box 71, WSBA.

Fifteen-lawyer Seattle law firm with sophisticated real property, commercial and securities practice, seeks litigation associate with 1-3 years' experience. Position requires high academic and litigation skills, provides early responsibility and enjoyable teamwork within firm. Reply to Box 70, WSBA.

Experienced business associates sought by sole practitioner with expanding practice. Prefer person(s) with sophisticated larger firm experience interested in control of their professional lives. Minimum of three years' business-related experience. Reply to Box 76, WSBA.

Entry-level tax position available through April 15 for J.D. interested in data processing of federal and state income tax returns. Call CCH Computax Inc. at (206) 251-5350.

Cashmere sole practitioner, Terrence M. McCauley, is seeking an associate and eventual partner. Applicants should have one to five

years' experience and background in commercial law, estate planning and administration and real property law. To apply, send a resumé, writing sample and salary history to Terrence M. McCauley, P.O. Box 836, Cashmere, WA 98815.

Valley Medical Center offers a tremendous opportunity for a creative, highly motivated, goal-oriented attorney. The successful candidate must have excellent communication skills together with a minimum of 3-years' experience in contract and real estate law. Knowledge and experience with the laws pertaining to public hospital districts would be extremely valuable. Very competitive salary and benefits based on experience and potential. Send resumé to Director of Human Resources, Valley Medical Center, 400 S. 43rd Street, Renton, WA 98055, an Equal Opportunity Employer.

As the flagship Medical Center and leading health care provider in south King County, Valley Medical Center offers unique and challenging career opportunities for all its staff and management.

Valley Medical Center has undergone expansive growth and development throughout the past few years in response to the medical needs of our growing community, the influx of talented new physicians, and technological advances in the medical world. With the completion of a recent $23 million expansion program, Valley is now the biggest and most comprehensive health care facility in south King County.

POSITION WANTED

Attorney with 8 years' private practice experience in commercial and casualty litigation and general corporate matters seeks position with in-house legal department or small/medium-sized law firm in Seattle area. WSBA member. Reply to Box 68, WSBA.

Mailclerk, 31 years' experience looking for long-term employment. Hard worker, bonded, reliable, loyal, good health, excellent references. Leave messages for Michael Alquist at (206) 632-7577 or (206) 464-6303.

Washington attorney with MBA in finance and accounting. Three years of experience in general practice. College teaching experience during law school and MBA school. Ranked in the top third in law school and top 10% in MBA school at leading universities. Seeks special opportunity in small community. Reply to Box 73, WSBA.

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Seeking will of Marilee J. Angell dated after December 11, 1975. Please contact: Phoebe Thompson, Department of Revenue, Post Office Box 448, Olympia, WA 98504. Phone (206) 753-5547.

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