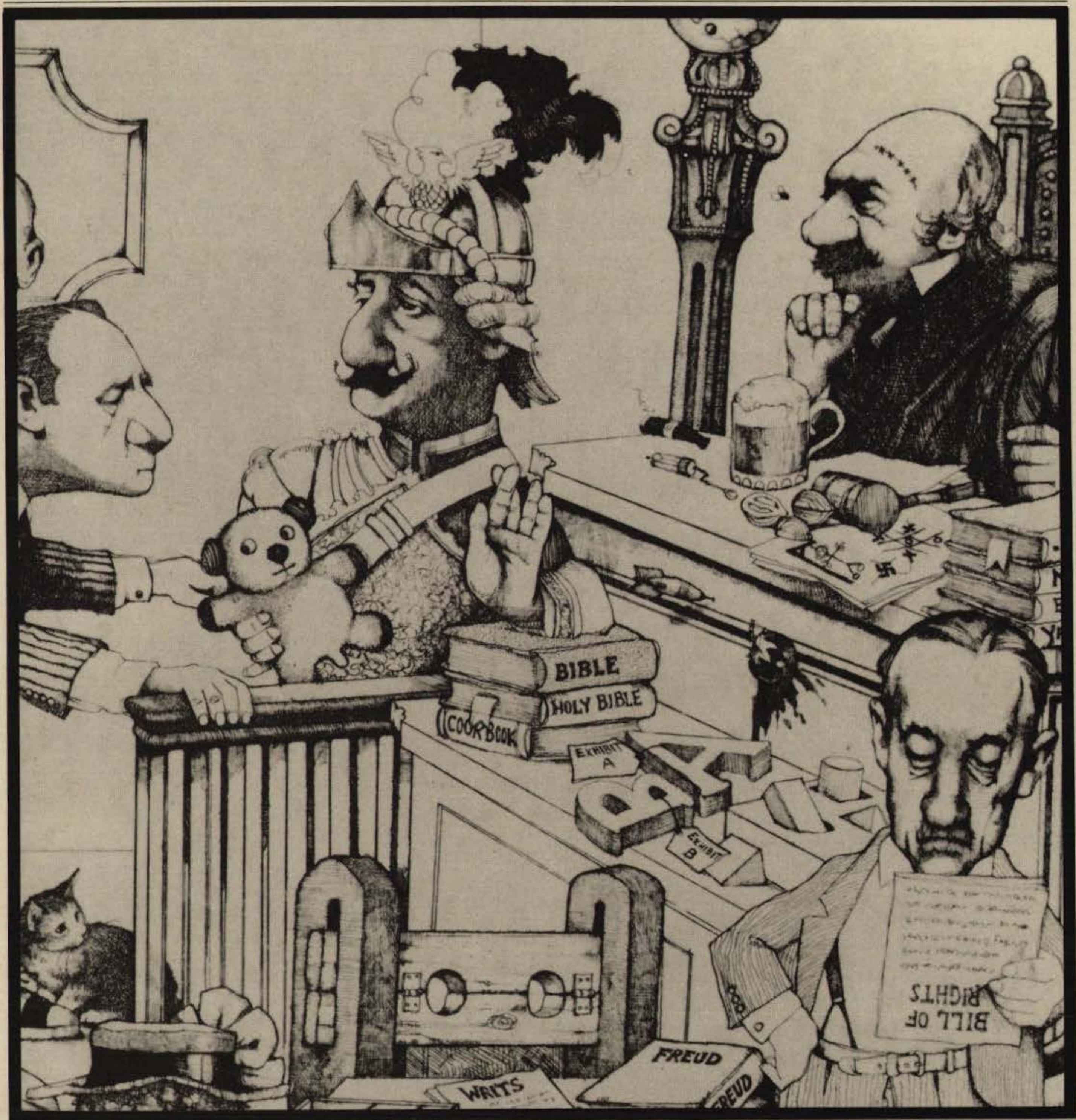
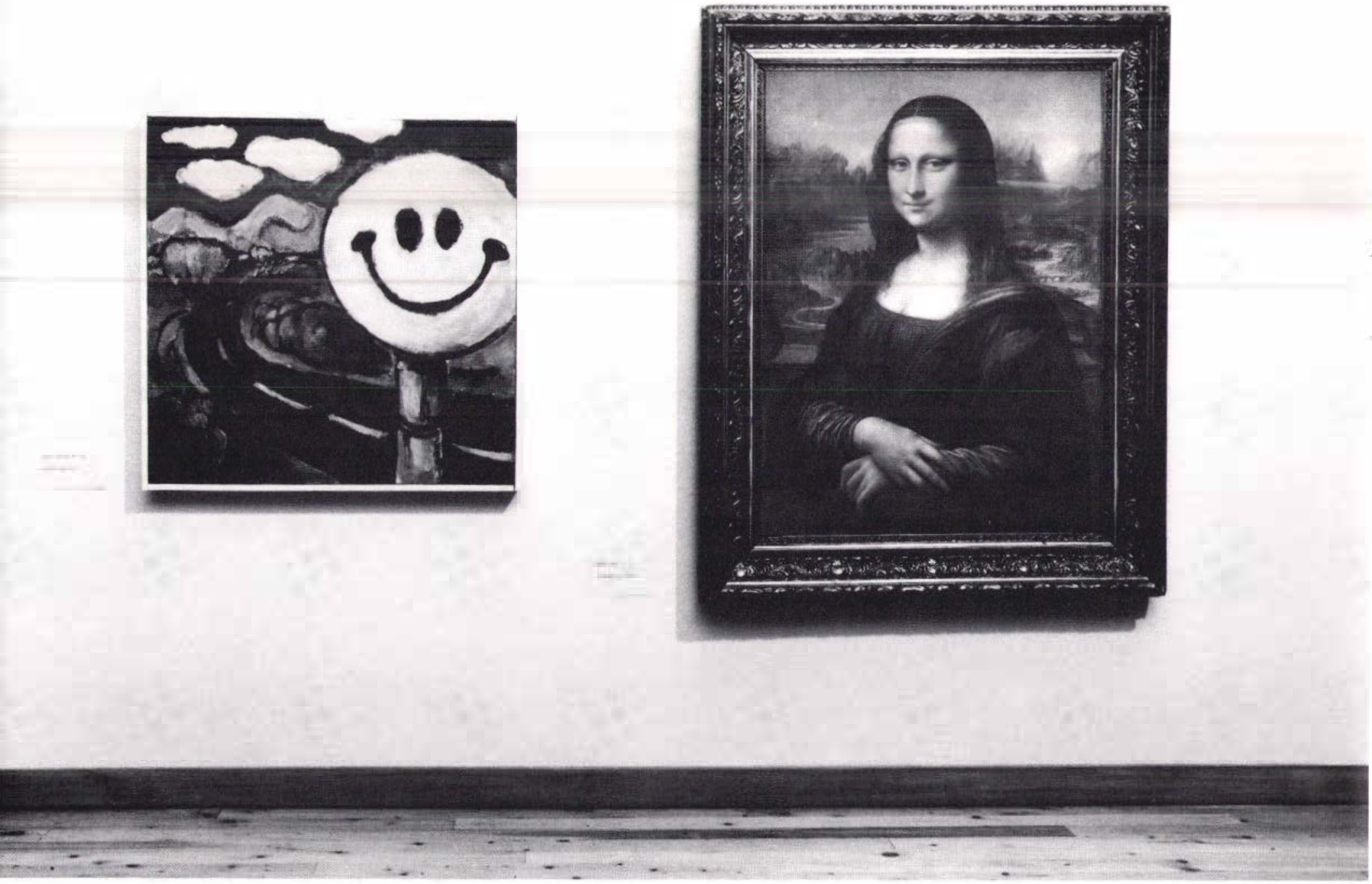
Washington State Bar News

Vol. 40, No. 6, June 1986



Expert Witnesses



Washington State Bar News

Vol. 40, No. 6, June 1986

FEATURES

IN THE NEWS

DEPARTMENTS

ART CREDITS

Cover: Detail from "Eyewitness," a Charles Bragg etching, featured at Kenneth Behm Galleries, Rainier Square/ Bellevue Square. The complete picture appears on page 38 of this issue.

Published by
WASHINGTON STATE BAR ASSOCIATION
505 Madison Street Seattle, Washington 98104

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PUBLISHED the last day of the month before cover date. Editorial deadline 25th day of month for second issue following. Direct correspondence to *Washington State Bar News*, 505 Madison Street, Seattle, WA 98104, telephone (206) 622-6054. All editorial material, including editorial comment, appearing herein represents the views of the respective authors and does not necessarily carry the endorsement of the Association or the Board of Governors. Likewise, the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement. SUBSCRIPTION, included in active membership, is $12.00 a year for inactive members and $24.00 a year for nonmembers. Single copies $5.00; article reprints $4.00.

Strengthening CR 68

Editor:

I strongly support M.J. Carlson's suggestion (March 1986 *Bar News*) that CR 68 be changed to provide that either a defendant or a plaintiff may make an offer of judgment and that if the offer is not accepted, the matter goes to trial and the other party does not improve its position from the offer that was made, then the offeror should receive reasonable costs *and attorney's fees* incurred after making the offer.

For cases with damages of $10,000 or less (not including interest) I have had success making offers as either plaintiff or defendant under RCW 4.84.250-.300. There is case law that says this statute must be pleaded in the complaint or answer if it is to be utilized.

Other interested attorneys should urge the Court Rules and Procedures Committee to propose this change to the Supreme Court.

MARYALICE NORMAN
Seattle

To Hob and Hob Not

Editor:

In the March 1986 "The Board's Work," page 16, there is an allusion which I don't understand.

There is an account of the Board's consideration of the Criminal Law Section's request that the Association file an amicus curiae brief in the case before Judge Rothstein in which a lawyer's client seeks to quash an IRS summons directing the client to produce the records of all fees paid by him to the lawyer. The story is clear enough. My difficulty is with the headline: "Hobbesian Choice: Fifth vs. Sixth Amendments."

What is a "Hobbesian Choice"?

The only Hobbes that I know of is Thomas Hobbes, an English philosopher in the time of the Stuarts. I do not know of Hobbes' name's being attached to any kind of choice, nor do I know of anything in his writings or his history that suggests any such concept.

There is a very well known choice with a "hob" in it, and that is "Hobson's Choice". About 400 years ago in Cambridge, England lived one Tobias or Thomas Hobson, a rather eccentric fellow who kept a livery stable. He had about 40 horses for rent, but when you wanted to rent one you couldn't take your pick. The only one he'd let you rent was the one closest to the door—it was that horse or none. You had a choice, to be sure, but it was rather limited. So a "take it or leave it" choice is a "Hobson's Choice."

But the choice presented to the Board of Governors is plainly not a Hobson's Choice; so one cannot assume that the headline is an *idem sonans* mistake. Hence I am still bewildered and shall appreciate your enlightening me about a "Hobbesian Choice".

JOHN N. RUPP
Seattle

Editor's note—Your editor is prone to seduction by pun, particularly if it is homophonious. She stands corrected by Mr. Rupp, the first editor of the Bar News.

CARNEY-STEPHENSON AND THE COLUMBIA CENTER, A DYNAMIC PARTNERSHIP

Jack Stephenson with new partner, John Spellman, in Carney-Stephenson's 23rd floor reception area.

For the expanding law firm of Carney-Stephenson, the search for a "perfect" office environment ended at Seattle's new Columbia Center.

Why Columbia Center? "We were looking for a class A building," says Jack Stephenson, senior partner in the firm. "The location is great, across the street from the King County and the Federal Courthouses – I can be back to my office in minutes. That and having other law firms we do business with right in the building, means more work gets done. And we enjoy all the conveniences: shops, a private club and easy-access parking right in the building."

"I like the way the building looks," says Stephenson. "People say that being in Columbia Center makes a statement and since moving here we've received overwhelmingly favorable comments. Many floors feature 9 corner offices – and the city's most amazing views. The building owner is right in the building: we get great service.

This is Seattle's premier building. I thought it was great when we moved in, and the more I'm here, the more I like it."

If you're spending more time at your present location, but not liking it any better, maybe you're ready to move up to Columbia Center. Call Martin Selig today at **467-7600**

COLUMBIA SEAFIRST CENTER

76 Stories of Pure Prestige

And His Nose Grew Longer...

Chicken Little ran by. "The sky is falling! The sky is falling!" he said to anyone who would listen. "It's true," said Pinocchio, "it's very, very true." Rip van Winkle heard the commotion and stirred. "Everyone said that years ago," he grumbled as he rubbed the sleep from his eyes, "but nothing's really changed at all." "Yes, *that's* true," said Pinocchio, "that's very, very true."

So might have these three fairy tale characters begun to discuss the Tort Reform Act. What else did they say? Readers are invited to complete the mythical conversation in 250 words or less. Double-spaced, please.

Remarkable

People scrabbled for a little living. They did everything for the children. They wanted their children to enter the American middle class. My son will be a doctor, they'd say, or a lawyer, maybe a teacher. I never heard anyone express lesser hopes for his child.

Only in America by Harry Golden

"What a remarkable statistic," I said to a friend recently. I was babbling about the fact that seven of the ten Governors of the Washington State Bar Association are first- or second-generation Americans. My friend wasn't impressed. "It's just America," he said.

And therein lies the tale.

Three of the Governors are first-generation Americans. **Frank Hayes Johnson** of Spokane is one. His father came from South Africa and his mother from Scotland. "She never lost her brogue," sighs Frank. The parents of **Hal Vhugen** of Seattle were much traveled—and equally travailed. They left their native Russia, spent a few years in Germany, and eventually made it to America. The result: One child was born in Russia, another in Germany, and Hal in America. And Tacoma's **Ed Lane?** His parents came from Canada, though his father, an orphaned lad, hailed originally from England.

The second-generation American Governors are barely more "established." **Angelo Petruss** of Olympia and **Roy Moceri** of Seattle have remarkably similar backgrounds. Their fathers came from Italy, as did their maternal grandparents. Angelo's mother, who has lived her entire life in Spokane, makes her home within a mile or two of where she was born. **Ted Zylstra** of Oak Harbor can boast of a Dutch mother who held Dutch, Canadian and American passports. His paternal grandparents also came from Holland. During the local Holland festival, when Ted shows up in his Dutch fisherman's costume (big bloomer pants, wooden shoes, etc.), out-of-town attorneys grumble about the "home court" advantage. And then there's Seattle's **Steve Reisler.** Thanks to his Austrian-born father, who became an American citizen and served his adopted country's intelligence community, Steve was raised in Germany and Italy.

Of the lot, perhaps one parent graduated college. Few finished high school. They were berry farmers, dry cleaners, a nurse, shoemakers, working-class folk, a dozen lifetimes in near and distant lands. A tradeoff of opportunities. An uncertain future. Hard work, pride, and a vision of something better.

And what of the three remaining Governors, **Jay White** and **Elizabeth Bracelin** of Seattle and **Don Bond** of Yakima? Jay traces his ancestry to Kentucky horse thieves. Bets and Don's skeletons remain in the closet.

Yes, we have come a long way since the days when anyone could run for office—anyone who was a free, white, male property holder, that is. Today, any active member of the Washington State Bar Association can run for the Board of Governors. *Any active member*. That's it. You don't have to be white, or male, of any particular political or spiritual bent. Any active member. So says Article III of the Bar's By-Laws.

To sit on the Board of Governors: Some lawyers dream of it. Fewer make the attempt. It's there for us all.

Carole Grayson

Astute Budgeting For Progressive Services

Well, there they go again! Giving our money away! Forty Eight Thousand, One Hundred and No/100ths ($48,100.00) Dollars for some project called "Today's Constitution and You". Right! At its April meeting in Vancouver, Washington, your Board of Governors did authorize the Association to contribute that weighty sum to Today's Constitution and You, a project which is on fast track and may be the model program in the entire nation for ushering in the Bicentennial.

We were very proud of the Board for saying "yes" to that request for funds. We were also very proud of the thoughtful, probing consideration given by each member of your Board of Governors as consciences were searched to determine how he or she would vote on the issue.

As the request was discussed, one thing became readily apparent. Your Board is as sensitive to the fiduciary responsibility it bears to the membership in financial matters as it is on other issues which affect the manner in which we practice our profession. We commend them for their concern.

In keeping with that concern, we thought it might be appropriate to spell out a few random thoughts on the state of the finances of the Association at the midpoint of my term of office. First, we are well and prospering. We operate on the theory of a balanced budget and do not look to dues increases to support experimental programs.

At that same recent Board meeting, a motion was passed to recommend to the Supreme Court an increase in the bar examination fee to place the examination on a "pay as you go" basis. Several years ago, the Board decreed that our client indemnity fund reserve should be gradually increased to $500,000.00 in order to be self-sustaining. We hoped to reach that goal by 1988. It appears that the reserve will be established easily by the end of fiscal year 1986-1987. The financial picture of this Association is very bright indeed.

That's true if we wish to remain static. We can continue our present efforts over the near future and not feel financial pressures.

But, let's examine what might be considered the other side of the coin. Last August, your Board approved a pilot program for a skills training project. The purpose: to enable new admittees to learn the basic, practical aspects of lawyering which are not taught in law school, which skills are necessary for such admittees to adequately serve their clients—that is, to assure that the public will be well-served by Tyro Lawyers. The cost of that pilot program was estimated to be $30,200.00, an expense the Board, in August 1985, was prepared to authorize.

The committee in charge of establishing that pilot program, chaired by Governor Don Bond, has reported to the Board that full implementation of the program, after a successful pilot program, will require a commitment of a quarter of a million dollars annually. The committee raises the question whether this Association wishes to assume such an obligation and whether this Association can do so without a dues increase.

For my part, I have addressed various local bars throughout the state this year, and have mentioned that I think it's imperative for our Association to undertake a strong affirmative program to assist the impaired lawyer—whether by reason of alcohol or chemical drug abuse, senility or psychiatric

reason. We fully anticipate a comprehensive proposal will be presented to the Board this summer. The proposal will be accompanied by a cost estimate, and I doubt that it will be less than $80,000.00 a year.

So, what do you do? "Entrench and protect what you have" or reach out, grow and carefully address the needs of your membership? I opt for the latter and I believe your Board will, too. But it will do so only after careful consideration of the need for, and worth of, such programs and whether or not their implementation will be in the best interest of our members and the public.

Bob Comfort

The Board's Work

by Carole Grayson

May 16-17, 1986. Spokane, WA

Present: All Governors and President Comfort. Also present: John Riley (WSBA Young Lawyers), Kathy Witter and Claudia Backlund (Washington Women Lawyers), Robert Farrell (WSBA Counsel), John Michalik (WSBA Exec. Dir.), Allen T. Miller (Govt. Lawyers), James Noe (Superior Court Judges Assn.), Patrick Sutherland (Wa. Assn. of Prosecuting Attys.), Solie Ringold (Ct. of Appeals Judges Assn.), Scott Smith (SKCBA Young Lawyers), Christine Cary (District Court Judges Assn.), M. Wayne Blair (SKCBA Bd of Trustees), Jack Gaffney (Admin. Law Judges Assn.).

77% PASS BAR EXAM 431 of 559 hopefuls passed the February 1986 Bar Exam: 75% passed the essay portion, and 89% passed the ethics section. 119 of 123 persons repeating ethics passed this time around. Overall pass rate on the July 1986 examination was 57%, with 70% passing the essay section and 68% passing the ethics.

LOCAL LINE SPOKANE Joe Gagliardi, representing the trustees of the Spokane Bar, and Judy Foster, Spokane Bar executive director, highlighted their bar's many activities:

- Of the 1,000 Spokane County lawyers, 862 belong to the local bar. With 682 able to do pro bono work, 408 are signed up, a percentage which Foster says is tops in the state.
- Even with no prior claims, malpractice premiums for the Bar's trustees and officers are "out of sight", said Gagliardi. In 1985, a $1,000 premium and $1,500 deductible provided $1,000,000 coverage. In 1986, a $5,000 premium and $5,000 deductible provided $500,000 coverage. How can local bars pool coverage to keep costs down, wondered Gagliardi.

POSSESSORY LIENS Wanting more information, the Governors unanimously voted to refer to the Rules of Professional Conduct Committee its proposed opinion on a lawyer's ethical obligations in asserting a possessory lien under RCW 60.40.010 and in surrendering a client's papers and property upon withdrawal.

PUBLIC RELATIONS Accepting the WSBA Public Relations Committee's recommendation, the Governors voted 10-0 to adopt the following WSBA Public Relations Policy:

"Public relations simply means good communication. Public relations is the opening of communication channels. Its basic purpose is to create an understanding of the purposes of an organization and the merits of its actions. It is not intended to obscure or obstruct information about negative points, nor is it intended to be merely cosmetic, but to communicate openly, completely and effectively with everyone and every group -- the "publics" -- that have reason to be interested in or concerned about the purposes and activities of an organization.."

REMEMBER SEPTEMBER By 8-0-2, the Governors voted to waive Article II, Section 3 of the Bar Bylaws for 1986. The effect: The terms of the Governors from the Second, Fourth, and Seventh Congressional Districts begin at the close of the Governors' September meeting. Lameduck Governors Don Bond of Yakima and Ted Zylstra of Oak Harbor abstained.

GROUP AND PREPAID LEGAL SERVICES Lowell Halverson of Seattle, chair of WSBA Group and Prepaid Legal Services Committee, and committee member Michael Casey of Spokane estimated that 15 million Americans are covered by group and prepaid legal services programs. The committee is sponsoring a CLE and symposium in September.

HOW TO WIN FRIENDS AND INFLUENCE PEOPLE "...You sell yourself by the acts you do," said Halverson on behalf of the Bar's Public Relations and Lawyer Referral Committees, and his own committee in their campaign for general institutional advertising by the Bar. "The Bar has an absolute treasure trove of understated public services," he noted.

The Governors voted 10-0 to create a task force to investigate the development of a general institutional advertising campaign.

CRIMINAL LAW The Governors unanimously voted to refer to the Criminal Law Section a resolution passed by the section's Executive Committee "...that it is unprofessional conduct and inimical to the administration of justice for a prosecutor to subpoena an attorney to a special inquiry proceeding or grand jury proceedings without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who has been or is now being represented by the attorney/witness.."

The governors requested: 1) information demonstrating a need for the resolution, 2) a copy of the ABA resolution or rule on the same subject and 3) a joint resolution to be presented by the Criminal Law Section and the Wa. Association of Prosecuting Attorneys.

The Criminal Law Section had also recommended that the resolution's content be adopted as an amendment to the Rules of Professional Conduct. Spokane lawyer Mark Vovos spoke for the section.

Thurston County prosecutor Pat Sutherland argued against the resolution, while Spokane County prosecutor Donald Brockett urged the Governors to "wait to see" the outcome of U.S. v. Tornay. (See March 1986 Bar News, pages 16-17, and April 1986 Bar News, pages 13-14.)

MALPRACTICE INSURANCE WSBA President-designate William H. Gates of Seattle, who chairs the Bar's Malpractice Insurance Task Force, and Task Force member Jerry B. Edmonds of Seattle discussed their group's written report and recommendations.

After considerable discussion, the Governors voted 6-4 to consider the development of a professional liability fund, but withheld final action until no later than the September 1986 meeting. In the interim, WSBA President Patrick Comfort will write to all WSBA members detailing the proposed liability fund and a related proposed Supreme Court rule.

Governors Angelo Petruss of Olympia; Elizabeth Bracelin, Roy Moceri and Harold Vhugen of Seattle opposed the motion. Petruss said he heard no outcry that the public was being hurt by lawyers without insurance. Said Moceri, "We can't justify this on the ground that we're going to save lawyers money. Are there enough lawyers out there so we should change the system?"

THE GOVERNORS UNANIMOUSLY:

- named Richard Hansen of Seattle to the Board of Directors of the Seattle-King County Public Defender.
- adopted a resolution supporting the appointment of William Dwyer of Seattle to the U.S. District Court, Western District of Wa.

UPCOMING MEETINGS: June 27-28, Vancouver, B.C. (Four Seasons); July 18-19, Orcas Island (Rosario Resort); August 22-23, Gleneden Beach, Oregon (Salishan).

A large tent covering a January boat show collapses under the weight of a 4" snowfall. The owners of the heavily damaged boats sue the organizers of the show, claiming that such a snowfall is not unusual in January, and thus a properly selected and erected tent should have handled the load. The organizers reject responsibility, claiming an Act of God.

A woman claims that ice on her apartment stairs was not properly removed and that it caused a serious, debilitating fall. The owner, on the other hand, states that no ice was on the stairs, and that the temperature that night was above freezing.

A stream which flows from a clearcut area into a residential neighborhood rose rapidly during a day of heavy rain, destroying several homes with a mixture of water, sediment and trees. The home owners claim that poor forest practices were the cause and sue the timber companies involved. The companies counter that the event was the result of record rainfall and thus was an Act of God.

Forensic Meteorology: A Northwest Perspective

by **Clifford F. Mass**

Many cases require the acquisition and interpretation of weather data. What kinds of weather produce damage and injury in the Pacific Northwest? How can an attorney get weather information or secure help in locating data or interpretation? This article will attempt to answer these questions.

To begin with, what kinds of cases demand meteorological information? Some major categories include:

(1) Property damage or personal injury due to wind, waves, heavy precipitation, lightning or the like.

(2) Incidents in which visibility or lighting play a role, such as an auto accident on a foggy street. In addition to weather data, such cases often require knowledge of solar or lunar illumination.

(3) Cases dealing with surface conditions such as wet or icy roadways and walkways.

With these categories in mind, let us consider the weather situations that are the most frequent causes of property damage and personal injury in the Pacific Northwest.

Damaging Northwest Weather

Compared to the rest of the nation, the weather of the Pacific Northwest is relatively benign. Hurricanes and tornados are virtually absent, while blizzards and severe thunderstorms are rarely experienced. However, there are a few "classic" weather scenarios that can bring about substantial damage and loss of life.

One example is the strong Pacific cyclones and associated powerful southerly winds that occasionally ravage the area. Occurring on the average every few years, these storms can bring winds as strong as 70 to 90 miles per hour over much of western Washington, with even stronger winds at "favored" locations. Classic examples of such storms include those of Columbus Day, 1962; November 13-14, 1981; February 13, 1979 (the Hood Canal storm), and Thanksgiving 1983 (during which many learned the pleasures of barbecued turkey). In most of these events a Pacific cyclone rapidly, and often unexpectedly, strengthened off the Oregon coast and then moved northeastward across northwest Washington or Vancouver Island. During such events winds can vary greatly over the region, generally being larger over or near the water; for example, wind speeds on Lake Washington's Evergreen Point Floating Bridge can be twice that observed in more protected locations.

The strongest southerly winds of all have been observed in the area around the Hood Canal Bridge. Under certain conditions southwesterly flow passing over and around the Olympics produces a small eddy or low to the northeast of the Olympic Peninsula. This phenomenon is analogous to the eddies one observes downstream of a large rock in a river. Air accelerating into the low speeds up and can produce fantastic wind speeds of over 120 miles per hour. We believe this is what happened the night the Hood Canal floating bridge was destroyed.

Strong winds, but from an easterly direction, are produced in a distinctly different way: When atmospheric pressure east of the Cascades is substantially greater than that to the west, air accelerates through gaps in the mountains. A casual examination of a topographic map of the Pacific Northwest indicates that the Cascades are not very uniform in height, with low-level gaps in the Columbia and Fraser River valleys; in addition, there is a relatively low region north of Mt. Rainier and east of Enumclaw. Just as when one squeezes a toothpaste tube to accelerate the contents out the opening, higher pressure east of the mountains causes air to speed up as it passes through these gaps. Thus, strong winds are frequently observed in and downstream of the gap regions. The Enumclaw ("place of evil spirits") area appears to be especially susceptible to strong winds—in December 1983 winds of over 120 mph were observed and damage was in the millions of dollars.

Another Northwest weather hazard is fog, as was made very clear last December, when thousands were unable to get into or out of Seattle-Tacoma Airport. Ironically, fog in both western and eastern Washington is often associated with very warm, clear conditions aloft. The warm air acts as a "cap" to the moist, dense air at low levels so that moisture and pollution levels increase near the surface. The result is deteriorating air quality and increasing fog each day. Visibility often drops to 1/8 or 1/16 of a mile. The moisture source of Puget Sound encourages fog formation, as does the surrounding topography which tends to weaken low-level winds that could potentially stir up the cold, fog-laden air.

Heavy precipitation in the Cascade foothills is another serious threat to life and property. Although many people expect that precipitation progressively increases as one ascends the Cascades, this is often not the case. Rather, precipitation amounts are often greatest in the foothills, where the incoming flow is suddenly forced to rise. With a strong, moist flow riding up the mountains, precipitation amounts of 5 to 8 inches a day are not uncommon.

A particularly vulnerable foothill area is found east of Bellingham. For example, intense rainfall on the slopes above Lake Whatcom has resulted in avalanches of water and debris that have surged down the slopes into populated regions. Damage in the January 1983 storm has been estimated in the tens of millions of dollars.

Finding Weather Data

The first step in any weather-related case is to secure the appropriate "raw" weather observations in the area of interest. Unfortunately, this task is complicated by the many sources and types of weather data.

The basic and most extensive weather-observing network is maintained by the National Weather Service and includes reporting stations at most major airports and military bases as well as ships, buoys and other locations. These data are often available hourly, are of relatively high quality, and are reliably archived for future access.

Other secondary sources of weather data include networks run by local utility companies, public agencies dealing with air pollution or water quality, ski resorts, and even radio amateur groups. The biggest difficulty in using these additional data sources is knowing of their existence. In addition, the quality of the secondary reports varies from excellent to worthless, their archival is uncertain, and important weather parameters are often missing. Nevertheless, the wide geographical distribution of these reports often makes them the closest observation to the incident in question, and thus invaluable if available.

Other sources are satellite and radar data. The former give a picture (every ½ hour) of where clouds are located, while the latter indicate areas of precipitation.

The data in the National Weather Service network is archived at the National Climatic Data Center in Asheville, North Carolina. At a nominal price, certified copies of the observations can be secured. If certified copies are not required, a call to the local Weather Service Forecast Office can sometimes bring answers to short data inquiries.


An overturned mobile home near Enumclaw destroyed during the windstorm of December 24, 1983.

Locating a Meteorologist

For more involved cases or when an attorney needs assistance in finding and/or interpreting weather information, a knowledgeable meteorologist can be secured. For example, a meteorologist might be asked to determine the weather conditions at a location between two observing sites or to determine the probability or return time of an event such as heavy rain.

Finding a meteorologist is complicated by the fact that there are no agreed definitions or specified educational or other requirements for using that title. In fact, individuals with a wide range of backgrounds claim to be "professional meteorologists". For example, TV weathercasters often call themselves meteorologists even though they must have only a cursory knowledge of the subject.

How can an attorney find an appropriate individual and evaluate his or her capabilities? First, an attorney should look for someone with at least some academic training: a bachelor's degree in meteorology or atmospheric sciences at the minimum. Secondly, the individual should have several years of experience in dealing with the meteorology of the area in interest. It cannot be stressed enough that each area has its local weather peculiarities and unique sources of data with which an outsider may not be familiar.

Where can a meteorologist be found? One source is a local university department of atmospheric sciences; large departments usually have a member knowledgeable in most areas of the discipline. Another source is the local National Weather Service office, since many maintain a list of individuals who claim to be consulting meteorologists. A final place to turn is the American Meteorological Society (AMS), which maintains a Certified Consulting Meteorologist (CCM) program; the AMS can provide a list of available CCMs. In addition, in the back of each issue of the Bulletin of the AMS are advertisements for both CCMs and members of the Society interested in consulting work.

Many attorneys make the mistake of waiting too long to order meteorological data or secure the services of a consulting meteorologist. Unfortunately, such a delay can irreparably weaken their client's case. Ordering data from the National Climatic Data Center can take a month or more, and the synthesis and analysis of the data can take an equal or longer period. Therefore, an attorney should begin acquiring necessary weather information at least two to three months before it is absolutely required. ☐

Appendix
Data and Information Sources

Data

1. National Climatic Data Center
   Federal Building
   Asheville, North Carolina 28801
   (704) 259-0682
2. National Weather Service Forecast Office
   7600 Sand Point Way
   Seattle, Washington 98115
   (206) 526-6087

Meteorological Consultants

1. Local Universities
   Department of Atmospheric Sciences, AK-40
   University of Washington
   Seattle, Washington 98195
   (206) 543-4250

   Department of Atmospheric Sciences
   Oregon State University
   Corvallis, Oregon 97331
   (503) 754-4557
2. American Meteorological Society
   45 Beacon St.
   Boston, Massachusetts 02108
   (617) 227-2425

Clifford F. Mass is an associate professor of atmospheric sciences at the University of Washington. He specializes in weather forecasting and the weather of the Pacific Northwest.

Informal Opinion re: Lawyer Named as Beneficiary or Executor on Will Prepared for a Client

Questions:

1. Do the Rules of Professional Conduct always prohibit a lawyer from preparing a will in which the lawyer is a named beneficiary?

2. Do the Rules of Professional Conduct prohibit a lawyer from designating the lawyer as executor in a will prepared by the lawyer?

Conclusions:

1. RPC 1.8 prohibits a lawyer from preparing an instrument giving the lawyer or immediate relative any substantial gift from a client, except where the client is related to the lawyer.

2. Nothing in the RPC prohibits a lawyer, at the request of the client after full disclosure, preferably in writing, from being named as executor in a will prepared by the lawyer.

Discussion:

Lawyer as Beneficiary:

The first issue is governed by RPC 1.8, which provides: A lawyer who is representing a client in a matter: . . . (c) shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

The comments to the ABA Model Rules of Professional Conduct, from which this provision was taken without change, provide:

> A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

While the comments to the Model Rules were not adopted by our Supreme Court, they are relevant in determining the intended scope of the rules and the construction which should be given them.

The Committee reads RPC 1.8(c) to adopt a per se prohibition of the preparation of any instrument under which the lawyer, or a related person, receives a gift, subject to only two exceptions:

1. Where the gift to the lawyer is not substantial; or
2. Where the lawyer is related to the client.

The term "substantial" is defined in the Rules of Professional Conduct as follows:

> 'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance.

In determining whether the subject of a particular gift is "substantial" the Committee believes the lawyer should focus on the economic nature of the proposed gift when viewed from the perspective of both the client and the lawyer at the time the will is prepared. If the proposed gift is substantial when compared with either the size of the estate or the financial status of the lawyer, RPC 1.8(c) prohibits the lawyer from preparing the will in which the gift is made. If the primary nature of the gift is not economic, such as where a client wishes to bequeath an object of sentimental significance to a lawyer, the Committee is of the opinion that RPC 1.8(c) would not prohibit the lawyer from preparing the will in which the gift is made. Where a substantial cash bequest is proposed or where the object is of substantial economic value, the Committee believes that RPC 1.8(c) prohibits the lawyer from preparing the will in which the gift is made. The Committee also believes that RPC 1.8(c) prohibits a lawyer from preparing a will in which the lawyer is the residual beneficiary because there is no way to determine whether such a gift is substantial at the time the will is prepared.

The second exception to the general prohibition applies in situations where the lawyer is a relative of the testator. While RPC 1.8 states the exception in absolute terms it must be kept in mind that the lawyer's conduct in preparing such an instrument would continue to be governed by the general conflict of interest rule, RPC 1.7(b), which provides in material part "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents in writing after consultation and a full disclosure of the material facts . . ." The Committee is of the opinion that this rule is applicable in all situations in which a lawyer prepares a will in which the lawyer is a beneficiary, including where the bequest is not substantial or where the client is a relative of the lawyer.

The Committee does not believe this construction of the relevant rules is inconsistent with the decision of the Supreme Court in *Estate of Shaughnessy*, 104 Wn.2d 89, ____ P.2d ____ (1985). While portions of the literal language of both the majority and dissenting opinions can be read to create an absolute prohibition against a lawyer preparing a will in which the lawyer is named as a beneficiary, the Supreme Court was addressing a situation in which the particular lawyer involved was both a specific beneficiary of $5,000 and the residual beneficiary of the estate. Together the specific bequest of $5,000 and the designation of the lawyer as the residual beneficiary clearly constitutes a "substantial" gift and thus a lawyer would be prohibited by RPC 1.8(c) from preparing a will containing them. The Committee does not believe that the opinion should be read to modify RPC 1.8(c) to prohibit a gift which is not substantial as described above or situations in which the lawyer has prepared a will for a member of his or her family which makes the lawyer a beneficiary.

Lawyer as Executor:

The second issue, whether a lawyer may prepare a will which designates the lawyer as executor, presents different issues. The Rules of Professional Conduct do not specifically address this issue. Under the former Code of Professional Responsibility, Ethical Consideration 5.6 provided:

> A lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

While this ethical consideration was not carried over to the Rules of Professional Conduct in express terms, the Committee believes it constitutes a sound and workable guideline for lawyers to follow in situations where their clients wish them to act as executors. The Committee does not believe the Rules of Professional Conduct prohibit a lawyer from preparing a will in which the lawyer is named as executor where that designation is at the express wish of the client after the client has been fully informed by the lawyer as to the duties and obligations of an executor and of the costs likely to ensue.

While the Committee believes that the designation of a lawyer as executor in a will does not create a business relationship between the lawyer and the client, the considerations expressed in Rule1.8(a) provide a useful guideline to a lawyer to designate him or herself as executor. The lawyer should disclose to the client the duties and obligations of an executor, the fees which the lawyer will charge for performing those services, the fees alternative executors would probably charge, and should advise the client that he or she is free to seek the advice of independent counsel. This disclosure should be in writing to ensure that the client understands its significance and to establish conclusively that it occurred.

As with the first issue, the literal language of *Estate of Shaughnessy* can be read to establish a per se prohibition against lawyers preparing wills in which they are named as executors regardless of the desires of their clients. This language is dictum, however, since the majority opinion specifically held that the Code of Professional Responsibility was not violated by the lawyer's actions. The Committee believes that both the majority and the dissenting opinions in the *Estate of Shaughnessy* must be read in light of the facts of the case presented to the court. In addition to the presence of substantial bequests to the lawyer, there is no indication that the lawyer fully advised the client nor that the client affirmatively decided that the lawyer should be the executor after being so advised. The Committee does not believe the Supreme Court intended to prevent a lawyer from preparing a will in which the lawyer is named as executor in situations where the client is fully advised and affirmatively desires the lawyer to so serve.

While undoubtedly it is the better practice for a lawyer not to be named as executor in a will which the lawyer prepares and such a course would preclude any questions arising later, the Committee believes that the ultimate decision is the client's. If the client, after full disclosure, desires the lawyer to act as executor, a lawyer has no professional obligation to refuse to do so. We do not believe the Supreme Court would prohibit a fully informed client from choosing to have his or her lawyer both prepare the client's will and serve as executor of the estate. ☐

Informal Opinions are published pursuant to authorization granted by the Board of Governors but they have not been individually approved by the Board and do not reflect the official position of the Association. An informal Opinion is provided for the education of the Bar and reflects the opinion of the Code of Professional Responsibility Committee.

Using Vocational Specialists in Marital Dissolution Cases

by **Karil H. Bell,** *M.A., N.C.C.*
and **Jane B. Hall,** *J.D.* *

Introduction

Marked financial inequities exist under present no-fault dissolution laws. No-fault law is based upon a concept of rehabilitative maintenance, with temporary spousal support. This concept only works well in selected cases, and in many situations it is unrealistic to expect that parity in earning capacity can be obtained.

There is a radical change in the standard of living of divorced couples one year after divorce. Weitzman & Dixon, *The Alimony Myth: Does No Fault Make a Difference?*, 14 FAM. L. Q. 141 (1980). *See also*, Hoffman, *Marital Disability and the Economic Status of Women*, 14 DEMOGRAPHY 67 (1977). Men experience a 42% improvement in their post-divorce standard of living, while women experience a 73% loss in their standard of living. Weitzman & Dixon, *The Alimony Myth: Does No Fault Make a Difference?, supra.* Under current marital dissolution practice, the husband retains the full benefit of the marital investment and his enhanced earning power and leaves the wife with the full burden of the opportunity cost of her years in non-market labor. Beninger & Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L. Q., No. 3 at 201 (Fall 1982). The result is a significant economic disparity. The March 1981 Current Population Survey, Bureau of the Census, noted that about one-half of all families below the poverty level in 1980 were maintained by women with no husband present and that the poverty rate for such families was 32.7%, compared with 5.3% for the married-couple families and 11% for families with a male householder present, no wife present.

These studies suggest a need for factual data regarding a financially disadvantaged spouse's (usually the wife) ability to provide for himself or herself after the dissolution. In marital dissolution cases involving a financially disadvantaged spouse, a vocational specialist can assess the income potential of this spouse, the loss of income potential resulting from non-market years, current employability, long-range financial prospects, and other factors to determine what type of maintenance is required. A vocational specialist can also provide accurate testimony at trial regarding the likelihood of future employment and can help substantiate your case for rehabilitative and/or long term maintenance.

When to Use the Vocational Specialist

The candidate for vocational counseling typically falls into one of three economic classifications: (1) the *unemployed but employable* person who lacks skills or career direction, (2) the *unemployable or marginally employable* person who will never be able to be economically self-sufficient due to age, mental or physical handicaps, and (3) the *underemployed* person who earns too little to either provide adequately for her economic needs, and/or has no possibility of ever achieving economic parity due to a lack of training.

Selecting the Vocational Expert

The vocational specialist assists the client by developing a concise, practical, and desirable plan for her to become economically self-sufficient. This requires an educational background and experience in counseling and testing, and knowledge of the local employment market and training programs. The specialist must be able to competently present the evaluation of the client in court.

*The authors acknowledge the kind assistance of Dr. Charles Maurer, Ph.D. and Joel Griffith Green, J.D., LL.M.

The Vocational Report

The vocational specialist's report summarizes the counseling process and vocational goals. It includes pertinent information tailored to the client's case. The following areas should be addressed in a vocational report:

SAMPLE VOCATIONAL REPORT FORM

A. *History*

Name, address, date of report
Client age
Personal background family status (children, marriage length, economic status, etc.)
Educational background
Work history, including volunteer experience
Review of any physical/psychological handicaps (including age)

B. *Counseling Process*

Review of all assessment instruments, including their purpose and results
Review of the counseling process, including client's desires, role in selection process, etc.
Discussion of the proposed training programs, including their costs, time-line for completion, why the program was selected, etc.
Discussion of the proposed vocational choice, including the job outlook, income potential, entry requirements, career ladder, etc.

C. *OR* a review of the client's history that supports the recommendation that the client is unemployable, or only marginally employable.

D. *Conclusion*

A concise review of the data that supports the logical outcome of the report.

The specialist's report must contain data on the probability of a client's success in a proposed career as well as the economic potential of the choice. The following information must be included in a report with a training option plan: (1) There must be a reasonable number of predicted job openings in the field. (2) The estimated average annual income must be adequate to meet the client's basic income needs. (3) The proposed work must reflect the client's interests, personality traits, and aptitudes or skills. (4) The client must demonstrate the desire to complete the proposed program. (5) The client must have the intellectual abilities needed to complete the training. (6) When appropriate for the client's abilities, a career ladder should be available to help her achieve economic parity with the working spouse.

When the advice of other experts has been used, their recommendations must be incorporated into the report. (Psychologists, physicians and other experts referred to in the report may be needed as expert witnesses if the case goes to trial.)

Direct Examination of the Vocational Expert

After receiving the specialist's report, interview the expert and review direct testimony and probable questions on cross-examination.

The specialist should explain any tests given and the results, so that the lawyer understands them. Test results are attackable by knowledgeable opposing counsel or an adverse expert witness. You can strengthen your case during direct examination by presenting evidence of the accuracy of the tests.

Comply with all court rules concerning expert witnesses at trial, so that the specialist's opinions and reports will be admissible. If opposing counsel wants to stipulate to the admissibility of the specialist's report, be aware that live testimony is often more persuasive and receives more attention from the court than documentary evidence.

The following list of direct examination questions for a vocational specialist should be adapted to fit the facts of a specific case. First, introduce and qualify the expert as an expert, including information relating to experience, publications, professional organizations, location of business, professional licenses, and so forth.

Sample Direct Examination Questions

1. Did you provide vocational counseling for (client's name)?
2. At whose request was this counseling performed?
3. On what dates and for how many hours did you see (client's name).
4. (Optional) Did you charge a fee for this evaluation? Who paid for this service?
5. (Optional) Did you work with any other professionals during your investigation and vocational report preparation?
6. (If the answer is "Yes") Who are these other professionals? What role did they play in your evaluation of (client's name)?
7. Can you describe your evaluation/counseling process?
   a. Was testing done? If so, what tests were administered?
   b. Is ______________ test accepted in the field as an accurate assessment of ______?
   c. Can you summarize the results of your testing for the court? Did you include this information in a vocational report?
   d. Did you complete all parts of the test material presented? Are all significant scores reported?
   e. What other evaluative techniques did you use to reach your conclusion? (Extract in appropriate detail the work the vocational counselor did with your client).
8. Will you please state for the court the conclusions you reached concerning the vocational needs of (client's name) based upon your investigation, counseling and experience?
9. I am handing you a document, Petitioner/Respondent's Exhibit ____ marked for identification. Please identify the document, the date of the document and the signature.
10. Are you the custodian of these records, and are they kept at your place of business?
11. Was this report made in the regular course of business?

ANNOUNCING

Judicial Evaluation of Lawyers

A voluntary program to increase lawyer competency

Through the joint efforts of members of a task force from the Washington State Bar Association, the Superior Court Judges' Association and the District and Municipal Court Judges' Association, a program has been established for trial judges to critique the performance of lawyers trying cases in their courtrooms. The purpose of this program is to increase lawyer competency.

This is strictly a voluntary program. No lawyer will be critiqued unless he or she requests the judge to do so. The program is also optional on the part of the judges. Some judges will be unable to participate because of time pressures or other reasons.

Any lawyer who wishes to have his or her trial performance critiqued by the trial judge should make the request to the judge in advance of the trial. (A request form and list of suggested evaluation guidelines are available from the Washington State Bar Association and many courthouses.)

A lawyer should inform opposing counsel of his or her request and obtain the permission of opposing counsel to meet privately with the judge after trial to hear the judge's critique. The Code of Professional Responsibility Committee has rendered an informal opinion that such a private meeting with the trial judge without the consent of opposing counsel would invite violation of DR-7-110. The judge in no case will discuss the merits of the case. He or she will simply evaluate performance in a given trial.

The form of the critique itself will be entirely up to the discretion of the trial judge. For most judges it will probably take the form of an informal oral discussion, wherein the judge points out the portions of the trial during which, in the opinion of the judge, the attorney performed well, and those areas where the judge believes the performance could be improved. Suggested guidelines include such areas as:

- Judicial Critique of Opening Statement;
- Judicial Critique of Closing Argument;
- Judicial Critique of Voir Dire; and
- Judicial Critique of Actual Trial.

The performance evaluation, whether oral or written, is strictly confidential between the judge and the lawyer assessed. Any written comments should be destroyed once the judge advises the lawyer of the assessment.

Adopted by

WASHINGTON STATE BAR ASSOCIATION
SUPERIOR COURT JUDGES' ASSOCIATION
DISTRICT AND MUNICIPAL COURT JUDGES' ASSOCIATION

For more information or copies of a descriptive pamphlet and "Request for Judicial Critique" form, contact:

Public Affairs Department
WASHINGTON STATE
BAR ASSOCIATION
505 Madison Street
Seattle, WA 98104

12. Were entries made at or near the time of the events recorded therein?
13. Does your report reflect accurately your findings and conclusions?

(Offer Petitioner/Respondent's Exhibit ___ into evidence.)

14. Do you have an opinion as to how long: (a) Retraining; (b) Education, or (c) Attainment of employment, etc. will take? (d) What is your opinion of this?
15. Based upon your investigation and interviews, do you have an opinion as to the cost of the: (a) retraining, (b) education, etc.? (Establish the probable cost to your client of further training, transportation, books, uniforms, etc., including the amount of time involved for maintenance purposes.) What is your opinion?
16. Based upon your experience and investigation, what are the prospects of a position in the ______ field being available upon completion of this training program? (Establish what information the expert relied upon to form this opinion.)
17. Based upon your investigation and interviews, do you have an opinion concerning (client's name) current employability? What is your opinion?
18. What are (client's name) chances of finding employment with her present skills? What wages could she expect to receive if she were to seek employment with her present skills?
19. Based upon your investigation and interviews, what is the income potential (entry wages and average wages) if (client's name) completes the recommended training program? (Establish the source of this information.)
20. Based upon your investigation and interviews, does this potential income (that available after training) reflect generally the lifestyle (client's name) had during her marriage?
21. Based upon your training and expertise, do you have an opinion as to whether (client's name) is capable of completing the training and becoming employed as a ___? On what do you base your opinion?
22. Do you have an opinion as to whether (client's name) is motivated to complete your recommended course of action? On what do you base your opinion? What is your opinion?
23. Has (client's name) done anything to begin the process? (Establish your client's willingness and motivation to pursue the suggested program.)
24. Would your recommendation have been different if (client's name) had not been going through a divorce?

Cross-Examination of the Other Party's Expert

When a vocational specialist will be used by opposing counsel to support that client's position at trial, a copy of the vocational specialist's report should be obtained. The lawyer and the client should review the report. Is the recommended plan acceptable or realistic in the view of the courts? Is it worth the emotional and financial cost to the client to challenge the report's recommendation? If so, there are several options to consider:

1. Call or see the expert (with opposing counsel's permission). This may allow the lawyer to evaluate what the expert did not do.
2. Depose the expert if he or she will not discuss the case or to lock in the expert's opinions. (This may not be necessary if the report and discussion with the expert provide enough ammunition to attack the expert's results.)
3. Subpoena the test results and other records of the expert and review them or have them reviewed by another expert (especially the test results).
4. Attempt to have the court require the opposing party submit to testing and evaluation by this new expert. (This is not often done in Washington State, but may be an option elsewhere or in cases where a fraudulent or extremely biased opinion has been submitted).
5. Obtain the following information from the expert:
   a. The fee paid to the expert. (A large fee bears on the expert's impartiality, credibility and

interest.)

b. Discover if the expert's income comes solely from involvement in litigation. (Could the expert be a hired gun?)
c. Is the expert a friend of the opposing party or an enemy of the other client?
d. Did the client show up for all appointments? (This bears on motivation.)
e. Did the client do all of the homework, and do it in a reasonable time-frame? (This bears on motivation.)
f. Determine the expert's qualifications. The qualifications of the expert can be discovered by asking other experts. It is often surprising to learn that the expert lacks the expertise or the necessary qualifications to qualify as an expert, or that he or she always testifies for the same law firm, in favor of the retaining party or always on behalf of the wife/husband.

The following series of questions are organized in categories that tend to discredit specific areas of the expert's testimony. Some or all of the questions may be appropriate to each individual case.

Sample Cross-Examination Questions

In the first set of questions establish that large fees were charged and that the collection of these fees reflects on the partiality of the expert.

1. Is it true that you are being paid for your preparation and testimony at this trial?
2. Are you being paid on an hourly basis or a lump sum fee basis?
3. How many hours did you bill for preparation?
4. ____ hours at $_____ per hour, totaling ______________ dollars?
5. How many hours of this preparation were done after you were deposed?
6. How many hours did you actually spend in counseling and/or testing (names)?
7. So your additional _____ hours at $_____ per hour were for preparation to testify?
8. Did you meet with (opposing counsel) prior to testifying?
9. What was the nature of this meeting (with opposing counsel)?
10. Is it fair to say that you reviewed the testimony you were to give in this case?

The following set of questions will establish any prior relationship between the expert and the client, or the expert and the client's counsel.

1. Was Petitioner/Respondent a client prior to the existence of this divorce action?
2. Is it fair to say she was referred to you by (opposing counsel) for testimony at trial and the report?
3. In how many divorce cases/trials have you testified for (opposing counsel)?
4. Is it true that in all those cases your recommendation was for a substantial educational commitment or retraining for your client? (Or list other common testimony traits.)
5. Is it true that in all those cases you billed for your services at $_____ for pre-trial and $_____ for your time at trial?
6. Is it not true that you have been a personal friend of the Petitioner/Respondent for _____ years?

The following set of questions is intended to produce a question in the Judge's mind as to the true experience and skill of the expert witness.

1. I believe your direct testimony was that you have been practicing for _____ years, is that correct?
2. How many people per year do you counsel?
3. Doesn't that mean then, that you have only examined or counseled ____ people?
4. Isn't it true that you have yet to see one of your counselees actually obtain employment after training?
5. Isn't it true that you do not keep records that statistically follow your clients through their proposed training/employment course? In fact, it is true that you do not know if your recommendations are successful, do you?

The next two questions are used to impeach the expert.

1. Isn't it true that you testified in the (Jones) case that further education was necessary for Mrs. (Jones)

because there were no jobs in the (teaching field)?

2. Isn't it true that weeks later you are now recommending (teaching) as a viable employment option?

The following set of questions establishes that the Petitioner/Respondent (client) lacks motivation for the proposed training program.

1. Isn't it true that ______________ canceled ____ appointments during your investigation?
2. Isn't it true that the Petitioner/Respondent failed to do the work you gave him/her?

The following set of questions will help to prove that the client needs no further education, is qualified for employment, and/or is simply uninterested in securing a job. In addition, this series of questions is designed to question the expert's recommendation as to a particular field.

1. Isn't it true that your client is already trained to do __________? (Isn't it true she/he is already employed doing ____________?)
2. Isn't it true that her field of training actually pays close to the same as your recommended field?
3. Isn't it true that if you averaged her income in the field that she is currently trained over the next five years that she would make more money than she will by going back to school for _____ (*i.e.*, 2) years and then working for three in your recommended field?
4. How many employment positions did Petitioner/Respondent apply for during the period while you were preparing your report?
5. Isn't it true that she did not even want to apply for any? Isn't it true that you encouraged her not to do so?
6. What alternatives to the proposed course of training and employment did you consider?
7. What other vocational fields, if any, did you explore with the Petitioner/Respondent?
8. Why did you reject those fields?
9. Did you consider the field of ____? Isn't it true that the field of _____ only requires six weeks of training and provides an income greater than that of the field you are proposing for this spouse?

The next set of questions is used to question the tests used and the results offered in the report.

1. With respect to the tests you administered, isn't it true that the ____________ (*i.e.*, Career Assessment Inventory) is geared to ______________ (blue collar jobs)?
2. (If the answer to the above question is yes) Why, then, did you administer it to the Petitioner/Respondent, who has a college degree and two years of experience?
3. You testified that you administered the California Psychological Inventory (C.P.I.), is that correct?
4. Isn't it true that the results of the C.P.I. test will change from month to month?
5. Isn't it true that in order to have a proper basis for you to make a recommendation, you must, at a minimum, give an interest test, an aptitude or achievement test, *and* a psychological test?
6. Why is it, then, that no psychological test was administered to this client?

This last series of questions dealing with tests is only a small sample. There are many others, depending upon the tests in question and the reported results. An examination of each test and the results can provide substance for trial preparation.

Summary

Vocational experts have become a necessity in many marital dissolution cases to help establish maintenance needs for the economically disadvantaged spouse. As the use of these specialists increases, it becomes imperative for lawyers to familiarize themselves with the experts' skills and tools: vocational tests, counseling goals, and the job market. Familiarity with the skills and tools used by the vocational expert will enable the attorney to be effective in direct and cross examination of his witness. Not only will lawyers gain supporting data for the case when using the vocational expert, but the client also will gain through the development of a clear, concise picture of future income potential and the path by which this may be achieved.

Without such an evaluation, counsel and the court can only attempt to predict the future economic circumstances of economically disadvantaged spouse with insufficient information. ☐

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Age Discrimination is Alive and Well in the Legal Profession

Age discrimination is alive and well in the legal profession despite the fact that it violates both state and federal law.

At a CLE seminar at the University of Washington Law School on October 8, 1983, I learned that age discrimination in employment is unlawful under RCW 49.60.010, 49.60.180, and 459.44.090. Persons between 40 and 65 years of age are protected. An "employer" is anyone employing eight or more persons. In federal law, 29 U.S.C. §621-634, the protected group is persons under age 70, and the law applies to employers of 20 or more employees.

The Washington Human Rights Commission is charged with enforcing the state statute. A person injured by an act which violates the statute may also bring suit under RCW 49.60.030. The federal law is enforced by the Equal Employment Opportunity Commission; a court action may also be brought by the injured party.

I am a middle-aged lawyer who was a solo practitioner with a varied practice over a 20-year period. Some time ago, I decided it was wise to leave the insecurity of a solo practice and seek a salaried position. So I sallied forth and applied for a number of positions—over 50—and got nowhere.

I cannot prove it was all age discrimination, but I believe much of the problem was age-related. I received one candid letter from a friend, the senior partner of an excellent firm, which explained the system very well: Lawyers are hired at a young age by the firms. If the young lawyers do well, they become partners in a few years. An older lawyer coming in upsets the system and is considered a threat by the younger lawyers in the firm. Otherwise, said my friend, he would have liked to have my experience, for the work was there.

The typical ad for an associate in the *Bar News* under "Positions Available" reads:

> . . . The firm seeks an associate with one to five years' experience in . . .

The lawyer with 20 years' experience is excluded from consideration. If this is not age discrimination, I don't know what is!

I analyzed the "Positions Available" in the *Bar News* for the last two years. Of the 244 ads, 99 (41%) specified experience from 1-5 years; 86 (35%) sought a "specialist" of one sort or another; 7 (3%) were for public office positions; and only 52 (21%) sought a general practitioner with no limitation on years of experience.

I am left with three choices: Continuing to beat my head against the wall, going back to solo practice, or leaving the law for other employment (not an easy job if you have 25 years' experience as a lawyer and none outside the law).

In an article in the August 1982 *Bar News*, a lawyer wrote of wanting to leave the practice after applying for 140 positions over two years without success. It was entitled "You Can't Get There From Here". Consider my thoughts a sequel.

Age discrimination is hard to prove, but you get to know when it is there. Prospective employers will seldom tell you that they automatically exclude all resumés of persons over 40 and with 20 years' experience. The ads are clearer, yet it is unlawful under RCW 49.60.180 to print or circulate any ad or use any employment form which expresses a limitation as to "age, sex, marital status, creed, color, national origin or . . . handicap . . ."

I am not sure what the cut-off age is in our profession for a job search, but it seems to be 40 or below.

What is to be done to get the legal profession to comply with state and federal law on age discrimination? I do not know. I had evil thoughts of a class action, but one would have to name "Box XYZ, WSBA" as defendant in the action. Meanwhile, I write this letter to get some of my brethren to consider the legal consequences of "the system". Lawyer advertising was long a part of "the system" as well, and it took the United States Supreme Court to rule that the First Amendment prevailed over bar association rules.

Please sign me,

Frustrated Middle-Aged Lawyer

Medicaid For Nursing Home Care:

Some Estate Planning Considerations

by Peter Greenfield
and Barbara A. Isenhour

Nearly 30,000 people in Washington live in nursing homes. How to pay for nursing home care concerns many people, particularly older people. Of special concern to married people is the prospect that the cost of providing nursing home care for one spouse may leave the other destitute.

Medicare, the health insurance component of Social Security, does not cover most nursing home care. By the time most people get around to thinking about it, private long-term care insurance is not a realistic option.

A majority of people in need of nursing home care must ultimately look to the Medicaid program for help. Medicaid is a joint state-federal program that will pay for nursing home care when certain medical and financial criteria are met.

Many people assume that a family's resources must be virtually exhausted before any help will be available through the Medicaid program. In fact, people in Washington who need nursing home care can benefit from medicaid without devastating their families. The extent to which they can do so is affected by how they have disposed of property in the past, how they hold it in the present, and the provisions they and their spouses make for disposition of their property at death. It is important for their lawyers to be aware of the Medicaid-eligibility implications of various estate planning alternatives.

Transfers of resources between spouses

Ordinarily, when a husband and wife are living together, and one needs medical care, eligibility for Medicaid, should they apply for it, is determined by taking into account the income and resources of both husband and wife. Consequently, how property is held as between husband and wife does not affect Medicaid eligibility in most cases.

An exception to this rule arises when one spouse needs nursing home care. After the first month in which a person resides in a nursing home, Medicaid eligibility is determined on the basis of the property owned by the applicant; *property owned by a spouse at home is not taken into account. See* 42 C.F.R. § 435.723; *Purser v. Rahm*, 104 Wn.2d 159, 167 (1985). (If one enters a nursing home on January 31, January is the first month, and the second month begins February 1.)

Because the spouse's property is not considered in determining Medicaid eligibility for a nursing home resident, which spouse owns what property becomes a matter of importance. Washington law permits unlimited gifts of cash or other resources *to a spouse* without any adverse effect on the Medicaid eligibility of the donor. *See* RCW 74.09.532; WAC 388-81-052(4); WAC 388-92-043(5). A gift to a spouse may be made either before or after one enters a nursing home. It may be accomplished using a deed, a separate property agreement, or in any other manner appropriate for the making of a gift.

For example, consider the case of a married couple with the husband in a nursing home and the wife at home and with $20,000 of community funds in a bank. The husband will not be eligible for Medicaid because of his interest in the funds in the bank. If his interest is transferred to his wife, making the funds her separate property, that obstacle to eligibility is removed.

Washington statutory authority for interspousal transfers of property applies only to "resources," not to "income." "Resources" and "income" are terms of art in the Medicaid context. *See* 20 C.F.R. § 416.1200 *et seq.* and WAC 388-95-380 ("resources"); 20 C.F.R. § 1100 *et seq.* and WAC 388-95-340 ("income"). In general, "income" refers to periodic payments when the right to receive them cannot be liquidated; "resource" refers to all other property rights, whether liquid or not. Wages and Social Security benefits are income; stocks and houses and sellers' interests in real estate contracts are resources.

When one spouse's interest in a resource is transferred to the other, future income produced by the now separate resource of the transferee will, of course, be separate income. Separate income of a spouse at home is not considered available to the spouse in the nursing home. So, the transfer of an interest in an income-producing resource to the spouse at home removes the income produced by that resource from the Medicaid-eligibility calculation.

The treatment of income produced by transferred resources is an exception to the general rule that interspousal transfers of the right to receive future income will not be recognized by the state for Medicaid purposes. For Medicaid purposes, the right to receive rental payments for a building, for example, may be transferred by transferring ownership of the building; but the right to receive wages or Social Security benefits may not be transferred.[1]

If it were not for the law allowing transfers of resources between spouses, many older people would be impoverished soon after a spouse had to enter a nursing home. Many would be unable to remain in their homes or to live independently. The legislative treatment of interspousal transfers reflects a commitment to the welfare of these potentially vulnerable people.

Transfers to others

Gifts to people other than spouses by individuals contemplating applying for Medicaid are subject to significant restrictions. In general, a transfer of (1) a non-exempt resource, (2) to someone other than one's spouse, (3) for less than fair market value, (4) within two years preceding the date of a Medicaid application, (5) for the purpose of qualifying for Medicaid, will result in a period of ineligibility for the applicant, and may result in criminal sanctions or a civil penalty against the recipient of the gift. *See* RCW 74.09.532; RCW 74.09.538; WAC 388-81-052; WAC 388-92-043. A transfer will *not* adversely affect Medicaid eligibility unless all five elements are present. The five elements will be considered in turn.

1. *A non-exempt resource*

Resources exempt for Medicaid purposes are listed at WAC 388-92-045. They include one's home (so long as one is living in it) regardless of its value. A gift of an *exempt* resource will *not* affect the donor's present or future Medicaid eligibility. *See* WAC 388-92-043.

Perhaps the most frequently asked question in this area is the following: Is a home an exempt resource for Medicaid purposes even if a prospective applicant for Medicaid plans to move out of it and into a nursing home within two years? The answer is "yes." *See Beltran v. Myers,* 677 F.2d 1317 (9th Cir. 1982).

A transfer of a *non*-exempt resource may result in a period of disqualification for Medicaid benefits (if the other four elements are present).[2]

2. *To someone other than a spouse*

As previously explained, transfers to spouses are permitted without limiting Medicaid eligibility. A transfer of a *non*-exempt resource to someone other than a spouse may result in a period of disqualification (if the other three elements are present).

3. *For less than fair market value*

A sale of a resource for fair market value does not result in disqualification of the seller from Medicaid eligibility. However, the proceeds of the sale will be considered available to the Medicaid applicant in connection with the Medicaid application. A transfer of a non-exempt resource to someone other than a spouse for less than fair market value may result in a period of disqualification (if the other two elements are present).

4. *Within two years preceding the Medicaid application*

Federal law does not permit the state to consider property that was transferred more than two years before a Medicaid application is made. *See* 42 U.S.C. § 1396p(c) and § 1382b(c). An individual who is in a position to defer applying for Medicaid for two years may, therefore, transfer an unlimited amount of property to anyone without adverse effect on Medicaid eligibility. (Of course, an individual with vast resources may not be tempted by a Medicaid bed in a nursing home.) A transfer of a non-exempt resource to someone other than a spouse for less than fair market value within two years preceding a Medicaid application may result in a period of disqualification (if the remaining element is present).

5. *For the purpose of qualifying for Medicaid*

To have a disqualifying effect, a transfer must have been done for the purpose of making the transferor eligible for Medicaid. A transfer made by someone, for example, who was unaware of the existence of the Medicaid program would not result in disqualification.

In a dispute about whether Medicaid eligibility has been affected by a disqualifying transfer, the Department of Social & Health Services has "the burden of proving that the person knowingly and willfully assigned or transferred cash or other resource(s) at less than fair market value for the purpose of qualifying for assistance. . . ." WAC 388-92-043(8)(a).[3] If an administrative hearing is held to determine whether there has been a disqualifying transfer, and the applicant prevails, the applicant is entitled to a reasonable attorney fee. WAC 388-92-043(8)(b).

Even if there has been a disqualifying transfer, the period of ineligibility may be waived if imposition of such a period would result in undue hardship. WAC 388-92-043(7).

Revision of wills and community property agreements

If a Medicaid recipient in a nursing home inherits property, the inheritance will be considered available to the recipient for purposes of determining continued Medicaid eligibility. When one spouse enters a nursing home, the other spouse may wish to revise his or her will to take this fact into account.

Interspousal transfers of resources may conflict with provisions of preexisting community property agreements. The agreements should be revoked or revised to avoid such conflicts.

Property transfers and durable powers of attorney

RCW 11.94.050(1) requires specific language in a document creating a power of attorney to authorize the making of a gift of a principal's property based on the power of attorney. Subsection (2) was presumably adopted to exempt Medicaid-related interspousal transfers from this requirement. It reads: "Nothing in subsection (1) of this section prohibits an attorney in fact or agent from making any transfer of resources not prohibited under RCW 74.09.532 when the transfer is for the purpose of qualifying the principal for [Medicaid]." Unfortunately, the ambiguous language of subsection (2) does not necessarily imply that specific authorization is unnecessary.

In preparing a durable power of attorney for one who wishes to authorize a future transfer of resources to affect Medicaid eligibility, the prudent attorney should include specific authorization for such a transfer, as well as, where appropriate, authorization to revoke a community property agreement. ☐

1. The Legislature recently adopted the following rule governing transfers of income: "An agreement between spouses transferring or assigning rights to future income from one spouse to the other shall be invalid for purposes of determining [Medicaid eligibility], but this subsection does not affect agreements between spouses transferring or assigning resources, and income produced by transferred or assigned resources shall continue to be recognized as the separate income of the transferee . . . . " Laws of 1986, ch. 220, § 1.

The rules governing treatment of community income in connection with Medicaid eligibility determinations for nursing home residents were also recently changed by the Legislature. At present, after the first month, half of the community income may be retained by the spouse at home; that income is not considered available to the nursing home resident and is, therefore, not considered in assessing Medicaid eligibility. *See Purser v. Rahm*, 104 Wn.2d 159 (1985). Effective in July 1986, the spouse at home will be permitted to retain half of the community income or all community income received in his or her name, whichever is *greater*. Laws of 1986, ch. 220, § 1.

2. The statutes imposing a period of ineligibility on one who transfers resources within two years of a Medicaid application for the purpose of qualifying for Medicaid (RCW 74.09.532) and imposing criminal and civil penalties on knowing and willful recipients of such transfers (RCW 74.09.538) do not expressly distinguish between transfers of exempt and non-exempt resources. They have been administratively interpreted to apply only to transfers of non-exempt resources. *See* WAC 388-92-043; WAC 388-81-052. Except under limited circumstances not presently applicable to the Washington Medicaid program, federal law does not permit the state to consider the transfer of exempt resources in connection with Medicaid eligibility. *See* 42 U.S.C. §§ 1396p(c), 1382b(c).

3. In an administrative hearing to assess a civil penalty against a recipient of transferred resources, there is "a rebuttable presumption that a person who received cash or other nonexempt resources from an applicant or recipient for less than fair market value within two years preceding the date of application for medical care, did so knowingly and willfully for the purpose of enabling the applicant or recipient to qualify or continue to qualify for assistance." WAC 388-81-052. *See* RCW 74.09.538(2). There does not appear to be any basis for applying a similar presumption in a proceeding to determine eligibility of an applicant or recipient.

***Peter Greenfield** and **Barbara A. Isenhour** are lawyers on the staff of Evergreen Legal Services in Seattle.*

Operation Outreach: An ABA/WSBA Partnership

by **Jo Rosner,**
Attorney/Educator

Congratulations are in order. The Washington State Bar Association has been chosen as one of seven state bars in the U.S. to participate in the American Bar Association's "Bar-School Partnership" program. WSBA will join with county bars, three school districts—Highline (Seattle), Spokane and Yakima, and the Office of the Superintendent of Public Instruction in a one-year program funded by the Department of Education. The program is aimed at making law-related education an integral part of school programs.

The ABA will offer training, publications and technical assistance that will benefit students, teachers, parents and the legal community. Each state team will conduct a training workshop, for which the ABA will provide up to $1,000 for expenses. Materials supporting the efforts of the bar-school teams will provide "how-to" information on such topics as maintaining a community resource base for LRE, and the use of lawyers and other legal personnel in the classroom. Technical assistance to both state and local teams will be offered during on-site visits.

In May 1986, a Leon Jaworski Symposium on mobilizing state bars for LRE brought state teams together to assess their implementation plans and help direct their efforts. Our staff bar was represented through funds provided by the DOE grant. The final activity will be a National Outreach Development Seminar, planned for November 1986.

ABA's executive director, **William Falsgraf**, sees the goals of the Bar-School Partnership Program this way: "Educating young people about the law and legal system is important to bar associations for many reasons, among which are: improving the image of law and lawyers, dispelling misconceptions about the law, helping students understand the role of law in a democracy—and the part they must play in preserving our freedoms."

State Bar President **Patrick C. Comfort**, in announcing the selection of Washington State, said "This designation affirms the State Bar's commitment to law-related education, and our desire to develop and improve LRE programs throughout the state."

Robert M. Leadon
1946-1986

by **T. Noble Foster**
Director of Continuing Legal Education

Robert M. "Rob" Leadon, 39, a member of the Yakima law firm of Velikanje, Moore and Shore, P.S. died Wednesday, April 2, 1986 from injuries suffered in an automobile accident. He will be remembered by Washington state attorneys as an able and dedicated practitioner of statewide reputation in the areas of real estate law, securities, and commercial litigation.

Rob was born August 14, 1946 in Yakima and attended St. Paul's Elementary School, graduating in 1964 from Marquette High School.

He attended Gonzaga University in Spokane from 1964 to 1965 and Gonzaga University in Florence, Italy from 1965 to 1966. He then attended Johns Hopkins University in Baltimore, Maryland from 1967 to 1968 where he graduated with a degree in history. Rob attended the University of California-Hastings School of Law in San Francisco and graduated with a juris doctorate degree in 1971.

Rob's first encounter with Washington lawyers came when he volunteered his services to Henry Beauchamp of the Southeast Yakima Community at Work. Beauchamp in turn introduced him to Doug Peters. Rob clerked in the Selah office the following two summers before passing the bar and his Architecture 101 class. Rob was admitted to practice in this state on November 17, 1971 and became associated with the law firm of Felthous, Brachtenbach, Peters and Schmalz in Selah (later to become Peters, Schmalz, Leadon and Fowler), where he practiced until joining Velikanje, Moore & Shore, Inc., P.S. in Yakima in August 1984. He was a partner in the Velikanje firm at the time of his death on April 2, 1986. He was a member of the American Bar Association, Washington State Bar Association and Yakima County Bar Association.

During recent years, Rob was a regular contributor to the Washington State Bar Association's CLE programming efforts. In 1981, he was a speaker at the Real Property, Probate and Trust Section Mid-Year meeting where he presented a paper on water rights.

Again in 1983, Rob was a speaker for the Real Property, Probate and Trust Section Real Estate Contract Subcommittee which revised the Washington Real Estate Contract Forfeiture Act. Later that same year, he chaired the WSBA seminar entitled "Introducing the New Real Estate Contract Forfeiture Act". The seminar was presented in five different locations throughout the state to large audiences each time, making it one of the most successful seminars in recent years.

Prior to his untimely death, Rob had been appointed as a speaker representing the Real Property, Probate and Trust Law Section at the 1986 Bar Convention scheduled for November in Honolulu.

Rob Leadon will also be remembered for his contributions to the second edition of the Washington Real Property Deskbook in which he authored the chapter on water rights and co-authored a chapter on real estate contracts. He was a willing and eager contributor to CLE activities—always ready to volunteer his considerable expertise. It was a pleasure for us in CLE to have the opportunity to work with Rob, and he will be missed.

Rob's law partners have said that even though he had accomplished and achieved much in practice, he was always looking forward to the greater challenges of the future. He was always climbing toward the peak of practice. He never considered that he had reached his point.

He maintained a close relationship with his clients. Oftentimes, the clients looked to Rob not only for legal advice but also for the common sense that he always brought to the meetings. They looked to him as their conscience and business adviser. He was not only their personal attorney, but he was also one of their closest friends. Everyone who knew Rob and worked with him considered him a close friend.

In addition to his Bar Association activities, Rob was active in civic affairs in the Yakima area including the Yakima Symphony Orchestra, the Yakima Valley Community College Foundation and the Holy Family Catholic Church.

He is survived by his wife Patricia Leadon of Yakima and children Jennifer and Michael; his father Robert A. Leadon; a brother, Dr. Steven Leadon of San Jose, California; two sisters, Mrs. Warren (Nancy) Harding of Burke, Virginia, and Marilyn Leadon of Yakima and Seattle; and his grandmother, Prudence Magistrale of Yakima.

The family suggests memorials to the Yakima Greenway Foundation Memorial fund, the Yakima YMCA Memorial fund, St. Joseph Elementary School, or the Yakima Valley Community College Foundation.

CASELAW CAPSULES

Notes from the Academy

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

Administrative Law. *(Case 1.)* Utility and Transportation Commission allowed regulated utility to recover costs resulting from cancellation of nuclear plant. Supreme Court affirmed, using arbitrary-and-capricious and substantial-evidence theories. Court did not explain why "clearly erroneous" standard of RCW 34.04.130(6) was not used. Dissent said majority had too differential an attitude toward Commission. ***POWER v. Utilities & Transp. Comm'n***, 104 Wn.2d 798, 711 P.2d 319 (12/12/85).

(Case 2.) Petitioners' claim that they had protectable liberty interest in potential for parole was dismissed, but case was remanded to Board of Prison Terms and Paroles because of its errors in following its own procedural rules. ***In re Ayers***, 105 Wn.2d 161, 713 P.2d 88 (1/23/85).

—J. M. Vaché

Local Government Law. Service of process on secretary to county executive was not substantial compliance with RCW 4.28.080(1), requiring service on county auditor. Lack of service was fatal to claim against county for wrongful employment discharge. ***Nitardy v. Snohomish County***, 105 Wn.2d 133, 712 P.2d 296 (1/16/86).

—J. M. Vaché

Real Property. County was not strictly liable in trespass where plaintiff's land was flooded by sewer that ran under land. Plaintiff failed to show necessary intentional or negligent acts. ***Hughes v. King County***, 42 Wn. App. 776, 714 P.2d 316 (2/10/86).

—W. B. Stoebuck

Real Property Security. *(Case 1.)* Redemption statute, RCW 6.24.150, allows mortgage sale purchaser who has paid special assessments to recover them from statutory redemptioner only on condition that purchaser has filed statement of such payment with county auditor. Where purchaser had paid assessments but had not filed such statement but had given redemptioner actual notice of payment, this substantially satisfied purpose of statute. Therefore, redemptioner was liable to reimburse purchaser. ***GESA Federal Credit Union v. Mutual Life Ins. Co.***, 105 Wn.2d 248, 713 P.2d 728 (2/6/86).

(Case 2.) Mechanics lien statute, RCW 60.04.010, authorizes "an agent for the owner" to contract for lienable work. A contractor who is not registered under RCW chapter 18.27 is not such an "agent". ***Fair Price House Moving Co. v. Pacleb***, 42 Wn. App. 813, 714 P.2d 321 (2/18/86).

—W. B. Stoebuck

Torts. *(Case 1.)* Where the method of treatment of different specialists or schools of medicine are or should be the same, an expert in one school (*e.g.*, orthopedic surgeon) may testify regarding the standard of care applicable to the other (*e.g.*, podiatrist). ***Miller v. Peterson***, 42 Wn. App. 822, 714 P.2d 695 (2/18/86).

(Case 2.) Plaintiff injured in roller skating game had assumed risk of injuries known and appreciated before participation. While assumption of risk, as form of contributory negligence, had no independent significance under Washington's comparative negligence statute, plaintiff's participation in game relieved other participants of any duty regarding risks inherent in game. ***Ridge v. Kladnick***, 42 Wn. App. 785, 713 P.2d 1131 (2/10/86).

—J. T. Richardson

Notice

Beginning in July 1986, every issue of the Washington State Register will publish the maximum interest rate permitted to be charged under this state's usury law, RCW 19.52. The maximum service charge allowed for the succeeding calendar year under the retail installment sales law, RCW 63.14 will be published in the first January issue of the 1987 Washington State Register.

This official publication is pursuant to Chapter 60, Laws of 1986 which was legislation introduced by the State Attorney General. The Treasurer's Office will compute the interest rate and supply the information to the Code Reviser's Office, which publishes the Washington State Register twice monthly.

The first publication date is July 2, 1986.

CHELAN COUNTY

Hector Gonzalez of Wenatchee is the new Executive Secretary of the Washington State Commission on Mexican American Affairs. Gonzalez, an attorney with Evergreen Legal Services, also serves on the Superintendent of Public Instruction's ad hoc Committee on Hispanic Education.

EAST KING COUNTY REPORT

by **DOUGLAS W. HARRIS**

John Acheson, formerly with Reaugh & Prescott, and Gordon **Woodley**, formerly of Prince & Woodley, have set up their solo practices together at Suite 1100, Skyline Tower. Both John and Gordon focus their practices on tort litigation. The office of Goddard, Wetherall, Nelson and Abolofia has moved from Redmond to what we still call the ENI Building at 110-110th Avenue, Suite 500, Bellevue. The move was effective on May 1, 1986, so they should almost be unpacked by now. Gordon **Tobin** opened his office at 4122 128th Avenue S.E., Suite 301, Bellevue.

Eric Jeppeson announced the birth of Christopher Karl Jeppeson, an eight pound fourteen ounce boy. Eric is hoping he won't grow up to be a lawyer.

Heard at the April board meeting: The planning of an East King County Superior Court is moving right along. Several options are in the works, with the most promising and feasible being a two day per week calendar. We would like to have a family law commissioner one day and a regular court commissioner or judge (possibly pro-tem) one day. There is a long way to go to make this a reality, but progress is being made. Needless to say, there are several logistical and budget problems to be solved. Your support of this project is needed and anyone with ideas or suggestions should contact **Megan Heath** at (206) 454-0761.

Miscellaneous: The Eastside attorney referral list is making progress. Apparently, to cut costs the Eastside Legal Secretaries have offered their services to type the thing up. The list should be in booklet form if all goes well, listing attorneys on the Eastside by areas of practice emphasis. Watch for your questionnaire in the mail.

Finally, efforts are continuing to get an Eastside Superior Court Clerk's office set up sometime in the future. More on that to follow.

As you may notice from time to time, I get short of material for this column. See your name in print or squeal on your friends and give me a call. I'll print anything (almost).

PIERCE COUNTY REPORT

by **ROBERT W. MARSDEN**

The Young Lawyers Section of the Tacoma-Pierce County Bar Association came up with another award-winning Law Week effort. Highlight of the week was the Law Day Banquet on May 1, featuring Washington State Bar Association President **Pat Comfort** as speaker. Honored at the banquet were attorney **Claude M. Pearson** and **Eileen O'Brien**, Director of the Pierce County Victim-Witness Assistance Program. Both received the annual Liberty Bell Awards for their contributions to the legal profession and the community at large. Law Week activities also included the Young Lawyers' traditional information booth at the Tacoma Mall.

Some 22 law students participated in the Washington Women Lawyers "Shadow Program" in Pierce County. The unique program provided an opportunity for the students to accompany lawyers during the work day and discover some of the realities of the legal profession.

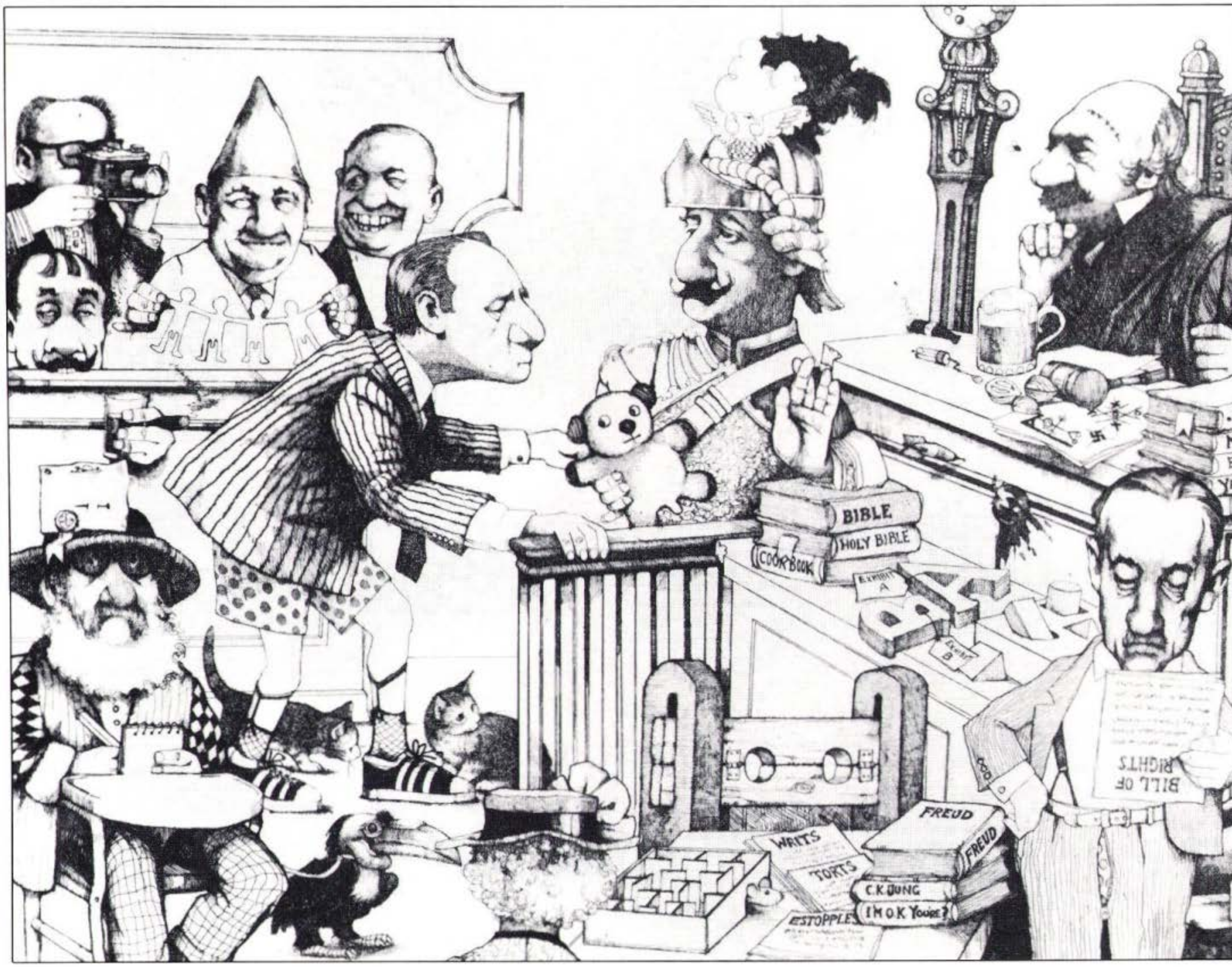
William A. Abbott has relocated his Tacoma office. He will be sharing office space with the firm of Adams, Gagliardi Halstead.

SKAGIT COUNTY REPORT

by **WM. H. NIELSEN**

Leslie Mitcham is leaving Skagit County for Colfax. It seems she is prepared to embark on a new practice of law location and a new matrimonial situation. I guess it was easier than moving the wheat farm to Mount Vernon. **Pat McMullen** is getting ready to move into his new office, although still remaining in Sedro Woolley. We anxiously await the open-house invitation. **Chuck Twede** from Twede and Svaren and **Gil Mullen** from Mullen and Rickert have recently returned from separate sojourns to Hawaii in preparation, I'm sure, for the Bar Convention. The younger partners in the respective firms had that haggard look during their absence.

Janice Ellington's secretary, **Lori Cordray**, was recently named secretary of the year by the Skagit County Legal Secretaries' Association. Another former employee of the Prosecuting Attorney's office makes good. Congratulations.



courtesy Kenneth Behm Galleries

"Eyewitness". Etching by California artist Charles Bragg, who is known for his satirical renditions of doctors, lawyers, militarists and clergymen, among others.

In an entirely unrelated note, Earl **Angevine** was spotted taking flowers into his office early one morning. We can only speculate on the hideous deed he did to warrant such action.

SPOKANE COUNTY

CORRECTION

Paul Bastine, past president of the Spokane County Bar Association, *presented*, rather than received, the Liberty Award during Spokane County's Law Day activities. This year's recipient is **Edwin J. McWilliams**, long-time civic leader.

WHATCOM COUNTY REPORT

by **MICK MOYNIHAN**

From the northwest corner of the state, this biannual message basically reports that nothing much has changed. The new president of our local bar is **Dave Anderson**, who took over the reins with something not usually seen—a positive bank balance. That positive bank balance was the result of former president **Dean Brett's** manipulations.

While those who have recently come to our county to practice law are too numerous to mention, two of our locals who have departed to greener pastures elsewhere are **Steve Childress** and **Phil Brandt**. And, of course, I cannot pass without mentioning that the Legal Secretaries Association put on another successful Bosses' Night. **Elaine De Valois** was selected by the Secretaries as Member of the Year. **Denise Brennan** and **Loch Clark** were selected as a combined Boss of the Year.

After a poring over numerous applications, some of the hopes of the hopefuls were dashed when the County chose **Chuck Snyder** as the new Hearing Examiner. Chuck feels that the appointment is a real boost. Now he will be able to devote his time to promoting the local sports car club, which is his true interest.

WASHINGTON WOMEN LAWYERS

WWL's annual dinner featured Governor **Booth Gardner.** Held on April 2 at the Sea-Tac Red Lion Inn, it was a great success. 180 persons attended. The dinner served partly as a fund raiser for the State WWL Board and its King County Chapter, which assisted in the event. **Pat Vlaming**, Kitsap County, Vice President/Programs of the State Board, and her committee are to be congratulated for their outstanding efforts in organizing the affair! The event generated great enthusiasm and interest in WWL and allowed members an opportunity to meet the Governor.

Kathi Persinger is WWL's new administrator. She replaces Susan **Helf**, who is pursuing her teaching career. Kathi's part-time law practice will allow regular WWL office hours from 9 am-noon on Monday, Wednesday, and Thursday. Kathi's organizational ability and enthusiasm will be great assets to WWL. She welcomes your ideas and participation.

DISCIPLINE

Reprimanded

Oak Harbor attorney **Charles H. Dold** (admitted in 1978) has been ordered reprimanded by a Review Committee of the Disciplinary Board, pursuant to a stipulation for discipline based on his failure to cooperate with the Association's investigation of a complaint filed against him.

Censured

Bremerton attorney **Robert J. Banghart** (admitted in 1975) has been ordered to receive a Letter of Censure, pursuant to a stipulation for discipline based upon his failure to cooperate with the bar auditor and with bar counsel in the random audit of his trust account books and records.

Seattle attorney **Gerald L. Bopp** (admitted in 1970) has been ordered to receive two Censures, following entry of a hearing officer's decision which was not appealed. One Censure was ordered due to Bopp's neglect of a legal matter entrusted to him. He failed to arrange for entry of a judgment after a case was settled by stipulation of the parties, allowing the action to be dismissed for want of prosecution. An additional Censure was ordered for Bopp's misrepresentation to his client regarding the status of the litigation, his failure to promptly withdraw from the case when discharged, his presentation of a judgment to the Superior Court indicating his representation of the client after he had been discharged, and his failure to timely file an answer in the disciplinary proceedings.

Puyallup attorney **Kenneth W. McCarthy, Jr.**, (admitted in 1972) has been ordered to receive a Censure based upon a hearing officer's findings that McCarthy committed three separate incidents of neglect of client matters between 1976 and 1982. Two of the matters involved delays in completion of probates of estates. The third matter involved failure to adequately advise a client of the danger of losing an investment because of tax delinquencies. In addition, McCarthy was ordered to pay restitution to an estate in the amount of $3,733.06.

IN MEMORIAM

William E. Clancy, Jr., died March 22 at the age of 68. Born in Chinook, WA, Clancy worked as a reporter for the *Aberdeen World* after graduating from Portland State University. The World War II veteran graduated with honors from the University of Washington law school in 1949. Clancy spent his entire legal career with the Seattle firm of Helsell Fetterman Martin Todd & Hokanson, becoming senior partner.

Howard Jay Graham died March 21 in Walla Walla at the age of 80. Though not a lawyer, Graham was a leading constitutional scholar of his day. His work was noted in minority decisions by Supreme Court Justices William O. Douglas and Hugo Black. In 1953, Thurgood Marshall and the National Association for the Advancement of Colored People asked Graham to help prepare the briefs used to argue the school segregation cases, including the 1954 landmark case of *Brown vs. Board of Education.*

After receiving a B.S. in political science from Whitman College in 1927, the Iowa native became handicapped by ear problems that eventually made him deaf. He received a master's degree from the University of California at Berkeley in 1930, a librarianship in 1939, and, in 1969, an honorary Doctor of Laws degree from Whitman.

Graham was accessions chief, bibliographer and researcher at the Los Angeles County Law Library from 1950 to 1959. He received numerous awards, including two Guggenheim Fellowships. His 35 reviews and articles on early English legal history and American constitutional law appeared in such publications as *Harper's*, *The New Republic*, and *Yale Law Review.*

Remembrances to the Whitman College Alumni Fund.

Earl A. Phillips died March 7, about the time many Washington lawyers received the March *Bar News* and read about him in "Semper Fidelis" on page 12. Interviewed for the article in November 1985, the 89-year-old continued to put in a full day at his Central Building office in Seattle until mid-February. Over the last 20 years, he dedicated half his earnings to establish college scholarships and donated $1 million to Christian students interested in law. He had been the U.S. representative to the World Peace Through Law Association. Remembrances to any college scholarship fund.

IOLTA Grant Applications Available

The Legal Foundation of Washington, the nonprofit recipient of interest earned on IOLTA accounts, announces the availability of grant applications and grant criteria for 1986 IOLTA funds. Grant awards will be announced in December 1986. Please contact the Foundation at 600 Central Building, 810-Third Avenue, Seattle, WA 98104 or at (206) 624-2536 for further information.

RESOLUTIONS COMMITTEE

Filing Deadline for Resolutions to be Presented at Annual Business Meeting

Anyone desiring to have a resolution presented at the Annual Business Meeting should file it with the Resolutions Committee, Washington State Bar Association, 505 Madison, Seattle, Washington 98104.

Resolutions must be presented to the Resolutions Committee at least 20 days before the Annual Business Meeting, that is, on or before 5 P.M. on August 29, 1986.

All resolutions must be accompanied by a written report (the resolution and report not to exceed a combined total of 1,000 words) explaining the resolution.

PRELIMINARY NOTICE OF SPECIAL PUBLIC HEARING ON RESOLUTIONS AND OF PUBLICATION DEADLINE

The Resolutions Committee of the Bar will, as usual, hold a public hearing to consider the views of the proponents and opponents of resolutions to be presented to the membership of the Bar at the Annual Meeting. The hearing will be held on Thursday afternoon, September 18, 1986. The time and location of the hearing will be announced in the next *Bar News*. In addition, in an effort to allow more time to those presenting views and in an effort to give the members of the Committee more time to consider the resolutions and to request any additional information which might be helpful to the Committee, an advance session of the public hearing will be held prior to the Annual Business Meeting in Seattle on September 10, 1986 at the offices of the Bar Association, 505 Madison, Seattle, Washington at 10 A.M. Proponents and opponents of resolutions are urged to attend the September 10 session if at all possible, and, if not, to present their views in concise written form for consideration by the Committee at that session. Presence at or absence from the September 10 session will not affect any right under the by-laws to present views at the September 18, 1986 hearing. At that hearing, preference in presenting views will be given to those with viewpoints which were not expressed at the earlier session.

If a resolution is to be published in the *Bar News* before the Annual Meeting, the by-laws provide that it must be received by the Resolutions Committee at least 60 days prior to the Annual Meeting, or on or before July 21, 1986. The July issue of the *Bar News* will contain further details regarding the purpose, function, and personnel of the Committee and the time and location of the September 18 hearing.

RESOLUTION COMMITTEE MEMBERS

Thomas D. Loftus, Chairperson, John Aaby, William L. Dowell, Kenneth O. Eikenberry, Gary D. Gayton, Jack A. Hawkins, Lembhard G. Howell, John F. Kruger, Jonathan G.K. Lee, Frederick L. Noland, Gregory H. Pratt, Scott L. Simpson, Phillip L. Thom and Richard L. Wiehl.

Comments on Task Force Referendum and Resolution Procedures?

The Task Force on Referendum and Resolution Procedures is considering revisions in the resolution and referendum procedures including the scope thereof. Among the matters considered will be the appropriateness of a mandatory association addressing certain issues. Any member desiring to comment should contact any member of the Task Force. The Task Force is composed of the following:

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ATTORNEYS

Donnelly, Vincent J. *Outplacement of lawyers: a guide to the art of firing for law-firms and corporate legal departments.* Pittsburg, PA: Innovations Press, 1985. Pp. 124.

BANKRUPTCY

Litigating value: an advanced Chapter 11 workshop. Seattle, WA: Washington State Bar Association, 1986. 1 vol. (loose-leaf)

BUSINESS ENTERPRISES

Advising Washington businesses. Seattle, WA: Washington State Bar Association, 1986. (loose-leaf)

COMMUNITY PROPERTY

Huston, John and Harry Cross. *Community property update.* Seattle, WA: University of Washington School of Law, Washington Law School Foundation, 1986. 1 vol. (loose-leaf)

CORPORATIONS

Haynsworth, Harry J. *Organizing a small business entity.* Small Business Series. Philadelphia, PA: American Law Institute—American Bar Association, 1986. Pp. 519.

DAMAGES

McCarthy, John C. *Punitive damages in wrongful discharge cases.* Tiburon, CA: Lawpress Corporation, 1985. Pp. 496.

ESTATE PLANNING

Practical pre-retirement planning. Tax Law and Estate Planning Series, Estate Planning and Administration Course Handbook Series #164. New York: Practising Law Institute, 1986. Pp. 320.

ETHICS

Orlik, Deborah K. *Ethics for the legal assistant.* Glenview, IL: Scott, Foresman and Company, 1986. Pp. 164.

Shaffer, Thomas L. *American legal ethics: text, readings, and discussion topics.* Analysis and Skills Series. New York, NY: Matthew Bender, 1985. Pp. 766.

MALPRACTICE

Horan, Dennis J. and George W. Spellmire, Jr. *Attorney malpractice: prevention and defense.* New York: Garland Law Publishing, 1985. (loose-leaf)

King, Joseph H., Jr. *The law of medical malpractice in a nutshell.* 2d ed. St. Paul, MN: West Publishing Co., 1986. Pp. 387.

TAXATION

Tax planning for the marital dissolution. Tax Law and Estate Planning Series, Estate Planning and Administration Course Handbook Series #165. New York, NY: Practising Law Institute, 1986. Pp. 160.

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McConnell, James G. *Comparative negligence defense tactics.* New York, NY: John Wiley & Sons, 1985. Pp. 260.

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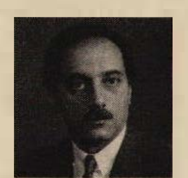
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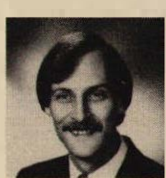
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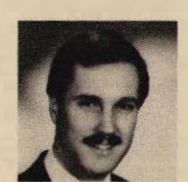
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Vol. 40, No. 6, JUNE 1986

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