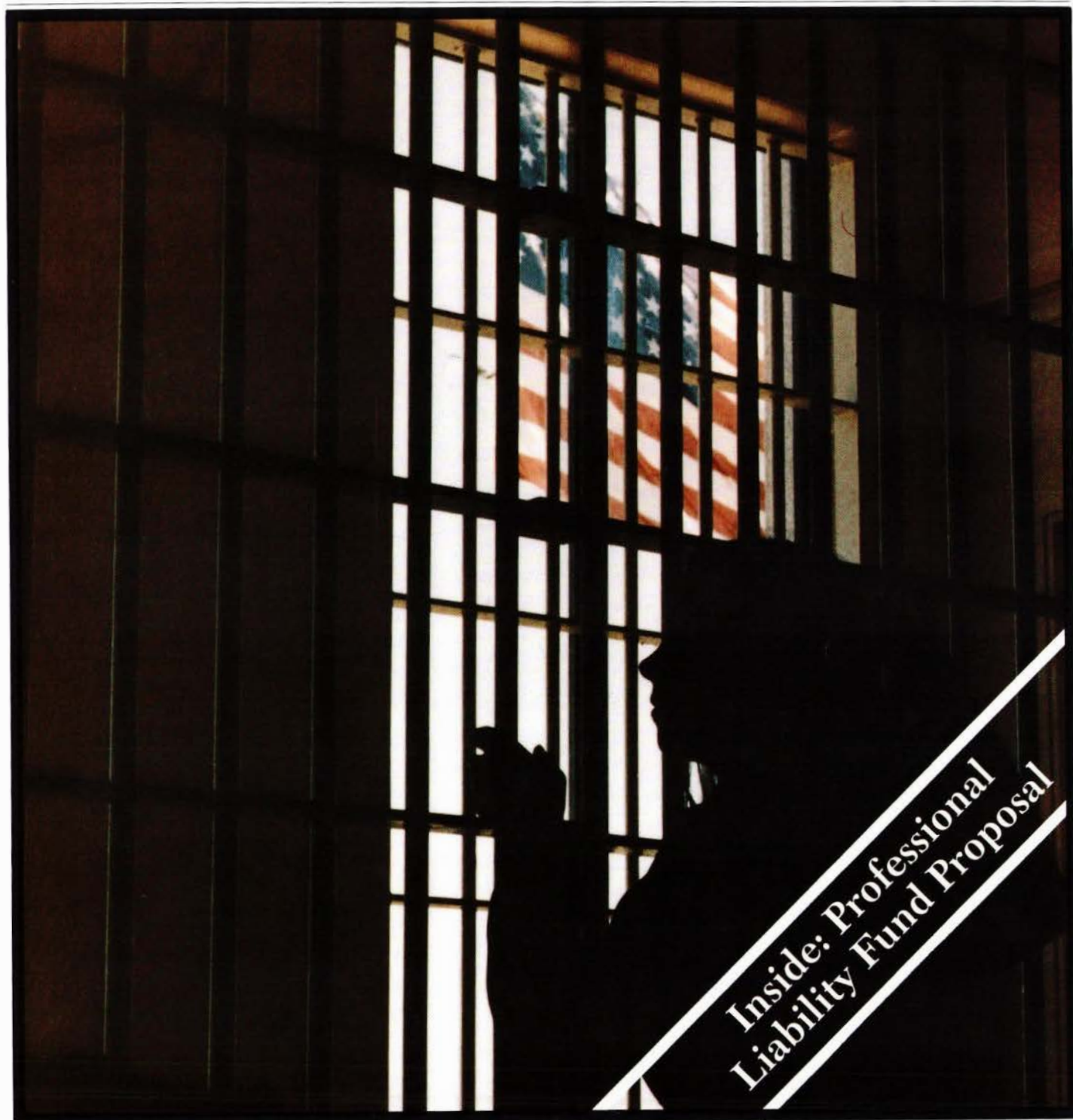


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Vol. 41, No. 1, January 1987



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by

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SUMMARY OF CONTENTS

- | | |
|---|---|
| 1. Overview of Issues in DWI Cases | 10. The BAC Verifier DataMaster |
| 2. The 2:00 a.m. Phone Call | 11. Cross Ex. State Expert — BAC Verifier DataMaster |
| 3. Initial Interview | 12. Cross Ex. State Expert — Breathalyzer |
| 4. Discovery and Related Issues | 13. Direct Ex. Defense Expert |
| 5. Plea Bargaining | 14. Closing Arguments |
| 6. Deferred Prosecution | 15. Implied Consent Law |
| 7. Jury Selection | 16. Jury Instructions |
| 8. Opening Statements | 17. Appendix: Statutes, Regulations, Checklists, etc. |
| 9. Cross-Examination of Arresting Officer | 18. Index, Table of Cases |

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FEATURES

SUBPOENAING YOUR OPPONENT: THE ADVERSARIAL SYSTEM OUT OF BALANCE 13
by Robert Wayne

FUNDING CRISIS THREATENS RIGHT TO COUNSEL 15
by Robert C. Boruchowitz

OF DATAMASTERS, DISCOVERY AND DWIS 19
by Stephen W. Hayne

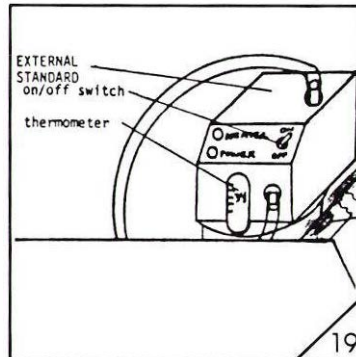
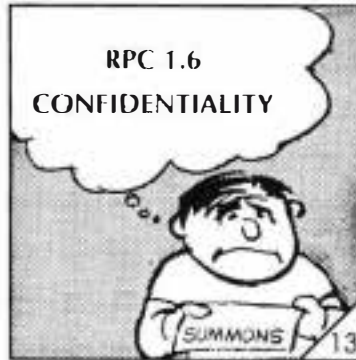
PROFESSIONAL LIABILITY FUND PROPOSAL 30

IN THE NEWS

Announcing the Formation of WACDL 26

DEPARTMENTS

- 4 Letters
- 7 The President's Corner
- 9 Editor's Page
- 11 LRE Update
- 27 Book Reviews
- 29 The Board's Work
- 44 Caselaw Capsules
- 47 CLE Clearinghouse
- 49 Around the State
- 52 Briefly Noted
- 52 Discipline
- 52 In Memoriam
- 53 Notices



1987 MEMBERSHIP DIRECTORY
The 1987 Directory of Attorneys is presently in its compilation stage. Listings for the Directory are being compiled from information contained on 1987 Dues Statements (mailed to all WSBA members in early December). When sending in your dues to the Bar Office, **please note the instructions on the Dues Statement relative to the address and phone number to be used for your listing in the Directory.** Corrections for Directory listings must be received by February 1, 1987—the deadline for dues payment.

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When We Young Lawyers Take Over

Editor:

Without regaling you with the usual disclaimer about how I never write letters to editors *except* when outraged, I must take exception to the column by Douglas Shaw Palmer entitled "Learning From Each Other" which appeared under the If You Ask Me column in the November issue.

If Palmer were keeping abreast of the developments, indeed of the most recent history, of the Young Lawyers Section, he would be aware that in the six years just passed there has been no WSBA Young Lawyers Section committees on Antitrust Law or Probate. Perhaps the Seattle-King County Bar Association Young Lawyers Section has had such committees, but in my experience the State Bar YLS has not had duplicative committees except in the areas of legislation and law-related education.

His concern for dialogue between the older lawyers and the younger attorneys is admirable, if somewhat idealistic. It should be kept in mind that on the two occasions that the Young Lawyers Section sought a voting member on the Board of Governors, the older attorneys used their considerable clout to prevent such a heresy. Instead, the Board has taken what I consider to be a more far-reaching action in creating a division for all younger lawyers. This recognizes that there is a growing feeling of disenfranchisement among the newer members of the Bar and also gives them a chance to show their abilities in the field of changing the status quo. It also prevents a direct dialogue, as suggested by Palmer.

Although it may be unfortunate that the schism perceived by Palmer has been institutionalized (for lack of a better term), I think that it is symptomatic of the attitudes that have been cultivated for so long that they have become ossified. This "fractionating" is not desired by the younger lawyers, as suggested by Palmer, but is a direct result of the policies and fears of the elder statesmen of the Bar. The real danger is that

the Young Lawyers Division will become the seedbed for the nurturing of another generation of older lawyers who will fear the younger members of their own profession and seek to shut them out of the decision making process yet again. Some of this may be a natural tendency of the personality type that advances to positions of authority, and some of it may be a remnant of a patriarchal society. Whatever the source, it is endemic to us, as men (using that term generically, of course) and has been for centuries.

I feel that Palmer is placing the blame for the perceived separation on the young lawyers, rather than on the Association as a whole. The problem is larger than young lawyers vs. old lawyers, and it may not be reversible. I only hope that when we young lawyers take over we can stretch the boundaries of power to include everyone. Any bets?

CHARLES R. SNYDER
Bellingham

Tell It To the Reps

Editor:

In response to Stephen J. Maag's letter in the September *Bar News*, advising clients that they may direct assets for Medicaid eligibility purposes is hardly "a questionable practice from a public policy standpoint," as he asserts.

The "public policy" of this state on Medicaid eligibility is established by the legislature. Divestiture of assets is not merely a loophole which the legislature has neglected to close. The legislature has made a positive statement that divestiture is permitted, not only by acceding to the current state Medicaid regulations, but by passing the section of the power of attorney statute codified at RCW 11.94.050(2), specifically permitting divestitures to be made by power of attorney.

Maag may or may not be right that allowing eligibility to be achieved by divestiture is a bad idea, but this is an opinion to address to the legislature. His view that attorneys have a civic duty to hide this opportunity from their clients is dead wrong.

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Collegiality

I expect that if we sat down to make a list of the reasons why we like being lawyers, all of us would include somewhere on that list the pleasure of the association with fellow lawyers.

One of the most rewarding features of being president of this bar is the opportunity to attend bar meetings all over the state. I have been to many of these meetings, and I am consistently struck by the evident warmth and friendship shared by the lawyers who practice in the same community.

Part of this arises from the fact lawyers are generally extroverted, gregarious people. I have always felt that, given a choice of people to socialize with, I would take lawyers every time. I cannot remember ever being bored or frustrated for good conversation in the company of lawyers—even when the group is all strangers.

This congeniality among lawyers is more than natural sociability. I identify a distinct sense of shared pride in a worthy calling when lawyers are together. So often, for example, when I have been with a local bar group, someone will identify one of his colleagues as having some special accomplishment or a notable recent success: "I want you to meet Jim Brown, he just got that new ruling in the Peerless Motors case."

It is true, of course, that most lawyers are never bashful about their own recent triumphs, but there is, in addition, this feeling of shared success in good work done by a colleague.

Perhaps the most dramatic example of lawyer collegiality is the tremendous work of our recovering alcoholics. I do not know if all of you realize the extent of the dedication and perseverance by these members of local committees to deal with the needs of fellow lawyers who come within the grip of alcoholism. Except for an occasional acknowledgment such as these remarks, these heroes are totally unsung. Their only reward is their own knowledge of lawyers saved, practices bailed out, families restored and clients protected. Some of them will read these remarks, and I just want to say that we all appreciate this marvelous work so very much.

The devotion of the recovering alcoholics to aiding fellow lawyers is a special and stirring example of the universal willingness of lawyers to help one another. Can any of you say you never asked another lawyer, gratuitously, to help you solve a problem? And when you have, was there ever a

time when the other lawyer refused to help? I do not believe there will be many "yes" answers to these questions. We are competitors, but we nevertheless seem to want the other fellow to do a good job, too. And there is more to this mutual support than just the casual tip over the telephone.

The other day I was faced with the need to do some documentation for a client on a very abstruse problem. Preparing the papers and organizing the agenda for this action required consideration of several different legal areas. Doing it from scratch would have taken a couple of lawyers at least a week. Happily at an early point I ran into one of those soft-cover ALI-ABA course books in which a New York firm had reprinted a complete treatment of the entire problem, including briefs, documents, explanations and alternative solutions. It was just like turning on a light in a dark room. I am sure some client paid that firm a six-figure fee the first time this work was done, and here it all was, laid out free for the taking. It saved my client thousands of dollars and produced a more thorough result.

Some of you have worked on those CLE books and had your forms printed up for all to copy. Many (most?), (all?) of you have used leases, pleadings and other forms provided in this way by other lawyers. And this sort of assistance is not confined to substantive areas; we share freely all kinds of good ideas for law practice management and law practice development.

Some will say that all of this publication is done to establish expertise and obtain referrals. I say this is just a small part of the motivation. I believe lawyers genuinely want their fellow lawyers to do a good job. This is the only possible explanation for the willingness to share our discoveries and to show others so fully the best products of our own ingenuity. While this is high evidence of the wonderful collegiality which exists among lawyers, it is more than that—it is the difference between being a professional and being a business person.

But I will not be Pollyanna. There is, regrettably, some bad news which cannot be overlooked in the story of lawyer collegiality.

The lack of civility which often pervades the relationship between lawyers on opposite sides of lawsuits is a disgrace. "Lack of civility" is, indeed, a mild characterization. I know lawyers who in a lifetime of trial work never once, if you accept their version, had a case with a decent lawyer on the other



side. Every opposing counsel is eventually described as somewhere between unscrupulous and criminal. What is more, I do not quickly identify any litigator I know who does not occasionally slip into denigrating some lawyer against whom he has a case.

It does not require a psychiatrist to analyze this phenomenon. Trying cases creates high tension in a totally competitive atmosphere. In the course of any litigation there are no less than dozens of intersections between opposing counsel—usually people with a high level of personal ego. All along there are points won and points lost. Things never go completely smoothly for either side. The frustration this causes is perhaps inevitably going to be rationalized as resulting from improper conduct of the competing advocate.

In the long run, no lawyer who regularly carps about the misconduct of his opponent will enjoy the respect of his peers. But that is not the important point. What is really unfortunate is that clients and others who do not have the perspective to put this carping in context will be left with the belief that unethical conduct in litigation is commonplace. This is not a fact. What is even worse is that frequently the ill will that develops between counsel makes it difficult for the court to do its job and gets in the way of accomplishing what is best for the client.

Relations between lawyers are for the most part a wonderful combination of friendship and of mutual support—collegiality in the best sense of the word. I just wish that all of us could keep in mind that, in litigation, that other lawyer is really someone just like ourselves—a competent lawyer doing his best to represent his client.

William H. Jaffe

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Thank You For Thinking of Me . . .

A not-so-funny thing happened on my way to organizing this issue on criminal law: I got sued by a former criminal client for 2.5 million dollars. I had represented him at trial where he was convicted of shooting a woman to death during a robbery. As his court-appointed counsel, I received \$22 per hour.

I am in auspicious company in the lawsuit: other defendants include the co-defendant's attorney; the prosecutor and his boss, the County Prosecutor; the trial judge, and the county. The claims against the prosecutors and the judge had been dismissed even before I was served . . . on the last day my malpractice policy was in effect.

Nevertheless, I was absolutely devastated.

Two hours later, while telling a colleague of my pain, it went away. *Mirabile dictu!* For once my brain and heart had met.

The pain went away when I realized that it had taken something as absurd as this civil rights claim to put my other personal and professional issues in perspective.

- I realized which persons and things truly mattered to me.

- I realized that the energy I had spent agonizing was energy spent fighting myself. (Better to use this energy to confront issues outside of myself!)

- I realized I had spent too much of my life trying to keep everyone happy. (How futile! Better to take care of myself and stop trying to take care of everyone else!)

I am tempted to send my former client a letter which begins, "Thank you very much for thinking of me in your recent civil rights action filed in federal court. What I learned about myself as a result of being sued saved me the costs of several years of therapy . . ."

We, the people

The claim against me? That my failure to provide my client with copies of certain witness statements deprived him of his civil rights.

CrR 4.7(h)(3) seems to dispose of the matter.

As I write in late November, I have yet to file my answer. I did immediately advise my malpractice insurance carrier of the suit, and I enclosed a copy of the pro se pleadings so my carrier could see the ridiculous abuse of protected constitutional rights my former client and his co-defendant in crime were engaged in.

Yes, they had succumbed to the greed which underlies our civil legal system and had gone for the deep pocket. My pockets are so shallow hummingbirds won't nest there.

We, the people, through our courts and our legislators, have developed laws to protect the rights of all persons—even those convicted. (Yes, Virginia, prisoners have rights, too.) This developing "specialty" of the law provides fodder for so-called jailhouse lawyers (aka "writwriters").

What do inmates do all day? Only a few work on honor farms or fight fires. In the leisure-bound '80s, what prison industries remain for the vast majority of inmates? Chain gangs are no longer in favor. How many prisoners grow their own food and meat? Whatever happened to making license plates? Or building furniture?

How would I pass the time if I knew that I was gonna grow gray in prison? I would maintain a facade of toughness, which soon would no longer be a facade. I would blame everyone in the world for my being in prison . . . including my court-appointed lawyer. Pretty soon I would meet up with a writ writer. We would work out a mutually satisfying relationship, get some law books and a typewriter, and get to work. Our playground would be an overcrowded court system where it takes years for lawsuits to come to trial.

What incentive is there?

My malpractice claim history will be sullied until I am gray. I will spend valuable time defending against this absurd claim. But this avenue of our courts—42 U.S.C. §1983—should not be closed. For, along with every 10 or 20 or 50 frivolous civil rights claims filed by prisoners in federal courts, there is one of merit. All claims deserve and receive due process; anything less would be far more horrible for us all.

Crimes generally stem from a combination of substance abuse, social and educational deficiencies, and boredom. Making our prisoners work as they do in Honduras, where I lived after college, would better serve us and our malcontents. Even as our president attempts to "save" Honduras, we have much to learn from the Hondurans—especially in penology. The Honduran prison is downtown, not stuck in the middle of nowhere, and it resembles an open air market—which is what it is. Prisoners work at a vast array of crafts and sell them to the visiting public. Prisoners contribute toward their room and board. They enjoy homemade food and conjugal visits—two basic, healthy pleasures.

What incentives do American prisoners have to "become good"? Until they have an incentive to reform themselves, they will continue to pass the time attacking the external rather than working on the internal. Prison violence will be the norm. At least civil rights lawsuits provide a non-violent avenue of release.

Meanwhile, what incentive is there for lawyers not to abuse the power of the summons and complaint?

Carole Grayson

Editor's note—Due to space limitations, the index for articles in the 1986 Bar News (Volume 40) will appear in the February 1987 issue.

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We the People . . . 1787-1987 Teaching the Spirit of the Constitution

by Jo Rosner,
Attorney/Educator

This 200th anniversary of the U.S. Constitution makes it the oldest written constitution in the world. What should young people know about constitutionalism? About the constitutional process?

In searching for some answers, an article in the special Bicentennial issue of the American Bar Association's law-related education magazine, *Update* (Spring 1986, page 48), yielded some important insights. "Constitutions and the Spirit of Liberty" was written by Paul Murphy, professor of history at the University of Minnesota and a member of the ABA's Advisory Commission of the Special Committee on Youth Education for Citizenship. In the section entitled "The Hearts of Men," Professor Murphy writes:

The Constitution is a set of sensible general rules for achieving national values and principles—the ones we talk about in saluting the flag with liberty and justice for all or singing "America, sweet land of liberty." Establishing principles is the way to implement values, and institutions are structures for achieving these principles.

But we can never repeat too often that constitutions only work if people want them to. And healthy ones only work the way the people want them to. Judge Learned Hand gave a very interesting little speech during World War Two. He was talking to a noontime crowd at a park in New York City in the depth of the war, when we

were struggling to defeat Hitler and the Axis powers.

Hand said, "Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can save it. No constitution, no law, no court can even do much to help it. But when it lies there, it needs no constitution, no law, no court to save it."

Thomas Reed Powell, who taught constitutional law at Harvard Law School for many years, made the same point by focusing on what happens when the spirit of liberty flickers out. Writing after World War One, when we had practically eliminated free speech and press for the wartime period, he said, "Nine men in Washington cannot hold a nation to ideals it is determined to betray."

What both of these people are saying is that constitutionalism is a frame of mind. It is an attitude. And how do we teach attitudes? How do we instill in students a

sense of the importance and value of a particular document? How do we say to young people, you should think this way, you should appreciate that a free society is a precious thing? My own children got this idea very clearly planted in their young minds by living nine months in a military dictatorship, where every morning you went to school and passed by armed policemen. Every morning the other children didn't know if their father would come back at the end of the day. My kids came back to this country patriotic about the glories of living in a free society.

We can't take our youngsters to live for a year in Nigeria, but we can at least try to convince them of the values of good constitutionalism and the importance of their playing a role in preserving and protecting that constitutionalism. No one says it will be easy—but everyone agrees that it is vital.

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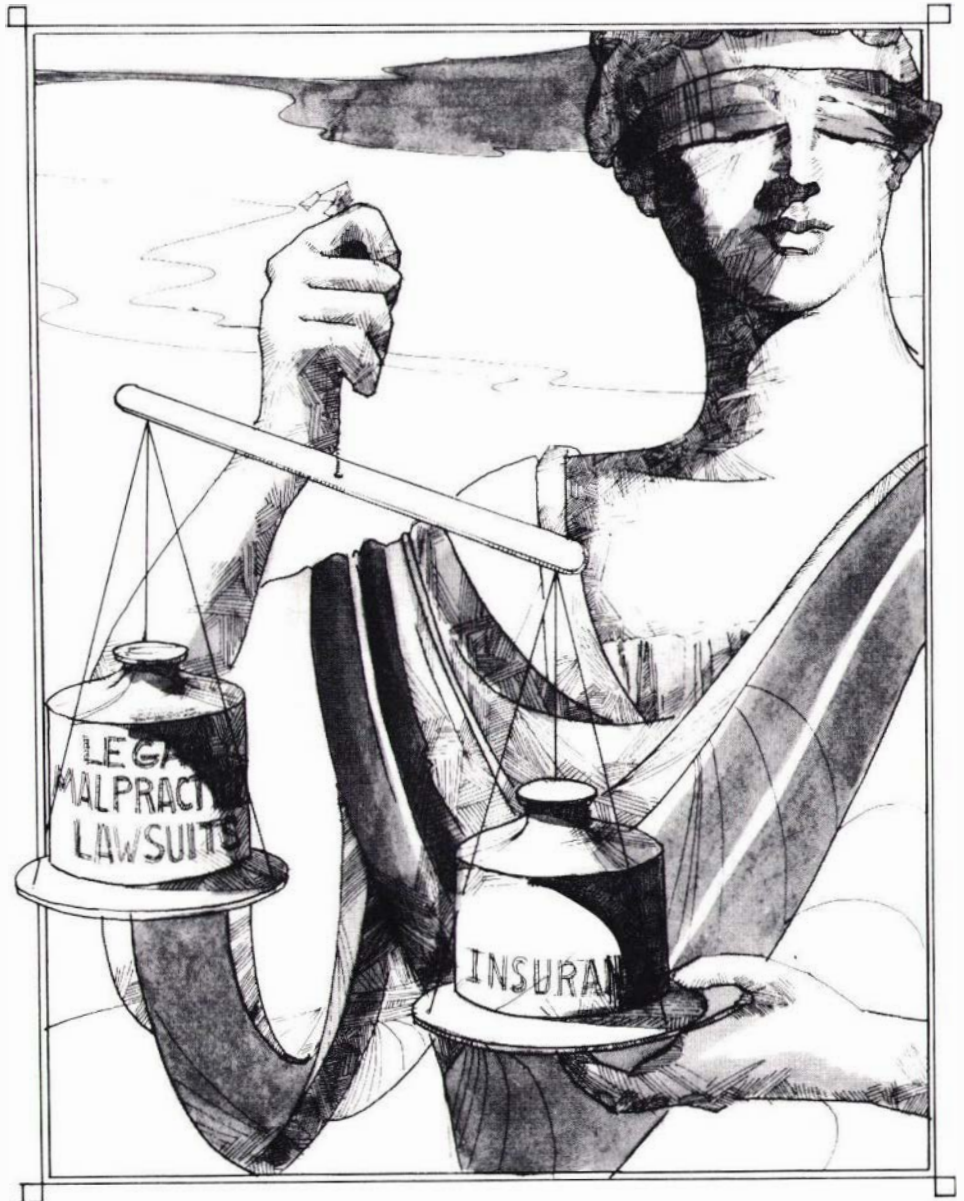


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This month's issue was coordinated by the Executive Board of the WSBA Criminal Law Section. In 1985-1986 it comprised about 700 members. Dues are now \$10 per year. Section chairman Robert Wayne of Seattle devotes his guest editorial to an issue that strikes at the heart of the legal profession.

Subpoenaing Your Opponent: The Adversarial System Out Of Balance

by Robert Wayne
Guest Editor

This editorial proceeds from a basic premise: Our judicial system for dispute resolution is adversarial. It is based upon the assumption that a just result can best be obtained by allowing the disputing parties to choose their own advocates and submit their positions to an impartial judge. Two adversaries on a plain stage, set to do as much as their wits will allow, governed by a common code of ethics. Victory based upon strength of issues and thorough preparation.

Over the past four years, the government's use of subpoenas to opposing lawyers has created an imbalance that threatens the adversarial system. Imagine a system in which one could disqualify one's opponent. The effect of such a blow on the opposing side would be all the stronger if it were delayed until the eleventh hour, after months or years had been invested by the opposition in that attorney-client relationship. Foul play? That would never be tolerated, you say. The courts would quickly put an end to it.

If you were to walk across the hall from the civil side to the criminal courts, you would find that the situation described is occurring. The practice of issuing subpoenas to defense attorneys has created a conflict that is leading to a call for adoption of an ethical rule that may restore the adversarial balance.

The issue is important because the subpoenaing of an attorney almost inevitably results in his disqualification. The very issuance of the subpoena leads to an erosion in the relationship between the lawyer and his client. Imagine the conster-

nation of the client who learns that his or her attorney of long standing is going to be stepping behind closed doors to testify before a grand jury about some aspect of their relationship, under oath and in secret. Even the attorney who is faithful to the confidences of his client is soiled by the appearance of secretly aiding his client's adversary. Should secret testimony lead to a trial subpoena, the client faces the possibility of having his lawyer step from counsel table to the witness stand.

The government argues that all witnesses are alike. Why make attorneys into a privileged class? Indeed, lawyers may have the juiciest information of all. Who called them into service? How much were they paid, and in what form were the payments? Was the client the source of the incriminating documents?

What the Justice Department minimizes is the incredibly chilling effect the subpoena power can have on the formation and maintenance of the attorney/client relationship. If the process of representation can be compromised by an adversary, then the basic premise of the system is put at risk. No longer is there a free market in which to find an advocate who you think will best represent your interests. No longer is there any assurance that there will be continuity of representation and preservation of confidences.

The subpoenaed lawyer finds himself alone in the middle: does he protect the client, or does he concern himself with the defense of his own good name? And what about the specter of appellate reversal for ineffective assistance of counsel and the possibility of a malpractice claim premised upon divided loyalty?

Worse fears may come to mind when he considers the increasing number of attorneys who have been indicted in prosecutions for obstruction of justice premised on little more than aggressive, informed defense.

Bar associations have begun to respond by asking their state supreme courts to adopt ethical rules requiring government attorneys to obtain prior ex parte approval from a court, recognizing that the mere issuance of a subpoena can adversely impact the attorney/client relationship. Massachusetts has such a rule in place. The Illinois Bar has petitioned its Supreme Court to adopt a similar measure. The bar of New York and the ABA have both adopted strong resolutions. The WSBA Criminal Law Section has twice passed resolutions calling upon the Board of Governors to submit the rule to the Supreme Court. The Board has the matter under consideration and is awaiting additional input.

Responding to the pressure, the Justice Department adopted internal guidelines that require the approval of an Assistant Attorney General. But, in the Ed Meese Justice Department, approval has been at a rate in excess of one attorney subpoena a day. See, Rudolf & Mahrer, *A Subpoena a Day Keeps the Clients Away*, 1 Crim. Justice #3 (Fall, 1986) at 4-5. What's more, the guidelines are totally internal and don't have any provisions for sanctions when violated.

The other front of this war is in the arena of IRS summonses issued to attorneys for fee information. Such a summons is not within the scope of the Justice Department's internal rule. In one case in this state, the criminal division of the IRS has issued subpoenas to three law firms to learn how much one client paid. Two have complied and have ceased their representation of the client. The third, who had been representing the client in the IRS criminal investigation, moved to quash the subpoena based upon the client's right to counsel of choice and continuity of representation. The

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WSBA has filed an amicus brief along with the Seattle-King County Bar Association, WSTLA and the National Association of Criminal Defense Lawyers. Judge Barbara J. Rothstein recently ordered compliance with the subpoena, and the issue appears headed for the Ninth Circuit.

The WSBA Criminal Law Section will again take the subpoena/summons issue before the Board of Governors and ask for a resolution calling on the Supreme Court to adopt an ethical standard that will protect the attorney/client relationship. The issue is not the creation of a privileged class of witnesses. It is whether the appearance of fairness and the reality of the balance of power have been so compromised that prior judicial intervention is needed.



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Funding Crisis Threatens Right To Counsel

by Robert C. Boruchowitz

The more than 300 lawyers representing appointed clients in criminal cases in Washington generally have too many cases, are underpaid, and do not have enough support staff. The largest defender office in the state has 74 attorneys and handles 15,000 clients per year. The starting salary, \$18,500, is about one-third lower than the prosecutors'. The caseload burdens these lawyers carry and the low salaries they receive threaten their ability to provide effective assistance of counsel.

In 1963, the United States Supreme Court in *Gideon v. Wainwright*¹ established the right to counsel in state court criminal prosecutions.

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

Yet this fundamental and essential right has been under attack ever since *Gideon*. The National Legal Aid and Defender Association produced a report in 1982 entitled "Gideon Undone," chronicling problems of inadequate funding, excessive caseloads and insufficient support staff across the country.

The Fall 1986 issue of ABA *Criminal Justice Magazine* has an article entitled "Why We Are Not Defending The Poor Properly," which finds a financial crisis in the indigent defense system at a time when criminal filings are rising.

The Supreme Court had realized in 1932 the critical importance of counsel:

The right to be heard would be, in many cases, of little avail if

it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.²

The Court applied the right to juveniles in *In re Gault*, (1967).³ Not until 1972 was it applied to misdemeanor cases involving incarceration. *Argersinger v. Hamlin*.⁴

Public defense offices, assigned counsel programs, and contract systems developed across the country and in the various counties in Washington. Today the promise of *Powell* and *Gideon* is met only erratically. In the state's most populous county, King, defenders are paid one-third less than the prosecutors and carry caseloads as much as 50 percent higher than Bar Association standards. Assigned counsel are paid \$22 per hour. In Pierce and Spokane counties, the representation of clients facing civil commitment proceedings has been criticized as unconstitutional by a study by legal services lawyers and the former dean of the University of Puget Sound Law School.⁵ In Whatcom County, the defender had to fight to replace a lawyer who'd resigned, even though her departure meant a 25 percent increase in caseload for her remaining colleagues. In Spokane, the defender attorneys carry more than 700 misdemeanor cases each per year—more than double the Bar guideline.

A federal class action lawsuit was needed to jolt Spokane County into providing enough lawyers to bring the misdemeanor caseload below 900 per person and to provide a secretary so that the juvenile division lawyers had someone to answer their telephones when they were in court. To this day, the Spokane office, with more than 30 attorneys, has no word processing or computer equipment. In at least one rural county, the contract defender office has received pressure from the prosecutor about hiring decisions, and the director has felt threatened by the police. In some counties, public defense lawyers seldom ask for appointment of experts in misdemeanor cases because they know the judges won't grant it.

There are disparities from county to county and within counties. Appointed attorneys in Grays Harbor with Class A felonies are paid \$750 plus \$400 per day of trial. But contract juvenile attorneys in that county receive only \$65 per case. In Thurston County, felony attorneys receive \$410 per case while the district court contract attorney receives an average of \$28 per case. In Yakima, felonies are paid at \$175 per case.

In at least one county, it is common for the court to accept waivers of counsel from juveniles, despite the fact that their convictions can lead to incarceration in juvenile institutions and be counted against them as adults.

On the appellate level, there is an organized defender office in Division One, but in the rest of the state appeals are handled on an *ad hoc* basis, with lawyers not being paid until the mandate is issued—often as long as two years after the lawyers receive the cases.

Study after study on the local, state, and national levels has made clear that low-cost competitive bidding

leads to low-quality representation, yet county after county has flirted with a variation of it. Most Washington counties provide their primary public defense through a contract program.

In 1975, the State Bar completed an extensive study, funded in part by an LEAA grant, which concluded that the best method of providing public defense services was a mixed non-

profit defender-assigned counsel system. It found that the contract system was inadequate because of inherent economic disincentives against satisfactory representation of the accused.⁶ Yet in an ABA-sponsored study in January 1986, consultant Robert Spangenberg found that the majority of counties used a private bar-assigned counsel system, and he noted a trend toward use of local

contract programs to attempt to control costs.⁷

Recently, Spokane County commissioned a study in part because of cost concerns. The evaluators rated the defender attorneys well, but urged that they receive funds for more support staff. They took the opportunity to oppose competitive bidding, noting the serious quality problems competitive bidding brought to San Diego, e.g.

The Seattle-King County Bar Association completed a nine-month study in 1982 which included detailed guidelines for providing public defense services, including caseload maximums for lawyers, support staff and supervisor ratios, and salary parity with prosecutors. The Washington Defender Association, formed in 1983 to provide backup support for defenders across the state, used an ABA Bar Information Project Grant to help develop and publicize its own guidelines, similar to those produced by SKCBA.

In 1984, the Washington State Bar Association Board of Governors endorsed the WDA standards. The Board of Governors already had passed a resolution in 1982 opposing public defense contracts based on competitive bidding without reference to standards of quality.

In 1985, the American Bar Association issued its own denunciation of competitive bidding based on cost and endorsed defender guidelines developed by the National Legal Aid and Defender Association which are similar to the SKCBA and WDA guidelines, calling for caseload standards, salary parity, and adequate support staff and training.

Several counties and cities have begun to refer to the WDA standards, but none has implemented all of them. In Seattle, the city still bases its budget on 400 cases per lawyer per year, one-third higher than the guideline of 300. King County uses a figure of 450.

In the 1986 legislature, WDA Executive Director Lynn Thompson presented a report on the crisis in public defense funding. She described public defense services as

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“crippled by inadequate funding, poor administration, heavy caseloads and inconsistent standards.”⁸

The Judicial Administration commission Report in 1985 recommended that there be partial state funding for public defense. The legislature passed a bill calling for a commission to study the possibility of state funding for public defense, but the governor vetoed it when the funding was removed at the last minute. Several committees have been meeting this year under the aegis of the Senate Judiciary Committee to study state funding, and a new bill establishing a study framework will be introduced in January.

The WDA has proposed a state-funded reimbursement plan, in which counties could receive payment for one-half of their public defense costs if they could prove that their defender systems meet performance and staffing standards. This is similar to plans developed in other states. Thirty-two states now have some form of state funding.

When defender lawyers have to

handle 155 felonies each per year, as in King County, or 700 misdemeanors, as in Spokane County, and when their office only receives \$390 for a felony case, the quality of representation and the efficiency and integrity of the courts are threatened. Defender offices have difficulty retaining capable staff, as government and private practice salaries continue to climb far above defender pay scales.

The scope of the problem is enormous. In King County, 33,000 cases are handled by defender lawyers each year. In Spokane, it is more than 12,000 cases. Defender lawyers carry caseloads that are simply unacceptable to most private practitioners.

Yet because the volume of cases is growing as the crime rate grows, county officials resist providing the funds necessary to provide the stability and support required to bring the defender programs into compliance with local, state, and national standards. The rest of the Bar has the opportunity to help to

convince our local officials to provide funds in the short run and to persuade the legislature to develop a reimbursement *cum* standards system beginning in 1988. If relief is not provided soon, the dedicated lawyers who, in effect, subsidize the system now will begin to disappear; the courts will be jammed with inexperienced, poorly trained lawyers struggling with too many cases; and ineffectively represented clients will be suing their lawyers and the county governments.

The studies have been done. Talented people in defender programs are ready to work with dedicated volunteers in the bar associations to improve public defense programs. □

¹ 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

² *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

³ 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

⁴ 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

⁵ Tausend, Mirra, Graham, "Evaluation of The Quality of Defense Representa-



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tion Provided to Indigent People in Civil Commitment Proceedings in Pierce and Spokane Counties," April 15, 1986.

⁶ Washington State Bar Association Study on Methods of Providing Representation for Indigent Criminal Accused, 1975.

⁷ Spangenberg, Smith, "Preliminary Report on Indigent Defense Services in the State of Washington," January, 1986.

⁸ Washington Defender Association, "The Crisis in Public Defense," 1986.

Robert C. Boruchowitz has been Defender Director for the Seattle-King County Defender Association for eight years. He chaired the ABA Criminal Justice Section Defense Services Committee and served two terms as Chair of the WSBA Criminal Law Section. He was graduated from Northwestern University Law School in 1973.

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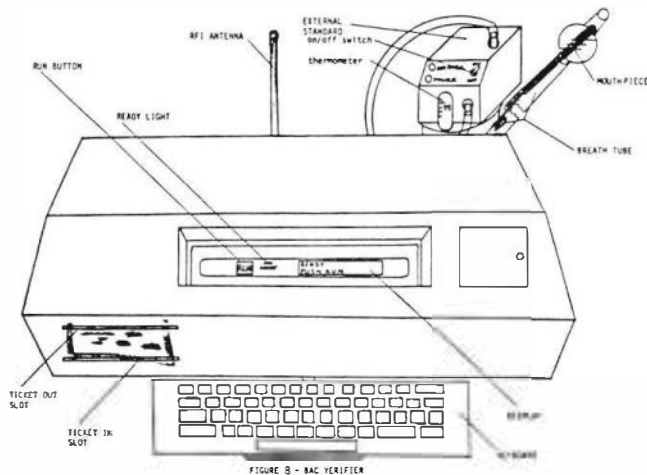
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Of DataMasters, Discovery and DWIs

by Stephen W. Hayne

Shortly after midnight on December 23, 1985, a somewhat bewildered police officer stood before a strange machine in a small room in the Bellevue Police Department. Manual in hand, he tentatively pushed a button on the unfamiliar keyboard. Suddenly, the machine came to life; sucking, wheezing and whirring through its preliminary cycles. A few moments later, history was made as a DWI suspect blew the world's first official breath sample into the BAC Verifier DataMaster II. Thus began a new era in the prosecution of drunk driving cases in Washington.

Is the widely-touted DataMaster the answer to prosecutors' prayers, as claimed by the state toxicologist and its fledgling manufacturer? Or is it an unreliable, enormously complicated, technological boondoggle, as many defense attorneys maintain? Only time will tell, but the state's choice of the DataMaster over its obviously more qualified competitors raises serious questions for future judges and juries. How and why the DataMaster was selected, how it does (and doesn't) work, and what its use means to attorneys, judges, and juries in DWI cases is the subject of this article.

I do not claim a lack of bias on the subject. I defend DWIs, plain and simple. On the other hand, the factual information in this article is accurate and based on the state toxicologist and State Patrol's own documents, studies, statements, and testimony. The materials were collected during a four-month-long discovery process defending the first

cases involving the DataMaster, and represents a review of 20,000+ documents, six days of depositions, three days of hearings and untold hours of research. The conclusion is inescapable: the state may have made a very big mistake.

I. The DataMaster: How? Why?

In August 1983, the State Patrol convinced an ad hoc budget committee that it was time to replace its 30-year-old Breathalyzers with new "infrared" alcohol breath testing machines. Four manufacturers were invited to submit machines for testing: the Intoxilizer 5000, Intoximeter 3000, Breathalyzer 2000, and the BAC Verifier (the DataMaster's predecessor). The initial evaluations were designed to test each machine for precision (how close together repeated tests of the same sample are), accuracy (how close the test result is to a known value), and blood/breath correlation (how close the breath test result is to a contemporaneously drawn blood sample). No tests involving quality control, manufacturing history, or reliability were involved.

The tests, performed by the Washington State Patrol Crime Laboratory from February to March 1984, revealed some disturbing results. The Verifier failed over half the tests for precision and accuracy, misidentified acetone as ethyl alcohol, and completely broke down during other important test procedures. This disappointing performance led to a State Patrol memorandum, "Conclusions and Opinions on Each Instrument," which hailed the Intoxilizer 5000 as

the Patrol's clear "instrument of choice." The memo described the Verifier's performance:

Several functional problems were experienced with the instrument during testing. The printout was not of an acceptable format. The company is new in the breath test field and has only recently demonstrated an interest in data collection capability. No data collection has been demonstrated . . .

Despite the Patrol's misgivings and the Verifier's poor performance on the evaluation tests, the State Toxicologist, Dr. Vidmantas Raisy, testified:

The initial evaluations of the four instruments, the results as far as I was concerned, were acceptable; therefore we could have gone with any of the instruments. (Raisy's dep., p. 23).

Dr. Raisy's conclusions were at odds with those of the people who did the actual testing, but all four manufacturers were invited to bid on the state's contract. Three bids were received in August 1984. Verax Systems, Inc., manufacturer of the Verifier, was the clear winner, underbidding the Intoxilizer by almost 30%. In November 1984, the contract was signed, but subsequent events would more than confirm the Patrol's fears about the machine's performance and the fledgling manufacturer's ability to meet the demanding specifications and delivery dates.

While awaiting production and delivery of the first 25 machines (due March 1985), the state toxicologist signed into law new WAC provisions

in 448.12 officially "approving" the BAC Verifier DataMaster for use in DWI prosecutions in the state of Washington. The name change from "Verifier" to "DataMaster" was more than cosmetic: the DataMaster was, in many respects, an entirely different machine from the Verifier evaluated by the Patrol in 1984. A completely untested, much more complicated device than its predecessor, the DataMaster had added a "data collection capacity." This required numerous fundamental design changes, none for the purpose of improving the machine's accuracy, precision, or reliability. In fact, Dr. Raisys "approved" the machine without ever having seen one:

Q: Then specifically did you [prior to approving the DataMaster] review any tests, the results of any tests that were performed on the DataMaster rather than the Verifier?

A: I don't think so.

Q: Had you received any reports, studies, test results on precision, accuracy, blood/breath correlation on the BAC Verifier DataMaster before you certified it?

A: Before the Washington Administrative Code, no, I don't think so. Or at least I don't remember. Dr. Raisys' testimony was confirmed by Sergeant Rod Gullberg, the chem-

ist in charge of the testing program for the State Patrol:

Q: . . . at the time that the [DataMaster] was approved for service in the state of Washington, had you relied on any tests performed by any other laboratory, state agency, research facility?

A: No.

No other state or federal agency tested the DataMaster, either, simply because the machine was still on the drawing board. Building one proved an extremely difficult task for the previously unknown and financially strapped manufacturer. The delivery date for the first 25 machines came and went, and the State Patrol's anxieties increased. When four prototype machines were finally delivered, they didn't work. At this point, termination of the contract was considered:

Q: . . . had any consideration been given at that point in time to terminating the contract with Verax?

A: Yes.

Q: When were those first concerns or discussions held?

A: I would—to the best of my recollection, about the time the 120 days [for delivery] was expiring and we had those first four [machines] and they were locking up. At some point in there we had, I guess, to make a determination as to—at that point I

think we could have legally terminated the contract or agreement and we had to make a decision as to whether or not it was in our best interest to do that or to continue with the company . . . [w]e sent George Ishii, who was at one time the director of the Seattle Crime Lab, to the factory to meet the people and look at the factory and make a judgment as to whether or not he felt they [could provide us with an instrument that would do what it was supposed to do].

Q: His conclusion was?

A: His conclusion basically was that they could, but that it would be a tough, tough chore for them, that they were a relatively small, relatively new company. He felt that they had the personnel and the desire and the ability to deliver us the instrument that would perform properly and that because of their size and their growing pains that they could fulfill the contract, deliver the appropriate number of instruments, but it would be a tough, hard battle for them. (Program Mgr. Lloyd Danielson's dep., p. 33).

Thus did the state reluctantly decide to gamble on Verax and its DataMaster, a bet which may or may not pay off. Considering the machine's record under controlled lab conditions, the State Patrol was justifiably concerned over its potential under the stresses and strains unique to actual "field" conditions.

Defense counsel and prosecutor alike must become knowledgeable enough about the design and function of the machine to recognize the often subtle hints of a malfunction. Due to space limitations, what follows is an overly simplified explanation of how the machine is supposed to work, mechanically, scientifically and electronically.

II. The Testing Sequence

Since the machine is always "warmed up," the testing sequence can begin any time after completion of the 15-minute observation period required under WAC 448.12.230.

The officer begins by typing in the time the 15-minute observation period began. All entries are made on a standard typewriter-type computer

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keyboard connected to the machine by an electrical cord. He types in his name, the code number for his police department, the subject's name, date of birth, sex and ethnic origin.

The officer then enters coded numbers for the arrest location, crime arrested for, whether an accident was involved (and what type), where the subject had been drinking, and the subject's occupation. He has the option of reviewing the data to check it for accuracy, and then he enters all of the information into the computer memory of the machine. After the data is stored, the actual breath test sequence is begun and the officer's role, barring difficulty or a refusal, is essentially over, since the remaining steps are largely automatic.

After insertion of the "evidence ticket," the machine "purges" itself by drawing room air into the "sample chamber." This purging process, which occurs several times during the test sequence, is designed to clear the chamber of any residual alcohol and to test the "ambient" (room) air to ensure the absence of alcohol or other interferences in the immediate environment.

The next step is "ambient zeroing": the machine establishes the level of any alcohol remaining in the machine and subtracts it from the subsequent test results. The result of the ambient air test is then recorded on the evidence ticket as the first "blank test" (see evidence ticket, figure 1), along with the time. In the author's experience, all "blank test" results have been .00.

Next is the "internal standard" check, in which a quartz filter is automatically inserted into the sample chamber between an infrared light source and a "detector board." The quartz filter absorbs infrared energy in a known, predetermined amount and is used to verify that the machine is working properly by correctly "recognizing" the presence of the filter. If it does, the word "verified" is printed on the evidence ticket.

The officer then attaches a mouth piece to the breath tube. The machine allows one minute for the officer to type in "y" or "n" to the displayed question: "subject

refused?" If no answer is typed in within the 60 seconds, the test sequence automatically terminates, erases the data previously entered, and goes back to step one. If "y" is typed in, the "refusal" is printed on the evidence ticket and the test ends.

If the "n" is entered, the subject is given two minutes to provide an "acceptable" breath sample by "inhal[ing] a full breath and then provid[ing] a slow, consistent, continuous breath sample through the mouth piece" until the officer says to stop.¹ The subject must keep blowing until the machine flashes the words "test results, alcohol .____" (to two digits).

If the subject blows, but the machine does not "accept" the sample, after two minutes it will again flash "subject refused?" At this point, the officer must decide whether the subject has made "an earnest attempt"² to provide an acceptable sample. If not, it is considered a refusal, the test is terminated, the defendant is usually charged based on the remaining evidence, and will face a difficult battle with the Department of Licensing over the one-year loss of license for "refusing" the test.

In most cases, however, the breath sample is accepted and the alcohol (or any other substance which the machine "sees" as alcohol) will be measured via a complicated mathematical-electronic process (described later). A two-digit result is then printed on the evidence ticket following "subject sample." The purging or blank test process is then repeated with another .00 result.

The next step is to test a "simulator solution" (shown on the evidence ticket as the "external standard"). Attached to the back of the machine is a jar filled with a mixture of alcohol and water with a small space of trapped air above the solution. This mixture is supposed to approximate a .10 alcohol concentration in the trapped air which the machine must "read" between .090 and .110. (WAC 448.12.230). If the result is outside these parameters, the test results are invalid.

(Note, however, that an "external standard" of less than .10 does not mean the machine is "reading low," since the potency of the solution deteriorates rapidly and is usually replaced every 30 days.)

After this test of the simulator solution, the subject must give a second sample (using a new mouth piece). The results of the subject's two tests must agree "within plus or minus 10% of the average of the two" to be considered valid under WAC 448.12.220.

The State Patrol reports that 11% to 20% of completed tests on DWI subjects are *outside* the acceptable range, despite the fact that Washington's standard is less stringent than most other states'. So far, the Patrol has been unable to solve the mystery of so many inconsistent results, a phenomenon which is theoretically impossible according to the manufacturer's claims and the machine's "fail-safe" design.

Once the second sample has been measured, the machine does a final room air "blank test," which is printed as a .00; the time is recorded, and the evidence ticket is removed from the machine. The whole testing sequence takes approximately three to four minutes.

Most of the entered data and test results are then stored in the memory of the machine for later gathering by the Patrol's centralized "host" computer in the crime laboratory in Seattle. Regularly, the "host" computer automatically telephones each DataMaster and "polls" it for the accumulated data, freeing the limited memory capacity of the machine for the next tests. This accumulated "database" is permanently stored in the host computer's memory for later review by interested persons.

Next, we will discuss the role of individual mechanical and electronic components of the machine, how it attempts to measure alcohol in the breath and, finally, where to look for relevant discovery materials in DWI cases.

III. What is a DataMaster and How Does it Work?

The BAC Verifier DataMaster II is

the still-evolving descendant of a relative newcomer to alcohol breath testing: the BAC Verifier. It is a machine which was designed and produced specifically for Washington by a young company headquartered in Fairport, New York, Verax Systems, Inc.

As far as breath testing machines go, the DataMaster is very appealing in theory and appearance. It differs from other machines in that it has the

capacity to gather and transmit information from individual police departments to a host computer located in Seattle. This feature proved irresistible to Washington officials, even though most of the data gathered is, at best, of passing interest in the prosecution of a DWI case.³ However, this "database" is a potential gold mine to the defense attorney willing to put the time, money, and effort into careful research on the track

record of a particular machine. This topic will be discussed more thoroughly below.

First, how does the machine actually measure a breath sample for alcohol?

As a suspect blows into the heated DataMaster breath tube, two components are ensuring the highest possible test results: the thermistor and the slope detector. The thermistor is the first component the breath sample passes through inside the machine and is a device which measures "resistance" electrically. It is designed to ensure that the subject is blowing hard and long enough to deliver a sample from deep in the lungs, where the highest concentration of alcohol is found. The machine is programmed to require the subject to blow hard enough to establish a sufficient resistance level for at least five seconds in order for the sample to be accepted. Once the air sample passes the thermistor, it travels into the sample chamber via the three-way valve (the same valve which directs samples of room air and simulator solution into the sample chamber during other phases of the test sequence).

As the breath passes into the sample chamber, its alcohol content is "read" four times a second, and the results are plotted electronically by the slope detector. The slope detector is programmed to expect a steadily rising curve, indicative of deeper and deeper lung air. When the curve or slope reaches the highest reading and begins to fall off or level out, the machine captures that reading and flashes the result on the control panel screen. The result is then printed on the evidence ticket and stored in memory for eventual transfer to the host computer in the crime lab.

The slope detector is claimed by the manufacturer to "protect" suspects against false high readings by detecting mouth alcohol in the breath sample. Theoretically, it will detect mouth alcohol by seeing a reverse slope (high-to-low) and flashing "invalid sample." However, no serious testing of this aspect of its function has been performed, and

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such devices have a poor reliability record on other breath machines.

Thus, while the slope detector and thermistor ensure an "adequate" sample, they usually guarantee the highest result, something the old Breathalyzer couldn't do.

How does the DataMaster detect alcohol in the breath sample? It employs a method known as "infrared spectroscopy." This simply means that it shines light through the breath sample and measures the loss of energy between the light source and the detector. The method is based on the Beer-Lambert Law (molecules "absorb" infrared energy at predictable wave lengths, and if one knows at which wave lengths alcohol is absorbed, one can tell how much alcohol is in the sample by measuring absorption only at that wave length). The DataMaster measures alcohol from 3.37 to 3.44 microns.

The DataMaster's sample chamber comprises three tubes, approximately one meter (three feet) long. It uses mirrors to reflect the light from one tube to another and on to the detector. The breaks in the tube are necessary in order to lengthen the light path and provide better "resolution" in what the detector sees.

However, despite the relatively long light path, the actual volume of air sampled is only 50 cc (milliliters), approximately the size of a golf ball. Thus, the diameter of the 3-foot-long sample chamber tubes is very small—only about one-third of an inch.

In order for the machine to read a breath sample for the presence of alcohol, the detector transmits data to its internal computer for analysis. The computer applies a complex and as yet undisclosed mathematical/electronic process to interpret the detector's findings into blood/breath terms (e.g., "subject sample: .15"). To illustrate the complexity of the process, eight pages of Sergeant Gullberg's deposition were required to describe just one of the several mathematical formulae employed in the DataMaster.

The manufacturer of the machine, seeking protection under trade

secrets and proprietary interest claims, has gone to great lengths to keep the process, mathematical formulae and electronic schematics secret. The schematic description of the electronics alone reportedly encompasses several hundred pages and weighs over twenty pounds.

The actual breath-testing-to-alcohol result process thus remains a secret at this time. But its very complexity allows significant opportunities for error. For instance, despite the guarantee of accepting only consistent samples provided by the thermistor and slope detector, the machine continues to be plagued by frequent test results outside expected or acceptable limits. In theory it is impossible for the machine to register .10 and .14 readings within three minutes on the same subject. In reality, such test results are not uncommon.

However it occurs, once the breath sample has been accepted and analyzed by the machine, it exits through a one-way valve back into the room. Significantly, the original purpose of the one-way valve was to allow a "sample trap" to preserve a sample of the breath for retesting. However, the State Patrol elected to eliminate this feature in their bid specifications for the new machines. Upon being

questioned, Dr. Raisys revealed that the decision was based upon Washington law, which does not require preservation of a sample. *State v. Canaday*, 90 Wash.2d 808 (1978).

The final stage of the testing sequence involves the printing of the test results on the evidenceticket and storage of the data for later retrieval by the host computer at the crime lab.

The data collected is permanently stored and may be retrieved by interested persons. This "database" provides the defense attorney with a wealth of discovery material useful at hearing or trial. At the touch of a button, the entire history of a specific machine, including all test results and recorded malfunctions, can be retrieved. The database can reveal how many times the machine gave results outside the requirements of the Washington Administrative Code, how many times the machine has experienced an error code, how many "incomplete" tests may have preceded a client's "refusal," how many times the machine has "misdiagnosed" an interferent, etc.

In preparing for cross-examination of the state's expert in a DataMaster case, keep in mind the newness of the machine and breath test procedure. Cross examination is limited only by your imagination, knowledge of the machine's theory, electronic and

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IV. Cross-Examination of the DataMaster Technician

The DataMaster is an incredibly complex piece of machinery. Most attorneys will initially be intimidated by its apparent sophistication. However, it is this very complexity which provides many of the fruitful areas for

cross-examination. For the relative newcomer, however, it is advisable to keep it simple and direct. The following is a brief outline of suggested areas of cross-examination of the DataMaster technician.

A. History of the Machine

To begin, review the cross-examination of State Patrol Sergeant Rod Gullberg in *City of Bellevue vs. Van*

Noort, (Bellevue District Court Cause BE 92686). The examination reveals the many changes in individual components in the machine since its approval for use by the state toxicologist. Remember, the DataMaster was designed and built specifically for the state of Washington and was literally "approved" before the state had even received the first prototype. But continuous malfunctions and consistent unreliability required literally dozens of changes in individual components. The DataMaster of today bears little resemblance to the DataMaster approved in March of 1985. In fact, individual components continue to be changed, altered, reprogrammed and redesigned. Stress the unproven track record of the machine and continual alterations. The unfortunate truth is that the machine was rushed into service well before the bugs had been worked out, and it is still experiencing unexplained difficulties.

B. Maintenance Records

A record of maintenance and repair worksheets is kept by the State Patrol for each machine. Every time a malfunction or other complaint is received regarding a machine, a maintenance technician is supposed to identify the problem, repair it, recalibrate the machine if necessary, and record the incident. In many cases, the maintenance records will reveal a recurrence of the same problem or malfunctions close in time to the date of the defendant's breath test. The records also document the frequent inability of the technicians to recreate the problem complained of. Thus, the cause of the malfunction often remains a mystery. The Patrol also keeps a log of telephone complaints from officers in the field identifying problems which are never recorded by the host computer.

C. The Database

The information contained in the database of the host computer can reveal much, but not all, about an individual DataMaster's past performance. For instance, an interesting development with the advent of the DataMaster is its ability to record

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incidents of "radio frequency interference." For years, the State Patrol has maintained that RFI was simply not a problem in breath tests in the state of Washington, despite contrary findings in other states. In many instances, a DataMaster located where Breathalyzer had been—on the same table, in the same room, in the same police station—has shut down repeatedly due to radio frequency interference.

The database also provides "error codes" which record instances of the machine shutting itself down due to malfunctions: "system won't zero," calibration error, printer error, etc., as well as radio frequency interference. A review of a typical database will almost certainly reveal numerous incidents of error codes which may prove useful to defense counsel.

When cross-examining the DataMaster technician, use great caution to avoid losing the judge or jury by over-complicating the process. It is important to reduce these complex principles to simple explanations and easily understood examples.

Use considerable care preparing cross-examination so that the questions and answers will be easily understood by a layperson. Set simple, straight-forward goals. Develop questions requiring yes or no answers whenever possible. Careful preparation will allow the attorney to control the examination by requiring the technician to answer the question asked and only the question asked. As in all cross-examination, remember: Never ask a question when you don't know the answer.

In summary, the BAC Verifier DataMaster infrared breath testing device signals a new era in prosecuting and defending drunk driving cases in Washington. Its sophistication and complexity offer great challenges to attorneys, especially those on the defense side. However, it should also be remembered that with challenge comes opportunity. To those willing to put forth the effort, the result will ultimately be fairer trials for those clients accused of this increasingly unpopular offense. □

¹ DataMaster Operator's Manual, p. 25.

² DataMaster Operator's Manual, p. 25.

³ Much of the data gathered is simply demographic.

Stephen W. Hayne has practiced law in Seattle for 13 years and currently limits his practice to criminal defense and personal injury. Co-author with Douglas Cowan of

Defending DWIs In Washington (Butterworths, March 1987), he is former chairman of the criminal law sections of WSTLA, SKCBA, the state chapter of NACDL, and is a founding member of WACDL. Currently on the Executive Board of the WSBA Criminal Law Section, Hayne is a frequent lecturer on criminal law topics. He gratefully acknowledges the assistance of attorneys Doug Cowan and Jon Scott Fox in the research and preparation of this article.

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Announcing Formation of the Washington Association of Criminal Defense Lawyers

A coalition of members from the criminal law sections of WSBA, WSTLA, WDA, NACDL and local bar associations announce the formation of a single statewide organization of criminal attorneys to be known as The Washington Association of Criminal

Defense Lawyers.

Patterned after similar organizations in other states, the WACDL will unite private and public defense attorneys in an organization designed to address the particular needs of Washington criminal lawyers and

their clients.

While not intended to replace the criminal law sections of the other bar associations, the WACDL's sole purpose will be to advance and protect the rights of accused persons by providing meaningful assistance to criminal lawyers. The WACDL will offer:

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- a computerized research service
- effective lobbying efforts in Olympia
- lists of expert witnesses
- a "hotline" for help from other WACDL members
- professional and social functions

Above all, the association will provide the camaraderie and support necessary to survive and succeed in the practice of criminal law. All interested persons are invited to contact their local representative for further information:

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Defending DWIs in Washington by Douglas Cowan and Stephen Hayne

Final Verdict by Adela Rogers St. Johns

reviewed by
Michael A. Frost

Defending DWIs In Washington, Douglas Cowan and Stephen Hayne; Butterworth Legal Publishers, Redmond, Washington, 1987. \$115 list price (1 vol., ringbinder).

My initial reluctance to review a book written by long-time colleagues and friends vanished upon reading the manuscript of *Defending DWIs in Washington*. Unlike many other attempts on this topic, this approximately 450-page book is a practical

manual for defense lawyers. All of the "state of the art" technologies and techniques found in DWI cases are described at length, including separate sections on the BAC Verifier Datamaster and Horizontal Gaze Nystagmus tests. Every aspect of the book is tailored to the practicing attorney, including the binder which is designed to allow easy removal of sections for trial and supplementation.

An overview section at the beginning of the book provides a step-by-

step analysis of issues and problems which arise in the "typical" DWI case. These issues and problems receive separate and detailed coverage in the following chapters. The chapters on handling "The 2:00 a.m. Phone Call" and "Cross-Examination of State Expert—BAC Verifier Datamaster" are particularly well done. A separate chapter covers "Cross-Examination of the State Expert—the Breathalyzer Technician" in cases where the BAC Verifier Datamaster is not used by the officer. Lastly, suggested jury instructions and a checklist are included. All chapters are well researched and supported by Washington law.

Although this book was written as a DWI defense manual, it contains suggestions helpful to any criminal case. The voir dire, cross-examination, and summation chapters are excellent in this respect. The summation chapter also contains specific suggestions for defusing commonly encountered adverse evidence in a way that jurors may appreciate. For example, where

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an officer testifies that the client stepped off the line three times while walking nine steps down and seven back during field sobriety tests, the authors suggest:

"Invite the jurors to try the tests in the jury room, pointing out that perfection is the only passing grade. Emphasize the fact that the client was given only one chance under the worst possible conditions. . . . [I]sn't it fair to ask the jury to give the client credit for doing thirteen of the sixteen steps correctly? Ask the jury to consider whether doing thirteen steps properly is more indicative of the client's condition than doing three steps improperly."

This book should be useful to lawyers of all experience levels, although more sophisticated readers may find that the sample cross-examinations tend to drag on a bit. Since this area of the law is in a constant state of change, some supplementation will undoubtedly be necessary in order to keep the book current. *Defending DWIs in Washington*, however, will make a worthy addition to any criminal lawyer's library.

Final Verdict, Adela Rogers St. Johns, Doubleday & Co., Inc. Garden City,

New York, 1962.

For anyone who enjoys lawyer biographies, this book is a classic about the life of Earl Rogers of Los Angeles, one of this century's most brilliant criminal defense lawyers. It was Rogers, after all, who successfully defended Clarence Darrow in Darrow's jury bribery trial arising from his defense of the notorious McNamara brothers.

Final Verdict views Rogers' life through the eyes of his daughter, Adela Rogers St. Johns, a first-rate author and journalist in her own right. St. Johns spent much of her life growing up in and around her father's office and watching his trials. What results is an unusually personal picture of the trial genius at work as well as detailed descriptions of trial strategies and techniques which still provide modern-day food for thought.

Rogers won cases which no other defense lawyer would agree to take by imagination, hard work, and a flair for the dramatic. A favorite technique was to study the weakest part of his client's case at length until he figured out a way to turn it into a strength. Rogers was also one of the first to use ballistic experiments at trial. He knew more about medicine than most doctors. Rogers reportedly handled over 112 murder cases and obtained

acquittals in over 100 of them.

One of the more interesting aspects of *Final Verdict* is its somewhat unconventional portrayal of Clarence Darrow, whom Rogers privately described as "the champion of lost causes and lost cases." St. Johns leaves no doubt that she and the majority of other court watchers thought Darrow was guilty, and that her father's largely unappreciated efforts prevented Darrow from being forced to write his final briefs from behind the "gray dim walls of San Quentin." Whether this is a fair evaluation of the evidence in Darrow's case is the subject of controversy. It is interesting to speculate about how history would have differed had a verdict of guilty been returned in Darrow's case, for many of his more famous trials, including the Scopes monkey trial and the Leopold-Loeb case, took place after his own trials. Following his acquittal, Darrow fired Rogers for reportedly drinking too much during trial and represented himself *pro se* during a second trial involving a charge of bribing yet another juror in the McNamara case. That trial ended with a hung jury which voted nine to three in favor of conviction. The case was closed when the state decided against a third trial in exchange for Darrow's promise to never practice law in California again.

Whatever the truth may be in Darrow's case, *Final Verdict* makes fascinating reading. Once a best seller, it is available at most used-book stores. Prices vary from \$5 to \$10 for a hard-bound copy, although copies are occasionally found at bargain prices. I once found a copy in excellent condition at the annual Langley used-book sale for fifty cents.

Michael A. Frost has been practicing criminal law in Seattle since 1974. He is a past chair of the Criminal Law Section of the Washington State Trial Lawyers Association and presently serves on the Executive Committee for the Criminal Law Section of the Washington State Bar Association. He is a sustaining member of the National Association of Criminal Defense Lawyers and a founding member of the recently created Washington Association of Criminal Defense Lawyers.

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WASHINGTON STATE BAR NEWSLINE

The Board's Work



by Carole Grayson

Seattle, WSBA Headquarters, December 12-13, 1986

Present: President William Gates; Governors Reisler, Weston, Mocerri, Vhugen, and White of Seattle; Johnson of Spokane; Shea of Pasco; Lane of Tacoma; Petruss of Olympia; Carlson of Everett.

Also present: Robert Farrell (WSBA Legal Counsel), John Michalik (WSBA Exec. Dir.), Scott Smith (SKCBA Young Lawyers), Tom Fitzpatrick (WSBA Young Lawyers), Gary Utigard (District Ct. Judges Assn.), Janet Gaunt (Wa. Women Lawyers), Solie Ringold (Ct. of Appeals Judges Assn.), Mary Prevost (Govt. Lawyers), Earl Lasher (SKCBA Trustees), John J. Fattorini (WSBA lobbyist), Harold Clarke (Superior Ct. Judges Assn.)

ETHICS OPINIONS: David Boerner of the University of Puget Sound Law School, chair of the WSBA

Rules of Professional Conduct Committee, discussed the Committee's review of the 180 existing WSBA formal ethics opinions.

The committee's goals were "to eliminate dead wood" and set the stage republishing those opinions still valid under the RPC, said Boerner. "The whole purpose is to have the opinions available to educate lawyers. It is in no one's interest to have them difficult to obtain."

The Governors voted 9-1 (White nay) to adopt the Committee's recommendations. Reproduction is slated for spring 1987.

"A-CHANGIN'" Bob Dylan was quoted by the chair of the WSBA Task Force on Lawyer Advertising, Julian

ADVERTISING Dewell of Everett. "The times, they are a-changin'", said Dewell, "and advertising is here to stay whether we like it or not."

The Governors voted to refer the Task Force's recommendations to the WSBA Rules of Professional Conduct Committee. The matter will be back before the Governors by April 1987.

"Should the Bar be involved in regulating a constitutionally protected activity?" asked Governor Steven Reisler of Seattle.

MALPRACTICE PLAN Because the malpractice insurance proposal acted on by the Governors is covered elsewhere in this issue, the Board's Work focuses on the parliamentary aspects of this important vote:

A motion ("A") was made that the Governors approve and recommend that the Supreme Court adopt the program and fund proposed by the Professional Liability Fund Task Force, subject to the condition that before submitting it to the Supreme Court, the Governors would have to

be satisfied that reasonably affordable excess insurance coverage was available.

Before any vote on motion A, a substitute motion ("B") was made to defer any action until the Bar conducted a non-binding poll of the membership on the plan. Substitute motion B passed 6-4 (Petruss, Johnson, Lane and Reisler nay).

A motion to reconsider ("C") motion B was made, and it passed 6-4 (White, Weston, Mocerri, Vhugen nay).

When motion B was reconsidered, it failed 4-6 (White, Weston, Mocerri and Vhugen voted in favor).

Back on the table was original Motion A. Before any vote on it, there was a motion to amend Motion A ("D") to delete any reference to the Governors' making a "recommendation" to the Supreme Court. Motion D failed 2-8, though neither my notes nor the official minutes disclose who voted how.

Then came a motion to amend Motion A ("E") to delete the condition that before submission to the Supreme Court, the Governors would have to be assured that reasonably affordable excess insurance coverage was available. Motion E failed 3-7, though neither my notes nor the official minutes disclose who voted how.

Then came a vote on Motion A (the original motion in its unamended state), and it passed 7-4. Governors White, Weston, Mocerri and Vhugen voted against the motion. President William Gates, member and former chair of the liability fund task force, indicated he was voting in favor of the motion.

Finally came a motion ("F") that, due to the Governors' action and because a resolution on the same issue had passed at the 1986 Annual Meeting, the question whether to adopt the professional liability insurance program and fund would be referred to the active membership in a referendum before the Governors make any recommendation to the Supreme Court. The motion passed unanimously.

WHEN IS NO ACTION ACTION?

Last year, Seattle attorneys Douglas Shaw Palmer and Howard Todd co-sponsored a resolution to eliminate the 50% threshold requirement of Article VII, Section 8 of Bar Bylaws. By passing 52-44 at the annual meeting, the resolution came before the Governors for their consideration.

After Palmer and Todd had addressed the Governors, Governor Johnson moved to adjourn the meeting. Because such a motion is non-debatable, the meeting adjourned without the Governors acting on the resolution.

The effect is to leave the action of the voters at the annual meeting not the position of the WSBA.

PROFESSIONAL LIABILITY FUND PLANS FINALIZED; ISSUE SET FOR MEMBERSHIP VOTE

After 18 months of study, a series of communications and mailings to all active members of the Bar, hearings on the subject across the state and increasingly detailed presentations to the Board of Governors, a course of action has been settled upon with regard to the concept of a Professional Liability Insurance Fund. At its December 1986 meeting the Board of Governors heard extensive presentations, pro and con, on the issue. Thereafter, by a 7-4 vote, the Board made a decision to approve, and recommend for adoption by the State Supreme Court, a Professional Liability Insurance Program and Fund, with the caveat that before submitting such a program to the Court the Board would have to be assured of the availability of reasonably affordable excess insurance coverage.

In view of the importance of the issue, the Board of Governors has also determined to submit the question to the entire membership by way of Referendum. Ballots in that Referendum will be mailed approximately 10 days after publication of this issue of the *Bar News*. In advance of that Referendum, the Board has directed the publication of: (1) a description of the proposed coverage plan; (2) the contents of the actual plan; (3) the proposed implementing Supreme Court Rule; and (4) arguments pro and con on the question.

Those items are set forth in the following pages and deserve your attention and consideration as necessary background to the upcoming Referendum.

WASHINGTON LAWYERS' PROFESSIONAL LIABILITY FUND DESCRIPTION OF THE PLAN

I. Participation

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

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

II. Limits

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

All lawyers in the same firm will be required to choose the same limit and same deductible.

If a lawyer has more than one claim in a year and has exhausted his limit he will no longer be covered, but another lawyer in the same firm who is vicariously liable will still be covered.

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

Low-revenue/\$100,000: In order to qualify, the following must be true: (1) the lawyer's gross revenue in each of the immediately preceding four years or as many of the preceding four years in which the lawyer has engaged in any practice of law which would not be exempt under this plan does not exceed \$20,000, and (2) the lawyer has not at any time in the preceding four years been vicariously liable for professional negligence of any other lawyer.

III. Deductible

The following deductibles will be in the program: \$2,500, \$5,000, \$10,000, \$25,000, \$50,000 and \$100,000.

However, any deductible above \$5,000 would be available only with the full coverage of \$250,000.

The Fund would pay the claimant and the claims costs from the first dollar and the lawyer who elects for any of the above deductibles would *indemnify* the Fund up to the amount of the deductible. In the case of deductibles at \$25,000 and above, satisfactory proof of financial responsibility will be required.

The deductible amount applies to both damages and claim expense.

IV. Assessment Schedule

Deductible	Low Revenue		
	\$100,000 Limits	\$100,000 Limits	\$250,000 Limits
\$0	\$883	\$524	\$1,191
\$2,500	\$847	\$506	\$1,140
\$5,000	\$811	\$488	\$1,088
\$10,000	N/A	N/A	\$ 986
\$25,000	N/A	N/A	\$ 781
\$50,000	N/A	N/A	\$ 678
\$100,000	N/A	N/A	\$ 473

For newly admitted lawyers the schedule would be:

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

However, newly admitted credits cannot be applied to low revenue rates.

V. Coverage and Exclusions

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

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

**WASHINGTON STATE LAWYERS'
PROFESSIONAL LIABILITY FUND
COVERAGE PLAN
DRAFT**

<u>Subject</u>	<u>Contents</u>	<u>Page</u>	<u>Subject</u>	<u>Contents</u>	<u>Page</u>
I. Definitions		31	XI. Notice of Claims		34
II. Coverage		32	XII. Innocent Covered Lawyer		34
III. Prior Acts Coverage		32	XIII. False or Fraudulent Claims		34
IV. Exclusions		32	XIV. Relation To Insurance Coverage		34
V. Defense, Settlement, Payment		33	XV. Assistance and Cooperation		34
VI. Limit of Liability		33	XVI. Confidentiality		35
VII. Deductible		33	XVII. Subrogation		35
VIII. Territory		33	XVIII. Action Against Fund		35
IX. Option To Extend Claims			XIX. Assignment		35
Reporting Period		34	XX. Changes		35
X. Discovery Clause		34			

I. COVERAGE PLAN DEFINITIONS

When used in this Plan, the following terms have the meanings set forth below:

"Claim" means any demand made upon a Covered Lawyer for damages or services arising out of an act, error or omission in the rendering of professional legal services for others.

"Claims Expense" means:

- (a) fees charged by any designated counsel;
- (b) all other fees, costs and expenses resulting from the investigation, adjustment, and defense of a claim, if incurred by the Fund;
- (c) fees charged by any lawyer designated by the Covered Lawyer with the written consent of the Fund.

However, "claims expense" does not include the salaries of regular Fund employees or officials, or other routine administrative costs of the Fund.

"Covered claims" are those claims arising out of the Covered Lawyer's capacity as a lawyer in the private practice of law, as a fiduciary, and as a notary public; which claims are first made during the Plan Period, which arise from conduct occurring after the Initial Coverage Date, and which are not excluded by other terms of this Plan.

"Covered Lawyer" means:

- (a) The Named Lawyer.
- (b) Any lawyer vicariously liable for the conduct of the Named Lawyer because of being in the same law firm, but only to the extent that such liability arises from an act, error or omission by the Named Lawyer in the private practice of law and whose principal office is in the State of Washington.
- (c) In the event of the death, adjudicated incapacity, or bankruptcy of the Covered Lawyer, then his or her conservator, guardian, trustee in bankruptcy, legal or personal representative in his or her capacity as such.

"Damages" means a monetary judgment or settlement and does not include fines, court-imposed sanctions, statutory penalties, punitive or exemplary damages, nor the return of or restitution of fees for professional services, nor injunctive relief.

"Designated Counsel" means any lawyer retained or employed by the Fund for any purpose, other than an employed lawyer of the Fund.

"Employed Lawyer" means an attorney practicing law as an employee for an employer which is not engaged in the private practice of law.

“**Fiduciary**” means a personal representative, administrator, conservator, executor, guardian, trustee or any similar fiduciary capacity ordinarily performed by a lawyer in the **private practice of law**.

“**Initial Coverage Date**” means the date of commencement of the most recent period of continuous coverage as a **Named Lawyer**.

“**Law firm**” means an association of lawyers organized as a business entity engaged in the private practice of law.

“**Named Lawyer**” means the lawyer named in the Declarations Sheet.

“**Personal Injury**” means false arrest, detention or imprisonment; wrongful entry or eviction or other invasion of the right of private occupancy; the publication or utterance of a libel or slander or other defamatory or disparaging materials, or a publication or utterance in violation of an individual’s right of privacy; malicious prosecution or abuse of process; and outrageous conduct.

“**Plan Limit**” is the amount of coverage set forth in the Declarations Sheet. The deductible amount, if any, is a part of and included in—and is not in addition to—the Plan Limit. The Plan Limit is the Limit of Liability of the Fund both for a single claim and for the aggregate of all claims made against the **Covered Lawyer** during the **Plan Period**. The total of both loss payments and claims expense are included in the Plan Limit.

“**Plan Period**” means the calendar year from January 1, or that portion of the calendar year from the commencement date of the **Named Lawyer’s** coverage under this Plan if after January 1, to December 31.

“**Private Practice of Law**” means the performance of those professional legal services for others ordinarily performed by lawyers in the private practice of law in the State of Washington, but does not include acts, errors or omissions of a lawyer performed:

- (a) while acting as an **employed lawyer**;
- (b) while acting as an elected or appointed public official; prosecuting or assistant prosecuting attorney; corporation or assistant corporation counsel for a municipality; attorney general or assistant attorney general; judge, hearings officer, administrative judge or in any judicial or quasi-judicial capacity unless acting as an arbitrator or as a trustee in bankruptcy;
- (c) while such lawyer is granted exemption from participation in the Fund.

II. COVERAGE

The Washington Lawyers’ Professional Liability Fund shall pay all sums which the **Covered Lawyer** shall become legally obligated to pay as damages as a result of covered claims, subject to the **Plan Limit**, provided the **Covered Lawyer** has his principal office in the State of

Washington at the time claim is made, and provided the **Covered Lawyer** has complied with all terms and conditions of this Plan.

III. PRIOR ACTS COVERAGE

A claim against the **Covered Lawyer** arising from acts, errors or omissions occurring prior to the **Named Lawyer’s Initial Coverage Date** under this Plan, shall be deemed a **covered claim**, provided:

- (a) such claim would otherwise be a **covered claim** under this Plan; and
- (b) there is no prior policy of insurance which affords coverage for such claim resulting from such act, error or omission, whether or not the available limits of such prior policy are sufficient to pay any such claim; and
- (c) prior to the **Initial Coverage Date** the **Covered Lawyer** had no knowledge of, nor could have reasonably foreseen, such claim that has been asserted arising out of any prior act, error or omission of the **Covered Lawyer**.

IV. THE EXCLUSIONS

Coverage under this Plan does *not* apply:

1. to any claim arising from any dishonest, fraudulent, criminal, or deliberately wrongful act or omission;
2. to any claim for **personal injury**, unless such claim results from negligence of the **Covered Lawyer** in the **private practice of law**;
3. to any claim for physical bodily injury, sickness, disease or death of any person; or for injury to, loss or destruction of, any property or resultant loss of use thereof. This exclusion does *not* apply to mental anguish or emotional distress arising out of the **Covered Lawyer’s** activities in the **private practice of law**;
4. to any claim against the **Covered Lawyer** in his or her capacity as an owner, part-owner, promoter, officer, director, or manager of a profit or nonprofit corporation or business enterprise in any form which is not engaged in the **private practice of law**;
5. to any claim arising out of the alleged violation of any state or federal consumer protection act or similar statute or statutes.
6. to any claim arising out of notarized certification or acknowledgment of a signature without the physical appearance of the signator before such notary public; unless such claim arises from the act of an employee of the **Covered Lawyer** and the **Covered Lawyer** has no actual knowledge of such act;
7. to any claim arising out of the **Covered Lawyer’s** activity as a **fiduciary** under any employee retirement plan;
8. to any claim;

- (a) asserted directly against the **Covered Lawyer** for punitive or exemplary damages, fines, sanctions or penalties, or
 - (b) asserted directly or vicariously against a **Covered Lawyer**, arising out of the imposition of any attorney's fees, costs, fines, penalties, sanctions or other amounts imposed to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses;
9. to any **claim** made by a present, former, or prospective employee, partner, officer, director, or shareholder of the **Covered Lawyer** or his **law firm**, or by a spouse, parent or child of the **Covered Lawyer**, unless such **claim** arises out of the professional legal services of the **Covered Lawyer**, in an attorney-client relationship;
 10. to any **claim** based upon or arising out of discrimination or sexual harassment by the **Covered Lawyer**;
 11. to any **claim** arising out of a proceeding brought against the **Covered Lawyer** by the Washington State Bar or any similar entity;
 12. to any **claim** against a **Covered Lawyer** for the recovery of funds, property or fees which have or will accrue directly or indirectly to the benefit of any **Covered Lawyer**;
 13. to any **claim** caused by an act, error or omission of the **Covered Lawyer** in the rendering of advice concerning whether or not to invest in a specific investment;
 14. to any loss sustained by the **Covered Lawyer** as a beneficiary or distributee of any trust or estate.

V. DEFENSE, SETTLEMENT AND PAYMENT

The Fund shall defend any **claim** against the **Covered Lawyer**, even though such **claim** be groundless, false or fraudulent. By undertaking to defend a **claim**, the Fund does not admit such **claim** is a covered **claim**. The Fund's duty to defend a **claim** shall terminate if and when the Fund determines that no part of the **claim** is a covered **claim**. The Fund's duty to defend all **claims** shall terminate when the **Plan Limit** is exhausted and control of the defense is tendered to the **Covered Lawyer**.

The Fund shall have the absolute right to conduct the defense of the **claim** and to select **designated counsel**, subject to the right of the **Covered Lawyer** to one objection to the **designated counsel**, and the Fund shall thereafter select alternate **designated counsel**.

The Fund shall have the right to conduct such investigation as it deems necessary and, with the consent of the **Covered Lawyer**, to settle any **claim**. If the **Covered Lawyer** refuses consent to a settlement or compromise recommended by the Fund and acceptable to the claimant, then the Fund's **Limit of Liability** with respect to such **claim** shall not exceed the amount of such recommended

settlement or compromise, plus **claims expense** then accrued.

VI. LIMIT OF LIABILITY

The liability of the Fund shall not exceed the **Plan Limit** as a result of the aggregate of all **claims** first made against the **Covered Lawyer** during the **Plan Period**, including if purchased, the **Optional Extension Period**.

The making of a **claim** against more than one **Covered Lawyer** in the same **law firm** shall not operate to increase the Fund's limit of liability, and only one **Plan Limit** shall apply. If the liability of a **Covered Lawyer** arises solely from vicarious liability for the conduct of another lawyer who is a **Covered Lawyer** under his or her own **Plan**, then the **Plan Limit** of the lawyer with the highest available **Plan Limit** shall be applicable, and the total liability of the Fund for such **claim** is limited to such highest available **Plan Limit**.

Two or more **claims** arising out of a single act, error or omission, or a series of related acts, errors or omissions, shall be deemed a single **claim**. All such **claims**, whenever made, shall be considered first made during the **Plan Period** or **Optional Extension Period** in which the earliest **claim** arising out of such act, error or omission was first made, and all such **claims** shall be subject to the **Plan Limit**.

VII. DEDUCTIBLE

The deductible amount, if any, stated in the **Declarations Sheet** shall be applicable to each **claim**.

In the event a single **claim** is made against more than one lawyer, only one deductible shall be applicable. The applicable deductible is the deductible of whichever such lawyer has the lowest deductible; except that, if the lawyer whose act, error or omission gives rise to the **claim** has a deductible imposed by the Fund which is higher than the lowest deductible otherwise applicable, then the deductible imposed by the Fund shall apply.

The deductible amount shall be applied first to **claims expense** and then to loss payments, if any. The determination of the Fund as to the reasonableness of **claims expense** shall be conclusive on the **Covered Lawyer**.

The deductible amount for each **claim** shall, upon written demand by the Fund, be paid by the **Covered Lawyer** to the Fund within ten days of demand. If the Fund so requests, the **Covered Lawyer** shall make direct payments within the deductible to appropriate other parties.

VIII. TERRITORY

The coverage afforded by this **Plan** applies to acts, errors and omissions occurring worldwide, provided that **claim** is brought in the United States, its territories or possessions, or Canada.

IX. OPTION TO EXTEND CLAIMS REPORTING PERIOD

If the coverage for the **Covered Lawyer** under this Plan is terminated for any reason, the **Covered Lawyer**, upon payment of an additional assessment as determined by the rules of the Fund then in effect, shall have the option to extend the claims reporting period, referred to as the **Optional Extension Period**, for claims arising from any act, error or omission occurring before such termination and otherwise covered by this Plan.

The right to purchase the **Optional Extension Period Coverage** must be exercised by notice to the Fund in writing, not later than sixty days after the such termination. If such notice is not given, the right to purchase the **Optional Extension Period** shall terminate.

X. DISCOVERY CLAUSE

If during the **Plan Period**, or any **Optional Extension Period** if purchased, the **Covered Lawyer** first becomes aware that he or she has committed a specific act, error or omission for which coverage is provided under this Plan and for which it is likely a claim will be made, and if the **Covered Lawyer** shall during the **Plan Period** or the **Optional Extension Period** give written notice to the Fund of:

- (a) the specific act, error or omission; and
- (b) the injury or damage which has or may result from such act, error or omission; and
- (c) the circumstances by which the **Covered Lawyer** first became aware that such act, error or omission may result in a claim being made;

then any claim that may subsequently be made against the **Covered Lawyer** arising out of such act, error or omission shall be deemed for purposes of this coverage to have been made during the **Plan Period** or the **Optional Extension Period**.

The fact that the period during which claims may be first made against the **Covered Lawyer** under this Plan is extended by virtue of the **Optional Extension Period** shall not increase the **Plan Limit**.

XI. NOTICE OF CLAIMS

The **Covered Lawyer** shall, as a condition precedent to the right of protection afforded by this coverage, give to the Fund at the address shown on the **Declarations Sheet**, as soon as practicable, written notice of any claim made against the **Covered Lawyer**.

In the event suit is brought against the **Covered Lawyer**, the **Covered Lawyer** shall immediately notify and deliver to the Fund, at the address shown on the **Declarations Sheet**, every demand, notice, summons, or other process received by the **Covered Lawyer** or by the **Covered Lawyer's** representatives.

XII. INNOCENT COVERED LAWYER

Whenever coverage under this Plan would be lost because of failure to comply with the conditions relating

to giving the Fund notice of a claim, coverage will be afforded under the Plan to any **Covered Lawyer** who does not personally participate or acquiesce in the concealment of such claim, provided that notice of such claim is given to the Fund as soon as practicable after discovery.

XIII. FALSE OR FRAUDULENT CLAIMS

If a **Covered Lawyer** shall participate, aid, abet or assist in the presentation of any claim, action, suit or proceeding against the Fund, knowing the same to be false, fraudulent, or collusive, then this Plan shall be void as to such **Covered Lawyer** for such claim.

XIV. RELATION OF FUND COVERAGE TO INSURANCE COVERAGE

If the **Covered Lawyer** has valid and collectible insurance coverage which also applies to any covered claim, the Fund's coverage shall apply to the deductible, if any, of such insurance, but the Fund shall not otherwise be liable under this Plan until the limits of such insurance coverage have been exhausted, unless such other insurance is written only as specific excess insurance over the **Plan Limit**.

XV. ASSISTANCE, COOPERATION AND DUTIES OF THE COVERED LAWYER

As conditions of coverage under this Plan, the **Covered Lawyer** shall:

- (a) provide to the Fund within ten days after written request, sworn statements providing full disclosure concerning any claim or any aspect thereof;
- (b) attend and testify at any hearing scheduled by the Fund;
- (c) furnish to the Fund within ten days after written request, all files, records, papers and documents as they may relate to any claim, action, suit or proceeding against the **Covered Lawyer**;
- (d) submit to arbitration of any claim; execute authorizations, documents, papers, releases or waivers when so requested by the Fund;
- (e) permit the Fund to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense and settlement of all claims;
- (f) not communicate with any person other than the Fund regarding any claim that has been made against the **Covered Lawyer**, after notice to the **Covered Lawyer** of such claim, without the consent of the Fund;
- (g) shall cooperate with the Fund and upon request shall assist in making settlements, the conduct of actions, suits or proceedings and in enforcing any right of subrogation, contribution or indemnity; and shall attend hearings and trials and assist in securing and giving evidence and in obtaining the attendance of witnesses; and

- (h) shall not, except at Covered Lawyer's own cost, voluntarily make any payment, assume any obligation, or incur any expense.

XVI. CONFIDENTIALITY

All claim information submitted by the Covered Lawyer to the Fund is privileged and confidential. Such information submitted is not reviewable by the Washington State Bar Association. However, the Covered Lawyer is not relieved from any duty to comply with the Rules of Professional Conduct.

XVII. SUBROGATION

Subject to the rights of any excess insurer, in the event of any payment under this Plan, the Fund shall be subrogated to all the Covered Lawyer's rights of recovery therefor against any person or organization, and the Covered Lawyer shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Fund shall not exercise any such rights against a member or employee of the Covered Lawyer's law firm for negligence. The Covered Lawyer shall do nothing to prejudice the Fund's rights of subrogation.

XVIII. ACTION AGAINST THE FUND

No action shall lie against the Fund unless, as a condition precedent thereto, the Covered Lawyer shall have

fully complied with all the terms of this Plan, nor until the amount of the Covered Lawyer's obligation to pay shall have been fully and finally determined either by judgment against the Covered Lawyer after actual trial, or by written agreement of the Covered Lawyer, the claimant, and the Fund.

Nothing contained in this Plan shall give any person or organization any right to join the Fund as a party in any action against the Covered Lawyer to determine the Covered Lawyer's liability. Bankruptcy or insolvency of the Covered Lawyer or of the Covered Lawyer's estate shall not relieve the Fund of any of its obligations hereunder.

XIX. ASSIGNMENT

The interest of any Covered Lawyer under this Plan is not assignable.

XX. CHANGES

Notice to or knowledge of any representative, agent or employee of the Fund or by any other person shall not effect a waiver, constitute an estoppel or be the basis of any change in any part of this Plan; nor shall the terms, conditions, or exclusions of the Plan be waived or changed except by written endorsement issued and signed by an authorized representative of the Fund to form part of this Plan.

Proposed Admission to Practice Rule 10 (Revised 10/24/86)

WASHINGTON LAWYERS' PROFESSIONAL LIABILITY FUND

Proposed Rule 10.1 - Purpose and Definitions

(a) Purpose:

It is in the interest of the public and of the Bar that a fund be established to pay legitimate claims against lawyers for professional negligence and that all lawyers engaged in private practice in this state be required to participate in the fund. These rules direct the establishment and maintenance of such a fund to be managed by a nonprofit corporation formed under Chapter 24.03 of the Revised Code of Washington, and under the general supervision of the Supreme Court.

(b) Definitions:

Words and terms used in this rule shall be defined as follows:

"Association" means the Washington State Bar Association.

"Board of Governors" or "Board" means the Board of Governors of the Washington State Bar Association.

"Claim" means any demand made upon a lawyer for damages or services arising out of an act, error or omission in the rendering of professional legal services for

others, as more fully defined in the coverage plan established by the Fund.

"Directors" means the Board of Directors of the Fund.

"Fund" means the Washington Lawyers' Professional Liability Fund.

"Hearing Panel" or "Panel" means one or more panels of three active members of the Washington State Bar Association who are participants in the Fund, appointed by the Board of Governors to hear appeals from decisions of the Board of Directors of the Fund.

"Member" means an active member of the Washington State Bar Association.

"Supreme Court" or "Court" means the Supreme Court of Washington.

Proposed Rule 10.2 - Professional Liability Fund

(a) Establishment:

The Washington State Bar Association shall establish a nonprofit corporation under Chapter 24.03 of the Revised Code of Washington named Washington Law-

yers' Professional Liability Fund which shall have the duties and powers set forth in these rules.

(b) Board of Directors:

The affairs of the Fund shall be managed by a Board of Directors consisting of nine members to be appointed by the Supreme Court. The Court may seek nominations from the Board of Governors of the Washington State Bar Association. No fewer than six of the Directors must be admitted to the practice of law in the State of Washington. Of the Directors first appointed, two shall be appointed for one year, two for two years, two for three years, two for four years, and one for five years. Thereafter, appointments shall be for five-year terms. No member shall serve more than two full consecutive terms of five years. In the case of any vacancy occurring during a term of office, the Supreme Court shall appoint a person to complete that term. The Supreme Court may remove a Director at any time.

(c) Duties and Powers:

(1) The Directors shall manage and direct the Fund.
(2) The Directors shall determine a schedule of assessments necessary for the maintenance of the Fund. The schedule of assessments shall be based upon the requirements of the Fund to fulfill its purposes and upon such criteria as the Directors deem appropriate. The Directors shall establish a procedure with the Board of Governors of the Washington State Bar Association whereby any proposed assessment schedule shall be delivered to the Board of Governors, along with supporting data, in advance of the billing and collection of the assessment. The Board may in its discretion request review by the Supreme Court of any schedule. A copy of the schedule of assessments and data shall also be submitted to the Supreme Court, which may, in its discretion, initiate a review of the schedule. Notwithstanding any review then being made, the Fund may proceed with the imposition of the assessments as proposed, subject to any modification or refund which may result from the review process.

(3) The Directors shall establish a coverage plan to define and govern the payments to be made from the Fund for claims against participating lawyers. The coverage plan may be modified from time to time, but no modification shall become effective until the Fund has complied with procedures to be established to notify the Board of Governors of the proposed modification. The Board of Governors may in its discretion request review by the Supreme Court of any such modification. A copy of the proposed modification shall also be submitted to the Supreme Court, which may, in its discretion, initiate a review of the proposed modification.

(4) The Fund may not amend its Articles of Incorporation without the approval of the Supreme Court, except in respect to its registered agent and office.

(5) The Fund shall have the powers to perform any act authorized by the Washington Nonprofit Corporation Act as now in effect or hereafter amended and which is reasonably convenient or necessary to carry out the provisions of this rule.

(d) Membership:

The corporation shall have no members.

Proposed Rule 10.3 - Participation in Fund

(a) Participation Requirement:

Every active member of the Association whose principal office for the practice of law is in the State of Washington, except those who satisfy the conditions for exemption in APR 10.4, shall pay an annual assessment in accordance with a schedule to be set annually by the Fund, and shall be entitled to the benefit of the Fund on the terms and conditions established by the Fund in accordance with these rules. All funds received under this rule shall be deposited into a Professional Liability Fund to be maintained by the corporation under the authority of the Supreme Court, which shall be used to carry out the purpose of the Fund pursuant to the Bylaws and coverage plan as shall be adopted and amended, and from which all reasonable and necessary expenses of the corporation and of administering the Fund shall be paid.

(b) Duty to Cooperate:

Every lawyer covered by the Fund shall cooperate with the Fund as required by the coverage plan.

Proposed Rule 10.4 - Exemption

(a) Exemption Criteria:

(1) Any active member who completes and executes the form of Certificate of Exemption provided by the Fund shall be exempt from the requirements of these Rules if the member does not maintain his or her principal office in or engage in any practice of law in the State of Washington, or such practice in Washington does not go beyond:

- (i) employment by a business entity (other than one which is engaged in the private practice of law); or
- (ii) employment by a public or governmental official or entity, its subdivisions or agencies, including federal, state, municipal, county, city, regional, legislative, administrative, military, or political officials or entities; or
- (iii) employment as an elected or appointed public official or legislator; prosecuting or assistant prosecuting attorney; corporation or assistant corporation counsel for a municipality; attorney general or assistant attorney general; judge, hearing officer, administrative judge or in any judicial or quasi-judicial capacity; or
- (iv) employment by a bona fide legal aid or public defender organization which insures the employee for professional liability through the National Legal Aid and Defender Association.

(2) A member who would otherwise qualify for exemption under APR 10.4(a)(1) is not disqualified for exemption because, in addition to the employment or practice described in that rule, the member also practices on behalf of any client without compensation or expectation of compensation.

(b) Special Exemptions:

An active member may be granted an exemption by the Fund on a showing, in conformance to any procedures established by the Fund, that the member's practice of law is so limited as to be the equivalent, in terms of potential professional liability to clients, of the grounds for exemption set forth in APR 10.4(a).

(c) Exemption on Admission:

The exemption shall be available to a person being admitted to practice if the person is able to state that following admission his or her practice will qualify for exemption as set forth in this Rule.

(d) Termination of Exemption:

Any member exempt under this section shall notify the Fund and comply with APR 10.3 prior to engaging in any practice of law beyond the limitations of this section. The exemption shall terminate upon the member engaging in any practice of law beyond the limitations of this section.

Proposed Rule 10.5 - Compliance and Enforcement

(a) Compliance:

On or before an annual assessment date as set by the Fund, each active member shall:

(1) Pay the required Professional Liability Fund assessment for that year or enter into a periodic payment agreement as adopted and approved by the Fund; or

(2) File the prescribed Certificate of Exemption under APR 10.4(a) subject to the approval of the Fund.

(b) Compliance - Payment of Deductible:

Every member who has a claim pending or owing under the coverage plan which is subject to any deductible amount shall pay into the Fund the amount of the deductible upon demand by the Fund. Pursuant to the terms of the coverage plan, the Fund may demand payment of the deductible in its discretion at any time after the claim is made.

(c) Delinquency:

Any member who fails to pay his or her annual assessment due by the annual assessment date, a periodic payment at such date as may be set forth for payment in a periodic payment plan, or any deductible by the date due under the terms of the coverage plan, shall immediately cease practicing law and shall be given immediate notice that 10 days after the date of the notice the Fund will report the noncompliance to the Supreme Court, unless the member has filed a request for review under APR 10.5(g). The Court shall immediately suspend the member from the active practice of law until the member is in compliance with this Rule. In addition to any interest or penalty due under the terms of the coverage plan, any member seeking to comply after suspension shall pay a special filing fee of \$50, except that the special filing fee shall be increased by \$100 for each consecutive year in which the member accomplishes compliance after suspension.

(d) Exemption Not Approved:

If the Fund does not approve a Certificate of Exemp-

tion, the member shall be immediately notified of that fact, and that unless the member files a request for review within 10 days of receipt of the notice, the member will be deemed not to have complied with this rule and will be reported to the Supreme Court for immediate suspension under APR 10.5(c).

(e) Falsification of Filing:

Any member who files a Certificate of Exemption under APR 10.4 which contains any material misstatement of fact or omission shall be in violation of these Rules, and may be subject to discipline.

(f) Practicing Law while in Noncompliance:

Any member who fails to comply with this rule and who continues to practice law may be subject to discipline.

(g) Review by Directors:

A member receiving notice that a Certificate of Exemption has not been approved, or that the member is not in compliance with these Rules, may, within 10 days of the date of that notice, file with the Fund a request for review of that decision by the Directors. The request shall be in writing and may be accompanied by affidavits, memoranda or other written material in support of the claim for exemption. The member may also request oral argument before the Directors. The Directors' review shall be conducted not less than 10 nor more than 30 days after receipt of the request for review, and the member shall be advised of the date of review. The Directors shall file a written decision, a copy of which will be mailed to the member. The decision shall be final unless within 10 days from the date thereof the member files with the Fund a written notice of appeal to a Hearing Panel.

(h) Appeal to a Hearing Panel:

Any appeal shall be considered by a Hearing Panel of three members who are participants in the Fund and who are appointed by the Board of Governors. One panel member shall be designated chairperson. To perfect an appeal, if testimony was taken before the Directors, the appellant member shall, within 15 days of the filing of the notice of appeal, cause a narrative report of proceedings to be transcribed and filed with the Fund in compliance with RAP 9.3. The narrative report of proceedings shall be prepared at the member's expense. The chairperson of the Directors shall certify that the narrative report of proceedings contains a fair and accurate report of the occurrences in and evidence introduced in the matter. The President of the Fund shall prepare a transcript of all orders, findings, and other documents pertinent to the proceeding, which transcript shall be certified by the chairperson of the Directors. The Hearing Panel may require the appellant member to submit his or her argument in writing and it may, but shall not be obligated to, permit the member or the member's lawyer to appear in person before it. The Hearing Panel may affirm, reverse, or modify the ruling of the Directors as it deems appropriate. The decision of the Hearing Panel shall be reduced to writing and a copy shall be mailed promptly to the member. The decision of the Hearing Panel shall be final, unless within 10 days from the date thereof, the member

files with the Fund a written notice of appeal to the Supreme Court.

(i) Appeal to the Supreme Court:

To perfect an appeal to the Supreme Court, if testimony was taken before the Hearing Panel, the appellant member shall, within 15 days of filing the notice of appeal, cause a narrative report of the proceedings before the Hearing Panel to be transcribed and filed with the Fund in compliance with RAP 9.3. The narrative report of proceedings shall be prepared at the member's expense. The chairperson of the Hearing Panel shall certify that any narrative report of proceedings contains a fair and accurate report of the occurrences in and evidence introduced in the matter. The President of the Fund shall prepare a transcript of all orders, findings, and other documents pertinent to the proceeding before the Hearing Panel, which transcript shall be certified by the chairperson of the Hearing Panel. The Fund shall then file promptly with the Clerk of the Supreme Court the narrative report of proceedings and the transcripts pertinent to the proceedings before the Hearing Panel. The matter shall be heard in the Supreme Court on the motion calendar, to which the provisions of RAP 17.4 and RAP 17.5 shall be applicable.

(j) Time:

The times set forth in this Rule for filing notices of appeal are jurisdictional. The Hearing Panel or the Supreme Court, for appeals pending before each body respectively, may for good cause shown:

(1) Extend the time for the filing or certification of required materials, or

(2) Dismiss the appeal for failure to prosecute it diligently.

(k) Costs:

If the member prevails in his or her appeal before the Hearing Panel or the Supreme Court, the member shall be awarded costs against the Fund in an amount equal to the member's reasonable expenditures for the preparation of the record submitted in that appeal.

(l) Disposition of Final Order:

When a decision of the Directors or Hearing Panel denying a Certificate of Exemption or upholding a finding of noncompliance becomes final without appeal to the Supreme Court, that decision shall be immediately transmitted to the Court and the Court shall immediately suspend the member from the active practice of law.

(m) Duties upon Suspension:

Any member who has been suspended from the practice of law for noncompliance with this rule must comply with the provisions of Title 8 of the Rules for Lawyer Discipline.

(n) Notices:

All notices required by these Rules shall be made by mail to the last address shown in the records of the Fund in the manner provided for service by mail in CR 5(d)(2)(A).

Proposed Rule 10.6 - Confidentiality

The files and records of the Fund relating to any claim against a member for payment out of the Fund shall be deemed confidential and shall not be disclosed except pursuant to the member's consent or court order.

Proposed Rule 10.7 - Annual Reports

In addition to any annual report required by the Washington Nonprofit Corporation Act, the Fund shall annually:

(a) File a report with the Supreme Court promptly after the close of a plan year that summarizes the Fund's activities, and sets forth income, indemnity and claims expense payments, operating expenses, reserves and pending liabilities, and the current assessment schedule, which may include an evaluation of the performance of the Fund in carrying out its purposes.

(b) File a report with the Board of Governors that shall include a copy of the report to the Supreme Court and shall also include recommendations regarding programs that may aid in claim reduction.

ARGUMENT FOR A PROFESSIONAL LIABILITY FUND

By H. Graham Gaiser

Background

The Plan for the Washington Lawyers' Professional Liability Fund is the product of a Task Force of Washington lawyers appointed by the Board of Governors to study implementation of a Bar Association bylaw mandating legal malpractice insurance, and to examine pos-

sible solutions to the high cost and lack of availability of legal malpractice insurance in this state.

Originally appointed in the summer of 1985, the Task Force studied the available insurance marketplace, the situation in this and other states, what others are doing to resolve the problem, and what the future is likely to be in

the legal malpractice insurance market. The Task Force engaged McNeary Insurance Consulting Services to assist in feasibility studies and to give actuarial advice. A survey of the Bar membership, conducted by McNeary in January 1986, indicated that 80% of full-time Washington lawyers (and 88% of part-time) in private practice favored the Bar's "forming some mechanism" to provide malpractice coverage.

The Task Force studied the viability of many alternatives, including a liability fund, a captive insurance company, a bar-owned insurance company, a plan for proven financial responsibility—and numerous variations on each theme. The end result is the proposed Plan for creation of the Washington Lawyers' Professional Liability Fund.

If adopted, the Plan will provide coverage for covered lawyers against claims arising out of professional negligence in the private practice of law. In response to specific needs made known to the Task Force, earlier versions of the Plan have been modified to provide some flexibility. A choice of \$250,000 or \$100,000 limits will be offered, with a choice of deductibles. A category of "low income" lawyers will be offered \$100,000 limits at a further reduced premium.

Implementation of the Plan will be by court rule promulgated by the State Supreme Court, and the Plan will operate under the auspices of the Court. A nonprofit corporation will be formed to administer a professional liability fund, financed by mandatory annual assessments from all nonexempt lawyers in Washington State who are engaged in the private practice of law. This nonprofit corporation, the Washington Lawyers' Professional Liability Fund, will be governed by a Board of Directors appointed by the Supreme Court which may seek nominations from the Board of Governors. The Court will be asked to promulgate by Court Order the Coverage Plan and Schedule of Assessments submitted by the Directors through the Board of Governors.

Why a Mandatory Professional Liability Fund?

(1) The public benefits from mandatory coverage for negligent errors committed by lawyers in private practice.

(2) Washington lawyers benefit by taking charge of their own malpractice coverage.

(3) The Fund must be mandatory to assure the necessary financial base to be viable.

The Plan reduces the risk of loss to the public occasioned by lawyer negligence by providing a mechanism for assuring financial recourse to most claimants. The choice of limits to be offered by the Fund are probably adequate to compensate most claimants. (American Bar Association statistics indicate 96% of all legal malpractice claims are concluded by indemnity payments as \$100,000 or less.)

The commercial market for legal malpractice insur-

ance is burdened by instability, uncertain availability, underwriting standards which are often arbitrary, and high premiums. By taking control of their malpractice coverage, Washington lawyers can fine-tune a plan to meet their specific needs.

It is difficult to quantify the problem of availability of commercial insurance, but the Task Force is satisfied that a problem exists. There are no reliable statistics indicating how many lawyers are unable to obtain insurance. (The January 1986 Bar survey indicated 26% of full-time lawyers in private practice were refused renewal in the previous year; how many found coverage with another company is not known.) However, the Task Force has been exposed to many "horror stories" of the competent lawyer who is unable to procure legal malpractice insurance, seemingly because of arbitrary underwriting decisions bearing no relationship to a particular lawyer's claims experience. Many capable lawyers obtained coverage only at exceptionally high premiums. The commercial legal malpractice insurance marketplace has been historically unstable and cyclical. All indications are that the present upward trend in premiums and uncertain availability will continue for the foreseeable future.

There is no guarantee that the future costs of coverage under the Fund will be less than that of the commercial market. But the mandatory Fund environment is favorable for that prospect: there is no profit motive, no marketing expense, and no commission. In any event, Washington lawyers will be assured that their assessments are directly related to their own claims experience—and not that of other lawyers around the country or other risks that some commercial insurers might lump together with lawyers in pricing.

Assessments over time will be based upon the actual claims experience of Washington lawyers, not upon hypothetical projections. Reliable claims data can be obtained, with areas of concern pinpointed for Continuing Legal Education and specific claim reduction programs. The lawyer with adverse claims experience can be surcharged, or a substantial deductible can be imposed; the truly "bad lawyer" may face economic disbarment. The decisions on who gets coverage at what price are placed in the hands of lawyers and removed from the often arbitrary decisions of commercial insurance underwriters. The attention is focused on the individual's actual claims experience, not his or her area of practice. Claims handling by the Fund can be more efficient and performed with more expertise than by the ordinary multi-line commercial insurer.

The proposed Washington Lawyers' Professional Liability Fund may not be a panacea for legal malpractice liability problems. It does not purport to be. It is unlikely that any one lawyer will agree with all its provisions, including the Task Force members themselves. But, simply put, the Plan which ultimately evolved is the consensus of what the Task Force and its consulting actuaries believe will work, to the benefit of the public and Washington lawyers.

ARGUMENT AGAINST A PROFESSIONAL LIABILITY FUND

By Harry H. Schneider, Jr., Paul W. Steere, and Elizabeth J. Bracelin

Implementation of the proposed Professional Liability Fund will impose a costly and unnecessary burden on the majority of lawyers in Washington. The proposal should be rejected because it is inherently inequitable, unduly expensive, and only marginally helpful to the lawyers it seeks to benefit and the public it purports to protect.

A stated purpose of the Fund is protection of the public, yet there is no objective data indicating that the public has been harmed by uninsured lawyers. Even if such data existed, a mandatory program would not be needed. Public protection can be accomplished adequately simply by requiring the majority of our lawyers to verify their existing insurance coverage or resources adequate to withstand malpractice liability. The Bar then could focus on the limited problem of whether to create an insurance program for those few lawyers who cannot obtain commercial insurance.

Instead, it is recommended that we each purchase \$250,000 of annual coverage from the Bar, regardless of whether we need it or whether we could purchase it elsewhere for a cheaper price. The true purpose of the fund therefore is to force lawyers who otherwise would not purchase their insurance from the Bar to subsidize those few who might choose to do so. And a powerful mechanism will guarantee broad-based participation: Lawyers who elect not to buy the Fund's coverage will be disbarred.

1. Is a Mandatory Plan Needed?

There is no data verifying the number of Washington lawyers who are unable to *obtain* insurance. Responses to the Task Force's questionnaire on this issue were inconclusive. According to the Task Force consultant: "... Analysis of the comments on this section indicate that (the number of non-renewals) is principally the result of INA withdrawing from the market." Many responding lawyers were able to renew coverage elsewhere, and a majority of responding lawyers indicated they disfavored the type of proposal now being advanced. Of 165 letters mailed to the Task Force, only

six complained of an outright inability to secure malpractice insurance.

2. High Cost.

For every lawyer who wrote to the Task Force welcoming the Fund as a perceived antidote to high insurance costs, many more letters were received from lawyers complaining that the first year premium of \$1,191 will increase their current insurance costs without improving coverage. Even then the projected first-year premium is deceptively low. Actuaries retained by the Task Force "strongly recommended" that the premium be 26% higher, or \$1,670 per lawyer.

Beyond the curious underpricing of first-year premiums, there are other serious questions about the Fund's long-term viability. The Fund will have absolutely no capital and little, if any, investment income. It will offer first-dollar coverage but will not reserve fully for incurred claims. The Fund's power to tax attorneys for any shortfall apparently is considered a sufficient answer to these questions.

The Fund will become even more expensive over time. According to the actuaries, the initial annual premium of \$1,191 will increase rapidly to \$3,225 per lawyer within five years. Premiums will rise to whatever level is necessary to pay claims and operating expenses, with absolutely no ceiling on the amount and no restriction on the Fund's ability to collect it under the management and control of an independent board of directors not elected by lawyers and not accountable to the members of the Bar.

Comparison of the Fund's premiums with those of commercial carriers is misleading because traditional insurers are obligated to collect annually sufficient premium to cover all incurred losses regardless of when such claims are paid, while the Fund will collect in premium only what is to be paid out during a one-year period. This is possible because the Fund will have the unfettered right to collect future assessments of whatever amounts are required, an ability to tax subscribers

which the commercial carriers obviously do not have. While proponents of the Fund describe this as "leaving the cash reserves in the lawyers' pockets," it actually is leaving a substantial contingent liability in all our pockets. Oregon's experience is instructive. In 1985 the Oregon Fund paid out 4.4 million dollars in indemnity and 2.3 million dollars in claims expense, a total of 6.7 million dollars. The Oregon Fund's premium that year, however, generated only 4.4 million dollars, creating a deficit and necessitating an immediate increase in annual premium from \$900 to \$1,600 per lawyer.

3. Join the Fund or Be Disbarred.

Every attorney must participate or lose the license to practice. In this way, premium will be extorted from those who would prefer to purchase insurance elsewhere. The Fund also will mandate coverage at levels which many lawyers presently elect not to obtain, or which they appropriately self-insure through responsible deductibles. As the Task Force's consultant concluded, most lawyers in Washington require insurance at levels higher than \$250,000. Fifty-two percent of sole practitioners in Washington who purchase insurance now have limits of liability double those to be offered by the Fund. Of these, over half bought limits of \$1 million or more. Seventy-one percent of Washington firms with two to five lawyers have limits of \$1 million or more; ninety-three percent of firms with six to 30 lawyers have limits of \$1 million or more. Almost all now take deductibles ranging up to \$50,000. Of firms over 30 lawyers, sixty-three percent have deductibles of \$250,000. Clearly, the Fund's coverage does not fit even the minimum needs of most Washington lawyers who nonetheless will be required to purchase it or abandon their careers.

4. Subsidizing High-Risk Attorneys.

By definition, the Fund will require a majority of low-risk attorneys to subsidize a minority of high-risk practitioners. An attorney with no history of malpractice claims will pay the identical premium as an attorney with documented multiple claims. An attorney engaged in low-risk areas will pay the same premium as attorneys in high-risk areas such as SEC or municipal bond work. The Fund will force each attorney to pool risks with lawyers who properly might be declined coverage. There is no candidate too high-risk for the Fund to insure because the right to practice law is conditioned on enrollment in the Fund. The Bar will not deny coverage to anyone, and the membership as a whole automatically underwrites the risk.

The Task Force replies that higher-risk lawyers eventually will be surcharged to counter this initial leveling effect. This solution, however, is unrealistic. It is well-established that surcharges never can compensate for the truly bad-risk. The Fund will face the dilemma of either imposing surcharges which amount to de facto (and legally challengeable) disbarment or passing on the costs of the substandard risk to responsible lawyers. In Oregon, which is the *sole* example of a mandatory program, individual annual premium plus surcharges can run as high as \$24,000 per lawyer with no option to drop the coverage once premiums and surcharges rise to an unaffordable level. Under a mandatory Fund, you either pay or resign from the practice of law.

The Fund will restrain every attorney's ability to purchase comparable insurance in the marketplace on more favorable terms, whether those terms be premium cost, level of coverage, or amount of deductible. By forcing lawyers to purchase coverage they do not need, the Fund will make it economically unfeasible for some lawyers to maintain their present coverage at higher levels. For those lawyers, implementation of the Fund will expose them to greater uninsured losses, with resulting risk to their clients. In this way, the public is jeopardized rather than protected by the Fund.

• • •

In Summation

Mandatory insurance with no ceiling on future assessments is a decidedly poor solution to the so-called malpractice crisis. Unfortunately, inadequate attention has been given to more palatable alternatives such as a malpractice insurance fund which is not mandatory; contributions to an assigned risk pool; or a plan that would allow attorneys to exempt themselves upon demonstration of alternate insurance coverage. Such alternatives would better achieve the goals of providing insurance to those attorneys who choose to purchase their coverage from the Bar, and assuring that all practicing attorneys in Washington are financially responsible to withstand claims. Rather than embracing a plan which is bound to meet with strong opposition and lead to unprecedented divisiveness, the Bar should explore more realistic and workable solutions which would be in the interest of the membership as a whole. The present proposal—which is designed to favor some members at the expense of others, and which necessarily will pit members of an otherwise collegial professional association one against another—should not be adopted.

ARGUMENT FOR A PROFESSIONAL LIABILITY FUND—REBUTTAL

The Plan for the Washington Lawyers' Professional Liability Fund, now approved by the Board of Governors, is being submitted to a vote of the membership. The choice presented for each member is ultimately this: Do Washington lawyers continue with the status quo, or do we take charge of our own legal malpractice coverage with a plan most lawyers believe is the optimal alternative? Remember, 80% of us said in our poll last January that the Bar should come up with a solution.

Opponents have questioned the need for a mandatory plan, alluding to the lack of data verifying the number of lawyers who cannot obtain insurance. But there is more to "need" than a mere count of lawyers who cannot obtain coverage. The need is stability and reasonable cost, now and in the future.

The reality of commercial insurance is that the lawyers' malpractice line is a tiny piece of the whole casualty insurance market, presently in the midst of high loss ratios and with a lack of underwriting capacity. Little relief in the present tight market is in sight.

In the 1970s there was a point when just two companies were writing legal malpractice coverage in this state, and there was a real question whether they would stay in the market. Five years later there were perhaps a dozen companies. Now we are back down to essentially three, with rates increasing. During this period, premiums have been on a roller coaster.

One commercial insurer just doubled its rates and imposed a one-time \$700 assessment on each lawyer. Why? "Reinsurance" costs.

The oldest firm in Everett broke up in the last year. Why? They could not get malpractice insurance. What happened? They went to other firms and now they have insurance. Together, they were considered an undesirable risk; individually, each is insurable.

These are just some examples of the vagaries of commercial insurers. Does any of this really make sense?

With a mandatory fund we have a large enough base of attorneys to establish our own rules, determine our own costs, and work all these matters out on the basis of our own experience. Yes, we need the Plan.

The cost of malpractice coverage, whether by commercial insurance or by the Fund, is a direct function of how much money is paid out in claims. It is as simple as that. Notwithstanding suggestions to the contrary, our actuaries fully approve of the assessment schedule recommended by the Task Force. If the Fund does become more expensive over time, as the actuaries project, so would commercial insurance premiums. But under the Fund such unproductive ingredients as profits and sales costs are not included in the assessment, unlike the premiums

of commercial insurers.

Opponents suggest that an independent Board of Directors of the Fund can change assessments without accountability to the membership. But the Directors are accountable to the Bar. The proposed court rule requires that the Assessment Schedule be submitted to the Supreme Court and furnished to the Board of Governors with full supporting data. The Board of Governors has the authority to ask the Court to modify any proposed change. In short, there will be a full accounting to the Bar. Under the present system lawyers have no idea how their premiums are determined.

Opponents have noted that in 1985, Oregon paid out \$2.3 million more than it took in, necessitating an assessment increase from \$900 to \$1,600 for 1986. But the *total* Oregon experience—including 1985—is that more has been taken in than paid out. Furthermore, the Task Force had the benefit of Oregon's experience and adopted a more fiscally conservative approach. Unlike Oregon, the Fund's initial assessment has been purposely set above a strictly "payout" projection. The Plan's assessment of \$1,191 is the annual average of what the actuaries estimate will be paid out over the Fund's first three years. If a strict payout basis had been used, the first year assessment would have been \$571. The actuaries project that the assessment will be about the same under either the payout or incurred approach by the fourth year.

The Task Force and the Board of Governors recognize that many lawyers require limits in excess of the Fund's \$250,000. Final submission of the Plan to the Supreme Court is conditioned upon the availability of an excess insurance market for Washington lawyers.

Opponents argue that the Fund subsidizes high-risk attorneys. A basic characteristic of insurance is that those people at risk, even if they have no claims, pay in money to satisfy the claims of those who do. This is fundamental.

Who are high-risk attorneys? We know that those lawyers whom insurance companies consider high-risks are not necessarily so. The Fund will find out through its actual experience. As the program develops, high risks will be identified and adjustments can be made. Lawyers can design and apply principles of surcharge and deductibles through their knowledge and experience in the practice of law better than an insurance company applying insurance principles derived from other lines of insurance. Lawyers who disagree with individually imposed surcharges or deductibles have an appellate process available under the Court rule.

The Task Force has studied alternatives to the Plan. The alternatives are simply not feasible, for economic or other reasons. The Plan is the best solution.

The case for a Fund is very persuasive on the basis of simple reasoning from the unacceptable experience with commercial coverage here. But we need not rely just on simple reasoning. In Oregon, those lawyers have had eight years of successful, direct experience with a fund (and ours is preferable because of more flexibility). And Oregon lawyers *like* it. An Oregon poll in July 1986

showed 85% in favor of mandatory insurance, and 77% preferred the Oregon Fund as the mandatory source. This is a truly impressive endorsement.

The time has come for Washington lawyers to take control of their malpractice coverage needs. We now have that opportunity through the Plan.

ARGUMENT AGAINST A PROFESSIONAL LIABILITY FUND—REBUTTAL

Arguments advanced in support of the Fund are unconvincing. Rather they weigh in favor of rejection.

1. **Need.** Proponents concede "there are no reliable statistics" demonstrating need. The statistic that 26% of responding lawyers experienced a non-renewal of malpractice insurance in 1985 does not prove need because the same poll disclosed that 93.5% of the responding full-time lawyers *have* insurance. Those who were non-renewed (INA withdrew from the market) apparently got their coverage elsewhere. There is no evidence whatever of public need. On this record, proponents ask our Bar to vote for the most expensive, controversial program in Bar history.

2. **Mandatory Feature.** Proponents concede why the Fund must be mandatory: otherwise too few would join; and without compulsory membership lawyers who do join would later leave in favor of cheaper or better arrangements. The mandatory feature is an ironic admission that the Fund is not good enough to stand by itself. Proponents' position is therefore "join or be disbarred".

If the cost of the Fund becomes unaffordable you do

not even have the freedom to be uninsured.

3. **Costs.** The Task Force concedes that the Fund may not be less expensive than commercial insurance. That concession does not go far enough. Unlike commercial insurance the Fund will have no significant investment income. It insures all comers, bad and good risks alike. It offers first-dollar coverage. It defers expenses by under-reserving claims. It spreads the cost of a large administrative bureaucracy (17 persons to start; Oregon, a smaller state, has 22) over a small base of assureds.

Nor has the additional cost of *excess* insurance been mentioned. At the December Board of Governors meeting the Task Force estimated that it would cost \$900 or more per lawyer to "in-fill" coverage up to \$1 million.

The Oregon Fund has experienced steep escalations in premiums, a 300% increase since 1980. Yet, despite this rise in premium, since 1982 the Oregon Fund has paid out more in claims and claims expenses every year than it collected in premium. These figures speak for themselves:

OREGON PROFESSIONAL LIABILITY FUND*

	Indemnity Paid	Claims Expense	Total	Premium Collected	Deficits
1982	\$1,574,193	\$ 868,596	\$2,442,789	\$2,160,308	\$ (282,481)
1983	1,681,000	1,328,645	3,009,645	2,993,237	(16,408)
1984	3,067,826	1,759,522	4,827,348	3,903,910	(923,438)
1985	4,417,358	2,306,233	6,723,591	4,429,063	(2,294,528)

The Mandatory Fund concept has developed amid severe controversy, a fact not apparent because most of the publicity about the Fund to date has been from its Proponents. The original Task Force was sharply divided. Many lawyers have stated their disagreement with a mandatory plan. Four members of the Board of Governors voted against the Fund at the December meeting. These differences underscore the need for

every lawyer to make a careful, independent and personal judgment about this issue. In no sense should the referendum be treated as a collegial ratification of a routine proposal.

* Adapted from statistics published in *The Brief*, Tort and Insurance Practice Section of ABA (Vol. 15, No. 4) p. 21 Summer 1986.



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

Creditor-Debtor Law. (Case 1.) Prefiling payment by Chapter 11 debtor in bankruptcy to retain sales tax collected by debtor was recoverable as preference where state did not trace payment to actual funds collected in trust. Interest on preference was recoverable from date of Chapter 11 trustee's demand for repayment. *In re Olympic Foundry Co.*, 63 B.R. 324 (Bankr. W.D. Wash. 1986).

(Case 2.) Garnishment proceeding was properly dismissed where judgment creditor attempted to garnish amount due by garnishee for conversion of judgment debtor's property, because garnishment cannot be employed to reach debt or claim that could not be recovered by judgment debtor in action ex contractu. *Trane Co. v. Randolph Plumbing*, 44 Wn. App. 438, 722 P.2d 1325 (7/22/85).

— M. D. Rombauer

Evidence. (Case 1.) In action brought

by shipyard worker claiming to suffer from asbestosis, held: (a) So-called Sumner Simpson papers, relating to health hazards associated with asbestos from 1920s to 1940s, were admissible against defendant manufacturer to show negligence in failing to warn public of those hazards. Court rejected argument that evidence was too remote in time and subject matter to show foreseeability of harm. (b) Papers were irrelevant to claims based upon theory of strict liability. Jury was adequately instructed on distinction between negligence and strict liability, and, in any event, defendant had not properly preserved point for appeal. (c) State-of-the-art evidence was admissible to show that defendant became aware of hazards associated with asbestos after plaintiff was exposed to it and to show that defendant failed to warn plaintiff of those hazards. *Lockwood v. A C & S, Inc.*, 44 Wn. App. 330, 722 P.2d 826 (7/14/86).

(Case 2.) Washington Supreme Court has reaffirmed its view, not often articulated, that when evidence is offered to impeachment by contra-

diction, such evidence is subject to other rules of evidence, including hearsay rule. In action on worker's compensation claim, Department of Labor and Industries should not have been permitted to refer to medical reports during cross-examination of claimant's medical expert for purpose of contradicting and impeaching claimant's expert, where authors of reports did not testify, where claimant's expert had not relied upon reports in forming his own opinion, and where reports had not been admitted into evidence. Court held that questioning was tantamount to hearsay, improperly putting before jury both diagnosis of claimant's condition and inference that his condition was not causally related to industrial injury. Court stated that if Department wished to impeach claimant's expert or to introduce additional medical testimony by using reports of non-testifying physicians, Department should have done so by calling those physicians as witnesses. Court added that cross-examination would have been proper if Department had been able to estab-



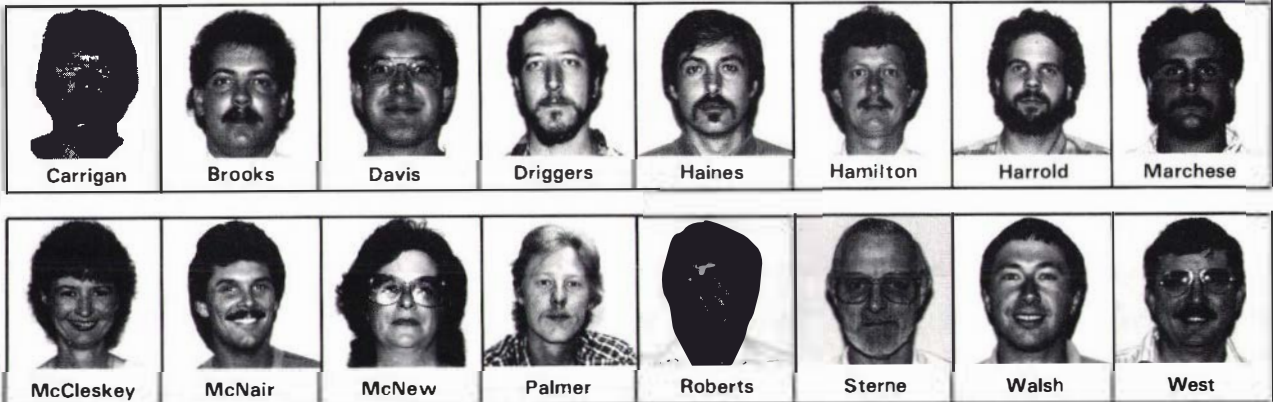
Victor Spino
Process GM, VP

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lish that claimant's expert had relied upon reports in question. *Washington Irrigation and Dev. Co. v. Sherman*, 106 Wn.2d 685, 724 P.2d 997 (9/11/86).

—K. B. Tegland
(former member, University
of Washington law faculty)

Planning and Zoning. (*Case 1.*) Under statute that gives "any property owner who deems himself aggrieved" standing to challenge approval of subdivision plat, association formed to represent its members in land-use matters has standing when one or more of its members has standing as "owner." Court follows *Loveless v. Yantis*, 82 Wn.2d 754, 513 P.2d 1023 (1973), on this point. *East Gig Hbr. Impr. Ass'n v. Pierce County*, 106 Wn.2d 707, 724 P.2d 1009 (9/11/86).

(*Case 2.*) When owner of land that should have been short-platted obtained building permit and built house without obtaining short plat approval, building permit was illegally issued. However, neighbors who complain of this are entitled to damages or injunction only if there was "a substantive violation of the subdivision laws." Case remanded for determination of whether such "substantive violation" occurred. *Kates v. City of Seattle*, 44 Wn. App. 754, 723 P.2d 493 (8/5/86).

—W. B. Stoebuck

Personal Property Security. Logger and stumpage liens had priority over prior perfected security interest. Article 9, UCC, does not apply to priority contest between security interest and nonpossessory statutory liens; instead, priorities are governed by common law or priority rule stated in statute creating lien, and security interest in timber, logs, and wood products was a "lien" subordinated by logger's and stumper's lien statute, RCW 60.24.038, which provides that liens in RCW Ch. 60.24 are "prior to any other lien." Corporations, partnerships, and sole proprietorships relying on others' labor are entitled to claim logger's liens under RCW 60.24.020, which provides a lien for any "person" performing labor, overruling *Campbell v. Sterling Mfg. Co.*, 11 Wash. 204, 39 P. 451 (1895). Dissent as to overruling of *Campbell. In*

re Brazier Forest Products, 106 Wn.2d 588 (9/4/86).

—M. D. Rombauer

Real Property. (*Case 1.*) Real estate contract purchaser, in possession of land, cut and sold merchantable timber. After vendor forfeited contract, vendor brought this action for damages for waste. Court's holding: "Waste encompasses a variety of injuries that may occur to real estate, including the removal of timber. . . . Nevertheless, the removal of timber constitutes waste only if it decreases the value of the land." (*Comment.* This is a case of first impression in Washington on an important issue upon which American courts are divided. The Washington Supreme Court, in one terse sentence, adopted the doctrine of meliorating waste. Moreover, though perhaps one should not read too much into such short remarks, the Court endorsed the concept that the underlying purpose of the law of waste is to protect the economic value of land, not its physical integrity. These are large and important questions that deserve far more comment. W.B.S.) *Kruger v. Horton*, 106 Wn.2d 738, 725 P.2d 417 (9/18/86).

(*Case 2.*) Implied warranty of habitability, previously adopted in Washington for sale of new homes by builder-vendor, does not apply to sale of complex of five apartment buildings to real estate investor. Apparent grounds of decision are: (a) Builder did not build buildings for resale; builder had owned and operated four of them for approximately 18 months. Implied warranty doctrine applies only to dwellings built for resale. (b) Purchase contract contained clause reading in part, "neither the seller nor his assigns shall be held to any covenant respecting the condition of any improvements." In sale where buyer is investor and parties deal at arm's length, such clause is enforceable. To extent that is unclear, court also relies upon fact that (c) this was commercial transaction in which buyer was buying for investment and sought out seller. Dissent by three judges would, inter alia, "make the warranty of habitability applicable to the sale of any residential structure constructed and sold by a professional

builder, regardless of whether it was constructed for purposes of resale." *Frickel v. Sunnyside Enterprises*, 106 Wn.2d 714, 725 P.2d 422 (9/18/86).

(*Case 3.*) Plaintiff owned home on Ketron Island, Pierce County, on Puget Sound near Steilacoom. County established ferry to island, with several trips a day. Then county reduced service to one trip each way per day. Plaintiffs contend this is inverse taking of their right of access to public system of roads. Though acknowledging that public ferries are part of road system, court says that access to ferry is not a right of "property" protected by constitutional eminent domain clauses; such access is fundamentally different from access by land to a public road. Therefore, no taking occurred. Court says this is case of first impression in any jurisdiction. (*Comment.* There probably is no other case like this. Fact pattern, though unlikely to occur frequently, affords fascinating opportunity to think about takings of right of access.—W.B.S.) *Litz v. Pierce County*, 44 Wn. App. 674, 723 P.2d 475 (8/1/86).

—W. B. Stoebuck

Real Property Security. Debtor's land was subject to first and second deeds of trust, to secure two obligations to two creditors. When second obligation was defaulted, holder of second trust deed (second creditor) foreclosed by trustee's sale and bid land in, subject to first trust deed, for balance due on obligation, thus satisfying obligation. (Deed of trust statute does not permit deficiency after trustee's sale, anyway.—W.B.S.) Then holder of first trust deed foreclosed in court, using optional judicial foreclosure method, and land was sold to satisfy first debt. Second creditor failed to bid and so lost land. Now, second creditor, by subtle course of reasoning, argues debtor is obligated to pay its debt, either because second creditor is to that extent subrogated to first creditor's claim or because second creditor became surety who has had to pay debtor's debt to first creditor because second creditor lost land when first creditor foreclosed. *Held*, (a) trial court properly dismissed second creditor's complaint on motion for summary judgment,

and (b) trial judge did not abuse his discretion in refusing to award attorney fees to defendant on ground that plaintiff's claim was frivolous under RCW 4.84.185. *Fluke Capital & Man. Serv. Co. v. Richmond*, 106 Wn.2d 614, 724 P.2d 356 (1986).

—W. B. Stoebuck

Torts. (Case 1.) Plaintiff's cause of action against her father for childhood sexual abuse was barred by statute of limitations, notwithstanding

her argument that discovery rule tolled statute until psychological therapy brought to consciousness her memories of the abuse less than one year before she initiated action. Discovery rule requires objective, verifiable evidence of harm, making it substantially certain that facts of tortious incident may fairly be determined despite passage of time. *Tyson v. Tyson*, 107 Wn.2d 72 (10/30/86).

(Case 2.) Damages for emotional

distress are recoverable for wrongful termination of employment in violation of public policy; and because recovery for that tort requires proof of intent, plaintiff need not prove defendant intended to cause emotional distress, but need show only that the wrongful termination resulted in emotional distress damages. *Cagle v. Burns and Roe, Inc.*, 106 Wn.2d 911 (10/9/86).

(Case 3.) Three-year statutory limitation period for tort of wrongful birth commences at birth, not from physician's act or omission that allowed birth of deformed child. Claim for failure to obtain patient's informed consent may be within scope of Consumer Protection Act if plaintiff can demonstrate that claim is based on dishonest and unfair practices used to promote entrepreneurial aspects of physician's practice. *Quimby v. Fine*, 45 Wn. App. 175, 724 P.2d 403 (8/20/86).

(Case 4.) Supreme Court refused to abandon common law distinctions among land possessor's duties not to injure invitees, licensees, and trespassers. Mere payment of fee to attend party does not make person who is otherwise a social guest an invitee. Where licensee knew or had reason to know of risky condition known to land possessor, possessor is not liable for failing to exercise reasonable care to eliminate risk or warn of it. *Younce v. Ferguson*, 106 Wn.2d 658 (9/11/86).

(Case 5.) Under Washington constitution, plaintiff in defamation action must establish prima facie case by evidence of convincing clarity in order to defeat summary judgment motion by media defendant, at least when alleged defamatory statement is about "private affairs." *La Mon v. Butler*, 44 Wn. App. 654, 722 P.2d 1373 (7/31/86).

(Case 6.) Private plaintiff (not public figure) who brings defamation action against non-media defendant need not establish prima facie case by evidence of convincing clarity, in order to defeat defendant's summary judgment motion, at least when alleged defamatory statement is about "private affairs." *La Mon v. City of Westport*, 44 Wn. App. 664 (7/31/86).

—J. T. Richardson

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Northwest Securities Taxation Seminars Institute

Spring Law Office Management

Realization on Liens & Interests

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

The *Seventh Annual Northwest Securities Institute* will be held in Vancouver, B.C. at the Hyatt Regency on February 20 & 21, 1987. This prestigious event will include faculty members from New York, Washington, D.C., the states of Washington, Oregon, California and the Province of British Columbia. The Northwest Securities Institute has established a tradition of bringing together highly respected, experienced practitioners and government officials to focus on issues of concern and provide practical tips for the benefit of Institute registrants. This year's program will continue that tradition.

Chairpersons **Michael E. Stansbury** (Foster, Pepper & Riviera, Seattle), **Jack H. Bookey** (Regional Administrator, Securities and Exchange Commission, Seattle), and **Ronald L. Greenman** (Tonkon, Torp, Galen, Marmaduke & Booth, Portland) have assembled an excellent program for your benefit. The Friday sessions will feature **A.A. Sommer, Jr.** from the firm of Morgan, Lewis & Bockius in Washington, D.C. as the keynote speaker. He will address the topic of "Responsibilities and Liabilities of Participants in Securities Transactions." On Saturday, the Institute will conclude with a luncheon featuring remarks from SEC Commissioner **Charles C. Cox**.

Topics on Friday include, among others, treatment of "Developments and Trends in the Liability Insurance Market"; "Duties and Liabilities of Directors—New Stat-

utes and Other Developing Approaches in Balancing Protection and Accountability"; "The Role of Attorneys in Securities Transactions: Responsibilities, Liabilities, and Loss Prevention Techniques"; "Liabilities of Participants in Securities Transactions From the Perspective of Plaintiff's Counsel"; "British Columbia Securities Practice—General Principles and Comparison to U.S. Practice"; "The Vancouver Stock Exchange—Transactions and Financing"; "Private Offerings and Restricted Securities Developments at the SEC and in Washington and Oregon"; "Special Developments in Direct Participation Programs"; "Recent Developments at the SEC"; and "Insider Trading and Other Developments Under the Securities Exchange Act of 1934."

Other members of the distinguished Institute faculty are: **Christopher J. Barry** (Bogle & Gates, Seattle); **William K. Brown, Jr.** (Marsh & McLennan, New York); **Judith B. Downes** (Bull, Housser & Tupper, Vancouver, B.C.); **Linda D. Fienberg** (Associate General Counsel, Office of the General Counsel, SEC, Washington, D.C.); **Clive V. Forth** (Hanna, Forth & Scott, Vancouver, B.C.); **Joseph D. Franzi**

(Peat, Marwick, Mitchell & Co., Bellevue); **Curt B. Gleaves** (Schwabe, Williamson, Wyatt, Moore & Roberts, Portland); **Henry H. Hewitt** (Stoel, Rives, Boley, Fraser & Wyse, Portland); **David D. Hoff** (Riddell, Williams, Bullitt & Walk-inshaw, Seattle); **Charles J. Katz, Jr.** (Perkins Coie, Seattle); **D. Bruce Lamka** (Davis Wright & Jones, Seattle); **Kevin C. McMahon** (Jones, Grey & Bayley, P.S., Seattle); **George N. Prince** (Assistant Regional Administrator—Regulation—SEC, Seattle); **Alan Schulman** (Milberg, Weiss, Bershad, Specthrie & Lerach, San Diego); **Gregory N. Smith** (Davis Wright & Jones, Seattle); **Joseph P. Whitford** (Foster, Pepper & Riviera, Seattle); **Steven E. Wynne** (Lindsay, Hart, Neil & Weigler, Portland); and **Elisse B. Walter** (Associate Director, Division of Corporation Finance, SEC, Washington, D.C.).

For further information about this program, please contact **Debbie Kirchhauser** at the new WSBA address: 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599 or telephone (206) 448-0433.

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opportunity finally presents itself? How should you fashion a lien to place your client in the most advantageous position? Co-Chairpersons **Marjorie D. Rombauer** (Professor, University of Washington, Seattle) and **Christopher C. Meleney** (Shulkin, Hutton & Bucknell, Seattle) have designed a program entitled *Realizing on Liens and Interests: Procedures and Problems* for those with an interest in creditor-debtor practice. The seminar will be presented

in Yakima on March 20 (at the Thunderbird Inn), in Bellevue on March 27 (at the Holiday Inn), and in Tacoma on April 3 (at the Executive Inn). The program will be designed for presentation at primarily the "intermediate level." For further information about this program, please contact Colette Robertson at the WSBA, (206) 448-0433.

Don't forget that during March you will have the opportunity to register for a Wednesday evening

seminar dealing with law office management that will include a light buffet meal offered in conjunction with the program for your convenience. The program will be offered in Yakima on March 4, in Seattle on March 11, and in Bellevue on March 18. Please contact Karla Ellison at the WSBA for further information about this seminar, (206) 448-0433.

A special series of three seminars dealing with taxation matters will also be presented during March! On March 6 there will be a program focusing on *Real Estate Tax Matters*. On March 13 you will have an opportunity to attend a program dealing with *Individual Income Tax and Estate Planning*. And on March 20 there will be a seminar dealing with *Taxation of S Corporations* that should be of interest to all attorneys—general practitioners and tax attorneys—whose practice involves or might involve incorporation matters. For further information about these three offerings, please contact Debbie Kirchhauser at the WSBA, (206) 448-0433.



University of Washington School of Law
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WINTER/SPRING 1987 SCHEDULE

DATE	COURSE #	TITLE
2/20-21	8701	MARINE POLLUTION IN PUGET SOUND 9:00-5:30, 1st day—9:00-12:00, 2nd day 10 CLE credits—\$250
3/7	8702	INTRODUCTION TO COMPUTER-ASSISTED LEGAL RESEARCH 8:30-5:00—7.0 CLE credits—\$135
3/14	8703	RECENT DEVELOPMENTS IN CRIMINAL LAW AND PROCEDURE 9:00-5:00—6.5 CLE credits—\$135
3/21	8704	ATTORNEY FEES 9:00-12:30—3.5 CLE credits—\$75
3/28	8705	EFFECTIVE COURTROOM TECHNIQUES FOR HANDLING COMMON EVIDENCE PROBLEMS (REPEAT) 8:30-4:45—6.75 CLE credits—\$135
4/4	8706	BASIC ESTATE PLANNING 9:00-5:00—6.5 CLE credits—\$135
4/11	8707	LIABILITY OF CORPORATE DIRECTORS AND OFFICERS 9:00-12:00—3.0 CLE credits—\$75
4/18	8708	THE FIRST ANNUAL FAMILY LAW INSTITUTE 9:00-5:00—6.5 CLE credits—\$135
4/21	8709	HIGHER EDUCATION AND THE LAW 8:45-4:45—6.5 CLE credits—\$135
4/25	8710	POWERS OF APPOINTMENT IN TRUSTS AND ESTATES 9:00-12:00—3 CLE credits—\$75
5/16	8711	DEVELOPMENTS IN FARM FINANCING AND BANKRUPTCY 9:00-5:00—6.5 CLE credits—\$135
5/23	8712	MAJOR ISSUES IN PRETRIAL CIVIL PROCEDURE 9:00-5:00—6.5 CLE credits—\$135

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7.00 credits \$145
FEB 26 Spokane (Sheraton Hotel)
FEB 27 Bellevue (Red Lion Inn)

Realizing on Liens and Interests: Procedures and Problems
6.75 credits \$95
MAR 20 Yakima (Thunderbird Inn)
MAR 27 Bellevue (Holiday Inn)
APR 3 Tacoma (Executive Inn)

Real Estate Tax Matters
4.00 credits \$60
MAR 6 Seattle (Westin Hotel)

Individual Income Tax and Estate Planning
4.00 credits \$65
MAR 13 Seattle (Stouffer Madison Hotel)

Taxation of S Corporations
7.00 credits \$125
MAR 20 Seattle (Westin Hotel)



CLARK COUNTY REPORT

by JOHN F. NICHOLS

Another month and another move. **Rick (Bekins) Pomerville** has opened up in a new location with **Sarah Stookey**. Rick's third office in one calendar year, while a good mark, only ties him with **Jan Anderson** for the record. With only one month to go in 1986 and the shortage of office space, the record should probably be safe for another year.

Other new members of the Clark County Bar Association include such familiar names as **Rob Harris**, son of retiring Judge **Eugene Harris**; **Bob Shannon**, late of the Vancouver Police Department and now with **Morse & Bratt**; **Virginia Beder**, who is with some Portland firm; and **Lindsey Thompson** of the **Weber, Baumgartner** firm.

We all knew that it couldn't last forever, but we did hope that it would last until the bill to West Publishing was paid off. Yes, the news that Clark County attorneys were filthy rich and working only three days a week finally spread north. As a result, the Seattle firm of **Williams, Kastner & Gibb** has decided to get a piece of the pie and is opening up an office in Vancouver. **Don Greig** and **Mark Stoker** will man the office and apparently will be hiring one or two assistants to count the retainers and laugh on the way to the bank. The rest of us locals will have to be content with name changes and contested mitigation hearings.

The results of the November elections saw **Randy Fritzier**, **Darvin Zimmerman**, and **Ken Eiesland** being elected to the three District Court judgeships. Those still in the running for new Superior Court openings are undergoing an interview with Gov. Gardner at an unknown location. The selection will be announced about the same time as the new courtroom is finished, which may be forthcoming.

Those out-of-towners who have had the pleasure of looking for the

Clark County Law Library will be pleased to know that it has found a new permanent location on the first floor of the courthouse. The library, done in chic mauve and formica, promises to be both comfortable and trend setting. Truly a place to see and be seen.

COWLITZ COUNTY

Patrick Billberg of Kelso was honored by the Cowlitz Alliance for the Mentally Ill in October during National Mental Illness Awareness Week. Billberg represents mental patients in legal proceedings and has been aiding efforts to establish a group home.

EAST KING COUNTY REPORT

by DOUGLAS W. HARRIS

Since I missed filing my report last month, some of this month's announcements may be even older than usual. Anyway, here goes.

Jeff Revelle has announced that **Cheryl Bichich** has joined Revelle, **McCarthy, Ries & Hawkins** as an associate. Cheryl was formerly with **Kargianis and Austin**.

S. Michael Rodgers and **Daryl A. Deutsch** announce the formation of their new firm, **Rodgers & Deutsch**, which will continue at the same address. **James H. Dailey** has relocated his offices to 16275 N.E. 85th Street, Redmond, WA 98052. His phone number remains the same. Also, a press release from Insurance Corporation of America announced that **William G. Adams** has joined ICA as a claims attorney at their northwest regional office in Kirkland.

Finally, **Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax** has established an escrow department at its Eastside office. **John Shaw** is its supervising attorney and **Dorn MacPhail** will manage the department at the firm's Bellevue office.

By the time this report goes to print, the elections for EKCBBA offices will be over, but in case you missed it, the nominations from the nominating committee were as follows: President, **Mary L. Gaudio**, Vice President, **Eric V. Jeppesen**, Trustees, **Douglas W. Harris**, **Bruce D. Gardiner** and **James A. Trujillo**.

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There may be other nominations made from the membership, but I don't know of any yet. The elections will be held at the annual December "banquet" at the BAC on December 18, 1986.

Finally, you should have received your Eastside Attorney Directory by now. Your comments on this publication would be appreciated.

FRANKLIN COUNTY

James Hurson became a partner in the Kennewick firm of Raekes Rettig Osborne Forgette and O'Donnell in October. The son of former juvenile court judge Dan Hurson is a 1982 graduate of the University of Washington Law School.

GRAYS HARBOR COUNTY REPORT

by JOHN L. FARRA

The local Bar Association on Sep-

tember 26, 1986, had its annual golf tournament. The following are the results:

1st Low Gross: Jon C. Parker
2nd Low Gross: Mark McCauley
1st Low Net: Scott Sage
2nd Low Net: Jeff Raney
3rd Low Net: J.D. Schumacher
4th Low Net: Steve Brown
1st High Gross: John Greaney
2nd High Gross: Tom Brown
1st-Retired Division:
Chuck Hyndman
Closest to the Pin: Omar Parker

Continuing the update of attorneys in Grays Harbor County, it was indicated recently that a rundown of the Grays Harbor Prosecutor's Office staff would be made. Michael Spencer is the G.H.C. Prosecutor; Gerald Fuller is the Chief Criminal Deputy. Other attorneys that work in the office are deputies: Jennifer Wieland, H. Steward Menefee, W. David Rovang, Betsy Brinson-Bergholz, John L. Greaney and William P. Gilbert. Spencer was

unopposed for re-election this fall.

It also should be noted that one of the remaining bachelors in Grays Harbor County Bar Association, Frank Franciscovich, was recently married, and all members of the Bar Association of Grays Harbor wish him well. Franciscovich practices with Gladys Phillips and James Brown in Aberdeen.

PIERCE COUNTY REPORT

by ROBERT W. MARSDEN

Congratulations to Ron Leighton, new treasurer of the Washington Association of Defense Counsel. Congratulations also to F. Ross Burgess, immediate past president of the Association, for his appointment to the Association's Board of Directors.

Christopher Keay, formerly an associate with Billett, Comfort and Rosenow, has opened his own office in the Tacoma Mall Office Building.

Three notable Pierce County lawyers recently did their part for the local March of Dimes campaign.

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A sobering statistic arose at the American Bar Association's Standing Committee on Lawyer's Professional Liability this Spring:

"A young lawyer beginning private practice today, can expect two to four claims for legal malpractice during the course of his or her career, assuming a career span of thirty to forty years."

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Craig Adams, Bob Denomy and Jim Leggett, bachelors all, offered themselves for the annual March of Dimes "date auction." The three to four hundred bidders plunked out over \$8,000 for a worthy cause. The "X-rated" Leggett, it is reported, even took his shirt off in order to entice prospective bidders. That's disgusting.

SKAMANIA COUNTY

Harold "Ron" Reynier of Underwood was sworn into the State Bar in October. The Pennsylvania native was graduated from the Northwestern School of Law at Lewis & Clark College in Portland and clerked for Stevenson lawyer John Thomas Day, P.S., where he now is an associate.

SPOKANE COUNTY REPORT

by JUDY J. FOSTER

Happy New Year From Spokane County! All of us here hope everyone around the state had a pleasant holiday season. (I did - *finally* got to go to Hawaii for two glorious weeks over the holidays. It was terrific!!)

Spokane County Bar Association now boasts 850+ membership. Quite an increase over the past couple of years. If anyone within the county is not a member and would like information about joining, please contact the bar office at (509) 456-6032.

Through the Legal Foundation of Washington, the Spokane Bar Association received a nice grant to continue the SBA Pro Bono Program for 1987. We would like to thank those at the Legal Foundation who made this grant possible and, of course, the most thanks should go to all those attorneys out there who have so willingly devoted hundreds and hundreds of hours to our program. We made over 400 referrals this past year. Thanks, to each of you.

On the Move! Frank Conklin is now "of counsel" at Murphy, Bantz and Bury, Suite 631, Lincoln Bldg., Spokane, 99201; (509) 838-4458. Donald Hackney, Roger Peven, Cynthia Schwartz and Ed

Beukelman have formed a partnership: Hackney, Peven, Schwartz & Beukelman, N. 222 Wall, Suite 422, Spokane, 99201; (509) 624-8200. John Riley, III is now associated with Witherspoon, Kelley, Davenport & Toole, P.S., Suite 1100, Spokane, 99201; (509) 624-5265. Michael Custer has recently been made a partner with Bastine, Coombs & Custer, P.S., E. 12929 Sprague, Spokane, 99216; (509) 928-2345. Thomas Hartman is now house counsel for First American Title Insurance Co., W. 704 First, Spokane, 99204; (509) 456-0550. Anthony Grabicki has opened his own office, Suite 1010 Paulsen Bldg., Spokane, 99201; (509) 838-1150.

Of Worthy Note: Attorney, Michael C. Ormsby, a partner with Lukins & Annis, has been elected Chairman of Eastern Washington University's Board of Trustees. Mike has served as a member of their board since 1985.

WASHINGTON ASSOCIATION OF DEFENSE COUNSEL

John J. Soltys, of the Seattle law firm of Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, P.S., has been named President of the Washington Association of Defense Counsel for the 1986-1987 year.

Robert L. Israel of Lane Powell Moss & Miller, Seattle, has been named Vice-President; William J. Leedom, of Williams, Kastner & Gibbs, Seattle, has been named Secretary; and Ronald B. Leighton has been named Treasurer. He is with the Tacoma law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim.

Trustees of the Association are F. Ross Burgess of Tacoma, William W. Baker of Everett, Terry A. Brooks of Yakima, Palmer Robinson of Seattle, Charles C. Gordon of Bellevue, James M. Lindsey of Seattle and Christopher L. Pickrell, also of Seattle.

Upcoming programs include the monthly dinner meeting at the Washington Athletic Club on January 13, 1987; a joint meeting with the Oregon Association of Defense

Counsel the weekend of February 6-8, 1987; a dinner at the Washington Athletic Club on March 10, 1987; and the annual dinner meeting also at the WAC, on June 9, 1987.

The annual spring meeting and seminar in Vancouver, British Columbia, now is scheduled for the weekend of May 8-9, 1987.

The Association also has named its committee chairmen for the upcoming year. They are William W. Baker, Membership Committee; William C. Smart and Christopher L. Pickrell, Amicus Committee; Palmer Robinson, Legislative Committee; Laura M. Murphy, Newsletter Committee; Daniel E. Tolfree, Medical Seminar Committee; J. Richard Crockett, Spring Seminar Committee; Robert Keating and J. Richard Crockett, Oregon Bar Liaison Committee; and Joel S. Summer, Press Committee.

Nora C. Tabler has been hired as the WADC's first Executive Director.

If you have any further questions about the information contained in this notice, please feel free to contact Joel Summer at (206) 622-8020.

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Seattle attorney **Michael R. Alfieri** (admitted 1953) has been ordered reprimanded and censured following hearing. The reprimand was based on Alfieri's neglect of an estate in which he drafted the will which also named

himself as executor. The hearing officer determined that a reasonable investigation of the decedent's affairs would have disclosed assets in need of administration, and that for over one year Alfieri failed to make investigation or to respond in a timely fashion to the concerns of the estate beneficiary. Alfieri was ordered censured for his failure to file a response to the amended complaint.

IN MEMORIAM

John Forbes Walthew, formerly of Seattle, died November 11 in Union Gap, Yakima County, at the age of 86. In the 1950s, he successfully defended a union official charged under the Smith Act in a trial in which the five codefendants were convicted. In the 1960s, he defended a woman convicted of first degree murder and sentenced to life in prison. At her second trial, she was acquitted after the jury deliberated more than 24 hours.

Born in Zillah, Yakima County, Walthew was graduated from the University of Washington Law School in 1926 and was on its law review's original board of editors. He was senior partner in Walthew, Warner, Keefe, Costello, Thompson & Eagan, which made its offices in the Pioneer Square building bearing his name.

Walthew was a former president of WSTLA and a member of the International Academy of Trial Lawyers. Remembrances to the Fred Hutchinson Cancer Research Center, the American Diabetes Association, or the Yakima First Church of God.

Notice

To improve ex parte services and speed the turnaround time on mailed requests, the Snohomish County Clerk's Office has received authority to assess fees for handling ex parte correspondence. The revenue from the fees will permit the Clerk's Office to hire a part-time legal secretary with the sole responsibility of processing ex parte mail and providing other ex parte services as required.

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My computer is overflowing with new rules, new statutes, and new case law that will eventually be included in the Washington Practice pocket parts. These pocket parts are fine for their intended purpose, and I will continue to write them. The pocket parts, however, are only published about once a year.

I am pleased to announce that, with my publisher's blessing, I am now able to rush new developments to you with my own newsletter. The newsletter, *Tegland's Litigation Today*, collects for you all significant changes in the Washington law of evidence, civil procedure, and appellate procedure.

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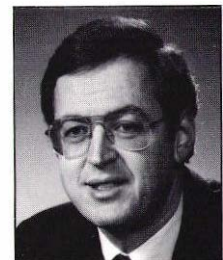
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