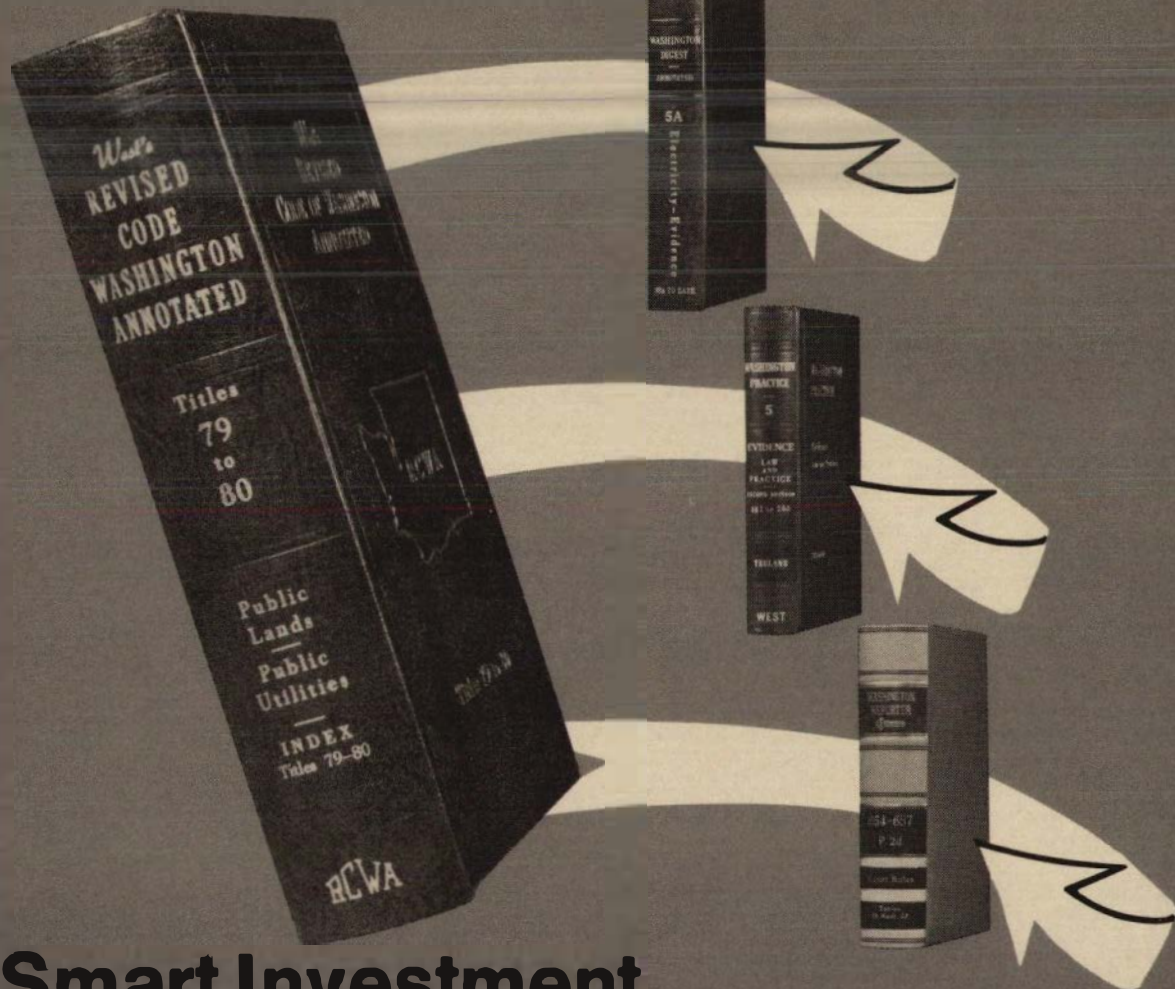


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News

Vol. 41, No. 7, July 1987





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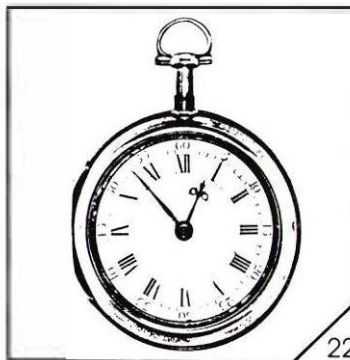
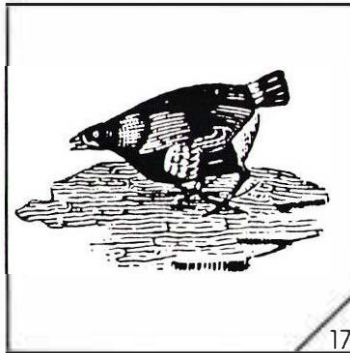
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ART CREDITS

Cover: Seattle photographer Mark Ricketts graces our cover this month with his photo of white camellias. Ricketts' work has appeared in *Architectural Digest*, *Metropolitan Home*, *Unique Homes*, *Washington Magazine* and numerous trade magazines dealing with the construction industry.

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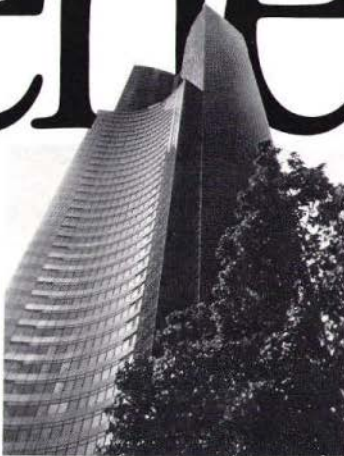
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SECRETARY



Quibbling

Editor:

In reading the President's Corner in the May issue, I was wondering whether his eye caught the Oath of Attorney, as he states, or the Oath of Attorney caught his eye. Ah, yes — what a privilege it is to be an attorney and to quibble with the most visible attorney of us all about his prose! Oh, oh — have I violated paragraph 7 of the Oath?

WILLIAM G. INGALLS
Bellevue

Excise Tax

Editor:

Governor Booth Gardner has signed into law SSB 5911 which repeals the conveyance tax and raises the real estate tax.

All King County real estate documents bearing a May 19 and forward date will be subject to a 1.59 percent excise tax. Revenue stamps will not be required on these documents.

Documents with a May 18 or older date will be subject to the old rate of 1.32 percent.

King County Records and Elections Division, which collects the tax for the state, has staff available to help in the transition. Please contact Danene Milard at (206) 344-3948.

The tax increase will benefit Washington natural resources conservation areas throughout the state.

JANE HAGUE
Manager, King County
Records and Elections

What Incentive Is There?

Editor:

Several people have called, written or otherwise communicated with me on "What Incentive Is There," April *Bar News*. I learned of *Anderson v. Harris*, 47 Wn.App. 525 (1987) right after it was published but did not bring it to your attention because I thought you had already gone to press. The appellant there apparently did not raise the "post trial" v. "pre trial" issue. (It is interesting to note the *Pacific Reporter* refers to the motion in that case as a "posttrial motion," 734 P.2d 525.)

Also, obviously, my old copy of the Federal Rules will have to be replaced immediately.

ORLY J. SORREL
Seattle

Federal Incentives

Editor:

Orly J. Sorrel's April article concerning CR 11 incorrectly states that it "imposes a much higher and more explicit standard than the corresponding FRCP 11." The federal rule was amended in 1983, and the Washington 1985 amendments to CR 11 were patterned after the amended federal rule. "In 1985 our state's CR 11 was amended to incorporate essentially the same language as the amended federal rule 11." *Wilson v. Henkle*, 45 Wn.App. 162, 174 (1986).

The fact that the federal and state rules are virtually identical means that the large body of federal case law which has developed since 1983 is persuasive authority for interpreting the state rule. *Rinke v. Johns-Manville Corp.*, 47 Wn.App. 222, 225 (1987). Recent decisions construing the federal rule include *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986) and *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986).

JOHN W. LADENBURG
Pierce County Prosecuting Attorney

More Incentives

Editor:

In response to Orly Sorrell's April article on frivolous suits, I personally know of at least one case in which sanctions were imposed under RCW 4.84.185. In *Demopolis vs. Wildermuth*, King County 84-2-02593-0, Judge Roselle Pekelis awarded significant attorneys' fees against the plaintiff who had pursued through trial claims for slander, slander of title, trespass and damages arising from the repossession of an apartment based on forfeiture of a real estate contract. Several of these claims were non-suited at the end of defendant's case, after being fully defended. Judge Pekelis determined that one-half of the fees incurred by defendant were related to the frivolous claims and awarded fees accordingly.

Obviously, the question of when a claim is frivolous is not always easy to determine, and under the current statute, judges — I believe appropriately — protect the rights of litigants to present or defend claims where there is a reasonable modicum of evidence supporting their position. The solution is *not* to declare that attorneys' fees are awarded only for frivolous actions, but is to allow them to be awarded generally to the prevailing party.

I do not advocate a wholesale adoption of the English system. The American rule, especially with regard to personal injury litigation, has appropriately given access to the court system to people who could not otherwise afford it. I advocate, however, an intermediate rule — particularly in the context of commercial litigation — which would serve both as a brake on the zealous use of the courts for questionable cases and equitable compensation for those who prevail.

DOUGLAS G. ANDERSON
Seattle

Where Credit is Due

Editor:

The April *Bar News* carried a list and brief description of recent recipients of IOLTA funds. Thanks. I prepared the list and note that I erred. Spokane Legal Services provides services to five coun-

ties and not four. Left out of the description was Spokane County.

Credit where credit is due. Spokane Legal Services works hard on behalf of the citizens of Spokane County as well as for those in Lincoln, Ferry, Stevens and Pend Oreille counties.

BARBARA C. CLARK
Executive Director
Legal Foundation of Washington

Oops

Editor:

We appreciate your including a summary of the 1987 IOLTA Awards in the April *Bar News*. We have copied and distributed this to the members of our Board of Directors.

This summary correctly indicated that Spokane Legal Services Center uses its IOLTA funds to provide free

legal services to low income residents of Lincoln, Ferry, Stevens, and Pend Oreille counties. However, we also use these funds to provide these services to low income residents of Spokane County, the most populous county in our service area.

Thank you again for bringing the good work of all of the IOLTA grantees to the attention of the Bar.

KENNETH ISSERLIS
Acting Director
Spokane Legal Services Center

Pro Bono Is At The Office

Editor:

I once knew a very rich couple who were being driven along Fifth Avenue in Seattle past a church. Around the church wound a long line of people. The woman remarked, "Oh, someone died and they are holding a funeral." The husband replied, "He must have been very famous and well liked." The chauffeur said, "No, sir, that's a food line. Those people are hungry." The response was, "Oh, no, not in Seattle."

Well, in an almost similar way the large law firms have discovered what the general practitioner has known from the beginning. A good deal of the people can't pay for legal services. The divorce lawyer knows it. The criminal lawyer knows it. The contingent fee lawyer knows it. The neighborhood lawyer knows it, and now Seattle's finest know it, but now it's called "pro bono" and you go to a clinic to do it.

No criticism to the Bar for awarding plaques for "pro bono" work, but good going to the lawyers whose clients are all poor, who do their "pro bono" every day at the office.

RICHARD F. KRUTCH
Seattle

A Touching Relationship

Editor:

The recent WSBA Lawyers' Assistance Program questionnaire which attempted to find out whether we as lawyers laugh at dirty jokes, gossip, curse, procrastinate, enjoy sex or feel compelled to beat or harm people confused me. I wish to inquire as to where one would go to correct the answers to the questions. The following questions I am sure I answered in the wrong context:

Touching my partner makes me feel (extremely negative, quite negative,

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slightly negative, neutral, slightly positive, quite positive, extremely positive)

Kissing my partner makes me feel (extremely negative, quite negative, slightly negative, neutral, slightly positive, quite positive, extremely positive)

My partner's physical appearance makes me feel (extremely negative, quite negative, slightly negative, neutral, slightly positive, quite positive, extremely positive)

Having sexual relations with my partner makes me feel (extremely negative, quite negative, slightly negative, neutral, slightly positive, quite positive, extremely positive)

What caused the confusion in my answers, of course, is that I thought they were talking about my partner in the office. I had no idea that the poll meant the person I am living with.

Is there any way this can be corrected? I think that I may have caused the test to be somehow misbalanced.

DOUG OWENS

Anacortes

p.s. Is it true that lawyers who don't keep up with their CLE credits have hair on the palm of their hands?

Thesians to the Rescue?

Editor:

Having tried a few L & I jury trials on the record, I appreciate the suggestions offered by Judge Evan E. Sperline in the April *Bar News*.

Of those offered, trial by wild dog is preferable. Trial by the pound is definitely not preferable since, typically, the self-insured employers and the attorney general's office have more money and have always been able to inundate the poor claimant's counsel with paper.

In all seriousness, the problem is a good example of the legal profession's lack of imagination. I have often suggested the use of drama students from the local community college to play the roles of the witnesses. Self-insured employers and representatives of the state routinely objected to this proposal on the basis that these actors would unduly emphasize the testimony of certain witnesses.

I have no doubt that this would be true, but at least we would be enter-

tained by the efforts of enthusiastic young would-be Oliviers rather than bored by the singularly ineffective performances of the attorneys who are stuck with reading testimony into the record.

WILLIAM R. McCANN

Sedro Wooley

Not Another Lawyer-Shark Joke

Editor:

President William Gates laments the demise of the professional liability fund and worries about how we are to handle the mounting number of claims. [April 1987 *Bar News*.]

I am a licensed but non-practicing attorney now (with *very* rare and small exceptions), so I have no interest in subsidizing those lawyers who are more likely to get sued than I am. One has a vision of carnivorous plaintiffs' attorneys who, having helped foment an entitlement mentality and having terrorized most other professions, now turn against their professional fellows.

The recent tort reform legislation passed in our state is a tiny drop in the bucket towards what needs to be done. I fantasize a limited return to governmental immunity, a curtailment of contingency fees, mandatory payment by the loser of the winner's attorneys' fees, and law suits limited to liability, with damages determined by workmen's comp-like formulas.

Whatever is done, the creation of a deeper pocket will no more resolve the problem — especially the corrosive entitlement mentality — than throwing scraps of meat will deter a shark attack.

DANIEL M. WARNER

Bellingham

I Declare!

Editor:

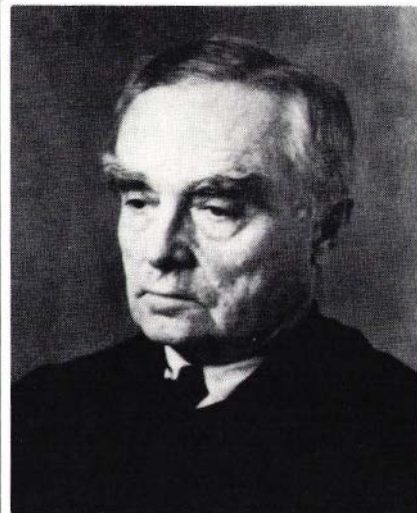
Congrats on "A Declaration of Dependence" in the May *Bar News*. Excellent! 99% of us are totally unaware of the problems you outline, including the xenophobia facet.

The little piece by Edith Rice also opens eyes. I have had occasion to appreciate the hearing-impaired problem (I am not speaking of a personal problem, albeit my wife has suggested that I am at times...).

JACK HEPFER

Seattle

A FEDERAL CASE MAY TURN OUT TO BE A MINEFIELD



Federal jurisdictional and procedural law do create traps.

And the factual and legal issues raised by federal substantive law can have their own very special complexity.

Since 1964, I've taught, written or practiced in the areas of federal procedure and jurisdiction and federal regulatory legislation. I've been president and legal education chairman of the Federal Bar Association of Western Washington.

If you have a federal case and would like some pre-trial, trial or appellate help, please give me a call.

Bill Bishin

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See *Biography in Notices Section*

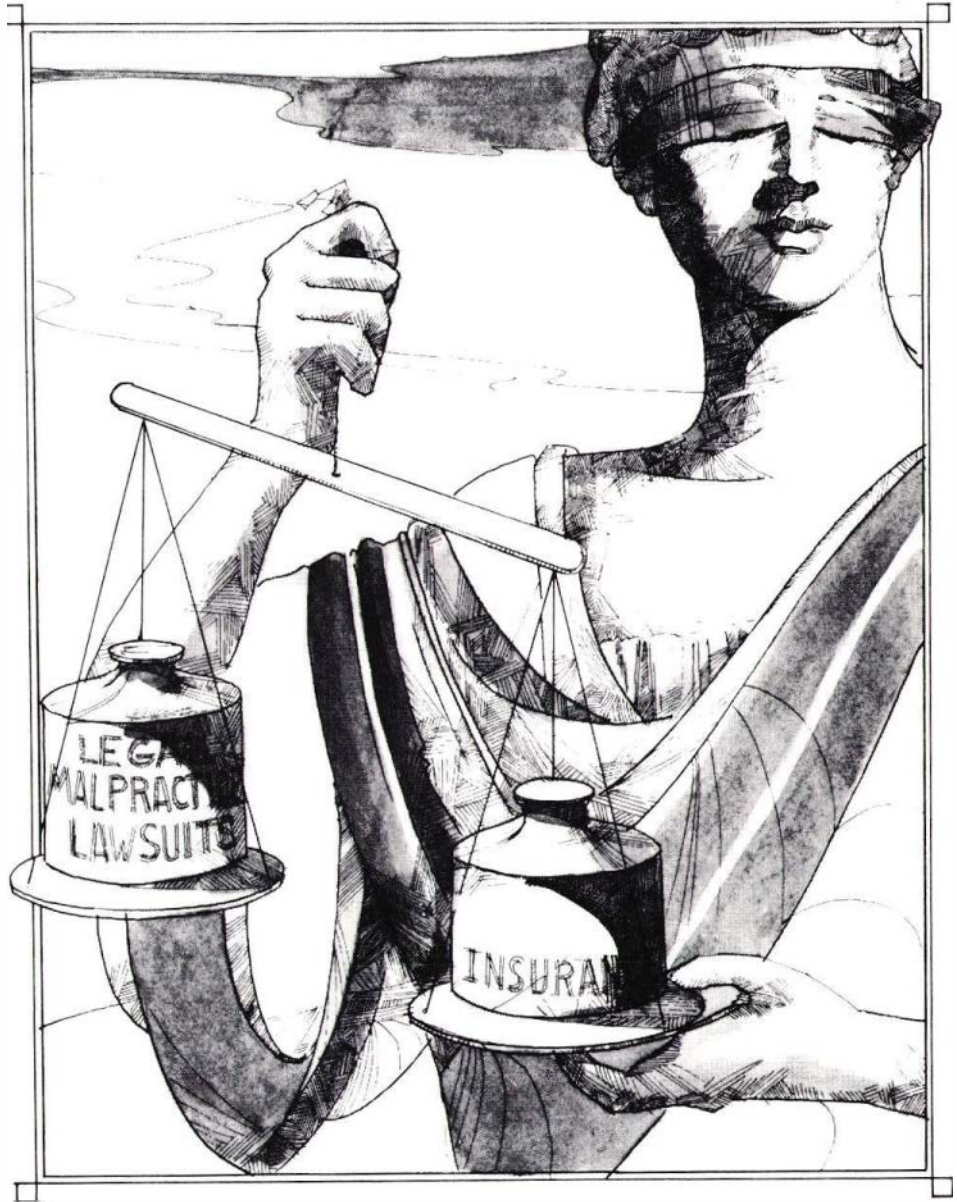
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I Thought You'd Like To Know

Editing is a lot like gardening. Five summers ago, I so agonized about which seedlings to sacrifice for the benefit of the group that I wrote this poem about the Mengelian vs. the Mendelian forces in my 10' x 20' garden universe:

Triage

First incunabula
makes follicles flicker,
rational lobe protest.
How to choose?

I remember my first crowings
as the shoots burst forth,
green from brown.
The books instruct on the beneficence
but it's not convincing.
Choose? *Moi?*

Mengelian logic overcomes the Mendelian.
For the good of the whole we extirpate
randomly, rationalizing furiously,
the third or fourth, the weak-leaved.
How many Ignoble Prizes have been won,
or lost, tending tender shoots?

An editor weeds out the weak for the sake of a better whole . . . or should. An editor roots out lackluster words or those which are carelessly added, or which sap impact. Gardener Grayson no longer agonizes about pulling seedlings. Editor Grayson, with many more seasons under her belt, has never agonized about pulling words. Some of this magazine, however, is not subject to editing, the Governors of our State Bar have declared, so if you happened to come upon a 95-word sentence in the May 1987 *Bar News*, you know why.

Periodically, I receive articles which, on the surface, seem as if they belong . . . just as in my garden there are some of the dangdest weeds which, I swear, look just like my beets. And elsewhere there are critters growing merrily which look like the earliest inklings of cucumbers and cantaloupes and honeydews. But I've learned not to be confused (or flattered by) such mimicry by weeds or words. Over time, it becomes easier to tear out the fakers and toss them onto the compost heap.

Sometimes the only way I can tell what I have planted in a particular space and what has opted to appear without my intervention is by stepping back and getting the big picture. Otherwise, the result can be as it was five years ago when I innocently pulled all the anise seedlings, thinking they were weeds, and wound up with the best-cultivated rows of chamomile weeds this side of a tea plantation.

Thus is it with submissions to this magazine. Sometimes I can't tell what someone is driving at if I screw up my eyes for the close-up picture. That's why I always read copy through at least once without engaging in the ritual laying on of the red pen.

What would life be like without dirt under the fingernails? Dirty smudges are battle scars which I wear proudly.

And as editor, I periodically get inundated by innuendo, sullied by slanderous sillinesses, and muddied by mudslinging. But that's how my garden grows.

Carole Grayson

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Swearing In

The other day I had the joy of participating in the swearing in of one hundred seventy new lawyers. It was a joy to be a part of the overwhelming feeling of euphoria generated by this audience.

Pride, relief, excitement about the future — they were all there. Proud graduates, proud families, touched observers.

One hundred seventy new lawyers and each one so proud to be A **LAWYER!**

None of them gave a speech, but you could read their speeches on their faces as each stood to be introduced: The goal achieved, years of effort and sacrifice, study, papers, tests — done — I won! Not a student anymore, not just a person anymore, now A **LAWYER!**

With the inspiration of the fine speech of Appeals Court Judge Kenneth Grosse and the stirring words of the Oath of Attorney fresh in their mind, there was, in addition to pride, an evident sense of purpose and ideals about their new profession. It was wonderful to see this, a joy to feel it.

It was 37 years ago when I was sworn in, but I remembered, as clearly as if it had been the day before, the same surge of pride and idealism these young people were experiencing. We have all been there. We all experienced this wonderful day when we finally made it — we were lawyers!

Reflection led me to ask: What happened to that feeling? What happened to the pride, the exhilaration, the idealism of that day we became members of the Bar? I wondered, for example, by what dark processes that enthusiasm about the honor of the profession could be convoluted into rationalizing the embezzlement of a client's funds or misleading a judge. But that was a morbid inquiry, inappropriate to the day and one for which I had no answers.

What about me — What about the thousands of us practicing law here in this state — Is there anything left of the feeling of that first day? As I reflected on all I had seen of lawyers over a lot of years, and particularly all around the state over the last few months, it was clear to me that that feeling never really goes away.

I believe every one of you reading this column is still proud you are a lawyer just as you were on that first day. True, we are not still being hugged by joyous parents, and we do not still hear the ringing words of the valedictory, but there is for all of us a continuing, constant awareness of status and responsi-



bility — we have achieved and we hold something that is good.

As I said, I had the joy of sharing in the exhilaration of swearing in day and, as it turned out, it was a lot more than a vicarious pleasure.



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A Deviation Of But One From The Path

by **John J. Michalik**
WSBA Executive Director

As a person whose interest in the State Bar Association and the legal profession in Washington state is not confined to the present, I sometimes spend a quiet moment or an idle lunch hour pawing through the Association's records and archives. Every now and then (in fact, quite frequently) that sort of browsing turns up a nugget or two, a bit of nostalgia or thoughts that ring as true now as at a time in the past. I ran across one of those just the other day.

In April of 1936, fifty-three lawyers were admitted to the Bar following success on the Bar Examination. The report of the Admissions Ceremony noted that "Various Superior Court judges instructed the neophytes upon their obligations and duties." Among those judges was the Honorable J.B. Lindsley, Judge of the Superior Court

in Spokane County. After running through practical suggestions gleaned from his experience as a lawyer and a jurist, Judge Lindsley closed with the following few words on professionalism, the nature of lawyers and the practice of law.

"Among an ancient people, it is said that a man who proposed a new law did so with a rope around his neck, signifying a willingness to be hung if it worked badly. If that rule prevailed with us, the number of public executions would enforce as no other experience could, that wise maxim. The law is a science. It is no mere trade. It is not the road to wealth, and if it is pursued with that aim only, the one privileged to so engage manifests a total failure of appreciation of the character of the profession. Lawyers in their professional contacts hold larger trusts than all other vocations combined, and the record of the profession generally in its

fiduciary responsibilities is the highest of all those engaged with personal relations.

"Integrity of character and fidelity to opinions and duty are the first requisites of a good lawyer. The property of a client which comes into his possession can neither be borrowed nor loaned. It is a sacred trust, to be constantly and scrupulously accounted for. You are licensed now to take up your professional duties and to a large extent the good opinion which the public should have of the Bar generally is in your hands, because a deviation of but one from the path of good conduct brings, to a degree, discredit upon the whole profession."

Resolutions

To be considered at the 1987 Annual Business Meeting of the Washington State Bar Association

According to the by-laws of the Washington State Bar Association, resolutions and reports received by the Resolutions Committee at least 60 days prior to the Annual Business Meeting are to be published in the Washington State Bar News prior to such Annual Business Meeting.

The Resolutions Committee earnestly solicits written responses and comments from members of the Association regarding proposed resolutions and requests that any such responses and comments be submitted to the Resolutions Committee, c/o the Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, Washington 98121-2599. The function and purpose of the Resolutions Committee is to report to the membership of the Association upon each resolution, giving its recommendation, proposed amendments thereto, or comments thereon.

As announced in the last Washington State Bar News, the Resolutions Committee will hold a public hearing prior to the Annual Business Meeting. The hearing is scheduled for 10:00 a.m. on September 1, at the offices of the Washington State Bar

Association, at the above address. Upon completion of business that day, or at the Chairperson's discretion, the hearing will be adjourned to reconvene on September 9, 1987 at 4:00 p.m. at the Hyatt Regency Hotel, Vancouver, B.C. The advance public hearing session on September 1 has been scheduled in an effort to allow more time to those presenting views and in an effort to give the members of the Committee more time to consider the resolutions and to request any additional information which might be helpful to the Committee in making its recommendations on the resolutions to the membership. Proponents and opponents of resolutions are urged to attend the September 1 hearing if at all possible, and, if not, to present their views prior to that time in concise written form for consideration by the Committee at that hearing. Presence at or absence from the September 1 hearing will not affect any right under the by-laws to present views when the public hearing reconvenes on September 9. At the reconvened hearing, preference in presenting views will be given to those with viewpoints which were

not expressed at the September 1 hearing. Proponents and opponents will be given a reasonable opportunity to be heard at the advance session and at the reconvened hearing.

At the conclusion of discussion of each resolution at the reconvened hearing, the Resolutions Committee will recommend approval or rejection of any such resolution, with amendments if deemed appropriate.

A copy of the by-laws regarding time deadlines and other information about submitted resolutions may be obtained from the Washington State Bar Association Office.

Members of the Resolutions Committee are Donald H. Bond, William L. Dowell, Kenneth O. Eikenberry, Gary D. Gayton, Jack A. Hawkins, Lemhard G. Howell, John F. Kruger, Jonathan G. K. Lee, Frederick L. Noland, Gregory H. Pratt, Scott L. Simpson, Phillip L. Thom, James A. Vander Stoep, Ted D. Zylstra and Thomas D. Loftus, Chairperson.

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Handling Securities During Probate

by Martin Horne

When a lawyer is faced with the probate and distribution of an estate containing securities, there are a number of practical considerations. The first consideration is often locating and gaining control of the securities.

The decedent may have held securities in various locations outside a brokerage firm. This property is subject to the obvious normal market value fluctuations and to several potential problems. It is very common to find that the decedent or the administrator neglected to clip and redeem bond interest coupons in a timely manner. Bonds may have matured or may have been called and no longer be earning interest.

Another problem has been increasing over the last few years as corporate reorganization has increased. Many stocks have been subject to tender offers and dramatic short-term changes in share value. If the securities are not held in a brokerage account, the administrator may not have been notified of tender offers or bond calls and may be unaware of the alternatives available to protect the value of the estate's property.

The decedent also may have owned securities for which no certificates can be found. The administrator may be unaware of this property but nevertheless is responsible for its preservation. An inventory of the decedent's papers may reveal important clues about missing certificates. A prospectus, official statement, or annual report may give a clue that the deceased was

interested in an investment. Proxy materials are a strong indicator of ownership in a company. Additionally, it may be relatively simple to compare the decedent's tax returns and brokerage statements listing interest and dividend-paying securities. If there is a Form 1099 or K-1 for a security not listed in any brokerage statement, the deceased must have owned the security and held the missing security certificate.

If a certificate cannot be located after a diligent search, a brokerage firm can assist in obtaining a new certificate. In some cases, a corporation's transfer agent will issue the new certificate in the name of a surviving joint tenant or of a legatee. Usually, however, the transfer agent will reissue a certificate only in its original form. The process of replacing the certificate may take several weeks. Although the estate will continue to receive dividends and interest, since there is no certificate available, the administrator may not trade or liquidate the security during this time.

Vive le différence

Another problem area with securities lies in the accounts of married persons. Most securities accounts of married persons are labeled as joint tenancy accounts rather than community property. The attorney may be aware whether the securities account is community property. If the trading and use of the securities by the surviving spouse could have an impact upon spousal election or other testamen-

tary provisions, the attorney should notify the spouse and the brokerage firm of the correct ownership classification.

Securities placed into a brokerage account for liquidation or transfer to a surviving spouse, joint tenant, or beneficiary require several documents specified by the brokerage firm. These may include certified death certificates, affidavits of domicile, letters of instruction, stock and bond powers, and certificates of appointment or other proof of the administrator's authority. Brokerage firms can provide a list of the particular documents required for each form of security ownership and transfer. The number of documents may seem excessive, but providing them minimizes problems with the transfer agents who may be subject to the requirements of various states of corporate domicile.

Liquidity Problems

Limited partnerships present special problems of illiquidity in an estate. Some may not be transferred or may be transferred only to other partners. If a partnership is sold, it may take a brokerage firm weeks to find a buyer; and the partnership interest may sell at a very substantial discount. The practical choices are often reduced to only two: the estate selling the partnership at a discount or the estate continuing to own the partnership until maturity. (See Mark Thompson, *Bar News*, October 1986, page 21). The liquidity problems of limited partnerships should decrease in the

future in light of the trend towards master limited partnerships which trade on the stock exchanges.

Restricted stock also presents a problem of illiquidity. In some cases, the holding requirements for control or restricted securities will have been satisfied and the stock can

be liquidated or transferred free of the restrictive legend. In other cases, the restrictive legend remains intact when the stock is transferred to a beneficiary. There may also be limitations on the amount of restricted securities that may be liquidated during specified time

periods. The conditions of the restriction will depend upon factors such as how the securities were acquired, when they were completely paid for, and whether the decedent or beneficiary is classified as control or affiliate person.

A brokerage firm's restricted securities department should be able to coordinate an evaluation of the continued restricted status of securities and the removal of the restrictive legend by the corporation and transfer agent. The clearing and subsequent liquidation or transfer may take several weeks to complete.

An evaluation of the securities must be made for tax purposes. But a second type of evaluation must be made relative to the preservation of the value of the estate. The portfolio should be examined for speculative and volatile issues that are not designated as specific bequests. In light of the administrator's fiduciary duties, it may be prudent to reposition the estate's assets into more conservative positions early in probate.

The cornerstone to the practical handling of securities during probate is establishing the working relationship between the administrator, attorney, and securities firm. Ideally, a conference call or meeting should be arranged to discuss items such as specific bequests, called and matured securities, missing certificates, and temporary investment objectives. The attorney can specify which evaluation date will be used so that the securities firm can begin an evaluation report. The securities broker can make recommendations to protect the estate from volatility and risk to the principal pending liquidation or distribution of the estate. The client administrator should be able to leave the meeting with a feeling of assurance that the handling of the securities matters is well under control. □

Martin Horne works as a financial consultant and stockbroker at Shearson Lehman Brothers in Seattle. He is a member of the WSBA and Seattle-King County taxation and probate sections.

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The Seller's Right of Reclamation And Bankruptcy

by Zachary Mosner

Recent amendments to the Bankruptcy Code to provide for seller's reclamation of warehoused grain or fish product, 11 USC §546(d), highlight a continuing conflict between the rights of reclamation afforded a seller under state law and their priority relative to prior perfected inventory lenders.

When the Bankruptcy Code was first amended in 1978, 11 USC §546(c) was drafted to overrule a line of authority that had evolved wherein a reclaiming seller under UCC 2-702(2) was deemed an unperfected creditor with rights inferior to the avoidance powers of a bankruptcy trustee. Previously, the trustee had been given several hypothetical rights of perfection to avoid transfers or rights in goods where a seller, lender or supplier had not perfected rights under state law prior to bankruptcy. These rights were expanded and clarified with the 1978 amendments under 11 USC §544.

The right of a seller to reclaim goods arises under limited circumstances as a matter of state law:

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten-day limitation does

not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or intent to pay.

RCW 62A2-702(2). The Bankruptcy Code attempted to recognize this provision by providing:

[T]he rights and powers of a trustee under sections 544(a), 545, 547 and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but

- (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor; and
- (2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court —
 - (A) grants the claim of such a seller's priority as a claim of a kind specified in section 503(b) of this title; or
 - (B) secures such claim by a lien. 11 USC §546(b)

The UCC reclamation rights are thus recognized as fully perfected as to the avoidance powers of the bankruptcy trustee if various statutory conditions are met. Those state rights are

reduced somewhat and further constrained by federal law. Finally, neither the Bankruptcy Code nor the UCC expressly disposes of the relative priority of the lien afforded the reclaiming seller as to a prior perfected inventory lender: a line of cases precedent has evolved, however, which provides guidance in interpretation. These matters will be analyzed separately herein.

Federal Preemption Of State Law

The Bankruptcy Code requires that a reclaiming seller may assert either statutory or common law rights as to goods sold in the ordinary course of business. On its face, the Code would appear to grant the seller rights that go beyond UCC 2-702(2); however, as a practical matter, in most states the adoption of the UCC has rendered common law rights unenforceable. *In re Eli Witt Co.*, 12 B.R. 757 (M.D. Fla. 1981). The Bankruptcy Code addresses reclamation rights as to goods sold in the seller's ordinary course of business, a burden of proof not imposed under UCC 2-702(2). While the ten-day receipt rule survives, the seller's right of reclamation is only perfected under 11 USC §546(c) when written demand issues. That notice, post-bankruptcy, is not a violation of the automatic stay. 11 USC §362(b)(3); *In re Nat'l Sugar Refining Co.*, 27 B.R. 565 (S.D. N.Y. 1983).

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for reclamation under state law in limited circumstances is wholly denied under bankruptcy law. *In re Contract Interiors, Inc.*, 14 B.R. 670 (E.D. Mich. 1981). Finally, whereas the exercise of the reclamation remedy under UCC 2-702(3) would exclude all other remedies, under the Bankruptcy Code, reclamation may be denied and the seller may be afforded an unsecured priority claim or a lien.

In a bankruptcy estate where a secured creditor already controls collateral, and may itself be partially unsecured, the grant of a priority may be worth little. Further the grant of a lien, which may prove junior in priority, may be useless. Finally, should the debtor demonstrate the goods are necessary to performance under a plan of reorganization, denial of reclamation, even where there are no competing lien claims, is a virtual certainty.

Priority And State Law

Even though the Bankruptcy Code strictly limits reclamation rights and remedies, it would appear the problems as to priority would exist for sellers under state law, absent an intervening bankruptcy:

The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (RCW 62A.2-403) RCW 62A.2-702(3).

This language has been used to bootstrap the seller's remedy into a secured transaction, thereby subjecting it to priority rules of RCW 62A.9-312(3). How the courts get there is a matter of concern, because, as a practical matter, they are making the lien rights of UCC 2-702(2) junior in priority to an inventory-based lender unless various Article 9 notice and filing provisions are met. It is submitted that the drafters of the Uniform Commercial Code may not have intended this result.

"Buyer in ordinary course" is defined by UCC 1-201(9) wherein it is stated that "buying may be for . . . secured or unsecured credit . . ." Further, "purchase", as defined by UCC 1-201(32), includes taking by mortgage, pledge or lien . . . or other voluntary transaction creating an interest in property." It would follow that an inventory lender would fit into the ex-

ceptions category of UCC 2-702(3). The difficulty then is in reconciling the term "subject to" and further understanding by analogy the potential weaknesses of judicial construction of statutes. It should first be noted that UCC 9-312 makes absolutely no reference back to UCC 2-702; in turn, 2-702 makes no direct reference to Article 9. This should be contrasted to UCC 2-326 on consignment, where title is expressly reserved in the name of the seller subject to Article 9. More significantly, under UCC 9-114, where there has been a failure to file notice of consignment, it is expressly stated under (2) that a person who delivers goods is subordinate to a person who would have a perfected security interest in the goods if they were property of the debtor.

A security interest arising solely under Article 2, according to UCC 9-113, is "subject to" Article 9 "except to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods". Again, the words "subject to" appear,

and Article 2 is broadly cross-referenced. However, 9-113 does not cross-reference 2-702 at all.

It is submitted that UCC 2-702(2) does not do anything to create a security interest because title never passes. This is distinguishable from UCC 1-201(37), which indirectly cross-references 9-113 and 9-114 by its definitional text. In short, UCC 2-702(2) is an anomaly, but may have been intended to stand independent of Article 9.

Cases To Date

The drafters of the Bankruptcy Code recognized that 2-702 "has generated much litigation, confusion, and divergent decisions in different circuits." *Notes of Comm. on the Judic.*, Senate Report No. 95-989. However, virtually every case decided to date has favored the inventory lender over the reclaiming seller. However, not all commentators agree with the results. . . . "[I]t is not obvious to us whether the seller or the secured creditor has the higher equity; conceivably 2-702(3) should be redrafted to elevate the seller over the

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secured creditor." White & Summer; UCC, 2nd Ed. §24-9, p. 1028.

To discuss existing case law in terms of "equity" is not to suggest that any equitable remedies for seller may be imposed in bankruptcy proceedings. Where UCC 2-702 rights are asserted under 11 USC §546(c) no constructive trust will be imposed. *In re Charter Co., Inc.*, 52 B.R. 263 (M.D. Fla. 1985). The prevailing line of cases designates an inventory lender with perfected rights as a "good faith purchaser"; as such, under UCC 2-702(3) a reclaiming seller's rights are subordinate. *In re FCX, Inc.*, 62 B.R. 315 (E.D. N.C. 1986); *Lavonia Mfg. Co. v. Emery Corp.*, 52 B.R. 944 (E.D. Pa. 1985) [D.C.]; *In re McLouth Steel Corp.*, 22 B.R. 722 (E.D. Mich. 1982); *In re Dixie Enter., Inc.*, 22 B.R. 855 (S.D. Oh. 1982); *In re Lawrence Paperboard Corp.*, 52 B.R. 907 (D. Mass. 1985).

In *In re Western Farmers Ass'n.*, 6 B.R. 432, 435-436 (W.D. Wash. 1980), Judge Steiner considered the issue and adopted the prevailing line of authority. Thereafter the Ninth Circuit consid-

ered a clear line of authority related to the issue and in *dicta* stated . . . "we do not decide, the question of whether section 2-702 creates a security interest directly cognizable under Article 9. [cites omitted]." *In re Coast Trading Co., Inc.*, 744 F.2d 686, 691 (9th Cir., 1984). This statement seems strangely at odds with prior rulings and may signal an inclination to change the direction of the law. For the time being, the only basis for directly attacking a perfected inventory lender's senior lien is to question its good faith. The case of *In re American Food Purveyors*, 17 UCC Rep. 436 (N.D. Ga. 1976) considered the lender's knowledge of impending bankruptcy to be inadequate policing of collateral and reached a result favorable to the reclaiming seller. It is not clear that the result is commercially reasonable or fully supportable as a matter of law. As a matter of practicality, the burden of proof and cost of litigation on the point of good faith are substantial, and the potential result speculative.

There remains one practical solution in the circumstances. Assume seller

ships \$4,000 worth of goods on February 6, 1988 and they are received February 9, 1988 and that buyer files in bankruptcy reorganization under Chapter 11 on February 10, 1988. Further assume the terms of shipment were "Net 30" and a UCC 2-702/§546(c) letter timely issue. What precludes a Chapter 11 debtor from paying such a creditor in the ordinary course of business? There hasn't been a case decided yet entirely in point; obviously an inventory-lender with an agreed cash collateral order will be reluctant to release funds post-filing when it stands to have its collateral base enhanced. But, query, whether either the lender or debtor can selectively pay creditors for post-filing obligations as they come due. The future for the reclaiming seller in bankruptcy is not bright without corrective legislative action. □

Zachary Mosner practices law at Gordon, Thomas, Honeywell, et al. in Seattle with emphasis on creditor representation in bankruptcy, commercial litigation, and foreclosure.

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ALERT:

Changes In Enforcing Judgment Procedures

by Marjorie Rombauer

The Enforcement of Judgments Act adopted by the legislature, HB 927, becomes effective at 12:01 a. m., July 26, 1987.

The act revises and reorganizes most of RCW Title 6, including the full chapters covering homesteads, personal property exemptions, executions, stays, adverse claims, sales, and redemptions. The attachment and garnishment chapters are also revised and reorganized and moved into the new RCW title covering enforcement of judgments.

The primary purpose of the revision was to eliminate unconstitutional provisions, inconsistencies, duplications, serious gaps in coverage, and ambiguous or archaic language. Substantive changes that appeared to be noncontroversial were also incorporated when they appeared to be needed (for example, provision for a 60-day continuing lien on wages rather than 30 days), and by a Senate amendment the homestead exemption was increased from \$25,000 to \$30,000.

Major procedural changes result from provisions designed to overcome constitutional objections to procedures for pre-judgment and post-judgment garnishment, attachment, adverse claims, and district court execution procedures (governed under the new act by the same provisions that apply to executions out of superior courts). Most forms related to enforcement procedures will have to be revised, including Notice of Sale of Real Property, Notice of Expiration of Redemption Period, Writ of Garnishment, and An-

swer of Garnishee (both regular and continuing-lien wage garnishments).

The form for the Writ of Garnishment, which appears in section 1010 of the act, will be a source of confusion because it itemizes a \$50 attorney's fee and costs that had been specified in the bill in the preceding section 1009. By Senate amendment, however, the express provision for recovery of the \$50 attorney's fee and costs was deleted from section 1009, and ambiguous language that appears in the existing RCW 7.33.090 was restored (providing for withholding of, in addition to the amount claimed due, the greater of \$50 or 10 percent of the amount claimed). The same amendment left ambiguous cross references in §§1020 and 1025 of the act to "costs and attorney's fees as prescribed in RCW 7.33.090 [§1009]."

Post-judgment garnishment provisions require notice to individual judgment debtors of common exemption rights. The notice must be accompanied by a prescribed claim form that covers the most basic exemptions. Providing the required notice is not made jurisdictional, but no disbursement order can be entered unless a required return of service on, or affidavit of mailing to, the judgment debtor is on file.

A judgment debtor has 28 days from the date of a writ of garnishment to file an exemption claim. A judgment creditor who disputes a claim must arrange for a hearing on the objection not later than 14 days after receipt of the claim and must notify the judgment debtor of the date and time. If there is no objection, funds or other property claimed exempt must be released within 10 days after receipt of the claim.

Wage exemptions are restated for

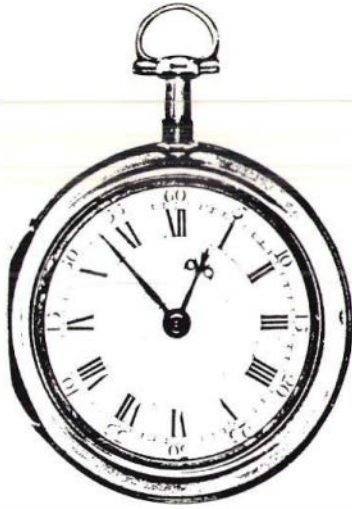
simplification and to conform to federal exemption requirements (which removes the existing provision for no exemption against certain child support garnishments, allowing a 50 percent exemption against child support garnishments in most cases or 40 percent if the judgment debtor is not supporting another child or spouse).

The bill was drafted with a November 1 effective date, but the earlier effective date was substituted because of developments in a class action in the federal district court in Tacoma in which substantial doubt was cast on existing post-judgment garnishment procedures, doubt that was removed by the draft bill.

Drafting of the bill was a two-year project of the Executive Committee of the Creditor-Debtor Law Section of the WSBA. In addition to members of the committees, more than 50 persons — attorneys and enforcement personnel — reviewed and commented on drafts of the bill. The bill was sponsored by the Washington State Bar Association. It was introduced in the House by Representative Seth Armstrong, Chairman of the House Judiciary Committee.

The Creditor-Debtor Law Section will present a CLE seminar covering the new act at the state bar convention in Vancouver, B.C., on Friday afternoon, September 11, 1987, from 2-5 p. m.

Attorneys may obtain a general summary of the major substantive changes and affected forms keyed to sections of the act by sending a self-addressed, stamped (39¢) envelope to Professor Marjorie D. Rombauer, Law School JB-20, University of Washington, Seattle, Washington 98195. □



Billing By The Hour Should Be Banned

by Jeffrey L. Tolman

The public believes that attorneys take simple situations and complicate them beyond recognition. In one area, at least, lawyers have done the reverse. They have taken a complex process—billing—and simplified it to the point where only one factor—time—is considered.

Billing solely by the hour is a symptom of our failing and falling professionalism. Instead of negotiating an agreeable fee with our clients, as true professionals would, we attorneys have become servants to time.

The inherent problems in billing by the hour make the practice unfair and undesirable.

1. Billing by the hour puts the client's and the attorney's interest in direct conflict. The client wants his or her matter resolved as quickly, smoothly, and as inexpensively as possible. The lawyer, on the other hand, gets paid more the longer the matter carries on.

2. There is no relationship between the task and the bill for that task. A phone call or letter that produces no effect is nonetheless billed out at the amount of time it took or at a minimum charge (often .2 of an hour). For unproductive tasks, the client receives no benefit; the attorney does.

3. The client has no input into how the attorney's time is spent on the file. Certainly no client would encourage his or her attorney to spend time "reviewing the file," for

example. Each of us know attorneys who bill a file to death. Allowing the person who benefits from dotting the i's and crossing the t's to bill at will, regardless of the impact, is like throwing Br'er Rabbit into the briar patch.

Attorneys may feel that it is inappropriate for me to question the ethics (or time records) of my fellow professionals. Perhaps a few questions will clarify my concern and bring this issue home for more of us.

Would you be agitated if you received a bill from your physician for \$40 for reviewing your records?

Would you without complaining pay \$15 per letter for your physician to correspond with all of your former health care providers to ensure that your physician has your complete health information?

How would you feel about paying for all the time it took the physician to review these records to make sure that he or she was up to date on your health history?

Most attorneys would be furious, I think.

A Modest Proposal

What do I propose? Washington attorneys are governed by the eight criteria of RPC 1.5 in setting a fee. The criteria to be considered are:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. The likelihood, as apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3. The fee customarily charged in the locality for similar legal services;

4. The amount involved and the result obtained;

5. The time limitations imposed by the client or by the circumstances;

6. The nature and length of the professional relationship with the client;

7. The experience, reputation and ability of the lawyer or lawyers performing the services; and

8. Whether the fee is fixed or contingent.

In only one criterion is "time" mentioned. Yet the criteria, when taken together, describe and prescribe a fee that, based on all of the facts, is fair to both the client and attorney.

Billing Professionalism

To have a fair fee should be the basic goal of billing, whether the final bill reflects a fee of \$10 per hour or \$250 per hour. Fairness, although a simple concept, is diluted by the obsession by lawyers and judges with "time spent" and "the hourly rate." It is simple to bill by the hour, and it certainly makes sense, at first blush. The simplicity of the process does not compensate for its inherent inequities, though.

Professionals should be willing to negotiate fees with clients based on the criteria of RPC 1.5. Our professional stature is eroded by the inherent unfairness of billing on time alone . . . and this unfairness is not unnoticed by the public. Clients and attorneys should look at *all* of the criteria of RPC 1.5 before setting a fee, not just at the time expended. Our profession will gain credibility and, to some extent, get back in the good graces of the public if we look at fairness first and time expended later.

Billing solely by the hour should be banned. □

Jeffrey L. Tolman practices law in Poulsbo. He writes: "This article was inspired by many judges who [wrongfully] feel that billing by the hour is gospel, and by my friend and law partner, Jay Roof, who has always [and very successfully] billed based on fairness."

ALERT:

The New Immigration Act Poses Problems

by Kate Pflaumer

For Criminal Defense and General Practitioners:

Be aware that *any* criminal conviction may have serious immigration consequences for a client applying for amnesty under the New Immigration Act, The Immigration Control and Reform Act of 1986. Do not wait until the time of a guilty plea to get information or advise your client to see an immigration attorney. It is critical that you and your client evaluate the immigration consequences before entering any kind of guilty plea.

Under the new law, aliens residing in the United States since before January 1, 1982, are eligible for amnesty. A felony conviction or three or more misdemeanors (defined as offenses in the United States for which a client could serve five days to a year) will render an applicant ineligible. Note that this definition of misdemeanor *may* include traffic offenses.

Both aliens seeking legalization under the continuous residence provisions and those seeking to qualify as farmworkers will be ineligible if excludable under the provisions of §212(a) of the Immigration and Nationality Act of 1980 (8 USC § 1182). This would include a crime of moral turpitude (if more than a petty offense) or two crimes of moral turpitude of any level. It would also include any drug offense, though simple possession of less than 30 grams of marijuana may be waived.

It is unclear what effects judicial recommendations against deportation or deferred sentences will have, but the Immigration and Naturalization Service is likely to be restrictive.

For Immigration or General Practitioners:

To qualify for the amnesty provision for aliens continuously present in the United States since before January 1, 1982, applicants must prove their presence. Farmworkers must prove quality of employment. In documenting those claims, be aware that your client may have used multiple names or false social security numbers. Be cautious in evaluating the proof. Admission of the facts of a crime may make your client ineligible for amnesty.

If prior offenses appear to be a bar to amnesty, it is important to explore ways of setting aside the convictions. It may be necessary to attack collaterally those convictions before or contemporaneously with application for legalization.

Kate Pflaumer for the Joint Legal Task Force on Central American Refugees.

For more information, contact LEAP, the Legalization Education Advocacy Program with the Seattle-King County Bar Association at (206) 382-2509 or 1-800-445-5771.

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The Space Needle on your left. Clearly astray.

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It is 1201 Third Avenue by Wright Runstad & Company, circa 1988.

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Yet it was an outsider, The New York Times, that brought up the real significance of this new office tower on the Seattle skyline:

*"Today, Wright Runstad & Company is building a 55-story office tower... as integral to the future of downtown Seattle as the old wood homes were to the past."*⁶

Architects of 1201 Third Avenue: Kohn Pedersen Fox Associates PC, New York, and The McKinley Architects PSC, Seattle. © The New York Times Co. 5/11/86 and 3/16/86.



vs the Seattle skyline.

About the architects of 1201 Third Avenue, Paul Goldberger, New York Times architecture critic, said:

"Among those who have strongly influenced American architecture over the last decade – Robert Venturi, Robert A.M. Stern, Michael Graves, Philip Johnson – none provides a better sense of the temper of the times than does Kohn Pedersen Fox. Its work is the new American mainstream." ©

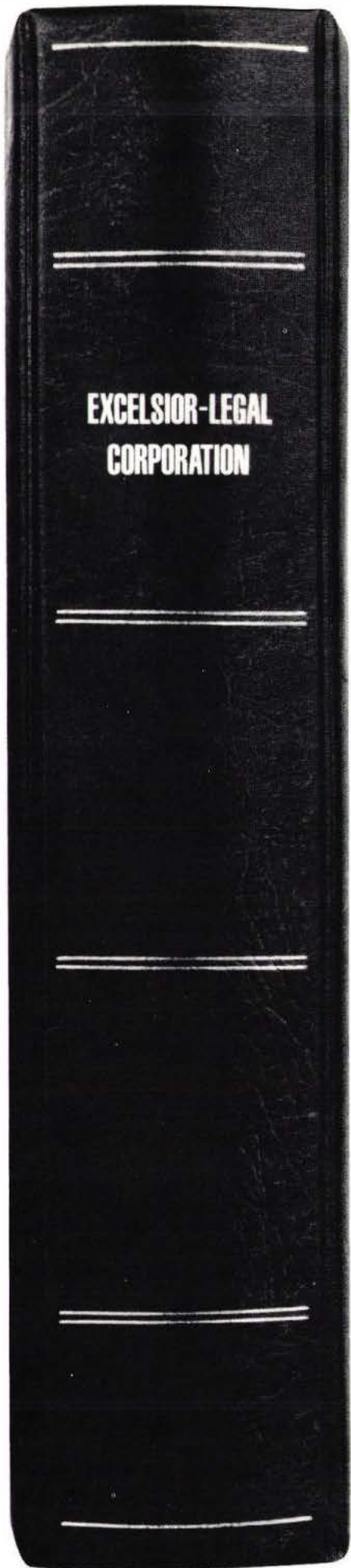
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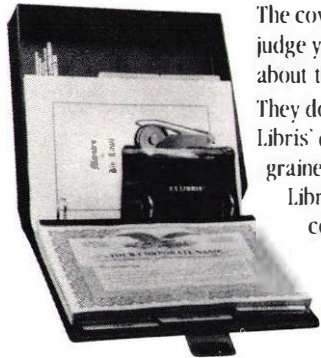
After all, an opportunity like this may not happen again.

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WA

The Board's Work



by Carole Grayson

June 19-20, 1987. Pasco Red Lion

Present: President William Gates and Governors Jay White, Roy Mocerri, Harold Vhugen, Steven Reisler, and Julie Weston, all Seattle; James Vander Stoep, Chehalis; Myron Carlson, Everett; Edward Shea, Pasco; Frank Hayes Johnson, Spokane; Edward Lane, Tacoma.

Also present: Phil Thompson (Ct. of Appeals Judges Assn.); Mary Prevost (Govt. Lawyers Bar Assn.); Matthew Sayre (SKCBA Trustees); Tom Fitzpatrick (WSBA Young Lawyers); John Michalik (WSBA exec. dir.); Donald Means (WSTLA); Katharine Witter (Wa. Women Lawyers); Harold "Pete" Clarke (Superior Ct. Judges Assn.)

BUDGET BLUES? "If we don't go into the reserves this year, we certainly will next year," reported Governor Harold Vhugen of Seattle, who is the WSBA treasurer. There has been no dues increase since 1981, which Vhugen termed "reasonably remarkable." His Budget Committee may recommend a dues increase. The budget will probably be finalized in August.

COURT CONGESTION AND DELAY The Governors voted 9 to 1 to table a motion to authorize an additional \$2,000 for the first Regional Conference on Reducing Trial Court Congestion and Delay. In March, the Governors appropriated \$1,000 for the conference, which is set for October 3 at the Doubletree Inn at Southcenter.

WSBA CREDIT UNION Largely because its field of membership has remained basically unchanged since 1978, Seattle lawyer and WSBA Credit Union president H. Tony Martin asked the Governors to expand its field to include legal messenger services and their employees. Expansion would strengthen loan demand and the union's overall health.

Governor Frank Hayes Johnson of Spokane, a credit union member, said that with only 1,400 out of a potential 25,000 members belonging to it, "There exists a marketing problem."

The Governors unanimously voiced no objection to expanding the field to "the legal family," i.e., legal messengers, service employees, court reporters, etc.

BAR NEWS: STATUS QUO In May, President Gates joined Governors Lane, Ed Shea of Pasco and Vhugen and Roy Mocerri of Seattle in opposing the unanimous recommendation of the Editorial Advisory Board to retain the Bar News' forty-year-old structure of having a so-called independent editor who is a practicing lawyer. The matter was placed on the July agenda due to the 5-5 tie.

Because at least one Governor would be absent in July, President Gates moved the issue to the June agenda. Meanwhile, as Governor Julie Weston of Seattle told the Governors, the Seattle-King County Bar Association trustees and Young Lawyers Section, the Washington Women Lawyers, the Government Lawyers Bar Association [ed. note: and the WSBA Young Lawyers Division] sent resolutions urging the Governors abide by the Editorial Advisory Board recommendation. It is "technically correct," said Governor Frank Hayes Johnson of Spokane, that the matter had been on the July agenda. Governor Mike Carlson of Everett added, "The first notice to lawyers about the matter was in the June Bar News."

When President Gates asked how many Governors would vote to defer, no hands rose. Nonetheless, said Governor Jay White of Seattle, "The subject of notice is critical if we are going to change the structure of the Bar News. But if we are going to affirm the structure, notice is not so important."

Governor Ed Shea of Pasco, who read from a constituent's letter which complained of "little if any notice," disagreed. "You can't have it both ways," he said: either notice is important or it is not important, regardless of the merits.

Governor Weston, who moved for adoption of the Editorial Advisory Board's recommendation, said that she would "very much like to avoid a referendum on the subject. There is a great deal to be said for having a lawyer-editor familiar with the issues" facing practicing lawyers. She noted that the bar associations that had executed resolutions represented "well over half the membership of the Bar."

The Editorial Advisory Board subcommittees have met and implemented the functions outlined

in the EAB handbook, EAB member Ruth Nielsen of Seattle told the Governors. The EAB subcommittees provide "not a solution but a layer of insulation," said WSBA executive director John Michalik. "The only thing you solve with a staff editor is (liability) coverage because a staff editor is a Bar employee." Michalik termed the EAB proposal "very well done."

If the Bar News had an in-house editor, the Editorial Advisory Board would have only a "contact function," said Nielsen, in summing up the written response of EAB chair Duane Swinton of Spokane. There would be "no real critiquing or overseeing or selecting" of the editor. If there were an in-house staff editor, added EAB member Matt Sayre of Seattle, the EAB "would envision the Governors as referees, which I guess is the last thing you'd want." Under the reorganized EAB, said Sayre, the editor will have "necessary support..."

Governor Harold Vhugen of Seattle characterized "some of the correspondence" concerning the Bar News as "intemperate...The issue has become a matter of personalities, which is not justified...There's been far too much heat." The structure, if implemented, would eliminate "some of the problems. I've been persuaded to change my mind not because I feel that there'll be any difference" (if the editor is a staff employee or continues to be independent), but because "I also represent my constituency."

Governor Shea of Pasco also followed the wishes of "more than 50 percent" of his constituency. He said that the EAB is taking "a constructive role."

Nielsen said that it was "very difficult for the EAB to consider the in-house situation in the abstract... we had no concrete proposal" from the Governors.

Only Governor Roy Mocerri of Seattle voted against retaining the present Bar News structure. He termed it "a structural weakness in our organization which has come to the fore today and if it's not dealt with today will come to the fore tomorrow... the EAB's interest will peak." He was "very disturbed by publication of the [Ed] Huneke letter [in the June Bar News] which would not be in the Bar News with a staff editor, and so much the better."

Governor James Vander Stoep of Chehalis, who was absent in May, said he "personally" agreed with Mocerri's synopsis, but abstained. "'Remember Pearl Harbor' was a catchword," he said, as is having an independent Bar News editor, "but I can't conceive that it is hellishly different whether it is independent or in-house...I can't conceive that the WSBA needs protection from the headquarters of the WSBA." To retain the present structure is "a mistake" but he was "willing to give it a try." The matter "should be decided strictly on the merits." Personalities are extraneous considerations."

Governor Frank Hayes Johnson of Spokane said he regretted the intrusion of personalities, and added, "I lack Mocerri's foresight and pessimism." The EAB deserves "an opportunity."

Governor Ed Lane of Tacoma said, "I have independently outside this meeting decided to change my vote." He was "quite satisfied" with the Bar News despite "some minor problems", and he termed it "a fine publication."

Governor White of Seattle said there had been "no debate about personalities."

The vote also approved the EAB subcommittees on production; content and writing; and review and critique. The Bar News editor's handbook and guidelines will be discussed in August.

LOCAL LINE: THE TRI-CITIES John Carroll, president of the Benton-Franklin Counties Bar Association: Pro bono efforts have "just about 100 percent participation, but there is "one dissident," said Carroll. Attorneys have about four pro bono appointments per year--which moved Seattle-King County Bar Association trustee Matt Sayre to note that his bar gives "hero or heroine" status to any lawyer who handles two cases a year.

Carroll recommended that the Lawyers Assistance Program provide local workshops.

"Have people who sponsored CLE programs forgotten that we're here? We do get a few, but they're darn few...We feel somewhat neglected," said Carroll.

PROFESSIONAL
LIABILITY REPORT

Jerry B. Edmonds of
Seattle chairs the
WSBA Professional

Liability and Insurance Committee, which he termed somewhat inactive during the existence of the task force that recommended the creation of a professional liability fund. That recommendation was rejected by the membership by a 4-1 margin. Despite that vote, says Edmonds, the issue of professional liability insurance occupies a "rising prominence in our lives. More than just money is involved. Peer reputation and a degree of pride" are also involved. Edmonds estimated that 1-1/2% to 2-1/2% of a lawyer's gross revenue is devoted to malpractice insurance. "The cost of coverage in a multi-state (captive) is not likely to be a whole lot less than the cost of commercial carriers," said Edmonds.

Edmonds said that insurance data would be more reliable than lawyers' self-reporting. He asked, "Should we go to the insurance commissioner...and ask for more complete disclosure?"

Attorneys need more information on rate filings and about prior act endorsements. The Committee may devise a buyer's guide. He suggested that all CLE courses address malpractice concerns.

REINSTATEMENT PROCEEDING
OF ROBERT L. BUTLER

On Saturday, June
20, the Governors
held a public

hearing on the application of disbarred lawyer Robert L. Butler of Edmonds for reinstatement. Butler stipulated to disbarment in 1981 following his guilty plea to first degree theft. That case involved thefts of over \$7,000 from client funds in a partnership dissolution matter and over \$3,000 from trust in a lien forfeiture matter. Butler was allowed to withdraw his plea of guilty and the case was dismissed after he completed a deferred sentence which required restitution and 400 hours of community service. Butler also indicated that in 1975, he settled the case of Carol Spore for \$10,000, and after his efforts to find her were fruitless, he took the \$10,000 out of trust in 1976. On all the matters, said Butler, "I did intend to repay. It wasn't an easy thing for me to take the funds. I never tried to conceal that I took money out of trust."

Butler told the Governors that he took the funds because of his inability to pay the medical bills incurred by his daughter after she fell off a horse in 1974. Two years later his wife moved out, and he remained the custodial parent.

Butler graduated from the University of Portland in 1949 and the University of Washington Law School in December 1957. He was admitted to the Bar in 1958.

Since disbarment, he has worked primarily on house renovations on weekends for \$5 per hour and has done some construction work. In 1983, his annual income was about \$5,000; in 1984, approximately \$8,000.

Butler didn't know how much his daughter's bills totaled, but he was responsible for 30%. In the late 1970's, he "destroyed" the bills.

Butler's lawyer, Richard M. Barney, Jr., of Federal Way, identified himself as "not just the petitioner's lawyer; I am his friend." He indicated that he had offered Butler a salaried position in his law office in the event of reinstatement. In his closing, Barney characterized Butler as "not a man who needs a baby sitter but a payroll deduction plan..."

Butler acknowledged that he had forged the signature of an attorney on a Notice of Appearance. More than 60 support letters were received on Butler's behalf. "Do you feel that your letter writers would have written of their support if they had had information about these matters?" asked Governor Vander Stoep.

The Governors appeared concerned with Butler's compliance *vel non* with former DRA 6.7 (affidavit to be filed with the Supreme Court that the disciplined lawyer has notified clients of disbarment). "The question of credibility is essential," said President Gates. "Some among us are also concerned about discrepancies in the military record." He ordered that the record be left open for Butler to establish that "his version of service record is the fact."

If financial hardship recurs, said Butler, creditors "can sue me, but I am not going to go into trust funds. I certainly learned the hard way...I lived my first 50 years as a law-abiding citizen and practiced for 20 years as an ethical lawyer. In the last six years, I have lived a life that is morally and ethically right. I

haven't excused my misconduct...This stigma [of the criminal charge], even though it is dismissed, is always there...I am an embarrassment to myself, my family, and my legal colleagues. Nonetheless, I had to be disbarred. I had been convicted of a crime involving moral turpitude."

Special Bar Counsel Shannon Stafford of Seattle made no recommendation although if the Governors recommended reinstatement, he would recommend 50 hours of psychiatric treatment in the first year. Stafford was assisted by his associate, Teena Killian.

The Governors will return a decision on the matter within 60 days.

CORRECTION

A statement on page 14 of the June 1987 *Bar News* in Howard Bell's article, "Attorney Trust Fund Deposits Simplified," suggested that it would be proper to transfer client funds to a firm's general account for subsequent distribution to the client. This is not correct. The trust account rule, RPC 1.14, prohibits placing client trust funds in any account except an identifiable trust account.

NOTICE

The Washington Supreme Court recently passed General Rule 12, which defines the purposes of the Washington State Bar Association (\$A.), lists specific activities authorized (\$B.) and activities not authorized (\$C). To bring WSBA Bylaws into consonance with the new rule, the Governors passed a revision of Article 1 at the June meeting. President Bill Gates will feature the changes in his August *Bar News* "President's Corner," and the full text of the revised article will be published in September.



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The Most Difficult Question

by Michael D. Kraft

Whenever I mention to any non-lawyer that my practice includes criminal defense, I always get asked the same question. I know that it is not just me, because everyone who does criminal defense work reports the same thing.

The question is: "How can you defend someone who you know is guilty?"

To non-lawyers, this is the single most difficult ethical question which can be posed to a lawyer. They don't understand how anyone could want to see violent men set free to continue to do harm to society. Often I get the impression that the person has been waiting a long time to have the opportunity to ask that question to a real live attorney.

Of course, I always try the standard response, discussing everyone's right to representation, and painting criminal defense as the cornerstone of a free society. Sometimes I actually make the person understand, and

occasionally I even make sense. Also, I explain, most of the guilty people I see end up with a plea bargain. So the question rarely has reached the stage of practical reality in my practice.

Recently, however, I have realized that there is a much more difficult question which may be posed. While it is easily understood by lay persons, none would ever think to ask it. In fact, it represents a much more shocking concept than the question they are asking.

The more difficult question is: "How can you allow someone to plead guilty who you know is innocent?"

Anyone with a criminal defense practice knows the situation. The client is clearly innocent, yet the evidence against him is quite damaging. The cost of trial is high, and the results are akin to flipping a coin. The other option presented to the client is a tempting plea bargain offered by the prosecutor with such inducements as a minimal fine, reduced charges, and (for misdemeanors) a deferred sentence.

The client doesn't qualify for a pub-

lic defender, but he must dip into savings or borrow from relatives in order to pay your fees if he goes to trial. He is presented with a clear economic choice. Either he can pay the high cost of trial and take his turn at the roulette wheel of justice, or he can plead guilty, take the slap on his wrist, and pay a greatly reduced attorney's fee. In simple terms, it costs him less for you to accept a small punishment than to insist on his innocence.

The law itself recognizes the potential of this happening. The *Alford* plea is specifically designed to be a guilty plea from a person who believes himself innocent, but who wants to take advantage of a safe plea bargain instead of a risky trial.

Of course, prosecuting attorneys won't necessarily agree with this analysis. They mostly prefer to believe that the problem lies with the gullible defense attorneys who believe that story the defendant is telling. They might not see any difficulty with asking an innocent person to plead guilty because, in their view, this very rarely happens. Anyone who is truly innocent would naturally insist on "proving" his innocence and would throw himself on the mercy of the jury (and the lawyer's billing computer).

To be fair, prosecutors do dismiss a case now and then when they also come to believe the defendant is innocent. And I'll admit that clients don't always tell me the full story. But the fact remains that every now and then a person who truly is innocent finds himself pleading guilty to a crime he didn't commit simply to untangle himself from the system as cheaply as possible.

That's why I think that the most difficult question for any attorney is not how to deal with freeing the guilty, but rather, how to sleep at night after helping to convict the innocent. □

Michael D. Kraft is a solo attorney in Lynnwood who has not lost his ideals or belief in justice in the rough and tumble practice of law.

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

If you deal with business law or represent corporations on a regular or occasional basis, consider attending a seminar in July! *Bankruptcy Pitfalls in Business Transactions: Prevention and First Aid* will be presented in Seattle on July 10 at the Westin Hotel. This full-day program will focus on issues that arise when a solvent enterprise must deal with a financially troubled business. The faculty will address practical topics such as "Landlord/Tenant: What a Bankruptcy Filing Can Do To Your 'Airtight' Lease" and "Lenders: Is Your Security As 'Perfect' As It Could Be?" For further information about this program, please contact Lita Spratt at the Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599 or telephone (206) 448-0433.

The Corporate Counsel Institute: Counseling the Corporation in a High-Tech World will be of interest to all who serve as, or work with, corporate counsel. The Institute will be presented in Seattle at the Westin Hotel on July 23 and 24. The featured guest speaker following the Friday luncheon is **Harrison H. Schmitt**, former astronaut, who will present comments entitled "Issues of the Future in Technology." Schmitt served as a United States Senator for New Mexico from 1976 to 1982 and is presently a private consultant in such fields as technology, space bio-medicine, and public policies.



Harrison H. Schmitt

Program chairs **F.E. Dorkin** (Director, Legal Services, Boeing Electronics Company, Seattle) and **Pamela R. Myers** (Rainier National Bank, Seattle), have assembled a distinguished faculty for the Corporate Counsel Institute. Speakers include: **Christopher R. Clegg** (Perkins Coie, Seattle), **Peter Day** (Division Chief Counsel, Boeing Computer Services Company, Seattle), **Laverne L. Dotson**

(Touche Ross & Co., Seattle), **Carol A. Emory** (Perkins Coie, Portland), **Richard P. Fox** (Ernst & Whinney, Seattle), **Gary Garrett, Ph.D.** (Cobb Consulting Group, Bellevue), **Francis J. Gaudette** (Chief Financial Officer and Vice President of Finance & Administration, Microsoft Corporation, Redmond), **Michael B. Goldenkranz** (Assistant General Counsel, Blue Cross of Washington and Alaska, Seattle),

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N. Michael Grove (Vice President and General Counsel, Bell Communications Research, Inc., Livingston, New Jersey), Richard L. Hames (Davis Wright & Jones, Seattle), Barry S. James (Lockheed Shipbuilding, Seattle), Arthur G. Kroos, III (International Counsel, Beaverton), Arthur J. Levine (Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, D.C.), Kevin C. McMahon (Jones, Grey & Bayley, P.S., Seattle), H. Donald Nelson (Patent Attorney, Boeing Aerospace Company, Seattle), Ralph H. Palumbo (Heller Ehrman White & McAuliffe, Seattle), Bruce M. Pym (Graham & Dunn, Seattle), Parker Sroufe (Chief Executive Officer and Chairman of the Board, ESCA Corporation, Bellevue), and James B. Wilson (Senior Assistant Attorney General, University of Washington, Seattle). For further information about this program, please contact Debbie Kirchhauser, Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599 or telephone (206) 448-0433.

The Red Flag Seminars for 1987 are titled *1987 Legislative Alert*. Program Chair Kristal Wiitala Knutson (Office of Hearings, Department of Social and Health Services, Olympia) has recruited a faculty that will address selected areas of legislation of importance to Washington practitioners. Speakers include: The Hon. Seth Armstrong (Chair, House Judiciary Committee, State House of Representatives; Armstrong, Alsdorf, Bradbury & Maier, Seattle), the Hon. Phil Talmadge (Chair, Senate Judiciary Committee; Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, Seattle), Clifford A. Webster (Carney, Stephenson, Badley, Smith, Mueller & Spellman, Seattle), Daniel J. Radin (Assistant Attorney General, Seattle), James W. Sherry (Office of Support Enforcement, Olympia), the Hon. Marlin Appelwick (Chair, Ways and Means Subcommittee on Revenue, State House of Representatives; Appelwick, Trickey, Shuiter & Spicer, Seattle), Kimberley D. Prochnau (Evergreen Legal Services, Seattle), Leslie Goldstein (Office

of the Code Reviser, Olympia), Robert Naon (House Democratic Caucus, Olympia), and Gail L. Toraason (Attorney at Law, Olympia).

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Amicus Curiae On Appeal

by Mark H. Adams
Commissioner, Division Two

What is the proper scope of amicus curiae participation on appeal? This question, which various authorities have answered differently over the years, is answered in Washington by Rules of Appellate Procedure (RAP) Title 10.

As background, a useful discussion of the traditional general principles of amicus participation can be found in *Alexander v. Hall*, 64 F.R.D. 152 (D. S., 1974). Amicus curiae is, of course, a Latin phrase meaning "friend of the court," as originally distinguished from an advocate before the court. Amicus curiae briefs have been known in English common law since the 14th century. *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 208 (1978).

An amicus curiae is not a party to the litigation and, therefore, does not necessarily represent the views or interest of either party. An amicus tra-

ditionally serves only for the court's benefit by, for example, assisting the court in cases of general public interest; by making suggestions to the court; by "providing supplementary assistance to existing counsel"; or by assuring a "complete and plenary presentation of difficult issues." *Alexander v. Hall*, 64 F.R.D. at 155 (1974) (citations omitted).

In modern practice, both the court rule and case law recognize that an amicus curiae need not be merely a disinterested bystander, but may be a person or organization who is interested in the outcome. RAP 10.6(b); *Young Americans for Freedom v. Gorton*, 91 Wn.2d at 208. As stated in the drafters' official Comment to the text of RAP 10.6:

Providing access to the appellate court by those persons or groups who will be significantly affected by the outcome of the issues on review can materially assist the court in the decision-making process. Social order and

confidence in the judicial system are promoted when interested persons have the opportunity to receive a fair hearing.

Washington Appellate Practice Handbook, p. 30-56 (WSBA, 1984 Supp.). An appellate court will occasionally solicit an amicus brief from an informed source.

RAP Title 10 governs amicus curiae participation in Washington state appellate courts. RAP 10.6(a) provides that a person who wishes to file an amicus curiae brief may obtain permission by motion brought before oral argument on the merits of the appeal. The appellate court will grant permission only if all parties consent or if the proposed brief of amicus would assist the court. Such a motion may be filed only by an attorney authorized to practice in Washington or by an attorney associated from another state. Regular motion practice applies. See RAP Title 17. The court has broad discretion to decide whether or not to allow partici-



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pation by an amicus curiae. *Alexander v. Hall*, *supra*; *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982); *Linker v. Custom-Bilt Machinery, Inc.*, 594 F. Supp. 894 (E.D. Pa. 1984). See *Young Americans for Freedom v. Gorton*, *supra*.

RAP 10.6(b) explains what a motion by an amicus applicant must contain. The motion must include a statement of the applicant's interest and the identity of any group being represented, the applicant's familiarity with the issues on review and with the parties' arguments, the specific issues that the amicus curiae brief proposes to address, and the applicant's reason for believing that an additional brief is necessary on the specific issues. The proposed amicus brief may be tendered with the motion.

The rules also address the form and timing of an amicus curiae brief, assuming that the court grants permission. The form of the brief should conform generally with RAP 10.3(a), but need not contain assignments of error. RAP 10.3(e). It should be limited to "issues of concern to amicus," "avoid

repetition of matters in other briefs," and avoid making any arguments that were not made in the trial court. RAP 10.3(e), 2.5(a). The brief may be filed whenever the appellate court specifies; because an amicus curiae is supposed to be aware of the parties' arguments on the issues, ordinarily the amicus brief should be filed after those of the parties, or at least no earlier than that of the party whose position amicus generally supports. See RAP 10.2(f), 10.6(b). An amicus brief should not exceed 30 pages, double spaced. RAP 10.4(b). The court is likely to enforce this rule strictly.

Any party to the appeal may file a brief in answer to the amicus brief, but limited solely to "new matters" raised by amicus. RAP 10.1(e), 10.2(g), 10.3(f). Parenthetically, however, the indication in the rules that an amicus brief can raise "new matters" is difficult to square with those cases holding that the court may refuse to consider arguments raised only by amici curiae and not by the parties. *E.g.*, *Coburn v. Seda*, 101 Wn.2d 270, 279 (1984); *Washington State Bar Assn. v. Great Western*

Federal Savings, 91 Wn.2d 48, 60 (1978); *Knetsch v. United States*, 364 U.S. 361, 81 S. Ct. 132, 137 (1960). Counsel should not be surprised if the court finds it expedient to cite those cases when it does not want to decide an issue argued only by amicus.

The amicus should not just arrive in court on the oral argument date expecting to argue orally, but must make prior arrangements. Many, if not most, amici curiae do not make oral argument. However, an amicus curiae may argue orally if a party shares argument time or if the court grants additional time upon application. RAP 11.2(b).

An amicus curiae can make a positive contribution to appellate review by responsible presentation of specific issues as they relate to the entire appeal and by following the procedural requirements. The courts welcome rational briefing by an informed person or group, but may reject a shrill or exaggerated brief that generates more heat than light.



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Growing Up with the Constitution

by **Rosemary Adang**

Teaching Today's Constitution, a curriculum designed for grades 7-12 by Today's Constitution and You, a Bicentennial project of Metrocenter YMCA and sponsored by the WSBA and other groups, asks students to examine the Constitution and face crucial questions such as: Who should have the power to declare war? What are the issues behind the Nuclear Waste Initiative? What exactly is freedom of speech, the right to privacy, due process? What should be done when one person's rights conflict with another's or the government's?

Hundreds of Washington teachers, as a result of statewide teacher training programs, are prepared to teach with this curriculum, taking an approach which recognizes the serious responsibility of preparing our youth to govern our society, whether as private voting citizens or public officials.

In 1983, with the 200th anniversary of the Constitution just four years away, Today's Constitution and You began developing this curriculum and other educational programs. Since then, Today's Constitution and You has designed over 20 public educational programs on the U.S. Constitution.

The Mock Trial Competitions at the regional, state, and national level have been completed. Regional competitions resulted in the selection of eight teams for the statewide competition held at the King County Courthouse on May 2, 1987. High school teams from Belfair, Bellevue, Kirkland, Seattle, Spokane, Tacoma, Vancouver, and Yakima participated. Presiding "judges" included attorneys **John Bell, Anne Bremner, Jeanette Dalton, Katherine Flack, Michael Lambo, Allen Shabino**, and Commissioner **Jack Richey**. Scorers and Courtroom Coordinators included attorneys **Stephen Bernheim, M. Wayne Blair, Cheryl Bleakney, Karl Boettner, Bill Butigan, Larry Custer, Scott Ellerby, Tracy Faust, Kay Frank, Cliff Freed, Stephen Garvey, Gwendolyn Howard, Frank Lehmann, Al Lyon, Scott O'Toole, Aaron Owada, Michelle Pailthorp, David Reeve, Heather Houston Reeve, Steven Reisler, Susan Samuelson, Hal Sheets, David Spellman, Robin Webb,**

and **Rick Wilson**. Chief Justice **Vernon Pearson** presided over the final round — an exciting case argued by Gonzaga Preparatory School (the winner) and Franklin High School.

Gonzaga Prep went on to represent Washington state in the national competition in Washington, D.C.

On June 6-7, the Museum of Flight and Today's Constitution and You sponsored a "Junior Space Colony Constitution Writing Camp." Fourth, fifth, and sixth graders throughout Washington have been studying the U.S. Constitution through a set of lesson plans called "Constitutional Connections" in preparation for this event. Classes were chosen to attend the Space Colony Camp as delegates from separate space colonies. The aim of the assembly? A bill of rights for the galaxy — an ambitious but perfectly realistic goal for these young scholars.

June 15-17, Gonzaga University and Today's Constitution and You presented the second Space Colony Constitution Writing Camp for high schoolers. Students from across the nation participated in this chance to frame a constitution for a society of the future.

In August, with funding from the National Commission on the Bicentennial of the U.S. Constitution, Today's Constitution and You will present "Integrating the Constitution III," a teacher's institute for middle-level teachers from throughout Washington. Thirty teachers have been selected to attend this three-day workshop, which follows in the successful footsteps of "Integrating the Constitution I & II," institutes for elementary and middle school teachers.

Thanks to the occasion of the 200th anniversary of the signing of the U.S. Constitution, Washington state can look forward to a more knowledgeable and effective citizenry. Continuation of these efforts through 1987 and into the years after this initial burst of activity is the next goal. Won't you join us in this effort? For more information, contact Today's Constitution and You, Metrocenter YMCA, 909 Fourth Ave., Seattle, Washington 98104, (206) 382-5013.

Rosemary Adang, Community Programs Coordinator for Today's Constitution and You, is a writer and community organizer for Metrocenter YMCA.

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Notes From the Academy

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

Civil Procedure. State sued to recover salary overpayments to state employees. Complaint requested that court order overpayments be deducted from employees' future paychecks. Trial court found that overpayments had been made but held it had no authority to order deductions from paychecks and further held state would have to bring new actions to obtain simple money judgments against employees. On appeal employees argue that, because of lack of notice, they would be denied due process if state were allowed to amend complaint on trial to seek simple money judgments when complaint had sought deductions from paychecks. Held, trial court erred in refusing money judgments. Defendant employees had notice adequate to satisfy requirements of due process because complaint notified them of amounts claimed and of their obligation to return overpayments. *State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (2/5/87).

— K. B. Tegland
(former member, U. of W. law faculty)

Creditor-Debtor law. (Case 1.) Mechanic's and materialman's lien claimants who had recorded notices of lien against property that thereafter became property of Chapter 11 bankruptcy estate lost their liens when they took no action before end of eight months after recording lien notices. State statute that requires commencement of foreclosure of such lien within eight months, RCW 60.04.100, is statute of duration, not statute of limitation that is tolled by Section 108(c) of Bankruptcy Code. In dictum, court said that only way such lien claimants can preserve benefit of recorded liens after bankruptcy filing is to obtain relief from automatic stay and to commence foreclosure within the eight-month period. *In re Hunters Run Limited Partnership*, 70 B.R. 297 (W.D. Wash. 1987).

(Case 2.) Stock appreciation rights (SARs) granted to executive — judg-

ment debtor — as compensation were not "property" subject to execution under RCW 6.04.060. SARs were purely personal to judgment debtor and in no way bound employer until exercised by judgment debtor. Because options were not property subject to execution, order in proceedings supplemental to execution, under RCW 6.32.080, could not be used to force exercise of options by judgment debtor. Assuming options were subject to execution, there is no statutory mechanism to reach them. Court chose to decide case although it was moot (judgment debtor had retired and allowed options to expire) because similar SARs had been granted to a number of executives. On substantive issue, dissenter reasoned that SARs were essentially wages and were "property" subject to execution. Dissenter argued that Washington Supreme Court has broadly construed what constitutes "property" under RCW 6.04.060; and RCW 6.04.020 (providing for execution by commanding obedience to special order of court) provides mechanism to reach benefits of the option. *Safeco Ins. Co. v. Skeen*, 47 Wn. App. 196, 734 P.2d 41 (3/18/87).

— M.D. Rombauer

Evidence. Plaintiff, injured when his motorcycle struck curb adjacent to freeway, recovered damages against state for negligent design. Trial court refused to admit state's evidence that plaintiff regularly drank in taverns on Saturdays, same day of week accident occurred. Held, affirmed. Official comment to ER 406 defines "habit" as "one's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic." Court added that, "Caution is essential in dealing with habit evidence because it verges on inadmissible evidence of character." *Norris v. State*, 46 Wn. App. 822, 733 P.2d 231 (2/18/87).

— K. B. Tegland
(former member, U. of W. law faculty)



EAST KING COUNTY REPORT

by DOUGLAS W. HARRIS

By the time this column gets printed the 1987 EKCBA Annual Spring Function will be history. However, since it doesn't take place until next week I won't be able to tell you about it until next month. I'm sure everyone had a good time. The next social event of the season will be the annual EKCBA Golf Tournament in August. **Chris Frost** has volunteered to organize the event again this year so he won't feel guilty about winning all of the best prizes. **Jack Allen** promises to press forward with his campaign for "no low gross."

On the office scene, Oseran, Hahn, Kelley, Spring & Maimon, P.S. announced that **Douglas K. Robertson** has associated with the firm, which has relocated its offices to 850 Skyline Tower in Bellevue. Their phone number remains the same at (206) 455-3900. Also, **Joseph L. Lawrence**, **Ralph W. Moldauer** and **Cassandra L. Marshall** have formed the partnership of Lawrence, Moldauer & Marshall located at 1710 Koll Center, 500-108th Avenue N.E., Bellevue. Their phone is (206) 451-8301.

Well, if you don't have your EKCBA Directory by now, it may already be out of date. The unforeseeable delays continue, but the directory should be delivered and extra copies available for a nominal charge. The Board of Trustees has also been pushing a fairly successful membership drive over the past few months. In April, a membership invitation letter went out to approximately 684 attorneys on the East Side who are not or were not EKCBA members. That is a lot of attorneys. As of May 1, 1987, we had 55 responses. There is a growing need for participation of East Side attorneys and I encourage you all to get involved.

GOVERNMENTAL LAWYERS

by MARY C. BARRETT

Governmental Lawyers Bar Association is pleased to announce its 1987-1988 officers: **Frank Edmundson**, president; **Mary C. Barrett**, first vice president; **Jerry Westby**, second vice presi-

dent; **Melody Bankers**, secretary; and **Robert Fallis**, treasurer.

In addition, **Mary Prevost** was elected State Bar Liaison; **Helen Hanigan** was re-elected as membership committee chairperson; **Mary Jo Diaz** and **Nancy Krier** are the co-chairs for the CLE committee, and **Michael Weier** is the new chairman for program and social activities committee.

On May 27, the GLBA hosted a "meet the candidates for the District 3 Board of Governors." On June 24, GLBA hosted Chief Justice **Vernon Pearson**, and the July 29 program will be announced. We will also present the ever popular Legislative Update CLE in late July or early August.

Regular luncheon meetings are held on the last Wednesday of each month. The next time you are in the area, plan on dropping in. For more information, contact Mary at (206) 459-6558.

SKAGIT COUNTY

The firm of Welts and Welts, founded in 1914, has merged with the firm of Haberly and Paxton. The firm now includes **David Welts**, **John Murphy**, **Kent Haberly**, and **Brian Paxton**. **Alfred McBee** will continue as counsel to the firm, the same position he has served with Haberly and Paxton.

STEVENS COUNTY REPORT

by Chris A. Montgomery

With the retirement of Superior Court Clerk **Blanche Goodfellow** in early 1986, the door was open for individuals seeking this position to make their bid. The fall of 1986 saw the election of **Patricia A. Chester** as our new Superior Court Clerk, replacing interim Superior Court Clerk **Larrie Waterman**. **Judy L. Americk** filled the newly created Superior Court Administrator position when the Superior Court Judges eliminated court reporters and opted for tape recording of all hearings and trials. Some question the wisdom of the new system, but the judges are happy with the recordings and problems have been minimal.

One of our former Bar Association presidents, **Pamela K. Madsen**, once suggested that future seminar topics and speakers could include: Judge **Larry M. Kristianson** on "Judicial Verbal Economy in the 1980s"; **Stephen R. Blake** on "Tips and Tactics on How to Stall Litigation"; **Andrew C. Braff** on "Dynamic Closing Arguments"; **Lewis B. Arnold** on the "Domestic Violence Act"; **Dan B. Johnson** on "How to Earn a Million Dollars Without Even Trying"; **John G. "Jerry" Wetle** on "Decision Making";

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and W. Michael Clark (now deceased) on "Tenants Rights Under the Landlord/Tenant Act."

Law Week, 1987 was kicked off with a Mayoral Proclamation marking the 30th annual nationwide observance of Law Day. The mayors from every incorporated city in Stevens County joined together with various elected officials from Stevens County and the Stevens County Bar Association to call upon all citizens, schools, businesses, clubs and the news media to commemorate the role of law in our lives by participating in "Dial-a-Lawyer" which was aired on KCVL 1270 AM Radio May 5, 1987 and "Law School for Non-Lawyers," a program to be sponsored through the Colville Community College, Fall Term 1987.

This year Dannette F. Watson, Robert E. Simeone, and Dan B. Johnson were panel attorneys for the "Dial-a-Lawyer" program. During a one-hour "Sound Off" program, they answered general questions concerning the law by calling participants to the program. During the program it

was announced as part of our "Law Week" activities that the Stevens County Bar Association was making the Citizen Rights Series Pamphlets available at the main counter of the Superior Court Clerk's office at no charge. Superior Court Clerk, Patricia A. Chester, agreed to allow the bar association to place a display rack on the counter. Immediately following the "Dial-a-Lawyer" program, there was considerable citizen inquiry at the Clerk's office for these pamphlets. The program was well received by the community.

We will be sponsoring our first "Law School for Non-Lawyers" this fall at the local community college. This course is well on its way to becoming a reality thanks to the help of Richard M. Wilson, Yakima; Gerald F. Miller, Vancouver; Timothy J. Carlson, Yakima; Jeffrey L. Tolman, Poulso; and the Young Lawyers Network. Promised support from the Washington State Bar Association, Colville Community College, the Superior Court Clerk and local attorneys are instrumental in the anticipated success of the program.

DISCIPLINE

Resignation with Discipline Pending

Tacoma attorney Anton J. Miller (admitted 1969) has been permitted to resign from the Bar Association with discipline pending. The Board of Governors accepted his resignation effective May 15, 1987.

Censured

Seattle attorney Kenneth M. Brown Jr. (admitted 1968) has been ordered censured by the Disciplinary Board, following a disciplinary hearing, for failing to cooperate with the Association's investigation of two complaints.

Censured and Reprimanded

Seattle attorney Stanley R. Byrd (admitted 1967) has been ordered to receive three letters of censure and one reprimand. The reprimand and two of the censures arose from his representation of a marriage dissolution client. As found by the hearing officer, Byrd used a power of attorney executed by his client to place a deed of trust on a home owned by the client and his mother without notice to the client. This conduct resulted in Byrd's first censure. Later, without his client's permission or authority, Byrd again used the power of attorney to execute two \$15,000 promissory notes in his own favor. He also executed and recorded two deeds of trust on the home, which was to be awarded to the wife under the terms of a settlement agreement. This conduct resulted in a reprimand. During the pendency of the dissolution, at the client's request, Byrd also prepared an undated agreement affecting the title to real property owned by the client and his mother. After the agreement was signed and notarized, it reflected a date predating the date of the filing of the dissolution. Byrd provided a copy of the falsely dated document to opposing counsel in response to an interrogatory regarding the client's ownership interest in real property. This conduct resulted in a second censure.

Byrd was also ordered censured for failing to give notice of a motion for default to a party who appeared by

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counsel in custody modification proceedings, but whose counsel had withdrawn prior to the motion.

Suspended

Tacoma attorney **F. Curtis Hilton** (admitted 1958) was ordered suspended from the practice of law for 30 days by order of the Supreme Court effective May 15, 1987. This action was taken pursuant to a stipulation that Hilton failed to file an Answer on behalf of his lawyer-client in the lawyer's disciplinary proceeding, failed to take any action on behalf of his client after being advised of the hearing officer's decision, failed to advise his client of the entry of an Order of Disbarment, and failed to advise his client of his abandonment of the case. In addition, Hilton will be on probation for two years following his reinstatement to active practice.

IN MEMORIAM

Frederick M. Crollard Jr., died April 29, 1987 in Wenatchee at the age of 70. Valedictorian at Wenatchee H.S., he received his bachelor's degree from University of Notre Dame in 1938 and finished first in his law school class at Notre Dame in 1941. After serving in the Army during World War II, he opened a law practice in Chelan in 1947. A few years later, he went into practice with his father, who was a pioneer resident of the Wenatchee Valley. After his father's death in 1968, Crollard Jr. continued to practice in Wenatchee. His brother, **Homer**, is a lawyer in Yakima.

James B. Sanchez died in Bremerton of complications from diabetes on March 28, 1987 at the age of 65. The Bremerton native spent his childhood in Wyoming, eventually returning to Bremerton. He received a B. S. in 1943 and J. D. in 1948 from the University of Washington. He headed the Kitsap County Bar Association from 1953 to 1954 and had also served as a WSBA Bar Examiner and as local area counsel for disciplinary matters.

Gary B. Wiggs died March 15, 1987 in Seattle at the age of 38 from Acquired Immune Deficiency Syndrome. A native of Miles City, Montana, he was graduated from Washington State University and the University of Ore-

gon Law School. Appointed a state industrial appeals judge for the Board of Industrial Insurance Appeals in 1978, he was named chairman of that Board by Gov. Gardner in 1985. He acted as counsel in a case in which the Washington Supreme Court established a juvenile's right to education during confinement. Remembrances to the Seattle Art Museum's photography collection or the Seattle Opera Association.

1987 Corporate Law Department Directory

The last Corporate Law Department Directory was published in 1982. The Corporate Law Department Section intends to publish a new one, which will list all section members and in-house counsel throughout the state. We need your assistance in providing information to make the directory as useful as possible. If you are in-house

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counsel or a section member, please provide the following information for yourself and other company attorneys or section members you are aware of: Name, position/title, company/firm name, address and telephone number. Write or phone Dorothy Richardson, PACCAR, Inc at P.O. Box 1518, Bellevue, WA 98009; (206) 455-6562.

STATE LAW LIBRARY Recent Acquisitions

Listed are some new titles available for loan by calling (206) 753-6525, or by mailing your request to: Washington State Law Library, Temple of Justice, AV-02, Olympia, WA 98504-0502. A bi-monthly *Selected Recent Acquisi-*

tions list, generally containing 150-250 new titles, is also available. Copies may be obtained by sending your request to the Washington State Law Library.

ATTORNEYS

Attorney fees. Materials for a Continuing Legal Education Seminar. Seattle, WA: University of Washington School of Law, 1987. Pp. 100.

Newberg, Herbert B. *Attorney fee awards.* Colorado Springs, CO: Shepard's/McGraw-Hill, Inc., 1986. Pp. 500.

COMPUTERS

Bakke, Gary L. *Microcomputers in a law office.* 2d ed. Eau Claire, WI: Professional Education Systems, Inc., 1986. Pp. 106.

CONSUMER PROTECTION

Alperin, Howard J. and Roland F. Chase. *Consumer law: sales practices and credit regulation.* St. Paul, MN: West Publishing Co., 1986. 2 vol.

Pridgen, Dee. *Consumer protection and the law.* New York, NY: Clark Boardman Company, Ltd., 1986. 1 vol. (loose-leaf)

LABOR LAW

Washington litigating wrongful discharge, age and sex discrimination cases. Eau Claire, WI: Professional Education Systems, Inc., 1986. Pp. 229.

LAW OFFICE MANAGEMENT

The art of managing your support staff: the legal employer's guide to recruiting, training and utilizing support staff. Chicago, IL: Section of Economics of Law Practice, American Bar Association, 1986. Pp. 360.

LEGAL RESEARCH AND WRITING

Computer-assisted legal research. Materials for a Continuing Legal Education Seminar. Seattle, WA: University of Washington School of Law, 1987. Pp. 125.

STATE AND LOCAL GOVERNMENT

Peck, Cornelius J. *State and municipal tort liability and section 1983.* Seattle, WA: University of Washington School of Law, 1986. Pp. 124.

TORTS

Kakalik, James S. and Nicholas M. Pace. *Costs and compensation paid in tort litigation.* Santa Monica, CA: Rand Corporation, The Institute for Civil Justice, 1986. Pp. 157.



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The Grays Harbor County Bar Association's 29th annual salmon fishing derby reaches new depths off Westport on August 11, 1987. The derby is lim-

ited to members of the Bar. For information about accommodations, the awards banquet (which includes heavy hors d'oeuvres rather than a sit down dinner), and the new breakfast location, contact Curtis M. Janhunen, Chairman, at P.O. Box 1806, Aberdeen, WA 98250, or call (206) 533-1600 or 532-1960. \$80.00 covers the charter fee, bait, breakfast, lunch, hors d'oeuvres, cocktails, etc. Salmon license is \$1.25. Boat rental is \$5.00. The motel is \$15.00.

Software Contract Forms Available

The Software Licensing Practices Committee of the ABA's Section on Science and Technology has published a collection of software contract forms. The 1,081-page bound collection includes 88 forms. The forms are not endorsed or approved by the Committee or the ABA. The collection, called "Software Contract Forms-1987 Collection", is available for \$77.50, which includes postage and handling, from ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611.

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New WSBA Pamphlet

The State Bar's award-winning Citizen Rights pamphlets have a new addition: "What You Should Know about Prepaid and Group Legal Services". As many as 50 million people may be enrolled in some type of legal service plan by 1990, according to one consumer clearinghouse. An estimated

12 million Americans were subscribers in 1986.

The pamphlet uses a question and answer format to explain terms, features and regulations involved in the plans. The pamphlet also summarizes different types of coverage, methods of administration plans, advantages and disadvantages of various plans, and typical costs. Consumers are provided tips

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on selecting a plan.

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Plan Ahead

The University of Puget Sound School of Law is devoting the Spring 1988 issue of the Law Review to a symposium on drug testing entitled *Mandatory Drug Testing: Balancing Rights in the Workplace*.

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The symposium will address the legal, practical, and philosophical implications of drug testing in the workplace. A few of the specific issues to be addressed include the role of the federal constitution, accuracy of drug tests, and employee's causes of action.

Concurrent with publication in the spring issue of the UPS Law Review, selected papers will be presented by their authors at an oral symposium scheduled for March 25 and 26, 1988.

Interim Suspension

Tacoma attorney Samuel J. Allotta (admitted 1966) was suspended from the practice of law pending the outcome of disciplinary proceedings, by order of the Supreme Court entered May 21, 1987 and effective immediately.

WVLA

Washington Volunteer Lawyers for the Arts is a Non-Profit organization, located in Seattle, that provides free legal services to artists and arts-related groups with art-related problems. WVLA was formed ten years ago by faculty at UPS Law School, and is affiliated with other VLA groups throughout the U.S. To date WVLA has been funded exclusively by the Arts Commissions, referral fees, and contributions.

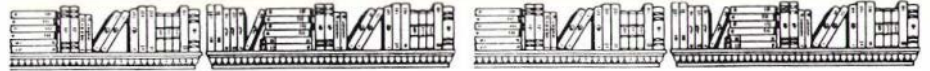
WVLA is a Pro-Bono organization that serves artists throughout Washington state. The referral service's job is to match the client with an attorney who has a background and interest in the art practiced by the artist in need. The result is well-focused legal care for each individual artist/client. Panel attorneys are generally art aficionados, and many, but by no means all, orient at least a portion of their practice around some faction of art law.

To qualify for free assistance, the artist must net less than \$10,000 per year. WVLA has found that the majority of applicants meet this criteria. A profile applicant makes \$4,000-\$5,000 and is a dedicated writer, performer, or graphic artist who devotes full time to promot-

ing his or her craft. Many who are helped have grown into successful Northwest notables ... Reilly and Maloney, the Empty Space Theatre, and Strong Wind Wild Horses come to mind. Often the early relationships blossom into permanent, fee-paying relationships.

The demand for WVLA's services has grown substantially. Typical problems which seem a crisis for the artist may often be summarily dispatched through a short meeting or 'phone conversation. Assistance is often needed in the areas of copyright, contract or the attainment of NPO status; however, there is a growing need for property and tax lawyers.

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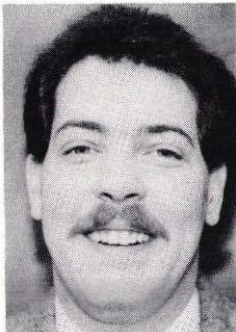
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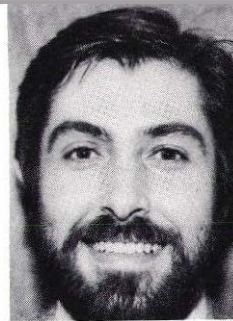
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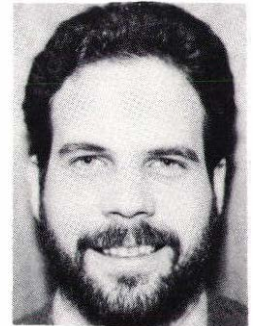
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Spotlight

At the suggestion of Bellingham lawyer, Peter H. Arkison, the Bar News is inaugurating a new feature called "Spotlight". As Arkison has written, "I would like to suggest the Bar News periodically take time out to honor the various attorneys that spend substantial amounts of time performing volunteer services for the Bar... I think that recognition like this is in keeping with the efforts of President Gates to get lawyers to project a positive image of the legal profession. If lawyers like Marjorie Rombauer, the first spotlighted lawyer, are allowed to labor without receiving any recognition from the Bar, how can the public ever hope to know about them?"

Marjorie Rombauer, a professor at the University of Washington, has

spent substantial time during the past two years collecting all of the statutes in Washington related to the enforcement of judgments as part of a project undertaken by the WSBA Creditor-Debtor Section. After obtaining input from numerous attorneys, she prepared the rewritten statutes for presentation to the legislature; these were adopted.

Although she and a handful of other attorneys know how much work went into this project, she has labored in anonymity. Although most attorneys will benefit from her work, almost no one will ever know that she was primarily responsible. It is attorneys like her who make such a meaningful contribution to the Bar and the public; however, it is the few who are "glory hounds" or who go astray who get all of the attention from the media.

Submitted by Peter Arkison,
Bellingham

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Attorney jobs — National and Federal Legal Employment Report: highly regarded monthly detailed listing of hundreds of attorney and law-related jobs with U.S. Government, other public/private employers in Washington, D.C., throughout U.S., and abroad. \$30 — 3 months; \$50 — 6 months. Federal Reports, 1010 Vermont Ave., N.W., #408-WB, Washington, D.C. 20005. (202) 393-3311. Visa/MC.

Wanted: attorneys interested in subrogation referrals. Please reply to Box

136, WSBA, or call 1-800-237-3405.

Spokane one-lawyer office needs associate to take over practice. Salary plus percentage of profits. Call for details at (509) 325-4552.

Environmental compliance. Northwest distributor of chemical and petroleum products seeks an individual to act as both environmental compliance manager and corporate legal counsel. Position reports to the Vice President of Finance at Portland corporate headquarters. Interacts with regulatory agencies regarding transport, handling, labeling and reporting requirements. Provides general legal assistance.

Ideal candidate will have both a law degree and one to two years' increasingly responsible environmental experience with RCRA, CERCLA, TOSCA, OSHA and DOT regulations and compliance, as well as state and local environmental regulations. Background in chemistry/engineering is desirable.

Interested candidates send resumé, which must include salary history and salary requirements, to Box 143, WSBA.

Yakima insurance defense trial firm, av rated, invites resúmes from new graduates or up to three years' experience. Confidential. Box 146, WSBA.

Federal Trade Commission seeks

one or more experienced attorneys. Public interest or trade regulation background preferred. Send resúmes only to Federal Trade Commission, 915 2nd Ave., Suite 2806, Seattle, WA 98174.

Major Seattle firm seeks associate for business practice; two to three years' experience; excellent academic credentials. Prefer Washington State Bar member. Send resumé to Box 145, WSBA.

Short & Cressman seeks: (1) experienced estate planning attorney to oversee established practice, including supervision of associates and paralegals; (2) tax attorney for tax and business planning department. Advanced degree required. Replies will be treated with full confidentiality. Send resúmes to Kenneth Myer, 30th Floor, First Interstate Center, 999 Third Avenue, Seattle, WA 98104.

Wanted: attorney, U.S. Department of Labor, Seattle Office. Litigation Experience Required. Salary \$22,458 - \$27,172 start. Write: Office of the Solicitor, 8003 Federal Office Building, Seattle, WA 98174.

Shidler McBroom Gates & Lucas seeks to hire a highly qualified Washington attorney with a labor and employment law practice. Please send your resumé and reply to Hiring Coordinator, Shidler McBroom Gates &

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United States Trustee, U.S. Department of Justice, Seattle, Washington. Salary: \$70,500. The Department of Justice, an equal opportunity employer, is seeking an individual for a five-year appointment by the Attorney General, to head the U.S. Trustee's office responsible for the states of Alaska, Idaho and Montana (both exclusive of Yellowstone National Park), Oregon and Washington. The U.S. Trustee is responsible for monitoring the legal and financial aspects of cases filed under chapters 7, 11, 12, and 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the U.S. Attorney's Office for possible prosecution. The successful candidate must possess a law degree and be admitted to the bar; extensive management experience; outstanding academic credentials. Familiarity with bankruptcy law and accounting principles is preferred. A resumé and completed SF-171 must be addressed to Mr. Thomas J. Stanton, Director, Executive Office for U.S. Trustees, U.S. Department of Justice, Room 812-G, HOLC Building, Washington, D.C. 20534, and postmarked by *August 30, 1987*. No phone inquiries. Interviews, at the applicant's expense, will be held in Washington, D.C.

Shidler McBroom Gates & Lucas, a full-service firm, with offices in Seattle and Bellevue, seeks to hire three highly qualified Washington attorneys. One position is available for a civil litigation associate with three to five years' experience. Two positions are available for attorneys with up to two years' experience. Of these associates, one will concentrate in the areas of business and real estate, and the other will handle general civil litigation. Please send your resumé to Hiring Coordinator, Shidler McBroom Gates & Lucas, 3500 First Interstate Center, 999 Third Avenue, Seattle, WA 98104.

Reed McClure Mocerri Thonn & Moriarty seeks associates with two to four years' experience for its business and commercial practice. Business and

corporate experience is required, with some experience in the areas of employee benefit plans and ERISA, bankruptcy, healthcare or securities preferred. Please forward resumé to Mr. R. Thomas Olson, Reed McClure Mocerri Thonn & Moriarty, 3600 Columbia Center, Seattle, WA 98104-7081. The confidentiality of resúmes will be respected at the applicant's request.

Small, but rapidly growing, Snohomish County firm seeking experienced litigation lawyer with top academic credentials. Client contact required and community involvement expected. Send confidential resumé to: Box 142, WSBA.

Attorney position: Seeking attorney with five to seven years' litigation experience to handle tort defense work. Strong trial skills required. Send resumé to: Recruitment, 212 Maple Park, KG-11, Olympia, WA 98504.

Trial attorney — two years' experience preferred. Salary negotiable — depending upon experience. Send resumé to 1535 Tacoma Ave. So., Tacoma, WA 98402, Attn: C.H. Herrmann.

Mid-sized Seattle law firm seeks associates for two positions: a litigator with strong general litigation background, demonstrated analytical and writing skills and interest in medical malpractice, personal injury or commercial matters; and a business attorney with substantial experience in labor, real estate, securities or tax law and an interest in general business transactions.

Applicants should have two to four years' experience and excellent academic credentials. All inquiries in confidence. Reply to Recruiting Coordinator, P.O. Box 21846, Seattle, WA 98111.

Medium-sized downtown Seattle law firm seeks attorney with one to two years' experience in civil litigation. Please reply to Box 141, WSBA.

Attorney wanted: Established Snohomish County law firm seeks energetic young attorney with two to three years' general practice to assume management of branch office in Monroe WA; salary and profit sharing, management and practice support; excellent opportunity in an established and growing community. Please send resumé to Box 140, WSBA.

Attorney: Hyatt Legal Services, the nation's largest law firm and pioneer in the delivery of prepaid legal services to families and individuals across America, is seeking a highly talented and motivated attorney with experience in general practice. A wide range of practice and almost unlimited growth potential is available. Excellent salary and benefits. An opportunity to become a part of the most successful legal service team in history. Reply in confidence to Sharon Camacho, Esq., Regional Partner, Hyatt Legal Services, Dept. WAS5, 1525 4th Avenue, Suite 610, Seattle, WA 98101.

SEEKS ASSOCIATION

Tacoma law firm seeking to expand and add partners. Firm is interested in discussing merger possibility with small, one-to-three-person firm or individuals with established client base. Please reply to Box 139, WSBA. All replies confidential.

WILL SEARCH

Seeking will of Ralph M. Johnson, former retired employee of Lone Star Cement. Contact Julie Dickens, Attorney, 3005 One Union Square, Seattle, WA 98101. (206) 583-0155.

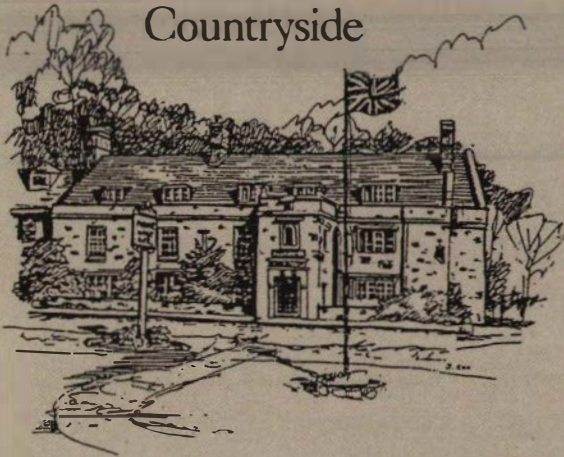
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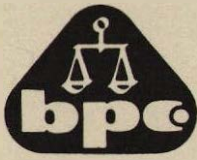
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