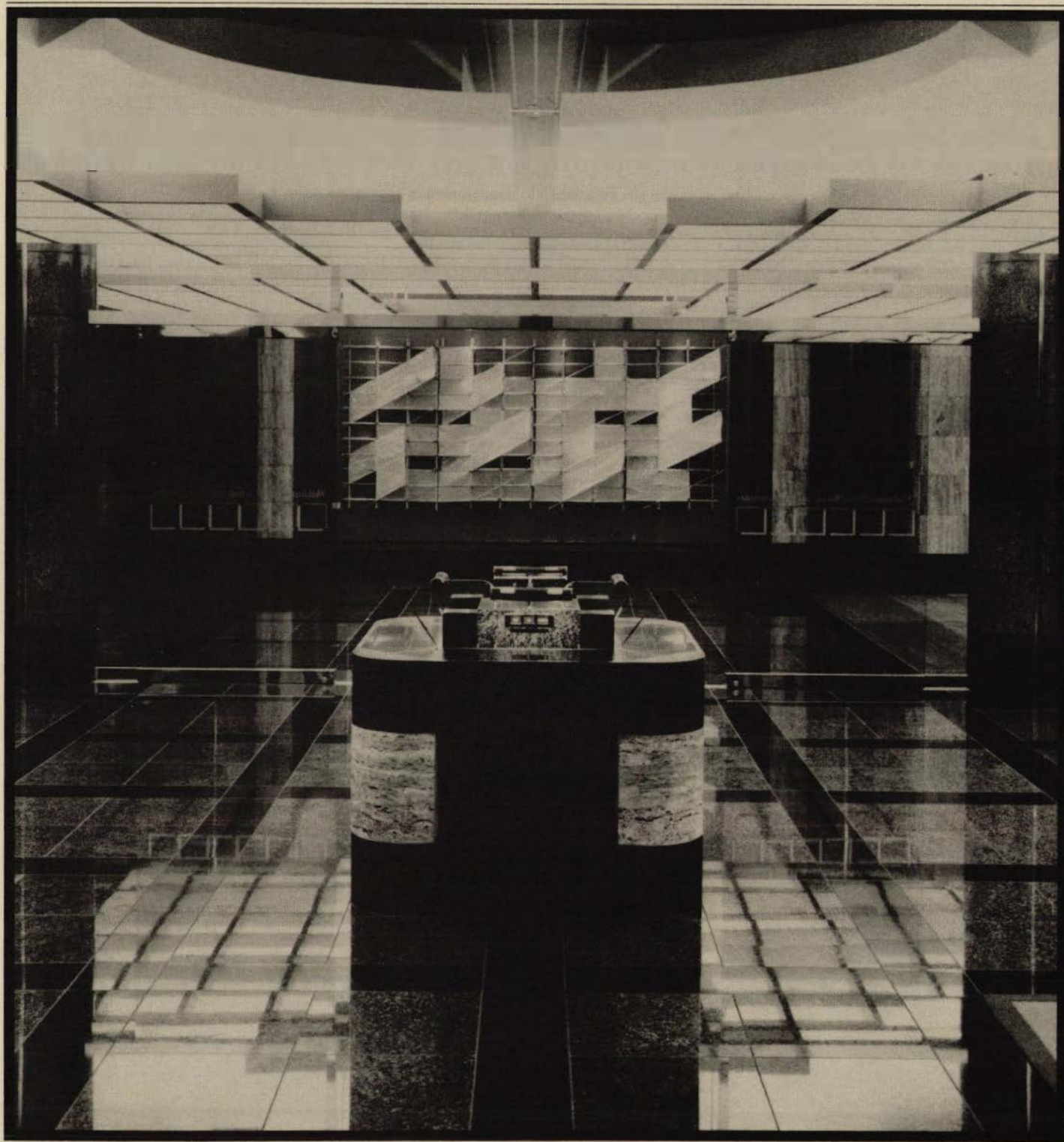
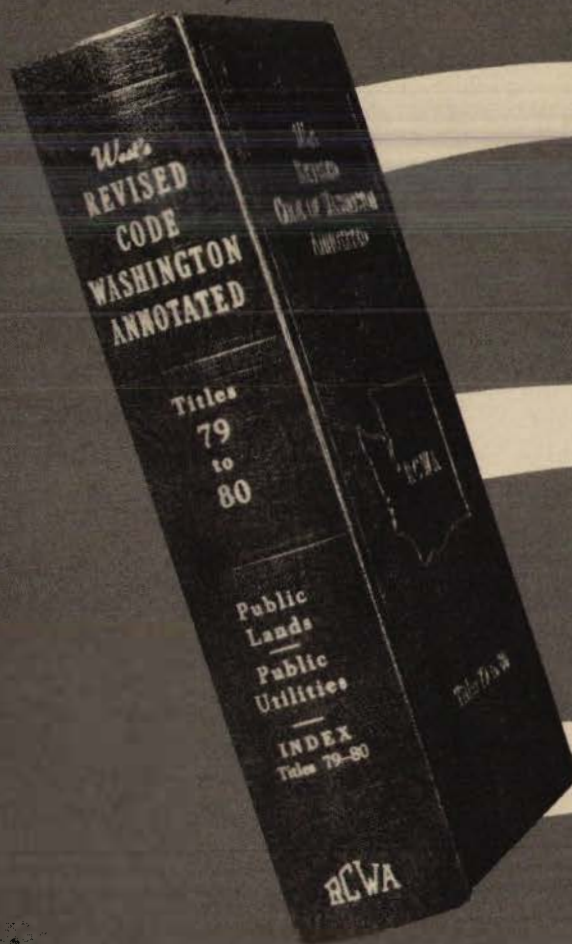


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FEATURES

**INVESTING IN YOUR CLIENT'S BUSINESS** 15  
by Dale B. Ramerman

**NEW PROTECTIONS FOR CORPORATE DIRECTORS** 25  
by James E. Dunlap

**THE NEW BANKRUPTCY CODE CHAPTER 12: FRIEND OF THE FAMILY FARMER?** 29  
by George E. Frasier

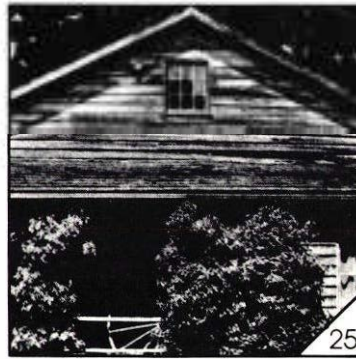
IN THE NEWS

**In the LAP** 11

**Building Professionalism Vancouver 1987** 17

**1987 WSBA Convention CLE Seminar Schedule** 19

**Supremes – Last Day** 35



DEPARTMENTS

- 4 Letters
- 7 The President's Corner
- 9 The Corner Office
- 13 Editor's Page
- 23 The Board's Work
- 34 LRE Update
- 36 CLE Clearinghouse
- 37 Caselaw Capsules
- 38 Around the State
- 43 Briefly Noted
- 43 Discipline
- 44 Notices

ART CREDITS

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*Letters to the Editor of reasonable length are invited. Such letters should be typed and signed. The Editor reserves the right to select communications or excerpts therefrom for publication, and to edit any letter as may be appropriate.*

## Compulsory Missionaries?

Editor:

I have had it up to here with lectures on legal ethics and economics from lawyers who live off \$250-per-hour corporate clients and have reception rooms bigger than my entire law firm.

The suggestion of compulsory pro bono is the latest instance of high-society arrogance and ignorance. Maybe some silk stocking lawyers feel guilt and a necessity to atone for their legal lifestyles. However, those of us in the trenches, who deal every day with the legal problems of the common people who are seldom seen above the snowline at the Columbia Center, do not feel compelled to participate in a ritual of "take an Indian to lunch" chic.

I would guess that the average Washington lawyer gives away at least one half-hour every day in legal services to

people of the middle class or below. How often does a first-time caller get twenty minutes of advice, never to be billed, which helps him to deal with his problem? How many hours are conscientiously not billed, or are billed with little expectation of payment, because of the client's economic situation? Is there one of us who does not always have at least one time-draining file which we opened against our economic better judgment because we sympathized with the client's plight and felt that he deserved representation? Is it not a form of pro bono to furnish legal services to common people for less than one-half of the fees charged by the lawyers with the guilty consciences?

The people who cook up schemes like compulsory pro bono over lunch at the Rainier Club are out of touch with the realities of the practice, and they obviously have enough time on their hands to make them dangerous to the rest of us. Perhaps a compulsory six-month missionary experience in the suburbs every five years deserves consideration.

**NELSON CHRISTENSEN**  
Seattle

cronesia, a group of small equatorial coral and volcanic islands under the trusteeship and administration of the United States Government. I was the managing attorney of the local legal services office, providing civil and criminal representation to Island residents. Within the Palauan Archipelago, at least three distinct languages, plus several dialects, are spoken in addition to English and Japanese.

All court proceedings and official records are in English, although not everyone understands the language. The court clerk/bailiff serves as the official interpreter. Everything I learned about interrogation techniques, developing rapport with a witness, and the like went out the window when a translator was involved. I would ask a question; it would be translated into Palauan and then, if required, into the appropriate local dialect or language. The witness would answer in his/her native dialect or language in what seemed like paragraphs. The reverse translation process usually resulted in a one- or two-word response in English.

At times, there were discussions—sometimes arguments—among the opposing counsel, the judge and the interpreter in both English and Palauan, over whether an accurate translation had been given. As I understood neither the translation nor much of the discussion, it was extremely frustrating. Often I was sure the translation was not verbatim ("Yes" and "No" [the usual translation], in Palauan or in any other language, consist of only one or two syllables, far less than the witness spoke). My client, a native speaker, assured me that everything was as it should be. I had to accept that on faith, having no other way to evaluate it.

Future court appearances and client interviews, even when interpreted by my own staff, were equally frustrating. When cases involved issues of local custom—which had the force of law but often made no sense to my western perspective—the assistance of a person who could not only translate words but also interpret custom was invaluable. Gestures had to be translated as well. (Island gestures were different

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## Helping Out

Editor:

I am writing to you to request volunteer attorneys for the American Cancer Society of Washington State. I am ending my one year term as the Legacy and Planned Giving chairman for Washington. The county chairperson would serve in putting on a seminar or two regarding Estate Planning and coordinate any inquiries by the people of the county. If you are interested, please contact Dan Calloway, Washington Division Fund Raising Director at 1-800-562-2109 for further information.

**PHILIP E. FRIBERG**  
Vancouver

## Plea in Paradise?

Editor:

The May 1987 *Bar News* articles on the use of interpreters in court spotlighted an increasingly important and frustrating problem. They reminded me of the frustration and helplessness I felt when I was the person needing the services of a translator.

In 1980-81, I lived in Palau, in Mi-

from western "body languages," as meanings were more universally understood and much less subtle.)

Language and cultural differences make contact with lawyers and the court system an even more frustrating, incomprehensible and frightening thing than it normally is. As attorneys, it is our responsibility to do what we can to ease these concerns. As in most other matters, patience is a virtue. Compassion, understanding, and a competent translator-interpreter also help.

**ALLAN B. AMENT**  
Seattle

### Cruel and Unusual

Editor:

It appears that Judge Evan E. Sperline [April 1987 *Bar News*] does not believe the old adage, "He also serves who sits and waits." Most injured workmen or women would gladly trade places with him, drawing \$5,000 per month while they and their counsel endeavor to get them some sort of meager pittance to keep their injured body and soul together.

Judge Sperline seems to bewail the fact that he cannot play an active role in the trial and intervene at his whims. The famed King County attorney, George Vanderveer, used to cool off an activist judge who insisted on getting into the act by saying, "Your Honor, if you asked that question on behalf of opposing counsel, I object to it. If you're asking that question on my behalf I move to withdraw it."

I can suggest several innovations for Judge Sperline that would help him while away the hours.

First: If the learned judge would listen to the testimony, he might learn a little about medicine, psychiatry, industrial poisons and the multitude of killing methods applied by corporations to their employees. After 37 years at the bar, I am convinced that the jurors often have a far better understanding of the issues than the man or woman in the black robe. And not as many prejudices.

Second: If the learned judge cannot comprehend the medical testimony, which is entirely possible, he should quietly read the briefs submitted by counsel. Or at least peek at them.

As to the alternatives proposed by Judge Sperline, I have appeared before judges that were far worse than a wild dog. And you can't throw His Honor a bone in open court.

On trial by the pound, I have found fat judges to be fairer than skinny judges with pinched mouths. Unless, of course, the fat judge is having an attack of gout or quarreled with his wife that morning. The worst judge of all is the one who used to act as defense attorney for Vestal Virgin Insurance Company and has a pervasive and abiding bias against all plaintiffs.

As to "Graduated Polysyllaballistics," medicine, chemistry, occupational disease, and toxins in the workplace are all becoming more complex as science advances. If the learned judge cannot keep up, leave the matter to the jury.

As to "trial by Fred," the State Salary Commission has proposed raising the salary of judges from \$60,000 to \$68,500 and then to the obscene level of \$74,600. If a similar system would do as well for injured workmen, I'd be satisfied.

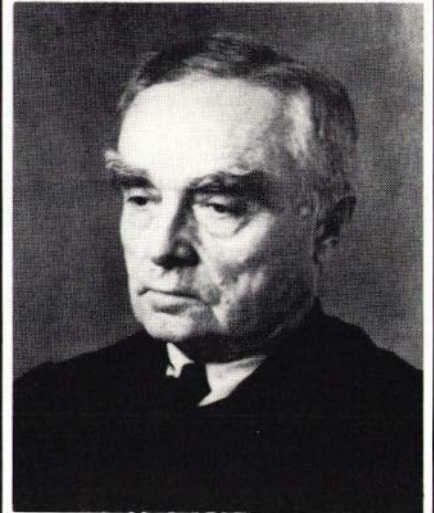
Although Judge Sperline doesn't say so, it's apparent he wants to abolish trial by jury for injured working men and women and thus reduce injury, pain and poverty to a statistic. Perhaps we should set up a system of labor courts where a judge sits with a jury and tries only L&I cases. I'm sure that at \$74,600 per year we would not lack for applicants.

**JAMES E. DUREE**  
Westport

### Did You Know?

GSLSA—Greater Seattle Legal Secretaries Association (an affiliate of the Washington and national associations of legal secretaries) is alive and well and *active* in the Seattle area. Membership benefits include discounts on handbooks and supplements, monthly dinner meetings (gearing up again in September), a monthly bulletin containing legislative and courthouse procedural updates, and discounts on local and statewide seminars. Contact president Jacqi Wolf, (206) 441-4440.

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## Roots

Unlike my prior comments in this column, I am this time reporting to you on a specific event in the life of the Bar which you should know about and understand. What has happened is that on June 10, the Washington Supreme Court adopted a Court Rule setting forth the purposes of the Washington State Bar Association.

Why was such a fundamental subject dealt with after the Bar was 54 years old?

The Board of Governors had two concerns: many unified bars (read "you have to be a member of the bar to practice law") were in litigation about First Amendment rights, and some of our members were raising questions about the appropriateness of the subject matter of some of the resolutions introduced at our annual meetings.

The members' suits were making law for bar associations from California to New Hampshire and many places in between. These suits were based on "negative" First Amendment rights. The argument is: given that I am required by law to belong to the bar, the bar has no business engaging in activities or taking positions for me in matters beyond its proper functions as a bar association. This principle had already been established as constitutionally sound in other cases involving different organizations. Every court which has decided a bar association case has agreed that the principle is applicable. Different results, however, have been reached in different states as the particular court interpreted and applied the language of the court rule or statute by which the particular bar association was created. The rationale is that the member's right to avoid the bar's acting or speaking for him or her, contrary to his wishes or beliefs, is subservient when the bar is carrying out a compelling state interest. Compelling state interest is found by examining the court rule or statute under which the bar is chartered.

In some cases involving lobbying and in several where the bar took a position on some broad political issue, the court held that the founding legislation or rule was too narrow to support such activity.

Any evaluation of the propriety of actions of our Bar under these decisions necessarily lead to an analysis of our charter. This turns out to be somewhat complicated for this Bar.

The State Bar Act, adopted in 1933 as RCW Chapter 2.48, gives the Board of Governors the power in its discretion from time to time to adopt rules concerning six fairly specific subjects, including generally the disbursement of funds, and then, as a catch-all, authorizes adoption of rules "providing for all other matters, whether similar to the foregoing or not, affecting in any way whatsoever, the organization and functioning of the state bar." Furthermore, the Supreme Court of our state has held that the Bar is an instrumentality of the judicial system. In the *Graham*<sup>1</sup> case where this proposition was most recently and most forcefully set forth the Court, citing the State Bar Act, observed: "There are no legislative standards established for the exercise of discretion in the expenditure of funds by the Board of Governors of the Bar. Complete discretion is conferred on the Board on the collection and disbursement of all association funds."

In this setting, your Board of Governors could not, with confidence, determine what the scope of the authority of this bar association may be. We concluded that we should draft a statement of purposes and ask the court to accept it. The result is General Rule 12 (GR 12).

Substantially, this rule sets forth broad purposes and specific activities within these purposes which are intended to include those which have been carried out traditionally and which have been accepted by the membership.

There are two noteworthy features of the Rule. First, it specifically authorizes the Bar to "maintain legislative liaison" (read "lobby"). Second, at



section (c), it specifies actions not authorized as follows:

(1) Taking positions on issues concerning the politics or social positions of foreign nations;

(2) Taking positions on political or social issues which do not relate to or affect the practice of law or the administration of justice;

(3) Supporting or opposing, in an election, candidates for public office.

It is expected that the above limitations would have precluded introduction of some resolutions which have been acted on at annual membership meetings in the past.

We all feel much more comfortable with this clarification.

<sup>1</sup> *State ex nil Graham v. State Bar Association*, 86 Wn.2d 624, 548 P.2d 310.

# RESOLUTION

...To Be Considered at the  
1987 Annual Business Meeting of the  
Washington State Bar Association

## RESOLUTION ON PROPOSED AMENDMENTS TO RULES OF LAWYER DISCIPLINE

### BE IT RESOLVED:

The membership of the Washington State Bar Association disapproves the proposed amendments to Rules of Lawyer Discipline 1.1(j) and 8.7 which provide that lawyers may be required to submit to compulsory assessments of physical or mental impairments.

### SUPPORTING STATEMENT

The WSBA Board of Governors has urged the Washington Supreme Court to adopt disciplinary rules that would require lawyers to submit to mental or physical assessments, upon refusal to do which they would be subject to bar discipline. See "Proposed Amendments to Rules of Lawyer Discipline," 108 Wn. Adv. Sh., No. 5 (June 19, 1987) pp. i-v. The subject of the proposed rules is ill-defined; their scope is over-broad. Whatever rehabilitative purpose might have been intended has been misdirected toward a disciplinary end. The Board has advanced its proposal without documented need, precedent, or evaluation. Yet what is most seriously wrong with the proposed rules is their implicit disregard for the rights to privacy and due process to which lawyers are entitled as citizens. The Board's approval of this extraordinary extension of the bar's disciplinary authority occurred without meaningful notice to or consultation with the membership. Its position should be repudiated.

The over-breadth of the proposed amendments is self-evident. The rules provide that a lawyer may be compelled to submit to an assessment by the WSBA Lawyers' Assistance Program

"[u]pon information that [the] lawyer appears to be suffering from a mental or physical impairment, including but not limited to misuse of drugs or alcohol, which is presently having or is likely to

have a substantial adverse impact on the lawyer's capacity to practice law adequately, ..."

Proposed RLD 8.7(a).

The preface to the Board's proposal states that mental or physical impairments may be discerned from physical illness, mental or emotional disturbance, misused alcohol or drugs, domestic difficulties, financial problems, gambling addiction, and even "the practice of law itself." 108 Wn.2d Adv. Sh., *supra* at i. The rule makes it clear that such impairments need not actually affect a lawyer's practice in order to invite the bar's intervention. The fact is that every lawyer experiences adversity. That fact alone should not be considered sufficient cause for the disciplinary arm of the bar association to require a lawyer to see the WSBA staff psychologist.

Any suggestion that the proposed amendments are necessary to provide rehabilitative services is untenable. The rules do nothing more than establish a mechanism for bar disciplinary authorities to bring gossip and rumor within the scope of their investigations, and to compel lawyers to accept the intervention of the bar association's in-house psychologist. This mechanism is not necessary in order to implement voluntary assistance programs. It does not recognize that a lawyer may prefer to seek private evaluation and treatment. One would expect some explanation why it is necessary to involve the bar's disciplinary authority to provide rehabilitative services to

impaired lawyers, but the Board of Governors has not offered any. No study, precedent, or argument has been offered by the Board in support of its proposed amendments to the rules of lawyer discipline.

What is most seriously wrong with the Board's proposal is its disregard for lawyers' rights to privacy and due process. The Board has proposed a procedure whereby a lawyer can be compelled to submit to a mental or physical examination upon the basis of information from undisclosed informants, whose communications are absolutely privileged. Proposed RLD 8.7(b), 12.11(b), 108 Wn.2d Adv. Sh., *supra* at iii and iv. The Board's proposal does not assure lawyers a hearing, a meaningful opportunity to present witnesses, or an appeal. Yet upon the basis of such procedurally untested allegations about broadly defined mental or physical impairments, a lawyer may be disciplined for refusing to disclose the most intimate details of his or her life to a psychologist, not of the lawyer's own choosing, who is on the payroll of the Washington State Bar Association.

Lawyers would not tolerate such treatment of their clients. They ought not to be expected to endure it as a condition of their right to practice law.

*Proponents of the resolution:* Fred Diamondstone, Peter J. Eglick, Richard Jones, Robert Mussehl, Katrin Frank, Karen J. Vanderlaan, Judith Jeffers and Howard K. Todd.



## The Lawyers' Assistance Program — Open For Business

by John J. Michalik

WSBA Executive Director

The purpose and scope of this month's column is clear, simple and important: to introduce to you the Washington State Bar Association's *Lawyers' Assistance Program* (LAP). This program is easily one of the most important Association programs ever. It is designed to provide unique and important services to a segment of our membership which heretofore has had to seek assistance outside of the profession: the "distressed" lawyer — the lawyer suffering from physical illness, mental or emotional disturbance, alcohol or drug addiction or many other types of problems which may impair both the lawyer's practice and his or her life in general. You may not fall into one of the categories of persons the LAP is designed to help; nevertheless, you should be aware of and familiar with this program. Please read this column.

Historically, the State Bar has for many years sponsored and promoted a Committee on Alcoholism designed to provide attorney-to-attorney help with regard to alcohol-related problems. In 1985 the Association's Long Range Planning Task Force recommended that this effort be expanded, diversified and intensified as a major resource and service to the membership. That recommendation was adopted by the Board of Governors, which set up a special task force to develop the details of this effort. When that task force completed nearly a year's worth of intensive effort with a detailed report to the Board of Governors in the summer of 1986 it proposed a program unprecedented in trade and professional association experience: a professionally-staffed yet volunteer-intensive program combining the best of professional assistance and the aid of other practicing lawyers. The report and program were enthusiastically adopted by the Board and, over the course of now almost exactly a year, careful and deliberate planning and implementation have led to a program which is now ready to serve the needs of the membership.

A wide range of problems can detrimentally influence a lawyer's performance. In addition to physical, mental and emotional illness and disturbance, alcohol and substance abuse, domestic difficulties, financial problems, gambling addiction, and the practice of law itself may impair a lawyer's practice. The Lawyers' Assistance Program has been established to prevent or alleviate those problems before the lawyer's practice and his or her career are permanently shattered and clients and their affairs damaged. The program will provide confidential prevention training, crisis intervention, pretreatment evaluation and counseling, peer counseling, professional counseling or referral, and post-treatment follow-up.

Structurally, the LAP has basic supervision through a permanent, five-member steering committee comprised of active members of the Association—three of whom formed the task force which recommended the basic program to the Board of Governors. The steering committee reports to the president of the State Bar and is directly responsible for advising the staff program director on program development and implementation. Three program staff oversee the administrative and clinical execution of the program: an administrative coordinator, a professionally trained clinician and the program director. The director reports to the steering committee and the Association's Executive Director. In addition to the steering committee, the program director also receives professional guidance and input from an advisory committee consisting of trained professionals in a variety of areas. The advisory committee does not direct the program: its purpose is to assist the director in developing treatment approaches and programs. Another important aspect of the LAP is its volunteer Peer Counseling Panel, whose members will assist, statewide, in evaluating and assisting in the treatment of impaired lawyers. This panel consists of recovering lawyers and other lawyers whose personal lives or professional experiences motivate them to assist impaired lawyers. Members of the panel are supervised by the program director and, prior to becoming active in the LAP, must go through and com-

plete special training sessions specifically developed for impaired lawyer assistance. This peer counseling panel is a tremendous example of lawyers willing to help lawyers in need and is a crucial part of our overall program.

The LAP is designed to accept lawyers from three types of "referrals." One of these involves referrals from the disciplinary system. This portion of the LAP has been operational for approximately one month. A lawyer may be referred to the LAP before or during the investigatory or discipline process. Such a referral is *not* a substitute for discipline where such is appropriate; it is a recognition that oftentimes disciplinary problems involving trust account violations, neglect of client affairs and similar matters have their roots in other difficulties such as alcohol or substance abuse. The goal with these types of referrals is to assist in treating those root causes on a parallel track to the discipline system. A second type of referral involves, importantly, self-referrals: the lawyer voluntarily recognizing his or her problem and seeking professional help. Early identification of impairment obviously increases the likelihood of successful treatment. Self-referrals should become the heart of the LAP. Finally, the LAP is also designed to handle referrals by third persons. This area has been specially structured not only to ensure confidentiality (as in *all* parts of the LAP) but also to provide verification of the referral *without* in any way exposing the subject lawyer to public exposure or comment. The safeguards are numerous, and the verification procedure will always be handled by the professional staff.

Our program director is Dr. G. Andrew H. Benjamin. Andy Benjamin not only is a member of the Bar staff, but he is also a clinical psychologist and a lawyer. His background is varied and exceptional. His commitment to this program is extraordinary. As noted, Andy heads a three-person staff which also includes a trained clinician and an administrative coordinator. In addition to handling referrals, this staff is and will be engaged in the training of peer counselors; the presentation of educational programs for lawyers; the establishing of a referral network across the

state so that persons coming to the program can receive help close to home; the monitoring and continued counseling of persons coming into the program; and a host of other "support" activities. Many of the services in the LAP come without charge—the purpose is to help members of the Bar who are in need. In other cases, and in particular where referral to an outside, specialized agency is deemed advisable, the subject lawyer will be required to pay

the necessary fees and charges of that agency. The overall goal of this program is to provide the important opportunity for those who need this type of help.

As you are all aware, in late November of 1986 the State Bar Association moved to its new headquarters in the Westin Building at Sixth and Virginia in Seattle. A key component of the design of the new headquarters involved setting up the Lawyers' Assistance Program in a discreet location within the

Bar to provide confidential service to those coming to the LAP office while still allowing the LAP staff to draw upon all other headquarters resources and facilities. We believe we have accomplished those goals: LAP is located on the fourth floor of the Westin Building, with its own direct entrance, bypassing the main Bar reception areas. The Program also has its own direct phone number: (206) 448-0605. The goal in the physical facilities as well as in all phases of this program is to ensure confidentiality, ease of access and an unparalleled service to the members of this Association.

My only frustration in writing about the LAP is that I don't have the space to give you a complete picture. That picture will be painted for you in many other ways—for example, the "In The LAP" feature which debuts in this issue of the *Bar News*. We also now have available a complete program description which is yours for the asking. So is the help this program is designed to provide for the members of this Association who are in need and need a place to start. The key to all of that is very simple, and it doesn't take much effort: if you need help, it's (206) 448-0605.



### IOLTA Grant Applications

Applications for the 1988 grant program of the Legal Foundation of Washington are available from the Foundation at 600 Central Building, 810 Third Avenue, Seattle, WA 98104-1612. The Foundation funds programs involving civil legal services for the poor, pro bono and/or private bar representation for the indigent, law-related educational programs for lay persons or law-related educational programs which will have broad positive impact upon the legal foundations of the poor, alternative dispute resolution programs, and emergency situations to assist organizations or community groups with unexpected needs and enable them to continue law-related educational or charitable services.

**A** PPEAL: ● *on direct discretionary review of a denial of summary judgment, the Washington Supreme Court held that the State is not immune from liability for the National Guard's negligence. This was the first case in the nation to decide whether the federal Feres doctrine immunizes state National Guard training activity.*

### Edwards & Barbieri

We are pleased to have helped Douglas Ehlke of Federal Way and Fred Scott of Charleston, S.C., secure this result. *Emsley v. Army National Guard*, 106 Wn.2d 474, 722 P.2d 1299 (1986).

PREPARATION for appeal should start at the trial court level. Proper presentation of a winnable legal argument at the trial court is essential to your case on appeal. We are available for consultation, association or referral in your next case.

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# In the LAP

As you see in this month's *Corner Office*, the Board of Governors has established a comprehensive assessment and counseling program for distressed lawyers, a group which has been the focus of my career as a lawyer and clinical psychologist. Our Bar leadership has created this exciting opportunity to develop a model program which, I believe, *will work* because it is based on confidentiality and supportive interactions.

## The Washington Bar Study

Everyone seems to have an opinion about how lawyers handle—or fail to handle—the rigors of their practice. Yet neither lawyers nor social scientists have acquired much hard data about lawyer distress. We do not know how many lawyers are distressed, what particular forms are prevalent, or how distressed lawyers compare with other lawyers.

To answer these questions, the Lawyers' Assistance Program (LAP) sent the Lawyer Ways of Living and Health Questionnaire (LWLH<sup>®</sup>) to a random 10 percent of Washington lawyers. It included over 300 scaled items: problems with health, social isolation, general distress, marital (partner) discord, alcohol, drugs, anger, and debilitating psychological symptoms (*e.g.*, depression, anxiety, etc.). The items and responses to them will be discussed at length in upcoming reports. Each item came from instruments well validated by social science research. This, combined with the response rate (68%), suggests that the findings generalize reliably to the whole Bar.

An anonymous reviewer of an article published in *The American Bar Foundation Research Journal* (Spring 1986) complained about the results of a similar Arizona law student and lawyer study. She argued that the unexpectedly high number of lawyers who placed high on the psychological measures were not really distressed. Rather, she wrote, many had failed to answer truthfully. However, the reviewer failed to appreciate that the answers were consistent across different scales, a fact which tends to confirm response accuracy. In the Washington study, we addressed the issue of accuracy more directly: we included valid-

ity items drawn from the Minnesota Multiphasic Personality Inventory (MMPI).

## Findings

Only two percent—typical of any normal population—of our returns raised questions of validity. Most of this two percent appeared to be responses that would place the subject in a good light. This may be interpreted not as outright untruthfulness but as a symptom of denial. For some lawyers in our sample, distress is accompanied by a tendency to deny pain and a sense of loss. These lawyers may fear others' noticing their distress, a process which leads to their isolating themselves from others as well as from their own feelings. Unfortunately, their concerns about professional reputation and social embarrassment often prevent them from acknowledging their distress—and from seeking assistance before the distress escalates. Hundreds of Washington lawyers have been through treatment. They serve as clear examples of the ability to recover without social embarrassment or the loss of professional reputation.

No statistics can reflect the terrible toll that results from unacknowledged or untreated distress. The Board of Governors and the Supreme Court have permitted us to deliver our services confidentially to self-referred lawyers or those referred by third parties. We're here to assist you.

## How You Can Assist

Many of you know lawyers whose practices suffer because of personal distress. They have failed to overcome their problems independently. Both peer counseling with other lawyers and professional assistance—choices which our program offers—can prevent the distress from becoming a discipline issue. If the lawyer is not recovering independently, please become involved. Consider the following five intervention steps:

1. Show the distressed lawyer your concern. Let him or her know you care. Intervention is an expression of friendship. It is sometimes rejected, but do offer.
2. Educate the lawyer to the fact that professional treatment and peer counseling work. There are hundreds of lawyers who are recovering and who can attest that life has become more fun and productive . . . and their confidences have been maintained.
3. Study and outline carefully how the lawyer's distress has been manifested while at the practice of law. You cannot just say, "You are depressed all the time" (drink too much, have lost your memory, etc.). The lawyer will cite many instances where he or she has not been afflicted with the particular problem. Be specific: "You missed this filing deadline; you failed to show up in court on Thursday, etc." Deteriorating ability to work effectively is the most important factor leading to identification and treatment of the problem. It is objective and compelling when cited by concerned colleagues.
4. Confront the lawyer with the consequences of allowing the problem to remain untreated: "You're going to lose your job, your spouse, your family; your clients will file disciplinary complaints that will lead to your suspension, disbarment, and public notoriety." If you wish, a counselor from LAP will be present to support the lawyer and you during an intervention. If your initial intervention does not work, keep documenting the impairment of professional practice. Call on us next time; we can make a difference.
5. Remember, LAP can quietly match the lawyer with a counselor. Thanks to our peer counselors, we also know which mental health professionals and programs have worked well for lawyers. □

# WASHINGTON WILLS AND TRUST FORMS

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**Paul M. Larsen** is the chairperson of the Corporation, Business and Banking Law section of the Washington State Bar Association. He is a partner in the Yakima office of Bogle & Gates and has a general business and commercial practice.

The Washington State Bar Association Corporation, Business and Banking Law Section—it may be a mouthful, but it is nevertheless apt. Although the American Bar Association simplified its counterpart's name to the Business Law Section, we have elected to retain the longer name because it more accurately describes the diversity of the section's work.

Some of that diversity is evident in the articles in this *Bar News*, which the section has had the privilege of sponsoring. Section sponsorship essentially means that the section's Publication Committee Chairperson, John Reed, was able to persuade members of the section to write the excellent articles in this issue dealing with various issues within the section's purview and that I am given the opportunity as the guest editor to tell you more about the section.

We have an Executive Committee made up of a chairperson; chairperson elect; vice-chairperson; recorder; immediate past chairperson; two members at large; and the heads of the various section committees. Our executive committee meets four times a year, but the section's real work is done by the committees, all of which have a significant impact upon our daily practice of law within those areas. The committees and their chairpersons are as

## Guest Editorial by Paul M. Larsen



**John A. Reed** is the publications chairperson of the Corporation, Business and Banking Law section of the Washington State Bar Association and was the coordinator of this issue of the *State Bar News*. He is a partner with Davis Wright & Jones in Seattle and has a general corporate and business practice.

follows:

*Corporate Laws*, P. Cameron DeVore; *Financial Institution*, Stanley R. Carlson; *Securities Laws*, Charles J. Katz; *Agricultural Laws*, Robert L. Zagelow; *Uniform Commercial Code*, Robert G. Wallace; *Publications*, John A. Reed; *Non-profit Laws*, Anne M. Redman; *Franchise Laws*, C. Kent Carlson; *Current Development Project*, John M. Steel; *Conflicts of Interest in Business Practice*, Robert H. Douthitt; *RICO*, Kevin C. McMahon; *Partnership and Limited Partnership Law*, William G. Pusch.

All committees meet on a regular basis. They keep abreast of proposed legislation which may affect their work and provide guidance to the Bar Association and legislature regarding new model rules or laws as drafted by their counterpart revision committees of the American Bar Association. The committees are broad-based and attract members with varying views of the intent and effect of legislation upon the practice of law and the citizens of the state of Washington.

With 1,728 lawyers, the Corporation, Business and Banking Law Section is one of the more established and largest sections within the Washington State Bar Association. We take an active role in the continuing legal education of Washington lawyers. The sec-

tion pioneered the three-day mid-year program format now used by many other Bar sections. We annually co-host, with our Oregon and British Columbia counterparts, a securities law institute. We also present a CLE program at the annual meeting of the Washington State Bar Association. There is usually an additional program, or road show, produced by the section in conjunction with the Washington State Bar Association CLE Department, which covers aspects of business law of interest to the general practitioner.

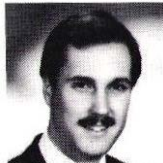
The section's quarterly newsletter discusses changes to the laws, provides practice tips and informs section members about committee activities.

As I said in my opening remarks, the name "Corporation, Business and Banking Law Section" is a mouthful. However, the section does include numerous areas for participation. Most lawyers practice within one of the areas which is directly related to the committee work of the section. If you are one of those lawyers, please think seriously about joining us. If you are already a member, I encourage you to offer your expertise to the committee which addresses an area of interest to you and your clients.

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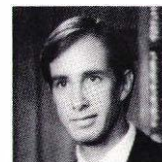
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# Investing In Your Client's Business

by Dale B. Ramerman

A client offers you a great opportunity—property with real potential, stock in a new company, an equity position in a project. Before you say “yes,” consider what might happen if your investment were later challenged. Neither meticulous compliance with the Rules of Professional Conduct nor successful defense of a disciplinary proceeding assures success in a civil suit. If a client challenges a lawyer's investment in the client's business, the lawyer faces a presumption the investment was fraudulent. The lawyer has the burden of proof on every issue, including establishing that no third party would have paid more or offered better terms than the lawyer.

## Playing By The Rules

The two ethical rules most likely to apply when a lawyer invests in a client's business are RPC 1.8(a) (business transactions with a client) and 1.7(b) (conflict of interest). The business investment rule sets conditions the lawyer must meet before investing; the conflict rule deals with the lawyer-investor giving the client legal advice regarding the lawyer's investment and continuing to represent the client after the investment is made.

Rule 1.7(b), in part, provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interest, unless the lawyer reasonably believes the representation will not be adversely affected, and the client consents in writing after consultation and a full disclosure of the material facts.

The threshold for application of this rule—“may be materially limited by the lawyer's own interest”—is very low. When the lawyer considers investing in a client's business, the threshold would be crossed because the interests of the lawyer as investor and the client as seller are adverse. Thus, the lawyer can represent the client only if both of the conditions are met: the client consents in writing after full disclosure, and the lawyer reasonably believes representation will not be adversely affected.

It is the reasonable belief require-

ment that may be impossible to meet. If by definition the investing lawyer and the client have adverse interests, it seems very unlikely it would be objectively reasonable for the lawyer to believe he or she could represent the client in this transaction.

Continued representation after the investment is made is more difficult to analyze. In the case of *In re Martin*, \_\_\_ F.2d \_\_\_ (1st Cir. April 17, 1987), the court held that a security interest in the client's assets given to secure a lawyer's fees did not necessarily create a conflict of interest that under §327(a) of the Bankruptcy Code would prevent subsequent representation of the client in a bankruptcy Chapter 11 proceeding. But if the lawyer invests in stock as a minority shareholder, a different result may follow under RPC 1.7(b). If the client and the lawyer both have an interest in the business, the lawyer must continually ask whether his or her interest as an investor regarding implications of ongoing legal advice may differ from the interests of the client. For example, if a sale of the business to a third party is contemplated, the interests of the client who is a majority owner, guarantor of liabilities, or full time employee of the business, may differ from the interests of a lawyer who is only a minority investor.

Even if the lawyer is not giving the client legal advice relating to the business in which the lawyer is investing, the requirements of Rule 1.8(a) must be satisfied if the lawyer has a lawyer-client relationship for any other purpose and seeks to invest in the client's business. This rule prohibits a lawyer from entering into a business transaction with a client or from knowingly

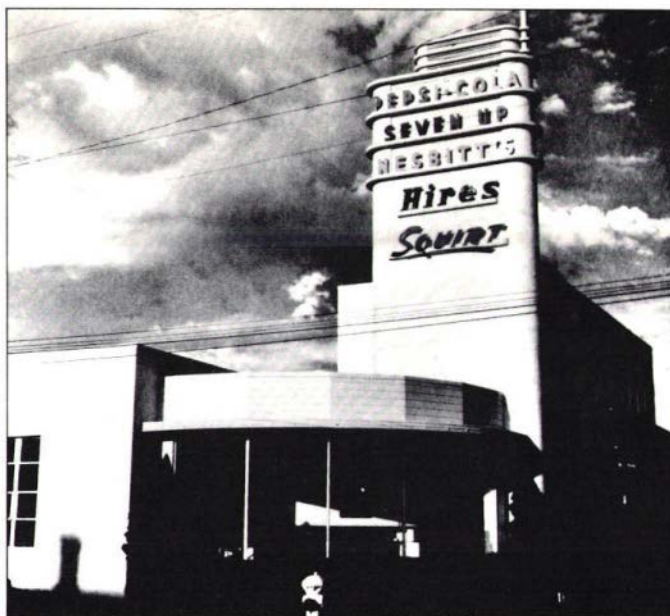
acquiring an ownership, possessory, security or other pecuniary interest adverse to the client unless four prerequisites are met:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client;
- (2) the transactions and terms are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
- (3) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (4) the client consents.

Rule 1.8(a) applies more broadly than to investing in a client's business. It probably also covers, after commencement of the representation of a client, negotiating or renegotiating a fee agreement or taking security to secure a fee obligation. See *Kennedy v. Clausing*, 74 Wn.2d 483 (1968). The ABA Model Rule Comments, which were not adopted by the Washington Supreme Court, do limit 1.8(a) to this extent:

Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

Because of the common sense nature of



The Pepsi Bottling Company, ca. 1935. Photo courtesy University of Washington Press  
(A Guide to Architecture in Washington State by Sally B. Woodbridge and Roger Montgomery, 1980, page 85)

these comments, they are likely to be followed by the Washington Supreme Court should it have occasion to apply Rule 1.8(a) to the transactions discussed in the comment.

If the lawyer acquires stock in the client's company, and that company is involved in litigation, the lawyer will have a proprietary interest in the subject matter of the litigation. Rule 1.8(j) limits such an interest to liens granted by law to secure a lawyer's fees or costs as well as to contingent fee arrangements. The District of Columbia Bar ethics committee has held that a minority ownership of stock in this situation may be proper under the contingent fee provision. *AMA/BNA Lawyers Manual of Professional Conduct*, 3 Current Reports No. 6 at 123.

The predecessor of the Rules of Professional Conduct, the Code of Professional Responsibility, was less stringent. Code provision DR 5-104 applied only if the client expected the lawyer to be giving the client professional advice about the transaction. Rule 1.8, on the other hand, applies to business transactions even if the client is separately represented in the transaction. The Code provision required only consent after full disclosure; it did not require that the transaction and terms be fair and reasonable to the client, that the transaction and terms be transmitted to the client in writing in terms the client can understand, or that the client be given an opportunity to seek the advice of an independent counsel.

When called on to apply DR 5-104, however, our Supreme Court applied standards similar to RPC 1.8(a), which now governs lawyer conduct. These more stringent requirements for disciplinary proceeding also apply in a civil suit by a client challenging a transaction with the lawyer.

### Civil Liability

The problems faced by a lawyer defending a civil suit challenging a business transaction between a lawyer and a client are so great that common sense would suggest a lawyer should never enter into such a transaction. In such a suit there is a presumption the transaction was fraudulent, and the lawyer will have the burden of proof on every issue.

In a disciplinary proceeding, *In re*

*McClothlen*, 99 Wn.2d 515 (1983), the Supreme Court found that a lawyer violated DR 5-104 by purchasing property from the client. In applying DR5-104, the court held that because of the nature of the lawyer-client relationship, a business transaction between a lawyer and a client is prima facie fraudulent. To justify the transaction, the lawyer has the burden of showing that there was no undue influence, that the client was given exactly the same information or advice as would have been given by a disinterested lawyer, and that the client would have received no greater benefit had the client dealt with a stranger.

While *McClothlen* was a disciplinary proceeding, its stringent requirements will almost surely be applied in a civil action by a client. The C.J.S. section cited, which is now found at 7A C.J.S. "Attorney and Client" Section 214, deals with the burden of proof in a civil case, and this section has been cited by our Court in a civil case discussing the lawyer's burden of proof. *In re Peterson's Estate*, 6 Wn.2d 294, 311 (1940).

In addition to the presumption faced by the lawyer and the heavy burden that must be carried to defeat a claim challenging a business transaction with the client, some defenses may not be available. For example, in *Liebergessell v. Evans*, 93 Wn.2d 881 (1980), the defendant had borrowed funds from the plaintiff, and had prepared promissory notes with a usurious rate of interest. The court held that because the defendant stood in a fiduciary position to the plaintiff in the loan transactions, the defendant was estopped from claiming usury as a defense.

### Four Practical Comments

A law firm should have a mandatory review procedure as a prerequisite to investment by any lawyer in a client's business or to any modification of a fee agreement with an existing client. Do not represent yourself! Let someone else review whether you are complying with the rules. If you practice alone, get someone else's advice. This review should consider whether the lawyer-investor can show by clear, cogent and convincing evidence that:

1. The transaction and its terms are fair and reasonable to the client, and no better transaction or terms are available to the client

from a third party;

2. The transaction, its terms, and any other possibly relevant information in possession of the lawyer-investor have been fully disclosed to the client in writing and in a manner which the client can understand;
3. The client is represented in the transaction by independent counsel, or has been advised and provided ample opportunity to get independent counsel and has unequivocally stated that he or she is not relying on the lawyer-investor for any legal advice regarding the transaction; and
4. The client is under no undue influence, is not under any disability that would preclude consent, and in fact does freely consent.

Second, assume that if your investment is subsequently challenged you will face the highest burden of any fiduciary to sustain the transaction. Our Court is likely to hold that the lawyer must persuade the trier of fact on every issue by clear, cogent and convincing evidence.

Third, think carefully before you sue a client for fees. Probably in the majority of the cases where the client makes a claim against an attorney, or the client initiates a disciplinary proceeding, the attorney first sued for unpaid fees. In every one of those cases it is safe to assume that the attorney, with hindsight, would have been glad to forgo the fees—and the subsequent lawsuit or disciplinary proceeding.

Finally, if you decide to invest or enter into some other business transaction with a client, there is one way you can almost certainly avoid any subsequent problem. There is no case in Washington, and maybe none in the country, where a challenge to a lawyer-client business transaction has been sustained when the client had been represented by independent counsel regarding the transaction. Insisting that your client obtain independent advice may threaten your relationship with the client, but it is the best insurance you can get against subsequent problems stemming from the transaction. □

*Dale B. Ramerman has practiced law in Seattle with Bogle & Gates since 1969.*



## Coming Soon: The 1987 Annual Meeting

WSBA President Bill Gates has editorialized throughout much of his term as president about the concept of "Professionalism" and its importance in performing our tasks as members of the legal community. Professionalism is more than an abstract ideal. It is an attitude and standard of conduct which affects everything we do as lawyers. The evidence of our commitment to professionalism is everywhere—in our attitude toward clients, in our written work product, in our personal goals to be the best we can be and to give our best effort, in being results-oriented, in the way we manage and treat our support staff, in our drive to make efficient law office management a key to better law practice, and in our setting of service above all other considerations in the practice of law.

### Building Professionalism Through CLE

In September, we will have the opportunity to personally improve and extend the concept of Professionalism, and our commitment to it, as we attend the 1987 Annual Meeting of the Washington State Bar Association.

Once again we will convene in beautiful Vancouver, B.C., for our Annual Meeting, and once again we will have the whole panoply of scenic wonders, world class facilities, gourmet delights, social enjoyment and friendly sports competition. No other bar association is so frequently blessed with this grand setting in which to enjoy all of these

varied activities with colleagues, family and friends.

Yet, the main reason for meeting like this, year after year, is the opportunity to *grow professionally* through the offering of first-rate Continuing Legal Education seminars. 1987 is no exception as we convene at the Hyatt Regency Hotel. A total of 18 CLE seminars will be presented this year, most of them sponsored by our various WSBA sections, and many of them featuring nationally renowned speakers in their areas of expertise. The program outline for the 1987 Annual Meeting follows this description. Among our outstanding CLE speakers, you will find such educational leaders as Kansas City attorney **Tom Condon** taking part in the *Strategic Advocacy* seminar being presented by the Young Lawyers Division; **Lawrence L. Kiser**, Seattle Regional Trial Counsel, Securities and Exchange Commission, speaking on *Business Crimes*; Prof. **Arthur Kinoy**, Distinguished Professor of Law at Rutgers University School of Law; and Washington, D. C. attorney **Carter G. Phillips** speaking on appellate advocacy at the highest court levels. These are well-known speakers, but they are typical of the caliber of all of the presenters you will enjoy at the Annual Meeting.

Altogether, if you keep your nose to the grindstone (which no one is expected to do completely in the surroundings of this world class city, of course), you have the potential to collect 21 credit hours of premier continuing legal education toward satisfying your

yearly requirement.

### Super Sporting Events

For those looking to take a break between CLE seminars, we will feature our traditional sporting and social events. In sports, easy-going competition will be the rule of the day if your interests are in golf, tennis or our world-famous *Race Ipsa Loquitor*.

The **Annual WSBA Golf Tournament** will be played on Thursday, September 10, at the Carnoustie Golf and Country Club in Port Coquitlam, just east of downtown Vancouver. A variety of prizes will be awarded for low gross, low net, highest admitted score, longest drive, etc.

On Wednesday and Thursday, September 9 and 10, the **Annual No-Fault Tennis Tournament** will be played at the Western Indoor Tennis Club. This is a mixed doubles tournament, limited to 32 teams, so register early. It will be conducted on a round-robin basis, with teams matched according to similar abilities.

After a one-year hiatus, the famed *Race Ipsa Loquitor* returns to the beautiful setting of Stanley Park, with the starting time pegged at 3:15 p.m. on Friday, September 11. The run around and through Stanley Park features a Two-mile and a Six-mile race in each of the following categories: Juniors—men and women 35 years and under; Middles—men and women 36 to 50 years; and Seniors—men and women 51 years and over. There is no cost for the *Race Ipsa Loquitor*—Just show up,

sign up, and run!

### Premier Luncheon Speakers

Our Annual Meeting once again features great and memorable luncheon programs, this year on Wednesday and Friday of the convention week. Wednesday, September 9, you'll hear former All-American, All-Pro Quarterback **Joe Theismann**, now a popular CBS sports broadcaster. Friday, September 11, our Annual Morell E. Sharp Memorial Luncheon, sponsored by the Washington State Bar Foundation, will feature **Professor Robert McKay**, former Dean of the NYU Law School and Chairman of the ABA Special Action Commission to Improve the Tort Liability System. We look forward to having these two outstanding luncheon speakers to provide a counterpoint to our continuing program of CLE seminars.

### Special Events to Remember

Special Events abound at the 1987 Annual Meeting. On Thursday, September 10, you'll have an opportunity to go exploring at Granville Island, a fascinating, redeveloped complex of fresh

produce markets, restaurants, theatres, hotels, floating homes, art galleries, etc. Two organized tours have been set up to accommodate the varied CLE seminar schedules.

We are constantly bombarded with advertising about new movies. You have a rare treat in store in the person of **Milt Tatelman**, creator of many of Hollywood's most memorable (and sometimes outlandish) movie promotional campaigns. Learn through the good humor and insight of one who knows about the colorful dynamics of film promotion. You'll come away with an appreciation of how the advance billing of feature films can be as creative and provocative as the films themselves.

As with all WSBA Annual Meetings, you will have many opportunities to meet with friends and colleagues at the variety of reunions and other social occasions traditionally held.

The cap on a week of outstanding educational, social and sporting events will be in the grand WSBA tradition, our **Friday Night Gala Dinner Dance and Show**. The Ballroom of the Hyatt Regency will be transformed into a Las

Vegas Showroom for a full evening of festivities, which start at 6:30 p.m. with no host/cash bar service, followed by an extraordinary dinner mounted by the Hyatt's Master Chef, Othmar Steinhart. Then, a show to end all shows headlined by the internationally renowned **Maureen McGovern**. Opening the evening's entertainment will be Seattle's own **Ross Shafer**, host of the popular Channel 5 weekly comedy show, "Almost Live." Ms. McGovern follows as the star attraction of this most memorable of evenings. It will be the perfect social finale to a perfect week of Annual Meeting activities.

If you haven't already registered for the 1987 WSBA Annual Meeting, do it now to be assured of reservations for the luncheons, sporting events and special programs of your choice. For those not yet registered with a Vancouver hotel, now is the time to contact the hotel of your choice directly.

The 1987 Annual Meeting promises to be a professionally and socially rewarding experience for both you, and your family and friends. Don't miss it! We look forward to seeing you there.

## WASHINGTON ADMINISTRATIVE CODE

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# 1987 WSBA Convention CLE Seminar Schedule

## Tuesday, September 8

2:00 p.m. — Family Law Section  
5:00 p.m.

1

### New Solutions in the Divorce Revolution

*Section Chair:*

Hon. Stephen M. Gaddis, Seattle

*Program Chair:*

Faye C. Kennedy, Everett

*Topics and Speakers:*

"Computerization of the Family Law Practice: Applying the New Technology, One Byte at a Time"

Donald W. Ferrell, Seattle

"Avoiding Post-Decree Poverty: Old Obstacles and New Opportunities in Financial Planning for Displaced Homemakers; New Legislation Covering Collection of Support, Maintenance and Property Payments"

Virginia Worthington, Spokane

"The New Parenting Act: Wherefore Goeth the Custody Battle?"

Hon. Stephen M. Gaddis, Seattle

Hon. Mariin Appelwick, Seattle

3.00 CLE CREDITS

2:00 p.m. — Environmental and Land Use  
5:00 p.m. Law Section

2

### Land Use and Environmental Law for the General Practitioner

*Section Chair:*

Joel M. Gordon, Seattle

*Program Chair:*

Andrew H. Salter, Seattle

*Topics and Speakers:*

"Procedural Pitfalls in Seeking Review of Local Land Use Decisions"

Dennis McLerran, Seattle

"Procedural Pitfalls before the Pollution Control Hearings Board and the Shoreline Hearings Board; Regulation of Development in Wetlands"

Jay J. Manning, Olympia

"Hazardous Waste Law for the General Practitioner"

William H. Chapman, Seattle

Rodney L. Brown, Jr., Seattle

"Siting of Locally Unwanted Land Uses"

Gary Wilburn, Olympia

3.00 CLE CREDITS

## Wednesday, September 9

9:00 a.m. — Young Lawyers Division  
12:00 noon

3

### Strategic Advocacy

*Division President:*

Thomas M. Fitzpatrick, Seattle

*Program Chairs:*

Joel Green, Seattle

Laura M. Murphy, Seattle

*Topics and Speakers:*

"Trial Advocacy"

John L. Messina, Tacoma

"Discovery Advocacy"

Kelly P. Corr, Seattle

"Negotiation Advocacy"

Thomas J. Condon, Kansas City, Missouri

"Commentary from the Bench"

Hon. Barbara J. Rothstein, Seattle

3.00 CLE CREDITS

9:00 a.m. — CLE Committee  
12:00 noon

4

### Business Crimes

*Committee Chair:*

Dillon E. Jackson, Seattle

*Program Chairs:*

John C. Merkel, Seattle

Charles A. Cleveland, Spokane

*Topics and Speakers:*

"Substantive Areas of Federal/State Law"

"Governmental Approach"

"Defense Approach"

"Question and Answer Session"

Gene S. Anderson, Seattle

David B. Adler, Seattle

Darrell D. Hallett, Seattle

Lawrence L. Kiser, Seattle

John C. Merkel, Seattle, *Moderator*

Charles A. Cleveland, Spokane, *Moderator*

3.00 CLE CREDITS

9:00 a.m. — Intellectual and Industrial Property  
12:00 noon Section

5

### Overview of Patent, Copyright, Trademark and Trade Secret Law for the General Practitioner

*Section and Program Chair:*

Jerry E. Nagae, Seattle

*Topics and Speakers:*

"What Are, and What Good Are Patents, Anyway?"

John O. Graybeal, Seattle

"Copyrights"

Michael W. Bocianowski, Seattle

"Trademarks"

George C. Rondeau, Jr., Seattle

"Introduction to Trade Secrets"

David L. Garrison, Seattle

3.00 CLE CREDITS

2:00 p.m. — Corporation, Business and Banking Law  
5:00 p.m. Section

6

**What Every Lawyer Should Know  
About the Tax Reform Act**

*Section Chair:*

Paul M. Larson, Yakima

*Program Chair:*

Daniel B. Ritter, Seattle

*Topics and Speakers:*

"Business Decision-Making After the Tax Reform Act"

Donald K. Querna, Spokane

"How the Tax Reform Act Affects the Choice of Entity"

C. James Judson, Seattle

"Buying or Selling a Business After the Tax Reform Act"

Richard L. Mull, Seattle

"Personal Tax Planning After the Tax Reform Act"

Prof. Roland L. Hjorth, Seattle

3.00 CLE CREDITS

2:00 p.m. — World Peace Through Law Section  
5:00 p.m.

7

**Arms Trade and U.S. Security**

*Section Chair:*

Deborah Perluss, Seattle

*Program Chair:*

William L. Hanson, Seattle

*Topics and Speakers:*

"Patterns and Problems of U.S. Arms Sales"

Michael T. Klare, Amherst, Massachusetts

"International Transactions and the Defense Contractor"

Richard W. Oehler, Seattle

"High-Tech Technology Transfers"

Dr. Stephen J. Bryen, Washington, D.C.

3.00 CLE CREDITS

2:00 p.m. — Law Office Economics and Management  
5:00 p.m. Section

8

**Personnel Problems and Problem Personnel:  
Sex, Drugs and Law Office Management**

*Section Chair:*

Stephen E. Horenstein, Vancouver

*Program Chair:*

Elliott W. Johnson, Mount Vernon

*Topics and Speakers:*

"Lawyers as Employers: Policies on Performance, Discipline, Discharge, Drugs and Alcohol"

Carolyn Cairns, Seattle

"Lawyers as Defendants: The Hazards of Workplace Litigation — Sex, Smoking, and Wrongful Discharge, Etc."

Frederick T. Rasmussen, Seattle

"Panel Discussion on Employment Aspects of Law Office Management"

Carolyn Cairns, Seattle

Frederick T. Rasmussen, Seattle

Elliott W. Johnson, Mount Vernon

3.00 CLE CREDITS

**Thursday, September 10**

9:00 a.m. — Real Property, Probate and Trust  
12:00 noon Section

9

**The New ALTA Title Policy Forms;  
Ethical Considerations in Estate Planning;  
and Planning for the New  
Generation Skipping Transfer Tax**

*Section Chair:*

Edward W. Kuhrau, Seattle

*Program Chairs:*

Evan O. Thomas III, Seattle

David W. Thorne, Seattle

*Topics and Speakers:*

"The New ALTA Title Policy Forms"

John L. Hosack, San Francisco

"Ethical Considerations in Estate Planning"

Dean John R. Price, Seattle

"Planning for the New Generation Skipping Transfer Tax"

Lloyd Leva Plaine, Washington, D.C.

3.00 CLE CREDITS

9:00 a.m. — Administrative Law Section  
12:00 noon

10

**Recent Developments in Administrative Law**

*Section and Program Chair:*

Edward G. Lowry III, Seattle

*Topics and Speakers:*

"Commentary on Recent Developments"

Dean James M. Vaché, Spokane

"Proposed New APA — Legislative Action, Past & Future"

Prof. William R. Andersen, Seattle

"Judicial Review of Administrative Actions Under the Proposed New APA"

C. Dean Little, Seattle

"Public Disclosure of Personal Information in Government Records"

Jeffrey O. C. Lane, Olympia

Thomas G. Holcomb, Olympia

3.00 CLE CREDITS

9:00 a.m. — International Law and Practice  
12:00 noon Section

11

**International Sales — The New Rules**

*Section Chair:*

Melvyn Simburg, Seattle

*Program Chair:*

John T. Sessions, Seattle

*Topics and Speakers:*

"Purchase and Sales Guidelines to the International Sale of Goods Convention"

G. Donald Haarer, Fountain Valley, California

"Recent Changes in Immigration Law"

Pamela Cowan, Seattle

"Update on Trade Legislation"

Philip Jones, Washington, D.C.

3.00 CLE CREDITS

2:00 p.m. — CLE Committee  
5:00 p.m.

12

### Pre-Employment Screening Practices: Employer/Employee Rights

*Committee Chair:*

Dillon E. Jackson, Seattle

*Program Chairs:*

James M. Beard, Seattle

William A. Coats, Tacoma

*Topics and Speakers:*

"Discrimination on the Basis of Sex"

Judith A. Lonquist, Seattle

"The Employer's Concern: Drugs and Alcohol"

Patrick J. Donnelly, Seattle

"The Employee's Concern: Drugs and Alcohol"

Richard H. Robblee, Seattle

"Pre-Employment Inquiries"

Bart J. Waldman, Seattle

3.00 CLE CREDITS

2:00 p.m. — Public Procurement and Private  
5:00 p.m. Construction Law Section

13

### Alternative Dispute Resolution in Construction Matters and Recent Developments in Lien and Bond Claims Law

*Section Chair:*

Donald McL. Davidson, Seattle

*Program Chair:*

Bruce P. Babbitt, Seattle

*Topics and Speakers:*

"Introduction and Overview of Alternative Dispute Resolution in Construction Matters"

Bruce P. Babbitt, Seattle

"A Judge's Perspective on the Necessity of Alternative Dispute Resolution; Statutory Provisions for Alternative Dispute Resolution"

Hon. George H. Revelle, Seattle

"The Use of Alternative Dispute Procedures in Major Construction Litigation"

Arthur W. Harrigan, Jr., Seattle

"Mediation Services"

Neal Blacker, Seattle

"Lien and Bond Claims: Recent Developments"

Kerry C. Lawrence, Bellevue

Jeffrey A. Smyth, Seattle

Joseph C. Calmes, Bellevue

3.00 CLE CREDITS

2:00 p.m. — Taxation Section  
5:00 p.m.

14

### Washington State Taxes — An Update

*Section Chair:*

Joel Paget, Seattle

*Program Chair:*

James H. Bush, Tacoma

*Topics and Speakers:*

"Washington's Tax Structure: Unique is not Necessarily Better"

Bill Wilkerson, Olympia

"Tax Reform: Should It Happen? Can It Happen?"

Hon. Marlin Appelwick, Seattle

"Alternatives to the Present Tax Structure"

Bruce A. Koppe, Seattle

"Sales Tax on Services"

William D. Townsend, Tallahassee, Florida

3.00 CLE CREDITS

## Friday, September 11

2:00 p.m. — Creditor-Debtor Law Section  
5:00 p.m.

15

### Garnishment, Attachment and Execution Under the 1987 Enforcement of Judgments Act

*Section Chair:*

Jack J. Cullen, Seattle

*Program Chairs:*

Daniel M. Caine, Seattle

Prof. Marjorie D. Rombauer, Seattle

*Topics and Speakers:*

"Overview of New Act"

Prof. Marjorie D. Rombauer, Seattle

"Post Judgment Garnishment"

Daniel M. Caine, Seattle

"Prejudgment Garnishment and Attachment"

Patrick J. Layman, Bellevue

"Execution Against Personal Property"

Peter H. Arkison, Bellingham

"Execution Against Real Property"

Warren E. Koons, Bellevue

3.00 CLE CREDITS

2:00 p.m. — Consumer Protection, Antitrust and  
5:00 p.m. Related Business Torts Section

16

### Strategies in Modern Business Litigation

*Section Chair:*

Christopher Kane, Seattle

*Program Chairs:*

John R. Ellis, Seattle

William H. Clarke, Spokane

*Topics and Speakers:*

"A Demonstration Approach to Dealing With Litigation Regarding Consumer Protection, Antitrust and Unfair Business Practices"

Hon. Barbara J. Rothstein, Seattle

Thomas L. Boeder

John R. Ellis, Seattle

Thomas J. Greenan, Seattle

Robert H. Whaley, Spokane

William H. Clarke, Spokane, Moderator

3.00 CLE CREDITS

2:00 p.m. — Criminal Law Section  
5:00 p.m.

17

**Expert Witnesses in the Courtroom**

*Section Chair:*

Robert J. Wayne, Seattle

*Program Chair:*

John A. Strait, Seattle

*Topics and Speakers:*

"Expert Testimony"

Karl B. Tegland, Seattle

"The Expert Witness in Eyewitness Identification Cases: A Debate"

Richard A. Hansen, Seattle

Anne M. Bremner, Seattle

"Preparation of an Expert Witness for Trial"

Robert J. Wayne, Seattle

Dr. Stephen R. Feldman, Seattle

"Cross Examination of an Expert Witness"

John A. Strait, Seattle

3.00 CLE CREDITS

**Saturday, September 12**

9:00 a.m. — Trial Practice Section  
12:00 noon

18

**Perspectives on the Constitution:  
Crisis or Transition?**

*Section and Program Chair:*

Douglas Dunham, Seattle

*Speakers:*

Prof. Arthur J. Kinoy, Rutgers, New Jersey

Carter G. Phillips, Washington, D.C.

3.00 CLE CREDITS

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tured for the more evasive. **MIN.**

**\* BARON'S QUEST** ..... 285.  
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mine the validity of a recipient's demands.

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# WASHINGTON STATE BAR NEWSLINE

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## The Board's Work



by Duane Swinton

July 17-18, 1987. Laurel Point Inn,  
Victoria, B.C.

Present: President William Gates and  
Governors Jay White, Roy Mocerri, 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: Karl Tegland (Ct. Rules  
and Procedures Committee); Tom  
Fitzpatrick (WSBA Young Lawyers); Peter  
Steere (Superior Ct. Judges Assn.);  
Solie Ringold (Ct. of Appeals Judges  
Assn.); Edward Allan (Magistrates  
Assn.); Patricia Smith (Wa. Women  
Lawyers); John Phillips (SKCBA Young  
Lawyers Div.); Geoffrey Revelle (SKCBA  
Trustee); Mary Prevost (Government  
Lawyers Bar Assn.); Patrick Sutherland  
(Wa. State Prosecuting Attorneys Assn.);  
and John Michalik (WSBA Executive  
Director.)

**MANDATORY PRO BONO.** President-elect,  
Jack Dean, reported  
that it is likely the State Bar Association  
will have "a minimum of another  
year" to take a look at possible manda-  
tory pro bono despite inquiries made by the  
State Senate Judiciary Committee into  
the issue. In a letter to Dean, State  
Senator and Judiciary Chairman, Phil  
Talmadge, indicated there would be no  
need for legislative action if there is  
a continued increase by attorneys in pro  
bono activity. Talmadge appears to be  
interested in having The Legal Founda-  
tion fund pro bono activities in more  
than the seven counties it currently  
does and also in extending its pro bono  
assistance to the "middle class."

**NEW GOVERNORS.** Newly-elected governors  
are Jim Turner, uncon-  
tested from the 8th District, and in  
three closely-contested runoff elec-

tions - Paul Stritmatter, 3rd District;  
William Bergsten, 6th District; and  
Steve DeForest, King County at-large.

**NEW BAR EDITOR.** The Board accepted the  
resignation of Carole  
Grayson as Bar News editor effective  
March 1, 1988. Grayson, editor since  
March 1985, had previously indicated  
her desire to step down at the conclu-  
sion of serving three years as editor.

**LAWYERS' ASSISTANCE PROGRAM.** Executive Director  
Michalik reported  
more than 100 attor-  
neys statewide have signed up to receive  
instruction as peer counselors under the  
Lawyers' Assistance Program. Two training  
sessions have already been held in  
Seattle, and similar sessions are  
scheduled in both Yakima and Spokane.

**IOLTA.** The Board instructed the Rules  
of Professional Conduct Com-  
mittee to prepare language for a rule  
allowing the lawyer, with the agreement  
of a client, to invest client funds in  
accounts other than those at qualified  
public depositories, as the IOLTA rules  
now provide. The investments, however,  
are to be allowed only in "cash-deposit  
money-market-type accounts," according  
to the motion of Governor Ed Lane  
adopted 7 to 2 by the Board. The  
Governors' vote overrode a recommenda-  
tion by the Rules of Professional  
Conduct Committee not to change the  
current rule.

The Governors deferred action on  
another proposed IOLTA amendment that  
would specifically spell out the type of  
charges financial institutions could  
deduct when computing interest or  
dividends under the IOLTA program.  
Geoffrey Revelle, acting on behalf of  
the escrow section of SKCBA, objected  
the proposed rule would adversely impact  
firms with escrow practices.

**RULES ON ADVERTISING.** The Governors voted 9-0 to forward to the Supreme Court three amendments in the Rules of Professional Conduct relating to lawyer advertising. One amendment requires a lawyer to make a written or recorded advertisement available to the State Bar Association and to provide, upon request, evidence of facts contained in the ad. The Board also requested the Rules of Professional Conduct Committee to undertake a study of rules relating to television advertising and commercial referrals.

**PROCEDURAL LIMBO.** More than a year after court clerks in Washington state requested relief from the burden of maintaining filed discovery materials, the Board referred back to the chairmen of the Court Rules and Procedures Committee and Trial Practice Section proposed rules in civil procedure concerning discovery. The Board directed the chairmen to come back to the Board with a "simple" rule "along the lines of the federal court rule" pertaining to filing discovery materials. The federal rule basically provides that depositions, interrogatories, and admissions are not to be filed unless ordered by the court or as needed. The question still to be addressed by the Board is what rights of

access, if any, the press would have to unfiled discovery materials.

**OTHER ACTION.** In other action, the Board: (1) appointed Michael Garrison and Harry Cross, Jr. to the Judicial Information Systems Committee; (2) appointed Governors Julie Weston and Myron Carlson to the Superior Court Judges Employment Benefits Committee; (3) appointed Governor Ed Lane and William Gissberg to the Judicial Council; (4) directed the Bar Association staff to study the possibility of establishing a legislative information service for lawyers; (5) reappointed Ed Holm as a Legal Foundation trustee; (6) approved an additional \$1,278 to assist the Court Congestion and Delay Committee in funding the October 1987 Regional Conference on Trial Court Delay Reduction; (7) reappointed Robert Patrick to the Evergreen Legal Services Board of Directors; (8) selected Vancouver, B.C., as the site for the 1992 Bar Convention over two other cities - Portland and Spokane; (9) selected Senator Ted Bottiger of the 6th District and University of Law Professor, Marjorie Rombauer, as recipients of the Bar Association's award of merit; and (10) voted to allow attorneys who are under court-ordered suspension to resign from the Bar Association.

#### Dues Increase Noted

The State Bar Association's Budget Committee has approved an increase in State Bar Annual dues to the following levels:

First two full years of practice	\$115
Thereafter:	\$195

The increase proposed would be effective with dues payable as of February 1, 1988 and would be tied to the Association's Budget for Fiscal 1988. The Budget Committee's recommendation involves the first State Bar Association dues increase since 1981 and at the \$195 level translates into an increase of \$2.50 per month in member dues.

A major factor supporting the dues increase is the cumulative impact of inflation, over the course of seven years, on salaries, printing, postage and other normal expenses of the Association. The Budget Committee had considered an increase in August of 1986 but had determined to defer that, in favor of a tightened budget, for an additional year. As that year draws to a close, the Association is facing a shortfall which will necessitate drawing upon accumulated reserves and the prospect of a near \$200,000 imbalance in the budget proposal for Fiscal 1988 without the increase.

Other than as caused by inflationary factors, the added income under the dues increase will support needed staff additions in the Legal Department to assist in the increasing disciplinary caseload; will allow for final computerization and growth in the Association's Bookkeeping department; will allow for preservation and retention of the operating reserve and the Clients' Security Fund without special member assessments; and will assure the continuation of efforts in law-related education, the publication of the highly-acclaimed *Resources*, increased efforts in public relations programs for the press and local bar associations and a series of important member services. The increase also encompasses a contingency allocation designed to permit the maintenance of programs without the immediate likelihood of a further dues increase.

The increased dues schedule is well within the already prevailing range of bar association dues in other western states. Presently approved dues levels in neighboring states include (with new admittees dues levels noted first): California—\$172/\$240 with additional mandatory fees for Clients' Security Fund and Professional Responsibility; Arizona—\$140/\$200 with additional Clients' Security Fund assessment; Idaho—\$100/\$200; Utah—\$110/\$180 with additional Clients' Security Fund assessment; Oregon—\$140/\$195 with additional mandatory professional liability insurance assessment; and Alaska—\$300 with additional Clients' Security Fund Assessment.

In terms of "aging", thirty-eight state bars have had one or more dues increases since 1981, when the last increase in Washington State Bar dues was approved. Of the remaining states, six also had their last dues increases take effect in 1981 and four of those six have now set increases to take effect in 1987 or 1988.

The Budget Committee's recommendations on the dues structure will be considered by the Board of Governors in connection with the Fiscal 1988 Budget.

# New Protections For Corporate Directors

by James E. Dunlap

Recent legislation, effective April 29, 1987, permits Washington corporations to give directors new protections from liability to their corporation or its shareholders.<sup>1</sup> Directors and shareholders of every Washington corporation should evaluate how the new legislation will affect them.

The law includes two new amendments to the Washington Business Corporation Act. The first authorizes an optional provision in a company's articles of incorporation that would eliminate or limit directors' personal liability for monetary damages in certain circumstances. The second amendment broadens a corporation's ability to indemnify directors for expenses incurred in lawsuits for certain types of improper conduct, so long as authority to indemnify is specifically approved by shareholders. In addition to the two major amendments, the procedures for advancing expenses to directors in the defense of lawsuits have been liberalized. There were analogous changes made to the statutes governing nonprofit corporations.

Concerns about directors' exposure to liability developed as a response to increasing judicial review of directors' actions, especially in the takeover context. In the past, the so-called "business judgment rule" had shielded directors from most liability on the theory that, in the absence of self-interest, the directors, and not the courts, should make business decisions. Various courts reviewing recent contests for corporate control have perceived an inherent conflict of interest between directors' self-interest in maintaining their positions and the best interests of the corporation or its shareholders. Some of these courts have refused to give directors the usual presumption of proper conduct.<sup>2</sup>



Factor's House, Fort Nisqually, 1843. Photo courtesy of City of Tacoma. Published in *A Guide to Architecture in Washington State* by Sally B. Woodbridge and Roger Montgomery (Seattle: University of Washington Press, 1980, page 63)

While maintaining that they are not second-guessing the directors' substantive business decisions, courts have also demonstrated a willingness to scrutinize more carefully the processes by which business decisions are made.<sup>3</sup>

Developments in the insurance industry provide further evidence that directors' exposure to liability has increased. Traditionally, directors' liability insurance provided a way for corporations to protect directors and encourage qualified persons to serve as directors. This insurance has become increasingly difficult to obtain. Even when available, many policies now provide much narrower coverage, are subject to a much larger deductible or self-insurance requirement, and carry substantially higher premiums than they once did.

Within the last year, directors' concerns regarding their exposure to liability had become a significant problem in Washington. Numerous companies reported that their outside directors had resigned or that qualified candidates for outside directorships were becoming difficult to find. As other states, notably Delaware, adopted legislation modifying some of the legal rules thought to be exacerbating the problem, many Washington corporations either reincorporated or sought advice about reincorporating in a state that had such legislation. In addressing these concerns, the Washington legislation, though similar to Delaware's, eliminates ambiguities that appear to exist under Delaware law.

## Limitations Must Be Authorized by Articles

Under amended RCW 23A.12.020, articles of incorporation may now contain a provision that eliminates or limits directors' personal liability for monetary damages to the corporation or its

shareholders, except for liability arising from (a) intentional misconduct by a director, (b) a knowing violation of law by a director, (c) the authorization of illegal distributions or loans to directors, or (d) any transaction from which the director will personally receive a benefit in money, property or services to which the director is not legally entitled.

Major features of the new law are:

1. The new legislation is an enabling statute only. The limits on liability will not apply unless included in or added to the corporation's articles.
2. An amendment by shareholders limiting liability does not affect suits by nonshareholders against a director.
3. The law is flexible in that it allows for a total elimination of monetary liability (in appropriate circumstances) or a dollar limit, such as a dollar "cap" per director or for members of the board as a whole.
4. Limitations on liability relate only to monetary damages and will not lower the standard of care required of directors. RCW 23A.08.343 still requires a director to perform his or her duties in good faith, in a manner that the director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.
5. The amendment to the articles is a limitation only on the recovery of monetary damages, and not on obtaining injunctive or other equitable relief.
6. Any limitation on liability will affect only a director's exposure to monetary damages for conduct as a director. A director who is also an officer or a shareholder could still be liable for actions taken in those capacities.
7. Because of federal pre-emption, the new legislation will not affect a di-

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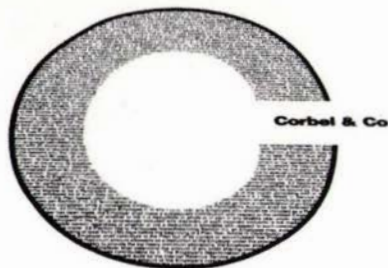
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rector's liability to the corporation or its shareholders for violations of federal laws.

8. Adoption of limits on liability may not reduce the number of lawsuits, although fewer lawsuits against directors should prove successful. To be successful, plaintiffs will need to allege and prove additional facts, *e.g.*, a director received money or property to which he or she was not entitled.

### Taking Advantage of the New Law

Different types of corporations and different groups within each corporation may have different perspectives on the advisability of taking advantage of the new law. Some may choose to grant less protection. Here are some considerations that should affect this decision.

1. *Corporations Having Outside Directors.* The new amendments were adopted primarily because of the needs of public corporations and others with "outside" directors. These corporations will probably want to take full advantage of the new law. The importance to the shareholders of attracting quality outside directors and minimizing the cost of insurance should, in most instances, more than outweigh any risk that might be created by shielding directors from liability for negligent acts. In fact, the new protections may encourage initiative by removing the fear that decision-making directors could be personally liable if their actions were later determined to have been negligent.

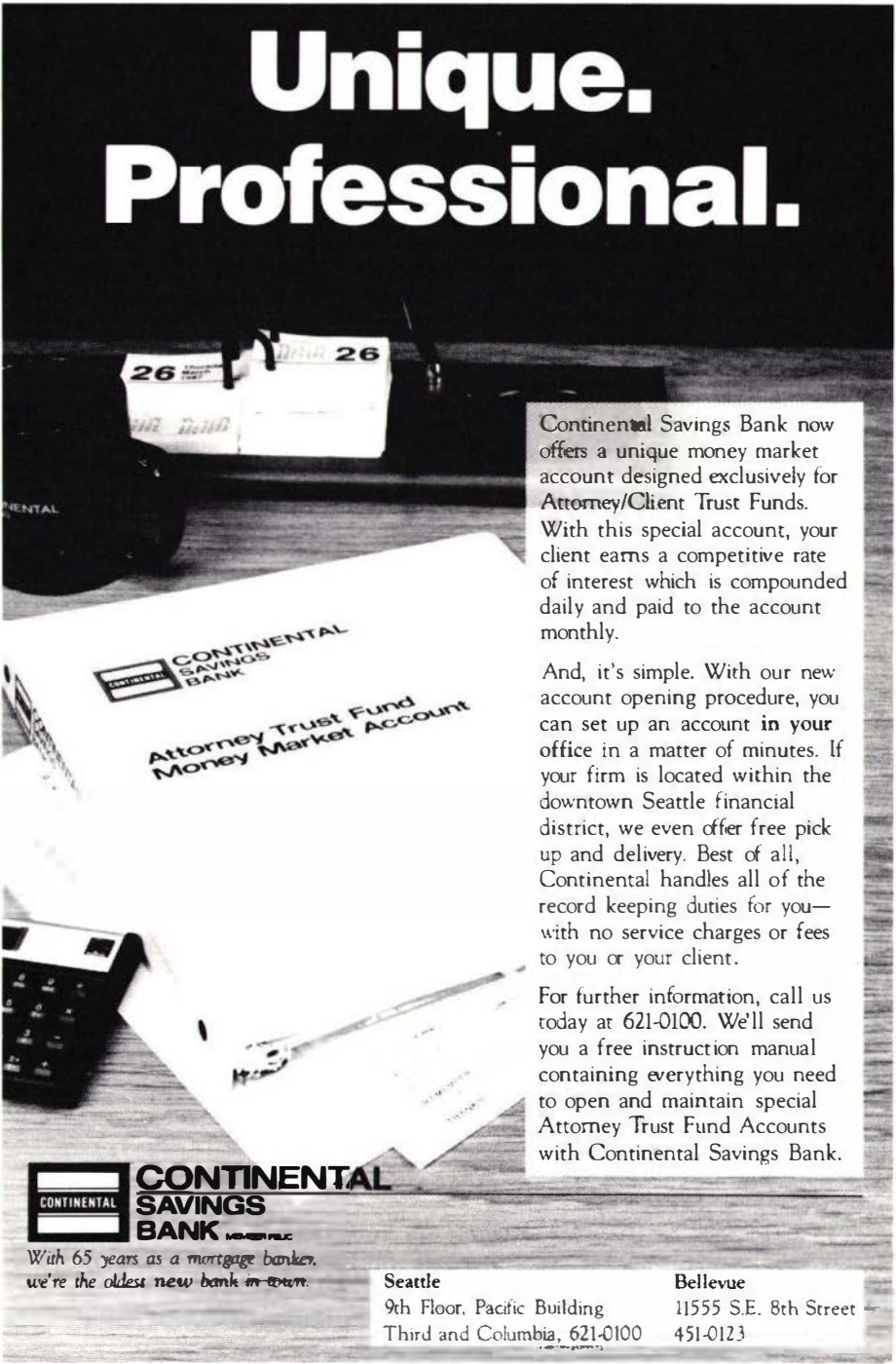
2. *Closely Held Corporations.* In many closely held corporations, the directors are also substantial shareholders. Thus, some of the reasons for limiting the liability of directors of public corporations or corporations with outside directors may not exist. Further, many insider disputes in small corporations deal with conduct that may not be protected by the new statute, *e.g.*, deliberate conduct, such as the appropriation of corporate opportunities or the oppression of minority shareholders, or conduct resulting in the receipt of illegal personal benefits. An amendment to the articles should still be considered as a form of insurance to protect against lawsuits alleging director negligence, not only by existing sharehold-

ers, but by persons who later may become shareholders, including receivers, trustees in bankruptcy, or secured creditors who have foreclosed on stock.

Some passive investors of closely held corporations may find that limiting director liability is not in their best interest because it would result in the loss of one potentially significant method of protecting their investment from negligent mismanagement.

3. *Sole Shareholders.* The cost of preparing and filing an amendment to the articles of incorporation may not be warranted for a corporation with a single shareholder and no independent directors, unless the company contemplates adding other shareholders or outside directors. An amendment may nevertheless be desirable if there is a possibility that third parties could become shareholders unexpectedly, for

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example, if the sole shareholder's stock is to be pledged as security for a loan.

### Drafting Suggestions

In the preparation of a provision limiting liability, a combination of two approaches is recommended. The simplest provision would recite that directors shall enjoy the greatest limitations on liability as may be authorized under Washington law. An alternative approach would explicitly enumerate the limitations and exceptions that presently exist under the Washington statute. Because the shareholders should be fully informed of the extent of proposed limitations on liability before deciding whether to adopt them, there is some advantage in spelling out the statutory language in full. This more specific alternative can, of course, be accompanied by a broad authorization to limit liability to the full extent permitted by law, including changes that might occur in the law in the future.

### Indemnification Authority Extended

Director indemnification, another

traditional means of director protection, has also been expanded by the new laws. Indemnification provisions, which differ from limitations on liability, provide that under certain conditions the corporation will defend the director and pay the costs of defense and any judgment. Unlike the limitations on director liability, indemnification applies to all actions, including actions by non-shareholders.

Before its recent amendment, the indemnification statute (RCW 23A.08.025) permitted, but did not require, corporations to indemnify directors who acted "in good faith" and believed themselves to be acting in the best interests of the corporation or, in some cases, at least not opposed to its best interests. The new legislation expands the scope of permissible indemnification so that, if it is approved by shareholders, directors may be indemnified for any conduct other than for intentional misconduct, knowing violations of law, illegal dividends or loans to directors, or transactions in which the director benefited personally. Under the statute, officers, employees and agents may be indemnified to the same

extent as directors.

Since the expanded scope for indemnification is the same as that for limitations of director liability, corporations electing to limit liability will presumably wish to adopt expanded indemnification as well.

### Liberalized Advance of Expenses

Provisions concerning the advance of expenses to directors who are sued have also been amended. The indemnification statute used to provide that, although a corporation could indemnify a director in full for attorneys' fees after the director had succeeded in the action, it could not make advances against the costs of defense unless: (1) an appropriate corporate group had determined, based on knowledge then known to the group, or legal counsel had opined, that indemnification would not be impermissible; (2) the director had affirmed his or her good faith belief that he or she met the appropriate standard of conduct; and (3) the director had undertaken in writing to repay the advances if it were ultimately determined that the director did not meet the standards for indemnification.

Historically, the first of these requirements has made corporate groups reluctant to advance expenses because of the difficulty of assessing the degree of knowledge then known to them. Under the amendments, the director's undertaking to repay becomes the corporation's primary form of protection, and advances can be made if *either* the first *or* second requirement is also met. Determination of the right to have expenses advanced should now be routine, as the director need only agree to repay and attest to a good faith belief that his or her conduct was appropriate. □

#### Endnotes

<sup>1</sup>1987 Wash. Laws Ch. 212 §§ 701-710.

<sup>2</sup>An extended discussion of the parties' initial burdens of proof is contained in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); see also *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985).

<sup>3</sup>The most significant case of this type is *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985).

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# The New Bankruptcy Code Chapter 12:

## Friend of the Family Farmer?

by George E. Frasier

During the past several years, American farmers and farm lenders have had financial problems on a scale unknown since the Great Depression. Oversupply and falling demand have sharply eroded farm income and, with it, the ability of farmers to pay their debts. The value of farm assets, particularly land, has fallen accordingly. Many farmers and their lenders are saddled with onerous debt that cannot be paid from operating income and devalued collateral worth less than the debt.

When voluntary efforts to extend maturities, reduce interest rates and even write off a portion or all of the debt fail, farmers have increasingly sought such relief under the Bankruptcy Code. Most farmers have too much debt to meet the \$100,000 unsecured debt and \$350,000 secured debt limits of Chapter 13<sup>1</sup> and are thus limited to relief under Chapter 11. However, farm Chapter 11s have been singularly unsuccessful. All but a handful terminate in liquidation.<sup>2</sup>

In 1986, Congress concluded that the farm Chapter 11 failure rate transcended simple economics. Congress determined that farm Chapter 11s were "needlessly complicated, unduly time consuming, inordinately expensive and in too many cases unworkable."<sup>3</sup> Concern was expressed that some undersecured creditors might be abusing the Chapter 11 "absolute priority rule" to block economically viable farm reorganizations, and force liquidations.<sup>4</sup> A new Chapter 12 was added to the Bankruptcy Code to give small family farmers<sup>5</sup> "a fighting chance to reorganize their debts and keep their land."<sup>6</sup>

Like Chapter 11, Chapter 12 has three fundamental purposes: to stay all collection actions against the debtor while it prepares a plan to reorganize its debts;<sup>7</sup> to permit the debtor to retain possession of its assets and to continue in business pending approval of its plan;<sup>8</sup> and to provide a mechanism



Steptoe barn Photo courtesy of University of Washington (A Guide to Architecture in Washington State by Sally B. Woodbridge and Roger Montgomery, 1980, page 42)

(the "cram down") to force unwilling creditors to accept the plan.<sup>9</sup> The primary focus of Chapter 12 is to make it easier for the debtor to provide the "adequate protection" which must be given to secured creditors as a condition of staying their foreclosure actions, and using, leasing and selling their collateral, pending approval of the plan; to dramatically shorten the time available to prepare and obtain approval of the plan; and to make it easier to cram down the plan on unwilling unsecured and undersecured creditors.

### Adequate Protection

In Chapters 11 and 12, a secured creditor is entitled to payment in full of its loan, including post-petition interest, collection costs, and attorneys' fees, up to the value of its collateral.<sup>10</sup> However, all collection and foreclosure actions are automatically stayed, and the debtor can use, lease and sell the collateral in the operation of its business.<sup>11</sup> Because this obviously can affect the value of a secured creditor's claim, the creditor is entitled to "adequate protection" for its claim.<sup>12</sup> If the debtor cannot provide adequate protection, the automatic stay is lifted, and the secured creditor can proceed to foreclose.<sup>13</sup> This normally is the death knell for the debtor's attempt to reorganize and continue in business.

If the value of the collateral comfortably exceeds the amount of a secured creditor's claim, the "equity cushion" normally is sufficient to provide adequate protection.<sup>14</sup> However, if interest accruals, physical depreciation,

or falling market value threaten impairment of the secured creditor's claim, the debtor can be required to make periodic cash payments, provide adequate additional collateral, or otherwise provide adequate protection against the loss.<sup>15</sup>

If the collateral is worth less than the secured creditor's claim, the undersecured creditor is still entitled to protection from loss caused by physical depreciation or falling market value.<sup>16</sup> However, the undersecured creditor is not entitled to post-petition interest as such on the secured portion of its claim.<sup>17</sup> Thus, each day that the automatic stay remains in effect costs the undersecured creditor one day's opportunity to realize on the collateral and reinvest the proceeds. Under Chapter 11, courts outside the Fifth Circuit generally follow the Ninth Circuit's *American Mariner* decision, which requires debtors to pay interest payments on the value of the collateral as adequate protection for the undersecured creditor's lost opportunity cost.<sup>18</sup>

In most farm bankruptcies, the debtor's secured debts substantially exceed the value of all its property, and the debtor is hard-pressed to pay current operating expenses let alone lost opportunity costs to undersecured creditors. In courts which rigorously apply *American Mariner*, farm Chapter 11s frequently die an early death. However, many bankruptcy courts have been less than rigorous in their application of *American Mariner* in farm Chapter 11s. Moreover, some recent deci-

sions have postponed the day of reckoning until the estimated date when foreclosure would be complete and redemption rights would expire.<sup>19</sup> Thus, many farm debtors can avoid lost opportunity cost payments under Chapter 11 for a year or more.

However, it is clear that Congress blamed *American Mariner* for the failure of many farm Chapter 11s. Chapter 12 overrules *American Mariner* and provides undersecured creditors who hold a security interest in farm land

with adequate protection in the form of payments equal to the reasonable rental of the farm land, apparently on the assumption that rent payments will be less than interest on the value of the land.<sup>20</sup> Other undersecured creditors probably are not entitled to any compensation for lost opportunity costs.<sup>21</sup>

Although the Chapter 12 adequate protection standard was obviously intended to help family farmers, its net effect probably is nearly neutral and and may even be more burdensome

than the Chapter 11 standard. In courts which rigorously apply *American Mariner*, the substitute requirement of rent payments probably will be equally fatal to Chapter 12 cases. In the Fifth Circuit, the requirement of fair rental payments to undersecured creditors may impose a higher burden of adequate protection in Chapter 12 than in Chapter 11.<sup>22</sup> In other courts, the new standard probably will have little practical effect because of the tight Chapter 12 deadlines discussed below.

### Timing

Farm and nonfarm Chapter 11 cases normally take many months and frequently take years unless the case is cut short because the debtor cannot provide adequate protection for its secured creditors. Chapter 11 does not impose any deadlines for either filing plans of reorganization or obtaining their approval. In contrast, Chapter 12 requires that the plan be filed within 90 days after commencement of the case and that the confirmation hearing for approval of the plan be concluded not later than 45 days after the plan has been filed. Extension of the plan filing and confirmation deadlines can be granted for cause, but extensions are to be granted sparingly.<sup>23</sup> If the statutory deadlines are not extended for cause, a Chapter 12 case should be concluded no later than 135 days after the case is filed. If the plan has been filed with the petition, the case could be concluded in 15 days or less.<sup>24</sup>

The short deadlines under Chapter 12 require both debtors and creditors to expedite settlement negotiations and trial preparation. These deadlines also drastically reduce the importance of lost opportunity costs to undersecured creditors and, as a practical matter, take away almost everything debtors might have gained under the new adequate protection standard. The net effects are to reduce both the incentive and the opportunity to litigate adequate protection issues and to take away the debtor's advantage of delay under Chapter 11.

### Chapter 12 Cram Down

In Chapter 11, all of the debtor's nonexempt property and all of the debtor's future income, except personal services income of individuals, is dealt with by the plan.<sup>25</sup> Secured creditors

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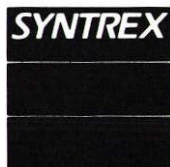
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must either accept the plan or be paid in full up to the value of their collateral.<sup>26</sup> Immediate payment is not required. However, any deferred payments must be adequately secured, and they bear interest at the market rate for loans of like kind and quality.<sup>27</sup>

Unsecured creditors must either accept the plan by a majority in number and two-thirds in amount and receive at least the liquidation value of their claims and be paid in full, or they must receive everything left over after payment of secured and priority creditors unless the debtor pays new consideration equivalent to the value retained (the "absolute priority rule").<sup>28</sup> Where undersecured creditors have deficiency claims of more than one-third of the unsecured debt, they can effectively block confirmation of a Chapter 11 plan and force liquidation under the absolute priority rule.

In most farm Chapter 11s, one or more undersecured creditors hold sufficient deficiency claims to block confirmation under the absolute priority rule and to force liquidation. One of the principal purposes of Chapter 12 is to take away this tool from undersecured

creditors.

Chapter 12 deals with all of the nonexempt property of the debtor and all of the debtor's future income for three years, including personal services income.<sup>29</sup> As under Chapter 11, secured creditors must either accept the plan or be paid in full up to the value of their collateral. Here too, deferred payments are permissible if they are adequately secured and bear market rate interest.<sup>30</sup>

Under Chapter 12, unsecured creditors are entitled to receive only either the greater of the liquidation value of debtor's nonexempt property after payment of secured and priority claims or the debtor's disposable income for three years.<sup>31</sup> Unsecured creditors usually will not receive any payment, because the liquidation value of the debtor's property is unlikely to be more than the total of all secured and priority claims, and the debtor has every incentive to set the payments to secured creditors at a level which will leave no disposable income for payment to unsecured creditors.

Chapter 12 eliminates voting rights for unsecured creditors, and it has no

absolute priority rule.<sup>32</sup> Thus, undersecured creditors with deficiency claims totaling more than one-third of all unsecured claims cannot block approval of the plan and then force liquidation. The practical effect is to shift the risk of failure of the farming operation to the undersecured creditors because the debtor has no equity at risk. If the debtor fails, any loss in collateral value due to depreciation, declining market values or foreclosure delay will be borne by the undersecured creditor. If the debtor prospers, the undersecured creditor will have to share the prosperity with unsecured creditors who had no interest in the collateral, and even then, for only three years. Any profit thereafter will accrue solely to the debtor.

In Chapter 11, undersecured creditors can use the absolute priority rule as a simple and relatively automatic way to avoid this risk. Under Chapter 12, the only protection available to undersecured creditors is to establish that the debtor cannot make all payments required under the plan.<sup>33</sup> If undersecured creditors can do so, they are able to block approval of the plan and force

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liquidation.

Undersecured creditors probably will be able to establish that the debtor cannot make the payments required under the plan if the fair market value of the collateral, the market rate of interest for loans of like kind and quality, and the debtor's probable future income are properly established. This result flows not from a legal principle, but from the economic fact of life that normal farm operations do not generate enough income to pay priority claims, operating and living expenses and debt service on debt equal to 100 percent of the value of all of the farmer's real and personal property.

Of course, such valuation litigation is time-consuming and expensive. The short deadlines in Chapter 12 will exacerbate the problem by requiring crash preparation for the confirmation hearing. However, apart from the settlement impetus supplied by the substitution of expensive and risky valuation litigation for the relatively inexpensive and automatic protection of the absolute priority rule, the new cram down standard probably will have little impact on the ability of a determined undersecured creditor to block ap-

proval of a plan of which it disapproves and force liquidation.

### Conclusion

It is still too early to tell whether Chapter 12 will succeed in giving family farmers "a fighting chance" to save their farms. However, it seems probable that debtors will be no better off in Chapter 12 than in Chapter 11. The new adequate protection standard at best makes little difference, and it may even impose a higher burden than in Chapter 11. The tight deadlines of Chapter 12 take away the debtor's advantage of delay and reduce the importance of adequate protection under any standard. The added expense and risks of litigation under the new cram down standard may encourage settlements, but they will not prevent a determined undersecured creditor that has done its homework on valuation issues from blocking confirmation and forcing liquidation. Loss of the absolute priority rule will prevent unreasonable undersecured creditors from blocking economically viable plans. It remains to be seen whether the real problem was unreasonable creditors or uneconomic plans. □

### Endnotes

<sup>1</sup> Bankruptcy Code § 109(e), 11 U.S.C. 109(e). Unless otherwise noted, all citations hereafter are to the Bankruptcy Code, 11 U.S.C. 101 *et seq.*

<sup>2</sup> At three recent bankruptcy conferences, the participants were informally polled, and none could recall a single farm Chapter 12 case in which the farmer was able to restructure his debts and continue farming.

<sup>3</sup> Conference Report (H.R. Rept. No. 99-958), 99th Cong., 2d Sess. (hereafter "Conf. Rept.") at 48 (1986).

<sup>4</sup> § 1129(b)(2)(B)(ii); Cong. Rec. S. 5556 (May 7, 1986).

<sup>5</sup> §§ 101(17), (18), 109(f). Eligibility for relief under Chapter 12 is limited to individual and closely held corporate and partnership farmers with total debts of not more than \$1,500,000. Eighty percent of the debt, exclusive of home mortgage debt, must arise out of farming operations. Individuals must have received more than 50 percent of their gross income for the prior tax year from farming operations. There is no gross income test for corporations and partnerships, but more than 80 percent of the value of their assets must be assets related to farming operations. There is no "farm asset" test for individuals.

<sup>6</sup> Conf. Rept. at 48.

<sup>7</sup> § 362(a).

<sup>8</sup> §§ 363, 1107, 1203.

<sup>9</sup> §§ 1123, 1129, 1222, 1225.

<sup>10</sup> § 506(a), (b).

<sup>11</sup> §§ 362(a), 363, 1107, 1203.

<sup>12</sup> §§ 361-363, 1205.

<sup>13</sup> § 362(d)(1).

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- Do not represent parties with conflicting interest.
- Calendar all deadlines, statutory limitation, law and

motion matters, trial setting dates and all other dates which must be remembered.

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<sup>14</sup>2 Collier on Bankruptcy (hereafter "Collier") ¶ 361.01[2] (15th ed. 1987).

<sup>15</sup>§§ 361, 362(d)(1), 363(e), 506(b), 1205.

<sup>16</sup>Ibid.

<sup>17</sup>§§ 502(b)(2), 506(b).

<sup>18</sup>In re American Mariner Industries, Inc., 734 F.2d 426 (9th Cir. 1984); Grundy National Bank v. Tandem Mining Corp., 754 F.2d 1436 (4th Cir. 1985); see In re Briggs Transportation Co., 780 F.2d 1339 (8th Cir. 1985). In July 1986, the Fifth Circuit held that undersecured creditors were not entitled to compensation for lost opportunity costs. In re Timbers of Inwood Forest Associates, Ltd., 793 F.2d 1380 (5th Cir. 1986), aff'd en banc, 808 F.2d 363 (5th Cir. 1987), cert. granted, 55 U.S.L.W. \_\_\_\_\_ (1987). Until the Supreme Court resolves the issue, lost opportunity cost payments probably will be required in most Chapter 11 cases outside the Fifth Circuit.

<sup>19</sup>In re Ahlers, 794 F.2d 392 (8th Cir. 1986) (petit. for cert. pending).

<sup>20</sup>§ 1205(b)(3). It appears that rent payments are required regardless of whether the land is falling in value. Compare § 1205(b)(3) with § 1205(b)(1), (2), (4); see In re Timbers of Inwood Forest Assoc., Ltd., 808 F.2d at 379 (dissenting opinion). Ironically, the fair rental value standard under Chapter 12 imposes a higher burden of adequate protection on family farmers than the Chapter 11 standard in the Fifth Circuit. Ibid.

<sup>21</sup>§ 1205(b)(1), (2), (4). However, the legislative history of Chapter 12 and the constitutional prohibition on takings without compensation suggest that some form of compensation for lost opportunity costs may be required. Cong. Rec. S. 5556, 5558 (May 7, 1986); First English Evangelistic Lutheran Church v. Los Angeles County (U.S. Sup. Ct., June 9, 1987); United States v. Security Industrial Bank, 459 U.S. 70 (1982); Wright v. Union Central Life Insurance Co., 311 U.S. 373 (1940); Borchard v. California Bank, 310 U.S. 311 (1940); John Hancock Mutual Life Insurance Co. v. Bartles, 308 U.S. 180 (1939); Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, 300 U.S. 440 (1937); In re Ray, 70 B.R. 431 (Bankr. E.D. Mo. 1987). But see In re Rennich, 70 B.R. 69 (Bankr. D. S.D. 1987).

<sup>22</sup>See note 20, supra.

<sup>23</sup>§§ 1221, 1224; Conf. Rep. at 50.

<sup>24</sup>Suggested Interim Rules for Chapter 12-4(d).

<sup>25</sup>§§ 541(a), 1123, 1129.

<sup>26</sup>§§ 1129(a)(7), (8), 1129(b)(2)(A).

<sup>27</sup>Ibid.; In re Welco Industries, 60 B.R. 880 (BAP 9th Cir. 1986).

<sup>28</sup>§§ 1126(c), 1129(a)(7), (8), 1129(b)(2)(B); see In re Ahlers, supra.

<sup>29</sup>§§ 541(a), 1207, 1222(c), 1225(b). The plan can cover the debtor's future income for up to five years, but the debtor almost certainly will not propose such plans unless the longer term is necessary to pay priority creditors.

<sup>30</sup>1225(a)(5). The appropriate rate of interest under Chapter 12 is less clear than under Chapter 11. Chapter 12 was adapted from Chapter 13, under which the courts have used a variety of interest rates ranging from the treasury bill rate to the market rate for loans of like kind and quality. 5 Collier ¶1325.06 [4] [b] [iii] [B]. The only circuit court decisions to date under Chapter 13 have adopted the market rate standard. In re Colgrove, 771 F.2d 119 (6th Cir. 1985) (market rate, but no more than

contract rate); Memphis Bank and Trust Co. v. Whitman, 692 F.2d 427 (6th Cir. 1982) (market rate). Debtors undoubtedly will seek to rely on the Chapter 13 decisions establishing a lower rate. The only reported decision concerning the appropriate rate under Chapter 12 adopts the market rate standard. In re Citrowske, 72 B.R. 613 (Bankr. D. Minn. 1987). Moreover, in two recent unpublished opinions, bankruptcy courts in Montana and Idaho have held the market rate standard applicable. In re Janssen Charolais Ranch, Inc., Case No. 86-40693 (Bankr. D. Mont. May 5, 1987); In re Barnes, Case No. 86-033-53F (Bankr. D. Idaho May 7, 1987). In light of the trend in decisions under Chapter 13 and the similarity in purpose of

Chapter 12 to Chapter 11, the market rate standard probably will prevail.

<sup>31</sup>1225(a)(4), (6). Disposable income is what is left over after the debtor pays installment payments to secured creditors, priority creditors, operating expenses and living expenses for the debtor and his dependents.

<sup>32</sup>§ 1225.

<sup>33</sup>§ 1225(a)(6).

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## A change in L.E.A.R.N. -ing... The New "Center for Law-Related Education"

by James Dolliver  
*Justice, Washington Supreme Court*

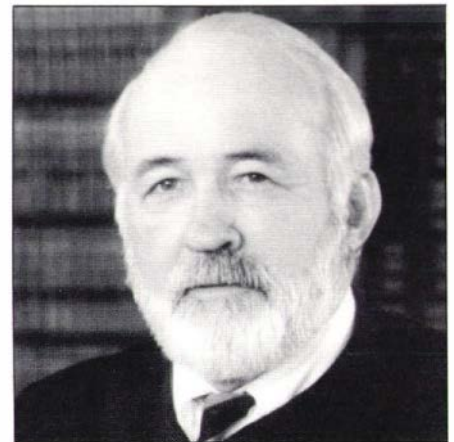
L.E.A.R.N. (Law-related Education and Resource Network) has graduated from "Network" to a full-fledged "Center" for law-related education. At a recent board meeting, the members voted to shed the connotation of impermanency in the label "network" and to become the Washington State Center for Law-related Education.

The newly structured Center, for which I will serve as president, has outlined an ambitious set of goals for the year:

- 1) to identify public school districts interested in expanding law-related education and to determine how their needs can be met;
- 2) to cooperate closely with the Superintendent of Public Instruction's Office in institutionalizing law-related education in Washington;

- 3) to develop programs for helping school districts in implementation of the new Guidelines for the Social Studies relating to LRE;
- 4) to help the Washington State Bar Association's efforts to develop a resource library to be used by educators, attorneys and others interested in LRE;
- 5) to facilitate grant-writing and fund-raising efforts that would benefit LRE.

The Center will be working in close association with WSBA, which houses the Center's activities; the American Bar Association, which supplies curriculum ideas through its Special Committee on Youth Education for Citizenship; the Superintendent of Public Instruction's Office; and the Washington Council on Crime and Delinquency.



Other agencies and associations have sent representatives to our meetings over the last six months, and we anticipate an expansion of involved participants who will bring fresh ideas to the Center's future activities. We look forward to interaction among all those interested in educating the public about the law. □

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# Supremes—Last Day

When the bailiff cried, "All rise!" in the state Supreme Court June 18, it was the last time those words will be heard in that room for more than two years.

That day marked the end of the Court's 1987 session. August 24, residents of Olympia's Temple of Justice will leave the building and go into temporary quarters in Olympia's Highways-Licenses Building. They will stay there until earthquake-proofing and remodeling work is completed on their historic, World War I-era building. Completion is scheduled for the summer of 1989.

The first building constructed on the present capitol campus, the Temple was occupied in 1913. But though it was built of heavy marble and brick, it was not built to withstand high-intensity earthquakes. Work to remedy the problem and restore some of the building to its original design begins this fall.

Beginning in late August, the Court

will take over most of two floors in the old Highways-Licenses Building. But the Court won't hear cases there. Instead, clerk Reginald Shriver has arranged an odyssey-like calendar which, during their fall term, will take the nine justices from Olympia to Bellingham and back again.

On September 17, they will sit at the University of Puget Sound Law School in Tacoma, where they will join with the state Court of Appeals in ceremonies observing the 200th anniversary of the U.S. Constitution. Later that month, they will go to Bellingham for two days—a first for the Court—where they hear cases on the campus of Western Washington University.

Their fall schedule will also take them into federal courtrooms in Seattle and Tacoma. Back in Olympia, a House hearing room will be their locus until the beginning of their winter term—and the start of the 1988 legislative ses-

sion. Then, the theatre-like auditorium in the state Department of Social and Health Services building will become their courtroom.

They will return to their own building in July of '89, in time to open the doors to state Centennial year visitors. Judges and court staffers will find a remodeled, rewired, reinforced—in short, a totally rebuilt—building waiting for them. Certain areas—the marble-lined foyer, the paneled courtroom, and the recently redecorated conference-reception room—will look as they do now. But other areas, partitioned off years ago to create additional office and storage space, will be restored to look as they did in the 1920s.

Total cost of the reconstruction project will be \$14 million. The project will be under the direction of the Department of General Administration. □

## Revised Schedule at a Glance

Tuesday, September 15, 1987	House Hearing Room — Olympia
Thursday, September 17, 1987	UPS Law School
*Tuesday, September 22, 1987	House Hearing Room — Olympia
*Wednesday, September 23, 1987	House Hearing Room — Olympia
*Tuesday, September 29, 1987	Bellingham
*Wednesday, September 30, 1987	Bellingham
Tuesday, October 13, 1987	9th Circuit Court
Wednesday, October 14, 1987	9th Circuit Court
Tuesday, October 20, 1987	U.S. District Court Tacoma
Tuesday, October 27, 1987	9th Circuit Court
Wednesday, October 28, 1987	9th Circuit Court
Monday, November 9, 1987	House Hearing Room — Olympia
Tuesday, November 10, 1987	House Hearing Room — Olympia
Tuesday, November 17, 1987	U.S. District Court Tacoma
Wednesday, November 18, 1987	U.S. District Court Tacoma
Tuesday, November 24, 1987	House Hearing Room — Olympia
Wednesday, November 25, 1987	House Hearing Room — Olympia

\*Hearing sites switched.



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## Condon and Kinoy Headline Convention

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

Eighteen continuing legal education seminars will be offered for registrants attending the 1987 Annual Meeting in Vancouver, B.C. A detailed description of each program schedule has been placed in another part of this issue for your review.

We are pleased to confirm that the 1987 seminars will feature another outstanding group of speakers. Two of the major stars this year are **Arthur Kinoy**, Distinguished Professor at Rutgers School of Law in New Jersey, and **Thomas J. Condon**, a partner in the Kansas City law firm of Condon, Strayer & Shouse, P.C. and a 12-year veteran of the National Football League.

Arthur Kinoy will participate in the special Saturday Trial Practice Section seminar entitled "Perspectives On The Constitution: Crisis or Transition?" Kinoy is a Distinguished Professor at Rutgers School of Law. He is Vice-President of the Center for Constitutional Rights in New York City (and was one of its original founders); he is the author of *Rights on Trial: The Odyssey of a People's Lawyer*. He has argued numerous cases before the U.S. Supreme Court, including such landmarks as *Dombrowski v. Pfister*, 380 U.S. 479 (1965), a civil rights case dealing with the authority of federal courts to stay proceedings in a state court; *Powell v. McCormack*, 395 U.S. 486 (1969), representing Adam Clayton Powell in attempts to oust him from Congress, and *U.S. v. U.S. District Court of E. Dist. of Michigan*, 407 U.S. 297 (1972), dealing with warrantless wiretapping. During the 1960s, Kinoy represented Dr. Martin Luther King.

Thomas Condon will participate in the Young Lawyers Division CLE "Strategic Advocacy" seminar. He will address the topic "Negotiation Advocacy" and will cover various aspects of negotiation, including strategies, the dynamics of negotiating, negotiation styles, working with and persuading one's clients, and ethical considerations. A graduate of Boston College

and of the University of Baltimore Law School, he has considerable negotiation experience and a diverse background that provides him with particular expertise in this area; he played 11 of his 12 years in the National Football League as starting right guard for the Kansas City Chiefs. From 1975-1978 he was the Chief's Alternate Player Representative to the NFL Players Association, and the Player Representative from 1978-1982. He was a member of the NFLPA's Executive Council from 1979-1982, and in 1983 was an organizer and speaker for the United States Football League Players Association. From 1984-1986 he was the president of the NFLPA, where, among other duties, he was involved in negotiating the contract with the NFLPA's current executive director, Gene Upshaw. He has been a member of the NFLPA's Competition Committee, a trustee on the NFLPA Retirement Board, and an ex-officio member of the Agent Disciplinary Committee. Combine that experience with his legal background and his status as Certified Player Agent for the NFL, and you can see that Condon has been involved in negotiation advocacy since 1975 and will provide the Young Lawyers Division seminar with a unique viewpoint.

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- SEP 23 Seattle (Westin Hotel)

Rex E. Lee, former U.S. Solicitor General, had been scheduled to appear on the Trial Practice Section seminar program; we regret to announce that he has had to cancel his appearance due to illness.



## Notes From the Academy

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

**Civil procedure. (Case 1.)** In asbestosis case, though complaint alleged only products liability, plaintiff was rightfully allowed to recover on negligence theory. Complaint was deemed amended when pretrial discovery proceedings and motions made it clear plaintiff alleged negligence. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (3/5/87).

(Case 2.) RCW 4.84.250 allows prevailing party to recover attorneys' fees in cases involving relatively small amounts of money, provided prevailing party gets judgment for at least as much as he or she offered to settle before trial. Previous court of appeals decisions have required prevailing party specifically to cite statute in complaint in order to obtain such fees. Supreme Court now holds complaint need not cite statute. Prevailing party did, however, mention statute when making offer of settlement. *Beckmann v. Spokane Transit Authority*, 107 Wn.2d 785, 733 P.2d 960 (3/5/87).

(Case 3.) RCW 6.04.060 provides that "all property, real and personal, of the judgment debtor, not exempted by law, shall be liable to execution." Debtor held stock appreciation rights in his corporate employer, which allowed him to receive difference between his stock option price and market price on day he chose to exercise his rights. *Held*: (a) Debtor's stock appreciation rights were not "property" under statute; and (b) even if rights were to be considered property, court had no power to order employee debtor to exercise rights for benefit of his debtors. *Safeco Insurance Co. v. Skeen*, 47 Wn. App. 196, 734 P.2d 41 (3/18/87).

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

**Real property security.** Priority of engineering liens, authorized by RCW Chap. 60.48, does not relate back to date work was commenced, as do mechanics' liens. Priority provisions of RCW 60.04.050 (mechanics' liens) are not read into RCW Chap. 60.48. Therefore, priority of engineering lien dates only from date filed. *CH2M Hill, Inc., v. Greg Bogart & Co.*, 47 Wn. App. 414, 735 P.2d 1330 (4/13/87).

— W. B. Stoebuck

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**PIERCE COUNTY REPORT**  
by **ROBERT W. MARSDEN**

About 40 participated in the recently concluded Tacoma-Pierce County Bar Association's bowling league. Participants included people from just about every sector of the legal community. The team of Judge **Bruce Cohoe**, **Ted Gonzales**, **John Feutz** and **Ramon Esquire** finished first in the league, with the team of **Don Mansfield**, **Ryan Mansfield**, **Elaine Murphy** and **Victoria Webb** winding up in second place.

**Dennis Ball**, formerly an associate with **Kenyon Luce**, has opened his own office in downtown Tacoma.

**Joseph G. Tucci** has become a shareholder and principal in his law firm. The firm's name is now **Thompson, Krilich, La Porte & Tucci**. **P. S. David H. Prather** has joined that firm as an associate.

**Marywave Van Deren** has been named a partner in the Seattle-Tacoma law firm of **Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim**.

Wedding Bells are scheduled to ring for newly appointed Pierce County Superior Court Commissioner **Craig Adams** and **Sandra Kindig**. **Kindig** is a principal in the firm of **Kindig and Jahns**.

Congratulations to **Don Meath**, who was recently appointed to the position of Court Commissioner for the Washington Court of Appeals, Division II. **Meath** is a former Pierce County deputy prosecutor and, for the past eight years, has been with the Pierce County Department of Assigned Counsel. He replaces **Karen Seinfeld**, who was recently appointed to the Superior Court.

**Michael Flynn** and **Chris Eichhorn** have moved their offices from North Hill Puyallup to downtown Tacoma.

Noticeably absent at the County-City Building these days are the full beards of **Scott Candoo**, **Steve Gregorich**, **Larry Moore**, **Bert Johnson** and **Tom Dinwiddie**. Apparently the Smith Brothers syndrome is passé.

**SEATTLE-KING REPORT**  
by **JAMES L. VARNELL**

*Office Moves.* **Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax** an-

nounces five new shareholders of the firm: **Gary Huff**, **Michele G. Gangnes**, **Dennis H. Walters**, **Gail P. Runnfeldt**, and **William H. Beaver, Jr.** **Bruce J. Heiman** has joined **Preston, Thorgrimson, Ellis & Holman** as a partner. **David L. De Courcy** and **Suzanne Oliver Cohen** announce the formation of their professional corporation for the practice of law. **Monroe, Stokes, Eitelbach & Lawrence** announce that **Robert J. Thomas** is now associated with the firm. **Robert M. Keefe**, **Kevin F. Keefe**, **Thomas P. Keefe, Jr.**, and **Peter Moote** have associated to form **Keefe-Moote law firm**. **Thomas P. Keefe, Sr.**, is of counsel.

**Perkins Coie** announces that **Anthony J. Thompson** is a partner and **Donald C. Baur** an associate in the Washington, D.C. office. **James R. Moore** and **Richard W. Oehler** are now of counsel in the Seattle office. **Susan R. Davis** and **Donald K. Davis** have formed the **Davis** firm in Ballard; **James Beard** is officing with them. **Barry L. Flegenheimer** is now a partner in the newly named firm of **Li, Klein, Bell, O'Connor and Flegenheimer**. **Graham & Dunn** announces that **Douglas G. "Long Ball" Berry** and **Philip H. Brandt** are members of the firm. **Charles D. De Jong**, **Mark A. Finkelstein** and **James T. Firn** are now associated with the firm. **Marywave Van Deren** has been named a partner in **Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim**. **Joseph G. Tucci, Jr.**, has become a shareholder and principal of **Thompson, Krilich, La Porte & Tucci**; **David H. Prather** is an associate there.

**Keith G. Baldwin**, **Lori Nelson Adams** and **Robert D. Johns** have become members of **Reed, McClure, Mocerri, Thonn & Moriarty**. **John O. Burgess** is now managing partner and **James A. Oliver**, administrative partner of **Short, Cressman & Burgess**. **Gerald L. Coe** has been named chief executive officer of **Washington Health Network**. **Jones, Grey & Bayley** has merged with Portland-based **Stoel, Rives, Boley, Fraser & Wyse**. **Dwayne A. "Top Dollar" Richards** and **Laurie A. Kinerk** have moved their offices to 1023 Columbia Street. **De Funis & Balint, P.S.** and **David W. Gossard** have relocated their respective offices to the United Airlines Building.

**Thomas R. Merrick** has joined **Bul-**

livant, Houser, Bailey, Pendergrass & Hoffman as an associate. **Julie A. Brown** has joined Osborn & Gosanko as an associate. **Ralph W. Anderson, Robin L. Thompson** and **Jacqueline L. Kulp** have joined Trujillo & Peick as associates. **Jane B. Hall** has relocated her office to the Columbia Center. **Mark J. Wilson** has joined Bundy, Meyer & Home as an associate. **Gregory D. Lucas** is sharing office space with **Vickie L. Crutchfield** in Renton.

**Michael Tierney** and **Karen Feyerherm** have joined Betts, Patterson & Mines as associates. **Michael D. Hepburn** and **Leslie Ann Budewitz** have joined Mitchell, Lang & Smith as associates. **Bradley B. Jones** and **Robert P. Zuanich** have relocated their offices to the AGC Building. **Ann J. Durham** has joined Henry & Ducharme as an associate. **Robert H. Campbell** has been promoted to managing director of Shearson Lehman Brothers, Inc.

After six and one-half years as assistant director of CLE for the WSBA, **Joel Green** is now law clerk to the Honorable **Thomas T. Glover**, U.S. Bankruptcy Court, Seattle. **Denis Wade** and **John Dahl** have joined Mullavey, Prout, Grenley, Foe & Lawless as associates. **Mussehl, Rosenberg, Jeffers, Cotter & Wechsler** announces that **Judith D. Jeffers** and **Mary H. Wechsler** have become partners, and that **Katharine M. Ross** and **Elizabeth C. Steinacker** are associates. The Sharpe law firm has disbanded. **Christopher Sharpe** and **John Gorrell** have retired. **Warren Dewar** has moved to Burns, Schneiderman & Finkle and **Virginia Young** has opened her own office.

*Special Recognition.* The Seattle-King County Bar Association announces the election of officers for 1987-88: **M. Wayne Blair**, president; **Fred R. Butterworth**, first vice-president; **Stew Cogan**, second vice-president; **Ronald E. Cox**, secretary; **Michael Killeen**, treasurer. Elected to the board of trustees for a three-year term are: **Julia I. Baute**, **Lucy Isaki**, and **Marsha J. Pechman**.

**J. Shan Mullin** has been elected chairman of the board of directors and chief volunteer officer of United Way in King County. **Malcolm Moore** is president-elect of the American College of Probate Counsel. **Robert C.**

**Mussehl** has been re-appointed chair of the Standing Committee on World Order Under Law. **John J. Soltys** has been named as the recipient of an Exceptional Performance Award by the Defense Research Institute and the Defense Research and Trial Lawyers Association. **Melvyn J. Simburg** has been elected chairman of the WSBA section of international law and practice.

*Honors.* The Seattle-King County Bar Association honored the following

at its 81st Annual Meeting: **Gerard M. Shellan** as the Outstanding Judge; **M. Wayne Blair** received the Helen M. Geisness Award for service on behalf of SKCBA, particularly in areas of mandatory arbitration and efforts to reduce court congestion and delay; the outstanding lawyer or non-lawyer award was presented to **Ronald M. Gould** and **Robin C. Anderson** for their efforts with the "Today's Constitution and You" bicentennial project; the Pro Bono Service Award to **Preston, Thor-**

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grimson, Ellis and Holman; the President's Award to **Lloyd D. Coble** and **Ronald W. Coble** for outstanding service to low-income clients; and the Young Lawyers' Award to **Michele A. Gammer** for her efforts in establishing a Civil Rights Pro Bono Attorney Panel in the U.S. District Court, and to **John Ruhl** for his leadership in establishing the Dispute Resolution Center of Seattle-King County.

*Dubious Honors.* The Seattle Legal Assistants' Panel (referred to as SLAP) recently presented various awards at its

annual meeting held in the Tower Club of the Columbia Center. The following received "SLAPs," which are similar in appearance, and equal in prestige, to an Oscar: for most last-minute pleadings requested at 4:59 p. m. on a Friday afternoon to **Richard P. Matthews**; for the least responsive, most uncooperative attorney to **Annon May**; for the most requests for weekend and post-5:00 p. m. work (largely as a result of his dilatory work habits) to **David R. Koopmans**; and the award for consistently longest lunch "hours" (a tie) to

**Michael C. Duggan** and **Andrew R. Hamilton**.

**SNOHOMISH COUNTY  
REPORT**  
by **LEE B. TINNEY**

**Walter O. Peale** and **John Segelbaum** have moved to 51 W. Dayton, Suite 208, Edmonds, WA 98020, and they are pleased to announce that **Richard J. Shurtz**, formerly of Ephrata, has joined them as an associate. This must be a popular spot, as **Tom P. Conom** has also moved to the same address, only he's at Suite 206. **Arnold M. Young** is now at 19500 - 144th Avenue N.E., Building A, Suite 1000, Woodinville, WA 98072. **Melinda Grout** has also moved from Sultan to Woodinville, joining **Ann Kruse** at 13901 N.E. 175th, Woodinville, WA 98072 as her associate. In Everett, Fisher, Patterson, Metcalf & Simpson have relocated their offices to 3224 Wetmore Avenue, Suite 204.

In recognition of the achievements of Snohomish County Legal Services and the Snohomish County Bar Association, Governor **Booth Gardner** proclaimed June 25, 1987 as Snohomish County Pro Bono Publico Day in the state of Washington. Kudos to all of those attorneys contributing pro bono services.

**Ed Novack** was appointed by the Supreme Court to chair a commission to study the possibility of reforming attorney fee arrangements in tort cases.

It's not all work and no play. In the Healers v. Stealers Third Annual Softball Tournament (doctors v. lawyers), the doctors won the first game, and the lawyers the second. The third deciding game got rained out. The most popular option (to the lawyers) to resolve the tie is to have Judge **Joseph Thibodeau** rewrite the rules so the defending champion (lawyers) is declared the automatic winner in the event of a tie. For those who prefer greener grass, the annual Snohomish County Bar Association Golf Tournament is scheduled in July, and a good turnout is expected for that, too.

Last, some food for thought. How do you respond to a notice of withdrawal of counsel, received from a pro se? **Dick Johnson** is still trying to figure this one out.

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## STEVENS COUNTY REPORT by CHRIS A. MONTGOMERY

We are pleased to announce that Stevens County will be participating in a MENTOR project at Colville Senior High School this fall. Jo Rosner, project administrator, and Chris A. Montgomery, local bar president, met with representatives from Colville Senior High School on June 22 to make plans for this exciting project. We encourage any bar association interested in broadening the scope of their activities to contact Jo Rosner. You will find her to be an extremely helpful person.

Local attorney Dannelle F. Watson married James D. Allen on May 23. Since Dannelle is big on women's rights, there was much debate in the bar association as to whether or not she would use a hyphenated last name or succumb to the traditional assumption of the male surname. The debate ends with a compromise, and she will now be known as Dannelle W. Allen (no hyphenation). You can rest assured that women's rights will not suffer as Dannelle remains an ardent advocate. She also just happens to be a very well-

respected attorney in our community.

Chris A. Montgomery had the opportunity to speak to the Colville Chamber of Commerce on June 9. His presentation, made on behalf of the WSTLA Speakers Forum, was on "The Jury System: How and Why It Works." The "Welcome to Jury Duty" video prepared by the Office of the Administrator of Courts in Olympia was used to augment the presentation. Twenty-five businesspeople from the community received the presentation.

Louis N. Chernak, a 1986 graduate of Gonzaga University School of Law, has joined Montgomery Law Firm as an associate. He should prove to be a valuable asset to the MENTOR project with his background in teaching in secondary English and journalism.

## THURSTON COUNTY REPORT by ALAN SWANSON

Our annual dinner and dance was held on May 30 at the Olympia Country and Golf Club. Outgoing President Alan Swanson (who incidentally did a fantastic job last year) presided. Over the last year, Alan put the touch on

several lawyers to head up various public service projects which our bar association undertook, and since these lawyers actually completed these projects without our bar association's being sued, it seemed appropriate to recognize these good fellows. Accordingly, the following were presented with the prestigious Thurston County Bar Association Volunteer Service Award: George Darkenwald, Steve Bean, Ed Holm, Doug Wyckoff, John Hoglund, and Charles Williams.

New officers for the 1987-1988 year are: President, Jay Lyman; Vice President, George Darkenwald; and Secretary-Treasurer, Rochelle Wienker. Our three new trustees are Fred Gentry (now he'll have to show up for at least some meetings!), John Sinclair and Dick Ditlevson.

The extremely popular slow-pitch softball team known as "the Loopholes," sponsored by Swanson, Parr, Cordes, Younglove, Peebles & Wyckoff (sounds like a Seattle law firm!), is winding down yet another glorious season of losses. Any lawyer in this area with a big ego should play a few games with the Loopholes, since it's truly a humbling experience.

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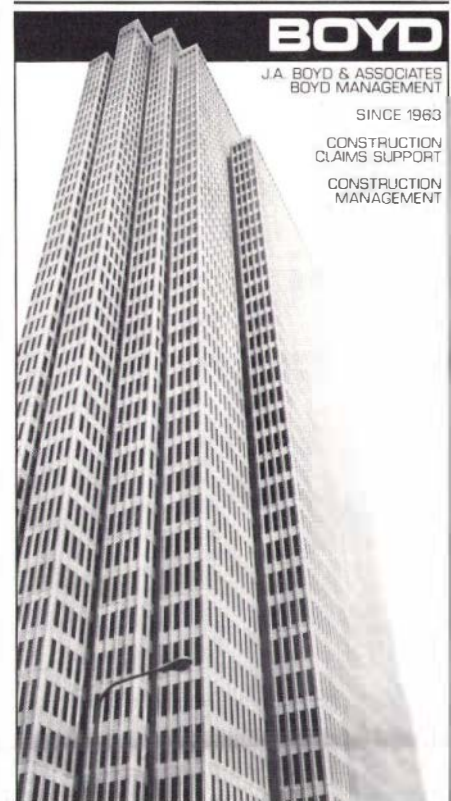
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commercial litigation in her practice.  
Mr. West will continue his business  
and corporate practice.

The firm also announces that partner

### JEFFREY C. THEDE

has moved from the Portland office to the firm's  
Seattle office,

and that

### SCOTT J. BORTH,

formerly of Merkel, Caine, Jory, Donohue & Duvall,

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### WAYNE R. MICHIGAMI,

former law clerk to Justice W. Michael Gillette,  
Supreme Court of Oregon,

have become  
associates practicing in the  
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Now, on to the bowling news ... Winning the gutter-ball award of last place in their league is the team of Connolly, Holm, Tacon & Meserve. Attorneys on that team are Chris Meserve, Chuck Szurszewski, Teresa Jordan, Tracy Mitchell, Jerry Mitchell, Ed Holm, and Margaret Cunniff. Considering the fact that the act of bowling requires that a person almost simultaneously walk forward, swing a heavy ball, and then let go of it, all in one fluid motion, I suppose it's not too surprising where this team ended up...

Doing slightly better was another bowling team with the very clever name of "Honor Roll." I won't tell you how much better they did, since the people on this team desperately need something in their lives to brag about, and there's really no point in giving them any encouragement. But at least it sounds as if they were able to aim the ball after letting go of it. These were Jim Connolly, Walt Perry, Carmel Mackin, and then they threw in a couple of judges to give them that certain flair of authority, Dan Berschauer and Rick Strophy.

Our bar association has now drifted into summer "inactive status" ... much like many of its members.



### Admitted to American College of Trial Lawyers

Five Washington attorneys have become fellows of the American College of Trial Lawyers, a national association of 4,200 fellows in the United States and Canada. Its purpose is to improve the standards of trial practice, the administration of justice and the ethics of the trial branch of the profession.

Admittees are: Keith Gerrard, Perkins Coie, Seattle; Arthur W. Harrigan, Jr., Danielson Harrigan Smith & Tollefson, Seattle; George Karganis, Karganis & Austin, Seattle; Jack G. Rosenow, Rosenow, Hale & Johnson, Tacoma; and Arthur Dean Swanson, a sole practitioner in Renton.



## DISCIPLINE

### Censured

Seattle attorney **Robert L. Erickson** (admitted 1973) has been ordered to receive two Censures by the Disciplinary Board following a hearing. One Censure was for his neglect of the probate of two estates for approximately three years. The other Censure was for mishandling of his client trust account, including failure to have sufficient funds in the account to cover client obligations; failure to deposit sufficient funds of his own to cover bank charges, so that client funds were used for that purpose; and failure to keep accurate and complete records of trust account transactions. Erickson was also placed on probation for two years.

Seattle attorney **Phillip E. Anselmo** (admitted 1981) has been ordered censured by the Disciplinary Board, based upon his direct communication with an adverse party in which he recommended settlement at a time when he knew the party was represented by counsel.

### Reprimanded

Inactive Association member **Elyette M. Weinstein** of Seattle (admitted 1984) has been ordered reprimanded pursuant to a stipulation for discipline, based upon her practice of law while on inactive status.

## ET ALIA

### Christian Legal Society

The Christian Legal Society will sponsor a breakfast during the WSBA convention. This will be the fifteenth year for the event. The breakfast will be held on Friday, September 11, at 7:30 a. m. The convention program will list the room location.

As in past years, there will be a special speaker. Attorneys and their spouses interested in attending are requested to make reservations with Lyle K. Wilson, Pioneer Bank Building, 910 - 164th Street S.E., Mill Creek, WA 98012, telephone (206) 742-9100, by August 20.

### Criminal Law Section

The Criminal Law Section Executive Board invites interested section

members to submit applications for Secretary, President-elect, and three board position openings. Nominations and elections will occur in September. The board currently consists of private practitioners from Bellingham, Spokane, and Seattle; a city attorney; a U.S. Attorney; a county prosecutor; a public defender director; and two law school professors.

Submit a brief narrative about your background and reasons for desiring a board position to Rosemary P.

Bordlemay, Ogden, Ogden, Murphy & Wallace, 2300 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121.

### Interim Suspension

Seattle attorney **Linda K. Navarro** (admitted 1982) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered June 2, 1987. (Interim suspension is pursuant to RLD 3.1 and is not a disciplinary sanction.)

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**Seeking the heirs of Beatrice Arlene Gabulson and/or anyone having knowledge of Valerie Renee Walkey.** Please reply to Post Office Box Number 668, Friday Harbor, Washington, 98250.

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