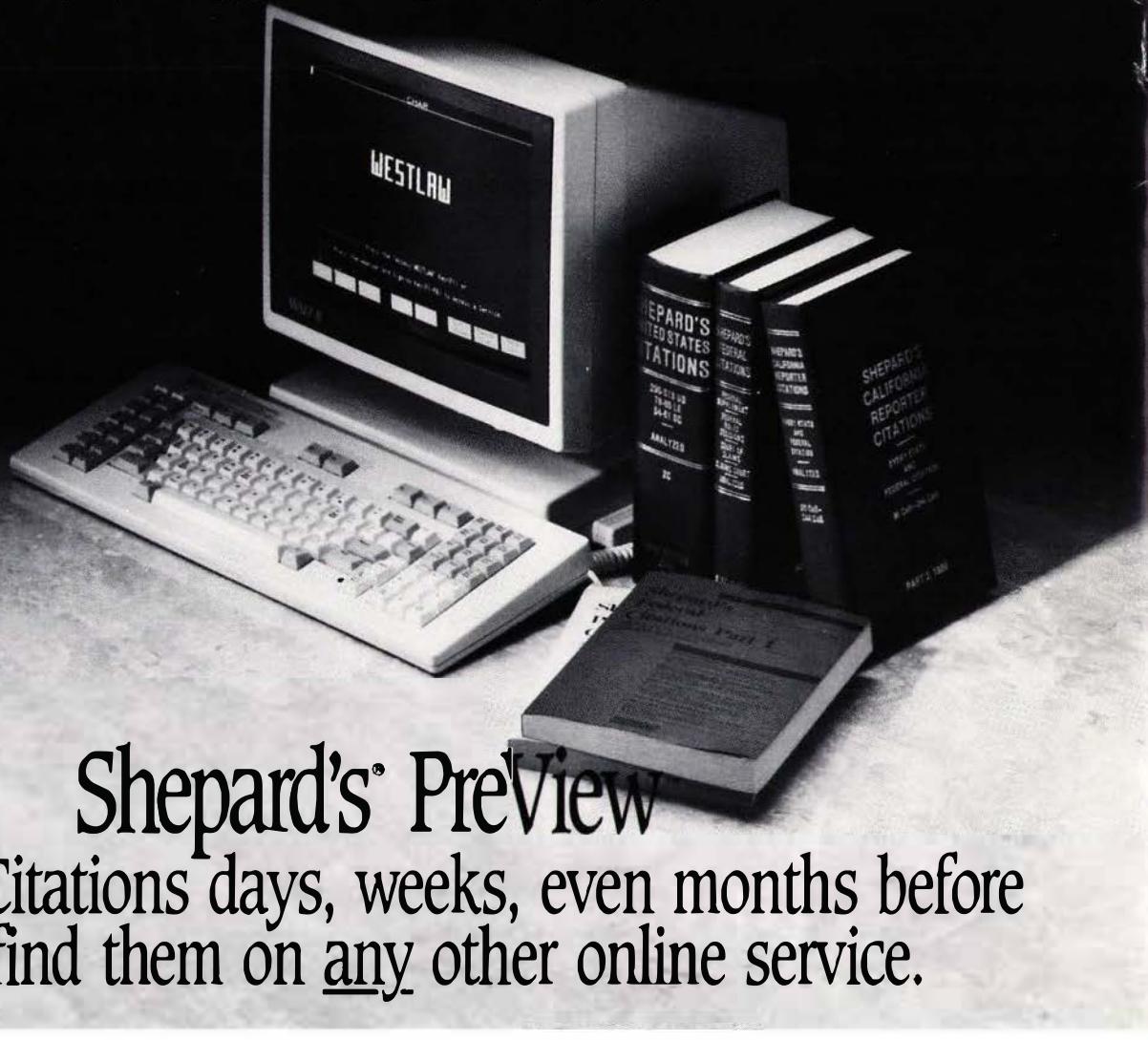


Washington State **Bar**
News

Volume 43, No. 6, June, 1989

**Annual
Financial Issue**

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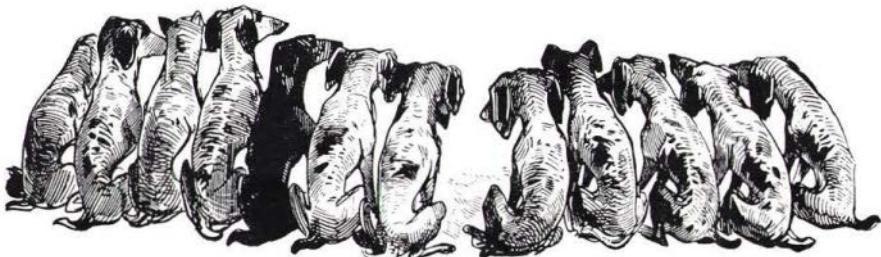
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Letters to the Editor of reasonable length are invited. Such letters should be typed and signed. The Editor reserves the right to select communications or excerpts therefrom for publication, and to edit any letter as may be appropriate.

A Stroh In The Bar

Editor:

Mr. Stroh ("Life After Lawyering," Letters, the *Bar News*, April 1989, page 6), is hereby nominated for the *Bar News'* Tacky Letter All-Time Champion.

DON WITTENBERGER
Lynnwood

Telephone Tackiness Is Avoidable

Editor:

After beginning my morning placing calls to a number of attorneys to whom I had placed calls a week earlier without having received any response — several of them persons who rarely ever return a call — I thought it would be a good time to vent my frustration in writing.

The general lack of telephone courtesy among attorneys in dealing with their colleagues is alarming. I am sure many who conscientiously return those calls they cannot, for some reason, take in the first instance, feel the same frustration. Most troublesome is the attorney who has called me, asked me to return a call and, when I do as requested, am told by some staff member that the attorney is busy, on the phone, has clients, or, worst of all, is in conference.

There are two simple rules of telephone etiquette all attorneys ought to follow: First, they should return all calls as soon as time permits, even if only to continue the conversation, if necessary, at a later time which is certain to be more convenient. Second, when a call is returned, they should take it, regardless of the situation they are in at the time. If necessary, they can tell the caller of a later time when a more appropriate conversation can be had.

I hesitate to suggest that one simple rule can obviate the need for these rules, which is simply — to take all incoming calls from attorneys. But that's too simple, isn't it?

We are all very busy and made more busy and frustrated by needless calling and recalling which, incidentally, increases the cost of legal services. Let's forget the charade that we are too busy to take and return calls from our colleagues. Let's all renew our efforts to rid ourselves of telephone frustration and exercise common telephone courtesy.

BRIAN J. DANO
Moses Lake

Another Bale of Summons On the Doorstep, Ken —

Editor:

This letter is in reaction to a decision recently handed down by the Court of Appeals, Division 1, Landreville vs. Shoreline Community College District No. 7, *Official Advance Sheets*, 53 Wn. App. 330 (February 17, 1989). It is not my intent to comment upon the ultimate decision of the court, but rather to comment on the position of the Office of the Attorney General.

The deciding issue in that case was whether jurisdiction was acquired over the state when a process server for the plaintiff left a copy of the summons and complaint with an administrative assistant in the attorney general's office. One has to assume from that that actual notice was given. The Court of Appeals determined that such service of process was ineffective under RCW 4.92.020. While technically the manner of service may have violated the statute, I do not think it behooves the Office of the Attorney General to raise such a defense when actual notice was received. We as attorneys could perhaps raise such a defense if the papers are dropped off with our receptionists, as is often done. Such a position is even less tenable when taken by paid public officials who should have some interest in serving the ultimate ends of justice.

It perhaps might be necessary and appropriate for us to now ascertain the home address of Kenneth Eikenberry and see that he is personally served with every summons and complaint filed against the state of Washington. While doing this would be somewhat absurd, it would certainly be a response in kind to the actions of the Office of the Attorney General.

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A Belated April 1 Court Notice

Editor:

Enclosed please find a copy of a new Clallam County Superior Court form of order proposed by attorney Craig Ritchie on April 1, 1989. This proposed order form appears to be extremely appropriate, and it is my hope that the *Bar News* may see fit to publish it as a sample form for other counties throughout the state.

KENNETH D. WILLIAMS
Port Angeles

(The order form is reproduced below — Editor)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLALLAM COUNTY

vs. Plaintiff,) Case No. _____
vs.)
Defendant.)

THIS MATTER having come on:

- (1) Regularly; (6) Without calling it in before 11:00 a.m.;
 (2) Irregularly; (7) Without calling it in before 11:00 a.m. Wed.
 (3) Very irregularly; (8) Without any notice to anybody;
 (4) Impertinently;
 (5) On Bended Knee;
 (1) Upon motion of _____
 (2) By agreement of all parties.
 (3) Ex parte.
 (4) For no good reason;

and the Court having:

- (1) reviewed the files and records herein;
 (2) glanced at the outside of the file;
 (3) been upset because nobody brought the file;
 (4) looked only at the "Judge's Copies" of papers sent by counsel;
 (5) only listened to the unsworn BS of counsel;
 (6) not looked at or considered anything at all;

and being:

- (1) fully advised (2) partially advised
 (3) somewhat advised (4) ill-advised
 (5) not at all advised (6) clueless;

in the: (1) premises; (2) Matter at issue; (3) law;

NOW, THEREFORE,

It is hereby ordered:

() DONE () DATED

- (1) open court (5) chambers
 (2) closed court (6) the hall
 (3) the tennis court (7) the coffee room of the clerk's office
 (4) a recess (8) see court heading, *supra*.

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Professionalism Isn't Dead

Editor:

In mid-May, after 14 years of practicing law, I retired from active legal practice to found Preventive Lifestyles, Inc., a company whose goal is to help people lead longer, healthier lives by breaking harmful habits, such as smoking, and developing healthy habits, such as following a good diet and exercising regularly. Contrary to speculation, my decision was not reached after reading Hugh Stroh's letter in the April *Bar News*, but was the result of my long-term life planning.

I realize that I do not have the breadth of experience of many retiring attorneys. However, my practice in Washington over the past ten years has provided some valuable insights into the profession and the people practicing in it. First, my greatest pleasure has been my contact with thousands of attorneys all over the state, 99 percent of whom have been polite, reasonable and competent. While I have had dealings with a very few attorneys whose competence I seriously questioned, I have only met one true misogynist. Even the number of "difficult personalities" has been low, considering the volume of my practice. (I am certain that, at times, I myself have been thus characterized by my opposing counsel.)

Second, I have been amazed at my colleagues' generosity in providing "professional courtesy" (i.e., free legal advice) when I have needed it, and I have sought to reciprocate whenever and by whomever I am asked. I can only praise and encourage this practice.

Third, my biggest complaint about my fellow attorneys is their occasional failure to familiarize themselves with the law or procedure before beginning or taking an action. My one piece of advice to attorneys — both new and old — is "read the statute" and "play by the (court) rules." If you are in an unfamiliar area, at least review the statutes and annotations or seek professional courtesy from someone who knows the field before you embark. We practicing in Washington are fortunate in that Rule 11 sanctions are rarely sought or granted. Still, the best way to avoid both sanctions and malpractice claims is to research an unfamiliar issue first.

Similarly, the best way to avoid causing opposing counsel unnecessary, expensive and frustrating work is to play by the (civil) rules. Give all counsel adequate and timely notice; follow local rules where they are applicable; and be

reasonable in granting extensions of time and continuations. Forcing an opponent into court to seek this type of relief frequently does no more than run up unnecessary fees and engender hard feelings.

Fourth, I generally have been satisfied with the quality of Washington judges and their opinions. It has become increasingly rare to find a judge who has not read the pleadings prior to a hearing or whose decision reflects either bias or a lack of understanding of the issues. My only criticism of our judiciary is their occasional tendency to "split the baby" rather than applying the law (an impression which no doubt arises from my professional defense orientation).

In conclusion, as I look back over 14 years of practicing law, my overall impression is one of pride and satisfaction. The lessons learned and experience gained in my Washington practice are invaluable. Lawyer jokes to the contrary, I think we are doing a pretty good job of running a clean but difficult system. My thanks to all my colleagues who have helped make my past ten years such a positive experience. While I will miss many of you as adversaries, I look forward to our continued contact as friends.

BOBETTE S. JONES
Seattle

Increased Filing Fees Will Hurt Some They're Intended To Help

Editor:

I read in my March 23, 1989, *Olympia Report* that the Board of Governors wants to endorse Substitute House Bill

1237 because of the critical need for legal aid services for the poor in this state. Apparently, the difference between the current \$78 filing fee and the proposed \$100 filing fee would be put into a special fund for legal aid services for the poor.

The effect of this is to further restrict access to the courts of that class of persons who are not "poor" but who, on the other hand, are struggling hard to make ends meet. Many of my clients have a hard enough time coming up with the \$78 filing fee and \$200 or \$300 for an initial retainer. To have the Bar Association now asking this class of "almost poor" to help fund legal services for the very poor seems to me to be absurd.

I am taking a guess when I say this, but I suspect that most of the lawsuits filed in King County are not filed by wealthy individuals or lucrative businesses. I suspect that most of the cases filed in superior court are filed by individuals who are working for a living. It would be more equitable to tax society at large if we are going to fund legal services for the poor.

I notice that Substitute House Bill 1643 would provide for pre-judgment interest for judgments not based upon a contract or tax refund. This sounds like a step forward in getting much-needed financial assistance to injured persons, who currently have to wait for up to two years for a trial date (in King County). What is the position of the Board of Governors on this?

IAN MACRAE
Issaquah

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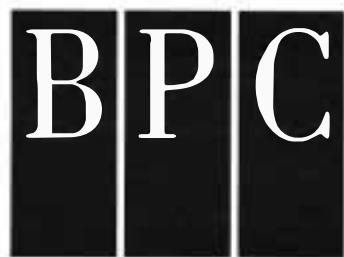
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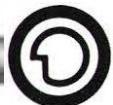
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Quack! Quack!

During the past year I have consistently limited my *Bar News* column to matters which have come before the Board and which bear on the practices of all of us who are members of the legal community. As I have previously mentioned, my articles are submitted almost two months in advance of publication . . . so my remarks are generally old news before they are printed.

Although I am now midway through my term as president, by the time you read this column I'll be limping along as a lame duck with only three and one-half months to go.

I've been very much impressed this year by the membership's reaction to my request for input on important Bar projects. The response to the Bar questionnaires has been promising in terms of the number of people who filled them out and mailed them in. Only about 3,000 have been analyzed at the time this column is being written so I will save information on the results of the poll until all responses have been analyzed, sometime next month.

With respect to the Novack Commission Report, the Board of Governors voted unanimously to oppose the recommendations contained in the report and directed me to write to Chief Justice Callow advising him of the Board's opposition and outlining alternative proposals which will serve both the Bar and the public. The Board has committed its resources, where feasible, to provide additional education for the public regarding attorney fees practices and has suggested alternatives regarding, among other things, contingency fee contracts. The Board proposal on contingency fee practices provides the client with the option of paying costs within 30 days of billing to be charged a contingent fee on the net recovery or not paying costs as they become due and being charged on the gross recovery. The full text of the report to the court may be obtained from the Bar office.

We had scheduled a full afternoon at our April Board meeting in Bellevue to deal with the task force report on professionalism. Because of time constraints, the Board was only able to deal with the very substantial issues outlined in the report for only a short period of time.



Elizabeth J. Bracelin

Some of the suggestions proffered by the task force included a type of mentor program for younger lawyers; a commitment by law firms to set high ethical standards as applied to all of their attorneys; proposed scholarship funding, etc. These issues will remain under study. Stephen DeForest, Board member representing King County at large, has graciously offered to be liaison to the task force. Any comments or suggestions you may have on ways of dealing with the professionalism issue should be directed to Mr. DeForest at his office or at the Bar office. I hope that we will hear from you once again, and thanks so very much to those of you who have been so generous in sharing your ideas this past year.



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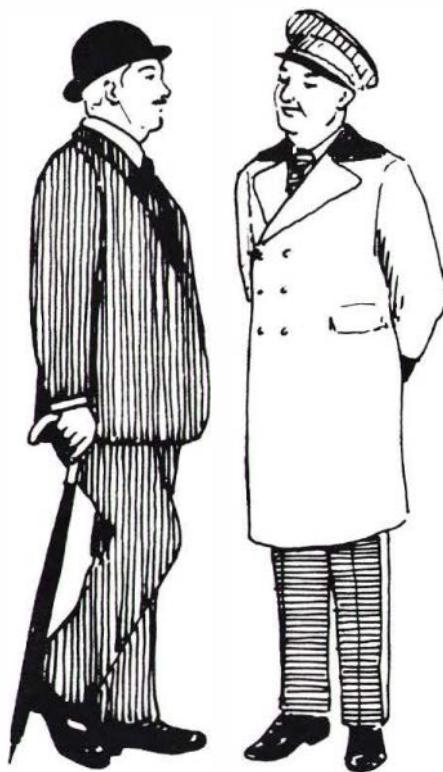
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Customer Actions Against Securities Dealers

by Fredrick D. Huebner

Black Monday — the stock market crash of October 19, 1987 — ended one of the longest-running financial parties of the twentieth century. The 508-point decline in the Dow Jones Industrial Average marked the first time that many investors and brokers had seen a bear market. Post-crash economic pressures on both brokers and investors have spurred a new wave of customer lawsuits against securities brokers — over 4,000 in 1987 alone.

This article reviews the law and practice of litigation between dissatisfied investors and their securities broker-dealers. It examines four areas that an attorney representing a customer or broker needs to consider: the relationship between the customer and the securities broker, the common types of customer actions, the defenses to customer actions, and the system of securities arbitration that is now used in resolving most customer actions.

The Relationship Between the Customer and the Securities Broker

The starting point for an attorney pre-

paring a claim or defense should be a thorough understanding of the relationship between the customer and the securities firm. A securities "broker-dealer" functions in two ways: as a "broker," it buys and sells securities for the account of others; as a "dealer" it buys and sells from and for its own account.¹ As a broker, the securities firm is the customer's agent and has the traditional common-law fiduciary duties of an agent. As a dealer the securities firm has a similar set of quasi-fiduciary duties. The Securities Exchange Commission has long taken the position that by "hanging out a shingle" the securities firm impliedly represents that it will deal fairly with its customers.²

Whether imposed by common law or the "shingle theory," the securities firm's basic duties include: (1) the duty to recommend a security only after becoming informed as to its nature, price and financial prognosis; (2) the duty to carry out the customer's order promptly in a manner best suited to serve the customer's interests; (3) the duty to inform the customers of the risks involved in purchasing or selling a particular security; (4) the duty to refrain from self-

dealing and to disclose any personal interest the broker may have in a particular recommended security; (5) the duty not to misrepresent a material fact; and (6) the duty to transact business only after receiving authorization from the customer.³

The scope of the fiduciary obligation may be expanded. First, if the customer gives the broker a written discretionary authorization to trade the account, or if the broker so dominates the relationship that the customer is unable to realistically evaluate the broker's recommendation, then the broker is said to control the account and has a fiduciary duty to manage the account in accordance with the customer's investment objectives and best interest.⁴ Second, the written account agreement between the customer and the broker may incorporate by reference the rules of securities industry organizations, such as the New York Stock Exchange (NYSE) or the National Association of Securities Dealers (NASD). Such contract language has been held to incorporate rules protecting customers into the broker's set of duties.⁵

Common Customer Actions: Churning, Suitability and Transactional Problems

Churning

A customer's account is "churned" when a broker engages in excessive trading in order to generate commissions for the broker's benefit. A scheme to defraud, churning is unlawful under both the Washington State Securities Act (WSSA) and the Securities Exchange Act of 1934 § 10(b).⁶ In theory, a churning scheme may also give rise to a claim under the federal Racketeer-Influenced and Corrupt Organizations (RICO) Act or the Washington State Criminal Profiteering Act, RCW Ch. 9A.82. Most courts have dismissed such claims, however, because the theory of the criminal "enterprise" contained in those statutes simply does not apply to the typical relationship between the customer and the securities firm.⁷

To establish a churning claim, a customer must show: (1) that the broker exercised control over the account; (2) that the volume of trading in the account was excessive in light of the customer's investment objectives; and (3) that the broker acted with scienter. Under the WSSA, negligent disregard for the customer's interest may be sufficient to state a claim. All three elements must be established for the customer to prevail.

The first element, control, can be proved by the existence of a written grant of discretionary trading authority to the broker or by evidence that the customer habitually follows the broker's recommendation and is unable to evaluate the appropriateness of the broker's conduct.

The second element, excessive trading, means a volume of trading that is excessive in size or frequency in view of the financial resources of the customer and the character of the account.⁸ Excessiveness is typically shown by evidence of the customer's financial resources, investment goals, and an expert analysis of the volume of trading in the account in relation to the size of the account.

The most important analytical measure of excessive trading is the "turnover rate" in the account. Turnover is usually calculated by the average investment method.⁹ The total cost of securities purchased is divided by the average investment in the customer's account, yielding the turnover rate. A turnover rate of six or higher usually suggests churning. However, many courts and arbitration panels have found churning at rates well below six, particularly when the customer intends to have a conservative "investment" account.¹⁰

A second important measure is the "commission ratio," which compares the broker's commissions to customer's

investment in the account during the relevant period. Commission ratios of 20 percent or higher may indicate churning. A related indicator is the relative share of the broker's commission revenue that is generated by the account in question. If the customer's account provides a disproportionate share of the registered representative's total commission income from all of his clients, that fact may be considered evidence of churning.

A pattern of "in-and-out" trading may also suggest churning. In-and-out trading is defined as, "[A] sale of all or part of the customer's portfolio with the proceeds immediately reinvested in other securities followed in a short period by the sale of the newly acquired securities."¹¹ In-and-out trading or "day trading" is not churning if the customer is sophisticated and has the desire and funds to speculate.¹²

A related consideration is the quality of the securities purchased. Indiscriminate purchase of poor-quality securities below investment grade, particularly through a margin account, can be evidence of excessive activity. On the other hand, evidence that the broker selected good-quality stocks may offset evidence of a higher-than-usual turnover rate.¹³ A court or arbitration panel is likely to distinguish between evidence of poor-quality stocks that are purchased and sold in an in-and-out pattern and the accumulation of speculative stocks. Accumulation is not churning because the essential element of the broker's intent to generate commissions for his benefit is lacking.¹⁴

The broker's scienter or negligence is usually inferred from the pattern of trading itself, supplemented by expert testimony as to the overall quality of management of assets in the account. While negligence and scienter are considered separate elements of a churning claim, separate proof of the broker's mental state is probably not necessary.¹⁵

Suitability

The concept of suitability comes from the "know your customer" rules of the NYSE and NASD. Both organizations require a broker to use due diligence to learn the essential facts relevant to each customer and each trade and to have reasonable grounds for believing that any investment recommendations made

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are appropriate for the customer. The suitability concept first arose in reaction to high-pressure telephone "boiler room" sales operations which sold speculative low-priced securities without regard to the customer's circumstances, needs or ability to withstand financial loss.¹⁶

Suitability claims can be premised on three basic theories: (1) breach of fiduciary duty; (2) breach of contract; (3) fraud or misrepresentation.

As noted above, the scope of a broker's fiduciary duty to the client depends upon their particular relationship. If the account is discretionary, in fact or by virtue of a written agreement, the broker has a duty to select suitable securities. Breach of the duty is actionable at common law as a breach of fiduciary duty. If the account is nondiscretionary, and the broker has not assumed responsibility for investment selection, there is generally no common law or securities law duty to select only suitable securities.¹⁷

A second theory is breach of contract. To the extent that the account agreement between the customer and firm incorporates the customs of industry and the rules of securities exchanges or the NASD, some courts have held that violations of exchange rules may be actionable as a breach of contract.¹⁸

Finally, the purchase of unsuitable securities may be accompanied by a broker's misrepresentation as to the suitability of the selected stocks, or a false promise to buy only suitable stocks. In such cases, a false representation will state a cause of action for securities fraud under SEA § 10(b) and WSSA RCW 21.20.420(1).¹⁹

In deciding whether the securities were suitable for the customer, a finder of fact considers the financial quality of the securities purchased; the customer's needs, stated investment objectives, education and situation in life; and expert testimony as to the overall management of the customer's portfolio. All factors should be considered. A perfectly appropriate speculative investment for a high-income, aggressive investor may be unsuitable for the retired person in need of income.

Transactional Problems

Many types of transaction problems can lead to a dispute between the cus-

tomer and the broker.²⁰ Two of the most common problems are unauthorized transactions and the proper execution of customer instructions.

Brokers have a common-law fiduciary duty to refrain from unauthorized trading and to use due diligence in executing orders. A broker must use reasonable care to execute the customer's purchase or sale instructions in a timely manner. The timeliness problem is particularly acute in rapidly rising or falling markets, where thousands of dollars in losses may be incurred if the broker or the securities firm does not act promptly.

Damages In Customer Actions

The two basic measures of damages in customer actions are restitution and rescission. Restitution, the traditional measure, allows the customer to recover from the broker the commissions, fees and interest charged by the broker-dealer. Rescission is now the common measure. Generally, rescission returns to the customer the amount invested in the account, less the value of what the customer received at the time the account was closed or the improper activity ended. The purpose of rescission is to give the customer the gross economic loss suffered as a result of the improper handling of the account. Therefore, some courts have attempted to adjust the

amount of damages to reflect market price movements.²¹ Under any measure, the customer has a duty to mitigate damages.

The Washington State Securities Act specifies rescission damages. The customer may recover the amount paid for the securities, less their value when the securities were sold, less the income received on the securities, plus interest at eight percent, costs, and attorneys' fees.

The Defenses To Customer Actions

It has long been recognized that an investor may not wait to see how an investment turns out and then sue if there is a loss. Therefore, estoppel, laches, waiver and ratification are defenses to customer claims for churning and unsuitable stock trading. Each of these equitable defenses will be applicable in different contexts and in different ways.

Estoppel typically becomes an issue in the context of the customer's knowledge of the handling of the brokerage account. For example, on a suitability claim the customer may be estopped from denying knowledge of the nature and type of the transactions by receipt of confirmations and monthly statements, discussions with the broker, or consultation with other financial advisors. On the other hand, estoppel as to the type of transaction taking place in the account is

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not necessarily estoppel as to excessive trading or unsuitability. A very unsophisticated customer may not be able to judge whether the volume of trading is excessive or the securities chosen suitable.²²

Ratification is the confirmation of the previous act done by a party or another person. It provides a securities broker with a defense if the customer approves the management of the account, usually in unauthorized-trading cases. Typically, customer approval will be demonstrated by receipt of trading confirmations and monthly statements. Many firms have improved the clarity of their account statements, and it may become more difficult for customers to claim ignorance of their account.

Waiver is the intentional relinquishment of a known right. Laches is a lack of diligence by a party in pursuing a claim that is prejudicial to the party asserting the defense. Waiver and laches become issues when there is a substantial delay between the conduct complained of and initiation of suit. Prejudice to the broker-dealer can exist simply because it could have put a stop to the broker's behavior had the customer protested.

Equitable defenses may not succeed when there is a close personal relationship between the broker and the customer, or where the customer protests but receives reassurances as to the handling of his account.²³

The Securities Arbitration System

In *Shearson American Express, Inc. v. McMahon and Rodriguez de Quijas v. Shearson/American Express Inc.*, the United States Supreme Court settled all doubts that the Federal Arbitration Act, 9 U.S.C. § 3, requires the enforcement of arbitration clauses in securities industry customer account agreements. Under the Act, arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the renovation of any contract." If the arbitration clause applies to the claim at issue, it is enforceable, and the appearance of such provisions in fine print, on the reverse side of the customer account agreement, does not affect their enforceability.²⁴

The securities industry maintains its own arbitration systems. The most

commonly used are NYSE and NASD arbitration. Both provide simplified case-handling procedures that begin with the execution of a Uniform Submission Agreement, and proceed through preparation of a statement of claim and answer, the exchange of information, hearing, and award.²⁵

Attorneys representing customers typically have four complaints about the industry arbitration process. First, although there are provisions for exchange of information and the issuance of subpoenas, discovery is more restrictive in arbitration than under the Civil Rules. Second, at least one of the arbitrators on panels of three or more are employed by the securities industry. Third, the legal rules of evidence do not apply. The arbitrators become the sole judge of the materiality and relevance of any evidence offered.²⁶ Fourth, appeal from arbitration is extremely difficult. The arbitrator's decision, unless indicating "manifest disregard of the law," is essentially unappealable.²⁷

Despite such complaints, industry arbitration is the dominant forum, specified in most customer agreements. Both the NYSE and the NASD are handling a doubled caseload that will grow larger as a result of the *McMahon* and *Rodriguez* decisions. Thus far, state efforts to regulate the securities industry's use of arbitration agreements have been held preempted by the Federal Arbitra-

tion Act.²⁸ The Securities Exchange Commission has, pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78s, adopted new regulations governing securities industry arbitration. The rules make three significant changes. First, the rules narrow the definition of public arbitrators, reclassifying attorneys and other professionals who devote more than twenty percent of their time to securities industry clients as industry arbitrators. Second, the rules require an expanded form of award that sets out the issues decided. Third, a party to an arbitration involving a public customer may request copies of all awards previously rendered by the members of the arbitration panel.²⁹

Despite some adverse political reaction to the *McMahon* and *Rodriguez* decisions, it appears that arbitration will continue to be the dominant forum for resolving disputes between investors and the securities industry. □

¹ Securities Exchange Act of 1934 § 3(A)(4) and (5).

² L. Loss, *Fundamentals of Securities Regulation*, 811-43 (2d ed. 1988).

³ *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953 (E.D. Mich. 1978).

⁴ *Follansbee v. Davis, Skaggs & Co., Inc.*, 681 F.2d 673 (9th Cir. 1982).

⁵ *Iowa Grain v. Farmers Grain and Feed Co., Inc.*, 293 N.W.2d 22 (Iowa 1980) (violation of Chicago Board of Trade Margin

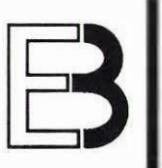
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⁶Securities Exchange Act Rule 17 C.F.R. 240.15 C1-7(a)(1988).

⁷RICO is primarily a criminal statute which makes it unlawful to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, to conduct an enterprise through a pattern of racketeering activity, or to conspire to do those acts. 18 U.S.C. § 1962(a)-(d). 18 U.S.C. § 1964 creates a civil action for violation of the statute. "Racketeering activity" is defined as the commission of "predicate acts" including violations of the Securities Laws. Most RICO claims against securities brokerages are brought under 18 U.S.C. § 1962(c), which makes it unlawful to conduct an enterprise through a pattern of racketeering activity.

Most courts reject RICO claims against securities brokerages in churning cases for three reasons. First, the brokerage cannot be deemed both the "enterprise," which is normally not a proper RICO defendant, and a culpable person liable for violations of RICO. Thus, if a brokerage firm is the "enterprise" that plaintiffs contend was conducted through a pattern of racketeering activity, it is not liable as a defendant. *Levine v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 639 F. Supp. 1391 (S.D.N.Y. 1986) and cases cited therein. The Ninth Circuit Court of Appeals has accepted this principle in a different fact setting. *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984).

Second, most courts hold that the brokerage cannot be held liable on RICO claims on a theory of *respondeat superior* for the acts of employees because that would, in effect, impose liability on the "enterprise" rather than the culpable persons. *Rush v. Oppenheimer & Co., Inc.*, 628 F. Supp. 1188 (S.D.N.Y. 1985).

Third, churning of a single customer's account may not constitute a "pattern" of racketeering activity, because churning of the account is usually considered a single unified act. *Lowenbraten v. Rothschild Unterberg, Towbin*, 685 F. Supp. 336 (S.D.N.Y. 1988). The Ninth Circuit may not reach the same result. *California Architectural Building Products, Inc. v. Franciscan Ceramics Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987).

⁸New York Stock Exchange Rule 408(c).

⁹The average investment method sometimes known as the "looper formula" is the traditional measure of turnover. The SEC uses the "average equity method" in which the total cost of purchases is divided by the average equity in the account.

¹⁰A turnover standard of 6 was suggested in Note, "Churning by Securities Dealers" 80 Harvard Law Rev 869 (1967). Churning can however be found in a turnover rate well below 6. *Harrock v. Edward D. Jones & Co., Inc.*, 750 F.2d 767 (9th Cir. 1984).

¹¹*Hecht v. Harris Upham & Co.*, 283 F.

Supp. 417, 435-36 (N.D. Cal. 1968).

¹²*Horne v. Francis I. duPont & Co.*, 428 F. Supp. 1271 (D.D.C. 1977).

¹³*Twomey v. Mitchum Jones & Templeton, Inc.*, 262 Cal. App. 2d 690, 69 Ca. Rptr. 222 (1st D. 1968) (poor quality securities evidence of excessive activity); *Gleit v. Shearson Hamill & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 95,799 (1975-76 binder) (S.D.N.Y. 1976).

¹⁴*Altischul v. Paine, Webber, Jackson & Curtis, Inc.*, 518 F. Supp. 591, 595 (S.D.N.Y. 1981).

¹⁵*2 Bromberg & Lowenfels, Securities Fraud and Commodities Fraud* § 5.7 (323) (1988).

¹⁶New York Stock Exchange Rule 405; *NASD Rules of Fair Practice*, Art. 3 § 2, and relevant policy of the Board of Governors. *See also L. Loss, Fundamentals of Securities Regulation*, 829-37 (2d ed. 1988).

¹⁷*Sherry v. Diercks*, 29 Wn. App. 433, 628 P.2d 1336 (1981); *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980).

¹⁸See note 5 *supra*.

¹⁹L. Loss, *Fundamentals of Securities Regulation*, 834-35 (2d ed. 1988); *Levine v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 639 F. Supp. 1391, 1394-95 (S.D.N.Y. 1986); *Anderson v. Knox*, 297 F.2d 702, 705 (9th Cir. 1961), *cert. denied*, 370 U.S. 915.

²⁰Other "transactional" problems that may give rise to liability include charging the customer a price that has no relation to current market; charging unreasonable prices in individual transactions, excessive mark-ups or mark-downs; accepting funds or securities from brokers while insolvent or undercapitalized; failure to disclose any substantial long or short position in a security that may affect dealer's recommendation with respect to that security; failure to disclose that the dealer is making a market in the security which it is selling to the customer as principal. *See L. Loss, Fundamentals of Securities Regulation*, 814-17 (2d ed. 1988).

²¹There is an excellent discussion of the various rescission damage measures applied by the courts in *2 Bromberg & Lowenfels, Securities Fraud and Commodities Fraud*, § 5.7 (272)(1-3).

²²*Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417, modified, 430 F.2d 1202 (9th Cir. 1970).

²³*Kravitz v. Pressman, Frohlich & Frost, Inc.*, 447 F. Supp. 203, 211 (D. Mass. 1978); *Costello v. Oppenheimer & Co.*, 711 F.2d 1361, 1370 (7th Cir. 1983).

²⁴*Shearson/American Express Inc. v. McMahon*, ____ U.S. ____ , 108 S. Ct. 31, 97 L. Ed. 2d 819 (1987); *Rodriguez Quijas v. Shearson/American Express, Inc.*, 1989 WL 48821 (U.S.) (May 15, 1989). The federal act applies to claims brought under state law. *Garmo v. Dean Witter Reynolds, Inc.*, 101 Wn.2d 585, 681 P.2d 253 (1984).

Arbitration clauses must show that the parties agreed to arbitrate the claim at issue. *Van*

Ness Townhouses v. Mar Industries Corp., Fed. Sec. L. Rep. (CCH) ¶ 94,101 (9th Cir. December 6, 1988). *Van Ness* holds that arbitration may not be compelled if the arbitration clause preserves the right to litigate securities law claims, as was required by Forman SEC Rule 15(c)(2). The Rule was in effect from 1984 to 1987. Arbitration clauses are not *per se* adhesionary. *Webb v. Rowland & Co., Inc.*, 800 F.2d 803 (8th Cir. 1986).

Under Washington law, a person who voluntarily signs an agreement is bound to the terms of the agreement, even if they have not read the agreement. *Nat'l Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973). "Fine Print" is enforceable, even if on the reverse side of the agreement. *H.D. Fowler Co., Inc. v. Warren*, 17 Wn. App. 178, 562 P.2d 646 (1977).

²⁵See New York Stock Exchange, Inc. Arbitration Rules and the National Association of Securities Dealers, Inc. Code of Arbitration Procedure. There is an excellent discussion of securities industry arbitration in Lipton, *Broker-Dealer Regulation*, 15 Securities Law Series, Ch. 4 (1988).

²⁶See, e.g., NYSE Arbitration Rule 621.

²⁷The Ninth Circuit Court of Appeals has traditionally followed the "manifest disregard" standard in reviewing arbitration awards. To overturn an award the arbitrators must act with "manifest disregard of the law [that] must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." *San Martine Compania De Navegacion S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961). The Supreme Court, however, in *Shearson American Express, Inc. v. McMahon* seemed to believe that a tighter standard might apply, observing that judicial scrutiny of arbitration awards was "sufficient to ensure that arbitrators comply with the requirements of the statute." 55 U.S. Law Week 4757, 4760 (1987). The grounds for vacation of an arbitration award under Washington law are set out by statute. RCW 7.04.160-170. An arbitration award is not subject to vacation or modification under RCW 7.04.160(4) based on an error of law unless the award on its face reveals that the arbitrator adopted an erroneous rule or made a mistake in applying the law. *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 775, 750 P.2d 1290 (1988).

²⁸*Securities Industry Association v. Connolly*, No. 88-2153-WD (Dist. Mass. December 19, 1988).

²⁹S.E.C. Release No. 34-26584, 54 F.R. 9955 (March 8, 1989).

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Seeking Venture Capital Financing For A Closely Held Business Enterprise

by Mark A. Levin

Success costs money. When your successful small-business client seeks assistance finding venture capital funds, much can be accomplished with some simple advice on what your client should expect from the venture capital search and how to prepare for it.

I. Planning Ahead

A. Contents of a Business Plan

Many small-business clients recognize they need "more money," but can't say just what they want it for. Others have impressive schemes for expansion, but haven't identified new capital as their missing ingredient. Your client's search for venture capital is underway.

At the start, the client should be encouraged to develop a clear, specific, plain language statement of why funds are being sought, how they'll be used, and what results are expected. Looking ahead, this statement should express the client's vision for the company if the additional funds are obtained.

B. Preparation of a Business Plan

Information Package

Business planning should bring into focus the client's needs. The results of the process must then be translated into a persuasive package for presentation to potential investors.

Your client's vision statement, clearly written, should be the frontispiece of the business plan, followed by recent, complete financial statements. Pro-forma financial statements, explaining in detail your client's predictions of success from the growing venture, should follow — keeping in mind that the investors will not only want to know *how* they will get their return on their money, but *when*. Commonly, the information package also contains a nondisclosure agreement to be signed by potential investors and returned before any critical

information concerning the company's business status and future plans is released.

All attention should be given to producing an attractive and informative package capable of impressing the target audience. Certainly, a little investment in stylish design, layout and production will be well spent.

II. Getting Professional Advice

Your having guided your client to a clearer sense of direction, the next important task is to advise where to look for funding assistance and what to expect from the search process. Two professionals are essential — you, the legal advisor, and a capable certified public accountant.

A. Accounting Issues

Your client should use an accountant for assistance in several areas. At the start, an accountant will be helpful for counseling regarding the business' need for additional funds and in the development of a meaningful plan.

More important, your client will need neat, well-organized financial statements and pro-forma statements in the business plan. Casually kept books and shoeboxes of records may suit your client's present style perfectly, but potential outside investors look for *and expect* clear and well-prepared financial information.

Even after potential investors are attracted, they (or their counsel) will likely conduct a thorough "due diligence" inspection of your client's business books and records, scrutinizing the company with a fine-tooth comb. An orderly set of accounts, particularly records of the company's outstanding debt and secured obligations, will be essential.

B. Legal Issues

Small-business clients seeking investment capital are often unaware of the

number and complexity of potential legal issues that may arise in their search for funds. Of course, from start to finish, legal fees will be accruing, and although the final charge may seem steep, your services are invaluable. However, by promptly informing your client of the challenges you will work through together, you may avoid friction later when you send out the final bill.

Initially, the lawyer's role will involve general counseling: *i.e.*, listening, and advising your client of the issues and ideas proposed in this article and of other insights from your experiences. Also, you can prepare your client to consider the terms and conditions investors will likely seek in return for their money. Thus, when the client returns, fresh-minted business plan in hand, (s)he will also need to consider the following issues:

1. Terms of the Promissory Note.

Any borrowing will be evidenced by a promissory note. What term of borrowing does your client's plan contemplate? What interest rate can your client expect to pay? How will the client pay it back — amortized installments, at the end of the term, or some other hybrid combination?

2. Standard Loan Agreement Terms.

Caution your client to appreciate the significance of the warranties and covenants that a loan agreement may include, and to recognize that existing shareholder debt (presumably debt running to your client), may be subordinated to new borrowing provided by outside investors.

3. What Security Can Be Offered?

Although allowing new investors no security interest for their investment is the least risky for your client, outside investors generally will require collateral to protect their investment. Your cli-



"Gameplan" by Fran K. Smullins. Photo by L. T. Thompson (1976).

ent should consider how much to "put on the line" in return for the new investment funds.

The easiest assets to allow the investors to take as collateral are specified assets of the company: either its personal property such as inventory, accounts, contract rights, equipment, lease improvements, or real property.

Allowing your client to pledge his or her stock in the company or a "blanket" security interest in all of the company's assets brings the security interest a little closer to home and risks your client's interest in the company.

Just as we all shop for the best price in any important purchase, your client should be encouraged to study the market to learn the "going rates" in venture capital deals and to then "shop around" for the best terms for the new investment capital.

Last, and to be avoided for obvious reasons, is a personal guarantee. If a personal guarantee is to be given, try to limit its duration, or alternatively, try to negotiate that the guaranty be a limited

nonrecourse security interest in certain personal assets only, such as the client's car or home.

Careful consideration by your client (and spouse with respect to community property assets) of available collateral at an early stage is crucial.

4. Investors' Ownership Interest in the Company.

Generally, venture capital investors anticipate acquiring a portion of the client's company in return for providing the investment financing.

Your client should consider how much of the company (s)he is willing to part with. Be sure that your client understands that shared ownership may mean more than simply sharing future profits: yielding control of the company's business decisions, including decisions concerning your client's own salary and employment terms.

The client should consider his or her values in owning the company. Will new investors share these ideas, or if not, is there room for compromise in your client's views? If possible, to deal with these and other control issues, your client and the investors should enter into a shareholders' buy/sell agreement restricting transfers, setting a company valuation formula for buyouts and governing arbitration of disputes.

5. Anticipating Investors' Due Diligence.

One of the most valuable areas of activity prior to looking for venture capital will be for your client to anticipate the due-diligence scrutiny that outside investors will perform. At a minimum, you can ensure that your client's corporate minute book is complete and current. Additionally, your client should be prepared for requests to renegotiate corporate debt or key issues, to set in writing any key business agreements or understandings not yet formalized, to provide title reports for real property owned by the company, to list pending claims and disputes, and to provide assurances that the company is in compliance with all applicable laws and regulations governing the current (and the proposed) business activities.¹

III. Going To The Market

A. Market Awareness in re Costs of Financing

Like all business decisions, that to obtain venture capital financing must involve information concerning the anticipated costs.

Direct costs to be paid to the investors are generally self-evident: assumption of interest payment obligations, risks of foreclosure on assets, and the ultimate burden of repayment of principal by the company. Also, the company's owners may be selling a portion of their future profits, giving up company control, and perhaps risking their personal assets or being bought out entirely.

While the categories of direct costs are easily identified, the terms of venture capital deals vary tremendously. ***Just as we all shop for the best price in any important purchase, your client should be encouraged to study the market to learn the "going rates" in venture capital deals and to then "shop around" for the best terms for the new investment capital.***

Other transaction costs should also be considered in advance. Professional

services — accountants, lawyers, and possibly securities counsel, will be needed, sometimes at substantial cost. The investors may also request their legal counsel fees be paid by your client's company.

B. Strategies in re Sources of Available Investment Funds

Your client is now fully-prepared to

begin looking for investment capital. Where is it found? How do you negotiate it? What does it take to close the deal?

There are vast sums of money available looking for good homes. The challenge is tapping into the flow. While accountants, attorneys, and investment brokers can all assist, your client should also be "on the street" talking to other

business people (except where business plans may be secret) to learn of good sources.

Nothing replaces hard work and good luck in finding future investors. One client of mine met a \$150,000 investment source on the sidelines of his 12-year-old son's town league soccer game. Another's was a \$30,000 cocktail party discovery. Advise your client to be positive and aggressive — good results will follow.

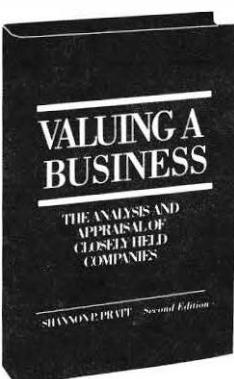
If your client has prepared well, initial presentation and negotiation of investment terms should proceed smoothly. But, during negotiations, you may also wish to sift out problems before going too far by using letters of intent to discover if an agreement in principle has been reached. You can draft these letters as binding or nonbinding depending on the attitudes of your client and of the investors.

C. Closing of the Investment Transaction

When the time comes for closing, you should carefully review all documents and oversee issuing stock, corporate resolutions, notes and security instruments. Some work will likely be done by the investors' counsel — particularly the filing of security instruments. If this will be your responsibility, be clear to the investors that your representation is for the company in order to avoid any potential conflict of interest charges. Arrangements will need to be made for the transfer of funds, whether through an escrow agent or by direct payment. Perhaps your client will also want to put aside a bottle of champagne for finalizing the event. □

ABOUT THE AUTHOR

Shannon P. Pratt is president of Willamette Management Associates, Inc., a national business valuation firm. Dr. Pratt holds a Doctorate in Finance from Indiana University. He is a Fellow of the American Society of Appraisers in Business Valuation, Chartered Financial Analyst and currently serves as Chairman of The ESOP Association Valuation Advisory Committee. Dr. Pratt is the author of numerous articles and two other strategic books on Business Valuation: *Valuing A Business*, (1981), and *Valuing Small Businesses and Professional Practices*, (1986), both published by Dow Jones-Irwin.



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¹This article does not address securities law issues. At a minimum, you should ensure that the transaction is in compliance with federal and state private transactions exemptions. For sophisticated transactions, an experienced securities attorney's consultation should be included in your client's planning.

Mark A. Levin practices with the Seattle law firm of Lasher Holzapfel Sperry & Ebberson. His practice is concentrated in general business, real estate and corporate matters.

On The Run After *Hunters Run*

Perfecting Mechanic's/ Materialmen's Liens in Bankruptcy

by Zachary Mosner

The perfection of materialmen's and mechanic's liens in this and most states is an arduous and technical process. Most courts are unforgiving as to the most innocuous faults, mistakes or defects undertaken in the process. The penalty paid is the loss of a lien and priority in a specific parcel of property, which can often be the difference between getting paid and "writing off" an account.

Until about this time last year, it was commonly assumed that if a materialman's lien or mechanic's lien had not been fully perfected at the time of a bankruptcy filing, any further action to complete perfection was prohibited by the automatic stay imposed under 11 U.S.C. 362. All of this radically changed with Judge Steiner's opinion in Bankruptcy Court in Seattle in *In re Hunters Run Ltd. Partnership*, 70 B.R.297 (W.D.Wash.1987). While all lien claimants had duly filed Notices of Claims of Lien before filing, none had filed any subsequent action within eight months thereafter. RCW 60.04.100. As a consequence, the court determined that the lien ceased to exist thereafter because the statute was one of *duration* rather than of limitation. The court refused to apply 11 U.S.C. 108(c) granting a suspension of any statute of limitations, and preempting state law by simply deciding that the Washington statute controlled, and was one of duration, not limitation. The court, however, overlooked Washington law that clearly would have precluded the decision it reached:

When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action. RCW 4.16.230.

As the automatic stay was both an injunction and prohibition, the calculation of time under RCW 60.04.100 was tolled and could not include the time that had run in bankruptcy proceedings.

The court also failed to adhere to prior Ninth Circuit authority that, while based on California law, was entirely in point. California's statute, C.C.P.A. 356, is almost identical to RCW 4.16.230. Thus, in *In re Etherton*, 88 F.Supp.874 (S.D.Cal.1950) upon very similar facts, the court concluded that the state statute made it clear that with the bankruptcy filing and stay: "Nothing more remained to 'perfect' . . ." *supra*, page 878.

In *In re Paul Potts Builders, Inc.*, 608 F.2d 1279 (9th Cir. 1979), the Ninth Circuit considered the California equivalent of RCW 60.04.100 and definitively ruled it a statute of limitations, not duration. This case was also not considered in the *Hunters Run* decision. After the Ninth Circuit drew its conclusion, and without any consideration of *In re Etherton*, *supra*, it concluded that the statute of limitations was to be used as a

"shield" and not a "sword," and thus determined that lien rights remained intact. *Supra*, page 1283.

At this time nothing has been done to overturn the decision in *Hunters Run*. Until someone brings a court challenge, there are substantial risks in not taking aggressive action in bankruptcy court to perfect lien rights. For now, that means in a timely fashion moving to lift the stay before the time expires for either sending a notice of commencement of work, filing a lien or commencing suit. This adds considerable time, expense and litigation to case administration of bankruptcies, but is unavoidable for the time being. □

Zachary Mosner is a commercial attorney emphasizing commercial litigation, bankruptcy and foreclosure matters in his Seattle practice.

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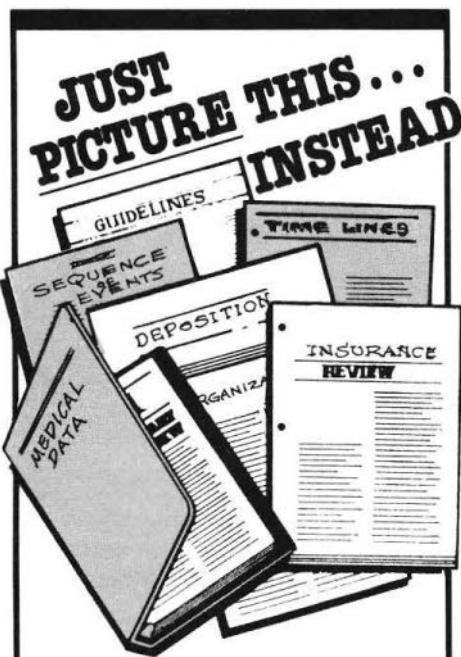
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Judge Barbara Durham and "defense counsel" Megan Black (Capital High School)



"Plaintiff's counsel" Heidi Entzel and Carl Warring flanked by "plaintiff Luke Carter" (father of Casey), Gary Starr.

Photos by Cheri Brennan
Assistant Director of Public Affairs

Moses Lake High School students outscored Olympia's Capital High School team to win "Try This," the Washington Centennial Mock Trial Competition, held April 29 and 30 at the Thurston County Courthouse.

The WSBA and the Office of the Administrator for the Courts co-sponsored the law-related event, funded in part by the Washington Centennial Commission and involving more than 400 students, teachers, attorney-coaches and court officials.

State finalists included teams from Central Kitsap High School, Port Townsend High School, Spokane's Gonzaga Preparatory School, Tacoma's Stadium High School, Seattle's Franklin High School and Bellevue's Explorer Post 814.

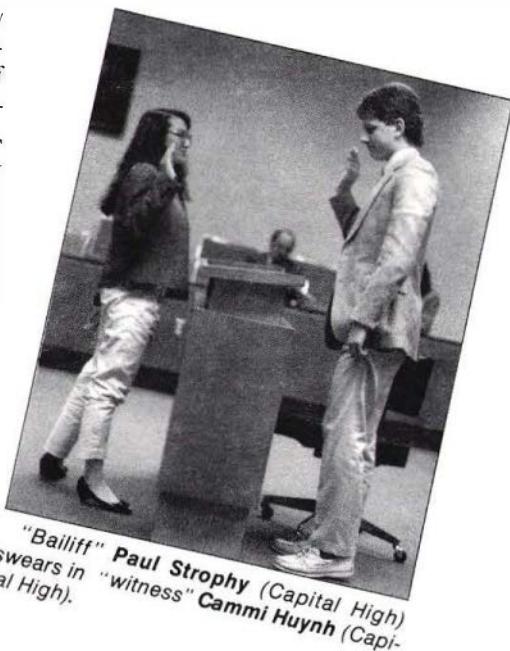
Students assumed roles as attorneys, witnesses and bailiffs for the trial of a hypothetical AIDS case in which a 15-year-old student is barred from the classroom by school officials after she tests positive for the virus.

in Centennial Mock Trials

Proceedings were governed by simplified rules of evidence; presentations were scored by a panel of judges who considered overall performance, opening statements, examination of witnesses and closing arguments.



Gillian Jorgensen role-played 15-year-old Casey Carter, student who was barred from school upon testing positive for AIDS virus.



"Bailiff" Paul Strophy (Capital High) swears in "witness" Cammi Huynh (Capital High).
Observers joined Justice Barbara Durham in praising the participants for their work. During a debriefing after the trial, she remarked, "Having been a judge for 17 years, I've seen lawyers that didn't do as good a job as you students . . ."



Pictured above is the winning team from Moses Lake High School, with other participants from the 1989 Washington Centennial Mock Trial competition. Front row, left to right: District Court Judge Carl N. Warring, Chris Perdue, Janet Ford, Melissa Brown, Gillian Jorgensen; Middle row: Gary Starr, Coach Reggie Sutter, Gloria Coronado, Jenny Hodgen; Back row: Kent Johnson of the Office of the Administrator for the Courts, Frankie Delgado, Washington State Supreme Court Chief Justice Keith M. Callow, Carl Warring, Washington State Supreme Court Justice Barbara Durham, Heidi Entzel.

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Overwhelmed, Underpaid and Overworked

I learned about the Lawyers' Assistance Program by reading this column. In February of 1988, I needed a *confidential* listener and counselor. Like many of us, I had begun to feel overwhelmed, underpaid and overworked. These feelings invariably fed a sense of depression that I'd somehow learned to carry around. At any rate, just over a year ago, I took a chance: I called LAP from a pay phone, safely away from home or office. (Throughout the next several months LAP staff showed every concern for strict confidentiality.)

The impetus for contacting LAP was the problems common to so many of us: the constant demands of a multiplicity of complex cases, long hours and high risk for what seemed like low pay. I had a decreasing interest in recreational activities and home life. I was no longer a new or young attorney. The satisfaction of being able to perform professionally with a degree of confidence and experience no longer made up for the stress. The thought of spending the next 20 or so years in such servitude was not pleasurable.

ant. And, in all honesty, I never thought of myself as the lawyer type anyway. I put out good work, but the psychological price was always exacting.

I was put in touch with one of the LAP professional counselors. A twice-a-month, hour-long consultation was arranged at the LAP office. The counselor who specializes in working with lawyers has developed an approach that takes into account both the strengths and vulnerabilities of practicing attorneys. It involves harnessing those talents sharpened by the practice of law (they enabled me to survive law school in the first place) in the recovery effort. In my own case, we explored means of assuming responsibility for control over my life, *i.e.*, moves into different areas of practice, whittling down my caseload, referring difficult clients, obtaining adequate compensation. I suppose it should have been obvious, but I was amazed at how much brighter the world looked after I began to decrease stress through these changes.

The art of relaxation probably comes naturally to few lawyers. It never has to

me; I had to learn it, almost from scratch. Like any newly-acquired skill, this one needs constant reinforcement. It's easy to allow a caseload once under control to slip out of hand; it's easy to get locked into the old habit of not having time to enjoy life or to take time off. We developed various "exit strategies" to offset the effects of old habits.

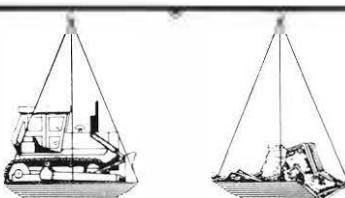
LAP's efforts on my behalf were creative as well as professional. The counselor provided information about an inexpensive light therapy that, research suggests, helps relieve winter depression ("seasonal affective disorders"). It helped my state of mind a great deal and produced a change in an unproductive sleep pattern.

As I mentioned previously, the sessions were conducted at the LAP office within the Bar Association complex: LAP is in an isolated corner, so confidentiality is assured even during regular work hours. (The counselor saw me early in the evening after work.) Also available after hours are Adult Children of Alcoholics meetings, held the second and fourth Wednesdays of each month.

Members who are familiar with how their dues are spent (for spot audits, disciplinary actions, complaints against attorney procedures, etc.) should be pleased to learn that LAP is a strictly confidential program specifically designed to lighten the load of the individual attorney. It is a service designed to meet just the needs of its clients: lawyers.

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Chronic stress will lead to exhaustion and the development of distress symptom(s). Lawyers reporting a wide range of distress symptoms (*e.g.*, clinical depression, eating disorders, chronic procrastination, alcoholism, anxiety attacks, anger problems, etc.) have sought LAP's assistance. They have reduced, and are reducing, their distress while ending their isolation.

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Charles S. Voorhees and the Omnibus Admissions Act



Courtesy University of Washington Law Library

by Charles K. Wiggins

"Willow of the Palouse"

Charles S. Voorhees served two terms (1885-1889) as delegate to the House of Representatives from Washington Territory. He figured prominently in the Congressional debates leading to passage of the Omnibus Admissions Bill which entitled the Dakotas, Montana, and Washington to admission into the Union as states.

Born in Covington, Indiana in 1853, Voorhees attended Georgetown University, then studied law in the office of his father¹ in Terre Haute, Indiana, and was admitted to the bar in 1875. From 1876 to 1882, Voorhees was assistant cashier under the clerk of the U.S. House of Representatives, perhaps through the influence of his Senator father. In 1882 Voorhees moved to Washington Territory, settled at Colfax, opened a law office, and was elected prosecuting attorney of Whitman County on the Democratic ticket. In 1884 he was nominated delegate to Congress by the Democratic Convention. Voorhees' father, who stood six foot four inches tall, was known by his colleagues as the "Tall

Sycamore of the Wabash"; his son, in those more poetic times, was dubbed the "Willow of the Palouse."

The Railroad Forfeiture Controversy

Two issues dominated the election of a territorial delegate to Congress in 1884: admission of Washington to statehood, and forfeiture of the land grant to the Northern Pacific Railroad. Prior Republican representatives had labored vainly to convince Congress that staunchly Republican Washington was ready for admission. But from 1876 until 1889 Democrats controlled either Congress or the Presidency. They regretted admitting Colorado in 1876, just in time to cast its three electoral votes for General Hayes, the successful Republican candidate, in the bitterly contested election. In 1884, Washington's Democrats argued that election of Voorhees, a Democrat, would more favorably incline Congress to admit Washington to statehood.

The second major campaign issue in 1884, railroad forfeiture, was deeply rooted in history. In 1864 Congress had given the Northern Pacific Railroad the right to construct a line from some point on Lake Superior to Portland, Oregon.

With this right Congress gave the railroad 40 alternate sections of public land for each mile built within the territories and 20 sections for each mile within states. This was an enormous amount of public land — approximately 50,000,000 acres. Construction was to start within two years, but funding proved scarce. Congress eventually extended the time to commence construction to 1870, and the time for completion to 1877. The railroad enlisted the foremost investment banker in the United States, Jay Cooke & Company of Philadelphia, to assist in raising the funds to build the railroad. Congress again amended the charter of the railroad to permit it to issue mortgage bonds and to authorize the construction of a branch line from Portland to some point on Puget Sound to be selected as the terminus of the main line.

The bond sales proceeded and construction commenced. Recognizing the importance of the railroad terminus, the Puget Sound cities competed to become the point at which ocean traffic met the transcontinental railroad. The two largest towns on the Sound, Olympia and Seattle, offered various inducements to the railroad to select their town. The

railroad however, quietly bought up as much land as possible on the west shore of Commencement Bay and selected the tiny village of Tacoma as its terminus. By 1873 the Northern Pacific Railroad reached from Kalama on the Columbia River to Tacoma, and a barge down the Columbia connected with Portland.

Construction was interrupted by the failure of Jay Cooke & Company.

Cooke's efforts to market the railroad bonds in Europe were interrupted by the Franco-Prussian war, and the railroad went into receivership.

In 1878 conditions began to improve and the railroad gradually resumed construction. Company officials also planned a line running west from the Columbia across the Cascades to the main terminus, but plans were foiled by a

German-born Civil War newspaper correspondent, Henry Villard.

In an effort to protect German bond holders' interests in Oregon railways, Villard eventually gained control of river and rail transportation on the Columbia River under the Oregon Railway and Navigation Company. Villard and the Northern Pacific entered into an agreement for Northern Pacific to use Villard's rails through the Columbia Gorge. To scotch the Northern Pacific's competing line through the Cascades, Villard organized the famous "blind pool" by convincing friends to invest millions of dollars with him for an undisclosed venture, quietly bought up Northern Pacific stock, and took control. Villard completed the Northern Pacific's transcontinental line with the driving of a symbolic last spike in western Montana on September 8, 1883, but enormous construction costs had so drained the companies that Villard's empire collapsed in December 1883.

Villard was succeeded by a management which was financially interested in the Tacoma Land Company, and was thus more inclined to exclude Seattle from rail connections and to focus development on Tacoma. The president of the Northern Pacific visited Seattle in July 1884 in order to assure the people of Seattle that the railroad would build its Cascade line through Stampede Pass and to quiet the agitation for forfeiture of the railroad's heretofore unearned land grant. The visit failed in its purpose, and in August the Northern Pacific terminated all railroad service to Seattle.

The hostility of the people of Seattle and King County toward the railway knew no bounds and created a unique political opportunity for Democrats. The territory's Republicans uniformly opposed land grant forfeiture; the Democratic territorial convention, swollen by defecting pro-forfeiture Republicans, called for forfeiture of the unearned land grant and nominated Voorhees, an Easterner, for Congress to defuse the criticism that forfeiture was "the Seattle idea."

In the midst of the election campaign, Voorhees ran afoul of the classic nemesis of the attorney turned politico — an inconsistent position taken previously on behalf of a client. Voorhees had defended the Northern Pacific against a

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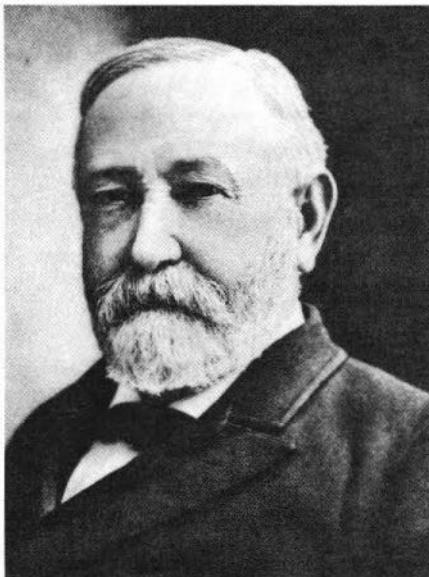
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Benjamin Harrison (photo courtesy of Special Collections Division, University of Washington Libraries)

settler who claimed that his rights were superior to the railroad's, arguing that the land had not returned to the public domain when the railroad failed to comply with the conditions of the land grant — the opposite of his position as Democratic candidate.

The prominent Seattle lawyer Thomas Burke defended Voorhees in a letter to the *Seattle Post-Intelligencer* which explained the difference between a lawyer's brief and his true opinions, which, as Burke's biographer later observed, "must have brought comfort to many baffled laymen who had long suspected that lawyers were congenital liars."² Burke went on to explain Voorhees' change of heart:

The trial of this . . . case and other cases of this type, soon revealed to Mr. Voorhees the harsh, unfeeling, and oppressive character of this corporation, and like a true man and conscientious lawyer that he is, he promptly threw up his retainer and severed his connections with a client insensible alike to justice and honesty. He left the employment of the wealthy corporation to enter the service of his poor neighbors . . . Neither threats or honeyed words nor glittering wealth had power to swerve him from his duty . . .

Voorhees carried the territory by a bare margin of 146 votes, becoming the first Democratic delegate to Congress

from Washington Territory since the Civil War. The forfeiture sentiment clearly carried the day, giving Voorhees a margin in King County of over 2,200 votes.

Once in Congress, Voorhees labored unsuccessfully for forfeiture of the railroad land grant. In a lengthy speech to the House of Representatives on July 26, 1886, Voorhees reviewed the history

of the Northern Pacific and criticized its predatory tactics: "Alarac and his Goths would have blushed to have been charged with such wholesale and comprehensive villainy."

Congress declined to forfeit the land grant, but the agitation for forfeiture spurred the company's construction of its Cascade line, which was finally completed in 1887.

APPEAL: 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.

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Working For Admission To Statehood

Voorhees introduced two statehood bills into the 49th Congress. One proposed annexation of northern Idaho, thus increasing Washington's population and improving its chance for statehood. The second bill would have admitted Washington to the Union. Voorhees' bill

succeeded despite a Montana attempt to annex the Idaho counties: it was sent to President Cleveland for signature on March 2, 1887, in the closing days of the 49th Congress. For unknown reasons, Cleveland withheld his signature and the bill died by pocket veto. Thus ended Washington's hopes of annexing northern Idaho. Cleveland's pocket veto hampered Voorhees' election campaign

in 1888, and it was probably a factor in his defeat.

Elected for a second term, Voorhees introduced statehood and annexation measures in the 50th Congress. The annexation measure was adversely reported in committee, and the statehood bill was replaced by an omnibus bill covering Washington, Dakota and Montana. In the Senate, the bill bogged down so badly that the Presidential and Congressional elections of 1888 preempted the admission issue altogether.

In June 1888 the national Republican Party adopted a statehood platform plank for the Dakotas, Montana and Washington. The Republican platform condemned the Democratic House of Representatives for its refusal to extend statehood to the deserving territories as "a willful violation of the sacred American principles of local self-government..." The platform stated that the people of Washington, North Dakota and Montana territories should be permitted to form constitutions and establish state governments without unnecessary delay. GOP Presidential nominee and Indiana Senator Benjamin Harrison — a colleague of Voorhees' father — declared his support for statehood in his acceptance. By contrast, both the Democratic platform and President Cleveland's acceptance were silent about western statehood. Trapped by his party, Voorhees was forced to distance himself from the Cleveland administration and rely on the theme of his prior campaigns, identifying the Republican Party and its candidate with railway and other corporate interests. But by 1888 the argument had lost its force and Voorhees was defeated.

By the time the 51st Congress convened in 1889, Washington had been admitted to statehood. Voorhees tried for election to the Senate, but the overwhelming Republican majority in the first Legislature doomed his aspirations.

The Omnibus Admission Act

Jubilant celebration throughout Washington Territory marked Benjamin Harrison's 1888 election victory. Territorial newspapers uniformly concluded that the Republican victory insured statehood, if not within a year, at least in the near future. In Seattle a raucous parade and celebration was organized by the

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Harrison Legion, a local committee which had supported Harrison's campaign. Ex-governor Elijah Ferry mounted an impromptu podium on a wagon and addressed the crowd:

We have reason to rejoice, not only because Harrison has been elected, not because Allen has been elected... We have reason to rejoice, for our victory comes near our homes. In one year and one month Washington Territory will be a state.

Ferry was remarkably accurate. Twelve-and-a-half months later, Ferry took the oath of office as first governor of the new state.

The Republican Party not only regained the White House, it also gained control of the House of Representatives by a slender majority and retained its control of the Senate. In December 1888 the House Democratic caucus struggled to decide whether to bow to the inevitable and reap what political capital it could by authorizing the admission of new territories expected to be Republican. Two issues dominated the debate: First, should Dakota Territory be divided, doubling its (Republican) representation in the Senate? Loathe to allow Dakota to divide, the lame-duck Democrats could not ignore Dakota's population of 700,000, far more than the 180,000 required for a representation in the House, and far more than Washington's 186,000. The Democrats eventually agreed to allow the residents of Dakota Territory to vote on division. The second major issue was whether to admit Utah Territory, with sufficient population at 210,000, but disfavored because of Mormonism and the practice of polygamy. The Democratic caucus eventually agreed to an omnibus admission bill for the territories of Dakota, Montana, Washington and New Mexico, with a separate admission act for Utah.

The full House debated admission from January 15 to 18, 1889. Each of the territorial delegates urged the House to admit his territory to statehood. Admission of the territories was eloquently championed by S.S. Cox, an attorney who had represented New York City for several terms in Congress. Cox said,

The people of Washington Territory come, like the wise men of the East, not asking gifts, but bringing gifts. What do they bring?

Why, sir, the trophies of their own labor, the evidence of their own worth. They present before us the cities and towns which they have founded. They present schools, churches and workshops. They bring all — all the products of their labor, and place them upon the altar of the union, a pledge for the common defense. Such a people can

safely be entrusted with self-government.

Refuse to admit this state and its territorial sisters? Why, sir, you may enact that frost shall cease in the North and blooms in the South, or try to fix the figure of Proteus by statute, but you cannot prevent the people of this territory from their demand, and you must accede to it;

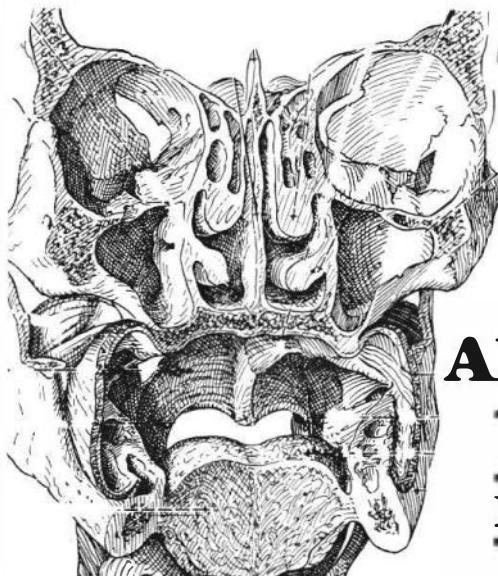
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if this Congress does not we know that the next Congress will. The spirit of the people of the Northwest is that of unbounded push and energy. These are the men who have tunneled our mountains, who have bridged our rivers, who have brought every part of our empire within the reach of foreign and home markets, who have made possible our grand growth and splendid development. They are the men who have made our national life. There is no parallel in history to their achievements. You cannot hold them captive to the Federal system. You must give them self-reliant statehood.

After several days of debate, the House voted to amend the bill which the Senate had passed for the admission of South Dakota and to substitute the Omnibus Bill authorizing the citizens of Dakota to vote on division, and for constitutional conventions in North and South Dakota, Montana, Washington and New Mexico. The delegate from Dakota vigorously opposed the Omnibus Bill, which had the effect of delaying the admission of South Dakota.

Delegations were present in Washington from both North and South Dakota, and they urged the Senate to reject the Omnibus Bill and to press for the immediate admission of South Dakota. The

Senate refused to concur in the Omnibus Bill; for several weeks the bill was stalled in the Senate, then in a joint Senate-House conference which sought a compromise. Hopes for admission dimmed as the final adjournment of the 50th Congress and the March 4 inauguration of the Harrison administration grew nearer. Unless the President-elect chose to call a special session of Congress, admission would be delayed until the new Congress reconvened in the fall of 1889.

After weeks of wrangling, the House finally receded from its demand to admit New Mexico. Representative Cox offered a resolution that South Dakota be admitted by proclamation of the President if its citizens voted to adopt the Sioux Falls constitution, and that North Dakota, Montana and Washington all be authorized to vote on a proposed constitution and then admitted by Presidential proclamation. Cox's resolution prevailed, and both houses passed the Omnibus Bill on February 20, 1889. President Cleveland signed the bill on February 22, two weeks before leaving office.

One final amendment to the Omnibus Bill was particularly significant for Washington State. Representative Springer of Illinois, chairman of the House Committee on Territories, wanted to rename Washington as the

State of Tacoma. The move sparked considerable controversy in Washington, including a letter by ex-governor Watson Squire charging that the Northern Pacific had chosen the name for the city of Tacoma, had wanted to change the name of Mt. Rainier to Tacoma, and now wanted to rename the state. Watson argued the importance of keeping the name as a "trademark" and in honor of George Washington:

And is not this commonwealth one of the monuments erected to the father of the republic? Why impiously seek to tear it down? Is the monument unworthy of the name? Only an ignoramus could harbor the thought!

The Omnibus Bill would have renamed the state Tacoma until the final vote on February 20, at which time the name of Washington was restored.

Epilogue

Voorhees' service in Congress ended on a high note — he could point with pride to the passage of the Omnibus Admissions Act. A number of congressmen attributed their support for statehood to the efforts of Voorhees and J.K. Toole, the delegate from Montana. Voorhees moved to Spokane in 1889 and continued in the private practice of law until his death on December 26, 1909. □

Note on Sources

Voorhees' election campaign of 1884 is discussed in R. Nesbit, "He Built Seattle": A Biography of Judge Thomas Burke (1961). Keith Murray has chronicled the admission controversy in *The Movement for Statehood in Washington*, 32 Pac. N.W.Q. 349 (1941). I have drawn the account of the debate over the Admissions Bill from contemporary newspaper accounts.

¹ Voorhees' father, Daniel W. Voorhees, was a prominent Indiana congressman and lawyer. In 1859 the senior Voorhees defended John E. Cook, one of the raiders in John Brown's expedition. After serving five terms in the House of Representatives, from 1861 through 1872, the senior Voorhees was elected to the United States Senate in 1872.

² R. Nesbit, "He Built Seattle": A Biography of Judge Thomas Burke, page 85 (1961).

Charles Wiggins is a Seattle attorney in the firm of Edwards & Barbieri. His practice is primarily appellate.

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CALENDAR

June 1989

2 Sixth Annual Computer Law Institute, Seattle. *Sponsored by:* WSBA Continuing Legal Education Committee and others. *For information:* (206) 448-0433.

9 Antitrust Law Under the New Administration and State Responses, Portland, Oregon. *Sponsored by:* Northwestern School of Law of Lewis & Clark College. *For information:* (503) 244-1181.

10 Getting Paid: Effectively Using Statutory Lien and Bond Rights, Tacoma. (Note: Also to be presented June 17 in Yakima and June 24 in Seattle.) *Sponsored by:* WSBA CLE Committee and Young Lawyers Division. *For information:* (206) 448-0433.

16-17 WSBA Board of Governors' Meeting/Joint Meeting With ABA Board of Governors, Vancouver, B.C. *For information:* (206) 448-0441.

22 The Art of Collecting Art. *Sponsored by:* Washington Volunteer Lawyers for the Arts. *For information:* (206) 223-0502.

23 Hazardous Substances and the Law at A Complex Aquatic Site, Seattle. *Sponsored by:* WSBA Continuing Legal Education Committee and Section on Environmental and Land Use Law. *For information:* (206) 448-0433.

30-July 2 WSBA Family Law Section Midyear Meeting and Seminars, Blaine. *Sponsored by:* WSBA Continuing Legal Education and Family Law Section. *For information:* (206) 448-0433.

July 1989

14-15 WSBA Board of Governors' Meeting, Bellevue. *For information:* (206) 448-0441.

28 Expert Witnesses and Medical Malpractice. *Sponsored by:* U of W Continuing Medical Education. *For information:* (206) 543-1050.

August 1989

18-19 WSBA Board of Governors' Meeting, Hood Canal Union. *For information:* (206) 448-0441.

September 1989

10 WSBA Board of Governors' Meeting, Whistler, B.C. *For information:* (206) 448-0441.

10-15 WSBA 100th Annual Meeting and Convention, Whistler, B.C. *Sponsored by:* WSBA. *For information:* (206) 448-0441.

October 1989

19-20 1990 Affirmative Action Briefing, Seattle. *Sponsored by:* National Employment Law Institute. *For information:* (415) 924-3844.

(*Calendar* carries information on events of interest to members of the Association. Please send event notices to Lindsay Thompson, Editor, the *Bar News*, 7414 N.E. Hazel Dell Avenue, Vancouver, WA 98665.)

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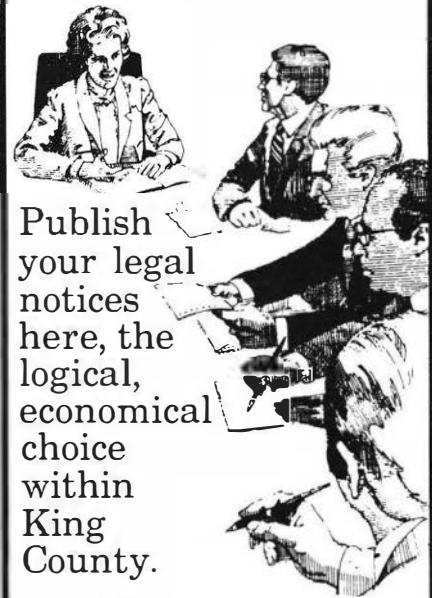
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THE BOARD'S WORK

— By Lindsay Thompson

Editor of the Bar News

Spokane: May 19-20, 1989

Present: President Bracelin and the Governors. Governor Bill Bergsten was absent on other business May 20. **Also present:** Don Brockett (Prosecuting Attorneys' Association); Harold Clark (Young Lawyers Division President-Elect); Alece Cox (Washington Women Lawyers); Frank Edmondson (Government Lawyers Association); Frank Hayes Johnson (Legal Foundation of Washington); John McKay (Young Lawyers Division President); John J. Michalik (WSBA Executive Director); Keith Nelson (SKCBA Young Lawyers); Matt Sayre (SKCBA Trustees); George Scott (WSBA Public Affairs Director); Judge Frank Sullivan (Superior Court Judges' Association); and Lindsay Thompson (*Bar News* Editor).

The road show headed east in May, for a brief stay in the Inland Empire. During their visit the Governors lunched with the Spokane County Bar Association and attended a reception with the local chapter of Washington Women Lawyers.

Executive Session Activity: The Governors' initial Friday morning session was, as is their custom, an executive session closed to observers. Matters dealt with in executive session, while not reportable by this correspondent, are sometimes discussed by various Governors in their monthly letters to constituents. Readers should consult those publications for accounts of executive session activity.

Changing the Guard at the ABA: Two of WSBA's five seats to the ABA's House of Delegates came up for new two-year appointments. Bellingham lawyer Frank Chmelik, appointed last year to a one-year interim term, was unanimously elected to a full term as the Young Lawyers Delegate.

The other delegate, Spokane lawyer and former WSBA president, Mike Hemovich, ran afoul of two competing policy interests: the need for seniority to rise in the ABA, and the Board's policy of encouraging turnover in appointments. Hemovich had served nine years in the ABA House.

Governor Don Curran argued for Hemovich's reappointment, noting that "Methuselah would be a junior member in the House of Delegates." In addition, Hemovich had chaired an ABA committee and done a good job. Governor Julie Weston argued for turnover. "We have lots of people who want to serve the Association and can't because not enough places are available," she said. She then nominated Seattle lawyer and former WSBA president Paul Steere. Governor Jeff Tolman made two nominations: Hemovich for reappointment, or, if the turnover policy was enforced, then Seattle lawyer and former Young Lawyers Division president Tom Fitzpatrick. On a paper ballot, the Board split 5-4-2 for Steere, Fitzpatrick and Hemovich respectively. In the runoff, they elected Fitzpatrick, 6-5.

SKCBA trustee Matt Sayre told the Board his board felt it was "high time" a woman was elected to the House of Delegates. Governor Julie Weston replied that none had expressed an interest, and several Governors told Sayre SKCBA could have put one up if it meant that much to them.

Who Will Judge the Judges? Young Lawyers Division president John McKay presented his quarterly report to the Governors, then set the cat among the pigeons by presenting the Governors the YLD's Report on Judicial Selection. The 34-page study concludes "a system of selecting judges nominated on the basis of merit by one or more nonpartisan nominating commissions involving broad public participation, combined with periodic, uncontested retention elec-

tions for each judge, can best inspire public confidence in the judiciary, while properly balancing the needs for judicial independence and public accountability and removing any negative impact on quality which may result from direct elections."

But what to do with it? Accepting it, some thought, would imply an endorsement of its conclusions. After a long, wandering debate over where to send the report, the Board voted 7-2 to refer it to WSBA's committees and sections for comment in the normal course of their business, then unanimously voted on a second motion to refer it to county bar associations. Governor Paul Stritmater thought these referrals, particularly seeking response in "normal course of business" would gently bury it. He moved that it be removed to the WSBA Legislative Committee for a report back at a date certain, but the Board canned that idea, 6-4.

Circuit Breaker: Washington Senator Slade Gorton is planning to introduce a bill to split the Ninth Circuit Court of Appeals and create a Twelfth Circuit covering Alaska, Idaho, Montana, Oregon and Washington. President Bracelin reported both Senators Gorton and Adams wanted to know the Association's position on such a proposal.

In 1982 the Board endorsed creation of a new circuit; at Spokane they reviewed the arguments pro and con from that time. Governors Steve DeForest and Julie Weston wanted some updated information on the need for a new circuit, and the matter was put off for decision until June.

Committee Turnover Revisited: The Board had to make an appointment to the State Statute Law Committee which labors in the obscurity of RCW 1.08.

The holder of the seat up for appointment was Spokane lawyer Bernard Gallagher, completing his second six-year term. Debate centered, again, on the Board's version of faith vs. works. Should value to the committee prevail or turn over to make opportunities for others to serve? This time seniority won, and Gallagher was reappointed for six more years.

Dealing with the "F" Word: The Board took up three matters dealing with the Client's Security Fund. The first was a revisit to a CSF Committee proposal to amend Rule 7(C) to define "dishonesty." The term would include wrongful acts committed by a lawyer in the nature of theft or embezzlement of money in the wrongful taking or conversion of money, property or other things of value, refusal to refund unearned fees received in advance where the lawyer performed no services or so few that refusal to refund the fee constitutes conversion or wrongful taking, or a lawyer's act of intentional dishonesty or deceit which proximately leads to the loss of money or property.

Committee member Michael Green said the new rule, copied from ABA rules recently adopted, would make the fund committee's job easier by giving them a "bright line" to follow instead of making case-by-case decisions which are problematical. The Board didn't see that as a reason to adopt the rule, however. Governor Julie Weston thought the rule could lead to Fund liability for consequential damages. Governor Ron Gould thought the definition could include acts which really aren't dishonest as ordinarily understood. But Governor Paul Stritmater said, "When a client puts money in trust, if you draw on it before you do the work, that's a dishonest act" which ought to be dealt with.

Governor Ed Shea thought the current system worked fine.

Governor Jim Turner found it "hard to relate what we've heard before" in deciding Client's Security Fund grants, to the three new definitions. Governor Weston, returning to the debate, thought the new rule would encourage claims without merit. The Board rejected the proposed amendment unanimously.

The committee fared little better with the proposal to increase Fund claim limits from \$50,000 to \$100,000 via any of a variety of mechanisms for raising the extra money to finance the change. The Board's Budget Committee took a unanimous position against the increase. The Board agreed. There's not money to pay for such things just now, they said.

Item Three was a Board Budget Committee proposal to redefine the Client's Security Fund so it's a lower case "f" fund. Calling it a capital "F" fund is misleading, the Committee argued; it implies a dedicated fund, which the capital "F" fund isn't. What the Board has done for years is transfer funds into savings to build up a \$500,000 lowercase "f" fund from whose interest Client's Security capital "F" funds were paid out to approved claimants.

Trouble is, the interest generated by the lower case "f" fund hasn't been enough at times to satisfy claims on the capital "F" fund. And the (F)(f)und, in both upper and lower case formulations, distorts the budget picture by creating a potential half-million-dollar liability on the ledger. So the Budget Committee proposed changing the Client's Security Fund title to Client Security Program, and merging the \$500,000 into the general fund (where, say the budgeteers, it's been all along from an accounting standpoint). Since the grants under the Client Security Program are discretionary with the Board of Governors, an annual budget appropriation would be made to cover anticipated demands on the program.

Governor Ed Shea thought a dedicated fund should in fact be set up, so that what the Association does in this program

coincides with what it appears to be doing. But Governor Jeff Tolman thought "our first duty is to our constituents. We'll have to suck it up for a couple of years to get a better handle on the budget. If we have to be stingier with awards in this program, so be it." The Board approved the proposals, which go into effect immediately.

Did Someone Say, "Referendum?" Last year the Budget Committee persuaded the Board to apply interest on Association section funds to indirect overhead (read: Bar office costs). That netted \$15,000. But, the Committee finds, that's not enough. Section overhead has been doubling every couple of years; last year it was \$73,000. The Committee proposed a \$5 per capita fee in each section to cover overhead. With 13,588 total section members, this "modest and uniform Administrative Fee" (capital 'F') would bring in another \$67,940.

Governor Steve DeForest proposed deferring action until the sections were consulted. "If we do this now," he said, "what's going on in China will look like a sideshow." Governor Paul Stritmeyer was more blunt: "This is a dues increase looking for a definition." And off it went, to be considered by the sections.

Wrap-up in Spokane: In other action, the Board looked at length at the often ambiguous results of the Member Survey presented by Public Affairs Director George Scott. They decided to ask for further study of a captive insurance company, in which considerable interest was expressed by members in the survey responses. They also considered, but tabled action on endorsing, the proposed constitutional amendment to change the composition and operations of the Commission on Judicial Conduct.

Next month the Governors repair to Vancouver, British Columbia, there to meet with the Board of Governors of the American Bar Association.

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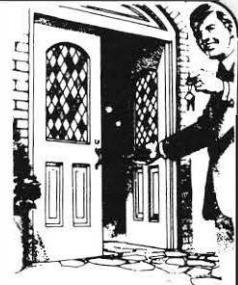
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Official and Other Notices of Interest to Association Members

Disciplinary Notices

Reprimanded: Spokane attorney **Arthur H. Toreson, Jr.** (admitted 1974) has been ordered reprimanded pursuant to a stipulation for discipline based upon his neglect of the closing of a real estate transaction, his failure to account for funds in his possession, and his failure to cooperate with the Association in its investigation of that matter. Toreson was also placed on probation for a period of two years.

Nondisciplinary Notices

Transferred: Seattle attorney **Robert L. Erickson** (admitted 1973) has been transferred to inactive status effective March 27, 1989.

Transferred: Wenatchee attorney **James E. Freeley** (admitted 1980) has been transferred to inactive status effective March 30, 1989.

Court Rules - Advance Notice

When it reconvenes this fall, the Court Rules and Procedures Committee is scheduled to review the Superior Court Criminal Rules (CrR) and Criminal Rules for Courts of Limited Jurisdiction (CrRLJ). Members of the Bar are invited to submit comments on these rules to Steven Rosen, WSBA, 500 Wes-

tin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599.

Deaths Reported

The death of the following member of the Association has been received by the Bar Office. An obituary will appear in a future issue of the *Bar News*.

Charles J. Horowitz, 84, Seattle attorney, judge of the Court of Appeals (1969-1974) and justice of the Supreme Court (1974-1980), in Seattle, March 25, 1989.

In re RCW 19.52.020(1): Legal Interest Rates

The average coupon equivalent yield from the first auction of 26-week treasury bills in May 1989 is 9.16 percent. The maximum allowable interest permissible for **June 1989** is therefore **13.16 percent**. For further details, see the October 1987 *Bar News*, page 39. Interest rates can be found each month since then in the *Bar News*.

RESOLUTIONS

Filing Deadline for Resolutions to be Presented at the Annual Meeting

Any ten (10) active members of the Washington State Bar Association may

present a written resolution to the Board of Governors for possible consideration at the Annual Business Meeting. Such resolutions must be presented and filed with the Board of Governors at least twenty (20) days before the Annual Meeting. Any resolution must be accompanied by a written report explaining the resolution. The resolution and explanatory report together shall not exceed a total of one thousand (1,000) words. Resolutions are to be filed with the Board of Governors, Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, Washington, 98121-2599. The deadline for filing such resolutions and explanatory reports will be 5 p.m. on Monday, August 28, 1989 (the first business day following the twentieth day prior to the Annual Meeting).

Referral to Resolutions Committee

The Board of Governors shall refer to the Resolutions Committee any resolution within the purposes of the Association as set forth in Article I of the Bylaws. If the Board of Governors finds the resolution is not within such purposes, then such resolution shall not be considered at any meeting.

Preliminary Notice of Special Public Hearing on Resolutions and of Publication Deadline

The Resolutions Committee of the Bar will, as usual, hold a public hearing to consider the views of the proponents and opponents of resolutions to be presented to the membership of the Bar at the Annual Meeting. The hearing will be held on Wednesday afternoon, September 13, 1989. The time and location of the hearing will be announced in the next *Bar News*. In addition, in an effort to allow more time to those presenting views and in an effort to give the members of the Committee more time to consider the resolutions and to request any additional information which might be helpful to the Committee, an advance session of the public hearing will be held, prior to the Annual Business Meeting, in Seattle on September 5, 1989 at the offices of the Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, Washington at 9 a.m. Proponents and opponents of resolutions are urged to attend the Sep-

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tember 5, 1989 session if at all possible, and, if not, to present their views in concise written form for consideration by the Committee at that session. Presence at or absence from the September 5 session will not affect any right under the Bylaws to present views at the September 13, 1989 hearing. At that hearing, preference in presenting views will be given to those with viewpoints which were not expressed at the earlier session.

If a proper resolution is to be published in the *Bar News* before the Annual Meeting, the Bylaws provide that it must be received by the Board of Governors at least sixty (60) days prior to the Annual Meeting, or on or before July 17, 1989. The July issue of the *Bar News* will contain further details regarding the purpose, function, and personnel of the Committee and the time and location of the September 13, 1989 hearing.

Litigation Support Conference

The American Institute of Certified Public Accountants (AICPA) held its first national litigation conference on May 11 and 12 in San Francisco: "The CPA's Role in Litigation Support Services." It featured mock trial instruction on being an expert witness and lectures by lawyers and CPAs on how to incorporate litigation support services into existing CPA firms.

AICPA is the professional organization of CPAs which sets audit standards, provides continuing professional education, enforces the code of professional ethics and prepares and grades the Uniform CPA Examination.

For more information about AICPA or the litigation conference, contact David Christensen in Bellevue at (206) 646-4869 or in Beaverton, Oregon at (503) 629-2100.

Totem Award

The AIDS Task Force of the WSBA received a Totem Award for its "AIDS and the Law" program. The competition, conducted annually by the Puget Sound Chapter of the Public Relations Society of America (PRSA) recognizes outstanding public relations programs.

The State Bar's entry took top honors in the Community Relations/Nonprofit Organizations category. Seven Totem Awards were presented at a May 16 banquet at Seattle's Four Seasons Olympic

Hotel. Ninety-six entries were judged by the San Francisco Chapter of PRSA, with scoring based on planning, execution and results.



The task force was formed in 1987 to examine legal considerations of AIDS (Acquired Immunodeficiency Syndrome). An expanded task force was appointed in 1988 to promote awareness of new legislation and to implement a series of recommendations from the initial group.

A comprehensive communications program was developed to educate various target audiences about AIDS law. Components of the campaign included a

pamphlet, a continuing legal education seminar for lawyers, a manual for attorneys to assist people with AIDS, and pattern speeches.

This is the third Totem Award presented to the WSBA. It received an award in 1984 for its "Citizen Rights" pamphlet series and in 1986 for its speakers' bureau.

Bar News in Legal Resource Index

The *Legal Resource Index*, a standard legal periodical indexing tool, now indexes articles from the *Bar News*, beginning with September 1988. The *Index* is available on Infotrac's CD-ROM, WESTLAW and LEXIS. It indexes legal periodical literature since 1980.

(Items for inclusion in "Digest" should be sent to Lindsay Thompson, Editor, the *Bar News*, 7414 N.E. Hazel Dell Avenue, Vancouver, WA 98665.)

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Notes From the Academy

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

Criminal law. In DWI case, jury was instructed that prosecution must prove defendant "had 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath . . ." (Emphasis added.) Washington Supreme Court reversed conviction on ground that instruction was susceptible of being construed by a reasonable jury as creating an (unconstitutional) mandatory presumption that disputed Breathalyzer reading of 0.16 was correct. It is not clear whether result was affected by fact that jury sent judge note manifesting confusion on the point. *City of Seattle v. Gellein*, 112 Wn.2d 58, 768 P.2d 470 (2/23/89). — G. R. Nock

Planning and zoning. (*Case 1.*) City zoning ordinance that prohibited "naturally grown fences" over eight feet high was not unconstitutionally vague. Defendant was properly convicted of misdemeanor for maintaining row of closely spaced fir trees higher than that along his boundary. *Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 767 P.2d 1375 (1/26/89).

(*Case 2.*) In inverse condemnation (regulatory taking) case in which city defends on ground plaintiff failed to exhaust administrative remedies and plaintiff counters exhaustion would have been futile, issue of futility is for court, not jury. Court of appeals approved on this point. However, court of appeals required too high a standard of proof when it said plaintiff had to establish futility by "uncontroverted evidence." Considering difficulties plaintiff has in establishing futility, plaintiff should

simply have to "persuade the court" that exhaustion was futile. But in this case, Supreme Court agrees with court of appeals that facts proven did not establish that it was futile for landowner to exhaust administrative remedies. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 768 P.2d 462 (2/23/89), affirming 51 Wn.App. 176, 752 P.2d 936 (1988).

(*Case 3.*) City denied plaintiff building permit, based upon its interpretation of language of its zoning code. In prior litigation, plaintiff established that city's interpretation was erroneous. Now plaintiff brings action under 42 U.S.C. § 1983, seeking damages and attorneys' fees for violation of his federal constitutional rights of due process and against denial of equal protection. *Held:* Trial court's judgment for plaintiff reversed and case ordered dismissed. (a) To maintain § 1983 claim based upon denial of due process, plaintiff must "show conduct that is arbitrary and unreasonable." Facts that city misinterpreted its own ordinance and did not seek independent interpretation do not establish denial of due process; not "substantially frivolous or ill-intentioned." (b) No denial of equal protection because plaintiff failed to show "intentional or purposeful discrimination." *Grader v. City of Lynnwood*, 53 Wn.App. 431, 767 P.2d 952 (2/13/89). — W. B. Stoebuck

Real property security. *Held:* (a) In order for the mortgagor to transfer his statutory right of redemption, he must effectively convey his title to the land. Even though statutory right of redemption itself is personal property, transfer must be by an instrument sufficient to convey title to the land. Therefore, unacknowledged, unrecorded instrument was not sufficient to transfer mortgagor's right of redemption. Previous redemptioner prevails over attempted transferee of mortgagor's redemption right. (b) Court refuses to extend time for statutory redemption, on "equitable" grounds, to allow time for mortgagor to correct the insufficient instrument. *Fidelity Mutual Sav. Bank v. Mark*, 112 Wn.2d 47, 767 P.2d 1382 (2/23/89). — W. B. Stoebuck

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Average Coupon Equivalent Yields from the Auction of 26-week Treasury Bills: 1984 to Date

These are the average coupon equivalent yields from the auction of 26-week treasury bills from January 1984 to date. The highest rate of interest permissible under **RCW 19.52.020(1)** is computed by the **addition of four percentage points or is 12% per annum, whichever is higher**.

The yields shown on the chart are those *applied to the month shown*, computed on the coupon equivalent from the first market auction average in the *month preceding*, as specified in the statute.

These limits apply to loans which are made during the designated month. Note: Any loan made pursuant to a commitment to lend at an interest rate permitted when the commitment is made is lawful.

The average coupon equivalent yield from the first May 1989 auction of 26-week treasury bills, applicable to the computation of the maximum allowable interest rate for June 1989 is 9.16%. According to the state treasurer's office, the maximum allowable interest rate for June 1989 is 13.16%. Note that when the equivalent bond yield is below 8%, the *maximum* interest allowable remains at 12%.

January	1984	9.77%	October	1986	5.38%
February	1984	9.80%	November	1986	5.34%
March	1984	9.71%	December	1986	5.52%
April	1984	9.97%	January	1987	5.69%
May	1984	10.49%	February	1987	5.79%
June	1984	10.98%	March	1987	5.83%
July	1984	11.32%	April	1987	5.76%
August	1984	11.29%	May	1987	6.07%
September	1984	11.45%	June	1987	6.46%
October	1984	11.53%	July	1987	6.40%
November	1984	11.07%	August	1987	5.95%
December	1984	9.64%	September	1987	6.45%
January	1985	9.19%	October	1987	6.66%
February	1985	8.48%	November	1987	7.33%
March	1985	8.78%	December	1987	6.55%
April	1985	9.54%	January	1988	6.42%
May	1985	9.06%	February	1988	6.67%
June	1985	8.38%	March	1988	6.41%
July	1985	7.53%	April	1988	6.20%
August	1985	7.44%	May	1988	6.21%
September	1985	7.93%	June	1988	6.41%
October	1985	7.69%	July	1988	7.05%
November	1985	7.71%	August	1988	7.04%
December	1985	7.69%	September	1988	7.52%
January	1986	7.64%	October	1988	7.79%
February	1986	7.48%	November	1988	7.86%
March	1986	7.42%	December	1988	8.13%
April	1986	7.22%	January	1989	8.73%
May	1986	6.46%	February	1989	8.86%
June	1986	6.37%	March	1989	9.04%
July	1986	6.72%	April	1989	9.18%
August	1986	6.11%	May	1989	9.38%
September	1986	5.98%	June	1989	9.16%



AROUND THE STATE

CLARK COUNTY REPORT by JOHN F. NICHOLS



The social and athletic event of the year was held last month at Club Green Meadows in Vancouver. The event, of course, was the annual Fort Vancouver Legal Secretaries' Association "Bosses Night." The evening kicked off with judge **Dean Morgan** warming up the crowd with such zingers as excerpts from **Rich Melnick's** cross examinations. If the crowd had enjoyed the monologue half as much as the judge did, it would have been a huge success. Unfortunately, they were a slow bunch.

Most of the attorneys present failed to see anything wrong with asking a lady if she was a widow because of the death of her husband.

That aside, the crowd settled in to the more serious segment of the evening, the awards. **Dale Read Jr.** captured the "Worst Dressed" title with his catchy ensemble during the recent snowstorm. The outfit, meticulously matching herringbone with plaid together with red boots, was topped off with a Russian winter hat, thereby earning Dale the name "Little Nikita."

This year's "Bachelor of the Year" award was given by default to **Casey Marshall**. All the usual nominees have become ineligible. **Doug Whitlock** is married; ditto for **Dale Read**; even **Marla Ludolph** is hitched. Casey, despite all the props (multiple BMWs; hot tub; Water Pik; and bean-bag furniture), is still looking for love or, at least, a date. Well, to the victor go the spoils, which this year comprise a \$25 gift certificate to the "Party-Line" gab line.

Finally, the award of the night, "Boss of the Year," was awarded to **Steve Thayer**. In an emotional presentation, Steve's secretary read her nominating letter, filled with profound gratitude toward Steve for his thoughtfulness, generosity and professionalism. Steve even lines up dates for his secretary with his criminal clients. The entire audience

collectively sighed when she described how Thayer allowed her to wax his car and then let her sit in it while he went into court to plead his client. What a guy.

EAST KING COUNTY REPORT by RANDOLPH I. GORDON

Is there life after judgeship? Expecting to review the evidence: The Honorable **James C. Kaiser** of the Northeast District Court, who plans to leave the bench before his present term expires in January 1991. Judge Kaiser offered the following thoughts to your intrepid reporter:

On Why Now: "I started young as a judge. I was only 35 when I began serving [in 1978] and after 11 years, I feel it's time to move on. . . . I never expected to retire as a judge."

On Plans: "I am presently discussing the possibility of working as general manager for Washington of a California-based firm providing alternate methods of dispute resolution [whose] arbitrators and mediators are exclusively former judges."

In Retrospect: "I feel I made a real contribution in sentencing and disposition of cases and, in particular, with helping to deal with the alcohol and abuse problems seen daily in the district court."

The Hardest Thing: "No matter how the judge decides and how impartial he may be, one side or the other can always attribute the result to politics. The federal system is better."

On a Successor: "My successor should have district court criminal practice experience, ideally from both defense and prosecutorial perspective, and a demonstrated judicial temperament through pro tem work."

Judge Kaiser will be alive and well, living in Kirkland.

Already certain of *vita post vita judicialis*, The Honorable **J. George Follett**, formerly a judge in New York State, more recently a financial planner assisting counsel with structured settlements, has joined Jerry C. Weil & Associates, a settlement consulting firm, as vice president for the Pacific Northwest Region. His offices will remain at 1800 - 112th Avenue N.E., Suite 304-E, in Bellevue.

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Vice president **Ken Davidson**, chair of EKCBA's Community Services Committee, recently released a comprehensive study finding substantial unmet need for basic legal services on the Eastside. The days may be gone when "Why did the chicken cross Bel-Square?" can be answered: "To get to its BMW." The report focuses on what heretofore has seemed oxymoronic: Eastside poor, projecting over 18,800 residents below the poverty level next year with fully five to ten percent of Eastside families unable to meet basic housing, food, clothing, and health care needs. Davidson noted that inability to afford legal representation effectively denied access to the courts and compared it to "providing hospitals without doctors." The study recommends establishment of a staffed legal services office.

Flushed with the success of last fall's real estate seminar, EKCBA will be sponsoring a second CLE, this one on personal injury practice, to be chaired by **Dan Kilpatrick** of Davidson, Czeisler & Kilpatrick. Set for June 23 at the Bellevue Holiday Inn, the faculty fea-

tures the following all-Eastside panel: **Bob Czeisler, Dick Kilpatrick, Dick McDermott, Steve Toole, Gordon Woodley**, and your reporter.

The Davidson, Czeisler & Kilpatrick firm has taken its place at the forefront of the eastward migration of King County law offices with the opening of its new Duvall office. Attorneys from the firm will rotate through the Duvall office, which will be staffed by a full-time closing officer, **Margie Clark**.

Steven J. Gordon has announced the relocation of his firm to Bellevue Place, 800 Bellevue Way N.E., Suite 300.

Judith F. Jaeger, of Casey, Gordon & Cohen, P.C., has been elected to serve on the board of directors of the National Kidney Foundation of Washington: "Dedicated to eradication of kidney and urological diseases and hypertension." (Cape not included.) To those who need a worthy cause to justify a trip to the golf course, consider the Glenlivet Scotch Scramble benefiting the National Kidney Foundation at Twin Lakes Golf & Country Club, 3583 S.W. 320th Street, Federal Way, WA on June 30. For details and fees (which discretion prevents me

from addressing here), call (206) 838-5573.

GRAYS HARBOR COUNTY REPORT

by JOHN L. FARRE

Update, continued: This continues an overview of legal talent in Grays Harbor County. I will start with the attorneys presently alive in Aberdeen. The so-called large law firms of Grays Harbor County are primarily in the city of Aberdeen. The first of these, located in the SeaFirst Bank Building, is **Tom Brown, Dave Edwards, Douglas Lewis and Curtis M. Janhunen**. It is hard to believe that these individuals, who are approximately the same age as I am, are now recognized as seasoned lawyers. Unfortunately, the season is getting later. They have one lawyer associated with them, **Howard Fischer**. **Jack L. Burtch** is located on First Street in the city of Aberdeen and is now one of the more elderly attorneys on the harbor. Just kidding, Jack.

One of the younger twosomes is the law firm of **Tom Copland and Jack**

HOW WOULD YOU DECIDE THIS CASE (Case Number Two)

The Plaintiff retained an attorney to represent him in a bodily injury action as a result of injuries sustained while making a vehicle pickup in an adjacent state.

The attorney assigned the file to an associate in his law firm. The associate brought suit in Federal Court in the plaintiff's resident state against the out of state vehicle owner.

Sound familiar? Read on.

The defendant asserted lack of personal jurisdiction in its answers. After the statute of limitations had expired, the defendant moved to dismiss the suit for lack of jurisdiction.

The Plaintiff brings suit against the attorney for failing to commence suit in the proper jurisdiction and within the statute of limitations.

How do you think the court found?

Decision: The vehicle owner's motion for dismissal was granted. In the separate action against the attorney, the court found in favor of the Plaintiff and substantial damages were awarded. Fortunately, the law firm was insured and a professional liability claim was subsequently paid.

Could this loss have been avoided?

Neither attorney nor any partner reviewed the file until after the plaintiff made inquiries regarding the suit's dismissal. The obvious method of avoiding this situation is to supervise the work of all associates in your office. Another method in avoiding a problem is the testing of affirmative defenses regarding service or jurisdiction prior to the expiration of the statute of limitations. The use of dual docket systems with cross checking assists in timely response to statute deadlines. In addition, since suit was brought in Federal Court, the attorney could have sought a transfer of the action to an appropriate Federal Court in the adjacent state. The attorney failed to do this in his opposition papers or to seek leave to re-argue this point after the judge granted defendant's motion.

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Micheau. Also, in the SeaFirst Building is the group of lawyers composed of **Ernest Ingram, Ted Zelasko, Richard Goodwin, Richard Vroman, Dennis Colwell, Gary Morean and Art Blauvelt, III.** Two of the fast guns on the harbor are associated together with the law firm of **Steve Johnson and James Heard.** Heard is presently challenging some interesting aspects of our first-degree murder statute in the state of Washington. In the old Becker Building is old **Stan Krause**, young at heart; **Gordon Godfrey**, and their associate **Greg Durr.** Our expert on workers' compensation and Social Security disabilities, **James Solan**, is still practicing at his same location on Heron Street. **Gladys Phillips** and **James Brown** have one associate, **Kurt Hefferline.** Also located in the SeaFirst Building is **Frank Franciscovich**, who — according to his Yellow Pages ad — is generally involved in the practice of law. Another sole practitioner is **John D. Schumacher**, located also on First Street. A recent transfer from Ocean Shores, also in sole practice, is **Janet M. Watson.** Also, three lawyers involved in some

kind of practice, are the author, **John L. Farra, Michael Smith and Stephen J. Hyde.** They are all located in the old Daily World Building.

MICRONESIA REPORT by STEPHEN A. COHEN

Yet another Washington Bar member has joined the Office of the Northern Mariana Islands Attorney General. She is King County lawyer **Patricia Halsell**, assigned to the Criminal Division.

The Attorney General's office has also been blessed with the assistance of another legal extern from the University of Washington School of Law. She is third-year law student **Christine Mattson**, who will be graduating in June. Chris is devoting most of her working hours to tax research.

Three Washington lawyers have recently experienced job changes: Northern Marianas Assistant Attorney General **Craig Platt** has been appointed Chief of the Criminal Division. **Eric Basse**, former Assistant Attorney General for the Republic of Palau, has

changed venue to Saipan, where he is now in private practice. **Brian McMahon** has forsaken the post of Northern Mariana Islands Public Defender for the delights of private practice, having joined the Saipan law firm of Fitzgerald, Herald and Bergsma. Brian commutes periodically between Saipan and Washington and reports that he is building a home on Agate Pass in Kitsap County.

David Webber, Northern Marianas Assistant Attorney General, has been busy shepherding the new computer system in the Attorney General's office. Dave is the system administrator, whose job is to keep the office on line and in line.

Northern Marianas Assistant Attorney General **Robert Naraja**, a graduate of the Gonzaga University School of Law, has broken ground and begun construction of his new home on Saipan.

The Washington attorneys in the Northern Mariana Islands are keeping up their reputation for being world travelers. **Marty Lovinger**, Northern Marianas Assistant Attorney General, has returned from Palau, Hong Kong and the Philippines. Northern Marianas As-

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sistant Attorney General **Stephen A. Cohen** has returned from the magical isle of Bali in Indonesia. **Larry Rogers**, attorney for the Mariana Islands Housing Authority, has returned from Washington, D.C.

Northern Marianas Assistant Attorney General **Richard Weil** has returned from Los Angeles, Niagara Falls and Seattle. While in Los Angeles, he attended the mainland wedding of **Lee Nelson**, former legal extern for the Attorney General's office. The Los Angeles ceremony followed the couple's first ceremony in January on Saipan. Also in attendance at the Los Angeles wedding were former legal externs **James Hawk** and **Doug Ogden**. Lee and Doug will be graduating in June from the University of Washington School of Law as, too, will James from the University of Puget Sound School of Law.

Brian McMahon has been busy pursuing his interest in spectator sports. In September he attended the summer Olympics in Korea, and in December he attended the Tokyo Bowl in Japan where he witnessed Barry Saunders of Oklahoma State beat Texas Tech.

Finally, the Washington legal contingent in the Northern Mariana Islands was paid a visit in April by King County attorney **Floyd Fulle**. Floyd stayed at the home of Richard Weil.

PIERCE COUNTY REPORT by **GEORGE S. KELLEY**

The retirement of judge **William Brown** was marked by a luncheon sponsored by the Washington State Trial Lawyers Association and the Pierce County Judiciary. The lunch was excellent and all local trial lawyers, judges and dignitaries were present except judge Brown. He was golfing in Arizona.

The day was saved by presentation of awards for 20 years of judicial service to Supreme Court Justice **Vernon Pearson** and Court of Appeals Judge **Stanley Worswick**. **George Christnacht** and **Bob Deutscher** made the presentations.

The young lawyers' slowpitch team under sponsorship of Puget Sound Bank's trust department opened its season with a 15-10 victory over a team of gravel truck drivers. Coach **Larry Cou-**

ture claims the team has been in existence in one form or another for almost 20 years. Some players find unique excuses for missing games. Consider **Dick Smith**, who picked the night of the season opener to wed his office mate, **Kathleen Jordon**. He didn't even invite the team to the reception.

Then we have ex-WSU baseball standout **Mike Jennings**. He attended Chicago Cubs spring training camp for old-timers in Arizona. Mike reportedly can still hit those 50 mph fastballs.

Mary J. Johnson relocated her office to 601 Tacoma Avenue South.

Warren Peterson of Gordon, Thomas, et. al was awarded the President's Award Medal by Pacific Lutheran University for 19 years' service as University legal counsel. Unlike the University of Puget Sound, Pacific Lutheran did not start a law school during Warren's tenure. Thank you, Warren.

Candace Saunders and **John Cain** have joined **Tom Dinwiddie** and friends in Tom's waterfront offices on Dock Street. Actually, the offices are built inside an old warehouse on the City Waterway. The warehouse contains

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other offices, a tavern/restaurant, a tour boat facility and small retail shops and about 10,000 pigeons roosting in the rafters. If you visit Tom, be sure to bring your umbrella.

Joining the Gordon, Thomas firm are **Nate Mannakee, Thomas Palotas and Patricia Schafer**.

Steven J. Brown and Randall M. Johnson have opened an office out by the Elks Club.

Ed Lane, late of Johnson, Lane and Crawford, is now sharing office space with **Smith, Alling, Hudson and O'Connor**.

SEATTLE-KING REPORT by JAMES L. VARNELL

Worthy Of Note. The U.S. Office of Trade has named **Michael Sandler** to a panel of 24 Americans who will rule on disputes under the U.S.-Canada Free Trade Agreement. **Douglass A. Raff** has been named managing partner at Riddell, Williams, Bullitt & Walkinshaw; **Lyn Tangen** and **Thomas Burt** have been appointed to the firm's execu-

tive committee. **Frank DeMarco** is now managing attorney at Hyatt Legal Services' Northgate office. **Bobette S. Jones** has retired from the active practice of law to start Preventive Lifestyles, Inc., a company designed to help people lead longer, healthier lives by helping them break unhealthy habits (such as smoking, overeating and possibly the practice of law) and develop healthy habits (such as exercising regularly and eating a good diet). Bobette points out that she has enjoyed her 14 years of legal practice which would, presumably, include a hotly-contested construction trial with this correspondent nine years ago.

Writers' Union Turncoat. Contrary to the standard cocktail party practice of boasting of one's legal accomplishments, this correspondent has never been known to glorify favorable results, if any, in this column. Continuing that tradition, **Mike Ricketts** and **Dave Svarren** (of Burlington, no less!) recently double-teamed this correspondent, and were granted summary judgment in a Whatcom County Superior Court case by Judge **Mike Moynihan**. Having

one's remaining claims dismissed was bad enough; finding out later that Moynihan writes the "Around the State" report for Whatcom County was doubly disheartening. Obviously, membership in the writer's fraternity means nothing to him. And, as if that weren't enough, our other claims had been dismissed six months earlier by Judge **David Nichols**, former friend and law school classmate (U. of W. 1971).

Office Moves. Foster Pepper & Shefelman has named four partners in its Seattle office: **Bradley J. Berg, John C. McCullough, Daniel L. Thieme** and **Judee A. Wells**. **Alice L. Blanchard** and **Newell D. Smith** have joined Mikkelborg, Broz, Wells & Fryer as associates. **Timothy D. Blue, Phillip E. Egger, John P. Evans, Judd H. Lees, Patrick M. O'Loughlin** and **Mary H. Spillane** have become partners in Williams, Kastner & Gibbs; **Gregory P. Bessert, Eileen M. Concannon, Carmen L. Cook, John S. Doles, Thomas M. Dunford, Matthew D. Green, Joanne R. Hicklen, Claudia S. Hogan, John L.G. Morgan, William H. Murr, Russell W.**

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Pike, Randall B. Printz, Rebekah R. Ross, Christopher L. Shank, Meg J. Shelton, Matthew L. Sweeney and Ann T. Wilson have joined the firm as associates.

Russell C. Love has joined Thorsrud, Cane & Paulich. Lane Powell Moss & Miller has moved to 1420 Fifth Avenue, and **R. Bruce Johnston, Ralph C. Pond, David T. Hunter, Richard A. Nielsen, Jr., William L. Black III, and Mark Rindner** have become members of the firm; **Tod J. Bergstrom, Linda E. Blohm, David H. Davis, Thomas P.E. Herrmann, George Hunter, Laurie S. Levin, J. Tate London, Michael K. Nave, Michael A. Nesteroff, Albert M. Raines, Elizabeth A. Richardson, Cheryll Russell, Richard W. Sears, Raymond S. Weber and Patricia H. Welch** have become associates. New shareholders in Shidler, McBroom, Gates & Lucas are **Christopher M. Carletti, Lance C. Dahl and Peter C. Spratt; Trenholme J. Griffin** has joined the firm as of counsel.

Shulkin, Hutton & Bucknell has relocated to 1201 Third Avenue and announces that **Jerry N. Stehlík** has become a shareholder; **Florence K. Deleanko** and **Lawrence R. Ream** have joined the firm as associates. **Yvonne Huggins-McLean, J. Murray Kleist, Matthew G. Knopp, Judy I. Massong and Janet L. Rice** have become partners at Schroeter, Goldmark & Bender; **Jeffrey P. Robinson** and **Brian Tsuchida** have joined the firm as associates. **Richard C. Flamm** has become a partner in Smith & Leary, and **Theresa J. Rambosek** and **James R. Hennessey** are now associated with the firm. **Rube G. Junes** is a new partner at Taylor & Hintze. **James Dwyer, Jonathan Eddy, Robert Blais** and **W. Scott Wert** are new partners at Bogle and Gates; **Joseph McIntosh, Norman Bruns** and **James Brown** are of counsel to the firm.

Gloria Lung Wakayama has become a partner in Harris, Orr & Wakayama. **Patrick H. Vane** has joined the Seattle office of Witherspoon, Kelley, Davenport & Toole as of counsel. **Frederick P. Corbit, David M. Heineck, Cindy S. Helmick** and **Andrew M. Kenefick** have joined Heller, Ehrman, White & McAuliffe; **Patrick W. Dunn** and **Richard D. Thaler** have also joined the firm as special counsel. **Meridith A.**

Copeland and **David L. Hennings** have become principals of Betts, Patterson & Mines; **Margaret A. Dowling, Susan C. Hacker** and **David L. Johnson** have joined the firm as associates. **Jeffrey Haley** has joined Davis, Wright & Jones. **A. Kyle Johnson** has moved to Stanislaw, Ashbaugh, Chism, Jacobson & Riper as a partner. Bullivant, Houser, Bailey, Pendergrass & Hoffman has relocated to the 41st floor of the Columbia

Center. **Fred Diamondstone** has moved to the Smith Tower.

SPOKANE COUNTY REPORT

by **BERNIE McNALLEN and RICH KUHLING**

May 1, Law Day, the Spokane Bar had the pleasure of honoring four members celebrating their 50th year of practice: **Robert Brown, L. Warden Hanel**.



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Gordon St. Clair Lower, and Larry Thayer. Our most senior member, **Phil Brooke**, 73 years in practice, has decided to take the summer off. **Jim Bam-**

berger, director of legal services, gave the Law Day speech, "Access to Justice."

We welcomed the Board of Governors

meeting in Spokane May 19.

June 2 we'll have seen **Mike Pontarolo** assume the presidency of the county bar association; **Gary Gainer**, vice president; **Rick White**, secretary; and the election of a new treasurer and trustees. **Pam Arnold**, our new executive director will have been with us one year. Congratulations.

The third or fourth ad hoc bar association tennis tourney arranged by **Dutch Wetzel** and **Mike Perrizo** will have taken place June 3 and 4. The golf tourney is scheduled for June 16.

Congratulations to **Charlie Dorn**, district court judge, married April 10.

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YAKIMA COUNTY REPORT

by **JOSEPH D. HAMPTON**

Jim Adams is a lucky man. Not only is his office located across the street from Baskin-Robbins, he always has great seats at the Air Fair. This is due in no small part to the fact that he usually helps put the whole thing together, and this year is no exception. Jim wears the vice president's hat for this year's Air Fair, which will feature the Air Force Thunderbirds, along with the usual assortment of A10s, F15s, A7s and other bingo-sounding aircraft. Y'all come for aeronautic fun in the sun June 24 and 25, at the airport. Call (509) 248-0246 for more information.

The Yakima County Legal Secretaries Association honored **Jim Davis** as "Boss Of The Year" at their bosses' night held in April. Condolences to Jim, as he will now have to live up to all the great things said about him.

Your obedient correspondent recently was admitted to practice before the Tribal Court of the Yakima Indian Nation. Perhaps unknown to non-Yakimans, the tribe has significant influence on life in the county, and the tribal court plays a vital part in the functioning of the tribal government. The Yakimas have adopted their own Law and Order Code, maintain a tribal police force, and report decisions of their appellate court. Former Yakima attorney **David C. Ward** is the tribal court judge, and holds court at the Nation's complex in Toppenish. Many local attorneys are admitted to practice in the tribal court.

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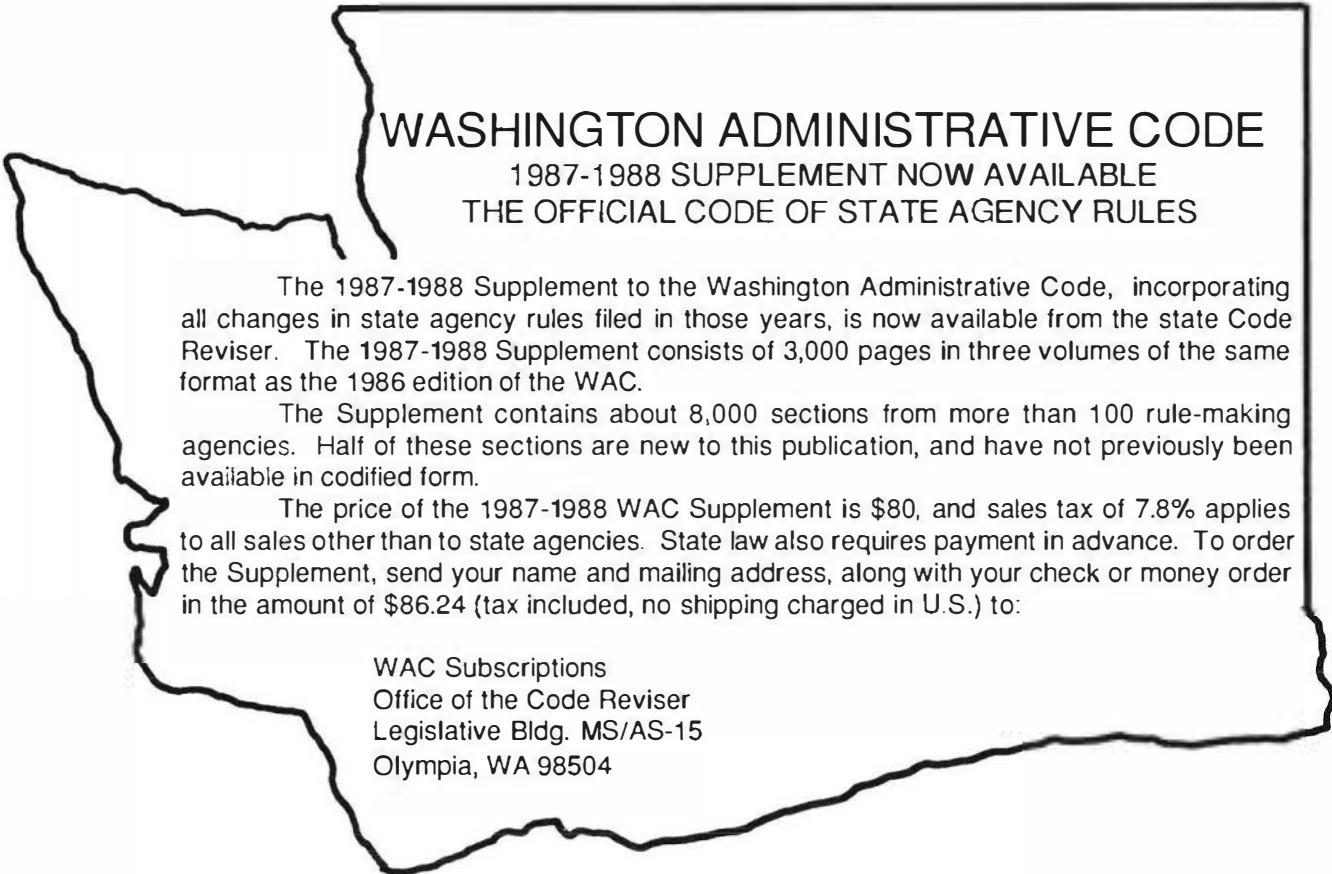
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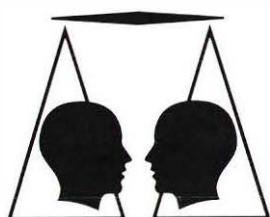
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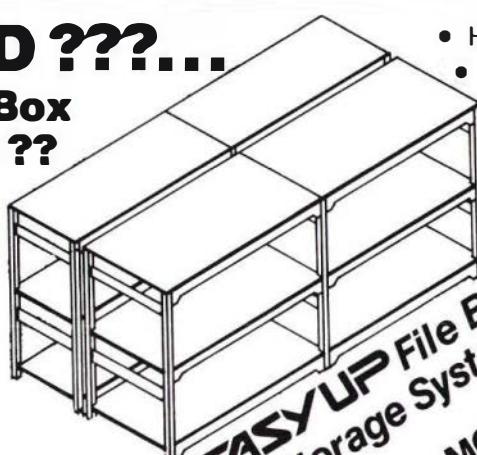


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In Praise of Lawyers As Conversationalists

by Jeff Tolman

In three or four decades the art of conversation has, to a large extent, died. In this every-problem-can-be-solved-in-26-minutes-just-like-on-TV world, no one's interested in serious, pointed discussion. Lawyers, because of their education and training, hold one of the last bastions of conversation left in this country. Sure, there are lawyers who couldn't make a story about winning the Nobel Peace Prize interesting. More often than not, though, lawyers understand the rudiments of conversation and can carry on a good one.

One of the aspects of refined dialogue in which lawyers are trained is the importance of allowing your conversation partner to finish a thought or, at least, a sentence. Judges and court reporters have trained most lawyers to listen first, and then talk. This is not true of many laypeople. Imagine a transcript of most discussions:

Speaker #1: "Hello, Jeff. It's nice to see you again. How are you?"

Speaker #2: "I'm fine. How are . . ."

#1: "Am I? Fine. The kids are . . ."

#2: "6 and 3, aren't they? Are you and Laurie still . . ."

#1: "Married? Yes. Happy? Certainly. How about . . ."

#2: "Me? Yeah, I'm married and happy, too. You'll never guess who I saw the other day . . ."

#1: "Really? I saw Mike Kirk, just out of the blue. Do you know him?"

A lawyer's training in the importance of a clean transcript is invaluable in carrying on a good conversation.

Second, and as important, is most lawyers' ability to stay on point. This trait is particularly helpful in working with scatterbrained clients. Every lawyer has had such a client:

Attorney: "Mrs. Smith, now that I have explained the difference between a Will and a Community Property Agreement, do you have any questions?"

Client: "Yes, Mr. Tolman. If I die and, for example, want to leave my house to, say, my granddaughter . . . oh, by the way I have a picture of her here in my purse. It'll just take a minute for me to find it."

Attorney: "Mrs. Smith, let's talk more generally. Do you have any questions about . . ."

Client: "Here it is! Isn't she beautiful? She's marrying a proctologist in June. I never knew what they did, did you? Well, one Sunday at dinner I asked him about it. And I couldn't eat for two days! Now, what were we talking about?"

Staying on point, and keeping others on the issue, isn't always easy, but it is always important.

Lawyers' training in *stare decisis* is also helpful in their development as conversationalists. Like good law, a good conversation is a logical progression of ideas and related experiences. Most lawyers also have strong vocabularies and wider-than-usual life experiences. These are helpful in making a point both interesting and relevant.

Not everyone is so blessed. Almost all of us have a family member who is as boring as he is eccentric. I am aware of one such fellow who loves to chat, but is obsessed by the need to tie every dialogue into his major life experience — two days at the 1956 Pendleton Roundup. Our dinnertime conversations are predictable:

Chris: "Uncle Bill, will you please pass

the salt?"

Uncle: "Salt! That reminds me of a diner — the finest diner I ever 'et in — in Pendleton, Oregon. They had salt shakers just like these."

Chris: "Uncle Bill, these salt shakers are made of an aluminum alloy that wasn't invented in 1956."

Uncle: "Oh. Well, the smell of the salt on the food reminds me of my breakfast in Pendleton. I'll never forget it. June 29, 1956. It was a hot day. Sultry, and the smell of a good rodeo saturated the air . . ."

You can walk, or talk, many miles without getting anywhere if one shoe is nailed to the floor.

Lawyers have another tool to keep conversations on track that laypeople do not have: objections. Many times over lunch I have heard a lawyer say,

"Kevin, had we been in court the last five minutes I would have objected to your comments as being nonresponsive, irrelevant and not based on any facts presently in evidence."

While this conversational tool works well among lawyers, I discourage using it with nonlawyers, unless, of course, you prefer to dine alone.

Finally, I think lawyers are particularly good conversationalists because we like to talk to each other. While day in and day out we try to best our colleagues, friend and foe alike, at the same time we know we share the same fears, dreams and agonies. This odd love/hate relationship is very conducive to dialogue. As long as lawyers can find each other, the arts of conversation and litigation will survive. □

(Jeff Tolman is WSBA Governor for the First Congressional District. He lives in Poulsbo.)

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Legal
Foundation of
Washington

1988
Annual
Report

President's Report

For the Legal Foundation of Washington the beginning and end of 1988 were marked by special events:

- The Charles A. Goldmark Distinguished Service Award was given in January to my fellow Spokane attorney, Carl Moxey. This award applauded his belief that legal services must be available to all persons regardless of their ability to pay and his dedication to making that belief a reality through long-term devotion of 20 percent of his legal practice to pro bono services.
- The year ended with distribution of nearly \$2,800,000 to 41 grantees. Since the Legal Foundation of Washington was created in 1984, we have distributed more than \$8,800,000 in interest earned on pooled lawyers' trust accounts.

Although pleased with this disbursement, we remain frustrated because we cannot assist all in need. We are aware of the harsh fact that nearly 400,000 of our neighbors in Washington live in poverty.

Our 1988 grant decisions were motivated by this statistic of need, by our past President Jack Deon's leadership on behalf of pro bono, and by the report of the Washington State Bar Association's Pro Bono Task Force headed by Seattle attorney, Monty Gray. That report counseled us to "keep IOLTA funds concentrated in the area of meeting the legal needs of the poor."

Beginning in 1981, cutbacks in federal funding stymied access to justice for the poor. IOLTA has been able to provide funding to partially replace those federal dollars.

The private bar has also rallied to the need. Pro bono programs coordinated and administered by local bar associations throughout the state have mushroomed with the aid of IOLTA funding. We

currently fund 16 pro bono programs and hold funds awaiting organization of two more. Coordination of this critical network of pro bono services was established this past year with a grant to the Washington State Bar Association. Augmenting our resources for this work was clarification by the Supreme Court of appropriate fees and charges to be deducted from IOLTA accounts.

Our mission has been accomplished with a nine-member board of trustees appointed by the Washington State Supreme Court, the Governor, and the Washington State Bar Association. We each serve a two-year term, with the opportunity to serve on additional term.

While we are responsible for administration of funds, we could not increase access to justice for the poor without the assistance and cooperation of lawyers throughout the state, the judiciary, financial institutions, the staff and board of the Washington State Bar Association, and the dedicated grant recipients. Thank you for making IOLTA work.

Finally, we must continue to remember two important points. One, without the Supreme Court's action in promulgating Rules of Professional Conduct Section 1.14, the Legal Foundation would not exist. And two, lawyers should be commended for the thousands of hours of pro bono services given to the poor.



J. Ben McInturff
President

1988 Grants

Annual grants totaled \$2,789,500. Nearly 81 percent of these funds was given to legal services for the poor. Pro bono programs received 14.5 percent, law-related education just over 3 percent, and alternative dispute resolution service nearly 2 percent.

Applications for 1989 annual grants and assistance in applying are available from the Founda-

tion office. Applications must be returned by 5:00 p.m., August 31, 1989. Grantees will be announced in early December.

Small innovative grants provide up to \$2,000 in seed money for new approaches to legal services for the poor, law-related education, or alternative disputes resolution. Application may be made to the Foundation at any time.

Direct Civil Legal Assistance for the Poor

Centro Compesino Immigration Project
 Education Law Project
 Evergreen Legal Services
 Fremont Public Association
 Legal Action Center
 National Lawyers Guild
 Puget Sound Legal Assistance Fdn.
 South Sound Advocates
 Spokane Legal Services Center
 Unemployment Law Project
 University Legal Assistance
 Washington Immigration Project

Immigration counseling and legal services	\$70,000
Legal assistance to obtain educational services	\$50,000
Civil legal services in 31 counties	\$1,347,491
Welfare-rights advocacy	\$40,000
Landlord/tenant and welfare-rights advocacy	\$45,000
Legal assistance through internship program	\$2,000
Legal services in Pierce, Thurston, Mason counties	\$301,927
Legal services to disabled citizens	\$11,000
Civil legal services in Northeast WA	\$214,332
Unemployment-compensation representation	\$60,000
Family-law representation in Spokane County	\$20,000
Immigration information and representation	\$90,000

Pro Bono (Volunteer Assistance by an Attorney)

Benton-Franklin Legal Aid Society
 Chelan-Douglas County Legal Aid
 Community Action, Whitman County
 Grant County Community Action
 Grays Harbor County Bar Association
 Joint Legal Task Force
 on Central American Refugees
 Lewis County Bar Association
 Northeast WA Rural Resources
 San Juan County Bar Association
 Seattle-King County Bar Association
 Seattle-King County Bar Association
 Seattle-King County Bar Association
 Skagit County Bar Association
 Snohomish County Legal Services
 Spokane Bar Association
 Spokane Bar Association
 Washington State Bar Association
 Whatcom Opportunity Council
 Yakima Bar Association/YWCA
 YWCA of Kitsap County

Coordination of volunteer legal assistance	\$27,000
Expansion of volunteer legal assistance	\$8,000
Coordination of volunteer legal assistance	\$5,000
Coordination of volunteer legal assistance	\$14,000
Development of a volunteer program	\$10,000
Coordination of volunteer legal assistance	\$40,000
Development of a volunteer program	\$10,000
Coordination of volunteer legal assistance	\$14,000
Coordination of volunteer legal assistance	\$4,000
Coordination of volunteer family-law clinic	\$40,000
Neighborhood information and referral clinics	\$12,000
Coordination of volunteer legal services	\$35,000
Coordination of volunteer legal assistance	\$18,000
Coordination of volunteer legal assistance	\$36,750
Coordination of volunteer legal assistance	\$10,000
Coordination of volunteer dissolution clinic	\$10,000
Coordination of volunteer programs statewide	\$22,000
Coordination of volunteer legal assistance	\$24,000
Coordination of volunteer domestic assistance	\$30,000
Development of a volunteer program	\$10,000

Law-Related Education

Community Service Center for the
 Deaf and Hard of Hearing
 Northwest Women's Law Center
 Seattle-King County Bar Association
 Tenants Union
 WA Center for Law-Related Education

Advocacy for access to legal assistance for the deaf	\$25,000
Legal information and referrals	\$20,000
Production of musical for high school students	\$10,000
Statewide toll-free telephone hotline	\$10,000
Statewide directory of law-related materials	\$20,000

Alternative Dispute Resolution

Dispute Resolution Center,
 Spokane County
 Dispute Resolution Center,
 Snohomish County
 Dispute Resolution Center,
 King County
 Northwest Intertribal Court System

Program coordination	\$10,000
Program coordination	\$10,000
Program coordination	\$10,000
Program coordination and training	\$18,000

Small Innovative Grants

Benton-Franklin Legal Aid
 Dispute Resolution Center
 WA Center for Law-Related Education
 WA Ass'n for Community Economic Dev.

Training for parenting plan assistance	\$2,000
Minority training scholarships, Snohomish County	\$1,800
Publish summary of important WA legal cases	\$1,950
Legal research of housing funding sources	\$2,000

Distinguished Service Award

The Charles A. Goldmark Distinguished Service Award is presented to an individual, group, or organization that best realizes equal access to justice. It is named for the prominent Seattle attorney who was president of the Foundation's Board at the time of his death in 1986.

The award recognizes outstanding accomplishments outside ordinary duties of employment, that has a recognizable, positive impact on residents of Washington State, and that

furtherns the goals of the Foundation. Recipients to date:

1987 Charles A. Goldmark
1988 Carl Moxey

Nominations with documentation and letters of support for the next award must be received by the Foundation no later than October 15, 1989.

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