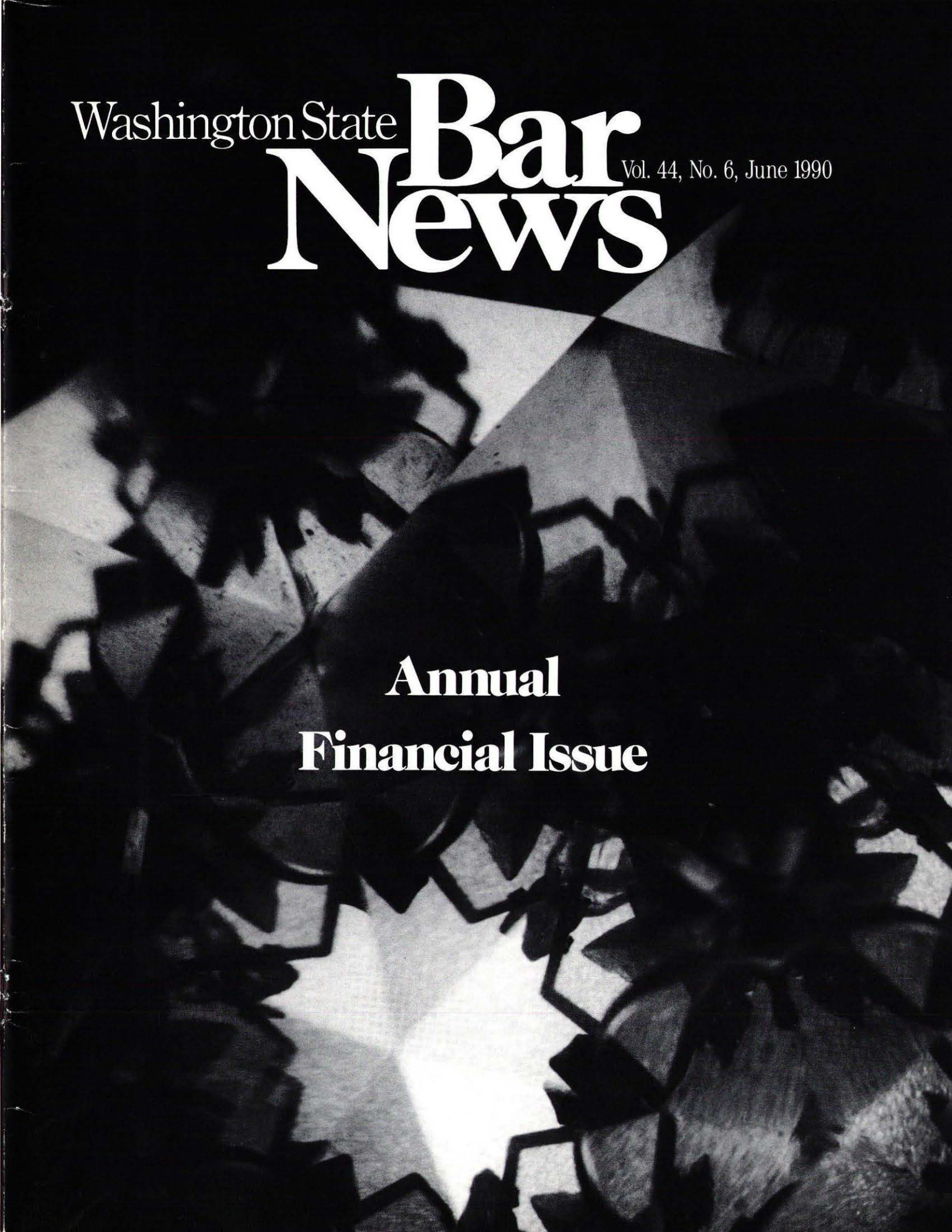
Washington State Bar News
Vol. 44, No. 6, June 1990



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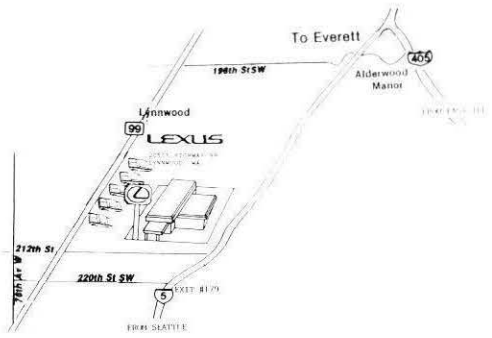

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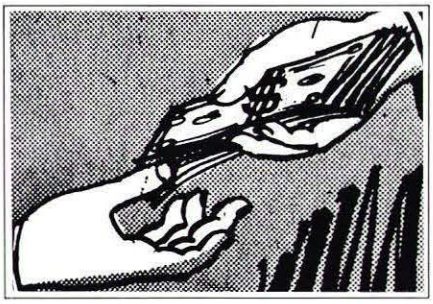

ANNUAL FINANCIAL ISSUE

FEATURES

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Administration (**206**) **448-0441** — Lawyers' Assistance (**206**) **448-0605** — Admissions (**206**) **448-0563** — Legal Department (**206**) **448-0307** — Continuing Legal Education (**206**) **448-0433** — Lawyer Referral (**800**) **552-0787**

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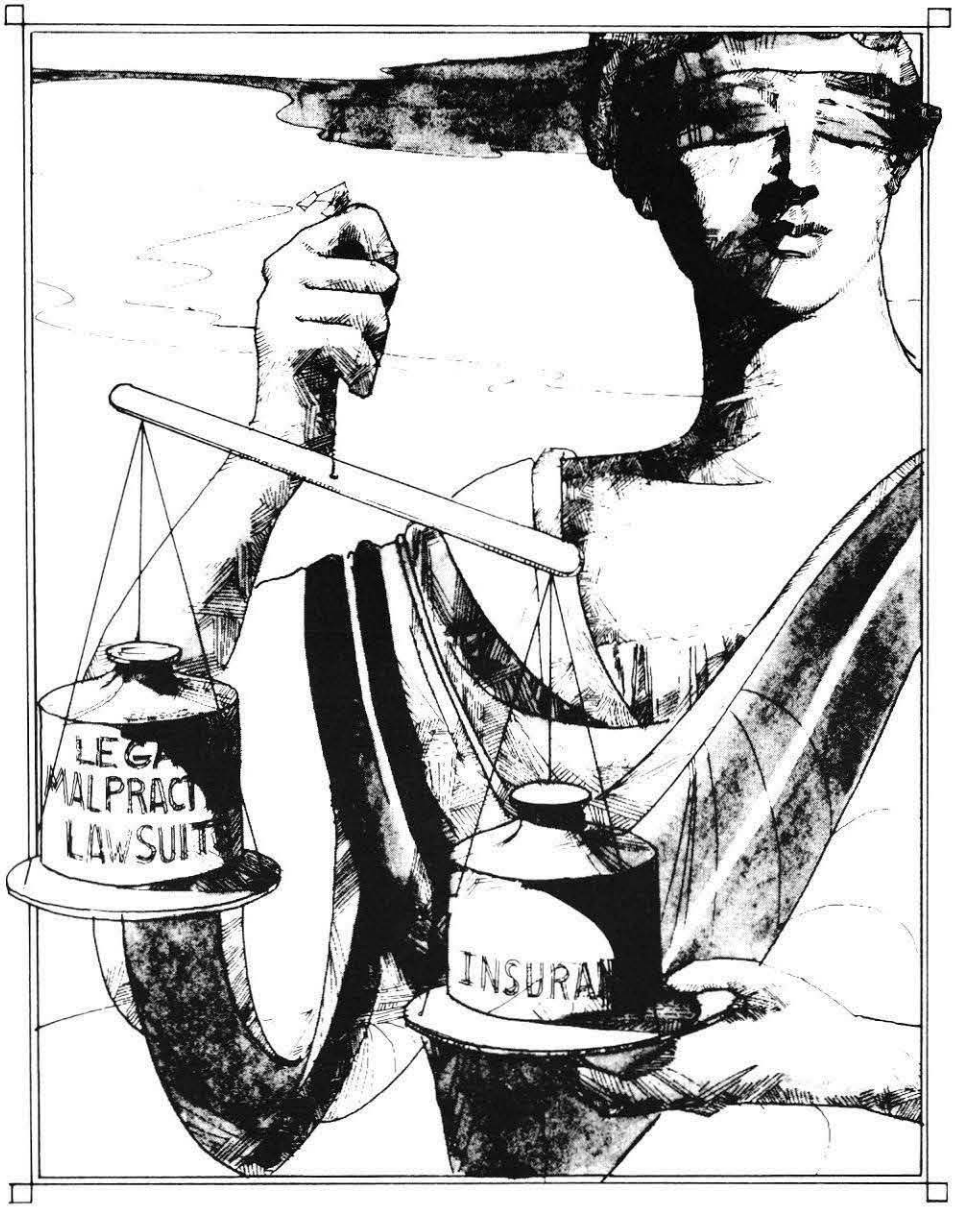

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Letters to the Editor of reasonable length are invited. Such letters should be typed and signed. The Editor reserves the right to select communications or excerpts therefrom for publication, and to edit any letter as may be appropriate.

CLE on TV

Editor:

I am writing in my capacity as president of the Benton-Franklin County Bar Association. On March 20, 1990 the members present at our monthly meeting voted unanimously in favor of the Videotape CLE Resolution. The resolution is as follows:

Videotape CLE Resolution

"RESOLVED, that CLE credit should be granted for individual viewing or hearing of such videotape or audiotape CLE materials as are otherwise approved for CLE use."

Our members feel that CLE credit by means of videotape is an idea which will save lawyers substantial amounts of time and money. It will also permit us to benefit from many valuable CLE events which are held at times and locations incompatible with our personal schedules. States such as Montana and Colorado already permit credit for the individual use of CLE tapes.

We sincerely hope that the Board of Governors and the Board for Continuing Legal Education will amend existing CLE rules to permit this valuable use for modern videotape technology.

H.W. FELSTAD, President
Benton-Franklin County
Bar Association
Richland

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, WA 98121-2599. The deadline for filing such resolutions and explanatory reports will be 5 p.m. on August 27, 1990 (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 Thursday morning, September 13, 1990. 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 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 7, 1990 at the offices of the Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA at 9 a.m. Proponents and opponents of resolutions are urged to attend the September 7, 1990 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 7 session will not affect any right under the Bylaws to present views at the September 13, 1990 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 16, 1990. 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, 1990 hearing.

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President Vander Stoep, representing the Washington State Bar Association, was among the speakers at the May 7 rededication ceremony for the Temple of Justice in Olympia. The following is the text of his speech.

Rededication

In 1989, as with the state of Washington, the WSBA celebrated its Centennial Anniversary. It is my honor to serve as the 100th president of the WSBA.

To be here today is a distinct pleasure—and honor—for all of us. I am certain that each justice who has entered the Court chambers and taken a seat on the bench has done so with a degree of humility and awe. In this building a succession of learned justices have labored in the discharge of their responsibilities to make our three branches of government function well.

This rededication and the realization of what has transpired here through the years is the first occasion for me to actually relate to the feeling that was expressed by then President Abraham Lincoln, himself a lawyer, when in November 1863 he spoke those words at Gettysburg, with which we are all so familiar, and which I paraphrase:

> But in a larger sense, we cannot dedicate—we cannot consecrate—we cannot hallow—this building. The justices, living and dead, who labored here have consecrated it far above our poor power to add or detract. The world will little note, nor long remember, what we say here, but it can never forget what they did here. It is for us, rather, to be here dedicated to the great task remaining before us.

James A. Vander Stoep

The setting in which President Lincoln's words were spoken—namely, a battlefield where men had died in a divisive conflict—is totally different from our setting today. This building exemplifies the truism that differences should be resolved by law, not by battle.

Attorneys Use Credit Counseling Services

by **Fred A. Morgan,** *CCCE*

Many attorneys are unaware that there is an expensive and effective alternative to bankruptcy. Consumer Credit Coun-seling Services (CCCS) works with troubled debtors to help them pay their debts in an orderly manner by working with their creditors.

How It's Done

Attorneys, particularly those with consumer receivables, have found that referring clients with credit problems is a convenient way to gain the orderly liquidation of accounts that otherwise might be lost.

An initial counseling appointment is set up with a trained counselor at which time a financial profile for the client is established. All sources of income are listed; living expenses are scheduled; and funds left over for debt repayment plans are identified.

Once the plan has been established, the client is required to bring in a monthly cashier's check or money order, and the CCCS office makes a disbursement to each of the individual's creditors.

Of course, not all appointments result in a debt management plan. Clients whose financial problems do not fit into a plan are given budgeting advice. Some can self-administer their own plans, and some need referrals for other types of professional help.

Who Uses It

Referrals from Washington attorneys to CCCS offices throughout the state have increased markedly since the beginning of 1988. The Seattle CCCS office reports a 55% growth rate in attorney referrals in the 18-month period ending 3-31-90.

Consumer Credit Counseling is a proven alternative for individuals who have a steady income, are over-extended and are being pressured by creditors. Studies of Chapter 13 filings have consistently shown that a majority of those protected individuals could have paid out their debts on their own in 36 or fewer months.

Because a bankruptcy may remain on an individual's credit bureau report for up to 10 years, borrowing or negotiating for loans can be extremely difficult during that period. Many otherwise responsible consumers are kept out of the credit market for an extended period and learn little or nothing from the bankruptcy experience.

Increasing losses due to bankruptcy, including prorated payments under Chapter 13 and fractional payments under Chapter 7 liquidations, are being felt throughout the state. As in other sectors of the credit-granting community, losses to practicing members in the legal profession are mounting.

Some creditors, recognizing the effectiveness of CCCS efforts, give special terms to clients who are using a debt management plan. Other creditors, with limited exceptions, generally accept the terms of a repayment plan.

Who Pays

There is no charge for CCCS services. Funding for each counseling service comes from creditor "fair share" contributions, client contributions and employers. There is no fee requirement for services, and those choosing not to support CCCS will, nevertheless, benefit. However, the ongoing ability of CCCS to meet the increasing demands made upon them are related to the success of the fair share program.

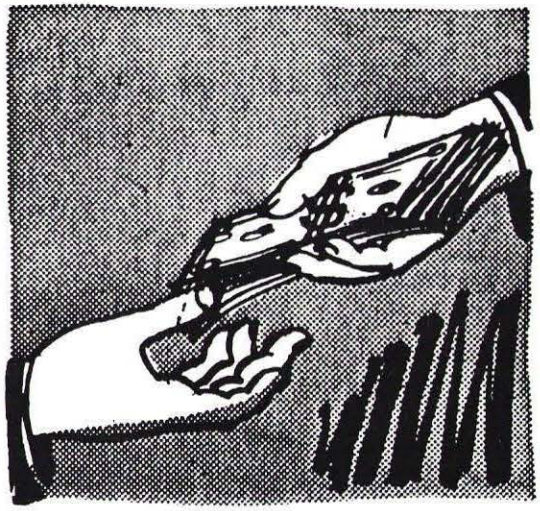
Many of the attorneys who have discovered the consumer credit counseling alternative to bankruptcy report that they handle the fair share contribution the same as they handle collection agency costs. CCCS is a 501(c)(3) organization, however, and any contribution made can be taken as a charitable expense for tax purposes. Requests for a fair share vary with the overhead costs of each CCCS office but do not exceed 15% of the amounts remitted to the client's creditor.

Fair share contributions can be deducted from each remittance check; this eliminates mailing and handling costs for law offices. Most lawyers who receive remittances on debt management plans select the deduction method for making their fair share contribution.

Administration

CCCS of Seattle is directed by a board of 34 trustees, several of whom come from legal practices, including Attorney General Ken Eikenberry, Prosecuting Attorney Pat Sainsbury, Donald Thoreson of Betts, Patterson and Mines, and William Weinstein of Weinstein, Hacker, Yost, Berry and Matthews. Members of the Bar or their clients can obtain literature or information from their local services by calling: Kennewick, (509) 586-2181; Seattle, (206) 441-3920; Spokane, (509) 455-5568; Tacoma, (206) 588-1858; Yakima, (509) 248-5270. □

***Fred A. Morgan** is president of CCCS, Seattle. He has a banking background and is a former Oregon Banking Commissioner.*



Counsel for Community Banks: Why Your Bank May Be a Target for Acquisition and How to Help It Weather the Process

by **Joanne Robbins Hicken**

The predominant type of bank in Washington state is the community bank. The term community bank is nonlegal and refers to a small bank, usually a state bank rather than a national bank, with assets up to $100 million dollars. In 1985, nearly 82% of banks in the United States had less than $100 million in assets.

Community banks, particularly in Washington state, face major changes in the coming year as a result of the current trend in the banking industry toward acquisition and consolidation. This article describes two major factors contributing to this trend and provides counsel for community banks with some practical ways to help the client weather the process.

Interstate Banking: California Opens Its Door

The first reason for the anticipated increase in acquisitions of community banks in Washington state is the gradual elimination of the prohibitions against interstate banking. Federal and state laws generally prohibit a bank from establishing a branch in a second state, (*e.g.*, the McFadden Act, 12 U.S.C. § 36). A bank can circumvent this restriction by establishing a holding company to own the bank. The Douglas Amendment to the McFadden Act allows a bank holding company to acquire additional banks located outside its state if the acquisition is specifically authorized by the statutes of the state in which the target bank is located. 12 U.S.C. § 1842(d). This fact explains, for example, the emergence of banks in several states with the same name followed by the name of the state, such as First Interstate Bank of Washington, or Security Pacific Bank Washington. Each bank with the same general name is separately chartered, but all of them are owned by the same bank holding company.

Effective July 1, 1987, the statutes of Washington state specifically authorize the acquisition of banks in this state by an out-of-state bank holding company if, among other things, the bank holding company is located in a state which would allow a Washington state bank holding company to acquire a bank located in that state. RCW 30.04.232. Since the effective date of that statute, several large Washington banks have been acquired by out-of-state bank holding companies, most commonly from California.

East Coast bank holding companies generally have not yet forayed into the West Coast because the predominant West Coast state, California, does not yet allow it. Until January 1, 1991, California allows banks located in that state to be acquired by an out-of-state bank holding company only if, among other things, the bank holding company is located in certain Western states, including Washington. California Financial Code § 3773 (repealed as of 1/1/91).

On January 1, 1991, California's law will become similar to the law in Washington state. California will allow an out-of-state bank holding company to acquire a bank located in California if the laws of the state of the bank holding company would allow a California bank holding company to acquire banks located in that state. California Financial Code § 3751 *et seq.* (operative as of 1/1/91).

One anticipates that many East Coast bank holding companies will evaluate West Coast banks for acquisition during 1990 so as to be able to create a solid West Coast presence during 1991. Community banks in Washington state likely will be the focus of some of this attention.

Dwindling Profit Margins

The second reason why community banks may be a target for acquisition is the dwindling profit margins related to financial services. This fact is a result of the increased competition in the provision of financial services. For example, securities firms offer mutual funds with the flexibility and liquidity of savings accounts. Businesses use junk bonds and short-term notes to obtain working capital instead of seeking a bank loan.

Banks are required to maintain certain levels of capital. They risk regulatory sanctions, or even closure, if they fail to maintain those levels. Dwindling profit margins make compliance increasingly difficult. Accordingly, banks need to consolidate to produce economies of scale and to broaden their market scope.

Practical Tips to Counsel For a Community Bank

Community banks will face several

issues in the course of the acquisition process, and counsel may wish to educate senior management regarding them. Unless senior management addresses these issues in advance, it may overlook them in the excitement and long hours associated with the acquisition process. Failure to address these issues can mean increased problems and unnecessary expense.

Warn about insider trading. If the stock of the community bank or the acquiring bank holding company is publicly traded, the acquisition process may give rise to the crime of insider trading. Insider trading occurs when someone buys or sells stock on the basis of information which is not public. This crime is not easily recognized by the nonlawyer.

The employees of the community bank may learn of the possible acquisition in advance of its announcement and purchase a large block of stock without appreciating the risk. After an acquisition, the Securities and Exchange Commission will investigate any prior substantial stock transactions, particularly when the transactions involve employees of one of the institutions involved. Counsel's efforts to educate employees regarding insider trading may save the bank's reputation and help its employees avoid embarrassment and legal difficulty.

Bank managers should avoid making blanket assurances about job security. The employees of a community bank involved in an acquisition will have anxieties about subsequent consolidation of the work force. Many of them will express their anxieties to their managers or quietly begin to look for jobs elsewhere.

Although managers will be tempted to offer assurances about job security in order to boost morale, counsel should advise the bank management to avoid this temptation. Assurance from a manager about job security may amount to a legal contract which obligates the financial institution to continue employment or pay a large severance settlement.

No business can predict with certainty what its personnel needs may be in the future; the bank needs to

preserve the flexibility to terminate employees at will. A safe way to encourage employees to remain is to offer periodic bonuses to long-term employees during the transition.

Help local management foster open communications to the acquirer. The acquiring bank holding company may wish to make changes in the operations of the community bank. The management of the community bank may be reluctant to identify problems in implementing those changes for fear of antagonizing the new bosses.

For example, the acquiring financial institution may wish to use its existing check printer to print checks for the community bank. The community bank may have a formal or informal understanding with a local printer, however. Failure to deal appropriately with the community bank's existing obligation may lead to a lawsuit brought by the local printer.

Counsel may encourage the community bank managers to rely on him or her to relay unfavorable information of this type to the acquirer. The attorney, after all, will be in the best position to evaluate the existence of a present legal obligation which would impede the acquirer's goal.

Convince the acquirer of the need to consider local laws and practices. The acquirer may wish to standardize its products and services, and may require the community bank to conform. Before it adopts the changes, however, counsel for the community bank should review the products and services for compliance with local law and practices. For example, most loan documents must reflect state law as well as federal law.

Examine all affiliate relationships for compliance with Federal Reserve Act sections 23A and B. The acquiring bank holding company or its affiliates may have an existing correspondent or other type of relationship with the community bank or its affiliates. As a result of the acquisition, the existing relationship may become unlawful under Sections 23A and B of the Federal Reserve Act, which prohibits or restricts certain types of transactions between financial institutions and their affiliated companies. 12 U.S.C. §§ 371c and 371c-1.

Because of its smaller size, the community bank may be in a better position than the acquirer to quickly determine whether any impermissible relationships will exist subsequent to the acquisition. Counsel, rather than management, should make this determination in view of the arcane and complex nature of these statutes.

Trade names: avoid infringing the trade names of others and protect the bank's trade names. The acquiring bank holding company may want the community bank to adopt its name to benefit from joint advertising and to foster name recognition. Another business already may use the acquirer's name in Washington state, however, and that business may sue the community bank for infringement. To minimize this problem, local counsel should identify any prior user of the trade name and negotiate for the sale of the name, if necessary.

Trade names of the acquirer should be protected in Washington state to avoid others' using them. Local counsel is in the best position to register the trade name at the state level.

Both the acquiring bank holding company and the community bank should address these problems. Some of the problems addressed in this article may appear at first to belong to the acquiring bank holding company, but this conclusion is erroneous. The community bank will remain a separate legal entity from the bank holding company and thus will be subject to liability in its own right. The community bank may be sold as quickly and unexpectedly as it was acquired, and its management will be held accountable for its problems. □

WSBA member ***Joanne Robbins Hicken*** *practices with Williams, Kastner & Gibbs in Seattle. She is a graduate of Kalamazoo College (B.A., 1971); George Williams College (M.S., 1976); and the University of Washington School of Law (J.D., 1980).*

It Wasn't the Law. It Was Me.

Last year I crashed and burned...again.

Mostly I felt a sense of failure. I was changing jobs for the fourth time in four years. I had quit practicing law, because I thought I wanted something "better," but with each new job I felt that the stress was too much. I was embarrassed, and I withdrew from my friends and acquaintances. Home was no better: my finances were unstable; my wife threatened to leave me for being so cold; my kids began to have similar problems. I retreated, dissatisfied, into the safety of a nice job in a law firm.

My life was not working, and I knew why. For years I had been a student of psychology and had read enough books to fill a library. My effort was not totally without successes and insights. First, I recognized that I suffered from chronic depression. Second, I identified with the root causes: I had been raised in a dysfunctional family. On the outside we looked like the Cleavers. But on the inside our home was sterile and devoid of emotion and expression; feelings were avoided at all costs. Third, I had become increasingly alienated from my feelings, needs and wants. I have always been a good robot, but that method of coping was unhealthy. All my intellectualizing had been ineffective in making a change. I hurt so badly that, thank God, I finally accepted that will power was not enough.

At this turning point, I knew that I could not make any significant change on my own. My problems were emotional in nature, so that answer lay in sharing my life, giving expression to what was in my heart—work on the experiential, not the intellectual, side. I called LAP.

LAP referred me to an individual therapist, whom I began seeing once a week. I wanted to become aware of my feelings and how to process them in a healthy way, rather than denying and suppressing them.

LAP gave me another good idea—meet with a peer counselor, an attorney who had recently worked on the similar issue of how to beat depression and get healthy. I did. Instantly we spoke a com-mon vocabulary, and I found myself sharing things that I had never revealed. We still meet once a month to compare notes and bear witness to each other's struggles.

When I was ready, I began attending LAP therapy sessions. I'm glad, because I found the intensity of the sessions so powerful. I was shocked at how easily I tapped into deep feelings, ones that I had been unaware of.

I also explored whether my body chemistry was contributing to my chronic depressions. I met with a drug treatment specialist who prescribed antidepressant medication. After six months, I can attest that it has been of significant help. It supports and complements the experiential therapies.

Group therapy convinced me that sharing was the key to improvement. As I wound down my involvement with the group, I resolved to build a network of confidants. My brother and sister agreed to meet with me once a month to listen to my struggles. We talk about our similar problems and how to support each other with ideas for growth. I plan to keep expanding the circle. I sense that my momentum for growth is increasing.

I still have periods of depression, but they are milder, and the impact is much less than it used to be. At work, the results are objectively demonstrable: I have increased my productivity about 30%; my average daily billable-hour rate is higher, more stable, and—most importantly—I work with less effort and more fun.

My journey is far from finished. I am struggling to improve my people, parenting and marital intimacy skills. At work I "dare to be average" rather than seek perfection, and I've learned that it's OK to hurt a little as I go along. I'm still vulnerable, in fact more vulnerable, to both bad and good feelings, but this is healthy. I'm content with being a lawyer now. My problems are not about the law and me; and they weren't before. They are about me and how I relate to life. As I become a more mentally healthy and functional person, I find that the law is a satisfying, enjoyable career. In fact, I suspect that being a lawyer is my highest and best use.

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. If you need the support of LAP, do not hesitate to call: (206) 448-0605.

Valuation of Publicly Offered Limited Partnerships

by **Michael S. Katz**

The limited-partnership form of business organization has existed for many years. It offers the ability to directly share investment profits and losses, while retaining limited liability, which can be a useful arrangement. Numerous limited partnerships have been created and marketed to the investing public, particularly during the past fifteen years.

Billions of dollars of capital have been raised through such partnerships for a wide variety of business investments, mostly ventures in residential and commercial real estate, oil and gas, television, restaurants, alternative energy, and equipment leasing. Such partnerships are viewed and sold as tax shelters, generating paper losses in the early years of the partnership which offset the investors' other income and thereby reduced income taxes. The economic benefits of these tax reductions often outweighed any more fundamental economic benefits, *i.e.*, the potential future cash flows arising from the underlying business.

The federal tax reform measures of 1986, however, substantially restricted the use of the passive investment losses generated by limited partnerships. Thus, recent limited partnerships have been structured and sold with more emphasis on the fundamentals of an underlying business rather than on tax benefits.

Many limited partnerships are expected to have relatively short lives, perhaps seven to ten years, after which they may be fully liquidated. During the life of the partnership, however, an individual partner's interest may be difficult to sell, and exchange prices or values for such interests are not publicly reported.

Nonetheless, investors must often determine the fair value or fair market value of limited partnership interests when circumstances require buying, selling, or trading such assets or when a distribution of assets is required, as in a divorce or upon the death of an investor.

Valuation Concepts

In concept, the valuation of a limited-partnership interest is not different from that of any business or business interest organized under some other legal structure. The three major approaches to business valuation are still potentially applicable, namely the:

- market approach — valuation of an interest by reference to actual sales of identical or comparable business interests,
- income approach — valuation of an interest by analysis of future income which the business can generate for the investor, and
- asset approach — valuation of an interest by the sum of replacement or liquidation values of the individual assets comprising the overall business.

A full discussion of these general valuation approaches is beyond the scope of this article. However, limited partnerships which have been publicly offered through brokers or other distributors and which are widely held (*i.e.*, have more than a few dozen investors) often share certain characteristics important to the valuation process. They are discussed below.

The Market Approach

Limited-partnership interests are not designed to be readily marketable. Normally, any transfer of an interest must be approved by the managing general partner and can be blocked if such a transfer would cause a tax problem for the overall partnership.

Nonetheless, a secondary market does exist for certain large well-established limited partnerships. There are perhaps a dozen brokers across the country who buy and sell some limited-partnership interests. National Partnership Exchange in Florida, Partnership Securities Exchange and the Nationwide Partnership Marketplace in California, Bigelow Management Inc. in New York, and Equity Resources Group in Massachusetts are some who have been trading limited-partnership interests in recent years.

This market is *not* efficient or, necessarily, fair:

- Interests in partnerships that do not have a several-year track record are probably not marketable;
- there are relatively few actual transactions in comparison to, say, the public stock markets;
- prices vary widely for the same interests, and the gap between bid and ask prices can be large; and
- information about actual transactions is not regularly reported

or readily available.

Despite these drawbacks, consideration of this secondary market should be a part of the valuation process and may be useful in establishing a floor or liquidation value for a limited-partnership interest.

Another consideration is the existence of comparable companies in some of the industries in which limited partnerships conduct business. Such companies may be publicly traded on a stock exchange or privately held and traded out with readily available market information. Examples include the cable television industry, where information is available for both public and private sales of business interests, and the real estate industry, where REITs (real estate investment trusts) are publicly traded and can be compared to certain limited partnerships.

A useful indicator of value may be determined by a compilation of key market ratio data, *e.g.*, price to cash-flow, price to earnings, price to dividends, or price to book-value for companies that are as comparable as possible to the limited partnership, in terms of mix of business, size, location etc.

The Income Approach

The key methodology which is most often applicable to valuing limited partnership interests is that of discounted cash flow analysis. This requires a projection of future cash flows available to the investor which can be discounted to a present value based on a desired investment rate of return. The rate of return is intended to reflect both the time value of money and the riskiness of achieving the projected future cash flows.

In some instances, one can approximate the discounted cash flow analysis by capitalizing cash flow, earnings, or dividends using either 1) a market-based capitalization rate, or 2) a desired rate of return combined with simplifying assumptions regarding future growth in the limited partnership's business. This approach is almost never appropriate, however, for project-oriented businesses, partnerships with very limited remaining lives, or for limited partnerships where tax aspects are a major consideration.

Potential investors in publicly offered limited partnerships are provided an offering prospectus which must disclose substantial information regarding the business being contemplated and the terms of the partnership. Normally, the prospectus also contains financial projections for the business as a whole and for individual limited-partner interests.

The projections are important in the valuation process, since one can use them to determine the after-tax rates of return which investors implicitly required when the limited partnership was originally formed. This type of market expectation information is normally *not* directly available for common-stock investments.

After several years of business

operation, the original partnership projections may no longer be valid. Current before- and after-tax cash flow projections can be prepared by careful analysis of:

- the original financial projections,
- actual financial statements and tax returns since the partnership's inception,
- current budgets, status reports, or projections which may be available from the managing general partner,
- changes in the business or economic environment,
- changes in tax law since the partnership's inception, and
- changes, if any, in the partnership agreement and profit/cash flow distribution arrangements that may have occurred since inception.

The rates of return implicit in the original projections — with adjustments to reflect current economic conditions, business risk, and interest rates — can then provide a basis for discounting current cash flow projections for the remaining expected life of the limited partnership.

One can establish reasonable estimates of the value of the limited-partnership interest by analyzing a range of discounted future cash flows, using varying assumptions regarding the limited partnership's business future, the tax status of an investor, and desired rates of return.

The Asset Approach

This approach involves estimating the value of the limited partnership by summing the values of the specific assets held by the partnership, offset by the partnership's debt or other liabilities. The value of the partnership must then be allocated to individual limited-partnership interests in accordance with the profit and/or cash distribution provisions of the partnership agreement. Note that the agreed-upon terms for liquidation distributions often differ from the terms for ongoing distributions of operating profits or loan flows.

This approach is normally most useful when a liquidation of the limited partnership is contemplated, feasible, and desirable (*i.e.*, the partnership is worth more dead than alive) and/or the partnership holds readily marketable assets such as real estate properties or equipment assets.

Appraisals of specific assets may be available through the managing general partner, from tax assessment files, from other sources knowledgeable about the specific assets in question, or by application of market, income, or cost approaches to the specific assets.

In the asset approach, both the liquidation costs and the tax effects of liquidation may be of significance in arriving at reasonable value estimates.

Concluding Comment

Publicly offered limited partnerships are an interesting hybrid investment vehicle:

- Limited partnership interests, like common stock of public companies, are often widely owned, but they do not offer the liquidity associated with a public stock exchange.
- Limited partnerships are often found in industries where closely held private companies also operate, but usually the limited partnerships have more complex ownership and tax structures, more limited operating lives, and more passive roles for the owners/limited partners.

Thus, valuation of limited-partnership interests can be quite challenging. The market, income, and asset-based approaches fundamental to the valuation of both public and private businesses are still applicable. Some special factors must be considered, however, due to the nature of the information available for a publicly offered limited partnership, the tax motivations and effects associated with limited partnerships, and the complexity of typical limited partnership arrangements. □

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Last-To-Die Insurance as

by **Christopher J. Sayre**
with **Edward R. Selover**

The so-called unlimited marital deduction, contained in Section 2056 of The Internal Revenue Code (IRC), was one of the most popular provisions of The Economic Recovery Tax Act of 1981 (ERTA). Simply put, it provides that certain transfers at death from a deceased spouse to a surviving spouse are deductible from the gross estate for federal estate tax purposes.

The advent of the unlimited marital deduction gave rise to a basic estate plan designed to transfer most or all of the property owned by either spouse to the surviving spouse at the first death. Many people may therefore assume that, in this way, they will avoid estate taxes.

In fact, they have merely postponed them until the death of the surviving spouse, at which time they may be dismayed to learn that federal death taxes are imposed at the highest marginal rates of any federal tax -- the range is from 37 percent to a maximum of 60 percent. *[See Table A.]*

Clearly, any sophisticated estate plan must take into account not just the welfare of the surviving spouse, but the ultimate disposition of the estate itself. Court and probate records reveal that three out of four estates lack sufficient cash to pay estate settlement expenses. Money must be raised to meet these costs before the remaining assets can be distributed among the beneficiaries.

This means the forced sale of securities, real estate or business properties in 75 percent of today's estates, and a forced liquidation of assets usually results in additional heavy losses. Estates can be literally decimated by expenses such as probate fees, executors' fees, and, as indicated above, estate taxes.

These financial problems encountered at the second death can be solved by survivorship life insurance -- commonly known as second-to-die or last-to-die life insurance. Providing coverage on the lives of *two* individuals under one policy, a second-to-die policy provides a death benefit payable upon the second death of the two insured lives -- the exact time at which all probate costs and federal estate taxes associated with property held jointly by the spouses will be incurred.

Table A
Federal Real Estate Tax

Taxable Estate	Tentative Tax Plus		Rate on Excess
$ 500,000	$ 155,800	+	37% of the excess
750,000	248,300	+	39% of the excess
1,000,000	345,800	+	41% of the excess
1,500,000	555,800	+	45% of the excess
2,000,000	780,800	+	49% of the excess
2,500,000	1,025,800	+	55% of the excess
5,000,000	2,390,800	+	55% of the excess
7,500,000	3,765,800	+	55% of the excess
10,000,000	5,140,800	+	55% of the excess
20,000,000	10,640,800	+	55% of the excess

Adding considerably to the attractiveness of survivorship life insurance is the fact that it provides insurance on two lives at substantially less cost than two individual policies. The premium for a survivorship policy depends on the age and health of each spouse at the time of application and continues to be payable after the death of the first insured.

The relatively inexpensive premium results from the addition of a second life to the mortality calculation, since the inclusion of a second death contingency to the actuarial calculations drastically reduces the possibility of the payment of an early death benefit.

A commonly heard question in regard to second-to-die policies is whether it would be better to simply insure the younger spouse. Since in many circumstances one spouse is younger than the other, it is certainly more likely that the younger spouse would be the second to die. Individual coverage on the younger spouse would most likely provide for the second death costs in that case.

The inherent flaw to this approach, however, is an obvious one -- it is never a certainty that one spouse will die first. Since the goal, and indeed the responsibility, of an estate planner is to minimize costs to the estate, the gamble that the individual policy will pay the benefits at the appropriate time and decrease the settlement costs of the estate seems an unduly risky one.

How Last-to-Die Life Insurance Works in Concert with Common Marital Deduction Transfers

Though Section 2056 has, in fact, complicated rather than simplified estate planning, last-to-die life insurance works ideally in concert with most plans. An examination of common methods of marital deduction transfers shows how.

The simplest and most-common method of transferring property to a surviving spouse---the outright unrestricted transfer of property--is obviously eligible for the unlimited marital deduction. This includes probate assets owned solely in the name of the deceased spouse and transferred directly to the surviving spouse.

Property held jointly by both spouses is automatically transferred at the death of the first spouse and is also eligible for the deduction (provided a right of survivorship exists). Other types of unrestricted qualifying transfers to a surviving spouse include property left to a surviving spouse who is the named beneficiary of life insurance policies, qualified retirement plans, and IRAs

an Estate Planning Tool

owned by the deceased spouse.

Regardless of the type of marital deduction transfer used, the federal estate taxes resulting from the transfer of marital property will be incurred at the second death, when the benefits of second-to-die insurance are paid.

Keep in mind that certain transfers which place various restrictions on the ownership rights of the surviving spouse are nondeductible and do not qualify for the marital deduction. An interest in property transferred to a surviving spouse will be a nondeductible terminable interest under IRC Section 2056(b) if:

* it terminates upon the occurrence of an event or contingency, such as death,

* the interest that remains after the first death is passed to the surviving spouse in the same transaction, and

* a third party gains possession of the property after the surviving spouse's interest in the property terminates.

Because federal estate taxes are subject to progressive rates, many wealthy individuals often leave assets outside of the marital deduction, intentionally creating first-death taxes in order to remove these assets from the gross estate of the second spouse to die. Subjecting these assets to tax in the first estate may lower the overall estate burden since the marginal bracket applicable to the second estate may be lowered as a result.

Many states have inheritance or estate taxes that do not shelter marital transfers in the same fashion as the federal estate tax system. In these circumstances, state death taxes---often quite significant ---may be due even when no federal estate taxes are incurred.

If significant first-death costs are anticipated, individual life insurance for each spouse may be desirable; if they are likely to be low, however, a loan on or withdrawal from the cash value of a second-to-die policy might provide sufficient liquidity for the surviving spouse to alleviate costs.

The value of using life insurance for estate planning purposes has been increased by many other recent changes of the federal tax code. Under certain circumstances, for example, the new generation-skipping taxes impose an additional 55 percent death tax on any property left to grandchildren.

Furthermore, IRC Section 2036(c) provides for an anti-estate freeze which eliminates many estate tax loopholes and generally increases the cost of transferring wealth of family members. The additional financial burden created by these laws underscores the importance of life insurance coverage for estate enhancement and preservation.

Making Maximum Use of the Unified Credit with an A-B Trust.

Because the marital deduction reduces the gross estate prior to the determination of the final taxable estate base, the unified credit should be taken into account with marital-deduction planning. Designed to prevent the imposition of federal estate taxes on moderate-sized estates, the unified credit exempts the first $600,000 of the taxable estate.

Rather than using the marital deduction to shelter all property from transfer tax at the first spouse's death, thus wasting the unified credit, you can plan the estate in such a way that each spouse makes maximum use of the credit and together they can shelter up to $1.2 million in marital assets from any federal estate taxes.

This arrangement, commonly known as an A-B trust, transfers property from the deceased spouse's estate to both a marital (A) and a unified-credit-bypass (B) trust. Roughly $600,000 is placed into the B trust and the remainder is transferred into the A trust.

The B trust, specifically designed not to qualify for the marital deduction, is available as a unified credit shelter. Often referred to as the family trust, the B trust may be used to provide the surviving spouse with a life income and some invasion rights and is often used to provide for other family members of the transferor-spouse.

On the surviving spouse's death, his or her interest in the B trust terminates, and the remainder is left to the children. Thus, trust assets will not be included in the surviving spouse's gross estate for federal estate tax purposes.

Since each spouse's estate plan creates a B trust, the maximum use of each spouse's unified credit is made. Up to $1.2 million can be transferred to heirs, free of estate taxes providing, of course, that each spouse has the necessary amounts of individually-owned assets at death to transfer to the B trust.

This optimal use of the unified credit and marital deduction works perfectly in conjunction with second-to-die life insurance. Adopting the optimal estate plan eliminates all death taxes at the first death while the surviving spouse receives the benefit of the marital deduction trust left by the deceased spouse.

Upon the death of the second spouse, the value of assets held by him or her will be fully taxable to the extent that they exceed the remaining unified credit shelter. These taxes will require liquid assets—a significant drain on the second estate which can be met with the second death benefit of survivorship life insurance.

Quite often, the transferor-spouse will want a substantial amount of control over the trust property being left to a surviving spouse. Particularly, the transferor-spouse may want to limit the invasion rights of the surviving spouse and/or control the ultimate disposition of the property. Certainly, most individuals are very concerned that their property pass to their children after their spouse's interest terminates.

For this reason, Congress enacted a special exception to the nondeductible terminable interest rule which allows qualified terminable interest property (QTIP) to terminate the interest of the surviving spouse while at the same time preserving the marital deduction for the transferor-spouse.

This provision of the tax code gave rise to the QTIP marital deduction trust. Property in this trust, which must be provided by the decedent spouse, can consist of probate assets or proceeds

from life insurance, retirement plans, or other assets. The surviving spouse must have the right to all income from the QTIP, payable at least annually for life.

For this reason, income-producing property is generally suggested for the QTIP trust. However, a trust will qualify as a QTIP if state law or the provisions of the trust permit the surviving spouse to demand that the trustee convert the trust's nonproductive assets to income-producing property.

An additional restriction is that no individual can be given the right to direct that the QTIP property go to anyone other than the surviving spouse as long as that spouse is alive.

The most popular feature of the QTIP is the ability to give someone else the power to appoint the QTIP trust property after the surviving spouse dies. The original transferor-spouse can provide for the ultimate disposition of the QTIP property through the provisions of the trust, and thus is able to protect the interests of his or her children by leaving them a remainder interest in QTIP.

The congressional intent for the marital deduction is preserved by a rule which requires the executor of the deceased transferor-spouse to make an irrevocable election on the deceased spouse's estate tax return to include the value of the QTIP trust in the surviving spouse's estate.

Ownership of the Second-to-Die Policy and Its Impact on Estate Planning

Familiarity with the various types of trusts available as options in careful estate planning is useful when you are considering the ownership of a second-to-die life insurance policy.

The estate tax treatment of a survivorship policy covering the life of an insured decedent is the same as individual life insurance. If the decedent possessed incidents of ownership in the policy at any time in the three years prior to his or her death, the policy is included in the estate for tax purposes.

If the first spouse to die owned the second-to-die policy outright, the policy will be included in his or her estate at its full replacement cost, not at the amount of the death benefit. If the first spouse who dies was not the policy-owner and held no incidents of ownership within three years prior to death, the policy will not be included in that spouse's estate.

In any event, the policy will qualify for the marital deduction if the policy is left to the surviving spouse.

With proper planning, you can avoid a situation whereby the benefits from the survivorship policy compound the estate tax burden created by the second death. If a third-party ownership arrangement is used for the survivorship policy, the policy death benefits will be received by the beneficiary free of estate taxes.

For example, the children could be the policyowners of the parents' policy, thus receiving the death benefits free of estate tax and having sufficient liquidity to preserve the taxable estate. (Keep in mind that the executor or the estate of the insured should not be named as

policy beneficiary, to prevent the policy proceeds from compounding the estate tax problem.)

In some instances, ownership of a second-to-die policy by the insureds' children are not practical, as in cases where the children are too young to take on the responsibilities of ownership. Since the owner of the policy will have access to the cash values, any children selected as policyowners should be mature adults.

One should also consider the risk that the policy could be jeopardized in some manner by the child. For example, the cash values could become subject to the claims of the child's creditors or of an ex-spouse of the child in a divorce proceeding.

If ownership must be retained by the insureds, the death benefits will be included in the gross estate of the second spouse to die. This may still be advantageous to the estate, since the policy benefits are payable in cash and are immediately available to the executor, unlike other estate assets such as real estate or closely held stock which are less liquid and generally unavailable to pay the immediate expenses associated with death.

The transfer of the last-to-die policy to an irrevocable trust can be a key to solving many estate planning problems. First, the ownership of the policy by the trustee of an irrevocable trust will avoid having the death proceeds included in the estates of the insured spouses, providing no incidents of ownership were held by the spouses within three years of death.

The survivorship trust can pass the substantial death benefits to the heirs of the insured spouses outside of their estate tax base. Thus the trust will avoid compounding estate settlement costs facing the typical estate.

The use of a trust to hold the policy will also avoid the risks associated with having the children named as individual third-party owners. The assets of the trust will be protected from the creditors of both the insureds and the beneficiaries. The trustee will hold the policy and pay the necessary premiums during the life of either insured.

Following the death of the survivor, the trustee will receive the insurance proceeds and administer them according to the terms of the trust. The parents can design the trust to provide for minor or special needs of the children or grandchildren and delay distribution of funds until such time as the parents deem appropriate.

Also, premium amounts paid by the parents to the trust will avoid gift taxation provided the survivorship trust is properly drafted and administered. In particular, if annual Crummey withdrawal rights are contained in the trust provision, the parents can pay up to $20,000 of annual premium for each beneficiary and avoid gift taxes.

The survivorship trust is identical to the individual life insurance trust in most respects. However, most individual life insurance trusts provide benefits for the surviving spouse. This provision must be excluded from the survivorship trust, since the death benefit will not be available until both spouses are deceased.

Under normal circumstances, the non-

insured spouse is often named as a co-trustee of the insured spouse's individual life insurance trust. Since both spouses are insured in a second-to-die policy, neither should retain the role of fiduciary in order to avoid retaining any incidents of ownership in the survivorship policy, which might frustrate the purpose of the trust by causing proceeds of the policy to be included in the estate of an insured spouse.

Recent Tax Court Rulings With Regard to the Three-Year Rule

As mentioned above, if the first spouse who dies held no incidents of ownership within three years prior to death, the policy is not includable in that spouse's estate. Section 2035, which contains this rule—commonly referred to as the "Three Year Rule"—has undergone several transformations in the last two decades.

Currently the rule, as enacted in ERTA in 1981, requires inclusion of life insurance proceeds in the insured's estate if the insured, within three years of death, transferred an interest in the policy which would have caused inclusion of the proceeds under Section 2042 if the interest had been retained by the insured.

Applying this rule is easy when the insured owns an existing policy on his life, transfers it, and then dies within three years. The proceeds are includable under Section 2035.

Application of the rule is less certain when the insured dies within three years after a new policy is issued directly to someone other than the insured (*e.g.*, to an irrevocable life insurance trust created by the insured).

In light of two recent taxpayer victories in the Tax Court, *Estate of Leder* and *Estate of Headrick*, it is possible for proceeds on a policy applied for and owned by someone other than the insured to escape inclusion in the insured's gross estate under Section 2035.

Though includability of life insurance proceeds in an insured's gross estate under Section 2035 has been litigated in numerous cases, the *Leder* and *Headrick* cases are the only ones so far which have dealt with this issue under the version of Section 2035 enacted in ERTA. (This version applies only to the estates of decedents who have died after 1981.) In both cases, the Tax Court's favorable ruling was based on a highly technical reading of Section 2035.

In *Leder*, [89 T.C. 235 (1987)], a policy insuring Mr. Leder's life was issued to his wife as sole owner and beneficiary, in January 1981. She signed the application for the policy as owner. Mr. Leder signed only as the insured. Mrs. Leder, in February 1983, transferred the policy to herself as trustee of an irrevocable trust she created. As trustee, she held the policy in four equal shares, one share each for the benefit of herself and her three children by Mr. Leder.

Monthly premiums of about $3,900 were paid by pre-authorized withdrawals from the bank account of Mr. Leder's

wholly owned corporation, which were treated as loans to Mr. Leder. Mr. Leder died in May 1983, within three years of the policy issue date.

The IRS argued that, in effect, Mr. Leder indirectly transferred his policy to his wife within three years of his death, and therefore the policy proceeds should have been includable in his gross estate under Section 2035.

The Court, using a strict interpretation of the language in the Section, said that Section 2035 does not apply unless the insured possessed an incident of ownership in the policy under Section 2042, and which was transferred at some point within three years of his death.

Based on the facts, the Court decided that Mr. Leder never held an incident of ownership over his policy. Consequently, proceeds of the policy were not includable in his estate under Section 2035, even though the decedent had paid the premiums.

In *Headrick* [93 T.C. 171 (August 7, 1989)], the IRS put forth a better argument, but still lost. Mr. Headrick, a tax lawyer, had drafted his own irrevocable life insurance trust agreement, with his wife and children as primary beneficiaries. The agreement permitted, but did not require, the trustee to purchase insurance on Mr. Headrick's life (or any other person in whom there was an insurable interest).

It also permitted, but didn't require, the trustee to pay policy premiums. The agreement expressly stated that the trustee alone could exercise each incident of ownership over the policy.

On December 18, 1979, Mr. Headrick and a bank trust department (trustee) entered into the trust agreement. Mr. Headrick did not require that the trustee buy life insurance as a condition of entering into the agreement. At the same time, Mr. Headrick transferred $5,900 to the trustee. On the same day, Mrs. Headrick waived the right to withdrawal of the $5,900 gift (*i.e.*, the Crummey power) on behalf of her and the children.

On December 19, 1979, the trustee executed Part 1 of the insurer's (Massachusetts Mutual) application for life insurance in the amount of $375,000. The application designated the trustee as policy owner and beneficiary. Mr. Headrick *signed only as the insured, not as applicant.*

The trustee elected to pay monthly premiums of $435.76, the first check dated December 20, 1979. That same day, Mr. Headrick submitted to the medical examination required in Part 2 of the application. On January 8, 1980, the policy (whole life) was issued to the trustee.

Three months after the trust was established, Mr. Headrick became a member of the (bank) trustee's board of directors. He also served as chair of the trustee's trust committee. The responsibility of this committee was to periodically review and discuss new trusts and their investments. Mr. Headrick's trust was first reviewed by the committee on April 30, 1980.

Mr. Headrick made additional gifts to the trustee in December of 1980 and 1981. No withdrawals were made by the trust beneficiaries. On June 19, 1982, Mr. Headrick died (age 33) in an automobile accident. The insurer paid the policy death benefit to the trustee.

The IRS made three arguments for the inclusion of the proceeds in Mr. Headrick's gross estate. First, the IRS argued that the trustee was in fact acting as Mr. Headrick's agent in acquiring the life insurance policy, evidenced by Mr. Headrick's "dominance over the trust arrangement."

Second, the IRS argued that the insured "indirectly paid the insurance premiums," and that should support inclusion of the proceeds in the insured's estate.

Third, the IRS argued inclusion based on a "beamed transfer" theory. That theory, so named by the case of *Bel vs. U.S.* (452 F.2d 683), generally says that an insured is treated as having "transferred" a policy (even though issued directly by the insurer to another person) where the facts and circumstances show that the insured conceived the plan and guided its implementation.

The Tax Court rejected the first argument by concluding that the facts did not show that the trustee was acting as the insured's agent.

The Court rejected the IRS' second argument on the basis that payment of

premiums is no longer a valid test for inclusion of policy proceeds. That test was eliminated in the enactment of the 1954 Code.

The "beamed transfer" theory was rejected because the cases using that theory were decided under Section 2035 as it existed prior to enactment of the present version of Section 2035 in ERTA in 1981. The reasoning of those cases is not applicable to the current version of Section 2035.

The Tax Court simply concluded that Mr. Headrick never possessed an incident of ownership under Section 2042, and consequently there was no transfer of the policy under the terms of Section 2035. Therefore, the proceeds were not includable in Mr. Headrick's estate.

The law concerning the "three-year rule" is not settled, although the IRS was unsuccessful in appealing the decision in the *Leder* case. In the meantime, estate planners should work closely with clients to put the insureds in the best position possible to avoid inclusion of the policy proceeds in their gross estates under Section 2035. This can be accomplished by carefully arranging the insurance plan in a manner similar to the arrangements in the *Leder* case and particularly in the *Headrick* case.

Conclusion

A properly designed estate plan can meet the objective of using second-to-die insurance to create estate liquidity but not additional tax. The cost of settling an estate is generally the responsibility of the executor. Costs are paid out of estate assets according to the tax clause in the decedent's will. In the absence of a tax clause, states generally provide that the costs be paid from the estate assets which generate the costs.

Most insureds generally wish to avoid including the survivorship insurance proceeds in the estate of the surviving spouse. This does not mean, however, that the proceeds will be unavailable to provide liquidity for the estate.

A survivorship irrevocable life insurance trust can be specially designed to avoid estate inclusion and provide substantial liquidity relief to the estate. The proceeds of the second-to-die policy should never be targeted to pay estate tax costs. Nor should the trustee of the survivorship trust be given the discretion to pay these costs from trust assets. The use of these proceeds directly to pay estate tax costs cause the proceeds to be included in the insured's gross estate.

However, the trustee can be empowered to loan the insurance proceeds to the executor in a bona fide loan transaction, or use the proceeds to purchase less liquid estate assets from the estate at their fair market value. These powers permit the executor to provide cash liquidity to the estate, without subjecting the proceeds to estate tax.

Estate planners should further be aware that although there are many different versions of survivorship life insurance available, choosing the right company is at least as important as choosing the right product. It is incumbent upon the planner to exercise reasonable due diligence when selecting the company so future viability of the plan will not be compromised. Evaluation of financial strength and stability, company capacity and industry ratings are critical.

Beyond this, it is advisable to choose a company with the experience and credentials to provide estate-planning services to support the practitioner. These resources should include consultation with and individual case assistance by legal and insurance professionals as well as specimen plan documents such as model life insurance trust and split-dollar agreements.

In view of this, it is both prudent and expedient for the planner to help the client choose the appropriate product and the appropriate company. Teamwork between planner and insurer facilitates the planner's task of guiding the client smoothly through the estate planning process to an effective and efficient plan.

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Walla Walla, May 18-19, 1990

Present: President Vander Stoep, President-elect Halverson, and the Governors, save Governors John Slater and Jeff Tolman, absent on other business, and Bill Bergsten, absent on other business Saturday. Also present: Harold Clarke (WSBA/YLD); Frank Edmondson (Government Lawyers' Assn.); Mary Fairhurst (Washington Women Lawyers); Jim Hershey (Prosecuting Attorneys' Assn., Friday); Dan Hess (WSTLA); John J. Michalik (WSBA Executive Director); Robert Peterson (Superior Court Judges' Assn.); Larry Ransom (SKCBA Trustees); Lindsay Thompson (*Bar News* Editor/Clark County Trustees); Morton M. Tytler (Government Lawyers' Assn.); Robert Welden (WSBA General Counsel).

This Is Getting To Be Like "The Trouble With Tribbles": Executive Director John Michalik reported that another 406 applicants had passed the February Bar exam. The overall pass rate was 68.7%, up 8% from last summer's exam. The ethics pass rate was 79.7%; the pass rate on the main portion of the exam was 73%. Look for them soon, coming to a courthouse near you.

Michalik also reported that nominations for the Board of Governors seats up for election had closed. The Eighth District, which has never had a contested election, continued in its tranquil ways by electing Tom Chambers unopposed. Alva Long and Kelly Corr seek the King County at-large seat of retiring Steve DeForest; Monty Hester and David Murdach contest the Sixth District seat of Bill Bergsten. The Third District, which usually opts for more choices, has Pat Sutherland and Mary Fairhurst of Olympia and Steve Tubbs of Vancouver to choose from. Ballots go out June 5 and are due back by June 22.

So Now We Can Have A Disaster: Coincidentally commemorating the tenth anniversary of the eruption of Mt. St. Helens, the Governors approved the WSBA Disaster Response Plan after some more revisions by the Disaster Response Task Force. Chair Don Law of Olympia was unhappy that the Governors had directed the Task Force to trim back the authority of a team of WSBA members who'll be dispatched to disaster sites to keep things from getting out of hand with 'parachuting' lawyers from out of state and the like. The original plan had given the team members a broad brief to assist victims, but Board concerns about liability led to a scaling back from legal advice to legal assistance. Law made plain that the Task Force didn't like their innovative plan being treated that way, but said it was one of those cases where "all you can do is give a crisp salute" and get on with the job. Notwithstanding that, Law said Washington now has "the best plan in the nation" and one sure to be emulated by other state bar associations.

Governor Ron Gould said he was still not satisfied that the plan adequately protected the Association from liability for damage claims arising from running the team or things the team might do, and he preferred to defer action until it was known whether the WSBA could insure against such liability, and at what cost. The Plan was approved, 7-1, Gould opposed.

And Another Plan: The American Bar Retirement Association, which runs pension and profit-sharing plans for lawyers (no ABA membership required) wrote Executive Director John Michalik to point out only 185 Washington lawyers belong to the plan, and suggested making it more widely known.

Governor Steve DeForest wondered if other plans ought to be looked at, too, if the Association was in some way going to appear to be endorsing one like the ABA's. Governor Lem Howell thought it ought to be publicized. "This is the sort of thing we ought to be doing as a member service," he declared. Governor John Schultz tried to refer the matter to the General Practice Section for study, but got no second. Governor Don Curran pointed out that the Board's duty was no more than to let people know the plan exists, after which individual lawyers can make their own decisions on whether to participate. Maybe a notice could be run in the *Bar News*, someone suggested. That's called advertising, *Bar News* editor Lindsay Thompson remarked, and usually has to be paid for. And that's where the matter was left. Watch the ad space for more news.

Okay, But Will There Be Exams? A new idea percolated up to the Board from the WSBA staff: a scholar in residence. The idea is still embryonic, but would involve a person of some consequence from government, academia or private practice to spend six to nine months working on a project of use to the state and members of the Bar. Examples cited included further refining the Skills Training and MENTOR programs; developing more concrete proposals of improving professionalism; developing a law firm consulting service; research and drafting of law reform proposals and legislation; developing alternative dispute resolution programs; or development of a truly comprehensive set of legal forms for use by lawyers. The question for the Governors was whether the idea was interesting enough to develop.

Yes, but only if it can be funded by outside monies, was the reply. Lem Howell said it was a great idea if some law firm would fund it, otherwise, "I have fears of going forward with such a plan." John Schultz saw no benefit to Fourth District lawyers from such a plan, and said so. Paul Stritmatter thought the idea one worth exploring, and suggested that it would be a good way to tap the expertise of retired lawyers. After some more declarations on how such a plan should not be funded by the Association if adopted, the matter was referred back to staff for further development.

The Governors then recessed for lunch with the Walla Walla County Bar Association, which turned out to almost the last member for the event. Perhaps it was curiosity: the last WSBA Board of Governors meeting in Walla Walla was at least three decades ago, and over time the Board may have assumed a mythic aspect. Whatever the reasons, it was a very pleasant event, and Walla Walla Bar Association President Charles Phillips took the occasion to run some business by the assembled attorneys; a new county law library board was appointed, and a resolution calling for CLE credit for listening to or viewing audio or videotapes in one's home or office was approved. Already approved by the Benton-Franklin and Lewis County bar associations, the resolution seems to be taking on

a life of its own. After lunch Phillips talked with the Board for a time about programs of the local bar association, and in particular the trials of setting up a pro bono program in a small county where a substantial number of lawyers wonder if it is necessary.

Spreading the Good Word: Barbara Clark, who was in Walla Walla for her daughter's graduation from Whitman College, put on her cap as Executive Director of the Legal Foundation of Washington to ask the Governors to see if the Association's Public Affairs Department can't help publicize pro bono and other programs funded by the Foundation, and also whether the Board might want to formalize a liaison with the Foundation—maybe through a Governor attending their meetings.

Governors Gould and Stritmatter thought the PR idea a good one. Stritmatter noted, however, that whenever budget time comes, Public Affairs always takes the hit to save money or apply it elsewhere. He said, "If it means more money has to be spent in that area to accomplish the job, I'm for it. I'll go on the record about that." And so he has. The Governors voted unanimously to direct the Public Affairs staff to help out.

No. It Doesn't Mean the Chief Justice Has An Italian Car: Former President Patrick Comfort unwittingly triggered an explosive debate on the court with his report on the work of the Board for Judicial Administration, a three-year-old adjunct of the Supreme Court dealing with aspects of court administration. Comfort happened to mention a panel Chief Justice Callow has appointed to look at how the state courts are working, chaired by former WSBA President Bill Gates (see page 40 of this issue). Considerable comment was directed to the composition of the panel, which Governor Paul Stritmatter said included a police chief and a prosecutor but no criminal defense lawyer; officers of a bank and a utility company but no plaintiff's lawyers, no WSBA representative, and no one from the Litigation Section. It was reported that entreaties to the Chief Justice to supplement the panel's membership had been rebuffed.

Governor Lem Howell called the panel's composition "an outrage" and "a gross example of judicial fiat," among other things. Almost as annoying to the Governors is that the panel will issue its report December 1, 1990, and will allow public comment for two weeks, ostensibly to ensure that its proposals can get to the Legislature in January. "Who's going to have time at the end of the year to give this a serious look, much less pose any alternatives?" one Governor remarked. Governor Jim Turner said the composition of the panel was like convening a committee on bypass surgery and not including any heart surgeons on it.

A motion was posed asking Comfort to tell the BJA the Governors were unhappy, and to go on record calling for a more representative panel's appointment. Governor Gould thought action ought to be delayed pending hearing something other than anecdotage about how the Chief Justice chose the panel. The President thought it would be useful to try and meet with the Chief Justice first and convey the Board's feelings to him before taking other steps. Governor DeForest agreed. "We should talk before drawing a line."

Governor Stritmatter disagreed. The Chief Justice had already

made it clear he would not change the panel. Moving to the motion, Governor Gould asked that the two parts be separated, but Stritmatter refused to allow the amendment. Governor Bergsten moved to table the matter until June. On that motion, Governors Bergsten, DeForest, Schultz and Turner voted aye; Governors Curran, Gould, Howell and Stritmatter voted nay. The President broke the tie by voting to table, and said he would meet shortly with the Chief Justice.

More ABA Matters: Carried over from last month was the question of three of the Board's appointments to the ABA House of Delegates. In the interim, Governors had sought applications for the posts through their newsletters. Governor Ron Gould moved to reappoint ABA delegates Patrick Comfort, a former WSBA President, and Ed Shea, a former member of the Board of Governors. Both were unanimously reelected. The Board determined that the third seat, held for a number of years by former Board of Governors member Tom Loftus, should be rotated. Governor Jim Turner nominated Seattle lawyer Margaret McKeown; Governor DeForest nominated Seattle lawyer Nancy Gibbs, and Governor Curran nominated Spokane lawyer Robert Roberts. The nominations being closed, the Governors noted that the WSBA delegation includes no women and it was past time to have one. Governor Bill Bergsten requested a secret ballot; Governor Lem Howell said things ought to be done in the open and called for a recorded vote. The President declared the ballot would be secret, and when the votes were counted, Margaret McKeown was declared elected.

But They're So Far Away, No One Will Notice: Saturday morning Governor Lem Howell proposed that about ten percent of eastern Washington's seats on WSBA committees be taken away and given to his district to correct what he called an intolerable maldistribution which left his district underrepresented by eight to twelve percent.

"That's absurd," retorted Governor John Schultz. "Eastern Washington lawyers feel isolated now. King County has nearly half the seats already. You want more? It's unfair. They'll all be reallocated next year anyway with the census results." Howell pointed out that King County could elect the President of the Association every year if they wanted to, but before that act of forbearance could be elaborated upon Howell asked that the matter be put on the June agenda for a fuller airing.

Bylaws Amendment: A proposal to amend WSBA bylaws Article II, section 3(a)(ii) to allow a member of the WSBA who's been on inactive status but actively practicing in another state to go back on active status here without taking the Bar exam. Being in active practice in good standing elsewhere would create a rebuttable presumption of qualification for readmission here, replacing present case-by-case review with this more definite standard.

The Board didn't think it was necessary, and defeated the amendment 3-4, Governors Curran, Gould, Stritmatter and Turner opposed.

Does Anyone Know the Theme From Haydn's Farewell Symphony? With two Governors absent and others slipping away one by one, the Board was in the unusual position of potentially being unable to act Saturday. With

Governor Lem Howell's midmorning departure, the Board actually went inquorate. But before they did, they authorized the Computerization of Law Committee to set up a booth at the Bar convention in September to show members some of the remarkable developments coming in the next year or two.

Wrap-up in Walla Walla: In other action, the Board heard a report from Governor Don Curran on a meeting of the Superior Court Judges' Association board; deferred action on appointments to the Law Revision Commission until June; referred a Supreme Court report on potential case-processing standards for trial courts in Washington to the sections for comment; considered a communication from the Chief Justice expressing concern over a proliferation of local court rules in Washington; appointed Seattle lawyer Ann Cockrill to the Evergreen Legal Services board of directors, and preliminarily considered a Supreme Court proposal to make permanent the present test rules governing cameras in court.

Next meetings: Port Ludlow, June 15-16; Moclips, July 20-21; Vancouver, WA August 17-18; Spokane, September 13-15 (Bar Convention).

by **Lindsay Thompson**
Bar News *Editor*

June 1990

1-3 WSBA Family Law Section Midyear Meeting, Yakima. *For information*: (206) 448-0433.

7-9 Washington Association of Criminal Defense Lawyers Annual Meeting and CLE, Lake Chelan. *For information*: (206) 623-1302.

8-10 WSBA Real Property, Probate & Trust Section Midyear Meeting, Blaine. *For information*: (206) 448-0433.

12-16 Family Law Mediation Training, University of British Columbia. *Sponsored by*: Continuing Legal Education Society of B.C. *For information*: (604) 669-3544, fax (604) 669-9260.

15-16 WSBA Litigation Section Midyear Meeting, Lake Chelan. *For information*: (206) 448-0433.

15-16 WSBA Board of Governors Meeting, Port Ludlow. *For information*: (206) 448-0441.

19 Computer Law: A Growing Field in Tort and Criminal Law in Washington, Seattle. *Sponsored by*: National Business Institute, Inc. *For information*: (715) 835-7909.

22 Basic Corporate Practice Under the New Washington Business Corporation Act, Seattle. *Sponsored by*: UW School of Law. *For information*: (206) 543-0059.

July 1990

15-20 Canadian Institute for Advanced Legal Studies Conference, Stanford University, Palo Alto, CA. *For information*: Marie Capewell, Supreme Court of British Columbia, (604) 660-2760.

20 Economy & Efficiency in Trial Preparation, Seattle. *Sponsored by*: WSBA and WYLD. *For information*: (206) 448-0433.

20-21 WSBA Board of Governors Meeting, Moclips. *For information*: (206) 448-0441.

August 1990

17-18 WSBA Board of Governors Meeting, Vancouver, WA. *For information*: (206) 448-0441.

24-Sept. 2 WSBA Skills Training Course, Spokane. *For information*: (206) 448-0433 or Thomas Wolf (509) 838-8341.

("Calendar" carries information on events of interest to members of the Association. Please send event notices to Lindsay Thompson, Editor, *Bar News*, 7414 N.E. Hazel Dell Avenue, Suite A, Vancouver, WA 98665. **Deadline is the 15th of each month for the second issue following.**)

Notices of Interest to Association Members

Nondisciplinary Notices

Interim suspension: Tacoma attorney **Joel S. Rose** (admitted 1983) was ordered suspended from the practice of law as a result of his felony conviction pending the outcome of disciplinary proceedings by Supreme Court order entered April 5, 1990.

Interim suspension is pursuant to RLD Title 3 and is not a disciplinary sanction.

Disciplinary Notices

Disbarred: Olympia attorney **Charles E. Street, III** (admitted 5/27/82) was disbarred by Supreme Court order on March 28, 1990, following an uncontested disciplinary hearing, based on his neglect of three clients' matters, his failure to communicate with three clients, his failure to completely represent those three clients, his failure to expedite litigation in two of those clients' matters, a pattern of conduct that demonstrated unfitness to practice law, and noncooperation in the Bar's disciplinary investigation.

Public Notices

National Credit Union Share Insurance Fund May Not Insure Client Trust Deposits

Rule 1.14(c) permits deposit of client trust funds into credit union accounts insured by the National Credit Union Share Insurance Fund (NCUSIF). Any lawyer doing so should be aware that the NCUSIF does *not* insure all funds deposited into such credit union accounts. Unlike other federal insurance programs (FDIC and FSLIC), NCUSIF only insures funds the beneficial interest of which is owned by an individual or organization qualified to establish a member account in the credit union. Therefore, the fact that a lawyer qualifies to maintain an account with a credit union qualifying for insurance with NCUSIF does not mean that the funds of clients of that lawyer deposited into such an account will be insured. Any lawyer using such a credit union account for a trust account should determine whether the funds of any and all clients deposited into the account are, in fact, insured.

By contrast, all funds deposited into credit union accounts insured by the Washington Credit Union Share Guaranty Association are insured regardless of the beneficial owner of the funds, pursuant to RCW ch. 31.12A.

Loans for lawyers in public service: The University of Washington School of Law is now accepting applications for several grants to be made from its Loan Assistance Program. Those

eligible to apply for assistance are persons who graduated from the University of Washington School of Law after January 1, 1988, and who are employed by nonprofit public interest or government agencies that provide legal services for poor persons. The application deadline is October 1, 1990 for January 1, 1991 grants.

Applications for assistance may be obtained from Irene Wasner, University of Washington School of Law JB-20, 308 Condon Hall, Seattle, WA 98195. For information, call (206) 543-4552.

Anyone wishing to support this program may send his or her tax-deductible check, made payable to the Washington Law School Foundation/LAP, to University of Washington School of Law JB-20, Seattle, WA 98195 or call (206) 543-8707 for more information.

In re RCW 19.52.120(1), Legal Interest Rates: The average coupon equivalent yield from the first auction of 26-week treasury bills in May 1990 is 8.28%. The maximum allowable interest permissible for **June 1990** is therefore **12.28%**. Compilations of the average coupon equivalent yields from auctions of 26-week treasury bills appear on page 39 in the October 1989 *Bar News* for 1982-1984, and on page 37 of the June 1989 *Bar News* for 1984-1989. See page **51** of this issue for an updated table.

Grant applications sought: Legal Foundation of Washington President Paul A. Bastine has announced that the Foundation's 1991 grant application is available. Applications may be obtained from the Legal Foundation of Washington, 600 Central Building, 810 Third Avenue, Seattle, WA 98104.

Applications for the funds are due August 31, 1990. Funds will be distributed beginning in January 1991.

(Items for inclusion in "Digest" should be sent to Lindsay Thompson, Editor, *Bar News*, 7414 Hazel Dell Avenue, Suite A, Vancouver, WA 98665. Deadline is the 15th of each month for the second issue following.)

THE MENTOR PROGRAM

No, They Weren't There For Sentencing

Thirty Kentwood High School students spent a day in court and their lunch hour with a judge on Tuesday, April 17. The event is part of MENTOR, the unique law firm/high school partnership program sponsored by the WSBA.

Bryan Coluccio, a partner in the Seattle law firm of Short, Cressman & Burgess, says that for him the experience was "a little like coming home." Coluccio was raised in Kent, and Kentwood Principal George Wilson was Coluccio's principal at Kentridge High School during

the 1970s. Coluccio credits Wilson with encouraging him to attend Seattle University, where he earned a Bachelor's degree in 1979. He went on to graduate from the University of Puget Sound School of Law in 1982.

Coluccio planned the four-week MENTOR program with Kentwood social studies teacher Glen Baron. The students visited Coluccio's law firm on April 11 and met the firm's attorneys and support staff. On the 17th, they visited with a King County Superior Court Judge, toured the King County Courthouse, and sat in on trials in progress.

The program culminated April 24 with a mock trial staged by the class of juniors and seniors. An assault case was "tried," with the defense team, prosecution, witnesses, defendant and jury role-played by the students. Coluccio and several attorneys from Short, Cressman & Burgess moderated the proceedings.

Kentwood High School is new to the MENTOR program this year. Since 1985, the WSBA has sponsored MENTOR partnerships between high schools and law firms at 52 schools across Washington.

"Law-related education programs like MENTOR provide a unique opportunity to promote citizenship among teenagers," said James Vander Stoep, WSBA president. The program "helps students develop an understanding of their rights and responsibilities as citizens."

Broad-based support has enabled the expansion of the MENTOR program. Assistance is provided by school administrators, county bar associations, law enforcement agencies, judges and other court personnel.

The program's popularity is also attributed to its flexibility, which allows participation of law firms and high schools of all sizes. Each partnership is encouraged to tailor a program to fit its local interests and resources.

MENTOR operates as a program of the State Bar's Public Affairs Department. It is endorsed by the Office of the State Superintendent of Public Instruction, the Superior Court Judges' Association and the Washington Center for Law-Related Education. Jo Rosner, an attorney/educator, has served as program administrator since its inception.

NEW ODOMETER LAW

Miles To Go Before I Sell

In an effort to help stem the nearly three million incidents of falsified odometer readings in the United States each year, a federal odometer law is being implemented in Washington state effective May 1, 1990. The new law requires the seller of any vehicle which is nine years old or less to disclose on either the title form (if it's a new title form issued after January 1990) or on an odometer disclosure form (if the vehicle has old title form), the number of miles on the odometer along with other pertinent vehicle information.

"The enforcement of this new op-

erating law," said Mary Faulk, director of the Department of Licensing for Washington state, "will protect citizens from the deceptive practice of falsifying odometer mileage."

After May 1, any vehicle title which is being transferred must have the disclosure information. If missing or incomplete, the title cannot be transferred.

Exemptions from this law are:

- vehicles with more than 16,000 pounds declared gross weight,
- any vehicle without a motor,
- vehicles ten years or older,
- a vehicle sold from the manufacturer to a federal agency,
- a vehicle transferred prior to first retail sale, and
- off-road vehicles.

If a vehicle odometer has been broken, there is a provision on the newer titles and on the odometer reporting statement to declare that the mileage is not actual. Also, five-digit odometers that have registered over 100,000 miles can be recorded as exceeding the mechanical limits of the odometer

Faulk warns that while the old title form has a space listed on the front side for the odometer reading, this is not sufficient to meet the reporting requirements of the federal law. An odometer disclosure statement, which can be obtained at Department of Licensing offices, county auditors, and vehicle licensing outlets must be completed and submitted with the old title form.

If a vehicle has the new title, which the state began distributing in January 1990, the necessary information can be listed in the appropriate space on the backside.

A vehicle odometer reading will be entered into the state's database each time it is sold. This information will then be printed onto each new title issued making it easier for potential buyers to determine whether the mileage on a vehicle is actual or if it is suspiciously out of line with the mileage identified on the title.

Faulk advises those individuals purchasing vehicles to make certain that the seller abides by the new law. "The Department of Licensing really wants to save the buyer from a lot of needless headaches. If they don't have the necessary sign-off and mileage from the seller, then they're going to have to track them down and get it. Again, this is to protect the buyer."

In addition to reviewing mileage on the title form, there are other techniques which prospective buyers might employ when considering the purchase of a used vehicle. A good practice in general, the Department says, is to have a vehicle looked at by a mechanic. Not only will (s)he be able to diagnose any potential mechanical problems, but can also check the engine compression and look for worn struts or ball joints, since these are fairly reliable indicators of high mileage.

Other possible signs of high mileage include excessively worn clutch, brake and accelerator pedals. Also, misaligned numbers on the odometer may indicate that the odometer has been rolled back.

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

Civil procedure. Personal representative brought wrongful death action on behalf of beneficiaries against physician, alleging negligence. Action was concededly barred by three-year statute of limitations for malpractice, measured from date of alleged negligence, but would be timely under three-year statute applicable to wrongful death actions, measured from date of death. *Held*, time was measured from date of death, and action was timely. Court reasoned that contrary result could lead to illogical situation in which time could expire before cause of action even accrued. ***Wills v. Kirkpatrick***, 56 Wn.App. 757, 785 P.2d 834 (Div. 2, 1/29/90).

— *K. B. Tegland*

Contracts. (*Case 1.*) Borrowers alleged course of dealing in which bank frequently restructured its loan in response to changes in borrower's situation. Analogizing to Uniform Commercial Code, RCW 62A.1-203 and 1-205(1), court held that this course of dealing gave rise to reasonable expectations by borrower and created good-faith obligation by bank to give some consideration to borrowers' proposals for further restructuring before it called loan. Loan officer's inaccurate communication of borrowers' proposals to loan committee, which rejected them, raised question as to officer's good faith. Bank's freedom to reject proposals would be relevant to whether breach proximately caused borrower's losses. Therefore, trial court committed reversible error in granting summary judgment for bank on borrowers' counterclaim for damages for breach of obligation of good faith. ***Badgett v. Security State Bank***, 56 Wn.App. 872, 786 P.2d 302 (Div. 2, 2/13/90).

(*Case 2.*) Construction lender whose notes were in default foreclosed deed of trust judicially and obtained deficiency judgment. In same action, borrower-developer prevailed on counterclaim for profits lost as a result of lender's failure to advance funds as agreed in construction loan agreement. *Held*, deficiency judgment reversed. It was inconsistent with jury's verdict for developer on counterclaim, because award of net lost profits was based on assumption that loan would have been repaid if lender's breach had not prevented completion and sale of project. Thus, it was implicit in jury's finding that lender's breach proximately caused borrower-developer's default on loan. ***Northwest Land & Investment v. New West Federal Sav. & Loan Ass'n***, 57 Wn.App. 32, 786 P.2d 324 (Div. 1, 2/20/90).

— *S. W. DeLong*

Evidence. In prosecution for statutory rape, counsel stipulated that four-year-old victim would not testify. Trial court then admitted child's out-of-court statements under RCW 9A.44.120, the so-called child hearsay statute. On appeal, defendant argued that statute and right to confrontation were violated because record contained no indication that child was "unavailable," as required by statute. Appellate court held defendant had waived requirement of unavailability by not calling child to testify. ***State v. Borland***, 57 Wn.App. 7, 786 P.2d 810 (Div. 1, 2/20/90).

— *K. B. Tegland*

Real property. Among various issues in case is issue whether buyer under earnest money agreement was justified in refusing to close on ground that title was not "marketable." Agreement was for purchase of a lot in a subdivision that had been replatted. Original plat contained 17 lots; replat contained 18. Original plat did not prohibit replatting, but it did contain restrictive covenant limiting usage to one dwelling house per lot. Upon attorney's advice that 18 houses on 18 lots would or might violate this restriction, buyer refused to close and demanded refund of earnest money. *Held*, title was "unmarketable," and buyer was justified in terminating. Title is unmarketable if, among other reasons, buyer would be subjected to "reasonable probability of litigation," even if buyer would probably win that litigation. There was sufficient question about whether covenant in original plat was violated that buyer would have been subject to a "real prospect of litigation." ***Shinn v. Thrust IV, Inc.***, 56 Wn.App. 827, 786 P.2d 285 (Div. 1, 2/12/90).

— *W. B. Stoebuck*

(continued from page 31)

A brochure explaining the odometer reporting requirement is now available at all Department of Licensing offices, county auditors or vehicle licensing offices.

CONTINUING LEGAL EDUCATION

Lawyers to Get New Tweeds

Washington lawyers David D. Swartling and Lawrence R. Mills will be presented on Sunday, August 5, in Chicago, during the annual luncheon of The American Law Institute-American Bar Association Committee on Continuing Professional Education (ALI-ABA) for its lecturers and authors held in conjunction with the American Bar Association's Annual Meeting.

Swartling and Mills, both of Seattle, were jointly nominated and will each receive a Tweed Award for their joint efforts in developing and presenting the WSBA's Skills Training Course, a nine-day program covering both office practice and litigation. In addition to being extremely well-received locally, the course was commended for its innovation at the Arden House III National Conference on the Continuing Education of the Bar and is nationally recognized as a model program for other jurisdictions to emulate.

The recipients of the Awards were recommended to the ALI-ABA Committee by a special Committee consisting of Chairman A. Leo Levin, Professor of Law at the University of Pennsylvania and former Director of the Federal Judicial Center in Washington, D.C.; Marjorie F. Knowles, Dean of Georgia State University College of Law; and Paul A. Wolkin, Executive Director of ALI-ABA and Executive Vice President of The American Law Institute in Philadelphia.

First of a six-part series

by **Joseph C. Scott**
Western Regional Manager
West Services, Inc.

Editor's Note: The *Bar News* is the recipient of a grant from West Publishing under which the magazine is provided six months of free Westlaw computer research services as an aid to editorial work, as well as a financial grant from West to provide a series of columns on developments in Westlaw computerized research. The following text has been provided by West Publishing.

How to Stay Current: Use WESTLAW Topical Highlights Databases

"The focus of technology in the 1990s will be on attorney workstations and applications," according to Jon Klemens of the legal management consulting firm Altman & Weil, Inc., in the *ABA Journal's* July issue. He adds, "It is now incumbent upon law firms to improve the proficiency of lawyers in day-to-day administrative and practice-related tasks." One way you can improve your proficiency is by effectively using WESTLAW.

Meet the Challenge of the Information Explosion

Attorneys from small practices and big firms have a common challenge: keeping up-to-date in the face of rapidly changing and expanding law. When you need the latest infor-mation, avoid accumulating needless paper—stacks of unread newspapers and magazines—and find what you need quickly and economically in the WESTLAW Highlights databases.

Suppose, for example, you're waiting for a client to arrive to discuss a proposed settlement in an auto accident case. You can use the time to check recent developments in uninsured and underinsured motorist coverage or antistacking provisions. From your desktop terminal, sign on WESTLAW and access the WESTLAW Topical Highlights-Insurance database (WTH-IN).

WESTLAW Highlights Databases
(As of February 1, 1990)

(Name)	(Database Identifier)
General Highlights Databases	
WESTLAW Bulletin	WLB
U.S. Supreme Court Bulletin	WLB-SCT
Topical Highlights Databases	
Admiralty	WTH-ADM
Antitrust	WTH-ABR
Bankruptcy	WTH-BKR
Corporations & Securities	WTH-CORP
Criminal Justice	WTH-CJ
Education	WTH-ED
Employment Law	WTH-LB
Energy	WTH-EN
Environmental Law	WTH-ENV
Family Law	WTH-FL
Financial Services	WTH-FIN
Insurance	WTH-IN
Medical Malpractice	WTH-MDML
Multistate Taxation	WTH-MTX
Products Liability	WTH-PL
Real Property	WTH-RP
WESTLAW State Bulletins	
California	WSB-CA
Florida	WSB-FL
Illinois	WSB-IL
Louisiana	WSB-LA
Massachusetts	WSB-MA
New Jersey	WSB-NJ
New York	WSB-NY
Ohio	WSB-OH
Pennsylvania	WSB-PA
Texas	WSB-TX

Using Topical Highlights Databases

Highlights databases are the product of many hours of thoughtful editorial effort by West attorney-editors, who sift court opinions and legislation for information on changes and advancements in the law.

From the WESTLAW Directory, you can quickly choose the Highlights databases that fit your needs.

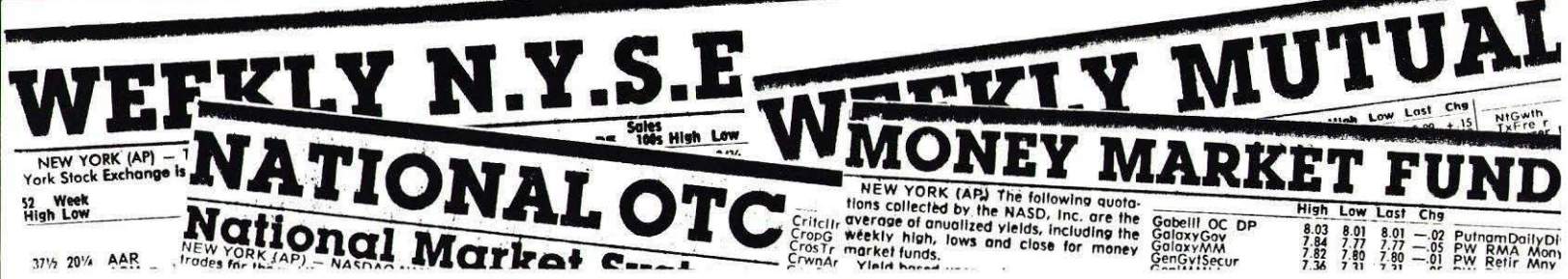
When you access a Highlights database, WESTLAW automatically retrieves a list of recent cases, legislation and administrative actions. To view a summary of any item in this list, type its number. To retrieve the full text of a case, use FIND. After scanning the case on line, you can then print the case to read it at leisure or to file it with a particular matter under advisement.

Quickly Locate a Jurisdiction...or Search Past Highlights

WESTLAW Highlights databases retain summaries for one year. To search all the summaries in one of these databases, type s to display an Enter Query screen, and then type a query, *e.g.*, uninsured underinsured /s motorist.

Use the LOCATE command on WESTLAW to browse for particular terms. For example, from the first summary in the WESTLAW Topical Highlights-Insurance database (WTH-IN), type loc arizona to retrieve the summaries of new cases, legislation or administrative action from Arizona.

Alternatively, you can have a staff member regularly print and circulate the list or the summaries appropriate to the firm's special areas of expertise. Attorneys can then designate the items they want to read, and the staff member can print and deliver those items to the attorney concerned.



Securities Loss Recovery: A Growth Area in the Law

by **John N. Stafford**

This article briefly reviews the current investment scene and points out actual and potential growth areas in the law for securities loss recoveries.

The 1970s were known as "the decade of the squeeze," as inflation, interest rates, taxes and debt increased exponentially. This produced, *inter alia*, an explosion in bankruptcy filings and a concomitant increase in business for the bankruptcy bar.

A parallel situation has developed over the past 15 years or so in the area of securities loss recovery, where the growth of legal business should be explosive. Some pundits have characterized the 1980s as "the decade of greed." Whether or not that is true, a vast dollar volume of securities-related losses have been or will be booked as a result of the current and past activities of investment firms.

This brief article assesses the size of the potential recoveries and estimates how that translates into legal business. An additional effort is made to list some of the many categories where these losses have taken, or are likely to take, place.

As we have quickly seen in the ongoing savings and loan (S&L) debacle, such estimates are difficult to quantify. However, there is a general principle which has been applicable—it invariably turns out to be a larger number than anticipated.

As the S&L saga began to unfold, we were told that it was a $10-billion problem. Then it was a $100-billion problem. Now, according to the Government Accounting Office (GAO), we are looking at a $300- to $500-billion problem. I estimate that it could reach a trillion dollars or more, what with real estate being only half way through a 20-year bear market. (Bear markets normally last about half as long as bull markets.) With residential real estate overpriced, on average, by about half, and overappraisals of both residential and commercial property rampant, the ongoing markdown of property values may impact a much greater number of institutions than has heretofore been estimated. In fact, a number of commercial banks (from Bank of America to the Bank of New England) have written down appraisals, charged off tens of millions of dollars' worth of bad loans, and reported substantial losses on their real estate operations.

There have even been reports that the Federal Deposit Insurance corporation (FDIC), like its former S&L counterpart, the Federal Savings and Loan Insurance Corporation (FSLIC), is essentially bankrupt. So there may be looming a multi-hundred-billion dollar tap on the federal taxpayer to bail out commercial banks, as well as the "thrift" institutions. How does this all impact the legal profession, in terms of securities loss recovery?

Well, as for the banking system, it will have no direct effect as long as the federal government is successful in getting the federal taxpayer to finance the ongoing bailout. However, if there is a taxpayer revolt, or any renege on the part of the government in backing federally insured deposits, a vast opportunity would exist for private recovery of lost deposits.

Securities-Related Losses

But the more immediate focus should be on a host of securities-related losses which have occurred, or which are likely to occur, in at least the following areas:

1. Fraudulent sales practices.
2. Uneconomic deals (limited partnerships, takeovers, et al.).
3. Market manipulations/program trading.
4. Penny stocks.
5. Bonds, bond trading and swaps.
6. Insurance and annuities.
7. Secondary offerings.
8. Derivative instruments (options and index futures).
9. Junk bonds.
10. Initial public offerings (IPOs).
11. Unit trusts.
12. Mutual funds.
13. Commodity trading.
14. Financial disinformation.
15. Money market mutual funds (MMMFs).
16. Zero coupon bonds.

Let's take a brief look at what makes up each of these categories and estimate the expected loss totals in each.

1. *Fraudulent sales practices.* This category includes the well-known, garden variety problems which have existed for many decades. In today's multi-trillion- dollar set of markets, this is a hard number to pin down. But if these practices exist in only one percent of the dollar volume, we are looking at about $40 billion in fraud-tainted sales of securities.

2. *Uneconomic deals.* This category especially includes limited partnerships, a mainstay of the securities brokerage firms and financial planners, even after the 1986 Tax Reform Act. Be they oil and gas, real estate, technology, or equipment leasing, they have been used and abused to the extent of several hundred billion dollars in sales. Some of the early programs in oil and gas, and in real estate, had economic value, and many paid off handsomely. However, as time went on, the economic viability of many new programs became more and more questionable. This process is similar to that pertaining to initial public offerings (IPOs), discussed separately below, where offerings become more and more valueless as the bull market continues to the point that only a small percentage have genuine value just prior to the top. This is also generally true of takeover deals and leveraged boyouts (LBOs). I think of Campeau and Southland Corporation in this context. If only 10 percent of these deals were uneconomic *ab initio*, we are still looking at a substantial part of $100 billion in actual or potential losses.

3. *Market manipulation.* We must make a distinction immediately

between officially sanctioned market manipulation, and that which is officially illicit. In the first category is program trading, a method which should never have been approved by the exchanges or by the regulatory agencies with jurisdiction. Not only is it officially approved, but additional special favors have been granted, such as the SEC's December 16, 1986 private letter to Merrill Lynch, Pierce Fenner and Smith (and by implication, several other firms) sanctioning systematic violation of the advancing price ("up-tick") rule on short sales. Program trading, assisted by this regulatory waiver, allows systematic destruction of markets for the purpose of reaping a profit as a result of the activity itself. It is directly akin to the "bear raid" tactics of Jay Gould and other "pool" operators in the latter part of the last century and the first part of this one. Under the leadership of the late U.S. Supreme Court Justice William O. Douglas when he was SEC chairman, these destructive tactics were essentially stopped cold by the imposition of this rule, which allows a short sale to be executed only on up-ticks. When short sales on down-ticks are allowed, a market or a security price may be arbitrarily destroyed, without any economic or business reason for the price decline. A perfect example of this process was the October 19-20, 1987 "market meltdown," where hundreds of billions of dollar value were destroyed in a single day. The 1,000-point advance in the Dow Jones averages since then helps to demonstrate the lack of any rational basis for that debacle. Also illustrative is the price of American Telephone (AT&T) stock, which was artificially driven down from about 33 to 20 in a two-day period. It immediately recovered to about 25, and subsequently rose to nearly 49. There was essentially no change in the fundamental business or prospects of AT&T during that short period of decline.

In my estimation, there has been too little recognition of official culpability in this destructive behavior, and too much deference to these same bodies in terms of assessing whether a violation of the law has occurred, even when the harm is obvious. This is a wide-open area for creative litigators.

Other areas worth noting are index futures and index options, discussed separately below. Both are inherently market manipulative, although controllable. However, the proper controls have not yet been applied. (See the White House-sponsored "Brady Report" on the October 1987 market crash for an analysis of these derivative instruments and some proposed fixes.)

Other not officially sanctioned market manipulation abounded, and still abounds, to a greater or lesser degree, in virtually every market. The stock markets where Ivan Boesky, David Levine, Princeton Partners, Singer (Paul Bilzerian), etc. operated come to mind. Fortunately or unfortunately for litigators, much of this activity actually produced gains rather than losses for most investors in the affected stocks.

Also, we have it in the bond market, where Michael Milken ran a Ponzi scheme fraud operation for years, right under the noses of the regulatory bodies. It took a U.S. Attorney, not a regulatory body, to bring him and his crowd to the bar of justice.

In the commodity and currency markets, it was not the Commodity Futures Trading Commission (CFTC), but rather Anton Valukas, a United States Attorney for the Northern District of Illinois, who began to put the brakes on the fraudulent trading practices on the floor of the Chicago Mercantile Exchange ("The Merc") and the Chicago Board of Trade (CBOT). Still to be seen is strong enforcement action against the Chicago Board Options Exchange. As these federal criminal actions against front-running (executing trades for one's own account ahead of a client's order), fraudulent and phantom executions, and so on are wrapped up, a strong factual basis for civil actions will have been laid—another open field for civil litigators.

And still to come are major actions pertaining to the Commodity Exchange ("Comex") in New York for similar practices. Contracts traded there include gold, silver and platinum. Coffee, cocoa and sugar trade on their own exchange.

In the index futures area, George Soros is suing Shearson Lehman Hutton for over $100 million for questionable execution of trades in October 1987. Many others may have similar causes of action.

These markets, in the aggregate, trade trillions of dollars a year. If fraudulent practices apply to only one percent of the dollar volume, we are still looking at hundreds of billions of dollars in losses.

4. *Penny stocks.* Billions of dollars have been lost in the penny stock market over the past several years, but this area is characterized by the typical scam recovery problem: The evil is easy to identify, but the victim is embarrassed and reluctant, and the perpetrator is gone. Though regulatory authorities have focused some well-deserved attention on this market, to a large degree the actual recovery of losses is unlikely. Attorneys might better serve their clients by advance warnings and a review of proposed purchases, especially in light of the SEC's new rules requiring more extensive "know your customer" procedures and suitability requirements. I recommend an FTC-type rule, a "buyer's remorse" clause; perhaps a seven-day, rather than a three-day, to coincide with the settlement period.

5. *Bonds, bond-trading and "swaps."* Even though the bond market is considered safe and conservative, it isn't. It's much larger than the equity markets, and is infected, in my opinion, by nearly as much fraud and greed. First of all, bond value is not "fixed" in terms of purchasing power value (unless it is indexed to gold or some inflation index), so over enough time it will become worthless. Bond issuers often count on this fact—to be able to pay off their debt in cheaper dollars. And since the dollar is down to eight cents based on the 1937 Consumer Price Index (CPI), it's easy to see that they are winning their bet (almost a sure thing as long as the federal government continues to pursue monetary and fiscal policies which enhance and accelerate this process). This trend should accelerate over the next 10 to 20 years. So long-term bonds are inherently risky. In my opinion, sales practices which fail to acknowledge this obvious and proven fact border on fraud. This is another wide-open field for litigators, especially those who are students of financial history.

More directly, as the market pricing debacle in the junk bond market has shown, fraud permeates some bond markets, many of which are artificial. Quoted prices may be meaningless.

Year-end tax loss selling and swapping of bonds is a time-honored way for

brokers to pay for their Christmas presents. These trades should be carefully checked for inappropriate recommendations, excessive "spreads" and excessive commissions.

Washington Public Power Supply System (WPPSS) offers another example of bond problems, combining the inherent value problem of bonds with the uneconomic basis of some limited partnerships. This is not the last time we will see a WPPSS situation, so advise your clients to look behind the bond rating and to take note of excessive yields. They are usually signs of risk, not juicy opportunity.

6. *Insurance and annuities.* Although a straight insurance policy is not a security, the increasing "securitization" of insurance through annuities and other financial products may bring a particular purchase within the purview of the securities laws. At least two serious problems loom with securitized insurance products—fraudulent sales practices and the deteriorating health of many insurance companies. More than 100 have gone under recently in both Texas and California. Many are stuck, as are banks and S&Ls, with decreasing prices on primarily commercial real estate investments. Sales practices not used with straight insurance sales are being imported from the securities business. Misrepresenation and "over-promising" are two aspects of this problem. Both securities salespeople, being duly licensed in insurance, and some insurance salespeople in securities are out of their fields. We are looking at tens of billions in potential losses in annuities and potentially hundreds of billions in insurance (not a subject of this article).

7. *Initial public offerings (IPOs).* As the stock market rose in the '80s, from the "depression" low of less than 600 in 1974 to over 2,700 in 1987, IPOs had a resurgence. Their previous peak had been in the late '60s, just before the widely forecast (and correctly so) "Crash of '69." The quality of these offerings is invariably inversely proportional to the height of the Dow Jones Industrial Average. The best deals are offered near the lows, and for a while after as the market advances. The worst deals always come out just before the top. This phenomenon occurs because of a basic human failure—the inability to recognize value quickly. Most people wait until something is "proven" before they will buy. This works with consumer goods and people, but not in financial markets, where success demands being ahead of the crowd. Near the top, it's an easier "sale" for both the broker and issuer.

Since we recently had a top in the market, there were a large number of bad deals. So we are looking at several billion dollars in losses. However, since no value analysis is made by the SEC or most state securities divisions, recovery may not be easy. First, because of the rule of disclosure, above all. Second, because the "bad guy" issuers are probably bankrupt or have left town. Clients, again, would be well-advised to have IPO prospectuses reviewed by counsel before they buy. Simple common sense, and the cooling of buyer's fever over a few days' time, would probably do more to prevent losses in this area than anything else, even a value test by regulatory bodies. (These would still be ignored by many, even if performed.)

8. *Secondary offerings.* These are less of a problem generally than IPOs because they are usually issued by more-seasoned companies. Even so, there have been instances of stock issues in recent years which tanked soon after issue. Mobile Home Industries' common and Western Union's preferred issues of 1984 immediately come to mind. Both sold stock knowing that their financial position was worse than that represented in the prospectus. There may be a few tens of millions in losses here.

9. *Derivative instruments.* These are securities which are related to underlying securities. Examples include options on stocks, options on indexes, futures on indexes, options on futures, futures on bonds, futures on currencies, and so on. The potential for abuse is much greater here, in part because derivative instruments are not easily understandable to the average investor. They are even unintelligible to many professionals. And they are often harder to judge in terms of value than, for instance, a basic bond or stock. Also, they tend to be inherently more volatile, and price changes tend to occur in shorter periods of time. Furthermore, they represent greater leverage, and thus a greater risk.

This is a fertile field for the bar. Tens of billions in losses occur every year. Trillions in dollar volume trade annually. Fraud and abuse have been widespread and essentially unrestrained by the regulatory bodies. (Former U.S. Senator Thomas Eagleton recently resigned from the board of one such body, stating that self-regulation was a myth.) Governmental bodies have both been understaffed and lacked the institutional knowledge to understand the practices taking place.

Audit trails have been notable by their absence. However, change is afoot, especially on the last point. Since the October 1987 crash, greater attention

has been focused on this area, primarily by the federal government. Between the U.S. Attorneys, the White House "Brady Report," and other studies (some commissioned by the exchanges), abusive practices have come under greater scrutiny and changes have been proposed, such as those related to front-running and phantom trades. More timely and accurate reporting of trades is also being mandated.

Obviously, then, where a loss has occurred involving a derivative instrument, the above-identified areas may be a good place to look for a cause of action. But not exclusively. There are many other tricks which haven't received the attention or remedy they deserve. And, of course, violations of the new, "tougher" rules are bound to occur.

10. *"Junk" Bonds.* Touched upon above, junk bonds are high-yield bonds of generally lesser quality (not investment grade), hence the need for a yield to offset the inherent risk. This entire market reached a multi-hundred-billion dollar peak in the 1980s. Already, losses of up to one-third or more of the entire market value of some of these bonds have occurred. In my opinion, these bonds were sold on essentially false premises, some resting on questionable academic studies done at some of our "finest" institutions. Most of these studies dealt with the historical and expected default rate of substandard bonds. Too many of them did not go back far enough, or were biased, having been com-missioned by the would-be issuers or brokers like Drexel Burnham Lambert.

Any holder of a junk bond with a loss should contact his or her attorney. The possible grounds for recovery include fraudulent sales practices, inadequate or incorrect information, the inherent riskiness of the security, failure to properly advise of the actual risk, and the fraudulent nature of the after-market (rigged and artificial).

11. *Unit "trusts."* The name "trust" here should be thought of in the same way one should look at a failed thrift with the name "Fidelity Federal Guaranteed Trust"—askance. Such securities are similar to closed-end mutual funds, which they essentially are. Most of them invest in bonds and trade, if at all, in an after-market where there is often a large spread between the bid and the ask prices. In this sense, they are similar to the penny stock market, although perhaps not as egregiously. In the post-Drexel junk bond market, you might see a $100 par bond quoted at $30 bid with $40 offered. If you wished to sell it, you might get $30 for your $100 "face value" bond. To buy one, you would pay $40. The dealer takes the difference of 25 to 30 percent for profit and to cover inventory risk.

My point is that the unit trust market can be similar to the penny stock and junk bond markets—huge spreads in the after-market. Too many investors are not advised of either this or the after-market risk. Other problems stem from the fact that most of these trusts have a fixed portfolio and are unmanaged. Therefore, even one bad investment can drag down the value of the whole; many unit trusts are facing precisely this problem with junk or low-grade bonds in which they have foolishly invested.

This is also a multi-hundred-billion dollar market. As losses mount, investors will need competent legal assistance to recover them. Fortunately, many of these trusts have the backing of "good defendants," with deep pockets, for at least the near term. So the opportunity to actually collect on a judgment or settlement is greater than in some of the other areas we've discussed.

12. *Mutual funds.* These can be either stock or bond funds, open or closed, fee or no-fee (or hidden-fee). Many aspects of these securities are subject to scrutiny, and to the recovery of losses. This is a multi-hundred-billion-dollar industry.

a. *Sub-par investment performance.* Most fund managers, on average, have actually under-performed the market (as measured by the Standard and Poor's 500 index) for many years. Particular funds have lost large annual percentages, even in advancing markets. Too many "managers" and operators are in the business only to make a buck—they really have no qualifications to run a fund.

b. *Excessive or hidden (deceptive) fees.* Eight percent used to be the standard cost of buying a "load" fund. Now many funds cost less than that, or are even "no-load." But even some no-load funds have back-door (exit) fees. And some funds advertise as no-load while they actually charge a fee. A new association has been formed of truly no-load funds.

c. *Bad management.* The Strategic's funds and others have been subjects of regulatory scrutiny for such activities as self-dealing and the violation of position limits.

d. *Idiotic policies.* Even the "best" fund, Fidelity Magellan, was fully (100 percent) invested going into the October 1987 crash, holding stock in 1,400 companies and losing over 20 percent of its value. This was insane, if not actionable.

e. *Fraudulent sales practices and track records* are other areas of concern in this category.

13. ***Commodity trading.*** This is a vast field, with literally trillions of dollars at stake, and greater losses because of the risky and volatile nature of the instruments. However, few individual clients trade commodities, so in the interest of brevity, I'll just make a few points:

a. There is an immense amount of fraud and abuse because commodity trading has been, and still is, very profitable and easy to conceal (much like the drug trade). Regulatory enforcement has been very lax. A "Keating 5" type development could well be expected in this area.

b. Rapid turnover means multiple trades, and therefore immensely greater possibility of both fraud and error, in sharp contrast, for instance, to the purchase of the same dollar value of something like AT&T, which may then be held for many years.

c. Most investors' unfamiliarity with these markets and even what they themselves are doing make this an easier area in which to perpetrate fraud.

d. Commodity funds eventually lose their money. Most are overdiversified, poorly managed, or subject to great abuse of the investor dollar (*e.g.*, payment of excessive commissions).

14. ***Financial disinformation.*** One interesting aspect of the Ivan Boesky insider trading case is that the actual gravaman of his offense was corporate and financial espionage. Yes, he and others traded on the information illicitly, but the real harm was done when the information was stolen. Afterwards, a large number of people benefited because Boesky shared his information with others. The deliberate leak was beneficial for two reasons: First, legal cover was provided for what otherwise would have been insider trading—illicit use of material *nonpublic* information. Once a rumored takeover was mentioned in the media, it was no longer nonpublic, and almost anyone trading on it could claim a solid defense against prosecution. This activity went on for at least two or three years, and people made hundreds of millions of dollars before anything was done about it. Second, "stock parking" took place informally, as large investors and arbitraguers bought large blocks of stock in the open market and held them. They were willing to do so specifically because the information was good, primarily because it had been stolen. It is hard to quantify, but probably somewhere near 85 percent, at one time, of these deliberately leaked takeover rumors were accurate. This is in stark contrast to the usual, pre-Boesky takeover rumors reliability percentage of perhaps ten percent. A startling difference.

So those who were not in on this game may well have a cause of action under current laws.

On the other hand, destructive financial disinformation is issued almost daily by interested parties who are protecting or enhancing a currently held or about-to-be-held position. Two examples come to mind. Short-sellers are notorious for leaking and issuing negative reports about securities where they profit from a decline in price. And so are individuals and institutions who sell "covered calls." Negative comments are often seen in the week of, or prior to, expiration of these call contracts. In this manner, these and other investors receive the full value of the call option premium they have received with less risk of having to cover (buy back in) their position. This also applies to stock index futures and stock "baskets."

These practices could also be discussed under the market manipulation section.

Rumor-mongering is rife in the markets, but almost never punished, even though it could easily be traced to the source in many instances. Until the authorities begin to prosecute this activity, however, a civil action would normally require substantial investigative resources to pin down the defendant.

All of the above (and there are many other forms and examples) represent actual and potential losses in the tens of billions of dollars, at least on an annual basis.

15. ***Money market mutual funds.*** These funds invest primarily in money market instruments, *i.e.*, U.S. Treasury bills, short-term commercial paper and CDs, and short-term municipal paper. They issue shares, which are always denominated at one dollar. There has never been an actual loss of principal with one of these funds—yet! But there have been two times when it was close. Under certain conditions, there *could* be a return of less than $1 per share, *i.e.*, a loss of principal. This is a multi-hundred-billion-dollar market, however, so even a two percent loss on five percent of the outstanding shares would result in a $4 billion loss to holders of these shares.

16. ***Zero-coupon bonds.*** I've saved the worst for the last. These bonds are purchased at a large discount from par and pay no current interest, (In fact, taxes must be paid on unpaid interest!) The expectation is for a large payoff at maturity. But Richard Russell, the savvy editor and owner of *Dow Theory Letters*, a 30-year-old investment newsletter, has called these bonds potentially the biggest financial scam of the century. Not only have questions been raised about the full faith and credit nature of these instruments which are U.S. Treasury-security-related, but of the financial stability of many of the nongovernmental issuers, primarily large brokerage firms. Even some municipal issues may become suspect, if the ongoing destruction of real estate

values continues for another ten years, as it may. Furthermore, the purchasing power of the U.S. dollar has declined to eight cents in 50 years based on the 1937 CPI (noted above). The current dollar could lose as much value in the next 15 to 50 years. Therefore, even the zero-coupon bond holder who paid as little as $20 for a $100 par bond could well suffer purchasing power loss if history is a guide.

Two final points:

First, many attorneys who litigate are unfamiliar with securities law and market practices. Many securities attorneys aren't litigators or have been putting deals together on behalf of issuers. This is a particularly attractive area for young attorneys without an established practice—but with the right background or interest—such as MBAs or business and finance majors. On the defense side, many attorneys are already well-qualified in established areas, but may not be aware of the wide range of loss categories or how to handle some of them. Those above may well benefit from contact with the relatively few attorneys who are already practicing in this area, as well as properly credentialed consultants, who are able to analyze, advise and assess, and to serve in this area as expert witnesses.

Second, the opportunity for recovery is much greater now than in the '60s or '70s (or even the '80s) in part because of the explosive national and international growth of markets. And where money is pyramidized, it is more easily stolen. Many issuers are, or are backed by, large institutional entities, who have deep pockets, unlike the small, localized "deals" and limited partnerships of earlier times. With the overall size of the markets in the multi-trillion-dollar range, there are actually and potentially hundreds of billions of dollars in loss recoveries. If the average fee is even as little as ten percent, the legal fees could be in the tens of billions of dollars. And a much-needed service would be provided to the bar's clients. □

Spokane resident ***John N. Stafford*** *has an extensive legal background and high-level regulatory and adjudicatory experience in the Federal Executive. He works as an expert witness and analyst in securities disputes, inter alia.*

The Court System: Slowly But Surely

by **Keith M. Callow**
Chief Justice
Washington State Supreme Court

There is no question but the courts will evolve as society changes. The question is: whether the evolution will happen to us for the worst, or do we manage it for the better. Courts must evolve to handle new challenges. However, courts have not been noted for the alacrity with which they have recognized the need to adapt and reject outmoded customs. The courts owe it to the legislative bodies to make time and money saving improvements when they can do so. The legislative bodies owe funding to the courts when the courts run themselves well.

The criminal justice system is composed of interlocking divisions: law enforcement (police and sheriffs), prosecution (prosecutors and public defenders), courts (judges, staff, and facilities), and corrections (punishment, treatment and rehabilitation). You cannot fund one link in the chain and neglect another. To do so is to create either a bottleneck or a part of the chain, coping by doing its best, but cutting corners. The court system will always try to handle the load it faces every day, but, unless properly funded, may only be able to do so at the price of justice.

While the state appellate courts are current, the trial courts of our state — superior, district and municipal — are being overwhelmed, are besieged by a growing caseload, too few judges, understaffing and a funding system that often leaves the courts as the last recipient of attention and money from the legislative body responsible. While the trial courts are struggling to stay afloat, the Legislature, counties and municipalities feud over who should provide for the judiciary and the system flounders. Perhaps the reason that the appellate courts are handling their assignments, while the trial courts are struggling, is that the appellate courts are totally state funded, while the superior courts are partially funded by the state and counties, the district courts are totally funded by the counties, and municipal courts are supported by the cities and towns.

The superior courts of the state are doing a herculean job in trying to keep up with the ever increasing load of cases, but they are bound to be overwhelmed unless they receive more than begrudging support. Under the speedy trial rule, a person charged with a crime must be tried (trial must commence) within 60 days of arraignment if the defendant is not released from jail, or within 90 days if released from jail. Criminal trials take precedence, by law, over civil trials. Because of the press and increase of criminal cases, the larger counties, King and Pierce notably, faced with difficulty in getting civil cases to trial have set up separate criminal and civil departments so the civil cases can get attention and judge time. This is all well and good, but when it comes to crunch time and a presiding judge is faced with no available judge and time is running out under the rule for the commencement of a criminal trial, the presiding judges have had to suspend civil trials, pull judges away from the middle of those trials, and assign the civil department judges to commence criminal cases in order not to have serious criminal charges dismissed with prejudice.

Statewide the superior courts have experienced an increase in overall case filings of nearly 20 percent since 1985. Criminal case filings have gone up 54+ percent since that year. There was a 22 percent increase in drug case filings in 1989 alone, this being primarily responsible for the 9 percent increase in all statewide criminal filings last year. Total statewide filings have gone from 45,000 plus in 1983 to 65,000 plus projected for 1990, up 46 percent in that 7-year period, while the increase in judicial person power has been only 17 percent. To have administered justice on the same level and in the same manner as was done in 1985, by an accepted objective standard, 33 more judicial officers should have been added to the superior courts across the state. However, during this period, only 19 new judicial positions were provided.

The criminal case increase is overwhelming the local superior courts. Criminal filings in King County have marched steadily upward. A little over 4,000 in 1983, nearly 5,000 in 1985, 6,000 in 1987 and around 8,500 in 1989. But, the really stunning statistic is that while the law, safety and justice expenditures in King County were increased by 273 percent during those years for the prosecution and public defender link in the criminal justice system (the generators of criminal trials), they were only increased by 55 percent for the King County superior courts. This seems a sad lack of recognition for the trial judges of King County who have lengthened each of their trial days by one hour. This is a high price paid by conscientious people in a high stress job with no thought of reward.

That is the situation in the superior courts, the trial court of general jurisdiction; let me turn to the courts of limited jurisdiction, the district and municipal courts. The district and municipal courts statewide had 2.17 million filings last year, a record high. Driving while intoxicated/physical control filings surged to over 40,000 in 1989. Jury trials in 1989 were up 30.4 percent over 1988. The district and municipal courts coped but many judges and staff worked long hours to do it, cases had to be dismissed and pressure was present on prosecutors to plea bargain dispositions to fit the calendars. To process the cases, in excessive of 1985 caseloads, the limited jurisdiction courts now should have an additional 23 judicial officers.

Various municipalities across the

Evolving Into the 21st Century

state have adopted different techniques to avoid the costs of the criminal justice system and to cope with the numbers of filings. One technique has been the decriminalization of acts considered criminal. One example is calling shoplifting an infraction rather than a crime, thereby avoiding prosecution, defense and jail expenses. When a crime is decriminalized penalties are imposed for the commission of an act rather than fines levied for the commission of a crime. This makes shoplifting a money-maker for a municipality rather than a cost burden. There is incoming money but no outgoing costs for trial or jail time. The result is inequality and the citizen then faces different consequences in different areas for the same misdeed. You, as a citizen, should care that the law should be the same and mean what it says statewide and that the courts will impose a fair, predictable and uniform sanction for wrongdoing whatever it is and wherever it is committed.

Much credit should be given the Seattle Municipal Court for its efforts. As noted in a recent report of the court:

> "We shifted our night court to the jail, began Sunday arraignments, held court on holidays and used pro tem magistrates and evening magistrate hearings..."

Let me tell you of a conversation I recently had with Barbara Yanick, Presiding Judge of the Seattle Municipal Court. She stated that the funding of the criminal justice system will become a priority when the people who work in downtown Seattle cannot find a way home without going through an area where there are frequent shootings. From what I read in the newspapers, it is getting more difficult to find a safe route every day. She also said that we have a whole generation which has no values except money and being "street slick." These are kids who sneer at the minimum wage job when they can make $100 a night; for whom jail holds no fears or loss of standing and in whom we are engendering contempt for society and our institutions. These are future citizens to whom we have given the legal rights of democracy but in whom have been instilled none of its responsibilities. The people who work in the system say "you think this generation is in trouble, wait till you see the next!"

To bring an objective view to the problems of the trial courts and their funding, I am appointing a Commission on Washington Trial Courts which will be ably chaired by Bill Gates, a past president of the Washington State Bar Association who many of you know, who has agreed to lead a commission of legislators, civic leaders, and public officials to investigate and report on whether the trial courts are doing as good a job as possible, who should fund them and how much they should receive.

The purpose of the Commission shall be to:

1. Examine the problems and issues facing the superior, district and municipal courts of the state of Washington.
2. Develop plans for the future of these Washington State trial courts, including assessments involving:
   a. The structure, organization, staffing and administration of those courts.
   b. Recommendations for improvements and efficiencies which might be implemented by such courts.
   c. Recommendations as to what are appropriate funding sources and appropriate levels of funding for those courts.
3. The Commission shall report to the governor, the Legislature, the counties and municipalities, and the Supreme Court on the revisions, if any, in the laws of the state, counties and municipalities which the Commission, based on its study, deems advisable.

It is the job of the trial courts to manage themselves and do as cost effective a job as possible, *consistent with justice.* A trial court is not an assembly line where all the products are the same. Each case presents its own facts and issues. Each litigant looks upon his or her case as the most important and only one in the state. Judges and administrators and those in the executive and legislative branches of government never forget that when a trial is concluded each citizen involved should walk out of the courthouse feeling that they had their day in court, that the court had time to pay attention to their case and that they were treated fairly.

I have great hopes that this Commission will perform their task with this principle in mind and that they will do their work well.

How often the first claim of the fellow just arrested is "Hey, it's a free country, isn't it?" Yes it is, but one way or another we all have to pay for it. Judge Learned Hand said: "If we are to keep our democracy there must be one commandment: 'Thou shalt not ration justice'."

The judicial system of our nation is one of its crowning jewels. It has been a source of great pride to us and the envy of the world. In this country the individual has had little to fear from our criminal justice system. Our system has constantly improved over the first 200 years of our existence, but *now* we are faced with the threat of a declining quality of justice.

Our state judicial system touches millions of our citizens each year. If those who become involved in the judicial machinery of dispute resolution come away from their experience with a feeling of resentment, distrust or disrespect, all of government is threatened. The time is now to support the entire criminal justice system. This is everyone's concern, each of us has a stake in it. The politics of postponement and procrastination fail us every day. Meanwhile the drug dealer is not pausing a minute. □

THE JUDICIARY

Ricardo S. Martinez took his place on the King County Superior Court bench April 17, 1990, succeeding Judge **Charles S. Burdell, Jr.** Martinez is a former deputy prosecutor in the Criminal Division of the King County Prosecutor's Office.

Kitsap County Superior Court Judge **James D. Roper** has been appointed to the State Juvenile Dispositions Standards Commission by Governor **Booth Gardner.** The commission makes recommendations on terms of confinement for juvenile offenders to the Legislature and imposes and collects diversion agreement fines.

The Supreme Court of the State of Washington has announced the selection of **Ronald R. Carpenter** for the position of Deputy Clerk of the Supreme Court. He will he deputy to C.J. Merritt, clerk of the Supreme Court. "Ron Carpenter, with his distinguished background and experience as a lawyer will be a tremendous asset to the Supreme Court," Merritt said.

Carpenter has 19 years of experience as a lawyer. He comes to the Supreme Court from the law firm of Hickman, Webster, Ensley & Carpenter of Colfax. He was the Prosecuting Attorney for Whitman County from 1975 to 1984. Prior to that he was a Deputy Prosecuting Attorney for **Robert Patrick.**

After graduating from the University of Idaho, colleges of Law and Business, in Moscow, Idaho, he was a captain in the United States Army Judge Advocates General.

NEWS FROM HOME

Gayle M. Ogden, senior corporate attorney at ISC-Bunker Ramo Corporation, Spokane, has been named affirmative action officer and special assistant to the president at Eastern Washington University.

The EWU Board of Trustees approved her appointment during its March 23 meeting. Ogden began her job in April. Ogden's law degree is from Gonzaga University School of Law (1975). She also holds a bachelor's degree in linguistics and a secondary education certificate from the University of Washington (1972).

As ISC senior corporate attorney from 1986 to 1990, Ogden had full responsibility for all employment law matters concerning the company's 2,000 employees. She designed, drafted, implemented, trained and continued to ensure the compliance of an affirmative action/equal employment opportunity program and had supervisory responsibility for all employment litigation, including Human Rights Commission hearings and state and federal discrimination lawsuits. She was manager of corporate benefits and legal counsel to human resources at ISC, 1984-1986; she served as an assistant attorney general in Spokane, 1977-1982, taught a course on sex-based discrimination law at Gonzaga University School of Law in 1978, and was in private law practice prior to that time.

She is on the Professional Resource Options board, Rape Crisis Network advisory board, Lutheran Social Services of Washington board and American Heart Association board. Ogden is also active with Junior League of Spokane and FutureSpokane.

An avid runner, she lives in Spokane with her husband John, who is the director of financial services for Spokane County, and their 10-year-old daughter Leslie.

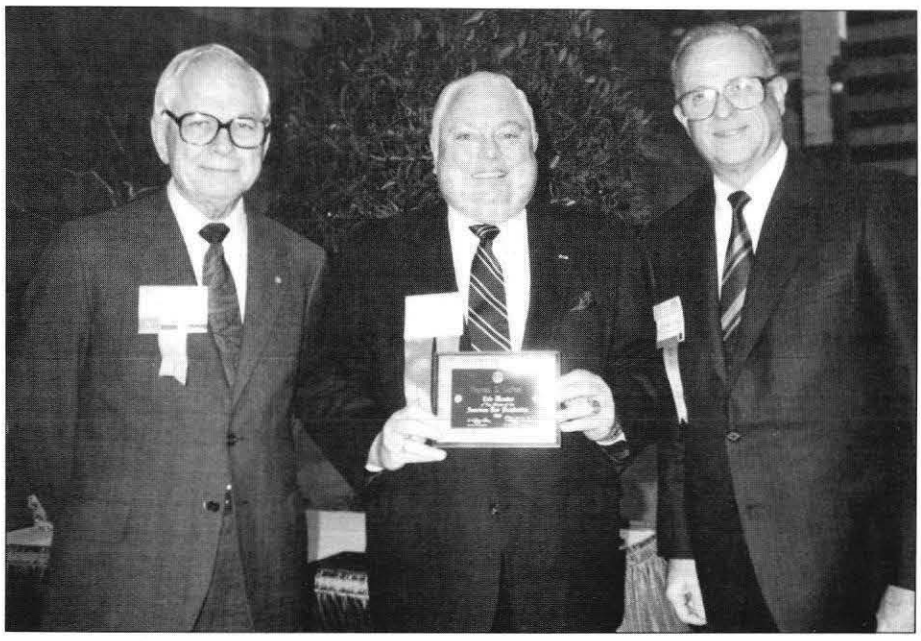
The American Arbitration Association (AAA) held its annual meeting April 3 in New York City, and 12 new directors were elected to the Board of Directors, among whom is **Theodore J. Collins,** vice president and general counsel, The Boeing Company, Seattle.

Thomas D. Loftus of Seattle (center of the accompanying photo) was honored as a new Life Fellow of the American Bar Foundation in Los Angeles at its 34th Annual Meeting. The plaque was presented to him by **Robert M. Ervin** (left), Chair of the Fellows and **William G. Paul** (right), the newly elected Chair of the Fellows.

Another Fellow from Washington who was honored as a new Life Fellow was **Malcolm A. Moore** of Seattle.

Established in 1955, the Fellows is an honorary organization of practicing attorneys, judges and law teachers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession. Members encourage and support the research program of the American Bar Foundation.

The objective of the Foundation is the improvement of the legal system through research concerning the law, the



Robert M. Ervin, Thomas D. Loftus, William C. Paul.

administration of justice and the legal profession.

John A. Gose and **Constance L. Proctor,** both of Seattle, served on the faculty of ALI-ABA's annual advanced course of study, "Real Estate Defaults, Workouts, and Reorganizations," presented May 31-June 2 in San Francisco.

The course concentrated on the application of the U.S. Bankruptcy Code to real estate defaults and on state law remedies, workouts and the prevention of real estate project failures. It also examined the protection of lenders and the representation of developers and others who have an interest in a troubled real estate project. The program covered all stages of the real estate transaction, from inception through the development of problems and the default. It also explored the workout phase, or period of ultimate disposition of collateral and realization on guarantees and other third-party undertakings. Particular attention was paid to hazardous waste and other environmental issues, lender liability, insolvent lenders and the effect of the FDIC and RTC regulatory and claim system on real estate defaults.

ASIAN BAR ASSOCIATION OF WASHINGTON

"History in the Making" describes the theme of ABAW's May 3 membership meeting honoring Judge **Kimi Kondo,** recently appointed member of the Seattle Municipal Court bench. A Mayor **Norm Rice** appointee, Kondo is the first Asian woman to become a judge in this state. Prior to her appointment, she served as a magistrate for Seattle Municipal Court, had her own private practice and actively participated in the ABAW.

During the last month, other ABAW activities included:

A membership directory, which will be a valuable resource for ABAW members. If you have not received a directory form, call Gary Malbara, (206) 633-1310.

The Path to the Bench: On April 26, the Education Committee sponsored a seminar on "How to Become a Judge: The practical aspects of seeking appointment or being elected to the bench." Several superior court and municipal court judges explained their pathways to the bench.

The Economics of a Law Practice: **David K.Y. Tang, Chi-Dooh "Skip" Liu, Alma Misako Kimura** and **Gloria Lung Wakayama** spoke on client development at the brown bag lunch seminar, Tuesday, June 12 at Preston, Thorgrimson, Shidler, Gates & Ellis, Columbia Center, 54th Floor Conference Room.

Congratulations are in order: **Dean Lum** is now an associate at Bradbury, Bliss & Riordan. **Jean Nishimori-Divine** practices with the Office of Inspector General. **Michelle Hurley** has moved to the firm of Anderson and Hunter. **Sue Tanable** works for the Washington Appellate Defender. **Sue Leong** joined the U.S. Army Corps of Engineers. **Rod Kaseguma** has joined the firm of Inslee, Best, Doezie & Ryder. **Peggy Nagae Lum** is of counsel and Director of Associates at Betts, Patterson & Mines, P.S. **Benson Wong** recently became a partner at Keller, Rohrback, Waldo, Hiscock, Butterworth & Fardal. **Rod Kawakami** and **Sharon Sakamoto** have formed a new firm, Kawakami and Sakamoto.

ABAW is an association of Asian/Pacific-American attorneys and judges. The next membership meeting is August 18. For membership information, please contact **Cynthia Kadoshima,** (206) 223-1313.

CLARK COUNTY REPORT

by **JOHN F. NICHOLS**

There's a Nightmare in My Basement: Remember when you were a kid, and if your house had a basement, there was always a certain dread of the unknown lurking therein. And your older brother(s) would describe in excruciating detail the consequences of being caught in the middle of the basement with the lights out and the door locked. And when your mother would send you downstairs for a loaf of bread, your brothers would turn off the lights, shut the door and, maybe, after 20 minutes of living terror, they might let you in—but only after you swore under penalty of dismemberment never to tell your mother. And you promised yourself that someday, when you got older, you'd become an attorney and then you could prosecute your brothers and send them away forever and probably your whole family, too, because they all had laughed at you and kept sending you downstairs for various things that they knew were never down there in the first place. Remember those things? Yep,

the same thing happened to me, too.

Well, anyway, it appears that Vancouver has its own version of "Nightmare in My Basement" in an unconfirmed report (well, it came from a secretary): Local defense attorney **Ed Dunkerly** is rumored to soon have a lawyer/being residing in his basement. Sightings correspond with speculation from the offices of Lee, Mitchelson, Yoseph, Gray & Lansdorf of one pony-tailed attorney, **J.R. Yoseph.** Whether Ed started this rumor as a product of his own devious mind or as an attempt to keep wife/attorney/partner **Gail Ihringer** out of the basement is anyone's guess. But, in any event, don't go into the basement without the local court rules or some heavy artillery.

Bosses' Night, 1990: The Ft. Vancouver Legal Secretaries' Association held their 24th Annual Bosses' Night this spring to mixed reviews. First off, **Roger Bennett** from the prosecutor's office was the M.C. Apparently his attorney namesakes, **Art Bennett** and **Bob Bennett,** were originally chosen and the programs printed. Unfortunately, they both pulled out due to sprung hernias sustained at the thought of Roger's being M.C. Next, the Boss of the Year went to **Alicia Lowe,** who supervises a one-person branch office in Camas for Poyfair, English & Lowe. In the nominating letter submitted by her secretary, Alicia was described with the usual hyperbole of being very special, etc., but the finishing attributes, "She keeps her fingernails cleaned real good and hardly ever spits on clients" garnered Alicia the award. Good job. Finally, the assembled multitude and attorneys were entertained by that real good group, "Legal Tender." Said combo consists of attorneys **Ben Shafton** (strings), **Steve Horenstein** (saxaphone), and Judge **Dean Morgan** playing some kind of horn. Their music is a cross between Manilow and Newton (Isaac, that is); but considering the dancing ability of the CCBA, somehow it was appropriate. Proving once again that there should be no sax at Bosses' Night.

EAST KING COUNTY REPORT
by **RANDOLPH I. GORDON**

Lawyer as scapegoat. Lawyer as predator. Lawyer as hit man. Lawyer as thief. Lawyer as weasel. Lawyer as snake. Lawyer as hero. Lawyer as hero? Well...why not?

> The hero deed to be wrought is not today what it was in the century of Galileo. Where then there was darkness, now there is light. But also where light was, there now is darkness. The modern hero deed must be that of questing to bring to light again the lost Atlantis of the coordinated soul. Obviously this work cannot be wrought by turning back or away from what has been accomplished by the modern revolution. For the problem is nothing if not that of rendering the modern world spiritually significant. Or rather, phrasing the same principle the other way round, nothing if not that of *making it possible for men and women to come to full human maturity through the conditions of contemporary life.*

Our pride and purpose have dulled since the Founding Fathers sought to liberate human potential. In Eastern Europe, we observe the stultifying effect of centralized power and command economics has on the attainment of a vibrant, creative and self-actualized human population. Our system of laws, whether freeing people from fear or protecting productive and creative resources, makes it possible to achieve full human maturity. Like Tennyson's Ulysses, must we lawyers "mete and dole unequal laws unto a savage race?"

We are worn down by calumny and the execration of the thoughtless. Yet, what if we were to awake—as heroes? Lawyers are ideally situated to be modern heroes in the realm of politics, law, business, or as supporters of the cultural and charitable functions that feed our hearts and minds. It's 1990. Do you know where your dragons are?

Consider our humble local bar. The Honorable **Terence P. Lukens,** lawyer, has just been elected mayor of Bellevue. What political and social dragons await his passage? Newly appointed Judge **Wil Roarty** in the Northeast District Court, visibly delighted in his new post at our last meeting, undoubtedly will bring vitality and vigor to his challenges. And there are others: EKCBA president **Ken Davidson** and dozens of others, whose patient midwifery brought forth the Eastside Legal Assistance Program for the unabashed purpose of serving the disenfranchised; former trustee **Diane VanDerbeek,** whose efforts have led to the Eastside Satellite to better serve the people of the Eastside; **Judith F. Jaeger,** on the board of the National Kidney Foundation of Washington; and the countless others helping with the charitable and cultural associations serving the community.

Two Eastside attorneys, making their contribution through participation in the bar, have been active in the affairs of the Seattle-King County Bar Association. **Geoff Revelle** and **Steve Toole** have been nominated for elected positions of second vice president (a track that leads to first vice president, and thence to president) and trustee, respectively. Steve Toole presently serves as secretary for EKCBA.

Plans for inter-bar activities include the annual EKCBA June Cruise around Lake Washington which, this year, included members of the South King County Bar Association. The vessel, amply stocked with food and drink (and music) left the Kirkland dock at 7 p.m. on Friday, June 1, and returned after dark sometime. (Aftermath report to follow.)

Even heroic deeds can be fun.

The Washington State Bar has let us down. When we were sworn in, we should have been issued signal rings and capes. Heroes one and all.

HISPANIC BAR ASSOCIATION

Hispanic members of the Washington legal community recently formed the Hispanic Bar Association. The organization held its first meeting on April 9 at the University of Washington School of Law. Persons interested in obtaining further information about the organization may contact **Sandra Madrid,** University of Washington School of Law, Condon Hall JB-20, 1100 N.E. Campus Parkway, Seattle, WA 98105; (206) 543-0199; facsimile (206) 543-5671.

Legal Foundation of Washington incoming president ***Paul A. Bastine*** *(on right) presenting Goldmark Award to* ***Paul Lawrence****, representing Preston Thorgrimson.*

Co-recipient of the 1990 Goldmark Award, ***Abraham A. Arditi****, with 1989 Legal Foundation of Washington outgoing president* ***M. Margaret McKeown****.*

Legal Foundation of Washington Awards

(presented in January 1990)

ISLAND COUNTY REPORT

by **JANE SEYMOUR**

Island County, consisting of Whidbey and Camano islands, is becoming one of the most rapidly growing areas of the state. The County Planning and Building departments are overwhelmed with work, as applications for building permits pour in. The number of attorneys is uncertain, estimated at around 50.

Superior court is in Coupeville, which is on Whidbey Island. The time between filing and trial averages three months for civil cases, which are pre-assigned. When Judge **Howard Patrick** retired from the bench after 16 years, Judge **Alan R. Hancock** joined Judge **Richard Pitt** on the bench.

The Island County prosecutor for 16 years is **David Thiele,** who has decided to finish out his current term and not seek re-election.

Bar association president is **Vickie Churchill** of Oak Harbor. **Molly Davis** of the Island County prosecutor's office in Coupeville is secretary-treasurer.

Issues of interest: developing CLEs and whether there ought to be an organized program of pro bono work. Off-island attorneys are invited to propose CLE programs to president Churchill,

Recent office moves: The newest attorney on Whidbey Island is **Carolyn Cliff** (litigation) of Langley, formerly of Davis, Wright in Seattle. **Jane Seymour** (real estate), formerly of Oak Harbor, is now relocated at 5589 South Harbor Avenue in Freeland.

Events: June 7, the Island County Bar Association hosted an evening of wine and cheese and a special showing of the play about the Scopes Trial, *Inherit the Wind*.

MICRONESIA REPORT

by **STEPHEN A. COHEN**

The Washington legal community in the North Mariana Islands has been enlarged by four new members. From King County, **Jon Hunt** joined the Civil Division of the Attorney General's

office, and **Bruce Turcott** has become Assistant Attorney General; **Kenneth Larsen** has become a venturer in commercial fishing business homeported in Saipan. Both Bruce and Ken have earlier experience in Micronesia. For three and a half years, Bruce was a law clerk to the Chief Justice of the Supreme Court of the Federated States of Micronesia and an FSM Assistant Attorney General. Ken was an Assistant Attorney General for the North Marianas in the late 1970s. Jon found himself on the winning side of the largest civil rights action ever brought against the Commonwealth under 42 U.S.C. 1983. Jon was the lead counsel of the defense team and received personal congratulations from the Governor for the outcome. Thurston County's **Samuel Thompson** has become the Commonwealth Supreme Court's first law clerk.

There also have been a number of job changes among the Washington crew in the North Marianas. Gonzaga Law graduate **Edward Manibusan** resigned his post as Attorney General to go into private practice with the newly renamed Salas, Gebhardt and Manibusan, and Gonzaga Law graduate **Robert Naraja** was appointed as Ed's successor. Robert would enjoy hearing from his Gonzaga classmates and can be reached c/o the Attorney General's Office, Capitol Hill, Saipan, MP 96950.

North Marianas Assistant Attorney General **David Webber** was elevated to the post of Chief of the Civil Division. **Tim Bruce** resigned as Legal Counsel to the North Marianas Senate to become Special Legal Counsel to the Governor, and **Maile Huvar Bruce** left her position as Administrator of the Coastal Resources Management Office to become an attorney for the Hawaii State House of Representatives.

The Washingtonians have continued their proclivity for travel. North Marianas Assistant Attorney General **Pat Halsell** and North Marianas Assistant Public Defender **Ronald Hammett** returned from trips to Bali. **John Biehl** and **David Nevitt**, partners in the Saipan office of Carlsmith, Wichman, Case, Mukai and Ichiki, were respectively in Hawaii and Australia, and **Tim Bruce** was in Hawaii and the Philippines.

The aforementioned **Dave Webber** was in Washington, D.C. for a session of the Supreme Court, where he witnessed oral argument on a case in which the North Mariana Islands had submitted an amicus brief, and then in Hawaii; **Jon Hunt** was in Washington, Oregon, Tennessee, Kentucky and Florida for the taking of depositions.

Gail Geiger was in Seattle, and **Steve Nutting** was in Bali, where he was joined by Seattle attorney **Thomas Schwanz. Stephen Cohen** was in Washington D.C., New York City, Los Angeles, Portland, Seattle and Tokyo.

The North Mariana Islands has received a number of tourists from the Washington legal community. The abovementioned **Thomas Schwanz** and Seattle attorney **Barry Gay** paid visits to **Steve Nutting**, staying at Steve's Capitol Hill home in Saipan. And **Florence McMullin**, investigator for Associated Counsel for the Accused, visited North Marianas Assistant Attorney General **Richard Weil,** staying at his Capitol Hill home. Richard traveled to Thailand, Malaysia and Singapore, and **Stephen Cohen** visited the Philippines, Thailand, Malaysia, Singapore and Indonesia. While in Malaysia and Singapore, he attended sessions of the Supreme Courts of both countries and visited their national law schools. The University of Washington School of Law should be pleased to learn that Singapore's law school subscribes to and keeps current the *Washington Law Review*.

Finally, the North Marianas Attorney General's Office has bid a fond goodbye to Assistant Attorney General **Marty Lovinger**. Marty has returned to Seattle. We all wish him well.

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

Judge **James Healey** recovered from his recent heart attack enough to return to his judicial duties. While convalescing, his honor got married. Congratulations on both efforts.

Davies, Pearson, P.C. reports that **Cindy M. Huff,** former urban planner with the city of Tacoma, has joined the firm as an associate. She was not the proverbial "player to be named later" in a move by **John Kouklis** from Davies, Pearson to the city attorney's office. Truth is that John was a free agent.

Don Bennett has been appointed to the House of Representatives to fill the

unexpired term of **George Walk.** Bennett never practiced law in these parts, having officed with the attorney general in Olympia. He will, however, be an additional attorney-representative from Pierce County joining **Art Wang** and **Ron Meyers** in seeing that the concerns of the local bar are not forgotten.

It appears that the price of next year's Lincoln Day Banquet will be reduced from $50 to $25 and its location moved from the Tacoma Golf and Country Club to the Sheraton Hotel downtown. There will be no open bar, thus ending the tradition of slugging down as many "free" drinks as possible during the cocktail hour and then trying to stay awake for the speech.

John Messina is the author of a book entitled *Handling Motor Vehicle Accident Cases,* which is being published by Callaghan and Company of Illinois. Those of you who don't think John knows enough about motor vehicle litigation to fill a book will take comfort in learning that members of his firm and 18 other lawyers contributed to the effort. Television and movie rights are being negotiated.

Those of us who regularly drive to the County-City Building know how hard parking space is to find. You may be interested to learn that five public slots have recently been reserved for the working press. This outrage was occasioned by a trial of a sex offender in Judge **Thomas Sauriol**'s court. On the first day of trial, the judge closed his courtroom doors at 9:30 and many members of the press and television were left standing in the hallway with no one to interview but each other. The fact that these same members of the press had earlier forced the court to disclose the out-of-county location of the jury selection process only made matters worse. Of course the press corps complained to the County Executive that they were late for court because of the shortage of parking slots. Despite the fact that there are no First Amendment guarantees of convenient courthouse parking for reporters, the public's right to know won out over the public's right to conveniently park. Next time you are walking to the courthouse in the rain, consider it a small price to pay for our constitutional freedoms or, on the other hand, try carpooling with a reporter.

On another front of the free speech war, we have Blado, Stratton, P.S. v. Olympic Savings Bank, a landlord-tenant dispute over the size of the law firm's sign on the second floor of the landlord's bank building. It seems Olympic Savings is concerned that their customers think the bank is located in the "Blado Stratton Building," while the lawyers claim they are merely expressing their right to commercial free speech.

Mergers of Pierce County law firms are in the news this month. Kane, Vandeberg, Hartinger & Walker joined with Johnson & Crawford to become Vandeberg & Johnson. Offices will be in the First Interstate Building.

Smith, Alling, Hudson & O'Connor, P.S. took in **Edward Lane** and now are Smith, Alling, Lane and will continue practice at 1102 Broadway Plaza.

Girolami, Wood & Meyers added **Brian Meikle** as a partner and **Andrew R. Hay** as an associate. Offices continue to be in the Norton Clapp Law Center.

Finally, we have news from Puyallup that **Alvin Mayhew** and **Tony Froeling** opened an office out on East Main Street across from the Milk Barn.

SEATTLE-KING REPORT

by **JAMES A. VARNELL**

Of Note. **Bruce Pym,** former president of the Seattle-King County Bar Association, annual member of this correspondent's best-dressed attorneys' list, and slugging third-baseman of one of Seattle's top softball teams, *Pro Se,* has been elected chair of the board of United Way of King County. **Stephen L. Day** has been selected to serve as regional counsel of the Interstate Commerce Commission for the 13-state Western Region. Dr. **Paul C.B. Lieu,** a faculty member in the Asian Law Program at the University of Washington School of Law, has been retained by Short, Cressman & Burgess as an advisor on intellectual property matters and business transactions with

the Pacific Rim. Lane Powell Moss & Miller, along with Security Pacific Bank, Deloitte & Touche and the *Puget Sound Business Journal* sponsored "Beyond Survival," a seminar-outreach effort for 25 new and emerging small businesses.

Three sailors from Seattle, including Lane Powell attorneys **Steven V. Gibbons** (skipper) and navigator **W. L Rivers Black** joined with two marathon runners from Alaska as the first Americans to compete in Australia's "Health Australia's Three Peaks Yacht Race." This event included sailing 317 nautical miles along the coast of Tasmania and scaling three peaks comprising a distance of 133 kilometers. Heretofore, Black had been known largely for his efforts in staging the Seattle "Southern Picnic" each August. Any grits lovers interested in attending should contact Black directly. (**Keith McClelland** take note: even Tar Heels are welcome!) Seattle Board of Industrial Insurance Appeals judge and ocean kayaker **Janet L. Smith** has received favorable reviews (including the *New York Times Book Review* of 4/29/90) for her recently published *Sea of Troubles*, a mystery novel in which a spirited Seattle attorney visits a client's exclusive resort in the San Juan Islands and helps solve a mysterious murder (in between interviews).

Trivial Pursuit. In a recent column this correspondent, somewhat in jest, it was thought, recognized one **William Creech** as the most-knowledgeable sports trivia expert to have graduated from the University of Washington School of Law. It was not known then that bestowing such an accolade (?) upon Creech would engender such envy in other sports buffs. However, a recent visit to, and chance meeting at, the Snohomish County Courthouse resulted in a severe (and undeserved) berating from **Richard Swanson,** a 1972 UW law school graduate, sometime collector and publisher of sports information, and would-be pretender to the crown.

Personality Profile. As noted elsewhere in this column, **Kathleen Elvins Gorham** has been named an associate at Mikkelborg Broz. Prior to assuming that position, Gorham had served for more than 20 years as legal secretary at Mikkelborg Broz; Karr, Tuttle; and for this correspondent from 1972 through 1978 at another firm. What should be noted, but was not stated in the law firm announcement, was that Gorham had "gone back to school" post-family and completed her undergraduate degree at the University of Washington while employed on a full-time basis, and subsequently clerked for the bar over the past four years. Although one who clerks still must pass the regular Bar exam, clerking does carry with it various disadvantages, including missing the captivating, hold-your-breath class sessions of, *inter alia:* **Roland Hjorth** in federal income tax and **Warren Shattuck** in real and/or personal property security at the UW; **Cecil Hunt**'s property law and **Mark Reutlinger**'s torts classes at UPS; and the edge-of-your-seat dissertations at Gonzaga Law School of **Marc Wilson** on Articles 3 and 4 of the Uniform Commercial Code; and **John Morey Maurice** on corporation law.

Office Moves. Hendricks & Lewis has named **L. Elise Dieterich** and **Lauren Goldman Marshall** associates. **John McKay, Mark G. Beard, Mark C. Carlson, Barry N. Mesher** and **James P. Wagner** have become members of Lane Powell Moss & Miller. Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim has named **Judith Ann Bearzi, Bradley A. Maxa** and **Donna R. Roper** partners. **John Rodda** has become a shareholder and **Rod Kaseguma** an associate at Inslee, Best, Doezie & Ryder. Bogle & Gates has named **Richard Tallman, Robert Bakemeier, James Brown, Linda Christopherson, Brian Durrell, Robert Greening, Steven Mulder, Douglas Parker, Jonathan Rodriguez-Atkatz, Robert Rohde, Philip Wagner** and **Mark Whitlow** partners. **Don Bauermeister** and **William Parker** have become of counsel.

Stuart Dunwoody, Joseph Reece and **Craig Gannett** are new partners at Davis Wright Tremaine. **Edwin Sato** has become a shareholder at Shulkin, Hutton, Bucknell. **Robert J. Rohan, Michael A. Goldfarb, David E. Breskin** and **Anthony D. Shapiro** have formed Rohan, Goldfarb, Breskin and Shapiro with offices in the Watermark Tower. **David T. McDonald, Linda K. Norman, Karl** ("No Hit") **J. Quackenbush** and **G. William Shaw** have joined together to form McDonald & Quackenbush with offices in the Washington Mutual Tower. Cable, Langenbach, Henry, Edmunds & Kinerk and Franklin & Watkins have merged to form Cable, Langenbach, Henry, Watkins & Kinerk with offices in the Key Tower. **Daniel Hoyt Smith** has joined MacDonald, Hoague & Bayless. Perkins Coie has named the following partners: **James M. Van Nostrand, Alexandra A. Brookshire, Michael L. Hall, Michael T. Reynvann, Mark D. Schultz** and **Scott F. Seablom.** Bauer, Hermann, Fountain & Rhoades has relocated to 1350 Key Tower and has added **Christopher C. Meleney.**

Mikkelborg, Broz, Wells & Fryer announces the following additions: **Margaret Doyle Fitzpatrick** and **Jess G. Webster** as partners; **Kathleen Elvins Gorham** as an associate; and **Michael R. Caryl** and

Dexter A. Washburn as counsel. **Peter B. Camp** has become of counsel with Taylor & Hintze. **James P. Donohue** has become a special partner in the Seattle office of Miller, Nash, Wiener, Hager & Carlsen. Edwards & Barbieri has changed its name to Edwards, Sieh, Wiggins & Hathaway. Graham & Dunn has relocated to the 33rd floor of the Pacific First Center. **Anthony L. Rafel** has become a partner at Culp, Guterson & Grader; **Carolyn P. Barden, William T. Cornell, Edward J. Cummings, Roslyn Solomon** and **Nancy G. Stephenson** are now associated with the firm, and **Susan L. Guthrie** is of counsel. **David G. Knibb** and **Kenneth E. Rekow** have joined Sylvester Ruud Petrie & Cruzen.

SPOKANE COUNTY REPORT

by **BERNARD McNALLEN**

Kudos: Eleven members of the Spokane law firm of Evans, Craven and Lackie have recently volunteered to serve as deputy prosecuting attorneys to assist in handling a variety of drug cases currently pending in the Spokane County Superior Court. This is another splendid example of private attorneys doing their best to contribute to their community in a meaningful and valuable way. Congratulations!

Upcoming events: The Spokane Public Defender's office will be celebrating its twentieth year and will host a reunion which will take place on June 23 at Commellini's restaurant. The reunion will be preceded by a golf tournament at the Esmeralda Golf Course on June 22. All are welcome.

Highlighting the festivities at Commellini's will be a "roast" of **Richard (Dick) Cease** who, along with the Public Defender's office, will be celebrating his twentieth anniversary as Spokane's Public Defender. **Paul Wasson** and **Kevin Curtis** will serve as masters of ceremony. This should be a fun event with fond remembrances of Cease's two decades of service to Spokane.

Worthy causes: June first saw the annual kickoff of the County Dracula Blood Drive, which was highlighted by competition between the young lawyers and senior lawyers of the Spokane Bar Association. So roll up your sleeves, so to speak.

Elections: The Spokane Bar Association had its annual meeting and election of officers for 1990-1991 as we went to press.

Additional services: The Spokane County Superior Court and Spokane Bar Association will share a fax machine and number, (509) 456-5714, for several months on an experimental basis. Volume will determine the advisability of continuing the service. Attorneys and law offices may coordinate a use of the fax machine with the bar office.

PLEASE NOTE: Until the Washington Supreme Court passes a rule governing the filing of fax materials with the court, neither the Spokane Superior Court nor the Spokane clerk's office can or will accept faxed documents for filing.

WASHINGTON WOMEN LAWYERS

The Seattle-King County Chapter of Washington Women Lawyers announces the award on May 10 of $1,000 scholarships to **Laurie A. Powers,** University of Washington School of Law, and **Laurie A. Jinkins,** University of Puget Sound School of Law. The scholarships were awarded on the bases of commitment to legal issues affecting women and need.

The Seattle-King County Chapter also hosted a luncheon on May 16 at the Stouffer Madison Hotel to honor Judge **Nancy Holman,** who was the first woman lawyer appointed to the King County Superior Court bench and has served for 20 years.

IN MEMORIAM

Clarence W. Pierce, 90, died March 10, 1990 in Seattle. Born in Peabody, Kansas, Pierce graduated from Jefferson High School in Portland, Oregon in 1919 and from the University of Washington School of Law in 1925. He practiced in Seattle for 60 years, 41 of them from an office in the Smith Tower, and became an expert in the field of probate law.

Despite his expertise, Pierce never lost the common touch, and he was known for sitting down at his typewriter to bat out wills for the indigent, charging little or nothing for them. As late as the 1970s, Pierce was charging five to ten dollars for them, a friend recalled.

During World War II, Pierce served as an Army major and earned a commendation medal for his work. He retired in 1985. Survivors include his wife.

Murray E. Taggart, 72, died April 3, 1990 in Lincoln City, Oregon. He

was a member of the Walla Walla firm of Taggart, Lutcher & Phillips. Born in Endicott, Taggart graduated from Walla Walla High School in 1935, then went to New York City, where he studied piano, voice and chorus at the Julliard School in 1936 and attended Columbia University. Returning home, he took his bachelor's degree from Whitman College in 1939 and a master's degree there in 1940. Upon graduation he joined the Army and received a direct commission. He became chief of motor transport for the U.S. Third Army under General George S. Patton, went ashore in the Normandy invasion of 1944, and was involved in the Battle of the Bulge. He retired from active duty as a lieutenant colonel with five Bronze Stars, one Oak Leaf Cluster, the Meritorious Service Commendation, and numerous campaign ribbons. Taggart later served in the reserves as a Judge Advocate General Corps lawyer.

After the war, Taggart read law at Yale, graduating in 1947. He returned to Walla Walla and set up practice; over the years he served as Walla Walla municipal court judge, county prosecuting attorney; and city attorney for several area communities. His civic activities filled a long column in his newspaper obituary. Taggart was a founding member of the Washington State Association of Municipal Attorneys.

Survivors include his wife, four children and five grandchildren.

Robert E. Stoeve, 72, died March 21, 1990 in Spokane. From 1964 until his retirement last year, Stoeve was a partner in the Spokane firm of Turner, Stoeve, Gagliardi & Goss, concentrating on personal injury and insurance defense litigation.

That was only a portion of a widely varied career for Stoeve. Born in North Dakota, he graduated from Concordia College in 1938 and the University of Washington School of Law in December 1941. He was admitted to the Bar in 1942, then served as assistant state law librarian and law clerk to Judge William J. Steinert in 1942-1943. He served with the Army in World War II and received the Bronze Star.

After the war, Stoeve settled in Spokane and worked in private practice for a couple of years. From 1946 to 1947 he served as deputy prosecutor for Spokane County, followed by a stint as assistant regional counsel for the Federal Bureau of Reclamation as a special assistant to the United States Attorney in Boise, Idaho. He returned to Spokane in 1953 and took a post as assistant attorney general in charge of the Department of Labor & Industries' litigation in eastern Washington.

Stoeve returned to private practice in 1955.

Survivors include his wife, a sister and the members of his firm.

George W. Martin, 82, died April 2, 1990 in Seattle. Born in Scotland, he emigrated with his family to Montana and obtained his undergraduate and law degrees from the University of Montana. During that time he held the Pacific Coast record for the mile, and he was a competitor in the 1928 U.S. Olympic trials. He joined the Washington State Bar in 1931 and became a partner in the Seattle firm of Helsell, Fetterman, Martin, Todd & Hokanson. He retired from practice in 1984.

Martin was widely considered to be a "Lawyer's lawyer," with a reputation for exceptional skill in trial. In the 1960s, Martin served as special master for federal judge George Boldt in a nationwide antitrust case; in 1976 he again served as special master in an Alaska native land claims case.

From 1952 to 1955, Martin served on the WSBA Board of Governors, and as its president from 1956 to 1957. He was a member of the House of Delegates of the American Bar Association from 1960 to 1963, and was a Fellow of the American College of Trial Lawyers. Survivors include his wife, a son, George W. Martin, Jr., also a Washington attorney; a daughter and four grandchildren.

Average Coupon Equivalent Yields from the Auction of 26-week Treasury Bills: 1985 to Date

These are the average coupon equivalent yields from the auction of 26-week treasury bills from January 1985 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 1990 auction of 26-week treasury bills, applicable to the computation of the maximum allowable interest rate for June 1990 is 8.28%. According to the state treasurer's office, the maximum allowable interest rate for **June 1990 is 12.28%**. Note that when the equivalent bond yield is below 8%, the *maximum* interest allowable remains at 12%.

January	1985	9.19%
February	1985	8.48%
March	1985	8.78%
April	1985	9.54%
May	1985	9.06%
June	1985	8.38%
July	1985	7.53%
August	1985	7.44%
September	1985	7.93%
October	1985	7.69%
November	1985	7.71%
December	1985	7.69%
January	1986	7.64%
February	1986	7.48%
March	1986	7.42%
April	1986	7.22%
May	1986	6.46%
June	1986	6.37%
July	1986	6.72%
August	1986	6.11%
September	1986	5.98%
October	1986	5.38%
November	1986	5.34%
December	1986	5.52%
January	1987	5.69%
February	1987	5.79%
March	1987	5.83%
April	1987	5.76%
May	1987	6.07%
June	1987	6.46%
July	1987	6.40%
August	1987	5.95%
September	1987	6.45%
October	1987	6.66%
November	1987	7.33%
December	1987	6.55%
January	1988	6.42%
February	1988	6.67%
March	1988	6.41%
April	1988	6.20%
May	1988	6.21%
June	1988	6.41%
July	1988	7.05%
August	1988	7.04%
September	1988	7.52%
October	1988	7.79%
November	1988	7.86%
December	1988	8.13%
January	1989	8.73%
February	1989	8.86%
March	1989	9.04%
April	1989	9.18%
May	1989	9.38%
June	1989	9.16%
July	1989	8.44%
August	1989	8.05%
September	1989	8.12%
October	1989	8.31%
November	1989	8.36%
December	1989	7.89%
January	1990	7.69%
February	1990	7.93%
March	1990	8.15%
April	1990	8.22%
May	1990	8.24%
June	1990	8.28%

NOTICES

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American Federal Savings v. McCaffery, 107 Wn.2d 181 (1986) Affirmance of trial court's determination of upset price in mortgage foreclosure.

In Re Marriage of Landry, 103 Wn.2d 807 (1985) Affirmance of trial court's division of military retirement pension.

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Jensen v. Beaird, 40 Wn.App. 1 (1985) Modification of computation of set-off for settlement with one defendant.

In Re Marriage of Lindsey, 101 Wn.2d 299 (1984) Reversal of trial court's refusal to divide property acquired by couple while living together before marriage.

Gammon v. Clark Equipment Co., 38 Wn. App. 274 (1984) Reversal of defense verdict in personal injury case because of defendant's violation of discovery orders.

Campbell v. A.H. Robins, 32 Wn.App. 98 (1982) Reversal of trial court's order refusing to compel attendance at trial of out-of-state officers of defendant corporation.

In Re Health Estate, 30 Wn.App. 115 (1981) Reversal of trial court's award to bank which mis-handled stop payment order.

In Re Puget Sound Power & Light, 28 Wn.App. 615 (1981) Reversal of trial court's order of public use and necessity in condemnation case.

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