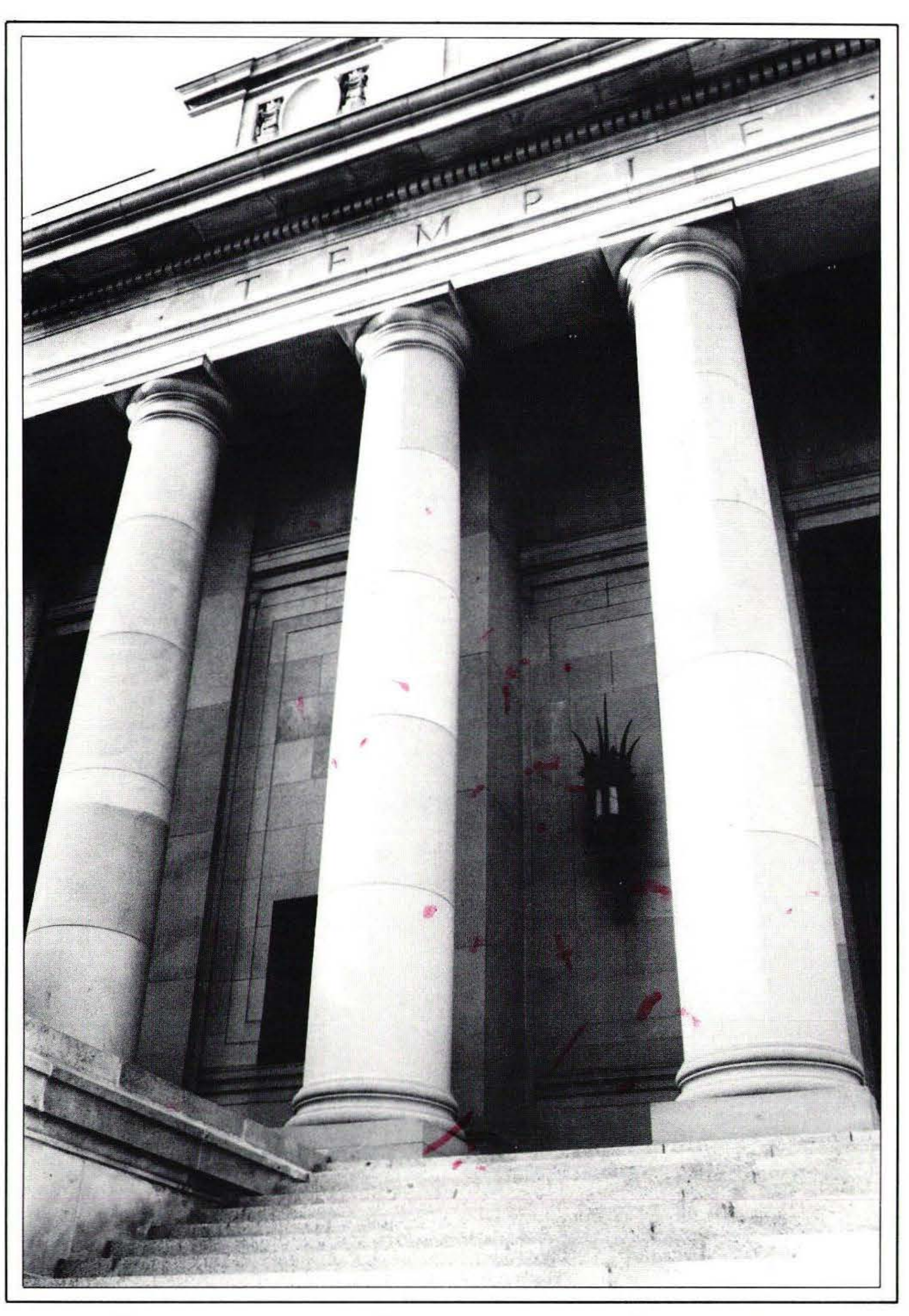
Washington State Bar News

Vol. 44, No. 7, July 1990



State Supreme Court Voting Patterns

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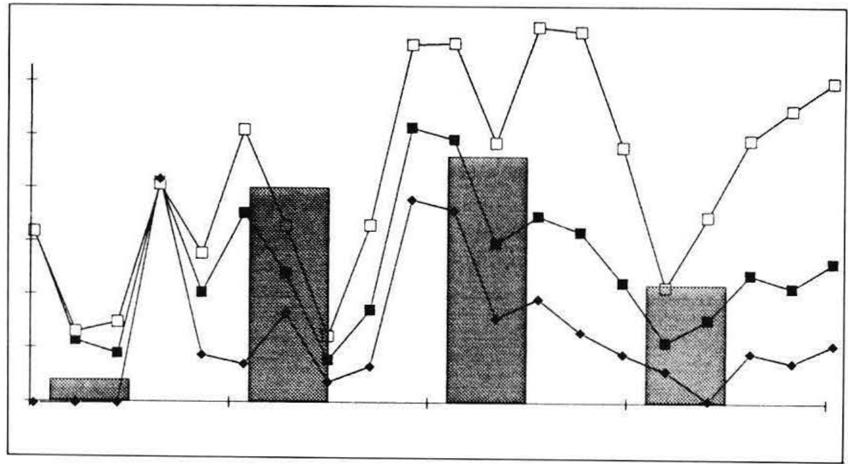

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ART CREDITS

Entrance to the Temple of Justice in Olympia, which was recently the scene of a festive rededication. (See President Vander Stoep's column on page 5.) Photo by Rothwell & Kerber of Olympia.

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LETTERS

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.

About That Desk...

Editor:

Jim Vander Stoep seems to set up an either/or scenario (April 1990 editorial "Which Side of the Desk Has Priority?"), in which he discusses the pressures on attorneys to increase billable hours. The choice presented to attorneys is to act either as professionals and serve the client or as businessmen and serve the attorney.

I submit that the only side of the desk for an attorney is the client's. In doing so, both the attorney's and the client's needs are met. As a result, more work from the existing client is forthcoming (always the best source of new business) and the satisfied client becomes an excellent referral source.

It is not a choice between a business or a profession. The only future option for attorneys is an enlightened view of client's needs, coupled with a professional package of service and product delivery to meet them.

In the increasingly competitive field, attorneys who spend too much time on the wrong side of the desk will soon not have a desk at all.

JAMES H. MITCHELL
Portland

On Public Disclosure

(The following letter was sent to WSBA President James A. Vander Stoep but authorized for publication by its author — Editor)

Dear Mr. Vander Stoep:

I am one of five commissioners of the Public Disclosure Commission. I am also a practicing attorney in Seattle. I am writing to convey to you my appreciation for the attention you and the Bar Association's Board of Governors have given to the issue of whether the disclosure of the names of clients by attorneys who happen to be public officials, as required under the Public Disclosure Act, will be a violation of the Rules of Professional Conduct.

The policy statement issued by the Board of Governors on March 17, 1990 was discussed at the Commission's meeting on March 26, 1990, and again, on April 24, 1990. Based upon our reading of the Board of Governors' policy statement on this issue, it is our expectation that attorneys will be relieved to know that they can disclose the names of their clients without fear of disciplinary action. As a practicing attorney who is required to file PDC statements of financial affairs as a public official, I personally am relieved to have the Board of Governors clarify its position in this matter.

At our meetings, we (the commissioners) expressed mixed views as to what the effect of the issuance of the policy statement will be. Some of the commissioners saw the policy statement as an indirect amendment to the disclosure law. All of the other commissioners have also taken the position that it will be difficult to grant a reporting modification request simply because a client of a law firm refuses to allow the public official/attorney to disclose his or her identity. This view is expressed more completely in a letter addressed to you by Commission chair Bruce Wilson, as endorsed by commissioners Ruth Beck, Gene Struthers, and Doug True.

Our overall view is that the Commission must still consider every reporting modification request on its own merits, taking into consideration the nature of the position held or sought and other relevant factors. In order to grant a reporting modification request, the Commission is still obligated by law to first make a finding that a manifestly unreasonable hardship exists and that a modification will not frustrate the purposes of the Public Disclosure Act. Further, a modification of the reporting requirements will only be granted to the degree necessary to overcome the hardship presented.

After reviewing the policy statement adopted by the Board of Governors, we interpret that statement as a declaration that it is not a violation of the Rules of Professional Conduct for attorneys to disclose the names of their clients when the identities of those clients "is a matter of public record as the result of court filings, listing in Martindale-Hubbell or other publication, or is otherwise a matter of public knowledge." As a matter of practice, we will interpret this statement broadly such that

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it will be our expectation that the allowance of disclosure when client identity is "a matter of public record" because of "court filings...or otherwise a matter of public knowledge" was meant to include the allowance of the disclosure of clients where the attorney has filed documents on behalf of clients which have become part of the public record and where the attorney has represented such clients in proceedings other than court proceedings, *i.e.*, administrative agency proceedings.

Further, I personally take the position that whether or not a client's identity is a "matter of public knowledge" will be interpreted broadly by both the Commission and by the Bar Association such that so long as persons outside of the firm representing the client or the firm's agents are aware of such representation, and such knowledge is not otherwise privileged, disclosure of the client's identity will not constitute a violation of the Rules of Professional Conduct.

We have also read the policy statement such that where the identity of clients is not otherwise a matter of public record or public knowledge, the burden is placed upon the attorneys to request the consent of other business, corporate and government clients when the identities of those clients is required under the Act.

There have been instances where, after receiving a request for a reporting modification, we have required the official to list the names of all clients who have business dealings with the public entity in which that attorney is an official. In such cases, it may well be that the identity of all such clients is not otherwise a matter of public record or public knowledge. We take the position that the Public Disclosure Act requires the disclosure of such clients. We read the Board of Governors' policy statement to declare that in such instances, the attorneys are required to seek the consent of those clients prior to disclosing their identities. Where consent is withheld or where seeking such consent would cause an unreasonable hardship, the attorney should thereafter seek a further request for a reporting modification.

Subsequent to and during our discussions of the policy statement, we considered a number of new requests for reporting modifications and requests for renewals of reporting modifications granted in previous years from attorneys and spouses of attorneys. Many of these requests were granted; however, the orders granting these modifications were written so as to require the disclosure of the names of clients "...within the parameters of the Bar Association's Board of Governors' policy statement." With this requirement, we have taken the position that all reportable clients can, and will, be listed. Where clients expressly object to disclosure or where obtaining clients' consent would cause an unreasonable hardship, it is up to the attorney/official to seek a further request for a reporting modification.

I wish to also add the following comments and observations regarding requests for reporting modifications by attorneys that have come before us during my tenure on the PDC. Even before this matter came to a head with the request for a reporting modification by Philip Sharpe, the PDC had been engaged in lengthy discussions over the question of how we should handle requests for reporting modifications brought by attorneys. A few months ago, an entire special Commission meeting was devoted to a discussion of such requests by attorneys.

I personally take the position that disclosure of client identities is essential to the underlying purpose of the Public Disclosure Act, and that, absent some compelling hardship, I will vote in favor of full disclosure of business, corporate, and governmental clients who pay more than $5,000 to an attorney or the law firm in which an attorney is a partner. We do not have in place in this state an ethics commission, similar to ones that exist in other states or the federal government, which monitors conflicts of interest. The closest thing we have to an ethics commission is the requirement of disclosure through the Public Disclosure Act.

Attorneys are bound by the Rules of Professional Conduct, which prohibit attorneys from representing clients when such representation gives rise to a conflict of interest. However, it is unclear whether the Bar Association's disciplinary board would have jurisdiction to impose sanctions upon an attorney who did not disclose the identity of clients whose interests might be affected, either favorably or unfavorably, by actions taken by the governmental entity to which that attorney is a member. I should add, however, that the Code of Judicial Conduct does contain an absolute prohibition against judges hearing cases that may give rise to a conflict of interest or the appearance of impropriety, and for judges, the requirements of the Public Disclosure Act are overshadowed by the Code of Judicial Conduct.

Because we do not have an ethics

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commission which serves to ferret out potential conflicts of interest, the best we can do is see to it that information is available to the public so that the public is free to investigate and divulge action by a public official that may or will have an impact upon his or her clients or vice versa. Disclosure and the availability of that information to the public is the only real assurance we have that public officials will not use their office to gain advantages for their clients or disadvantages for those who are competitors to their clients.

It is for the above reasons that during my tenure on the Commission, I have voted against and will continue to vote against broad modifications to the reporting requirements that are requested by attorneys.

ALMA M. KIMURA
Commissioner,
Public Disclosure Commission

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Whose Agenda?

Editor:

No one will doubt AIDS is a terrible disease and, as pointed out by John Kydd in his article "AIDS and Family Law" (*Bar News*, March 1990), is an issue that the courts will no doubt be dealing with more and more in the future. But I wonder if Mr. Kydd's purpose in writing his article was primarily to inform the Bar on how courts confronted by this issue can handle cases sensitively and fairly? I think not. It seems to me the purpose of the article was to tell us "old-fashioned" folks that we are silly to think same-sex "marriages" and homosexuality are not perversions, but unenlightened discrimination against persons who practice such behavior. Not only that, but us "old-fashioned" folks ought to be ashamed for not falling trap to the lie that one of the ways to cure AIDS is to legalize such behavior. What Mr. Kydd conveniently forgot to mention in his article is that homosexuals gave us AIDS in the first place — the first cancer in contagious form with no cure in sight.

JIM SPURGETIS
Spokane

Editor:

I read the article, "Aids and Family Law," on April 1 but, sadly, I believe it was not a joke.

The author prefers subjecting a child victim of sexual abuse to a "short course of AZT...to reduce the possibility of [HIV] transmission" rather than testing the alleged abuser for the antibody. AZT has serious known side effects. Apparently, protecting the abuser from stigma is more important than the well-being of the victim.

The AIDS epidemic is being cynically used to foster the anti-family agenda of the homosexual lobby. This article, for example, urges us "to retire our tired taboo against same-sex marriage" and "strike down laws penalizing private sexual behavior." It advocates "safe-sex" education to prevent AIDS, but the real goal is to teach homosexual acts to young people, presumably as an alternative lifestyle.

ROBERT J. CARPENTER
Seattle

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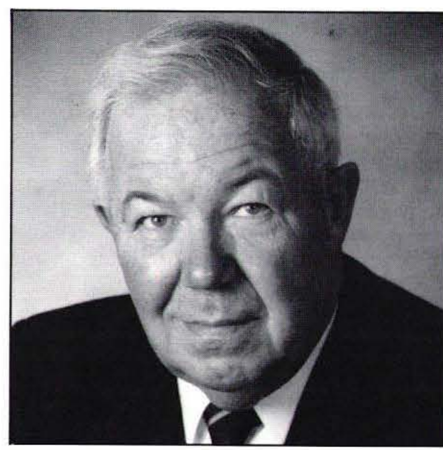
Isn't It Better To Work From Within Than From Without?



James A. Vander Stoep

At its midwinter meeting the House of Delegates of the American Bar Association, it adopted, by a somewhat narrow margin, a resolution opposing legislation that would remove the power from a woman to decide whether to terminate a pregnancy. Rightly or wrongly, this was interpreted by many as a pro-choice, pro-abortion stance by the ABA. This is, of course, a very deep-seated social/political issue of our time. Some longtime prominent ABA persons resigned from the organization and urged others to do likewise. Cooler heads—including the Catholic Health Association—concluded that the way to address the issue is from within the framework of the organization—attend the annual meeting in Chicago and gather votes to reverse the resolution. Aside from the merits of the stances of the pro-choice and pro-life groups, there is the question of whether this is a proper area for the adoption of a resolution by the ABA. It will be interesting to see what happens in August, but regardless of the outcome, I salute those who address the matter by vote within the framework of the organization.

We recently had an interesting occurrence in this state. Chief Justice Callow announced at the Seattle Rotary Club that he was appointing a Commission on Washington Trial Courts. Its mission is basically two-fold: court funding and court operation. Persons from all levels of the judiciary and many lawyer organizations felt strongly that there should have been a broader-based representation from the bench and the bar to serve on such a body. Despite entreaties from many people, Chief Callow firmly stood his ground and refused to add to or alter makeup of his appointed Commission. It is my hope that, even though there is strong disagreement with the composition, lawyers and judges will cooperate and try to learn ways whereby they can assist the Commission. We all have a vital interest in the workings of our trial courts, and it is no time to turn backs on the Commission.

These two subjects are, I believe, prime examples of opportunities to serve a purpose rather than stand and throw rocks.

J.A. Vander Stoep

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6. Minutes of all meetings of shareholders and directors (partners); five years.
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8. Loan applications; five years.
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Skills Training Duo Earns Well-Deserved National CLE Award

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

Our CLE Department has long been aware of Seattle attorneys Larry Mills (Mills & Cogan) and Dave Swartling's (Karr Tuttle Campbell) hard work and dedication to the WSBA Skills Training Course. Now their efforts have been recognized by the American Law Institute-American Bar Association (ALI-ABA) Committee on Continuing Professional Education. On August 5, in Chicago, they will be among a select few to receive the Harrison Tweed Award for Special Merit in CLE. We are proud and delighted that Larry and Dave have been chosen to receive these awards. Their professionalism and strong commitment to skills training is in the highest tradition of the Bar. Here is a brief summary of their tremendous accomplishments.

February 1987. Little did Larry and Dave know what they were getting into when CLE Director Terry Foster asked them to go for a lunchtime run along the Seattle waterfront.

His real purpose was to persuade them to serve as "Program Administrators" for the Bar's yet-to-be-developed Skills Training Pilot Course. This program was commissioned by the Board of Governors back in 1986 following reports from the Task Force on Continuing Professional Competence and a special Board-created Skills Training Committee. The course was to be aimed at newly admitted lawyers and focus on practical skills that practitioners use every day.

Central to the course is a focus on hands-on training and practical exercises, to be performed by the registrants and critiqued by experienced lawyers, specially trained to be skills instructors. Larry and Dave spent literally hundreds of hours during the next few months recruiting faculty and selecting or creating the materials that would be needed for the course. In addition, they were both on site nearly full-time during the nine days that the pilot course was presented, at the University of Washington School of Law, in September of 1987.

The pilot course was an overwhelming success, and it later received national recognition at the Arden House III conference on CLE in New York. Larry and Dave did not rest on their laurels, however. The Board authorized three additional presentations of the course, beginning in 1989. Larry and Dave continued their involvement during the second presentation of the course last year and are hard at work planning for this year's course, to be presented in Spokane from September 24 through October 2.

The Harrison Tweed Award is named for the New York attorney who was the first president of the American Law Institute and chair of its Committee on Continuing Professional Education. He was also a long-time advocate of legal aid for the underprivileged, and he became the first president of the National Legal Aid Association. These awards are bestowed annually in recognition of significant contributions to continuing legal education at the national, state, or local level, or career achievements in advancing the education of the bar. Larry Mills and Dave Swartling are richly deserving of their awards, and we extend our congratulations to them.

John J. Michalik

Voting Patterns of the Washington State Supreme

by **Eric B. Schmidt**

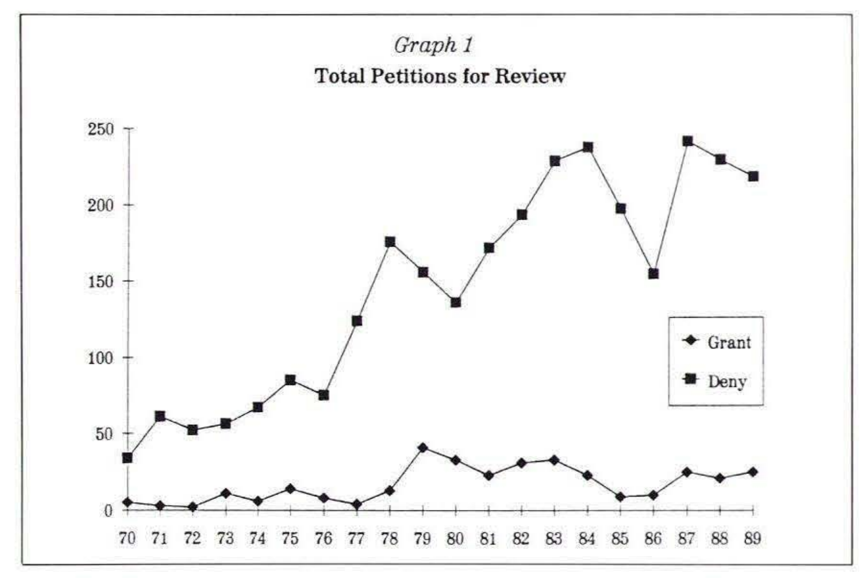
Table 1

Fate of Petitions for Review by Publication

	All Decisions				**Published**			**Unpublished**		
Year	Total	Grant	Deny	%	Grant	Deny	%	Grant	Deny	%
1970	39	5	34	12.82	5	34	12.82	0	0	0.00
1971	64	3	61	4.69	3	53	5.36	0	8	0.00
1972	54	2	52	3.70	2	31	6.06	0	21	0.00
1973	67	11	56	16.42	7	36	16.28	4	20	16.67
1974	73	6	67	8.22	5	40	11.11	1	27	3.57
1975	99	14	85	14.14	13	51	20.31	1	34	2.86
1976	83	8	75	9.64	5	33	13.16	3	42	6.67
1977	128	4	124	3.13	3	58	4.92	1	66	1.49
1978	189	13	176	6.88	10	66	13.16	3	110	2.65
1979	196	40	156	20.41	24	66	26.67	16	90	15.09
1980	169	33	136	19.53	19	52	26.76	14	84	14.29
1981	195	23	172	11.79	16	67	19.28	7	105	6.25
1982	225	31	194	13.78	19	49	27.94	12	145	7.64
1983	262	33	229	12.60	24	63	27.59	9	166	5.14
1984	261	23	238	8.81	17	73	18.89	6	165	3.51
1985	207	9	198	4.35	6	65	8.45	3	132	2.21
1986	165	10	155	6.06	10	63	13.70	0	92	0.00
1987	267	25	242	9.36	19	79	19.39	6	163	3.55
1988	251	21	230	8.37	16	58	21.62	5	172	2.82
1989	244	25	219	10.24	18	58	23.68	7	161	4.17

Graph 1

Total Petitions for Review



Introduction

The year 1989 represented two significant anniversaries for the courts of the state of Washington — the centennial of the State of Washington and the twentieth anniversary of the creation of the Washington State Court of Appeals. The creation of an intermediate appellate court transformed the Washington State Supreme Court from a court of mandatory jurisdiction to a court of discretionary jurisdiction. This relief from the obligation of reviewing all appeals has allowed the Supreme Court to selectively accept cases for review and decision, which are therefore those the Supreme Court has deemed the most important and controversial.

This article examines the decisions made by the Supreme Court in criminal cases from 1969 through October 1989, not for their holdings and conclusions, but rather for the pattern of decision-making by the Court as a whole and the individual justices. It also examines the cohesiveness of the Court in its decision-making. Finally, it examines the patterns of the Court in deciding what cases to accept for review.

The History of Discretionary Review

Until 1969, a person convicted of a crime had the right of appeal to the Supreme Court. In that year, the Court of Appeals was created and was vested with exclusive appellate jurisdiction in all but a few situations.[1] Appeals from the Court of Appeals to the Supreme Court were thereafter allowed only in the discretion of the Supreme Court,[2] which was vested with the authority of promulgating rules for consideration of "petitions for review." The Supreme Court adopted the Supreme Court Rules on Appeal (ROA) and the Court of Appeals Rules on Appeal (CAROA) (which provide for discretionary review),[3] both of which were subsequently recodified as the Rules of Appellate Procedure (RAP).

Discretionary review is to be granted:

(1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or

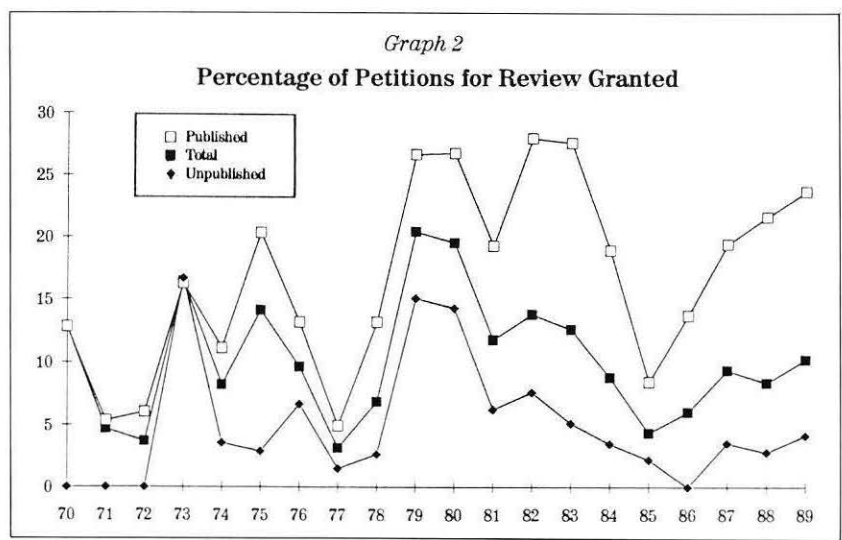
(3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.[4]

The Court maintained the right to hear the following cases upon direct review or upon certification by the Court of Appeals:

(1) cases of quo warranto, prohibition, injunction or mandamus

Court—Criminal Cases in the Discretionary Era



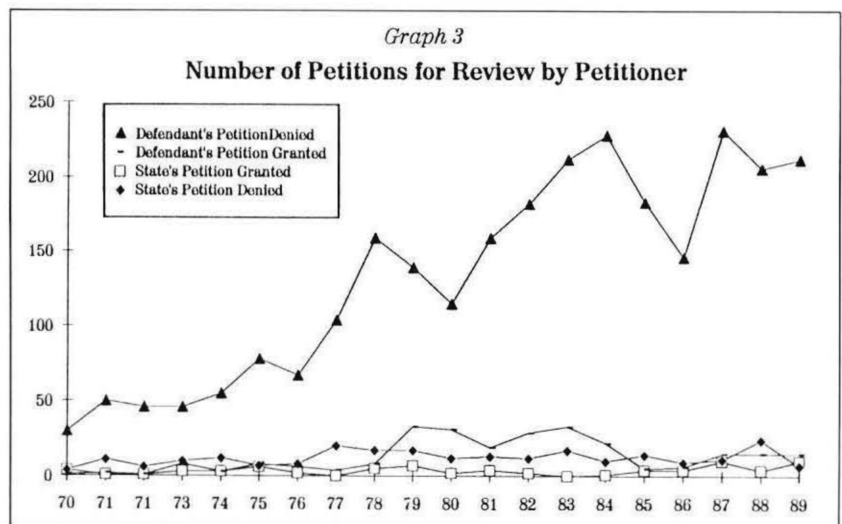


Table 2

Fate of Petitions for Review by Petitioner

	All Petitions				**State Petitions**			**Defense Petitions**		
Year	Total	Grant	Deny	%	Grant	Deny	%	Grant	Deny	%
1970	39	5	34	12.82	4	4	50.00	1	30	3.23
1971	64	3	61	4.69	1	11	8.33	2	50	3.85
1972	54	2	52	3.70	1	6	14.29	1	46	2.13
1973	67	11	56	16.42	3	10	23.08	8	46	14.81
1974	73	6	67	8.22	3	12	20.00	3	55	5.17
1975	99	14	85	14.14	6	7	46.15	8	78	9.30
1976	83	8	75	9.64	2	8	20.00	6	67	8.22
1977	128	4	124	3.13	0	20	0.00	4	104	3.70
1978	189	13	176	6.88	5	17	22.73	8	159	4.79
1979	196	40	156	20.41	7	17	29.17	33	139	19.19
1980	169	33	136	19.53	2	21	8.70	31	115	21.23
1981	195	23	172	11.79	4	13	23.53	19	159	10.67
1982	225	31	194	13.78	2	12	14.29	29	182	13.74
1983	262	33	229	12.60	0	17	0.00	33	212	13.47
1984	261	23	238	8.81	1	10	9.09	22	228	8.80
1985	207	9	198	4.35	4	14	22.22	5	183	2.66
1986	165	10	155	6.06	4	9	30.77	6	146	3.95
1987	267	25	242	9.36	10	11	47.62	15	231	6.10
1988	251	21	230	8.37	4	24	14.29	15	206	6.79
1989	244	25	219	10.24	10	7	58.82	15	212	6.61

directed to state officials; or

(2) criminal cases where the death penalty has been decreed; or

(3) cases where the validity of a statute, ordinance, tax, impost, assessment or toll is drawn into question on the grounds of repugnancy to the Constitution of the United States or of the State of Washington, or to a statute or treaty of the United States, and the superior court has held against its validity; or

(4) cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination; or

(5) cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the court or between decisions of the Supreme Court.[5]

The Process of Seeking Discretionary Review

In order to seek discretionary review, a party must file a petition for review in the Court of Appeals within 30 days after the decision is filed or after a timely motion for reconsideration has been denied.[6] The petition is then forwarded to the Supreme Court, where it is considered without oral argument by one of its two departments.[7] The petition for review is granted if it receives votes from a quorum of five justices.[8]

Voting Patterns in Granting Petitions for Review

The first study analyzes the patterns of the Supreme Court's decisions to grant or deny petitions for review; the majority of those filed in criminal cases are denied.[9] The number granted has remained relatively constant while the number denied has increased dramatically. See Graph 1 and Table 1. The percentage granted has ranged from a low of 3.13 percent to a high of 20.41 percent. See Graph 2 and Table 1.

Two questions in regard to the granting of petitions for review were considered. First, does the Supreme Court grant review more often from published Court of Appeals decisions? Graph 2 and Table 1 demonstrate that the higher court has con-

sistently granted review in a greater percentage of opinions from the published decisions than from the unpublished ones.

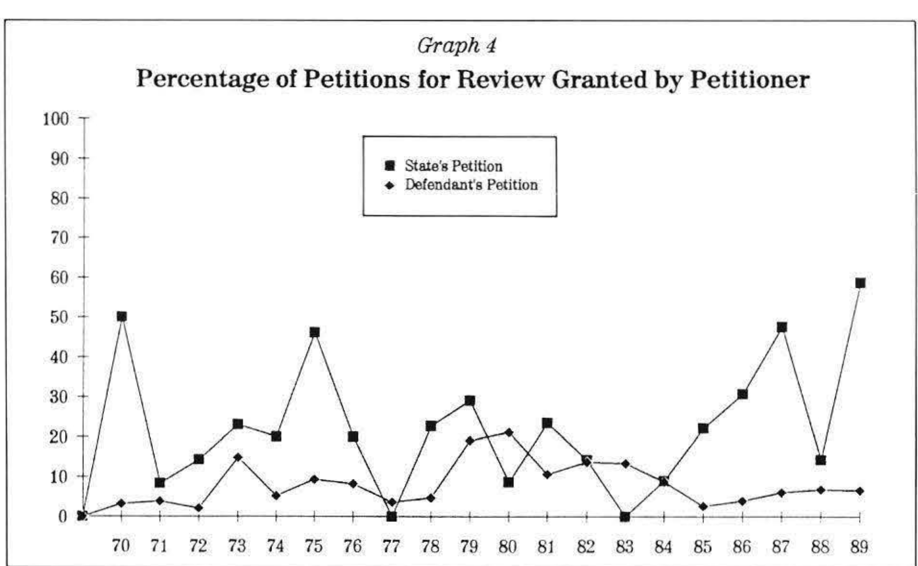
Second, does the Supreme Court grant review more often when the state files the petition for review? As Graph 3 and Table 2 demonstrate, the state files far fewer petitions for review than does the criminal defendant. However, the Supreme Court far more often grants those filed by the state than those filed by the defendant. See Graph 4 and Table 2.

Reversal Rates

How often does the granting of a petition for review result in a Supreme Court decision that reverses the Court of Appeals? Or put another way, does the fact that five justices have voted to grant the petition for review mean that a reversal is a fait accompli? Graph 5 and Table 3 demonstrate that there is no correlation between the granting of the petition and the eventual result of the case. They also demonstrate that there is no consistent difference in the reversal rate, whether the Court of Appeals opinion is published or unpublished.

Voting Patterns of the Court in Criminal Opinions

The second study examines the voting patterns of the Supreme Court as a whole during the discretionary era. Each criminal opinion[10] has been evaluated to determine the result of the case, the justices signing the majority opinion, and the justices writing or signing concurring or dissenting opinions. The first question analyzed is how often the Supreme Court votes to affirm cases which resulted in convictions or to reverse cases which resulted in dismissals. As seen in Graph 6 and Table 4, there have been three distinct periods in which the "affirmance ratio"[11] has been similar. In the years 1971-1977, the affirmance ratio was between 60 and 80 percent. In the years 1978-1984, the affirmance ratio dropped to between 38 and 53 percent, with one exception.



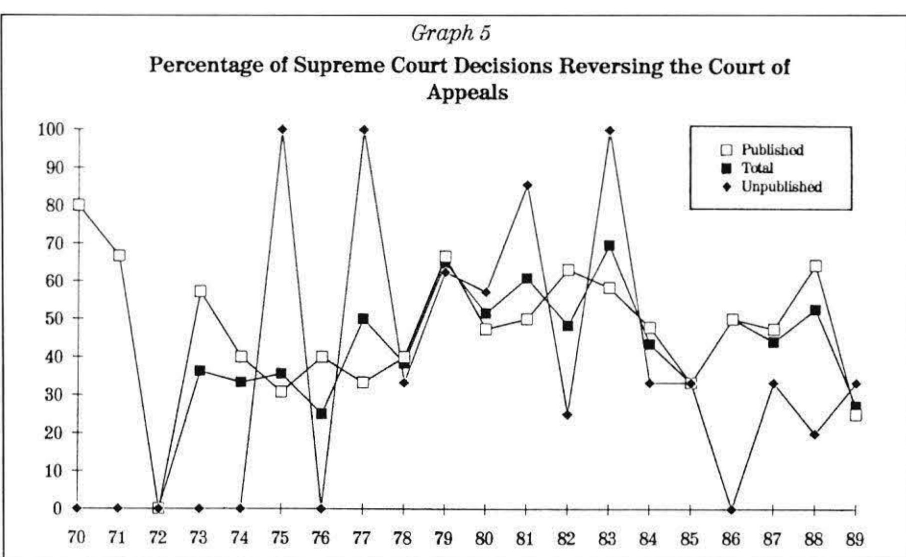


Table 3

Affirmance of Court of Appeals after Petition Granted

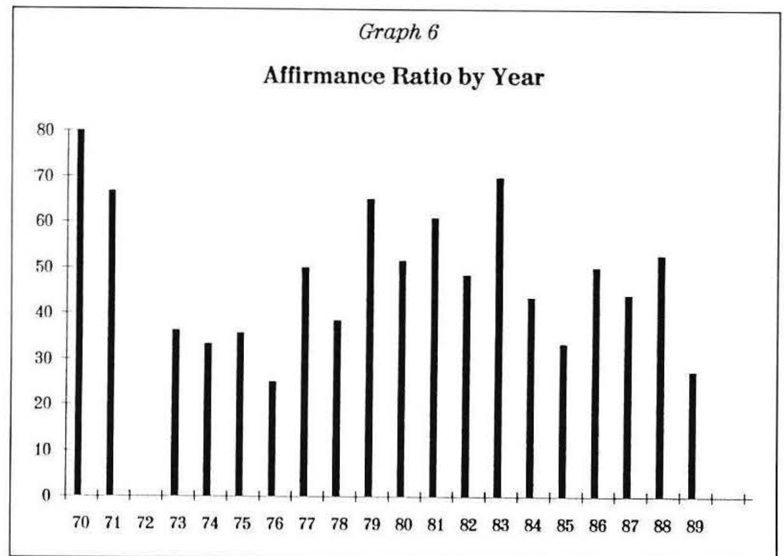
	All Decisions				Published			Unpublished		
Year	Total	Aff'd	Rev'd	%R	Aff'd	Rev'd	%R	Aff'd	Rev'd	%R
1970	5	1	4	80.00	1	4	80.00	0	0	0.00
1971	3	1	2	66.67	1	2	66.67	0	0	0.00
1972	2	2	0	0.00	2	0	0.00	0	0	0.00
1973	11	7	4	36.36	3	4	57.14	4	0	0.00
1974	6	4	2	33.33	3	2	40.00	1	0	0.00
1975	14	9	5	35.71	9	4	30.77	0	1	100.00
1976	8	6	2	25.00	3	2	40.00	3	0	0.00
1977	4	2	2	50.00	2	1	33.33	0	1	100.00
1978	13	8	5	38.46	6	4	40.00	2	1	33.33
1979	40	14	26	65.00	8	16	66.67	6	10	62.50
1980	33	16	17	51.52	10	9	47.37	6	8	57.14
1981	23	9	14	60.87	8	8	50.00	1	6	85.71
1982	31	16	15	48.39	7	12	63.16	9	3	25.00
1983	33	10	23	69.70	10	14	58.33	0	9	100.00
1984	23	13	10	43.48	9	8	47.86	4	2	33.33
1985	9	6	3	33.33	4	2	33.33	2	1	33.33
1986	10	5	5	50.00	5	5	50.00	0	0	0.00
1987	25	14	11	44.00	10	9	47.37	4	2	33.33
1988	21(a)	9	10	52.63	5	9	64.29	4	1	20.00
1989	25(b)	8	3	27.27	6	2	25.00	2	1	33.33

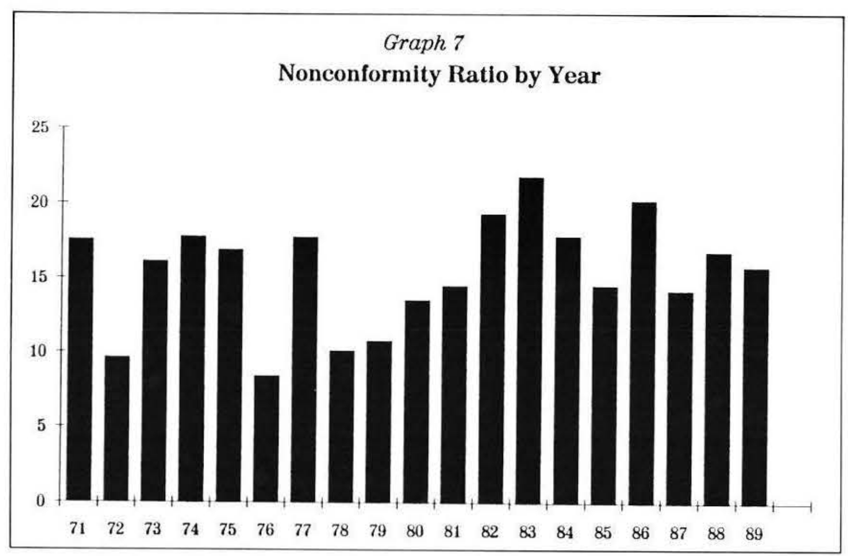
(a) 2 cases pending at end of 1989
(b) 14 cases pending at end of 1989

Table 4

Performance of Supreme Court as a Whole

Year	Total Votes	Affirmed Votes	Affirmed Ratio	Nonconforming Votes	Nonconforming Ratio
1971	222	157	70.72	39	17.57
1972	145	116	80.00	14	9.66
1973	205	160	78.05	33	16.10
1974	231	139	60.43	41	17.75
1975	219	151	68.95	37	16.89
1976	202	134	66.34	17	8.42
1977	248	170	68.55	44	17.74
1978	168	80	47.62	17	10.12
1979	315	165	52.38	34	10.79
1980	554	210	37.91	75	13.53
1981	227	158	69.60	33	14.53
1982	305	163	53.44	59	19.34
1983	312	155	49.68	68	21.79
1984	510	229	44.90	91	17.84
1985	220	140	63.64	32	14.55
1986	272	195	71.69	55	20.22
1987	261	207	79.31	63	24.14
1988	303	215	70.96	51	16.83
1989	278	219	78.78	44	15.83





Finally, in the years 1985-1989, the affirmance ratio has increased into the 70 to 80 percent range.

The second question analyzed is how often the Court was able to reach consensus in the majority opinion. The number of votes for any position other than the majority opinion — concurring opinions, dissenting opinions and concurrences in the result — were used to determine nonconformity. As Graph 7 and Table 4 demonstrate, the "nonconformity ratio"[12] does not demonstrate the trends shown for the affirmance ratio. The only consistent trend in the nonconformity ratio is that the periods of greatest increase in the ratio — 1981 to 1983 and 1985 to 1987 — have been preceded by the years of the greatest changes of justices: four each in 1979-1980 and 1984-1985.

Voting Patterns of the Individual Justices

The third and final study examines the voting patterns of each of the justices during the discretionary era. As in the second study, each criminal opinion was analyzed to determine (1) which justice wrote the majority opinion; (2) which justices signed that opinion; (3) whether any justices wrote separate concurring or dissenting opinions; and (4) which justices signed those separate opinions. Graph 8 and Table 5 summarize the votes of the justices and present the "affirmance ratio" for each justice. The justices who were on the Court during the first period of discretionary review (1971-1977) — Justices Finley through Wright — had affirmance ratios of 54 to 86 percent, with most of the justices having affirmance ratios between 60 and 80 percent. The justices who became the majority of the Court during the second period (1978-1984) — Justices Utter through Pearson — had affirmance ratios of 38 to 70 percent, with most of the justices having affirmance ratios between 40 and 60 percent. Finally, those justices who became the majority during the third period (1985-1989) — Justices Andersen through Smith — had affirmance ratios of over 75 percent, with one exception at 65 percent.

The final question considered is the frequency with which each justice chooses not to sign the majority opinion and instead chooses to concur separately or dissent. This "nonconformity ratio" is summarized in Graph 9 and Table 6. No trends are evident. The highest nonconformity ratio was that of Justice Dimmick (26.85). The lowest nonconformity ratios are those of Justices Sharp (0.00) and Hamilton (9.73).

Conclusion

The creation of the Washington State Court of Appeals in 1969 freed the Washington State Supreme Court to intervene selectively in those cases it deemed most important. A review of the Supreme Court's actions in criminal cases over the subsequent 20 years results in observation of the following trends:

(1) Petitions for review from published Court of Appeals opinions are four times more likely to be granted than those from unpublished opinions.

(2) Petitions for review filed by the state are two and a half times more likely to be granted than those filed by the defendant.

(3) The fact that a petition for review is granted does not automatically result in a reversal of the Court of Appeals opinion.

(4) In analyzing the action of the Supreme Court as a whole, there have been three periods with similar affirmance ratios: 60 to 80 percent in the years 1971-1977; 38 to 53 percent in the years 1978-1984; and 70 to 80 percent in the years 1985-1989.

(5) The tendency of the Court to have a higher frequency of nonconformity — votes other than for the majority opinion — increases in the years following the largest number of changes in justices and decreases quickly thereafter. Two explanations are possible: first, that a new majority of justices forms after a large number of changes, reducing the need to dissent or concur separately; and second, that justices dissent or concur more often early in their terms and then write less frequently.

(6) The justices most likely to affirm criminal convictions, with affirmance ratios over 85 percent, have been Justices Andersen, Durham and Sharp. The justices least

Graph 8

Affirmance Ratio by Justice

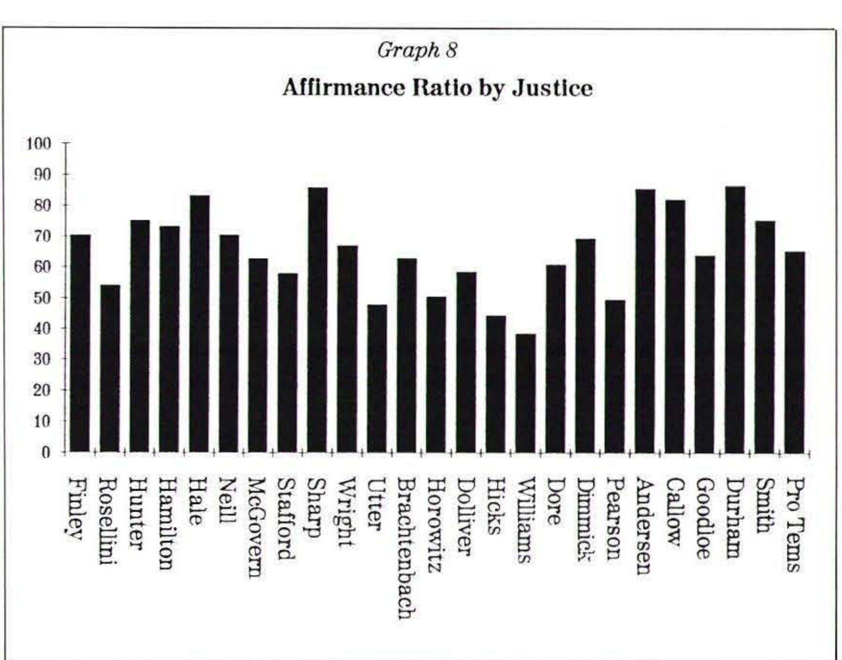


Table 5

Voting Patterns by Justice

	Conviction Affirmed/ Dismissal Reversed							**Conviction Reversed/ Dismissal Affirmed**							
	Major		*Con*		*Diss*			*Major*		*Con*		*Diss*			***Aff***
Justice	W	S	W	S	W	S	CIR	W	S	W	S	W	S	CIR	%
Finley	17	62	3	0	7	0	3	5	21	3	1	0	2	0	70.16
Rosellini	31	160	6	2	12	18	2	21	127	4	3	18	5	6	53.98
Hunter	12	85	1	1	1	4	1	2	26	1	2	4	4	0	75.00
Hamilton	18	107	2	5	0	1	1	7	42	1	1	3	5	0	73.06
Hale	7	57	7	0	0	0	2	2	14	1	0	8	3	0	83.17
Neill	1	23	0	1	0	2	1	0	7	0	2	0	0	0	70.27
McGovern	1	4	0	0	1	1	0	0	1	0	0	0	0	0	62.50
Stafford	28	163	6	4	6	6	5	24	116	3	6	3	12	1	57.70
Sharp	0	6	0	0	0	0	0	1	0	0	0	0	0	0	85.71
Wright	19	126	1	4	1	2	0	5	68	3	5	3	16	0	66.80
Utter	31	195	16	4	47	37	4	33	157	6	5	2	7	0	47.61
Brachtenbach	35	247	4	9	1	11	3	17	150	6	8	5	22	1	62.62
Horowitz	11	70	0	1	3	11	0	11	61	0	1	1	5	0	50.29
Dolliver	18	211	2	1	5	15	3	20	133	5	3	13	11	4	58.33
Hicks	8	57	0	2	2	7	0	7	65	4	1	0	1	0	44.16
Williams	9	76	2	2	4	11	0	19	103	3	6	0	2	1	38.24
Dore	15	124	8	5	18	7	5	14	72	2	1	8	11	0	60.69
Dimmick	18	54	4	2	0	0	0	7	30	2	3	12	13	4	69.13
Pearson	15	99	3	7	11	22	3	13	79	0	4	0	0	1	49.42
Andersen	16	81	1	7	0	0	8	0	15	0	3	3	7	3	85.42
Callow	9	93	1	1	2	3	1	3	14	1	2	1	8	0	82.01
Goodloe	10	53	1	1	5	8	0	6	18	0	0	0	0	0	63.73
Durham	20	77	5	2	0	1	1	0	13	2	0	6	5	2	86.57
Smith	4	17	0	1	1	1	0	1	4	0	0	0	0	1	75.33
Pro Tems	2	105	0	3	0	5	1	0	51	2	6	4	5	0	65.22

Major = majority opinion
Con = concurring opinion
Diss = dissenting opinion
W = wrote opinion
S = signed opinion
CIR = concurred in result

Notes

(1) Cases do not include personal restraint petitions, interlocutory appeals, or cases where the sentence, but not the conviction, were challenged.

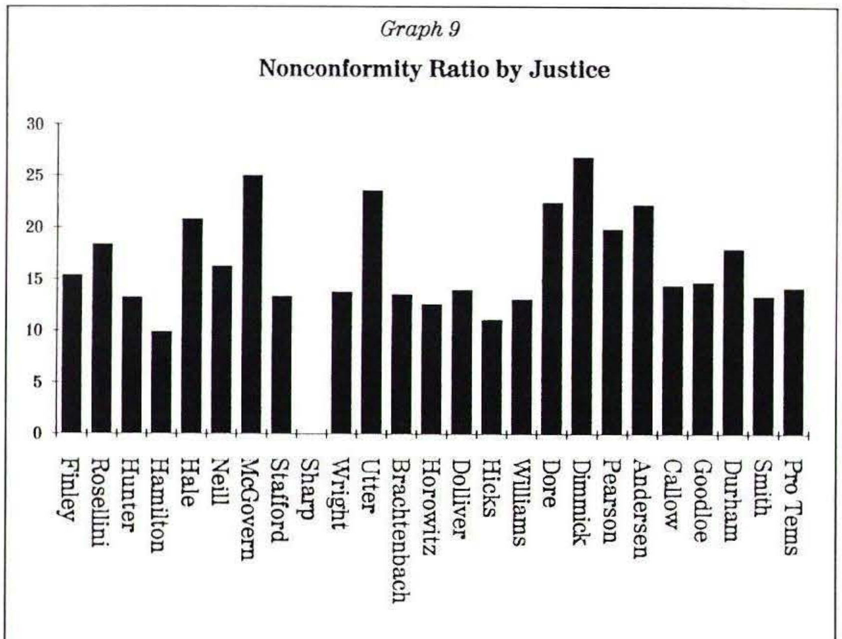
(2) "Conviction reversed" includes all cases in which at least one of the appellant's convictions was reversed or at least one of the dismissed charges is affirmed.

(3) "Aff. %" or "Affirmed Ratio" is the proportion of votes to affirm the conviction (majority and concurrence in affirming plus dissent from reversing) to the total votes cast.

Table 6

Nonconformity Ratio by Justice

Justice	Nonconforming Votes	Total Votes	Ratio
Finley	19	124	15.32
Rosellini	76	415	18.31
Hunter	19	144	13.19
Hamilton	19	193	9.84
Hale	21	101	20.79
Neill	6	37	16.22
McGovern	2	8	25.00
Stafford	51	383	13.32
Sharp	0	7	0.00
Wright	35	255	13.73
Utter	128	544	23.53
Brachtenbach	70	519	13.49
Horowitz	22	175	12.57
Dolliver	62	444	13.96
Hicks	17	154	11.03
Williams	31	238	13.03
Dore	65	290	22.41
Dimmick	40	149	26.85
Pearson	51	257	19.84
Andersen	32	144	22.22
Callow	20	139	14.39
Goodloe	15	102	14.71
Durham	24	134	17.91
Smith	4	30	13.33
Pro Tems	26	184	14.13



likely to affirm, with affirmance ratios under 50 percent, have been Justices Utter, Pearson, Williams and Hicks.

(7) The justices most likely to dissent, or concur separately, with nonconformity ratios over 20 percent, have been Justices Utter, Dore, Andersen, Dimmick, Hale and McGovern. The justices least likely to dissent or concur separately, with nonconformity ratios less than 10 percent, have been Justices Sharp and Hamilton.

There does not appear to be any "institutional identity" of the Washington Supreme Court that modifies the voting patterns of its justices. The Washington Supreme Court's voting patterns have changed drastically as new justices have brought their individual voting patterns to the Court. The better predictor of the Washington Supreme Court's voting pattern is the individual voting patterns of the currently sitting justices, not the past voting pattern of the Court as a whole.

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[1]1969 Wash. Laws, Ex. Sess, ch. 221, codified at RCW Ch. 2.06.

[2]RCW 2.06.030.

[3]76 Wn.2d xxvi-xci, xcix-clxiii (1969).

[4]Under the current rule, RAP 13.4(b), a petition for review will be granted only if one or more of these considerations are met. In the original rule, CAROA 50(b)(3)(i), the petitioner was required to prepare a jurisdictional statement as part of the petition for review that specified which of these considerations supported review by the Supreme Court.

[5]RAP 2.06.030. *See also* RAP 4.2(a). In the original Rules on Appeal, an aggrieved party had a right to appeal to the Supreme Court "[w]hen the court of appeals reverses a judgment or order of the superior court by less than a unanimous decision." ROA II-2(a), recodified at RAP 13.2(a). *See* 76 Wn.2d xc (1969). However, this rule was rescinded effective June 7, 1979. *See* 93 Wn.2d 1102 (1979).

[6]RAP 13.4(a). A motion for reconsideration must be filed within 20 days after the decision is filed. RAP 12.4(b).

[7]RAP 13.4(h). Each department consists of four justices and the Chief Justice, who sits in both departments. SAR 6.

[8]RCW 2.14.070. If a petition does not receive five votes to either grant or deny in the department, then the petition is considered en banc. *Id.*

[9]For purposes of this review of petitions for review, criminal cases include all aspects of criminal actions, including interlocutory appeals, appeals from judgments, state's appeals from dismissals, and sentencing.

[10]For purposes of this study, criminal opinions are only those reviewing judgments of conviction or dismissal. They do not include personal restraint petitions, interlocutory appeals, or cases where the sentence, but not the conviction, were appealed.

[11]The ratio of the total votes to affirm convictions and to reverse dismissals to the total votes in all criminal cases.

[12]The ratio of the number of votes for positions other than the majority opinions to the total votes cast. □

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Voir Dire—It's Short and Sweet, said One Blind Man;

by **John T. Dineen**

The bench and bar have shown little public agreement lately on what role voir dire should play at trial.[1] The recent flurry of articles and letters in local bar publications has generated much light but little resolution.[2] One small glimmer of agreement, however, has become the belief that "quality" is key to the future of voir dire in the superior court.[3]

For 14 months in 1988-1989, I studied the voir dire process in over 40 King County Superior Court jury trials.[4] Fortunately, without being forced to wear the blinders of "making my case" or "managing the court."[5] I have concluded that much of the confusion about voir dire is similar to that experienced by the blind men trying to describe the elephant; it depends on how you approach the beast.[6]

The belief that something more is needed in seating an impartial jury than merely having the court round up 12 citizens that say "I think I can be fair" dates back to early Roman law.[7] Our legal system has incorporated this belief into its trial practice by providing trial time for the voir dire process.[8] But what, exactly, is this "something" that voir dire provides? Most of the research and literature treats voir dire as though it were a singular kind of process. I suggest, however, that closer analysis reveals it to be more of a composite process: four basic but somewhat independent factors — purpose, process, impact and abuse. The following is a description of voir dire from such a multi-factor perspective:

The purpose of voir dire is to allow attorneys an opportunity to question prospective jurors for the presence of either actual or implied bias.[9] This allows for intelligent decisions about who is best suited to be seated as an actual juror.[10]

The process of voir dire develops from the generation of two rather different types of strategies. First, overt questioning must efficiently probe[11] jurors who are often unwilling participants.[12] Second, covert mental decisions[13] must make effective use of peremptory challenges.[14]

The actual impact of voir dire is complex. Some argue that voir dire, in reality, is also a process that "familiarizes"[15] jurors with certain legal concepts. One major treatise states that in addition to exposing bias, "Certainly the voir dire is an appropriate time to familiarize jurors with legal concepts, case issues, and their responsibilities as jurors."[16] The court has not fully shared this perspective.

The appropriate control of voir dire abuse has been hotly debated.[17] While it is agreed[18] that there has been serious abuse of both overt[19] and covert[20] voir dire strategies, there has been little agreement as to how court rules limiting voir dire should be structured.[21]

Hundreds of pages have been written about how attorneys should generate effective voir dire.[22] The legal literature is full of discussions and tutorials concerning what magic questions should be included,[23] how to derive strategies from social-scientific theories,[24] and how to reintegrate specific examples of prior noteworthy dialogues.[25] Some discussions emphasize overt questioning and posturing strategies, while others stress internal decision processes.

In contrast, surprisingly little has been written about the systematic analysis of actual courtroom voir dire.[26] No doubt this has helped to fuel the current debate. Much rhetoric has been produced about the lack of "quality voir dire"[27] or the abundance of "meaningless questioning,"[28] but a literature review provides little insight into how often the court is faced with these problems or even how to define these concepts. Given the somewhat curious form of the ongoing debate, I began a more empirical examination of voir dire.

My hope was that the development of an unobtrusive coding system for voir dire behavior[29] would provide a means with which to empirically evaluate such basic issues as: 1) what attorneys actually do in voir dire; 2) how the court rules actually operate to limit the voir dire process; 3) how the overall voir dire process may impact the venire; and, 4) the more specific hypothesis that attorneys do more than evaluate potential bias; they generate both informational and educational strategies during voir dire.[30]

Methodology

During the preliminary phase of this research, I informally reviewed the content of voir dire from nearly 30 prior criminal trials[31] and eventually developed a coding strategy consisting of five categories.

The categories evolved from the observation of the natural clustering of actual voir dire questioning.[32] However, they were somewhat tailored to provide insight into overt questioning patterns as well as covert decision strategies. While the covert

No!No! It's Grand and Complex, said the Other.

strategies were, by definition, unknown, the study did attempt to assess the basic types of information attorneys sought to gain for their internal decisions.

The five final categories were:

1) *Framing questions*, *e.g.*, Do you agree that Mr. Smith sits here innocent of all charges until proven guilty beyond a reasonable doubt?

These questions are really more like statements about principles of law rather than questions that probe specific issues. Often these questions were of the simple yes or no type, and sometimes they were open-ended.[33]

2) *General inventory questions*, *e.g.*, Do you have children? What books have you recently read?

3) *Experience inventory questions*, *e.g.*, Have you ever been to court? Have you ever been a victim of crime?

4) *Feelings questions*, *e.g.*, How do you feel about the police using undercover procedures in drug cases? How do you feel about the current drug problem?

The observation of this type of question over a number of trials suggests that these questions are much like framing questions in that they usually make statements about some aspect of police work. Often these questions were the simple yes or no type. For example, Do you have a problem with...?

5) *Other*. This was a catch-all category for any questions that did not fall into the other categories.

In general, any voir dire question can simply be viewed as an attorney's attempt to collect data that will help make internal, peremptory decisions. From a number of prior observations, however, it was hypothesized that the use of certain questions goes beyond simple data acquisition. For example, both framing and feeling questions often evaluate some aspect of the trial. They could, theoretically, be used as an educational tool in addition to serving as a simple informational probe.[34]

The formal study phase began by encoding, tallying, for two months,[35] the total attorney-generated voir dire for 10 criminal trials held in Department 36 of King County Superior Court.[36]

The voir dire setting was judged, in advance, to be typically constrained by court-applied voir dire limitations.[37] For example, the court asked all general questions (on average, 26), and the attorneys were instructed prior to voir dire that they could not ask questions that argued facts, indoctrinated, legally instructed, extracted promises, or probed hypotheticals. In addition, each side faced a general time limit of five minutes per juror.

During each trial, steps were taken to ensure that all coding was done without either the prosecution or the defense being aware that their questions were being coded.

Results

How could the examination of simple tally data provide insight into voir dire strategies? The analytic approach focused on three characteristics of the data: 1) basic inventory; 2) patterning characteristics; and 3) changing profile over time.

Basic Inventory

The behavior of the independent defense counsel and nine deputy prosecutors was observed.[38] The ten criminal trials covered a variety of crimes, including rape, burglary, assault, and VUCSA.

In seating 120 jurors for the 10 trials, 202 veniremen were questioned. Four thousand two hundred seventy-eight questions were asked. The court interrupted or limited questioning a total of 30 times by either asking counsel to re-phrase a question or to move on to other matters. At no time did the court stop questioning based on time limitations alone.[39] Attorneys generated questions that could be coded into the four primary encoding categories 93% of the time with only 7% falling into the "other" category. Figure 1 shows the overall percentage profiles of each coding category and the total number of questions asked in each category.

A breakdown of these data into average trial statistics revealed the following: Framing questions were generated 48 times on average, with a range of 30 to 87 questions, *i.e.*, the least asked for any trial was 30, and the most asked for any trial was 87. General inventory questions were generated 114 times, with a range of 20 to 196. Experience inventory questions were asked 161 times, with a range of 93 to 444. Feeling questions were asked 74 times, with a range of 30 to 102. Finally, other questions were generated 31 times on average, with a range of 15 to 49.

Attorneys asked the most questions from the general and experience inventory categories. This cluster of questions represented, on average, 275 questions — 55% of all questions asked. However, the range of these two categories was quite large, from 113 to 640 questions, which suggests that attorneys showed less than a consensus as to which specific inventory questions provided an appropriate data base for peremptory decisions.

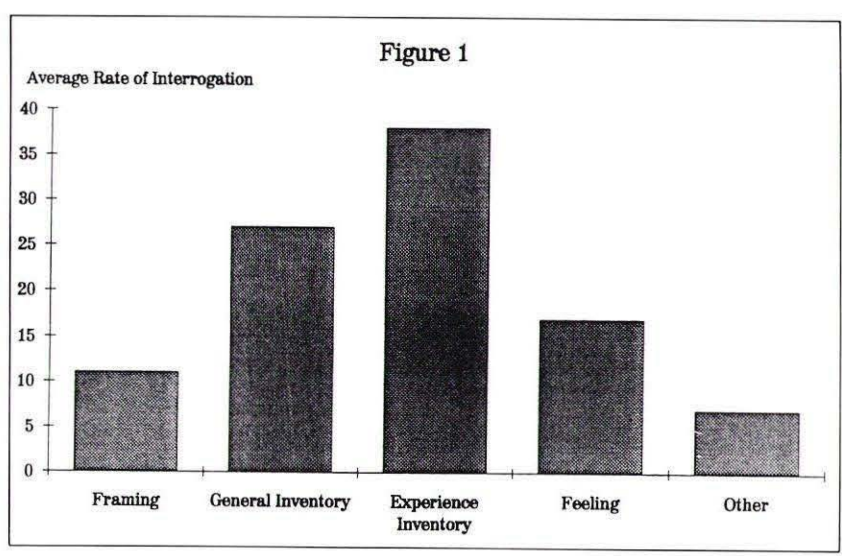
The number of court-imposed limitations on questioning behavior during the actual voir dire process were relatively few in number, three on average. This may have been due, in part, to the court's general procedure of setting specific voir dire guidelines prior to the start of voir dire.[40]

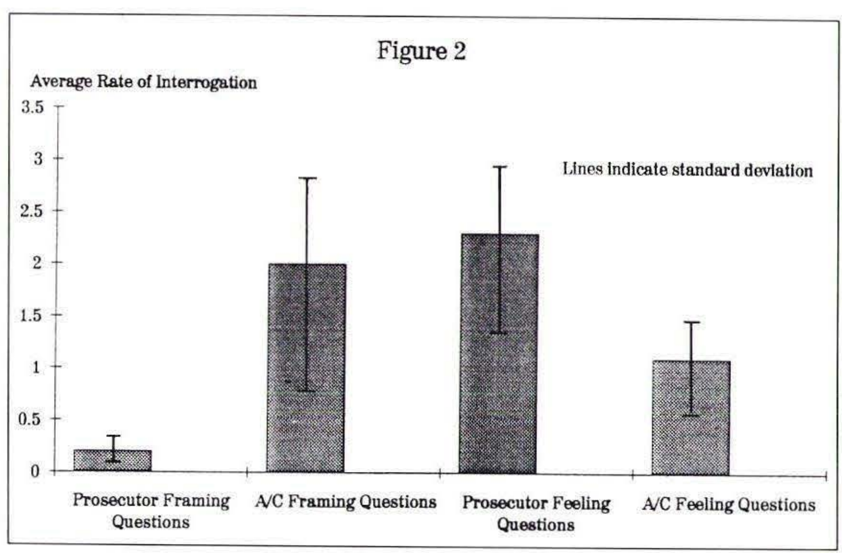
Pattern Characteristics

More qualitative analysis turned to the issue of whether attorneys generate overt questioning patterns. The data in Figure 1 was broken down and re-plotted in terms of the prosecutor's behavior versus the defender's behavior.[41] The data revealed both similarities and differences. Figure 2 clearly shows two distinct patterns.[42]

First, the prosecution generated a number of feeling questions and very few framing questions. Second, the defense generated the exact opposite pattern — many framing questions and fewer feeling questions. This result was not all that surprising, since most framing questions explored such basic principles as "the presumption of innocence," "the defendant not being required to take the witness stand," "the state's burden," etc. In contrast, feeling questions focused on such issues as "the current crime epidemic," "undercover police work," "the drug problem," etc.

Data analysis failed, however, to reveal any clear patterns or differences for any other category.



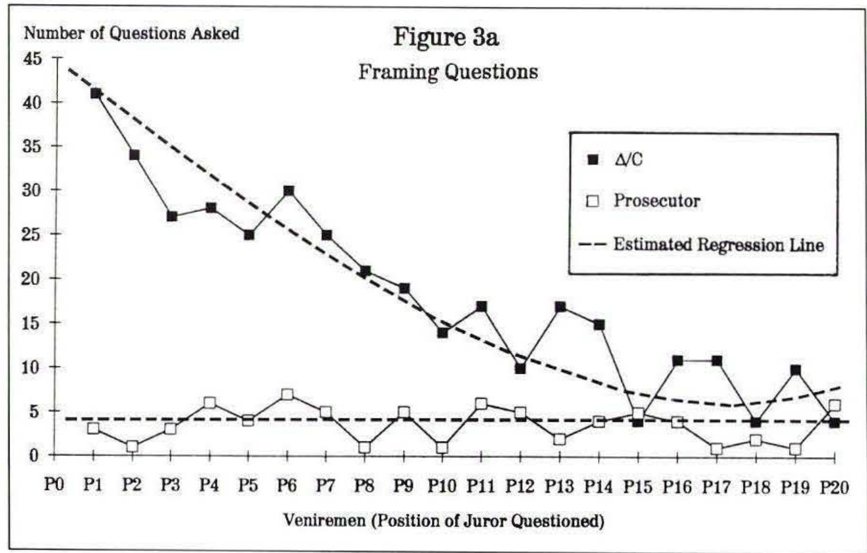


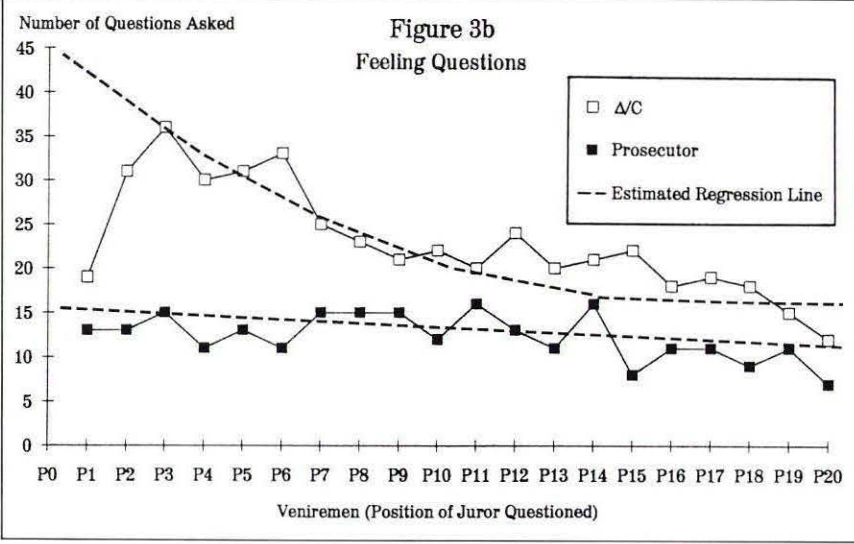
Profile Changes

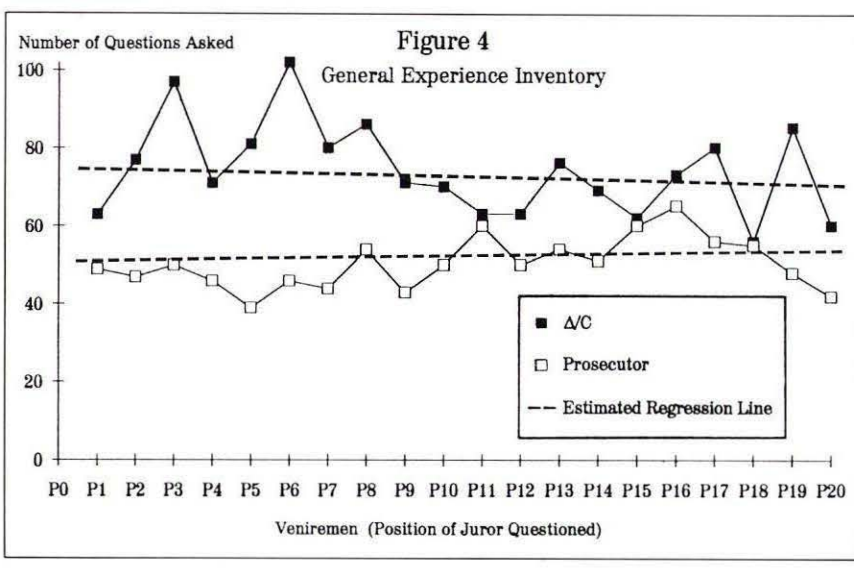
Finally, data analysis investigated the hypothesis that questioning behavior changes as voir dire progresses.[43] To evaluate such a hypothesis, the combined data in Figure 2 was broken down and re-plotted in "quasi" real time.[44] Figure 3 is a plot of the framing and feeling questions asked by the prosecution and defense, plotted over time as voir dire progressed.[45] The graph clearly shows how questioning profiles for feeling and framing questions changes as the veniremen are sequentially questioned.[46] Since this change over time was not present for any other question category (see Figure 4),[47] it was concluded that these changes in questioning patterns represented a "strategy-like" process[48] as opposed to other explanations, such as attorney fatigue or court limitations.[49]

The curves seen in Figure 3 also bear a remarkable similarity to inverted learning or shaping curves described in the psychology literature.[50] For example, the general profile of framing questions generated by the defense revealed an initially high generation followed by a slow tapering off as voir dire progressed. Do framing questions actually serve two purposes: 1) to probe for bias and 2) to shape the overall cognitive environment facing the venire with certain legal principles? The prosecution neither generated many framing questions nor did they show any overt pattern to the few framing questions they did ask.

The exact opposite profile is seen for feeling questions. For these questions, it was the prosecution that generated the inverse shaping curve. Do feeling questions serve the dual purpose of: 1) probing for bias and 2) shaping the cognitive environment of the venire with certain perspectives on crime, investigation methods, etc.? The defense generated a much lower number of feeling questions without any overt pattern to their behavior.







Discussion

The data from this study will be discussed from two somewhat different perspectives. First, they provide insight into several issues related to the ongoing local voir dire debate. Second, they bear directly on the hypothesis that voir dire serves both informational and educational purposes.

The Local Voir Dire Debate

When viewed quantitatively, the data from this study demonstrated that an attorney's independent role in voir dire is still alive in superior court.[51] For example, during the average voir dire, attorneys: 1) were able to generate a variety of different voir dire questions; 2) were allowed to individually examine 20 veniremen in order to seat 12 jurors; 3) were allowed to ask over 427 questions probing for actual or implied bias; and 4) were constrained by the court only three times.

The study also provides some insight into how the local voir dire debate may have evolved. It is a bit ironic, however, that the current "discussions" between the bench and bar are so similar to the heart-felt debates relived daily in the courtroom itself — two parties observing the same scene but generating such differing perceptions of "what happened."

From the court's perspective, most attorneys generate a needlessly large number of questions during voir dire. This has been confirmed, to a degree, by the documentation of the large number of inventory questions asked during our study.[52] Judges may also believe that many voir dire questions are meaningless or wasteful.[53] However, almost nothing has been written spelling out exactly what courts hold as meaningless or wasteful.[54] In contrast, the perspective of many attorneys is that the court has lost sight of just how complex, or perhaps subtle, voir dire really is.[55] They believe that the imposition of arbitrary limits on time and content is irresponsible and promotes injustice.[56] The

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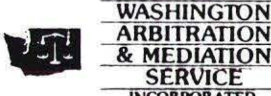
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data from this study demonstrate the following.

First, those questions that have been hypothesized to serve the dual function of inquiry and education (feeling and framing questions): 1) were more limited in number by the attorneys themselves; 2) served a clearly overt purpose; and 3) were more consistently generated across trials.[57] Second, the more basic inquiry questions (general and experience inventory questions): 1) were numerous; 2) showed no pattern to their generation; 3) showed a lack of consistency in application; and 4) did not diminish in generation as voir dire progressed (see Figure 4). The generation of these questions ranged from 113 in one trial to 640 in another! While this study did not attempt to break down this specific category into subcategories for analysis, informal observations suggested that these questions were too numerous, often lacked a clear purpose, and they took on the appearance of being tedious and wasteful for both the court and the venire.[58]

Whether many of the inventory questions did actually provide counsel some sophisticated insight for covert decisions was not evaluated. Such a hypothesis is doubtful, however, given that no attorney had employed expert voir dire consultants who were using "special" or "subtle" demographic information.[59] In general, the "overt" appearance of these questions suggested that many were tailored more to the purpose of "getting to know" a venireman or, as unbelievable as it may seem, simply to provide "breathing room" during trial.[60]

In the world of actual courtroom voir dire, this study suggests that attorneys, while probably focusing more on internal decision strategies, must also keep aware of the overt appearance of their questions. The failure of questioning strategies to provide some degree of overt insight into their covert purpose may put voir dire in jeopardy. The current limitations on voir dire, however, have not eliminated counsel's ability to generate educational strategies.

Evaluation of the Educational Side of Voir Dire

The data from this study document that attorneys tailor individualized voir dire strategies on at least two different levels. At what I have called the inventory level, attorneys generate a variety of specific questions aimed at probing individual veniremen for actual or implied bias. Such questioning strategies, however, are also the focus of the local court rules limiting voir dire by applying general time constraints and content limitations.[61]

At the pattern level, Figure 2 clearly shows that individualized voir dire strategies survive in spite of court limitations. For example, contrast the differences in emphasis between the prosecution's and the defense's focus on either framing or feeling questions. It is assumed that these patterns were preplanned or conscious, overt strategies. The effectiveness, however, of such strategies at exposing bias remains far from clear.[62] Furthermore, this study did not examine the specific impact of such an emphasis on specific jurors or trial outcomes. Two points, however, remain clear. The different emphasis strategies generated either by the prosecution or the defense appear well-tailored to important trial issues, and these differences clearly survived the current limitations imposed on voir dire by local court rules.[63]

This study also empirically demonstrates that there are changes in how certain questions are asked as voir dire progresses (see Figure 3).[64] To discriminate between these more global or macro patterns[65] and the simple random repeating of questions requires a time-frame analysis.[66] However, when properly evaluated, the generation of these time-based patterns bear a striking resemblance to learning and shaping curves.

Whether these patterns were consciously developed and whether such a pattern of question asking behavior had a cognitive impact on the venire remains unanswered. The data, however, were remarkably consistent. The same general patterns were seen in all ten trials. Three facts

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are clear about this level of voir dire behavior. The questioning of the venire changes as voir dire progresses; veniremen sit through an environment that appears to cognitively frame a variety of trial specific issues; and these behaviors survive court limitations.

As some have suggested, the overall cognitive environment that veniremen sit through as voir dire progresses has a variety of "educational-like" characteristics.[67] It provides quite specific information to the venire. It places differential emphases on this material. And it presents the material in a manner that may maximize its intake. (The actual impact of this educational environment on individuals was not addressed in this study.) Some argue, for example, that "juror education" does not take place without a specific type of transactional dialog between a potential juror and an attorney.[68]

Further Observations and Comments

In spite of the court's insistence that the voir dire process is limited to the purpose of uncovering bias, the reality of voir dire is that it probably serves multiple functions.[69] Regardless of the impassioned pleas of attorneys, voir dire is filled with questions that provide little beyond social chitchat.[70] So what's left? At a less-empirical level, this study also provided the informal observation that voir dire appeared to produce a kind of cognitive "consistency."[71]

Generally, jurors have little trial experience. The court pulls a group of people off the street, labels them jurors, spins them around a couple of times, assigns them to a courtroom, and turns them loose on a trial. While most know generally of such basic trial concepts as "the state's burden," or "the defendant's right not to take the witness stand," voir dire brings home the somewhat more specific courtroom application of these principles. It does this, not by reading a rule, but by rehearsing the principle, changing the perspective a bit here and there.[72] This is, perhaps, what the data in Figure 3 are all about.

The initial observation of some 40 trials suggested that voir dire provided a consistency across trials as to the jury's focus, commitment, and process.[73] This consistency, however, is not generated from the rehearsal of counsel's theory of the case. It does probably emerge from efficient voir dire of the basic principles of a jury trial. This informal theory is not without some support in the research literature.[74]

Experimental evaluation of juror deliberation in trials conducted with or without attorney-generated voir dire found that adversarial voir dire had the effects of: 1) minimizing the impact of extraneous pretrial publicity, 2) eliminating jurors who were easily swayed, and 3) encouraging jurors to follow the law and resist group pressure.[75] "Our data suggest that voir dire examinations sensitize jurors to the importance of the law and of examining the evidence. Jurors selected with voir dire make a public commitment, which may explain the fact that they do not display great shifts of votes during deliberations."[76]

So, where do all the insights, research, data, and theory leave us? Back to the beginning: "Quality voir dire" would solve many of the current problems. A successful definition of "quality voir dire," however, certainly needs to encompass a realistic perception of the dynamics surrounding each of the individual aspects of voir dire: purpose, process, impact, and abuse.

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[1] *See*: "Truth or Consequences — Is Voir Dire Really a Waste of Time?," by Paul Luvera, *Washington State Bar News*, pages 11-14, May 1989 and "The Purpose of Voir Dire," by the King County Superior Court Judges, *Washington State Bar News*, pages 10-11, August 1989.

[2] "In justice," "failure of judicial responsibility," and the mere promotion of "efficiency" have been used to describe the current limitations on voir dire in King County Superior Court. See #1 above. The court has suggested that these criticisms are "...overstated, if not inaccurate, generalities..." and that the current limits on voir dire are in response to abuse, lack of attorney preparation, and the "...meaningless questioning of citizen jurors...." *See* #1 above.

[3] *See*: "The Purpose of Voir Dire," page 11, #1 above and "Truth or Consequences — Is Voir Dire Really a Waste of Time? A Judge's Rebuttal," by The Honorable David A. Nichols, *Washington State Bar News*, pages 7-9, August 1989.

[4] While serving as a clerk/bailiff, I was allowed to encode the voir dire for all criminal trials in Department 36 of Superior Court during the period from January 1989 to February 1990.

[5] Much of the current debate has, at its core, the fact that attorneys see voir dire as one thing while the court sees it as something else. During this study, I brought neither bias to the data.

[6] Each side to the voir dire debate emphasizes different aspects of the process. Neither side is blind to the other's perspective; however, the public side of the debate suggests that the analogy is appropriate.

[7]*See* footnote #1 in: "The Effect of Peremptory Challenges On Jury and Verdict: An Experiment In Federal District Court," by Hans Zeisel & Shari Seidman Diamond, 30 *Stanford Law Review*, at 491, 1978.

[8]*See* King County Court Rule 47. Also note: not all common-law systems hold this perspective to the same degree of importance. Such countries as England and Canada successfully conduct their trials without voir dire.

[9]CrC 6.4 and RCW 4.44.170, 4.44.180, and 4.44.190.

[10]CrC 6.4.

[11]While attorneys are making internal decisions about which jurors are best suited to sit on the jury, they must employ an overt questioning strategy aimed at probing a potential juror's beliefs.

[12]*See* "Jury Self-Disclosure in the Voir Dire: A Social Science Analysis," by David Suggs & Bruce D. Sales, 56 *Indiana Law Journal*, 245, 1981 and *The Jury in America*, by John Gunther, page 58, 1988.

[13]These refer to the internal decisions that attorneys must make for peremptory challenges.

[14]Since attorney-conducted voir dire is adversarial and peremptory challenges are limited, attorneys must make very careful use of their strategies.

[15]"In the Valley of the Blind: A Primer On Jury Selection In a Criminal Case," by Herald P. Fahringer, 43 *Law and Contemporary Problems*, at 120, 1980.

[16]*Jurywork Systematic Techniques*, 2nd Ed., by the National Jury Project, Inc., 1984, at 10-3.

[17]*See* #1 above.

[18]*See* "Truth or Consequences," #1 above, at 11.

[19]There are few specific definitions of overt questioning abuse; however, it generally refers to needless, over-intrusive, or stalling practices. *Also see*: "Voir Dire Examination of Jury Panel," by the Honorable Robert W. Winsor, *Washington State Bar News*, pages 23-27, July 1980.

[20]For a discussion of covert abuse *see*: "Affirmative Selection: A New Response to Peremptory Challenge Abuse," by Tracey Altman, 38 *Stanford Law Review*, 781, 1986. This paper, along with several others, discusses the use of peremptory challenges to shape the racial profile of the impaneled jury.

[21]*See* #1 above.

[22]I have reviewed over 100 articles, books, letters, and treatises on voir dire. This is in addition to at least two CLE handbooks: *Voir Dire Changes in the Wind: Learn to Use It or Lose It*, WSBA CLE, 1988, and *Effective Jury Voir Dire*, CEB - California, Fall, 1989.

[23]*Jurywork*, #16 above; *Effective Voir Dire*, #22 above; "Jury Selection and Voir Dire in Criminal Cases," 30 *Am Jur Trials*, 561; *Jury Selection in Criminal Trials: New Techniques and Concepts*, by Ann Fagan Ginger, Law Press; *Jury Selection, An Attorney's Guide To Jury Law and Methods*, by V. Hale Starr & Mark McCormick, Little Brown, 1985; *Jury Selection In Civil and Criminal Trials, Vol. II*, by Ann Fagan Ginger, Law Press, 1985 edition; *Calloghan's Trial Practice Series: Jury Selection Strategy and Science*, by Lisa Blue & Jane Saginaw, 1986.

[24]"The Conduct of Voir Dire: A Psychological Analysis," by Valerie P. Hans, 11 *The Justice System Journal*, 1986; "The Limits of Scientific Jury Selection: Ethical & Empirical," by Michael J. Sak, 17 *Jurimetrics*, 1976; *Jurywork*, #16 above; *Jury Selection in Criminal and Civil Trials*, #23 above; "Jury Selection in Criminal Trials: New Techniques and Concepts," #23 above; "State-of-the-Art in Jury Selection Techniques, More Science Than Luck," by Margret Covington, *Trial*, Sept. 1983, page 84; *Voir Dire Changes In The Wind*, #22 above; and *see* a discussion about jury consultants in: *The Wall Street Journal*, Oct. 24th, 1989.

[25]*See* #s 23 & 24 above. There are many excerpts from actual courtroom voir dire in the literature. Usually, however, they are reprints of short dialogs between an attorney and a prospective juror and are usually used to show or emphasize the use of such questioning strategies as open versus closed questioning. *See generally, Jurywork Systematic Techniques*, #16 above.

[26]Review #16 above.

[27]*See* "Truth or Consequences," #1 above.

[28]*See* "The Purpose of Voir Dire," #1 above, at page 10.

[29]This unobtrusive coding scheme recorded the questions generated by counsel by the tally of questions on a preprinted form, which provided space for recording each question for each attorney for each category for each veniremen.

[30]*See* #16 above.

[31]The analysis of voir dire was initially done informally. A variety of tentative hypotheses about the form of voir dire questions were examined before the final categories were formalized.

[32]Generally, categories were based on the natural clustering of voir dire questioning behavior. The distortion of the natural categories from the observer's bias/opinions was limited as much as possible.

[33]Voir dire treatises discuss the differences in effect between open-ended questions and simple yes-no questions. It is generally felt that open-ended questions are better. *See* #23 above.

[34]There are a variety of educational tools in a setting such as voir dire. Here I suggest that "statement-like" questions could shape or frame certain aspects of

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the case, *e.g.*, Do you agree that there is a crime epidemic? *Also see*: "Developing Voir Dire Questions: A Defense Viewpoint," by Michael J. Myers, in *Voir Dire Changes in the Wind*, #22 above.

[35]The use of a tally sheet provided the least intrusive method of data recording.

[36]*See* #4 above.

[37]Voir dire limitations in Department 36 were dictated specifically by the court rules. Voir dire was not as controlled as in federal court nor was it open-ended.

[38]Three defense attorneys were privately retained; the rest were assigned from either OPD, SCRAP, or ACA.

[39]Twice the court did remind counsel that their time was running short.

[40]Not only were guidelines discussed prior to voir dire, but a list of the court's general questions was given to each attorney. Counsel were also asked which general questions they would like to see the court ask.

[41]Data analysis was not cast in a typical significance test format. To say that these patterns were significantly different at the .01 or the .005 level was not the goal. What was important was to develop the ability to detect trends, which could be better evaluated at a later date. The finding that questioning levels were different beyond one standard deviation (as seen in Figure 2) was more than enough to warrant future inquiry.

[42]The data in Figure 2 are normalized. Normalization was done to offset the fact that different trials questioned different numbers of veniremen. The method was to divide the number of observations in each category by the sample size.

[43]Informal observations had suggested that framing questions were asked more during the beginning of voir dire than at the end of voir dire.

[44]I refer to "quasi" real time because the graph sequentially plots the first 20 veniremen as they were sequentially examined in each trial.

[45]The same parameters apply to both plots: framing and feeling questions.

[46]Figure 3 shows that the change was systematic. The dashed lines represent hypothetical best-fit regression lines; *see* #50 below.

[47]The plots for all other categories were random (*see* Figure 4). A best-fit regression line is near horizontal, *e.g.*, *see* the prosecutor's pattern for framing questions and defense's pattern for feeling questions in Figure 3.

[48]The forms of the framing and feeling curves were simply too structured and consistent to be artifacts.

[49]If fatigue caused questioning to decrease, why didn't all the other questioning categories taper off? *See* #47 above and Figure 4.

[50]*See* general discussions of learning curves in such treatises as: *Handbook of Operant Behavior*, by Werner K. Honig and J.E.R. Staddon, Prentice-Hall, 1977 and *Handbook of Learning and Cognitive Processes, Vol. 1 Introduction to Concept and Issues & Vol. 2 Conditioning and Behavior Theory*, W. K. Estes, Lawrence Erlbaum Associates, 1975.

A more interesting potential match of experimentally generated learning curves and the data gathered from this study comes from data published about the concept of "learning how to learn" or "insight." For example, *see*: L.B. Ward, *Psychological Monographs*, 1937, Vol. 49, No. 220, page 13. Here, it was generally shown that people or animals faced with learning unfamiliar or complex tasks grew successively better (took less time) to accomplish a task as presentation was repeated. The identical "inverse" curve was seen as successive presentations of the task were graphed against time to accomplish goal.

[51]It has been proposed by some that voir dire has been rendered useless by the local court rules (*see* #1 above). Whether the results would be different, however, for other courts imposing very strict voir dire limitations is unanswered. This study does provide a working model from which to generalize about the moderate application of voir dire limits.

[52]While somewhat arbitrary, it was felt that the 640 inventory questions was a lot.

[53]*See* #1 above.

[54]*See* materials in #23 & #24 above.

[55]*See* #1 above.

[56]*Id.*

[57]While these two categories pushed closest to arguing one's case during voir dire, they also appeared to be the most controlled and to have the clearest purpose. The line, however, between arguing one's case and basic trial principles is fine at best.

[58]This was based on informal observation; specific evaluation was not done. While counsel seemed aware that the court would closely control framing and feeling questions, they did not seem to be as concerned that inventory questions were being scrutinized as well.

[59]Many of the questions would provide only peremptory insight if counsel was working from some super-detailed demographic. No indication of this was observed. For example, it is possible that a statistician could show that one's house color relates to some important political or psychological profile, but no such information was evident at any trial studied.

[60]I do not suggest that such behavior was aimed at disrupting the trial.

[61]*See* #s 8 & 9 above.

[62]The emphasis of this study is on the fact that the educational environment is generated. Whether actual jurors took advantage of it, were indoctrinated by it or were enlightened by it was not addressed. Perhaps this question can never be adequately answered without too much distortion of the process. In addition, other areas of jury research argue that jurors are quite reluctant to express bias or "tell the truth," no matter what questioning strategies are used. *See* #12 above.

[63]I refer to the pattern data as overt strategies. I did not specifically ask, however, whether counsel actually intended

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to employ such a strategy.

[64]*See* #50 above.

[65]I use the words "global" or "macro" in the sense that the generation of such patterns required the production of many questions, spanning the entire voir dire process.

[66]A random, nonpatterned profile would have a horizontal regression line, *e.g.*, the rate of questioning would neither increase nor decrease over time. (*See* Figures 3 & 4.)

[67]*See* #16 above. "Prefacing questions to jurors in a way which discusses the aspects of the case and relates it to them can plant the seeds necessary for them to accept your version of the case when presented." *See* "Developing Voir Dire Questions: A Defense Viewpoint," #34 above at 3A-8.

[68]It has been argued that juror education is "...best accomplished through a give-and-take questioning process that encourages the prospective juror to think about the issues she or he will confront in a trial." *See* #16 above.

[69]*See* #s 9 & 10 above. The reality I refer to is the cognitive environment generated by counsel.

[70]*See* #1 above.

[71]I felt that this consistency was seen in nearly all the juries I have studied. It is also due, however, to such non-voir dire factors as judicial presence, instructional formats, and general courtroom demeanor factors.

[72]What serves as too much or the wrong kind of rehearsing is far from clear. It certainly depends on the circumstances. There is a fine line between proper rehearsal and the waste of time. Perhaps that is why the framing and feeling curves taper off, while other questioning patterns do not.

[73]*See* #71 above.

[74]"Voir Dire By Two Lawyers: An Essential Safeguard," by Alice M. Padamer-Singer, Andrew Singer & Rickie Singer, 57 *Judicature*, 386, 1974.

[75]*See* discussion of footnote #74 in *Jurywork Systematic Techniques*, #16 above, at pages 2-24 & 10-3.

[76]*See* #74 at 391.

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Port Ludlow, Washington: June 15-16, 1990

Present: President Vander Stoep and the Governors. Also present: C.C. Bridgewater (Prosecuting Attorneys' Assn.); Fred Butterworth (SKCBA Trustees); Harold Clarke (WSBA/YLD); Judge David Draper (Superior Court Judges' Assn.); Frank Edmondson (Government Lawyers' Assn.); Mary Fairhurst (Washington Women Lawyers); Ed Holm (Legal Foundation of Washington); Mike Larson (SKCBA/-YLD); John J. Michalik (WSBA Executive Director); Judge Dan Phillips (District Court/Magistrates' Assn., Friday); Judge Roy Rainey (District Court/Magistrates' Assn., Saturday); Lindsay Thompson (*Bar News* Editor/Clark County Trustees); Judge Phil Thompson (Court of Appeals Judges' Assn.), and Robert Welden (WSBA General Counsel).

Well, as Garrison Keillor might say, it was a quiet weekend at Port Ludlow. The big news was the president's announcement that on a recent fishing excursion he hauled in a 56-pound salmon. After the hubbub and accolades died down, the Board proceeded to other business:

Interest(ing) News: Executive director John Michalik told the Board the finances of the Association are in good shape. The Board's plan to develop a reserve account for the future is progressing: there is now $100,000 gathering interest as reserve account funds. Going through the line items in the financial report, Michalik noted that interest income for the Association is booming: $106,000 had been budgeted; $94,000 is already earned. Governor Lem Howell of Seattle praised the Young Lawyers Division for their assiduous development of outside income sources: they have raised 152% of their budgeted income.

No, We Didn't Say That: The Supreme Court has published proposed amendments to CR 26(b)(3) dealing with calculation of contingent fees in light of the Novack Commission report and the Board's responses to it. Trouble is, the proposed rule says it was recommended by the Board of Governors, and the Board were quick to point out that they didn't recommend what the Court says they did. After some pointed characterizations of the proposed amendment ("nonsensical," "makes no sense," "will hamper settlements"), Governor Jeff Tolman proposed sending a delegation to see the Court. It passed unanimously, and Governors Stritmatter, Curran and Schultz were appointed to go and sort it out.

Lights! Camera! Evidentiary Ruling! Governor Steve DeForest of Seattle reported on a proposed court rule codifying regulations for letting the media into the courtroom. The Supreme Court was considering two amendments to the proposed text of GR 16. The goal was to bring the rule in line with recent model rules recommended by the ABA, and to take away the present ability of a witness, juror or party to block broadcasting of voice or picture by the media. The

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origins of the idea were a request some years ago by a reporter that the playing field be leveled: print journalists could quote trial proceedings verbatim, while electronic media could not in live manner.

The two amendments varied in leaving in, or taking out, the ability of jurors, witnesses and others to veto media presence. It was noted that the new rules would allow the judge the discretion to set ground rules and would open the processes of the courts to the public.

Governor John Schultz opposed making any change. "There's a difference between running trial proceedings in the newspaper and the sensationalism television can bring to a court," he said. "Judges may have a veto, but they won't do anything with it under this rule because they tend to be afraid of the media. It ought to be left up to the litigants."

Jeff Tolman was concerned about the revelation of information about jurors and witnesses in notorious cases which could place them in danger. The judge could limit coverage, DeForest said. Judge Phil Thompson of the Court of Appeals thought trying to keep the media out was more trouble than letting them in. "After a while, they lose interest" if they are let in, he said. Schultz then moved to approve the original version of the Court's proposed rule, without either amendment. A lengthy discussion ensued; Schultz's motion was passed 7-3, Governors DeForest, Gould and Turner opposed.

And Then They Wove the Net a Little Finer: The Governors approved amendments to RPC 1.14 which would require financial institutions to notify the WSBA when lawyer trust accounts become overdrawn. WSBA General Counsel Bob Welden and Nancy Gibbs, vice president and senior counsel to Seafirst Bank, presented the proposed rules, lately revised to take into account problems the banks had with the original reporting rules.

Governor Lem Howell thought the proposal a classic example of Big Brotherism, because it will require that lawyers, once notified of an overdraft, report it to the WSBA Disciplinary Counsel and explain why it occurred. "You're compelling lawyers to testify against themselves, and it doesn't take into account accidental or erroneous overdrafts." Governor Don Curran thought it was a good idea. "I may not know what's going on in bookkeeping in my firm," he said. "This will help me make sure I am in compliance with the rules. It does me a service." The amendments were approved, 8-2, Governors Howell and Tolman opposed.

The Joy of Sections: The WSBA needs a 20th section, Tacoma lawyer Claude Pearson says, and he came to Port Ludlow to argue for the creation of one organized around interest in alternative dispute resolution (ADR). The Legislature is writing mediation and arbitration clauses into laws all the time, Pearson said, but not saying how it will be handled, by what rules or standards, or much of anything. A section can mobilize interest better than the current WSBA

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committee, and ought to be approved right away so it can get involved in the 1991 legislative session. He asked the Board to waive the normal requirement that there be a six-month waiting period before the creation of a new section.

Executive director John Michalik said a couple of sections had indicated they might object to the creation of the ADR section because of overlaps with their sections' work. Pearson said he had a summit meeting with section heads coming up shortly and was confident he could get them to sign off on the creation of the new section.

After a lengthy presentation by Pearson and others, Governor Lem Howell suggested putting the matter out for comment by the sections and dealing with it in July by waiving the six-month waiting period.

Governor Ron Gould opposed waiver, saying other sections might feel railroaded. Paul Stritmatter thought it a bad idea to waive the period, usually employed to get the feelings of other sections, when we already know of section objections. But in the end they decided to carry it over to July and see how things stand then.

There, That's One Less Committee to Have to Make Appointments to:

The Board took note of the utter lack of activity of the Lawyer Referral Committee in recent years and the increasingly computerized nature of the actual referral process, and decided to eliminate it.

A question arose whether the Board of Governors' deliberations on Client Security Program cases--where people put in for reimbursement of monies paid to lawyers who served them badly, or not at all--should be turned over to a Board committee if they fell below a certain dollar amount. These matters take a lot of time for the Board in executive session. Should the deliberations be in open session, Jim Turner wondered. No, everyone said, that's not the sort of thing you want to get into in public. An unhappy client might make all kinds of allegations about a lawyer in a request, and all of that would be out in the open, even if the allegations were found to be meritless. Governor Lem Howell proposed referring the question of creating a Board committee to the general counsel for drafting of a bylaws amendment and rules; it passed unanimously.

How Much Is Enough? Governor Lem Howell raised his objections to the committee selection process. He felt his district, the 7th, underrepresented and thought a rule of strict proportional representation should be followed. A table prepared by John Michalik was considered, showing the 7th had 24% of active WSBA members on May 1, 1990 and 16% of committee seats. Excluding special disciplinary counsel and fee arbitration panel members, the 7th had 20% of the committee seats.

Governor Steve DeForest circulated a memo noting that the numbers are a little skewed by the fact that they are based on residence, not place of work, which in the Seattle area gets confusing. He reworked Michalik's numbers by combining the 1st, 7th and 8th districts (Seattle and environs) and the 2nd through 6th districts (everywhere else) and found the latter had 37.9% of active members and 49.8% of committee seats. He thought a realignment ought to be phased in over the next

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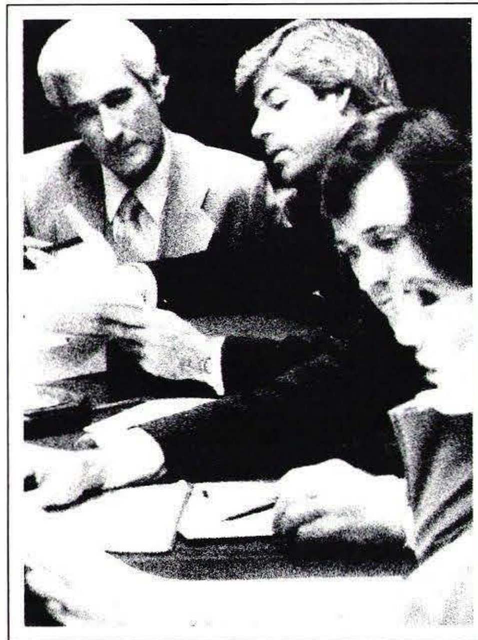

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three years as seats come up for review.

Governor John Schultz objected. "There's no problem here. The staff memo spells out the situation accurately. Apparently Lem's idea is that King County ought to have a majority on all committees." With the census redistricting coming up next year, everything will change anyway, he continued. Why not wait until then? In the meantime, there's a lot to be said for diversity of view on committees and making sure that non-King County lawyers get a meaningful role in the Association they, too, are members of.

Besides, said Schultz, warming to his theme, King County runs everything anyway. He produced a list of WSBA section chairs: "13 of 19 are from King County," Schultz said. "Who's fooling whom?" A look at committee chairs during the debate revealed 18 of 28 are from Seattle.

Paul Stritmatter said King County doesn't rule everything in the Association, but lots of people in his district feel that way. This issue could foster such views and prove divisive, he thought. Besides, he said, opportunities for non-King County lawyers to participate in any kind of bar activities are vastly fewer than for King County lawyers, so a marginal overrepresentation on some committees serves a useful purpose.

Governor Bill Bergsten thought it was "kind of silly to be talking about percentages of lawyers. That's not what we are about. We're trying to get a fair representation of lawyers from around the whole state."

"I'm not trying to be divisive," Howell countered. He said he was just trying to get some fairness. In the 4th District one has a one in five chance of a committee appointment, he said. "In the 7th it's one in 19." With the discussion bogging down and no resolution in sight, the president expressed a desire to move on to other business, and the Board did so.

Retainers and Advanced Fees Distinguished: The Board adopted a new formal opinion discussing the difference between "advance fee deposits" and "retainers." The former are client funds which must be deposited into a trust account until earned and withdrawn. Retainers are earned upon payment and should not go into trust accounts. The opinion recommends that this distinction be drawn to the client's attention in writing to avoid problems down the road. The opinion was adopted unanimously and will be published in the *Bar News* upon receipt of the official text.

Keeping Secrets: Federal law requires lawyers who are paid over $10,000 in cash to reveal who paid them. On the other hand, a 1990 informal WSBA opinion held that a client's identity is a secret and divulging it can be a disciplinary matter. A new proposed formal opinion would have held that lawyers not divulge such information except as set forth in RPC 1.6. Governor Ron Gould read a letter from the U.S. Attorney's Office for the Western District of Washington asking that action be delayed a month so there could be consultations with the U.S. Department of Justice and a presentation by the U.S. Attorney's Office at the next Board meeting. The Governors agreed to wait.

The New Commission on the Courts: Created by Chief Justice Callow and directed to look at everything under

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the sun relating to the courts and produce a final report by year's end, the Commission on Washington Courts is no favorite of the Board. They feel, virtually to a person, that it is doing an end run around the WSBA with respect to some issues previously referred to it by the Chief Justice, and that its membership is not representative. The Board invited commission chair and former WSBA president Bill Gates up to tell them about it, and see what the commission specifically plans to look at.

The Chief Justice is concerned about a lack of uniformity in operation and quality of various aspects of the state courts, Gates said, as well as the methods by which they are funded. It has divided into three committees: one on funding, which he chairs; one on district and lower courts, chaired by former legislator Delores Teuesch; and one on the superior courts, chaired by Rep. Marlin Appelwick. All will be having hearings in the next month, will have a draft report in October, have some hearings on the draft in November, and produce the final report in December.

Members of the Board tried a number of approaches to learn what the commission will study. Items like adopting six-person juries, requiring parties to accept pro tem judges, and the like are exceedingly feared. Yes, Gates said, those are all in the mix. Beyond that, the exchanges were pretty much amiable fluff, Gates maintaining he didn't know what the commission would end up doing in detail. There were jaw muscles flexing all around.

Wrap-up in Port Ludlow: In other action, the Board:

o heard a report by Paul Stritmatter on the most recent meeting of the Superior Court Judges' Association;

o heard a report from Governor Jim Turner on plans for the Board's annual planning retreat, to be held in Vancouver, WA in August;

o approved some technical amendments to the bylaws of the Young Lawyers Division;

o voted to hold the 1994 WSBA convention in Seattle;

o voted to take no position on the current controversies surrounding the National Endowment for the Arts;

o heard a report from former WSBA Governor Steve Reisler on the work of the state Commission on Judicial Conduct;

o heard a report from the Board's Computerization of Law Committee; and

o voted to send the WSBA's delegates to the ABA convention uninstructed on the issues to be taken up there.

Future meetings: July 20-21, Moclips; August 17-19, Vancouver, WA; September 11-15, Spokane (Annual Meeting).

BOARD OF GOVERNORS ELECTION RESULTS

Here are the results of elections to the WSBA Board of Governors:

Third Congressional District: Mary Fairhurst of Olympia and Steve Tubbs of Vancouver will go into a July runoff. Pat Sutherland of Olympia was the third candidate. Paul L. Stritmatter of Hoquiam is the outgoing Governor.

Sixth Congressional District: Montell E. Hester of Tacoma was elected over David Murdach of Tacoma. William P. Bergsten of Tacoma is the outgoing Governor.

Eighth Congressional District: Thomas J. Chambers, Jr. was elected unopposed. James S. Turner is the outgoing Governor.

King County At Large: Alva C. Long of Auburn was elected over Kelly Corr of Seattle. Steve DeForest is the outgoing Governor.

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

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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.

Tacoma attorney **John D. Karna** (admitted 1987) was ordered suspended from the practice of law pending the outcome of disability proceedings by Supreme Court order entered May 10, 1990.

Tacoma attorney **John J. Dorman** (admitted 1980) was ordered suspended from the practice of law pending the outcome of disciplinary proceedings by Supreme Court order entered May 10, 1990.

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

Disciplinary Notices:

Disbarred: Seattle attorney **Jean H. Scharf** (admitted 1977) was disbarred by the Washington Supreme Court on December 11, 1989. The Court's order was based upon 14 counts of misconduct, including failing to keep client funds in a trust account, failing to keep adequate records of client funds, failing to refund unearned fees, refusing to account for client funds, aiding and abetting third parties in defrauding clients, excessive fees, dishonest, fraudulent and deceitful billing practices, neglecting legal matters, violation of previous disciplinary orders to pay costs of disciplinary proceedings and refusing to cooperate with Bar investigations.

Disbarred: Seattle attorney **Sonya K. Scharf** (admitted 1980) was disbarred by the Washington Supreme Court on December 11, 1989. the Court's order was based upon 30 counts of misconduct, including failing to keep client funds in a trust account, failing to keep adequate records of client funds, failing to refund unearned fees, refusing to account for client funds, excessive fees, dishonest, fraudulent and deceitful billing practices, neglecting legal matters, incompetent representation, and refusing to cooperate with Bar investigations.

Disbarred: Olympia attorney **Charles E. Street, III** (admitted 1982) was disbarred by Supreme Court order on March 28, 1990, following an uncontested disciplinary hearing, based on his neglect of three clients' matters,

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his failure to communicate with three clients, his failure to expedite litigation in two of those clients' matters, a pattern of conduct that demonstrated unfitness to practice law, and non-cooperation in the Bar's disciplinary process.

Suspended: Olympia attorney **John S. Lynch, III** (admitted 1975) was ordered suspended from the practice of law for two years by order of the Washington State Supreme Court effective April 26, 1990.

Lynch was suspended for his conduct, while employed as deputy prosecuting attorney, in making an unauthorized photocopy of a photograph of another deputy prosecutor and members of the undercover drug unit and taking the photocopy home. Through Lynch's negligence the photocopy was removed from his home and ended up in the hands of a drug dealer. It was discovered by the police during a raid on the drug dealer's residence. The disclosure of this photocopy resulted in an unprecedented complete change in the members of the undercover drug unit in order to protect the members of the unit.

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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 June 1990 is 8.03%. The maximum allowable interest permissible for **July 1990** is therefore **12.03%**. Compilations of the average coupon equivalent yields from auctions of 26-week treasury bills appear on page 39 in the October 1987 *Bar News* for 1982-1984, page 37 of the June 1989 *Bar News* for 1984-1989, and page 51 of the June 1990 *Bar News* for 1985-1990.

(Items for inclusion in "Digest" should be sent 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.)

Formal Opinion #185
Ethical Duty of a Lawyer Who Guarantees Payment on Behalf of a Client to a Creditor from Proceeds of Settlement or Judgment

Question:

What are the ethical duties of a lawyer who guarantees payment, either orally or in writing, on behalf of a client to a creditor such as health care provider, from proceeds of settlement or judgment?

Discussion:

Frequently, a lawyer representing an injured person in a contingent fee case is requested by a health care provider or other creditor to guarantee payment of the creditor's claim (not related to the expenses of the litigation) from the proceeds of any settlement or judgment recovered on behalf of the client in return for an agreement by the creditor to forego any attempt to collect the debt in the meantime. At times a creditor such as a health care provider may ask the lawyer and/or the client to sign a lien form or other written "guarantee"; at other times, the creditor may merely accept the assurances of the lawyer that the debt will be paid from any settlement or judgment. Assuming that the client consents to such a "guarantee," a lawyer may properly enter into such an arrangement with a client's creditor.

The ethical dilemma arises when, after settlement or judgment, the client requests that the lawyer disburse all proceeds of the settlement or judgment directly to the client, without paying the creditor.

Rule 1.14(b)(4) requires that a lawyer pay at a client's request all funds in the lawyer's possession which the client is entitled to receive. The question is whether the client is entitled to receive those funds which the lawyer, with the client's consent, has guaranteed would be paid to the creditor.

Before the lawyer may guarantee payment of such funds, or advise a client to sign a lien or guarantee, the lawyer must explain the matter to the client "to the extent reasonably necessary to permit the client to make informed decisions regarding" the lien or guarantee. RPC 1.4(b). This explanation may be included in the written contingent fee agreement. RPC 1.5(c). The explanation should include the advice to the client that once the client has authorized the lawyer to guarantee payment of such debts, that authorization is irrevocable by the client. If the client subsequently has a good-faith dispute as to the amount to be paid, the lawyer should advise the client and the creditor that the lawyer will continue to hold the funds in trust until the dispute is resolved.

Assuming that the client has been properly advised of the effect of making or signing a guarantee or lien, and has consented thereto, the Committee is of the opinion that, absent a good-faith dispute as to the amount of debt claimed by the creditor to be due, the client has

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authorized payment of those funds by the lawyer and is no longer "entitled" to disbursal of those funds by the lawyer. Further, the Committee is of the opinion that failure by the lawyer to honor a guarantee or lien the lawyer has signed or agreed to in connection with representation of a client would violate RPC 4.3 where the lawyer has failed to correct a misunderstanding by an unrepresented person as to the obligation by the lawyer to pay the creditor; and would violate RPC 4.4, which prohibits a lawyer from using means that have no substantial purpose other than to burden a third party, in this case by misleading the creditor into believing that the debt of the client would be paid.

If the lawyer had entered into such a "guarantee" without the client's consent, then the lawyer may not withhold the funds from the client if the client requests them. Whether by making such a "guarantee" the lawyer has obligated himself or herself to the creditor is a legal question on which the Committee can render no opinion. However, representing to a creditor of a client that the lawyer had authorization to enter into such an arrangement when the client had not consented to it might constitute a violation of RPC 8.4(c) and might subject the lawyer to discipline.

Financial obligations owed by a client, such as medical bills owed to a health care provider, must be distinguished from expenses related to litigation, such as expert witness and court reporter fees. See, ***In re Witteman***, 108 Wn.2d 281, 737 P.2d 1268 (1987); ***Copp v. Breskin, et al.***, 56 Wn. App. 229, ___ P. 2d ___ (1989).

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).

According to the Bylaws of the Washington State Bar Association, proper resolutions and reports received by the Board of Governors at least sixty (60) days prior to the Annual Business Meeting are to be published in the *Washington State Bar News* prior to such Annual Meeting. The Annual

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The price for the 1989 WAC is $320, and sales tax of 7.8% applies to all sales other than to state agencies and out-of-state subscribers. State law also requires payment in advance of shipment. To order the WAC, send your name and street address (UPS will not deliver to PO Box), along with your check or money order in the amount of **$344.96** (tax included, no shipping or handling charges in US) to:

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The Official Code of State Agency Rules

Business Meeting of the Washington State Bar Association shall be held on the morning of Friday, September 14, 1990 beginning at 8:30 a.m. at the Sheraton Hotel, Spokane, WA. Proper resolutions and reports received by the Board of Governors by 5 p.m. on July 16, 1990 will be published in the August 1990 *Bar News*.

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.

Notice of Public Hearing on Resolutions

As announced in the June *Washington State Bar News*, the Resolutions Committee will hold a public hearing prior to the Annual Meeting. The hearing is scheduled for 9 a.m. on September 7, 1990, at the offices of the Washington State Bar Association, at the above address. Upon completion of business that day, or at the Chairperson's discretion, the hearing will be adjourned to reconvene on September 13, 1990 at 9 a.m. at the Sheraton Hotel, Spokane, Washington. The advance public hearing session on September 7, 1990 has been scheduled in an effort to allow more time to those presenting views and in an effort to give the members of the Committee more time to consider the resolutions and to request any additional information which might be helpful to the Committee in making its recommendations on the resolutions to the membership. Proponents and opponents of resolutions are urged to attend the September 7 hearing if at all possible, and, if not, to present their views prior to that time in concise written form for consideration by the Committee at that hearing. Presence at or absence from the September 7 hearing will not affect any right under the Bylaws to present views when the public hearing reconvenes on September 13. At the reconvened hearing, preference in presenting views will be given to those with viewpoints which were not expressed at the September 7 hearing. Proponents and opponents will be given a reasonable opportunity to be heard at the advance session and at the reconvened hearing.

At the conclusion of the hearings on each resolution, the Resolutions Committee will recommend approval or rejection of any such resolution (with any amendment deemed appropriate.)

Resolution Committee Members -- Ted D. Zylstra, Chairperson, James H. Allendoerfer, Hugh K. Birgenheier, Philip H. Brandt, Scott A. Collier, Paul C. Gibbs, Harry H. Goldman, Gary L. Hemingway, Michael J. Hemovich, James T. Johnson, Frederick W. Lieb, Eugene C. Routh, Janice E. Shave, Edward F. Shea.

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NEWS FROM HOME

Snohomish County Legal Services: The program has once again received statewide recognition because of the efforts of one of their volunteer attorneys. **Steve Peiffle**, of Bailey, Duskin & Peiffle in Arlington, recently received the 1990 Tom Neville Pro Bono Service Award given by the WSBA Young Lawyers Division. In the last three years, he has taken at least five cases per year for direct representation through S.C.L.S.; most of these have been in the area of family law, including contested dissolution cases with children. Of special note is his assistance of a hearing-impaired woman in her attempts to divorce an abusive spouse. Steve has been a staunch supporter of the program in his capacity as a bar officer and has been involved with the Young Lawyers Division's pro bono efforts.

John T. Piper, of Bogle & Gates in Seattle, has been elected a Fellow of the American College of Tax Counsel. The College currently is composed of 415 Fellows and is governed by a board consisting of one regent from each federal judicial circuit and one at large. Piper is an alumnus of the University of Washington and received his LL.M. from NYU in 1960.

The Seattle-King County Bar Association has elected new officers and members of its board of trustees, effective July 1, 1990. **Matt Sayre** was elected president; **Peter Greenfield**, first vice president; **Geoffrey G. Revelle**, second vice president; **Daniel Gandara**, secretary. Treasurer **Kelby D. Fletcher** will continue his two-year term ending June 1991. New trustees, elected to three-year terms, are **Katrin E. Frank**, **Jerry R. McNaul** and **Patricia H. Wagner**.

THE JUDICIARY

o *The Backlog*: A May 2, 1990 article in the *Seattle Post-Intelligencer* by reporter **Jack Hopkins** says the King County court system's notorious case backlog is beginning to recede. "The 70,000 cases waiting to go to trial two years ago have been whittled to about 30,000 that are ready for a courtroom. Court officials hope to take care of the rest of them between now and August 1991."

However, civil and criminal case filings continue to increase each year. In 1989, 63,435 cases were filed, an increase of 5.9 percent over 1988. This year, 66,000 to 67,000 filings are expected.

o Lewis County Prosecutor **James Miller** resigned June 30 to run for the district court seat held by Judge **James Turner**.

o In Seattle, **Katharine C. Hershey** has been appointed family court commissioner for King County. She replaces **Joan DuBuque**, who was appointed to the King County Superior Court bench in January. Hershey is a graduate of Hollins College and the University of North Carolina School of Law.

o Pierce County is studying a possible satellite court facility in the Tacoma Mall, the *Tacoma News-Tribune* reported in a May 1, 1990 story by **Kathy George**. Convenient hours and parking were cited as considerations. The court site "would allow people to sip a coffee latte from Nordstrom or browse sale racks at Frederick & Nelson while waiting to ask the judge for mercy," George reported.

ASIAN BAR ASSOCIATION OF WASHINGTON

Judge **Ron Mamiya** introduced newly appointed Judge **Kimi C. Kondo** of the Seattle Municipal Court at the May membership meeting. Congratulations to Judge Kondo, Washington's first Asian woman judge.

Congratulations also to **Wallace D. Loh**, newly appointed Dean of the University of Washington School of Law.

Peggy Nagae Lum is now of counsel to Betts, Patterson & Mines. **Benson D. Wong** has become a

partner at Keller Rohrback. **Dean Lum** is leaving the Prosecutor's Office to be at Bradbury, Bliss & Riordan. **Jean Nishimori-Divine** is with the Office of Inspector General. **Michelle Hurley** now practices in Snohomish County at Anderson & Hunter. **Irene Tanabe** is with the Washington Appellate Defender. **Sue Leong** is now with the U.S. Army Corps of Engineers.

Mark your calendars for ABAW's annual summer picnic happening on Saturday, July 14, at Coulon Park (creekside) in Renton.

CLARK COUNTY REPORT

by **JOHN F. NICHOLS**

Yes, these are depressing times in Clark County. First came the announcement that the *Star* had bought out the *National Enquirer*. So much for effective independent journalism.

Then that new legal publication, *Washington Law*, featured its list of the state's "Ten Best Law Firms." It was probably just a coincidence that these firms happen to be the ten largest in the state and based in Seattle.

Just as I was recovering from that blow, the April edition of *Washington Law* announces its "Top Ten Lateral Hires." Since most of us CCBA'ers don't know "lateral hires" from "Hire's Root Beer," it was reassuring that nine of the ten involved Seattle area attorneys. Apparently **Rick Pomerville**'s recruitment of **Bob Bennett**'s legal intern wasn't important enough to the editors in the Emerald City.

As the final coup-de-grace of depression, **Don Russo** outbid me for the radio rights to "America's Funniest Home Videos." This, coupled with his cable radio project, gives Don a solid base for his planned recreation of Mariner highlight(s).

But 'tis springtime in Clark County and attorneys young and old turn to the annual rites thereof, to wit: injuries. **Joe "Catfish"** (or is it "Can'tfish") **Mercer** inaugurated the fishing season with a broken shoulder. No, he did not fracture said clavicle while hoisting a net overloaded with salmon. Rather, "Can'tfish" was injured when, in attempting to disengage the boat from its trailer, he tripped over the tongue (the trailer's, not his), completed a one-half of a 360-degree flip, landing thereby on his shoulder. Joe returned from the White Salmon Hospital just in time to greet his fishing buddies who had maxed out. Last seen, Joe was doing all of his fishing from the safety of his Lazy-boy watching "Fishing with Bob."

Jim "Pele" Hamilton is presently being accompanied by a set of crutches due to a strained knee and back ligaments. No, Jim didn't pull his back trying to pick up **Gerry Wear**'s tab for lunch, but sustained same while playing soccer. Apparently Jim is preparing for the World Cup and is playing in a special developmental league comprised of older, out-of-shape, myopic attorneys. (Somewhat superfluous, huh?) It is unknown whether the accident occurred during play or while stretching in preparation thereof. Next time, Jim, wear a helmet.

New faces: **Rob Russell** is newly associated with Gregg & Hoffman. Rob, whose hobbies include body-building, has vowed to "pump up" the soft underbellies of **Bob Gregg** and **Ken Hoffman** to give the firm a more "manly" image. All members of the firm are now required to wear "Dookers" and engage in inane "guy talk" (still superfluous?) just like in the commercials. All in all, this is an improvement over their previous image campaign—"The Simpsons."

EAST KING COUNTY REPORT

by **RANDOLPH I. GORDON**

The physicians have a word for it: iatrogenic. Meaning: induced inadvertently by a physician or medical treatment. Physicians recognize that when they are treating a complex biological system, untoward effects can occur. Do lawyers have a word for the analog in their treatment of the complex social interactions they confront? If not, I would propose "legistagenic," which, at least, has the virtue of the correct etymological antecedents, even if it does not roll trippingly off the tongue. Just as the observer affects the events observed at the subatomic level (the Heisenberg Uncertainty Principle), does a lawyer ever really know what was happening in the room before he or she entered it? (Maybe they really like each

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other.) How much of the enmity, polarity, testimony, indeed memory, in a given case is a legistagenic distortion? Where even the mere duration of legal action often affects clients' expectations, how much of the perceived damages are themselves purely a product of legistagenicity? While occasionally a client can articulate, "All I really want is...," how many times do we see clients whose heartfelt desires are formed or enhanced by litigation which, in turn, spends much of its focus to recover compensation for injuries largely unrecognized (nonexistent?) before initiation?

Mediation services help address the problem of legistagenicity. Mediation techniques and awareness should be communicated in law schools, bar exam questions, and required continuing legal education (for those of us that need retrofitting). In the meantime, check your *Yellow Pages* under "Mediation Services." You know, the one that gets used.

In the event mediation fails to immediately solve all our problems, ECKBA board members **Jim Trujillo** and your reporter have been named as co-chairs for an EKCBA task force to investigate and prepare a report to the membership respecting proposals for an Eastside law and justice facility and jail sites. This blockbuster, albeit even-handed, judicious, and authoritative report will be available in paperback by year's end. Volunteers for committee service are welcome.

Recent SKCBA elections have resulted in increased representation of the Eastside: **Geoff Revelle**, of Revelle, Rees & Hawkins, was elected SKCBA's second vice president, placing him in line for president of SKCBA in two years.

Holly Hohlbein, newly admitted to the Bar, has joined Casey, Gordon & Cohen, P.S. as an associate and looks forward (at present) to a practice emphasizing land use, environmental and general litigation issues.

For those interested in applied physics, please note that the EKCBA Golf Tournament is scheduled for August 24 at the Carnation Golf Course. **Chris Frost**, his wife **Carol**, and secretary **Phyllis Allen** will be organizing the tournament once again.

Report forthcoming as to our EKCBA cruise. Lawyers have a word for it: fun!

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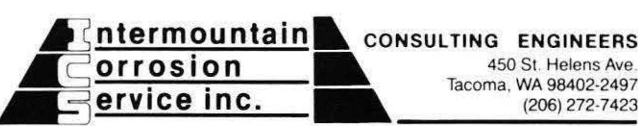

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KITSAP COUNTY REPORT

by **KATHLEEN M.S. WRIGHT**

Greetings from Across the Pond. After years of self-imposed silence, the Kitsap County Bar shakes its collective sleepy head and bursts back onto the scene to report its news, views and reviews.

Accolades: **Karen Flynn**, the Kitsap County Auditor, was the winner of the annual Liberty Bell Award on Law Day, May 4. The award is given through the ABA for outstanding service by a lay person in assisting citizens to understand their legal duties and rights.

Karen is the first auditor to prepare a local voter pamphlet. She pioneered an effort to register voters by postcard through the Department of Licensing when vehicle registrations are renewed.

The public relations committee of the Kitsap Bar is to be commended for its work on Law Week. The committee enlists attorneys to speak at local schools during Law Week, organizes a mock trial competition in high schools, sponsors a school essay contest and chooses the Liberty Bell winner. One of the provocative essay questions: Should a 16-year-old "hacker" who breaks into the Star Wars defense computer be rewarded or punished.?

How can he have time to practice law? **Jeff Tolman** of the Poulsbo firm of Roof, Tolman & Kirk and our First District representative to the State Bar Board of Governors, was honored by the State Bar for "professionalism."

Moves: **Greg Wall**, a local resident and former lemming commuter to the Emerald City (are we in Kansas yet?) has forsaken the joys of the 7:10 a.m. ferry to move his practice to Port Orchard.

Changing offices from Poulsbo to Suquamish is **Charles Peach**.

Additions: **Steve Olsen**, formerly of the Jefferson County Prosecutor's Office, is now associated with the Law Offices of Greg Norbut.

Joining the Silverdale firm of Smith, O'Hare & Crane is **Kathleen Quinn Lappi.** Kathleen is also a member of the Arizona Bar.

Sports: Local legal jocks bandaided together to emerge victorious in the Bremerton Police Basketball Tournament. Local attorneys **John Brody** and **Jack Kindred**, district court judge **Jim Riehl, Rick Woodrow** of the PA's office and **David Lewis** of the clerk's office have an astounding record over the last ten years of 51 wins and nine losses. The harrowing hoopsters have received more than a few inquiries from **Bernie Bickerstaff.**

Events: The monthly bar luncheon, held in the palatial splendor of the upstairs dining room of the High Joy Bowl in Port Orchard, was the site of the Law Day celebration on May 4. We were honored to have as guests four Japanese lawyers, who appeared as puzzled as other bar members by the 100 percent starch and carbohydrate menu. Country cuisine at its finest, or, perhaps, a new use for the old bowling pins? The Japanese lawyers told us that Japan has only a two percent bar "pass" rate. A modest proposal...

Not to be outdone by Clark County's Annual Beagle Award for tasteless advertising, Kitsap County hereby introduces its monthly "Kittie" award. "Kittie" is a tortured acronym for Kitsap Investigation of Tortured Text and Insipid Excuses. Candidates for the award are all examples of nonsensical writing and very lame excuses. The award is made solely at the whim of this author. This month's winner comes from an unfortunate pro se dissolution petitioner. The parenting plan as drafted by the petitioner mother contained an interesting proposal. Under "Other,"

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Mom wrote, "On alternate years, father will have child on even years and mother on odd years." Since Mom presently has little Henrietta during 1990, Henrietta's chances of living with either parent from 1991 on are nonexistent.

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

The board of trustees of the Tacoma-Pierce County Bar Association recently banned smoking in the lawyers' lounge of the courthouse, thus ending a long tradition of exchanging gossip in smoke-filled rooms. The fact that a majority of the board are nonsmokers had little to do with the decision. The board's primary concern was the health of the bar office staff and fear of workers' comp claims. When the smoke finally cleared, **Mel Rubin** was nowhere to be found.

Larry McNerthney of McGavick, Graves says that contrary to some published reports, he is not employed in the Office of Assigned Counsel and did not appear on a national television show about drug-dealing in Tacoma. He must have been confused with **Michael McNerthney,** who is a public defender and was on TV. We're not sure how this confusion occurred, since they don't look alike nor are they even related.

To make matters more confusing at McGavick, Graves, a fellow calling himself **Paul Snyder**, who looks like the real Paul Snyder, joined the firm. We will investigate and get back to you on this one.

Henry Haas has organized a neighborhood law clinic where lawyers and legal secretaries will provide referrals and free legal advice to the public. Volunteers will be called upon for no more than two short evening sessions per year. While there are enough people to start the program, Henry is looking for more volunteers.

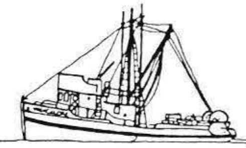
Elizabeth McNagny, an attorney with the Puget Sound Legal Assistance Foundation, was given one of the Liberty Bell awards by the Young Lawyers for her efforts in establishing a pro se dissolution clinic and working with the aforementioned Mr. Haas in the neighborhood law clinic program.

Bonneville, Viert, Morton and McGoldrick have expanded their operations to include a Federal Way office. Also, they added **Dale N. Schuman** and **Judith Raub Eiler** as partners and **Paula Swain Pridgeon** and **Kevin Patrick Donnelly** as associates.

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

Of Note. **Katharine C. Hershey** is the newly appointed family court commissioner of the King County Superior Court. **Laura Treadgold Oles** has been given a 1990 Kennedy Center Award for service as counsel to the Washington Alliance for Arts Education. **Dillon E. Jackson** has been inducted as a Fellow of the American College of Bankruptcy. **John T. Piper** has been elected as a Fellow of the American College of Tax Counsel. **David Soukup** has been elected vice president of the board of trustees of the National Court-Appointed Special Advocate Association. **Paul V. Rieke** has been installed as the president of the Seattle Downtown Central Lions Club.

Office Moves. Bonneville, Viert, Morton & McGoldrick has opened a Federal Way office; **Dale Norman Schuman** and **Judith Raub Eiler** have become partners, and **Paula Swain Pridgeon** and **Kevin Patrick Donnelly** are new associates. **Richard Cole** and **Kimberly Kernan Woods** have joined Tousley Brain as associates. **Bruce Kraselsky** has joined Davis Wright Tremaine. Preston Thorgrimson Shidler Gates & Ellis has named **Mark Beatty, Connie Collingsworth, Paul Lawrence, Ross Macfarlane, Elizabeth Thomas** and **Thomas Wolfendale** as partners. **Brian Comstock** has joined Short Cressman & Burgess as a partner. Mills and Cogan has named **Roger S.**



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Kohn as an associate. **John J. O'-Donnell** has become of counsel to Ogden Murphy & Wallace. Johnson & Crawford and Kane, Vandeberg, Hartinger & Walker have merged to become Vandeberg & Johnson. **Peter H. Haller** has joined Lindsay, Hart, Neil & Weigler as special counsel. Bauer, Hermann, Fountain & Rhoades has relocated to 1350 Key Tower; **Christopher C. Meleney** has joined the firm. Edwards & Barbieri has changed its name to Edwards, Sieh, Wiggins & Hathaway.

New partners at Foster Pepper & Shefelman are: **P. Stephen DiJulio, Linda L. Foreman, Warren J. Rheaume, Stuart T. Rolfe, George L. Smith** and **J. Tayloe Washburn**; **James C. Tracy** has become of counsel. Joining the firm as new associates are: **Christopher M. Alston, Jonathan J. Beighle, Patrick J. Callans, Cynthia L. Doll, Michael K. DuBeau, Cynthia R. First, Xiaoming Ke, Alan Koslow, Marc T. Kretschmer, Richard E. Leigh, Neal R. Malmsten, Douglas H. Ogden, Thomas M. Pors, Karen J. Putnam, Matthew M. Smith** and **Carla J. Swanson.**

Lane Powell Moss & Miller has merged with Spears Lubersky Bledsoe Anderson Young & Hilliard of Portland, Oregon, to form Lane Powell Spears Lubersky.

WHATCOM COUNTY REPORT

by **MICK MOYNIHAN**

George Livesey was seen driving a real hot car recently. After the fire department took care of that, he is now driving a new car. That old 1972 VW gave him a lot of good service. Rumor has it that he once locked his keys in the car with the engine running, and it drove itself out to the G&CC.

Sharon Herships is planning on a spring wedding and then a trip around the world, while **John Tario** is planning on going off in his sailboat and coming back when he runs out of money. Hopefully, John will be back next fall, when several of us, including **Mike Tario**, are looking forward to some ice hockey, now that the arena is reopening.

Steven Kozer is with the Asmundson firm this month.

Elizabeth Gallery-Fox has settled in and is enjoying her work in the prosecutor's office, and the new deputy in the public defender's office is **Linda Nye.**

Carpenter, Walker & Hardesty have moved. After several years over on the other side of the freeway, they are now within shouting distance of the courthouse, probably feeling that being able to yell at the courthouse is cheaper than a new fax. **Betsy Brinson** (from a family of dentists) has recently associated with CW&H.

Dave Turner, who gave up the practice of law to become a hippie, was recently in town. He will have to give all that up, however, as he will enter into practice with his father in Colorado later this year.

Mary Kay Becker and **Judith Proller** are taking a very active role in seeing that CLE programs are regularly offered here in the county. Comments have been positive.

Frank Atwood was recently given an involuntary tour of the Coronary Care Unit at St. Joe's. I wonder if anyone told him to stop smoking...That and the scheduled bypass surgery are just a ruse, says **John Anderson**, to get rid of some unwanted files.

Mike Bobbink was recently appointed as the municipal court judge for the city of Blaine. And for Mike, who was born and raised in the area, it is sort of like the chickens coming home to roost.

IN MEMORIAM

Thomas R. Herdt, 32, died in Port Angeles in May. A graduate of the University of Southern California and the University of Puget Sound School of Law, Herdt worked for a year in the Clallam County Juvenile Lawyers' Assistance Program, then joined Port Angeles attorney **Lane J. Wolfley** in private practice. Herdt had been in private practice for two years at his death.

"Tom was a hardworking, friendly person without guile," wrote his partner in a letter to the *Bar News*. "He was a loyal and fun partner. His loss will be sorely felt in our office and community."

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